OUTER HOUSE, COURT OF SESSION

[2019] CSOH 111

CA95/19

NOTE OF REASONS BY LADY WOLFFE

In the cause

AUTAURIC LIMITED

Pursuer

against

GLASGOW STAGE CREW LIMITED

Defender

Pursuer: Manson; Morton Fraser LLP
Defender: Upton; BBM Solicitors

27 December 2019

Introduction

[1] This matter called before me on the defender's opposed motion for its minute of amendment to be received. The pursuer robustly opposed its receipt. I continued the hearing, not least to afford the defender an opportunity to respond to a matter the pursuer raised in the course of the hearing (being averments in a sheriff court action against the pursuer by another company (Scotia Events Services Limited ("Events")) one of whose directors was also a director of the present defender at the material time). In fact, both parties took the opportunity to lodge further short written submissions.

[2] I have had regard to parties' oral and written submissions, which I do not here repeat, and to the additional materials lodged by the parties relative to the hearing on this motion. This Note is a slightly expanded version of the *ex tempore* decision I issued at the continued hearing.

[3] The pursuer avers that a contract was concluded between it and the defender for the provision of a substantial outdoor stage to host a concert; that on the day in question rain was able to penetrate the roof structure, which resulted in water pooling on the stage thereby posing a number of risks to the performers; and that, accordingly, the concert was cancelled at short notice with significant loss to the pursuer. The legal ground is the pursuer's contention that the stage provided did not conform to the contract specifications.

Discussion

Agreement of issues prior to fixing a proof

[4] I begin by noting that by the time a proof was fixed in this commercial action, the principal issue for determination was whether the defender had breached the terms of the oral contract averred (and admitted) to have been agreed between the parties. Quantum has also been agreed, at a figure of over £1 million. The terms of the contract and the parties to it are all agreed. As is customary in the commercial court, parties lodged their statement of issues prior to the procedural hearing at which a determinative hearing of one form or another is fixed. In its statement of issues, the pursuer particularised the principal issue into several discrete matters (pertaining to representations, whether a particular state of affairs, if established, constituted breaches of the admitted contract, and causation). In its own statement of issues, the defender accepted all but one of these as correctly identifying the

matters in dispute between the parties (the single exception related to causation). The defender did not suggest any additional issues.

[5] In this case, parties were agreed proof before answer was required to resolve their dispute (as defined by the pursuer's statement of issues). Accordingly, at the procedural hearing a three-day proof was fixed for a date in May 2020, together with the usual timetable for lodging of witness statements and for productions, and meetings between the parties. That timetable has been implemented, including the exchange of parties' principal witness statements (which stand as their evidence in chief at proof), before the defender's minute of amendment was intimated.

Scope and effect of the minute of amendment

[6] Turning to the scope and effect of the proffered minute of amendment, it seeks to delete certain admissions -to the effect that the pursuer was the counterparty to the contract. (The defender's minute of amendment contains 14 paragraphs. Many of these are consequential upon the defender's proposed deletion of admissions, in answer 21, that the parties contracted on the terms averred. The minute also seeks to delete the defender's admission, in answer 14 that the defender's "Mr Prasher had come to learn of the pursuer's involvement ….")

[7] While counsel for the defender's initial position was that the minute of amendment did not involve a retraction of the admission that an oral contract had been concluded in the terms averred, his position evolved in the course of his submissions. If the parties to the contract could not be identified, then, he submitted there would be no *consensus in idem*; there would be "dissensus" and potentially no contract concluded at all. It should be noted that the defender's proposed amendment is uncertain as to the person with whom the

defender contracted. There are references in it to both "PCL" and "PCL Presents". Neither PCL nor PCL Presents bears to be a legal person, but is simply a trading name (a matter which the defender's counsel accepted in submissions). Notwithstanding this, the proposed amendment is that the defender "understood it was contracting with PCL" or (if as amended at the bar) "with PCL Presents". (By contrast, and perhaps compounding the uncertainty, in his submissions made in moving the minute of amendment, the defender's counsel acknowledged that the defender could not dispute "that there was a contract with Mr Cawdor", ie the sole director of the pursuer.)

[8] In light of the foregoing, the effect of the minute of amendment, if granted, would have the potential to open up additional questions including whether there was a concluded contract. Having regard to the averments in the sheriff court action, that Alexander Prasher (who is described in the sheriff court pleadings as the sole director of Events (and who was one of the directors of the defender at the material time)) and Paul Cawdor (ie the sole director of the pursuer) "have contracted with each other in their capacity as Directors on behalf of the parties in excess of 10 occasions since in or around 2000, all of which contracts between the parties have been formed orally", there is a prospect of the proof being extended to consider whether there was a similar course of dealing. Counsel for the defender assumed that the minute of amendment would not have an impact on the proof, though it may have a material impact on the timetable and proof preparation, not least in requiring a further round of principal witness statements on these issues. Counsel for the pursuer was less sanguine as to the effect of the minute of amendment. It may imperil the proof. The pursuer's counsel strongly challenged the relevancy of the proposed amendment; it could not be assumed that there would be no debate on the amended averments, once

these were settled. Counsel for the defender's position was that it was inappropriate to assess matters of relevancy at this stage.

The explanation for the admissions made and now sought to be deleted

[9] This is not a case in which a minute of amendment is prompted by discovery of some hitherto unknown fact or change in the law as previously understood. It was not suggested that agents and counsel previously instructed had exceeded their instructions. Counsel for the defender's explanation was that he had brought fresh eyes to the defender's case.

[10] In considering such explanation as there was for the reason and timing of the proposed minute of amendment, I note that the agents and counsel instructed previously were reputable and able. I would have expected some explanation to have been tendered from them to confirm whether the present state of the pleadings resulted from prolonged oversight of an obvious matter, as counsel for the defender inferred (his "elephant in the room" submission). However, they are not here to provide any positive explanation of what is, at least by implication, a suggestion of at least extreme laxity or a dereliction of their respective professional duties as agent and counsel in confirming the client's instructions on key matters – such as the identity of the pursuer or the counterparty of any contract being admitted. This is not a case of mistaken identity, ie where one company name is similar to that of another and the amendment is to substitute the correct party. No new document or fact has emerged. On the limited documentation available and referred to in the course of submissions, the name of the pursuer (ie as a limited company, "Autauric Ltd") did not initially appear in associated documentation after the oral contract was concluded. Rather it was "PCL" or "PCL Presents", ie what is averred and admitted to be the trading name of the pursuer. It would therefore be surprising if the question of the correct name or identity of

the pursuer *were not* something on which specific instructions had been taken - at least by the time matters were considered by the defender's previous legal advisers. In my view, there is force in counsel for the pursuer's observation that the key admission now to be deleted was a *qualified* admission and therefore must have been the subject of specific instructions by the defender to the pleader of the defences to make that qualified admission.

[11] I accept the pursuer's submission that the defender does not provide a credible explanation of how these admissions came to be made, now suggested to have been made unwittingly. Counsel for the pursuer noted the many opportunities the defender had once these proceedings were raised to confirm its instructions on this critical issue, including: when the defender received the summons, when it consulted with and gave instructions to its counsel and agents to prepare defences, when those defences were lodged and were later adjusted, when the pursuer's identification of the real issues was agreed, and the scope of the proof determined at the procedural hearing. (The pursuer sought to make a similar point under reference to some pre-litigation communings. In light of the defender's objections that these were made on a "without prejudice" basis I do not take these into account.)

[12] While counsel for the defender made passing reference to the regulations requiring disclosure of the names and other prescribed details of limited companies, it was not suggested that the absence of this made any difference, or caused any prejudice, or otherwise led to any remedy or sanction provided for in those regulations. Given that the contract was, on the present averments, concluded orally, it is difficult to see how there could have been any prejudice at the material time when the contract was formed. In any event, no submissions were made to bring these regulations into play; nor were they produced.

The test to be applied by the court considering the receipt of a minute of amendment

[13] For the purpose of identifying the test to be applied by the court on receipt of a minute of amendment, counsel for the defender relied on a passage in McPhail's *Sheriff Court Practice* and on the observations of the Lord Justice Clerk (Thomson) in *Thomson* v *Corporation of Glasgow* 1962 SC(HL) 36 at 52. Counsel for the defender relied especially on the observations in that case that "amendment is, in theory, a belated adjustment for which the laggard has to pay" (*ibid* at page 52). Counsel for the defender accepted that there will be additional time required – he suggested a further two months for revised witness statements, for example – and further expense in the form of answers and enquiries necessary for them. The defender accepts it will meet the expenses of the amendment process. Implicit in this submission is the premise that any prejudice is sufficiently compensated by an award of expenses.

[14] Counsel for the pursuer referred to *Aon Risk Services Australia Ltd* v *the Australian University* [2009] HCA 27 ("*Aon*"), a decision of seven justices in the High Court of Australia. Under reference to paragraphs 30 (*per* French CJ) and paragraphs 111 to 114 (*per* five other Justices of remaining court of seven) counsel for the pursuer invited a more modern and nuanced approach. The High Court of Australia in that case considered in detail the many factors that might inform the question of whether a party should be allowed to amend its pleadings. Much of the discussion in that case was taken up with a consideration of an earlier decision in that jurisdiction (*Queensland* v *J L Holdings*) and whether it precluded a number of the factors the court identified in *Aon.* French CJ wrote (at paragraph 30):

> "It might be thought a truism that 'case management principles' should not supplant the objective of doing justice between the parties according to law. Accepting that proposition, *JL Holdings* cannot be taken as authority for the view that waste of

public resources and undue delay, with the concomitant strain and uncertainty imposed on litigants, should not be taken into account in the exercise of interlocutory discretions of the kind conferred by rule 502. Also to be considered is the potential for loss of public confidence in the legal system which arises where a court is seen to accede to applications made without adequate explanation or justification, whether they be for adjournment, for amendments giving rise to adjournment, or for vacation of fixed trial dates resulting in the resetting of interlocutory processes".

[15] In their joint judgement the five justices observed, at paragraphs 111 to 114:

"111. An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *JL Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.

112. A party has a right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient *opportunity* to identify the issue they seek to agitate.

113. In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.

114. Rule 21 of the Court Procedures Rules recognises the purposes of case management by the courts. It recognises that delay and cost are undesirable and that delay has deleterious effects, only upon the party to the proceedings in question, but to other litigants ..."

I also note the observation to the end of paragraph 94 (of the judgement of the five justices),

that:

"where a party had had a sufficient opportunity to plead his or her case, it may be necessary for the court to make a decision which may produce a sense of injustice in that party, for the sake of doing justice to the opponent and to other litigants."

This observation is a helpful reminder of the shift in the balance of power between parties and the court in respect of the progress of a litigation. The adoption of active case management powers moderates the classic model of adversarial litigation in furtherance of other objectives. The whole of this important case repays careful reading, not least for the clarity of its discussion of the effect of active case management in shifting the focus from being solely concerned with doing substantive justice between the parties to one involving recognition of these other, wider objectives in a modern system of civil justice.

[16] Indeed, active case management is the hallmark of a modern commercial court, whose principal objectives include efficient and effective resolution of disputes and proportionate cost. Effectiveness means maintaining an appropriate control over the conduct of the parties. This does not mean that changes in tactics are permissible, so long as they do not prolong the overall resolution of the dispute. The court no longer passively cedes control of the pace and conduct of litigation to the parties. The court's *raison d'etre* is to do justice between the parties but, in doing so, it may have regard *inter alia to* the strain and uncertainty that prolonged litigation or a late change in a party's position imposes upon parties. Effectiveness also means the exercise of the court's power to facilitate parties' identification of the real issues in dispute, and then maintaining their focus on those issues.

[17] In commercial actions before this court, it is expected that the parties will have complied with the pre-action protocol, with the effect that the issues are well-ventilated between the parties and that they will have disclosed material documents and expert reports to each other by the time proceedings are raised. For this reason, the commercial judge is as a generality unlikely favourably to countenance requests for long periods of adjustment at the outset of litigation. That factor is relevant to the exercise of the court's case management powers. In the context of active case management in commercial actions, the question of

allowing a fundamental change at an advanced stage in the proceedings might be framed by asking: Has the litigant had sufficient opportunity to identify the issues in dispute and to reflect this understanding in its pleadings (or in similar statement of its position, such as a note of argument or statement of issues)?

[18] I regard it as a not insignificant factor that this case was well conducted by parties consistent with the practice and ethos of the commercial court. As the annotations to the opening of chapter 47 of the Rules of the Court of Session 1994 make clear, the purpose of creating specialist case management powers available to the commercial judge in commercial actions was to provide the business community with a greater degree of speed and flexibility in the resolution of disputes (*per* Lord President Hope in *Sterling Aquatic Technology Ltd* v *Farmocean AB* 1983 SLT 713, 715L) and that, once placed in the hands of the commercial judge, to ensure she has all the powers for a speedy disposal *(per* Lord President Emslie in *Jones and Bailey Contractors Ltd* v *George H Campbell & Co (Glasgow) Ltd* 1983 SLT 461, 462). Under the rubric "procedure in commercial actions", rule 47.5 provides that the "procedure in a commercial action shall be such as the commercial judge shall order or direct". That rule confers a wide discretion on the commercial judge to exercise her case management powers to achieve these objectives.

[19] In this case, by virtue of the commercial court procedures and case management, parties agreed what could be agreed and identified the real issue in dispute between them. This was essentially whether the defender breached the terms of the admitted contract and whether that caused loss to the pursuer in the sum agreed. In my view, that is the material context in which to consider the defender's minute of amendment.

[20] Turning to the specific matters in this application, among the factors counsel for the pursuer identified as relevant to the court's consideration of whether to allow the minute to

be received included the increased worry for the pursuer: what had been uncontested has become highly contentious. This feature was referred to in the passages from *Aon* already quoted. On the issue of the timing of the minute of amendment in relation to any proof (one of the factors referred to in *Thomson* and founded on by counsel for the defender), counsel for the pursuer noted that the minute came after exchange of the principal witness statements and which was stood as their evidence in chief for the proof.

Decision

[21] Whether a minute of amendment is to be received is pre-eminently a matter for the court's discretion having regard to a number of factors. These factors are bound to vary from case to case. It would be unwise to try to identify all of the factors; they may include, but are not necessarily restricted to, the whole history of the conduct of the case (and which may include pre-litigation communings, if appropriately disclosable or vouched), the scope of the amendment, the reasons it is necessary, the reasons for its timing, whether it assists in identifying the real issue in dispute between the parties, its effect on the other parties and on any hearings, and issues of prejudice.

[22] In my view the minute of amendment in this case is not necessary to determine the real issue of controversy between the parties. What is the "real issue" is a question for the court but this may, of course, be informed by the parties' understanding of what is the essence of disputes they have brought to the court for it to resolve. This is not the same thing as a "lawyer's argument", as counsel for the pursuer characterised the defender's reason for bringing the minute of amendment forward, or, because fresh eyes had identified "a point to be taken", to use counsel for the defender's language.

[23] In this case, by virtue of the commercial court procedures and case management, parties agreed what could be agreed and identified the real issue in dispute between them. This was essentially whether the defender breached the terms of the admitted contract and whether that caused loss to the pursuer in the sum agreed. In my view, that is the material context in which to consider the defender's minute of amendment. Accordingly, the real issue of controversy between the parties was that referred to above (at para [4]), being the sharp issue of liability against an agreed background of what the contract between the parties required of the defender. That discrete issue was the outcome of parties' considered positions, articulated and agreed under the discipline of the commercial court's case management powers.

[24] In considering counsel for the defender's reliance on *Thomson*, I note that in that case the Lord Justice Clerk, Lord Thomson, referred to a number of factors, including prejudice, as assessed by "the structures within which our system works" and "the whole history of the case". Consistent with *Thomson*, I take into account, as part of the current "structures", the wide discretion conferred on the commercial judge by rule 47.5, as well as the purposes for which those powers are exercised (as articulated by Lords President Hope and Emslie, as already noted). Properly construed, *Thomson* is not authority for the bald proposition that the overriding consideration in allowing an amendment was simply that the person amending would pay. On this matter I am attracted to the more nuanced and multi-faceted approach of the High Court of Australia in *Aon*. While the court in *Aon* was considering its own case law and procedures, its general observations about the impact of case management powers in moderating the worst excesses of an unqualified adversarial system are instructive. I refer to the question posed at the end of paragraph [17], above, as helpful in assisting in the exercise of the discretion available to the commercial judge under the Rules.

[25] In considering that question, I also note the absence of a credible explanation, including a frank acknowledgement of a genuine mistake or oversight (if that is what has occurred), as opposed to an unattractive speculation from silence. The defender's approach was premised on the assumption that it will be sufficient to allow a minute of amendment to be received upon an offer that the amending party will pay the other side's expenses (which counsel for the pursuer rightly points out does not compensate for all of the expense actually incurred) simply to enable the defender to pursue a newly identified "point to be taken". In my view that justification will not suffice. The defender has had a reasonable opportunity to consider its position in response to the pursuer's claim and to agree what are the real issues in dispute. I have already noted the scope and potential effect of the proposed minute of amendment on the substantive procedure and settled issues in this case. Having regard to the whole circumstances, I do not regard it as commensurate with modern case management procedure in this court to grant this motion and I refuse it.

[26] Finally, for completeness, I should note that I do not accept counsel for the defender's submission that the court may not have regard to issues of relevancy at the stage of receipt of a minute of amendment. While it is correct that more searching consideration of issues of relevancy is for a full debate, that does not preclude a more pragmatic approach when, in the appropriate case, the court may consider the strength (or otherwise) of averments proposed to be added by amendment. In this case, the proposed amendment was to add averments of the defender contracting with PCL or PCL Presents, neither of whom was a legal entity. PCL or PCL Presents were accepted to be trading names, which necessarily lead to Autauric as the legal entity trading via these names. In these circumstances, counsel for the pursuer's submission that these averments were irrelevant appeared well founded.

Coda

[27] In contrast to the Civil Procedure Rules ("the CPR") in England, our Rules do not articulate an overriding objective of civil litigation or an acknowledgement of considerations of efficiency, effectiveness or the proportionate use of resources (including court resources). Again in contrast to the CPR, our Rules do not impose a positive obligation on litigants to assist the court in achieving that overriding objective. Maybe they should. In the meantime, I would encourage parties and practitioners litigating commercial actions to recognise, as Megarry J said 35 years ago, that civil justice "Is a co-operative process to which solicitors, counsel [and I would of course now add solicitor-advocates] and judges all make their contribution": *Barbour's Settlement Trusts* [1974] 1 WLR 1198 at 1203.