SHERIFF APPEAL COURT

[2024] SAC (Civ) 21
KKD-A115-18

Sheriff Principal N A Ross
Appeal Sheriff T McCartney
Appeal Sheriff D O'Carroll

OPINION OF THE COURT

delivered by APPEAL SHERIFF THOMAS MCCARTNEY

in the appeal in the cause

MARTIN GEORGE CHERRIE and AMY PATERSON

Pursuers and Respondents

against

KEVIN VAUGHAN, trading as VIP JOINERY

Defender and Appellant

Defender and Appellant: MacKenzie, (sol adv); Harper Macleod LLP
Pursuers and Respondents: K Young, advocate; MML Law

17 May 2024

Introduction

[1] The sheriff courts have rules of procedure, pleading practice and law of evidence developed and refined over many years. Together they provide a framework within which civil litigation can proceed in a fair and coherent manner with each party having proper notice of the line intended to be taken and the main facts upon which reliance is placed. This case is a salutary example as to how matters can go awry when scant regard is had to established procedure and practice.

[2] Thus one ends up in a situation where the defender challenges on appeal the sheriff's findings based upon evidence introduced by the defender, under objection, which had no foundation in the averments on record for either party. Further challenges arise when it is realised that in a breach of contract case, the averments and evidence as to what loss arises from the breach are entirely lacking in focus and clarity to the extent that the evidence as to loss comes substantially from the defender's case. There is no averment about what term of the contract has been breached, whether it is express or implied, or how it was breached, but wide-ranging evidence was nonetheless introduced by both parties. Attempting to apply the customary principles of appeal to this case has proved a perplexing task.

[3] From the judgment, in 2017 the pursuers decided to convert the attic space in their home. Architectural drawings were instructed, planning approval obtained and structural drawings prepared. The defender was instructed to carry out the work. The agreed price was £20,000, payable in staged payments of £2,000 per week. Work commenced on 2 October 2017. Due to concerns as to the quality of the work, the pursuers put the defender off the job on 2 November 2017. By that time the pursuers had paid to the defender the sum of £14,000. The work carried out by the defender's workman was of an extremely poor quality. Numerous defects were identified. The remedial work, which has not yet been carried out, requires stripping out completely the work done by the defender and starting the build again.

[4] In this action the pursuers crave damages for breach of contract. The defender challenged the pursuers' averments at debate on the grounds of relevancy and specification. At debate the sheriff repelled the defender's preliminary plea and appointed the cause to a proof. That interlocutor has not been brought under review on appeal.

[5] The case was appointed to a proof before answer. However the points taken by preliminary plea at that stage related to averments introduced subsequent to the debate by amendment and are not matters that require consideration in this appeal.

[6] The sheriff granted decree in favour of the pursuers for payment of £36,000, being £26,000 for the cost of restoration of the property and £5,000 for each pursuer for inconvenience and distress.

[7] The grounds of appeal are that the sheriff erred in relation to sufficiency of averments, causation, quantification of loss and assessment of damages, the award of interest and the issue of betterment.

Sufficiency of averments and causation

[8] The sheriff found in fact that the structural drawings for the loft conversion were inaccurate as they failed to take account of joists running perpendicularly to the joists running from the front of the building to the back and that these joists are obvious upon inspection. He found in fact and law that it was the responsibility of the person employed by the defender to undertake the work to bring to the attention of the engineer and architect the problem the perpendicular joists posed in implementing the plans.

[9] However, the pursuers had no averments on record to provide a foundation for the sheriff to make these findings. The pursuers led no evidence on this, but the defender did. Evidence as to an issue with the perpendicular joists was from the defender's witness, Mr Allan Grant, who was presented by the defender as an expert witness. Counsel for the pursuers objected to this evidence on the basis of there being no fair notice given the absence of pleadings. The evidence was allowed, and in fact bolstered the pursuers' case.

[10] The solicitor advocate for the defender submitted that the issues with the perpendicular joists were critical to the pursuers' case. He submitted that, in essence, the sheriff found that the original design was fundamentally flawed from the outset. Separately, he submitted that any breach of contract by the defender did not cause any loss. The works implemented a faulty design, namely that the existence of perpendicular joists were not shown on the plans, and the works required to work around that. Even correctly executed works would have required to be removed due to this fundamental problem. The sheriff failed to have proper regard to that evidence. The sheriff purported to elide that issue by holding that the defender was responsible for the failings in the drawings as it was his responsibility to bring the issue to the attention of the engineer and architect.

[11] The defender's solicitor advocate submitted that the difficulty for the pursuers is that no such case was ever pled against the defender. In fact precisely the opposite was averred. The first time it was advanced by the pursuers that there was a duty to warn of defective design was in submissions following the conclusion of evidence. The sheriff therefore erred in making findings which were not open to him on the pleadings before him.

[12] Counsel for the pursuers submitted that there was nothing in the pleadings capable of giving notice to the pursuers of a defence resting upon the specific claim that the presence of perpendicular joists in the attic structure had been missed by the engineers, rendering the drawings incorrect or unworkable. The absence of such averments worked against the defender. This positive defence as advanced did not match the defence on record which was pled in general terms and ignored the perpendicular joists. Objection had been taken at the appropriate time to this evidence.

[13] Counsel submitted that, once evidence was led about whether the presence of perpendicular joists did cause an issue, there was a clear basis for a case that the defender

had a duty to warn. The legal argument was advanced in response to an unpled defence where the defender has put a factual matter into issue without record. In that circumstance the defender cannot be prejudiced by being met by that legal proposition.

Decision on sufficiency of evidence and causation

[14] In our view the error made by the sheriff is that he allowed this evidence at all. The pursuers' objection to evidence in support of the specific assertion of a design fault in respect of perpendicular joists should have been sustained and evidence on this not admitted. There is no record for it. Counsel for the defender sought to find averments for this defence in averments of other specific design failings and relying on the preceding phrase "without prejudice to the foregoing generality". That will not do in respect of a line of defence described in submissions by the defender as "fundamental".

[15] If that was to be the defender's position he required to set that out on record. Had he done so the pursuers would have had the opportunity to consider and make appropriate averments in response. Had the defender wished to rely on what is stated to be the fundamental design flaw relating to the perpendicular joists it was open to him to convene a third party to the action. He did not do so. The defender's position was that this evidence should be allowed despite the absence of record. The defender cannot reasonably complain about the pursuers' consequent legal submission as to how the law should apply in respect of evidence introduced by the defender of which the pursuers did not have fair notice.

[16] It is unclear from the sheriff's note why he decided to allow the evidence in respect of perpendicular joists to which objection had been taken. The sheriff states that he agreed with the objection to the evidence of Mr Grant based upon insufficient pleadings but was

prepared to accept his evidence to some extent, which included his evidence as to the architectural design which utilised perpendicular joists.

[17] As matters transpired, the subject was introduced by the defender. The evidence of Mr Grant in respect of the perpendicular joists having been allowed, there is no unfairness to the defender in the pursuers responding with a legal submission and the sheriff accepting that submission in his application of the law to the facts as found by him based upon the evidence led. We are not prepared to entertain a subsequent submission from the defender that allowing this evidence was unfair, or that the sheriff went too far in basing his findings in law upon it. Absence of fair notice, whether of fact or law, appears to have been a matter of little concern to the defender at the hearing. It does not become a legitimate basis for appeal now.

[18] The defender submits that the pursuers' case on causation fails due to the preceding design fault relating to perpendicular joists and that the sheriff erred in failing to recognise that. Such an approach requires that the defender be allowed to advance an unpled defence and the pursuers are not allowed to make a legal submission arising from evidence on the point led by the defender under objection and with no prior notice. The rules of pleading do not allow that. This ground of appeal is refused.

Quantification

[19] The sheriff found in fact that the cost of the remedial work and completion of the plans to stage of decoration was reasonably assessed in the sum of £26,000. That figure was based upon a Scope of Works document by Mr Michael Annandale, a witness for the defender, which put a figure of £41,000 on the Scope of Works. From that the sheriff deducted £6,500 in respect of the use of steel and a further deduction of £8,500 in respect

of joinery work associated with the steel and dealing with the perpendicular joists, all of which he considered could not be recovered by the pursuers.

[20] For the defender it was submitted that the sheriff's findings in fact in relation to quantification of loss were predicated upon the evidence of the defender's witnesses, Mr Grant and Mr Annandale. No reasonable sheriff could have concluded that the evidence of Mr Grant and Mr Annandale provided an evidential basis upon which to quantify loss. It did not support the figure of £41,000 as a basis for quantification. The sheriff proceeded on the basis that Mr Annandale's Scope of Works detailed the work required to repair the works carried out by the defender and to bring the property to the stage at which it should have been if the plans had been complied with and work undertaken in a workmanlike manner.

[21] In fact, the Scope of Works expanded significantly beyond dealing with matters identified in earlier reports and included substantial additional elements. Mr Annandale's Scope of Works was, on his own evidence, a completely new job. He was not subject to any cross-examination on these points. The failure to cross-examine Mr Annandale could not be taken as anything other than an acceptance of his evidence. In the absence of cross-examination on those points Mr Annandale's evidence must be taken as correct.

[22] Mr Annandale gave evidence that the cost of rectifying the issues was £1,600. In placing reliance on Mr Annandale's evidence on the cost of the Scope of Works and disregarding his evidence on the cost of remedial works, the sheriff had gone off on a frolic of his own. The sheriff had no evidence before him to allow him to reach a conclusion on the cost of remedial works other than Mr Annandale's estimate of £1,600.

[23] For the pursuers it was submitted that the sheriff did not err in finding that the pursuers had quantified the losses. The sheriff set out plainly how he arrived at the figure

of £26,000 as the cost of remediation occasioned by the defender's breaches. The sheriff had analysed and considered by appropriate cross-referencing the totality of the relevant evidence before the court and did not disregard any of Mr Annandale's evidence in the way contended for by the defender. The sheriff had undertaken a careful and appropriate cross-referencing of the evidence in order to assess a reasonable sum in accordance with the facts.

Decision on quantification

[24] The sheriff had three figures presented in evidence as to the cost of works required. Firstly, there was an updated quotation from Wyse Concepts totalling £62,472. That is the sum craved by the pursuers and relied upon by them on record. Secondly, there was the sum of £41,000 based upon the evidence of the defender's witness, Mr Annandale, as to the cost of the works set out in his Scope of Works document. Finally there was the sum of £1,600 being Mr Annandale's original assessment as to the cost of necessary works.

[25] The sheriff rejected Mr Annandale's assessment of outstanding works in the sum of £1,600 as "patent nonsense". While that assessment is not explained in detail the sheriff did note the disparity between that sum and Mr Annandale's subsequent estimate of £41,000. The sheriff also had regard to the extent of the remedial work required as set out in the findings. Mr Annandale's estimate of £1,600 was no more than an unexplained figure, and it was not analysed by any witness. The sheriff was not obliged to accept this evidence simply because there had been no cross-examination. Assessment of evidence is a matter for the court. We cannot conclude that the sheriff was plainly wrong in rejecting the figure of £1,600.

[26] The sheriff also rejected Mr Wise's figure of £62,472 and preferred Mr Annandale's estimate of £41,000 based upon his Scope of Works as being the more accurate assessment given its greater detail. The sheriff was fully aware of the challenges facing him. Under reference to *Duncan* v *Gumleys* 1987 SLT 729 he noted that the court was not bound by rigid rules, but that there required to be evidence upon which to base an award. Such evidence could include inference from expert opinion. He considered Mr Wyse's unchallenged estimated figure. He noted that it was based on Mr Annandale's Scope of Works. He noted that the latter document contained works which were not required, such as steelwork and some associated joinery works. He had also sight of the expert report of Mr Grant, with descriptions of the works and photographs. He accepted that the exercise was of necessity a broad brush exercise. In our view, on the evidence, the sheriff could do little else, while there was a clear requirement for an award of damages based on the evidence which he did have.

[27] While the sheriff was entitled to use Mr Annandale's estimate of £41,000 as a basis to assess damages, we have come to the view that the process by which the sheriff then arrived at the sum of £26,000 was flawed and cannot be sustained. The sheriff deducted the sum of £6,500 in respect of the cost of unnecessary steelwork. There was an evidential basis for that based upon an estimate for that work by Mr Wyse in his evidence. The sheriff then made a further deduction of £8,500 in respect of joinery associated with the steel and the amendment of the perpendicular joists. He arrived at that figure by taking one half of the costs quoted by Mr Wise for the first fix joinery. We have not been able to accept that he had a basis, however broad, for that figure.

[28] A further difficulty in respect of an award based upon Mr Annandale's figure of £41,000 is that the sheriff found in fact that Mr Annandale's Scope of Works contained

additional works as requested by the pursuers and not part of the original plans. Those works were not specified, there was no evidence as to their cost and the sheriff did not have regard in reaching the figure of £26,000 to the existence of additional works. While we accept that the sheriff was entitled to attempt to reach a figure to reflect the cost of necessary remedial work, and to make inferences from the evidence before him, we have not been able to accept that the sheriff's assessment of £26,000 has a sufficient evidential basis.

[29] The pursuers have suffered loss due to the defender's breach of contract. The work carried out by the defender requires to be stripped out entirely. The pursuers have paid the sum of £14,000 to the defender for work which now has to be completely re-done. At the very least, they have lost the sum of £14,000 paid by them to the defender. Each party was asked in the course of submissions before us as to whether that figure may be the only reliable assessment of loss. Each accepted that that could be a conclusion if any other basis to assess damages was rejected.

[30] In the very special circumstances of this case, given the shortcomings of how the case was pled and presented and the absence of clear evidence attesting to the loss suffered by the pursuers on a cost of cure basis, the sum of £14,000 is the only reliable figure on which to assess damages. Therefore we shall sustain the appeal to the extent of reducing the sum awarded in respect of crave one from £26,000 to £14,000.

[31] The defender made submissions about betterment, but the foregoing approach to calculation renders that argument otiose. Parties made submissions on interest, but based on the starting point that the sum awarded represented the cost of replacement. The sum of £14,000, while forming the basis of calculation of future remedial works, was in fact paid for the defective works over a period of 5 weeks from about 28 September 2017. The pursuers have been out of pocket since then. They are entitled to interest at the judicial rate

since payment. We will accordingly award simple interest at 8% a year from 2 November 2017.

Inconvenience and distress

[32] The sheriff awarded £5,000 for each pursuer in respect of inconvenience and distress. The solicitor advocate for the defender sought to make a submission as to the amount of this award. In the absence of any ground of appeal directed at the award of solatium the court did not allow that point to be advanced. Thus the sheriff's award in this respect with interest from the date of citation is unchanged.

Bias

[33] There was no ground of appeal founded upon judicial bias, apparent or real. This was not advanced as a stand-alone ground of appeal, but rather as a factor which infected the sheriff's decisions. It was submitted that there was a real possibility that a fair minded observer would conclude that the sheriff was biased against the defender.

[34] We reject that submission. The sheriff's responsibility as decision maker required that he assess witnesses and form a view as to the credibility and reliability of each. There can be no doubt from reading the judgment that the sheriff formed a strongly negative assessment of the defender and his witness, Derek Paterson. The sheriff was entitled to make that assessment and articulate his view on the credibility and reliability of the evidence. He was entitled to do so robustly where merited. We are not persuaded that there was a real possibility that a fair minded observer would conclude that the sheriff was biased against the defender or his witnesses. Although his criticisms were pithy, there was ample evidential basis for such a view.

Conclusion

[35] We shall allow the appeal to the extent of recalling the sheriff's interlocutor granting decree for payment by the defender to the pursuers in the sum of £36,000 and of new grant decree in the sum of (i) £14,000, upon which interest will run at 8% from 2 November 2017, and (ii) £5,000 to each of the pursuers, upon which interest will run at 8% from the date of citation until payment.

Expenses

[36] It was common ground between the parties that in the event that neither party was wholly successful a further hearing may be necessary to consider the question of expenses. In the event that parties are not able to agree the issues of expenses within 21 days, the clerk will arrange further procedure.