SHERIFF APPEAL COURT

[2019] SAC (CIV) 11
HAM-A520-16

Appeal Sheriff McCulloch
Appeal Sheriff Small
Appeal Sheriff Holligan

OPINION OF THE COURT

delivered by APPEAL SHERIFF A G McCULLOCH

in an appeal in the cause

MIRIAM CUMMINGS

Pursuer and Respondent

against

JASKARAN SINGH otherwise JASKARAN SANDHU SINGH

Defender and Appellant

Act: Campbell, advocate; Mellicks, Glasgow
Alt: Moore; Moore McDonald, Motherwell

25 March 2019

[1] In this matter the pursuer is the landlord of premises in Motherwell, occupied as tenant by the defender, and used by him as a hot food takeaway restaurant. The lease dates from 2001, and contains, *inter alia*, the following provision, as clause 5:-

> "The Tenants bind and oblige themselves:- (One) at all times and from time to time to execute at their own expense all such works as are directed or required to be done or executed upon or to the premises or any part thereof under or by virtue of any Act or Acts of Parliament in force for the time being or by any Local or other authority notwithstanding without prejudice to the foregoing generality that the direction or order for the execution of such works may be addressed to the Landlord;

> (Two) without prejudice to the provisions of Clause FIVE (One) hereof at their own expense to comply in all respects with the provisions of any Act of Parliament already or hereafter to be enacted and all notices which may be served by Public, Local or Statutory Authority in relation to the premises and not to do or omit or permit or suffer to be done or omitted any act or thing which will cause the Landlord to be in breach of any of the provisions of any such Act or notice and to keep the Landlord fully and effectively indemnified against all actions, proceedings, damages, costs, expenses, claims and demands whatsoever in respect of any such act or omission…."

Following upon complaints about noise in 2013, the relevant Local Authority, North Lanarkshire Council, served on the pursuer, as landlord, a notice in respect of statutory nuisance in accordance with section 80 of the Environmental Protection Act 1990 (hereafter referred to as the "Abatement Notice"). Certain discussions were entered into between landlord and tenant, resulting in the present action being raised. That action went to debate, under reference to three Rule 22 Notes for the defender, and one for the pursuer regarding the counter-claim, where after argument the Sheriff repelled the second to tenth pleas in law for the defender, sustained the pursuer's first plea in law in respect of the counter-claim, and thereafter allowed a proof. The defender has appealed to this court in respect of all parts of that decision.

[2] The case brought by the pursuer, read short, seeks a crave for declarator that the defender is obliged in terms of the lease to carry out at his expense such works required by the Abatement Notice; for decree ordaining the defender to implement his obligation to undertake such work as is required by the Abatement Notice within 42 days; failing such implement, for decree ordaining the defender to allow the pursuer access to do the work required by the Abatement Notice; failing implement as second craved, for payment of a specified sum; for declarator that the defender must indemnify the pursuer against actions costs and claims arising from the Abatement Notice; for payment of a specified sum in relation to such costs; and payment of a sum for inconvenience and stress caused by the

defender's breach of contract. These claims are met by various general pleas in law seeking dismissal on grounds of relevancy, specification and also by specific pleas directed against particular averments and pleas in law. Further, the defender claims that the terms of the lease have been superseded by a subsequent agreement in writing, which the pursuer has breached, which should result in absolvitor. The defender also has a counter-claim for declarator that a binding agreement was reached in an exchange of letters, and for payment of a specified sum. It is to be noted that the pursuer has been prosecuted for her failure to comply with the Abatement Notice, that the case did not call for trial given that this action had been brought, but the prosecution may be brought again.

[3] The appellant adhered to his Note of Argument, and concentrated on his first and last points, being 2.1 and 2.5 of the Grounds of Appeal. The first dealt with craves one and two. It was argued that crave two was for a decree *ad factum praestandum*, obliging the defender to do something. That being so, the decree had to be precise, but as it was not sufficiently precise, it became irrelevant. The appellant had sought to challenge the pursuer's averments in article 3 of Condescendence, in support of an attack on the relevance of the first two pleas in law. The sheriff had wrongly relied on the cases of *Highland and Universal Properties Ltd* v *Safeway Properties Ltd* 2000 SC 297, and *Retail Parks Investments Ltd* v *The Royal Bank of Scotland Plc (No 2)* 1996 SC 227, as these cases turned on their own facts and in any event could be distinguished as they related to "keep open clauses". The sheriff ought to have had greater regard to cases such as *Fleming and Ferguson* v *Paisley Magistrates* 1948 SC 547 in which it was said that

> "This court will not pronounce a decree *ad factum praestandum* except in terms of such precision as will leave the defenders in no doubt as to the exact obligation to be discharged by them…the same principle of course applies to a declarator preliminary to a decree of specific performance."

The point was that even if the Abatement Notice was not specific about exactly what needed to be done, the decrees sought against the defender must be specific, so that he knew exactly what it was that he was required to do. Craves 1 and 2 do not specify with the required precision what works must be carried out by the defender. Instead they rely upon the Abatement Notice for such specification. But the Abatement Notice does not specify with the required precision for a decree *ad factum praestandum* what works have to be carried out to the property. All that was said in article 3 of Condescendence regarding what works were needed was "upgrading the sound insulation" or "measures which will have the equivalent effect of reducing the noise". When the Abatement Notice itself was considered, it too was lacking in specification. It required work to be done "which minimises the noise emissions from the operation of the food business within said premises to a reasonably acceptable level". But acceptable to whom? It was argued that the pursuer should first agree with the local authority exactly what was required for compliance with the Notice, then advise the defender. The pursuer accepts that work has been carried out, but that it is insufficient. Thus the defender is left not knowing what he needs to do to comply with the Notice. According to the appellant, the sheriff had conflated what was needed in terms of the statutory Notice with what was needed for common law decrees of declarator and implement. Thus the appellant's pleas should not have been repelled, but should have been sustained, leading to dismissal of the principal action.

[4] Ground of appeal 2.2 had been dealt with by a brief Minute of Amendment correcting arithmetical error, and therefore was not insisted upon. Ground 2.3 was an appeal against the decision of the sheriff to hold that Crave 5 was a relevant crave, and that it was supported by a necessary degree of specification. This crave sought a declarator that the defender was obliged to indemnify the pursuer from costs and other demands whatsoever,

in connection with the defender's failure to carry out the works required by the Abatement Notice. If the appellant was correct in arguing that craves 1 and 2 were irrelevant and/or lacking in specification, the same must apply to this crave. The defender would be left giving a "blank cheque" to the pursuer for any works necessary to comply with the Abatement Notice. The defender would be precluded from challenging the works, or the time taken to complete them. Further there was no specification as to the nature or amount of any costs so incurred. The pursuer had amended in reliance on the case of *Zahid* v *Duthus Group Investments Ltd* 2018 CSOH 59, but in that case, the pursuers had sued for a specific sum, rather than seek a declarator.

[5] Ground of appeal 2.4 was not argued. 2.5 deals with the counter-claim. Here, the sheriff had dismissed the counter-claim. The appellant argued that she was wrong to do so, and a proof ought to have been allowed. It was argued that there was a clear contract contained in an exchange of letters between agents. The sheriff had wrongly concluded that there was no binding agreement. In a debate, the pleadings are taken *pro veritate*. The defender averred that an agreement was reached and concluded by the letter of 15 June 2015, page 66 of the Appendix to the Appeal Print, production 6/13/1. The exchange of letters was a free standing agreement, not part of the lease. It is independent of Clause 5 of the lease, but due to the context was associated with it. It was wrong for the sheriff to determine, without a proof, that there was no concluded contract. She ought to have heard evidence of the context, as stated in the case of *Arnold* v *Britton* 2015 AC 1619, given that the defender pled that there was a contract. The defender would show that the subsequent letters referred to by the pursuer were not part of any contract.

[6] In response, counsel for the respondent argued that the appeal should be refused. He adopted the note of argument. Dealing first with the counter-claim, it was reaffirmed that a

consideration of the documents (the whole exchange of letters) showed clearly that there was no agreement as contained in the defender's 13th plea in law. The sheriff had been entitled to interpret the letters and, if satisfied that they did not amount to a binding agreement, dismiss the counter-claim as irrelevant as it was bound to fail. The mere fact that the defender says there is an agreement does not mean that a proof should be allowed if the documents relied on do not support that contention. Further, the defender founded only on the letters for the contract, not pleading any extrinsic evidence to assist in interpretation. Finally, the defender sought a sum of money being one half of the cost of work to be done by a specified contractor. On his own averments, the work had been done by a different contractor. For this reason alone, it could be seen that even if there was a contract, the defender was in breach. The appellant's argument that the contract (if there was such) was separate from the lease was not supported by his pleadings. Plea in law 13 argued that the contract superseded the terms of the lease. This contradiction was fatal, and the counter-claim was correctly dismissed.

[7] With regard to the principal ground of appeal 2.1, the respondent argued that the sheriff was correct in her approach. The craves for the pursuer seek declarator and implement of contractual obligations found in clause 5 of the lease. There is no dispute about the terms of the lease. Clause 5 is quite clear, in that it passes the landlord's obligations on to the tenant. It cannot be viewed as "You tell me what to do and I will do it" which seemed to be the defender's position. The defender is ignoring the direct obligation imposed on him by clause 5. It is a third party, not the landlord, who determines what is to be done, or if what has been done is suitable to resolve the issue. The Abatement Notice itself arises from a nuisance caused by the defender. It is issued not by the landlord, but a third party. It is not prescriptive in laying out what is needed to comply, other than the noise

must be abated. Thus any measure or measures that abate the noise will do. The defender does not need to be told what he must do, it is his obligation to comply with the Notice. Flexibility is granted to the defender, for his benefit, as he can choose how and when to comply. If the pursuer had to be prescriptive in what was required, she would also need to confirm it with the local authority. But this is unnecessary. It is the defender that is causing the nuisance, and when clause 5 is also considered, it is for the defender to sort out a problem of his own making. The defender has done some work, but not sufficient to satisfy the local authority. He needs to do more. To avoid conflict with declarators and other orders which might be granted, he just needs to comply with the terms of the Abatement Notice. Dealing with the suggestion of lack of precision in the craves, the pursuer offers to prove that the defender's failure to comply with the Abatement Notice is a breach of his obligations found in clause 5 of the lease. Where a party has breached a contract, the other party has the right to seek specific implement of the contractual obligation. There is no requirement that the defender should know with certainty what he is required to do in order to comply with the order of the court, An order can specify the end to be achieved, but leave open the precise means whereby the defender is to achieve that end. These propositions can be found by analysing the *Retail Parks* case, which was followed by the Inner House in the *Highland* v *Safeway* case. In any event, in the present case, the defender can be in little doubt as to what obligation he is required to comply with.

[8] Finally, Grounds 2.2. and 2.3 had been dealt with by recent amendment. There was no more to say on these grounds, and 2.4 was no longer argued. The appeal should be refused. In a brief response, the court's attention was drawn to the various principles enunciated by Lord McCluskey in the *Retail Parks* case, at p238. The fourth principle was said to be that the court…cannot grant a decree *ad factum praestandum* "unless the relevancy

objection can be overcome and an appropriately worded, sufficiently precise and enforceable decree devised".

Decision

[9] It is clear to us that the terms of the lease are accepted, that the Abatement Notice has been served on the pursuer, as it must as landlord, and that the landlord seeks to transfer responsibility for the Notice to the defender, in terms of clause 5. We accept the general propositions set out in the *Retail Parks* case, but it is important to note that the six points listed at page 238 by Lord McCluskey are matters said to be agreed by parties. His Lordship went on to formulate, at page 240-41, six general statements of the legal considerations to be kept in mind in assessing the relevancy of a plea for decree *ad factum praestandum*, while recognising that each case must also be assessed on its own merits. These are:

> "(First) No decree will be pronounced by the court to enforce an obligation said to be contained in a contract if the material wording of the contract itself leaves it uncertain what the debtor in that supposed obligation has to achieve in order to fulfil the obligation; however, the mere fact that the relevant wording *does* make it sufficiently clear what the debtor has to do is not necessarily of itself sufficient to entitle the creditor to obtain a decree of specific implement in respect of a breach or apprehended breach of the obligation. (Second) The fact that the court has pronounced a decree to compel specific performance *ad interim* does not prevent the court from concluding at a later stage, and after full submissions in the light of the established facts, that such an order cannot properly be pronounced on a permanent basis. (I should add, however, that in assessing the allegation that the terms of the order are insufficiently precise to make the order enforceable, the history of the defenders' compliance with the order during the interim period might assist the court in reaching a view as to the sufficiency of its precision and specification.) (Third) It is not fatal to the obtaining of such an order that a number of distinct acts may have to be performed in order to secure compliance; nor is it fatal that the order is likely to remain effective against the defenders over a period of years. However, the more numerous the acts desiderated or likely to be required to secure compliance and the longer the period of time during which it is envisaged that the order will remain effective, the more necessary will it be to find terms for the order that will satisfy the need for adequate precision. (Fourth) An order of the court may in effect specify the end to be achieved but leave open the precise means whereby the defender is to achieve the specified end; to that extent, at least, the order may contain

> a degree of flexibility. (Fifth) In considering the precision that is necessary in a court order, breach of which could have serious, including penal, consequences, the court should consider the commercial realities which form the background to the undertaking of the parties' mutual obligations. (Sixth) The possible difficulties for the debtor in the obligation in knowing what is required of him should be considered against the background of the enforcement procedures available if a breach of the order is alleged."

When considering this case in the context of the *Highland and Universal Properties Ltd* v *Safeway Properties Ltd* case, Lord Kingarth, at page 317 indicated that:

> "the notion was rejected that every single particular of what a defender required to do had to be spelled out. It was recognised that the clauses themselves were often drafted with a degree of flexibility to benefit both parties and that such flexibility could reasonably be retained in an order for specific implement which specified the end to be achieved but left open the precise means whereby it was to be achieved."

We agree with that proposition, and note that the sheriff referred to it in her judgement. What we have here is a Notice setting out that something needs to be done, to achieve an end. The end is clear, namely abatement of the noise made by the defender. How it is to be achieved, is left to the defender. He is, after all, best placed to know how the noise is caused, where it comes from, what equipment is in use when there is noise, and when would be best for him to have the work done. There is no conflation between the Abatement Notice and the craves sought. The pursuer seeks orders from the court in terms of clause 5, which clause effectively places the defender, as tenant, in the shoes of the pursuer, as landlord. We see no basis upon which the defender should be in a better position than the pursuer, as he would be if there was a requirement that the work to be done had to be specified to him. The Notice requires that the nuisance, from the premises occupied by the defender, is abated. How he does that is a matter for him. We are satisfied that the orders sought in craves 1 and 2 are relevant, and there is sufficient specification, to allow the matter to proceed to proof.

[10] With regard to the counter-claim, we consider that there was no error on the part of the sheriff. She was entitled to look at all the documentation lodged by the parties. It is of

course correct to say that a party's averments are at debate taken *pro veritate*, but where one party contends that a contract had been formed, and the other disputes it, the court is entitled to consider the documentation provided to see if the contention can be made out. In the present case it is quite clear to us, as it was to the sheriff, that there was no binding contract as at 15 June 2015. A perusal of the relevant letters makes it clear that whilst there might have been some agreement on parts of letters, there was no agreement on the whole. One of the letters said by the defender to constitute part of the contract is that of 2 June 2015, page 62 of the Appendix to the Appeal Print, production 6/9/1. This is from the pursuer's agent seeking confirmation that the defender will carry out certain work specified in a letter of 18 May 2015. There is no response, yet the defender relies on both letters to say that there is a binding contract. The defender makes no offer in the pleadings to add to the bare letters, and thus the court was entitled to consider the letters to see if the allegation that there was a binding contract was correct. As it was not, the sheriff was entitled to take the view that the defender had no prospect of success in the counter-claim, and dismiss it. This view is reinforced when considering that the defender departed himself from the terms of what he said was a binding contract, by having the work done by someone other than the contractor specified in the contract.

[11] Grounds of appeal 2.2, 2.3 and 2.4 were either not insisted upon, or were made unnecessary by the pursuer's minute of amendment. Accordingly, we are of the view that the sheriff was entitled to dismiss the counter-claim, and having repelled the second to tenth, and thirteenth pleas for the appellant, allow a proof in the principal action. The appeal is refused.

[12] We were not addressed on expenses, but on the assumption that expenses would follow success, we award the expenses of the appeal against the appellant, and certify the

appeal as suitable for the employment of junior counsel. Should either party wish to make representations against such an order, they should advise the Clerk to the Sheriff Appeal Court within seven days of issue of this opinion.