SHERIFF APPEAL COURT

[2020] SAC (Civ) 4
LAN-A91-17

Sheriff Principal Stephen QC
Sheriff Principal Murray
Appeal Sheriff Holligan

OPINION OF THE COURT

delivered by APPEAL SHERIFF W HOLLIGAN

in appeal by

SHINE PROPERTIES LIMITED

Pursuer and Appellant

against

BIGGAR MUSEUM TRUST

Defender and Respondent

Pursuer and Appellant: Bennie, advocate; Bannatyne Kirkwood France & Co
Defender and Respondent: Duthie QC; Smail & Ewart

23 April 2020

[1] This case involves missives for the sale of heritable property known as Moat Park, Heritage Centre, Biggar ("the property"). The property is a former church. By missives dated 12 March 2015 ("the offer letter"), 20 January 2016 ("the qualified acceptance letter") and 30 June 2016 ("the concluding letter") the respondent contracted to sell the property to the appellant. The transaction did not settle. The respondent resiled from the contract. The appellant raised an action against the respondent claiming damages for breach of contract, the damages being loss of profit and abortive costs. The matter proceeded to proof. The

sheriff rejected the appellant's claim and granted decree of absolvitor. Against that interlocutor the appellant now appeals.

[2] The key facts of this case are not in dispute and can be summarised as follows. There is a gap in time between the offer letter and the qualified acceptance letter (9 months). This was on account of the respondent acquiring access rights from South Lanarkshire Council ("the Council"). Clause 1.1 of the offer letter provided that " "Date of Settlement" means the date on which settlement takes place whether at the Date of Entry or some other date". Clause 3 of the offer letter defined "Date of Entry" in the following terms "Entry to and full vacant possession of the property shall be given to the purchaser 10 working days after the grant to the purchasers of a Building Warrant in terms reasonably acceptable to the purchaser". Clause 2.1 set out a number of suspensive conditions, the most significant of which is clause 2.1.3. Under the heading "Building Warrant" the clause provided that it was a suspensive condition that the purchaser receive a Building Warrant for the proposed development on terms reasonably satisfactory to the purchaser. Clause 2.3 went on to provide that it would be at the "absolute subjective discretion of the purchaser whether any part of condition 2.1" has been complied with. For present purposes the most significant clause of the qualified acceptance letter was clause 9 which provided: "The sellers shall exhibit prior to and deliver at settlement a defective title indemnity policy in respect of the lack of formal access rights over the area coloured pink on the plan annexed (to the qualified acceptance letter)".

[3] Before the sheriff, the proper interpretation of the clauses relating to the Building Warrant was the subject of debate. It did not feature greatly in the appeal. At findings in fact 9 and 25 the sheriff found that the application for the Building Warrant was submitted by the appellant to the Council on 3 June 2016. Approval was granted on 17 February 2017.

The appellant did not inform the respondent of the grant: the respondent found out from the Council and a former architect the terms of the Building Warrant. The sheriff found that the terms of the Building Warrant were reasonably satisfactory to the appellant and that the date of entry should have been 10 working days after 17 February 2017, namely 3 March 2017. The transaction did not settle on that day.

[4] In her findings in fact 10 to 12 the sheriff found that the appellant proceeded on the basis that it intended settling the transaction. For example, the appellant obtained various quotes and engaged professionals; the appellant obtained an offer of finance and told the respondent's agents the funding would be available in April 2017. In or about 16 May 2017 the appellant became aware that the property had been re-advertised. It took issue with this telling the respondent's agents that the appellant was committed to settling and threatening interdict against the respondent from re-advertising the property for sale. The respondent accordingly withdrew the property from marketing.

[5] In finding in fact 13 the sheriff recorded that the respondent's solicitors wrote to the appellant's solicitors noting that they had seen the Building Warrant. They also noted that the appellant had failed to settle the transaction notwithstanding various telephone conversations between the agents for the respective parties. The sheriff records the respondent's agents intimating that they are

> "instructed to put your clients under notice that they are in breach of contract and in the event that they fail to settle their purchase in terms of their contract by close of business on 31 May 2017 our clients consider the contract to be at an end; they will re-market the property and reserve the right to claim damages for any losses sustained on resale".

[6] On 23 May the appellant's solicitors proposed settlement on 12 June 2017 stating that the notice from the respondent's agents did not give the appellant time to resolve "the issue in relation to the Building Warrant". No issue was identified. The respondent's agents

accepted the proposed settlement date of 12 June 2017. In finding in fact 16 the sheriff concluded that a marketable title was offered for sale. However, she also went on to hold that there was a potential defect in the title and that the agreed resolution to that issue was to provide a title indemnity insurance policy. Clause 9 of the qualified acceptance letter provided that the policy was to be exhibited prior to, and delivered at, the date of entry. A draft indemnity was adjusted between the agents for the parties prior to June 2016.

[7] The chronology of the following days is important to resolution of this matter. On 6 June 2017 at 12.14 the appellant's agent sought the title indemnity policy from the respondent's solicitors. It was required to draw down the appellant's funding. Settlement did not take place on 12 June 2017. Settlement was offered by the respondent at 12 noon on 16 June 2017 failing which the respondent's agents said the respondent would resile from the contract. By email timed at 11.28 on 13 June 2017 the appellant's solicitor contacted the respondent's solicitors seeking exhibition, *inter alia* of the title indemnity policy. The respondent's agents replied at 13.00 that day stating that they would "contact the insurers re the DTI Policy. We obtained a draft policy way back when so I will ask the insurers to confirm the policy can now be put in place on the basis of the original draft". The email is acknowledged at 16.48 on the same day. On 15 June the respondent's agents obtained and forwarded to the appellant's agents the property enquiry certificate, legal report and charges search.

[8] Findings in fact 21 and 22 provide as follows:-

> "21. The defender's solicitors sought confirmation of the insurance indemnity policy from the insurers on 13th June 2017 in terms of a draft agreed over a year previously between the parties. The insurers responded on 15th June requiring confirmation that the pursuers did not intend building over the area covered by the policy and requiring details of any upgrading work to be carried out on the area covered by the policy. This information was sought by the defenders' solicitors from the pursuers' solicitors by email

> at 15.22 on 15th June 2017. The plan of the area covered by the indemnity was sent at 16.35 that day. The pursuers' solicitors emailed Mr Khanna for comment at 16.01 and sent the plan at 10.00 on 16th June 2017.
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> 22. The defenders' solicitors were not aware of any discussion between the pursuers and their solicitors. The defenders' solicitors had received no response at all to their request for information from the pursuers' solicitors by noon on 16th June 2017. Settlement did not take place. On 16th June the defenders wrote a formal letter narrating a failure to settle in terms of the missives and resiling from the contract."

[9] The appellant's agents emailed the respondent's agents on 21 June 2017 stating that no works were intended on the area covered by the indemnity policy. They enquired whether the matter could be brought to settlement without a requirement to comment on the formal letter of 16 June 2017. The pursuer's agents threatened legal proceedings on 28 June 2017. The respondent's agents adhered to their position. The appellant accepted that the contract was at an end on 1 August 2017.

Submissions for the appellant

[10] In her note of argument Ms Bennie began by referring to 12 June as being the date proposed by the appellant's solicitors for settlement. Settlement did not take place on that date; an alternative date offered by the respondent was 12 noon on 16 June 2017 failing which the respondent would resile. The focus, therefore, is on 16 June 2017 and the question is what were the obligations of the parties at that date? The appellant had the obligation to pay the purchase price and the respondent had the obligation to deliver a valid marketable title to the appellant. The respondent undertook to exhibit a title indemnity policy prior to the date of entry and to deliver one at settlement. Whilst the respondent may have been in a position to deliver a disposition on the relevant date, as a matter of fact the respondent was not in a position to deliver a title indemnity policy. The respondent had not exhibited a title

indemnity policy prior to 16 June 2017 and was not in a position to deliver one on the same date. It did not then possess or hold such a policy. Delivery of a title indemnity policy was a material term of the contract. In the appellant's submission, the sheriff appears to have accepted that the respondent was in breach of its obligations on 16 June or at least not in a position to deliver the title of indemnity on 16 June (see findings in fact 21, 22 and 23). The sheriff's approach, at finding in fact 26, was that the respondent was not responsible for a breach of the obligation to provide the policy because it could not do so without input from the appellant. The appellant did not comply with its obligation to provide the required confirmation of the proposed works on site indemnified. The sheriff erred in making this finding. The defender was not in a position to settle on 16 June 2017. This led to and explains the error of law in finding in fact and law 6 which concludes that the defender was entitled to resile despite being unable to fulfil its obligation to provide the title indemnity policy.

[11] In relation to the legal aspects of the appeal, the appellant relies upon the principle of mutuality of contract. There is a general presumption that a contract is to be regarded as a whole and that a failure by one party would justify the other in breaking off the contractual relations or in with holding performance provided the other party is not himself in breach. Reference was made to *Turnbull* v *Hugh McLean & Co* (1874) 1R 730; *Forster* v *Ferguson & Forster & Ors* 2010 SLT 867; and *McNeill* v *Aberdeen City Council* 2014 SC 335. It was not the appellant's case that the respondent was in breach of its obligation on 16 June but rather that it was not able to insist on performance of the appellant's obligations when it was not in a position to fulfil its own obligations. In this context it is relevant that while the contract terms may be less than well drafted, those terms bind both parties.

[12] The sheriff has not separated out the breaches she found to exist (reference was made to finding in fact 26 and finding in fact and law 6). The first occasion the appellant had been called upon to provide information to the respondent was on 15 June 2017 the day prior to settlement. The sheriff accepted that the respondent contracted to provide a marketable title. The title indemnity policy was the means by which that obligation would be discharged. Why the respondent could not provide the policy is relevant only to the question of the obligations on the appellant, not the respondent. At finding in fact 26 the sheriff held that the appellant did not comply with its obligation to provide confirmation of the proposed works on the site to be indemnified and even if that is correct, the appellant must have had until noon on 16 June to comply with its obligation, the same as the respondent. Any question of failure or breach could therefore only arise after noon on 16 June 2017. As at 12 noon on 16 June 2017, even if the appellant was in material breach as to settlement and payment of the contractual consideration, the respondent was not in a position to provide a marketable title. It was not in a position to perform or fulfil its obligations under the contract.

[13] On 16 June 2017 (and presumably on 12 June 2017) the respondent had not complied and could not comply with its express obligations under the contract. That being so, the appellant submits that the respondent was not able to found on any non-performance or breach on the part of the appellant.

[14] The sheriff found that the respondent had not complied with its obligations because of the actions or failures of the appellant. For that to be correct must mean that what the sheriff relied upon was a breach, not of the obligation in relation to payment of the price or contractual consideration, but another different obligation. However, that is not what finding in fact and law 5 says. The sheriff said "noon of June 16th 2017 was the final date to

remedy the breach". Any such other breach could only have occurred after 12 noon on 16 June 2017. The sheriff speaks of "the context was a final chance to settle the transaction" (paragraph 18 of the note). The point is that the respondent was not in a position at 12 noon on 16 June 2017 to settle the transaction or, as a result, to insist upon performance of the contract by the appellant.

[15] The respondent would not have been left without a remedy. The respondent was simply not entitled to bring the contract to an end on 16 June 2017. Reference was made to the cases of *Rodger (Builders) Limited* v *Fawdry* 1950 SC 483 at 492 and *Campbell* v *McCutcheon* 1963 SC 505. In finding that the respondent could then resile the sheriff erred in law.

Submissions for the respondent

[16] For the respondent the following findings are important:

> "(i) On a fair reading of the missives as a whole the purchasers had to complete the contract if they obtained a Building Warrant the terms of which were reasonably acceptable to them (finding in fact 7);
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> (ii) Approval was granted in terms of the appellant's application on 17 February 2017 the terms of which were reasonably satisfactory to the appellant who was satisfied with them (finding in fact 9);
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> (iii) The appellant was in material breach of the missives in that it failed to take entry and full vacant possession ten working days after the grant of the Building Warrant (finding in fact 25).
>
> (iv) The appellant failed to settle the transaction by failing to make payment of the purchase price by the date of entry of 3 March 2017 or on any other of the dates agreed (finding in fact 25)."

[17] These four facts are fatal to the appellant's appeal. The appellant's ground of appeal ignored the critical fact that the appellant itself was in material breach of the missives in respect that it failed to take entry and full vacant possession on either 3 March 2017 or on any other of the dates subsequently agreed. The respondent did not resile until 16 June

2017, the respondent was entitled to resile on any date from 3 March 2017. The respondent's subsequent (considerable) forbearance did not divest them of their entitlement to exercise that remedy.

[18] The appellant's attempt to argue that the respondent was in breach of the missives in respect that it failed to exhibit a defective title indemnity policy is an attempt to distract from the fact of the appellant's own prior and continuing material breach of the missives. The sheriff dealt correctly with this issue (see findings in fact 26, finding in fact and law 6 and paragraphs 8 to 18 of the sheriff's note).

[19] The respondent was not in breach of the missives. The sheriff sets out her reasoning for so concluding in finding in fact 26 which reasoning is sound. In short, the respondent was not responsible for a breach of the obligation to provide the policy because it was unable to do so without input from the appellant. It was the appellant that did not comply with its obligation to provide the required confirmation of the proposed works on the site to be indemnified. Confirmation of the previously agreed draft could have been provided in the time before settlement. There was no reason advanced to explain why the information could not have been provided before noon on 16 June 2017. The appellant was aware of the time constraints on 15 and 16 June and that its funding would not be released without the indemnity policy. The appellant's final position was that no works would be carried out on the indemnified area confirming the agreed draft but not communicated until 21 June 2017. The appellant failed to respond at all to the request for confirmation before noon on 16 June. Had the respondent been provided with the required confirmation by the appellant it could have provided the indemnity insurance in time to settle at noon on 16 June. The respondent was not prevented from the resiling because there was no indemnity insurance. Indemnity insurance could not be provided without the required information from the appellant. The

uncontradicted evidence of the solicitor for the respondent (paragraph 17 of the sheriff's note) was that when she had received the confirmation she expected to submit the application for the policy online and get the policy immediately. She described it "like getting car insurance online".

Decision

[20] In our opinion, in order to resolve this matter it is necessary to examine and take into account the whole facts and circumstances leading up to (and including) 16 June 2017.

[21] Before the sheriff, the question of the Building Warrant was an issue and in particular the interaction between clauses 2.1.3 and 2.3. The sheriff found, as a fact, that the terms of the Building Warrant issued by the Council was satisfactory to the appellant (finding in fact 9) and no issue as to that finding was taken. As a matter of fact the Building Warrant was issued by the Council on 17 February 2017. Therefore, in terms of the missives, the date of entry ought to have been 10 working days thereafter, namely 3 March 2017. From the sheriff's view the failure of the appellant to settle the transaction on that date amounted to a material breach of contract, entitling the respondent to resile (paragraph 13). Between March and May 2017 the appellant acted as if it intended to proceed with the bargain and, in particular, threatened the respondent with interdict if it proceeded to re-advertise the property for sale. On 17 May 2017, the respondent's solicitors put the appellant on notice that the appellant was in breach of contract and that in the event of a failure to settle by close of business on 31 May 2017 the respondent would consider the contract to be at an end, entitling it to remarket the property and seek damages. That communication was a clear ultimatum to the appellant (see finding in fact 13). The response by the appellant's solicitors suggested their client's intention to adhere to the bargain. The

settlement date of 31 May was reorganised for 12 June 2017. Again, settlement did not take place. The sheriff found (finding in fact 18) that the respondent's agents proposed a further date of 12 noon on 16 June 2017 as the date for settlement failing which the respondent would resile. The date of 16 June was accordingly the third attempt to settle the transaction.

[22] From an early stage in the negotiations a title indemnity policy was part of the transaction. Exactly what aspect of the title required the provision of such a policy is not clear and neither counsel could give us details. The best which can be said is that it concerned a lack of clarity as to access rights. The title is a registered title. There was no evidence as to whether the Keeper had excluded indemnity in relation to any part of the property. The obligation to obtain a policy was part of the missives. Clause 9 of the qualified acceptance letter obliged the respondents to "exhibit prior to and deliver at settlement a defective title indemnity policy". From the evidence the terms of a draft policy had been adjusted between agents in or about June 2016 (finding in fact 16). The unchallenged evidence of the solicitor acting for the respondent is that an application for a policy could be submitted online and obtained immediately (paragraph 17).

[23] From 6 June 2017 the appellant's solicitor requested the title indemnity policy from the defender's solicitors at a point at which settlement was anticipated on 12 June. It was required for the appellant's funding. On 13 June 2017 the appellant's solicitors again sought exhibition of the title indemnity policy. That drew a response from the respondent's solicitors referring to the original draft policy. The respondent's agents approached the insurers on 13 June 2017. They replied on 15 June seeking: (1) confirmation that the appellant did not intend building over the area covered by the policy; (2) details of any upgrading work to be carried out on the area covered by the policy. That information was sought from the appellant's agents at 15.22 on 15 June 2017. That was information within

the appellant's knowledge. The appellant's agents asked their client for the information. They did not revert to the respondent's agents. 12 noon passed on 16 June 2017 and the transaction did not settle. It is a matter of fact that provision of the policy would have been easy to achieve. It was described as being akin to obtaining car insurance online. The terms of the policy had already been adjusted. All that was required was confirmation of two matters which was forthcoming on 21 June 2017, several days after the relevant date. The sheriff found that, had the information been provided, the policy would have been available for settlement at 12 noon on 16 June 2017 (finding in fact 26). The information was within the knowledge of the appellant.

[24] There is no dispute between the parties as to the principle of mutuality of contractual obligations. In *McNeill* v *Aberdeen City Council* the matter is summarised by Lord Drummond Young at paragraphs [19] and [20] in which his Lordship quotes from Lord Justice Clerk Moncrieff in *Turnbull* v *McLean & Co*. Put shortly, in mutual contracts (and the present case is a mutual contract) the stipulations on either side are the counterparts and the consideration given for each other. A failure to perform any material or substantial part of the contract on the part of one will prevent him from suing the other for performance. Put shortly, the appellant says that the respondent could not insist on performance of the appellant's obligation as it was not in a position to fulfil its obligations, namely to provide a valid marketable title. It appears to have been assumed before the sheriff that there was an express obligation to provide a marketable title. Counsel for the appellant was unable to point to a specific provision in the missives imposing such an obligation nor was such a provision obvious to us. Leaving that aside, the respondent's argument is that the respondent was unable to provide the policy because the appellant failed to give its agent the information to enable her to do so. Indeed, the request for the

information was met with no response whatsoever from the appellant despite the fact that settlement was due to take place the following day; and the information was within the appellant's knowledge. Furthermore, the transaction ought to have settled on 3 March 2017, being the date of entry. The appellant was put on notice in May 2017 that if it failed to settle the transaction by 31 May, later agreed to 12 June, the respondent would resile. On 12 June the appellant again failed to settle the transaction and a further date was fixed for 16 June. The sheriff accepted that the respondent would have been in position to deliver the defective title indemnity insurance at settlement, had the appellant responded to the request from the respondent's agent to provide the information requested by the insurers to enable them to issue a defective title insurance policy. The provision of the policy was wholly dependent upon the appellant providing certain information to the respondent as to the appellant's intention as to the property. The appellant knew the date, and indeed the time, for settlement but it did nothing in response to the request for information. The appellant did not ask for further time or provide any explanation as to why there might be a delay. Had the information been provided timeously the transaction could have settled. The appellant cannot rely upon the apparent failure on the part of the respondent to provide the policy when it failed to give the respondent the information it required to satisfy its obligation. On the evidence before the sheriff all other requisites for settlement were satisfied. The appellant failed to provide the information and failed to settle the transaction on the appointed date. It follows that the sheriff reached the correct conclusion and the appeal will be refused. With the exception of the expenses occasioned by the challenge to the competency of the appeal, the respondent is entitled to expenses of the appeal.