

Hart Builders (Edinburg) Ltd v St. Andrews Ltd [2002] Adj.L.R. 08/20

HART BUILDERS (EDINBURGH) LIMITED a Company incorporated under the Companies Acts (number SC30263) and having its Registered Office at Macmerry Industrial Estate, East Lothian EH33 1ET, PURSUERS

against

ST ANDREW LIMITED a Company incorporated under the Companies Acts (number SC177533) and having its Registered Office at Halbeath Industrial Estate, Dunfermline. KY11 1EG, DEFENDERS

JUDGMENT : Sheriff Isobel Anne Poole : Advocate of Lothian and Borders. **Edinburgh** : 20th August 2002:

The Sheriff having resumed consideration of the cause excludes from probation the pursuers averments in the sixth Article of condescendence from "with" in the third line of the Article on page 8 to "£44,341,26" to the fourteenth line on page 9 thereafter excludes the word "Accordingly" which follows and debates "t" and substitutes "T" in the following word there: excludes from probation in the pursuers' Answer 6 from "Denied" in the first line thereof on page 9 to "met" in the last line of the Answer on page 10, quoad ultra before Answer. Allows both parties a proof of their respective averments meantime reserves the question of expenses.

NOTE : This action relates to a building contract over a residential development "Caledonian Village" which is situated to the south of the main Edinburgh to Glasgow railway line near Haymarket Station.

1. The pursuers are the builders involved and the defenders are the developers.
2. On 13 October 2000 by Minute of Tender and Acceptance a contract was concluded for stage three of the construction work for Caledonian Village.
3. Work was carried out by the pursuers.
4. On 26 February 2002 the pursuers applied to the defendants for interim payment in the sum of £95,877.98 ("number 19") which was the sum sued for in the present action. The defendants have failed to pay.
5. At debate on an amended record dated 16 July 2002 the defenders insisted on their first and third pleas-in-law and the pursuers insisted on their third plea-in-law being preliminary pleas.
6. The case was pled in the background of the provisions of the Housing Grants Construction and Regulations Act 1996 (the Act) and the Regulations made thereunder "*The Scheme for Construction Contracts (Scotland) Regulations 1998 (1998 No 687 (S34)) (the Regulations)*".
7. It had particular relevance to the debate before me that no "Notice of intentions to Withhold Payment" had been made by the defenders.
8. The defenders have, in fact raised an action in the Court of Session in relation to a claim against the pursuers' standards of workmanship under the contract.
9. By section 111(1) of the Act it is provided that:
"A party to a construction contract may not withhold payment after the final date of payment of the sum due under the contract unless he has given an effective notice of intention to withhold payment".
10. By the end of the debate it was apparent that both sides accepted that following a recent line of authority a pursuer such as a present pursuer must set out a claim and the basis of the claim in circumstances such as the present. A pursuer could not simply rely on the fact that no notice of intention to withhold had been made whatever the apparent terms of section 111(1) of the Act.
11. The cases cited to me for that proposition were **S L Timber Systems Ltd -v- Carillon Construction Ltd** 22 June 2001 - Lord McFadyen in the Court of Session. **Millers Specialist Joinery co Ltd -v- Nobles Construction Ltd** reported in "Construction Industry Law Letter September 2001 a decision of the Technology and Construction Court by HH Judge Gilliland QC p 1770, and a decision of Sheriff James Taylor in **Clark Contracts Ltd -v- The Burrell CO construction management Ltd** 2002 GWD 14462.
12. I understood that that line of authority has in effect reversed a practice after the 1996 Act came into effect and has been subjected to criticism but, as yet there is no authoritative decision by an appellate court.
13. Despite what is stated in the defenders Rule 22 Note the defenders' attack at debate focused principally on the pursuers' pleadings and centred on specification points.
14. The pursuers offered to amend it if necessary in the face of the criticism but the defenders held to their insistence for dismissal of the case.

15. I took the view that, on a fair reading of the pleadings, there is a basis for claim set out in the pursuers pleadings. Namely:
 1. There was a Contract;
 2. The contract was for particular works;
 3. The works were carried out;
 4. An application for payment was made which specified the works and the payment sought for each element of work which is the sum sued for.
16. I was unable therefore to conclude that this was a case for dismissal. In my view the factual dispute as to the payment of "number 19" has been set out and it would seem unfair to each of the parties to refuse to recognise that.
17. The Pursuers have offered to amend and no doubt will do so, if so advised.
18. If I may now turn to the pursuers' attack on the defenders' pleadings.
19. The pursuers' main attack was directed at the defenders sixth Answer.
20. It was contended that since **SL Timber** it had been beyond dispute that a defender could not avoid payment on the basis of a claim for damages. That was what the defenders Answer 6 attempted to do. Decree de plano should therefore be granted to the pursuers.
21. Further it was contended that the defence was otherwise based on two points
 1. personal bar in respect of delay
 2. agreementand neither point was sufficiently specified.
22. In reply for the defenders it was contended that there was no basis for the granting of decree de plano as if there were a relevant case pled by the pursuers than there existed a dispute on the facts.
23. In any event, so the defenders argued the pursuers' contention was misconceived. Standing the case law, the pursuers could not succeed merely because there was no withholding notice. Matters raised by the defenders such as snagging lists and rectification were a matter for proof. The retention element could only be calculated as a percentage of the overall contract and that was a matter of fact.
24. Lord McFadyen stated at para 22 of his written decision:

"In my opinion the absence of a timeous notice of intention to withhold payment does not relieve the party making the claim of showing the ordinary burden of that he is entitled under the contract to receive the payment he claims. It remains incumbent on the claimant to demonstrate. If the point is disputed that the sum claimed is contractually due. If he can do that he is protected by the absence of a section 111 notice from any attempt on the part of the other party to withhold all or part of the sum which is due on the basis that some separate ground justifying that course exists. It is no doubt right as the adjudicator pointed out that if the section did require a notice of intention to withhold payment as a foundation for a dispute as to whether the sum claimed was due under the contract it would be relatively straightforward for the party disputing the claim to give such a notice. But that consideration does not in my view, justify ignoring the fact that the section is expressed as applying to the case where an attempt is made to a sum due under the contract and not as applying to an attempt to dispute that the sum claimed is due under the contract. Nor in my view is there merit in the adjudicator's concern that acceptance of the defenders' construction of section 111 would render the 1996 Act largely ineffective. I see no difficulty for an adjudicator in reaching a provisional determination of a dispute as to whether the sum claimed is due under the contract. That is what on the adjudicator's own view of the section the adjudicator would require to do if the party disputing the claim on the basis that the sum claimed was not due under the contract gave a notice of intention to withhold payment on that ground. In my opinion, therefore, the adjudicator erred in holding that the pursuers were relieved by the defenders' failure to give a timeous notice of intention to withhold payment of the need to show that the sums claimed were due under the contract."
25. I took the view that the contractual foundation of the pursuer's claim is challenged in the averments in Answer 5 and in fairness a proof before answer should be allowed to the pursuers.
26. That left the defenders substantive averments in Answer 6.

27. On a fair reading of those averments the issues raised by the defenders in Answer 6 to the pursuers averments that the defenders have refused or delayed to make payment of the sum craved - are those defective workmanships set off liquidate damages snagging lists and the like.
28. I took the view looking to the structure of the Act and the case law cited to me that my failing to issue a Notice of Intention to Withhold Payment against "number 19" the defenders have disenabled themselves from raising the issues that they have in Answer 6.
29. It is perhaps not without interest that the defenders have raised as pursuers a separate action in the Court of Session against the present pursuers as defenders in respect of those issues.
30. So that I have excluded from probation the defenders averments in Answer 6 – apart from their denial. I have as a consequence excluded the pursuers response to those averments in Article 6 of condescence.
31. I have meantime reserved the question of expenses as asked.