

JERSEY / JUDGMENT

Allscot -v- AC Mauger [2011]

JRC 048 (03 March 2011)

[2011] JRC 048

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judgment

the bailiff: 1. This is an appeal by Allscot Limited ("the plaintiff") against a decision of the Master dated 23rd June, 2010, whereby he refused to grant summary judgment against A C Mauger and Sons Limited ("the defendant").

Background

2. The factual background can be shortly stated. The plaintiff carries on business as a plumber. In March 2007, the defendant appointed the plaintiff a sub-contractor at the development it was carrying out at the Sarum site, St Saviour. The plaintiff carried out work during 2008 and rendered six invoices totalling £5,447.72. The plaintiff claims this sum together with £7,900, being the balance of retention monies held by the defendant (giving a total claim of £13,347.72). 3. The defendant admits that the plaintiff carried out the work concerned and also admits liability for five of the six invoices issued by the plaintiff. The defendant disputes the last invoice, amounting to £1,751 on the basis that the plaintiff was remedying its own defective work. In addition, the defendant claims to set off the sums admitted in the invoices (i.e. £3,696.72) against the sum which it counterclaims. The defendant says that in carrying out work installing lavatories, the plaintiff used a connection not approved by the manufacturer. As a result, a leak occurred causing significant damage. The defendant says that it has expended £21,113.83 to remedy the plaintiff's defective work. The defendant says that the work was necessary because of the plaintiff's breach of contract and counterclaims for the sum concerned. It also seeks an indemnity from the plaintiff in respect of any liability of the defendant to the owner of plot 10 in respect of loss of rent and liability of the owner to the tenant. This appears to have arisen out of the fact that the property had to be vacated in order for the repair works to be carried out. 4. In its reply, the plaintiff says that the connection used was compatible, was properly installed and was agreed by the site foreman on behalf of the defendant. It therefore refutes the plaintiff's counterclaim. 5. The evidence before the Master was the same as the evidence placed before this Court. The Master dismissed the application for summary judgment on the grounds that there was a conflict of evidence between the parties which could only be resolved by oral evidence at trial and what the defendant was saying was such that there was a fair or reasonable

possibility of the defendant having a real or bona fide defence. The applicant's principles 6. Both parties agreed that, notwithstanding the decision in Downes-v-Marshall

[2010] JRC 115B , which altered the test for appeals from the Registrar of the Family Division to the Royal Court, this Court should apply the traditional test for appeals from the Master, namely that this Court was entitled to come to its own decision on the matter whilst having due regard to the decision of the Master. As a result, we heard no argument on the point. Suffice it to say that the Court was content to proceed on that basis, as it considers that there are material differences between the roles of the Master and the Registrar which point in favour of maintaining the existing test for appeals from the Master. 7. There was also no dispute between the parties as to the test to be applied on an application for summary judgment. A detailed description is to be found in the Supreme Court Practice (1999 Edition) of the United Kingdom at paras 14/4/1 - 14/4/36 and the position was conveniently summarised by Bailhache, Bailiff in Tomes-v-Coke-Wallis 2002/131A at para 8 of the judgment as follows:- "The legal test on an application for summary judgment is well settled. The following passage from the White Book has been adopted and applied in numbers of cases - 'As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment. "Where the defence can be described as more than shadowy but less than probable, leave to defend should be given, especially where the events have taken place in a country with totally different mores and laws". 8. In this connection, it is important to recall the terms of RCR 7/3(1) (which is in identical form to the equivalent English Rule in existence at the time of the 1999 edition of the Supreme Court Practice):- "A defendant may show cause against an application under Rule 7/1 by affidavit or otherwise to the satisfaction of the Court." Having explained at paragraph 14/4/3 that a defendant may show cause against the plaintiff's application for summary judgment either by a preliminary or technical objection or on the merits, the 1999 edition of the White Book goes on to say this at paragraph 14/4/4:- " Showing a defence upon merits

- the defendant may show cause by "affidavit or otherwise". In practice the Masters will generally require an affidavit from the defendant before they will feel "satisfied" that the defendant is entitled to leave to defend save in exceptional or obvious cases, e.g. in a small claim, a letter from the defendant acting in person living a long way from the court raising a genuine issue may be sufficient. The use of the term "or otherwise" is not intended to open wide the door for giving leave to a defendant who has no real defence; the primary obligation remains on the defendant to "satisfy" the court that there is a triable issue or question or that there ought to be a trial for some other reason." 9. Furthermore, as this Court emphasised in Toothill-v-HSBC Bank PLC

[2008] JLR 077 at para 29, paragraph 14/4/5 of the White Book goes on to say this:- "The defendant's affidavit must "condescend upon particulars" and should, as far as possible, deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on to support it... Indeed, in all cases, sufficient facts and particulars must be given to show that there is a triable issue". 10. Unusually, despite the obligation referred to in the White Book to satisfy the Court that there is a triable issue, the defendant has elected not to file an affidavit in response to that filed by the plaintiff. Advocate Hoy explained that he had taken into account the comparatively modest sum which was being claimed and the need to keep costs in proportion. Nevertheless, the fact remains that, contrary to the procedure set out in the White Book, the defendant has not adduced any facts or matters, nor has it filed any affidavit at all, let alone one which "condescends upon particulars". There is nothing therefore to contradict the evidence put forward by the plaintiff save to the extent that Advocate Hoy is able to point to any inherent weaknesses or unlikelihood in relation to the plaintiff's evidence. The evidence 11. The plaintiff has filed an affidavit sworn by Mr Picot, a director of the plaintiff. That affidavit exhibits a number of other documents. These include witness statements by Mr Douglas McLeod, Mr Jamie Ainsworth and Mr Andrew Pygott. Mr McLeod and Mr Ainsworth were plumbers employed by the plaintiff at the Sarum site; Mr Pygott was the site foreman employed by the defendant. Mr Pygott's statement was made for the purposes of a planned mediation and was expressed to be made on a without prejudice basis for the purposes of that mediation, but Advocate Hoy confirmed that he had no objection to the statement being admitted in these proceedings; indeed he expressly relied upon the statement. 12. So far as material, we would summarise the effect of the evidence of Mr Picot, Mr McLeod and Mr Ainsworth as follows. The plaintiff had often worked as a sub-contractor with the defendant. The contract on this occasion stipulated that "Geberit" components should be used in connection with the toilets. This was satisfactorily achieved in relation to most of the houses but difficulties arose in connection with plots 10 and 11. That was because the defendant wrongly positioned the soil stack (i.e. the large pipe into which the soil would flow from the toilets) to the extent of some 200mm. As a result, it was not possible to connect the toilet pan to the soil stack using the "Geberit" component because of the limited amount of space and the fixed nature of the component. It was the fault of the defendant that the soil stack was in the wrong position and that accordingly the "Geberit" component could not be used. 13. The problem first occurred in relation to plot 10. Faced with this difficulty, Mr McLeod and Mr Ainsworth convened a site meeting with Mr Pygott in order to decide what should be done. Three possibilities were discussed. The first was that the soil stack be moved and put into the correct position. However this would have required the defendant to re-open the slab which covered the soil stack and it would have been quite a major exercise. It was rejected by Mr Pygott. 14. The second suggestion put forward by the plaintiffs was that the Geberit steel frame, to which the toilet pans would be connected, be moved. However, this was also rejected by Mr Pygott. 15. The only other solution which Mr McLeod and Mr Ainsworth could think of was to use an alternative

component to connect the pipe to the soil stack. They suggested using Hepworth fittings and in particular a Hepworth flexible pan coupling. This required Mr Pygott to arrange for his men to channel out the screed and part of the concrete in order to allow the plaintiff to connect the pipe into the waste stack. This solution was accepted by Mr Pygott who organised the channelling work on the houses which had this fault. 16. The advantage of the Hepworth component was that it was a flexible coupling. The evidence on behalf of the plaintiff states that, once the coupling has been curved and fitted in position, it remains locked in position and will remain so unless disturbed. Following the installation of the Hepworth component and completion of the work, the statutory air test was carried out by the Building Control Department. It was satisfactory in relation to both plots 10 and 11. This proved that there was no leak in the system. 17. Several months later, the plaintiffs were asked to return to the site to investigate a damp patch in the cloakroom area of plot 10. After cutting an inspection hole, they established that the Hepworth flexible coupling had disconnected from the soil stack. Thus soil from the toilet had leaked. The evidence on behalf of the plaintiff was that this could not have occurred unless the connection had been disturbed. This could occur if contractors had removed the toilet pan and thereby pulled the Hepworth connector off the join with the soil stack. According to the plaintiff, a plumber should have been requested to undertake any such exercise and any competent plumber would have checked that the connection was still secure when replacing the toilet pan. According to Mr McLeod, once the cause of the damp had been established, the defendant elected to deal with the position by reverting to Geberit components and that this required the re-positioning of the Geberit frame. This was of course the second solution originally put forward by the plaintiffs but which had been rejected by Mr Pygott on behalf of the defendant. 18. Mr Pygott's statement is largely consistent with the evidence put forward by the plaintiff. He accepts that he was informed that there was a problem and that the solutions put forward were, first, the re-opening of the slab to relocate the stack and secondly, relocation of the Geberit frame. He confirmed that he advised Mr McLeod that it would be impossible to re-open the slab or to relocate the frame given the design of the bathrooms. He says that Mr McLeod and Mr Ainsworth advised that the problem could be resolved by use of the Hepworth system. He relied entirely on their expertise in that regard. He denied instructing them to use the Hepworth system but it is clear from his statement that he agreed to their suggestion that they should do so, given his refusal to adopt the first or second solution. 19. Mr Picot has exhibited to his affidavit a document issued by Hepworth which shows that its soil products are compatible with the Geberit soil products. He also exhibited confirmation from the building surveyor that satisfactory air tests were carried out on plots 10 and 11. 20. In summary, the only evidence before the Court is to the effect that it was an error by the defendant that the soil stack was in the wrong place with the consequence that the Geberit connector could not be used. The first two solutions to this problem put forward by the plaintiff were rejected by the defendant's site foreman. The third solution put forward was the use of the Hepworth flexible connector. We accept that in this respect the site foreman was relying upon the plaintiff that this was a suitable solution but

nevertheless he consented to it. The evidence produced by the plaintiff suggests that the Hepworth flexible connector is indeed compatible with the "Geberit" fitting and that, once the flexible Hepworth connector was fixed in position, it would not move unless the toilet pan was removed and the whole pipe was pulled. Thus the evidence of the plaintiff is that, given the successful air test, the leak could only have developed if someone else had subsequently removed the toilet pan and in doing so had dislodged the connection. That had not been done by the plaintiff and any competent plumber would not have allowed that to happen when the toilet pan was removed. Discussion 21. So what is the defence put forward by the defendant? It is to be found at paragraphs 10 and 11 of the Amended Answer which read as follows:- "10 At plot numbers 10 and 11 on the Development the Plaintiff fixed the pipe from the lavatory pan to the soil pipe, using a type of connection that was not approved by Geberit Sales Limited ("Geberit"), namely a Hepworth Building Products flexible pan connector. The plaintiff should have used an approved Geberit product, which would either have been a Geberit 90mm HDPE 90 degree Duofix soil connector or a Duofix straight connector. 11 This was a breach of contract by the plaintiff in that:- 11.1 The plaintiff did not employ good and proper workmanship and did not use suitable and proper materials in and about the Sub-Contract works; 11.2 The plaintiff should not have used fittings that were not Geberit fittings, without express authority from either the defendant or from Geberit itself; 11.3 Further, the connection between the lavatory pan and the soil pipe was not properly made and / or tightened. The Geberit system is designed so that the lavatory pan can be removed without any damage." 22. There is no dispute that the Hepworth fitting was used instead of the Geberit fitting. The defendant alleges that this amounted to a breach of contract for the three reasons put forward in paragraph 11. 23. It argues first in 11.1 that the plaintiff did not use suitable and proper materials in the works. This depends on whether the Hepworth fitting was or was not compatible with the Geberit fitting. The evidence produced by the plaintiff shows that the Hepworth soil fitting is compatible with the Geberit fitting and the defendant put forward nothing to support its assertion to the contrary. Indeed, even the short report from Geberit annexed to Mr Picot's affidavit does not assert that the Hepworth fitting was incompatible. There is therefore nothing to gainsay the plaintiff's evidence that the fitting used was compatible. 24. Secondly, in paragraph 11.2, the defendant asserts that the plaintiff should not have used non-Geberit fittings without the express authority of the defendant. However, the evidence is clear that the defendant, through Mr Pygott, did agree to the use of Hepworth fittings instead of Geberit fittings. We accept for the purposes of this hearing that Mr Pygott would undoubtedly have been relying upon the advice of the plaintiff that Geberit fittings would be satisfactory and compatible and that takes us back to the first point. Nevertheless, the defendant's assertion at 11.2 is not borne out by the evidence. 25. At 11.3, the defendant asserts that the connection was not properly made and/or tightened. However, the plaintiff's evidence, supported by the building inspector, is that an air test was carried out, and that it was satisfactory. There is also evidence that once in position the connection would not have come loose in the absence of outside intervention. Again, there is nothing to contradict that from the

defendant. 26. The final assertion is that the Geberit system is designed so the lavatory pan can be removed without damage. That is a simple assertion and it is not clear how it is related to the defence and counter claim. However, the plaintiff's evidence is that, even with the Hepworth fitting, any competent plumber would have been able to remove the toilet pan and replace it without difficulty and would have ensured that the connection was still in place. Again, there is nothing to contradict this from the defendant. 27. In summary, we repeat that, as set out in the passages quoted from the White Book, there is an obligation on a defendant to satisfy the court that there is an arguable defence and this should be done by producing an affidavit which sets out sufficient facts and particulars to show this. In this case the defendant has not filed an affidavit. On the material before us there is nothing to show that there is a factual dispute so as to contradict the evidence put forward by the plaintiff to the following effect:- (i) It was the defendant's fault that the soil stack in the relevant plot was in the wrong position. (ii) As a result of the incorrect positioning of the soil stack, the Geberit fitting could not be used. (iii) The defendant, through Mr Pygott, refused to agree to the first two solutions put forward by the plaintiff to deal with this problem, namely moving the soil stack back to its correct position or moving the Geberit frame. (iv) The defendant, through Mr Pygott, agreed to the third alternative, namely use of the Hepworth flexible connector. (v) We accept that in doing so he would have been relying upon the expertise of the plaintiff, as plumbers, but there is nothing to suggest that this was negligent advice. The evidence shows that the Hepworth fitting is compatible with the Geberit fitting, that it was properly installed because of the successful air test, and that it could not be moved subsequently in the absence of outside interference, e.g. by removing the toilet pan. (vi) The most likely cause therefore is that the subsequent removal of the toilet pan by the defendant itself (or other sub-contractors on its behalf), caused the damage but the evidence before us is that, if carried out by competent plumbers, no damage would have been caused. Certainly there is no evidence or suggestion that it was the plaintiff who subsequently removed the toilet pans. 28. In the circumstances there is no factual dispute which has been put before us which requires resolution. The defendant has simply not put forward a triable issue. In the circumstances we conclude that the plaintiff is entitled to a summary judgment. 29. In accordance with normal practice a draft judgment containing the forgoing paragraphs was circulated to the parties on 15th November, 2010. However, paragraph 28 of the draft judgment contained the following additional two sentences to those in the previous paragraph of this judgment:- "The counterclaim arises out of exactly the same matters and is therefore struck out. We will hear the parties on the exact order to be made." 30. In response to the draft judgment, Advocate Hoy wrote on 23rd November pointing out that the plaintiff's summons did not seek to strike out the counterclaim and argument had not been heard on the strike out of the counterclaim. In the light of that submission the Court ordered that the matter be listed for further hearing in order that it might hear from the parties on this discrete issue. Unfortunately, for a number of reasons, that hearing only took place today. 31. Having considered the matter in the light of the parties' further submissions, we accept it is not open to the Court to strike out the counter claim. The plaintiff's summons

did not seek such an order and the power to strike out a pleading contained in Rule 6/13 is quite separate from the power to grant summary judgment in Rule 7/1. If a plaintiff wishes to seek summary judgment and strike out a counterclaim, his summons must specify both aspects so that a defendant knows the case he has to meet. 32. The question then arises as to what order the Court should make. On this aspect we were referred to paragraph 14/4/14 of the White Book (1999 edition) . The facts of this case are unusual. The sole defence raised by the defendant is one of set-off. The Court has found that, on the basis of the evidence produced at the hearing, there is no arguable defence. The counter claim arises out of exactly the same facts as the defence of set-off and the Court has therefore by necessary implication found that, on the basis of the evidence produced at the hearing, there is no arguable counterclaim. However, for the reasons stated, we cannot strike out the counterclaim at this stage. 33. In our judgment the only fair result is that the plaintiff should be granted summary judgment in the sum of £13,347.72 and that there should be no stay of execution of that judgment. However, the counterclaim remains in being. So, if the plaintiff wishes to apply to strike it out, it must issue a summons to that effect before the Master and on that occasion it will of course be open to the defendant to produce evidence that has not been produced before us. If the counterclaim is struck out, then that will be the end of the matter; if it is not or if the plaintiff does not apply to strike it out, the matter will then proceed to trial on the counterclaim only. If, at trial, the plaintiff is successful, it will keep the £13,347.72. If, on the other hand, having heard all the evidence, the Court finds for the defendant on the counterclaim, the plaintiff will have to pay whatever sum is awarded on the counterclaim. We have considered carefully whether a stay of execution of the judgment should be granted but, given that in this particular case, the Court has found that there is no arguable set off and that the counterclaim is based on identical grounds as the set off, we think it would be unjust for the plaintiff to be kept out its money until the counterclaim is resolved. 34. In summary we allow the appeal and we grant judgment to the plaintiff in the sum of £13,347.72. The counterclaim remains in being. The defendant must pay the plaintiff's costs on the standard basis both before the Master and before this Court in relation to this summons. Authorities *Downes-v-Marshall*

[2010] JRC 115B . Supreme Court Practice (1999 Edition) of the United Kingdom. *Tomes-v-Coke-Wallis* 2002/131A. *Toothill-v-HSBC Bank PLC*

[2008] JLR 077. White Book (1999 edition). Page Last Updated: 18 Aug 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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