SHERIFF APPEAL COURT

[2019] SAC (CIV) 8
STI-A21-14

Sheriff Principal Lewis
Appeal Sheriff Braid
Appeal Sheriff Murphy QC

OPINION OF THE COURT

delivered by SHERIFF PETER J BRAID

in the cause

DAVID YOUNG, Killearn Home Farm, Killearn, Glasgow, G63 9QH and JEAN CAROLE YOUNG, Killearn Home Farm, Killearn, Glasgow, G63 9QH

Pursuers and Appellants

against

SCOTT REDVERS MENZIES, Killearn Lodge, Killearn, Glasgow, G63 9QW and NICOLA ELIZABETH MENZIES, Killearn Lodge, Killearn, Glasgow, G63 9QW and KEEPER OF THE REGISTERS OF SCOTLAND, Meadowbank House, 153 London Road, Edinburgh

Defenders and Respondents

Appellants: MacDougall, advocate; BTO solicitors LLP
Respondents: Sutherland, advocate; Wright, Johnston & Mackenzie LLP

28 February 2019

Introduction

[1] The parties[1] (hereinafter referred to respectively, for convenience, simply as the pursuers and the defenders) are neighbours. They do not get along. In particular, they are

[1] Excluding from this term the Keeper of The Registers of Scotland, who played no part in the appeal.

in dispute over a septic tank on the pursuers' land. In 2014 the pursuers raised an action seeking, among other things, declarator that they own the septic tank and that they have the right to remove it and to install a new septic tank in a location of their choosing, to serve the defenders' property.

[2] After sundry procedure the action was due to proceed to proof on 7 December 2015. The proof did not go ahead. Instead, following what we were told was a day of negotiations between counsel (the parties and their respective experts also being present) agreement was reached for settlement of the dispute. That agreement was reduced to writing in a document entitled "Heads of Agreement", signed by the parties. It constituted a contract for settlement of the litigation.

[3] We set out the material parts of the contract below but at this stage it is sufficient to observe that the essence of it was that, in place of the septic tank, the pursuers were to install (at their expense) a new waste treatment system, on an identified part of their land, (delineated on a plan attached to the agreement) which was thereafter to be conveyed jointly to the defenders, along with certain servitude rights of access; and the defenders in return were to discharge certain servitude rights they held over the pursuers' property. Various other matters were agreed, and, importantly, the proof was to be discharged and the action sisted pending implementation of the agreement. It should further be observed (since this lies at the heart of the issue before us) that while parties had not agreed on the precise location, design or specification of the new waste treatment system, they did agree that these matters were to be agreed by their respective experts.

[4] The proof was indeed discharged, and the action was duly sisted. However, any observer of proceedings who had hung out the bunting in celebration of a fractious neighbourhood dispute having been settled, with the saving of much time and expense,

would, alas, have been sorely disappointed. Not only has the settlement agreement broken down, the dispute between the parties has, as the sheriff pithily observed with a degree of justifiable hyperbole, literally grown arms and legs. There are now 16 craves in the principal action, six craves in the defenders' counterclaim, 30 articles of condescendence and 12 statements of fact, all with corresponding answers, and a grand total of 45 pleas in law.

[5] While the litigation, if it continues to grow exponentially, could be a fecund source of business for this court for many years to come, for now only one of those disputes has reached us, and that is whether the contract constituted in the Heads of Agreement is enforceable, or whether it is void from uncertainty.

The Heads of Agreement

[6] It is now necessary to look at the material clause of the Heads of Agreement in detail. It is in the following terms:

> "The Pursuers shall at their own expense install a new waste treatment system (to be connected to the house known as Killearn Lodge, Killearn) within the area of ground shown hatched in black and white being 15 metres by 8 metres on the plan attached hereto, which extent and location are indicative only (hereinafter referred to as "the waste treatment site") together with all pipe connections thereto and outfall therefrom and all other facilities required in connection with the treatment and disposal of effluent and wastewater from the house known as Killearn Lodge (which waste treatment system, connection pipes, outfall and all other required facilities are hereinafter referred to as the "Killearn Lodge wastewater treatment works") and thereafter restore the ground disturbed in connection with said installation to a neat and tidy condition. The Defenders shall consent to the Pursuers making a connection to the Defenders (sic) electricity supply as necessary for said Killearn Lodge wastewater treatment works. The location of the Killearn Lodge wastewater treatment works shall, so far as technically and legally possible, be located towards the northwestern corner of the waste treatment site. The precise extent and location of the waste treatment site shall be no larger than reasonably required and, together with the design and specification of the Killearn Lodge wastewater treatment works shall be agreed between Mr. Brian Coughlan on behalf of the Pursuers and Mr. Ian Corner on behalf of the First Defender and the Second Defender (hereinafter referred to as "the Defenders"). Following the agreement of Mr. Brian Coughlan and Mr. Ian Corner, the location, design and specification of the waste treatment works are to be

> authorised and approved in advance of said installation by the Scottish Environment Protection Agency (SEPA) and by the relevant departments within Stirling Council responsible for Building Control and Environmental Health functions. The installation of the Killearn Lodge wastewater treatment works shall be done in accordance with the authorisation and approvals obtained for said works from SEPA and Stirling Council. The installation of the Killearn Lodge wastewater treatment works shall be carried out by a competent and experienced contractor agreed upon by Mr. Brian Coughlan and Mr. Ian Corner. For the avoidance of doubt the reasonable expense of instructing Mr. Ian Corner in respect of the matters specified herein shall be borne by the Pursuers".

[7] It is unnecessary to set out the other clauses of the Heads of Agreement at length but, briefly, insofar as material, clause 2 provided for the pursuers to grant a disposition conveying to the defenders jointly the waste treatment site and granting certain servitude rights of access; clause 3 contained the defenders' consent to the discharge and removal of certain existing servitude rights; clause 4 provided for the installation of the Killearn Lodge wastewater treatment works to be completed by 1 June 2016 or such other date as may be mutually agreed by Mr Coughlan and Mr Corner; clause 5 provided for the conveyancing described in clauses 2 and 3 to be completed by 1 July 2016 or not later than one month following the date specified or agreed in terms of clause 4; clause 6 provided that the pursuers were not to disconnect the defenders' existing connection to the existing septic tank, nor remove that septic tank until after the approval by SEPA and Stirling Council of the Killearn Lodge wastewater treatment works; clause 8 provided for the payment of the sum of £8,000, to be paid to the defenders' solicitors within seven days of the date of the agreement but to be held on deposit receipt until the delivery of the discharge referred to in clauses 3 and 5; and clause 9 provided for the action to be sisted, and for parties to sign a joint minute to dispose of the action, to be held as undelivered until delivery of discharges referred to in clauses 3 and 5.

[8] The agreement has been partially implemented in as much as the £8,000 referred to in clause 8 has been paid and the action has been sisted. However, beyond that it remains unimplemented. The reason for that is that the parties' experts, Mr Brian Coughlan and Mr Ian Corner have been unable to reach agreement on the matters which the Heads of Agreement envisaged that they would agree, namely, the precise extent and location of the waste treatment site, and the design and specification of the waste water treatment works.

[9] As the pleadings now disclose, the reasons why the parties have been unable to reach agreement are a matter of dispute. It is unnecessary to quote from the pleadings at length. It is sufficient, for present purposes, to note that the defenders aver that the failure to agree came about because the first pursuer instructed Mr Coughlan to change the proposed wastewater treatment system from the installation of a septic waste treatment plant to the installation of a new septic tank (statement 5 of the counterclaim); that on or about 11 April 2016 Mr Coughlan, acting on the instructions of the pursuers, submitted an application to Stirling Council in the name of the first pursuer for the installation of a proposed new septic tank; and that, following the submission of the building warrant application, the pursuers instructed Mr Brian Coughlan not to discuss matters further with Mr Ian Corner (statement 6 of the counterclaim). These averments (which of course require to be taken *pro veritate*), along with an appropriate plea in law, support the first crave of the counterclaim, which is for declarator that the pursuers have acted in breach of contract by (to put it colloquially) moving the goal posts. Instead of seeking to agree the nuts and bolts of a wastewater treatment system, the pursuers have, at least according to the defenders, told their expert to proceed with a replacement septic tank.

The appeal

[10] At the outset of the appeal hearing before us, counsel for the pursuers moved to amend the pursuers' note of arguments by introducing an argument about bad faith. Apparently, this was a pre-emptive strike in anticipation of an argument which it was feared the defenders might make. However, since the proposed new argument did not relate to any ground of appeal, we refused the motion. (As it transpired, bad faith did not feature in the argument before us, and so the proposed amendment was unnecessary in any event).

Submissions for the pursuers

[11] Thereafter, counsel for the pursuers argued that the Heads of Agreement did not constitute an enforceable contract. The sheriff had misdirected himself by asking whether all the essentials of the agreement had been agreed. That was the wrong question. The correct question was whether the contract was void from uncertainty. It was, in respect that it was incurably incomplete: *The Law of Contract in Scotland*, McBryde, 3rd edition, paras 5.19-20, 5.23 and 5.26. The terms required that the parties' nominated experts agree *inter alia* the design and specification of the system which must replace the septic tank. The sentence beginning "the precise extent and location of the waste treatment site…" was an essential term of the agreement. Other terms of the contract only became operable once the experts had reached agreement. However, no provision had been made to arbitrate or otherwise determine those matters in the event that the experts were unable to reach agreement. The sheriff could not force the experts to agree. There was no term which might be implied into the agreement which could give effect to the contract. In the absence of any mechanism to resolve the failure of the experts to agree, there was an incurable defect in the contract, and it was unenforceable. Reference was also made to *King's Motors (Oxford) Ltd* v *Lax* [1970] 1

WLR 426. If the offending sentence had not been in the agreement at all, the agreement would nonetheless have been unenforceable.

Submissions for the defenders

[12] Counsel for the defenders argued that the essential elements of a contract were contained in the Heads of Agreement. Accordingly, the contract was not void from uncertainty. *King's Motors* was readily distinguishable. The contract might have been frustrated in the event of disagreement between the experts but equally other matters might have prevented its implementation since any replacement scheme devised by the experts would require approval from the local authority and from SEPA in terms of the agreement. In the event the defenders' position was that the pursuers had given instructions to the experts which were inconsistent with the terms which had been agreed by the parties and had thereby prevented the experts from reaching any agreement between themselves. This was an issue of fact which required preliminary proof, as allowed by the sheriff. Counsel for the defenders further submitted that the part of the clause referred to by counsel for the pursuers dealt merely with some mechanical aspects of implementing the general agreement to install a waste treatment system on the appellants' property which was to service the respondents' dwelling. He contended that this was apparent from the two sentences which immediately followed and which dealt with other aspects of implementation. There was a distinction to be drawn between an agreement to agree something in the future, and an agreement that parties would each appoint a representative to attempt to negotiate an agreement within certain agreed parameters. In the course of his submissions, counsel also referred to *Miller Homes Ltd* v *Frame* 2001 SLT 459.

Discussion

[13] We have several observations to make, derived from the authorities to which we were referred.

[14] First, a question which often arises is whether the parties intended to be bound, or whether their intention was simply to agree matters, if they could, in the future. In the present case, there is no doubt that the parties intended the Heads of Agreement to be binding from the moment it was entered into. As we have observed, that was done on the steps of the court with a view to settling a litigation the proof in which was about to begin. The matters agreed went to the heart of the dispute between the parties. On the strength of the Heads of Agreement, the proof was discharged and the action sisted.

[15] Second, even when parties intend to be bound, that intention might be thwarted. One situation where that might occur is where the agreement is void from uncertainty. As counsel for the pursuers submitted, echoing McBride *The law of Contract in Scotland (3rd Edition*), para. 5.20, the phrase "void from uncertainty" is a misleading one. A contract which is "void from uncertainty" is not a contract which is treated as never having existed due to an absence of true consent. Rather, it is one where, whether or not parties have agreed all the essentials, one or more of the terms of the contract is so indefinitely expressed as to render the contract unenforceable. Such a defect may be cured by the subsequent actings of the parties. (So, here, if the pursuers are correct in submitting that the contract is void from uncertainty, but the experts had in fact reached agreement, then the contract would have been enforceable in all its aspects). In the present case, the pursuers argue that the uncertainty arises from the fact that the agreement is incurably incomplete, there being no mechanism for resolving the failure of the respective experts to reach agreement.

[16] Third, we agree with counsel for the pursuers to the extent that the question as to whether a contract is void from uncertainty is not resolved simply by asking whether all the essentials have been agreed. The uncertainty may be in an essential term or it may not. If the uncertainty is in relation to an essential term, such that no agreement at all has been reached in relation to that term, then the contract is likely to be held to be unenforceable. If the uncertainty does not so relate, then it will depend on the individual contract whether what has been agreed is enforceable or not.

[17] Fourth, where parties enter into an agreement to agree, or a contract to enter into a contract, any such agreement or contract will not be enforceable, but will be held to be void from uncertainty: *King's Motors (Oxford) Ltd* v *Lax* [1970] 1 WLR 426 per Burgess VC at 428.

[18] However, fifth, the courts are generally reluctant to reach such a conclusion: see, for example, *Miller Homes Ltd* v *Frame* 2001 SLT 459 per Lord Hamilton at para. 13 and the authorities referred to therein. We also note the reluctance with which Burgess VC reached the conclusion that the options clause in *Kings Motors* was unenforceable. It seems to us that such reluctance should, if anything, be even more pronounced when the agreement in question is one to settle a litigation. It would be undesirable in the extreme if litigations were settled on the steps of the court, but one or other party then sought to walk away from the agreement on the basis that the agreement was void from uncertainty (particularly where counsel have been involved in negotiating the settlement agreement).

[19] Sixth, even where the parties have not agreed on an essential term, but have agreed to agree in future, it does not necessarily follow that the agreement will be held to be void from uncertainty. If there is a mechanism for agreeing (for example) price (such as arbitration) the contract is likely to be held to be enforceable. It was the absence of any

mechanism in *King's Motors* which led to the option clause in that case being held to be unenforceable.

[20] However, seventh, it does not follow, either as a matter of logic or principle, that the absence of a mechanism for resolving every *impasse* which may lead to a contract being unworkable, or being frustrated, necessarily means that the contract is void from uncertainty. While we acknowledge that a failure by the experts to reach agreement in the present case may well lead to the contractual intention being thwarted[2], we also accept the submission of counsel for the defenders that other events may have a similar outcome, namely, the refusal by SEPA or Stirling Council to grant the necessary approvals. The contract does not cease to be enforceable, or become void from uncertainty if the latter were to occur; it is therefore not immediately obvious why a failure by the experts to agree should have that effect.

[21] To develop that comparison a little further, if SEPA (say) were to refuse approval for the wastewater treatment works, that would not constitute a breach of the Heads of Agreement; but if no approval were granted because it had not been applied for, that might constitute breach of an implied term. In essence, that is the distinction drawn by the defenders in relation to the failure of the experts to agree. They do not aver that such failure is in itself a breach, or that the experts can be forced to reach agreement; but, rather, that it is the pursuers' actions in giving instructions to their expert, directly contradicting what the parties had agreed, which constitute the breach.

[22] Eighth, as *McBride* points out, there is a difference between a contract being void from uncertainty on the one hand, and giving rise to uncertainty on the other. The meaning

[2] Whether it would be frustrated in a legal sense is perhaps a question for another day.

of many contracts may be uncertain until such uncertainty is resolved by the court either construing it or implying a term into it.

[23] Applying all of that to the present case, we do not consider that the agreement before us, properly analysed, is one where the parties have agreed to reach a future agreement on a term of the contract, whether essential or not. On the contrary, they have agreed, between themselves, everything which is within their province, as lay people, to agree. They have agreed what they wanted to do (remove the septic tank and replace it with a waste treatment system); where they wanted to do it (on an area of ground identified on a plan attached to their agreement); and when they wanted to do it (by 1 June 2016). They have also reached an agreement on the size of the new system (no larger than reasonably required). The remaining parts of the agreement – how precisely they intended to do it – were to be agreed by their respective experts (men of skill). It is significant in our view that the matters to be agreed by the experts – the precise location, design and specification – were all matters which were within the exclusive province of the experts. Implicit in that agreement between the parties was that their respective experts would be authorised to reach agreement within the broad parameters of what we have described as the "what, where and when" already agreed by the parties.

[24] We see no reason why an agreement between two parties that each will instruct a third party to negotiate subject to agreed parameters should not be enforceable. The parties have agreed all that they need to agree, and have further agreed that the nuts and bolts, as it were, will be resolved by their respective experts. That agreement is entirely different from any agreement which may or may not be reached by the experts in the fullness of time. We think it is also significant that the respective experts are not mere agents, but were instructed (and referred to in the Heads of Agreement) as experts. They thus owed duties not only to

the parties, but to the court. The pursuers' argument ultimately founders on a failure to grasp this distinction. There does not require to be a mechanism for the experts to agree, for the parties to be held to have entered into a binding and enforceable agreement to the effect that they will each authorise their experts to attempt to enter into an agreement. It is the agreement between parties which the defenders aver has been breached.

[25] One can test the above analysis by asking (as we did counsel for the pursuer) what the position would have been had the offending words not been present at all, and the clause had ended after the words "reasonably required". Although his position vacillated he ultimately agreed (as he had to, to maintain the consistency of his argument) that the contract would still have been void from uncertainty. However, we disagree. In the circumstances, in our view the court would have strained to find a meaning by implying a term of necessity. That being so, the fact that the parties did insert a mechanism for agreeing the "how" (albeit, there was no mechanism in the event that the parties' experts could not agree) cannot render that which would otherwise have been enforceable, unenforceable.

Decision

[25] For all these reasons we have refused the appeal. We will adhere to the sheriff's interlocutor and return the case to him for the preliminary proof which he allowed, while at the same time expressing the fervent wish that the proliferation of limbs will cease, and that the parties will find some means of bringing this litigation to an end.

Expenses

[26] Parties agreed that expenses should follow success. We have found the appellants liable in the expenses of the appeal, and certified the appeal as suitable for the employment of junior counsel, as moved by counsel for the respondents.