Overview | **[1974] 1 All ER 161**, | [1974] 1 WLR 155, | 26 P & CR 544, | 117 Sol Jo 912, | 229 EG 259

Holwell Securities Ltd v Hughes [1974] 1 All ER 161

COURT OF APPEAL, CIVIL DIVISION

RUSSELL, BUCKLEY AND LAWTON LJJ

16, 17, 18 OCTOBER, 5 NOVEMBER 1973

W A Macpherson QC and Hubert Picarda for the plaintiffs.

Frank Whitworth QC and Roger Ellis for the defendant.

Contract — Offer and acceptance — Acceptance by post — Mode of acceptance prescribed — Notice in writing to offeror — Option — Option to purchase freehold property — Notice — Option 'exercisable by notice in writing to' vendor within prescribed period — Purchaser writing letter to vendor giving notice of exercise of option — Letter sent by ordinary post — Letter never delivered to vendor — Whether option validly exercised — Law of Property Act 1925, s 196(4)(5).

By cl 1 of an agreement dated 19 October 1971 made between the defendant of the one part and the plaintiffs of the other, the plaintiffs were granted an option to purchase certain freehold property from the defendant. Clause 2 of the agreement provided: 'THE said option shall be exercisable by notice in writing to the [defendant] at any time within six months from the date hereof … ' On 14 April 1972 the plaintiffs' solicitors wrote a letter to the defendant giving notice of the exercise of the option. The letter was posted, properly addressed and prepaid, on 14 April, but it was never in fact delivered to the defendant or to his address. No other written communication of the exercise of the option was given or sent to the defendant before the expiry of the time limit on 19 April. In an action against the defendant seeking specific performance of the option agreement, the plaintiffs contended that, since a contractual offer could be accepted by posting a letter of acceptance, the time of acceptance being the moment of posting, the option had been validly exercised when their letter of 14 April was posted.

Held – The option had not been validly exercised. The rule that an acceptance of an offer could be effected, so as to constitute a binding contract, merely by posting a letter of acceptance, did not apply when the express terms of the offer stipulated that the acceptance had to reach the offeror. The requirement in cl 2 of the agreement that the option was to be exercised by 'notice in writing to' the defendant meant that the written document had to be communicated or notified to the defendant and was inconsistent with the application of the rule that the mere posting of the document was sufficient. Furthermore, since the option agreement was an 'instrument affecting property', within s 196(5)[a] of the Law of Property Act 1925, the provisions of s 196(4) were incorporated into the agreement; those provisions were inconsistent with the rule that the posting of a letter was sufficient since they contemplated that a notice would only be effective when it was delivered (see p 163 *h*, p 164

b and *g h*, p 165 *f*, p 166 *b* to *d* and *g* and p 167 *b c* and *h*, post).

[a] Section 196, so far as material, is set out at p 167 *b*, post

Henthorn v Fraser [1891–94] All ER Rep 908 and *Bruner v Moore* [1904] 1 Ch 305 distinguished.

Decision of Templeman J [1973] 2 All ER 476 affirmed.

Notes

For contracts made through the post, see 8 *Halsbury's Laws* (3rd Edn) 78–80, paras 134–139, and for cases on the subject, see 12 *Digest* (Repl) 96–100, *484–525*.

For the Law of Property Act 1925, s 196, see 27 *Halsbury's Statutes* (3rd Edn) 617.

Cases referred to in judgment

Berkeley Road (88), London NW9, Re, Rickwood v Turnsek [1971] 1 All ER 254, [1971] Ch 648, [1971] 2 WLR 307, 22 P & CR 189.

British & American Telegraph Co v Colson (1871) LR 6 Exch 108, 40 LJEx 97, 23 LT 868, 12 *Digest* (Reissue) 98, *506*.

Bruner v Moore [1904] 1 Ch 305, 73 LJCh 377, 89 LT 738, 12 *Digest* (Reissue) 99, *516*.

Dickinson v Dodds (1876) 2 Ch 463, 45 LJCh 777, 34 LT 607, 40 JP 532, CA, 40 *Digest* (Repl) 11, *11*.

Hare v Nicoll [1966] 1 All ER 285, [1966] 2 QB 130, [1966] 2 WLR 441, CA, *Digest* (Cont Vol B) 665, *300a*.

Henthorn v Fraser [1892] 2 Ch 27, [1891–94] All ER Rep 908, 61 LJCh 373, 66 LT 439, CA, 12 *Digest* (Reissue) 74, *383*.

Household Fire and Carriage Accident Insurance Co Ltd v Grant (1879) 4 Ex D 216, 48 LJQB 577, 41 LT 298, 44 JP 152, CA, 12 *Digest* (Reissue) 81, *420*.

Cases also cited

Byrne v Van Tienhoven (1880) 5 CPD 344.

Entores Ltd v Miles Far East Corpn [1955] 2 All ER 493, [1955] 2 QB 327, CA.

Appeal

By an agreement dated 19 October 1971 and made between the defendant, Thomas Hilaire Hughes, of the one part, and the plaintiffs, Holwell Securities Ltd, of the other part, the defendant granted (cl 1) an option to the plaintiffs to purchase the property known as 571 High Road, Wembley, which was registered at the Land Registry with absolute title, at a price of £45,000. The property was the residence of the defendant and also the place where he carried on his practice as a general medical practitioner. Clause 2 of the agreement provided: 'THE said option shall be exercisable by notice in writing to the [defendant] at any time within six months from the date hereof … '

By a letter dated 14 April 1972, ie near the expiry date for the option, the plaintiffs' solicitors wrote to the defendant's solicitors. The letter read:

> 're: Dr T. H. Hughes and Holwell Securities Limited, 571 High Road, Wembley. We refer to our earlier correspondence regarding our clients' option to purchase the above property. Our clients wish to exercise their option and we should be obliged if you would accept this letter as notice of the exercise of the option. Kindly acknowledge receipt. We enclose our clients' cheque in your favour for the sum of £4500 being the ten per cent deposit payable on the exercise of the option to be held by you as stakeholders … We are sending a copy of this letter to your client.'

Although cl 2 of the option agreement provided for notice in writing to the defendant, cl 3 provided that on the exercise of the option the plaintiffs 'shall pay to the [defendant's] Solicitors as Stakeholders by way of deposit the sum of … £4,500'. Thus the notice exercising the option was to go to the defendant, and the deposit was to go to the defendant's solicitors. The plaintiffs' solicitors, however, purported both to exercise the option and to send the deposit by the letter addressed to the defendant's solicitors. That letter was delivered by hand to the defendant's solicitors in the afternoon of 14 April. On the same day, and at about the same time, the plaintiffs' solicitors prepared another letter. It was dated 14 April and it was addressed, on the letter, to: 'Dr T. H. Hughes, 571 High Road, Wembley, Middx.' The letter read: 'Dear Sir, re: [illegible] High Road, Wembley: Holwell Securities Ltd. We enclose for your information a copy of a letter today sent to your Solicitors.'

The letter intended for the defendant, and the copy of the letter which had been sent by hand to the solicitors, were, between about 1.30 pm and 2 pm on 14 April, placed in an envelope addressed to the defendant and that envelope and its contents ('the notice') was immediately placed in a post basket on the third floor of the principal offices of the plaintiffs' solicitors. The notice was not seen again. In accordance with the usual routine in the solicitors' office the notice should have been franked

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and posted with other letters. In fact the notice never reached the defendant's hands. On 21 April 1972, ie after the expiry of the six months time limit, the defendant's solicitors wrote to the plaintiffs' solicitors stating that they could not accept the letter of 14 April as notice of exercise of the option and that they were therefore returning the plaintiffs' cheque.

By a writ issued on 4 July 1972 the plaintiffs claimed specific performance of the option agreement and, further or alternatively, damages for breach of contract. At the trial of the action Templeman J ([1973] 2 All ER 476 at 479, [1973] 1 WLR 757 at 760) found as facts (i) that the notice to the defendant was posted by the plaintiffs' solicitors on 14 April, and (ii) that the notice was never in fact delivered to the defendant or to his address. On 2 March 1973 Templeman J ([1973] 2 All ER 476, [1973] 1 WLR 757) gave judgment for the defendant. The plaintiffs appealed.

W A Macpherson QC and *Hubert Picarda* for the plaintiffs.

Frank Whitworth QC and *Roger Ellis* for the defendant.

Cur adv vult

5 November 1973. The following judgments were delivered.

RUSSELL LJ.

This case is reported below ([1973] 2 All ER 476, [1973] 1 WLR 757) and for the purpose of the appeal from the decision of Templeman J I need not rehearse the facts in detail.

It is not disputed that the plaintiffs' solicitors' letter dated 14 April 1972 addressed to the defendant at his residence and place of work, the house which was the subject of the option to purchase, was posted by ordinary post in a proper way, enclosing a copy of the letter of the same date delivered by hand to the defendant's solicitors. It is not disputed that the letter and enclosure somehow went astray and never reached the house nor the defendant. It is not disputed that the language of the letter and enclosure would have constituted notice of exercise of the option had they reached the defendant. It is not contended that the handing of the letter to the solicitor constituted an exercise of the option.

The plaintiffs' main contention below and before this court has been that the option was exercised and the contract for sale and purchase was constituted at the moment that the letter addressed to the defendant with its enclosure was committed by the plaintiffs' solicitors to the proper representative of the postal service, so that its failure to reach its destination is irrelevant.

It is the law in the first place that prima facie acceptance of an offer must be communicated to the offeror. On this principle the law has engrafted a doctrine that, if in any given case the true view is that the parties contemplated that the postal service might be used for the purpose of forwarding an acceptance of the offer, committal of the acceptance in a regular manner to the postal service will be acceptance of the offer so as to constitute a contract, even if the letter goes astray and is lost. Nor, as was once suggested, are such cases limited to cases in which the offer has been made by post. It suffices I think at this stage to refer to *Henthorn v Fraser*. In the present case, as I read a passage in the judgment below, Templeman J ([1973] 2 All ER at 483, [1973] 1 WLR at 764) concluded that the parties here contemplated that the postal service might be used to communicate acceptance of the offer (by exercise of the option); and I agree with that.

But that is not and cannot be the end of the matter. In any case, before one can find that the basic principle of the need for communication of acceptance to the offeror is displaced by this artificial concept of communication by the act of posting, it is necessary that the offer is in its terms consistent with such displacement and not one which by its terms points rather in the direction of actual communication. We were, referred to *Henthorn v Fraser* and to the obiter dicta of Farwell J in *Bruner v Moore*, which latter was a case of an option to purchase patent rights. But in neither

of those cases was there apparently any language in the offer directed to the manner of acceptance of the offer or exercise of the option.

The relevant language here is, 'THE said option shall be exercisable by notice in writing to the Intending Vendor … ', a very common phrase in an option agreement. There is, of course, nothing in that phrase to suggest that the notification to the defendant could not be made by post. But the requirement of 'notice … to', in my judgment, is language which should be taken expressly to assert the ordinary situation in law that acceptance requires to be communicated or

notified to the offeror, and is inconsistent with the theory that acceptance can be constituted by the act of posting, referred to by Anson[b] as 'acceptance *without notification*'.

[b] Law of Contract (23rd Edn, 1969), p 47

It is of course true that the instrument could have been differently worded. An option to purchase within a period given for value has the characteristic of an offer that cannot be withdrawn. The instrument might have said 'The offer constituted by this option may be accepted in writing within six months'; in which case no doubt the posting would have sufficed to form the contract. But that language was not used, and, as indicated, in my judgment the language used prevents that legal outcome. Under this head of the case hypothetical problems were canvassed to suggest difficulties in the way of that conclusion. What if the letter had been delivered through the letterbox of the house in due time, but the defendant had either deliberately or fortuitously not been there to receive it before the option period expired? This does not persuade me that the artificial posting rule is here applicable. The answer might well be that in the circumstances the defendant had impliedly invited communication by use of an orifice in his front door designed to receive communications. There is, I consider, a further or perhaps parallel ground for exclusion of acceptance by act of posting in this case, which arises under s 196 of the Law of Property Act 1925, and in particular sub-s (5) which was new in property legislation. It extends the other provisions of the section to 'notices required to be served by any instrument affecting property'. It was accepted for the plaintiffs that the option instrument was an instrument affecting property. The view of Plowman J in *Re 88 Berkeley Road, NW9* ([1971] 1 All ER 254 at 257, [1971] Ch 648 at 652, 653) that 'served' meant 'given' was not disputed. Subsection (4) of the section provides that such a notice shall be sufficiently served if it is sent by post in a registered letter addressed to the person to be served by name at his abode or place of business, and that, if it is not returned through the post office undelivered, service shall be deemed to be made 'at the time at which the registered letter would in the ordinary course be delivered'. Later provisions include in this the recorded delivery service. These provisions, if applicable to the present case, are of course to be regarded as part and parcel of the option instrument. Being such, they are, it seems to me, inconsistent with the application of the theory of acceptance at the time of posting. For suppose an exercise of the option by a registered letter which went astray, and suppose it to have been posted on the last option day: this section would deem the notice to have been given too late. This conflicts with and therefore negatives the application of a system of acceptance by the act of posting the registered letter, just as would be the case if the option instrument had expressly provided. 'The said notice in writing if sent by registered post duly etc, etc, shall be deemed to have been given to the intending vendor at the time at which etc, etc'. Counsel for the plaintiffs frankly accepted the validity of that argument, but contended that this was not the type of notice to which the section was directed. I do not see why it is not. Perhaps in the end his contention was based on much the same grounds as those on which he sought to deny the significance of the words 'notice in writing to' on which I have founded the first part of this judgment.

This leaves an alternative contention for the plaintiffs which Templeman J ([1973] 2 All ER at 484, [1973] 1 WLR at 765) dismissed with brevity. When the defendant's solicitors received the plaintiffs' solicitors'

letter dated 14 April (See [1973] 2 All ER at 478, [1973] 1 WLR at 758), they communicated by telephone with the defendant. They did not read the letter to the defendant. The defendant's evidence was as follows:

> '*Q* Did you then, as a result of that, ring Messrs Bulcraig & Davis? *A* As a result of that, I did, yes.
>
> '*Q* And to whom did you speak there? *A* I spoke to Mr Wade.
>
> '*Q* Do you remember what he told you? *A* Yes.
>
> '*Q* Not the exact words? *A* No. He asked me if I had heard from Messrs Brecher, the other people's solicitors, and I said "No". He said "Well, I have had a letter from them delivered to me today and I understand that you will be getting a letter as well, or a copy of this". My recollection is that he said "a letter" but later I understood that what was meant was a copy. And he said: "I don't think this option is exercised properly until notice is served on you", or "until you receive a letter", and I said "Oh, dear, I had intended to go to Ireland this evening. Will it be all right if I do?" and he said "Yes, it would". My recollection is that he said "Your presence does not have to be there" or "You don't have to be there yourself, if this letter is delivered, or posted to you".'

Counsel for the plaintiff argued that since the defendant knew that the plaintiffs were anxious to exercise the option, and there was in existence a written notice exercising it, therefore there was a 'notice in writing to the defendant'. I consider this argument to be fallacious. A person does not give notice in writing to another person by sitting down and writing it out and then telephoning to that order saying, 'Listen to what I have just written'. Moreover, the defendant did not have knowledge of the existence of the combination of two letters which alone could be said to be an exercise of the option. *Dickinson v Dodds*, which was referred to, does not assist on this point: all it does is to show that an offeree cannot accept a withdrawable offer after he has learnt, by whatever means, that it has been withdrawn.

Accordingly, I would dismiss the appeal; and Buckley LJ authorises me to say that he agrees with the judgment that I have delivered.

LAWTON LJ.

The issue in this appeal was clear. Did the plaintiffs exercise an option to purchase the premises known as 571 High Road, Wembley, by posting a letter to the defendant which he never received? The answer to this problem can be reached by two paths: the short one and the roundabout one. Both, in my judgment, are satisfactory but the roundabout one has some paths leading off it which can lead the traveller after legal truth astray. The plaintiffs, I think, took one of these paths. I propose in this judgment to start by taking the short path and then to survey the other.

It is a truism of the law relating to options that the grantee must comply strictly with the conditions stipulated for exercise: see *Hare v Nicoll*. It follows that the first task of the court is to find out what was stipulated: the instrument of grant has to be construed. It is a formal document which must have been drafted by someone familiar with conveyancing practice. From its layout and content it is likely to have been based on a precedent in the Encyclopaedia of Forms and Precedents. It follows, so it seems to me, that the words and phrases in it should be given precise meanings whenever possible and that words which are in common used amongst conveyancers should be construed in the way they use such words.

The material parts of the option clause are as follows: 'THE said option shall be exercisable by notice in writing to the Intending Vendor at any time within six months

from the date hereof … ' In my judgment, the phrase 'notice in writing' is of importance in this context. Conveyancers are familiar with it and frequently use it. It occurs in many sections of the Law of Property Act 1925; for examples, see ss 36(2), 136, 146 and 196. In the option clauses under consideration the draftsman used the phrase in connection with the exercise of the option but in other parts of the agreement he was content to use such phrases as 'agreed in writing' (see cl 4) and 'if required in writing' (see cl 8(a)). Should any inference be drawn from the use of the word 'notice'? In my judgment, Yes. Its derivation is from the Latin word for knowing. A notice is a means of making something known. The Shorter Oxford English Dictionary gives as the primary meanings of the word: 'Intimation, information, intelligence, warning … formal intimation or warning of something.' If a notice is to be of any value it must be an intimation to someone. A notice which cannot impinge on anyone's mind is not functioning as such.

Now in this case, the 'notice in writing' was to be one 'to the Intending Vendor'. It was to be an intimation to him that the grantee had exercised the option: he was the one who was to be fixed with the information contained in the writing. He never was, because the letter carrying the information went astray. The plaintiffs were unable to do what the agreement said they were to do, namely, fix the defendant with knowledge that they had decided to buy his property. If this construction of the option clause is correct, there is no room for the application of any rule of law relating to the acceptance of offers by posting letters since the option agreement stipulated what had to be done to exercise the option. On this ground alone I would dismiss the appeal.

I turn now to what I have called the roundabout path to the same result. Counsel for the plaintiffs submitted that the option was exercised when the letter was posted, as the rule relating to the acceptance of offers by post did apply. The foundation of his argument was that the parties to this agreement must have contemplated that the option might be, and probably would be, exercised by means of a letter sent through the post. I agree. This, submitted counsel, was enough to bring the rule into operation. I do not agree. In *Henthorn v Fraser* ([1892] 2 Ch 27 at 33, [1891–94] All ER Rep 908 at 911) Lord Herschell stated the rule as follows:

> 'Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.'

It was applied by Farwell J in *Bruner v Moore* to an option to purchase patent rights. The option agreement, which was in writing, was silent as to the manner in which it was to be exercised. The grantee purported to do so by a letter and a telegram.

Does the rule apply in *all* cases where on party makes an offer which both he and the person with whom he was dealing must have expected the post to be used as a means of accepting it? In my judgment, it does not. First, it does not apply when the express terms of the offer specify that the acceptance must reach the offeror. The public nowadays are familiar with this exception to the general rule through their handling of football pool coupons. Secondly, it probably does not operate if its application would produce manifest inconvenience and absurdity. This is the opinion set out in Cheshire and Fifoot's Law of Contract[c]. It was the opinion of Bramwell B as is seen by his judgment in *British & American Telegraph Co v Colson*, and his opinion is worthy of

consideration even though the decision in that case was overruled by this court in *Household Fire and Carriage Accident Insurance Co Ltd v Grant*. The illustrations of inconvenience and absurdity which Bramwell B gave

[c] 8th Edn (1972), p 43

are as apt today as they were then. Is a stockbroker who is holding shares to the orders of his client liable in damages because he did not sell in a falling market in accordance with the instructions in a letter which was posted but never received? Before the passing of the Law Reform (Miscellaneous Provisions) Act 1970 (which abolished actions for breach of promise of marriage), would a young soldier ordered overseas have been bound in contract to marry a girl to whom he had proposed by letter, asking her to let him have an answer before he left and she had replied affirmatively in good time but the letter had never reached him? In my judgment, the factors of inconvenience and absurdity are but illustrations of a wider principle, namely, that the rule does not apply if, having regard to all the circumstances, including the nature of the subject-matter under consideration, the negotiating parties cannot have intended that there should be a binding agreement until the party accepting an offer or exercising an option had in fact communicated the acceptance or exercise to the other. In my judgment, when this principle is applied to the facts of this case it becomes clear that the parties cannot have intended that the posting of a letter should constitute the exercise of the option.

The option agreement was one to which s 196 of the Law of Property Act 1925 applied: see sub-s(5) which is in these terms:

> 'The provisions of this section shall extend to notices required to be served by any instrument affecting property executed or coming into operation after the commencement of this Act unless a contrary intention appears.'

The option agreement was an instrument affecting property. A notice in writing had to be given to exercise the option. Giving a notice means the same as serving a notice: see *Re 88 Berkeley Road*. The object of this subsection was to enable conveyancers to omit from instruments affecting property stipulations as to the giving of notices if they were prepared to accept the statutory ones. As there was nothing in the option agreement to contrary effect, the statutory stipulations applied in this case. Subsection (4) is in these terms:

> 'Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.'

The object of this subsection, as also of sub-s (3), is to specify circumstances in which proof of actual knowledge may be dispensed with. This follows from the use of the phrase 'any notice … shall also be sufficiently served … ' If the submissions of counsel for the plaintiffs are well-founded, a letter sent by ordinary post the evening before the option expired would have amounted to an exercise of it; but a registered letter posted at the same time and arriving in the ordinary course of post, which would be after the expiration of the option, would not have been an exercise. The parties to the option agreement cannot have intended any such absurd result to follow. When the provisions of s 196(4) are read into the agreement, as they have to be, the

only reasonable inference is that the parties intended that the vendor should be fixed with actual knowledge of the exercise of the option save in the circumstances envisaged in the subsection. This, in my judgment, was enough to exclude the rule.

I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Brecher & Co* (for the plaintiffs); *Bulcraig & Davis* (for the defendant).

S A Hatteea Esq Barrister.

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