SHERIFF APPEAL COURT

[2019] SAC (Civ) 32
GLW-CA88-18

Sheriff Principal D C W Pyle
Sheriff Principal D L Murray
Appeal Sheriff N A Ross

OPINION OF THE COURT

delivered by APPEAL SHERIFF ROSS

in appeal by

SITEMAN PAINTING AND DECORATING SERVICES LIMITED

Pursuers and Respondents

against

SIMPLY CONSTRUCT (UK) LIMITED

Defenders and Appellants

Defenders and Appellants: Massaro, advocate; The Building Law Practice
Pursuers and Respondents: Middleton, advocate; Lyons Davidson Scotland LLP

9 August 2019

[1] Before an adjudication can take place in relation to a construction contract there must be a 'dispute' in terms of the Housing Grants, Construction and Regeneration Act 1996 (the "1996 Act"). The respondents ("Siteman") raised an adjudication in August 2017. By decision dated 14 September 2017 the adjudicator awarded £57,390.19 plus VAT. The appellants ("SCUK") refused to pay. Siteman raised an action in the sheriff court. Following debate, the sheriff granted decree for payment, without the necessity of hearing evidence. SCUK appeals that decision.

[2] SCUK is engaged in property development. It engaged Siteman as sub-contractor to carry out painting and decorating works on site. They entered a bespoke fixed-price lump sum sub-contract with provisions for interim payment and adjustments, and a payment schedule. The sub-contract sum was £151,168.10 plus VAT. Works commenced in May 2016 and a number of variations were instructed on site. SCUK unilaterally terminated the contract for non-performance on 23 January 2017. Siteman responded by letter dated 8 February 2017, rejecting any non-performance and noting no evidence had been produced. It requested payment of their most recent payment notice number 11 and intimated that it intended to pursue monies owed.

[3] Siteman's agents served a notice of adjudication dated 17 August 2017, which referred a dispute "*in respect of the proper value of works undertaken*", a dispute arising following SCUK's "*failure to pay amounts applied for by [*Siteman*] within its payment applications*" and seeking a decision that the gross sum of £237,939.76 plus VAT "*is due for works undertaken*". The adjudicator was appointed on 23 August 2017, and a referral notice was served on 24 August 2017. SCUK's response to the referral notice disputed that jurisdiction was conferred because of a "*lack of clarity*" of the notice and the reference of multiple disputes. It then proceeded to give a detailed response to the various heads of claim, which related to unpaid payment notices, variations, and non-payment of VAT, by reference to a Scott schedule. The court pleadings do not discuss details of the parties' dispute, or of events surrounding the termination of contract, or of the adjudication itself, and accordingly this evidence was not before the court, other than as background to the enforcement.

[4] SCUK refused to pay the sum of £57,390.19 awarded on 14 September 2017. It refuted, both at the time and in these proceedings, that the adjudicator had jurisdiction. It

claimed, firstly, that no "dispute" had been referred, owing to Siteman's failure to refer a "clear and precise" claim to adjudication, and, secondly, that multiple disputes had been referred which rendered the reference invalid. The sheriff found that neither defence was relevantly pled, and pronounced decree of payment.

Whether a dispute had crystallised

[5] A party to a construction contract may refer a dispute arising under the contract for adjudication. 'Dispute' includes any difference (1996 Act section 108). That party may serve a notice of adjudication giving notice of its intention to refer any such dispute to adjudication. A notice of adjudication shall set out briefly the nature and a brief description of the dispute, together with other requirements (Scheme for Construction Contracts (Scotland) Regulations 1998 – the "Scheme"). These provisions were reflected in the parties' contract.

[6] SCUK claimed that the notice of adjudication was too nebulous in its terms to identify a dispute for the purposes of the Scheme. It submitted that it was not enough that a dispute in general terms be identified. It must be capable of being understood and defended. The learned sheriff repelled that argument, and found that there was a dispute which served validly to constitute jurisdiction upon the adjudicator. We agree with his conclusion. There were two parts to this argument: the first related to the pleadings, the second to the test for whether a dispute has been constituted.

Admissions in the pleadings

[7] In the pleadings, SCUK makes some admissions, which the sheriff found amount to an acceptance that a dispute had been constituted. Siteman avers that "*During the course of*

*the works a dispute arose between the parties. The pursuers sought payment of a total of £105,140.82 plus VAT carried out by them pursuant to the Construction Contract as varied. [*SCUK*] refused to pay."* SCUK's pleadings respond by stating: "*Admitted that in the course of the works a dispute arose between the parties. Admitted that [*SCUK*] refused to pay…under explanation that the Defender is not entitled to the same…".* The dispute referred to is a dispute which existed before the notice of adjudication was served.

[8] Before us counsel for SCUK sought both to explain and to delete those averments. He submitted that there was a clear difference between the legal definition of 'dispute', which was not being discussed in the pleadings, and the ordinary meaning of a dispute, which was admitted and which referred to a generality that the parties were in dispute.

[9] While averments of fact do not necessarily equate to propositions in law, this argument does not assist in the present circumstances. The purpose of pleadings is to identify what points are to be argued and what points will not be contested. Whether there is a dispute between the parties is a matter of fact, and the word dispute "does not have some special or unusual meaning conferred upon it by lawyers" (*AMEC Civil Engineering Ltd* v *Secretary of State* [2004] EWHC Civ 2339 (TCC) at [68]). As counsel accepted, when it comes to showing a dispute exists, the bar is not a high one. In general terms, the dispute is whatever is in dispute at the moment that the referring party first intimates an adjudication reference. Accordingly, as a matter of pleadings alone, if a dispute is admitted, the court is entitled to regard that point as settled.

[10] Before the sheriff, SCUK sought to rely on qualifications to this admission which appear elsewhere in the defences. These are that that SCUK had challenged jurisdiction on the basis of the failure to refer a "*clear and precise claim to adjudication*". As the sheriff observes, that is not truly a qualification, because it refers not to a pre-existing dispute, but

the terms of the notice of adjudication itself. Even if that averment were correct, it would not rule out a pre-existing dispute.

[11] Counsel sought leave to delete these admissions in the pleadings. He maintained that the difference between a general dispute and a specific dispute suitable for adjudication was plainly set out in the averments. We do not accept that submission, and refuse permission to delete those admissions, for two reasons.

[12] The first reason relates to the merits of the cause. Where the sub-contract was purportedly terminated by SCUK and such termination was specifically rejected by Siteman, but works on site thereby ended, leading to Siteman serving notice some six months later expressly seeks payment of outstanding sums "within its payment applications", it is difficult to see that there is any room for confusion about what is sought. Siteman are claiming sums due under the contract. In the specific circumstances of this case, we do not accept that there is a genuine inability to identify what is claimed. That, taken together with the sheriff's rejection of the averment which purportedly qualifies the admission (namely that the absence of a "clear and precise" case in the notice, even if correct, does not rule out a pre-existing dispute), tends to show that the admissions are properly made and deletion should not be permitted.

[13] The second point relates to the burden of proof. Withdrawal of the admissions would not by itself result in a relevant defence. If SCUK intends to identify a difference, on the facts, between a general dispute and a specific dispute capable of founding adjudication, it has to aver and prove that position. There are no averments which would allow it to lead evidence that there was no specific dispute between the parties prior to the notice of adjudication. Where one party refuses to comply with an adjudicator's direction to pay, the onus is on that party to prove its entitlement to refuse payment (*GT Equitix Inverness Ltd* v

Board of Management of Inverness College [2019] CSOH 46 at [35]). There is an obligation on any pleader to make admissions where there is no relevant defence to a claim. For the reasons discussed, the purported defence is not a relevant one. There is nothing in the productions lodged which would tend to show - the matter was not the subject of detailed submissions - that the admission was not properly made.

[14] We refuse leave for those admissions to be withdrawn by amendment. The sheriff was entitled to find, on the face of the pleadings, that SCUK accepted that a dispute had crystallised for the purposes of the Scheme, and that the qualification upon which SCUK proposed to rely was ineffective to qualify that position. That is sufficient to dispose of this point. In the event that this were wrong, it is necessary to consider the second submission on whether a dispute has been constituted.

Whether the claim is too ill-defined

[15] SCUK places reliance on certain propositions set out in *AMEC Civil Engineering Ltd* v *Secretary of State* [2004] EWHC Civ 2339 (TCC) or "*AMEC*". In *AMEC* the court identified seven principles for identifying when a dispute had arisen, which principles have gained subsequent judicial approval. One of those principles is that where a claim "is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute…". The sheriff discussed SCUK's argument that the terms of the notice of adjudication were insufficiently clear to give rise to a dispute. He noted that *AMEC* dealt with disputes arising prior to the notice of adjudication, and not the requirements of the notice itself. He accordingly regarded *AMEC* as not vindicating SCUK's position.

[16] SCUK complains in its pleadings of a failure to present a "*clear and precise claim*" in the notice of adjudication. That is a materially more demanding standard than is required by the 1996 Act or the Scheme, which require of a notice of adjudication that "the nature and a brief description of the dispute" are set out. Clarity and precision are not part of the statutory test for a sufficiently defined "dispute" for the purposes of founding jurisdiction, and are matters for the subsequent referral notice. In appropriate cases, where payment arrangements are complex and made under a subsisting contract, and where there is genuine scope for confusion as to the basis for demand of particular sums, it may be that a high degree of clarity and specification is required in order to give fair notice of a claim. This is not such a claim. No averments support such a position.

[17] Counsel for SCUK did not insist on the argument that the pre-existing dispute required to be clear and precise. His submissions relied instead on the *AMEC* test, namely that the claim is *"so nebulous and ill-defined that SCUK cannot sensibly respond to it"*, in relation to the notice of adjudication. That is a significantly lower standard.

[18] We find no error in the sheriff's approach or treatment of the authorities, and do not repeat them here. Every case will depend on its own facts. The sheriff identified that the *AMEC* propositions did not purport to cover the present situation. He considered whether a dispute was properly identified in the notice of adjudication, being the only source of dispute relied on by the parties. He noted that the notice of adjudication referred to: *"…the sums due and payable by [*SCUK*] to [*Siteman*] in respect of the works undertaken"* and *"[*SCUK's*] failure to pay amounts applied for by [*Siteman*] within its payment applications"*, and that the sum claimed was in respect of the "*works undertaken*".

[19] We consider that *AMEC* does not purport to deal with notices of adjudication, but pre-existing disputes. Even if that were wrong, and that test were to apply to notices of

adjudication, in our view it is a very low test. There was sufficient material before the sheriff to justify his being satisfied that a dispute was established. The terms of the notice are neither nebulous nor ill-defined. The notice met the Scheme requirement of brevity. SCUK was able to submit a full defence in its subsequent response to the referral notice.

[20] In our view, constrained as we are to considering only the terms and circumstances of the notice of adjudication, it was clear on its terms that the dispute related to non-payment of the interim applications for payment. The claim was clearly not for final payment, because no such payment had been demanded, and final payment was not yet due. It was payable, at the earliest, in January 2018 (clause 8.11 of the sub-contract). The language of the notice shows it is not a claim for damages, because it seeks to enforce payment.

[21] There is some evidential value in the adjudicator's view. He stated (note of reasons 20 and 21) that "*It is quite clear from reading the notice of adjudication that the dispute concerns the gross value of the works carried out by [*Siteman*]…again it is quite clear to me that the dispute is about gross value and the sums due…".*

[22] On the basis of the notice of adjudication alone, it is sufficiently clear for the purposes of founding jurisdiction that there was a dispute, and what that dispute comprised.

[23] For completeness, because neither party's submissions focused on any pre-notice dispute or discussed any details of the payment claims made under the contract, there is no factual material before the court which would allow us to conclude that either the adjudicator or the sheriff was in error in finding that there was a crystallised pre-notice dispute. A dispute, in general terms, was evident as early as February 2017, when SCUK purportedly terminated the contract, and Siteman rejected the termination (see 3/209 and

3/210 of the appendix) and enquired about payment. The notice of adjudication gave the nature and a brief description of the dispute.

[24] Counsel for SCUK placed some reliance on *Griffin and another* v *Midas Homes Ltd* 2000 WL 1544681, where the Technology & Construction Court made some observations about the requirement for notice. *Griffin*, however, falls to be distinguished, as the factual matrix was very different to the present case. In *Griffin*, the respondent's solicitors responded to the notice by stating explicitly "*we have absolutely no idea from your Notice of Adjudication which of these numerous items you are intending to refer to the adjudicator, or the grounds*…". The judge was able to identify a "range of possibilities" (which included outstanding invoices, the determination of the contract, the consequences of determination, and a general and unsupported claim for breach of contract and loss of profit) and found it "very difficult" to identify how the notice of adjudication embraced all of the claims which were referred and decided upon. The present case is markedly different. We were not invited by either counsel to consider any specific details of the claims or the contract, and neither counsel sought to found on them. We are accordingly left to consider the parties' pleadings and the adjudication documents. These do not suggest a complex or mystifying scenario of the type SCUK attempts to portray, or to the extent seen in *Griffin*. Siteman holds the award of the adjudicator. The burden of proof is on SCUK to show why it should not be enforced.

[25] We repel this ground of appeal. For the purposes of establishing jurisdiction, the dispute was established at the latest by the notice of adjudication.

Referral of multiple disputes

[26] The adjudicator is only permitted, in terms of the sub-contract, the 1996 Act and the Scheme, to consider a single dispute, unless by consent. SCUK did not so consent, and

maintains that the adjudicator exceeded his jurisdiction by considering multiple disputes. SCUK's counsel accepted that, depending on the facts, more than one payment application might be referred as part of a single dispute (*Barr Ltd* v *Law Mining* 2003 SLT 488), but it depended what those payment applications related to. He submitted that, in the absence of specification, the appellant did not know whether there were multiple issues in the payment applications. He maintained that, because Siteman had not sufficiently averred a sufficient connection between the claims, that there was no basis for concluding that there was jurisdiction.

[27] In our view the sheriff correctly applied the law, which recognises that the courts will not require every separate claim or issue to be described as a separate dispute, as that would run contrary to the intention of the 1996 Act. As Lord Clark stated in *Morgan Sindall Construction & Infrastructure Ltd* v *Westcrowns Contracting Services* [2017] CSOH 145:

> "…the courts should not adopt an overly legalistic analysis of what the dispute between the parties is, but should determine in broad terms what is the disputed claim or assertion. If the courts were to take an overly legalistic approach, each sub-issue or individual point of difference between the parties could be taken as a dispute. That approach is unrealistic and not in accordance with commercial common sense." (at [30]).

[28] On the facts, the adjudicator again identified that this was a single dispute, namely about the gross value and the sums due. The exercise he undertook involved considering a series of payment applications, with reference to what works had been carried out and whether variations had been instructed. Counsel did not discuss the process in any detail, so we are left with little more than an impression of what transpired. It is enough to note that SCUK does not offer in the pleadings any more than a bare assertion that there were, in reality, multiple disputes. The onus is on them to aver and prove such a case. It is not sufficient, at the stage of enforcement, to rely on speculation on what claims might have

been covered by the notice of adjudication. The adjudication process is complete. Any genuine difficulty arising is now capable of specific and detailed averment and submission. In the absence of such material there is no adequate reason to conclude that there was more than a single dispute. There is no basis to find that the sheriff erred in finding the claim to be, as he describes it, straightforward. We repel this ground of appeal also.

Disposal

[29] We will refuse the appeal and adhere to the interlocutors of the sheriff.

[30] Parties agreed that expenses should follow success, and the proceedings should be sanctioned as suitable for the employment of junior counsel. A discussion was had about an earlier one-day hearing relating to the lateness of the appeal where expenses were reserved. The appellant's argument was rejected, but discretion exercised to allow the appeal to proceed. We are satisfied that the appellant should meet the expense of that hearing, as the hearing was principally required by their argument which was not sustained.

[31] Accordingly, we find the appellant liable to the respondent in the expenses occasioned by this appeal process, and certify the cause as suitable for the employment of junior counsel.