

General Form of Judgment or Order

Business
&
Property Courts
in Manchester
Technology and Construction
(QBD) Court

Claim Number	D50MA043
Date	17 July 2018



MR J MORTIMORE	1st Claimant Ref 34028.TURNER.016.MH.LMC
UNITED UTILITIES WATER LTD	1st Defendant Ref GP/WHO02.17227

Warning: you must comply with the terms imposed upon you by this order: otherwise your case is liable to be struck out or some other sanction imposed. If you cannot comply you are expected to make formal application to the court before any deadline imposed upon you expires.

Before His Honour Judge Pearce sitting as a Judge of the High Court at Manchester District Registry, Civil Justice Centre, 1 Bridge Street West, Manchester, M60 9DJ

UPON the hearing on 14, 15, 16 and 17 May 2018, judgment handed down on 13 July

IT IS ORDERED THAT

1. Judgment for the Claimant in the sum of £8,545.00, along with interest of £897.22 (calculated at a rate of 3% per annum from mid-February 2015 onwards).
2. Payment of the total sum of £9,442.22 is to be made by the Defendant to the Claimant by 4:00pm on 20 July 2018. If payment is not made by that date, interest will accrue at a rate of £0.70 per day until the date of payment.
3. The Defendant is to pay the sum of £50,000.00 in respect of costs (including interest if applicable) to the Claimant by 4:00pm on 20 July 2018. Save as aforesaid, each side shall bear its own costs.

Dated 13 July 2018

IN THE HIGH COURT OF JUSTICE

Claim No.

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (QBD)

Before His Honour Judge Pearce, sitting as a Judge of the High Court at Manchester Civil Justice Centre on 14, 15, 16 and 17 May 2018, judgment handed down on 13 July 2018

JONATHAN MORTIMORE

Claimant

and

UNITED UTILITIES WATER LIMITED

Defendant

I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

JUDGMENT

Appearances: Claimant: Mr Simon Williams

Defendant: Ms Gaynor Chambers

Notes:

A. References in bold are as follows:

1/page no. Trial bundle, volume 1

2/page no. Trial bundle, volume 2

Supp/page no. Supplemental trial bundle

Day 1 (etc)/page no./line no Live note transcript for day 1 (etc.)

B. There are appended to this judgment a dramatis personae identifying the main actors and a chronology listing the main events.

Introduction

1. The Claimant was the principal shareholder of Mortimore Enterprises Ltd (“MEL”) a company that provided training services from premises at 33 Boundary Street, Liverpool (“the property”) until it ceased trading in January 2015. The Claimant contends that MEL ceased trading because of damage to the property caused by an escape of water on 25 October 2014 for which the Defendant is liable pursuant to Section 209 of the Water Industry Act 1991. On 2 February 2107, MEL assigned to the Claimant its cause of action against the Defendant.
2. Section 209(1) of the Water Industry Act 1991 provides: *“Where an escape of water, however caused, from a pipe vested in a water undertaker causes loss or damage, the undertaker shall be liable, except as otherwise provided in this section, for the loss or damage.”*
3. It is common ground that:
 - a. The Defendant is the water undertaker liable for this escape of water;
 - b. The Claimant is entitled to recover MEL’s losses caused by the escape;
 - c. Those losses are most appropriately calculated as being the value of the business at the time that it ceased trading.
 - d. The appropriate method of valuation is agreed to be a multiple of annual maintainable earnings. (The Claimant contends that the annual maintainable earnings and therefore the value of the business were considerable; the Defendant contends that the annual maintainable earnings and therefore the business value were at best minimal.)
 - e. The two interim payments referred to below in the total sum of £107,540, should be deducted from the value of the claim calculated on this basis. (For the avoidance of doubt, the Defendant does not seek any repayment if the value of the business is below this figure.)
4. In its Defence and at the commencement of the trial, the Defendant raised three issues:
 - a. The proper valuation of MEL (“issue 1”);
 - b. Whether the Claimant and/or MEL had acted reasonably to mitigate the losses suffered by MEL because of the flood (“issue 2”)
 - c. Whether third parties, in particular, the landlords of the property and their insurers and/or loss adjusters had acted in a manner that broke the chain of causation between the escape of water and the cessation of trading by MEL (“issue 3”).
5. At the conclusion of the evidence, the Defendant abandoned issue 3, maintained the other two arguments.

The trial

6. The trial took place between 14 and 17 May 2018 inclusive.
7. At the beginning of the trial, the Claimant sought permission to rely upon a supplemental witness statement from one Jan Garner. The purpose of that witness statement was to fill a clear gap in the Claimant's case as to the factual basis for the projections as to the future profitability of MEL made in the accountancy evidence adduced on behalf of the Claimant. I refused that application at the time. I later refused an application to examine the Claimant in chief on the same issues.
8. During the trial, I heard lay witness evidence from the Claimant (the majority shareholder in and Chief Executive of MEL), Ms Karen Cushion (a minority shareholder in MEL and its Sales and Marketing Manager, Company Secretary and Buildings Manager), Ms Gill Callaghan (Senior Claims and Litigation Officer with the Defendant) and Mr Jay Calvert (Director of the Forshaw Group).
9. I heard expert evidence from two structural engineers, Mr Maciver of Sutcliffe's instructed by the Claimant and Mr Milnes of the Vinden Partnership instructed by the Defendant; and from two forensic accountants, Mr Pillar of Toppings instructed by the Claimant and Ms Clifford of DTE instructed by the Defendant.
10. I was satisfied that all witnesses who gave evidence during the trial were seeking to assist the court by recounting matters to the best of their recollection. In so far as the Defendant suggested the contrary in respect of Mr Mortimore, I reject that for reasons given below.
11. I am however conscious that the Claimant and other employees of MEL may have a natural tendency to overstate the effect of the flood on the viability of the business, just as the Defendant's witnesses may seek to understate it.
12. In summarising the evidence, it is helpful to begin with considering the nature of the damage to the property and how this was analysed by various people and to go on to look at the effect of the damage to the property on the viability of MEL.

Evidence – damage to the property

13. The Claimant became aware of the flood on Saturday, 24 October 2014, though he had not realised the extent of the damage until he went to the workshop on the following Monday morning. He describes in his witness statement how he asked Ms Cushion, as building manager for MEL, to contact the insurers, and how the water was cleared during the following week. Ms Cushion in turn contacted CBRE, the managing agents for the landlords. She also instructed Mr Ian Maciver of Sutcliffe's to report on the damage.
14. Mr Maciver's opinion, summarised at paragraph 18(a) below, was contained in a report dated 21 November 2014. That report was provided to the Defendant. The Defendant in turn instructed Mr Milnes of the Vinden Partnership, who visited the property on 28 November 2014 together with a representative of Uretek.
15. The representative of Uretek advocated a solution to stabilise the slab and filling voids underneath it (see quotation at 1/89). Mr Milnes reported to the Defendant on 2

December 2014 that he had "little confidence" in the report from Mr Maciver of Sutcliffe's and that he favoured the solution proposed by Uretek (see email at 2/300). Mr Milnes also noted MEL was "extremely resistant to the proposal," its stated reason being that "Sutcliffe Engineers have said it cannot be done and they are concerned that the mezzanine above is now damaged beyond repair and dangerous..."

16. Thus, by early December a significant difference was apparent between the evidence obtained by the Claimant and that obtained by the Defendant as to the appropriate repair work. In order to understand that difference, it is necessary to know a little more of the property at 33 Boundary Street. It is a two-storey brick building, the front elevation of which can be seen in the upper photograph at 1/82. The interior floor of the building is a concrete slab. Onto this has been constructed a mezzanine floor providing storage, office and seating areas. One can see the concrete flooring below the mezzanine in the lower photograph on 1/83 and the mezzanine itself on the upper photograph of that page. The mezzanine itself was described by Mr Maciver as a box sitting on masonry piers that themselves sat on the slab. It follows that instability or movement of the slab would affect the mezzanine.
17. It was common ground between the structural engineers that there was evidence of historic movement of the slab that predated this flood. Indeed, the engineers agree that the mezzanine structure was constructed to accommodate the unevenness on the floor, indicating that the movement of the slab probably preceded the construction of the mezzanine (see paragraph 9, 1/95).
18. Mr Maciver said in cross examination that he had seen documents that indicated that a Building Control officer had signed off a mezzanine level in this building in 2008. He made the obvious point that he would not have expected an officer to sign off the mezzanine if it had been built on an uneven floor and that therefore such documents would be supportive of the Claimant's case that the flood significant damage to the floor. I had the impression that, when Mr Maciver referred in cross examination to documents from a Building Control officer, Ms Chambers had not seen such documents. Certainly, no such documents have been drawn to my attention. It is difficult to assess the weight to be attached to this piece of evidence but for reasons set out below it does not affect my judgment.
19. Following the flood, the Claimant contended that new cracking appeared (see paragraph 5.2 on 1/78). The Claimant, the Defendant and the landlords each instructed surveyors to investigate the damage to the property. Investigations by BDI, structural surveyors instructed on behalf of the landlords, showed there to be voids to be at the back right hand corner of the building, as indicated in the drawing at 1/100(ww).
20. Following their investigations, the various surveyors proposed remedial works as follows:
 - a. Mr Maciver (of Sutcliffe's for the Claimant): take down the mezzanine, excavate the floor slab, fill the void, consolidate the hard-core, cast a new slab and rebuild the mezzanine – six weeks work.

- b. Mr Milnes (of the Vinden Partnership for the Defendant): grout beneath the floor, screed the deflected floor section and inspect mezzanine for any damage - two weeks work (or three weeks if repair required to mezzanine).
 - c. Mr Foreman (of BDI, instructed by the landlords' agents): provide temporary support to the mezzanine by pinning, extra-late the floor slab, fill the voids, consolidate the hard-core and cast a new floor slab - four weeks work.
21. In their joint statement, Mr Maciver and Mr Milnes agreed that the void (or voids¹) underneath the concrete slab may have been exacerbated by the flooding (see paragraph 5 on 1/95). However, it was apparent from their supplemental reports that they disagreed as to the appropriate remedy:
- a. Mr Maciver considered that because the stability of the slab was in doubt, the grouting solution was insufficient;
 - b. Mr Milnes considered that the slab could be stabilised with grouting and that any issue as to the adequacy of the construction of the mezzanine was not caused by the flood.
22. In their oral evidence before me, Mr Maciver and Mr Milnes each stood by their original opinions as to the necessary work. Mr Forman did not give evidence before me but Mr Maciver and Mr Milnes each adopted parts of what he had said in his report. Mr Maciver relied upon Mr Foreman's opinion that it was necessary to remove the floor slab, fill the voids, consolidate the hard-core and cast a new slab. Mr Milnes relied upon Mr Foreman's opinion that it was possible to provide temporary support to the mezzanine as evidence that it was unnecessary to take it down altogether.

Evidence – effect of the damage to the property on MEL's business

23. It is important to understand how MEL operated. At paragraphs 2 to 7 of his witness statement (1/38-39), the Claimant describes the nature of the business. From 2001, the company provided training services for the construction industry. From 2009, it was based at the premises. Practical training was carried out either in the workshop area on the ground floor of the premises or at the trainees' workplaces. Academic elements of training could be carried out in the premises at mezzanine floor level.
24. The result of the damage to the premises was that MEL was not able to undertake training there. In his witness statement, the Claimant explains that MEL was obliged to offer training facilities from its premises and that they were unable to do so because of the damage (paragraph 22, 1/40). In order to ensure that the business survived, training was offered at workplaces where possible, in the anticipation that the repairs would be speedily carried out.

¹ During Mr Maciver's cross examination, he considered whether there was a single void or more than one. This could not be known without opening up the slab, but it does not alter the substance of the issue, since there was either one larger or more than one smaller voids, either of which could affect the stability of the slab.

25. On 13 November 2014, Miss Cushion emailed Stephen Richardson at CBRE, Ms Gadd of the Defendant and GAB Robins² – see 2/279. Having summarised the opinion of Mr Maciver, including his opinion that the workshop of the premises was likely to be out of use until around Easter 2015, she continued:

“Obviously this has already had an impact on our business and I fear moving it forward it will have major ramifications. We have apprentices who should attend the training centre to carry out practical training on a weekly basis. The workshop has already been closed for three weeks and we need to look in to how quickly we will be compensated for the interruption and any increased cost of working. The predicted interruption of six months is critical. Without the workshop, we do not have the capability to deliver some of the qualifications that our learners require to progress with their programs. If this is not dealt with as a matter of absolute urgency, we fear our accreditation to deliver the qualifications will be a jeopardy and from that, the contracts that generate a high proportion of our income will be at risk imminently and in the future, ultimately the business as a whole will be affected. It is vital we find a suitably equipped alternative facility in order to carry out the training required whilst the workshop is deemed unusable.”

26. On 18 November 2014, the Defendant admitted by letter (at 2/288) its liability for losses caused by the leak.
27. On 26 November 2014, Ms Cushion sent a further email (2/289) to Mr Richardson at CBRE, copying in Ms Gadd and GAB Robins, enclosing the report prepared by Mr Maciver and stating:

“We are in a position now where a decision urgently needs to be made on how we move forward. An accreditation to deliver training qualifications has been suspended as we do not have a training facility to deliver them and we are losing business as some employers that were due to start apprentices with us have requested they are placed with an alternative provider given the delay. Our contracts are major risk currently. As we are currently unable to register new apprentices, this is also affecting the amount of business we have moving forward so there will be a claim for loss of earnings. There are currently two options and it is critical that we obtain permission to move forward this week:

- 1. We have located potential alternative workshop premises and the agent is happy to take us in. The unit is at DBH Business Centre on Boundary Street and is available immediately at the cost of £1,100 per month plus VAT. The agreement would be for three months initially then extended by one month increments. The premises would need to be made fit for purpose and we estimate the cost to do this would be an additional £15,000. The premises would also need to be approved by our awarding body to reinstate our accreditation to deliver the qualifications.*
- 2. As a construction training provider, we have the expertise in-house to commence work on dismantling the existing workshop immediately and carry out the repairs required. Jon (the Claimant) has indicated we could have the workshop*

² Initially loss adjusters appointed for MEL, but latterly acting for the Defendant as well.

operational by the end of January. With this option, there will be less delay in starting the renovation, there would be no additional rent on time would effectively spent concentrating on repairing our workshop, rather than making an alternative premises fit for purpose and making good following its use stop

Can you please advise how we should proceed as a matter of urgency? Jon has stated he would prefer option 2..."

Ms Cushion goes on to ask how various costs are to be met.

28. As at 2 December 2014, CBRE was indicating that the landlord's insurers, NFU Mutual (which was CBRE's principal), was requesting the commencement of a tender process to fund the works indicated by Mr Maciver. However, it would appear that the differing opinion of Mr Milnes on the appropriate remedial works was creating a possible problem.

29. In an email to Mr Weston, MEL's insurance broker, dated 2 December 2014 at 2/302, Ms Cushion stated:

"Given the meeting with the surveyor representing United Utilities on Friday, the loss adjuster today advised that the insurance claims will be messy with disputes between insurance companies. Stephen Richardson suggested another option may be more feasible to us which would be to relocate to new premises permanently. A current rent for workshop and offices amounting to 250 m² are charged at £1541.67 per month. Moving would also involve the following costs:

- *rent for offices/classroom = £1,000 per month (awaiting costings to be confirmed)*
- *rent for workshop = £1,350 per month (100m² only) (awaiting costings to be confirmed)*
- *making workshop fit for purpose = £15,000*

If we were to consider this option, Jon asked would our insurance policy pay for additional rent and the work carried out making the premises fit for purpose and costs to move?

We also need compile a claim against United Utilities for uninsured losses, basically, work that has been lost or not been completed due to the business interruption. To date the impact is estimated as below, total of £61,650, and we really need to understand how and when this will be paid to us:

- *Completion of 6 apprentices for work to be carried out in November = £3,000*
- *Increased cost of working (4 people for 2 weeks) = £4,800*
- *Completion of 25 NVQ candidates due in November = £12,500*
- *Time spent by me coordinating all parties = £1,850*
- *The impact of me not carrying out my primary role = £15,500*
- *Loss of work, six apprentices that were waiting to start their programme and = immediate impact is £3000 but total income lost is £24,000*

Professional services (lease)	£1,500
Core sample for floor and building regulations for walls	£1,200
Take down existing wall	£800
Skip	£200
Build work bays (labour)	£4,000
Build ceiling studwork	£2,000
METSEC and timber	£4,800
Build two additional toilet blocks	£2,000
Materials	£1,000
Build separating wall to distinguish between workshop and welfare facilities	£8,640
Electrics 110V power and lighting	£5,000
Heating	<u>£1,000</u>
Total	£37,340

The email also estimated additional staff resources of £25,419 for a 3 month period, based on £8,473 per month.

36. As Ms Chambers for the Defendant pointed out, the effect of these further calculations was to increase the amount that MEL was saying that it needed to continue trading in the short term from around £20,000 to a figure of over £65,000.
37. During cross examination, the Claimant and Ms Cushion were each asked about this significant increase from the previous estimate of £15,000 to fit out alternative premises. The Claimant said that the original figure was incorrect and was given “*under pressure.*” Ms Cushion said that the figure of £15,000 was a rough estimate based on the building expertise within MEL having inspected the proposed new premises. The increased figure in this communication followed a breakdown of the likely materials and labour costs involved.
38. By an email dated 9 December 2014 (2/316), Mr Hardy of GAB Robins, acting on behalf of the Defendant and reflecting the advice received from Mr Milnes as set out at paragraph 12 above, indicated that the Defendant was prepared to meet the cost of the remedial work proposed by Uretek “*albeit (for clarity) without any admission of liability for the alleged damage at the property or any consequential loss flowing from it. Notwithstanding, United Utilities will also consider contributing to the reasonable business interruption loss of the tenant on presentation of a properly substantiated and evidenced claim for the period of the remedial works undertaken by Uretek and including an appropriate lead-in and post work period.*”
39. Ms Cushion responded by email dated 12 December 2014 (2/318):