SHERIFF APPEAL COURT

[2024] SAC (Civ) 43
DBN-A107-20

Sheriff Principal D C W Pyle
Appeal Sheriff D O'Carroll
Appeal Sheriff C M Shead

OPINION OF THE COURT

delivered by APPEAL SHERIFF DEREK O'CARROLL

in the appeal in the cause

GEORGE BEATTIE & SONS LIMITED

Pursuer and Respondent

against

GARELOCH SUPPORT SERVICES (PLANT) LIMITED

Defender and Appellant

Defender and Appellant: Whyte, Advocate; Lindsays LLP
Pursuer and Respondent: Boni, Advocate; DAC Beachcroft (Scotland) LLP

15 October 2024

Introduction

[1] The crux of the dispute between the parties in this appeal concerns whether an adjudicator exceeded his jurisdiction. Parties also dispute whether the appellant made an appropriate and clear objection to the adjudicator's jurisdiction in their response and rejoinder to the adjudication and if, having done so, they reserved that objection.

Background

[2] In 2019 the Ministry of Defence initiated works to replace the Glen Mallan jetty along the eastern shore of Loch Long, Argyll & Bute. Buildings on the jetty were to be removed, the jetty dismantled and a new one built. Those works were ultimately completed in 2022.

[3] Two of the contractors involved in those works are the parties to this action. They agreed that the respondent would remove the structures on the jetty and then dismantle parts of the jetty.

[4] There was no single document which embodied the entirety of the legal arrangements between the parties for the works; instead the contractual arrangements between the parties are contained in four quotations and correspondence accepting the same. With respect to the works for the removal of the structures on the jetty, the respondent issued Quotation 1 for the sum of £63,000 excluding VAT to the appellant on 1 February 2019. The respondent subsequently issued Quotation 2 for the sum of £28,875.80 excluding VAT on 17 June 2019; that quotation was for works to dismantle the jetty. The terms and conditions attached by the respondent were not identical. The appellant accepted both quotations on 12 July 2019 by two emails sent to the respondent. In the email accepting Quotation 2, the appellant sought two further quotations for additional dismantling work on the jetty. Quotations 3 and 4 were subsequently issued and accepted by the appellant.

[5] The works proceeded. The respondent issued four invoices to the appellant for payment which were all paid without objection. The respondent then submitted its fifth invoice, number 4138, on 27 January 2020 for £60,195.30 inclusive of VAT. That sum was not paid; instead, the appellant issued a Pay Less Notice on 9 April 2020 proposing to deduct £30,000, effectively as a set off against a claimed breach of contract by the respondent said to have caused delay and loss to the appellant. The respondent did not agree to that

deduction. The appellant refused then to pay anything at all. That is the dispute: the appellant's refusal to pay invoice 4138.

Adjudication

Referral

[6] The respondent referred the dispute to adjudication in its notice dated 29 July 2020. The notice stated that the contract in dispute was:

> "The Contract Agreement (hereinafter called 'the Contract') was entered into on 12 July 2019 between Gareloch Support Services (Plant) Ltd (hereinafter called 'the Payer') and George & Sons Limited (hereinafter called 'the Payee') for the floor sawing, diamond drilling and wire sawing into concrete jetty at Glen Mallan Jetty, Loch Long, Argyll and Bute (hereinafter called 'the Project').
>
> The Contract Sum was originally agreed in the sum of £28,875.80 … exclusive of VAT. Over the course of the works this increased dramatically ending up at £213,555.70 excluding VAT."

[7] The dispute specified was over the failure by appellant to pay invoice 4138. The respondent contended that the Pay Less Notice issued by the appellant was out of time, therefore invalid. So the invoice was payable in full.

[8] The appellant responded to the referral claiming that four separate contracts had been agreed between the parties, one in respect of each quotation issued. On the basis of the respondent's notice of referral, the appellant contended that payment could only be sought by the respondent for the sum of £28,875.80 exclusive of VAT: the sum agreed for Quotation 2. That had already been paid. Therefore there was nothing to refer to adjudication.

[9] The respondent responded by saying there were not four separate contracts. The parties had agreed to increase the scope of the original contract works and the contract sum

increased as a result. There was one contract which was comprised of four quotations and an acceptance to each of those.

[10] The appellant's rejoinder was that the respondent was bound by the position adopted in the notice of referral of 29 July 2020. The respondent had been paid for those works. That was shown by the fifth invoice itself. The appellant could only meet the case made against it, it was not required to provide its own analysis.

Adjudicator's decision

[11] The adjudicator issued his decision on 29 August 2020. He considered his jurisdiction was not challenged. However, he recorded the appellant's submission that his jurisdiction was confined to the dispute referred. He decided the Pay Less Notice was invalid. Therefore the respondent was entitled to payment in full of the disputed invoice with interest.

The sheriff court action

[12] The appellant did not accept the decision of the adjudicator. No payment was made. The respondent therefore raised the present action to enforce the decision of the adjudicator. In its defences, the appellant contended that the adjudicator had exceeded his jurisdiction by considering multiple contracts, rather than a single contract, when determining the dispute. The appellant averred that it had made its objection to jurisdiction clear to the adjudicator and that his failure to recognise such was a further error on his part. On that basis, the appellant's position was that the adjudicator had acted *ultra vires* of his powers and that his award should not be enforced by the sheriff. The adjudicator's decision that the Pay Less Notice was invalid, being out of time was not disputed.

[13] Following a proof before answer, the sheriff rejected the appellant's defence. She determined that the four separate quotations and acceptances amounted to a single contract and that only one contract had been referred to the adjudicator. Further, she considered that the appellant had failed to make a valid challenge to the adjudicator's jurisdiction. She therefore granted decree for the sum awarded by the adjudicator.

[14] We turn now to summarise the submissions for the parties in this appeal. The parties helpfully lodged detailed written submissions before the appeal hearing which were adopted at the outset. They have all been taken into account by this court. It is unnecessary therefore to rehearse them in full and it suffices for present purpose simply to summarise the most salient parts.

Submissions for the appellant

Witness credibility and reliability

[15] The only witness led by the respondent was Mr Beattie. The appellant contended that he was not credible nor reliable, contrary to the view the sheriff took. While reliance on Mr Beattie's evidence was only one factor contributing towards the sheriff's determination in favour of the respondent, the transcript showed that his evidence was not reliable. At points in his evidence, he was evasive, repetitive, uncertain, sometimes contradictory, and also refused to acknowledge certain basic realities of the documents put to him. He was unable to provide a convincing explanation on a number of points and some of his assertions were incredible. As a consequence, the sheriff erred and his evidence should be discounted in any analysis of the contractual position.

Contractual interpretation

[16] Section 108 of the Housing Grants, Construction and Regeneration Act 1996, read together with paragraph 1 of Scheme for Construction Contracts (Scotland) Regulations 1998, does not allow a dispute arising under more than one contract to be referred to an adjudication: *Rawlings Consulting (UK) Ltd* v *Maelor Foods Ltd* [2018] EWHC 2277 (TCC) at paras [24] - [25].

[17] It was not disputed that four separate quotations and four acceptances to each quotation were made. The appellant contended that that amounted to four separate contracts. In the notice, the respondent relied upon Quotation 2 as the foundation document for the contract said to be in dispute, despite the fact that Quotation 1 was a more coherent source of the alleged sole contractual relationship between the parties.

[18] The respondent was clearly being asked to quote separately for different phases of the project. There were changing patterns and quantities of work in respect of those different phases. The sheriff wrongly minimised the importance of this circumstance. These were differing types of works, to be performed at different times and there was no commitment to use the respondent for the whole of the project or even sequential phases.

[19] The sheriff placed excessive emphasis on the fact that a single invoice number was used by parties for the works as a key factor in determining there was a single contract when that was not the only credible explanation for such. The sheriff considered the use of different sets of terms (albeit the same terms were used for Quotations 2, 3 and 4) between the different quotations as being in the respondent's favour but "not determinative", despite the evidence showing that these differences in terms were extensive.

[20] As such, the sheriff erred in holding that only one contract had been referred to the adjudicator. Multiple contracts had been referred and, as a consequence, the adjudicator had exceeded his jurisdiction.

Jurisdiction – notification and reservation

[21] The appellant accepted that its arguments on notification and reservation could only be considered if it was successful in persuading this court that more than one contract was referred to the adjudicator. In that event, the appellant submitted that it had made it sufficiently clear in both its response and rejoinder to the adjudicator that his jurisdiction was being challenged. The sheriff erred in determining the legal test for demonstrating an effective challenge to jurisdiction of an adjudication. She considered that any challenge had to cross a threshold of explicitness; any challenge had to be made in express terms. That set the test too high and it ignored the important role of contextual indications as to protest.

[22] While it may be beneficial for there to be some express form or flavour of words invoked to protest jurisdiction, the absence of such should not obscure the practical reality and what can otherwise be clearly deduced from the documents. A general form of reservation while imperfect may be sufficient to preserve the party's objection: *GPS Marine Contractors Ltd* v *Ringway Infrastructure Services Ltd* [2010] EWHC 283 (TCC); *Aedifice Partnership Ltd* v *Shah* [2010] EWHC 2106 (TCC); *Michael J Lonsdale (Electrical) Ltd (In Liquidation)* v *Bresco Electrical Services Ltd* [2019] EWCA Civ 27; and *Hochtief Solutions AG* v *Maspero Elevatori S.p.A.* 2021 SLT 528.

[23] The appellant's objection and reservation was sufficient to put the adjudicator on notice that his jurisdiction was challenged. Regarding reservation of an objection to jurisdiction, in most instances the objection will be sufficient by itself to reserve a party's

position as to a challenge to jurisdiction. Complications arise where a party who having made an objection then deviates from it, as happened in *Hochtief*. That was not the position here, and the court should find that a sufficient objection had been made to the jurisdiction of the adjudicator.

Submissions for the respondent

Witness credibility and reliability

[24] Mr Beattie was able to speak to the quotations and email correspondence. The sheriff was entitled to rely upon his evidence. The witness explained why the works, risk profiles and payment terms taken together meant that there was only one contract formed between the parties. Even if the court considered there was merit in the appellant's criticism of the respondent, nothing turned on particular answers in cross-examination as to the relationship and timing of Quotations 1 and 2 and their acceptance. That was a matter for contractual interpretation.

Contractual interpretation

[25] The sheriff correctly held that whilst the different terms and conditions between Quotation 1 on the one hand and Quotations 2, 3 and 4 on the other was relevant to interpretation, this was not determinative and was outweighed by other factors. The words used in the correspondence between parties read as though the parties were entering into one contract, specifically due to the use of the words "phases" rather than contracts, as well as the use of "an extra over cost" and "additional cost". Moreover, the use of one single invoice number for all invoices was yet another factor that led to the conclusion that the four quotations amounted to a single contract.

[26] Even if the court was to accept that multiple contracts were agreed between the parties, the appellant's argument that there were four separate contracts was plainly wrong. At most, there were only two: (i) a contract with respect to Quotation 1; and (ii) a second founded by Quotation 2 and amended by Quotations 3 and 4. Whatever position the court took as to whether there was just one or two contracts, the fact remained that only one contract had been referred to the adjudicator. That being so, it was not open to this court to assess whether jurisdiction had been properly raised.

Jurisdiction – notification and reservation

[27] Even if multiple contracts had been referred to the adjudicator, the sheriff had applied the correct legal test to the facts to determine whether or not the appellant had made a sufficient objection to jurisdiction. There was a distinction between notification of an objection and subsequent reservation of that objection. The appellant had to do both if it wanted to challenge the adjudicator's jurisdiction in enforcement proceedings but had not done so. Accordingly, it had no basis upon which to challenge the enforcement of the adjudicator's award.

Decision

Witness credibility and reliability

[28] As is well-known, assessment of the credibility and reliability of witnesses is pre-eminently a matter for the sheriff at first instance who has seen and heard the witness giving evidence. Any appeal court will attach considerable weight to that assessment and will interfere with the findings of fact made by the sheriff only on the basis that she has plainly gone wrong or if it is satisfied that her decision cannot reasonably be explained or

justified: see Macphail *Sheriff Court Practice* (4th ed.) paragraph 18.152 and authorities cited therein. The sheriff has in this case clearly explained her reasons for accepting the evidence of Mr Beattie and preferring his evidence to that of the appellant's witness. We detect no error in her approach. This ground of appeal is in essence an attempt to reargue submissions on the evidence before the sheriff. It does not reveal any error of law.

Contractual interpretation: one or more contracts

[29] As regards the law applicable to this question, the sheriff noted that there was no disagreement between the parties on the law on construction of contracts. The dispute was about the application of the law to the facts of the case. That remained the position on appeal. So there is no appeal on the basis that the sheriff misdirected herself on the law or misunderstood the legal principles. Rather, the appellant's position on appeal is that the sheriff misapplied those principles to the facts of the case.

[30] The sheriff directed herself by reference to familiar authoritative sources. Whether there was one or more contract was governed by the principles of the general law of contracts. Those principles were summarised by Lord Hodge in *Morgan Utilities Ltd* v *Scottish Water Solutions Ltd* [2011] CSOH 112, paragraph 52. So, the court should consider what the parties meant by the language used in the contract. The correct approach is to consider what a reasonable person would have understood the parties to have meant, that reasonable person possessing all the background knowledge reasonably available to the parties at the time of the contract: *Rainy Sky SA* v *Kookmin Bank Co Ltd* [2011] 1 WLR 2900.

[31] We can detect no error of law in the way that the sheriff applied these principles to the facts of the case as she found them. Her approach is clearly set out in her extensive discussion and analysis at paras [55] to [74] of her judgment. There, she considers in detail

the adminicles of evidence and arguments for and against the one contract argument. In favour of the one contract position, the use of "phases" by the parties to describe the works, the request by the appellant that a single invoice number be used by the respondent for all invoices, the fact that all invoices for all the works did in fact use the same invoice number, the start date of phases being contiguous, the correspondence between the parties being a continuous series over a short time, and the language used by the appellant in its email accepting Quotation 2. These factors taken together she found were indicative of a single contract.

[32] The sheriff fully considered the factors said to point towards a series of separate contracts. Those factors were the absence of an overarching contract or framework document, the use of the word "offer" in the quotations, the fact of there being different phases with different kinds of work, the fact that each quote contained a figure for a discrete part of work rather than a cumulative figure, the attachment of terms and conditions to each quotation, not all of which were the same and the absence of the use by the respondent of the words "variation" or "amendment". She explains clearly why these factors taken singly or in cumulo were not persuasive of there being more than one contract. Applying the agreed law to the facts, she determined that the parties had entered into a single contract. So, it is implicit from that determination that notwithstanding the inaccurate reference by the respondent's agents in the written referral to adjudication to the starting date of the contract and the original contract price, all the work done by the respondent was done under a single contract and that was what was referred to the adjudicator who had jurisdiction to determination the dispute arising from that contract.

[33] The appeal against that conclusion rests essentially on the proposition that taking account of all the factors prayed in aid by the appellant, the sheriff ought to have reached

the opposite conclusion. In substance, although posing as a ground founding on the sheriff's error of law, this ground of appeal seeks merely to reargue the appellant's submissions on the evidence. It was the sheriff's task to determine the facts, analyse and weigh them appropriately, reach conclusions and determine the legal issue. This she did and she determined there was just one contract between the parties. The approach she took to reach that determination was correct in law as was the determination itself.

[34] We are fortified in that conclusion by another matter which arose in discussion during the hearing. It is common ground that the dispute concerned a single invoice number 4138 which the appellant refused to pay because the respondent refused to agree a set off of £30,000. It is also common ground that the invoice was for work referable to two or more of the quotations. Importantly, it is also common ground that the invoice did not ascribe separate charges to work attributable to different quotations, no break down was given, and that it would not be possible for either of the parties to separate the charges in that way on that invoice. Thus, as counsel for the appellant conceded, if the appellant's argument were correct, it would have been impossible for the respondent to have referred that dispute arising from the appellant's refusal to pay that invoice to adjudication at all. There would be no remedy under the statutory scheme.

[35] As counsel also conceded, on the appellant's argument, to use the remedy of adjudication, the respondent would have had to cancel invoice 4138, disentangle each constituent part of work, (if that were possible), ascribe those parts somehow to the work referred to in two or more quotations and then issue two or more fresh invoices totalling the same sum as in invoice 4138 to the appellant. If the appellant then again refused to pay those fresh invoices, the respondent would have had to make separate referrals to adjudication for each of the invoices, meaning that there would have to be two or more

concurrent adjudications necessary to resolve a dispute originating in a single disputed invoice. But that, maintained counsel for the appellant, with all the attendant delay, expense and difficulties, was what should have been done. And that against the background of a statutory framework conceived by Parliament which was intended to eliminate or reduce payment delays and simplify dispute resolution. It is only necessary to state the argument to see the manifest impracticality of such an approach. The reality, as determined by the sheriff, reflected in the composite nature of invoice 4138, was that the parties entered into a single contract for all the work involved and only a single adjudication on that invoice was required.

[36] Therefore the adjudicator was correct in law to determine that there was a single contract before him. He did not act *ultra vires* and he did not exceed his jurisdiction by making the determination that he did.

[37] The appellant concedes that in the event that this court upholds the decision of the sheriff as regards the unitary nature of the contract, the remaining grounds of appeal must fail. In deference to the parties' submissions on the remaining issues, we shall deal with them briefly.

Jurisdiction – challenge to jurisdiction and maintenance of challenge

[38] It was common ground that in a case of this type, where one party has referred a dispute to an adjudicator, the adjudicator is confined by the scope of the notice of adjudication: *DC Community Partnerships Ltd* v *Renfrewshire Council* [2017] CSOH 143. Unless the respondent to a referral challenges jurisdiction properly, it will be bound by the adjudication and cannot subsequently resist subsequent enforcement proceedings on the basis of lack of jurisdiction. Moreover, even if there is a proper challenge, that challenge

must be maintained if it is to be persisted in subsequent to the adjudication process. That begs the question as to the test for whether such a challenge has been properly made and maintained. The sheriff held that no proper challenge had been made.

[39] In our view, she correctly directed herself by reference to the Inner House decision in *Hochtief Solutions AG* v *Maspero Elevatori S.p.A* 2021 SLT 528. In the Outer House, Lord Clark held that the defender had not reserved jurisdiction, there being no express challenge and that the defender had consented to the adjudicator having jurisdiction to consider the contract position. In refusing the appeal, the Inner House held at para [36] that in deciding whether a challenge to jurisdiction had been properly made:

> "the critical question is whether it made its challenge "appropriately and clearly"…Such a threshold test is required, because the adjudicator and the referring party must be given an opportunity to assess whether the challenge is a good one. No purpose is served by continuing with a flawed adjudication".

[40] The sheriff, applying *Hochtief*, held that there was no express challenge and that the test set out there was not satisfied. In her opinion, the words used by the appellant in its submissions to the adjudication, no express reservation having been made, were not sufficiently clear so as to indicate to the adjudicator and the respondent that its position on jurisdiction was being reserved. The sheriff was entitled and correct to so conclude in our view. That being so, and no subsequent express reservation having been made, the final ground of appeal also falls to be refused.

Disposal

[41] The appeal is refused on all grounds. The parties were agreed that expenses of the appeal would follow success and that sanction should be granted for the employment of junior counsel. We so order.