OUTER HOUSE, COURT OF SESSION

[2020] CSOH 65

A688/14

OPINION OF LORD ARTHURSON

In the case of

RICHARD SYRED AND ANOTHER

Pursuers:

against

LADY CHRISTINE De La RUE AND ANOTHER, AS EXECUTORS OF THE LATE DAVID IAN LIDDELL-GRAINGER AND OTHERS

Defenders:

Pursuers: McColl QC; Thorntons Law LLP
Defenders: Garrity, Adv; Turcan Connell

26 June 2020

Introduction

[1] By way of missives dated 29 and 30 January and 22 and 23 May 2014, the pursuers purchased from the defenders the subjects defined therein as Ayton Castle, Ayton, Berwickshire, together with the Dignity of the Barony of Ayton in the County of Berwick. The definition of the subjects included sundry other properties associated with the castle itself. The date of entry under the missives was 15 July 2014 and settlement and transfer of the relevant titles duly occurred on that date. It was a matter of agreement that the defenders were unable to perform their obligations in terms of certain components of the missives at or by the date of entry, including the exhibition not less than four weeks prior to

that date of a water test certificate by Scottish Water confirming that the water supply to the Castle was in compliance with the Private Water Supplies (Scotland) Regulations 2006 and all other relevant regulations. In these circumstances it was agreed between the parties that at settlement the pursuers would retain the sum of £100,000 pending resolution of all outstanding matters. That discrete chapter of the transaction forms the subject of a counter-claim at the instance of the pursuers in the present proceedings.

[2] In the principal action the pursuers concluded as follows: first, for decree of specific implement by way of delivery by the defenders of certain fireplaces and wall lights which had been allegedly wrongly removed by them; second, in the event of delivery of these items, for payment by the defenders in respect of reinstatement costs; third, failing delivery, for payment by the defenders of certain sums in respect of the sundry fireplaces and wall lights; fourth, again failing delivery, for payment by the defenders of a further sum in respect of redecoration costs; fifth, for declarator that the defenders were in breach of clause 7.1 in the missives in respect (a) that the water supply to the subjects was not of adequate quality and did not comply with the said 2006 Regulations and (b) that the defenders had not within the period of four weeks prior to the date of entry exhibited a water test taken by Scottish Water confirming that the water supply complied with the said 2006 Regulations; sixth, for payment by the defenders of damages in respect of costs to be incurred in connecting the subjects to the mains water supply; and, seventh, for expenses.

Submissions for the Defenders

[3] Counsel for the defenders invited the court to sustain the defenders' first plea-in-law and to dismiss the principal action on the basis that in its entirety the action was irrelevant and lacking in essential specification.

[4] Counsel, in developing his argument, addressed first the chapter of the pursuers' case dealing with delivery of the fireplaces and wall lights, submitting that the pursuers, in averring that certain items were not in the Castle at the date of entry, had nevertheless failed to specify in appropriate detail exactly what items they were saying ought to have been there but had been found to be missing. There were no averments in respect of design, size, material, age or value set out in respect of the said items, it being uncontentious that considerable precision was required in descriptive averments in any conclusion seeking a decree *ad factum praestandum*. In such matters any putative defender must be able to read a court order of this kind in such a way that the terms thereof have such clarity, precision and definition that such a defender can be in no doubt as to what is expected of her or him by the court: *Retail Parks Investments Ltd* v *The Royal Bank of Scotland plc (No 2)* 1996 SC 227 and *Highland and Universal Properties Ltd* v *Safeway Properties Ltd* 2000 SC 297. Counsel contended that the pleadings on record and in particular the terms of the first conclusion were far from clear and that that conclusion was thereby incapable of being implemented. The subsequent conclusions for damages associated with that primary conclusion for delivery were similarly irrelevant. In addition, the pursuers having in this way failed to specify these items, it followed that the defenders had no fair notice of what values could be attributed to them and thus what damages might be payable by way of any alternative to an order for delivery. The conclusion advanced in respect of redecoration costs also fell to be struck out as irrelevant, the pursuers' pleadings offering no adequate notice of what unlawful removal was actually being alleged, what damage could have been occasioned by such removal and what redecoration costs were likely to be incurred, all in the event of non-delivery.

[5] Counsel for the defenders proceeded to address the second chapter of the pursuers' case on record, which chapter arose from the terms of clause 7.1 of the missives, as set out in

the offer letter dated 29 January 2014. That condition dealt with matters pertaining to water supply at the subjects, and was in the following terms:

> *"7 Water Supply*
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> 7.1 *Other than the Flemington Mill Cottage, all dwelling houses within the Subjects and any other building within the Subjects currently having a water supply, are served by a private water supply which is exclusive to the Subjects and Cocklaw Steading (which also includes two water troughs) all as provided for in terms of the draft Deed of Conditions annexed and signed as relative hereto. All pipes, storage tanks and apparatus connected therewith will be in working order commensurate with age and type at the Date of Entry. Such water supply is of adequate quality and complies with the Private Water Supplies (Scotland) Regulations 2006 and all other relevant regulations and there are no unimplemented requirements to upgrade the supply and no outstanding charges for testing or monitoring the supply. Not less than 4 weeks prior to the Date of Entry, the Seller will exhibit a water test taken by Scottish Water after 24 October 2013 confirming that the water supply to Ayton Castle complies with the said Regulations. Furthermore, the Sellers warrant that such private water supply has proved adequate in terms of quantity throughout their period of ownership."*

[6] It was a matter of admission that the defenders had not within the period of four weeks prior to the date of entry exhibited a water test in terms of clause 7.1. The defenders' position on this issue was, however, that the parties (i) having agreed to proceed to settlement under the missives on the date of entry without the defenders exhibiting such a water test, and (ii) having agreed that there would be a retention to cover this and other matters, the pursuers had thereby waived the obligation upon the defenders under clause 7.1 in respect of delivery by the defenders of the water test certificate. Counsel submitted that the only possible inference which could be taken from such a factual scenario was indeed one of implied waiver. With reference therefore to the declarator sought in terms of conclusion 5(b), while counsel accepted that the defenders had not produced a "clear" water test within that period, the pursuers, in the full knowledge that the defenders were thereby in breach of condition 7.1, had elected to proceed to settlement and to the agreement of a retention figure. This breach having already occurred, it must have been

plain to all by the date of entry that the defenders simply could not have presented such a certificate within the time frame set out in the missives. In any event, the clause itself specified that the test to be taken by Scottish Water was to confirm "that the water supply to Ayton Castle complies with the said Regulations". In such a context this reference to "Ayton Castle" was to the Castle building only, rather than to wider estate referred to at the outset of the clause as "the Subjects". In developing this chapter of his submissions counsel referred to *Armia* v *Daejan* 1979 SC (HL) 56 and to Reid & Blackie on Personal Bar, paragraphs 3-08 to 3-10 and 3-18. Implied waiver, counsel submitted, involved a deemed abandonment of a right, and was properly to be regarded as a matter of fact, the conduct of the waiving party requiring to be "viewed objectively to ascertain whether it is consistent with a continuing intention to exercise the right" Reid & Blackie, *supra*, para 3-10. While a court should not readily infer waiver, in the stark circumstances averred in the principal action, the abandonment by the pursuers of their right in respect of the obligation of delivery by the defenders of a water certificate four weeks before the date of entry was the only reasonable inference to be drawn from the actings of the pursuers which were the subject of factual averment. Counsel observed that while the issue of whether reliance and prejudice required to be the subject of averment was a fine point, nevertheless there were clear, unequivocal averments in respect of the defenders' reliance on the pursuers' conduct and it was further plain that prejudice would be occasioned to the defenders in the event that it was to be held that the pursuers could now enforce that right and seek damages under reference to an alleged breach thereof.

[7] Turning next to the quality of the water supply referred to in clause 7.1, counsel noted that the pursuers had averred that water samples taken by Scottish Borders Council on 18 June 2014 and subsequently tested by Scottish Water had indicated that the water

supply had failed to meet certain microbiological standards, had contained excessive levels of lead and had not met the applicable pH standard, which test result was consistent with the water supply not being of adequate quality and not meeting the 2006 Regulations at the date of entry. Such averments did not provide a proper specification of a breach of clause 7.1 regarding the adequate quality of the water supply, certainly as at the date of entry, counsel submitted. The tests referred to in these averments were tests in respect of the tap water within individual properties within the estate, counsel contended, and were not tests in respect of the private water supply system referred to in the missives. The pursuers had accordingly in these averments failed to offer to prove any breach of clause 7.1 regarding the adequate quality of the supply and were accordingly not entitled to the declarator sought in terms of conclusion 5(a).

[8] Counsel for the defenders concluded his submissions with an invitation to the court to dismiss the principal action on the basis of his preliminary plea. In the event that the court was not with him on dismissal, however, counsel moved that the principal action and counter-claim should proceed to proof before answer with all averments and pleas standing.

Submissions for the Pursuers

[9] Senior counsel for the pursuers moved the court to uphold the pursuers' sixth plea-in-law *quoad* the exclusion from probation of the defenders' averments anent waiver *et separatim* clause 7.1 of the missives; to sustain the pursuers' seventh plea-in-law and to pronounce decree *de plano* against the defenders in terms of the pursuers' conclusion for declarator in terms of clause 7.1; and, *quoad ultra,* to allow parties a proof before answer in respect of all of their remaining averments and pleas-in-law.

[10] Senior counsel began his submission by observing that it was plain from the offer letter dated 29 January 2014 that the transaction between the parties was in respect, first, of the subjects known as Ayton Castle, Ayton, Berwickshire and, second, the Dignity of the Barony of Ayton in the County of Berwick. Reference therefore in the missives to Ayton Castle was a reference to the whole heritable subjects to be conveyed in any subsequent disposition between the parties, including multiple other buildings, all rights to the Barony of Ayton being transferred by a subsequent Assignation. The missives therefore provided an express definition of the agreement to transfer heritage as "the subjects known as Ayton Castle". Any reference to "subjects" in the missives, when read as a whole, was accordingly a reference to "Ayton Castle".

[11] In terms of the missives themselves, certain light fittings and fireplaces were to remain *in situ*. The defenders within the pleadings had admitted that certain wall lights had been removed prior to settlement. A factual dispute arose, however, in respect of the fireplaces and wall lights which were the subject of the conclusion for delivery. The defenders' position was that as at the date of settlement there were as a matter of fact no fireplaces in the bedrooms, these items having been removed well in advance thereof, and that no light fittings had been removed by the defenders. In such circumstances, senior counsel for the pursers contended, there was clearly a dispute of fact regarding whether the fireplaces had been removed from specific rooms. It was of note that the pursuers had made averments about a named auctioneer attending shortly prior to the date of entry and observing dismantled fireplaces within the main hall of Ayton Castle, and further that that auctioneer had then been informed by one of the executors named as a defender that these items had come from upstairs bedrooms within the Castle. In the context of such a factual dispute, senior counsel submitted, ample specification had been given within the pleadings

and in turn in the conclusion seeking delivery. The pursuers had provided notice within their pleadings of what the items were and where they had been removed from, with the clear inference that the defenders had been the authors of such removal. In circumstances in which the persons in control of the subjects were the defenders, the defenders' assertion in respect of lack of precision was unfounded; indeed, the standard of pleading thereby desiderated by the defenders was one of near impossibility, requiring perhaps, for example, the incorporation of photographs, which in the whole circumstances was simply unrealistic.

[12] Turning to the conclusion for declarator of breach of clause 7.1 of the missives, senior counsel observed that by that condition the defenders were offering a warranty in respect of the adequate quality of the private water supply and its compliance with the 2006 Regulations, and that further the defenders by that condition had accepted an obligation to exhibit a water test taken by Scottish Water within a certain timescale. The condition finally addressed a warranty in respect of the quantity of the private water supply, but it was a matter of agreement that nothing turned on that issue for the purposes of parties' submissions. It had been accepted by the defenders that they had breached their obligation to provide a water test, and in the light of this acceptance senior counsel submitted that the pursuers were entitled to decree of declarator in respect of that breach. Senior counsel accepted, of course, that issues of causation and loss would require to be considered separately and that these matters should properly be the subject of probation in due course. On the waiver point, senior counsel submitted that the defenders' averred contentions, to the effect that the pursuers had simply proceeded to settlement and made a separate arrangement concerning retention, did not constitute a relevantly pled case of waiver. Senior counsel referred to *Armia, supra*, and in particular to a passage in the speech of Lord Keith of Kinkel at page 73 in which his Lordship set out the applicable general principle

thus: "Taking entry to subjects under a contract for purchase and sale does not, as a general rule, imply waiver of any conditions regarding title to the subjects." Senior counsel further submitted that the action of agreeing upon a sum to be retained was in fact consistent with a party not abandoning its right. On the issue of whether prejudice and/or reliance should be the subject of averment, it was of note that the defenders' pleadings were silent on the issue of reliance. The conduct of the pursuers averred upon by the defenders, comprising proceeding to settlement and reaching a collateral agreement on retention, could not on any view be said to amount to reliance. The defenders' position on waiver was accordingly irrelevant in law and should be excluded from probation, senior counsel argued. For that case to be a relevant one, the defenders would require to offer to prove where and when the abandonment of the clause 7.1 right by the pursuers had taken place and how that abandonment could be discerned. The defenders would also require to make express averments regarding the defenders' own reliance upon that abandonment.

[13] Finally, dealing with the component of condition 7.1 about the adequate quality of the private water supply and its compliance with the 2006 Regulations, senior counsel submitted that on a fair reading of the whole pleadings, the pursuers had adequately offered to prove a breach of clause 7.1 in that regard. The reference to water samples taken by Scottish Borders Council on 18 June 2014 was on reflection perhaps an evidential averment which was not actually strictly necessary. This portion of the pursuers' averments had in any event been set out further to advice from water engineering experts and in due course ought appropriately to be the subject of probation.

Discussion and decision

[14] Having heard and considered the submissions of counsel, I have concluded that

none of the points arising in the discussion which proceeded before me can or should be resolved without at least an element of probation. In these circumstances the interlocutor accompanying this opinion will simply pronounce that parties will be allowed a proof before answer of their whole averments, with all pleas standing.

[15] Turning directly to the first chapter of the pursuers' case, namely to the conclusion seeking specific implement by way of delivery of certain fireplaces and wall lights, and of course to the ancillary conclusions related thereto, I have reached the view that ample specification of the items in question has been provided within the corpus of the pursuers' pleadings, and in particular within article 4 thereof and in the operative conclusion seeking a delivery order. The various items, their number and their location are expressly averred upon by the pursuers. The component parts of the fireplaces, namely white marble mantles, friezes and jambs, are also set out. It is averred in article 4 that the subjects were in the control of the defenders and occupied by one of the executors named as a defender in the action. Absent photographic material or a detailed incorporated report from a professional person such as a surveyor or valuer, it is difficult to see what further precision by way of averment can be required of the pursuers in such circumstances. In these circumstances, any orders arising in terms of the first conclusion will on any view be readily intelligible to the defenders and will be more than capable of implementation. The ancillary conclusions within this chapter of the pursuers' case, both in the event of delivery and failing delivery, are in my opinion also relevantly set out. The context of the order *ad factum praestandum* sought is one in which the defenders were the owners and hence the sellers of the subjects. It is not unreasonable to infer therefrom that, whether the defenders were or were not in actual occupation, they would and should have been aware of the contents of the subjects of sale. I conclude in these circumstances that the criticisms advanced on behalf of the

defenders with regard to this first chapter of the pursuers' case are without substance and that the appropriate mode of enquiry in respect of that chapter in its entirety is by way of proof before answer.

[16] I have drawn a similar conclusion in respect of the averments of parties concerning the obligations said to arise in terms of clause 7.1 of the missives. The order for declarator sought by the pursuers in conclusion 5 to the effect that the defenders were in breach of clause 7.1, (a) regarding whether the water supply was of adequate quality and in compliance with the 2006 Regulations, and (b) regarding whether a water test taken by Scottish Water was not exhibited by the defenders to the pursuers within the period of four weeks prior to the date of entry confirming compliance with the 2006 Regulations, cannot in my view be resolved without the leading of evidence. Clause 7.1 gives rise to certain obligations in the said terms upon the defenders. On the issue of adequate quality and compliance with the 2006 Regulations, the pursuers, having set out the terms of the contract, have offered to prove such a breach. A portion of their evidential position has been set out regarding water samples taken on 18 June 2014, but in my view these averments, for the purposes of the present relevancy exercise, are neither here nor there. Further, in the offer letter dated 29 January 2014 the whole heritable subjects to be transferred by subsequent disposition are defined as Ayton Castle. In my view, the warranty in clause 7.1 in respect of adequate quality and compliance with the 2006 Regulations, can only be read as relating to the private water supply to these subjects, and I see no difficulty with that claim proceeding to proof as presently averred. Indeed, even more sparing averments might well have justified an order permitting probation of that part of the second chapter of the pursuers' case.

[17] Turning to the obligation to exhibit a water test within four weeks prior to the date of entry confirming that the supply complied with the 2006 Regulations, the defenders admit in answer 9 that they did not exhibit that contractually stipulated test within the said period. But for the defenders' case of waiver, the pursuers' averments taken with the defenders' said admission would constitute a clear and unanswerable claim for breach of contract on this point. Senior counsel for the pursuers of course contended that no legally relevant case of waiver had been expressed by the defenders in their pleadings. On the other hand, the defenders, through their counsel, have contended that an implied waiver on the part of the pursuers has been established on the facts averred. I have concluded, however, that while on balance it cannot be said that the defenders have not advanced a relevant case of waiver, it would certainly at this stage be inappropriate in terms to strike out this section of the pursuers' case on breach of clause 7.1. Cases in which the court requires to consider the issue of waiver are inevitably highly fact-sensitive, and the authors of Reid & Blackie, *supra*, state this position expressly at para 3.10 in the following terms: "Waiver is regarded as a matter of fact: the conduct in question is viewed objectively to ascertain whether it is consistent with a continuing intention to exercise the right." In a situation in which a party seeks to advance a case of implied waiver, the court must give careful consideration to whether there has been any deemed abandonment of the right in question. The pleading of specific facts and circumstances in that particular context may well be enough to set up a potentially relevant case of waiver. The present case advanced for the defenders on this issue is to the effect that the settlement of the transaction proceeded on the scheduled date of entry notwithstanding the pursuers knowing full well that it was by then impossible for the defenders to exhibit the relevant water test certificate. Furthermore, parties agreed that a significant sum should be retained. This circumstantial background could potentially be

commensurate or, equally, not commensurate at all, with such a deemed abandonment. It could well be held in due course that the election of parties to agree to a retention was in fact a sensible and practical solution to a real world conveyancing problem rather than the moment when the abandonment of a previously stipulated contractual right somehow crystallised. While reliance is not expressly stated in this set of pleadings, it is not difficult to imagine that evidence impacting on reliance could arise on the basis of the various matrices of facts set out in the whole pleadings. In such circumstances therefore I am not at this stage prepared to accede to senior counsel's proposition that a relevant case of waiver has not been pled by the defenders. Having said all of that, I struggle to see the basis upon which the defenders can contend that the issue of waiver is, on the basis of these pleadings, a closed chapter concluded in their favour; indeed, far from it. In my view the pursuers' conclusion for declarator in respect of the two parts of clause 7.1, and the consequent conclusion seeking damages in respect of the cost of connecting the subjects to the mains water supply, each comfortably survive the defenders' attack advanced in terms of relevancy, and these conclusions, together with all of the remaining conclusions, and parties' whole averments and pleas-in-law, will now be the subject of enquiry by way of proof before answer.

Disposal

[18] In all of these circumstances I propose to appoint a diet of proof before answer with all conclusions, averments and pleas-in-law standing. Meantime any matters of expenses arising will be reserved.

[19] Finally, I wish to record my thanks to counsel, the clerk of court and SCTS IT staff for their respective participation in and facilitation of the substantive hearing in this case by video conferencing from multiple remote locations with such considerable success.