SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES & GALLOWAY AT HAMILTON

[2020] HAM 50

HAM-A518-19

JUDGMENT OF SHERIFF DANIEL KELLY QC

in the cause

DONALD McARTHY TRADING PTE LIMITED

Pursuers

against

IRELAND ALLOYS LIMITED

Defenders

Pursuers: Massaro, Advocate; Levy & McRae, Glasgow
Defenders: Garrity, Advocate; Turcan Connell, Edinburgh

Hamilton, 16 November 2020

Issue

[1] After a series of contracts had been entered into for the sale of metal products, the purchasers disputed whether certain goods in one of the contracts conformed to the specifications. When an email exchange between the parties' solicitors ensued, parties found themselves at odds as to whether in the course of that exchange an agreement had been reached resolving the dispute. If it had, it was recognised that the pursuers were entitled to decree in terms of that agreement. If not, the defenders sought dismissal of the action as irrelevant. Also addressed at the debate was an *esto* case advanced by the

pursuers, a counterclaim made by the defenders and the pursuers' motion for the expenses of the cause to 4 March 2020.

The original contracts

[2] Various prior contracts had been entered into between the pursuers, who have their registered office in Singapore, and the defenders, who have theirs in Hamilton. It was not disputed that parties had entered into a contract with an invoice numbered 2702DT for the supply of goods by the pursuers to the defenders. The invoice is dated 11 June 2019 and is in the amount of US $712,764.75. The loading port was Singapore and the port of discharge was Southampton. An initial payment of US $427,658.85 had been made and the goods in respect of the purchase order arrived in Southampton on 5 July 2019. The pursuers aver that the payment terms provided that 60% of the sums due were to be paid prior to shipping, with the balance to be paid within 30 days of arrival at the United Kingdom port. According to the pursuers, the final payment of US $285,105.90 thereby fell due to be paid by 4 August 2019. The defenders disputed that there was any implied term that they only had 30 days in which to analyse the materials and to make payment of the balance. Subsequent to this date they contended that certain of the goods did not conform to contract and a dispute arose over payment of the balance of US $285,105.90, which is the amount craved. On 4 March 2020 the defenders made a payment of US $199,166.40 to the pursuers. The pursuers have attributed that payment to the invoice and their calculation of the resultant balance was US $85,939.40, which was the sum now sought, together with interest and expenses.

[3] The pursuers had separately provided goods to the defenders which were listed in a different invoice, namely number 2675DT dated 24 April 2019. One of those products was 6,650 Inco 907 Turnings invoiced at US $8.75 per kilogram, totalling US $58,187.50.

The email exchange

[4] An email exchange took place on 29 August 2019 between inter alia Carol Boyd and Victoria Savage, solicitors at Levy and McRae Solicitors LLP, Glasgow, acting on behalf of the pursuers, and Stuart Douglas, a director of the defenders. The exchange was in the following terms:

5.1 At 10.15 from Carol Boyd to Vidhi Didwania, Vedant Didwania, Alison Condron and Stuart Douglas:

> "Subject Re: Donald Mcarthy Trading pte ltd
> Dear Mr Douglas
> I now have my client's instructions. Their position remains that they seek either full payment of the balance or return of the entire goods. Please can you confirm which of these two options you wish to take by 3 pm today.
> Yours sincerely
> Carol Boyd"

5.2 At 14.52 from Stuart Douglas to Carol Boyd, Vidhi Didwania, Vedant Didwania and Alison Condron:

> "Subject: Re: Donald McCarthy Trading pte ltd
> Importance: High
> Good Afternoon,
> I can confirm that we will be making full payment of the balance of the goods contained within Invoice 2702DT. As per my previous email please can you confirm your clients position with regards to the 907 turnings? I will arrange payment once you have confirmed.
> Regards
> Stuart Douglas"

5.3 At 15.10 from Victoria Savage to Stuart Douglas, Carol Boyd, Vidhi Didwania, Vedant Didwania and Alison Condron:

> "Subject: Re: Donald McCarthy Trading pte ltd
> Importance: High
> Dear Mr Douglas,
> Thank you for confirming that you will be settling the outstanding balance of $285,105.90 due under invoice number 2072DT.

Upon settling the outstanding sum of $285,105.90 you shall be entitled to retain all goods shipped under invoice number 2072DT.
Our client will arrange to collect the Inco Turnings shipped under invoice number 2675DT on 2 September 2019.
I trust this clarifies matters.
Kind regards
Victoria"

5.4 At 15.33 from Stuart Douglas to Victoria Savage, Carol Boyd, Vidhi Didwania,

Vedant Didwania and Alison Condron:

"Subject: Re: Donald McCarthy Trading pte ltd
Importance: High
Victoria
Thank you for confirming. Can you please also confirm that upon full payment being processed, this matter is now concluded in full.
Best regards
Stuart"

5.5 At 15.56 from Victoria Savage to Stuart Douglas, Carol Boyd, Vidhi Didwania,

Vedant Didwania and Alison Condron:

"Subject: Re: Donald McCarthy Trading pte ltd
Dear Stuart,
For the avoidance of doubt, payment of $285,105.90 shall be in full and final settlement of any and all claims with respect to Invoice No. 2072DT.
Please remit the sum of US$285,105.90 direct to our client by 5pm today.
The claim pertaining to Invoice No. 2675DT will only be concluded upon our client uplifting the Inco 907 Turnings from your premises and confirming to you that everything is in order.
Regards
Victoria"

5.6 At 16.44 from Stuart Douglas to Victoria Savage, Carol Boyd, Vidhi Didwania,

Vedant Didwania and Alison Condron:

"Subject: Re: Donald McCarthy Trading pte ltd
Importance: High
Dear Victoria,
Firstly payment will not be processed today and we intend to offer full payment of $235,450.20 as a final settlement. This payment is based on paying in full at contract price for all the materials included in this invoice with the exception of the Waspaloy solids and turnings The Waspaloy has been analysed and has a Bismuth level of 11.1169ppm (Parts per million)

> with the standard being 0.5ppm. The payment of $235,450.20 includes the downgraded waspaloy solids and turnings priced at $6.64 per kilo. (Combined weight 9,570 solids & Turnings)
> Our purchase contract P – 059 – IA16 (attached and has been sent to your client) clearly states "It is a condition of purchase that the material supplied is not radioactive, dangerous or contains any substance, which may be injurious to health, or contaminated by any **alloys of Bismuth**, Lead or Tin or any other material which might have a detrimental effect on steel making". Clearly this material does not meet specification and is therefore rejected. However if your client does not agree to our revised offer your client is welcome to collect material with the 907 on September 2nd.
> I am willing to process this payment tomorrow morning on the condition that your client agrees that this shall be full and final settlement and that there will be no further claims pertaining to invoices to 2675DT and 2702DT. We will of course be ready to return the 907 on September the 2nd.
> Please let me know how you wish to proceed.
> Regards
> Stuart Douglas"

The defenders' submissions

Principal claim

[5] The defenders commented upon the court's jurisdiction to adjudicate upon the original contract, making mention of the pursuers' corporate seat. They accepted that this had not been raised in their pleadings or note of the basis of their preliminary plea but suggested that the question of jurisdiction might be considered *pars judicis*.

[6] The defenders argued in relation to the email exchange that there had been no consensus in relation to the essential elements of a settlement agreement, so that no agreement existed. It was submitted that, as there was no consensus, there was no contract and that the action was irrelevant. The defenders maintained that both parties must have manifested an intention to be immediately bound by all of the legally essential elements of the bargain. In assessing this, the court should adopt an objective approach, based upon what an informed reasonable person would have understood by the words and conduct of

the parties or their agents: *Fordell Estates Ltd* v *Deloitte LLP* [2014] CSOH 55, per Lord Malcolm at para 13.

[7] It was said that the correspondence, considered objectively by a reasonable person, fell far short of the legal requirements for a contract to have been formed under Scots law. There was no discussion of the proper law of the original contract nor of the purported contract. While the correspondence referred to performance under two separate prior contracts (referring to invoices with reference numbers 2675DT and 2702DT), the purported settlement agreement was averred to be in respect of only one of those invoices. Moreover, there was no date agreed for payment of the purported settlement sum. Elements of doubt and conditionality were said to be set out in the email sent at 15.56. The pursuers' solicitors were said to have been making an offer to settle the dispute. In asking at 15.56 hours for remittance of the sum of US $285,105.90 direct to their client by 5pm that day, the proposed payment date of 29 August 2019 was being dictated by the pursuers rather than agreed and there was no acceptance by the defenders of those proposed terms.

[8] The defenders also founded upon the email from Stuart Douglas to Victoria Savage timed at 16:44 on 29 August 2019. This was construed as a rejection of the terms offered by Ms Savage's email timed at 15:56. At the very least, it was argued that this was supportive of the defenders' position that neither party had understood that a binding contract had been concluded.

The pursuers' esto case

[9] The defenders submitted that the pursuers had failed to make any relevant averment as to the formation and terms of the original contract, which was the one on which the *esto* case was based. They submitted that, as the pursuers had failed to make any averments

about the fundamental and essential terms of that contract, the pursuers' averments in Article 5 ought to be excluded from any proof, should the action progress beyond the debate. There was also the question of jurisdiction in relation to that contract.

Counterclaim

[10] The defenders accepted that their counterclaim fell to be dismissed.

Expenses to 4 March 2020

[11] The defenders opposed the pursuers' motion for expenses to 4 March 2020 since they contended that both the action and the *esto* case were fundamentally irrelevant. The defenders maintained that there was no obligation due to the pursuer by reference to the purported settlement agreement and so litigating by reference to a non-existent contract was not warranted.

The pursuers' submissions

Principal claim

[12] The pursuers sought decree *de plano*. They contended that the correspondence amounted to a contract between the parties to settle the dispute and that, if it was established that there was a settlement agreement, they were entitled to decree. The pursuers agreed that the context was important in deciding whether there was a contract or not, and in this instance the context was that there were several contracts for the sale of goods where a dispute had arisen as to whether certain goods were in conformity with one of the contracts.

[13] The pursuers founded on the context in which the emails were sent as being a formal one. The context was a dispute about how much was due under an invoice in circumstances where the defenders were retaining the goods and seeking to renegotiate the price based on alleged defects. The defenders' response in the email timed at 14.52 was submitted to be unequivocal in confirming that the defenders would be making full payment of the balance of the goods contained in invoice 2702DT. Mr Douglas had also asked for confirmation in relation to another contract, namely of the 907 turnings, which products had been supplied on invoice 2675DT. At 15.10 Ms Savage, the pursuers' solicitor, had responded noting that the outstanding balance was US $285,105.90. Separately, she had confirmed that her client would arrange to collect the Inco Turnings supplied under the separate invoice on 2 September 2019. By the email timed at 15.33, it was maintained that the only outstanding matter was the confirmation that settlement would resolve matters and that at 15.56 Ms Savage had responded to confirm that it would.

[14] The pursuers argued that the defenders had changed their position in their email timed at 16.44 when Mr Douglas had offered payment of US $235,450.20, which was a difference of US $49,655.70. In this email the defenders had indicated there that they not been willing to pay in full at contract price for the Waspaloy solids and turnings, which they had downgraded to a lesser price of US $6.64 per kilogram. It was argued that the defenders were seeking to change their position by not making full payment of invoice 2702DT but instead offering part payment. They submitted that it was not open to a party to change a term of a contract once a contract has been concluded: *Baillie Estates Ltd* v *Du Pont (UK) Ltd* [2009] CSOH 95 at para [33].

[15] The pursuers sought to distinguish *Fordell Estates Ltd* v *Deloitte LLP*, disputing that the absence of an agreement on a date for payment would necessarily lead to a finding that no binding contract had been concluded, there being other factors raised there.

The pursuers' esto case

[16] If a binding settlement had not been reached, the pursuers averred that by the time that they had taken issue with the products the defenders had lost the right to reject the goods or to seek to revalue them. The pursuers offered to prove that a reasonable period for rejection or revaluation was four weeks based on custom and practice in the industry. They aver that it was an implied term of the contract that if the defenders wanted to revalue or reject the materials supplied, they required to do so by the due date for payment which was 4 August 2019. In the event that this argument was relevant, the pursuers sought leave to amend in order to add further specification.

Exclusions from probation

[17] In the event that decree were not granted, the pursuers sought to exclude certain averments from probation. These were averments alleging breach of contract on the part of the pursuers, a sentence which was said to be vague, retention, and a lack of agreement as to settlement.

Expenses to 4 March 2020

[18] The defenders had made a payment of US $199,166.40 direct to the pursuers on 4 March 2020. The pursuers have never been provided with an explanation as to why this money was paid but they have taken it as a payment to account. They claim that this

represents substantial success in the action at least up to 4 March 2020 which justified an award of expenses in their favour up to that date.

Decision

[19] No prior issue having been taken, it is not proposed to take any point *pars judicis* on whether the court has jurisdiction, especially when the principal question is whether a contract was formed between the pursuers' solicitors, based in Glasgow, and the defenders, based in Hamilton.

[20] The proper approach in law to questions of this kind is well settled and has been expressed as being that both parties must have manifested an intention to be immediately bound to all of the legally essential elements of the bargain. In assessing this, the court adopts an objective approach, based upon what an informed reasonable person would have understood by the words and conduct of the parties or their agents: *Baillie Estates Ltd* v *DuPont (UK) Ltd* [2009] CSOH 95, per Lord Hodge at paragraphs 25 – 26; *Fordell Estates Ltd* v *Deloitte LLP* [2014] CSOH 55, per Lord Malcolm at paragraph 13.

[21] Applying these principles, in *Fordell Estates Ltd v Deloitte LLP* Lord Malcolm found the circumstances to be such that there had not been a concluded contract. There, an important condition expressed in an email had not been withdrawn and remained unmet. The correspondence was "without prejudice". At each stage, before making a binding offer or counter offer, the surveyors required direct instructions from their respective clients and the "without prejudice" epithets required to be viewed in that context. There was a need for a final formal agreement to be drawn up by the lawyers and endorsed by the principal parties. These factors were held to reflect the shared understanding that neither correspondent could bind the parties.

[22] The overall context in which parties' solicitors corresponded on 29 August 2019 was that there had been the commercial sale and supply of materials where parties had disagreed as to whether certain of those materials were conform to the contract. Thereafter, the specific context of the correspondence was set out in the first email timed at 10.15, when the pursuers' solicitor intimated that they did have their clients' instructions and that their position remained that they sought either full payment of the balance or return of the entire goods. They asked for confirmation of which of these two alternatives the defenders wished to take by 3 pm that day. Already, therefore, the matter was focussed against the background of this disputed conformity to contract, in the presentation of the pursuers' solicitor's intimation that their clients sought either of these two outcomes.

[23] At 14.52 a director of the defenders confirmed that they would be making full payment of the balance of the goods contained in invoice 2702DT, thereby taking up one of the two alternatives. Confirmation of the pursuers' position with regards to goods in a separate contract was requested. It was intimated that payment would be arranged once that confirmation had been given. The director intimated that once confirmation had been provided, he would arrange payment.

[24] At 15.10 a different solicitor acting on behalf of the pursuers provided this confirmation in relation to the separate invoice. She intimated that the pursuers would collect the Inco turnings shipped on the invoice number 2675DT on 2 September 2019. At that point the only outstanding matter had, therefore, been resolved. As the confirmation which had been requested had been given, it would be reasonable to deduce that a concluded agreement had been reached by that stage. Further clarification of that was provided in the solicitor thanking the director for confirming that he would be settling the outstanding balance of $285,105.90 due under invoice number 2072DT and in her confirming

that upon settling the outstanding sum of US $285,105.90 the defenders would be entitled to retain all goods shipped under invoice 2072DT.

[25] At 15.33 the defenders' director thanked the solicitor for this confirmation. At this point he had received what he had sought. While it might have been otiose by that stage, he also sought confirmation that, upon full payment being processed, the matter would be concluded in full. At 15.56, expressly for the avoidance of doubt, the pursuers' solicitor did confirm that the payment of US $285,105.90 would be in full and final settlement of any and all claims with respect to invoice 2702DT. An informed reasonable person reading the exchange by this stage would have taken that this bore all the hallmarks of a concluded agreement.

[26] The pursuer's solicitor in the email timed at 15.56 requested that the sum of US $285,105.90 be remitted direct to the pursuers by 5 pm that day. It was contended by the defenders that this meant that no agreement had been reached as to the date of payment and that the date was being dictated by the pursuers rather than agreed. However, the defenders themselves at 14.52 had already intimated that payment would be arranged once confirmation had been given of the pursuers' position regarding the 907 turnings. That confirmation had been provided at 15.10 that day. There had, therefore, been agreement upon a point at which the amount would be payable. Rather than addressing an unresolved condition of the contract, that sentence would reasonably be construed as a request to have the sum paid that day, there having already been an agreement reached in the course of the email exchange and it having been agreed that this amount was by then due.

[27] Subsequently, at 16.44 the defenders' director intimated that the defenders would not be processing the payment that day and that they intended to offer full payment of US $235,450.20 as final settlement. He offered to process that payment the following

morning on condition that the pursuers agreed that this would be in full and final settlement and that there would be no further claims pertaining to both invoices 2675DT and 2702DT. However, an informed reasonable person reading the previous emails would have understood that an agreement between the parties had already been concluded prior to the 16.44 email having been sent. This subsequent email from the defenders' director contradicted the earlier agreement. Having previously confirmed that he would be paying the full price of US $285,105.90, he then said, in what he himself termed "our revised offer", that they intended to offer a lower amount. This was a unilateral proposed alteration and not one which was taken up by the pursuers. A subsequent communication could shed light upon whether parties had indeed intended to reach a concluded agreement. However, in setting out a different position this email presents more as a reconsideration, reverting to a previous position. As such, it came too late to form any part of the agreement which had already been reached. An informed reasonable person would have understood that the parties had already entered into a contract for payment of US $285,105.90 as the balance for the goods supplied on invoice number 2702DT, which was payable after 15.10 on 29 August 2019. Accordingly, this subsequent email from the defenders' director timed at 16.44 that date neither formed part of that earlier contract nor detracted from it.

[28] The pursuers' second plea-in-law in the principal action will, therefore, be sustained and decree granted in their favour in the reduced amount of US $85,939.40, with interest on US $285,105.90 at 8% per annum from 30 August 2019 to 4 March 2020 and thereafter on US $85,939.40 at 8% per annum from 5 March 2020 to the date of payment.

[29] The pursuers' *esto* case is no longer a live issue. Had it been, it would have been excluded from probation as it currently stands, since there is insufficient specification of any implied term of the contract. The pursuers sought further time to amend in order that it be

made relevant. While the claimed implied term based upon custom and practice in the industry appears vague, an opportunity to present a minute of amendment for consideration would have been provided to the pursuers had they wished to take it.

[30] The defenders' counterclaim no longer being insisted upon, the pursuers' first plea-in-law in the counterclaim will be sustained and the counterclaim dismissed.

Expenses

[31] While further submissions on expenses might have been required had other outcomes emerged, it was not disputed that if decree were to be granted the pursuers would be entitled to the expenses. While both sides sought sanction of the preparation and attendance at the debate as suitable for the employment of junior counsel, an interlocutor to that effect has already been granted on 18 September 2020 in response to an unopposed motion to that effect. It, therefore, only remains to find the defenders liable to the pursuers in the expenses of the action.