

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2017] SC EDIN 56

SA2065/14

JUDGMENT OF SHERIFF KENNETH J MCGOWAN

In the cause

SCOTTISH WATER BUSINESS STREAM LTD

Pursuer

Against

JAMES FORD

Defender

Pursuer: Tosh
Defender: Party

Edinburgh, 25 November 2016

The Sheriff, having resumed consideration of the cause grants decree against the defender for payment to the pursuer THREE THOUSAND ONE HUNDRED AND TWENTY SEVEN POUNDS AND SIXTY THREE PENCE (£3127.63) Sterling and expenses of THREE HUNDRED AND TWELVE POUNDS AND SIXTY THREE PENCE (£312.76) Sterling.

NOTE

Introduction

[1] This small claim came before me for proof. Having heard the parties, I reserved judgment. I now give my judgement and a brief statement of the reasons for it.

Background

[2] The case concerns the entitlement of the pursuer, as holder of a licence granted to it on 1 April 2008 by the Water Industry Commission for Scotland (“WICS”) in terms of Section 6 of the Water Services etc. (Scotland) Act 2005, to recover from the defender charges for water supplied to him at his farm premises.

[3] It was submitted to me by Mr Tosh that in order for the pursuer to succeed, the following matters had to be established:

- i. the defender was the occupier of the premises to which the supply was made;
 - ii. “arrangements were made” (see further below) by the pursuer with the defender for that supply;
 - iii. water was supplied;
 - iv. the correct charges were levied in respect of the water supplied;
- and
- v. the defender had failed to pay those charges.

[4] It was further suggested to me that only point ii. was in dispute.

[5] I did not understand the defender to dispute that analysis. Accordingly, I shall restrict my remarks to those necessary to determine that issue.

The basis of the claim

[6] The pursuer relies on Section 6(1) of the 2005 Act which deals with licence authorisation. The relevant part of that provides that the WICS for Scotland may:

“...grant a licence authorising a person to... make arrangements with the occupier of any eligible premises for or in relation to the supply of water to the premises through the public water supply system; and ... fix, demand and recover charges for or in relation to the supply of water to any premises in respect of which the person has made such arrangements:...”

[7] It was not disputed that the pursuer was the holder of a licence. The defender accepted that he was (and had been) the occupier since 1964. As I understand it, the defender had an account with Scottish Water prior to 1 April 2008. For reasons that are not entirely clear, information was passed by a field agent to the pursuer in 2006 to the effect that the premises was unoccupied and the pursuer's account was closed: Pursuer's Production 5/53/15. However, within a relatively short time, there was contact again between the pursuer and the defender and the remaining balance on the account then outstanding was cleared: Pursuer's Productions 5/53/16 and 17.

[8] In 2010, as part of a "vacant project" review, contact was made with the pursuer. At that stage, he confirmed his details: Pursuer's Productions 5/54/13. As a result, an estimated invoice was issued to him in respect of the period 1 April 2008 to 8 July 2010.

[9] In passing, I make two observations about this part of the case. Firstly, it seems clear that the defender continued to receive a water supply from the pursuer between May/July 2006 and 31 March 2008 which he has never been charged for. Secondly, the defender's position was that there was no telephone conversation on 8 July 2010 and that the first he had heard from the pursuer was the receipt of an invoice shortly after the date. In my opinion, the defender's memory was faulty and it is more likely than not that a telephone conversation did take place on 8 July 2010.

Were arrangements made?

[10] The phrase "make arrangements" is not defined in the 2005 Act. The meaning of it was discussed in the case of *Scottish Water Business Stream Ltd v Chataroo* 2015 SCEDIN 60, but that issue was not a decisive point in that case.

[11] The defender contended that the pursuer had not made arrangements with him. I disagree. In my opinion, the practical result of the telephone conversation in July 2010 was that commercial relations were restored between the pursuer and the defender. Thereafter, the pursuer continued to supply the defender with water and to bill him for it. That appears to me to satisfy the requirement that arrangements be made.

[12] But even if the disputed telephone conversation cannot in itself be said to have been the “making of arrangements”, then in my opinion that is a process which arose cumulatively as commercial relations were re-established. In particular, it is clear that the defender treated the pursuer as his water supplier. He contacted it with other issues to do with water supply and he paid for that water supply, at least in part: Pursuer’s Productions 5/54/4 onwards which vouch ongoing contact during 2011 and 2012.

[13] In my opinion, that is sufficient to dispose of this case.

[14] Arrangements having been made with the defender, the pursuer was entitled to issue a “retrospective” invoice. As noted above, the pursuer did not seek to recover charges for the whole period between mid-2006 and mid-2008.

Defender’s other arguments

[15] The defender contended that following the opening up of the market to competition on 1 April 2006, the pursuer had had ample time to “make arrangements” with him; had never done so; and moreover had, by failing to identify itself as a separate company (albeit one associated with Scottish Water), deprived him of the opportunity to seek a supply from another supplier.

[16] The evidence was that when the market was opened to competition on 1 April 2008, there were no other suppliers operating in the marketplace. That has gradually changed. But

for this argument to have any chance of succeeding, the defender would need to show that, on a specified date, he *would* have moved to another supplier; and that having been deprived of that opportunity, he has lost out financially (i.e. that the competitor's charges would have been lower than those levied by the pursuer). There was no such evidence before me. In any event, even it were established that the defender could have accessed a cheaper supply, that would not be a complete answer to this claim, since the defender's loss, if any, would be restricted to the difference between what the pursuer has charged him and what the putative alternative, cheaper supplier would have charged.

[17] The defender also complained about a lack of information about the pursuer being a separate company from Scottish Water, but I do not see that anything turns on this.

Conclusion and disposal

[18] In the whole circumstances, the pursuer is entitled to succeed. Therefore, I shall grant decree against the defender for payment to the pursuer of the sum of £2099.01 plus interest on that sum from the date of the raising of the action (15 August 2014) to the date hereof. That amounts to $£2099.01 \times 8\% \times 2.3 \text{ yrs} = £386.22$. I shall also grant decree against the defender for payment to the pursuer of the sum of £642.40 being the charges levied and unpaid since the action was raised. That gives a total of $£2099.01 + £386.22 + £642.40 = £3127.63$.

[19] I was invited to award the pursuer expenses in the event of it being successful and I so do. These are assessed at 10% of the sum claimed, being £312.76.

[20] Finally, may I thank Mr Tosh and the defender for the efficient and helpful way in which the hearing was conducted.