

**JUDGMENT OF SHERIFF PRINCIPAL IAIN MACPHAIL QC : Edinburgh : 10th January 2003**

The Sheriff Principal, having resumed consideration of the cause, allows the appeal; recalls the interlocutor of 20 August 2002 complained of; sustains the first plea-in-law for the defenders and appellants and dismisses the action; reserves all questions of expenses and appoints parties to be heard thereon on 30 January 2003 at 10.30 am within the Sheriff Principal's Appeal Court, Court 9, 27 Chambers Street, Edinburgh.

**Introduction**

- [1] In this action the pursuers sue the defenders for payment for works which they say they carried out in terms of a construction contract between the parties. The defenders stated a general plea to relevancy, but by an interlocutor pronounced after debate the Sheriff allowed a proof before answer. Against that interlocutor the defenders now appeal.
- [2] The pursuers' material averment are to the following effect. The pursuers agreed to carry out for the defenders the final stage of a residential development at Caledonian Village, Edinburgh. They had previously contracted with the defenders for the carrying out of the two earlier stages of the development. In accordance with the payment procedure which, the pursuers maintain, they had agreed with the defenders, the pursuers applied for an interim payment for completed work. That application was called interim application no 19. It sought payment of £95,877.98, which is the sum sued for. As appears from no 5/1/2 of process, which the pursuers incorporate in their pleadings, they submitted interim application no 19 together with their proposed final account, and the sum sought in interim application no 19 is the final payment which they claim to be payable under the contract.
- [3] The pursuers aver in article 5 of the condescendence, on page 4 of the closed record as amended (no 20 of process): *'In terms of the contract and said payment procedure, the final date for payment of the pursuers' interim application for payment no 19 was 31 March 2002. As no valid notice of withholding has been issued by the defenders, the pursuers' interim application for payment no 19, the subject of this action, remains due and payable. Further explained and averred that as the contract and said payment procedure comply with the requirements of the Housing Grants, Construction and Regeneration Act 1996, the provisions of the Scheme for Construction Contracts (Scotland) Regulations 1998 regarding payments do not apply.'*
- [4] It is necessary to explain the significance of the second and third sentences in that passage. Part II of the Housing Grants, Construction and Regeneration Act 1996 ('the Act') is concerned with, amongst other things, the entitlement to payment of a party to a construction contract. The contract between the pursuers and the defenders was a construction contract as defined by section 104 of the Act. Section 109 deals with the entitlement of a party to periodic payments for any work under the contract, and provides that in the absence of agreement between the parties on that subject, the relevant provisions of the Scheme for Construction Contracts are to apply. In Scotland the Scheme was made by the Lord Advocate in the exercise of his powers under the Act, and is The Scheme for Construction Contracts (Scotland) Regulations 1998 (SI 1998/687) ('the Scheme' or 'the Regulations'). Section 110(1)(b) likewise states that every construction contract must provide for A final date for payment in relation to any sum which becomes due and, if it does not, the relevant provisions of the Scheme again apply.
- [5] The relevant provisions of the Scheme, if it applies in this case, are paragraphs 8 and 5 of Part II. The effect of those paragraphs in this case is that the final date for the making of a final payment (such as interim application no 19) is to be 17 days from the date of the making of a claim by the payee (ie the pursuers). A 'claim by the payee' must comply with the requirements specified in paragraph 12.
- [6] Section 111(1) of the Act provides: *'(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.'*  
Thus, if the Scheme applies and the payee makes a claim which complies with paragraph 12 for payment of a sum due under the contract, the other party may not withhold payment unless he has given an effective notice of intention to withhold payment.
- [7] Here, as I have indicated, the pursuers maintain that the Scheme has no application, because the contract and the payment procedure complied with the Act. Their action is impliedly founded on section 111(1) because they say, in the passage quoted in paragraph [3] above, that the reason why interim application no 19 is due and payable is that no valid notice of withholding has been issued by the defenders. The

defenders, for their part, say in answer 5 on pages 6 and 7 of the record that the contract failed to provide for a final date for payment in relation to any sum which became due under the contract, and thus Part II of the Scheme applies; but, they say, interim application no 19 does not comply with the requirements for a 'claim by the payee' under paragraph 12. The defenders focus this contention in a preliminary plea (no 3) which seeks dismissal of the action on that ground, but at the hearing of the appeal their counsel did not seek a decision on that contention now, since the parties are at variance as to what was the payment procedure agreed between them. In the event of the allowance of inquiry, accordingly, the defenders' third plea-in-law would fall to be reserved.

### Relevancy

[8] At the hearing of the appeal the defenders moved for the recall of the Sheriff's interlocutor allowing proof before answer and for dismissal of the action in terms of their first plea-in-law, '(1) The pursuers' averments being irrelevant *et separatim* lacking in specification, the action should be dismissed.' Their counsel presented two arguments: the first was, in effect, that the action was irrelevant, and the second was that the pursuers' averments were lacking in specification. In support of his first argument counsel founded on the pursuers' averment in article 5 on page 5 which I have already quoted: 'As no valid notice of withholding has been issued by the defenders, the pursuers' interim application for payment no 19, the subject of this action, remains due and payable.' Founding on **SL Timber Systems Ltd v Carillion Construction Ltd** 2002 SLT 997, 2001 SCLR 935, [2001] BLR 516, he argued that since the dispute between the parties went to the question whether the sum claimed was due under the contract, the defenders were not required, to give a notice of intention to withhold payment. The action was founded only on the making of the application and the absence of a notice of intention to withhold payment. Interim application no 19 did not explain the nature of the claim.

[9] In reply, the pursuers' solicitor argued that the defenders had placed an inappropriate emphasis on the averment quoted, and that that averment merely responded to the defenders' averments in answer 6. The pursuers' pleadings disclosed a dispute which was adequately averred for proof before answer. He supported the Sheriff's analysis of the pleadings, which is in the following terms:

*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.*

*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 recognise that.'*

[10] I am unable to agree that the averment quoted should be read as a response to the defenders' averments in answer 6. Those averments set out various claims by the defenders against the pursuers, amounting to approximately £474,850; and the defenders go on to aver that they are entitled to withhold payment of any sums due to the pursuers until their claims have been met. It is difficult to understand why any response by the pursuers to those averments in answer 6 should appear in article 5. I accept that the averment quoted was made in answer to the defenders' averments, but the natural reading of it is that it is made in the course of a response to the defenders' averments in answer 5 and is intended to support the claim made in article 5.

[11] I am also unable to agree with the analysis quoted from the Sheriff's judgment. The fourth step in the analysis seems to me to over-simplify the nature of the dispute between the parties. As I shall explain later, the claim is for payment for contract variations and extensions of time, and is difficult to understand. Nor does the Sheriff appear to appreciate and address the significance of the pursuers' reliance on the absence of an effective notice of intention to withhold payment in terms of section 111(1).

[12] Section 111(1) has been considered by Lord Macfadyen in **SL Timber Systems Ltd v Carillion Construction Ltd**, *supra*. His Lordship's reasoning has been accepted in later cases, and was not challenged either before the Sheriff or at the hearing of the appeal. His Lordship said at paragraph 20 of his opinion (2002 SLT 997 at 1002L-1003D):

*'In my opinion the words "sum due under the contract" cannot be equated with the words "sum claimed". The section is not, in my opinion, concerned with every refusal on the part of one party to pay a sum claimed by the other.*

*It is concerned, rather, with the situation where a sum is due under the contract, and the party by whom that sum is due seeks to withhold payment on some separate ground. Much of the discussion of the section in the cases has been concerned with what circumstances involve "withholding" payment and therefore require a notice. Without the benefit of authority, I would have been inclined to say that a dispute about whether the work in respect of which the claim was made had been done, or about whether it was properly measured or valued, or about whether some other event on which a contractual liability to make payment depended had occurred, went to the question of whether the sum claimed was due under the contract, therefore did not involve an attempt to "withhold... a sum due under the contract", and therefore did not require the giving of a notice of intention to withhold payment. On the other hand, where there was no dispute that the work had been done and was correctly measured and valued, or that the other relevant event had occurred, but the party from whom payment was claimed wished to advance some separate ground for withholding the payment, such as a right of retention in respect of a counterclaim, that would constitute an attempt to "withhold ... a sum due under the contract", and would require a notice of intention to withhold payment.'*

- [13] The later cases in which his Lordship's opinion has been cited are **Barry D Trentham Ltd v Lawfield Investments Ltd** 2002 SLT 1094 at 1099E-F per Lord Drummond Young and **Clark Contracts Ltd v The Burrell Co (Construction Management) Ltd** 2002 SLT (Sh Ct) 103 at 105A-G per Sheriff Taylor. An English case to the same effect is **Millers Specialist Joinery Co Ltd v Nobles Construction Ltd** [2001] Construction Industry Law Letter 1770, a decision by Judge Gilliland QC.
- [14] In the present case the basis of the pursuers' action appears to me to be inconsistent with the law as explained by Lord Macfadyen in **SL Timber Systems Ltd**. They say that simply because they have claimed payment and no notice in terms of section 111(1) has been given, the sum claimed is due and payable. In my opinion, however, the true position is that no notice is necessary because the parties are in dispute as to whether the sum claimed is due under the contract; and therefore no notice was required. I consider that for that reason the defenders' primary argument should be sustained with the result that the interlocutor allowing proof before answer should be recalled and the action dismissed.

#### Specification

- [15] I shall, however, state my opinion on the defenders' second argument, which was that the pursuers' averments were so lacking in specification that the action should be dismissed for that reason. 'The pursuers' averments refer not only to interim application no 19, but also to a previous interim application, no 18. The latter application is said to exist in two versions: an earlier version dated 5 November 2001 and a later version dated 16 November 2001. The later is said to have superseded and replaced the earlier. The later was an application for £81,028.49. The pursuers say that they received a payment to account of £25,581.49, leaving a balance of £55,447 outstanding. Interim application no 19 is dated 26 February 2002 and is said to be inclusive of no 18, less the payment to account of £25,581.49. Both applications are produced and held to be incorporated in the pleadings. No 18 is no 5/1/1 of process and no 19 is no 5/2/1.
- [16] When one examines these documents to see what it is that the pursuers are offering to prove the result is, in my opinion, very confusing. It is clear only that the sum sued for relates to claims for contract variations and extensions of time. It does not seem possible to maintain, as does the Sheriff, that the pursuers are claiming payment for 'works' carried out and that they specify 'the works and the payment sought for each element of work'. Included, in no 18 is a figure of £114,008.75 opposite the words 'ADJUSTMENT FOR INST. 1-20 [ie instructions 1-20] + Ext. Of Time [ie extension of time]'. Attached is a spreadsheet relative to the extension of time claim. The final page of that spreadsheet, as reproduced in the production, brings out a total of £46,206, to which is added a calculation of head office overheads amounting to £19,241 giving a figure of £65,447. There is no indication, however, of how any separate figure relative to the adjustment for instructions 1-20 was arrived at.
- [17] No 19 appears on the same sheet as the final account. In the heading of that sheet the following words appear: 'Caledonian Distillery - Phase 3, Stage 1, 2 & 3'. The final account refers to 'amount of contract variations - as attached' opposite which is the figure of £155,351.98. The contract variations are described on the following three pages. These, however, are headed 'Caledonian Distillery - Phase 3, Stage 1'. Stages 2 and 3 are not mentioned, which is puzzling. In any event the variations in no 19 cannot be compared with the adjustment for instructions in no 18, the details of which are not disclosed. The extension of time claim in no 19 is stated at £30,593, with overheads of £15,393, giving a figure of £45,986. It seems odd that the figure

in no 19 is lower than the figure in no 18, if no 19 is inclusive of no 18, as the pursuers aver. In any event, neither extension of time claim can be understood simply by looking at the spreadsheets provided.

- [18] The pursuers' solicitor argued that their case was based on no 19, which set out their claim in sufficient detail. The matter should not be complicated by referring to no 18. He candidly stated that the averments relating to no 18 were misleading. He explained that the action had begun as an action for payment of no 18, and thereafter the pursuers had rendered no 19 to the defenders and the action had been amended to reflect that. Just because it would be possible to give more specification, that did not really mean that the averments on record were not sufficiently specific to go to proof. The applications had been made in a form instructed by the defenders. The defenders must know what variation instructions they issued. The pursuers' solicitor referred to Macphail's Sheriff Court Practice (2nd edition) paras 9.28, 9.29; **Avery v Hew Park School for Boys** 1949 SLT (Notes) 6; and **McMenemy v James Dougal & Sons Ltd** 1960 SLT (Notes) 84.
- [19] In my opinion, for the pursuers to have gone not only to debate but also to appeal with averments which were not only misleading but also capable of improvement by the addition of further specification, and to have relied on confusing and cryptically expressed documents which had been incorporated by reference, was an unnecessary and ill-advised high-risk strategy. Such pleadings are not an acceptable substitute for the statement of the pursuers' case on record in plain English. It is not sufficient to say, in effect, that the defenders ought to know what the pursuers' case is. It is often said that one of the purposes of specification in pleading is to afford the party's opponent fair notice of the material facts which the party offers to prove. It is also necessary, however, that the party's pleadings should provide the court with sufficient information to enable it to decide whether fair notice has been given. The case should be pleaded with at least enough specification to enable the court to determine that there can be no substance in any complaint by the defenders that they are materially prejudiced by a lack of fair notice. In this case the court must be able to understand what facts the pursuers intend to establish, on what grounds each claim is made in terms of the contract and how it falls to be valued in terms of the contract. Here, it appears to me that the pursuers' claim cannot be sufficiently understood. I would therefore have been prepared to dismiss the action on the ground that the pursuers' averments were lacking in specification.

### **The pursuers' plea to relevancy**

- [20] Since I have dismissed the action, I need only note briefly the pursuer's general plea to the relevancy of the defences, which is '(3) The defenders' averments being irrelevant *et separatim* being lacking in specification their defences should be repelled and decree granted as craved.' That plea was directed against the defenders' averments in answer 6. Those averments are intended to support a plea of personal bar which is stated on an esto basis and also state a case, not pleaded on such a basis, that the defenders are entitled to withhold payment of any sums due to the pursuers until various claims by the defenders against the pursuers have been met.
- [21] The Sheriff excluded those averments from probation for the following reason: 'I took the view, looking to the structure of the Act and the case law cited to me, that by failing to issue a notice of intention to withhold payment against "number 19" the defenders have disabled themselves from raising the issues that they have in answer 6.'
- [22] In my opinion that reasoning cannot be supported because it is not consistent with the Sheriff's approach earlier in her judgment. The Sheriff has assumed that interim valuation no 19 was an application for payment to which section 111(1) applied. Earlier in her judgment, however, she had left that question open for argument after inquiry. If the issues raised in the earlier parts of the record are suitable for inquiry by proof before answer, it follows that the defenders' averments in answer 6 cannot be deleted at this stage. If, therefore, I had decided that proof before answer was appropriate, I would have varied the Sheriff's interlocutor by deleting that part which excludes those averments from probation.

### **Result**

- [23] In the result, however, I have recalled the Sheriff's interlocutor and dismissed the action on the ground that the pursuers' averments are irrelevant. The parties were agreed that there should be a hearing on expenses.

Act: Drummond; Burness

Alt: Stephenson, Advocate; Anderson Strathern WS