OUTER HOUSE, COURT OF SESSION

[2020] CSOH 78

A331/18

OPINION OF LORD ARMSTRONG

In the cause

AWPR CONSTRUCTION JOINT VENTURE and OTHERS

Pursuers

against

EVERPRIME LIMITED (IN LIQUIDATION) T/A SKYBLUE and OTHERS

Defenders

First Defender: Ower; DLA Piper Scotland LLP
Sixth Defender: McKenzie; DAC Beachcroft Scotland LLP
Seventh Defender: Young; DAC Beachcroft Scotland LLP
Fifteenth Defender: Jones (sol adv); Russel + Aitken

12 August 2020

Introduction

[1] This action of multiplepoinding was raised at the instance of AWPR Construction Joint Venture, the first pursuer, an incorporated joint venture initially formed of three individual limited companies for the purposes of the Aberdeen Western Peripheral Route road construction project. Decree has been granted in favour of the first pursuer, and payment of the fund *in medio*, comprising the sum of £1,084,691.00, has been made by the first pursuer into court.

[2] Of the original 18 defenders who were initially convened, all but the first, sixth, seventh, and fifteenth defenders have withdrawn, or have otherwise indicated that they no longer insist in their claims to be ranked and variously preferred to the portions of the fund *in medio* said to be referable to them.

[3] The matter before the Court is essentially a dispute between the first defender, on the one hand, and the sixth, seventh, and fifteenth defenders, on the other, as to which of them are true creditors of the first pursuer.

[4] In the course of the Procedure Roll discussion before me, the first defender, now in liquidation, insisted on its preliminary plea to the effect that the Statements of Claim of the sixth, seventh, and fifteenth defenders, being irrelevant *et separatim* lacking in specification, ought not to be remitted to probation, and moved for decree entitling it to be ranked and preferred to the whole of the fund *in medio*.

[5] The sixth, seventh, and fifteenth defenders argued that the first pursuer's arguments on relevancy were not well founded, and that decree *de plano* should be granted in favour of each of them, entitling them to be ranked and preferred to the portions of the fund *in medio* referable to them, which failing, a proof before answer should be allowed.

[6] Each of the four parties expressly adopted their respective notes of argument and written submissions, the terms of which, together with the oral submissions presented before me, are reflected in what follows.

The submissions

(i) The first defender

[7] In terms of its Statement of Claim, the first defender adopted the first pursuer's first, second, third, fourth, fifth, eighth, and thirteenth articles of condescendence, as set out in the

Closed Record. That averred factual background is broadly to the effect that from the commencement of the project for which the first pursuer was formed, until about January 2017, the first pursuer contracted directly with third parties, including the sixth, seventh, and fifteenth defenders, for the provision of temporary labour. Under those agreements, such third parties invoiced the first pursuer directly. As the scale of the project increased, the first pursuer decided to outsource the invoicing by such third parties to the first defender. To that end, the first pursuer and the first defender entered into a contract in about January 2017, the terms of which were designed to streamline the process of the administration of invoicing to the first pursuer. The structure of the new system was that third parties providing temporary labour for the purposes of the project in which the first pursuer was engaged would invoice the first defender, the first defender would submit bulk invoices to the first pursuer, the first pursuer, having approved the invoices, would pay the requisite sums to the first defender, and the first defender would, in turn, pay the third parties accordingly. For the provision of that service, the first defender was to be paid, by the first pursuer, a fee of 2% of the net payments made to the third parties. The contract between the first pursuer and the first defender terminated when the first defender entered liquidation on 26 January 2018. Prior to its liquidation, the first defender provided the first pursuer with the services defined in the contract.

[8] In terms of that averred factual background, it is asserted by the first pursuer and the first defender that, on 14 December 2016, by email, the introduction of the new invoicing and payment arrangement was intimated to *inter alios* the sixth, seventh, and fifteenth defenders, indicating that:

> "all existing and new orders for labour agency works are to be transferred to (the first defender) to provide a single-billing interface for all agency works … . Any

> invoices received by (the first pursuer) after an agreed date in January 2017 will not be paid."

[9] The first defender avers that, in about January 2017, it entered into separate contracts with *inter alios* the sixth, seventh, and fifteenth defenders, in order to enable it to provide the services defined in its contract with the first pursuer. The first defender avers that, by letter dated 25 November 2016, it intimated to *inter alios* the sixth, seventh, and fifteenth defenders that it would be necessary for parties to contract with the first defender if they wished to continue to provide workers to the project in which the first pursuer was engaged, and that, on or about 19 January 2017, it provided *inter alios* the sixth, seventh, and fifteenth defenders with copies of sub-contracts designed to regulate the provision of labour and services between them. The first defender further avers (1) that, in consequence, from 31 January 2017, the sixth, seventh, and fifteenth defenders were aware that they would only be able to provide temporary labour to the project in which the first pursuer was engaged if they did so under the terms of the sub-contracts, (2) that the sixth, seventh, and fifteenth defenders each provided services in accordance with the terms of the sub-contracts, and (3) that it is apparent that was so by reason of the fact that the sixth, seventh, and fifteenth defenders issued their invoices to the first defender under and in terms of the sub-contracts.

[10] On that basis, the first defender avers that the referable contractual position was that the first pursuer contracted with the first defender, and that, in turn, the first defender contracted with the sixth, seventh, and fifteenth defenders for the provision of temporary labour, and that accordingly the sixth, seventh, and fifteenth defenders have no claim against the first pursuer or on the fund *in medio*. On that basis, the first defender's position is that the fund *in medio* comprises only of the sums due by the first pursuer to the first defender in terms of the contract between them.

[11] In support of the first defender's preliminary plea, to the effect that the averments of the sixth, seventh, and fifteenth defenders were irrelevant and lacking in specification, it was submitted that the terms of the contract between the first pursuer and the first defender were, in effect, determinative of the issue of which of the defenders had a valid claim to the fund *in medio*. In particular, it was submitted that it was significant that it was accepted by the sixth, seventh, and fifteenth defenders that they had each issued invoices to the first defender rather than to the first pursuer. That was consistent with the terms of the contract between the first pursuer and the first defender. It followed that each of the sixth, seventh, and fifteenth defenders were aware that they would be paid by the first defender and not by the first pursuer. That process was one which was separate and distinct from the issuing of invoices by the first defender to the first pursuer, which was a matter governed entirely by the terms of the contract between them. Further, none of the sixth, seventh, and fifteenth defenders had any right under that contract. Rather, since the invoices by the sixth, seventh, and fifteenth defenders were issued to the first defender, in accordance with the terms of the sub-contracts, and against the background of the email of 14 December 2016, the liabilities arising were ones due to them not by the first pursuer, but by the first defender. On that basis, the debts thereby due by the first defender to each of the sixth, seventh, and fifteenth defenders could not be said to be the same debts referable to the claim on the first pursuer by the first defender, since they arose from separate invoices, between separate parties, under different contracts. That being so, only the first defender was entitled to the fund *in medio*, which itself represented only funds due by the first pursuer to the first defender in terms of the contract between them.

(ii) The sixth defender

[12] The sixth defender's Statement of Claim is to the effect that it contracted with the first pursuer to provide temporary staff. Between about 2015 and 2017 it invoiced the first pursuer directly, and was paid by the first pursuer. In December 2016 and January 2017, the sixth defender received communications on behalf of the first defender to the effect that the processing of timesheets and invoicing for temporary labour was henceforth to be effected by the first defender which would provide a single-billing interface, but that no contractual changes would be taking place. Thereafter, the sixth defender submitted its invoices to the first defender, which invoices were paid until the first defender's insolvency.

[13] The sixth defender's position is that its contractual relationship remained with the first pursuer, and that its contract with the first pursuer was not novated or delegated to the first defender. The sixth defender was unaware of the terms of any contract between the first pursuer and the first defender, and the sixth defender did not enter into any contract with the first defender in or around January 2017. The services provided by the first defender were administrative only, and involved the processing and payment of the sixth defender's invoices on behalf of the first pursuer. The terms upon which the sixth defender provided temporary labour to the first pursuer did not change.

[14] It was submitted that, against the background of the sixth defender's factual averments of lack of knowledge of the terms of the contract between the first pursuer and the first defender, and its denial of entering into any contract with the first defender, the relevancy of the sixth defender's claim could not properly be determined by reference to the terms of the contract between the first pursuer and the first defender, or by ignoring the factual dispute as to the sixth defender's contractual relationship with the first defender.

Emphasis was placed on the terms of the email of 14 December 2016 which, it was submitted, were consistent with the sixth defender's factual averments.

[15] Insofar as the constitution of the fund *in medio* was concerned, it was significant that it was accepted by the first defender that its 2% fee, due by the first pursuer under the contract between them, did not form part of the fund *in medio*. In such circumstances, it was wrong to claim, as the first defenders averred, that the totality of the fund *in medio* comprised the sums due by the first pursuer to the first defender in terms of the contract between them. That analysis was consistent with the position of the sixth, seventh, and fifteenth defenders that it was the fact of the existence of the competing claims, and double distress thereby arising, which rendered the present action competent.

(iii) The seventh defender

[16] The Statement of Claim for the seventh defender indicates that the seventh defender supplied staff to the first pursuer in compliance with the first pursuer's instructions and requirements, including the issuing of all invoices to the first pursuer. The first pursuer settled the invoices submitted to it by the seventh defender. Following an email, dated 28 July 2017, sent by the first pursuer to the seventh defender, outlining changes to the process, the seventh defender, as instructed by that email, thereafter submitted invoices to the first defender. It was not admitted by the seventh defender that it ever received the first pursuer's email of 14 December 2016.

[17] Against that background, the seventh defender asserts that its contractual relationship remained with the first pursuer, that its contractual relationship was not novated to the first defender, that the first pursuer remained responsible for payment to the seventh defender, that the first pursuer continued to issue instructions to the seventh

defender, and that the only involvement of the first defender was to process payment. The seventh defender specifically avers that it never received any contractual terms from the first defender. Apart from the seventh defender addressing its invoices to the first defender, nothing changed in relation to the arrangements in place between the first pursuer and the seventh defender. The contract entered into between the first pursuer and the first defender was *res inter alios acta* as regards the seventh defender and could not affect any ranking as between the seventh defender and the first defender.

[18] The first defender's claim to be the first pursuer's sole creditor was clearly inconsistent with the existence of double distress, as illustrated by the structure of the schedule of the fund *in medio* (number 6/1 of Process), and the implicit competency of the action. It was significant that the first defender's 2% fee, due in terms of its contract with the first pursuer, was not included in the fund *in medio*. The fact that the 2% fee due was accepted as not comprising part of the fund *in medio* was a clear indicator that the first defender's claim to be the first pursuer's sole creditor, on the basis that the only sums due by the first pursuer were those due under and in terms of its contract with the first defender, could not be well founded. The seventh defender adopted the submissions of the sixth defender in respect of the correct approach to be adopted in relation to the constitution of the fund *in medio*.

[19] In relation to the position of the seventh defender, relative to the fund *in medio*, it was not in dispute that services had been provided to the first pursuer, that invoiced sums were due by the first pursuer, and that, initially, prior to January 2017, the first pursuer had contracted directly with *inter alios* the seventh defender, that those providing labour and services to the first pursuer had invoiced the first pursuer directly, and that the first pursuer had paid *inter alios* the seventh defender directly. The fact that, as a matter of administrative

convenience to the first pursuer, the seventh defender thereafter agreed to submit its invoices to the first defender, did not mean that the seventh defender had entered into a fresh contract with, or any agreement to novate or delegate its contract to, the first defender. There was a presumption against novation or delegation, the object of which was to substitute a new debtor for the old one. The onus of proving novation or delegation was one to be discharged by the first defender. The first defender's pleadings lacked any relevant or specific averments of novation or delegation in respect of the seventh defender.

[20] Further, the fact that the seventh defender had issued invoices to the first defender was not sufficient, on its own, to justify the conclusion that a contract had been entered into between the two parties. The fact that such invoices had been rendered was not determinative. While an invoice could be used as evidence of the existence of a contract, it was properly to be regarded only as an administrative document recording the provision of services under an antecedent contract, rather than being the embodiment, or formulation or variation, of a contract resulting in binding terms. Reference was made to the relevant dicta in the cases of *Holdings and Others* v *Elliott* (1860) 157 ER 1123, 1125; *Buchanan and Co* v *MacDonald* (1895) 23 R 264, 266-7; *Grogan* v *Robin Meredith Plant Hire* (1996) 53 Con LR 87, 91, 92; and *WJ Harte Construction Limited* v *Scottish Homes* 1992 SC 99, 112, 115, 116.

(iv) The fifteenth defender

[21] The fifteenth defender adopted the submissions made on behalf of the sixth and seventh defenders. The fifteenth defender had contracted with the first pursuer. There was no dispute that the fifteenth defender had provided services, and that the sums raised in the fifteenth defender's invoices were due. It did not follow from the fact that, subsequently, the

fifteenth defender had sent invoices to the first defender, relating to the provision of staff to the first pursuer, that the fifteenth defender had thereby contracted with the first defender.

[22] It was significant that the fifteenth defender had never received the email of 14 December 2016. The factual basis on which the argument for the first defender proceeded, to the effect that a sub-contract existed between the fifteenth defender and the first defender, was not accepted. In that regard, there was a factual dispute which would require evidence in order to be resolved.

Discussion

[23] The test for relevancy of a defender's averments mirrors the test for relevancy of a pursuer's averments. In testing the relevancy of a defender's pleadings, the averments concerned are not to be dismissed as irrelevant unless the defender is bound to fail even if all its averments are proved. For those purposes, the defender's averments are to be taken *pro veritate*. On that basis, the onus is on the party challenging relevancy to demonstrate that the case presented by the defender must necessarily fail.

[24] I accept that since the contract between the first pursuer and the first defender was *res inter alios acta* as regards the sixth, seventh, and fifteenth defenders, not least because, on the pleadings, they were unaware of its content, its terms, taken on their own, cannot be determinative in the matter of the ranking of the remaining defenders as regards their competing claims.

[25] Against that background, where the averments of each of the sixth, seventh, and fifteenth defenders indicate that it is not accepted that sub-contracts between them and the first defender were ever formally entered into, the bold assertion that there were in place

such sub-contracts, as averred by the first defender, is not a fact on which the first defender can rely in a challenge to the relevancy of the criticised pleadings.

[26] On the basis of the pleadings as presently averred, whether it is to be inferred from the fact, that the sixth, seventh, and fifteenth defenders issued invoices to the first defender, that there were contractual relationships in place between the relevant parties, such as to render the first defender primarily responsible for payment of the requisite sums, is a question of fact and degree which is capable of resolution only after evidential enquiry. The same must apply to the effect of the first defender's averments that the sixth, seventh, and fifteenth defenders provided services in accordance with the provisions of the sub-contracts relied upon.

[27] In terms of the first defender's written submissions, as confirmed in the course of oral argument, it was accepted by the first defender that it was not currently in a position to make further averments, or to produce documentation, in relation to the terms of the alleged sub-contracts between the first defender and the sixth, seventh, and fifteenth defenders. Unsurprisingly, on behalf of the sixth, seventh, and fifteenth defenders, some weight was placed on that very candid admission in the course of criticisms made of the first defender's pleadings. It was characterised as a material change of position from that set out for the first defender in the Closed Record. In that regard, it was submitted for the first defender that such a position was not "remarkable", as it was described, but, rather, was not untoward or uncommon when viewed from the perspective of the extent of, and difficulties arising in, the process of recovery involved in a liquidation of the size and complexity of that of the first defender. I accept that the concession was rightly and properly made. It was, however, confirmed on behalf of the first defender that, in due course, relevant evidence would be available to prove the terms of the contractual relationships between the first defender and

each of the sixth, seventh, and fifteenth defenders, on which reliance was placed, and that it was accordingly anticipated that in consequence amendment would be sought.

[28] I would comment, in passing, that, although I harbour some doubt as to whether, in an action of multiplepoinding, it must necessarily follow, from the mere fact that more than one defender is convened, that there must exist double distress, I am satisfied, on analysis of the terms of the contract between the first pursuer and the first defender, on which reliance was placed, and applying the appropriate approach to the test of relevancy, that, on the pleadings as they stand, given the factual disputes which are apparent, it cannot be said in relation to each of the sixth, seventh, and fifteenth defenders, that the case pleaded is irrelevant and must necessarily fail. That being so, the first defender's preliminary plea, as directed against each of the sixth, seventh, and fifteenth defenders, is not well founded. It follows that, at this stage, decree in terms of the first defender's second plea-in-law is not warranted.

[29] On behalf of each of the sixth, seventh, and fifteenth defenders, in the course of the discussion before me, I heard detailed criticism of the relevancy of the first defender's averments. Significantly, none of the sixth, seventh, or fifteenth defenders has a preliminary plea directed to such argument, but, in any event, I am satisfied both that dismissal of the first defender's claim, and that decree *de plano* in the case of each of the sixth, seventh, and fifteenth defenders is not warranted.

[30] In relation to the averments of the first defender, in the particular circumstances of the case, as averred and as expanded upon in the course of submissions, I am satisfied that, as a matter of relevancy and specification, the pleadings of the first defender, in their essence, are of sufficient materiality to justify enquiry into the referable contractual positions of each of the parties in the context of the sums claimed, the inferences to be drawn from the

manner of the actings of each of the parties, and the consequent effects on ranking amongst them. In reaching that view, I attach weight to the fact that, although there may be questions of degree as to the scope and extent of the presumption against novation and delegation in such circumstances, in the context of this case, given the facts averred and the relative background context, these issues arise and, given the respective position of the parties, could be resolved only on the basis of findings in fact.

[31] In the course of the discussion, reference was also made to the issues of whether, in the circumstances of the case, it could be inferred that the first defender was acting as an agent, or held funds as a trustee, or whether the first pursuer has been unjustifiably enriched. In that regard, I am satisfied also that, in the circumstances of this case, these too are issues which are susceptible of resolution only after enquiry.

Decision

[32] For these reasons, I shall repel the first defender's first plea-in-law, and allow a proof before answer. I shall reserve all questions of expenses, meantime.