SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

A213/14

2015SCGLA41

JUDGMENT
of
SHERIFF PRINCIPAL C A L SCOTT, QC
in the cause
John Gordon Innes

Pursuer

against

Robert Dermott Simpson

Defender

Glasgow, 20 May 2015.

The sheriff principal, having resumed consideration of the appeal, refuses same; adheres to the sheriff's interlocutor dated 20 November 2014; finds the pursuer liable to the defender in the expenses of the appeal; allows an account thereof to be given in and remits same, when lodged, to the auditor of court to tax and to report thereon.

NOTE:-

[1] As the sheriff narrated at the outset of her judgment following the debate on 24 November 2014, in this action, the pursuer seeks reparation from the defender for loss said to have been suffered by him as a consequence of the defender having induced the pursuer, by fraudulent misrepresentation, to grant a discharge of all claims vested in the pursuer against the defender and companies connected to the John Dickie Group Ltd.

[2] On the occasion of the debate, the sheriff required to deal with various issues. A minute of amendment for the pursuer had been lodged at the bar. Consideration of that amendment was continued for one week and on 2 October 2014 the sheriff made avizandum on the amendment, the arguments raised in debate and those concerning the defender's motion for summary decree.

[3] It will be seen that the sheriff allowed the pursuer's adjusted writ to be amended in terms of the pursuer's minute of amendment No 11 of process, as adjusted. However, the sheriff went on to sustain the defender's second and third pleas in law and to grant the defender's motion for summary decree. That led her to pronounce decree of absolvitor in favour of the defender.

[4] On appeal, it was argued for the pursuer that the sheriff had erred in law in certain respects and that she ought to have allowed a proof before answer. Detailed written submissions were presented on behalf of

the pursuer and the pursuer's solicitor, Mr Mackenzie, adhered to those submissions. They are appended hereto.

[5] Whilst Ms Gillies, for the defender, responded largely by way of oral submissions, answers to the grounds of appeal had already been lodged and, from time to time, Ms Gillies used said answers to identify convenient reference points in the course of her submissions.

[6] However, it is fair to say that the arguments on appeal, on both sides of the bar, largely amounted to a re-hearing of the various submissions presented before the sheriff. In that connection, the sheriff in her judgment has carefully and articulately set out the competing submissions for the benefit of the court. In considering the arguments, I prefer to deal, firstly, with the sheriff's approach *quoad* prescription.

Prescription

[7] The sheriff deals with the topic of prescription extensively between paragraphs [24] and [42] in her note. Mr Mackenzie submitted that the sheriff had erred in finding that no relevant case had been averred, that the pursuer could not have discovered, with reasonable diligence, that he had a claim within the prescriptive period and that the test of reasonable diligence had not been satisfied.

[8] For my part, having carefully considered the pursuer's arguments, I am unable to find fault with the sheriff's approach. She was, in my view, correct to distinguish the case of Glasper v Rodger 1996 SLT 44. Moreover, I have also concluded that the sheriff, at paragraph [42], was right to focus upon the issue which I believe to be at the heart of the matter, viz. the pursuer's failure, on record, to explain what it was about the alleged fraud which so misled him that he could not have, with reasonable diligence, discovered the truth.

[9] I do not accept the proposition that, in the circumstances of this case at least, the onus did not lie with the pursuer. As Ms Gillies submitted, in the first instance, it was for the defender to put in issue the question of prescription. However, Lord Penrose, in the case of *Adams* v *Thorntons* 2005 1 SC 30 at paragraph [24] made it clear that it is for a creditor to establish that he did not have actual knowledge of loss and had no reason to investigate whether a loss had occurred. In the present case, I consider that it was for the pursuer to advance relevant averments such as would satisfy the test of reasonable diligence.

[10] The particular circumstances of this case are not to be overlooked. The pursuer's chosen formulation on record (see article 7 of condescendence) is that, *inter alia*, the Bank of Scotland was *immediately* (my emphasis) appointing receivers to both companies. That is said to have been part of the untrue representations made by the defender at the meeting on 27 January 2009.

[11] One must take what the pursuer himself avers to mean what it says. In other words, the sheriff was, in my opinion, quite correct to observe at paragraph [40] that the pursuer might have anticipated that the appointment of receivers was going to take place within an extremely short timescale. For him to aver that he could not have ascertained the true position until 18 March 2009, almost 2 months after the January meeting, when looked at objectively, simply serves to cast relevance to the wayside.

[12] Nothing said in the course of the appeal leads me to determine that the sheriff's overall approach to prescription was incorrect. In particular, I agree with the conclusion at paragraph [42] in her note.

Relevancy

[13] I now turn to consider the arguments relating to the relevancy of the pursuer's averments on the merits. Here, to my mind, the pursuer's case also experiences great difficulty. At the outset of her submissions, Ms Gillies commented that Mr Mackenzie's submissions contained little analysis as to where

the sheriff had erred and, more particularly, maintained that the pursuer's case was ill-conceived in that he had mistakenly conflated the position of the defender with that of the limited companies.

[14] That latter point is worthy of closer analysis. It is the pursuer's case that the defender's representations regarding the financial state of the companies were fraudulent and induced the pursuer to accept the "compromise" proposal.

[15] However, the pursuer's case is actually predicated upon a *personal obligation* granted by the defender (on behalf of the shareholders). Therefore, the financial state of the companies or impending receivership was of no moment whatsoever regarding the alleged personal obligation owed by the defender (and any of the other shareholders).

[16] There is no explanation, by way of averment, regarding why it was that the affairs of the two companies impacted, to any extent, upon the integrity, or otherwise, of the personal obligation said to be owed by the defender. Nor do we know why the pursuer chose to compromise that personal obligation. (See paragraphs 22 and 28 in the defender's original note of argument). Accordingly, I am led to the conclusion at least to that extent that the basis for the pursuer's action is fundamentally flawed. That in itself would be sufficient for the averments regarding the £300,000 implementation claim to be excluded from probation for want of relevancy.

[17] Additionally, I find difficulty with the pursuer's reference in article 5 to the proposal (which the pursuer ultimately accepted) as being "in full and final settlement of the matter". Read in context, *the matter* can only mean the dispute regarding the alleged £300,000 obligation to re-purchase the pursuer's shares. However, the pursuer's pleadings are silent as to why, in terms of the Discharge dated 6 February 2009 (see article 6 of condescendence) he went on to enter a compromise agreement which, in its scope, went significantly beyond the mere full and final settlement of the dispute regarding the £300,000 claim. That *lacuna* in the pursuer's averments also detracts from the overall relevancy of his case.

[18] More generally, I reject the pursuer's contention that his case is on all fours with the case of *Mair* v *Rio Grande Rubber Estates Ltd* 1913 SC (HL) 74. (See Lord Shaw at page 82). That case was fact specific. In *Mair*, the representation in the prospectus induced the pursuer to buy shares in the company. There was a clear and direct correlation between the representation and the inducement. In the present case, the pursuer's averments lack the requisite clarity and direction which the law requires of a party claiming to have been defrauded.

[19] It is not suggested by the pursuer that the sheriff's reliance upon the case of *Zurich* v *Gray & Kellas* [2007] CSOH 91 and the views of Lord Brodie therein was wrong. I agree with the sheriff's approach at paragraphs [46] and [47] in her note. At paragraph [47] the sheriff adopted what Lord Brodie had to say in the *Zurich* case. Looking to the arguments in the present action, I can find no justification for reaching a different conclusion. Contrary to the submission for the pursuer at paragraph 4.4 in Mr Mackenzie's written submissions, the onus does not lie with the defender. The onus remains with the pursuer.

[20] On appeal, in seeking to support the relevancy of the pursuer's averments, Mr Mackenzie appeared to draw comfort from the five point formula set out by Lord Macfadyen in the case of *Wright* v *Cotias Investments Inc* 2001 SLT 353. Points (i) to (iv) are of general application whilst point (v) is more fact specific. However, it seemed to me that Mr Mackenzie's reliance upon the case of *Wright* was somewhat superficial.

[21] For the reasons given by the sheriff, the pursuer's averments, when subjected to proper scrutiny in the context of the factual matrix relied on by the pursuer, are deficient in regard to the defender's state of

knowledge at the time when the representations founded upon were said to have been made. Similarly, as I have already indicated, no cohesive correlation between any representation and the alleged inducement to enter into the compromise agreement is relevantly pleaded. Accordingly, points (iii) and (iv) at paragraph [38] in *Wright* have not been met.

[22] More recently, in the case of *Grant Estates Ltd (in liquidation)* v The Royal Bank of Scotland plc & Others [2012] CSOH 133, Lord Hodge at paragraph [88] noted "…the well-known authorities on the need for clear and specific averments of fraud". These included the case of *Wright* in addition to an earlier decision by Lord Macfadyen, viz. *The Royal Bank of Scotland plc* v *Holmes* 1999 SLT 563. Lord Hodge (in *Grant Estates*) referred to the need for clear and specific averments on three matters namely:

(i) The act or representation founded upon,

(ii) The occasion on which the act was committed or the representation made, and

(iii) The circumstances relied on as yielding the inference that that act or representation was fraudulent.

[23] In my opinion, the relevancy of the pursuer's averments in the present action is sufficiently exposed to merit dismissal of the action when it comes to the basic circumstances relied on as yielding the inference that any representation or representations made by the defender was/were fraudulent. The clear and specific basis for the inference of dishonesty (desiderated by Lord Hodge at paragraph [89] in *Grant Estates*) does not exist.

Loss and damage

[24] The sheriff also concluded that the pursuer had failed to plead a relevant and specific case in relation to his alleged loss and damage. (See paragraph [54] in the sheriff's note). In my view, the pursuer's position on record does fail to acknowledge the true character of the losses which he seeks to establish.

[25] As I understood Mr Mackenzie's submissions, at no point did he properly confront the proposition that the losses pleaded are, essentially, speculative in nature. Before the sheriff, the two heads of claims were characterised as "loss of opportunity claims". (See paragraph [48] in the sheriff's note). On the pursuer's analysis, he offers to prove that, were it not for the fraudulent misrepresentations, he *would* have been entitled to the sums claimed. That is said to be sufficient for the purposes of relevancy.

[26] The sheriff did not agree. In truth, what the pursuer offers to prove, is that the fraud induced him to accept the compromise proposal and that by granting the discharge condescended upon, he was, thereby, precluded from pursuing claims for the sums mentioned in article 8 of condescendence. For instance, being deprived of an entitlement to attempt to enforce implementation of the alleged shareholders' obligation to re-purchase the pursuer's shares at a price of £300,000, does not equate to an actual and direct loss of that sum.

[27] What might be characterised as a fundamental difficulty exists *quoad* causation. I have also drawn attention to the pursuer's averment that the compromise proposal was said to be "in full and final settlement of *the matter*" and to the difficulty created by the pursuer's failure to specify why the compromise he, in fact, entered into was significantly wider in scope. Ms Gillies' submission focused upon the pursuer's averments in article 8 regarding an entitlement "to payment of £106,000 from John Dickie Homes Ltd in relation to his loss of employment and loss of office". In circumstances where it is beyond dispute that receivers were ultimately appointed to the company the pursuer, in my view, requires to provide cogent specification as to why the claim for loss of employment etc is a relevant claim in the context of this action. With the appointment of receivers, the pursuer was likely to be made redundant in any event. (See paragraph [16] *supra*).

[28] However, that apart, I would not, on balance, have been prepared to allow, firstly, the pursuer's claim (as pleaded) for loss of the opportunity to insist that the alleged agreement be implemented to go to enquiry. Quantification of that claim would be far from straightforward. Much, of course, would depend upon the merits or otherwise of the pursuer's contentions regarding the existence of the undertaking, but, in any event, I agree with the views expressed and conclusions reached by the sheriff at paragraphs [49] and [50] in her note. The second sentence in article 8 does not constitute a relevant averment of the head of loss which the pursuer seeks to recover, nor does it afford the defender proper notice regarding the claim he is expected to meet.

[29] I also agree with the sheriff's approach to the averments concerning damages for loss of office and employment all as set out at paragraph [52] in her note. Once again, the mere mention of heads of loss coupled with monetary figures, in the particular circumstances of this case, does not equate to the pleading of actual and direct losses. In line with the submissions advanced on behalf of the defender, it is, in my view, incumbent upon the pursuer to specify the precise basis for his entitlement to the sums claimed, particularly where receivers were ultimately appointed in respect of the company or companies in question. Furthermore, it seems to me that the claim for interest charges is not directly referable to the alleged misrepresentations nor is it, in any event, the subject of proper specification.

[30] All of the foregoing is sufficient to dispose of the appeal. It only remains for me to express a view upon the sheriff's decision to grant the defender's motion for summary decree. Having considered the submissions on both sides of the bar and having reflected upon the terms of the sheriff's note from paragraph [55] onwards, I have reached the conclusion that no proper basis exists such as would entitle me to interfere with her decision. It is plain that the sheriff addressed the correct test and that the manner in which she dealt with the material placed before her in terms of the competing arguments for and against summary decree being granted was beyond criticism. Therefore, I also reject this aspect of the pursuer's appeal.

[31] I have, in the event, adhered to the sheriff's interlocutor dated 20 November 2014. It follows that the pursuer should be liable to the defender in the expenses occasioned by the appeal.