[2017] SAC (Civ) 15
FTW-A7-14

Sheriff Principal D L Murray
Sheriff Principal C D Turnbull
Sheriff A L MacFadyen

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal by

ARJO WIGGINS LIMITED

in the cause

BRITISH WATERWAYS BOARD trading as SCOTTISH CANALS

Pursuer

against

ARJO WIGGINS LIMITED

Defender and Appellant

and

BSW TIMBER LIMITED

Third Party and Respondent

Pursuer: No appearance
Defender & Appellant: Lindsay QC, DLA Piper Scotland LLP
Third Party & Respondent: R.G.Anderson, advocate, DWF LLP

5 April 2017

[1] The pursuer is the heritable proprietor of the Caledonian Canal. By Minute of Agreement dated 31 January and 29 February 1968 (hereinafter referred to as "the Wayleave

Agreement"), the pursuer granted a wayleave in favour of Wiggins Teape & Co Limited which permitted the laying of a water main and attendant cables beneath the canal at Corpach, Fort William. The interest of Wiggins Teape & Co Limited in the Wayleave Agreement was assigned to the appellant (who were then known as Wiggins Teape (UK) plc) in 1982.

[2] The Wayleave Agreement subsists until 31 December 2099. The consideration payable was initially £140 per annum. That figure was subject to review in line with the Index of Retail Prices appearing in the Central Statistical Offices Monthly Digest of Statistics. By 2011 the annual consideration had risen to £6,071.40.

[3] By letters dated 22 and 23 March 2006 the appellant and the respondent entered in to missives of sale in respect of subjects at Corpach, Fort William ("the Missives"). In terms of the Missives, the appellant was obliged to deliver a validly executed assignation of *inter alia* the Wayleave Agreement in favour of the respondent. The Missives contained a form of draft assignation. An executed assignation ("the Assignation"), in the agreed terms, was delivered by the appellant to the respondent on or around 4 April 2006.

[4] The present proceedings emanate from the failure to pay the annual consideration due in October 2011, 2012 and 2013, a total sum of £18,215.42. The crux of the dispute is whether it is the appellant or the respondent who are liable to pay the annual consideration. Whilst the sum at stake in this action is not particularly significant, the Wayleave Agreement has in excess of 82 years still to run.

[5] Following a debate, the sheriff at Fort William (a) purportedly of consent, repelled the third and fourth pleas-in-law for the respondent; (b) sustained the first plea-in-law for the respondent to the extent of excluding from probation six passages of the appellant's

averments directed against the respondent; and (c) repelled the appellant's first, second and third pleas-in-law.

[6] In the appeal before us the appellant was represented by Mr Lindsay QC and the respondent by Mr Anderson, advocate. There was no appearance on behalf of the pursuer. The parties to the appeal were agreed (a) that the respondent's third and fourth pleas-in-law ought not to have been repelled; (b) that the appellant's averments *anent* Clause Thirteenth of the Wayleave Agreement permitting the appellant to assign their obligations under the Wayleave Agreement without the pursuer's consent had been properly excluded from probation; and (c) that the appellant's third plea-in-law ought not to have been repelled (and the appellant's relative averments in relation to personal bar ought not to have been excluded from probation).

[7] The appellant submitted that the overarching error made by the sheriff was to fail to distinguish between the grounds of defence and the grounds upon which the appellant seeks to exercise a right of relief against the respondent.

[8] Before the sheriff, the defence to the pursuer's claim was in two parts. As noted above (see paragraph [6]), it is now conceded that the defence which turned upon the terms of Clause Thirteenth of the Wayleave Agreement was correctly excluded from probation. Accordingly, we need only consider that part of the defence which asserts that the pursuer impliedly consented to the assignation to the respondent of the appellant's obligations under the Wayleave Agreement.

[9] The appellant's case in this respect is based upon the pursuer accepting payment from the respondent and rendering invoices directly to the respondent. It is averred by the appellant that the pursuer's acceptance of payments from and issuing of invoices to the respondent amounted to consent to the Assignation. The appellant submitted that this is a

classic proof before answer point. It is one that the court would require to hear evidence in relation to. Outwith an admission by the pursuer that the respondent had made payments to them, of sums equivalent to those due under the Wayleave Agreement, from 1 October 2006 to 30 September 2011, the pursuer has not engaged with these averments. The appellant argued that the reason why the pursuer had issued invoices to the respondent was central. If one applied the test in *Jamieson* v *Jamieson* 1952 SC (HL) 44, this aspect of the defence could not be said to be irrelevant. It would not necessarily fail. The appellant contended that the sheriff had erred in excluding this part of their case from probation.

[10] The respondent argued that the intention the appellant sought to infer was inconsistent with the express terms of the invoices. Certain invoices are lodged in process and referred to in to the respondent's pleadings. The wording upon which this aspect of the respondent's argument relied is to be found in their answer 2. It does not form part of the appellant's pleadings. Whilst the respondent conceded that an invoice for one year's dues under the Wayleave Agreement was made out to and paid by them, in circumstances where there are no averments that the pursuer was aware of either the Missives or the Assignation, that was not enough to impute implied consent.

[11] We prefer the submissions of the appellant in this matter.

[12] There is no dispute between the parties as to the applicable law in relation to assignation. That is conveniently set out in the opinion of Lord Hodge in *Sim v Howat* [2011] CSOH 115 at paragraph [33]:-

> "A cannot transfer his obligations to B without the consent of the creditor, D. One can assign certain rights without the consent of the debtor; but one cannot transfer obligations without the creditor's consent. Otherwise one could rid oneself of very onerous obligations by transferring them to a man of straw… "

[13] For there to be a relevant case in relation to the transfer from the appellant to the respondent of the obligation to pay the sums due under the Wayleave Agreement, the consent of the pursuer must be averred. There is no dispute that the respondent made payments to the pursuers for a number of years. There appears to be no dispute that certain invoices were made out to the respondent. We are satisfied that the appellant's averments which are said to be eloquent of consent on the part of the pursuer are relevant and suitable for inquiry. As observed by Lord Watson in *Lord Elphinstone v The Monkland Iron and Coal Company Limited* (1886) 13 R 98 at 102, albeit in the context of a lease,

> "That a landlord has by implication consented to receive an assignee, or has so acted as to bar himself from alleging that he has not consented, must, in my opinion, be a matter of inference from the whole circumstances of the case."

That *dictum* applies equally to a case of the present type. It will be a matter for the sheriff, having heard evidence on the whole circumstances, including those relative to the payments made and the invoices rendered to determine if the pursuer's consent can be inferred. At this stage, it cannot be said that this aspect of the appellant's defence would necessarily fail.

[14] Turning to the rights of relief pled by the appellant against the respondent, these are predicated upon there having been no effective transfer from the appellant to the respondent and, thus, the obligation to pay the sums due under the Wayleave Agreement remains with the appellant.

[15] Again, this part of the appellant's case is in two parts. Firstly, the appellant contends that they have a contractual right of relief by way of the Missives and, subsequently, the Assignation. Secondly, *esto* the appellant has no such contractual right, the respondent is personally barred from saying that there is no right of relief. In light of the parties agreement that the appellant's third plea-in-law ought not to have been repelled (and that

the appellant's relative averments in relation to personal bar ought not to have been excluded from probation) we need only address the first part.

[16] The contractual right of relief relied upon by the appellant is said to be found in the Missives, the terms of which were given effect to by the Assignation. Both the terms of the Missives and the terms of the Assignation form part of the appellant's pleadings.

[17] Albeit, save for one provision which is not relevant for present purposes, the Missives have ceased to be binding or have any effect, it is accepted that regard can be had to their terms, as an aid to interpretation - see *@SIIP Pensions Trustees* v *Insight Travel Services Ltd* 2016 SLT 131 at 136 I – K.

[18] The relevant provisions of the Missives are as follows:-

> **1. DEFINITIONS AND INTERPRETATION**
>
> 1.1 In this offer:
>
> "**Assignation**" means an assignation of the Seller's rights under the Wayleave Agreements in terms of the draft assignation forming part 2 of the Schedule;
>
> "**Completion Date**" means the date 14 days after the date of conclusion of the Missives;
>
> "**Date of Settlement**" means the date on which the transaction contemplated by the Missives actually settles, whether that is the Completion Date or some other date;
>
> "**Wayleave Agreements**" means (*inter alia*) … (5) Minute of Agreement between British Waterways Board and the Seller dated 31 January and 29 February 1968;
>
> "**Wayleave Granters**" means those parties being in right of the granter's interest in the Wayleave Agreements.
>
> **4. SETTLEMENT**
>
> 4.1 **Seller's obligations**
>
> On the Completion Date and in exchange for the Price together with any

value added tax payable thereon the Seller shall:

….

4.1.8 deliver the validly executed Assignation;

10. WAYLEAVE AGREEMENTS

In relation to the Wayleave Agreements:

10.1 The Purchaser (*sic*) warrants that the Wayleave Agreements comprise the whole relevant documentation regulating the supply of water to the Subjects and that the Wayleave Agreement has not been and will not prior to the Date of Settlement have been the subject of any amendment or alteration or variation formal or informal between the Seller and the Wayleave Granters or any of them.

10.2 The Seller warrants that neither they nor the Wayleave Granters are in breach of any of their obligations under the Wayleave Agreements, no claims against the Seller or the Wayleave Granters are outstanding and the Seller shall relieve the Purchaser of any such claims against the Seller under the Wayleave Agreement arising prior to the Date of Settlement, the Seller will continue to comply with its obligations under the Wayleave Agreement until the Date of Settlement;

10.3 The Seller warrants there are no outstanding disputes or differences between the Seller and

10.3.1 any of the Wayleave Granters; or

10.3.2 any neighbouring proprietor, occupier or other third party whether referable to the Wayleave Agreement or otherwise.

10.4 The Seller warrants that the Seller has neither received nor served any notices terminating the Wayleave Agreements.

17. SUPERSESSION

Save in relation to Clause 11 (which shall remain in full force and effect until payment of the Overage Payment) the provisions of the Missives shall cease to be binding or have any effect upon the expiry of the period of two years after the Date of Settlement except in so far as they are founded on in any court proceedings which have commenced within the said period and except provisions regarding

> delivery of clear searches, recorded titles and/or Land Certificates which provisions shall remain in full force and effect until final determination or full implementation.

[19] The terms of the draft assignation are to be found at part 2 of the Schedule to the Missives. The appellant relies on two particular parts of the Assignation. Firstly, that part whereby the appellant assigns to the respondent:-

> "… the (appellant's) interest under the (various agreements referred to, including the Wayleave Agreement)".

Secondly that part whereby

> "…the (appellant) binds itself to free and relieve the (respondent) of and from all pecuniary and other obligations of the (appellant) under the Agreement referable to the period prior to the Date of Entry".

The term Date of Entry is defined in the executed assignation as 6 April 2006.

[20] The appellant contends that the word "interest" (in the first part) is habile to include obligations as well as rights. The appellant contends that the inevitable conclusion one draws from the wording of the second part is that the respondent became liable for the obligations specified from the Date of Entry onwards. That is what was agreed in terms of the Missives. This is all to be interpreted against a backdrop of the appellant conveying to the respondent the land to which the Wayleave Agreement relates.

[20] The respondent contends that the sheriff was correct to determine that the word "interest" in the Assignation was synonymous with "benefit". The Wayleave Agreement (at Clause Thirteenth) expressly provides for assignation of the benefit of the agreement. In support of their argument, the respondent relies on *Burns* v *Martin* (1887) 14 R 20 and *Lord Elphinstone v The Monkland Iron and Coal Company Limited* (1886) 13 R 98.

[21] In relation to the appellant's reliance upon their having bound themselves to free and relieve the respondent of and from all their pecuniary and other obligations referable to the

period prior to the Date of Entry, the respondent points to the complete absence of any express clause that seeks to impose these obligations upon the respondent from and subsequent to the Date of Entry. The respondent contends that these obligations cannot be imposed by way of construction of the Assignation. In support of their argument, the respondent relies upon *Arnold v Britton* [2015] AC 1619. The respondent maintains that the sheriff was correct to repel the first plea-in-law for the appellant.

[22] We prefer the submissions of the appellant in this matter also.

[23] The appellant's case of a contractual right of relief turns upon the proper construction of the Assignation. The speech of Lord Neuberger of Abbotsbury in *Arnold* at 1627 is instructive:-

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

[24] In this case, before turning to the language of the Assignation, it is worth noting that it was executed as part of a transaction in terms of which the appellant conveyed to the respondent the land to which the Wayleave Agreement relates. This fact was self-evidently known by the appellant and respondent at the time they entered in to the Missives. Whilst the Assignation is *ex facie* a unilateral document, it was executed in terms agreed by way of the Missives. The Assignation related *inter alia* to the Wayleave Agreement, the benefit of which could expressly be assigned.

[25] The relevant part of the Assignation assigns the appellant's "interest" in the Wayleave Agreement. It does not assign the "benefit" of the Wayleave Agreement. Had that been the extent of what was to be assigned, parties could have said so. They could have used the word that was to be found in Clause Thirteenth. They chose not to. In these particular circumstances, it cannot be said at this stage that "interest" is a synonym for "benefit". It would be open to the sheriff to hold that the natural and ordinary meaning of the relevant part of the Assignation is that "interest" is something different from "benefit". The proper interpretation of the Assignation will be a matter for the sheriff, having heard the evidence.

[26] That conclusion is supported by another relevant provision of the Assignation, namely, the part whereby the appellant bound themselves to free and relieve the respondent of and from all pecuniary and other obligations of the appellant's under the Agreement referable to the period prior to the Date of Entry.

[27] There is, to borrow from Lord Neuberger in *Arnold* at 1628, para 18, an infelicity in the drafting of this part of the Assignation. The use of "Agreement", which suggests a defined term, is clearly in error. There is no such defined term and no less than nine separate agreements are referred to in the Assignation prior to the phrase in question. From the terms of the Assignation, however, the use of "Agreement", clearly relates to only one of the preceding agreements, namely, that between the appellant and the respondent dated 22 and 23 March 2006, i.e. the Missives.

[28] To borrow from Moore-Bick LJ in *Dwr Cymru Cyfyngedig (Welsh Water) v Corus UK Ltd* [2007] EWCA Civ 285, whilst it is by no means unknown for surplus phrases to appear in commercial contracts, one starts from the presumption that phrases which are included are intended to have some effect on the parties' rights and obligations.

[29] If the intention of the parties had been to assign only the benefit of the Wayleave Agreement, not the burden, the language of this part of the Assignation makes no sense. The "burden" would have remained with the appellant and therefore their obligation to free and relieve the respondent of and from all pecuniary and other obligations of the appellant's would not only have been "referable to the period prior to the Date of Entry", it would have been in respect of the period subsequent to the Date of Entry also. On the respondent's argument, the words "referable to the period prior to the Date of Entry" would be surplus or redundant. We do not accept that they are. In our opinion, properly interpreted, "interest" encompasses both the "benefit" and the "burden" of the Wayleave Agreement.

[30] In the present case, the appellant and respondent are at odds in respect of the overall purpose of the Assignation, however, the facts and circumstances known by the parties at the time that the Assignation was executed, set out above at paragraph [24] are noteworthy.

[31] The question of commercial common sense was one addressed by the sheriff. Indeed, he adverted to having "some sympathy" to the appellant's submission that to retain the obligation to pay for the wayleave until 2099 would be "commercial madness". Unlike *Arnold*, this case is not one in which the issue of commercial common sense has been invoked retrospectively. The sheriff clearly saw some force in this part of the appellant's submissions. In our view, the sheriff erred by holding that there was nothing in the Missives or the assignation from which it could be inferred that there was an intention to transfer the obligation to make payment under the wayleave Agreement to the respondent. The circumstances averred by the appellant are suitable for inquiry. The proper interpretation of the Assignation will be a matter for the sheriff, having heard the evidence.

[32] Accordingly, we will allow both the appeal and the cross-appeal; recall the interlocutor of 12 May 2016 complained of, sustain the first plea-in-law for the respondent to

the extent of excluding from probation the appellant's averments in answer 2 of the Closed Record (no. 29 of process), which commence at line 1 of page 4 of said record with the words "*With regard to the Wayleave Agreement, Clause Thirteenth of the Wayleave Agreement provides that …*" and ends at line 14 of page 4 with the words "*… interest under agreements (First)(one) and (Eight) is not known*." and, before answer, allow parties a proof of their respective averments with all pleas standing.

[33] We were not addressed on the questions of expenses and, if appropriate, sanction for counsel will require to be resolved. We shall leave it to parties to discuss matters and to enrol the appropriate motion.