SHERIFF APPEAL COURT

[2023] SAC (Civ) 13
EDI-CA45-21

Sheriff Principal N A Ross
Appeal Sheriff H K Small
Appeal Sheriff B Mohan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

GOLDSMITH & CO (ESTATES) LIMITED

Pursuer and Appellant

against

SCALISCRO ESTATES LIMITED

Defender and Respondent

Pursuer and Appellant: McShane, advocate; Oraclelaw Ltd
Defender and Respondent: Garioch; Gilson Gray LLP

23 March 2023

[1] The appellant seeks to enforce payment under a contract for provision of estate management services. In about 2018, the respondent, which owns an estate on Lewis, invited the appellant to quote for services. The appellant replied in an email dated 20 June 2018, which on averment was accepted by allowing the services to be performed. That email (the "contract") lists a series of tasks to be performed, which would be paid for by a fixed monthly fee of £1500 plus VAT. Travel costs were chargeable in addition to these fees "at cost", with mileage at 65 pence per mile. The contract also sets out a list of excluded tasks.

There is also a residual category of "unforeseen work" which would be additionally charged at a fixed hourly rate.

[2] The appellant avers that the contract operated for approximately 3 years, following which relations broke down. During that period, the respondent paid the fixed monthly fee for services. Following the end of the relationship, the appellant submitted a further invoice in the sum of £90,981.36, apparently mainly attributable to "unforeseen services". The respondent refused to pay, and the action raised. The respondent identifies that the sum demanded more than doubles the charges anticipated under the contract.

[3] The respondent has claimed throughout the action that it does not have fair notice of all but one of the heads of claim. The claims were invoiced without dates, in round figures, and without describing why they were justified in terms of the contract. Following a number of hearings which involved the court appointing and managing a procedure intended to result in further specification, the respondent sought a debate. Following debate, the sheriff agreed that the appellant had not given fair notice of its case, and refused probation to the majority of the heads of claim. The appellant appeals that judgment.

The nature of the claim

[4] The claim was originally intimated as an invoice, dated 10 September 2021. It listed eleven heads of claim. The first head was for commission on rent receipts. It is accepted as sufficiently specified. The second and subsequent claims are challenged on the grounds of inadequate specification.

[5] The second head is brief. It relates only to travel costs. The third and largest claim is for "additional hours spent on lodge development tasks including dealing with multiple architects…" and is quantified as "3.5 years @ 2 full weeks per year, £37,800". The

remaining heads are similarly brief, and comprise a series of listed tasks, a cumulo figure for the number of hours expended, and a charge of £135 per hour.

[6] As a result of the sheriff's case management, a more expansive schedule was produced, lodged on 1 June 2022. Although it bore to give more detail about the type of works carried out, for most headings it did not give further information as to the contractual basis for the claims, or give any dates or breakdown of hours spent on individual tasks.

The appellant's submissions

[7] It was submitted for the appellant that the averments, taken together with the schedule, gave sufficient and fair notice. The sheriff had required too much, as there was no contractual requirement to provide details of who was carrying out work. The parties knew that there had been contact between them, and so it was not necessary to set out why the tasks were performed. It was enough that there was an overall contractual nexus. The work to be carried out was obvious to both parties at the time. The contract was akin to one of agency, albeit that the appellant did not claim they had a right to carry out any work they chose.

[8] Under reference to *Richards* v *Pharmacia Ltd* 2018 SLT 492, counsel submitted that it was necessary to have regard to the identity of the respondent and what they may be taken to know already. Counsel referred to the schedule, and submitted that if an entry said that both parties were present, it was not necessary to further specify what the claim referred to. The contractual basis was made out, because the respondent knew about it. The respondent would also have a further source of information from third parties, such as architects, who would also have rendered invoices which would give information. It was obvious that work had been done and required to be paid for.

[9] Counsel alluded to authorities on contractual interpretation, but accepted that matters of relevancy did not require to be addressed at this stage, as the challenge is on specification alone.

The respondent's submissions

[10] It was submitted for the respondent that even if the works were known about, it was still necessary to state what was done, and why it was done. The appellant had provided further specification of one aspect of the claim, namely what tasks were carried out, but not why these particular sums were payable, and not why the tasks were carried out in the first place. The agent accepted that the respondent must have known of some of the works, but that was not enough to show that the work done was not already included under the contract and covered by the monthly payment. Even if an hourly rate had been agreed, it was still necessary to show that the amount of work done was reasonable. It was not possible to rely on specification from third parties, whose interests and invoicing practices are different. Further, some of the claim seemed to relate to works expressly excluded under the contract, so it was impossible to see how the contract could justify those heads of claim. The context was of a general services contract which lasted in excess of 3 years, and the respondent was being required to identify specific works over an extended period. That was not possible. Nor was it possible to reverse-engineer any works done to calculate what works had been performed, as there was no finished product for which the appellant was wholly responsible.

[11] The respondent had requested a Scott schedule, which was a common and effective method of meeting this type of claim, and would have met most of the requirements. The sheriff had given every opportunity to the appellant to provide more information, but this

had not been taken. It was not a *quantum meruit* claim. It was a claim outside the core services, but unexplained.

[12] The respondent's position was that for the majority of claims, it did not understand why the appellant was entitled or required to carry out the extra works, or what works were actually carried out. Generic descriptions did not give enough information to explain the sums demanded.

Decision

[13] In any litigation, the pursuer requires to give sufficient notice of the essentials of its claim to allow the defender a fair opportunity to understand the claim, and to prepare any available defence. The degree of specification required will vary according to what needs to be proved for the claim to succeed, both in fact and law. It is a matter of judgment by the pleader. Parties agreed that the test for specification was as set out in Macphail: *Sheriff Court Practice* (4th ed) at paragraph 9.32. The dispute is about its application to this case.

[14] In a commercial action, fair notice may be based on a combination of relatively brief written pleadings together with productions such as affidavits, a Scott schedule, timesheets or other sources of evidence. That flexibility does not, however, relieve the pursuer from giving fair notice. A challenge to the adequacy of specification is assessed by testing whether fair notice has been given of what will be proved. The same rules will apply to any substantive defence.

[15] Specification must be sufficient to allow the legal basis for the claim, and the facts which support it, to be understood. What is required will depend on the nature of the case but regard must also be had to whom the pleadings are primarily addressed: the other party, and what the other party may be taken readily to understand (*Richards* v *Pharmacia*

Ltd per LJC Dorrian at para [47]). The assessment of adequacy is fact-specific, and the context of the claim is important. The context will include the identity of the defender and the nature of the activity with which the action is concerned. An argument on specification is not an arid pleading exercise, because it foreshadows the practical preparations necessary for proof, and focuses the issues on which evidence will be led. A loosely-specified claim, or defence, can lead to an unduly lengthy, wasteful, poorly-focused proof, and may on occasion serve to obscure that the claim is not relevant, or capable of being proved. It is too late to object at proof to lack of specification in the pleadings, as parties have by then consented to probation of the averments as they stand.

[16] Turning to the context of this claim, the starting point is the contract itself. The single contractual document is an email drafted in somewhat informal terms, and in language which in places can be described as unclear. It provides:

> "…therefore what I would propose is an annual figure (paid monthly in arrears) based on an anticipated time requirement of 133 hours per annum and then an additional agreed hourly rate for unforeseen work".

It then states "Our proposed functions in the first two years would be as follows:-" and proceeds to set out fourteen separate functions, which can be briefly summarised as including six visits per year, preparation of estate strategy and day to day management, direction of staff, dealing with statutory matters and insurances, authorising payments, book-keeping and budgets, overseeing estate maintenance, dealing with grant payments, overseeing sporting policy and shooting programmes and health and safety compliance. It is evident, therefore, that a considerable variety of functions was to be included in the monthly fee.

[17] The contract expressly excludes certain tasks such as payroll administration and employee records, all aspects of estate book-keeping and accounts. It also excludes the

"contractual administration of the refurbishment of the lodge/other built structures". Fees would be £1,500 per month plus VAT, with travel at cost in addition, and "all other aspect of work will be charged on a time basis at our hourly management charge of £135 plus VAT per hour".

[18] The present claim is presented under eleven heads. These have been briefly summarised. They require further examination.

[19] The first claim, for commission payments on rentals, is accepted as being understood and is not challenged on specification grounds. The second claim is for travel costs, ancillary to the other claims.

[20] The third claim is for "additional hours spent on lodge development tasks dealing with multiple architects…" and is quantified as "3.5 years @ 2 full weeks per year, £37,800". It is similar in style to the remaining claims.

[21] In assessing whether the reader, and in particular the respondent, can fairly understand what is claimed, each claim first has to be related to the contract. As pled, the claim is only contractually payable if it is for additional services. The appellant avers that "additional services were all those services provided to the pursuer which are not agreed services under the Contract".

[22] The appellant relies on the fact that the respondent, as owner, must have known about, and impliedly approved, the appellant carrying on works in relation to project management of the construction of the gamekeeper's cottage. That is no doubt correct, as the respondent does not claim ignorance of these works were being done. That is not, in our view, equivalent to regarding the respondent as adequately informed about the sums claimed by the appellant.

[23] The first notable omission from the appellant's case, in relation to the third head, is that neither the averments, nor the schedule, relate this claim back to the contract terms. It is not presently possible to identify why this work was done. The appellant presents this as additional work, but that does not clarify whether it is additional hours (for a core task), or additional tasks (outside the core tasks). If the latter, the appellant does not explain why the work was carried out at all. In the absence of any right under the contract to carry out works in their sole discretion (and no such right is claimed), the appellant does not explain what their contractual entitlement to carry out these works might be. It is not a *quantum meruit* claim. It is not a claim under a separate contract. The respondent is entitled to be told why this work was done, particularly where there is an obvious clash with the contract itself - the "contractual administration of the refurbishment of the lodge" was expressly excluded from the contract. There is no averment to the effect that the respondent authorised or otherwise approved any such additional work. The lack of specification serves to thwart any contractual analysis. This is not a *Richards* v *Pharmacia Ltd* situation, because any instruction (if there was one) might have been given by a number of estate employees at an unidentified point, or points, within a 3-year window, whether orally or in writing. The respondent cannot fairly be fixed with knowledge of what was agreed (if anything), by whom, on what date, in what terms, and how that related to this contract and no other. While contractual entitlement is ultimately a matter of relevancy, the nature and extent of that entitlement cannot be identified without sufficient specification as to the basis in law of the claim.

[24] The second problem affects this head, and all of the remaining heads of claim. This claim is brought under the contract. The contract provides for an hourly rate. It does not, however, set out timescales or numbers of hours per task for additional works (described as

"unforeseen works" in the contract - it is not clear by whom they are unforeseen). In the context of a small project, a global figure may be readily understood and require no more explanation. This contract, however, was carried on over 3 years without an invoice being raised, and involved a large number and variety of tasks which were covered by the monthly fee. The additional works appear from their description to overlap with the core contract works, and possibly with each other. It is therefore not obvious whether these are properly regarded as core tasks, or additional tasks. In addition, it is not possible to identify from the tasks completed how much work the appellant actually performed in completing them. It is not self-evident what tasks the appellant - as an estates management company - performed, over what period, and how much work was involved. The fact the respondent was aware, for example, that the lodge was being refurbished by other tradespeople, does not demonstrate that they know, or can discover, how many hours of work the appellant carried out in relation to that individual project.

[25] The remaining heads of claim suffer from similar shortcomings, and leave the same gap in understanding. The monetary claims bear the hallmarks of global estimates, rather than a calculation based on timesheets or any other primary evidence. While an estimate may sometimes be necessary, it is nonetheless incumbent on the appellant to explain the basis of the entitlement to payment. Without that explanation, a global, rounded figure is entirely inadequate to demonstrate a right to payment. It gives no opportunity for the respondent to assess the merit of the claim, or prepare a defence.

[26] For completeness, the respondent further submitted that it was necessary to identify who carried out the works. We do not agree that this level of specification is necessary. It is enough if the respondent can identify how many hours were performed, in carrying out what tasks. At present, they do not have even that information.

[27] For these reasons, we consider that the sheriff was correct, with one exception, to repel the heads of claim which he did. That exception is the second head, for travel costs. The contract provides for travel costs to be invoiced separately, and these are not included in the monthly fee of £1500. Accordingly, there would appear to be grounds for some claim for travel costs for at least the six core visits each year. We will allow the appeal only in this minor respect, by reinstating the second head of claim.

Disposal

[28] For these reasons, and apart from the issue of travel expenses referred to above, we refuse the appeal. Parties agreed that expenses might follow success. We take into account that we have formally allowed the appeal to a minor extent, but in our view the appeal cannot be described as vindicating the appellant's position, and the monetary value of this head is minor. We shall accordingly find the appellant liable to the respondent in the expenses of this appeal. We will thereafter remit the cause to the sheriff to proceed as accords.