[2017] SAC (Civ) 2
KKD-A151-15

Sheriff Principal C D Turnbull
Sheriff P Arthurson QC
Sheriff Principal B A Lockhart

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal by

Windsor Residential

in the cause

Trilogy Services Scotland Limited

Pursuers and Respondents

against

Windsor Residential

Defenders and Appellants

Appellants: Dawson, advocate, Taylor Law
Respondents: Garioch, solicitor-advocate, Blackadders

17 January 2017

[1] In *Banque Kayser Ullmann SA* v *Skandia Insurance Co Ltd* [1991] 2 AC 249, a dispute which concerned loan agreements for 80 million Swiss Francs, Lord Templeman observed that proceedings in which all or some of the litigants indulge in over-elaboration cause

difficulties to judges at all levels in the achievement of a just result; obstruct the hearing of other litigation; and that a litigant faced with expense and delay on the part of his opponent which threatens to rival the excesses of *Jarndyce* v *Jarndyce* may feel compelled to compromise or withdraw with a real grievance. Regrettably, certain of those observations are pertinent to this case, in which the sum sued for is £14,000; the expenses incurred to date on both sides more than likely exceeding that sum; and what may well be the real issue between the parties has still to be raised in the pleadings some 18 months after the dispute arose.

[2] The background to this appeal is unremarkable. The respondents are civil engineering contractors. In November 2014 they entered into a fixed price contract with the appellants for the execution of certain works in Burntisland. The contract terms appear on one sheet of A4 paper. The contract provided for payment by four separate instalments (referred to as "increments"). There is no dispute that the respondents completed the works required of them in relation to the first three increments and that they were paid for those works by the appellants.

[3] The present dispute arose in July 2015 when the respondents asserted that they had carried out and completed the works necessary to entitle them to payment of the fourth and final increment. On or around 16 July 2015, the respondents made application for payment of that increment by sending to the appellants their invoice in the sum of £14,000.

[4] The parties' contract is a "construction contract" as defined by the Housing Grants, Construction & Regeneration Act 1996 ("the 1996 Act"). The 1996 Act, by way of s.110A, contains certain requirements in relation to the giving of notices. The parties' contract makes no such provision for notices. Accordingly, in terms of s.110A(5) of the 1996 Act, the

relevant provisions of Scheme for Construction Contracts (Scotland) Regulations 1998 ("the Scheme") apply. Those are to be found in Part II at paragraph 9.

[5] The parties' contract provided a "payment due date", namely, within 7 days of receipt of invoice. The appellants were required, not later than 5 days after the payment due date, to give a notice to the respondents specifying the sum that the appellants considered to be due; the work to which the payment related; and the basis upon which that sum was calculated. It is made clear in paragraph 9(3) of Part II of the Scheme that the sum in such a notice may be zero.

[6] The appellants failed to give any such notice to the respondents. That is where the problems began.

[7] Such circumstances were envisaged by the drafters of the amendments to the 1996 Act and addressed by way of s.110B of the 1996 Act which came in to effect in November 2011 by way of the Local Democracy, Economic Development & Construction Act 2009. Where (as here), the payer (in this case, the appellants) has not given notice, in terms of s.110B(2) the payee (in this case, the respondents) may give to the payer a notice complying with s.110A(3). That notice may be given at any time after the date on which the payer ought to have given notice. No issue of the timing of notices arises in this appeal.

[8] Sometime later, on or around 9 October 2015, notices were sent by the respondents' solicitors to the appellants. A letter was sent to each of the appellants partners, in identical terms. Each letter was accompanied by a copy of the respondents' outstanding invoice dated 16 July 2015. The letters referred to the previous invoices having been paid in accordance with the contract and to the fourth increment of £14,000 remaining outstanding despite the fact that the relevant work had been completed in accordance with the contract. It was asserted that payment was due and that previous demands for payment had been

ignored. The letter culminates with a threat to raise proceedings for recovery in the absence of payment; the statement of a preference on the part of the respondents to avoid proceedings; and the appellants entitlement to obtain advice on the issue. Payment was not made and the present proceedings were commenced in Kirkcaldy Sheriff Court.

[9] The issue in the appeal before us is whether or not a letter by the respondents' solicitors, accompanied by the outstanding invoice, could constitute a notice under s.110A(3) of the 1996 Act.

[10] Put shortly, it is necessary in terms of the 1996 Act for notices to be served to create a notified sum, that being the sum which the payer (in this case, the appellants) requires to pay in terms s.111 of the 1996 Act, subject to their right to serve a pay less notice in terms of s.111(3).

[11] A notice complies with s.110A(3) of the 1996 Act if it specifies the sum that the payee considers to be, or to have been, due at the payment due date in respect of the payment; and the basis upon which that sum is calculated. Before this court, counsel for the appellants conceded that he could not dispute that the form and substance required by s.110A(3) was present in the communications of 9 October 2015, however, he contended that it was incumbent upon a party to make it clear that it was applying for payment. He contended that there required to be (a) a considerable degree of clarity that an application was a notice under the 1996 Act; and (b) an intention for it to be such a notice before it could legally be one. Counsel invited us to have regard to the stage in the present action at which the respondents contended that the letters ought to be regarded as notices. He argued that it could not have been the intention of the author of the letters that they be notices under the 1996 Act.

[12] Having regard to the concession properly made by counsel as to the form and substance of the communications of 9 October 2015, the issue for resolution is whether or not the respondents required to demonstrate that it was their intention to give notice under the 1996 Act. In our view, they do not.

[13] In support of their argument, the appellants referred to two decisions of the Technology & Construction Court, namely, *Caledonian Modular Ltd* v *Mar City Developments Ltd* [2015] EWHC 1855 and *Henia Investments Inc* v *Beck Interiors Ltd* [2015] EWHC 2433. Relying, in particular, of the observations of Akenhead J. at paragraph 17 of *Henia Investments Inc*, the appellants contend that it must be clear that, in substance, form and intent, what was given on behalf of the respondents was a notice complying with s.110A(3) of the 1996 Act. The appellants argue that there needed to be a considerable degree of clarity on what had been done. They submit that the letters lacked clarity and that it could not have been the writer's intention to create a notified sum by way of the letters.

[14] The respondents maintained that the sheriff was correct to hold that the letters of 9 October 2015 constituted the requisite notice. Looking at the wording of the letters, it was clear that they complied with the requirements of s.110A(3) of the 1996 Act and that was the end of the matter. The appellants were seeking to introduce an additional, subjective assessment of notices.

[15] In *Caledonian Modular Ltd* at paragraph 10, Coulson J. accepted the proposition that, in order to reach a conclusion on the legal effect of documents, one must have regard to both the contractual terms and the factual context in which those documents were sent. He cites the decision of Lord Macfadyen in *Maxi Construction Management Ltd* v *Mortons Rolls Ltd,* Court of Session (Outer House), 7 August 2001, unreported (2001 GWD 26 -1001) as support for this proposition.

[16] Adopting such an approach, it is unsurprising that the unsuccessful parties in both *Caledonian Modular Ltd* and *Henia Investments Inc* were so. In each case, they sought to take advantage of what could be described as a lack of clarity in their own documentation. There is no such lack of clarity here. The respondents' position is that they had completed the works necessary to entitle them to the fourth increment due under the contract, namely, £14,000. It was not disputed that they made application for payment of that amount under the contract. It is not disputed that, in the first instance, the obligation to issue a notice in relation to that application fell upon the appellants. It is not disputed that the appellants failed to discharge the obligation incumbent upon them. It is not disputed that in form and substance the communications of 9 October 2015 complied with the requirements of s.110A(3) of the 1996 Act. Those communications were accompanied by a copy of the original application. We pause to observe that in certain forms of contract far more sophisticated than that with which we are concerned in this case, where the payer does not serve a payment notice, the amount payable under the application can become the amount stated in the application. An example of this can be found in *Galliford Try Building Ltd* v *Estura Ltd* [2015] EWHC 412. Whilst that is not the case under this contract, the fact that the exact same details as were set out in the original application for payment were conveyed, again, to the appellants under cover of the letters of 9 October 2015 is, in our view, significant. Those details admittedly meet the requirements of s.110(3) of the 1996 Act. The factual context is clear. There can be no doubt as to the respondents intentions. They wished to be paid the amount they had first claimed some three months earlier. We do not read the decision of Akenhead J. in *Henia Investments Inc* at paragraph 17 as importing a requirement of "intention" in each and every case, as, in effect, the appellants argue for. To borrow from

a phrase quoted by the learned sheriff in his decision, such an interpretation would "drive a horse and cart through" the provisions of the 1996 Act.

[17] In conclusion, therefore, we are firmly of the view that the letters by the respondents' solicitors, accompanied by the outstanding invoice, constitute a valid notice under s.110A(3) of the 1996 Act.

[18] In their appeal, the appellants also took issue with the decision of the sheriff to repel their third plea in law, but to thereafter allow a proof. It was argued that this was an error and that the plea ought to be reinstated. The third plea in law for the appellants should not have been repelled standing the fact that there was a factual dispute between the parties. We return to this below.

[19] The third issue taken on appeal related to certain of the sheriff's findings on the question of expenses. Counsel fully conceded that these points would not have been taken on a "freestanding basis". The appellants maintained that the sheriff ought not to have allowed a 50% increase in the expenses due to the respondents, there having been no submissions to warrant 50% as the appropriate level of uplift; and secondly that an uplift had been granted for both the summary decree motion and the debate. The respondents argued that the sheriff was entitled to make the finding. The interlocutor specifies the basis upon which the uplift was allowed. The respondents' submission was that, on any view, the sheriff was entitled to allow an uplift; that the percentage of the uplift was a matter for the sheriff's discretion; and that the decision reached was one that fell within that discretion.

[20] On this matter, we prefer the submissions of the respondents. The sheriff explains the basis upon which he granted the motion. The relevant interlocutor specifies the basis upon which the uplift was allowed. The matter was one which fell within the sheriff's discretion and we can see no basis upon which we would be entitled to interfere with that.

[21] The second issue in the appeal (see paragraph [18] above) is best considered alongside the question of further procedure in this case. The only defence before the sheriff related to the notice point, on which the appellants have now twice been unsuccessful. Having rejected the appellants argument based upon that, it is unsurprising that the sheriff repelled the appellants third plea in law. There was no factual dispute on the pleadings to be resolved. For reasons that have not been explained, the respondents did not insist upon their first plea in law before the sheriff. It was accordingly repelled. In those circumstances, there was no means by which the sheriff could grant decree *de plano* and therefore he allowed a proof.

[22] Matters become more curious when one considers that the respondents subsequently enrolled a motion for summary decree, but elected not to insist upon it. Before us the reason for this was far from clear. We were told that, when this motion case was before the sheriff, reference was made an affidavit and a suggestion that the appellant would amend. Before this court, counsel for the appellants recognised that the appellants pleadings were in need of attention. Standing the terms of the sheriff's note of 3 August 2016 (and, in particular, paragraph 3 thereof), it is perplexing that the amendment procedure initiated by the appellants and concluded during the appeal process did not fully address matters. The appellants pleadings are singularly opaque. They comprise certain admisisons in relation to the parties' contract, the quite inappropriate quotation of large tracts of the 1996 Act and a number of calls. Nowhere within those pleadings is there the semblance of a defence to the action now that the notice point has been resolved in the respondents favour.

[23] No cross-appeal was advanced by the respondents. In light of the decision we have reached that is regrettable. On the pleadings as they currently stand, there is no defence to

the action. Before us, the solicitor-advocate for the respondents invited us to entertain a motion for summary decree made at the bar in the course of the appeal. We declined to do so.

[24] We will refuse the appeal and remit the matter back to the sheriff to proceed as accords.

[25] Parties were agreed that expenses should follow success. Accordingly, the appellants will be found liable to the respondents in the expenses of the appeal. Both sides sought sanction for the employment of counsel.

[26] The issue of sanction for the employment of counsel (which term is defined to include both advocates and solicitor-advocates) in this court and in the sheriff court is now dealt with by s. 108 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"). The court must sanction the employment of counsel if it considers, in all the circumstances of the case, that it is reasonable to do so. In considering matters, the court must have regard to two specified considerations, which are set out in s.108(3) of the 2014 Act, and may have regard to such other matters as it considers appropriate (see s.108(4)). We consider these against the facts of this case.

[27] Firstly, regard must be had to whether the proceedings are such as to merit the employment of counsel. In doing so, the court is directed to have particular regard to (i) the difficulty or complexity, or likely difficulty or complexity, of the proceedings; and (ii) the importance or value of any claim in the proceedings.

[28] The issue before the sheriff, and before this court, was, ultimately, a simple and straightforward one. However, the appeal proceedings were made difficult and complex as a consequence of the manner in which the appellants chose to conduct them. Their note of appeal (9 sheets), note of argument (10 sheets) and explanatory spreadsheet (10 sheets) bear eloquent testimony to this conclusion. Matters only became readily understandable and succinct when counsel addressed the court at the appeal hearing. As a consequence, it was only then clarified that the appeal turned on a narrow point. It is accepted that the value of the claim is low and that no wider issues of importance arise.

[29] Secondly, in terms of s.108(3)(b) of the 2014 Act, consideration must be given to the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel.

[30] In this case, at the debate before the sheriff, the appellants were represented by a solicitor and the respondents by a solicitor-advocate. The sheriff was persuaded that sanction should be granted for the debate. In the circumstances the sheriff describes, that is unsurprising. In the appeal before this court, the appellants were represented by an advocate and the respondents by a solicitor-advocate. In our view, no party gained an unfair advantage by virtue of this.

[31] As noted above, the court may have regard to such other matters as it considers appropriate. We have regard to the fact that sanction was granted in relation to the debate; we have regard to the terms, nature and extent of the note of appeal, notes of argument and the spreadsheet lodged by the appellants; and we have regard to the fact that sanction was not opposed by the appellants, indeed they also sought sanction for their counsel.

[32] In all the circumstances, we consider that the instruction of counsel was reasonable in this case. We shall accordingly grant the motion to sanction the appeal as suitable for the employment of counsel.