**SHERIFF APPEAL COURT**

**[2022] SAC (Civ) 23**
**ABE-A273-20**

Sheriff Principal C D Turnbull
Appeal Sheriff W H Holligan
Appeal Sheriff T McCartney

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

NEWTECH SERVICES HOLDING LIMITED

Pursuer and Appellant

against

PAUL McCLURE

Defender and Respondent

**Pursuer and Appellant: J.A.Reekie, solicitor-advocate; Brodies LLP**
**Defender and Respondent: Roxburgh, advocate; Burness Paull LLP**

15 July 2022

**Introduction**

[1] This appeal is in relation to the decision of the sheriff, following a debate, in terms of which he sustained the fifth plea-in-law for the defender and respondent ("the respondent"); repelled the first and second pleas-in-law for the pursuer and appellant ("the appellant");

and dismissed the action. The sheriff subsequently found the appellant liable to the respondent in the expenses of the action.

[2] The appellant has two substantive craves. First, to ordain the respondent to appoint and thereafter maintain in office one director of Remote Measurement Systems Limited ("RMS") within 14 days or such other period as the Court deemed appropriate. Second, for payment by the respondent to the appellant of the sum of £1,392,545.84 with interest thereon at the rate of 8% per annum from the date of citation until payment.

[3] RMS provides support services to the oil and gas industry. Until 14 May 2020, the respondent was a director, employee and shareholder of RMS. The respondent terminated his directorship with RMS on 14 May 2020. The respondent's employment with RMS terminated on 15 June 2020. The respondent remains a shareholder in RMS, holding 40% of its issued share capital. The remaining 60% of the shares in RMS are held by the appellant, who purchased them from the respondent by virtue of a share sale and purchase agreement dated 1 February 2017 ("the SPA"). The appellant, the respondent and RMS are parties to a shareholders' agreement also dated 1 February 2017 ("the Shareholders' Agreement").

**Grounds of Appeal**

[4] There are two grounds of appeal. First, the sheriff erred in his interpretation of the Shareholders' Agreement. Properly read in context the respondent is obliged to appoint a director. The appellant pled a relevant case that the respondent is obliged to appoint and maintain in office one director of RMS. The appellant's averments in this regard ought to have been admitted to probation. Second, the sheriff erred in his interpretation of Clause 11.1 of the shareholders agreement. The appellant pled a relevant case that the

respondent was in breach of Clause 11.1. The appellant's averments in this regard ought to have been admitted to probation.

**Submissions for the Appellant**

[5] In relation to the first ground of appeal, the appellant submitted that the sheriff had erred in his construction of Clause 4.2 of the Shareholders' Agreement. In particular, the sheriff erred in concluding that in the absence of a definition of the word "entitled" it should expect to be given its normal and natural meaning unless there was any special use or application of it within the Shareholders' Agreement that pointed in the direction of a particular or special meaning for its purposes. As a consequence, the sheriff erred by placing too much weight on the normal and natural meaning of the word. The sheriff ought to have given more weight to the use of the word in the context of the Shareholders' Agreement as a whole.

[6] The appellant argued that the provisions of Clauses 2.2, 4.6 and 4.7 of the Shareholders' Agreement gave context to Clause 4.2. Clause 2.2 requires each shareholder to use reasonable endeavours to promote the success of and develop the business of RMS. Clause 4.6 requires the attendance of at least two directors, including attendance by at least one director appointed by each shareholder, at a board meeting in order for the meeting to be quorate. The clause permits each shareholder to waive that requirement. Clause 4.7 requires that certain board resolutions must be approved by directors appointed by both the appellant and the respondent. The appellant offered to prove that absent a director being appointed by the respondent, and the consequent inability of RMS to make certain of the decisions listed in Clause 4.7, decisions to plan for the success of RMS and the development of its business could not be taken.

[7] The appellant argued that the success and development of the business to the best advantage of RMS was not promoted if RMS was disabled from making decisions of the sort listed in Clause 4.7. That situation arose where either party failed to appoint and maintain in office a director of RMS. Such an appointment was within the parties' rights and powers as shareholders of RMS. A party's failure to make an appointment was a failure to exercise that party's rights and powers as a shareholder to promote the success of, and develop the business, to the best advantage of RMS. In that context, Clause 4.2 ought to be construed as requiring the respondent to appoint and maintain in office a director of RMS. The appellant also argued that the sheriff erred in finding that the appellant's averments were, in any event, irrelevant and lacking in specification. The appellant had adequate averments in support of their position.

[8] In relation to the second ground of appeal, the appellant argued that the sheriff had erred in concluding that the appellant's case in respect of breach of contract was irrelevant and should be dismissed. The appellant's case on breach of contract was based upon the respondent not having taken steps to procure payment. The appellant's averments were suitable for probation. The appellant averred that the respondent was in breach of his contractual obligation to procure payment. The sheriff identified that "to procure" is a verb. That can only mean that there is an obligation on the respondent to do something. The appellant offers to prove that the respondent has done nothing to procure payment. The respondent has failed to appoint an alternate director. The appellant contends that the failure to do anything to procure payment has resulted in the breach of the obligation. The appellant offers to prove that this breach has resulted in RMS being unable to make certain decisions, including authorising repayment of the loan in question to the appellant. The appellant avers that the breach of contract has caused it loss in the second sum craved. The

obligation said to have been breached; the manner of the breach; and the loss occasioned by it are all identified. An action ought not to be dismissed as irrelevant unless it must necessarily fail even if all the appellant's averments are proved. It cannot be said that if the appellant proves all it offers to prove its contractual claim is bound to fail.

**Submissions for the Respondent**

[9] The respondent submitted that the sheriff was correct to conclude that Clause 4.2 did not oblige the respondent to appoint a director to RMS. The clause confers a right on the respondent, not an obligation. The language of Clause 4.2 is permissive rather than containing a mandatory requirement. Clause 4.1 provides that there will be "up to" a maximum of three directors. If Clauses 4.2 and 4.3 were obligatory rather than permissive then the clause would have provided for there to be three directors rather than a maximum of three directors. Clause 4.6 provides for a quorum to include a director appointed by each shareholder subject to two exceptions. One of those is "provided that such a director holds office at the relevant time". That provision clearly anticipates that one or other of the shareholders might not appoint a director.

[10] Clause 4.5 does not oblige either shareholder to nominate a director. Properly construed, that clauses obliges a shareholder to vote in favour of a director that is nominated by the other shareholder in accordance with his rights under the clause. Any other interpretation would be inconsistent with the wording of Clauses 4.1, 4.2, 4.3 and 4.6. Clause 4.7 does not prevent RMS from operating in the absence of a director appointed by the respondent. Clause 4.7, properly construed, provides that there are issues on which both the appellant and respondent have a right of veto. They are, by their very nature, matters of importance which are outwith the day to day operations of RMS.

[11] The Shareholders' Agreement specifically provides for circumstances where a resolution which falls within Clause 4.7 is proposed but not passed. In the first three years following execution of the Shareholders' Agreement, Clause 7 provides for the parties to reach agreement on the matter, which failing, an independent expert be appointed to determine the appropriate course of action. After three years following the execution of the Shareholders' Agreement, Clause 8 provides a mechanism whereby either party can seek to purchase the shares of the other party. The sheriff was correct to conclude that there is nothing in Clause 2.2 which required the Court to give Clause 4 anything other than its natural interpretation.

[12] The respondent submitted that the sheriff was correct to conclude that the appellant's arguments regarding breach of contract by the respondent were irrelevant. The appellant seeks payment from the respondent on the grounds that the respondent is in breach of its obligation to procure payment by RMS. Clause 11 of the Shareholders' Agreement did not require the respondent to make payment to the appellant if RMS failed to make payment. It required both the appellant and the respondent to exercise their rights as shareholders of RMS to facilitate the making of that payment where that was possible. The appellant's averments of breach of contract are irrelevant.

**Decision**

[13] The rights and powers of the shareholders are set out in the Shareholders' Agreement. Clause 4.2 provides that "for so long as [the respondent] shall be a Shareholder holding over 25% of the issued share capital of [RMS], [the respondent] shall be entitled to appoint and maintain in office one director of [RMS]". The respondent is a Shareholder holding over 25% of the issued share capital of RMS. In interpreting a document, where a

word or expression has a natural and ordinary meaning, effect should be given to that, see *Charter Reinsurance Co Ltd* v *Fagan* [1997] AC 313 at page 384 A-B. The word in issue here is "entitled". As correctly submitted by the respondent, it creates a right; it does not impose an obligation. It is necessary then to consider any other relevant provisions in the Shareholders' Agreement.

[14] The other relevant provisions referred to by the parties are Clause 2.2; Clauses 4.1, 4.2, 4.3, 4.6 and 4.7; and Clauses 7 and 8. Insofar as Clause 2.2 is concerned, we concur in the view expressed by the sheriff - there is nothing within that clause which requires this Court to give Clause 4.2 anything other than its natural and ordinary meaning. In relation to the various sub-clauses within Clause 4 referred to, again, there is nothing within them which support an interpretation of Clause 4.2 other than its natural and ordinary meaning. Clauses 7 and 8 are not of direct application to the present dispute. In our opinion, they provide no assistance in the interpretation of Clause 4.2.

[15] Clause 4.2 entitled the respondent to appoint and maintain in office one director of RMS. It did not oblige the respondent so to do. There is no uncertainty as to the language adopted. The language of Clause 4.2 is unambiguous. There is nothing within what were suggested by parties to be the other relevant provisions of the Shareholders' Agreement to support Clause 4.2 being given anything other than its natural and ordinary meaning. The sheriff reached the correct decision upon this issue.

[16] The appellant did not seek to advance an argument based upon Clause 11 of the Shareholders' Agreement amounting to a guarantee. Following an amendment before this Court, the appellant's case is that the respondent having breached his obligation in terms of Clause 11.1 to procure that RMS make payment to the appellant, and the appellant having

sustained loss and damage as a consequence, the appellant is entitled to damages from the respondent. Clause 11.1 is in the following terms:

> "The parties shall each procure that [RMS] shall pay to Newtech a sum in respect of all Non-liquid Inventory on or prior to the date failing 30 Business Days after the second anniversary of the Completion Date in accordance with the following formula:
>
> S = (Y-Z) x 0.6 / 0.4
> where
>
> S - is the amount payable to Newtech,
>
> Y - is the aggregate cost less write down/provision of all Inventory as shown in the Completion Accounts (as defined in the SPA)
>
> Z - is the aggregate of all sums received by [RMS] in respect of Sold Inventory (provided that where an item has been used in the production of new products and it is not possible to individually identify the sum received for such item then the cost less the write down / provision of such an item as shown in the Completion Accounts (as defined in the SPA) shall be deemed to be the sum received). In relation to any dispute as to the valuation of the Inventory, the policies and mechanisms for resolving disputes in the Completion Accounts shall apply.
>
> 0.6 – [the appellant's] share in the Non-liquid Inventory
>
> 0.4 – [the respondent's] share in the Non-liquid Inventory."

[17] The appellant's substantive averments in support of the breach of Clause 11.1 case are as follows:

> "The [respondent] is in breach of his obligation to procure payment. The [respondent] has taken no steps to procure payment by [RMS] to the [appellant] since the date payment fell due. By failing to appoint a director the [respondent] has put his ability to procure payment by [RMS] to the [appellant] out with his control. Further, and in any event, his failure to appoint an alternate director has inhibited [RMS] from engaging in decision making on reserved matters including the borrowing of monies that would have facilitated payment by [RMS] to the [appellant]. But for the [respondent]'s failures, payment could and would have been made by [RMS] to the [appellant] of the sums due under Clause 11 of the Shareholders Agreement. The [respondent]'s breach of contract has caused loss to the [appellant]. But for the [respondent]'s breach of contract [RMS] would have been in a position to pay the sum second craved."

[18] Having regard to the conclusion we have reached on the first ground of appeal (that relating to the appointment of a director by the respondent), the averments relating to a failure to appoint a director do not assist the appellant. All that remains is the averment that the respondent has taken no steps to procure payment by RMS to the appellant since the date payment fell due. The appellant does not aver the steps it contends the respondent ought to have taken. It is not averred that RMS cannot make payment and yet the appellant seeks payment from the respondent of the entire sum that is said to fall due under Clause 11. The obligation in question, namely, that of payment is one which is incumbent upon RMS.

[19] Notwithstanding the amendment, the appellant's averments in support of the breach of Clause 11.1 case are lacking in essential specification. We reach the same conclusion on the amended pleadings as the sheriff did on those before him.

**Disposal**

[20] The appeal will be refused and the interlocutor of the sheriff adhered to. The appellant will be found liable to the respondent in the expenses occasioned by the appeal. The Court will sanction the employment of junior counsel in relation to the appeal.