

JERSEY / JUDGMENT

CI Marine -v- Whipp [2014]

JRC 106A (12 May 2014)

[2014] JRC 106A

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judgment

the master: 1. This judgment represents my reasons for giving the defendant unconditional leave to defend in response to the plaintiff's application for summary

judgment.

I dismissed the plaintiff's application on 12 th May, 2014, after conclusion of the arguments submitted by both counsel. I also directed the defendant to file an amended answer and counterclaim to plead all matters now relied upon which were referred to in the evidence filed by the defendant in opposition to the application for summary judgment. Factual background 2. The plaintiff's claim is a simple one. It is for non-payment of fees for repairs to the defendant's boat following damage being suffered while the boat was at sea. The plaintiff rendered an account in the sum of £40,046.72 in June 2012. Interim payments on account were made by the defendant's insurers in February, April and July 2012. 3. In September 2012, the defendant's insurers paid the defendant the sum of £12,896.72 being the balance of the plaintiff's account less the defendant's excess. Previous payments had been made direct to the plaintiff. The balance was paid direct to the defendant, according to an email from the defendant's insurers dated 20 th February, 2013, at the defendant's specific request. In an earlier email dated 15 th February, 2013, the defendant's insurers indicated they could not make any payment to the plaintiff unless they had authorisation from the defendant to do so and they confirmed that the defendant had not given such authorisation. The email further stated:- "the contract for repair is between Channel Island Marine Limited (the plaintiff) and our insured Mr Whip so you must direct your correspondence to Mr Whipp as we are unable to be of any assistance." 4. Proceedings were therefore commenced by a summons issued on 15 th February, 2013. 5. On 25th February, 2013, the defendant sent an email to the plaintiff. In summary, the defendant stated he would not pay the plaintiff for any of the works because he regarded them as substandard and incomplete and that he was obtaining a report from Sunseeker. He further indicated that the sensible course of action for the plaintiff was not to commence proceedings and not to incur costs but to wait for the report from Sunseeker. The defendant also made it clear that if the plaintiff tabled the matter then the defendant would place the matter on the pending list and would defend the claim. 6. The plaintiff nevertheless placed the matter on the pending list on the 1 st March, 2013, and filed particulars

of claim on 26 th March, 2013. Paragraph 2 of the particulars of claim pleaded that the contract for repair was between the plaintiff and the defendant. 7. An answer and counterclaim was filed on 16 th April, 2013. Paragraph 11 of the counterclaim pleaded that the works undertaken by the plaintiff were to a standard which fell far below the satisfactory standard required or expected of the Sunseeker representative. Paragraph 12 alleged that the plaintiff had omitted significant repairs required to fix the damage and paragraph 13 pleaded that some of the repair works remain incomplete and some had been finished to an unacceptable standard. Paragraph 14 refers to the plaintiff being advised that a report on the works had been obtained from Sunseeker and the report confirmed the cost of rectification works exceeded the plaintiff's claim. 8. The answer and counterclaim however did not contain any particulars as to what works were not satisfactory, had not been carried out, or were incomplete or unacceptable. The cost of any such works was also not pleaded. Furthermore the answer and counterclaim did not exhibit or attach the report obtained from Sunseeker. This report, although it had been obtained in March, 2013, was only disclosed to the plaintiff at mediation in October 2013, (see paragraph 23 of the first affidavit of the defendant). I do not know why the report was not provided as soon as it was obtained, which is what the defendant appeared to intend when he sent his email on 25 th February, 2013, to which I have referred above. 9. Instead the parties focused on pleadings and only agreed to refer the matter to mediation in July 2013, which mediation took place in October. It is also right to observe that the Sunseeker report was not a particularly helpful document. It was not clear to me from the report which of the items referred to were matters arising out of either the plaintiff not carrying out works or carrying out works to a standard that was said to be unsatisfactory. 10. In light of the unsuccessful mediation, the plaintiff issued an application for summary judgment and filed an affidavit from Mr Richard Orman Matlock, director and shareholder of the plaintiff. The essence of the plaintiff's application was that the repair works, which had not been paid for, had been approved by Mr Peter Desty ("Mr Desty") who had been appointed by the defendant's insurers to oversee the repair works. 11. In response the defendant filed an affidavit dated 22 nd January, 2014, and a supplemental affidavit dated 29 th January, 2014. These were the papers before me when I was addressed by both counsel on 29 th January, 2014. 12. The defendant's complaints at time were as follows:- (i) A galley top had not been repaired; (ii) He disputed the claim for works done to uncouple a starboard engine and to replace engine mounts; (iii) He indicated the patio door required considerable further work to put right the plaintiff's repairs by reference to the report from Sunseeker. 13. During the hearing I elected to adjourn the plaintiff's application. I did so firstly because the insurance position was not clear. Although the defendant was arguing that insurers had not paid for repairs, the plaintiff had produced an email dated 6 th September, 2013, from Mr Desty authorising replacement of the galley top which was one of the defendant's complaints. Secondly the Sunseeker report made no reference to the starboard engine not being uncoupled. Thirdly it was not clear whether the insurers would or would not pay for the patio doors, given they had appeared to have authorised replacement of the galley top following attempts by the plaintiff to repair the same. It was also not made clear to me whether the matters complained of by the defendant arose out of the original incident that lead to repairs having been carried out or whether they arose out of defective repairs said to have been carried out by the plaintiff. As matters stood as at 29 th January, 2014, I was unable to determine whether

there was a counterclaim or not and if so for how much. I therefore indicated that the position of the insurers was to be clarified to understand whether in fact there was a counterclaim and if there was what it was for and for how much. 14. The matter came back before me on 18 th February, 2014, when the defendant filed a second supplemental affidavit. It was explained the insurers would not make further payments until such time as a further review was done of the work undertaken by its surveyor. I indicated that it was no clearer to me whether the insurers would pay or not and this seems to depend on what their surveyor said. The matter therefore seemed to require Mr Desty to look further at the works carried out by the plaintiff and the defendant's complaints. It was also still not clear to me whether the insurers would pay for the work for the patio doors or not, what other work was required, and whether any works addressing a defective repair, related to the original accident which had led to the claim. 15. I therefore proposed to the parties further adjourning the matter to await production of Mr Desty's report, which suggestion the parties agreed to. 16. Ultimately Mr Desty did produce a further report dated 26 th February, 2014. However, this report was not a fresh inspection of the vessel but rather was a summary of his previous reports. I do not know why Mr Desty did not produce a further report or did not inspect the vessel. It would not have been unduly difficult for him to do so and it might have been helpful for the parties, if he had. The vessel since the beginning of this year I was informed has been in Poole and Mr Desty is based in Cowes I would not have thought it would be unduly onerous for him to have inspected the vessel to assist the parties to resolve their dispute. 17. The matter finally came back before me on 12 th May, 2014, following a further attempt by the parties to resolve their differences through negotiation. For this hearing the defendant produced a third affidavit sworn on 6 th May, 2014, and a fourth affidavit produced on the morning of the hearing on 12 th May, 2014. 18. In his third affidavit, the defendant's position had developed as follows:- (i) Insurers would pay for the replacement of the galley top; (ii) They would also pay for a new patio door; (iii) However they would not pay for structural work required to be carried out to the existing door frame which was unsatisfactory. 19. Annexed to the third affidavit was an email dated 20th March, 2014, from Mr Simon May of Boat Care Limited, an independent surveyor, where Mr May stated that the repairs previously carried out by the plaintiff to an alloy beam above the patio doors were inadequate and inappropriate. This informal conclusion was confirmed by a more detailed report from Mr May exhibited to the fourth affidavit of the defendant. 20. The other aspect of the defendant's counterclaim by this time was that the costs charged by the plaintiff in respect of the lifting and uncoupling of the starboard engine and to look at the mounts was work that was not in fact carried out. During the hearing I was informed by Advocate Pallot that the insurers had reserved their right to recover costs if it was found in the defendant's favour that such works had not been carried out. While I was not provided with any formal evidence of this stance by insurers, what I was told does not surprise me and is the sort of position I would expect insurers to adopt if they had paid for works that were not in fact carried out. I of course make no findings to whether works were actually carried out but simply note the position of the insurers if that were found to be the case. The applicable legal test 21. The relevant tests on a summary judgment application are well known. I considered them in the case of Corefocus Consultancy Limited v Cronk

[2013] JRC 194 . The relevant paragraphs are 11, 13 and 14. In respect of the arguments before me in particular the following are material:- (i) In resisting an application for summary judgment a defendant's affidavit must condescend upon particulars and should deal specifically with the plaintiff's claim and affidavit and state clearly and concisely what the defence is and what facts are relied upon to support it. (ii) Where a defendant shows he has a fair case for defence or reasonable grounds setting up a defence or even a fair probability that he has bona fide defence then he ought to have leave to defend. (iii) Leave to defend must be given unless it is clear that there is no real substantial question to be tried, or there is no dispute as to facts or law which raise a reasonable doubt that the plaintiff is entitled to judgment. (iv) Conditional leave to defend may be given where there is good ground on the evidence for believing the defence set up is a sham or that the court is prepared very nearly to give judgment for the plaintiff. (v) A condition of a payment in to court ought not to be imposed where a reasonable ground of defence is set up. (vi) Leave should not be made conditional where there is a fair probability of a defence. 22. In *Hard Rock Café Limited and Another v HRCKY Limited*

[2013] JRC 244B at paragraph 14 citing the White Book I noted that where a defendant sets up a bona fide counterclaim arising out of the same subject matter of the action connected with the grounds of the defence, on a summary judgment application, I should give unconditional leave to defend. Decision 23. Before I set out my decision I wish to make certain observations about the conduct of both parties in relation to this matter. 24. Firstly both parties seem to have forgotten this is a claim for £15,000 and a counterclaim which now appears to be of a similar amount. Costs have already been incurred which probably exceed the amount at stake. Yet both parties insisted on pleading the case fully rather than clarifying the position with the insurers and providing evidence as to why it said that the repairs were not satisfactory. Both these steps only occurred when the court itself intervened in January and February of this year. This is despite the fact that the defendant in his email of 26 th February, 2013, invited the plaintiff not to continue with its proceedings but rather to await the outcome of the Sunseeker report. Yet no report was provided until October 2013 and what was provided was far from clear. The position of the insurers has also only emerged gradually. Had the parties focused on insurer's position then significant costs might have been saved. It is also right that I observe that the original answer and counterclaim filed by the defendant was wholly lacking in any particulars. I understand therefore why the plaintiff chose to issue an application for summary judgment. 25. It is also difficult to understand why Mr Desty had not returned to further look at the repairs carried out earlier this year after the summary judgment application was adjourned in February. I do not know whether it was the defendant, given that Mr Desty was appointed by his insurers, or the plaintiff who was dealing with Mr Desty. They both appeared to have had communications at different times with him but neither appear to have been able, either separately or acting together, to have been able to persuade him to return further to evaluate the defendant's complaints. 26. It was also right to observe that it was only on 6 th May, 2014, that any independent evidence was produced that one

aspect of the works carried out, namely the alloy strut above the patio door, may not have been satisfactory. This was only supported by an independent report on 12 th May, 2014, namely the day of the resumed application for summary judgment. It was also only on 6 th May that any further evidence was produced about why it is said the plaintiff overcharged the defendant for looking at the engine mounts. 27. I have set out the above because, for a dispute of this size, there has been a lack of cooperation between both parties to identify what is really in issue between them in a dispute where costs will otherwise rapidly outweigh what is at stake. The plaintiff focused on pursuing its claim which was inevitably going to cause the defendant to respond. The defendant, despite indicating it wanted to take a practical approach took seven months to produce an initial report complaining about the plaintiff's conduct, did not clarify the position with insurers until over a year after the dispute had commenced, and only obtained an independent report setting out the lack of repairs some fifteen months after proceedings were commenced. Had there been a more constructive approach on both sides, this dispute might have been resolved or at least significant costs saved. 28. I now set out my approach to whether or not to grant the plaintiff's application or whether to give leave to defend and if so on what basis. 29. The plaintiff's submission remained that the work was authorised by the defendant's insurer via their agent who authorised the transfer of the money to pay the plaintiff to the defendant. The plaintiff should therefore be paid. Advocate Slater submitted in that regard that the insurers were an independent third party who had approved the works carried out and thus the defendant could not withhold payment. If the defendant was unhappy that was a matter for him to take up with his insurers. 30. This submission is inconsistent with paragraph 2 of the particulars of claim to which I have referred. On the plaintiff's own pleaded case, he accepts that the contract was between the plaintiff and the defendant, not between the plaintiff and the defendant's insurers. I accept that it may be a defence to any counterclaim that the works were authorised by insurers as agent of the defendant, but the view I have reached is that such an agreement is a matter for trial. It is not a basis upon which I can grant summary judgment where the defendant has produced evidence to support his counterclaim. 31. That evidence is primarily the evidence contained in the report of Mr May to which I have referred. The view I have reached in relation to that evidence is that it gives rise to at least a fair case for a defence. I do not regard Mr May's evidence as being either a sham or a case where I am nearly prepared to give judgment for the plaintiff. Rather, I consider that the defendant has set up a bona fide counterclaim which arises out of the same subject matter of the action namely repairs to the defendant's boat, so that I should allow the defendant unconditional leave to defend. 32. I have reached this view on the basis of primarily the third and fourth affidavits filed by the defendant and in particular the independent report of Mr May. Had matters rested solely with the earlier affidavits filed by the defendant, the lack of any particulars contained in the defendant's answer and counterclaim and lack of clarity as to the position of the insurers (which is still not completely clear) I might have reached a different view. However, I would still have given conditional leave to defend based on a combination of requiring the defendant to pay the monies received from the insurers into court and

produce an independent report. Now that the defendant has produced an independent report albeit late in the day, the defendant has taken sufficient steps to meet the legal test I have referred to. 33. I am also satisfied there is an arguable case in relation to whether or not the plaintiff was overcharged for lifting the starboard engine. Although the evidence in respect of this allegation is not supported by an expert's report in the same way as the complaints about repair works carried out by the plaintiff, this is still not an issue that I cannot resolve on a summary judgment application, but has to be resolved at trial. 34. Although the defendant, for the reasons set out above, satisfied me that this is a case where the defendant should have unconditional leave to defend, the defendant's pleading does not at present reflect the case placed before me in the affidavits filed in particular the third and fourth affidavit of the defendant. In accordance with the power vested in me by Rule 7/5 of the Royal Court Rules 2004, as amended, to give directions following an order where I have given leave for defend, I directed the defendant, on the usual terms as to costs, to file an amended answer setting out all the facts and matters relied upon in support of its counterclaim by close of business 30 th May, 2014. The plaintiff also has liberty to file a reply and answer to the counterclaim. The matter should then be referred back to me for further directions in the first week of July. 35. Finally, I repeat the oral observations I made at the conclusion of the hearing on 12 th May, 2014, namely that this case is already likely to be uneconomic for both parties, whoever is successful at trial. I therefore urged the parties to reflect further on how they wish to resolve their differences rather than proceed to trial. I was informed, that shortly before the hearing, the defendant had made an offer to pay the claim, but not any costs, to bring an end to this matter. It is a shame that such an approach was not taken sooner but I hope that this decision does not prevent the parties thinking again on the course they are presently embarking on.

Authorities Corefocus Consultancy Limited v Cronk

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[2013] JRC 244B . Royal Court Rule 2004. Page Last Updated: 23 Sep 2016 BAILII: Copyright Policy
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