SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 24

A525/17

JUDGMENT OF SHERIFF KENNETH J MCGOWAN

in the cause

IAN JAMES WILSON

Pursuer

against

AGCO FINANCE LTD

Defender

Pursuer: MacDougall;
Defender: Devlin;

Edinburgh, 3 April 2018

Introduction

[1] The pursuer carries on business as a farmer. The defenders are a finance company. In or about 2014, the pursuer decided to purchase a new tractor for his farm business. The tractor was supplied by a third party, Ancroft Tractors Ltd ("Ancroft"). Title thereto was transferred to the defenders and the pursuer entered into a hire purchase agreement ("the agreement") with the defenders in respect of it. The tractor was delivered to the pursuer who took possession of it in about January 2014. The pursuer offers to prove that the tractor was defective in a number of respects; that the defenders were in breach of the contract; and that he is entitled to damages.

[2] This case came before me for debate on the defenders' preliminary pleas, dismissal of the action being sought.

[3] I was referred to the following authorities/sources:

a. Supply of Goods (Implied Terms) Act, 1973;

b. *The Law of Contract in Scotland*, McBryde, 3rd edition ("McBryde");

c. *Sheriff Court Practice*, MacPhail, 3rd edition ("MacPhail");

d. *Lamarra* v *Capital Bank plc* 2005 SLT (Sh Ct) 21;

e. *Lamarra* v *Capital Bank plc* 2005 SC 95.

Submissions for defenders

Rejection

[4] The agreement was regulated by the Consumer Credit Act 1974.

[5] The pursuer averred that he had rejected the tractor by email dated 20 October 2014: condescendence 4. That email was sent not to the defenders but to a different company, AGCO Ltd. That company and the defenders were not, as asserted by the pursuer, part of the same group. In addition, the pursuer had retained the tractor after the purported rejection; continued to use it; and ultimately purchased it some 13 months later.

[6] The pursuer avers that he had continued to encounter problems with the tractor.

[7] The defenders' position was that on these averments, there had been no effective rejection of the tractor.

[8] There was no suggestion that AGCO Ltd had been acting as the defenders' agent.

[9] In the absence of valid intimation of rejection, the pursuer could not succeed in any claims which were dependent on rejection.

[10] Furthermore, the matter was regulated by Section 12A of the 1973 Act. The pursuer did not plead that there had been a material breach of contract, such that the remedy of rejection would be relevant.

[11] In any event, the pursuer pleads that he paid everything due under the agreement; purchased the tractor; continued to use it; and he still retains possession of it some 4 years and 2 months after supply.

[12] In *Lamarra*, the sheriff at first instance held that the purchaser of a motor vehicle had not invalidated a rejection by retaining the vehicle and paying further instalments due under a contract in respect of it. But the facts of that case were distinguishable from the present case. In *Lamarra*, the use of and payments in respect of the vehicle continued for only a short period after the rejection; and the purchaser in that case had not gone ahead and bought the vehicle.

Crave 3 claim: specification of loss

[13] The various heads of claim were set out in condescendence 7.

Averment: The purchase price of the tractor was £83,400. The pursuer being entitled to a refund of the purchase price decree should be pronounced as second craved.

[14] It was accepted that this was a valid head of claim if there was a valid rejection.

Averment: [The pursuer] had to incur charges for replacement tractors when the tractor supplied to him by the defenders was unusable.

[15] There was no specification of the costs which the pursuer said he had incurred. If he had incurred them, he should be able to specify them.

Averment: the pursuer will also require to hire a tractor to cover the period from returning the defective tractor and securing a new tractor. The pursuer reasonably estimates the total rental

required will be 20 weeks… The pursuer reasonably estimates the rental charges will be £15,036 (being £12,530 plus VAT).

[16] It was not clear whether the 20 week period referred to covered both past and future charges or future charges only.

[17] There was no explanation as to why a 20 week period was required. Why was there any need for him to return the tractor?

[18] Presumably the pursuer was registered for VAT and therefore able to recover it.

Averment: the pursuer was unable to fulfil contracts he would have performed but for the defenders' breach. The pursuer could not fulfil a contract for ploughing. The value of those contracts to the pursuer was £22,320 (£18,600 plus VAT).

[19] There was an inconsistency in the language used. It was difficult to know what the pursuer was seeking to prove.

[20] Insofar as these claims pertained to loss of income, the pursuer himself would have incurred no liability to VAT if the money had not in fact been earned.

Averment: The pursuer was unable to earn any income from contract work he performs using his main tractor. He charges £23 plus VAT per hour or £100 plus VAT per day when performing contract work. The defective tractor supplied to him by the defenders was out of commission for a total of 390 hours. The pursuer reasonably estimates his loss of hourly earnings from contract work at £10,764 (being £8,970 plus VAT). The pursuer reasonably estimates his daily loss of earnings from contract work at £13,200 (being £11,000 plus VAT).

[21] The same point arose about VAT.

[22] Why was it necessary to distinguish between one type of loss and another?

Crave 4 claim for damages

[23] The claim for damages under the alternative claim (that if the pursuer had not validly rejected the tractor, he was, nevertheless, entitled to retain it and claim damages for the loss sustained) was articulated as the purchase price of the replacement less the trade-in value of the tractor.

[24] But compensation was designed to put a party in the position that they would have been in had the breach of contract not occurred. The correct way to quantify such a claim was to calculate the difference between the value of the goods as delivered and what they would have been worth if there had been no breach of contract.

[25] The pursuer's averments ignored the fact that he owns the tractor, which must have some value, and that he has had the use of it for several years.

Summary

[26] The defenders' position was that the pursuer's claims under craves 1, 2 and 3 should be dismissed since they depended upon there being a valid rejection. In any event, there was a lack of specification for the claim under crave 3.

[27] The pursuer's claim under crave 4 was irrelevant.

[28] The action should be dismissed.

Pursuer's submissions

Rejection

[29] It was legitimate to look at the terms of the email itself. It was addressed to Tim Hood and the words used amounted to a clear and unequivocal rejection of the tractor.

[30] The email was addressed to AGCO Ltd, who were understood to be "customer services" and who the pursuer was dealing with at the time.

[31] The question as to whether the rejection was valid or not was a question of fact and a matter for proof. The question for the court at this stage was: could it be determined at this stage without hearing evidence that the email was not a valid rejection as at October 2014?

[32] As to the second point, the question was whether the pursuer's subsequent actings inevitably invalidated the prior rejection?

[33] The position for the pursuer was that they did not. It was accepted that the pursuer did and still does retain possession of the tractor and was the owner of it. In that respect the situation was distinguishable from that in *Lamarra*.

[34] But the issue was "fact sensitive" and it was necessary to look at the relevant circumstances. In the present case, the pursuer was a farmer by trade; the tractor was purchased as his primary tractor and was the means by which he earned income. Thus, his subsequent actings had to be viewed in the context of the pursuer doing the best with what he had. In addition, all parties at that stage were actively engaged in trying to resolve the problem. It was accepted that the period of continued possession and use was lengthy, but nevertheless, the pursuer's position was that the email was a valid rejection; and that rejection was not subsequently invalidated.

Crave 3 claim: specification

[35] The starting point was that: "In an action of damages the pursuer must specify the details of the losses which in the aggregate form the sum claimed in the crave of the initial writ.": MacPhail, *Sheriff Court Practice*, 3rd edition, paragraph 9.30. Ultimately, questions of specification were matters of providing fair notice. The pursuer must provide the defender

with fair notice of the facts he offers to prove. In the present case, the pursuer has done so in condescendence 7.

[36] The claim made under crave 3 was supported by those averments. There could be no prejudice to the pursuer in allowing those averments to go to proof.

[37] It was accepted that VAT should not be included in relation to the loss of profits claims. Apart from that, the matters averred were simply matters of fact which the pursuer was offering to prove.

Crave 4: relevancy

[38] It was accepted that if it was found that there had been no valid rejection of the tractor, the claim made under crave 2 would fall to be dismissed. But such a determination would not affect the claim made under crave 4 for direct losses.

[39] It was useful to look at The Law of Contract in Scotland, McBryde, 3rd edition, paragraph 22-108, which said:

> "The Sale of Goods Act 1979 provides that in cases of non-acceptance of goods by the buyer the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept."

[40] It was a different Act which applied in this case but the same considerations applied as the wording of the relevant sections in the two Acts was identical. The foregoing extract could be read as if the word "rejection" was substituted for "non-acceptance". Thus, as applied to the present case, the measure of damages would be the difference between the value in or around October 2014 of a tractor provided with the effects and one which was defect free.

[41] But that was not the only way in which damages might be calculated: McBryde, paragraph 22-109.

[42] The proposition underlying the pursuer's claim is that he requires a tractor which is fit for purpose. What he has is a tractor which although not fit for purpose, still has value. As such, he needs to offset the value of the tractor which he does have against the cost of purchasing a tractor which is fit for purpose.

[43] In any event, it was a legitimate approach to cross-refer one method of valuing the claim against another method.

Reply for defenders

[44] The section of the 1979 Act referred to was predicated on there a having been a valid non-acceptance of the goods in question. That had not happened here.

[45] It was clear from McBryde that the correct method of valuation was the difference in value between the goods.

Reply for pursuer

[46] That was a fair point but all that it did was change the date of the quantification of the diminution in value. It simply postponed the exercise of determining diminution.

Discussion

Was there a valid rejection?

[47] It is necessary here to look at what the pursuer offers to prove. The relevant averments are found in condescendence 4.

[48] In summary, he says that the tractor was delivered to him in January 2014 and that he immediately began to have problems with it. He sought advice from the suppliers, Ancroft. The problems and the communications between the pursuer and Ancroft continued until about April 2014. Ancroft arranged for "a Massey Ferguson representative" to install new software in the tractor. A further fault was repaired by Ancroft under warranty. The pursuer had further concerns.

[49] It is then averred:

> "The pursuer contacted Tim Hood the Technical Assistance Manager of AGCO Ltd in the UK and Ireland to advise of the many issues he was experiencing on 26 September 2014. A copy of that email is produced, referred to and incorporated herein *brevitatis causa*. It is understood that the defenders are part of the same group of companies as AGCO Limited. The defenders provide finance on behalf go (*sic*) the group and AGCO Limited form the operational part of the group."

[50] The pursuer then says that he encountered further problems in about October 2014. He goes on to aver:

> "Following upon these other issues the pursuer sent Mr Hood a further email on 20 October 2014. A copy of that email is produced, referred to and incorporated herein *brevitatis causa*. In that email the pursuer rejected the tractor and requested a refund. Mr Hood responded to that email the following day on 21 October 2014. A copy of that email is produced, referred to and incorporated herein *brevitatis causa*. Mr Hood requested the pursuer to allow AGCO Ltd and Ancroft further opportunities to remedy the issues."

[51] Dealing with the substance of the email of 20 October, it appears to me that the other issues mentioned below aside, it is sufficiently clear to constitute a rejection of the tractor. But that is not the end of the matter. It is clear that the email to Mr Hood was addressed to a different company. Even if the defenders were part of the same group of companies as AGCO Ltd, it does not follow that intimation to the latter could be valid intimation to the former. There is no averment that, for example, Mr Hood was a director of both companies.

[52] In any event, as a matter of pleading the phrase"… it is understood that…" is of doubtful utility. It appears to me – at best – to fall into the same category as the averment "believed and averred" and would be subject to the same criticisms and constraints on its use: MacPhail, paragraph 9.54.

[53] So, in my opinion, the email did not constitute a valid rejection intimated to the other party to the contract, namely the defenders. Furthermore, there are no averments which are sufficient to entitle the pursuer to proof on the issue of whether the email should, in the circumstances, be deemed to have been a valid intimation to the defenders. The circumstances in which AGCO Ltd were contacted (rather than the defenders); what they said and did; and the role they played is the subject of very little by way of averment. The emails which have been incorporated into the pleadings add little and in my view cannot support the contention that AGCO Ltd had, or took on, some unspecified kind of "agency" role.

[54] In these circumstances, I have concluded that there was no valid rejection of the tractor.

Was the putative rejection invalidated?

[55] Lest I am wrong in the conclusion set out in the foregoing paragraphs, it is appropriate that I consider also the question of subsequent invalidation.

[56] In my opinion, the law on this is clear. A party who has rejected goods is not entitled to retain possession of them; and in particular is not entitled to continue to use them. Even if a hirer is permitted <u>some</u> latitude in relation to *post* rejection conduct which is inconsistent with rejection, such as in *Lamarra*, the circumstances in the present case are markedly

different. On the pursuer's own pleadings he has retained the tractor; continued to use it; and ultimately purchased it.

[57] Accordingly, even if there was a valid rejection through the medium of the pursuer's email to Mr Hood, in my opinion, that rejection has subsequently been invalidated by his actions.

[58] It follows that the pursuer's claim, in so far as it is periled upon a valid rejection of the tractor must be dismissed.

Crave 3 claim: specification

[59] Although not necessary for the purposes of my decision, it is appropriate that I record, albeit briefly, my comments on the arguments presented in this respect. Put shortly, my view is that other than the point raised about the recoverability of VAT on lost income (a point which was conceded) I consider that sufficient specification is given of this claim. What is required is fair notice. The pursuer has given notice of the various heads of claim including an estimated value thereof. In my opinion, the precise method of calculating these is a matter for evidence. Accordingly, had I allowed this claim to go to proof, I would have deleted the references to VAT on the loss of income claims only.

Crave 4 claim: relevancy

[60] In McBryde, 3rd paragraph 22-93, the learned author states:

> "A broad approach can be taken to assessment of loss, which is largely a jury question, with various measures of loss being used as a crosscheck on each other. Thus, for example, diminution in value may be compared with rectification costs. The law of damages should not be reduced to a rule of thumb. The result may be that written pleadings which state all necessary facts for a proof are sufficiently relevant, even although in the end an alternative method of calculation of damages might be

> used. Nor need a pursuer aver all possible measures of damages – the defender can aver alternatives."

[61] In the present case, the pursuer has offered to prove his loss in a particular way. Ultimately, whether the court is persuaded to award damages on that basis is a matter for proof and submission. In my opinion, at this stage, it cannot be said that a claim articulated in that way will necessarily fail. As such, I preferred the submissions for the pursuer on this point.

Disposal

[62] I shall repel the pursuer's 2nd , 3rd and 4th pleas in law; sustain the defenders' 6th and 7th pleas in law to that extent; and dismiss the action against the defenders as 1st, 2nd and 3rd craved.

[63] I was not directed to any specific averments which were said to be apt to be deleted and I have not taken that step since it appears to me that some of the averments which were perhaps primarily directed at supporting a case based on rejection may yet be relevant (in a non-technical sense) to the remaining claim under crave 4.

[64] Neither was I addressed on future procedure (in the event that some or all of the pursuer's case survived the debate, as has happened) or on expenses. Accordingly, the case will be put out for a procedural hearing before me to discuss these points.

Footnote

[65] There is one other matter which I touched on at the hearing which I wish to record my views on.

[66] As I observed at the commencement of the debate, my view is that the length of the individual articles of condescendence and answers thereto is excessive and does not conform to proper practice.

[67] By way of example, article 4 is about 73 lines long. Answer 4 is even longer. Article 7 is about 43 lines long. Answer 7 is, again, even longer.

[68] Although the pursuer cannot regulate the length of the defenders' pleadings, the genesis of this is the initial writ. There, article 4 is 66 lines long; and article 7 is 51 lines long. Article 3 is also too long at some 28 lines.

[69] The relevant conventions are of long-standing and I make no apology for beginning with an extract from *Pleading and Interlocutors*, J. M. Lees, first published in 1888:

> "77. The Articles of the Condescendence should be Short. - The policy of short articles, however numerous, in the condescendence cannot be overrated. It is both easier, and, as a rule, much better, to cast the averments in short articles. If such be done the defender can make short replies, which he cannot do if a long statement be made in one article, and he be unable to admit it all or deny it all… A defender may not venture to deny an assertion if made singly, which he might do if it is mixed up with several others that he can deny. It is to be remembered as a maxim for the draughtsman that every admission a litigant can obtain for his averments saves proof and avoids risk. The object of his opponent may be to deny as much as he dare; for the more a party has to prove, the greater the chance of a shortcoming by him on some point."

[70] The matter is also discussed in *Sheriff Court Practice*, MacPhail, 3rd edition, the relevant passage of which I again set out:

> "9.46 The draftsman of a condescendence or statement of facts in effect dictates the number of paragraphs in which his opponent may answer the draftsman's claim and state his own case, because the paragraphs of the opponent's answers must correspond to the condescendence or statement of facts. The draftsman should therefore compose his condescendence or statement of facts in short paragraphs, in order to enable the cases of both parties to be stated with clarity and precision. An all too common fault in sheriff court pleadings is that the draftsman confines himself to only three paragraphs, with formal matters in the first and third and all the facts forming his ground of claim in the second. The other party in reply is forced to state his whole defence in his own second paragraph. Both parties then extensively adjust.

> The result is long, discursive and confused narratives on either side which do nothing to clarify, and much to obscure, the issues between the parties…

[71] Unfortunately, it remains the case that by the time adjustment has ended, sheriffs often see "long, discursive and confused narratives on either side". The net result is that the pleadings do not fulfil their function which is:

> "… to enable the parties and court to ascertain with precision those matters on which the parties are at issue and those on which they are agreed, and thus to arrive at the question which the parties wish decided.": MacPhail, paragraph 9.102.

[72] While there is no magic formula, it appears to me that an article of condescendence should normally be no longer than about 10 to 12 lines; and that should certainly be the case at the stage of the initial writ being drafted. That allows room for the almost inevitable expansion which will take place during the adjustment and minimises the risk of a particular article of condescendence becoming so long that when read with the answer thereto has so great a mixture of admissions; matters which are not known or admitted or are denied; and counter averments that it is all but impossible to work out what parties' respective positions are.