SHERIFF APPEAL COURT

[2024] SAC (Civ) 24
HAM-A42-21

Sheriff Principal S Murphy KC
Sheriff Principal N A Ross
Appeal Sheriff T McCartney

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

SPARTAN SPECIALIST SERVICES LTD

Pursuer and Respondent

against

LHP SOLUTIONS LTD

Defender and Appellant

Defender and Appellant: Howie KC; Jain, Neil & Ruddy
Pursuer and Respondent: Steel; Mellicks

30 May 2024

[1] The pursuer and respondent (the "pursuer") avers that it is a multi-trade contractor, specialising in electrical, joinery and painting works. It claims £110,878.04 for works carried out for the defender and appellant (the "defender"), a property company, at two properties in Ayrshire. The defender avers it does not know or admit that such works were carried out, but if they were, it was under a joint venture agreement between the defender's director

and a director of the pursuer, as individuals. The defender's position is that it has no liability to make payment to the pursuer. These averments put the pursuer on plain notice that it has to prove the contract.

[2] The pursuer also avers that the contract is regulated by the Housing Grants, Construction and Regeneration Act 1996, as amended (the "1996 Act"). As there was no agreed payment regime, the 1996 Act served to regulate payment by way of statutory scheme. The defender pleads that the payment provisions are not triggered.

[3] There are two alternative cases. The first relates to an implied term of payment or reasonable remuneration, in the event that the 1996 Act scheme does not apply. The second is that, if there is no contract between the parties, the defender is nonetheless liable to make payment, because the defender has received a benefit from the pursuer and has been unjustly enriched as a result.

[4] The defender sought debate on the basis it did not have fair notice of the basic elements of the alleged contract, which is an oral contract. It also challenged the unjust enrichment case, and the relevancy of the case under the 1996 Act. Following debate, the sheriff decided that the averments of contract and of unjust enrichment were sufficiently relevant and specific to give fair notice. He repelled the pursuer's averments relating to payment under the 1996 Act as irrelevant. The defender appeals the former point. The pursuer cross-appeals on the exclusion of the 1996 Act case.

The defender's submissions

[5] Senior counsel for the defender submitted that the pursuer's case was so under-pled it was materially prejudicial to the defender. While defenders always want more

specification, there is a point where lack of specification has profound practical consequences. This was such a case. It was always a matter of degree. The defender was deprived of knowledge of elementary facts and context: the pursuer knows, or should know, what it intends to prove in relation to material dates, times, places, and persons present. None of these details were shared with the defender. They are essentials of the case.

[6] In relation to the 1996 Act scheme, there was no relevant case, as the demand for payment failed to follow, and thereby trigger, the statutory scheme. The unjust enrichment case entirely failed to explain why the sum claimed was reasonable, and on what basis the sum was payable. It was nowhere explained how the sum sought quantum meruit was coincidentally identical to the contractual sum sought, or why it was pled that the defender was lucratus, an entirely different basis for quantification. Further, the sheriff's interlocutor did not reflect his findings.

The pursuer's submissions

[7] Counsel for the pursuer submitted that the pleadings were adequate for proof. He accepted that there was no indication of when the contract was entered into. The lack of averment reflected uncertainty on the evidence, but would be remedied in evidence at proof. Consensus must have been reached prior to the work beginning, and that date was pled. There was no ambush. The averments relating to the statutory scheme demand and unjust enrichment were sufficient for proof.

Decision

[8] Any litigation based on contract must start with the questions – did the parties reach consensus, and if so, on what terms? Where the contract is written, these questions are likely

to be easily answered by lodging and referring to the contract documents. If the contract is oral, as it is here, the questions are the same, but the answer will pose much greater evidential challenges. Oral contracts are likely to exist only in the recollection, or imagination, of the alleged contracting parties and any witnesses.

[9] Evidence can only be led if there is a basis on record. Any contract case must give fair notice to the other party of the basics: when the contract was agreed, between whom, and in what terms. Where the contract is unwritten, that will inevitably raise further questions of how and where agreement was reached and, for non-natural persons, who represented the contracting parties. Each of these features requires fair notice in the pleadings. In the case of an oral contract, the pleadings must give sufficient notice for the disputing party, normally the defender, to identify what evidence to lead to refute the claims.

[10] If the existence or extent of the oral contract is disputed, the party relying on contract must approach proof with a clear idea, and having given clear notice, of when consensus was reached, and the terms agreed. The defender must be informed of those facts in advance. The proof is an exercise in establishing, amongst other things, those essential points. The pleadings are an exercise in giving fair notice to the defender of what the pursuer intends to prove. The proof is not a collaborative exercise in exploring the evidence, with a view to subsequently piecing together a coherent analysis. It is at the commencement of the proof, not after evidence is led, that the defender must have a sufficient understanding of the essential details of the alleged contract which the pursuer intends to prove.

[11] These are not arid technical points. They have profound practical consequences. The defender must be given the opportunity to refute a false case. That exercise is likely,

depending on the facts, to require identifying the people present at the alleged moment of consensus; the details of the event at which consensus was reached; and where and when, and possibly why, those events took place. The defender must be able to identify, by one means or another, what witnesses and evidence are crucial to its case. Only then can it proceed to consider the merits of the claim, and contact witnesses, take precognitions, recover documents, and obtain valuations or expert opinion.

[12] The averments in this case must be read against that background. The averments do not meet any of these requirements. The action as pled does not give fair notice of what the pursuer intends to prove.

[13] The pursuer avers:

> "In or around August 2019, the pursuer entered into discussions with Raffiq Jalil. The discussions were in relation to the properties. Mr Jalil was at the time a director of the defender…Following the discussions, a contract in relation to the properties was entered into. The contract was between the pursuer and the defender…the contract was not in writing. In terms of the contract the pursuer was engaged by the defender to carry out works at the properties. The works involved…"

[14] There then follows a long and detailed list of what the works comprised. Thereafter:

> "The works commenced on or around August 2019. Completion of the works was achieved on or about December 2019".

[15] Non-natural persons such as the parties can only act through natural persons. The pursuer's representative is not identified. He or she is an essential witness. The defender must guess who it is. No dates, places or other details are given, so the defender must also guess when consensus was reached, who might have witnessed that event, and whether documentary or video evidence exists. The defender is exposed to surprise evidence by unknown witnesses speaking to unknown but specific events which, if given fair chance to prepare, the defender might have led evidence to discredit.

[16] This basic information has profound and crucial evidential consequences. Whether the contract was reached at a packed meeting of directors, or at a busy site office, or at a director's private residence, or in a deserted café, is of critical importance, because it will become the focus of evidence at proof. The mechanism of agreement, whether the agreement was in person, by telephone, by video conference call with others present, or during a chance conversation at a social event, will determine what evidence requires to be led. The credibility of evidence may be bolstered, or undermined, by recovery of supporting evidence such as video recordings, diaries, travel itineraries, personnel records or the like.

[17] Flimsy pleading tends also to obstruct the analytical rigour required by, and of, the court. It is likely to be necessary to consider fine detail, such as the specific words used. That exercise may be the difference between a binding contract and a genuine misunderstanding, or an unjustified unilateral assumption. Consensus requires the knowledge and participation of all parties. While it would not normally be necessary to plead the fine details of a conversation, it is absolutely necessary that parties know where to look for them.

[18] Looking at the specific averments in this case, the unanchored reference to "discussions" creates further uncertainty. The pleadings give no hint as to the relevance of these to the contract. At common law, pre-contract negotiations are not a competent source of evidence to provide a gloss on the final terms of the contract. This unfocused pleading is likely to create the conditions for objections to inadmissible evidence during proof.

[19] Further, while there is lengthy pleading about the works to be carried out under the contract, it begs the evidential question of how such a lengthy list of detailed works was conveyed in a single conversation. That question is not answered. Was there more than one conversation? Was it a lengthy monologue? Was there any reference to documents? If

reliance is to be placed on previous (admissible) discussions then it is necessary to describe why they are relevant.

[20] In this action, the defender denies any contract, and pleads an alternative explanation for any works carried out. In our view the defender's preparations are plainly hobbled by inadequate notice. It faces the near-impossible task of proving a negative, without limit of time, space or evidence. It is not given notice, far less fair notice, of the very foundation of the action.

[21] The action falls to be dismissed. It fails, by want of specification of essential facts, to make out a relevant case for proof. It is unnecessary to deal with the remaining points, but some comment is appropriate.

[22] In relation to the case based on unjust enrichment, the same problems apply. Enrichment must be shown to be unjust. The lack of specification prevents that. There is a profound difference between works which were agreed or permitted by the recipient, and works which were done without agreement. There may be no or limited entitlement to make recovery for the latter. The basis of quantification, whether quantum meruit or quantum lucratus, will depend on the facts. They involve entirely different calculations. None of this is averred. The case based on unjust enrichment is therefore so lacking in specification as to be irrelevant.

[23] In relation to the claim for payment under the 1996 Act scheme, oral contracts are subject to the statutory payment regime, and the works involved are construction works. The claim was therefore competent. The averments reveal, however, that the pursuer failed to observe the requirements of the 1996 Act scheme. There was no competent demand for payment under the 1996 Act. The demand letter did not fulfil the statutory requirements, and the claim is thereby irrelevant.

[24] In relation to quantification, it has been left to an itemised series of receipts, deemed incorporated into the pleadings. Neither the defender nor the court are told why the items are payable or, alternatively, fair. Some, like the claim for "Spartan Specialist Services £32,269.59" are opaque to the point of irrelevancy. The productions do not serve to inform, any more than the pleadings.

[25] For completeness, we observe that the defender's competing averments about joint venture also fail to set out many of the essentials of that alleged contract. Those averments are not under appeal, so we make no further comment.

Disposal

[26] We will allow the appeal and dismiss the action. We will refuse the cross-appeal, as the claim under the 1996 Act scheme was properly excluded. Parties agreed that expenses should follow success. We will award expenses in the principal appeal on that basis. The cross-appeal did not, in our view, add materially to the complexity or duration of the appeal, and we will make no award of expenses. Senior counsel accepted that certification for junior counsel was appropriate, due to personal arrangements, and that was not opposed. We will certify the appeal as suitable for the employment of junior counsel.