ASC Anglo Scottish Concrete Ltd v Geminax Ltd [2008] APP.L.R. 10/10

JUDGMENT : Lords Eassie; Emslie, Lady Paton. Outer House Court of Session. 10th October 2008

[1] This action was commenced on the commercial roll in Glasgow Sheriff Court. By an interlocutor dated 25 June 2008 the sheriff granted summary decree against the defenders for the payment of the sum of £30,155.26 and this appeal is taken by the defenders against that interlocutor.

[2] The defenders are building contractors. The pursuers are manufacturers and suppliers of ready mixed concrete. Since 2005 the parties have had a continuing business relationship whereby the pursuers have sold and supplied concrete, and hired pumps associated with that supply, to the defenders. It appears that the practice followed by the parties was for the defenders to order what they required by telephone or fax and thereafter the concrete, or the pumps, would be delivered to the particular building site at which they were required by the defenders. At intervals, the pursuers sent an invoice or statement to the defenders for payment of a number of deliveries, or hires, or both.

[3] In a statement dated 9 May 2008, sent to the defenders, the pursuers intimated a claim for payment of £42,856.15, representing their charges for the supply of various quantities of concrete, and pump hire charges, spanning the period between 29 January 2008 and 16 April 2008. Some five days after the statement date, namely on 14 May 2008, the pursuers raised the present action for payment of that sum of £42,856.15 and arrested monies owed to the defenders by third parties. On 23 May 2008 the defenders tendered defences and a motion was made at the Bar for recall of the arrestment. That motion was refused *in hoc statu*. On 12 June 2008 an interlocutor was issued fixing a "*Case Management Conference for 25 June 2008 at 10.45am before Sheriff Deutsch, by way of conference call.*"

[4] The purpose and scope of a Case Management Conference is indicated in these provisions of rule 40.12 of the Ordinary Cause Rules 1993:

> *"**40.12.**(1) At the Case Management Conference in a commercial action the sheriff shall seek to secure the expeditious resolution of the action.*
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> *(2) Parties shall be prepared to provide such information as the sheriff may require to determine -*
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> *(a) whether, and to what extent, further specification of the claim and defences is required; and*
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> *(b) the orders to make to ensure the expeditious resolution of the action. .....*
>
> *(3) The orders the sheriff may make in terms of paragraph 2(b) may include but shall not be limited to -*
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> *(a) the lodging of written pleadings by any party to the action which may be restricted to particular issues;*
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> *(b) the lodging of a statement of facts by any party which may be restricted to particular issues;*
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> *(c) allowing an amendment by a party to his pleadings;*
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> *(d) disclosure of the identity of witnesses and the existence and nature of documents relating to the action or authority to recover documents either generally or specifically;*
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> *(e) the lodging of documents constituting, evidencing or relating to the subject matter of the action or any invoices, correspondence or similar documents;*
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> *(f) the exchanging of lists of witnesses;*
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> *(g) the lodging of reports of skilled persons or witness statements;*
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> *(h) the lodging of affidavits concerned with any of the issues in the action;*
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> *(I) the lodging of notes of arguments setting out the basis of any preliminary plea;*
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> *(j) fixing a debate or proof, with or without any further preliminary procedure, to determine the action or any particular aspect thereof;*
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> *(k) the lodging of joint minutes of admission or agreement;*
>
> *(l) recording admissions made on the basis of information produced; or*
>
> *(m) any order which the sheriff thinks will result in the speedy resolution of the action (including the use of alternative dispute resolution), or requiring the attendance of parties in person at any subsequent hearing. .....*
>
> *(5) The sheriff may continue the Case Management Conference to a specified date where he considers it necessary to do so -*
>
> *(a) to allow any order made in terms of paragraph (3) to be complied with; or*
>
> *(b) to advance the possibility of resolution of the action".*

[5] After the issue of the interlocutor appointing a case management conference by telephone, those acting for the pursuers intimated to the solicitors for the defenders that they had enrolled a motion for summary decree. They did so at about 1500 hours on 23 June 2008. That intimation was in fact less than the 48 hours stipulated in Rule 40.11 were the motion to be heard on 25 June 2008, but in the event no point was taken about it. Notwithstanding that, if granted, such a motion for summary decree results in a final decree and is not of the procedural nature of the orders catalogued in Rule 40.12, the sheriff entertained the motion and decided it adversely to the defenders on the strength of what transpired at the telephone conference call which took place on 25 June 2008. No hearing in open court took place.

[6] At this point it is appropriate to note the terms of the defences which had been tendered. The principal line taken in those defences was that the parties' agreement - which might perhaps be described as a *"framework agreement"* - was to the effect that 90 days were allowed for payment and so on any view the action was premature. In response the pursuers contended for payment terms of 30 days, which they said was to be found in the terms of a credit

application form submitted by the defenders in October 2004. (*Quantum valeat*, the copy of the credit application form, so far as reproduced in the appendix to the appeal, does not appear to contain such a provision. Within the appendix certain schedules are produced respecting the defenders' payment record. These suggest a general practice more consistent with 90 day payment terms than 30 day payment terms). In consequence of this aspect of the dispute the motion for summary decree was restricted to £30,155.26 being the aggregate of those sums in the statement appearing to have been outstanding for more than 90 days from the date of supply.

[7] While the defences so tendered were thus limited in their scope - but equally they could not be said to be purely skeleton defences - there was in the background a concern on the part of the defenders about the strength of the concrete supplied by the pursuers to a particular site, namely an underground car park at Dowanhill, Glasgow, at various dates during the period covered by the statement. These concerns had apparently been indicated to the pursuers prior to their hasty initiation of these proceedings. However, as was explained to us by counsel for the defenders, the solicitor for the defenders did not consider that, at that stage, he could properly aver in the defences that the concrete was defective because the defenders were still awaiting the requisite technical report on the core samples which had been taken from the concrete used in the car park in question.

[8] At the telephone case management conference on 25 June 2008 the defenders' solicitor, Mr Lloyd, in opposing the motion for summary decree told the sheriff, *inter alia* that the defenders had been investigating their suspicion that the Dowanhill site concrete was not conform to contract; that he, Mr Lloyd, now had a technical report from the laboratory which had tested samples of the concrete used in the construction of the car park; that the terms of the report confirmed what the defenders had suspected; that a further period of adjustment was sought; and that the defenders intended to lodge a counter-claim for the loss suffered. (Although not recorded in the sheriff's note as having been submitted by Mr Lloyd in the course of that telephone conversation, it is evident that the disconformity to contract might also constitute a defence to the pursuers' claim for the price of the concrete in question). The appendix to the appeal contains the report and counsel for the appellants duly tendered a note of proposed adjustments to the defences introducing the defence of breach of contract and indicating the making of a counterclaim.

[9] The sheriff's view of what was conveyed to him by Mr Lloyd, including the intimation that the defenders wished to lodge a counterclaim, is expressed by him in these terms:

"As matters presently stand the pleadings do not disclose any defence to the invoices which are older than 90 days, however, I consider that in dealing with a motion for summary decree the court may look beyond the pleadings and consider any assertion of fact made at the bar. The question for me to address was whether what had been said by Mr Lloyd was sufficient to show that there were issues which should be investigated at a proof. I was not persuaded that Mr Lloyd had placed enough material before me to raise a triable issue. He had not lodged the technical report which he said was before him nor had he copied it to Ms Anwar [the pursuers' procurator]. When I inquired as to when it was that he received the report it emerged that it had been in his possession for at least a week. He claimed that pressure of business had prevented him from using the report to prepare a counterclaim. That did not appear to me to excuse the fact that the report had not been lodged or intimated. More importantly it did not seem to me that a lack of time was likely to have been Mr Lloyd's principal difficulty in preparing further pleadings. There was no suggestion that he had available to him an engineer's report condemning the structure nor that he had any basis for assessing quantum. Mr Lloyd did not attempt to provide specification of the alleged breach of contract by reference to purchase orders, instructions or the like.

The power to grant summary decree allows the court to deal with a party who tries to use his written pleadings not to present a real defence but to throw up a smokescreen of supposed fact behind which he can delay the progress of an action, or part of an action, which he is bound to lose. On the other hand Rule 17 must not be applied in a way that would cause injustice by denying a defender the opportunity to prove averments which could provide a defence to the whole or any part of a claim against him.

For the reasons advanced by Ms Anwar there were indications that the defender was employing delaying tactics. In the first instance it had been said that the action was premature and, now that this could no longer be argued in relation to the largest part of the claim, there was advanced in its stead a wholly unspecific assertion that there was a counterclaim available to the defender. The information provided by Mr Lloyd was insufficient to persuade me that he was or would soon be in a position to make averments which if proven would provide a defence. I did not consider that to grant summary decree created an injustice for the defender. If it emerged that the defender had a colourable ground of action for seeking damages for breach of contract in regard to the supply of concrete then it would be open to the defender to raise a separate action."

[10] In the submissions before us there was little real dispute as to the legal principles guiding consideration of a motion for summary decree. Counsel for the defenders, and Mr Reid, the solicitor for the pursuers, both referred to the decision of the House of Lords in ***Henderson v 3052775 Nova Scotia Ltd*** 2006 S.C. (H.L.) 85. Mr Reid also took us to the Outer House decision in ***Frimokar (UK) Ltd v Mobile Technical Plant (International) Ltd*** 1990 S.L.T. 180.

[11] Plainly, before a court may proceed to grant summary decree, an essential requirement is that it is satisfied, on the basis of all the materials and information available to it, that there is no defence to the action. The two cases to which we were referred were cases in which the pleadings had been fully developed and the record had been closed. What is said in the opinions delivered in those cases must naturally be read with that in mind. In particular, where reference is made therein to issues requiring to be resolved at proof these must be read with that procedural background in mind. Where however a motion for summary decree is moved at a very early stage in the proceedings, when the pleadings have by no means been settled, the court must have that fact in mind and, in

our view, cannot lightly or perfunctorily dismiss any submission by the defending party's legal advisor that he has come to have information which will enable a defence to be advanced. Put in other terms, whether the court may be satisfied as respects the key issue, namely that there is no defence to the action, is naturally dependent upon the stage at which the proceedings have reached and the information or material then available. Particularly at the early stages of litigation, the latter includes information, not just directly before the court, but information as to the existence of a basis for a possible defence.

[12] In our view, which we have reached without difficulty, the sheriff erred in deciding that, notwithstanding what was said by Mr Lloyd during the telephone conference call on 25 June 2008, he was nonetheless in a position to conclude that there was no possible defence to the action. No proper account was taken by the sheriff of the early procedural stage which these hastily raised proceedings had reached. No proper account was taken of the primary purpose of the case management conference, which was the only matter which the defenders required to address prior to the intimation of the motion on the afternoon of 23 June 2008. The natural purpose of the case management conference, from the defenders' solicitor's standpoint, would be to intimate his intention to adjust the pleadings and lodge a counterclaim in the light of the report which he had received. There was plainly no obligation upon the defenders' solicitor to lodge the report, in advance of the case management conference, since it was only at that conference that he would expect to intimate its receipt, and his consequent intention to adjust and lodge a counterclaim.

[13] More fundamentally, criticism of any lack of diligence or immediacy on the part of the defenders' solicitors in intimating the technical report or in drafting adjusted defences or a counterclaim within the 43 hours of the intimation of the motion for summary decree, when the case management conference was to be conducted over the telephone cannot, in our view, be equiparated with circumstances demonstrating the absence of a relevant defence. The jump which the sheriff appears to make between, on the one hand, criticism of the defenders' solicitor for not immediately lodging the report prior to the telephone discussions, and, on the other hand, a conclusion that there was no relevant defence to the claim, is so obviously mistaken as effectively to require no further exposition.

[14] We would add that, from the terms of his note, the sheriff seems to have accepted the contention advanced by the pursuers' solicitor that in granting summary decree the defenders would suffer no prejudice, since the defenders could later raise proceedings for breach of contract. If the sheriff did indeed make that acceptance, that is, in our view, a further error on his part. Disconformity with contract is obviously an arguable answer to a claim for the price in a contract of sale. But, more widely, the ability to retain payment of the price as a security for a claim of damages arising out of a breach of contract is a valuable right in practical terms, not least because the solvency of the party against whom the right of retention is maintained cannot be assumed. The fact that the sheriff bears to have accepted this submission from the pursuers' solicitor is in our view a further indication that he did not truly approach this matter on a proper footing.

[15] Mr Reid, for the pursuers, did his best to defend the sheriff's decision. Put briefly, he submitted that the information conveyed over the telephone by Mr Lloyd was so imprecise, and lacking in detail, that the sheriff was justified in concluding that there was no issue requiring proof and that there was no triable issue. He submitted, therefore, that the first hurdle, namely the absence of any proper defence had been overcome. The matter then became one for the sheriff's discretion and that exercise of discretion could not be attacked. However, for the reasons which we have indicated, we consider that the sheriff could not properly conclude that at this stage of proceedings that first hurdle had been overcome. Accordingly no issue as to the exercise of discretion arises.

[16] Mr Reid also pointed out that the *cumulo* sum claimed by the pursuers included supplies to sites other than Dowanhill. There was, he submitted, no right to retain the sums due in respect of those other supplies against any liability of the pursuers for deficiencies in the Dowanhill supply. So there was, he said, no defence as respects those other supplies. But, whatever the soundness of that proposition - as respects which we say no more - the fact is that the motion for summary decree was moved and granted on a very different basis, involved no attempt to separate out Dowanfield invoices from the remainder. So that aspect of Mr Reid's submission also falls to be rejected. It is not for this court to enter into a discussion of rights of retention respecting issues never raised before the sheriff.

[16] Finally, we must record our distinct impression that much - if not all - of the difficulty which has arisen for consideration in this appeal flows from the sheriff's willingness to deal with an opposed motion for summary decree by means of a telephone conference call discussion appointed for a very different purpose. The practical problems of dealing with such a motion by that means are manifest. It is impossible for any party to tender any additional document; it is impossible to make any useful or effective reference to authorities; it is very difficult even to have regard to the terms of documents which have been lodged. We are aware that in ***Jackson v Hughes Dowdall*** [2008] CSIH 41, 8 July 2008, a differently constituted division of the Inner House remarked on the constitutional issues arising from the practice, in Glasgow, of transacting court business by private telephone conference calls and noted some of the practical issues arising. For our part, we express concern that the sheriff should have thought it appropriate to deal with an opposed motion for final decree in the private and, in practical terms, highly unsatisfactory, circumstances of a telephone conference call.

[18] For these reasons we therefore allow the appeal, recall the interlocutor of the sheriff of 25 June 2008, and remit to the sheriff to proceed as accords.

Act: Reid, Solicitor Advocate; Maclay Murray & Spens
Alt: Davies; Harper Macleod, LLP