

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT KIRKCALDY

[2021] SC KDY 21

KKD-A115/18

JUDGMENT OF SHERIFF A G McCULLOCH

in the cause

MARTIN GEORGE CHERRIE AND AMY PATERSON

Pursuers

against

KEVIN VAUGHAN
TRADING AS VIP JOINERY

Defender

Pursuers: Forsyth, Solicitor, Dundee
Defender: Alexander, Solicitor, Edinburgh

Kirkcaldy, 3 March 2021

Introduction

This is a preliminary proof following on the interlocutor of this court dated 1 September 2020 whereby such a proof was allowed in relation to the defender's third, seventh and eighth pleas-in-law. These pleas are, firstly:

"3. The defender not having entered into any contract with the pursuers, nor having undertaken any work on their behalf is not liable to the pursuers in respect of any breach of contract".

Secondly:

"7. Derek Paterson being the true *dominus litus* and the averments anent the defender being otherwise irrelevant proof should be restricted to a preliminary proof on the *dominus litus* of the defender."

Thirdly:

“8. The pursuers having averred that they contracted with the defender whom failing Derek Paterson, making payment by means of weekly cash payments and thus avoiding payment of any taxes due any contract so averred is *pacta illicita* and void and the action should be dismissed”.

After hearing the evidence the seventh plea, regarding the true *dominus litus* of the defender, was not insisted upon and is therefore formally repelled.

Finds in fact

1. The pursuers are partners who reside with their children in Kinglassie, Fife. The defender is a builder who trades as VIP Joinery, and who resides at 23 Baxter Road, Cowdenbeath, Fife. The defender also runs a limited company called VIP Building Services Limited.
2. In 2017 the pursuers decided to carry out improvements to their home, and had drawings prepared. On about 19 September 2017, they contacted the defender to see if he was interested in the project, and for a quotation. The defender had been recommended to them, and they found his details on a website. They contacted him by email, with the defender confirming his interest. He attended the property on 21 September. At his request the design drawings were emailed, and delivered, to the defender, who subsequently provided the pursuers with a quotation for the works of between £23,500 and £28,000 plus VAT.
3. The quotation was too expensive for the pursuers who advised that their maximum budget only extended to £20,000. This resulted in conversations between the parties with a view to reducing cost. The specification was changed, and the pursuers agreed to do some of the work themselves.

4. At a meeting on 26 September 2017, at the property, the defender agreed that with the changes to the specification, particularly to the design of the velux windows, he could complete the job within the pursuers' budget. He proposed that payments were made weekly, and in cash, to enable him to pay for materials and wages. The defender required to consider the plans to ensure that the changes would not cause difficulty with the architect, and on 27 September there was an exchange of emails regarding this. These emails culminated with one from the defender times at 20:38 saying "Are you happy with us carrying out project for you? If so I could arrange Derek & a labourer to make a start on Monday if that's suitable?"

5. The second named pursuer replied to say that as far as she was aware they wanted the defender to do the job, but would confirm with her partner. She asked for a further quote, and commented that the architect had confirmed that the necessary details were in the drawings already with the defender. On 28 September the second named pursuer forwarded the architect's response. She also spoke with the defender to confirm the contract with him.

6. As promised by the defender "Derek & a labourer" turned up on the Monday morning and started work. The defender had gone with his family to Florida on holiday. After he returned to Fife, he attended at the property and engaged in work there.

7. The pursuers made weekly payments as requested. These they paid to Derek (Derek Paterson) on behalf of the defender. However problems became apparent with the work, which caused concern to the pursuers, who eventually put the defender off-site.

8. Subsequently, in about November, the defender started to chase the pursuers for what he described as the outstanding payment that is due. An email of 7 November 2017 at 18:04 stated "we are only wanting paid for what we are due" and "You said you would pay

us for work completed....you asked us to leave the job." The email concluded with "We will have a debt collection company that we have through our insurance pursue the debt on our behalf." There was no such "insurance" and no debt collection company was instructed. In this the defender was lying.

9. Derek Paterson is the defender's brother-in-law, who has worked with the defender on many occasions. This can be seen from photographs and testimonials on the defender's website. He has also been bankrupt in the past and unable to trade as a main contractor.

10. The contract for the work at the pursuers' premises was between the pursuers and the defender trading as VIP Joinery. There was no contract between the pursuers and Derek Paterson.

11. Any accounting to tax authorities was a matter for the defender, and the pursuers were not party to an attempt, if made, to avoid payment of VAT.

Finds in fact and law

(1) That the pursuers entered into a contract with the defender, trading as VIP Joinery, in respect of renovation work at their property in Kinglassie.

(2) That the contract between the pursuers and the defender was not *pacta illicita*, and is valid and enforceable.

Therefore, repels the third, seventh and eighth pleas in law for the defender, and allows to parties a proof of their averments anent loss; repels the defender's first plea for want of insistence; finds the defender liable to the pursuers in respect of the expenses of and relative to the preliminary proof, orders an account thereof when lodged to be remitted to the

Auditor of Court to tax and to report; appoints the cause to call for a procedural hearing to determine the dates for proof and ancillary matters thereanent on 30 March 2021.

Note

[1] In respect of the preliminary proof it had been agreed that the evidence in chief of the witnesses would be by way of affidavit, and in due course witnesses confirmed that the content of their affidavits were a true and accurate account of their evidence. Thereafter witnesses were cross-examined and re-examined as necessary.

[2] The first witness was Martin George Cherrie. He is a 34 year old welder who resides with his partner, the second named pursuer, and their children at a property in Kinglassie. He and his partner were considering extending and converting their attic, and having spoken to a colleague at work the defender was recommended. He checked the VIP Joinery web page and got contact details of a mobile number. The second named pursuer sent a text about the proposed work, and the defender responded. By this time the pursuers had obtained architectural and engineering drawings. There was an initial meeting on 21 September 2017 attended by both pursuers and the defender. The drawings were shown to the defender and at his request were emailed to him, at the email address supplied by the defender. They were also printed off and delivered to him at his home address. A quotation was then supplied in the sum of £23,500-£28,000 plus VAT. This was beyond the pursuers' expectation and budget. The pursuers advised the defender that their budget was limited to £20,000 and the first named pursuer offered to do some of the work by himself, but the end result was that the defender indicated he would try to work to their budget, and then was able to confirm that if the design was changed from balcony Velux to normal Velux that would provide a saving of about £5,000 to the overall cost. At a meeting at the property

about 26 September 2017 the pursuers agreed that they would attend to the decoration of the renovated works, the change to the normal Velux, and at that it was agreed at a price of £20,000, but it required to be paid over a ten week period, by weekly cash payments, at the defenders request, apparently because materials and wages require to be paid for as the work progressed. It was not viable for him, as a small family run business, to wait for payment until the conclusion of the project. The impression taken by the pursuers from their discussions with the defender, was that the defender had tradesmen that he used regularly, and that he (the defender) would oversee the project. On 27 September the defender emailed indicating that if the pursuers were happy with "us" to carry out the project he could try and arrange for Derek to start on Monday. The second named pursuer responded that she would speak to her partner and let him know for definite. It was accepted that there was no further email of confirmation, but it was the position of the first named pursuer that a contractor called Derek did indeed turn up along with a labourer called Jordan and started on the work. Neither he nor his partner had met Derek before. The defender himself was on holiday in the early part of October, in Florida. As the project progressed the pursuers began to have concerns about the work, particularly with the insulation and the stairs. Derek indicated that he had been speaking to the defender on a regular basis. Eventually the first named pursuer managed to speak to the defender about his concerns, firstly with regard to the insulation and secondly an issue with the joists. By this time £14,000 had been paid to Derek, for onward transmission to Kevin. There were three payments of £3,000 and one of £5,000. Derek indicated that he had passed the various payments on to Kevin. There was a subsequent issue regarding a 15mm belly in the parapet wall which was mentioned to Kevin who asked for photographs, and that he would look when he was on site the next day. When he arrived at the premises he directed Derek to fix

that problem. He had also asked exactly where the pursuers wanted the light outside the bathroom to be fitted, all of which showed Kevin's involvement with the project. By week five, the pursuers were so concerned that they kicked the defender off site. As the defender was packing up he asked the second named pursuer for £1,500, but the pursuers refused to pay as they had already paid £14,000, and what they should have been paying at £3,000 per week would have meant £15,000 by the end of week five, but the defender had been put off before the end of that week. Receipts were asked for regarding materials, and the defender provided some, indicating that Derek had others.

[3] It was put to the first named pursuer that he ought to have been paying Kevin rather than Derek, and that Derek had not accounted to Kevin for the sums paid. He was also challenged on whether he had entered into a contract with the defender at all, it being the defender's position that he had merely introduced Derek to the pursuers for Derek to do the work, and all that the defender was going to do was help out if there were any issues. The correct defender was the contractor who was responsible for the work, and that was Derek. In response the first named pursuer indicated that he had sent a message to Derek, telling him that Kevin was blaming him, but the response was that he was just a sub-contractor and the matter was between the pursuers and the defender. It was further put to the first named pursuer that there was a meeting at the house on 29 September when the defender had brought Derek round, introduced him to the pursuers as the person who was going to be responsible for the work as he, the defender was going to Florida. It was the position of the first named pursuer that no such meeting took place, and the first time they ever saw Derek was when he arrived to start work on the Monday morning. Throughout the pursuers were confident that their contract was with the defender, which position was supported by the defender's subsequent actions, such as getting Derek to change things on

site where the workmanship had been inadequate; contacting building control for information, and sending emails to do with the work, including one which demanded payment, and threatening that they had insurance to pursue the pursuers for payment. For all of these reasons the first named pursuer was confident that the contract was with the defender. It was also the position of the first named pursuer that he paid in cash because he was asked by the defender to pay in cash, and the reason was given for that request. As far as the pursuer was concerned there was nothing particularly unusual about this, as in any event it was for the contractor, receiving the funds, to account to HMRC for any tax due. Certainly the pursuer had not raised the issue of VAT, had not requested that the defender not account or charge for VAT, but given that VAT had been mentioned in the original estimate given by the defender, the first named pursuer assumed that the defender would account for any VAT from the agreed price of £20,000.

[4] The second named pursuer then gave evidence and confirmed that her affidavit was a true and accurate reflection of her evidence. She was then cross-examined on the same issues. She confirmed that she had seen the defender twice before the work started, the first being around 21 September and the second around 26 September. At the second meeting the price was agreed, and the works to be done were also agreed. She did not mention or consider VAT either, assuming that that would be for the defender to account for as their budget was fixed at £20,000. She was confident that she had spoken to the defender on the telephone after the email of 27 September confirming that he should go ahead. There was no formal quotation sent in by the defender, but the worker that he had mentioned, Derek, turned up on the Monday morning, just as the defender had indicated he would. She also flatly denied that there was any meeting on 29 September where the defender brought Derek with him. The first time she met Derek was when he started work and arrived with

the labourer. Neither she nor her partner had entered into any contract with Derek at any time. Cash was paid to Derek, as had been agreed, and both pursuers assumed that Derek had accounted to Kevin for it. She also confirmed that over the period of just under five weeks that they were on site, Derek and the labourer were there from the beginning, and Kevin was there working when he returned from his holiday. She was also confident that the contract was with the defender, because of emails which used language to suggest that it was the defender seeking payment. An example can be seen in the email chain 5/1/1 of process where on 7 November 2017 at 1804 the defender had written "We are only wanting paid for what we are due". In her mind there was no doubt that they were contracting with the defender, and not Derek, and any issues to do with the payment of VAT were entirely for the defender.

[5] Thereafter at the conclusion of the evidence from the pursuers the defender gave evidence. He confirmed that his affidavit was a true and accurate reflection of his evidence and thereafter he was cross-examined. He explained that he had qualified as a joiner some 25 years ago and in the early 2000s started working for himself under the banner of VIP Joinery, as a sole trader. He explained that he had slowly built the business up doing local joinery and flooring work. By about 2011 the annual turnover of the business was approaching the VAT threshold and he had been able to quote for jobs without charging VAT. At some point he spoke to his accountant and following discussions he set up VIP Building Services Ltd of which he is the sole director and shareholder. Since that company was incorporated on 18 May 2011 he has carried out work both under the VIP Joinery (sole trader) banner and via the limited company. He indicated that larger jobs were done by the limited company, the smaller ones under the VIP Joinery sole trader banner. He arranged for sweatshirts, polo shirts and hooded tops for himself and the contractors working on the

company jobs to have a logo "VIP Building Services" embroidered thereon. His business cards were in the name of the limited company and it was his position that by March 2016 most of the work done was done by the limited company. He created a website www.vipbuildingservices.co.uk and this was a shared platform advertising the services of VIP Joinery Services Ltd, and VIP Joinery (the sole trader). They did however have separate email addresses.

[6] On 19 September 2017 he was contacted by the second named pursuer via his mobile number, she looking for a quote to have the attic converted into a bedroom. She had plans from architects and structural engineers, with planning permission and building warrants in place. He replied "Kevin, VIP Building Services". He visited the pursuers' property in Kinglassie on 21 September 2017 for a site visit, wearing his VIP Building Services logo jumper. He had a look at the plans on their computer, and asked for the drawings to be sent by email. They arrived on vipbuildingservices@hotmail.co.uk. He considered the work and ballpark estimate in the region of £23-£28,000 plus VAT with an approximate job time of around 6-8 weeks. The pursuers emailed the defender's website back indicating that the price was above their budget and after some discussion it came to his attention that their top end budget was £20,000. The defender said that he liked the pursuers and wanted to help them but this was hampered by a family holiday scheduled to commence in USA on 1 October 2017 for just over a fortnight. It was the defender's position that he agreed with the pursuers that he would bring another person, David Paterson, with him, indicating that he was a contractor who had been used by the defender before, and that he was somebody that might be able to take on their project within their timescales and budget.

Derek Paterson is the defender's brother-in-law. He is a builder/brick layer to trade and has worked with the defender for many years. He has also been bankrupt in the past and

unable to trade as a main contractor. It was the defender's position that he and Paterson attended with the pursuers at their property on 29 September 2017, that the defender was merely a by-stander as Paterson and the pursuers discussed the matters. Paterson advised that he was not VAT registered, and must have thought he required to charge them VAT. He indicated he would be able to do the job for £20,000. He would be able to start work more or less straightaway and thereafter they left. Derek did indicate to the defender that he was concerned that he may not be able to get materials, because he had been bankrupt in the past. The defender told him he could use the VIP accounts with suppliers.

[7] The defender then went on holiday with his family and in the course of that holiday received a number of calls from Paterson, who indicated that the job was a nightmare. On return from holiday he said that he had received messages from the second named pursuer saying that she was not happy with the work that Derek was doing. He decided to lend a hand to finish off some of the work, saying Derek had agreed to pay him for helping out. Matters became heated later in the week as the first named pursuer complained to both Derek and the defender that the stairs were not square. The defender presented a rebuttal to the first named pursuer, that it was not the stairs that were wrong but the existing wall that was wrong. The response was to be put off the site as another builder would be employed to finish the job. Thereafter there was an email exchange with the pursuers claiming that they had contracted with the defender, with the defender pointing out that the contract was with Derek Paterson, and he was just trying to help out. Derek Paterson did not have an email address at the time, his life being somewhat chaotic. He did have a mobile phone but in any event the defender said that he had agreed with Derek that he would send emails on his behalf to try and make sure that he got paid. At this point the defender said that he was unaware that the pursuers were claiming that cash had already been given to Derek. He

continued trying to persuade them to pay Derek, without success. In his affidavit the defender's position was quite clear, that the pursuers had thought that they were contracting with VIP Building Services Ltd.

[8] In cross-examination he accepted that his position was that the building work and contract had nothing to do with him, but that it was all to do with Derek Paterson. He did not accept that he was inventing the meeting of 29 September, insisting that it took place. He accepted that in emails he had referred to himself as "us" but he said that he was really meaning his company VIP Building Services Ltd. He accepted that he had not made it absolutely clear that he was quoting for the work as the limited company, but it was the limited company that featured on the business card that he had handed to the second named pursuer. He accepted that she had told him before the work started that "as far as I am aware we are going with you Kevin". He had taken that to mean his company rather than himself as a sole trader. He was then asked about the website for VIP Joinery, and Building Services Ltd and he accepted that both entities were covered by the website. He also accepted that project management was something which he was able to do and that it featured on the website. He denied that he was involved with the work at all, other than doing some "wee joinery job" for Derek in week four. He accepted that he seemed to have become piggy in the middle and was just trying to wash his hands of it, although he accepted that he had tried to put pressure on the pursuers for payment. Additionally he had tried to help out regarding the belly in the wall as late as 23 October. He denied that that was project management, merely trying to do the right thing. It turned out, according to the defender, that he had been completely shafted by Derek Paterson who appears to have received money, but claimed to be a sub-contractor. Reference was made to an affidavit of Brian Tait, solicitor (32 of process) which parties had accepted as accurate in the joint minute

of admissions. That affidavit referred to two meetings that Mr Tait had with Mr Paterson, where to begin with Paterson accepted responsibility for the work, but later changed his mind indicating that he could not in all honesty support the defender's position.

[9] Further there were exchanges of emails on 7 November regarding building control which the defender indicated was still his attempt to resolve issues between the pursuers and Derek Paterson. He was still chasing for payment, on behalf of Paterson, hence his use of the word "we" when he really meant that the money was due to Derek, but Derek was still to pay him £250 for the joinery work that he had done. He accepted that he had also written "I never washed my hands with your project" but that had been written on Derek Paterson's behalf. When asked about an email which indicated that he had insurance who would pursue the pursuers, he commented that this was an idle threat that he was making in the hope that they would pay Derek, he accepting that there was in fact no insurance. He indicated that this was not a lie, just a threat without foundation, with a view to ensuring that payment was made.

[10] The defender was then taken to an email that he had sent to solicitors instructed for the pursuers (5/1/10) in which it was stated that he the defender was a sole trader, and that the project was carried out by sub-contractors. He accepted that this letter had indeed been sent, but it was in response to the suggestion by the lawyers that Derek Paterson had been his employee, so his intention was just to say that he was a sole trader with no employees. He also referred to a letter that his wife had prepared for Derek Paterson to send to solicitors dated 5 September 2019 in which he confirmed that he, Derek, was indeed a sub-contractor. He indicated that this had been typed by his wife as "contractor" and that Derek himself had changed it to sub-contractor without the defender's knowledge. He accepted that Derek Paterson had not given evidence, and appeared to be unwilling to give evidence on

the defender's behalf. It was put to the defender that he was just trying to avoid liability for a job that he was involved in, as the main contractor, that had gone wrong. He indicated that this was not the case; that he had introduced Derek Paterson, done a little bit of work to the instruction of Derek Paterson, and to help out latterly he had involved himself in some emails seeking payment. Finally when asked as to whether he thought the contract was an illegal one, he indicated that in his view he had no contract legal or otherwise; the matter was entirely between the pursuers and Derek Paterson. He also confirmed that he had not told the pursuers that Derek had been bankrupt in the past, and that in response to a question regarding an email of 2 November 2017 about "a gap in our work schedule" he explained that this was because he had booked a week off his own business to help Derek, but they were subsequently kicked off the site.

[11] In re-examination he confirmed that there was no email from the pursuers to him after the second named pursuer had said that she would check with her partner, and nor was there any email from him after he had been round with Derek Paterson on 29 September. It was at the meeting on 29 September that the pursuers had agreed to pay in instalments of £3,000 per week, but that was a matter between the pursuers and Derek.

[12] Evidence was then led from the defender's wife, Lorraine Vaughan who again confirmed her affidavit was a true and accurate reflection of her evidence. In cross-examination she confirmed that she was not at involved in the business, nor in deciding whether the defender did a job as a sole trader or as the limited company. She thought however that the majority of the jobs went through the limited company. She confirmed that VIP Joinery had a sign which was placed when doing a job which contained the information that it carried out extensions and loft conversions (5/28c). She confirmed that Derek Paterson was her brother and that their relationship had been reasonable, until

recently since they had fallen out because he had altered a letter that he had asked her to type up on his behalf, without telling herself or the defender. She recalled that Derek Paterson had come round to her house on the Friday evening before they went on holiday to Florida, and that he and Derek had gone out. She understood that they had gone to visit the pursuers' property. She confirmed that the photograph 5/28a was a photograph of Derek and the defender, wearing VIP Building Services jumpers. He had worked many times for Derek, while she understood that on this particular occasion the defender had asked Derek to take the job on himself. She confirmed that she had been involved in sending an email indicating that the defender was a sole trader without employees, and that Derek Paterson was a sub-contractor. She accepted that this was not in fact the case. Derek was the main contractor on the pursuers' job, as far as she was aware. She accepted that she understood that Paterson had told the solicitor Tait that he would not get into bother for his sister and brother-in-law but believed he was just saying that to cover his own back. Her understanding of the position was that it was not the defender's job, but that Paterson had taken it on.

[13] The final witness was Miss Lumsden whose affidavit she accepted as true and accurate. She had no knowledge of the contract, and that prior to getting her own extension done later in 2017, by VIP Building Services Ltd, she had heard the second pursuer's mother indicate that her daughter was having an extension done at her premises by VIP Building Services Ltd, and that it was his brother-in-law that was doing the work because Kevin, the defender was to be on holiday. Subsequently the second pursuer's mother told Ms Lumsden that they were not going to go to court, as they had been told they would spend a lot on lawyer's fees only for the defender to fold his company and they would get nothing. Beyond that she had no knowledge of the contract or the work itself.

Pursuers' Submissions

[14] The pursuers' motion was that the court should repel the defender's preliminary pleas, and thereafter assign a proof on the merits of the action and find the defender liable in expenses in respect of the preparation and conduct of the preliminary proof. So far as the first preliminary issue was concerned, the parties to the contract, the pursuer submitted that this issue largely falls to be determined by the credibility and reliability of the parties. The pursuers' agent went so far as to say this was not an issue of an error or mistake by one of the parties; someone is being untruthful. The pursuers' position is that they contracted with the defender as a sole trader, trading as VIP Joinery. The defender's position is that he did not contract with the pursuers, but rather the contract was between them and his brother-in-law Derek Paterson. The defender was also planning to run a defence that if it was not him as an individual, or Derek Paterson, it was his limited company but that argument was dropped during the course of the preliminary proof, despite what was said in the defender's affidavit. The court was invited to prefer the evidence of the first and second named pursuers and that it was credible and reliable. It was suggested that their evidence was backed up by the numerous pieces on contemporaneous documentation available in process. There was an initial meeting on 21 September between themselves and the defender. They say there was a second meeting with the defender on 26 September. Again there is evidence of that meeting being arranged. It was accepted that there was no final email on either side concluding the bargain, but that it was clear from the emails in process that the initial quote was too high, so some of the works were removed to get the job within the pursuers' top line budget of £20,000. On 27 September 2017 the defender was chasing Amy Paterson to see if he was getting the contract, using the language "us" and that "he" could try and arrange

Derek and the labourer to make a start on Monday. In fact that is what happened. The second pursuer indicated that as far as she was aware “we are going with you Kevin” but it is accepted that this was subject to confirmation with the first named pursuer so does not of itself conclude the contract. However the evidence of the second pursuer was that there was a telephone conversation on 28 September. The defender had asked her to phone him which she did. In the course of that telephone call the second named pursuer confirmed the job was his, and the defender said that Derek would show up on Monday. The defender made no reference to this telephone conversation in his evidence nor in his pleadings, which the pursuers’ agent considered to be strange, as it was at this point that he on his evidence backed out of the job and decided to get Derek to have a look at it instead.

[15] The pursuers were both quite clear that the sum of £20,000 was agreed with the defender. It is accepted that there is no formal quotation after the initial quotation to which VAT was to be added. However the defender does admit in his affidavit and in evidence that he works as a sole trader without charging VAT to keep him competitive in relation to small jobs. The photograph in process which showed an extension proceeding elsewhere, accepted by the defender as “a big job” had the VIP Joinery advertising board outside.

There is no dispute that the works did commence on the following Monday and indeed after the contract was terminated the defender sent a text to the pursuers stating “the job would have been completed under the estimated timescale and to your budget”. So from that it must be inferred that the defender knew what the budget was. It was the pursuers’ position that although they accept the defender was not on site for the first three weeks, he was effectively project managing the job. Both the first named pursuer and Derek Paterson spoke to the defender when he was on holiday, the defender got in touch immediately on his return, and it was with the defender, and only the defender, that the pursuers say they

discussed the work and the payment. In all the circumstances there could be no doubt that the defender was heavily involved in the matter and following the dicta of Lord Denning in *Storer v Manchester City Council* "In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearance, a contract." The pursuers submitted that if that dicta is applied to the circumstances of this case it is beyond doubt that the defender had a contract with the pursuers. The defender was unable to give a satisfactory explanation as to why he was the person chasing for the money, threatening debt collectors from his insurance company (which he accepted was a lie) and why he was still in contact with building control long after the pursuers had terminated the contract. Indeed after the relationship was terminated he had written "I never washed my hands of the project you told me on the phone to leave" but could give no credible answer why he had said that, if he was merely a sub-contractor for two or three days to Derek Paterson. His position was not credible or reliable and should be rejected. He could give no credible explanation for confirming to solicitors in reply to their letter, that he was a sole trader and that Paterson was a sub-contractor, a position he now contends is not the case. Further it would appear that Derek Paterson confirmed to Brian Tait that he was the sub-contractor on the job and because of his former bankruptcy and HMRC number, he can only trade as a sub-contractor. The pursuers' agent expected to be criticised by the defender for not calling Derek Paterson as a witness. However his answer to that was that this was a preliminary proof on the defender's contention that he, the defender, did not have a contract with the pursuers. The defender could of course have called Mr Paterson, but chose not to do so. So far as the witnesses for the defender were concerned they all added little of weight or significance. Mr Tait's evidence was accepted by joint minute for what it is worth as hearsay. It was submitted for the pursuers that Tait

noted down a lie when Paterson initially attended with him, but then noted down the truth when Paterson re-appeared to tell him his up to date position. Mrs Lumsden's evidence is hearsay evidence of someone who was not a party to the contract either. No weight should be attached to her evidence at all. The fact that Mrs Vaughan indicated that she saw her husband and Paterson leaving her house on 29 September 2017 does not take the defence very far. She does not know for sure where they went, nor was she present for any of the contractual discussions, nor was she involved in any of the defender's businesses other than to type some letters to his, or Paterson's, direction.

[16] So far as the eighth plea-in-law is concerned, that the contract is *pacta illicita*, the pursuers point out there was nothing in the defender's evidence, or that of any of his witnesses, that would assist the court in this matter. Indeed the defender himself said that he did not know anything about it, it being his previous lawyer that had put the plea into the case. There was no positive evidence about an illegal contract at all and there is nothing from which the court could base a finding that the pursuers had *mens rea* in relation to the matter. Without that the defender could not be successful on this point. The pursuers were clear that they gave the defender a top line figure of £20,000. They say he agreed to meet that figure. It was for him to manage his tax affairs. Even if payment was made in cash, that in itself is not illegal. The defender's case seemed to the pursuers to be that because the pursuers paid in weekly cash instalments, it was automatically an illegal contract. That is clearly not the case. For the plea to succeed the defender has to show *mens rea* on the part of the pursuers and he has failed to do so. Authority for this is found in the case of *Dowling & Rutter v Abacus Frozen Foods Ltd* 2002 SLT 491. The pursuers' agent then went on to make a point about the pleadings for which prior notice had not been given. He submitted that this part of the defender's case was incompetent, following the *dicta* of the court in the case of

Charles Crimin v Cairn Bay Ltd 2004 Scot CS 157 at paragraph 14, that “when a party maintains the terms of a contract or their implementation are illegal then it is for that party to aver the circumstances of that illegality and plead it accordingly.” In the present case there were no positive averments at all. However there was an objection from the defender’s agent about taking this point, as it had not been taken by way of preliminary plea or note under rule 22. It was accepted by the pursuers’ agent that this matter was not the subject of a rule 22 note for the pursuer but it was still a point that the court should consider.

[17] It can be seen that there is a clear dispute as to who the parties are to the contract.

On the one hand the pursuers insist that they contracted with the defender as an individual and on the other hand the defender claims that they did not contract with him at all, the contract was with Derek Paterson. It is clear that the defender at some stage in the course of this case was also indicating that the contract was with the limited company, but he departed from that position in evidence, and in submissions.

Defender’s submissions

[18] It was submitted by the defender’s agent that so far as the third plea-in-law was concerned there was a clear conflict in the evidence of the parties. The pursuer’s argument was that they contracted with the defender, trading as VIP Joinery, by way of various oral conversations culminating in an agreement reached with him on 28 September, that he was to carry out works at their property, that thereafter he denied having so contracted and deflected blame to a third party, Derek Paterson his brother-in-law, that the defender concocted a scheme whereby Paterson agreed to take the blame for the contract, which scheme Paterson agreed to for a period of time until he got cold feet and relented. On the other hand the defender’s evidence was of denial that he had entered into any contract with

the pursuers. He admitted that he was involved in discussions with the pursuers, albeit he indicated he was acting on behalf of his limited company. He says they were too far apart on price, that he was going away on holiday at the beginning of October, that he arranged with the pursuers to attend at their property with his brother-in-law Paterson on 29 September, the purpose of that meeting to be to introduce the pursuers to Paterson who might be able to carry out the works at their property and at that meeting the pursuers instructed Paterson to carry out the works with a ceiling of £20,000 being agreed between them, payment in cash but thereafter it was Paterson who carried out the work, who paid for materials and who received cash payments from the pursuers. The defender accepted that he had attended for a few days towards the end of the job to help with the fitting of a staircase, for which he was to be paid £250 by Paterson. He admitted that he engaged with the pursuers towards the end of the job and thereafter with regard to alleged issues of workmanship with regard to final payment. He felt this was done by him because he felt piggy in the middle having introduced Paterson to the pursuer. He was merely trying to help resolve the issues. It was the defender's position that the various emails referred to do not constitute a contract. Matters were left somewhat in the air, with the second named pursuer indicating that they wanted the defender to do the job and saying that she would need to check with her partner first. After that, the only thing that happened according to the defender was that the defender attended with Paterson and it was Paterson who agreed to do the work and for the price and in cash. One would have thought that given the sheer number of emails that did exist prior to the work being done, that the agreement would have been committed to writing, so that it would have been clear. However that was not the case. The court was urged to consider that as not being surprising, given the agreement reached involved payment in cash. The pursuers admit this was a cash job. Clearly

whoever the pursuers reached the agreement with, it was one which was designed to save them money, that is not to pay VAT. The only price received from the defender included VAT. The defender accepted that it was subsequently agreed that some works would not be done, and that other items would be changed with a view to saving money. It was to be a cash job to bring the price within the pursuers' budget. It was a nonsense to suggest that the defender agreed to be the project manager, given that he was out of the country from approximately 1-16 October. Further, it was the defender's position that they had paid cash to Derek Paterson, including at least one payment after the defender was back in Scotland, and assisting on the job. No adequate explanation was provided by the pursuers about this, other than the second named pursuer saying that she simply handed the cash over to "whoever's hand reached her first". These payments were consistent with the defender's position that the pursuers contracted with Derek Paterson. The pursuers chose not to call Paterson as a witness in support of their case against the defender, and their failure to do so has to be commented upon, particularly standing the affidavit of Mr Tait, being agreed evidence, that Paterson had stated to him that he had contracted with the pursuers, albeit that he subsequently changed his mind about that. The defender maintained that whilst he had later on assisted Paterson at the property he was not the principal, and was just helping Paterson get the work done. He had also confirmed that he had acted as an honest broker in trying to sort out what were alleged by the pursuers to be defects in the building work that had been done. His primary position, regularly repeated, was that there was nothing in writing to vouch the terms of any agreement reached, the scope of the works or the amendments agreed nor the cost and payment terms agreed. It was the defender's position that it was for the pursuers to prove who they contracted with, and they had failed spectacularly to do so. To assist resolution of the dispute the defender had suggested in his

pleadings that the contract was between pursuers and Paterson, and that this had been agreed at a meeting on about 29 September when the defender introduced Paterson to the pursuers. The defender sought to explain away the absence of a proper contract because the pursuers were trying to get the job done for cash, without any VAT implications. That is why, according to the defender, there were no detailed estimates or quotes from Paterson, no receipts for the cash payments made, no invoices issued by anybody. It was to be a cash job to bring it within the pursuers' budget, and this was agreed between the pursuers and Paterson. Ultimately it was nothing to do with the defender. Further and in any event the defender denied that he had agreed to project manage the works, largely on the basis that he was going to be out of the country from 2-16 October, and would not be in a position obviously to project manage. On his return from holiday he took some time off to be with his children and again had nothing to do with any project management. When asked why, if their position was that the defender was the project manager, the pursuers had not contacted him about the structural issue that arose early on with regard to joist works, the pursuers would only say that they did not want to disturb the defender on his holiday, and that Paterson was able to sort it out. The first message sent to the defender with regard to the works by the pursuers was on 21 October, towards the end of the third week of work, with the next being on 27 October. For all of these various reasons the pursuers had failed to prove that their contract was with the defender, and the third plea-in-law should be sustained, concluding the matter.

[19] Only if the defender has failed to succeed with his third plea-in-law should the court go on and consider the eighth plea-in-law, namely that the contract was a *pacta illicita*. In this regard it was the defender's submission that the contract entered into by the pursuers is *pacta illicita* and void on the basis that the pursuers agreed to make payment in cash thus

avoiding payment of any taxes due. The relevant legislation is the Value Added Tax Act 1994, in particular section 72 thereof. It is obvious to say that the evasion of the payment of VAT is contrary to that section, becoming a criminal offence to be knowingly concerned in or in taking steps with a view to the fraudulent evasion of VAT. Any contract which therefor deprives the tax authority of VAT payments is illegal by way of that statute. As a result, any such contract is *pacta illicita*. It is also contrary to public policy for obvious reasons. It was conceded that there was little Scottish authority in this area of law, but reference was made to *McBryde, The Law of Contract (3rd edition)* in chapter 13. At paragraph 13-30 the learned author states that a contract is illegal if it involves moral turpitude or is subversive of the interests of the state. It is easier to categorise as illegal a contract which involves contravention of statute and moral turpitude such as a partnership of slave traders. The illegal contract is unenforceable and enrichment remedies are not available, or are perhaps limited.

[20] A court should have nothing to do with the rights of parties to the contract which arose under the contract. When illegality exists the courts must take notice of it *ex proprio motu* even though it is not pled by either party. This follows a line of English authority on this proposition which the defender submitted was reasonable for this court to follow. At chapter 19 of *McBryde* contracts which are contrary to public policy will not be given effect to. The defender accepted that it was not easy to define what is meant by public policy. Either the making of a contract or its performance may be viewed as illegal or immoral. Illegality is likely to arise as a result of express or implied contravention of statute. Immorality suggests something which offends against mores; behaviour which strikes at what is fundamental or vital for the wellbeing of society at the time. Reference was made to the cases of *Cuthbertson v Lowes* (1870) 8 M.1073, *Jamieson v Watts Trustee* 1950 SC 265 and

Dowling & Rutter v Abacus Frozen Foods Ltd 2002 SLT 491. Further reference was made to the English case of *Mahonia Ltd v JP Morgan Chase Bank* 2003 WL 22827091. That was a case involving the issue of a letter of credit by Enron in favour of the pursuers. The letter of credit was issued as part of a wider fraudulent scheme entered into between the parties. The decision of the English court acknowledged that a contract may be too remote from the illegality to be unenforceable but on the other hand it seemed to be clear that a contract which is lawful on its face but entered into for an unlawful purpose may not be enforced by the party knowing of and taking part in the illegality. The second English case was *21st Century Logistics Solutions (in liquidation) v Madysen Ltd* 2004 WL 229270. This case involved the sale of goods by the pursuers to the defenders in circumstances where the seller had devised a scheme to defraud the Inland Revenue, a scheme that the defender was not aware of. The court held that the contract was enforceable in those circumstances, principally because the defenders had no knowledge of the foregoing scheme. As was said by the court:

“it is important to observe that, as Lord Mansfield made clear, the principle is not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation. Moreover, the principle allows no room for the exercise of any discretion by the court in favour of one party or the other”.

[21] The starting point for the defender was that any contract which deprives the tax authority of VAT is *pacta illicita*, and contrary to public policy. Any attempt to sue upon that contract should be refused by the court. In this case there is an admission that the pursuers agree to pay cash for the works carried out to their property. They have been made aware that the defender, in his email of 24 September 2017, was seeking to charge VAT. The agreed price was considerably less than the quoted price, with or without VAT. The pursuers actively engaged to reduce the price to be paid by them and in doing so they

ensured that VAT was not charged. It may be that the defender also crossed the line, but the pursuers were aware of and took advantage of it for their own benefit. Consequently the contract is an illegal one, and cannot be enforced. The contract was illegal in its formation. The pursuers were not innocent bystanders enabling the circumstances for the defender to perpetrate the fraud, they were willing participants and benefited from it. The case of *Dowling & Rutter* can be distinguished for that reason. Thus the defender's motion on the eighth plea to be sustained with absolvitor and expenses awarded.

Discussion

[22] It is for the pursuers to prove with whom they contracted, notwithstanding that the proof proceeds on a preliminary plea by the defenders. It is clearly a matter of some dispute, and matters are not greatly assisted by the documentary evidence produced. The defenders are correct to say that the documentation does not form a contract. It does however give substantial insight into what the parties were thinking in the lead up to the work being done. However, the court is entitled to consider the evidence given by the parties, and their witnesses, and assess their credibility and reliability. In this regard I found both pursuers to be entirely credible and reliable. It was the defender, as an individual, that they first contacted. At no time did the defender suggest to them that if he was going to do the work, it would be done by his limited company. It is of course accepted that both the limited company and his trading name of VIP Joinery featured on the side of his vans, on his websites, on his business cards, on personalised workwear, and on emails. The public image offered by the defender was one where there was little or no difference between the limited company and the trading name VIP Joinery. The defender attended at the property and discussed the plans that had already been drawn up. He had the plans sent to his email

address, and thereafter he sent in a price for doing the work. The pursuers contacted him to say that it was too much and after some discussion their top price of £20,000 was disclosed. On that basis the parties agreed variations to the contract, some suggested by the pursuers (decoration, etc.) and some by the defender. Thereafter the defender appeared to press the pursuers for confirmation that he was to get the contract. This is clear from the exchange of emails (5/1/1) and in particular the email from the defender (vipbuildingservices@hotmail.co.uk) to the second named pursuer timed at 20:38 on 27 September which is in terms:

“Are you happy with us to carry out project for you? If so I could try arrange Derek & a labourer to make a start on Monday if that’s suitable?”

The response from the second named pursuer a few minutes later was:

“As far as I’m aware we are going with you Kevin however I will confirm with Martin in the morning and let you know for definite.”

There are no further relevant emails and so far as the pursuers maintained, and as promised by the defender, Derek and the labourer turned up to start the work fully briefed on what was expected of them on the Monday morning. It is of course the defender’s position that there was another meeting, on the evening of 29 September when the defender took Derek round to the pursuers’ house, to introduce him to the pursuers, and at that meeting the pursuers agreed to contract with Derek directly. To me it is telling that this alleged meeting was never documented. One would have thought that if the defender was wanting nothing to do with the project, as his position in court suggested, he would have ensured that there was an appropriate documentary proof, but there is nothing.

[23] I then consider the overall evidence given by the defender. His demeanour was one of evasion. He had to accept that he had lied in certain documents. In particular on

16 February 2018 the defender's wife, at the instruction of the defender, emailed solicitors then acting for the pursuers, in which the defender stated:

"I Kevin Vaughan am a sole trader and do not have any employees and never have. The project was carried out by a sub-contractor".

In evidence Mr Vaughan had to accept that this was incorrect. On another occasion the defender had written to the pursuers demanding payment of a balance due, contained in an email dated 7 November 2017 at 18:04 to the second named pursuer:

"If we don't hear back from you by Thursday 9 November at 5pm and don't receive payment by Friday 2pm we will assume that you are refusing to pay what's due. We will then delete all photos and cancel works with elect certificate etc. We will then have a debt collection company that we have through our insurance pursue the debt on our behalf. As I said I would rather do this amicably."

The defender accepted that there was no debt collection company, and there was no insurance and that this had merely been a threat to try and get payment. He also had to accept that he had repeatedly used "we" implying that the money was due to him (or perhaps his company) but in evidence maintained that he was just helping out Derek who was not very good with IT.

[24] I did not accept the defender's proposition that the contract was with Derek. It was clear that as soon as the defender returned from his holiday he came to the site to work. It was clear that materials were purchased using his trader accounts. I have no doubt whatsoever that it was the intention of the pursuers to contract with the defender, as an individual and that they did so. Any attempt by the defender to say otherwise is merely an attempt, once things had gone wrong on site, to shift the blame and to try to avoid liability. It was of course unfortunate that neither party called Mr Paterson to give evidence.

However the court can only deal with the information before it and on the basis of that

information I am satisfied that the pursuers contracted with the defender trading as VIP Joinery.

[25] I will now deal with the eighth plea-in-law, namely was this *pacta illicita*. In my view this can be answered quite simply in the negative. The pursuers agreed a price with the defender. There was no evidence that they asked if this could be a cash job. Indeed the evidence was that it was the defender who suggested that it would be best for payments to be made weekly, in cash, so that wages and materials could be paid for. The mere fact that cash is paid does not make a contract illegal. The illegality only arises when there is no accounting for VAT, or where the contract was made by both parties with the intention of reducing the price by avoiding any VAT liability. In the pursuers' submissions it was said that the defender has to show *mens rea* on the part of the pursuers in a criminal conspiracy to defraud HMRC. The defender failed to do so. The case of *Dowling & Rutter v Abacus Frozen Foods Ltd* is relevant. Decree for payment was granted in that case because the pursuers were openly innocent of criminal doing. They gave a valid and reasonable explanation for paying in cash, namely that it was at the request of the defender. There is nothing wrong with this particular arrangement, it being for the contractor recipient to account for VAT should that be necessary, in the course of his trading. Further, I would have expected there to be pleadings in support of the defender's position and there are none. I accept that the pursuer had not taken objection by rule 22 note to the defender's eighth plea. Be that as it may, it seems to me to be incumbent upon a party seeking to suggest that a contract is *pacta illicita*, to set averments explaining why so. Those averments ought to include information regarding the knowledge of both parties in respect of the purpose of illegality itself. I was referred to the case of *Charles Crimin v Cairn Bay Ltd* 2004 Scot CS 157 where at paragraph 14 the court held:

“when a party maintains the terms of a contract, or their implementation, are illegal then it is for that party to aver the circumstances of that illegality and plead it accordingly.”

Even absent a rule 22 note, it may be the case that a court of its own accord may declare that a contract is illegal either as *pacta illicita*, or contrary to public policy. I do not find the circumstances of this case gives rise to such a proposition. The only challenge made to the pursuers regarding the contract is that they paid in cash, and there must have been something fishy about that. In my view that is woefully insufficient to support the eighth plea-in-law which I must repel.

[26] It follows therefore that by repelling the third and eighth pleas-in-law in this judgment, and the seventh plea-in-law by agreement, that the matters should thereafter go to a proof on the pursuers' craves, and the remaining pleas-in-law. I will ensure a procedural hearing is held for parties to discuss further procedure. Parties each moved for the expenses of preparing for and the conduct of this preliminary proof. In the circumstances, expenses as taxed are awarded in favour of the pursuers.