

JERSEY / JUDGMENT

Mackie v Scott [2017] JRC 179 (26 October 2017)

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judgment

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Introduction

1. This judgment contains my detailed written reasons for ordering a preliminary issue in relation to whether or not the alleged liability of the defendant for the claims advanced by the plaintiff in her order of justice dated 22 nd June, 2017, are excluded by the operation of the "tout tel " clause in the contract of sale passed before the Royal Court of Jersey on 17 th January, 2014.

Background

2. The plaintiff's claim concerns her purchase of a property from the defendant. Prior to the sale of the property the defendant redeveloped the property. 3. The plaintiff claims damages for misrepresentation based on various enquiries made by her conveyancer of the defendant's conveyancer prior to the contract of sale being passed before the Royal Court. The plaintiff alleges that representations of facts were made which were false. 4. The plaintiff contends that the effect of the alleged misrepresentations was to render the contract of sale voidable. However, the plaintiff does not seek to set aside the contract but instead only seeks damages. In the alternative if the contract is void as a result of any misrepresentation the plaintiff alleges that she overpaid the defendant for the property by the amount of damages she has suffered. Attached as schedule 1 to the order of justice are detailed particulars setting out why the misrepresentations were untrue. Attached as schedule 2 are the total damages claimed amounting to £1,457,968.21. 5. The contract of sale contained the following clause "the property was sold with all such other rights, appurtenances and dependencies in the state in which it was at the date of sale with all its apparent or hidden defects (vices caches)..." . 6. The defendant in its answer pleaded that the effect of the above clause was that the plaintiff "agreed to purchase the property "warts and all", namely subject to all defects which then existed in the property, whether apparent or hidden at the time of the conveyance, save to the extent that there was deliberate

misrepresentation on the part of the defendant in relation to the existence of such defects (which is not the case here, no such claim having been pleaded or being justified as a matter of fact)". The clause invoked by the defendant, prior to contracts being passed in English, is known colloquially among Jersey lawyers and conveyancers as the "tout tel " clause referring to the introductory words of the French wording used for the clause set out above in English. The law on preliminary issues 7. There was no dispute between the parties on the applicable legal principles concerning when a preliminary issue should be ordered, applied in *Stock v Pantrust International SA and Others*

[2015] JRC 268 and *CMC v Forster RBC and Regent*

[2016] JRC 149 . The relevant questions for me to consider were therefore:- (i) Has an issue which is decisive or potentially decisive been identified? (ii) Is the issue a question of law, or a question of law and fact? (iii) Can the matter be decided on the basis of a schedule of agreed or assumed facts? (iv) Can the issue be tried without significant delay and making full allowance for the implications of an appeal? 8. These are the questions I asked myself in relation to the defendant's application. In relation to these questions, there was no dispute between the parties whether the issue asked for was a question of law and whether the matter could be decided on the basis of the matters pleaded in the order of justice. Rather the argument turned on whether the issue identified was decisive or potentially decisive and whether any such preliminary issue could be tried without significant delay. The parties' contentions 9. Advocate Redgrave for the defendant argued that the effect of the tout tel clause extended to excluding liability for any misrepresentation other than deliberate misrepresentation. Otherwise if the plaintiff was right, a vendor would be liable for defects not known to the vendor. The point of the clause was to shift the entire risk to the plaintiff. If a purchaser wanted to transfer any risk back to a vendor, a purchaser should insist on insertion of an appropriate warranty in any contract. In this case what the plaintiff was trying to do was to avoid the effect of the tout tel clause which clearly excluded any liability in contract by framing a claim in misrepresentation. 10. To order a preliminary issue, the court in applying the relevant tests only had to be satisfied that it was arguable that the tout tel clause covered misrepresentation claims other than deliberate misrepresentation. The defendant did not have to persuade the court that the issue would be determined in the defendant's favour. The court only had to conclude that there was a potentially decisive issue and that the other requirements for ordering a preliminary issue were met. 11. A preliminary issue was required because how far a vendor of immovable property could exclude liability for hidden defects remained unresolved following the decision of the Court of Appeal in *Kwanza Hotels Limited v Sogeo Company Limited*

[1983] JLR 105 ([1983] J. J. 105). The relevant standard clause in operation at the time of the *Kwanza* decision was as follows:- "Le tout tel qu'il est avec tout et autant de droits, appartenances et dépendances comme en peuvent appartenir ...". 12. The Court of Appeal stated in respect of this clause at page 121:- "Had we found that there was a vice caché , we

should have had to go on to consider whether the implied warranty was negated by the "Le tout tel qu'il est . . ." clause in the deed passed before the Royal Court. On our conclusion that question does not arise, and we express no view of it." 13. At first instance in *Kwanza Hotels Ltd v Sogeo Co. Ltd*

[1981] JLR 59 ([1981] J. J. 59), Sir Frank Ereaut, Bailiff had expressed a view on the effect of the *le tout tel* clause (see [1981] JLR 059 at page 77). "Le tout tel qu'il est" must be deemed to have some meaning and I consider they are similar to the expressions referred to in *Domat*, and mean that the purchaser takes the property as he finds it. However the passage does draw, it seems to me, a distinction between "*vices cachés*" which affect title and those which do not. The implied warranty as to title remains, but in other respects is negated". 14. Following the decision of the Court of Appeal, the *tout tel* clause in contracts for the sale of immovable property was modified as a matter of general practice by adding the words underlined to read as follows:- "*Le tout tel qu'il est avec tout et autant de droits, appartenances et dépendances comme en peuvent appartenir et dans l'état ou il se trouve avec tous ses vices apparents ou cachés, s'ils existent...*" 15. It was the English equivalent of these words that were included in the contract of sale between the plaintiff and the defendant passed by the Royal Court in 2014. 16. Advocate Redgrave's argument was that the additional words inserted since the decision of the Court of Appeal in *Kwanza* had to have some meaning. Even if there was a debate whether or not they applied to cover a vendor's title to a property, that concern did not rise in the present case. The present case solely concerned the state in which the property was sold and not any question of title. It was a claim to recover damages for defects. 17. The defendant's application was neither a hopeless point which could be struck out nor was it a point that had already been decided. Rather it was an important argument of general interest and needed determination. It was also a question of law where no factual evidence was required. 18. The preliminary issue, if found in his client's favour, would be determinative of the plaintiff's claim and would save time and money. He accepted there was a risk of an appeal but if there was a trial following an unsuccessful preliminary issue, the trial would turn on a combination of documentary and expert evidence. Accordingly, the possible prejudice caused by any delay both in hearing the preliminary issue and by any appeal was limited. Ultimately a fair trial could still take place if the preliminary issue did not go in the defendant's favour. 19. Advocate McNulty argued that, in deciding whether or not to order a preliminary issue, as a matter of discretion the court could take into account the merits and strengths of the issue. If the issue was hopeless or was likely to fail that was a strong if not conclusive factor against ordering a preliminary issue. I was referred to paragraph 37 of *CMC v Forster* where I took such an approach. 20. Advocate McNulty argued that it was clear from the Court of Appeal decision in *Kwanza* that a claim for misrepresentation and a claim for breach of contract were separate causes of action. She referred me to the following extract at page 113:- "It follows from our view of the meaning of the advertisement and the particulars not only that there was no misrepresentation, but also that there was no express warranty, either included in the contract of sale or collateral, to the same effect as

the misrepresentation for which the Appellants contended. We therefore turn to the second question [which concerned whether certain terms were implied into the contract of sale]. The answer to this depends upon the extent of the responsibility of a vendor, in the absence of any misrepresentation or express warranty, for defects of the thing sold." 21. Also in Kwanza the third question considered by the Royal Court was whether, if there had been a misrepresentation, the action should be dismissed if a purchaser failed to take the precautions a prudent purchaser should have taken. In response to this question, although it did not have to be decided, the Court of Appeal concluded there was no obligation on a representee to verify the truth of representations of fact made by a vendor:- "In our judgment the buyer is as much entitled in such a case as in any other case to rely on the seller's representations." 22. Kwanza was therefore Court of Appeal authority that a purchaser of real property was able to rely on explicit representations made by a vendor. The plaintiff further argued that there was an equivalent authority to the same effect in Guernsey (see *Guille v MacKay* C. A. June 14th, 1967). 23. The effect of the tout tel clause was therefore only to exclude liability in contract. It did not exclude liability for misrepresentation. If a party wished to exclude liability for misrepresentation then express words to that effect had to be included; otherwise what was the point of a purchaser making pre-contracting enquiries of a vendor? The whole process would be "a complete waste of time". 24. As an alternative submission Advocate McNulty contended that the clause was not necessarily conclusive because it might only extend to physical defects but not to failures to comply with planning laws. 25. Advocate McNulty also expressed concerns about the risk of an appeal. Given that the purchase of the property had occurred in early 2014, if the plaintiff was successful on the preliminary issue and then was successful at trial, she would be kept out of her money for at least an additional year. 26. A preliminary issue might not also be decisive because there was no warranty from the builder for the building work carried out. The plaintiff had asked, as pleaded at paragraph 6 c. of the Order of Justice, for any warranties and guarantees to be provided to her, and alleged at paragraph 7 e. that the defendant had represented that a warranty existed from the builder. 27. Advocate Redgrave in reply firstly argued that the point of pre-contract enquiries was as follows:- (i) Firstly, they were relevant as they may move a purchaser to make further enquiries or decide they did not wish to proceed to pass contract; and (ii) Secondly they could lead a purchaser to seek to have express warranties inserted into a contract of sale. 28. It was also for a purchaser to review any answers received to pre-contract enquiries and to follow up on any answers if they were not to the purchaser's satisfaction. In the case of paragraph 6 c. of the order of justice, there was no statement that a warranty existed from the builder. The reply in response simply stated that details of any warranties would be left at the property, not that a warranty from the builder existed. 29. The version of the tout tel clause considered in Kwanza at first instance did not assist the plaintiff because the normal wording had since been amended. Even the Court in Kwanza at first instance was of the view that 'vice caches' which did not affect title were excluded by the original clause. The defendant's argument was that the current version of the le tout tel clause clearly excluded liability for all defects whether apparent or

hidden, and so excluded liability for such defects whether based on a claim in contract or misrepresentation. Decision 30. The view I reached was that it was appropriate to order a preliminary issue. This was for the following reasons:- (i) Firstly, I was not persuaded that, putting it at its lowest, the defendant's arguments were hopeless or bound to fail in contrast with the view I reached in *CMC v Forster* ; (ii) Secondly, the matter is of general importance because the wording used in the contract between the plaintiff and the defendant is standard wording used in contracts for the sale of immovable property generally in the Island, unless modified expressly by the parties. It is also wording that has been adopted since the decision of Court of Appeal in *Kwanza* in 1983; (iii) The change to the wording of the "tout tel " clause adopted by parties since the judgment of the Court of Appeal in *Kwanza* appears to have been introduced because of the refusal of the Court of Appeal to make it clear whether it agreed with the observations of Sir Frank Ereaut at first instance on the effect of the tout tel clause as it was then drafted. The version of the tout tel clause in use since that time on its face therefore spells out expressly that a purchaser takes the property in the state in which it is found with all its defects whether apparent or hidden (See *The Effect of the Fourniture Et Garantie Clause In an Hereditary Contract* - John D Kelleher *Jersey and Guernsey Law Review* p37) The meaning contended for by the defendant that this clause covers damages for defects based on an allegation of misrepresentation is at least arguable. In other words, while a representee may generally be able to rely on representations made per the Court of Appeal in *Kwanza* and the Guernsey Court of Appeal in *Guille* , the issue to determine is whether such reliance is negated by the express wording of the current " tout tel " clause so the risk of inaccurate answers is passed to a purchaser. (iv) I am also not persuaded that the use of the current tout tel clause renders pre-contract enquiries pointless. The answers to such enquiries might lead a purchaser not to proceed or to a reduction in the purchase price. The answers might also lead to a variation of the terms of the contract of sale. If a vendor gave answers to pre-contract enquiries knowing they were false, or not caring whether they were true or not, a purchaser in such circumstances is not without remedy. However, this not the plaintiff's complaint. The plaintiff does not allege that any answers given were deliberately untrue or designed to mislead or deceive, but only that the statements made were untrue. (v) The interrelationship between the law of representation and the law of contract is not necessarily clear - see the decision in *Hong Kong Foods and Gibbons v Robin Hood Curry and Ors*

[2017] JRC 050 at paragraphs 134 to 151. This may have to be explored as part of deciding the meaning of the " tout tel " clause. 31. In relation to the time any preliminary issue would take as a question of law, the preliminary issue can be heard relatively quickly and has since the hearing been listed for January 2018. Even if there was an appeal, and allowing time for a judgment to be written and the necessary preparations for an appeal, the appeal of a preliminary issue would at worst delay matters for up to 12 months. Clearly that might be longer if the matter proceeded to the Privy Council. However, I consider that a second appeal would be relatively unlikely because the issue is one peculiar to the sale of

immovable property in Jersey and is not a matter of general and public importance where in my view leave would be likely to be given. 32. Furthermore if the preliminary issue ultimately turned out to be unsuccessful, a trial could still be conducted to reach a fair determination because the evidence at any trial would be a mixture of documentary and expert evidence. In addition, the plaintiff could be compensated by an appropriate award of interest for any additional delay. 33. In relation to the effect of delay caused by ordering a preliminary issue, I also took into account the fact that the plaintiff did not choose to commence pleadings until some 3 years after the purchase of the property. The plaintiff also does not seek to set aside the purchase but rather only seeks monetary compensation. 34. I accept that the preliminary issue might not determine one issue, which concerns whether or not a warranty existed from the builder for the building work. However, the request made simply asked for copies of warranties, guarantees or permissions to be provided with the answer being "all details would be left at the property". The request made by the plaintiff does not appear to ask whether a warranty existed, but only for a copy of any warranty. The defendant's case is that no representations were made as to what warranties existed nor were there any representations as to whether the builder had provided warranties which would be available to the plaintiff. It was therefore a matter for the plaintiff to follow up on these enquiries. As the claim is drafted at present this is a relatively discrete factual issue. What consequences might flow from it depend on whether or not there were any warranties from the builder and whether or not those warranties were or are capable of assignment. This discrete issue however, in my judgment, did not prevent determination of the main issue between the parties, namely the effect of the "tout tel" clause. 35. Ultimately, the issue between the parties is a question of contractual interpretation (see *Public of the Island of Jersey v Jersey Electricity PLC*

[2016] JCA 169) on the scope and effect of the tout tel clause. In my judgment this is the sort of issue which does justify a preliminary issue. If successful such an issue will avoid the need for a potentially lengthy and relatively costly trial on the detail of the representations said to have been made by the defendant, whether those representations were false and what loss might flow from any misrepresentation found to have been made. If the defendant fails on the preliminary issue a fair trial can still take place. 36. For all the above reasons, the defendant's application was therefore granted. *Authorities Stock v Pantrust International SA and Others*

[2015] JRC 268 . *CMC v Forster RBC and Regent*

[2016] JRC 149 . *Kwanza Hotels Limited v Sogeo Company Limited*

[1983] JLR 105 ([1983] J. J. 105). *Kwanza Hotels Ltd v Sogeo Co. Ltd*

[1981] JLR 59 ([1981] J. J. 59). *Guille v MacKay C. A.* June 14 th , 1967. *The Effect of the Fourniture Et Garantie Clause In an Hereditary Contract* - John D Kelleher *Jersey and Guernsey Law Review* 1997. *Hong Kong Foods and Gibbons v Robin Hood Curry and Ors*

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