



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. 175

BETWEEN:

PAUL CRIPPS

Plaintiff

-v-

POOL CARE LIMITED

Defendant

JUDGMENT

(in Court)¹

Breach of contract-negligence-installation of pool-burden of proof-sufficiency of evidence

Date of hearing: December 13-15, 2016

Date of Judgment: December 20, 2016

Mr Mark Diel, Marshall Diel & Myers Limited, for the Plaintiff
Mr Cameron Hill, Sedgwick Chudleigh Limited, for the Defendant

¹ This Judgment was circulated without a hearing in order to save costs.

Overview

1. The Plaintiff hired the Defendant to construct a swimming pool at his 21 Shell Point Road, Tuckers Town property (“the Property”) in or about 2008. Work commenced in April 2008 and was substantially completed by the end of that year. Things went ‘swimmingly’ initially thereafter, but before too long problems surfaced.
2. Firstly in 2009 tiles started falling off around the scum line and rust streaks appeared near the light fittings with two lights working only intermittently. The Defendant addressed these issues. In 2010 tiles were falling off again and the Defendant again attempted to remedy the situation and the Plaintiff warned that if the problem recurred he would engage an alternative company to carry out the repairs. Despite this, the Defendant (who was at this point a social friend of the Plaintiff) was called upon to fix similar tile issues in 2011, 2012 and early 2013. In August 2013 problems recurred and the Plaintiff obtained a quote from Pimental Pools and reports from Mason & Associates Ltd. (structural engineers) in October 2013 (“First Mason”) and January 2014 (“Second Mason”). First Mason identified the source of the tile problem.
3. The second problem was identified by Second Mason which described voids around light fixtures in the pool wall, hollow and soft spots in the ground slab and de-bonding of the ‘diamondbrite’ surface.
4. By a Specially Endorsed Writ of Summons issued by the Plaintiff’s former attorneys, Conyers, Dill & Pearman Limited, the Plaintiff sued the Defendant for \$54,292.49 plus interest pursuant to statute for the defective installation of the Plaintiff’s swimming pool.
5. By the end of the trial, the main issue in dispute (apart from pleading points which could not be advanced at so late a stage with great conviction) was whether the Plaintiff’s evidence demonstrated with sufficient clarity that the Defendant was responsible for the defects first identified in late 2013. At the outset I upheld Mr Hill’s objection to the Plaintiff’s engineering consultant Mr Mason being accepted as an expert because he was not sufficiently independent although he was clearly otherwise qualified.
6. Although the Statement of Claim is surprisingly vague about the precise legal nature of the claim (contract or tort?), sensibly read it implicitly alleges a contractual relationship, the terms of which were breached by the Defendant performing the work he was contracted to do in a negligent manner. The pleading was perhaps vulnerable to the complaint at the outset that the allegations of contractual breach were inadequately particularized making it impossible for the Defendant to plead to them. But having filed a Defence and exchanged both fact and expert evidence in advance of trial, any potential pleading complaints have been overtaken by events and are no longer sustainable.

The Plaintiff's evidence

7. The Plaintiff himself was a credible witness who gave his evidence in a straightforward manner. His evidence set the scene rather than carrying the central storyline as he was for most of the material times when the defects were being independently diagnosed and repaired not in Bermuda. I accept his evidence, which was not really challenged, that before late 2013 he gave the Defendant several opportunities to repair the tile-peeling problems which he personally witnessed. This was partly because of the social connections he had with the Defendant's Mr Warren McHarg, before he finally reached the end of his tether. It was also not disputed that after the repair work was subsequently carried out to the top of the pool, the loose tile problem has not recurred. He also pointed out in cross-examination that the repair option he opted for was the cheapest option and that he might well have had the entire pool redone. The Plaintiff admitted that he had asked for a particular grout to be used but denied ignoring Mr McHarg's advice that this was unsuitable.
8. Perhaps the most impressive part of Mr Cripps' evidence was what he did not say. When it was suggested that responsibility for any errors rested with the architect for approving technical decisions, he made no concerted attempt to fill what appeared to be a genuine evidential gap in his own conscious understanding of precisely how responsibilities were allocated between the Defendant, the Plaintiff's architect (David Benevides) and the Plaintiff's 'project manager/paymaster' (Mr Forbes) during the initial construction period. He appeared content to allow his case to stand or fall on the evidence of his consultant and expert and to be genuinely aggrieved without wanting to win his case at all costs.
9. First Mason described Mr Philip Mason's initial findings on inspecting the scum line area of the Plaintiff's pool. The crucial factual finding was as follows:

“Close examination of the defective areas indicate what appears to be a consistent horizontal crack running around the perimeter of the scum line tile with minor radial cracking originating in and around this area.”
10. The Report identified two construction errors: (1) the creation of a zone of weakness when the height of the pool was extended; (2) the absence of a joint specified by the plans around the pool coping tile. Second Mason described how further “*serious defects*” were discovered when the pool was emptied to carry out the initial repairs to the top of the pool. Most significantly, these included (1) large voids around both light cavities (attributed to poorly mixed or applied gunite), (2) weak hollow spots in the walls and ground slab (attributed to de-bonding of the Diamondbrite surface from the scratch coat) and (3) numerous areas of soft concrete in the ground slab together, de-bonding of the Diamondbrite surface from the base material with evidence that the

Diamondbrite had been installed over grit or sand. Mr Mason's evidence that he actually found the defects he described was not directly challenged. The conclusions he reached as to poor workmanship were challenged as being mere surmise.

11. I found no reason to reject the factual assertions of this credible professional witness as to the defects he found in the pool and described in his October 28, 2013 and January 17, 2014 Reports.
12. Mr Manuel Pimental's evidence was that he was contracted to do repairs to the scum line cracking and drained the pool to carry out those repairs. While erecting the staging hollow spots on the pool bottom slab were noticed, and further inspection revealed the defects Philip Mason described. He then carried out the necessary repairs. What he described finding and the extent and cost of his repairs were not effectively undermined.
13. Mr Peter Lang was accepted as an expert on swimming pools. He worked for 23 years installing pools and related equipment and has been an independent consultant since 1998. He chairs the Standards Sub-Committee of the UK Swimming Pools and Allied Trade Association, is a former Chair of the Technical Committee of the European Union of Swimming Pool and Spa Associations and is a Fellow of the Institute of Swimming Pool Engineers. I found him to be an impressive witness despite his lack of direct experience of gunite. He examined various photographs of the pool and other pools constructed by the Defendant. Despite vigorous cross-examination, he maintained the following crucial opinions based on his experience:
 - (1) the top layer of the pool which was added on at the end of the initial construction was not properly laid. It ought to have been joined with reinforcing rods to the rest of the structure. This was most likely why the cracks and loosening of tiles recurred until the Pimental repairs;
 - (2) the voids around the lights in the pool walls were probably caused by errors made by the 'nozzle man' applying the gunite cement mix. It was obvious from what Second Mason described that the Diamondbrite was not properly applied.

The Defendant's evidence

14. Mr McHarg himself was not an altogether convincing witness although he did his best to give his evidence in a straightforward way. He had the somewhat guilty demeanour of a batsman who knew that he had nicked a ball to the wicketkeeper and was hoping that the umpire would not rule that he was out. Mr Diel first pierced his defences in cross-examination by expressing surprise when the witness disclosed that he himself had been personally involved (along with two others) in the crucial pool construction

activities. He described how very tiring this work was. His Witness Statement gave no hint of this stating: *“The person operating all the relevant machinery was properly trained”*. To my mind, this was an attempt to disassociate McHarg himself from the impugned workmanship when his personal involvement ought to have offered a golden opportunity, if the work had been properly done, for him to give full particulars of the care that was taken and the credentials of his fellow ‘nozzle men’². His oral evidence did not improve this picture. Mr Diel next shone a light on an even more desperate attempt by Mr McHarg to disassociate himself and his company’s work from the defects complained of by the Plaintiff. He sought to attribute the cracks to seismic activity in the Bermuda area. However, the documents he relied upon revealed that the most recent earthquakes near Bermuda occurred in April 2011 (after the scum line cracks had first appeared in 2009 and recurred in 2010) and on Christmas Day 2013 (after the Defendant’s last attempt at repairs to the tile problem in 2011 and the recurrence of the problem in early 2013).

15. Mr McHarg did very convincingly explained why it was impossible for the gunite mixture itself to be deficient as it was mixed by machine, evidence which Mr Lang did not discredit. Mr McHarg was also referred to a May 29, 2008 email from his wife to the Plaintiff which stated:

“The Guniting of the pool was completed on Thursday of last week. I am going to let the shell sit for a week so I can then do a Schmidt impact test (hammer pressure test to check for any hollow spots and consistency of the gunite which can occur). I am telling you this as I have had some notifications of some hollow spots in the Castle Harbour Pool that we did ...”

16. As Mr Lang pointed out, this was an admission that similar problems had occurred in other work performed by the Defendant around the same time that the Plaintiff’s pool was being constructed. Was the pool tested for hollow spots as Mrs McHarg promised to do in her email? She was not called to confirm that the tests were carried out. Instead, the Defendant effectively put the Plaintiff to strict proof that it was responsible for the hollow spots. In paragraph 4 of Mr McHarg’s Witness Statement, for instance, he did not positively assert that the pool had been carefully checked for hollow spots in the summer of 2008 and that none had been found. Instead he deposed:

“...I understand that the alleged defects were discovered by a competitor company once the pool had been emptied and the exposed surface ‘tested’ by hitting it with a hammer. I take the view that this does not constitute evidence of any supposed breach of duty by me or the Company...”

² Paragraph 11 of his Witness Statement further deposed: *“...The Gunnite is applied to the reinforced frame using a ‘spray’ tool designed for that purpose and operated by a trained member of the Company’s personnel whose work would be inspected regularly by myself, as a director of the Company, or by the architect...”*

17. However he did state for the first time under cross-examination that the hammer test was indeed carried out in the summer of 2008 and that hollow spots were found and fixed. If thorough checks had indeed been carried out before the pool was completed, it is difficult to see why Mr McHarg waited three years to first voice the most compelling answer to the Plaintiff's complaints first raised in late 2013. The complaints were that he was responsible for what the Plaintiff described in his November 24, 2013 email as "*the mess of my pool and the appalling condition that it is in*". Rather than insisting that the pool had been professionally installed and fully checked before being handed over to the Plaintiff, Mrs McHarg meekly responded on November 26, 2013: "*We acknowledge the receipt of your e-mail and are sorry that you feel this way.*" And Mr McHarg did not insist on inspecting the pool before any further work was done to vindicate the quality of his own work product.
18. In his oral evidence Mr McHarg was unable to credibly explain why he declined at least two email invitations to him to see the state of the pool floor in late 2013. He was only able to say that he was by that date convinced that the Plaintiff had already decided to hire a third party to carry out the remedial work. This appeared to me to be inconsistent with a service provider who demonstrably felt able to defend the quality of his own work and was determined to do so. He agreed that it was Mr Forbes, and not the architect as his Witness statement suggested, who ensured that work had been carried out before authorising payment.
19. One particularly controversial part of Mr McHarg's oral evidence was his suggestion for the first time that that he had discussed raising the level of the pool to bypass a pipe with David Benevides who said that should be alright. This was not mentioned in his Witness Statement to the Plaintiff who thus had no opportunity to take instructions from Mr Benevides on these discussions. Mr McHarg said no discussion took place about tying in the new portion with the rest of the pool. Under cross-examination he explained that he had just recalled this discussion a few weeks before the trial. This somewhat hazy evidence did not clearly support the proposition that the way this aspect of the work was done was expressly approved by the Plaintiff's architect, let alone that the entire project was carried out under the active supervision of Mr Benevides. Mr Diel pointed out in closing that the plans expressly provided that it was for the Defendant to "*verify all levels*".
20. In fact Mr McHarg's main concern was the appropriateness of filling in with grout the gap between the top of the scum line tile and the coping which the Plaintiff insisted on for cosmetic reasons. Mr McHarg's Witness Statement only refers to his concerns about the grouting issue and deposes that this was done "*with the apparent approval of the architect, he was certainly notified of this change*". Mr Lang opined that this step had no connection with the cracking beneath the grout.
21. As to other jobs with similar problems, Mr McHarg stated that the Castle Harbour project mentioned in his wife's email took place in 2007. He was shown the Nautilus

Pools January 26, 2014 invoice for repairs carried out to the Ship's Hill pool which the Defendant had initially constructed. The invoice listed defects including cracks around the lights which were surrounded by soft material which could be removed by hand and sections of the pool which were pure sand. Mr McHarg fairly accepted that whoever prepared the invoice "*probably had no reason to lie*".

22. The Defendant's expert was Paul S. Foster of PSF Enterprises Inc., a Texas consultancy. He has 47 years' experience of more than 500 swimming pool projects, either as designer, builder, re-modeller or consultant. I also found him to be an impressive witness. He supported the Defendant's case that the mixture would not be problematic where the mixing was mechanically performed. He offered general explanations as to how voids could develop in the plaster laid on top of the gunite shell which did not entail poor workmanship (groundwater rising into the shell before the pool was filled, improper pool maintenance, the pool being drained for a long time, pool chemistry or age). There was no positive assertion that any of these potential causes applied in the present case. He agreed with Mr Lang that gunite rebound and other debris could cause voids in the plaster and that Diamondbrite would not separate "*unless there were problems with the application*". He was unable to opine on the necessity for the remedial work done by Pimental Pools in the absence of a full inspection.
23. Under cross-examination Mr Foster stated that he felt some movement or stress in the pool structure caused the tiles to come off and accepted that it was possible that misapplication of the gunite could have caused the hollow spots found in 2008 by Mr McHarg himself in the pool. He also accepted it was possible that Mr McHarg's own tests missed some hollow spots. Under re-examination he stated that in every construction project there was a risk of short cuts being taken. He could not tell from the photos whether the gunite was defective or the plaster was. However, in his experience he had never come across defective gunite. The problem he has experienced is caused by a failure of the bonding of the plaster and the gunite which rebound can cause during the process of creating the gunite shell.

Findings

24. I find that the Plaintiff has proved to the civil standard that (a) the Defendant was subject an implied contractual obligation to carry out its pool construction work with reasonable care and skill, and that (b) the defects he complains of were caused by the failure of the Defendant to comply with that obligation. In particular, I find that:
 - (a) the top layer of the pool was raised by the Defendant without sufficiently securing it the rest of the pool structure causing the cracking and loosening of tiles which the Defendant was unable to fix. I accept the expert evidence of Mr Lang in this respect and find that this aspect of the work was carried

out at the initiative of the Defendant without seeking explicit approval or advice from Mr Benevides;

- (b) the hollow spots and/or voids in the pool bottom were caused by a failure to properly clean the gunite shell surface of rebound and/or other debris so as to properly bond the plaster to the gunite shell. The Diamondbrite was not properly bonded to the plaster and the cement around the light fixtures was not properly packed. I rely in this respect primarily on the evidence of both experts combined with the evidence of the Plaintiff, Mr Mason and Mr Pimental;
- (c) these findings are further supported by the fact that other clients had similar problems and the lack of conviction with which the Defendant responded when notified of serious defects being found in November 2013;
- (d) for the avoidance of doubt I feel unable and consider it unnecessary to make any findings on the quality of the materials used.

25. In approaching the evidence, I consider that the facts of the present case engage the following statement of principle upon which Mr Diel primarily relied (Halsbury's Laws, Volume 78 (2010)/3, paragraph 62):

“Where the evidence relating to negligence is particularly within the control of the defendant, little affirmative evidence may be required from the claimant to establish a prima facie case which it will then be for the defendant to rebut.”

Conclusion

- 26. The Plaintiff's claim succeeds. He is entitled to enter judgment for the sum of \$54,292.49 plus interest pursuant to statute.
- 27. Unless either part applies by letter to the Registrar within 28 days to be heard as to costs, the Plaintiff's costs of the present application shall be paid by the Defendant, to be taxed if not agreed.

Dated this 20th day of December, 2016 _____
IAN RC KAWALEY CJ