SHERIFF APPEAL COURT

[2024] SAC (Civ) 40
PER-CA25-22

Sheriff Principal A Y Anwar
Sheriff Principal N A Ross
Appeal Sheriff D Hamilton

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL ROSS

in appeal by

LUKE ALEXANDER WILKES

Pursuer and Respondent

against

EDWARD ANDREW WELLINGTON

Defender and Appellant

Defender and Appellant: Young, advocate; Harper MacLeod LLP
Pursuer and Respondent: Dean of Faculty (Dunlop, KC); BTO Solicitors LLP

28 August 2024

[1] Rectification of a written contract is available under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ("the 1985 Act") if five criteria can be satisfied. There must be a document to rectify; there must be an earlier agreement; that agreement must disclose that, at the date it was made, there was a common intention; the document must have been intended to express or give effect to the agreement: and the document fails to express accurately the common intention (section 8(1); *Renyana-Stahl*

Anstalt v *MacGregor* 2001 SLT 1247 (Ex Div). The court's power is discretionary and the remedy flexible.

[2] The parties are in dispute about two option agreements for the purchase of two plots of land at Taymouth Castle, Kenmore. The pursuer claims that the options agreements have lapsed. The defender contends that they remain extant and has counterclaimed for rectification of each agreement. The option agreements are in near-identical terms, save for the designations of the plots, and can be discussed together. The pursuer is heritable proprietor of both plots.

[3] They are not the first options agreements between the parties in respect of those plots of land. The first agreements (the "Original Agreements") were dated 23 February and 1 March 2021. Each of the Original Agreements provided for payment of an Option Price of £5,000 in exchange for a three-year option period, commencing on 1 March 2021, to purchase the relevant plot at a price of £150,000. To secure performance by the pursuer, the pursuer granted a standard security over each plot. Although registration of title of both plots had been applied for, there was a delay in registration. This was only eventually resolved in February 2023.

[4] The Original Agreements contained a deadline for payment of the Option Price, of 12 April 2021. The defender did not make payment under either contract by that date. The Original Agreements provided that, in that event, they were to fall and be deemed *pro non scripto*, and that the standard securities would be discharged by the defender. Accordingly, by 13 April 2021, the Original Agreements were at an end.

[5] Shortly thereafter, the defender contacted the pursuer, with a view to resurrecting the options to purchase. Emails passed between them in late April and early July 2021. As a result, the defender instructed his agents to send two formal letters in near-identical terms

(the "Variation Letters") dated 5 July 2021 which offered to amend and renew each of the two Original Agreements. The pursuer accepted these on 15 July 2001. The resulting contracts comprised in each case the Original Agreement as varied by the Variation Letter (together, in each case, the "Amended Agreement"). Again, these can be discussed together.

[6] The present dispute arises because of the drafting of the Variation Letters. As drafted, they provided for a 42 day period for exercise of the Option, which was to purchase the plot at a price of £150,000 each. The Original Agreements had provided for a 42 day period (expiring on 12 April 2021) for payment of the Option Price, namely the sum of £5,000 for the privilege of a three year period within which the option to purchase for £150,000 might be exercised unilaterally. The difference in effect between the deadline in the Original Agreements "to pay the Option Price" and in the Variation Letters "to exercise the Option" served to fundamentally change the structure of the transactions.

[7] The 42 day period for payment of the Option Price expired without payment. The Amended Agreements having terminated, the pursuer raised the present action seeking, amongst other craves, declarator that the standard securities do not secure any extant obligation, that the pursuer is entitled to require discharge, and ordinance that the defender execute and deliver these. The defender refused, and counterclaimed for rectification of the Amended Agreements.

[8] The matter was heard at debate, on the basis that the entire action turned on the issue of rectification, and the emails produced were the only extrinsic evidence to be relied upon. There was no remaining dispute as to the meaning of the Variation Letters. The sheriff refused rectification, dismissed the counterclaim, and granted the orders sought in relation to discharge of the standard securities and ancillary matters.

[9] The sheriff analysed the email correspondence and found a common intention to enter into revised versions of the Original Agreements. Having so found, he criticised some of the common intentions as irrelevant or unnecessary. He observed that this resulted in unnecessary provision for exercise of the Option within 42 days, and that the Amended Agreements were flawed in a variety of ways, including lack of provision for payment of the Options Price. He found that they did, in all other respects, reflect a common intention.

[10] The sheriff refused the proposed rectification as it would lead to an outcome whereby the defender would receive a gratuitous benefit – the Option would be granted, but without need to pay the Option Price until the titles were registered. This, and other consequential effects, would benefit only the defender, and would be undesirable. He considered implication of terms as part of this assessment, particularly of reasonable time for payment. He found that parties did not communicate any common intention as to effect.

Submissions for defender and appellant

[11] Counsel submitted that it was plain that the Variation Letters, and therefore the Amended Agreements, were defectively expressed and failed to reflect the parties' common intention at the time they were signed. The sheriff appeared to have accepted that, but erred in declining to give effect to it. The sheriff erred in having regard to the principles of interpretation of contract and implied terms. Rectification involved distinct principles.

[12] The Original Agreements correctly reflected the parties' understanding, namely that an option of three years' duration was granted within which the purchases could be completed. This option would be defeated only if the Option Price were not paid within a deadline. Although the Original Agreements lapsed, the effect of the email chains, properly understood, was that parties agreed they be amended and restated. Some changes had been

agreed: the Option Price was reduced to £3,500, and the Option Price would only be due upon registration of the plots in the Land Register.

[13] It was clear, turning from the emails to the Variation Letters, that something had gone wrong. They did not reflect parties' agreement. They led to an absurd result. Parties' conduct following the Amended Agreements were consistent with the original arrangement, not the new drafting. It was clear that the drafter of the Variation Letters had made an error.

[14] In any event, the sheriff's reasoning was defective, in regarding the parties' common intention as irrelevant or unnecessary as to whether rectification should be granted. The sheriff had embarked on a critique of the deal, which was not relevant to rectification.

Submissions for pursuer and respondent

[15] The Dean of Faculty submitted that the sheriff had found that there was no communication of any common intention to rectify the Original Agreements. There was therefore no basis to find an antecedent agreement which the document failed to reflect. The Amended Agreements, as drafted, required service also of an Options Notice, not merely an Options Payment, and that unarguably had not been done. The sheriff had not addressed that point.

[16] The exchanges of emails were clear that the common intention was to require the exercise of the Option within 42 days of notification of registration. Assessment of common intention was an objective exercise (*Paterson* v *Angelline (Scotland) Ltd* 2022 SCLR 397), based on the parties' communications. An amendment drafted by the defender and expressly assented to by the pursuer would preclude rectification.

Decision

[17] In our view, the sheriff's analysis was flawed in that it did not recognise the clear distinction between the court's approach to rectification of documents and the approach to construction of contracts, including the implication of terms (*Patersons of Greenoakhill Ltd* v *Biffa Waste Services Ltd* 2013 SLT 729 at para [13]). The evidence that the court may consider is not the same for each issue. The exercise of rectification is to remedy errors of expression, not to imply terms or to assess the reasonableness of what the parties agreed. It is a statutory remedy, and requires that the statutory requirements are met, subject to the discretion inherent in the phrase "may order". Section 8(1) of the 1985 Act provides:

> "(1) Subject to section 9 of this Act, where the court is satisfied, on an application made to it, that -
>
> (a) a document intended to express or to give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made …
>
> it may order the document to be rectified in any manner that it may specify in order to give effect to that intention.".

[18] Whether the parties' expressed intention was objectively reasonable, necessary or otherwise sound, or whether terms required to be implied for commercial coherence, all matters which the sheriff analysed, are not relevant factors. Where parties have used unambiguous language, the court must give effect to it. While logical tensions, in the resulting contract may be relevant pieces of evidence in considering whether the parties did in fact reach agreement, they do not thereafter prevent the remedy of rectification, subject to the court's discretionary powers of grant. It is always open to parties to make a bad bargain.

[19] As noted above, there are five criteria before rectification can be granted. The first is that there is a document to rectify. That document is in each case the Variation Letter leading to the Amended Agreement.

[20] The second criterion is that there must be an earlier agreement. The defender submits that the earlier agreement is the Original Agreement, as resurrected by the two email chains discussed below. The pursuer submits that the agreement is to be found in the Variation Letters, expressly and formally accepted by the pursuer. In considering this, it is necessary to bear in mind that the agreement is assessed at the date of the making of the document, the Variation Letters, concluded on 15 July 2021.

[21] In assessing whether an earlier agreement existed on that date, the Original Agreement cannot be the starting point. That contract had by then lapsed in terms of its internal deadline of 12 April 2021. It reflected no common intention, other than that the parties were no longer bound by any aspect of the Original Agreement. The two email chains of April to May 2021 and July 2021, discussed below, represent both the only source of evidence of what was agreed and the earlier agreement, if any, itself. Subject to that, the second criterion is satisfied.

[22] The third criterion is that the earlier agreement must disclose that, at the date it was made, there was a common intention. This being a debate, and parties being content to rest on the email chain alone, the emails will yield the date of common intention. The pursuer emailed the defender on 2 July 2021 at 18:38 "Yes please proceed". That seems to be only possible time of consensus, if any, and parties did not suggest any other.

[23] There are two email chains between the parties: the first comprises four emails dated 23 April 2021 at 10:07, 23 April at 12:00; 11 May and 12 May 2021. The second chain was several weeks later, and comprises seven emails all dated 2 July 2021, timed at 11.02, 11:46, 18:02, 18:16, 18:38, 18:38 and 18:51 hours.

[24] What, if any, common intention had been reached by 2 July at 18:38 hours? The emails are not straightforward to analyse, as the sheriff found. He found it was difficult to

assess any common intention from the defender's confusing references in the messages of April and May. The first email started by stating that there were two hurdles to get over relating to the plots. These were a possibility of challenge (no longer relevant) and the fact the plots were not yet registered. On the latter point, the defender stated that he could not part with the option fee until the plots were registered. In relation to the option: "The 6 week options have now lapsed, meaning we need to re-new them & amend them, and then replace existing lapsed ones …" Having dealt with side issues, the email stated:

> "Timescales, We get the options amended to reflect the 7k option fee, payment of the fee on registration of the plots, we remove old options & re-place with new ones…"

[25] The defender's response was to agree this as "fair enough". On 11 May the defender wrote:

> "Quick update, Options agreements – these have been re-drafted and should be with you by Monday for your signature. These revised options will reflect the title registration point and replace the 6 week (lapsed) clause, and replace the options currently affixed to the title …".

[26] The first email chain ended with an acknowledgement.

[27] While we accept that not all of the essentials of a binding legal agreement require to be agreed before the contact sought to be rectified has been signed, we agree with the sheriff's assessment: the first email chain is confusing and shows no common intention. The emails must be construed on their bare terms, in the context of the admitted averments. They ended with the agreed position that the options agreements would be redrafted. The parties may or may not have had in mind the same structure as before. The emails do not, however, say that. In our view, what is clear is that the options agreements were to be redrafted and would be sent for signature. To regard this chain as showing a common intention as to the details, or even structure, of the agreement requires a degree of assumption which is not supportable, even on the balance of probabilities, on the plain

terms of the emails. The options agreements were to be "re-drafted", without the proposed terms being finalised.

[28] The second email chain commences with the defender stating:

> "Managed to find a lawyer! New order of works, 1. We amend & sign options and add to title (& remove old options) 2. Wait for titles to be registered in your name (which I will help to speed up) 3. I carry out/finish DD 4. I obtain £1 indemnity insurance 5. I pay over options fees …".

[29] The "DD" is a reference to due diligence. The pursuer replied, to intimate that his 9 year old son was terminally ill. He expressed a preference for speeding up the transaction so he could receive the purchase money.

[30] The defender replied stating that the new option price of £7,000 (being £3,500 for each plot) would not be paid until the pursuer's title was registered, and even then was dependent on due diligence. He wanted to speed up registration, and stated that the pursuer could sell on the open market, albeit values were much lower.

[31] The next email at 18:16 from the defender attached the Variation Letters and stated: "If you are still happy to go ahead can you please confirm you are happy with the attached letter so we can amend options as previously agreed …".

[32] There followed two emails from the pursuer. The first, at 18:38, stated that "I'm all over the place right now", and he just wished he could get all of the money sooner. The second, at 18:38 stated "Yes, please proceed".

[33] The sheriff found that, assessed objectively, the parties' expressed common intentions were to enter into revised versions of the Original Agreements. This included that the Option Price was revised down to £7,000, payable when the pursuer's title was registered, and that there would be title indemnity insurance, and collateral agreements. The sheriff then proceeded to analyse some of these common intentions as irrelevant or

unnecessary. He found that, in all other respects, they reflected the parties' common intentions, including the altered Option Price, reinstating relevant terms of the Original Agreements, including Option Period, the manner in which the Option could be exercised.

[34] We do not reach the same conclusion. The emails are all but silent on the deal to come. They discuss selected elements only, such as the Option Price, a changed mechanism for when it was payable, and collateral matters.

[35] They provide that the Original Agreements are to be amended and signed, and that options fees were to be paid over after registration of title, an innovation on the Original Agreements, which required payment within a 6 week period, on or before 12 April 2021. That innovation might be considered surprising, for it meant that no consideration at all was payable for the option, even beyond registration up to when due diligence was completed. What was clear was that the defender had engaged a lawyer, and was to provide a draft for approval. That draft was duly sent, and approved. The pursuer, understandably in light of his sympathetic family situation, barely engaged with the emails. He signed the draft.

[36] The foregoing does not, in our view, show any common purpose, earlier agreed, beyond the few aspects expressly mentioned. As an evidential exercise, the court is limited, as was the sheriff, to the plain terms of the emails, and to the Variation Letters themselves, being all that is available. The only wider context available is in the admitted pleadings but these do not, in our view, add anything to the terms of the emails. If there was a common intention it was only that the Original Agreements would be amended, and that lawyers were preparing a draft for approval. The consensus, objectively assessed, was that it would all be brought together in the document to come. This is supported by noting that the resulting Variation Letters went significantly beyond what was discussed in the emails: assignation rights were introduced, as was the use of good title as a suspensive condition.

[37] Accordingly, the third criterion is satisfied only in a very limited respect: there was a common intention, but it was no more than an agreement to agree. The agreement would be contained in the formal document to come. The imprecise and selective nature of the contractual points discussed in the email exchange did not matter because it was understood that a final, professionally prepared, document would be circulated for approval, negotiated adjustment, and signature. That, in our view, is the only common intention discernible from the email exchanges.

[38] The sheriff went further, and found that there was agreement as to the content of the proposed Amended Agreement. We are unable to agree. That is because there was no sufficient evidence of common intention as to the critical point, namely that the Original Agreement was to be reinstated except in as varied by the emails. While no doubt parties intended that the resulting Amended Agreement would reflect some of the earlier Original Agreement, there was no consensus as to what would be identical and what would be different. In the event, the Variation Letters introduced innovations which were novel and, as the sheriff noted, irrelevant and unnecessary.

[39] We do not demur from the sheriff's observations that the resulting contract contained inconsistencies and, in parts, absurdities. That, however, does not prevent the parties reaching agreement in those terms.

[40] The fourth criterion is that the documents, the Variation Letters, must have been intended to give effect to the agreement. We find that there was no prior agreement on the terms of the Amended Agreements, so this criterion does not arise. The Variation Letters were intended to be a subsequent, free-standing agreement which reflected some but not necessarily all of what was discussed in the emails. It was a separate contract, not just the formalisation of an earlier agreement.

[41] The fifth criterion is that the document fails to express accurately the common intention. We find that this criterion is not satisfied, as there was no prior common intention to express. In so finding, the foregoing observations can be relied upon. Separately, even if there had been a prior intention, the defender's position at the time was that there was no error. At the commencement of the dispute, when the status of the Amended Agreement was challenged, the defender's agent wrote (email of 28 March 2022, pled on record):-

> "In my view the correct interpretation of the Variation is that my client will have 42 days from the intimation date to exercise the option and pay the option price. I understand that was our respective clients' clear understanding of what was agreed, too – which my client can vouch from correspondence between them …".

[42] This is what the Amended Agreement states. Parties' conduct following the alleged agreement is available as part of the assessment exercise, as is their agents' conduct while acting within presumed authority (*Patersons of Greenoakhill Ltd* v *Biffa Waste Services Ltd*, above, at paras [43] and [44] per Lord Hodge). Such an exercise demonstrates that the defender's present position is the opposite of what was stated by his agents. The agents' correspondence of 28 March 2022 is, in our assessment, strong evidence that, even if there were a common intention, it was not to the effect contended for (now) by the defender. The Variation Letters, on the available evidence, mirrored the defender's instructions. The weight of evidence is heavily against the defender's averred interpretation of the parties' emails.

[43] There is a further evidential point here: the email exchange ends with an expression by the pursuer that he was keen to get the purchase price of £150,000 per plot as soon as possible. The Amended Agreement, in substituting a much shorter period for exercise of the Option, was consistent with that intention, and inconsistent with granting an uncontrolled

time for due diligence the defender. There are accordingly sound reasons for regarding the terms of the Variation Letters as quite deliberate, as the agent's response confirms.

[44] Finally, in considering the foregoing, we have kept in mind that rectification should only be granted when the onus of proof is clearly discharged. It is an inherently difficult task to prove the grounds for rectification. It is a stiff hurdle (*Patersons of Greenoakhill*, above, at para [47]). The defender has not discharged that onus.

Option notices

[45] For the pursuer a further point was argued, as it was before the sheriff, who did not opine on the point. It was submitted that, even if the foregoing were wrong, and the Option remained open to the defender, it had never been contractually exercised. Clause 2 of the Original Agreement provided not only for payment of the Option Price, but for service of an Option Notice at the same time. The defender had purported to exercise the option on 21 March 2023 by tendering the Option Price of £7,000. He had never served an Option Notice. It was now too late to do so.

[46] In the light of the foregoing, it is not necessary to deal with this point. It is sufficient to state that, as a matter of construction of the Amended Agreement, even if rectified to allow for a three year option period, this argument appears to be correct. It is common ground that registration of the title to the plots was intimated on 27 February 2023. If the defender were correct, he had 42 days from that date to serve the Option Notice. That period has long expired.

Disposal

[47] The appeal is refused. Parties agreed that, if the defender were to be successful, expenses should follow success. We will therefore find the defender and appellant liable to the pursuer and respondent in the expenses of the appeal, as taxed. We sanction the appeal as suitable for the employment of senior counsel.