



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 42
CA3/18

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

OUR GENERATION LIMITED

Pursuers and Reclaimers

against

ABERDEEN CITY COUNCIL

Defenders and Respondents

Pursuers and Reclaimers: Sandison QC, Turner; Eversheds Sutherland (International) LLP

Defenders and Respondents: Mure QC, Tyre; Morton Fraser LLP

23 July 2019

Introduction

[1] The issue in this reclaiming motion is in short compass. It is whether an email, which was sent by an agent of the pursuers to an employee of the defenders and attached a document entitled "Statement of Account", could constitute a "written notice" requiring payment in terms of site specific agreements entered into between the parties. Following a debate, the commercial judge held that it could not. It is against her interlocutor of 21 December 2018, which dismissed the action, that the pursuers reclaim.

Contract terms

[2] The pursuers and Mark Group Limited entered into a Master Agreement dated 10 and 16 April 2012 for, *inter alia*, the installation, monitoring and maintenance of “roof mounted photo voltaic systems” (solar panels) on a large number of the defenders’ buildings in Aberdeen. Seventy two identical site agreements were entered into by both parties and the Mark Group. These governed the arrangements for the installation and operation of the panels. The Mark Group were to act as agents for the pursuers in the supply and installation of the panels. Thereafter, the panels would be owned and operated by the pursuers. The pursuers would sell the electricity generated by the panels to the defenders. They would maintain the panels on behalf of the Mark Group.

[3] The site agreements contained terms of payment as follows:

“6. Payment

6.1 Mark Group (on behalf of [the pursuers]) will issue an electronic invoice for the Metered Output once a month and the [defenders] shall pay the Charges set out in each invoice within 20 days of its receipt. ...

6.2 If in respect of any invoice ... a Party ascertains that information used in preparation of such an invoice is subsequently altered, the Party shall within 14 days ... issue a statement showing the difference between the Charges paid or payable in accordance with such statement and the Charges which would have been so payable if such statement had been prepared on the basis of the altered information. Statements will be submitted with an invoice for the revised amount due, or by agreement of the Parties the reconciliation shall be carried out at the time the next Monthly or other statement is submitted and included in the invoice issued in respect of it.

6.3 All payments required to be made to effect any reconciliation ... shall be payable within 20 days of receipt of the relevant invoice relating to the revised payment.

6.4 If either Party shall fail to make a payment ... other than as a result of some default on the part of the other Party interest shall be payable thereon at the rate of 2% per annum above Barclays Bank plc base rate ...

...

- 6.7 If any statement or invoice submitted ... is disputed ...:
 - 6.7.1 the relevant Party shall pay the undisputed ... items and the provisions of clause 6.4 shall apply to the disputed ... items in respect of which the relevant Party may withhold payment until such time as the dispute or question is resolved ...
- ...
- 6.8 In the event that [the pursuers] changes its collection agent it shall give at least 10 Banking Days prior written notice to the [defenders]."

[4] The site agreements had terms governing termination in advance of the 25 year contract period as follows:

- "8. Termination
- ...
- 8.4 Any Party may terminate this agreement with immediate effect upon written notice to the other Parties if any of the following events shall occur ...:
 - 8.4.1 If the other Party commits any breach of its material obligations under this agreement ... and fails to remedy such breach, if capable of remedy, within 30 days after receiving written notice from (*sic*) the other Party requiring it to do so; or
 - ...
 - 8.4.3 If the other Party fails to make punctual payment of any amount properly due to the former Party under this agreement and such amount remains unpaid at the expiry of 20 Banking Days after receiving written notice from the former Party requiring payment ...".

[5] There was provision about notices in the following terms:

- "12. Notices
- 12.1 Any notice given by either Party to this Agreement shall be in writing and shall be deemed duly served if delivered personally or sent by facsimile transmission or by prepaid registered post to the addresses or (as the case may be) the facsimile number set out below...

[Defenders'] Address: Aberdeen City Council, Town House, Broad Street, Aberdeen ...

Facsimile Number: ...

Attention: The Head of Legal and Democratic

Mark Group Address: 70 Boston Road, Leicester...

Facsimile Number: ...
 Attention: General Counsel
 [Pursuers'] address: 70 Boston Road, Leicester ...
 Facsimile Number: ...
 Attention: General Counsel."

Facts

[6] The defenders stopped making any payment in respect of the pursuers' invoices in about October 2016. On 25 July 2017, an email was sent by the utilities operations manager of "Effective Energy" to a named employee of the defenders. Effective Energy were said to have taken over from the Mark Group as the pursuers' agents. The email identified its subject matter as a "Statement of Account" and attached a document of the same name. The email read as follows:

"Dear [M]
 Please see attached statement of balances now overdue, owing to Our Generation Solar.
 Regards
 [LW]
 Utilities Operations Manager"

[7] On 24 August 2017, the pursuers' solicitors wrote to "The Head of Legal and Democratic" of the defenders purporting to terminate each of the site agreements. The letter read as follows:

"You have failed to make punctual payment in respect of invoices properly due under the Site Agreement. Further, the sums properly due in terms of the invoices remain unpaid at the expiry of 20 Banking days following receipt by you on 25 July 2017 of written notice by Our Client requiring payment.
 Accordingly, pursuant to clause 8.4.3 of the Site Agreement, as solicitors and duly authorised agents for and on behalf of Our Client, we hereby terminate the Site Agreement with immediate effect."

[8] The pursuers now seek, *inter alia*, a declarator that they have validly terminated each of the site agreements and that the defenders are liable to pay, *inter alia*, the costs associated with the removal of the pursuers' equipment. The defenders challenge the validity of the termination on the basis that it was a necessary precondition to the service of any termination notice that the pursuers first gave the defenders written notice requiring payment. The issue came before the commercial judge on the hypotheses that: (i) the sums set out in the invoices were properly due in terms of clause 8.4.3; (ii) at the time of the termination notices, the pursuers were not in any breach which would have disentitled them from invoking the termination procedure; and (iii) on 24 August 2017, the pursuers had served written notices of termination upon the Mark Group. None of these matters were conceded by the defenders, but all would require proof. The pursuers' position was that the email of 25 July 2017 and its attachment constituted written notice requiring payment. The commercial judge disagreed and dismissed the action.

The commercial judge's reasoning

[9] The commercial judge analysed the issue under reference to *HOE International v Andersen* 2017 SC 313. *HOE International* was to the effect that, in cases concerning the validity of contractual notices, two questions may arise: first, are the terms of the notice sufficient to convey the necessary information to the recipient; and, secondly, has the notice been issued in accordance with the contractual procedure?

[10] Beginning with the second question, the commercial judge noted that, according to *HOE International*: (i) a purposive approach was particularly important; (ii) the more drastic the consequence, the greater the need for strict compliance; and (iii) in the absence of

prejudice, the court should be slow to hold that a failure in compliance was fatal to the validity of the notice. The purpose of the notice was to operate as a “trigger”, which put the defenders on notice that the pursuers wished to exercise the power to bring about an early termination. It gave the defenders the right to take certain steps to prevent this. It was the defenders’ failure to take those steps which gave rise to the pursuers’ right to terminate, not the fact that sums were unpaid. The notice changed the nature of an overdue balance into a form of default.

[11] A statement that sums were due or overdue was not enough. Payment had to be required. The notice had to communicate that payment was being required for the purposes of bringing about the default. Clause 8.4.3 required that the notice made it clear that non-payment within the requisite period would have particular consequences. This was essential, not least so that the defenders could consider whether to purge the prospective default, and to afford them 20 banking days in which to do so. The reasonable recipient of the email would not have understood the email as doing any more than stating that sums were overdue. He or she would not have understood it as communicating an intention to treat those sums as constituting a default, which justified termination in the event of non-payment.

[12] On the first question, which the commercial judge did not find it necessary to answer, of whether the requisite information had been communicated, she found 3 out of 10 points, which had been made by the defenders, compelling. First, the email did not intimate anything beyond the fact that invoices had been issued and were overdue. Re-statement of that fact did not constitute a notice “requiring payment”. Secondly, the invoices, which were referred to in the attached statement and were dated 2017, related to sums charged during periods from 2015. The email and statement did not convey an impression that the

pursuers intended to exercise any right to terminate with immediate effect. Thirdly, even if the procedure had been formally valid, a reasonable recipient would not have understood the documents as: (i) being more than a statement of account; or (ii) intended to form a basis for termination.

Submissions

Pursuers

[13] The pursuers sought a proof before answer on the basis that, seen in context, the email was capable of constituting the required notice. The commercial judge erred in holding that: (i) the email did not “require payment” for the purposes of clause 8.4.3; (ii) notice had not been issued in accordance with the contractual procedure; and (iii) the email had not been sufficient to convey the necessary information. In relation to the procedure, it was the term of the contract that was to be construed; not the notice (*HOE International*, at paras [17] and [22]). Normally, the only question was whether “strict compliance” with the contract term was necessary (*HOE International*, at para [33]). Key to that would be: (a) the purpose of the notice and of the formal requirements of the contractual term; and (b) whether the recipient would be prejudiced by a failure to comply with these requirements (*HOE International*, at paras [34] – [35]).

[14] On the construction of the notice, the question was how a reasonable recipient would have understood it, taking account of the objective context (*HOE International*, at para [28]). Any recipient was deemed to be aware of the terms of the contract to which he was a party (*HOE International (supra)*, at paras [28] – [29]). These ought to be “in the forefront of his mind” (*Mannai Investment Co v Eagle Star Life Assurance Co* [1997] AC 749 at 768). The law favoured a commercially sensible construction. The standard was an objective one. A notice

did not require “absolute clarity” or “perfect precision” (*Mannai Investment Co (supra)*, at 782, applied in *HOE International (supra)*, at para [31]).

[15] The provisions of clause 8.4.3 were simple. The notice had to be written. It had to be from the party seeking payment of sums due in terms of the contract. There was no dispute that the notice was written. The pursuers offered to prove that the persons who issued it (Effective Energy) did so as agents of the pursuers, and that the defenders were aware of this. The commercial judge ought to have concluded that the formal requirements had been met.

[16] The commercial judge ascribed a significance to the notice which it did not have. The procedure was a simple mechanism for enforcement. The serving of the notice simply opened up the possibility of termination. There was nothing drastic in its consequences and no basis for requiring strict compliance. The content of the notice was not relevant to whether it complied with the contractual term. Content was relevant only to the question of whether the necessary information had been communicated. There was no basis for interpreting clause 8.4.3 as requiring the communication of an intention to terminate the contract if payment was not timeously made.

[17] The commercial judge had erred in observing *obiter* that, properly construed, the terms of the email were not sufficient to convey the necessary information. The reasonable recipient of the email would have been aware that: (i) he or she was in a contractual relationship and that the material sent had the pursuers’ trade name on it; (ii) the defenders were due to make payment under the contracts and had been doing so for four years; (iii) the invoices referred to had been issued in respect of sums due under the contracts; and (iv) there was no reason for the issue of the email, other than to indicate that payment was

overdue. A reasonable recipient would have understood that he or she was being required to make payment, which was all that was prescribed.

Defenders

[18] The defenders submitted that the email of 25 July 2017, which had been sent to an employee who handled the day to day operation of the contract, did not constitute a “written notice from the [pursuer] requiring payment” in terms of clause 8.4.3 (cf *HOE International, supra* at para [12] and *Mannai Investment Co, supra* at 752). Accordingly, it did not validly terminate the site agreements. The purposes of a written notice were: (i) to permit the pursuers to terminate each site agreement with immediate effect, if any amount due and identified in the notice remained unpaid; (ii) to put the recipient on notice that, to prevent the other party from using that power, payment of an amount due had to be made; and (iii) to specify the amount that the pursuers required the defenders to pay.

[19] The consequence of the notice was drastic. It allowed the pursuers to bring the parties’ contract to an end; potentially long before its expiry date. It carried with it grave financial consequences. A notice was not to be equated with an invoice or a statement. Those types of documents were dealt with elsewhere in the site agreements, notably the payment provisions. Relatively strict compliance with the requirements of clause 8.4.3 was required in order to change a statement of overdue balances, upon which interest may start to run, into something which changed the relationship between the parties. The email merely stated that it attached a statement of balances now overdue. The attachment was headed “Statement”. It bore the references of earlier issued individual invoices. Invoices or statements might be expected to indicate the sums, which one party asserted were due in terms of a particular site agreement. They were not equivalent to notices requiring payment

of particular sums in relation to particular site agreements. They did not give notice of the type necessary to convert unpaid sums into a default. The commercial judge had not said that particular wording was required. The concept of a notice was something which involved a warning.

[20] Even if strict compliance were not required, and the email were to be construed as written notice, the notice was nonetheless invalid because it did not convey to the reasonable recipient the meaning required by the purposes, which clause 8.4.3 served (see *West Dunbartonshire Council v William Thompson and Son (Dumbarton)* 2016 Hous LR 8 at para [22]). All that the email did was intimate that invoices had been issued and were overdue. That did not constitute “requiring payment”.

[21] The statement was not a written notice bearing to be issued by the pursuers; it was a statement from a separate company with a different address. The defenders owed no obligation to that company. No reference was made to the pursuers in the email or the statement. Even if the notice could be construed as requiring payment, the reasonable recipient would be in doubt as to the proper payee.

[22] The dates of the invoices, and the periods to which they referred, gave no indication that the pursuers intended to exercise any right to terminate any of the site agreements. Clause 12 required that notices be in writing and served upon each of the three parties. The email was not served upon the Mark Group; nor had it been served personally, by facsimile transmission or by prepaid registered post.

[23] In construing both the contract and the notice, a commercially sensible construction pointed to the need for strict compliance. There was a difference between an invoice or a statement and a notice intended to trigger a right to terminate a long term contract. The mere repetition of an invoice previously issued did not import a requirement to pay under

clause 8.4.3. A commercially sensible construction did not support the pursuers' position, given the structure of the parties' contracts, the potential consequences of the notice, the prevailing circumstances, and the prejudice to the defenders of failing to give formal notice.

Decision

[24] In *HOE International v Andersen* 2017 SC 313 it was observed (Lord Drummond Young, delivering the opinion of the court, at paras [16] and [17]) that, in determining the validity and effect of a notice, two distinct types of questions may arise. First, are the terms of the notice sufficient to convey the necessary information to the recipient? This turns largely on a construction of the notice. Secondly, has the notice been issued in accordance with the contractual provisions? That may turn on whether strict compliance is required, having regard to the context of the term in the contract and the context of the contract generally. A purposive construction was appropriate and commercial common sense should be applied (*ibid* para [30]). The more drastic the consequences of the notice, the greater the need for strictness, but formal requirements may not be important if no prejudice followed. It is usually more convenient and logical to determine the formal validity of a notice first, before examining what the reasonable recipient would make of its content (*West Dunbartonshire Council v William Thompson and Son (Dumbarton)* 2016 Hous LR 8, Lord Menzies, delivering the opinion of the court, at para [22]).

[25] In both *HOE International* (*supra*, at para [12]) and *Mannai Investment Co v Eagle Star Life Assurance Co* [1997] AC 749 (at 752), there was a document which stated in clear terms that it was a notice of some sort. The antecedent question, where there is no mention of "notice", is whether the document relied on can be interpreted as being a notice at all. The use of the words "notice ... requiring payment" in clause 8.4.3, as a precursor to possible

premature termination of a 25 year contract, carries with it a sense of warning (see Shorter Oxford English Dictionary *sub nom* "notice I 1" *Muir Construction v Hambly* 1990 SLT 830, Lord Prosser at 834). Although it is no doubt correct to say that no particular words need to be used, whatever phrase is employed must be seen as drawing the recipient's attention to something which will happen, if he or she does not react to the admonition. There is nothing of that nature in the email of 25 July 2017. All that it did was enclose a "statement of account" for the recipient to "see". That simply does not constitute a notice for the purposes of the clause. The reclaiming motion must be refused on that basis alone.

[26] If the email were capable of being construed as a notice, then it would have been issued within the terms of the contractual provisions, on the assumption that the pursuers are able to prove that the defenders were aware that Effective Energy were acting as agents for the pursuers. Strict, or rather (as it was put in submissions by the defenders) "relatively strict", compliance with the procedure set out in clause 8.4.3 was required, given that the consequences of failing to heed the warning would, contrary to the pursuers' contention, be dramatic. However, the email is in writing and it was sent to the defenders. Clause 12 contains deeming provisions in relation to service, where a notice is delivered, faxed or posted in a particular way to a specified officer (Head of Legal and Democratic) of the defenders at their principal Aberdeen address. Such methods are not mandatory. All that is needed is proof that the notice was in writing and was received by the other party; in this case the defenders. It was not argued that the email was not received by the defenders, nor was it contended (as it might have been) that there was any prejudice to the defenders by its transmission to an employee of the defenders, who appears to have been involved in the financial mechanics of the ongoing contract rather than the consequences of a failure to pay under its terms.

[27] When the question, of whether the terms of the email were sufficient to convey the necessary information to the defenders, is asked, the answer must be in the negative. What was needed was a clear statement (*Mannai Investment (supra)*, Lord Clyde at 782), not just that sums were overdue, but, as a bare minimum, that the pursuers were requiring the defenders to pay these sums within “20 Banking Days” (cf 20 days *simpliciter* in clause 6.1). Although the matter would have been clear if the word “notice” had been used in the email or reference had been made to clause 8.4.3, neither course was necessary for the email to have constituted the requisite notice in terms of that clause. There had, however, to be specific reference to the requirement to pay within 20 Banking Days, which was a special feature of the clause and differed from the normal payment terms, to enable the recipient to understand that this was a particular requirement being made under the contract. The defenders would then have been put on notice of that requirement and, keeping the contractual terms to the forefront of their mind, could have deduced what the consequences of a failure to respond might be. As matters stood, the recipient was not put on notice that the attachment of a statement of account to the email, apparently in the normal course of business and relative to the provisions on payment and not termination, meant any more than that.

[28] The reclaiming motion will be refused. The commercial judge’s interlocutor of 21 December 2018 will be adhered to, except that it should have read that the court “sustains” the defenders’ first plea-in-law. That matter will be corrected accordingly.