OUTER HOUSE, COURT OF SESSION

[2024] CSOH 33

CA84/23

OPINION OF LORD BRAID

In the cause

KEVAN JONES AND SUSAN JONES

Pursuers

against

CRAIGTON HOLDINGS LIMITED

Defender

Pursuers: Tosh; Gillespie Macandrew LLP
Defender: McIlvride KC, E Brown; Campbell Smith LLP

21 March 2024

Introduction

[1] By share purchase agreement dated 31 October 2022 the pursuers agreed to sell the whole issued share capital of a limited company, Craigton Packing Limited, to the defender. The agreed purchase price, in terms of Clause 3 of the agreement, was £1 million, plus and minus certain add-ons and deductions. Clause 5 of the agreement provided for adjustment of the purchase price following preparation of Completion Accounts in accordance with part 6 of the schedule, which also provided a mechanism for the defender to dispute specified items in those accounts, entailing the service of a Dispute Notice within a specified period. By Clause 6 of the agreement, the pursuers warranted to the defender that the

warranties and tax warranties given pursuant to part 4 of the schedule were true, accurate and not misleading on the date of the agreement.

[2] Paragraph 4 of part 6 of the schedule sets out the basis on which the completion accounts should be prepared and provides, among other things, as follows:

> "4.2.1 Full provision shall be made for all debtor balances over 90 days old (such period commencing on the date of the relevant invoice). In the event that such balances are paid to the company prior to the later of (i) the Adjustment Date or (ii) the date falling twenty four months after the Completion Date, the buyer shall procure that the full amount of these balances received after Completion are paid to the Sellers within 30 days of the receipt thereof."

[3] A dispute has arisen between the parties as to whether accounts which were prepared were Completion Accounts drawn up in accordance with the agreement; and whether a Dispute Notice, in terms of the agreement, was served on the pursuers. It is not necessary to go into the finer points of that dispute for present purposes; suffice to say that it is the subject of this commercial action, in which the pursuers each sue for payment of the sum of £121,197 being the balance of the adjusted purchase price which they aver is due to them in accordance with the agreement. Those are the sums third and fourth concluded for.

[4] The pursuers also aver that the sum provided for in the accounts for all debtor balances over 90 days old was £68,444.78; and that, as a result of the normal payment patterns for such debtors, a significant proportion of those debtor balances has been paid and the rest is likely to be paid within 24 months after the completion date. They aver that the defender is in breach of its obligation to procure that the full amount of those debtor balances be paid to the pursuers in terms of paragraph 4 of part 6 of the schedule. The sum of £68,444.78 is the sum fifth concluded for by way of damages. In response to those averments, the defender avers that as at 5 January 2024, of the debtor balances over 90 days provided for, £56,624.42, together with VAT thereon, had been paid. It does not offer any

substantive defence to the averment that it is in breach of its obligation to procure that that sum be paid to the pursuers. Those averments have prompted a motion for summary decree by the pursuers for payment of the sum of £56,624.42.

The procedural history of the action

[5] The action has, until now, proceeded reasonably expeditiously as a commercial action. The preliminary hearing took place on 10 November 2023, in advance of which a joint statement of issues was lodged, which focused on issues surrounding whether the accounts relied upon by the pursuers were Completion Accounts, and whether an email sent on 22 December 2022 was a Dispute Notice, having regard to the terms of the agreement; and, in relation to the debtor balances, whether they had been or were likely to be paid to the company within the period of 24 months after the completion date and whether the defender had, or was likely to fail to procure that any such debtor balances were paid to the pursuers within 30 days of receipt. At the preliminary hearing, the parties were allowed until 8 December 2023 in which to adjust their pleadings and a procedural hearing was fixed for 20 December 2023.

[6] The parties needed longer for adjustment than anticipated and the initial timetable was varied, allowing for structured adjustment until 9 February 2024 (subsequently extended in relation to one specific issue, not relevant for present purposes) until 29 February 2024. A procedural hearing took place on 22 February 2024, when a 4 day diet of proof, commencing on 20 August 2024, was reserved, and the hearing was continued until 7 March 2024.

[7] On 29 February 2024 the defender intimated adjustments, not in relation to the single issue on which they had been permitted to adjust, but seeking to introduce a new defence:

stated briefly, that the pursuers are in material breach of the share purchase agreement, having breached a substantial number of the warranties granted by them, giving rise to warranty claims estimated by the defender to have a total value of £1,500,000. The proposed adjustments include an averment that the pursuers' obligation was to provide the defender with a shareholding of a company with the assets, and free of liabilities, as warranted by the pursuers, being the counterpart of the defender's obligation to pay the total price, and that in those circumstances the defender is entitled to retain the remaining part of the total price due to the pursuers (including the sum representing the now paid debtor balances) pending the resolution of their claims against the pursuers. Alternatively, if the defender's obligation to pay the sums concluded for are not the counterpart of the pursuers' obligation to provide the defender with the whole shares in the company in the condition warranted by them, the defender avers that it is just and equitable in the circumstances to allow it to retain the whole remaining price, if any, otherwise due to the pursuers (including the debtor balances) pending the determination of the defender's claims against the pursuers. Corresponding pleas-in-law are also sought to be introduced.

[8] The defender has also lodged a proposed counter claim in the sum of £1,500,000 in which it makes averments as to the particular warranties which are said to have been breached under reference to a letter of claim dated 29 February 2024 which gave the pursuers formal notice of the claims for breach of the general warranties and the tax warranties. It is unnecessary to delve further into the detail of the warranty claims at this stage; suffice to say that the warranty claim appears to have been made in accordance with the provisions of the agreement, and as regards the merits of the claims, as counsel for the pursuers submitted, it is impossible to tell at this stage whether they are well-founded or not.

The continued procedural hearing

[9] Three matters were argued before me at the continued procedural hearing, namely:

(1) Whether the pursuers' motion for summary decree ought to be granted.

(2) Whether the defender's late adjustments ought to be allowed.

(3) Whether the counterclaim ought to be received.

[10] A considerable amount of time was taken up at the hearing on the law of retention and in particular whether the company had any right to retain the debtor balances (insofar as received by it) in respect of the defender's admittedly illiquid warranty claims. Counsel for the pursuers founded heavily on two Inner House authorities, *McNeill* v *Aberdeen City Council* 2014 SC 335; and *JH & W Lamont of Heathfield Farm* v *Chattisham Limited* 2018 SC 440 from which he derived the following propositions: first, that a right to withhold performance of one obligation because of failure to perform another arose only where the respective obligations were the substantive obligations under the contract; second, that the obligations must be mutual; third, that a plea of retention provided security for future performance only; and fourth, that it was subject to the equitable control of the court. He acknowledged that there was also a right to "special retention" arising only in exceptional circumstances where the court could conclude that it was just and equitable to allow a party to withhold performance. Applying those propositions to this case, the defender had no right of retention and therefore no defence to the fifth conclusion (or at least, to the motion for summary decree) whether or not the late adjustments were allowed. As regards allowance of the adjustments, and counterclaim, these came too late in the day and should be refused. The pursuers had insufficient notice of the detail of many of the individual warranty claims, and a considerable amount of investigation into all of the warranty claims would be needed.

[11] Senior counsel for the defender, for his part, relied on *Inveresk Plc* v *Tullis Russell Papermakers Ltd* 2010 SC (UKSC) 106, in support of his submission that where liquid and illiquid sums were due under a contract, arising from obligations which (broadly speaking) were the counterparts of each other, the plea of retention is available; and he sought to distinguish the cases relied on by the pursuers on their facts. He drew my attention to the high test for granting summary decree (*Henderson* v *3052775 Nova Scotia Limited* 2006 SC (HL) 85), while at the same time conceding that the defender's defence to the debtor balances part of the claim was contingent upon its late adjustments being allowed. He submitted that the interests of justice favoured the allowance of the adjustments and counterclaim; and that the motion for summary decree should be refused.

Decision

[12] It is unnecessary in the context of this opinion to embark upon a detailed discussion of the law of retention. Suffice to say that in neither *McNeill* nor *Heathfield Farm* was the issue whether a party to a contract could withhold payment of a liquid debt in respect of an illiquid claim arising out of the same contract, and I agree with senior counsel for the defender that the factual scenarios under consideration in those cases were entirely different from that we are concerned with here. I therefore do not agree with counsel for the pursuers' submission that retention as a matter of right may be exercised *only* to secure future performance of a substantial obligation owed by the other party, or that the effect of *McNeill* and *Heathfield Farm* was to restrict the right of retention in the manner contended for by the pursuers. That is plain from what Lord President Carloway said at para [19] of the latter case, under reference to certain dicta of Lord Hope and Lord Rodger in *Inveresk*:

> "*Inveresk...*was concerned with the different situation where liquid and illiquid sums were due under a contract. In that situation, it has long been recognised that one party can refrain from paying the other (commonly known as retention) pending the resolution of a compensatory or 'offsetting' counterclaim for damages in respect of breaches arising out of the same (or a related) contract...This is an exception to the general rule that payment of a liquid debt cannot be withheld in respect of an illiquid debt. As such the right was not disputed..."

[13] The authorities do make clear, however, that for retention in such a situation to be exercised as of right, the liquid and illiquid claims must be the counterparts of each other, a broad view being taken to that question: see *Inveresk*, Lord Hope at para [42], where he said that the analysis should start from the proposition that all the obligations that a contract embraces are to be regarded as counterparts of each other unless there is a clear indication to the contrary.

[14] Applying all of that to this case, there would, at the very least, be a strong argument to the defender (if allowed to advance it) that its warranty claims do provide it with a basis to plead retention at least in relation to the conclusions for the balance of the purchase price, where the warranties can properly be seen as counterparts of the obligation to make payment for the shares. The argument is weaker insofar as the aged debtors are concerned, not least because, although both counsel tended to gloss over the point, the obligation incumbent upon the defender in that instance is to procure that the *company* make payment. Although counsel for the defender argued that the aged debtors represented part of the purchase price, I am not persuaded that that is the correct analysis, for the very reason that payment is to be made by the company; so while the pursuers will receive an additional benefit, it is not one funded by the defender. So, in relation to the obligation to procure payment, the pursuers' argument founded upon *McNeill* and *Heathfield* is stronger; in other words, the fact that the pursuers may have been in breach of the warranties does not

obviously relieve the defender from the separate obligation to procure payment of the aged debtors, once received by the company.

[15] I turn now to the question of whether the defender ought to be permitted to adjust a defence of retention into its pleadings. Paradoxically, the fact that a plea of retention is likely to be available to the defender to justify non-payment of the balance of the price (should that be found to be due) is a factor which favours the pursuers rather than the defender, since the question is whether the defender should be permitted to introduce a new defence at this stage in the action. As things stand, a proof is to take place in some five months. The action, until now, has been focussed on the issues identified in the joint note. The parties have had more than enough time to introduce all relevant issues into the action. The adjustment period allowed by the court has expired, and as noted, adjustment beyond 22 February 2024 was limited to one specific issue.

[16] As Lord Menzies observed in *CSC Braehead Leisure Ltd* v *Laing O'Rourke Scotland Ltd* 2008 SLT 697, para [20], in the context of whether to allow a third party notice, there is a tension between the aims of an efficient and speedy resolution of a dispute on the commercial roll, and the interests of justice. While Lord Menzies was of the view that the interests of justice must come first, with the speedy and efficient disposal of the action being a very desirable second, he also recognised that the balance between those two competing considerations may shift as an action progresses; in other words, the later in proceedings that a third party notice (or, as in this case, a counterclaim coupled with the introduction of a late defence) is moved, the more likely that the interests of justice may favour refusal. Further, if the commercial court is to operate efficiently, it is important that case management orders, including those which permit a limited period for adjustment, are adhered to.

[17] With the best will in the world, the defender's claim for damages for breach of warranty, whether pursued by way of counterclaim or in a separate action, will not be capable of being resolved by the time of the August proof. Not only is it unlikely that the pursuers will be able to fully investigate the claims by then, not least because of the lack of specification presently given in relation to some of the claims, but the four days presently allocated will be insufficient for evidence to be led in relation to the warranty claims in addition to the issues already in dispute in the principal action. The consequence of allowing the defender to plead retention will therefore be that if the pursuers succeed in the principal action, they will nonetheless not receive payment until the warranty claims have been adjudicated upon, possibly many months into the future. The question then becomes whether that would be a fair outcome. As counsel for the pursuers pointed out, under reference to certain vouching attached to the letter intimating the warranty claims, on the face of it the defender has not only been aware of the existence of many of the warranty claims, but has been able to quantify them, for many months; certainly since before the commencement of the principal action. Even a fraction of the intimated claims would have amounted to at least the sum sued for. It would therefore have been open to the defender to have lodged its counterclaim, and introduced a plea of retention in reliance on its claims for breach of warranty, long before it actually did so. In that event, all the issues could have been dealt with together, sooner than can now be the case. That is unfair on the pursuers should they succeed in the principal action, since they will be deprived of the use of money which they would otherwise have had.

[18] Turning to look at the matter from the defender's perspective, disallowance of the adjustments will not affect its substantive rights. It will not be deprived of the opportunity of asserting its right to damages by reason of breach of the warranties. It will simply be

deprived of a potential right in security which it could otherwise have had, had it acted more promptly. Even then, that will only have any practical impact should the defender fail in its defence to the principal action; and even then, if it has concerns about the pursuers' ability to satisfy any decree the defender might itself achieve, there are other remedies open to it in the form of diligence on the dependence, should the criteria for granting same be satisfied.

[19] For all these reasons, I have concluded that the interests of justice preclude the allowance of the late adjustments. The consequence of that is that the defenders have no defence to the fifth conclusion, and the test for granting summary decree is met in relation to that conclusion, to the extent of £56,624.42, the sum received by the company thus far.

[20] Turning finally to consider whether the counterclaim should be allowed, the reality is that the warranty claim will be pursued either by counterclaim or in a separate litigation. When one also has regard to the fact that introduction of the counterclaim need not delay resolution of the issues in the principal action (as Lord Malcolm pointed out in *Whyte and Mackay Ltd* v *Blyth & Blyth Consulting Engineers Ltd* 2012 SLT 1073, para [9]), and the desirability of cohesive case management, I have come to the view that it would be counter to the interests of justice, and ultimately serve no sound purpose, to require the defender to go to the expense of raising a separate action. I will therefore allow the counterclaim to be received.

Disposal

[21] I have refused to allow the defender's late adjustments to be received. Consequently, I have granted summary decree for payment to the pursuers of the sum of £56,624.42 with interest from today's date, reserving to pronounce further. I have allowed the defender's

counterclaim to be received. I will put the case out by order to discuss what further orders ought to be made in light of this opinion, both as regards the principal action and the counterclaim.