



SHERIFF APPEAL COURT

[2022] SAC (Civ) 3
ABE-CA23-20

Sheriff Principal D C W Pyle
Sheriff Principal C D Turnbull
Appeal Sheriff W H Holligan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

LAURA TIERNEY

Pursuer and Appellant

against

G F BISSET (INVERBERVIE) LIMITED

Defender and Respondent

**Pursuer and Appellant: Cowan, advocate; Murnin McCluskey
Defender and Respondent: RMcDiarmid, solicitor; Stronachs LLP**

9 December 2021

Introduction

[1] This appeal is concerned with payment for works carried out by the respondent for the appellant in relation to the construction of a luxury dog hotel in Aberdeenshire.

[2] The contract between the parties is not comprehensive in its terms. It comprises an estimate by the respondent dated 8 September 2015, for the carrying out of work “as per” three specified drawings, in the sum of £150,000 excluding VAT. The respondent’s estimate was accepted by the appellant, in the course of a discussion with a director of the respondent. The only express term as to payment was that the respondent’s “payment

terms are fourteen days from the date of [their] valuations which are carried out on a monthly basis”.

[3] The parties’ contract was not subject to the terms of a standard form of building contract. There was no express role for an architect or contract administrator. The contract was, however, a “construction contract” for the purposes of the Housing Grants, Construction and Regeneration Act 1996 (“the Act”). In this opinion references to sections are to sections of the Act.

[4] Works commenced in September 2015. The respondent’s first valuation was submitted on 17 February 2016. The respondent’s second valuation was submitted on 28 June 2016. By the time of the hearing before the sheriff, these valuations had been paid in full. The respondent’s third valuation was submitted on 17 November 2016. This valuation is considered further below.

[5] The appellant commenced proceedings against the respondent, in Aberdeen Sheriff Court, seeking repayment of what she contends was an overpayment made to the respondent in error; and damages for breach of contract. The respondent counterclaimed for payment of balance of the sum it contended was due in terms of the third valuation, namely, £40,572.34.

The sheriff’s decision

[6] Having heard counsel for the appellant and the solicitor for the respondent at a case management conference, the sheriff sustained in part the respondent’s first plea-in-law in its counterclaim and granted decree against the appellant for payment to the respondent of the sum of £40,572.34, that being the balance said to be outstanding in terms of the respondent’s third valuation. The sheriff also repelled each of the appellant’s pleas in law in the

counterclaim. The sheriff rejected the appellant's argument that the respondent's third valuation was ineffective as a payment notice for the purposes of the Act. He was satisfied that the third valuation issued was adequate to satisfy the requirements of a payment notice and that, for the Act to apply, it was not necessary for either or both parties to be aware of its application. The sheriff concluded that had the appellant been dissatisfied with the degree of specification contained within the third valuation she could have served an appropriate payment or pay less notice. She did not. The sheriff concluded that the appellant could not argue that the sum brought out in the third valuation was not payable. The sheriff also rejected an argument by the appellant that the respondent, having agreed to accept instalment payments, had waived any right to insist upon immediate payment.

The grounds of appeal

[7] The appellant appeals against the decision of the sheriff, permission to appeal having been granted by him. The appellant submits that the sheriff erred in holding that the respondent's third valuation was a valid payment notice in terms of the Act. The valuation did not specify the basis on which the notified sum had been calculated. It did not comply with the requirements of section 110A(3). The valuation was not in substance, form and intent a payment notice. It did not provide reasonable notice that the payment period had been triggered. The valuation was not issued in accordance with the parties' contract. By virtue of section 111(2)(b), the requirement to pay the notified sum is conditional upon the payment notice being issued "in accordance with a requirement of the contract". In terms of the contract, valuations were to be issued on a monthly basis. It was a matter of admission that they were not issued monthly. By failing to issue valuations in accordance with the contract, the respondent lost the right to payment under section 109(1). Further, the

appellant submits that the sheriff erred in holding that the appellant's averments and waiver were insufficient to merit inquiry. Further, and in any event, the sheriff erred in repelling all of the appellant's pleas in law in the counterclaim. The appellant's fifth plea-in-law, namely, that the sum sued for is excessive, remains extant in relation to the question of interest (which was not resolved before the sheriff).

Decision

[8] The ground of appeal requires the court to determine whether the sheriff was correct to determine that the respondent's third valuation, namely, that dated 17 November 2016, was a valid payment notice. There are three issues to be addressed in this regard. Does the valuation comply with the provisions of section 110A(3)? Is the valuation in substance, form and intent a payment notice? Was the valuation issued in accordance with the parties' contract?

[9] Considering the first issue, section 110A is in the following terms:

"110A Payment notices: contractual requirements

- (1) A construction contract shall, in relation to every payment provided for by the contract —
 - (a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or
 - (b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.
- (2) A notice complies with this subsection if it specifies —
 - (a) in a case where the notice is given by the payer —
 - (i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and
 - (ii) the basis on which that sum is calculated;
 - (b) in a case where the notice is given by a specified person —
 - (i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and
 - (ii) the basis on which that sum is calculated.
- (3) A notice complies with this subsection if it specifies —
 - (a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and

- (b) the basis on which that sum is calculated.
- (4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.
- (5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.
- (6) In this and the following sections, in relation to any payment provided for by a construction contract –
- ‘payee’ means the person to whom the payment is due;
 - ‘payer’ means the person from whom the payment is due;
 - ‘payment due date’ means the date provided for by the contract as the date on which the payment is due;
 - ‘specified person’ means a person specified in or determined in accordance with the provisions of the contract.”

[10] The parties’ contract does not require the payer (that is the appellant in this case); any specified person; or the payee (that is the respondent in this case) to give a notice in accordance with section 110A(2). In such circumstances, by virtue of regulation 4 of the Scheme for Construction Contracts (Scotland) Regulations 1998 (“the Regulations”), the relevant provisions in Part II of the Schedule to the Regulations apply. The Regulations set out a mechanism for determining what payments become due under the parties’ contract. In this case, responsibility falls upon the payer (the appellant), there being no specified person in this case. The implied terms of the parties’ contract, implied by virtue of section 114(4), required the appellant to give a notice in accordance with section 110A(2). The appellant failed to do so. The appellant’s failure cannot be overlooked in a consideration of certain of the issues raised in this appeal.

[11] Where, as in this case, the payer (the appellant) is required to give a notice in accordance with section 110A(2), and fails to do so, section 110B comes in to play and the payee (that is the respondent) may give to the payer a notice complying with section 110A(3). No issue as to the timing of such a notice arises in the present appeal. For completeness, it is appropriate to add that it was open to the payer (the appellant), in accordance with section 111, once the payee (the respondent) had given such a notice, to

give to the payee a notice of her intention to pay less than the notified sum. No such notice was given by the appellant.

[12] A notice under section 110A(3) must specify the sum that the payee (the respondent) considers to be or to have been due at the payment due date in respect of the payment, and the basis upon which that sum is calculated. In the present case, there is no dispute that the respondent's third valuation specified the sum it considered due.

[13] The issue in dispute is whether the notice specified the basis upon which that sum is calculated (see section 110A(3)(b)). The appellant argues that the respondent's third valuation does not. The valuation brings out a total of £214,169.95, exclusive of VAT. Of that sum, £18,373 relates to deductions and £82,542.95 relates to additions. The appellant's criticism of the valuation is that the detail provided in respect of the deductions and additions is restricted to a brief description of the work and the amounts sought (or not sought, as the case may be). The amounts sought are stated as lump sums. No breakdown of those sums is provided; not even between labour and materials. The appellant places reliance upon the *dicta* of Lord Macfadyen in *Maxi Construction Management Ltd v Morton Rolls Ltd*, Court of Session Outer House, 7 August 2001, unreported. The respondent argues that their third valuation sets out an itemised breakdown of the works carried out or deducted from the original scope of works with a breakdown of the price charged for each line item. The line items are divided into sections for deductions and additions, the deduction of sums already paid and the application of VAT. This sets out the method by which the notified sum at the bottom of the valuation statement is calculated. The respondent maintains that the valuation complies with the requirements of section 110A(3). The respondent places reliance upon *Kersfield Developments (Bridge Road) Ltd v Bray & Slaughter Ltd* [2017] EWHC 15 (TCC).

[14] The starting point of a consideration of this issue is the words of the statute. A notice under section 110A(3) must specify the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and the basis on which that sum is calculated. Here, what the respondent refers to as line items show how the amount the payee considers to be due is calculated. Absent that detail, there would simply be the amount considered due and that, alone, does not meet the requirements of the section. There requires to be some specification as to how the sum claimed is calculated. In the present case, there is sufficient specification. The appellant has fair notice of the amounts claimed and what those amounts relate to. It is a matter of fact and degree as to whether sufficient specification of a sum claimed has been provided. In the present case, the parties' contract is not subject to the terms of a standard form of building contract (unlike the position in *Maxi Construction Management Ltd* and in *Muir Construction Ltd v Kapital Residential Ltd* 2017 SLT 1294). The level of specification required will, to an extent, be dependent upon the requirements of the contract as to payment. The level of specification provided by the respondent in relation to three of the deductions is precisely that which is contained within the parties' contract. Such an approach cannot be criticised, particularly when the deductions relate to provisional sums. The appellant placed reliance upon the decision of Coulson J in *Grove Developments Ltd v S&T (UK) Ltd* [2018] Bus LR 954, at paragraph 26. In our view, the contents of the respondent's third valuation provided a more than adequate agenda for a dispute about valuation. If the appellant had been dissatisfied with the degree of specification provided, her remedy was to serve a pay less notice. As was observed by O'Farrell J in *Kersfield Developments (Bridge Road) Ltd*, whilst "deficiency in substantiation of a claim might justify rejection of such claim, in part or in full, it would not

of itself render the application invalid". The respondent's third valuation complies with the provisions of section 110A(3).

[15] The second issue for determination is whether the respondent's third valuation is, in substance, form and intent, a payment notice. The appellant submits that in addition to the requirements of section 110A(3), a payment notice must be clear and unambiguous. It must be a payment notice in substance, form and intent. The respondent's third valuation is not clear and free from ambiguity. It is not in substance, form and intent a payment notice. It does not state, in terms, that it is a payment notice. It did not give the appellant reasonable notice that the payment period had been triggered. Objectively assessed, the requisite intention to serve a payment notice was lacking. Reference was made to *Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd* [2017] EHC 17 (TCC) at paragraphs 32 to 38; *Grove Developments Ltd* at paragraph 27; and *Jawaby Property Investment Ltd v The Interiors Group Ltd* [2016] EWHC 557 (TCC) at paragraph 63.

[16] The respondent contends that their third valuation satisfies the requirements of the Act and that the appellant seeks to impose more onerous requirements than those contained within it. There is no requirement that the notice be labelled in any specific way. The terms of the parties' contract and previous valuation statements are relevant to a consideration of the valuation statement at issue (see *Maxi Construction Management Ltd*). In the decision of this court in *Trilogy Services Scotland Ltd v Windsor Residential* 2017 SCLR 640, the requirements of a payment notice were discussed. An issue in that case was whether it was necessary that the issuing party should make clear that it was "applying for payment" in terms of the Act. This court found that there was no requirement for the issuing party to demonstrate that it was their intention to give notice under the Act. The test is exactly as set out in section 110A(3). It is sufficient that there was intention to request payment (see

Trilogy Services Scotland Ltd at paragraphs 16-17). Such intention was clear from the valuation statement at issue in the present case, particularly standing the context of the contract and prior valuation statements.

[17] In the present case, we have no hesitation in concluding that the respondent's third valuation was a payment notice in substance, form and intent. It must be borne in mind that it was the appellant's failure to give notice as required by the parties' contract (see para [10] above) that triggered the respondent's entitlement to give notice. The respondent's third valuation was both clear and free from ambiguity. It concludes by asking for payment within 14 days. It is difficult to categorise the respondent's third valuation as anything other than an application for payment. Assessing the facts and circumstances of this case objectively, there is no doubt as to the respondent's intention. It was making application for payment. The reasonable recipient of the application would have been in no doubt that that was the case. The respondent's third valuation is, in substance, form and intent, a payment notice in terms of section 110A(3).

[18] The third issue for determination is whether the respondent's third valuation was issued in accordance with the parties' contract. The requirement to pay a notified sum is found in section 111. For the purposes of this section, the "notified sum" in relation to any payment provided for by a construction contract means in a case (such as the present one) where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice.

[19] The appellant contends that the respondent's third valuation was not issued in accordance with the requirements of the parties' contract. The respondent avers that, in terms of the parties' contract, valuations were to be issued monthly. The first valuation should accordingly have been issued 1 month after the commencement of the works, with

subsequent valuations being issued at monthly intervals thereafter. The respondent failed to issue monthly valuations. The works commenced in late September 2015, however, valuations were only issued on 17 February 2016; 28 June 2016; and 17 November 2016. It follows that the valuations were not issued in accordance with the parties' contract. The appellant relies upon *Volkerlaser Ltd v Nottingham City Council* [2016] EWHC 1501 (TCC).

[20] The respondent argues that the failure to issue valuations in certain months does not render the valuations that were issued disconform to contract. Nor does the failure to issue valuations in any particular month cause the respondent to lose its right to stage payments in terms of section 109(1) or the parties' contract.

[21] We prefer the respondent's submissions. Whilst the parties' contract states that valuations will be carried out monthly (see para [2] above), that has no bearing on the respondent's right to give to the appellant a notice complying with section 110A(3) where the appellant has failed to give a notice in accordance with section 110A(2), as she was required to do by the parties' contract. The respondent was entitled to give such a notice, but was not obliged to. The use of the word "may" in section 110A(3) makes this clear. The respondent was only entitled to give notice when the appellant failed to do so. The fact that the respondent elected not to do so in certain months is immaterial. The respondent's third valuation is a valid payment notice issued in accordance with the requirements of the parties' contract.

[22] In light of the conclusion we have reached that the respondent's third valuation is a valid payment notice, we turn to the second ground of appeal, namely, the appellant's *esto* position that the respondent has waived its right to immediate payment.

[23] The position in respect of this ground of appeal is less than satisfactory. The appellant's argument is predicated upon the respondent's averments that the parties agreed

a payment plan for the outstanding debt at the rate of £10,000 per month. The appellant submitted that the date of that agreement, although not pled, would appear to have been on or before 7 December 2016. The appellant made payment of five instalments. The sum counterclaimed remained outstanding. That is the respondent's position. The appellant neither avers nor admits an agreement. Counsel was unable to advise the court as to what the appellant's position in relation to the averred agreement actually was.

[24] Quite why the issue of waiver was argued before the sheriff and this court is perplexing. On the respondent's averments, the agreement would have seen the sum craved in the counterclaim paid in full by around the end of 2017. The sheriff considered the matter more than 3 years later. This issue may have a bearing on the question of interest which is still to be determined. We propose to say no more in relation to it, other than that the sheriff did not err in his treatment of it. By the time the matter was before him, inquiry on the question of waiver would have served no purpose.

[25] In relation to the third ground of appeal, parties were agreed that the sheriff should not have repelled the appellant's fifth plea-in-law in the counterclaim.

Disposal

[26] In light of the agreement reached by parties relative to the appellant's fifth plea-in-law in the counterclaim, we shall vary the sheriff's interlocutor of 29 March 2021 by inserting the words "first, second, third, fourth, sixth and seventh" in line 2 thereof between the words "the Pursuer's" and "pleas-in-"; *quoad ultra* we shall refuse the appeal, adhere to the sheriff's said interlocutor and remit to the sheriff to proceed as accords.

[27] The appellant shall be found liable to the respondent in the expenses of the appeal. The appeal will be certified as suitable for the employment of junior counsel.