**SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT DUNDEE**

**[2024] SC DUN 34**

DUN-A282-22

JUDGMENT OF SHERIFF JILLIAN MARTIN-BROWN

in the cause

DEREK McEWAN

Pursuer

against

JAMES SHANKLAND

Defender

**Pursuer: Oliver, Advocate; Jones Whyte Law**
**Defender: Upton, Advocate; Gilson Gray LLP**

DUNDEE, 9 FEBRUARY 2024

**Introduction**

[1] This dispute concerned the relevancy and specification of averments about: (i) joint and several liability for an obligation *ad factum praestandum*; (ii) the Consumer Rights Act 2015; (iii) incorporation of an expert report; and (iv) other miscellaneous points.

**Background facts and circumstances**

[2] The pursuer averred that he engaged Tayfix and New Roof Dundee Limited jointly and severally to renovate a property damaged by fire. Tayfix was not incorporated at the time of the renovation and the defender simply traded as Tayfix. The defender was also a director of New Roof Dundee Limited, which was struck off the Register of Companies in August 2022.

[3] By virtue of an offer contained in a quotation supplied on 31 March 2021 and the pursuer's acceptance thereof on 2 and 4 April 2021, the pursuer averred that a contract was

formed between the parties. The defender failed to complete the works by 13 October 2021 and refused to return to complete the works. Damages were sought for the works still to be carried out or requiring remediation.

[4] The defender averred that the contract was entered into between the pursuer and New Roof Dundee Limited. There was no scheduled completion date in respect of the works to be carried out by New Roof Dundee Limited to the property and any works that required to be completed were still within the company's quotation. The pursuer repeatedly changed the specification to his own personal taste, criticised the tradesmen and micromanaged them before terminating the contract.

[5] The defender sought a debate on their preliminary pleas, whereas the pursuer offered a proof before answer. An debate took place in person on 8 January 2024.

**Authorities**

[6] I was referred to the following authorities:

- *ANM Group Limited* v *Gilcomston North Limited* 2008 SLT 835;
- *Darlington* v *Gray* (1836) 15 S 197;
- *Eadie Cairns* v *Programmed Maintenance Painting Ltd* 1987 SLT 777;
- *Esso Petroleum Co* v *Southport Corp* [1956] AC 218;
- *Jamieson* v *Jamieson* 1952 SC (HL) 44;
- *MacDonald* v *Glasgow Western Hospitals* 1954 SC 453;
- *Parks of Hamilton (Townhead Garage ) Ltd* v *Deas* 2022 SCLR 292;
- *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900;
- *Rankine* v *Logie Den Land Co* (1902) 4 F 1074;
- *The Royal Bank of Scotland plc* v *Holmes* 1999 SLT 563;

- Keating, *Construction Contracts* (11th edn), para 4-001 to 4-010;
- Macphail, *Sheriff Court Practice* (4th edn), para 9.76;
- McBryde, *The Law of Contract in Scotland* (3rd edn), para 11-01 – 11-05; and
- Wilson, *Debt,* Chap 28.

**Defender's submissions**

***Joint and several liability***

[7] The defender submitted that the pursuer's averment that "the defender and New Roof Dundee Limited were jointly and severally engaged by the pursuer to carry out building works" was irrelevant and lacking in specification. Firstly, joint and several liability attached to debts, not to obligations *ad factum praestandum*. Secondly, there was a presumption that two co-obligants were not liable jointly and severally. The pursuer averred nothing to rebut the presumption. Thirdly, the pursuer did not specify on what terms or how it was agreed that the engagement was to be joint and several. The averment should not be admitted to proof.

[8] The quotation incorporated into the pleadings bore to be a "joint proposal" from Tayfix and New Roof Dundee Limited. *Wilson* was authority for the point that "jointly" *prima facie* indicated *pro rata* liability. There was a presumption against joint and several liability and in favour of *pro rata*.

[9] The pursuer averred that the pursuer and defender met at the property on around 20 March 2021 to discuss the works. The defender told the pursuer that there was a roofing company and a property maintenance company. The defender told the pursuer that the roofing company could do the roofing and the property maintenance company could carry out the internal works. Those averments were inconsistent with a joint and several

obligation *ad factum praestandum* where each party was obliged to do everything. The defender accepted that it was possible for obligations *ad factum praestandum* to be joint and several, but it would be an odd agreement for a standard piece of building work. The presumption was rebutted on the pursuer's own pleadings.

[10] The consequence of holding such averments irrelevant and not admitting them to proof was so fundamental as to knock out the lynchpin of the pursuer's pleadings, leaving no relevant averments about the attribution of the contract with respect to the defender and the case fell to be dismissed. It was not a discrete point that could be taken out.

**Consumer Rights Act 2015**

[11] The defender submitted that the pursuer's averment that "the contract was subject to terms implied by the Consumer Rights Act 2015" was irrelevant and lacking in specification. He failed to specify what provisions of the 2015 Act he claimed imported any implied terms and if so, what was the content of those terms. The averment should not be admitted to proof.

[12] It was not clear whether the pursuer was referring to the common law or to statute. It was a basic requirement of written pleadings to specify the provision founded upon according to *MacPhail*. Deletion of the 2015 Act averment would leave the common law averments to read sensibly and was a discrete point which would not lead to dismissal.

**Incorporation of expert report**

[13] The defender submitted that the pursuer's averments in relation to the expert report did not give fair notice. The pursuer merely averred that

> "The pursuer has obtained an expert report from Adams Building Consultancy quantifying the extent of the works still to be carried out or requiring remediation. In terms of the said report the expert assessed that the completed works would cost £24,000 plus VAT. Said report is produced herewith and held incorporated *brevitatis causa*."

The report itself had been irregularly intimated to the defender, within an inventory of productions which did not list it as a part of its contents. In any event, the report extended to 72 pages. Wholesale incorporation into pleadings of the terms of a document outwith the record was a failure to give fair notice.

**Miscellaneous points**

[14] The defender submitted that the pursuer's averment that "the defender told the pursuer the roofing company could do the roofing and the property maintenance company could carry out the internal works" lacked specification. It did not specify which works would be undertaken by the roofing company and which by the property maintenance company.

[15] The defender submitted that the pursuer's averments about payments did not give fair notice. The pursuer merely averred that

> "Between 13 April 2021 and 6 January 2022 the defender presented the pursuer with invoices and payment instructions, which the pursuer performed. Between 13 April 2021 and 6 January 2022, the pursuer paid the total of £161,000 respectively to the defender, New Roof Dundee Limited and to a company connected with the defender, Operational Greatness Limited."

No fair notice was given why some payments were said to have been made to the defender and others to New Roof Dundee Limited. No fair notice was given of why the pursuer claimed that he made payment to New Roof Limited against invoices from the defender.

[16] Finally, the defender submitted that the pursuer's averment that "the contract between the parties provided that the defender contracted on completion of the works to provide guarantees for all works to the pursuer" lacked specification. He did not specify where that was said to have been agreed.

[17] The defender submitted that none of those averments should be admitted to proof.

**Pursuer's submissions**

***Joint and several liability***

[18] The pursuer submitted that the burden of showing that a case ought to be dismissed at debate rested with the defender. An action could only be dismissed at debate if it must necessarily fail even if the pursuer proved all that he offered to prove. If the defender could not meet that onus then the matter would proceed to a proof before answer.

[19] That was similarly the case when the defender complained of a lack of specification. The court required to take a broad brush approach and would not find a lack of specification except in clear cases of prejudice to the defender. The plea of lack of specification found its proper application where the defender could truly say he did not know the case to be made against him and could only succeed where he was likely to be taken by surprise at proof and thereby materially prejudiced. The goal of pleadings was not to provide a petri dish for lawyers to grow pleading points but rather to ensure fair notice.

[20] The law of Scotland presumed that where two parties undertook to agree a single obligation, their obligation was indivisible and joint and several. Scottish courts had held obligations *ad factum praestandum* to be indivisible so that all the obligants were liable *in solidum*.

[21] In the circumstances averred by the pursuer, the contract was a lump sum contract where the defender and New Roof Limited agreed to perform renovation works in exchange for a single price (£168,000). The obligation to ensure practical completion of the works was indivisible, namely, the completion of the works in return for a single and undivided contract price. It was for this reason that a claim for damages did not ordinarily arise for a defect where works were ongoing, until after practical completion.

**Consumer Rights Act 2015**

[22] The pursuer submitted that the defender's complaints ran counter to the clear recent guidance given by the Sheriff Appeal Court in claims made under the 2015 Act that such straightforward claims were capable of being articulated and answered in a few brief paragraphs. Pleading chapter and verse was not required.

[23] The pursuer made expressly clear which implied terms he relied upon. The contract in question involved both the supply of goods (ie building materials) and services. It was therefore a "mixed contract" in terms of section 1(4) – (6) of the 2015 Act. That simply meant that both chapter 2 and chapter 4 of part 1 of the Act applied and imported implied terms into the contract as per section 1(3). Chapter 2 applied because there was a supply of goods; chapter 4 because there was a supply of services.

[24] The pursuer expressly averred that the Act implied the terms which he listed. In particular, he averred that the 2015 Act implied that: (a) the works would be carried out in a good and workmanlike manner and be performed with reasonable skill and care (ie as per section 49 of the 2015 Act); and (b) the goods supplied would be of satisfactory quality and fit for purpose (ie as per sections 9 and 10 of the 2015 Act).

[25] The 2015 Act contained a small number of implied terms. The pursuer described each implied term in terms nearly identical to both the wording used in the Act and also the heading for each section. He referred explicitly to the 2015 Act. The defender could not sensibly complain that he was likely to be taken by surprise at proof. The defender's specification point was without merit and to sustain the plea would be to run contrary to the very clear recent guidance provided by the Sheriff Appeal Court as to pleading requirements under the 2015 Act.

**Incorporation**

[26] The pursuer submitted that incorporating an expert report into the pleadings was a standard practice where a high level of detail was required. Commercial actions involving construction disputes relied on fair notice as to the alleged defects being given solely by way of expert report or Scott schedule even if not incorporated into the pleadings. The report set out in detail the different defects. It avoided copious amounts of technical detail being included in the pleadings. It allowed the pursuer's claim to be articulated far more briefly than would otherwise be the case per the guidance of the Sheriff Appeal Court in *Parks of Hamilton*. The defender's reliance on *Eadie Cairns* was misplaced. In that case, the report had not been incorporated into the pleadings. The question in this case was whether the defender had fair notice of the case against him, which he did.

**Miscellaneous points**

[27] The pursuer submitted that he plainly averred which works were to be undertaken by each of the two contractors. The roofing company (ie New Roof Dundee Limited) would carry out the roofing works and the property maintenance company (ie Tayfix, being a

trading name of the defender) would carry out the internal works. That was perfectly adequate, particularly where the defender was said to be in the construction trade. Any ambiguity arose out of the words the defender was averred to have used. The issue as to which contractor was *inter se* responsible for each element would prove immaterial if the court ultimately concluded that the obligations of the contractors to perform the works were joint and several.

[28] The pursuer submitted that fair notice was given as to why certain payments were made to the defender and others to New Roof Dundee Limited. It was plain and obvious that the pursuer averred that he made the payments that he did in accordance with instructions provided to him by the defender.

[29] Finally, the pursuer submitted that in relation to guarantees, the pursuer averred that the parties met to discuss the contract. That would include contractual terms. Given the brief nature in which a claim under the Consumer Rights Act 2015 ought to be pled, that was perfectly adequate.

**Decision**

**Joint and several liability**

[30] *McBryde* at paragraph 11-02 provides that: "Where there is more than one co-obligant, the law presumes that each is liable *pro rata*."

[31] Later in that same paragraph, reference is made to the House of Lords decision in *Coats* v *Union Bank of Scotland* 1929 SC (HL) 114 at p 119 per Viscount Hailsham that:

> "As a mere general rule, subject to many exceptions, and yielding to expressions indicative of an intention to the contrary, obligations are construed as involving rights and liabilities *pro rata*, so that one of two creditors can exact payment of a half only; one of two debtors is liable only in the same proportion."

[32] *McBryde* observes that in many ways this is an unsatisfactory default position because apart from the many exceptions recognised by the law, a creditor will usually prefer and will stipulate for joint and several liability, with several liability being the creditor's main wish. At paragraph 11-04, *McBryde* also observes that the *pro rata* rule is weakened by the exceptions to it which have been allowed, to the extent that almost all modern cases involve joint and several liability. Nonetheless, *pro rata* liability is presumed. The onus is therefore on the pursuer in this case to rebut that presumption. In light of the numerous exceptions to the rule, it may not be difficult to do so but something is required in order to rebut the presumption.

[33] *McBryde* at paragraph 11-05 highlights that obligations *ad factum praestandum* are one of the principal classes of exception to the *pro rata* rule. Reference is made to some older cases where Scots courts have held obligations *ad factum praestandum* to be indivisible so that all the obligants are liable *in solidum*. In *Darlington*, the defender and another co-obligant granted to the pursuer an obligation to return furniture by a certain date in good condition, with a limitation of liability of £60. The pursuer thereafter supplied furniture, which was not returned. When the pursuer subsequently raised an action against one co-obligant, the other having become bankrupt, the defender argued that it was not a simple obligation to perform a fact but rather an alternative engagement to return the furniture in question or pay £60 and inferred against him only liability *pro rata*. Lord Glenlee held that the obligation was a pure obligation *ad factum praestandum*. In keeping with the style of decisions from the 1800s, the decision is very brief and to the point, consisting of only one paragraph. However, the point is extremely clear, namely that obligations *ad factum praestandum* are joint and several.

[34] Applying the same principles to this case, although there is a presumption that Tayfix and New Roof Dundee Limited are liable *pro rata*, there is an exception for obligations *ad factum praestandum.* It is not necessary for the pursuer to aver on what terms or how it was agreed that the engagement of Tayfix and New Roof Dundee Limited was to be joint and several. It is sufficient that the pursuer averred that Tayfix and New Roof Dundee Limited were engaged to perform an obligation *ad factum praestandum*. The pursuer in this case averred that Tayfix and New Roof Dundee Limited were obliged to do a particular act, ie they were engaged by the pursuer to carry out building works at the property conform to architects' drawings and specifications provided by the pursuer. In my view, that is sufficient to bring the obligation of the defender within the exception to *pro rata* liability. Consequently, I am of the view that the pursuer's averments in relation to joint and several liability are relevant and should be admitted to probation.

**Consumer Rights Act 2015**

[35] MacPhail at paragraph 9.76 provides that:

> "where a party's case is founded on an opponent's breach of a provision of a statute or statutory instrument, the party's averments relating thereto should specify the provision founded upon, briefly quoting therefrom where necessary for intelligibility; and make clear the grounds on which that party seeks to establish that the opponent is guilty of a breach of the provision."

[36] For some reason, perhaps oversight, the pursuer in this case did not specify the provisions of the 2015 Act upon which he relies at the time of drafting the initial writ. Mistakes happen and I would have expected the pursuer to have rectified the issue when it was drawn to his attention in the note of basis of preliminary plea. It is surprising and disappointing to me that the pursuer has elected to go to debate on this point, rather than simply add in the relevant section numbers. These are matters within his knowledge, amply

demonstrated by the pursuer's counsel making reference to sections 9, 10 and 49 of the 2015 Act. It is not a question of being required to plead "chapter and verse" but rather a basic point of pleading, with which the pursuer's agents and counsel ought to be well aware.

[37] Nonetheless, the pursuer has expressly averred the terms of the relevant sections. In *Parks of Hamilton*, Sheriff Principal Anwar was critical of the pursuer's plea-in-law but held that although it could have been better expressed, it could not legitimately be said that it failed to give fair notice of the pursuer's case in law. It was perfectly clear from the pursuer's pleadings that the claim was a contractual one. There was no question of the court or the appellant being required to look through the pursuer's averments and then start to search to find a possible case in law.

[38] Applying the same principles to this case, although the standard of the pleadings is poor, I considered that the defender had been given fair notice of the provisions of the 2015 Act upon which the pursuer relied. The pursuer averred that the 2015 Act implied that the works would be carried out in a good and workmanlike manner and be performed with reasonable skill and care; and that the goods supplied would be of satisfactory quality and fit for purpose. I therefore admitted the averments anent the 2015 Act to probation.

**Incorporation of expert report**

[39] There appears to have been another error on the part of the pursuer in this case in relation to intimation of productions. However, it is clear that the defender is in possession of the expert report incorporated into the pleadings by the pursuer. That report sets out the alleged defects in detail, with photographs where appropriate. The pursuer averred the cost estimated by the expert for the outstanding works and the quotes received by two builders. The pursuer averred the cost of works carried out to make the property wind and watertight

meantime. He also averred his accommodation costs due to be being required to reside outwith the property for 14 months.

[40] In the circumstances, I considered that the defender had been given fair notice of the losses alleged. Though the report was lengthy due to the sheer number of incomplete works or works requiring remediation, it was entirely appropriate for the pursuer to incorporate the expert report. The alternative would have been pages and pages of written pleadings to describe something technical which was already clearly laid out in the expert report, together with photographs. Accordingly, I admitted the averments anent the losses to probation.

**Miscellaneous points**

[41] The remaining points raised by the defender were minor in nature and would not lead to dismissal or exclusion of a substantial part of the pursuer's case. Beginning with which works were to be undertaken by each of the two contractors, I considered that it was sufficient that the pursuer averred that the roofing company (ie New Roof Dundee Limited) would carry out the roofing works and the property maintenance company (ie Tayfix) would carry out the internal works. Fair notice had been given about the division of works.

[42] Turning to why certain payments were made to the defender and others to New Roof Dundee Limited, I considered that it was sufficient that the pursuer averred that he made the payments that he did in accordance with instructions provided to him by the defender. Fair notice had been given that the reason for the pursuer making the payments in that way was because the defender told him to do so.

[43] Finally, in relation to guarantees, I considered that it was sufficient that the pursuer averred that the parties met on 2 April 2021 at MKM Building Supplies, Dundee at 11.00am

and that the pursuer reviewed the contract at that meeting. Fair notice had been given about the circumstances in which the contract had been agreed.

[44] I therefore admitted all of the pursuer's averments on these miscellaneous points to probation.

**Further procedure**

[45] Parties were agreed that I should reserve expenses and fix a hearing thereon. I therefore assigned a procedural hearing in relation to expenses and further procedure.