ROYAL COURT (INFERIOR NUMBER)

1977/5

Before: Sir Frank Ereaut, Bailiff
Jurat W.E. de Faye
Jurat H. Perree.

Ronald Harold Sculthorpe and
Thelma Katherine Sculthorpe,
née Cleaton-Davies — Plaintiffs

v.

Mace Properties Limited — Defendant

Advocate J. Clyde-Smith for the plaintiffs

Advocate V. Vibert for the defendant

At the relevant time, Mr. G.M. Symonds was the majority shareholder in the two companies, Mace Construction Limited and Mace Properties Limited (the defendant). The former company was the building contractor to the latter.

By the terms of an undated agreement signed by the plaintiffs and by Mr. Symonds on behalf of the defendant, the defendant agreed to purchase the plaintiffs' shares in Mace Construction Limited for £25,000, the agreement being subject to the following conditions:-

"1. £10,000 to be paid at the exchange of this Agreement.

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.

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

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 so to do. 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 to keep them in good condition.

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

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

The sum of £10,000 was duly paid to the plaintiffs in accordance with clause 1 of the agreement.

The final certificate of completion of Ker Anna was submitted to the Building Inspectorate on 25th April, 1975, the employment of Mr. Sculthorpe was terminated on 30th April, 1975, and at that date the Penthouse, Marina Court, had been sold.

The plaintiffs were therefore entitled to be paid £15,000 as at that date, in accordance with clause 2 of the agreement. The next day, 1st May, Mr. Symonds paid to Mr. Sculthorpe £5,000 on account of that sum, but neglected or refused to pay the balance of £10,000. The plaintiffs therefore now action for that balance.

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The defendant admits that it still owes the balance of £10,000. However, it alleges that the plaintiffs defaulted in the performance of their obligations under clause 6 of the agreement, in as much as they vacated the flats in June or July 1975 and failed to have repaired the damaged portions of wallpaper in Flat No. 51, and that accordingly they are not entitled to be excused the capital and interest mentioned in clause 7, which totals £6,115.07. The defendant therefore now claims to be entitled to set-off that amount against the said sum of £10,000, leaving a balance admitted to be due to the plaintiffs of £3,884.93 which the defendant has paid.

The plaintiffs deny that they are in breach of their obligations.

The brief background to the agreement, which was undated but signed in early January, 1975, was as follows: In 1972 Mr. Symonds formed Mace Construction Limited for the purpose of developing property. He appointed Mr. Sculthorp, a former builder on his own account, as General Manager of that Company and transferred to the plaintiffs 49% of the shares in the Company. The plaintiffs owed to the Company a substantial sum. They occupied rent free flats 51 and 54, Marina Court, which had been developed by the Company and were owned by Mace Properties Limited. The plaintiffs had spent some £6500 on carpets, curtains, wall-paper 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 cover the plaintiffs'

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connections 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. The agreement was therefore designed to resolve all outstanding matters between the parties, and leave the plaintiffs with a capital sum with which to buy a house after moving out of the flats.

The obligation placed upon the plaintiffs by paragraph 6 to have repaired the damaged portions of wall-paper was inserted because at the date of the agreement areas of the paper were, to the knowledge of Mr. Symonds, in a damaged condition caused by the plaintiffs' cat, and he wished it to be made clear that it was the responsibility of the plaintiffs to make good the damage.

The Court has not found it easy to arrive at some of the facts or to assess the state of mind of the parties at the relevant time, for their testimony contains contradictions, whether through fading memory or lack of frankness is not clear. However, we find the following evidence to be relevant to the issue.

The plaintiffs told us that up to June 1975 they were, with the consent of Mr. Symonds, in occupation of both flats 51 and 54, Marina Court. In that month, Mr. Symonds orally asked the plaintiffs to vacate Flat 54 as he had found a buyer, and required possession by the end of the week. The plaintiffs left within five days, but continued to occupy Flat 51. However, they found Flat 51 too small for their needs, and so they moved out at the beginning of July without

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being asked to by Mr. Symonds. They gave one set of keys to Langlois, Estate Agents, who had been commissioned by Mr. Symonds to find a buyer for the flat. They retained one set of keys, because they considered they had a responsibility to look after the flat until a buyer was found, and they returned regularly to clean the flat and check for leaks.

Damage to the expensive wall paper in Flat 51 had been caused by the plaintiffs' cat. The damage had been made good earlier in 1975, but by the time they ceased to reside in the flat in July a subsequent cat of theirs had caused further damage.

Despite the wording of paragraph 6 of the agreement, both plaintiffs claimed that at about the time of signing the agreement Mr. Symonds, knowing that the wall paper was then damaged and that it was difficult to re-order the same paper, agreed to be responsible for repairing it at their expense. Nevertheless, they ordered rolls of the paper and claimed that, when they left the flat there was sufficient paper to repair the damaged areas, but that was disputed. Mr. Sculthorpe also alleged that after he had obtained supplies of the wall paper earlier in the year and informed Mr. Symonds, the latter had said that he would have the work done if the opportunity presented itself and debit the plaintiffs.

The plaintiffs agreed that under paragraph 6 of the agreement, they were responsible for making good the damaged wall paper, but they interpreted paragraphs 5 and 6 as meaning that on Mr. Symonds finding a buyer for Flat 51 they would receive one month's notice to quit, during which time they would have to repair the wall paper. Their state of mind

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on ceasing to occupy the flat in early July was that they had not been given notice to quit, no buyer had been found for it and they were free to resume possession at any time. They therefore considered that there was no hurry to repair, but that they would do so on being told by Mr. Symonds that he had found a buyer.

Their regular visits to the flat were interrupted by a holiday. On their return early in November they visited the flat and then found that it had been decorated. Instead of replacing the paper, the walls had been emulsified. The work had been done in September by Mr. Robinson on the instructions of Mr. Symonds. On finding that the decoration had been done, Mr. Sculthorpe, acting on legal advice, insisted on paying Mr. Robinson's account for the work, amounting to £119.36, which had been debited in Mr. Robinson's books to the account of Mr. Symonds. The plaintiffs did in fact owe Mr. Robinson for work done to the flat earlier that year, but Mr. Sculthorpe insisted on paying for the September work. Later, Mr. Symonds paid Mr. Robinson the amount of the bill, and so the latter refunded the amount which Mr. Sculthorpe had paid him, less the outstanding account due to him.

When the plaintiffs discovered that Mr. Symonds had caused the decoration to be done and had shown a potential buyer round the flat without their knowledge, they changed the locks, but shortly afterwards agreed to give up "vacant possession" of the flat, despite the fact that by then the dispute between them and Mr. Symonds had become the subject of legal proceedings, because the buyer was a personal friend of theirs and had recently had an operation.

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The relevant evidence of Mr. Symonds was as follows. In drafting paragraphs 6 and 7 of the agreement as he did, Mr. Symonds intended that in return for being let off an indebtedness of some £6,000 the plaintiffs should be required to repair any damaged wall paper when they quit the flats so that the flats would be in good condition on a sale. That was comparatively a very minor liability compared with the financial benefit the plaintiffs were thereby gaining, and it never occurred to him that they would omit or refuse to do the work.

At the time of signing the agreement he envisaged that the plaintiffs would remain in one or both flats until he found a buyer, but when he noted that their cats continued to cause damage to the wall paper, he decided that they would have to leave so that the damage could be put right in order to attract a buyer. He orally gave them notice to leave Flat 54 and then suggested they leave Flat 51 also, which they agreed to do because it was too small for them. When they left in early July, Mr. Symonds did not discuss the repair of the damaged wall paper with them because he assumed they would attend to it, but when after two months the work had not been done he decided he must do it himself, especially as people were viewing the flat and not buying. He therefore instructed Mr. Robinson to decorate the flat, which he did in September.

By then, relations were strained between Mr. Sculthorpe and Mr. Symonds, due substantially to Mr. Symond's failure to pay the balance of £10,000 which he owed under the agreement.

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His failure to pay was partly because he could not afford to do so, and partly because he had by May begun to regret having entered into the agreement, due to deteriorating property market conditions.

When Mr. Symonds discovered that the plaintiffs had not repaired the wall paper, he did not attempt to get in touch with them to remind them of their obligation. He claimed that he did not know where they were, but he conceded that even if he had known he would not have reminded them, because of the strained relations and because he thought that their failure to repair would disentitle them to the benefit of paragraph 7, and thus it would enable him to rectify the mistake he had made in entering into an agreement which he later felt was too generous to the plaintiffs.

The plaintiffs argued that they were not in default of their obligation to repair the damaged wall paper, for the following reasons.

First, that obligation fell due upon their vacating Flat 51. It was envisaged by the agreement that the plaintiffs would vacate not later than one month after receiving notice to do so and, although the wording of the agreement was incomplete, it was fair to say that it was further envisaged that vacant possession would not be expected until a purchaser had been found.

In fact, the plaintiffs agreed to leave Flat 54 after only five days' notice, and as regards Flat 51 they received no notice at all, but ceased to occupy it as a residence by their own wish. They retained one key, continued to feel responsible for the flat and returned several times to dust it and check for leaks, and on one occasion shampooed the carpets.

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They had not received notice, they had not handed the flat over, and they were not told that a buyer had been found until November. They considered that in such circumstances there was no obligation upon them to repair the damage as a matter of urgency, and indeed felt that it could be left until they were notified that Mr. Symonds had found a buyer.

They further agreed that time for execution of the repairs was not of the essence of the contract. The words "have repaired" did not imply the past tense, but meant "you will cause to be repaired". The agreement envisaged that the plaintiffs would completely vacate the flat after receiving notice and would then have the paper repaired for the benefit of the buyer.

The defendant answered that when the plaintiffs left the flat in early July they had vacated for the purpose of the agreement. It was ridiculous to say that, having moved all their furniture out and gone to live elsewhere, they could still claim that they remained in lawful possession of the flat until such time as a buyer had been found and one month had elapsed from the giving of notice. The repairs should therefore have been effected within a reasonable time after leaving in early July, say by the end of that month.

We cannot accept the plaintiffs' argument under this head. We think that the legal position was that when they vacated the flat as a residence paragraph 6 came into operation. We doubt whether the plaintiffs genuinely did interpret the agreement in that way, but if they did they were mistaken. Paragraph 6 was inserted simply to avoid the risk of an immediate eviction. By leaving of their own

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accord the purpose of that paragraph ceased; in effect the plaintiffs waived the need for, and the right to receive, the prescribed notice. The handing over of one set of keys to the estate agent was a clear indication to Mr. Benest that they had vacated the flat. The retention by the plaintiffs of one set of keys and their periodic visits may support their belief that they had not vacated the flat for the purposes of the paragraph, but does not alter what we consider to be the proper application of the paragraph to the facts. Subject to the question of waiver, the wall paper should therefore have been repaired within a reasonable time after their leaving in early July. In the light of what we say later, it is not necessary for us to decide what would have been a reasonable time, but if we had had to decide we would have said one month, subject to availability of labour and materials.

Secondly, the plaintiffs argued that Mr. Symonds had waived his insistence on the strict observance of paragraph 6 of the agreement as regards the repair of the paper, by his statements (already referred to) soon after the signing of the agreement, and again after further supplies of the paper had been obtained. That waiver amounted to a forbearance, as a result of which the plaintiffs were led to believe that, whilst they must pay for the work, there was no particular urgency and Mr. Symonds might himself give the instructions.

Mr. Symonds denied making any such statements, and it was argued on his behalf that it was highly unlikely that he would have done so almost immediately after signing the agreement. Furthermore, Mr. Sculthorpe's actions in November belied his claim.

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We think that Mr. Symonds did make on both occasions statements of the kind attributed to him. The wall paper was of a special type, and as the obligation was to make good the damaged areas it was natural that there should have been a reference to the possible difficulty of obtaining the same type and pattern. Furthermore, although the failure by the plaintiffs themselves to repair the damage at the correct time has now become an issue of crucial importance, as a possible means of extricating Mr. Symonds from an agreement which he has since regretted, we do not think that on the two occasions to which we have referred there was any intention to interpret the agreement so strictly. The main factor was that the plaintiffs had to meet the cost of the work. Mr. Symonds was employing a decorator on other work, it would be he who would finally benefit from the sale of the flat, a sale which might be made easier if the paper had first been repaired; it would therefore have been perfectly logical for Mr. Symonds to make the statements alleged, and we think he did.

As to Mr. Sculthorpe's actions in November, they certainly can bear the interpretation that the plaintiffs realised that they had failed to perform their obligation, and we think that in one sense they did feel that. But that is not the whole answer. We think that they had been lulled (and we do not use that word in any sinister sense) after their discussions with Mr. Symonds into a sense of false security, not as to who should pay for the work, but as to when it should be done and as to who would give the instructions, and we think that sense was induced, with no sinister intent, by Mr. Symonds. The agreement was, in our view, being loosely

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interpreted and Mr. Symonds' statements and conduct amounted to a forbearance as claimed by the plaintiffs.

Because of his conduct, if Mr. Symonds had wished to keep the plaintiffs to the strict letter, then he should have reminded them of their obligation and that the work should be done at once, and although he had by then defaulted in paying them their £10,000, we have no reason to think that they would not have performed it. Mr. Symonds did not remind them. We certainly do not accept that he could not have contacted them if he had wished to do so, but whether or not that be true, his failure to do so now prevents him in equity from benefiting from a failure by the plaintiffs to keep to the strict letter of the agreement.

Notwithstanding the conclusion to which we have just come, we think it necessary to deal with the plaintiffs' alternative argument, which was that even if the plaintiffs had strictly defaulted in their obligation to have the wall paper repaired, they had nevertheless substantially performed their obligations under the agreement as a whole by transferring their shares, vacating the flats and leaving the fittings, carpets and curtains; and even if one looked only at paragraph 6, the plaintiffs had still substantially performed their obligations, for the fittings, carpets and curtains which they had left had cost them over £6,000, whereas the cost of making good the damaged paper would have been under £200. They therefore asked the Court to apply the doctrine of substantial performance, under which a failure to complete only an unimportant part of a party's obligation does not prevent his claim for the agreed price.

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The defendant answered that that doctrine did not apply where the parties had by their contract expressed the intention that entire performance was an essential pre-condition by the other party of his promise, as was clearly the case in paragraphs 6 and 7, that paragraph 7 was quite separate from the rest of the agreement, and that in any case the doctrine only applied in the case of mutual promises and therefore could not apply here where the performance was itself the consideration for the promise.

The first thing we wish to say is that although two companies are involved in the agreement, we think that the reality of the situation was that this was an agreement between the plaintiffs on the one hand and Mr. Symonds on the other hand, and the interpretation of the agreement should be on that basis.

Secondly, we are satisfied that this was an agreement intended by both parties to effect a complete severance of all connexion between the plaintiffs and Mr. Symonds and his companies, and in conjunction with that severance to settle and discharge all outstanding matters between them. It was, we believe, clearly intended by the agreement that neither party would thereafter owe, or have any claim against, the other party.

The defendant relied upon the words "subject to No. 6 above" in paragraph 7 to show that the promise by Mr. Symonds in that final paragraph should be viewed quite differently to the mutual promises in the rest of the agreement. That would have been the case if paragraphs 6 and 7 had stood alone, but, as we have said, we think we must look at the

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agreement as a whole and when we do that we consider that all the paragraphs constitute a series of mutual promises designed to achieve a complete settlement, with no obligations outstanding on either side.

As part of that design, certain obligations were laid on each of the parties, which they were under a duty to perform as specified, or if performance was rendered impossible by their default they were liable in damages for such default, unless performance was waived. The defendant did in fact default on the payment of the balance of £10,000, and that is now the subject of this action. Mr. Symonds did not give the plaintiffs one month's notice to vacate Flat 54, as we think the agreement required him to do, but the plaintiffs waived that requirement. The plaintiffs did not have repaired the damaged parts of the wall paper upon vacating the flat, but we have said that we think that strict performance of that obligation was waived.

Even if one looks just at paragraphs 6 and 7, the plaintiffs have very substantially performed their part of the agreement, for they left behind fittings, carpets and curtains approximating in value to the amount excused by paragraph 7, and by comparison the cost of the work not done was very minor. If one looks at the agreement as a whole, as we think we should, Mr. Symonds has received everything he was entitled to receive except the repair of the damaged wall paper, which omission is properly compensated for by damages.

For all the above reasons, we give judgment in favour of the plaintiffs for the sum of £10,000, as claimed, less the amount of £3,884.93 paid over in accordance with the

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Order of the Judicial Greffier dated 26th November, 1975.

We also order the plaintiffs to pay to the defendant a sum to compensate for their failure to repair the damaged portions of wall paper. That sum should be what it would have cost to effect such repairs. It may now be impossible to estimate that cost. If so, a fair sum might be the amount of Mr. Robinson's bill paid by Mr. Symonds, namely, £119.36. We hope that the parties can agree, but if they cannot they will have to ask the Court to decide. We make no firm order in the matter as we were not addressed on this particular issue.

In the event of disagreement on the above amount, and in order to avoid uncertainity, we order that the defendant may withhold from the judgment sum due to the plaintiffs the sum of £200, pending settlement of the issue.