[1991–92 Gib LR 11]

T & T TRUSTEES LIMITED, TOWER HOLDINGS LIMITED and SHEAR v. FINSON (NOMINEES) LIMITED, FINBAR (NOMINEES) LIMITED and FINCH AND PARTNERS

SUPREME COURT (Kneller, C.J.): January 30th, 1991

Land Law—contract of sale—completion—contract concluded before exchange of contracts if executed and deposit paid—exchange of contracts unnecessary unless sale agreed "subject to contract"

Contract—mistake—unilateral mistake—payment made under mistake of fact prima facie recoverable even if payer's mistake due to carelessness or negligence—exception if (i) payer intended payee to keep money in any event, (ii) payment made for good consideration, e.g. to discharge debt, or (iii) payee altered position in good faith in reliance on payment

Land Law—contract of sale—deposit—unauthorized payment—purchaser forfeits deposit paid to vendor by solicitor's mistake—solicitor impliedly warrants has authority to pay deposit and estopped from claiming return if paid under mistake, when consideration given and vendor alters position detrimentally when bound by contract

The plaintiffs applied for a declaration that they had rescinded a contract for the sale of property to the first and second defendants, and an order that the third defendant had forfeited the deposit it had paid to the plaintiffs' solicitors on their behalf.

The first and second plaintiffs were nominee shareholders of G Ltd., a Gibraltar company through which the third plaintiff and his wife owned a house in Spain. Through their Gibraltar solicitors, the owners negotiated a draft contract for the sale of the house to the first and second defendants, nominee companies, holding for B. B's solicitors, the third defendant, approved the draft contract with minor amendments and awaited the engrossment for execution. The contract provided for the payment of a 10% deposit to be held by G Ltd. or the vendors' solicitors as stakeholders. B's solicitors awaited a transfer of funds from him for the payment of the deposit.

An alternative purchaser with whom the vendors had been negotiating as a reserve in the event that B did not complete within a specified time, withdrew from negotiations.

B's solicitors informed the vendors' solicitors that they had received a payment on account which they believed to be from B but that they would first seek confirmation of this before paying it over. Induced by assurances from B, his solicitors transferred the deposit together with the engrossed agreement of sale executed by the nominee companies as trustees for B. The completion date was fixed for two weeks later. The accompanying letter referred to outstanding matters to be dealt with before completion, relating to company searches, building works and the precise date for completion. The vendors authorized their nominees' execution of the contract and their solicitors cashed the deposit cheque.

A week later, B's solicitors informed the vendors' solicitors that in fact the deposit moneys had come from another client of theirs in connection with a different matter. They requested the return of the deposit in the light of this mistake, stating that there was no binding contract between the parties, but the vendors refused to authorize its return. B was later discovered to have no assets and to have past convictions for fraud.

The plaintiffs made the present application for a declaration that they had rescinded the contract and were entitled to keep the deposit and the defendants applied for its return. The third defendant had reimbursed to the purchasers the money paid over on their behalf.

The plaintiffs submitted that (a) the deposit had been paid to the nominees in accordance with the terms of the contract and was not returnable; (b) the contract was complete, since the parties had agreed its terms, the purchaser had signed and sealed it, the vendors had authorized its execution, and formal exchange of contracts was unnecessary; (c) since none of the plaintiffs had induced the third defendant's mistake, the contract for the sale of the shares in G Ltd. could not be void for mistake; and (d) the third defendant was estopped from obtaining the repayment of the deposit, since it had impliedly warranted that it had authority from B to pay the deposit to the vendors in satisfaction of the contract, and the vendors had turned down another potential purchaser on the strength of the agreement between them.

The third defendant submitted that (a) the deposit had been paid from funds that did not belong to B, and for the loss of which the firm had had to compensate the true owner by making up the shortfall in its client account from its own funds; (b) the contract was not binding, since the firm had not received a contract signed and sealed by the vendors and contracts had therefore not yet been exchanged; (c) the contract under which the deposit was paid was void because it was paid under a mistake of fact; and (d) the issue of estoppel did not arise, since it had not acted on behalf of B when it paid over the deposit from other funds, and they had paid it to the plaintiffs' solicitors, not the vendors.

Held, declaring that the contract had been rescinded:

(1) The contract of sale was a concluded contract even though there had been no formal exchange of contracts between the parties. The sale agreement was not made "subject to contract," and therefore the only

question was whether the contract had been made by offer and acceptance, which was to be decided on the basis of the parties' words and actions. The purchasers had signed and executed the agreement, and the vendors had authorized its execution when the deposit was paid over. There was no more to agree between them (para. 18; paras. 37–39; paras. 44–45).

(2) The deposit had been paid under a mistake of fact, namely that it was paid out of funds provided by B. The onus of proving that the mistake was a factual one lay with the defendants. Unlike a mistake of law, which did not entitle a payer to the return of his money, a factual mistake gave him the *prima facie* right to recover the payment even if he had been careless or negligent in failing to inquire into the facts, since it would be unconscionable for the payee to keep it. However, there were exceptions when it could be proved that the payer intended the payee to keep the money in any event, when the payment was made for good consideration, *e.g.* to discharge a debt, or when the payee had changed his position detrimentally in good faith because of the payment (paras. 40–42).

(3) In this case, there was a contract for the sale of the shares in G Ltd. to the purchasers. It could not be void for mistake, since the vendors had given consideration by executing the contract. They had done so because the purchaser's solicitors, acting as agents for their clients, had impliedly warranted that they had their clients' authority to pay over the deposit. The vendors had acted in good faith, unaware of the mistake, and the purchasers' solicitors were liable for any damage sustained as a result of the lack of that authority regardless of whether they had acted negligently, fraudulently, or simply mistakenly. In fact, they had failed to ensure that the funds came from B rather than from another client. The vendors had altered their position to their own detriment on the basis of the implied warranty of authority, as they became obliged to sell the shares at the price agreed and could not sell them to anyone else at a better price. They had surrendered their rights to the shares. Accordingly, the purchasers' solicitors were estopped from reclaiming the deposit they had paid on their clients' behalf (paras. 43–44; paras. 51–54).

(4) The vendors would be granted a declaration that they had rescinded the contract and that the purchasers had forfeited the deposit (para. 55).

Cases cited:

(1) *Avon County Council* v. *Howlett*, [1983] 1 W.L.R. 605; [1983] 1 All E.R. 1073, applied.

(2) *Barclays Bank Ltd.* v. *W.J. Simms Son & Cooke (Southern) Ltd.*, [1980] Q.B. 677; [1979] 3 All E.R. 522, referred to.

(3) *Bigg* v. *Boyd Gibbins Ltd.*, [1971] 1 W.L.R. 913; [1971] 2 All E.R. 183, applied.

(4) *Eccles* v. *Bryant*, [1948] Ch. 93; [1947] 2 All E.R. 865, applied.

(5) *Holt* v. *Markham*, [1923] 1 K.B. 504; (1922), 92 L.J.K.B. 406, applied.
(6) *Jones (R.E.)* v. *Waring & Gillow Ltd.*, [1926] A.C. 670; (1926), 95 L.J.K.B. 913, referred to.
(7) *Kelly* v. *Solari* (1841), 9 M. & W. 54; [1835–42] All E.R. Rep. 320, referred to.
(8) *Kleinwort Sons & Co. Ltd.* v. *Dunlop Rubber Co. Ltd.* (1907), 97 L.T. 263; 51 Sol. Jo. 672, referred to.
(9) *National Westminster Bank Ltd.* v. *Barclays Bank Intl. Ltd.*, [1975] Q.B. 654; [1974] 3 All E.R. 834, applied.
(10) *Rasnoimport V/O* v. *Guthrie & Co. Ltd.*, [1966] 1 Lloyd's Rep. 1, followed.
(11) *Rover Intl. Ltd.* v. *Cannon Film Sales Ltd. (No. 3)*, [1989] 1 W.L.R. 912; [1989] 3 All E.R. 423, referred.
(12) *Storer* v. *Manchester City Council*, [1974] 1 W.L.R. 1403; [1974] 3 All E.R. 824, *dicta* of Lord Denning applied.
(13) *Turvey* v. *Dentons (1923) Ltd.*, [1953] 1 Q.B. 218; [1952] 2 All E.R. 1025, applied.
(14) *Yonge* v. *Toynbee*, [1909] 2 K.B. 215, applied.

J.E. Triay, Q.C. and *R.A. Triay* for the plaintiffs;
P.J. Isola for the defendants.

1 **KNELLER, C.J.:** The plaintiffs, by their originating summons dated October 5th, 1990 claim against the defendants—

(a) a declaration that the plaintiffs have effectively rescinded a contract dated August 7th, 1990 between the plaintiffs and the first two defendants;

(b) an order that a deposit of £58,500 paid by the third defendants in the name and on behalf of the first two defendants to the solicitors of the plaintiffs on August 6th, 1990 by way of deposit pursuant to cl. 3 of the contract is forfeited to the first two plaintiffs as trustees; and

(c) costs.

2 The defendants strenuously resist the making of the last two orders in favour of any of the plaintiffs, and instead ask for an order for the return of the deposit to them with costs.

3 Some of the relevant background to the application is as follows. Triay & Triay, a firm of solicitors in Gibraltar, controls T & T Trustees Ltd. and Tower Holdings Ltd., which are companies registered in Gibraltar and act as trustees or nominees for clients of Triay & Triay. T & T Trustees Ltd. and Tower Holdings Ltd. hold the shares of Goodenham Ltd., which is a company incorporated in Gibraltar. They hold the shares as trustees of Mark Shear and his wife Irene Shear.

4 On or about July 19th, 1990 Triay & Triay received instructions from Stanor Electric Ltd. to the effect that a Dr. James Burns was contemplating the purchase of a house in Spain belonging to Goodenham Ltd. (and, through Goodenham Ltd., to Mr. and Mrs. Shear). Mrs. Shear went to see Mr. R.A. Triay at the offices of Triay & Triay in Gibraltar on July 20th, 1990, confirming the instructions from Stanor Electric Ltd. and instructing the firm to act for the vendors in the proposed sale. She came back the same afternoon together with Dr. Burns and they confirmed a verbal agreement for the sale of the shares of Goodenham Ltd. to Dr. Burns at a consideration of £585,000. Doctor Burns told Mr. Triay that Messrs. Finch & Partners, the third defendants, and another firm of solicitors in Gibraltar represented him. Mr. Triay was asked to submit a draft contract to Finch & Partners for their approval.

5 On July 23rd, after a telephone conversation with Mr. Finch, Mr. Triay supplied him with copies of the deed or *escritura* (deed of conveyance) in favour of Goodenham Ltd., the *obra nueva* (deed of declaration of a new building) and a draft contract for the sale of the shares of Goodenham Ltd. between T & T Trustees Ltd. and Tower Holdings Ltd. as vendors of the first part, Mr. Mark Shear as "the warrantor" of the second part, with the name and address of the purchasers being left blank.

6 Mr. Mark Shear told Mr. Triay on July 26th, 1990 that the Shears had received an offer of £625,000 from Whirley Promotions for the sale of the shares in Goodenham Ltd. Mr. Shear did not want to go back on his verbal agreement with Dr. Burns: there were no major differences between himself and Dr. Burns, and he thought the matter was going to be dealt with as soon as possible. He told Mr. Triay to tell Mr. Finch that if the contracts had not been signed by Monday, July 30th, 1990 Mr. Triay was to submit the same documents, including the draft documents, to Whirley Promotions instead. He passed on the name of the agent representing Whirley Promotions and he said he would contact Mr. Triay on Monday, July 30th in the morning. Mr. Triay told Mr. Finch this and confirmed it in a letter of July 26th.

7 Mr. Finch's partner, Mr. Raymond Pilley, had become responsible for the negotiations between Dr. Burns and Mr. and Mrs. Shear so far as Dr. Burns was concerned, and he had raised a question about an alleged dispute that Mr. Shear had with a neighbour about the ownership of the property. Mr. Triay dealt with this on instructions by letter on July 26th.

8 He explained that Goodenham Ltd. owned one property, namely No. 46D La Cerqilla, Nueva Andalucia, Marbella, Malaga, Spain. Mr. Shear was the registered owner of Plot 46, which is a different plot but it adjoins No. 46D. Some time in July 1987 Mr. Shear entered into a contract with the purchaser for the sale of Plot 46 and completion was to take place on

December 1st, 1987. The purchaser was unable to complete in time because he could only pay the price in Spanish pesetas and the agreement was that it should be paid for in sterling. Mr. Shear agreed to an extension of the time for completion so that the purchaser could get permission for the repatriation of the funds which the purchaser said would take him only 10 days. Mr. Shear received none of the purchase price in sterling and did not hear from the purchaser, so towards the end of December 1987, Mr. Shear issued an *acta notarial* to the purchaser telling him that the contract was at an end and that his deposit was forfeited.

9 Six months later, the purchaser bounced back with a letter to Mr. Shear asking for the completion of the transfer and, in effect, ignoring the *acta notarial*. Mr. Shear refused to complete and the purchasers sued him. The Spanish court found that Mr. Shear was obliged to complete but the purchaser had to pay the purchase price, with interest at 10% until payment. This did not please either Mr. Shear or the purchaser, who have both appealed, but they are negotiating a settlement out of court.

10 So Mr. Triay was authorized to tell Mr. Pilley that that dispute had nothing to do with the ownership by Goodenham Ltd. of Plot 46D, which was the one Dr. Burns was hoping to buy. Mr. Triay went on to tell Mr. Pilley that Whirley Promotions had offered £625,000 for Goodenham Ltd.'s Plot 46D and that it would be offered to that company if contracts had not been signed by Monday morning.

11 Mr. Pilley telephoned Mr. Triay the next day and said that the draft contract Mr. Triay had sent him was approved in principle. There were three points which needed clarification. First, that the deposit be paid over to the vendor or his solicitors as stakeholders, that is Goodenham Ltd. or Triay & Triay; secondly, that the period of notice be extended from 14 to 28 days; and thirdly, confirmation that the works currently being carried out on Goodenham Ltd.'s property would be completed by August 18th, 1990.

12 Mr. Triay was able to write on July 27th that Goodenham Ltd. agreed to extend the notice to complete from 14 to 20 days in the event of a default. Works were being undertaken on the annexe to the property and Goodenham Ltd. had received an undertaking from the builders that the works would be completed by August 18th, 1990. Mr. Triay took the opportunity to tell Mr. Pilley that Goodenham Ltd. had given a verbal undertaking to Mr. Simon Ross of Whirley Promotions that if the contract were not signed by the morning of Monday, July 30th, 1990 by Goodenham Ltd. and Dr. Burns, and Dr. Burn's deposit delivered, Goodenham Ltd. would sell the property to Whirley Promotions.

13 Mr. Pilley returned the draft agreement with a letter dated July 27th. He had amended the agreement in minor ways. He looked forward to

receiving the engrossment for execution. The shares would be held by nominee companies, namely, Finson (Nominees) Ltd. and Finbar (Nominees) Ltd. in equal shares. Doctor Burns had told him that Mr. Shear would complete the repair works to the damp-proof course in the annexe at Mr. Shear's expense and Mr. Pilley wanted written confirmation about this from Mr. Triay. Doctor Burns had made arrangements to telephone the deposit to Finch & Partners' clients and Dr. Burns would be calling in on Mr. Pilley on Tuesday, July 31st, and Mr. Pilley hoped to be in a position to exchange contracts. The draft contract had been duly approved as amended in black by Finch & Partners on behalf of Dr. Burns. It contained in cl. 3 a provision for Dr. Burns to pay to Goodenham Ltd. £58,500 when it was signed on account of a consideration of £585,000. It provided that that sum be called a deposit and should be held by Goodenham Ltd. or Triay & Triay as stakeholders. The agreement, when executed, incorporated the same clause.

14 Mr. Shear told Mr. Triay on Monday, July 30th that Whirley Promotions had found another property which it was going to buy. Mr. Shear told Mr. Triay to proceed with the sale of Goodenham Ltd. to Dr. Burns. There were several telephone conversations between Mr. Triay and Mr. Pilley about the arrival of the deposit. It was the only matter that was preventing the parties from signing the contract.

15 On Friday, August 3rd, Mr. Pilley told Mr. Triay that he had received £100,000 in the client account of Finch & Partners, which he was sure belonged to Dr. Burns but he had to get Dr. Burns's confirmation before he turned over the deposit to Triay & Triay.

16 On August 6th, Mr. Triay received from Finch & Partners a letter of the same date together with the engrossed agreement of sale duly executed by Finbar (Nominees) Ltd. and Finson (Nominees) Ltd., the companies controlled by Finch & Partners who were the trustees or nominees of Dr. Burns. The agreement contained an unamended cl. 5 which set the completion date as August 21st, 1990. Finch & Partners sent a cheque drawn on their client account in favour of Triay & Triay in the sum of £58,500, in payment of the deposit under cl. 3 of that agreement.

17 Mr. Pilley, in his letter of August 6th, 1990 to Triay & Triay (enclosing both parts of the agreement, duly sealed by Finbar (Nominees) Ltd. and Finson (Nominees) Ltd., and a cheque, which Triay & Triay were to hold as stakeholders), remarked that there were three outstanding points: First, Goodenham Ltd.'s file was being inspected, so it could not be searched and there would have to be a clear search before completion, secondly, he required a written undertaking that the building works referred to would be completed by the August 18th, and if there were any works still going on Dr. Burns would not complete the purchase, and

thirdly, the contractual completion date should be August 22nd because of the delay, although Finch & Partners and Dr. Burns would do their best to complete by August 21st if it were possible.

18 On August 7th, Mr. and Mrs. Shear approved of T & T Trustees Ltd. and Tower Holdings Ltd.'s executing the agreement in duplicate; Mr. Shear, the warrantor, gave Mr. Triay a power of attorney under seal; and they authorized the execution of that agreement. The cheque for £58,500, drawn on Finch & Partners' client account, was encashed and the proceeds credited to a client account of Triay & Triay, namely, account No. 3037–1–0 in relation to Goodenham Ltd.

19 On August 13th, 1990 Mr. Pilley came to Triay & Triay and told Mr. Triay that the deposit had been paid over to Triay & Triay from Finch & Partners' client account from funds which had not come from Dr. Burns, although they had been applied to his credit "through an extraordinary coincidence of events." They had been paid by error on the part of Finch & Partners, induced by the representations of Dr. Burns.

20 Triay & Triay immediately undertook to tell Mr. and Mrs. Shear what had happened and to take instructions from them as to whether they were willing to return the deposit of £58,500. If they were not, then Triay & Triay would not part with the deposit for any purchase except as might be agreed by Mr. and Mrs. Shear and Finch & Partners or, in the absence of such agreement, as might be determined by the court. Mr. Pilley was very appreciative of that reaction by Triay & Triay.

21 Triay & Triay advised Mr. and Mrs. Shear to return the deposit and to pursue their rights under the contract of sale. Triay & Triay did not wish to be arbitrators of the rights of their clients, Mr. and Mrs. Shear and Goodenham Ltd., because that might bring them into conflict in their own right as solicitors.

22 Mr. and Mrs. Shear told Mr. Triay that under no circumstances was he to return the deposit. Triay & Triay have considered the legal position of Mr. and Mrs. Shear further and maintain that where payment of a sum has been paid under a unilateral mistake by the person paying it, to which the person who is paid it is not a party and which the person who is paid that sum has in no way sought or procured, there is no cause in law for the sum to be returned to the person who paid it.

23 On August 13th, Mr. Pilley confirmed in writing that the cheque for £58,500 was drawn against the funds of another client and not those of Dr. Burns, and because the agreements had not been formally exchanged he asked Triay & Triay to note that they were holding the deposit strictly for the order of Finch & Partners. Triay & Triay did not accept that that was the position. It was in conflict with the undertaking they had given to Mr. Pilley at the earlier meeting. The funds were held in a client account

for the benefit of Mr. and Mrs. Shear, and Triay & Triay had no authority to comply with what Finch & Partners were asking them to do.

24 A letter dated August 15th was written by a Mrs. Susie Shear to Mr. Triay, confirming that the deposit should not be returned under any circumstances. There had been a discussion with Dr. James Burns and Mr. Borello who confirmed that the transfer of the shares of Goodenham Ltd. would be completed on the agreed date. Mr. Kittler was arriving at Gibraltar Airport on Monday, August 20th to see Mr. Triay and clarify the matter. He said "we are arriving," and whether that meant that he would be with Mr. and Mrs. Shear or with Dr. James Burns and Mr. Adrian Borello is not clear.

25 Mr. Triay set out the Shears' and Goodenham Ltd.'s position in all this in a letter dated August 21st. "The funds were unconditionally paid under the contract," is how he began. Neither the Shears nor Goodenham Ltd. nor Triay & Triay were a party to or responsible for the mistake made by Finch & Partners. The mistake was a consequence of Finch & Partners' relations with Dr. Burns and their other client or clients. He took the opportunity to tell Finch & Partners that they had not been provided with any documentary evidence to establish the mistake. Triay & Triay went on to say that "there seems to be no basis upon which it could be said that no formal exchange had taken place." The effect of the mistake as to the ownership of the funds paid would, at the very worst, oblige the Shears and/or Goodenham Ltd. to return the funds, but it would not invalidate the contract under seal which had been duly delivered.

26 Triay & Triay concluded by requiring completion pursuant to cl. 5 that very day, which was August 21st, and giving notice under cl. 7, without prejudice to any right or remedy available to their clients, to complete the contract within 28 days after service of that notice, failing which, and subject to any order that the court might make to the contrary on an application by Finch & Partners, the Shears and Goodenham Ltd. would be entitled to scoop up the deposit and to re-sell the shares in Goodenham Ltd.

27 Finch & Partners' reply of August 22nd began with an assurance that Dr. Burns was telling them daily that funds were on the way and if they arrived then the issue between them all would fade away. Then they went on to say that the deposit had been paid over to Triay & Triay by mistake, because Dr. Burns had advised Finch & Partners on July 24th that he was making immediate arrangements to telegraph to the credit of Finch & Partners' client account the sum of £100,000 from Pamucbank in Izmir, Turkey. No funds had arrived by July 29th, and Finch & Partners spoke to Dr. Burns, who then said his enquiries showed that his account had been debited there. Finch & Partners asked Barclays Bank, Gibraltar

to telex the Turkish bank, and apparently the Turkish bank said the money had been sent off.

28 On Friday, August 3rd, Finch & Partners had been told by their bankers that their client account had been credited with that £100,000 but they were unable to say anything more than that it had come through the Isle of Man. Dr. Burns had told Finch & Partners that he would have expected the funds to be passing through the Isle of Man. Finch & Partners had another client who was involved in a different transaction and who had been asked to send £285,000. He did so in two tranches: one for the sum of £100,000 and the other for £200,000. This client had sent more than £285,000, done so in two goes and had done it very speedily without notice. Finch & Partners were convinced that the £100,000 had come from Turkey through the Isle of Man and was what Dr. Burns had sent them. They drew a cheque and handed it over to Triay & Triay.

29 On August 13th an agent acting for the other client had asked whether or not Finch & Partners had received the £100,000, and the possibility of there having been a mix-up had dawned on Finch & Partners. They had made various enquiries over the next two days and, to their horror, it had been was confirmed that the £100,000 deposit of August 3rd had nothing to do with Dr. Burns.

30 Finch & Partners maintained, however, that there was no binding contract between Goodenham Ltd. and the Finch & Partners' nominee companies. They reiterated that Mr. and Mrs. Shear and Goodenham Ltd. could not keep the deposit. Their only hope was to maintain that a contract existed and to sue Dr. Burns's shell company.

31 Triay & Triay point out that no claim is made against their firm and that Finch & Partners have no claim for any relief against them. Furthermore, the letter from Finch & Partners underlines the fact that in no way did Mr. and Mrs. Shear procure or induce the mistake, nor were they party to it. The issues that arise, they declare, are whether Mr. and Mrs. Shear are entitled to retain the moneys pursuant to the agreement of sale or are bound to return them.

32 Finch & Partners' position in all this begins with the claim that the moneys paid to Triay & Triay on August 6th, 1990 were funds belonging to a different client and not to Dr. Burns. Mr. Christopher Finch of Finch & Partners has had to make up the shortfall in the client account from his own resources to comply with the Solicitors Accounts Rules. The money which was paid to Triay & Triay was paid by mistake. Furthermore, contracts would not be binding on the parties until such time as they had been exchanged. Mr. Pilley had to be in possession of one part of the contract, duly sealed or signed on behalf of the vendor in this case. He put that in the final paragraph of his letter of July 27th to Triay & Triay. He

has still not received his contract signed or sealed by the vendors which was sent to Triay & Triay with the letter dated August 6th, 1990. He has given notice in writing that the deposit was paid from funds from which the purchaser was not entitled to draw and pointed out that the contracts had not been exchanged.

33 There were three preconditions in Finch & Partners' letter of August 6th. The last was concerned with the change in the proposed completion date from August 21st to 28th. This condition had not been accepted by Triay & Triay, and the completion date remained as August 21st according to the documents. So the contracts were released to Messrs. Triay & Triay on terms which had not been agreed. Triay & Triay had stuck to August 21st as the contractual completion date. Mr. Pilley suggests, therefore, that since no contract came into force between any of the parties, the question of rescission need not arise.

34 Doctor Burns, according to Mr. Pilley, explained the delay in providing funds with numerous excuses. The doctor had a common law wife in Wales who is said to have frozen his accounts. The troubles in the Arabian Gulf were holding up the transmission of funds from Turkey. On August 2nd, Dr. Burns wrote out a cheque for £150,000, payable to Finch & Partners, which was sent to Barclays Bank in Gibraltar on August 28th and bounced because there were no funds in that bank. Dr. Burns said he would have to fly back to Wales to find out what his wife had done with the funds in the Gibraltar Barclays accounts.

35 Enquiries later revealed to Finch & Partners that Dr. Burns is not medically qualified, although he describes himself as a cosmetic surgeon. He does not own property in the United Kingdom or anywhere else in the world. He lives in a run-down farmhouse in Wales. The Social Security offices pay the rent for it. He has previous convictions for fraud. Finch & Partners have now reported him to the police in Gibraltar, who are making their investigations.

36 There does not seem to me to be any more that need be said about the facts which lie behind the originating summons of T & T Trustees Ltd., Tower Holdings Ltd. and Mr. Shear. It is now time to turn to the law. No decision of a Gibraltar court was cited so I now deal with the English authorities. There was no suggestion that they were bad law or that they should not apply to the members of Gibraltar's fused profession.

37 As a rule, there is no binding contract of sale until the contracts of sale have been formally exchanged if the parties have made a sale "subject to contract" (see *Eccles* v. *Bryant* (4)). If they have not made an arrangement "subject to contract" the only question is whether a contract has been concluded (see *Bigg* v. *Boyd Gibbins Ltd*. (3)). The simple answer is whether or not the contract has been concluded by offer and acceptance. It is not dependent on subsequent exchange of contracts.

38 Suppose one party says he intended that he should not be bound except on exchange? Lord Denning, M.R. in *Storer* v. *Manchester City Council* (12) answered this ([1974] 3 All E.R. at 828):

> "There is nothing in this point. In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: 'I did not intend to contract', if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough."

Storer accepted Manchester City Council's offer, contained in a letter, to sell its council house to him, by signing the agreement for sale and sending it back to the council. The council did not sign it and contracts were not exchanged. Storer had signed the agreement and sent it back to the council. Storer brought an action alleging that there was a binding contract for the sale of the house and asking for specific performance of the contract. He succeeded in the county court and on the appeal by the council, which was dismissed by the Court of Appeal.

39 That deals with the law on the first issue, which is whether or not there was a binding contract in this matter between T & T Trustees Ltd. and Tower Holdings Ltd., and Finson (Nominees) Ltd. and Finbar (Nominees) Ltd. for the sale of the shares in Goodenham Ltd. which owned the property in Spain.

40 The next issue is one that relates to the effect of mistake in the law of contract. Payments made under a mistake of law are not generally recoverable (see *Avon County Council* v. *Howlett* (1) ([1983] 1 All E.R. at 1082)). If, however, a person pays money to another under a mistake of fact which causes him to make the payment, he is *prima facie* entitled to recover it as money paid under a mistake of fact. This is so whatever the mistake even if the payer has been negligent or careless in omitting to use due diligence to inquire into the facts and the mistake is not shared by both parties (see *Turvey* v. *Dentons (1923) Ltd.* (13)). The onus of proving that the mistake was one of fact lies on the plaintiff (see *Holt* v. *Markham* (5) ([1923] 1 K.B. at 511)).

41 The plaintiff's claim may fail if (a) the payer intends that the payee shall have the money in all events, whether the facts be true or false, or is deemed in law to so intend; (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorized to receive the payment) by the payer or by a third party by whom he is authorized to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so (see *Kelly*

v. *Solari* (7); *Kleinwort Sons & Co. Ltd.* v. *Dunlop Rubber Co. Ltd.* (8); *R.E. Jones Ltd.* v. *Waring & Gillow Ltd.* (6); *Barclays Bank Ltd.* v. *W.J. Simms Sons & Cooke (Southern) Ltd.* (2) ([1980] Q.B. at 695 and 699); and *Avon County Council* v. *Howlett* (1) ([1983] 1 All E.R. at 1082)).

42 One of the bases on which these principles are founded is that it cannot be otherwise than unconscionable for the payee to retain the money which the payer gave him by a mistake of fact.

43 Solicitors who take it on themselves to act as agents for a client impliedly warrant that they have authority to do so and if they act in pursuance of that authority, make a contract or transact some business with a third party and when doing so represent that they do so on behalf of the principal, the solicitors, as agents, are liable for damage occasioned by the third party if that authority does not exist. This is so whether solicitors are fraudulent, negligent or simply mistaken. The reason is that they impliedly warranted the existence of that authority and it is immaterial whether they knew of the defect in the authority or not.

44 The basis for this principle is the implied contract which may, of course, be excluded by the facts of the particular case. Good faith is no protection (see *Yonge* v. *Toynbee* (14) [1909] 2 K.B. 215). The principle applies not only to solicitors but also to other agents such as those of owners of motor vessels (see *Rasnoimport V/O* v. *Guthrie & Co. Ltd.* (10)).

45 Mr. Isola conceded that the contract for the sale of the shares in Goodenham Ltd. by T & T Trustees Ltd. and Tower Holdings Ltd. to Finson (Nominees) Ltd. and Finbar (Nominees) Ltd. was a concluded contract. He submitted, however, that the deposit on it should be returned to Finch & Partners, the solicitors for Finson (Nominees) Ltd., Finbar (Nominees) Ltd. and Dr. Burns, since it was paid under a mistake of fact, namely, that it was paid out of funds provided by Dr. Burns when it came out of those of another client. There was no fraud, bad faith and little or no negligence or carelessness.

46 The Shears had chosen not to accept Whirley Promotions' better offer of £625,000 on July 27th, 1990 and Whirley Promotions withdrew it on July 30th, 1990 before the deposit was paid by Finch & Partners. The agreement was signed and executed by Finson (Nominees) Ltd. and Finbar (Nominees) Ltd. on August 6th, 1990. Whirley Promotions was not to be looked upon as a serious purchaser. The Shears did not lose any purchaser thereafter. The mistake was discovered on August 13th, 1990 and Mr. Pilley of Finch & Partners informed Mr. Triay of Triay & Triay, so the Shears were "on notice" from then that this mistake of fact had occurred. They had not changed their position thereafter. They still had their house and their title to it. It was unconscionable of them to keep the deposit money.

47 Finch & Partners were entitled, Mr. Isola submitted, to the return of the deposit paid by mistake, on the principles to be culled from *Kelly* v. *Solari* (7); *Turvey* v. *Dentons (1923) Ltd.* (13); *R.E. Jones Ltd.* v. *Waring & Gillow Ltd.* (6); *National Westminster Bank Ltd*. v. *Barclays Bank Intl. Ltd.* (9); *Barclays Bank Ltd*. v. *W.J. Simms Son & Cooke (Southern) Ltd.* (2); and *Rover Intl. Ltd.* v. *Cannon Film Sales Ltd*. *(No. 3)* (11). Solicitors can and do make *bona fide* mistakes of fact just as bankers and insurers do, and whether or not there was negligence or carelessness on the part of Mr. Pilley of Finch & Partners, the law clearly entitled the latter to recover the deposit.

48 Estoppel did not arise because Finch & Partners paid the deposit not from Dr. Burns's funds but those of another client of theirs and they did not pay it to the Shears but to Triay & Triay.

49 Mr. Triay's contention was that although the plaintiffs accepted that the deposit was paid under a mistake of fact, Finch & Partners could not recover it. This was because, as solicitors, they were agents who warranted that they had authority to do this from their principal, Dr. Burns. An agent who makes representations that he has that authority and acts as if he had it, is personally liable if that authority is lacking and the representation false, and this is so whether it is innocent or otherwise. The agent is estopped from denying lawful authority. His authorities were *Yonge* v. *Toynbee* (14); and *Rasnoimport V/O* v. *Guthrie & Co. Ltd.* (10). Mr. Isola's authorities did not touch upon the matter of a solicitor's personal liability for his payment of money under a mistake of fact.

50 A bank, Mr. Triay maintained, paying out of a client account by a mistake of fact such as a forged cheque, can recover the money so paid because it has no duty to the payee but only to its customer, and it warrants nothing and has no duty to the payee. He claimed that it was also a matter of common sense that a solicitor who procures a contract for a client and pays a deposit under its terms cannot recover it by going back on his authority. The conduct of legal business would halt if solicitor or client could question the authority of the other party's solicitor at every turn. ("Is that Dr. Burns's money? Have you his authority to use it for this deposit?") It would be impractical and undesirable.

51 Coming now right down to the facts in this matter, I find that Finch & Partners are the solicitors and agents for Finson (Nominees) Ltd. and Finbar (Nominees) Ltd., the intended purchasers of the shares in Goodenham Ltd. owned by T & T Trustees Ltd. and Tower Holdings Ltd. (the vendors). They are also the solicitors and agents for their client, Dr. Burns. Triay & Triay are the solicitors and agents for the vendors and Mr. Shear.

52 There was a contract under seal for the vendors to sell those shares to the purchasers. It could not be void for mistake. Finch & Partners paid

money to Triay & Triay, warranting that they had the authority of their principals to pay the principals' money to Triay & Triay for the vendors, as a deposit which was owed to them under the contract to secure the purchase of those shares. Finch & Partners did *not* have that authority, so the money was paid under a mistake of fact. They have reimbursed the client whose money they used by mistake for this deposit. They now stand in the shoes of that client. They thought it was money sent to them for this purpose by Dr. Burns but they had not made sure it was, and in fact it belonged to someone other than Dr. Burns.

53 None of the plaintiffs induced that mistake or was aware of it. They gave good consideration for it by executing the contract. They did so because Finch & Partners warranted that they had the authority of their principal. They would not have done so otherwise. They received that money in good faith.

54 When the vendors signed the contract of sale they became obliged to sell the shares to the purchasers at a certain price. They could not sell them to anyone else for a better price. The vendors changed their position to their detriment. This is because they had surrendered their rights to the shares or subjected them to the rights of others.

55 Finch & Partners as solicitors and agents of the purchasers and Dr. Burns are estopped from succeeding in their claim for repayment of the deposit. Accordingly, the plaintiffs' application succeeds and that of Finch & Partners fails.

56 The court orders that the plaintiffs' application be granted and a declaration given that T & T Trustees Ltd. and Tower Holdings Ltd. have effectively rescinded the contract dated August 7th, 1990 between T & T Trustees Ltd. and Tower Holdings Ltd. of the first part, Mr. Shear of the second part and Finson (Nominees) Ltd. and Finbar (Nominees) Ltd. of the third part. The deposit of £58,500 paid by Messrs. Finch & Partners in the name of and on behalf of Finson (Nominees) Ltd. and Finbar (Nominees) Ltd. to the plaintiffs' solicitors on August 6th, 1990 by way of deposit pursuant to cl. 3 of the above contract is forfeited to the plaintiffs T & T Trustees Ltd. and Tower Holdings Ltd. as trustees. The counterclaim of Finch & Partners for payment of £58,500 is dismissed. The costs of the application and counterclaim are to be the plaintiffs'.

Declaration accordingly.