SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

B1599/12

2015SCGLA40

JUDGMENT
of
SHERIFF PRINCIPAL C A L SCOTT, QC
in the cause
David Maguire

Respondent

against

5 pm Ltd & 6 Others

Appellants

Glasgow, 20 May 2015.

The sheriff principal, having resumed consideration of the appeal, adheres to the sheriff's interlocutor dated 31 July 2014 and refuses the appeal; certifies the appeal as suitable for the employment of junior counsel; finds the appellants Charles Shaw and Ronald Whitelaw Somerville liable to the respondent 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:-

Introduction

[1] In the context of interdict proceedings, the sheriff was called upon to deal with a dispute arising from a settlement agreement. The matter came before the sheriff by way of minute and answers procedure. The agreement was entered into between the respondent in this appeal, David Maguire and the appellants, Charles Shaw and Ronald Whitelaw Somerville. (For ease of reference in this note, I shall refer to the respondent as "DM" and to the appellants as "S & S").

[2] As the sheriff narrated in his own introduction, it was a term of the settlement that DM bound himself to sell his shareholding in the company 5 pm Ltd to S & S at a valuation price to be determined by an expert engaged for that purpose. Sally Longworth of Grant Thornton UK LLP (hereinafter referred to as "GT") was the chosen expert. Inter alia her letter of engagement provided that:

> "During the course of the engagement we may show drafts of our report(s) to you. In any event, prior to our final determination, we will exhibit to parties a final draft. This is done on the basis that they (sic.) are subject to revision and alteration and no reliance should be placed on any draft document without our prior written consent. You will bring to our attention any issue in the draft report(s) that you wish to have clarified prior to the report(s)

being finalised. A document remains 'draft' for these purposes until it has been manually signed by a Grant Thornton UK LLP partner."

[3] On 16 July 2013, Sally Longworth produced a report in which she determined the valuation price of DM's shareholding to be £266,875.00 (the first valuation). DM objected to that report on the grounds that it had not been issued in the first instance as a final draft. He gave notice that he considered the expert to have been in material breach of the terms of the letter of engagement and that he was rescinding the contract.

[4] On 9 August 2013, the expert directed the parties to treat her original report as a draft and invited comments. On 22 August 2013 (the second valuation), the expert wrote to the parties informing them that her determination remained as stated in her report of 16 July 2013.

[5] Whilst certain of the submissions in the appeal advanced on behalf of S & S, varied significantly from those argued at first instance, the summary by the sheriff at the end of paragraph [4] in his note as to the issue for the court to determine, broadly speaking, remains correct, viz. "Essentially the issue is whether either of the valuations has any validity and is binding upon the applicant such as to require him to implement his obligations under the settlement agreement." (The "applicant" being DM).

[6] The sheriff concluded that the first GT valuation was neither valid nor binding and that prior to the issue of the second valuation DM had validly rescinded the contract created by the letter of engagement. He sustained DM's first plea in law to the effect that the averments in the minute brought by S & S were irrelevant *et separatim* lacking in specification and that, accordingly, the minute fell to be dismissed.

[7] The change in approach adopted by senior counsel for S & S on appeal did not affect his client's overall contention that the sheriff's decision was wrong as a matter of law.

Submissions for Messrs Shaw & Somerville

[8] Senior counsel utilised the note of appeal to provide some structure for his oral submissions. The arguments for S & S embraced four propositions. Paragraph 8.1.1 in the note of appeal recorded the first proposition, viz. "…if a valuation is invalid on an application of the valuation test (see paragraph [11] *infra*) and so is set aside by the court, the consequential remedy which it is generally appropriate for the court to grant is to remit to the valuer to carry out a fresh valuation which does comply with the instructions."

[9] I was informed by senior counsel that it was common ground that S & S' first proposition was the most important when it came to the issues in hand. Senior counsel also accepted that these four propositions were not advanced before the sheriff. However, they were, he submitted, propositions of law which did not depend upon the making of further averments.

[10] In summarising S & S' first proposition, senior counsel maintained that a material failure by an expert valuer in following instructions was <u>not</u> a material breach of contract such as would entitle one of the parties instructing the valuer to terminate the contract. It was also suggested that the contrary proposition underpinned the approach to be adopted on behalf of DM and was the proposition which ultimately found favour with the sheriff.

[11] It was submitted that where there had been a material failure by a valuer, the correct remedy was a remit back to the valuer unless (a) that was inappropriate or (b) the valuation machinery had broken down. In the circumstances of this case, it was contended on behalf of S & S that the purported termination by DM was invalid and that the second GT valuation was valid. Senior counsel referred to the validity test set out in the case of *Veba Oil Supply & Trading GmbH* (2011) EWCA civ. 1832. That was whether a valuer had failed

in a "material "respect to comply with the instruction for the valuation. Senior counsel highlighted the fact that the sheriff's finding that the first valuation was invalid was accepted by S & S and that for the reasons set out in paragraph [37] of the sheriff's note. It was also accepted that the sheriff had applied the correct test when it came to assessing the validity of a valuation. (That test being the validity test derived from the *Veba* case *supra*).

[12] Under reference to paragraph 8.3 in the note of appeal, senior counsel saw merit in expressing the first proposition in the negative ie "where a valuation is set aside by the court, the valuer's failures are not to be treated in law as a material breach of contract, which gives one of the parties seeking the valuation the right to terminate the contract."

[13] Senior counsel maintained that there was a danger in "getting confused" over the use of the word "material". It was, he submitted, crucial to an understanding of the issue in hand to acknowledge that failure in a material respect did not translate to material breach of contract.

[14] Senior counsel contended that the first proposition for S & S, in effect, amounted to a term which fell to be implied as a matter of law into any valuation contract. Beyond the second sentence in paragraph 8.4.1 of the note of appeal, which reads:

> "The term is a secondary term of the contract, which precludes the general rules which would otherwise apply on a material breach of that contract.",

the implied term line of argument seemed to be unsupported by authority or by any other form of justification.

[15] However, a discrete categorisation of senior counsel's core first proposition involved him, in turn, in submitting that the rules on breach themselves restricted the right to terminate for a remediable breach. In that regard, he referred to McBryde on the *Law of Contract*, 3rd Edn, at paragraphs 20.103 and 20.122 to 20.127.

[16] Senior counsel also relied upon the cases of *Lindley Catering Investments Ltd* v *Hibernian Football Club Ltd* 1975 SLT (Notes) 56 and *Charisma Properties Ltd* v *Grayling (1994) Ltd* 1996 SC 556. He argued that a valuer had an opportunity to remedy a failure to comply with instructions before the general rules on breach would apply. (See note of appeal paragraph 8.4.2).

[17] A passage from Kendall on *Expert Determination* (4th Edn) at 14.18.3 was also founded on in support of S & S' first proposition. The statement that "The usual consequence of a material departure from instructions is that the expert must come to a new decision in accordance with the instructions, as clarified by the court, and it is not usually appropriate for the court to fill the gap by ordering an inquiry.", was praised for its clarity. Senior counsel submitted that it required to be read in conjunction with the validity test and that given such a strict test it was reasonable that the law would normally provide for a remit back to the valuer in order to remedy the situation.

[18] Various authorities were cited by senior counsel in support of his argument, viz. *John Barker Construction Ltd* v *London Portman Hotel Ltd* (1996) 83 BLR 31 at 62H to 64C; *Sudbrook Trading Estate Ltd* v *Eggleton* (1983) 1 AC 444 at 484B-C; *Macro* v *Thompson* (1997) 2 BCLC 36 at 69; *Barclays Bank plc* v *Nylon Capital LLP* (2011, Vol 2) LLR 347 at paragraph 71; *Ackerman* v *Ackerman* [2011] EWHC 3428 (Ch) at paragraph 390 *et seq*; *Jones* v *Jones* (1971) WLR 840; *Dean* v *Prince* (1953) Ch 590 at 600; and *Campbell* v *Edwards* (1976) 1 WLR 403 at 407A-B. Senior counsel submitted that when these authorities were analysed

in the round, they all served to throw up a pattern which senior counsel claimed to be supportive of his client's first proposition.

[19] Finally, the first proposition was hailed as producing a sensible result in policy terms. It was reflective of practical common sense, argued senior counsel who reminded the court of the decision in the *Macro* case. He asserted that the *de quo* was whether a right to terminate had arisen in the first place. For the avoidance of doubt, senior counsel made it clear that he did not accept that there was no dispute that the valuer in the present case was in material breach. However, he did accept that the valuer failed to follow instructions in a material respect.

[20] Senior counsel conceded that the second proposition for S & S, in practice, added little to the first proposition. It appeared at paragraph 10 within the note of appeal and was in the following terms:

> "10.1 The second proposition is that the contract for a valuation comprises a joint instruction between the parties seeking the valuation, on the one hand, and the valuer, on the other. Any rights which the party seeking the valuation may have under the contract have to be exercised by them jointly (for example, *Gloag on Contract* (2nd Ed) 203).
>
> 10.2 For completeness, the second proposition would apply, even if termination were an available remedy for a valuer's failure to comply with his instructions."

[21] Senior counsel for S & S also adhered to what was characterised in the note of appeal as being their third proposition, viz. to the effect that where a valuation is invalid on an application of the validity test, the valuer retains the power to issue a fresh, corrected valuation which does comply with instructions. The invalidity of the valuation does not render the valuer *functus*. The lack of authority for the third proposition was conceded. It was, submitted senior counsel, in substance, a corollary of the first proposition. The third proposition was, however, said to be a simple application of common sense to a valuation contract. There was no justification for incurring inconvenience and expense by way of a court order setting aside the valuation.

[22] Once again, senior counsel's fourth proposition was not vouched by any authority. It was to the effect that the validity test emerging from the *Veba* case applied equally to a corrected valuation issued by the valuer in accordance with S & S' third proposition. This fourth proposition was recorded at paragraph 12 in the note of appeal.

Submissions for David Maguire

[23] In advance of the first diet of the appeal hearing, counsel for DM had prepared a written Note of Submissions extending to 30 pages. At the request of the court, an abbreviated note was produced for the purpose of the second diet. Both notes are appended hereto.

[24] Counsel stressed the nature of the contract involved. DM, S & S and GT had entered into a tripartite contract for the valuation of DM's shares in the company. That situation was to be contrasted with circumstances wherein an aggrieved party had no contract with an expert or valuer. Counsel warned the court against making generalisations based upon authorities where there was no contract between an aggrieved party and the expert valuer in question. He contended that most of those cases cited by senior counsel for S & S involved no such contract.

[25] The basic circumstances of the present case were re-visited by counsel. The parties had agreed that the first valuation was invalid. GT's instructions had been to issue a draft valuation for comment *before*

issuing their final, binding valuation, but they had failed to do that. They had proceeded to issue a purported final valuation which was, therefore, a material departure from their instructions.

[26] Counsel challenged the first (main) proposition founded upon by S & S which he characterised as being, where a valuation is invalid, "…*the consequential remedy which it is generally appropriate for the court to grant is to remit to the valuer to carry out a fresh valuation*".

[27] He claimed that the proposition had been articulated in three ways:

(i) as an implied term incidental to expert determination contracts generally;
(ii) as an application of a general rule that a remediable breach does not occasion a right to rescind unless there has first been an unused opportunity to remedy matters; or
(iii) as an application of a rule in those terms, which at least applies to valuation contracts.

[28] Counsel for DM maintained that there was no authority for an implied term as an incident of expert determination or valuation contracts where either "generally" or absent unfairness it would be "appropriate" for there to be no right to rescind but instead for the expert/valuer to continue with the task in hand.

[29] In the wider sense, counsel argued that S & S had no authority for any proposition to the effect that the test as to whether a party to a tripartite valuation contract could rescind in the face of material breach was any different from the general approach adopted in any contractual context.

[30] The more detailed note of argument was prayed in aid, particularly at paragraphs 19 to 39. Counsel contended that the general rules applicable to material breach of contract must apply in the circumstances of the present case. There was no speciality attaching to expert determination or valuation contracts and none of the authorities cited by S & S came close to establishing that.

[31] It was submitted that S & S were confined to arguing that GT were not in material breach of contract by failing to issue a draft report in accordance with their instructions. Counsel for DM observed that to assert that a breach was remediable, was simply another way of saying that material breach of contract had not (or had not yet) occurred.

[32] Of course, counsel also noted that the sheriff, in his detailed note, had not devoted much consideration or discussion as to whether the (undisputed) material departure from instructions equated to a material breach of contract. At first instance, S & S had presented no detailed argument about that.

[33] The authorities relied upon by S & S were analysed by counsel for DM. The value of the passage taken from John Kendall's work on *Expert Determination* (at para 4.18.3) was seriously questioned. Counsel submitted that the passage amounted to no more than a description of what tends to happen in practice. It was, perhaps, no coincidence that the first proposition for S & S was very similar in its terms to the passage from Kendall.

[34] In any event, counsel submitted that there was a paucity of cases relating to tripartite contractual situations involving rescission of expert determination or valuation contracts. In the cases of *John Barker*, *Sudbrook*, *Macro*, *Nylon Capital*, *Jones* and *Dean*, counsel maintained that there was no contract between the expert involved and the aggrieved party with the result that the issue in the present appeal simply did not arise. With regard to the issue of being remitted back to the expert to try again, at best for S & S, the authorities cited were far from conclusive but, for instance, in the *Ackerman* case, the matter went back

because the challenge had concerned an interim or provisional decision which was only part of a longer process before the individual appointed by the parties.

[35] The decision at first instance in *Ackerman* required to be treated with care because Vos J had applied a validity test of his own devising. Moreover, Vos J's judgment that the material departure from instructions had not justified rescission required to be read in context. The breaches at an interim stage of the determination were held not to be so fundamental as to deprive one of the parties of his bargain or to amount to a repudiation of the agreement. In contrast, counsel reminded the court that the present case involved the expert purportedly issuing a final decision when that was contractually premature.

[36] Returning to the theme of material breach, counsel criticised S & S' attempt to distinguish "material departure" from "material breach" as being scholastic. The word "material" did not, he submitted, have a multitude of meanings. Trivial matters aside, counsel argued that a departure from a contract term amounted to a breach. In the present context, "breach" and "departure" were synonyms. If when described by way of one of two synonyms it were regarded as material, then it remained material when described by reference to the other synonym.

[37] Before the sheriff, parties were agreed that he might proceed upon the undisputed correspondence as well as the pleadings in the case. The sheriff had done so and he had concluded that the circumstances justified rescission. Counsel sought to develop the observation that, before the sheriff, S & S had made no attempt to differentiate between a "departure" (from instructions) and a "breach" therefrom. Counsel argued that the sheriff's conclusion to the effect that the breach was material was a factual conclusion derived from the primary facts of the correspondence on the footing that materiality was a question of fact. The sheriff having reached that factual conclusion on the basis of the admitted primary facts, no error of law had been identified as being appropriate to disturb the factual finding.

[38] With all that in mind, counsel for DM contended that materiality was not, therefore, at large in the appeal. However, even if it were, he submitted that the sheriff's decision could be completely justified. There was no general rule that a right to rescind could not be exercised without the contract-breaker having a chance to put matters right. If "remediability" were relevant, it was simply one aspect which was worthy of consideration when determining the materiality of a breach. The issue in the present case fell to be determined on the application of ordinary principles flowing from the established law relating to contracts. Counsel suggested that the high point of the argument for S & S was that in the cases of *Lindley* and *Charisma* remarks were made to the effect that, absent a reasonable opportunity to cure matters, a breach was not a material breach of contract should it be remediable. However, counsel pointed out that those cases did not explore in greater detail what the term "remediable" amounted to and that its characterisation must, instead, turn on the particular facts and circumstances of each case.

[39] The present case was far removed from consideration of a contractual right to an adequate supply of warm pies at a football match (*Lindley*) or a contractual right to punctual payment (*Charisma*). Assessment of "remediability" required to go hand in hand with assessment of the importance and effect of a breach in the context of what the innocent party was entitled to expect. Counsel submitted that GT's breach was material and not curable because of the cumulative effect of six considerations all of which were more fully specified at paragraph 42 within his abbreviated note of submissions. These considerations might be summarised as follows:

(i) GT's failure touched the root and essence of the contract.
(ii) GT had an overriding responsibility to justify parties' confidence in their ability to perform their instructions correctly.
(ii) Adherence to the agreed procedure was clearly material.

(iv) For a material breach of contract to exist the material departure from instructions did not require to affect the outcome.
(v) Final means final and retraction was ruled out.
(vi) GT's reaction when their breach was pointed out involved them getting on the wrong side of an argument with one of the parties they were meant to be serving.

Decision

[40] It will be seen that the argument presented on behalf of S & S in the appeal was markedly different from that presented before the sheriff. For instance, the position adopted on behalf of S & S at first instance was that the departure from instructions via the first valuation was *immaterial*. That, of course, was in absolute conflict with senior counsel's argument on appeal, viz. that a *material* failure by the valuer did not equate to material breach of contract.

[41] It is also apparent from the sheriff's note that much of the submissions presented to the sheriff on behalf of S & S were taken up with contentions in favour of the allowance of proof, *inter alia*, to determine whether or not the departure from instructions was trivial. (See, for example, paragraphs [14] and [15] on page 9). It had been submitted to the sheriff that "…materiality was always a question of fact". (See paragraph [24] on page 12 of the note).

[42] In any event, the sheriff concluded that the omission of the draft stage could not be characterised as trivial in the sense that it "would obviously have made no difference". That meant that the expert had departed from her instructions in a material way and that, accordingly, the applicant was not bound by the first valuation. (See paragraph [37] on page 16 of the sheriff's note).

[43] Of course, the foregoing conclusion was not challenged on appeal. However, all that brings into focus counsel for DM's submission that, in effect, the court should decline to proceed on the basis of an argument (for S & S) that:

(i) was not presented to the sheriff;
(ii) effectively amounted to a re-hearing of the debate (at first instance) as opposed to a proper appeal; and
(iii) did not involve any error of law, the sheriff having disposed of the issue of materiality (as presented to him) by reaching a conclusion on the basis of admitted facts, all in line with the submission then advanced on behalf of S & S.

I consider that there is merit in the foregoing submission by counsel for DM and would refuse the appeal for those reasons.

[44] However, were that approach to be regarded as incorrect I have, nevertheless, carefully reflected upon senior counsel's submissions in support of the appeal. It has to be said that the articulation of the argument for S & S in terms of four supposedly discrete propositions did not enhance the clarity of senior counsel's approach. Propositions 2 – 4 were, to my mind, difficult to understand and were, if anything, to be afforded only the role of "make-weight" when it came to the first and, in my view, core proposition for S & S. That is set out at paragraph 8.1.1 in the note of appeal which, incidentally, takes the form of written submissions rather than a note of appeal under OCR 31.4(3).

[45] At the heart of senior counsel's argument lay the attempt to distinguish "failure in a material respect" from "material breach of contract". That argument for S & S carries with it the contention that, when it comes to a breach, valuation contracts require to be treated differently from all others. One might have expected such an innovation upon the law of contract to be vouched by clear and cogent authority.

[46] Unfortunately, the cases cited by senior counsel in support of his client's core proposition, at best, left this court in a state of ambivalence towards the argument. Senior counsel seemed to hold up the case of *Ackerman* as carrying his client's argument "over the line" but I regret to say that, for the reasons alluded to by counsel for DM, I did not see it that way.

[47] The authorities cited provided no proper focus such as might give rise to any general principle or rule of law equating to S & S' core proposition at 8.1.1. Indeed, many of these cases fell to be distinguished on their own facts and circumstances. I agree with the submission of counsel for DM to the effect that the cases of *John Barker*, *Sudbrook*, *Macro*, *Nylon Capital*, *Jones* and *Dean* were not in point since no contract existed between the expert involved and any aggrieved party. The John Barker case involved certification by an architect in the context of a standard form building contract; in *Sudbrook* the dispute concerned the actual appointment of a valuer; *Macro* concerned what amounted to a fair value of shares fixed by auditors in the context of companies' articles; the *Nylon Capital* case related to an LLP agreement containing an expert determination clause; the issues in *Jones* flowed from an order of court; and the case of *Dean*, once again, concerned provision within the articles of a company regarding valuation of shares by an auditor.

[48] In any event, towards the end of the appeal hearing, I rather gained the impression that senior counsel's enthusiasm for reliance upon these authorities had somewhat diminished. Moreover, I am not inclined to the view that the passage extracted from Kendall at paragraph 14.18.3 properly serves to underpin senior counsel's argument. Whatever the "usual consequence" of a material departure from instructions I am not persuaded that the first sentence in paragraph 14.18.3 truly assists with or meets the issues in the present appeal.

[49] To my mind, senior counsel's own submissions tended to counter his overall argument. He submitted that where there had been a material failure by a valuer, the correct remedy was a remit back to the valuer unless that was inappropriate. Having regard to the manner in which GT handled matters following upon the issue of the first valuation, I simply do not see how it could be appropriate to go back to them with the request that they issue a valuation of new. In the context of whether, all things being equal, Sally Longworth would have had the jurisdiction to carry on and complete the task, the sheriff concluded that "all things were most certainly not equal". I have no hesitation in agreeing with that assessment. Even if it were correct to assert that the law would normally provide for a remit back to the valuer in order to remedy the situation, it seems to me that, in the circumstances of this case, the situation was far beyond being remedied.

[50] In my opinion, in so far as, absent authority, senior counsel for S & S relied upon "practical common sense" to support his argument (see paragraph [19] *supra*) I disagree. In my estimation, it would not and could not be sensible, on the facts and circumstances thrown up by this case, to allow the responsibility for a valuation to be remitted back to GT in light of what followed in the aftermath of the invalid, first valuation.

[51] Senior counsel asserted that the *de quo* of the argument was whether a right to terminate had arisen in the first place. In line with counsel for DM's submission, I have concluded that the attempt to distinguish "failure to follow instructions in a material respect" from "material breach of contract" was, indeed, nothing more than scholastic. I agree that, trivial matters aside, a departure from any contract term must amount to a breach. There is no distinguishable sub-category involving "failures in a material respect". Therefore, I entirely reject the argument presented for S & S on appeal.

[52] It follows that the sheriff's interlocutor dated 31 July 2014 stands. The minute for S & S will be dismissed. I agree with the sheriff's conclusion that, where the first valuation was invalid, and where prior to the issue of the second valuation DM had validly rescinded the contract, it followed that DM's first plea

in law required to be sustained. I have certified the appeal as suitable for the employment of junior counsel and found the appellants Charles Shaw and Ronald Whitelaw Somerville liable to David Maguire in the expenses of the appeal.