Judgment 27/2006 Trident Trust Company (Guernsey) Limited v Comprop Guernsey Limited – Royal Court (Civil Action File 970) – 2nd June 2006

Royal Court Civil Rules, 1989 (Rule 22) – application for summary judgment – landlord and tenant – tenant's claim for return of balance of deposit – landlord's claim for arrears of rent under an alleged oral amendment to the lease – landlord granted conditional leave to defend action

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 2nd day of June, 2006, before Richard John Collas, Esquire, Deputy Bailiff; sitting alone.

In the matter of

Between:

TRIDENT TRUST COMPANY (GUERNSEY) LIMITED

Plaintiff

and

COMPROP GUERNSEY LIMITED

Defendant

Whereas on 29th May, 2006 the Deputy Bailiff considered an application for summary judgment and heard thereon Advocate C. Hay for the Plaintiff and Advocate M.G.A. Dunster for the Defendant, who sought leave to show cause against the said application under Rule 22 of the Royal Court Civil Rules 1989, the Deputy Bailiff this day handed down judgment in the terms attached hereto and

1) GRANTED the Defendant conditional leave to defend the claim, such conditions to be decided on subsequent to further submissions from Counsel;

2) ADJOURNED the matter to 9th June, 2006 to hear argument on the said conditions.

S. M. D. ROSS
Her Majesty's Deputy Greffier.

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

In the matter of

TRIDENT TRUST COMPANY (GUERNSEY) LIMITED **Plaintiff**

-v-

COMPROP GUERNSEY LIMITED **Defendant**

Application for Summary Judgment

Judgment handed down: 2 June 2006

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for Applicant: Advocate C Hay
Advocate for the Defendant: Advocate M G A Dunster

Cases, texts & statute referred to:

1. Part III of the Royal Court Civil Rules 1989
2. Monument Trust -v- Gaudion & Gaudion [1996] 22 GLJ 45 and 81
3. Trinity Investments Limited and Another -v- Longport Properties Limited, Guernsey Court of Appeal [2001].
4. Mathind v. E. Turner & Sons) (1992) 23 Con L.R. 16, CA
5. Fieldrank Limited –v- E. Stein" [1961] 1 WLR 12 87
6. Lloyds Banking Company –v- Ogle (1876) 1 Ex. D. 262

1. This is an application by Trident Trust Company (Guernsey) Limited who I will refer to simply as "Trident" for Summary Judgment against Comprop Guernsey Limited who I will refer to simply as "Comprop". The application is brought under Part III of the Royal Court Civil Rules 1989.

2. The material facts are as follows. Trident was the tenant of Comprop in respect of first floor office accommodation at Sydney Vane House under a written lease dated 22 July 2002 pursuant to which Trident paid a deposit of £29,475 which was equal to six months rent. Clause 4 (g) (3) of the lease, made provision for Comprop to set off against the deposit at the end of the lease any costs incurred in remedying any breach of covenant and any outstanding rent or other monies due by Trident to Comprop under the terms of the lease.

3. Trident acknowledges that under that clause it is in order for Comprop to withhold £5,670 in respect of alleged dilapidations and pending the

outcome of arbitration proceedings between the parties concerning those dilapidations which are not admitted by Trident.

4. That leaves a balance of the deposit amounting to £23,805 which Trident says is due and payable to it. In November 2005, Trident commenced proceedings in the Royal Court in respect of which it now seeks Summary Judgement in the sum of £24,245 which includes interest accrued on the balance of the deposit to the date of issue of Trident's Cause.

5. Comprop are resisting the application for Summary Judgement and seek to show cause against the application under Rule 22 of the 1989 Rules. Comprop has produced an affidavit from Nigel Hugh Jones on its behalf. He makes reference to proceedings issued by Comprop against Trident, the commencement of which pre-dated Trident's proceedings for the return of the deposit. Comprop's proceedings have been amended since they were originally issued and in the Cause Reformée Comprop claims £24,616.00 for rent allegedly due for some basement premises at Sydney Vane House which were also used (to use a neutral term) by Comprop.

6. Both parties agree that Trident had the use of the basement premises, and that they were not included in the express terms of the written lease. It is agreed that Comprop had permitted Trident to use the basement premises, but both parties state that there is no written lease, or other written document, or even a contemporaneous file note evidencing the terms of its occupation.

7. What Trident says about those terms is best explained in its defence to Comprop's action. In short, Trident said it understood that the basement premises were to be rent free or in the alternative that it was to pay a reasonable rent, based upon their use as a storage facility. Trident also says that it incurred some substantial costs, nearly £10,000, which it paid to a subsidiary of Comprop for some building works required to update the basement in order to make it fit for occupation.

8. Comprop on the other hand, is less precise as to what it says were the terms of occupation.

9. In paragraph 13 of the Cause Reformée, Comprop states:-

> *"In the premises it was an implied term that Trident would use the [basement premises]:-*
>
> *(a) On the same terms as the First Lease; further or alternatively.*
>
> *(b) On terms which were normal market practice between a commercial landlord and a commercial tenant".*

10. In paragraph 14 Comprop states:-

> "*For the avoidance of doubt [Comprop] avers that as respects paragraph 16(b) above is concerned (sic), normal market terms were identical to those contained in the First Lease".*

11. The Cause Reformée was lodged with the court in February this year. Prior to then, on 18 January 2006, Mr Jones had sworn an affidavit in connection with the Summary Judgment application in which, in paragraph 5, he stated:-

> *"It is clearly part of [Comprop's] case that the use of the additional premises was on the same terms as the first lease. In other words, the additional premises were held on the same contractual basis as that set out in the lease which did subsist between [Comprop] and [Trident]. It will also be argued, to the extent it is any different, that the use of the additional premises was simply an enlargement of the premises covered by the first lease which Mr Le Tissier quotes from. In either of these cases the retention of monies is permitted".*

12. Advocate Hay, appearing for Trident, states that he and his clients do not understand what is meant by the allegation that:

> *"the use of the additional premises was simply an enlargement of the premises covered by the first lease*".

13. He assumes it is intended to describe some amendment to the written lease whereby the premises demised thereunder were to include, not only the first floor but also the basement of the building. As he points out, if that is Comprop's case, then it is surprising that when Comprop later filed the Cause Reformée it did not plead that the First Lease had been amended to plead that case and the material facts that Comprop will rely on in support of it.

14. Advocate Hay also criticises Comprop for its failure to particularise this defence in Mr Jones' affidavit. Advocate Dunster's reply to that argument is that this is a relatively modest claim and he is trying to keep the legal costs in proportion to the amount of money at issue. Advocate Hay argues that the manner in which the defence is put and the lack of particularity given, evidences what he called *"its shadowy nature".* He submits that it cannot be a genuine defence and hence ought not to be allowed to proceed to trial.

15. This brings me to the legal test that I need to have in mind when considering the application.

16. The Royal Court's powers to grant Summary Judgment have been considered on two occasions by the Court of Appeal: in *Monument Trust -v- Gaudion & Gaudion* [1996] 22 GLJ 45 and 81; and in *Trinity Investments Limited and Another -v- Longport Properties Limited* [2001].

17. In both cases the Court of Appeal followed the way in which the Supreme Court of England and Wales has interpreted Order 14 of the then rules of the Supreme Court (see page 2 I of Monument). The test for the Court to apply is:

"*whether the court is satisfied not only that there is no defence but also that there is no fairly arguable point to be argued on behalf of the defendants".* (See page 3 H of Trinity Investments).

18. Clause 4 (g) (3) of the written lease expressly provides that the only arrears of rent Comprop can set off against the deposit, are arrears due under the written lease. Therefore, if Trident's occupation of the basement was governed by a separate lease, then the deposit could not be used to set off the rent due under that separate lease. Furthermore, if no rent was to be payable in respect of the basement there would be no arrears to set off. So, Trident could only have a defence to the Summary Judgement application if there are arrears of rent due in respect of the basement which are due under the written lease, in other words, if the written lease has been amended, as apparently suggested by Mr Jones in his affidavit. Advocate Hay argues that cannot be a fairly arguable point because it is not clearly and precisely pleaded or asserted by Comprop, and has only been raised in what Mr Hay has described as a "*shadowy manner*".

19. I have to bear in mind that the terms under which Trident entered into occupation of the basement are not recorded in writing at all. Comprop agreed, apparently orally, that Trident could occupy the basement. At trial, the Jurats will hear the evidence, including no doubt the oral evidence of the key personnel at both Comprop and Trident who were involved in the discussions. I have no idea what that evidence will be. If there is a conflict, it will be for the Jurats to decide who they believe and for the Jurats to decide, after hearing my directions on the law, what are the consequences and effect of what was agreed. It is not too late for Comprop to further amend the Cause Reformée in order to plead that the written lease was amended in the manner suggested by Mr Jones in his affidavit. If Comprop do so, and depending upon the evidence, it is a possibility that the Jurats might find that the written lease has indeed been amended, and hence that any rent due in respect of the basement is due under the lease and can be set off by Comprop against the deposit.

20. Advocate Hay made a number of factual points. He relied upon:-

    1 The absence of any written lease.

    2 Comprop's failure to claim any rent in respect of the basement whilst Trident was in occupation.

    3 That Comprop issued two notices to quit against Trident, one in respect of the first floor and the other in respect of the basement. The first described Trident as a tenant of the first floor and the second as occupier of the basement.

    4 Comprop issued its proceedings in the Royal Court whereas if it alleges the rent is due under the lease, it could have issued arbitration proceedings.

21. These are all matters which will require explanation from Comprop, but I do not consider them to be 'knock-out blows'. Comprop has a lot of explaining to do and there are a number of points which can be taken on

cross-examination when it comes to trial. It is probably fair to say that at this stage, and in relation to Comprop's contention that the written lease was amended, the weight of evidence appears to be heavily against Comprop and in favour of Trident.

22. However, after very careful thought I have concluded it would be wrong for me, in this Summary Judgment application, to decide that it is not fairly arguable that there was an oral agreement to amend the written lease, so I have to grant leave to defend.

23. During the course of argument I drew counsels' attention to a passage in the 1999 White Book at 14/4/11 stating:

> *"Where an oral contract is sued on and its terms are in dispute, summary judgement must be refused (see Mathind v. E. Turner & Sons) (1992) 23 Con L.R. 16, CA) unless the Plaintiff can satisfy the court either that on the Defendant's version he is entitled to judgement or that the Defendant's version is not truthful or capable of believe (see para. 14/4/9)".*

24. Advocate Dunster kindly obtained, at short notice, a copy of the *Mathind* decision. My understanding of the judgment is that it does not lay down any general principle that where an oral contract is sued on and its terms are in dispute, Summary Judgment must be refused. Indeed, I do not consider it lays down any general principle. It is merely an example of the application of well established legal principles to the facts of that particular case.

25. At an earlier stage in the hearing I was minded to grant Comprop unconditional leave to defend, but having heard the effective and persuasive arguments of Advocate Hay and having carefully considered the matter, I have reached the conclusion that it would be appropriate to grant conditional leave. I have had regard to the judgment of Devlin L. J. in "*Fieldrank Limited –v- E. Stein"* [1961] 1 WLR 12 87 restoring the dictum of Bramwell B in *Lloyds Banking Company –v- Ogle* (1876) 1 Ex. D. 262, quoted in the 1999 White Book at 14/4/16 :

> *"That conditional leave may be granted where there is something suspicious in the Defendant's mode of presenting his case, or the court is left with a real doubt about the Defendant's good faith".*

26. I will turn in a moment to the difficult question of what conditions should be imposed.

27. Before doing so, I must mention Comprop's potential counterclaim, which would arise if rent is due in respect of the basement not under the written lease but pursuant to a separate lease or agreement. The arrears of rent could not then be set off against the deposit under the terms of Clause 4 (g)(3). Instead, Comprop will have a separate claim for that rent which could be pleaded by way of counter-claim. Comprop's action against Trident, as I said above, preceded Trident's action for the return of the deposit. It cannot be criticised as being suspicious in its mode of presentation. It could be pleaded as a bona fide counter-claim to Trident's action and it arises out of the same subject

matter as that action. If Comprop only had a counter-claim and not a defence, I would grant the summary judgment and then would have to decide whether to stay execution pending the hearing of Comprop's action. But having decided there is a defence and a fairly arguable point, it is not appropriate to grant judgment at this stage.

28. I have to decide what conditions should be imposed and as counsel have not addressed me upon these conditions, I will wish to hear from them. My preliminary thoughts are as follows.

29. It might be appropriate to make an Order requiring Comprop to pay into court the amount sought by Trident, namely £24,245. But, under the terms of the written lease, that money is already in a dedicated account, the interest on which is payable six monthly to Trident. There may be no benefit to Trident in paying the money into court especially if the interest rate available in HM Greffier's account is lower than is paid at present.

30. Another possible condition would be to require Comprop to pay into court an amount by way of security for the additional costs to be incurred by Trident in pursuing its action. Advocate Hay has admitted that because substantially the same facts arise in Comprop's proceedings, the additional costs involved in Trident's action may not be significant. However, I have an open mind on this question and will be willing to hear from counsel as to what would be an appropriate sum.

31. I direct that this matter, and Comprop's action be listed in the Interlocutory Court on 9 June when I will hear argument on the conditions to be attached to Comprop's leave to defend. I will also give direction on both Comprop's action and Trident's action with a view to ensuring that a hearing can take place as soon as possible. I would expect the parties to conclude all interlocutory matters so they can apply before the summer vacation for a hearing date. That is unless they agree to an adjournment to enable all their disputes to be resolved through ADR. I will strongly encourage them to agree to mediation.

32. Finally, I am grateful to both counsel for the clarity of their submissions.

