

In the Court of Appeal of Jersey

In the year one thousand nine hundred and seventy-eight, the first day
of November.

BEFORE: Peter Leslie Crill, Esq., Deputy Bailiff of Jersey,
President; John Godfray Le Quesne, Esq., Q.C. and
Martin Charles Nourse, Esq., Q.C.

BETWEEN

Mace Properties Limited

APPELLANT

AND

Ronald Harold Sculthorp and

RESPONDENTS

Thelma Katherine Cleaton Davies,
his wife.

M.C. Nourse, Esq., Q.C.

This is an appeal from a judgment of the Royal Court, delivered by the Bailiff on the 16th September, 1977.

The plaintiffs, Ronald Harold Sculthorp and Thelma Katherine Sculthorp, his wife, sue on an agreement which is undated, but which was signed in early January, 1975. The other party to the agreement was the defendant, a company called Mace Properties Limited, the majority shareholder in which was and is Mr. Gerald Henry Symonds, who signed the agreement on behalf of that company.

The background to the agreement, which I take largely from the judgment of the Royal Court, was, shortly stated, as follows. In 1972 Mr. Symonds formed another company called Mace Construction Limited for the purpose of developing property owned by the defendant property company. He appointed Mr. Sculthorp, who formerly had been a builder on his own account, as general manager of the construction company and transferred to Mr. and Mrs. Sculthorp forty-nine per cent of the shares in that company. The plaintiffs for their part owed the construction company a substantial sum of money, which was later quantified, including interest, at something over £6,100. They occupied rent free Flats 51 and 54 Marina Court, which had been developed by the construction company and were owned by the defendant property company. The plaintiffs said in evidence, and this evidence was accepted by the Royal Court, that they had spent some £6,500 on carpets, curtains, wallpaper and fittings in the flats. During 1974 the property market in Jersey deteriorated and the financial position of the two companies, and thus of the plaintiffs and Mr. Symonds, was adversely affected. The result was that Mr. Symonds wished to sever the plaintiffs' connection with the two companies and to obtain vacant possession of the two flats, so that they could be sold on financial terms satisfactory to both parties. The plaintiffs agreed to terms after several meetings and the agreement, which was principally

one for the purchase of the plaintiffs' forty-nine per cent shareholding in the construction company by the defendant property company was therefore designed to resolve all outstanding matters between the parties and to leave the plaintiffs with a capital sum with which to buy a house after moving out of the flats.

The agreement appears to have been one prepared by the parties themselves. It was typed on a piece of writing paper headed "Mace Group of Companies", with an address in St. Helier, setting out the names of four companies, including the names of both the defendant property company and the construction company. It starts off in these terms: "This is an agreement between Mace Properties Limited and Mr. and Mrs. R.H. Sculthorp whereby Mace Properties Limited agrees to buy the shares of Mace Construction Limited owned by Mr. and Mrs. R.H. Sculthorp for £25,000, subject to the following conditions." There are then set out seven conditions and there is nothing in those conditions or in their format to suggest that any one or more of them were to be treated separately from any of the others. The agreement was signed by Mr. Symonds, who was expressed to sign on behalf of the defendant property company. It was also signed by both Mr. and Mrs. Sculthorp. Although expressed to be an agreement by Mr. Symonds solely on behalf of the defendant property company, it is accepted by Mr. Vibert, in my view rightly, that it was in fact a tripartite agreement between Mr. and Mrs. Sculthorp, the defendant property company and also the construction company. The reason for this is that two of the conditions affected the construction company.

The convenient course will be for me to read the seven conditions in turn, to comment on them as I go along and to state the facts which are material to each.

Condition 1 was in these terms:

" £10,000 to be paid at the exchange of this Agreement."

That £10,000 was duly paid.

Conditions 2 and 3 were in these terms:

- "2. £15,000 to be paid at the time that the Ker Anna Development is completed or the first of the following properties is sold- Ker Anna, The Penthouse Marina Court, 51 and 54 Marina Court or the Upper Flat at Chanterelle whichever is the later.
3. During the period of your full-time employment as General Manager of Mace Construction Ltd. you will continue to receive a salary of £5,000 per annum paid monthly which will cease when work at Ker Anna is completed. It is understood that during this period you will continue to use your most earnest endeavours to supervise and finish the work in hand."

The properties named in condition 2 were all owned by the defendant property company. The final certificate of completion of the Ker-Anna development was submitted to the building inspectorate on the 25th April, 1975, and Mr. Sculthorp's employment as general manager of the construction company ceased on the 30th April. By that date the penthouse at Marina Court had been sold and condition 2 then took effect. On the 1st May the defendant property company, or Mr. Symonds on its behalf, paid to the plaintiffs £5,000 on account of the £15,000 which then became payable, but he neglected or refused to pay the balance. It has not been suggested, and it could not have been suggested, that the defendant property company would have had any defence at that stage to an action for the payment of the balance of £10,000. The defendant property company now claims not to pay the balance, or not to pay the whole of the balance, because of events which took place subsequently. With regard to condition 3, Mr. Sculthorp duly received his salary of £5,000 up to the date of the cessation of his employment on the 30th April, 1975.

Condition 4 is in these terms:

- "4. Execution of this Agreement excuses any of the Mace Group Companies or me personally from any claim for salary, profits or dividends that you might wish to make."

No point, as I understand it, arises on this condition, whose primary object appears to have been to extinguish any further right of the plaintiffs to salary or dividends from the construction

4-
company. This is one of the two conditions which affected the construction company, but it is to be noted that it was also capable of effecting the defendant property company.

Condition 5 is in these terms:

"5. You agree to vacate Flats No. 51 and 54 and the garage which you have been occupying at Marina Court at my request within one month of my requesting you to do so. It is agreed that I have no wish to have Vacant Possession until such time as a Purchaser or Purchasers for either or both of the flats so long as you agree to pay all outgoings and keep them in good condition."

In June, 1975, Mr. Symonds orally requested the plaintiffs to vacate Flat No. 54. In spite of the provision for one month's notice they left within five days. They continued to occupy Flat No. 51 for a period but, having found it to be too small for their needs, they moved out at the beginning of July without being requested to do so by Mr. Symonds.

Condition 6 is in these terms:

"6. Upon vacating the flats you will leave all fittings plus the carpets, curtains and light fittings and have repaired the damaged portions of wallpaper."

As to the construction of this condition two points can be made. First and more important, it is clear that the question whether this condition had been duly performed by the plaintiffs or not could not have been decided until, at the earliest, the plaintiffs had vacated the flats or one of them. On a combined reading of conditions 2, 3, 5, and 6, it must, I think, have appeared likely, although not certain, to the parties at the date they signed the agreement that the performance of condition 6 would not fall due until some time after the balance of the purchase money had become payable under condition 2 and the other previous conditions had taken effect. As will be seen from the dates which I have given, that is in fact what happened. Flat no. 51 was not vacated until the beginning of July, some two months after the balance of the purchase money became due under condition 2.

Secondly, although nothing much has been made of this point.

the words "you will have repaired the damaged portions of wallpaper" might be construed in one of two ways. They might be said to be a use of the future perfect tense, so that the obligation was to have completed the repairs by the date on which the premises were vacated. The other possibility, and this is the construction which was assumed in argument, is that the obligation arose on the date on which the premises were vacated. In other words "You", that is Mr. and Mrs. Sculthorp, "will cause the repairs to be done upon vacating the flats". On that view the obligation did not arise until the flats were vacated, and presumably the Sculthorps would have been entitled to a reasonable period of time to complete the repairs hereafter.

The important point, as it seems to me, is that the defendant property company could not have complained of any failure to repair until, at the earliest, the date of vacation of the flats or one of them. The factual position in regard to condition 6, so far as material, is as follows. On the one hand, it is not disputed by the defendant that the plaintiffs duly left behind all the fittings plus the carpets, curtains and light fittings; on the other hand, it is not disputed by the plaintiffs that when they left Flat no. 51 at the beginning of July, 1975, some of the expensive wallpaper in that flat was in a state of disrepair.

The final condition, condition 7, is in these terms:

"7. Subject to No. 6 above you will be excused payment of the amount which you still owe to Mace Construction Ltd. and furthermore Mace Construction Ltd. will not look to you for any interest on your various Borrowings which you have made from the Company during your employment."

That is the second condition which affected the construction company and in this case it affected that company alone. It involved a release by the construction company of indebtedness owed to it by the plaintiffs.

The first question to be decided in this case is what is the true construction of the agreement and, in particular, of the words "Subject to No. 6 above", which appear at the beginning of condition

The defendant property company, through Mr. Vibert, contends that those words mean that all the plaintiffs' obligations under condition 6 must be fully and strictly performed before the plaintiffs are entitled to the benefit of the release contained in condition 7. In other words, he says that the words "Subject to No. 6 above" create a condition precedent, which must be fully and strictly performed before condition 7 can have any effect. He says that, because the wallpaper was not repaired on the date when the plaintiffs vacated Flat No. 51, condition 7 never took effect and the plaintiffs are not entitled to any relief under it. In those circumstances, he says that the plaintiffs must pay, or as things now stand, must be debited with against their claim for the £10,000 balance of the purchase price the whole of the amount which they owe the construction company, including interest. The figure which the defendant property company claims to set off on this ground is £6,115.07. The defendant has now paid the balance of £3884.93 to the plaintiffs in accordance with an Order of the Royal Court which was made on the 26th November, 1975. Accordingly, the position when the action came for trial before the Royal Court in April, 1977, was that the plaintiffs were claiming to be paid the balance of £6,115.07 and the defendant was resisting that claim solely on the ground that some of the wallpaper in Flat No. 51 had not been repaired by the time that the plaintiffs had vacated that flat in July, 1975. It appears that the maximum possible cost of doing the repairs at that time would have been £200 or thereabouts.

Early in the taking of evidence the Bailiff queried whether it was seriously being said that because of the dispute over the wallpaper payment of the £6,000 could also be disputed. Some complaint was made of that in the appellant's notice of appeal, although it was not pursued in argument. In my view that observation of the Bailiff was no more than the instinctive reaction of a judge to a suggestion.

that a minimal breach by one party can be used by the other as an excuse for not performing a much more substantial obligation under the contract. Of course, if Mr. Vibert is right in saying that condition 7 creates a condition precedent in the terms for which he contends, he is entitled to make that suggestion. The question is, is he right in saying that? I am certain that the Bailiff was in no way pre-judging the case, and it is clear from the judgment of the Royal Court that every consideration was given to the defendant's arguments before them. In the result, those arguments were rejected and judgment was entered for the plaintiffs in the sum claimed, less the cost of the repairs, plus interest.

The question, then, or the first question, is, what is the true construction of the agreement read against those background facts of which extrinsic evidence is admissible for that purpose? In my judgment those facts are strictly limited. They would certainly include the amount owed by the Sculthorps to the construction company, as referred to in condition 7. They would also include the number and nature of the fittings and so forth referred to in condition 6. They might, - I do not put it higher than that - include the value of the fittings and so forth at the date of the agreement. In any event, I can see no reason why Mr. Sculthorp's evidence as to the price which he and his wife paid for them should not have been properly admitted in evidence. However, those background facts, which are I think, the only ones which can properly be looked at in regard to conditions 6 and 7, may, in the end, not have much effect on the question of construction. I should say in passing that it seems to be quite clear that it would not have been permissible to receive evidence of why one or other party thought those conditions, or either of them, were included, or what he or she thought would be their effect, if and when they were included.

I return to the words "Subject to No. 6 above". I tentatively suggested to Mr. Vibert during the course of the argument that one

might read the words "Subject to No. 6 above, etc." as meaning "if and to the extent that you perform your obligations under No. 6 above, then you will be excused the payment of what you owe to, the construction company." His answer to that was that, if that was right, that would make the performance of their obligations under clause 6 entirely optional to the Sculthorps. Having heard that answer; I think that Mr. Vibert is perfectly correct and that that is not a permissible construction of the words "Subject to No. 6 above". That is one extreme. On the other hand, it seems to me that the construction for which Mr. Vibert contends is right at the other extreme. He is asking us to read the words "Subject to No. 6 above" as meaning, in effect, "subject to your performing every single obligation contained in condition 6 above, strictly, fully and to the letter, crossing the t's and dotting the i's". In my judgment, that attaches far too much weight to those words. Before saying what I think is the true significance to be attached to them, I would say this. I have already said that at the date of the agreement, it must have appeared likely to the parties that condition 6 was one which would be performed after the previous conditions had taken effect. In other words, it was a condition whose performance might well be isolated in time. This is not a very important point but, if that view was right, it might give some explanation for condition 7, being expressly linked to condition 6 in isolation from the other conditions of the agreement. In fact, I am perfectly satisfied in my own mind, that, when one reads the agreement as a whole and remembers that the opening words make no distinction between any of the conditions in any way, they must all be read together. It is not permissible to look at one condition and say, "That is pure bonus for one party and he would have been quite happy to enter into the agreement without it". That is speculation. One must look at the agreement as a whole and see that it contains a series of mutual obligations with benefits to both sides, each set of which is given in exchange for those on the other side. There

may be a reason for finding condition 7 expressly linked only to condition 6, but in substance you cannot separate it from any of the other conditions.

Mr. Vibert says to us, as he is perfectly entitled to do, "You must give as much effect as you reasonably can to the words 'subject to No. 6 above' ". He says that if these words are interpreted except in the sense for which he contends, we would, in effect, be striking them out of the agreement altogether. With respect, that is a submission with which I cannot agree. One must approach the matter in this way. We must give some effect to the words "subject to No. 6 above", but if it is possible to do so in one of two different ways, then we must prefer that which is more in accordance with the probable intention of the parties. I told Mr. Vibert during the course of the argument not to worry about justice. This is because a question of construction is not a question of justice. It is a question of the probabilities of intention. We have to determine what was the parties' intention from the words which they used. If one construction would produce a sensible and probable result and the other a nonsensical and improbable one, a court of construction is not only entitled, but bound, to adopt the former alternative. In construing these words, I feel that it would be extraordinary if the parties had intended that some single trivial breach of condition 6 should entitle the construction company, to say "You are not entitled to any relief under condition 7. You have got to pay everything which you owe this company". A number of examples were given during the course of the argument. Mr. Le Quesne suggested the possibility of Mr. and Mrs. Sculthorp having removed a fitting which was significant enough not to be subject to the de minimis rule, but nevertheless one which was of no great value. Mr. Vibert was forced to accept that on his argument, just like the failure to repair the wallpaper, that would have prevented the Sculthorps from claiming any relief under condition 7.

-10-

What effect can be given to the words "subject to No. 6 above" which does not involve the nonsensical and improbable result for which Mr. Vibert contends? On consideration, it seems to me that the reason why those words were introduced into condition 7 was this. What was happening was that, by condition 6, Mr. and Mrs. Sculthorp were accepting an entirely new liability to the defendant property company. If condition 6 had not been there, they would have been perfectly entitled to remove all the fittings, carpets, curtains and light fittings except the fittings (if any) which as between landlord and tenant could properly be described as landlord's fixtures. And so, by condition 6, they were accepting an entirely new liability to the defendant property company. Condition 7 gave them, in exchange for the acceptance of that new liability, relief from a liability which already existed, not to the defendant property company, but to the construction company. In those circumstances it seems to me that it was quite natural to use the words "subject to No. 6 above" and that their presence can perfectly well be explained by the fact that the combined effect of conditions 6 and 7 was to create that new liability to one company in exchange for the relief given by the other.

On that view, this case can be decided simply as a matter of construction. The result of that construction is that Mr. and Mrs. Sculthorp, having become subject to an obligation under clause 6 would be liable in damages for a breach of the obligation. It is admitted that they have committed a breach of that obligation. It was so decided, in effect, by the Royal Court and that decision has not been questioned by Mr. and Mrs. Sculthorp. That breach is one which can be measured in damages and provision has been made for that by the order of the Royal Court. At present the order enables the defendant property company to hold back £200 from the £6115.07 owed by it to the plaintiffs.

The position here, if one accepts the foregoing construction of

the contract, is the simple case of a breach by one party of a contractual obligation ; the breach is capable of being remedied in damages, in this case by way of a set off against the sum rightfully claimed by that party in the proceedings. On that view of the matter it does not become necessary to consider the question of substantial performance. I would like to say, however, that, had it become necessary to consider that question, my inclination would have been to agree with the view of the Royal Court. On no footing is it necessary to consider any question of waiver. If the judgment of the Royal Court is read in full, it seems really quite clear that they thought that if there was a waiver, it was a waiver merely of the time for the performance of the obligation to repair, and not of the obligation itself. The Royal Court could not have held that there had been a waiver of the obligation itself and, at the same time, that the amount of the plaintiffs' claim should be diminished by whatever was the cost of the repairs which had to be done.

For these reasons, which are different from those given by the Royal Court, it seems to me that this appeal should be dismissed.

Peter Leslie Crill, Deputy Bailiff of Jersey.

I fully agree with the judgment which has been given by Mr. Nourse and wish to add nothing thereto as regards the judgment itself, but I would like to say this Mr. Vibert, it must not be assumed that because members of this Court question Counsel from time to time in the course of their submissions, that that necessarily presupposes that the Court is hostile to the case that Counsel is advancing.

John Godfrey Le Quesne, Esq., Q.C.

I also agree.