

INTERLOCUTOR : SHERIFF DEREK O'CARROLL Sheriffdom of Tayside, Central & Fife at Cupar. 23rd October 2007

The Sheriff, having resumed consideration of the cause, before answer, Allows both parties a proof of their respective averments on dates to be fixed hereafter; Finds the defender liable to the pursuer in the expenses as taxed occasioned by the diet of debate.

NOTE

1. This is an action in which the pursuer seeks payment of £8,730 from the defender, together with interest and the expenses of the action. The pursuer avers as follows. He contracted with the defender to carry out work on the defender's construction project. The contract was for the carrying out of work only and not for the supply of any materials. He carried out the work in terms of the written contract. The work done was approved by the chartered architect instructed by the defender and was of merchantable standard and fit for purpose. The defender has never submitted any written statement of alleged faults in the work carried out. He issued three invoices for the work done, totalling £9,730. Only the first, for £1,000, was paid. The pursuer sues for the balance.
2. The defender makes a bald averment that that the work was never completed. No specification at all is given of that averment. He further avers as follows. He has paid £11,000 in total to the pursuer, not £1,000 (although the defender's averments regarding the number of invoices submitted by the pursuer and their amounts are unclear). The bulk of the defender's averments concern the inadequacy of the detail contained in the invoices as to exactly what work was carried out by the pursuer under the contract. That alleged inadequacy is said to support further averments that the pursuer is not entitled to payment through failure to comply with the terms of Part II of the Housing Grants, Construction and Regeneration Act 1996 ("the Act"), read together with Part II of the Schedule to The Scheme for Construction Contracts (Scotland) Regulations 1998 [SI 1998/687] ("the scheme").
3. The parties are agreed that the contract was a fixed-price contract to supply labour to carry out works specified in the pursuer's quotation dated 9 October 2003 at 5/1 of Process ("the quotation"). The parties are agreed that the whole of the quotation is contractual (though no reference is made by either party to the pursuer's standard terms and conditions of sale referred to in the quotation). The parties are agreed that the contract was a construction contract within the meaning of section 104 of the Act. The parties are agreed that the first invoice, dated 31 October 2003 for £1,000 was paid. The terms of the quotation and the three invoices founded on by the pursuer are all incorporated effectively into the averments.
4. The Record also contains a counterclaim by the defender for £40,000. It alleges a breach of contract leading to loss of £40,000. There is however no specification whatsoever of that claim. I rather doubt whether that counterclaim is relevantly stated. However, neither of the parties made any reference to that counterclaim in their submissions at debate and it can be ignored for present purposes.
5. The debate concerned only the defender's first preliminary plea: "The averments of the Pursuer being irrelevant *et separatim* lacking in specification, the action should be dismissed.". The defender's consolidated Rule 22 note gave notice of the two arguments in support of that plea. The first argument was that the averments of the pursuer were insufficiently specific to give the defender fair notice ("the specification argument"). The second argument was that the pleadings of the pursuer were irrelevant since the claim for payment made by the pursuer did not conform to the requirements of the Act, read together with the scheme, and therefore payment was not exigible ("the claim for payment argument"). On either argument, it was said, the action could not proceed and should be dismissed.

The specification argument

6. In support of the specification argument, it was submitted as follows. The only specification in the pleadings of the work done for which payment was claimed was that contained in the invoices. Only the second and third invoices were in issue, the first for £1,000 having been paid. Neither invoice adequately specified the work done. In particular, the second invoice dated 15 December 2003 for £2,730 (5/3 of process), although detailing dates and hours worked, did not specify who carried out the works, what grade they were, how the hourly figure of £30 was arrived at. That was important since although the quotation did not specify who exactly was to be employed, or the hourly figure, it could be deduced from that quotation that an hourly rate of £12.50 was employed by the pursuer. That difference in hourly rate needed to be explained. If the difference was because some workmen were paid more than others, that should have been specified in the invoice so that the defender could see how the invoice total was arrived at.
7. The absence of specification was even more marked in the third invoice dated 2 April 2004 for £6,000 (5/4 of Process). There, (although dates were given, the number of men engaged was specified and a total sum was invoiced), in addition to the alleged defects in the second invoice, there was no specification of the hourly charge out rate or the hours worked in each weekly period or indeed the total number of hours worked. Again, it was said, without further specification, the defender could not determine whether the invoice was correct.
8. Thus, it was said, there was inadequate specification of the basis of the claim, the defender did not have fair notice of the basis of the claim, and the action should be dismissed. Alternatively it was claimed, the defender should not be allowed a proof of his averments as regards the third invoice only.

The claim for payment argument

9. Turning to the claim for payment argument, it was argued as follows. The terms of the Act and the scheme applied to the contract. Section 110 of the Act provides, so far as material, as follows:

Section 110 Dates for payment

- (1) Every construction contract shall-
- (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
 - (b) provide for a final date for payment in relation to any sum which becomes due.
- The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment. ...
- (3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply
10. The relevant provisions of Part II of the Schedule to the scheme are as follows:
- 2.(1) The amount of any payment by way of instalments or stage or periodic payments in respect of a relevant period shall be the difference between the amount determined in accordance with sub-paragraph (2) and the amount determined in accordance with sub-paragraph (3).
- (2) The aggregate of the following amounts:-
- (a) an amount equal to the value of any work performed in accordance with the relevant construction contract during the period from the commencement of the contract to the end of the relevant period (excluding any amount calculated in accordance with head (b));
 - (b) where the contract provides for payment for materials, an amount equal to the value of any materials manufactured on site or brought onto site for the purposes of the works during the period from the commencement of the contract to the end of the relevant period; and
 - (c) any other amount or sum which the contract specifies shall be payable during or in respect of the period from the commencement of the contract to the end of the relevant period.
- (3) The aggregate of any sums which have been paid or are due for payment by way of instalments, stage or periodic payments during the period from the commencement of the contract to the end of the relevant period.
- (4) An amount calculated in accordance with this paragraph shall not exceed the difference between-
- (a) the contract price; and
 - (b) the aggregate of the instalments or stage or periodic payments which have become due

Dates for payment

3. Where the parties to a construction contract fail to provide an adequate mechanism for determining either what payments become due under the contract, or when they become due for payment, or both, the relevant provisions of paragraphs 4 to 7 shall apply.
4. Any payment of a kind mentioned in paragraph 2 above shall become due on whichever of the following dates occurs later:-
- (a) the expiry of 7 days following the relevant period mentioned in paragraph 2(1); or
 - (b) the making of a claim by the payee.
5. The final payment payable under a relevant construction contract, namely the payment of an amount equal to the difference (if any) between-
- (a) the contract price; and
 - (b) the aggregate of any instalment or stage or periodic payments which have become due under the contract,
- shall become due on-
- (i) the expiry of 30 days following completion of the work; or
 - (ii) the making of a claim by the payee,
- whichever is the later.
6. Payment of the contract price under a construction contract (not being a relevant construction contract) shall become due on-
- (a) the expiry of 30 days following the completion of the work; or
 - (b) the making of a claim by the payee,
- whichever is the later.
7. Any other payment under a construction contract shall become due on-
- (a) the expiry of 7 days following the completion of the work to which the payment relates; or
 - (b) the making of a claim by the payee,
- whichever is the later.

Final date for payment

8. (1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of this paragraph shall apply.
- (2) The final date for the making of any payment of a kind mentioned in paragraph 2, 5, 6 or 7 shall be 17 days from the date that payment becomes due.

11. The interpretation provisions at paragraph 12 of Part II of the Schedule to the scheme are as follows (so far as material):

Interpretation

12. *In this Part-*

"claim by the payee" means a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due, specifying to what the payment relates (or payments relate) and the basis on which it is, or they are, calculated; ...

"value of work" means an amount determined in accordance with the construction contract under which the work is performed or, where the contract contains no such provision, the cost of any work performed in accordance with that contract together with an amount equal to any overhead or profit included in the contract price; ...

12. The solicitor for the defenders asserted that certain of the terms of Part II of the scheme were incorporated into the contract between the parties in terms of section 110(3) of the Act, since the contract did not provide an adequate mechanism for determining what payments became due under the contract and when. The critical aspect of the scheme, so far as the present proceedings are concerned, he said, is paragraph 4 of Part II of the Schedule to the scheme (see above). The effect of that paragraph is that a claim only becomes due to be paid on the making of a "claim by the payee". Unless such a claim is made, payment is not due, and therefore no action lies for recovery of a sum said to be payable under the contract. The term "claim by the payee" is defined in paragraph 12 (noted above). The effect of that definition is that a claim by the payee (in this case, the pursuer) must specify *inter alia* what the payment relates to and the basis on which the claimed payments are calculated. Moreover, since the second and third invoices are both staged payments, paragraph 2 applies. That provides that the amount payable is to be calculated by reference to (reading short) "value of work". That term is defined in paragraph 12 and requires reference in the claim by the payee to the cost of work performed in accordance with the contract. Thus, it was said, the claim by the payee must specifically relate to the terms of the contract and must bear some identifiable relation to the manner in which the contract was costed.
13. Since neither the second nor the third invoice (purporting to be claims by the payee) provided adequate specification (within the meaning of the scheme) of the calculation of the sums said to be due to the payee by the payer (the defender) the invoices did not amount to claims by the payee. Therefore no payment was due under the contract (including the terms incorporated by virtue of the Act and scheme) unless and until such a properly specified claim for payment were made. Therefore the action was irrelevant (since it was only the second and third invoices that were in issue).
14. Reference was also made by the solicitor for the defender to the terms of an unreported judgement of Lord Macfadyen: *Maxi Construction Management Ltd v Mortons Rolls Limited* of 7 August 2001. In that case, the pursuers sought interim payment under a construction contract based on a claim for interim payment made by the pursuers. The Lord Ordinary held *obiter* that the pursuers were not entitled to decree on the grounds that the manner in which the claim for payment was made did not constitute a "claim by the payee" within the meaning of paragraph 12 of part II of the scheme because, *inter alia* it did not specify the basis on which it was calculated (see paragraphs [24] and [29] of the judgement). That finding, *obiter* though it was, is said to support the defender's contention that in the absence of adequate specification of the basis for calculation of a sum said to be due by the payee, the payee was not entitled to sue for payment.

Reply for the pursuer

15. In reply to the claim for payment argument (he was told by me that he need not respond to the specification argument), the solicitor for the pursuer was brief. The terms of Part II of the scheme, (so far as claims for payment and due dates for payment were concerned), were not incorporated into the contract by section 110(3) of the Act. That was because those terms only applied where the contract did not provide an adequate mechanism for determining what payments became due under the contract and when: section 110(1). The contract between the parties did provide such a mechanism. That was to be found in the quotation. That specifies the whole contract price and that "an invoice will be issued at the end of each working week with payment due on presentation." That mechanism, briefly stated though it is, was enough to meet the requirements of section 110(1). What is adequate depends on the circumstances. In this case, the construction contract was a very simple one. The work to be carried out was straightforward. It was for a period of just 9 weeks. It was for labour only. It was a fixed price contract (so far as the elements of work specified in it are concerned). The sum involved was very small in relation to most construction contracts. Such a contract did not need the type of sophisticated payment mechanisms found in much larger and more complex construction operations. It was entirely adequate for its purpose. That was what the parties had agreed. They were entitled to do so. Moreover, the pleadings disclosed that there was an architect involved, employed by the defender who had certified the work done and who would be called by the pursuer to give evidence. Thus, the terms of the scheme did not apply and the action was relevantly pleaded.
16. In reply, Mr Miller argued that the mechanism in the contract, although constituting a mechanism for determining what payments were due under the contract and when, was not adequate. That was because the contract did not oblige the payee to specify exactly the basis for the calculation of the payments. He referred to his earlier arguments about what was required. Without such an obligation, there was potential for abuse. It was unfair. The terms of the scheme provided "an analogue" or test for the type of provision that was required in any construction

contract in order to meet the requirement of adequacy. The contract does not meet that test and was therefore not adequate.

Discussion

17. I deal firstly with the specification argument. I was not addressed on the test for determining whether pleadings are sufficiently specific to be allowed to probation. In my view, the requirements for specification are well summarised in *Macphail* Sheriff Court Practice (3rd ed.) at paragraphs 9.27 to 9.31 and in particular paragraph 9.29. In my view, what the pursuer requires to do in this case is to give fair notice of all the facts which the pursuer intends to establish. Importantly, the degree of specification which will be sufficient for fair notice depends on the facts. Enough specification must be given to enable the defender to identify what is being alleged against him and to prepare his case. Dates, times and places must be specified if reasonably known to the pursuer. When deciding whether the defender has been given fair notice, the court will construe the matter broadly and will regard a complaint of lack of fair notice as justifiable only where there is likely to be material prejudice to the defender.
18. In this case, the pursuer gives notice of the nature of the contract, the amounts that are said to be due under the contract, the dates on which those sums were claimed and the amounts and the dates over which the work was done. The place is known to both parties. The pursuer gives notice that in his view the work was completed conform to contract and that the defender's own architect has certified the work done.
19. It is true that further specification could have been given along the lines suggested before me. The question is whether that further specification is necessary to give fair notice of the claim that is being made against the defender, in the circumstances of this case. In my view, the pursuer does not need to go further than he has. This action is, on the face of things, a straightforward claim for payment. The parties are agreed that the contract is a fixed price contract for the carrying of certain work. The pursuer says he did the work but was not fully paid. The defender claims that the work was not finished, but offers no amplification at all of this bald averment. The parties dispute the amount that was actually paid by the defender. All these are matters for proof in my view. The defender is not in my view, in the circumstances of this case, entitled to demand further specification of the nature of the claim, particularly where there is no proper attempt to amplify claims that the work was not done, or not properly done. It is also the case that the work was done on the defender's own property. He must know what work was done. It is not denied that he employed an architect to assist him in the carrying out of the works by the pursuer. There is nothing to suggest that he does not or cannot find out what was done on his property by the pursuer. The contract was for a fixed amount and the whole sum claimed is less than that amount. He has in my view, in the circumstances of this action, fair notice of the case that will be made against him. There is in my view no material prejudice to the defender in allowing the pursuer's averments to probation.
20. I turn now to the claim for payment argument. I agree with the parties that the contract is a construction contract in terms of section 104 of the Act. The claim for payment argument depends crucially on establishing that the relevant terms of the scheme are incorporated into the contract. That in turn depends on whether the contract agreed between the parties satisfies section 110(1) of the Act. The parties are agreed that the contract establishes a mechanism "for determining what payments become due under the contract and when". The dispute between the parties as to the applicability of the scheme (regarding claims for payment) comes down to whether the contractual mechanism is "adequate".
21. I was invited by the solicitor for the defender to find that as a matter of law, the mechanism was not adequate (construing the terms of the contractual mechanism with the scheme mechanism). In my view, that is not the correct approach. In my view, whether a contractual mechanism is "adequate" is a question of fact, not law. What will be adequate in some cases will be inadequate in others. Large complex construction operations will no doubt require complex highly structured mechanisms. Equally, simple, straightforward construction operations may be satisfactorily served by a very simple mechanism. I do not accept that I can determine as a matter of law whether the contractual mechanism in this case is adequate, whether by reference to the scheme or otherwise. The adequacy of the mechanism is a question of fact though, no doubt, some assistance may be gained in the final assessment by reference to the scheme.
22. It follows that I cannot determine at this stage whether the contract between the parties does incorporate the terms implied by the scheme. That can only be done after proof.

Conclusion

23. The final result is as follows. I reject the defender's specification argument. As regards the claim for payment argument, that is something that I am unable to determine at this stage. Determination by the court as to whether a claim for payment was made, (having regard to the terms of the Act and scheme), and therefore determination as to whether the defender's first plea-in-law should be sustained or repelled, will have to wait till after proof. I therefore allow the parties a proof before answer of their respective averments leaving all pleas outstanding.
24. As regards expenses, the parties were agreed that expenses would follow success. I therefore find the defender liable to the pursuer in the expenses, as taxed, occasioned by the diet of debate.

Act: Wright, Solicitor
Alt: Miller, Solicitor