SHERIFF APPEAL COURT

[2019] SAC (CIV) 22
JED-A59-15

Sheriff Principal DCW Pyle
Sheriff Principal DL Murray
Appeal Sheriff PJ Braid

OPINION OF THE COURT

delivered by APPEAL SHERIFF PETER J BRAID

in causa

SHIREEN ANNE SHADE

Pursuer and Respondent

against

(FIRST) A N YOUNG LIMITED

First Defender

and

(SECOND) ALASTAIR NIALL YOUNG

Second Defender and Appellant

Second Defender and Appellant: Hastie, advocate; Melrose & Porteous
Pursuer and Respondent: Manson, advocate; Davidson Chalmers LLP

3 May 2019

Introduction: textualism v contextualism

[1] The issue in this appeal is: what is the correct construction to be placed on a guarantee given by the appellant to the respondent, dated 18 November 2014, in the following terms:

> "I… do hereby undertake to personally settle any enforceable debts due by the [first defender] to [the respondent].

> I confirm that I have been given the opportunity to take my own independent legal advice before signing this guarantee and I am aware that there will be legal consequences for me in doing so."

[2] The appellant contends that, properly construed in the context in which it was drafted, the guarantee relates only to one particular debt which was owed at the time the guarantee was given, namely, a sum of £16,101 due by the first defender to the respondent, being the total sum due (plus expenses of £363) in terms of a decree dated 21 October 2014 and extracted on 5 November 2014 (6/4/2 of process, page 10 of the Appendix). The respondent contends that, having regard to the text used, the guarantee relates to all debts, present and future. Thus, the battle between parties is, in essence, one between contextualism on the one hand, and textualism on the other.

Background

[3] The context in which the dispute arises is that of an action by the respondent against the first defender concerning allegedly defective dry rot works carried out by the first defender at premises owned by the respondent in Coldstream. The action was warranted on 9 November 2015, and served on the first defender on 25 November 2015. The appellant was subsequently brought into the action by amendment, the respondent averring that he is jointly and severally liable for any sum found to be due by the first defender by virtue of the guarantee. The parties having agreed that it would be expedient to settle the issue between them as to the correct construction to be placed on the guarantee, a preliminary proof on that issue took place on 13 August 2018. No evidence was led at the proof, the parties having entered a joint minute of admissions which formed the whole evidence. In

particular, in so far as relevant to this appeal, and paraphrasing where appropriate, the following facts were agreed:

a. dry rot and damp-proofing works forming the subject matter of the dispute were instructed in February 2011, and were carried out between February 2011 and April 2011;

b. in 2011 and 2012 agents acting for the respondent sent letters to the first defender in relation to a failure by the first defender to deliver a 30-year guarantee in relation to the works;

c. the letters sent did not intimate any defects in the works;

d. a claim in relation to the works forming the subject matter of the dispute was intimated in a letter dated 11 November 2015;

e. the first defender had carried out other works for the respondent at another property;

f. the respondent raised proceedings in respect of those other works;

g. following service of the writ in that other action in September 2014 the appellant, as director of the first defender, sent an email to the respondent's solicitor, dated 25 September 2014, offering to settle the sum sued for by instalments of £1,000 per month. That email is number 6/5/1 of process and appears at page 6 of the Appendix. It is in the following terms (*sic*):

> "I was wondering if [the respondent] would be in agreement for [the first defender] to set up a direct transfer every month to pay the money due up as i cant afford all this money in one go i could set up a transfer every month for £1000.00 till the money is paid up please get back to me in the next few days .I just want this sorted .I can set up astanding order for the £1000.00 to be transfered on a date of [the respondent's] choice";

h. the respondent's solicitor replied by email on 29 September 2014, a copy of which email formed 6/5/2 of process and appears at page 7 of the Appendix. In so far as material it is in the following terms:

> "We have passed on your email to [the respondent] and discussed the matter with her. Given the background, she is understandably concerned about the position should you fail to keep up with the monthly payments. She is willing to accept the offer of monthly payments of £1000 for the amount sued for plus legal fees. However, this acceptance is subject to you signing a personal guarantee over the sum owed by [the first defender], in order to protect [the respondent] should the business fail to adhere to this agreement or the payments stop. We will also proceed with obtaining the Court order, however whilst the agreement is adhered to and monthly payments are continuing, we will not act to enforce the order.
> For clarity, the sum sued for is £16,101 and once we have finalised the Agreement and guarantee we will confirm the legal fees incurred by [the respondent] in connection with this. On the basis that the first payment is made in October, monthly payments of £1000 would be payable until the debt is cleared in full";

i. on 29 September 2014 the appellant emailed a response in the following terms (6/5/3 of process, page 8 of the Appendix):

> "Thanks for that please send paperwork through I will sign it along with bank details and I will start paying now";

j. the minute of agreement and guarantee were still being drafted as at 8 October 2014. On that date an email was sent by the respondent's solicitor (a different individual within the same firm) (6/5/4 of process, page 9 of the Appendix) to the appellant in the following terms:

> "I am in the process of drafting the necessary paperwork – as discussed below.
> Can you please confirm your home address so that I can put it into the documentation… "

` The reference to the "paperwork – as discussed below" was to the above email chain;

k. the respondent took decree against the first defender, being the decree referred to above;

l. the minute of agreement and guarantee were sent by the respondent's agents to the first defender and to the appellant on 12 November 2014. Their letter of that date (6/5/6 of process, page 11 of the Appendix) was in the following terms:

> "We refer to our previous correspondence regarding this matter and now enclose Minute of Agreement and Personal Guarantee for your signature. You will note that the Minute requires your signature to be witnessed, and once you have signed both documents please return them to us in the accompanying envelope.
> Once again, we would advise you to seek independent legal advice in this matter as both of these documents are legally binding upon you";

m. the minute and guarantee were returned to the respondent's agents on 9 December 2015 having been signed by the first defender and the appellant, respectively, on 18 November 2014;

n. the appellant had no legal representation and received no legal advice on the respondent taking decree or the terms of the minute of agreement or the guarantee.

[4] The inclusion of reference to the email of 29 September 2014 was agreed to be subject to all questions of admissibility, competency and relevancy, and the respondent duly objected to its admissibility.

The sheriff's decision

[5] The sheriff favoured the respondent's textual approach. Having reviewed the authorities, he then had regard to the background knowledge held by both parties, which he summarised in his judgment at page 54 of the Appeal Print. One of the factors listed by him was that the respondent required a personal guarantee of payment from the appellant in respect of debts due by the first defender, which is a gloss on the email of 29 September 2014 which it does not bear. Be that as it may, he then turned to consider the language of the guarantee, observing that it was neither technical nor complex. He concluded that there was

no alternative construction to that proposed by the respondent. The only part of the sheriff's judgment which was unclear was whether or not he sustained the respondent's objection to the admissibility of the email of 29 September 2014, since he stated both that he took the email into account in considering the background knowledge, and also that he considered that it was not relevant to the proof of the meaning of the terms of the guarantee (page 57 of the print) and that he was sustaining the respondent's objection. However, on a fair reading of his judgment, it is clear that the sheriff did take the email into account but considered that it could not over-ride or vary the plain terms of the guarantee.

[6] Having so decided the sheriff then made a finding in fact and law in the following terms:

> "That in the event that decree is pronounced against the first defender in this action, the personal guarantee granted by the [appellant] in favour of the [respondent] dated 18 November 2014…renders the [appellant] jointly and severally liable with the first defender in respect of the debt constituted by any such decree and that the [respondent] will be entitled to decree against the [appellant] jointly and severally with the first defender on that basis in the event that decree against the first defender is pronounced as aforesaid…"

Thereafter, after dealing with expenses, the sheriff continued the case to proof on the remaining issues and pleas, not having been asked to repel or sustain any pleas-in-law.

The law

[7] The approach to construction of a contract has been the subject of much recent judicial consideration and there was no real dispute before us as to the legal principles to be applied. The sheriff took as a starting point the approach of Lord Clarke of Stone-cum-Ebony in *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900, paragraph 21, cited with approval by Lord Hodge in *Arnold* v *Britton* [2015] AC 1619, paragraph 76:

> "the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other".

[8] In *Arnold* v *Britton*, the Supreme Court held that the interpretation of a contractual provision involved identifying what the parties had meant through the eyes of a reasonable reader and, save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision; but although the less clear the relevant words were, the more the court could properly depart from their natural meaning, it was not to embark upon an exercise of searching for drafting infelicities in order to facilitate a departure from the natural meaning; that commercial common sense was relevant only to the extent of how matters would or could have been perceived by the parties or, by reasonable people in the position of the parties, as at the date on which the contract had been made; and that, moreover, since the purpose of contractual interpretation was to identify what the parties had agreed, not what the court thought they should have agreed, it was not the function of a court to relieve a party from the consequences of imprudence or poor advice (see paras 15-23, 66, 76-77).

[9] As Lord Neuberger put it at paragraph 15:

> "That meaning [of the relevant words] has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [deed], (iii) the overall purpose of the clause and the [deed], (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…".

[10] Lord Neuberger then went on to make certain further observations in paragraphs 17 to 23. Four of these were adverted to by the Inner House In *@SIPP Pension Trustees v Insight Travel Services Ltd* 2016 SC 243, In delivering the judgment of the Court, Lady Smith said at paragraph 17 on page 250:

> "It is relevant for the purposes of the present case to note the emphases placed by Lord Neuberger thereafter (paras 17 – 20) on four matters, namely: that commercial common sense should not be invoked to undervalue the importance of the language used by parties in the contractual provision being construed; that while poor drafting makes it easier to depart from the natural meaning and clear drafting makes it more difficult to do so, the court is not thereby justified in embarking on an exercise of searching for or constructing drafting infelicities so as to facilitate such departure; that commercial common sense is only relevant to how matters would have been perceived at the time of contracting and is not to be invoked retrospectively; and that although commercial common sense is very important the court should be slow to reject the natural meaning of a provision as correct simply because it seems to be a very imprudent term for one of the parties to have agreed, the purpose of interpretation being not to identify what the court thinks that parties ought to have agreed but what they have in fact agreed."

[11] In *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173 at paragraph 13, Lord Hodge said:

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis… The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix…"

[12] The canons of construction were identified by this court in *Anwar* v *Britton* 2019 SLT (Sh Ct) 23 as follows, at paragraph [14]:

> "i. The task for the court is to seek to objectively determine what a reasonable person with all the background knowledge reasonably available to both parties at the time of contracting would have understood the parties to have meant by the words they have used.

> ii. The court should be concerned to give effect to the natural and ordinary meaning of the words used by the parties.
> iii. In circumstances where there are ambiguities or rival meanings, the court is entitled to test the competing constructions with reference to business common sense.
> iv. Finally, the "internal context" of the contract at issue should be considered in seeking to construe a particular term. The court should therefore be concerned to read the contract as a whole in a coherent and consistent way with the result that terms complement rather than contradict one another".

[13] Finally, in *Scanmudring AS* v *James Fisher MFE Limited* 2019 SLT 295, Lord Menzies, after emphasising Lord Neuberger's words at paragraph 19 of *Arnold* v *Britton*, also referred to the point made by Lord Hodge at paragraph 77:

> "But there must be a basis in the words used *and* (emphasis added) the factual matrix for identifying a rival meaning. The role of the construct, the reasonable person, is to ascertain objectively, and with the benefit of the relevant background knowledge, the meaning of the words which the parties used. The construct is not there to re-write the parties' agreement because it was unwise to gamble on future economic circumstances in a long term contract or because subsequent events have shown that the natural meaning of the words has produced a bad bargain for one side".

Submissions

[14] Although counsel did not disagree about the principles to be applied, they differed in their application of them to the circumstances of this case. Counsel for the appellant submitted that – following Lord Neuberger in *Arnold* v *Britton* – one had to ascertain the overall purpose of the guarantee. By having regard to the email of 29 September one could see that the overall purpose was to guarantee the sum of £16,101. The sheriff erred by taking the view that he could decide the meaning by having regard to the words alone. Counsel accepted that the guarantee referred to "any debts", in the plural, but submitted that the sum due under the decree, being broken down into three separate amounts, could be seen as three debts, not one. He submitted that the phrase "any enforceable debts due" gave rise to an ambiguity since it could mean either any debts due at the time; or any debts due then or

in the future. That ambiguity could be resolved by having regard to the background circumstances, in particular the email. Had there been further sums due at the time of the guarantee, he submitted that these would not have been covered by the guarantee either. The sheriff had erred by stating that both parties knew that the respondent required a guarantee to cover all debts. That could not be taken from the email correspondence.

[15] Counsel for the respondent submitted that the guarantee fell to be construed by having regard to the words used. There was no ambiguity. The email was simply part of the whole circumstances. It could not be said that *the* purpose of the guarantee was to guarantee the debt of £16,101. That was simply *a* purpose. The email correspondence did not constitute a contract. The court could not and should not speculate as to what else might have happened between the parties between then and the signing and delivery of the guarantee. The court must not rewrite the parties' contract simply because it might think that the defender had made an unwise bargain, although even that should not be assumed. There may well have been cogent business reasons for the defender having signed the guarantee in the terms which he did.

Discussion

[16] It is clear from the authorities that a court's task in construing a contract is to decide the meaning of the words used. Lord Hodge's *dictum* at paragraph 77 of *Arnold* v *Britton*, quoted with approval by Lord Menzies in *Scanmudring AS* v *James Fisher MFE Limited* and referred to at paragraph [13] above, repays careful study, and it is in the context of those words that Lord Hodge's subsequent remarks in *Wood*, at paragraph [11] above, must be seen. While neither textualism nor contextualism may have exclusive occupation of the battlefield of contractual interpretation, the starting point in deciding whether words have

potentially more than one meaning can only be the words themselves, particularly bearing in mind the theme common to all of the cases cited above, namely, that the court is striving to ascertain the objective meaning of the words. The key words in the guarantee in the present case are straightforward: "*I undertake to personally settle any enforceable debts due by the company*". It is hard to identify any other meaning than that any debt due by the company is covered by the guarantee. The language used does not give rise to any hint that the guarantee is restricted either in time or by reference to any particular category of debt. Not only is the word "any" used, which on any view signifies that more than one debt is covered, but the document refers to "debts" in the plural, further affirmation that the guarantee is not restricted to one debt. As the sheriff correctly observed, the language used was neither technical nor complex. On the contrary, it was straightforward and in simple easy-to-understand terms.

[17] The fallacy in the appellant's argument is in saying that the purpose of the guarantee can be gleaned from the email. However, as counsel for the appellant submitted, the time-honoured rule of evidence in Scots law is that it is incompetent to contradict, modify or explain written contracts by parole or extrinsic evidence (*Walkers*: The Law of Evidence in Scotland 4th Edition at para 26.1.1). There is, perhaps an uneasy tension between this rule, and the contextual approach to construction, which may go some way to explaining the sheriff's apparently contradictory approach. It may not always be easy to distinguish what is part of the surrounding circumstances, to which regard may legitimately be had from prior negotiation, on the one hand, and an inadmissible attempt to contradict, modify or explain a contract, on the other. Since the email in question in this case formed part of a chain of correspondence agreed in the joint minute, it may have been somewhat artificial to have excluded consideration of it entirely. However, to the extent that it contained evidence

of the appellant's intention, that evidence was strictly speaking inadmissible. Even if that is wrong, and regard may be had to the entire email, it is plain that any statement of intention in it cannot be used to explain or modify the appellant's intention as expressed in the guarantee itself: *Arnold* v *Britton* paragraph 15 , factor (vi), quoted in paragraph [9] above. Further, the weakness in the appellant's argument became apparent when, in response to a question from the bench, he was constrained to submit that, had other debts been owed by the company to the respondent at the time of the guarantee, even those debts would not have been covered by the guarantee. Having regard to the wording used, that simply cannot be correct because it is directly contradictory to the guarantee itself.

[18] Viewing the matter from a slightly different angle, the response of the reasonable person faced with the guarantee in the knowledge of the background circumstances, may well have been to wonder why the appellant's intention had apparently changed, or to query why a possibly unwise obligation had been entered into; but even such a person, armed with such knowledge, could not fail to construe the meaning of the guarantee as being that the appellant undertook to pay all debts due by the first defender, whenever and however arising, such is the clarity and unambiguous nature of the words used. We agree with the sheriff that nothing in them can displace the plain meaning of those words.

[19] In reaching the view that we have, we are mindful, too, of the dangers in having regard to so-called business common sense in construing the contract. We refer to what Lady Smith said in *@Sipp Pensions Trustees*, quoted above at paragraph [10]. There may have been advantages to the appellant in guaranteeing all obligations of the company not least to prevent it from going into liquidation; or, for that matter, if the company were on a sound financial footing, then he may simply have taken the view that it posed little risk to him in signing it. But these are matters upon which we must not speculate. As was the sheriff, we

are satisfied that to place the construction on the guarantee urged on us by the appellant would not truly be to interpret the obligation, but to re-rewrite it.

[20] This last remark leads on to a matter which we raised with the appellant at the outset of the appeal, namely, rectification. The evidential rule referred to above has of course been tempered by the provisions of sections 8 and 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, whereby a contract may in certain circumstances be rectified if it does not give effect to the parties' intention. However, counsel for the appellant made plain that he had not sought rectification, because in his view (wrongly, as we have found) he did not have to. Accordingly, the issue of rectification is not before us, and the availability or otherwise of that remedy is not a matter upon which we need comment.

Decision

[21] For the reasons given, we are in no doubt that the meaning of the guarantee as it stands is that contended for by the respondent, namely, that the guarantee does, as the words plainly convey, cover any debts due, including any debt constituted by decree in the present action. Consequently, the appeal falls to be refused.

[22] There is one final matter. We drew attention during the appeal to the absence of any plea-in-law relating to the guarantee in the respondent's pleadings. As we have observed, the sheriff simply made a finding in fact and law and did not sustain or repel any pleas-in-law. Arising out of this, we consider that the correct disposal is to repel the appellant's second plea-in-law and otherwise adhere to the sheriff's interlocutor. Neither counsel took issue with this approach. However, during the appeal we also raised the possibility that the guarantee might be revoked between now and the date of any future decree, and, if so, what impact if any that would have on the finding in fact and law. Neither counsel had

considered that possibility in detail, and we did not hear submissions on it. In particular, counsel for the appellant expressly declined the opportunity to make any submissions on the breadth of the finding in fact and law. Accordingly we will leave it intact, and, after repelling the appellant's second plea-in-law, will adhere to the sheriff's interlocutor.

Expenses

[23] Counsel agreed that the expenses of the appeal should follow success and we will award these to the respondent, granting sanction for the employment of junior counsel, which was not opposed.