FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 59
CA85/16 and CA131/16

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the causes

AGRO INVEST OVERSEAS LTD

Pursuer and Respondent

against

STEWART MILNE GROUP LTD

Defender and First Reclaimer

and

AGRO INVEST OVERSEAS LTD

Pursuer and Respondent

against

MORGAN ASSOCIATES

Defender and Second Reclaimer

Pursuer and Respondent: MacColl QC, Mackenzie; Brodies LLP
Defender and First Reclaimer: Johnston QC, Walker; Anderson Strathern LLP
Defender and Second Reclaimer: Kinroy QC, M Morton (sol adv); BTO

20 December 2019

Introduction

[1] The pursuer and respondent, Agro Invest Overseas Ltd (Agro), is part owner of a section of a large estate in Dalwhinnie, Inverness-shire, situated on the shore of Loch Ericht and known as Ben Alder. In 2007 it entered into a series of contracts for the design and construction of certain works on the estate, including the building of an underground spa and leisure centre, situated at basement level in the main lodge building; works to a breakfast room above the leisure centre; a north tower extension to the main lodge; and the construction of a new private chapel and beach turret on the shore of the loch. The land upon which the leisure centre, breakfast room and north tower extension works were to be completed is owned by a Panamanian company, Compañía Financiera Waterville SA (CFW). Agro, along with eight other individuals, owns the land at the loch. Agro and CFW are subsidiaries of the same holding company. It is maintained that an agreement existed between Agro and CFW to the effect that Agro would act as agent and developer in relation to the works, and further, that in respect of the property held by CFW it would be liable for the costs of repairing any defects.

[2] Stewart Milne Group Ltd (SMG) were appointed as the main contractor. Morgan Associates (Morgan) were instructed as civil and structural engineers in connection with, amongst other things, the leisure centre. Agro states that problems, including water ingress at all of the aforementioned areas, and structural issues affecting the chapel and beach turret, were caused by defects in the design and the construction of the works. In April 2015 separate actions were raised by Agro against SMG and Morgan. A third case was brought against the architect, Mr Robert Trembath. The summonses were served on 28, 29 and

30 April respectively. The SMG action is based on breach of contract; the Morgan action alleges both breach of contract and fault, as does the action against Mr Trembath.

[3] Preliminary arguments as to prescription, title and interest to sue, and waiver were advanced on behalf of the defending parties. Following sundry procedure, which included the convening of both Morgan and Mr Trembath as third parties in the SMG action, the three cases were appointed to a preliminary proof restricted to the issues of:

(i) whether Agro had suffered loss in respect of alleged defects in the leisure centre, breakfast room and north wing extension, including the question of whether any obligation owed by Agro to CFW had been extinguished by the short negative prescription,

(ii) whether any obligation owed by each of the defenders to the pursuer had been extinguished by prescription, and

(iii) whether the pursuer had waived any right to claim against SMG.

[4] By interlocutor of 16 January 2019, the Lord Ordinary repelled each of the defending parties' pleas-in-law in respect of the said issues. SMG and Morgan have now enrolled reclaiming motions (appeals) in the individual actions directed against them. A reclaiming motion has also been presented by Morgan as a third party in the SMG action. (No motion for review has been lodged by Mr Trembath.) The reclaiming motions concern only the Lord Ordinary's findings in connection with the first issue, namely whether Agro had a liability to CFW, and, if so, whether it has prescribed.

The evidence as to the first issue

[5] The evidence before the Lord Ordinary as to the agreement between CFW and Agro came from two witnesses, Drs Ulrich Kholi and Guido Urbach. Both are Swiss attorneys

and are directors of Agro, the former being the president of the company. Dr Kholi has been a director since 1987. Dr Urbach took up the role in March 2015.

[6] Dr Kholi's evidence took the form of a witness statement supplemented by parole evidence at the proof. Paragraphs 9 to 13 are the pertinent sections of his witness statement. They read as follows:

> "9 ... Prior to the contract for the Works being entered into an agreement was entered into between [CFW] and [Agro] that [Agro] would act as agent and developers in relation to works to those parts of the Estate owned by [CFW] (the 'Agreement') ...
>
> 10 The Agreement was entered into some time in 2006 but was not documented in writing ... In principle, it was agreed that [Agro] is developing and renovating Ben Alder Lodge on behalf of [CFW] for a reasonable compensation according to market conditions. Since [Agro] as well as [CFW] both belong to the same holding company ... there was no requirement for any written agreement.
>
> 11 The terms of that agreement are that [Agro] are the party who were and are liable to meet the cost of the repair to any defective work to the Works to the Underground Leisure Centre, Breakfast Room and North Tower at the Estate ...
>
> 12 ... I confirm that pursuant to the Agreement [Agro] remain liable to [CFW] for any and all defects in and damage to the Works.
>
> 13 Accordingly, [Agro] is the party that has and will continue to suffer loss flowing from any breach of contract on the part of the defender to this action."

[7] Dr Kholi was asked whether he wished to add anything to his witness statement by way of expansion or clarification. He replied as follows:

> "Well, let me say no doubt there were oral agreements among the parties about [Agro] being in charge of Ben Alder, running the show up there and being mandated to keep the estate in good repair, good shape. And then speaking of clarifications, later on these oral agreements were recorded in a memorandum of understanding."

The witness confirmed that the written recording of the agreements happened later. He adopted his witness statement as part of his evidence-in-chief. He was not cross-examined by any of the defending parties.

[8] Dr Urbach adopted his witness statement which mirrors that of Dr Kholi except that, presumably because he was not a director at the material time, he acknowledged that his understanding of the 2006 Agreement came from discussions with Dr Kholi.

The submissions of the parties at the preliminary proof

[9] Agro relied upon the said agreement with CFW for the proposition that in respect of the works at the main lodge (which is owned by CFW), it had and would continue to suffer loss as a result of the alleged breaches of contract. The obligation was an "ongoing" one. It had not prescribed, and in any event could not do so any earlier than the obligations owed by the defending parties to Agro to make reparation for any breach of contract or fault on their part. Even if that was not the case, the raising of the present proceedings by Agro was a relevant acknowledgement within the five year prescriptive period of its obligation to CFW, all in terms of section 10(1)(a) of the Prescription and Limitation (Scotland) Act 1973.

[10] SMG accepted that if Agro had an extant liability to CFW which had arisen by reason of SMG's breach of contract, that could found a relevant claim by Agro against SMG. The onus was on Agro to prove that liability, but the evidence led was insufficient to support such a case. In any event, given the passage of time, any liability to CFW no longer subsisted. There were no averments as to a relevant claim or relevant acknowledgement having been made in terms of the 1973 Act. The raising of these proceedings did not constitute such an acknowledgement. Morgan's submissions to the Lord Ordinary followed similar lines.

The Lord Ordinary's decision

[11] The Lord Ordinary accepted that criticisms could be advanced in respect of the

quality of the evidence in support of the agreement, particularly the absence of written documentation, such as the memorandum of understanding, and the lack of detail as to how, when, and by whom the terms were said to have been agreed. However, Drs Kholi and Urbach were credible and reliable, and their evidence was "wholly unchallenged" (opinion para [34]). Accordingly their evidence was accepted, including in so far as it articulated the terms of the agreement. The question of whether the obligation subsisted at the date of the preliminary proof was for the court to determine on an objective basis, involving construction of the terms of the agreement and taking into account the relevant facts and circumstances. In the evidence the contractual term had been expressed as follows:

> "The terms of that agreement are that [Agro] are the party who were and are liable to meet the cost of the repair to any defective work to the Works to the Underground Leisure Centre, Breakfast Room and North Tower at the Estate." (opinion para [35])

Caution was required when seeking to construe contractual terms where the precise language used was not clear; however this was an oral agreement, and there had been no suggestion to the witnesses that the language used had been different, or that anything else had been said. The evidence had been "undisputed".

[12] No arguments had been advanced as to the correct construction of the contractual term, nor as to when Agro's obligation to CFW arose for performance. For Agro to be under an obligation to CFW, first there had to be defective work which, in relation to the areas covered by the oral agreement, had been caused by defective performance on the part of SMG and/or Morgan. According to Agro it sustained loss at the point of practical completion, which the Lord Ordinary decided was on 2 December 2010. He upheld Agro's submission that the raising of these proceedings constituted a relevant acknowledgement in terms of section 10(1)(a) of the 1973 Act. Plainly they were for the purpose of seeking to

establish the defective nature of the works and of determining the resulting costs which Agro will require to meet. The pleadings referred to the liability owed to CFW. Agro's obligation remained extant as at the date of the preliminary proof.

The reclaiming motions

[13] SMG and Morgan take issue with the decision that the raising of the present proceedings constituted a relevant acknowledgement in terms of the 1973 Act. Morgan also argues that the evidence of Drs Kholi and Urbach was insufficient to establish the existence of an oral agreement between Agro and CFW. In any event the cost of remedying any breach of duty by Morgan is said to be outwith the scope of the obligation allegedly owed to CFW.

The submissions for Morgan

[14] Agro failed to prove the words used to constitute the obligation to CFW. The evidence led was insufficient. The issue is not the credibility or reliability of Dr Kholi, but rather an exercise of interpreting his evidence. The Lord Ordinary failed to undertake that task. His evidence demonstrated that the oral contract in 2006 had a number of terms. There was no attempt to prove the overall tenor of the agreement. There was no evidence about where, by whom, and in what circumstances, or even language, the agreement had been concluded. It was not known whether Dr Kholi had been present at the time, and if not, how he came to be informed. The only significant evidence was at paragraph 11 of his witness statement. There was no evidence that he intended the words used in that paragraph to reflect the actual words constituting the obligation, as opposed to his understanding of their legal effect. Paragraph 12 of his statement is materially different

from paragraph 11. Dr Urbach adds nothing, in that he relied upon information supplied to him by Dr Kholi.

[15] The absence of cross-examination is irrelevant to an issue as to the sufficiency of evidence. The court must still evaluate the evidence: *Walker* v *McGruther & Marshall Ltd* 1982 SLT 345. Had the Lord Ordinary considered the question of what weight, if any, should attach to Dr Kholi's evidence, he would have been compelled to address the possibility of multiple hearsay, and would have attached no weight to the evidence.

[16] The obligation cannot be construed in isolation from the rest of the bargain: *Gloag on Contract*, 2nd ed at page 399, and McBryde, *Law of Contract in Scotland*, 3rd ed at paragraph 8-17. At most, any liability resting on Agro is no more than a payment obligation. It is not possible to say who is to procure the repair work. The scope of the obligation cannot be construed so as to include the remediation of faulty design work. The case against Morgan was one of failures in its design. Accordingly the cost of remedying any breach of duty by Morgan lies outwith the scope of any obligation owed by Agro to CFW. At best for Agro, the obligation accepted by the Lord Ordinary relates only to defective workmanship.

[17] Agro failed to prove that any obligation to CFW had arisen for performance within the five year period immediately prior to the service of the proceedings. The Lord Ordinary took the view that the obligation owed by Agro to CFW could not have become enforceable prior to the works being carried out in a defective manner in breach of the defending parties' obligations. Being a payment obligation, section 11 of the 1973 Act does not apply. In terms of section 6(3), the prescriptive period for any obligation owed to CFW is to be reckoned from the date on which it became enforceable. The obligation to make payment became enforceable when payment was due, which was when repairs became necessary. According to Agro, Morgan's design was defective from the outset. The prescriptive period

ought to be calculated from the date when the design was finished, or at the latest when it was relied upon for construction. The fact that the defects could not have been identified before March 2011 at the earliest is irrelevant.

[18] The Lord Ordinary's conclusion that the raising and service of the present proceedings was a relevant acknowledgement of Agro's obligation to CFW is flawed. The actions are not "performance towards implement" in terms of section 10(1)(a) of the Act – that would have to involve meeting the costs of the repairs. Even if the proceedings could be considered performance towards implement, they did not "clearly indicate" that the obligation to CFW subsisted, as is required by section 10(1)(a). It was only on the lodging of a minute of amendment in September 2017 that the alleged obligation to CFW was introduced into the pleadings. Furthermore a relevant acknowledgement must be made to the creditor or his agent – *Wilkie* v *Direct Line Insurance plc* 2009 SLT 530, per Lord Kingarth at paragraph 28.

The submissions for SMG

[19] The Lord Ordinary erred in holding that Agro had made a "relevant acknowledgement" of its obligation to CFW. There had been no evidence that CFW was aware of these proceedings, nor any evidence as to Agro's purpose in raising them. Any acknowledgement had to be made to the creditor in the obligation. The Lord Ordinary's approach stripped the word "acknowledge" of any real meaning. The phrase "clearly indicates" in the statutory provision makes sense only if the clear indication is given to the creditor. Any suggestion that, as the pursuer was the agent of CFW, there had been a relevant acknowledgement to the creditor, is misconceived. The whole notion of a relevant acknowledgement depends upon a separation in the roles of creditor and debtor.

[20] In any event, the first mention by Agro of the subsistence of any such obligation was introduced by a minute of amendment in September 2017. Before that the purpose of the summons was simply the recovery of damages arising from SMG's breach of contract. Furthermore the performance had to be clearly referable to the subsistence of the obligation – *Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Ltd* [2017] CSOH 57 Lord Doherty at paragraph 100. Accordingly, even if the Lord Ordinary's analysis is correct, there could have been no relevant acknowledgement until September 2017 at the earliest. Any suggestion that the prescriptive period for the obligation has not begun because the pursuer has yet to meet the cost of any remedial works, is misconceived, and in any event runs contrary to Agro's pleaded case.

Agro's submissions

[21] The Lord Ordinary's approach to the critical matters of fact at paragraphs [34] and [35] of his opinion is correct. There is little scope for an appellate court to interfere with such decisions. The defending parties did not cross-examine Drs Kholi and Urbach. Instead they chose to rely on criticisms not put to the witnesses. This is illegitimate – *Browne* v *Dunn* (1893) 6 R 67. In any event the Lord Ordinary took account of the criticisms, but ultimately found the witnesses to be credible and reliable. He was entitled to accept their evidence. The new argument that the obligation was not apt to cover defective design should not be entertained. In any event it is not a plausible or commercially sensible construction of the obligation.

[22] Turning to section 10(1)(a) of the 1973 Act, a distinction should be drawn between the legal consequences of a relevant acknowledgement on the one hand, and whether it alters the conduct of the creditor in relation to the obligation. The primary effect of a

relevant acknowledgement is a substantive one: if an obligation to which section 6 of the 1973 Act applies is relevantly acknowledged within the five year period, it will not prescribe at the end of that period. The creditor does not require to be aware of the acknowledgement for it to have that effect. If the creditor knows of the acknowledgement, he need not commence litigation within the five year period, but that is a procedural choice. Reference was made to *Royal Insurance UK Ltd* v *Amec Construction (Scotland) Ltd (No. 2)* 2008 SLT 825, per Lord Emslie at paragraph 22.

[23] A contrast can be drawn with the materially different wording in subsection (1)(b), which requires an unequivocal written admission made to the creditor or his agent. It also speaks of a "clear acknowledgement" as opposed to a "clear indication". The latter calls for no more than an objective assessment of the performance in question.

[24] If the above is wrong, Agro's knowledge as agent of CFW is sufficient. The evidence was that Agro had been acting as CFW's agent and developer.

[25] The period for prescription of the obligation to CFW could not have commenced any earlier than the prescriptive period for the obligations owed by the defending parties to Agro to make reparation for defective work. They now accept that the latter period had not expired when these proceedings were raised. The raising of these proceedings was a relevant acknowledgement of the obligation owed by Agro to CFW within the five year prescriptive period in respect of that obligation. If the performance by a debtor is of a kind that can only be explained by reference to the particular obligation, the requirements of section 10(1)(a) will have been met – *Gibson* v *Carson* 1980 SC 356, per Lord Allanbridge at page 360. There is no restriction as to what might be taken as a "clear indication" for these purposes. Reference was made to *Richardson* v *Quercus Ltd* 1999 SC 278, per Lord Prosser at page 287, with whom Lords Abernethy and Johnston agreed. Lord Johnston expressed the

view (at page 290) that a liberal and broad construction should be put upon both the phraseology of the statute and any inferences or conclusions to be drawn from the evidence bearing upon the statutory test.

Decision on proof of the agreement between Agro and CFW

[26] The submission that the Lord Ordinary erred in law in respect of his decision as to the agreement between Agro and CFW is not well founded. It is appropriate to consider the relevant background facts and circumstances. Agro had been asked to take the lead on behalf of the other interested parties in respect of all the development works, including the instruction of SMG and Morgan. In the words of Dr Kholi, they were "running the show" and were mandated to ensure the good repair of the estate. Agro entered into the contracts in their own name as principals. In these circumstances there would be a significant problem unless something was done to address the possibility that defects in the works caused loss and damage to one or more of the other landowners, most notably CFW who were, and are, the proprietors of the land on which much of the work was carried out. CFW would face an argument that they could not sue for loss caused to them by a breach of a contract to which they were not a party. On the other hand, Agro would be told that, except in respect of their own direct interest, they had suffered no loss. Accordingly, it would make good commercial sense for companies to take appropriate steps to deal with the matter. The reclaimers accept that if an agreement of the kind alleged was entered into in 2006, this would resolve the "black hole", and allow Agro to sue for damages in respect of defects concerning property owned by CFW. This is the background against which Dr Kholi's evidence should be assessed. (The focus is on Dr Kholi's evidence in that Dr Urbach added little, if anything, to it.)

[27] At first sight it might seem surprising that the arrangement was not recorded in writing, but it is a feature of the reclaimers' complaints that they take place in the context of their decision not to cross-examine the key witness. This does not absolve Agro of the burden of proving the agreement, but on the other hand the defending parties cannot object if inferences favourable to Agro are drawn. In any event, and as stated by Dr Kholi, the absence of writing is explicable in that Agro and CFW were sister companies under one holding company, and were co-operating on a single project in which they both had an interest.

[28] In the context of an oral agreement reached many years ago it is not unusual that the details, such as the full and exact terms of the arrangement, and how and when it was entered into, are not provided. It is understandable if a witness can speak only to the parties' intentions and the outcome or effect of their bargain. This may provide fertile ground for cross-examination, but, in the absence of such, the decision-maker can proceed only on the basis of the relevant evidence before him. The Lord Ordinary accepted Dr Kholi as both credible and reliable. The question then becomes whether the evidence is sufficient to allow the proposed finding in fact and law, namely that, in essence, Agro would be responsible for the cost of remedying defects in the works.

[29] Morgan contend that, if acting properly and without any misdirection, no judge could conclude in favour of Agro on this point. The court does not agree. The Lord Ordinary's reasoning is to be found at paragraphs [34] and [35]. He acknowledged that criticisms could be made as to the quality of the evidence and the lack of any written documentation. Nevertheless he considered that the unchallenged credible and reliable evidence articulated an oral agreement to the effect that Agro was liable to meet the cost of repairs to defective work at the main lodge. Having regard to the evidence upon which this

conclusion proceeded, we are unable to label it as unreasonable or unsupportable. It is clear that the judge recognised the distinction between evidence as to the facts, and expressions of opinion, and based his decision on the former. The evidence was sparse, but sufficient, especially in the absence of any challenge to it.

[30] Morgan contends that, at most, the evidence points to an agreement covering only poor workmanship, not defective design. It would make little sense for the parties so to limit their arrangement, and we see no merit in such a restricted approach to either the evidence of Dr Kholi or the findings of the Lord Ordinary. It would involve an unrealistically limited interpretation of Agro's commitment to meet the cost of repair in respect of defective work. When considered in the context of the full circumstances, it is apparent that the parties would have intended to cover any breach of contract which required repair work to be carried out. In the context of an oral agreement being spoken to many years later, it would not be appropriate to subject the words used by the witness to a strict "conveyancing document" style analysis.

Decision on prescription and "relevant acknowledgement"

[31] If the prescriptive period is running in respect of an obligation, it will be interrupted if, before it expires, it is "relevantly acknowledged". This will occur if either of the conditions set down in section 10(1)(a) and (b) of the 1973 Act are satisfied, namely:

> "(a) that there has been such performance by or on behalf of the debtor towards implement of the obligation as clearly indicates that the obligation still subsists;
>
> (b) that there has been made by or on behalf of the debtor to the creditor or his agent an unequivocal written admission clearly acknowledging that the obligation still subsists."

Agro maintain that the raising of these proceedings satisfied head (a). The prescriptive period was therefore interrupted and the obligation to CFW has not prescribed.

[32] The first criticism of this position is that any performance which otherwise meets the relevant test must be known to the creditor – here CFW. There was no evidence as to this, thus the prescriptive period was not interrupted and has therefore expired. In the court's view there is no merit in this proposition. It involves an unwarranted addition to the statutory words, which simply require conduct by or on behalf of the debtor which meets the terms of head (a). There is no reference to the communication of any information to the creditor. This can be contrasted with head (b), which provides for an obligation being relevantly acknowledged by a written admission made to the creditor.

[33] It was submitted that Agro's approach would rob the term "relevant acknowledgement" of any meaning, at least in respect of head (a). Its purpose is to convey a message to the pursuer in order that he need not raise proceedings. The court does not agree. A debtor can acknowledge the subsistence of a debt simply by his own actings. As soon as he does, as a matter of law the prescriptive period is interrupted. No doubt until the creditor is aware of this, he will be unable to found upon the acknowledgement, but this is procedural, not substantive. The submission involves an unwarranted gloss upon a self-contained statutory scheme. All of this is consistent with Lord Emslie's observations towards the end of paragraph 22 in *Royal Insurance UK* (cited earlier).

[34] The reclaimers submitted that the raising of the proceedings was not "performance ... towards implement of the obligation as clearly indicates that the obligation still subsists." On one view the use of the term "performance" imports a need for at least part implement of the bargain by the debtor. However, in *Richardson* v *Quercus Ltd* 1999 SC 278, Lord Prosser agreed with the submission that there is no restriction on what can be taken as a

clear indication, nor any limitation on what might be covered by the words "performance towards implement of the obligation" (pages 287/88). "Performance" can be something distinct from implementation. If viewed in isolation, an event might be insufficient, but when taken with the context provided by other circumstances could provide the necessary clear indication. His Lordship stressed that the focus should be on the language used in the section. Lord Abernethy agreed with the Lord President, as did Lord Johnston. The latter favoured a liberal and broad interpretation of the statutory provisions.

[35] The context and purpose of the Agro/CFW agreement has been addressed. By raising these proceedings Agro accepted the burden of proving the nature and extent of the defects in the main lodge (and elsewhere), and that they were caused by breach of contract/fault of the defenders. The court was told that the works at the main lodge account for a substantial part of the damages sought. Having regard to the nature and purpose of the liability undertaken by Agro towards CFW in 2006, there is no real difficulty in the Lord Ordinary's conclusion that the raising of these proceedings meets the requirements of head (a). But for the agreement, Agro would have an interest only in the works at the loch shore. CFW would readily understand that the raising of the actions was referable to Agro's responsibility for the consequences of failings on the part of SMG or Morgan. The matter can be tested by supposing that CFW sued Agro. If Agro pled prescription, CFW could reasonably ask – "Well, why did you take upon yourself to sue in respect of the main lodge works?"

[36] SMG in particular relied upon the absence of any mention in the pleadings of the agreement with CFW until the minute of amendment was intimated more than five years after the date of practical completion. The court does not invest this circumstance with the suggested importance. Whether service of the original summonses interrupted the

prescriptive period does not depend upon a reference in the pleadings to the obligation on Agro; but on whether, viewed objectively, it met the requirements of section 10(1)(a). For the reasons given above, the court concludes that it did.

[37] Morgan relied upon the proposition that, at best, Agro's liability is no more than a debt, namely an obligation to pay CFW the cost of any necessary repairs. It followed that only part payment could interrupt the prescriptive period. Even if one interpreted the agreement in such a passive and limited manner, this would not have the consequence that the raising of the actions failed to interrupt the prescriptive period. They could still be construed as a relevant acknowledgement in terms of head (a), not least as a step towards identifying the responsible parties and putting Agro in funds to finance its responsibilities.

[38] As to the suggestion that, for Agro's obligation to CFW, the prescriptive period in respect of any failures in Morgan's design began at an early stage in the whole process, the court is content to adopt the date of practical completion (2 December 2010). Arguably the subsequent end of the defects liability period would be more appropriate, but neither option is more than five years before the actions were raised.

[39] For the above reasons the reclaiming motions are refused. The court adheres to the interlocutor of the Lord Ordinary.