SHERIFF APPEAL COURT

[2019] SAC (Civ) 15
DUN-SG2-18

Appeal Sheriff A Cubie

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in an appeal in the cause

RAVENSBY GLASS COMPANY LIMITED

Claimants and Respondents

against

LIFESTYLE GLASS DESIGN LIMITED

Defenders and Appellants

Defenders and Appellants: Ian Ross, director
Claimants and Respondents: Cooper; Thorntons Law LLP

9 April 2019

Introduction

[1] The respondents raised a claim for payment of money due for the provision of glass. The appellants accepted having received the glass and the price agreed but sought to offset sums they claimed were due for faulty glass supplied as part of an earlier separate order.

[2] After a number of case management discussions, each continuation being either for the provision of information or to allow parties to discuss resolution, on 12 September 2018 at a case management discussion, the sheriff encouraged parties to use the in-court mediation service. When that failed, she granted decree being satisfied that there was no defence; the contractual relationship was governed by conditions of sale which specifically

excluded set-off. The appellants would have to take separate proceedings to recover sums (still not ascertained or agreed) which they considered to be due as a result of the faults.

Note of appeal

[3] The appellants argue that the sheriff erred in not allowing a hearing to consider the agreed admissions that credits were due to the appellants, and that variation had been agreed to the written terms; the sheriff had erred in allowing the lodging of the conditions of sale on 12 September, which was not in accordance with the rules; the sheriff erred in not allowing a continuation to allow the appellants to seek advice on the conditions of sale; the sheriff had ordered the provision of information which the respondents did not provide by 29 June and had erred by not imposing a sanction.

Appellant's Submissions

[4] The appellants were represented, as they had been before the sheriff, by their director, Mr Ross. The appellants submitted that the sheriff had erred in granting decree, primarily because of the failure of procedural justice; it was submitted that the sheriff's failings amounted to an error of law.

[5] The appellants submitted that the claim had been initially continued in order to address the issue of set-off. It was only latterly when the conditions of sale were produced that there was a change of direction which gave rise to the decision to grant an order for payment.

[6] On 12 September the sheriff had wanted parties to mediate; that had failed. She had then accepted that the conditions of sale, produced that day, prevented set-off and had granted the order for payment.

[7] The appellants submitted that they had been the victim of procedural unfairness, the conditions of sale (occasionally referred to as terms and conditions, but the label is of no consequence to their effect) having only been produced on 12 September. They had done as requested by the court by giving details of the sums claimed as set-off and arranging witnesses. The appellants submitted that the respondents had not so complied.

[8] The appellants submitted that the sheriff had been critical of the respondents for changing their position about set off. The appellants had conversations with and assurances from the respondents about resolution of the outstanding dispute. The appellants accepted that the amount of the sum due to the appellants had not been agreed or ascertained. But the respondents had agreed in principle that some compensation was due.

[9] In the appellants' submission the sheriff had erred by not letting them prove, at a hearing, the extent of the set-off. The appellants had a legitimate expectation that the sheriff would continue down the path first indicated, that is to allow the appellants to prove their loss. Although Mr Ross did not initially recollect signing the conditions of sale, he accepted that it was his signature. But it had come too late and was not properly lodged in process.

[10] The appellants had asserted a loss of £2,800 but the respondents had not accepted that figure. The appellants wished the chance to demonstrate what was due. In failing to give them that opportunity, the sheriff had erred in law.

Respondents' Submissions

[11] The respondents accepted that the matter had initially proceeded in relation to the question of set-off, largely as the sheriff wished parties to explore the appellants' claim for payment. But the position changed.

[12] The respondents had complied with the court's orders in so far as they could. They had also made their own enquiries which uncovered the conditions of sale. Until the first case management discussion, they had not considered it necessary to consider set-off. No hearing had been fixed. There was no breach of rules in relation to lodging documents.

[13] The standard conditions of sale were intimated to Mr Ross on 3 September by email. The copy conditions of sale which the appellants' director had signed was intimated on 11 September and produced to the court on the 12th. The appellants were not ambushed.

[14] The sheriff was correct to determine that there was nothing left to be established. The appellants had had legal advice before the first discussion and did not seek an adjournment until after the order was made. It was too late. The sheriff had not erred in her determination.

[15] The sum which the appellants were seeking was not ascertained; as the sheriff had found, there had been a discussion between the parties. The respondents had made an offer but the appellants had not accepted it; no counter offer was made so no agreement was reached (paragraph 3.5.7 of the sheriff's note). The respondents recognised that there were unresolved issues in relation to another transaction between the parties but no consensus was reached. Set-off had no application.

[16] The respondents submitted that the sheriff had not taken into account anything irrelevant or left out something relevant or otherwise gone plainly wrong. She exercised her discretion properly in relation to the materials which she had. The sheriff was satisfied that the conditions of sale excluded set off and there was no other defence. The appeal should be refused.

Appellants' Response

[17] The appellants argued that the conditions of sale were lodged too late for procedural fairness – no proper opportunity was given to respond. They accepted that an unsigned email copy was sent to Mr Ross on 3 September, but they did not regard that as decisive. The sheriff had previously taken notice of the set off claim. The basis of the case changed. The appellants wanted to take advice. The procedural unfairness arose from the appellants being deprived of an opportunity to challenge the conditions of sale and to establish the sums due in terms of the set off. The appellants should have been afforded an opportunity to establish the set off.

Basis for Decision

[18] Simple procedure has been the subject of judicial comment from this court in *Cabot* v *McGregor* [2018] SAC (Civ) 12, where the court said:

> "[41] …Section 75 [of the Courts Reform (Scotland) Act 2014] details the factors that are to be taken into consideration in the making of rules for simple procedure. These are that, so far as possible, when conducting a simple procedure case, the sheriff:
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> (a) is able to identify the issues in dispute,
> (b) may facilitate negotiation between or among the parties with a view to securing a settlement,
> (c) may otherwise assist the parties in reaching a settlement,
> (d) can adopt a procedure that is appropriate to and takes account of the particular circumstances of the case.
>
> [42] … It was intended that the court should take an interventionist approach to identify the issues and assist the parties to settle, if possible, and to determine how the case progressed. …. The rules should make clear that the court will control how the case progresses and will take an active role in identifying the issues in dispute and deciding what factual information and legal argument the court requires in order to determine the case.
>
> [45] …The intention of the legislature as indicated in the enabling act is the prime guide to the meaning of delegated legislation. (Bennion on Statutory Interpretation: section 3.13). The statutory guidance to the rule makers in section 75 of the 2014 Act

> focuses primarily on the court identifying the issues arising between parties; facilitating settlement and conducting proceedings in the manner which befits the particular case and its issues. It can readily be seen that the intention is to emphasise the court's active role in controlling how the case progresses by identifying the true questions to be determined and by assisting the parties settle the case where possible. Section 75 is concerned with disputed claims. …"

[19] The court continued:

> "[50] From an analysis of the simple procedure rules it appears to us that the main change is the focus on the court's power to intervene to assist parties resolve or settle their disputes. The court will control the conduct of the case and may make orders which will identify the issues of fact and law which the court may have to determine and allow the sheriff to determine the appropriate procedure for the circumstances of a particular case. The court's powers do appear wide and constitute, in effect, a more inquisitorial and pro-active approach. ….
>
> [51] The principles of simple procedure (Part 1- 1.2) are eloquent of the need for the court to encourage the prompt and proportionate use of time, expense and resources to achieve a just resolution of the parties' dispute..."

[20] Case management discussions, which are an important component of simple procedure, are governed by rule 7.7 which provides:

> "…(2) The purpose of a case management discussion is so that the sheriff may:
>
> (a) discuss the claim and response with the parties and clarify any concerns the sheriff has,
> (b) discuss negotiation and alternative dispute resolution with the parties,
> (c) give the parties, in person, guidance and orders about the witnesses, documents and other evidence which they need to bring to a hearing,
> (d) give the parties, in person, orders which arrange a hearing.
>
> (3) The sheriff may refer parties to alternative dispute resolution at a case management discussion.
>
> (4) The sheriff may do anything at a case management discussion that can be done at a hearing, including making a decision in a case or part of a case."

[21] In relation to the lodging of documents, the simple procedure rules provide only that documents have to be lodged in advance of the hearing. (Rule 10)

[22] These rules reflect the powers which the sheriff has to clarify, to discuss and to make orders. The sheriff is entitled in the course of each such discussion to take any steps which

assist in resolution. Orders are the way that the sheriff uses the powers to manage or decide a case. These may be given to the parties in writing, or may be given to the parties in person at a hearing, case management discussion or discussion in court. Rule 8.4 provides an enhanced order known as an unless order, defined as an order "which states that unless that party does something or takes a step, then the sheriff will make a decision in the case", including dismissing the claim, or awarding the claimant some or all of what was asked for in the Claim Form.

[23] The sheriff accordingly has wide powers to intervene and control, but these do not exist entirely in a vacuum. Although the court, as was said in Cabot, is to "encourage the prompt and proportionate use of time, expense and resources to achieve a just resolution of the parties' dispute", the resolution must still be just. The sheriff's powers are still informed by the rules of natural justice, procedural fairness, proportionality and the need for effective participation. It is expected that the sheriff will be even handed and not disadvantage one or other party.

[24] But the rules also make clear that there is no right or entitlement to a hearing. A hearing will only occur in circumstances where the hearing will help the sheriff resolve the dispute between the parties. The sheriff may gather sufficient material during the progress of the case to resolve matters. The discussion, given the sheriff's inquisitorial powers, is not necessarily a pre-cursor to a hearing; there is no inevitability about a hearing taking place.

Application of these observations to this appeal

[25] The starting point is that the conditions of sale are clear. They provide at paragraph 2.3:

> "The Buyer shall not under any circumstances be entitled to defer payment or set-off any claim or counterclaim against monies due to the Seller, whether such claim or

> counterclaim shall relate to the Agreement of Sale or any other contract with the Seller and the Buyer hereby waives all rights of set-off whether at law or in equity."

The appellants are accordingly unable to argue set-off in this claim.

[26] The appellants complain that the conditions of sale were lodged too late and in breach of the rules. The conditions of sale were not lodged late; no hearing had been fixed so there was no obligation to have lodged anything in terms of rule 10. The respondents' intimation of, and production of, the conditions of sale can be seen as part of the natural development of the case.

[27] The appellants were not really able to describe what they proposed to do in relation to any continuation granted. They apparently wished to take legal advice about the provenance of the conditions of sale. However any suggestion that the appellants were ambushed is undermined by the facts that they were sent a copy of the conditions of sale on 3 September (albeit not those signed by Mr Ross), and that the copy signed conditions of sale showed that Mr Ross signed them on 12/2/16, a matter he did not dispute (although he had not recollected). It is reasonable to expect companies such as the appellants to be aware of the conditions which regulate their business relationships; so there was no ambush. And despite the appellants' apparent concerns about the provenance of the conditions of sale, they still had not taken legal advice by the time of the appeal.

[28] The appellants argued that the sheriff had taken no steps to deal with what he argued were failures on the part of the respondents to comply with the sheriff's orders. I observe that none of the orders made was an 'unless order' in terms of rule 8.4; these are a staple of English civil procedure and some tribunal proceedings but are new to Scottish court procedural rules.

[29] If the appellant is suggesting that the sheriff should have used an 'unless order' to regulate the provision of the information, then I reject such a suggestion. Such an order should be used sparingly. As 'unless orders' are derived from English procedure, guidance for their use and effects can be found in English case law.

[30] In *Marcan Shipping (London) Ltd* v *Kefalas & Anor*. [2007] EWCA Civ 463, Lord Justice Moore-Bick concluded that Judges should consider carefully whether the sanction imposed is appropriate in all the circumstances of the case observing that it is a "powerful weapon" which should not be deployed unless its consequences can be justified, and observing "I find it difficult to imagine circumstances in which such an order could properly be made for … "good housekeeping purposes"".

[31] I endorse that approach. The sheriff was right to proceed with a standard order and no issue arises about any purported failure to comply with orders made.

[32] As far as the case management discussions were concerned, this seems to be a good example of the operation of simple procedure. The claim was initially opposed in relation to set-off; there was no material before the sheriff which ruled out that approach. The case was continued on two occasions for the provision and exchange of information, a sound use of the powers to investigate and clarify. The third discussion was continued on joint motion for a short time for negotiation which proved fruitless.

[33] At the case management discussion on 12 September 2018, the sheriff, in accordance with both her powers and responsibilities, directed parties to use in-court mediation. When that failed she determined that a hearing would not help. The sheriff had been advised that there was no agreement to set off sums and no contractual entitlement. The sheriff was entitled to dispose of the matter in the way which she did.

[34] As was said in *Cabot*, the court controls how the case progresses and takes an active role in identifying the issues in dispute and deciding what factual information and legal argument the court requires in order to determine the case. The sheriff has exercised that control in accordance with the principles and rules of simple procedure. There is no error in the approach adopted by the sheriff in either procedure or law.

[35] The appeal is refused with expenses to the respondents. I answer all of the questions posed by the sheriff in the negative and find the appellants liable to the respondents in the expenses of the appeal.