OUTER HOUSE, COURT OF SESSION

[2021] CSOH 27

CA2/21

OPINION OF LADY WOLFFE

In the cause

TRILOGY POWER SOLUTIONS GROUP

Pursuer

against

HAWICK PLANT AUCTIONS LIMITED

Defender

Pursuer: Reekie, Solicitor Advocate; Brodies LLP
Defender: Brown; Levy & McRae

12 March 2021

Introduction

[1] By an exchange of two emails, the pursuer, a Canadian company, offered to purchase from the defender, a company based in the Scottish borders, four second-hand gas-powered generators ("the generators"), which were located in shipping containers in Dubai ("the Contract").

[2] The pursuer alleges that the generators were defective in certain respects and they sue for breach of contract in this commercial action. They also have a separate ground of action based on misrepresentation.

The formation of the Contract

The defender's first email

[3] The circumstances in which the parties formed their contract may be briefly stated. The parties had never contracted before. Parties agreed that the Contract was comprised of the pursuer's offer and the defender's acceptance (both are set out below). However, parties referred to the initial email as part of the relevant context in which the Contract fell to be construed. The defender's managing director, Phil Sharpe, initiated contact by an email to a Mr Jean Loic Bagot dated 12 December 2018 ("the defender's first email"). This approach was seemingly out of the blue and Mr Bagot's question in his reply, querying how the defender had discovered his name or email, was not addressed in the subsequent email exchanges. (Mr Bagot, who is not connected to the pursuer, appears to have acted as its intermediary. No agency issue was raised.)

[4] The subject-line of the defender's first email was "Reconditioned QSK60 Generating Sets". A number of photos (in jpg format) were attached but these were not produced to the Court or referred to at debate. So far as material, the substantive text of the defender's first email ("the body of the defender's first email") was as follows:

> "Dear Mr Bagot,
>
> I understand you have been contacting Aggreko to find out who owns the 4 X reconditioned QSK60 gas sets. These machines were bought from Aggreko by ourselves and our laying in our storage facility in Jebel Ali, Dubai.
>
> These machines are in 20ft containers and there are also 4 x container with cooler packs. The years are as follows:
> XALW012 - Year 2008
> XALW019 - Year 2008
> XALW038 - Year 2012
> XALW009 - Year 2012

> These have been extensively repaired and reconditioned by Aggreko for a job in Iran. The job in Iran was cancelled and the machines became available for sale, which is when we bought them.
>
> The machines are fully owned by us and nobody else. They are currently being CSC plated to be shipped to our facility in Scotland. These are still available for sale and the price we require sis USD 150,000 each, ex Dubai.
>
> Please see attached photos….." (The spelling in original is retained.)

The email contains some further statements I need not record and it contained the defender's company and contact details appearing as *pro forma* text at the foot of the email. Mr Brown, who appeared for the defender, described this as no more than an offer to treat.

The pursuer's offer

[5] After sundry emails dealing with arrangements for the generators to be inspected on behalf of the purchasers, and referring to the availability of other items of equipment (but not resulting in any sale), Mr Bagot sent an email, dated 17 December 2018, to the defender's Mr Sharpe. Parties agreed that this constituted the pursuer's offer to purchase ("the pursuer's offer"). It was in the following terms (the capitalisation, punctuation and bold font are as in the original):

> "Subject: Offer for (4) AGGREKO Reconditioned Nat Gas QSK60 Generator Sets
>
> Dear MR SHARPE
>
> Tom MILNE went this morning on site,and send me his report.
>
> We can offer you USD 140.000 X 4, AS IS WHERE IS
>
> If you accept this offer,today a P/O will be issued to your Company with a downpayment of 10%.
>
> Buying and Paying Cy [company] is a Canadian Cy.

The Balance will be paid to you **FIRST days of January.NOT LATER. It could be possible that balance could be paid between Xmas and Dec 31st.**

We can take warehousing costs from end of this week til payment of Balance.

Hoping that the offer make us closing our first deal.

Best Regards,

Jean Loic BAGOT

Dear Mr Bagot,

I understand you have been contacting Aggreko to find out who owns the 4 X reconditioned QSK60 gas sets. These machines were bought from Aggreko by ourselves and our laying in our storage facility in Jebel Ali, Dubai.

These machines are in 20ft containers and there are also 4 x container with cooler packs. The years are as follows:
XALW012 - Year 2008
XALW019 - Year 2008
XALW038 - Year 2012
XALW009 - Year 2012

These have been extensively repaired and reconditioned by Aggreko for a job in Iran. The job in Iran was cancelled and the machines became available for sale, which is when we bought them.

The machines are fully owned by us and nobody else. They are currently being CSC plated to be shipped to our facility in Scotland. These are still available for sale and the price we require is USD 150,000 each, ex Dubai.

Please see attached photos, etc….." (Italics added to reflect text copied and pasted from the defender's first email.)

Comment on the extent of text comprised in the pursuer's offer

[6] On a first reading, it might appear that the pursuer's email was confined to the new text and that the words I have reflected in italics was the preceding email in an email string. If that were the case, the pursuer's offer would be comprised in the new wording (ie excluding the italicised text). However, the text in italics is not in fact an earlier email in

an email string (ie the defender's first email). After Mr Bagot's sign off, there are none of the *indicia* that the text below was the preceding email in a chain: it did not have the typical dividing line or text providing the date and time of transmission of the earlier email. Nor did it contain the details of the sender and recipient or the date and time of transmission, which would otherwise appear if the pursuer had been responding to an email in a chain (and where the email being responded to appears lower down the page). That the pursuer's offer was an initiating email may also be inferred from the subject-line, which would otherwise be preceded with "Re:", and also from the slight change in the text of the subject of the pursuer's email, which includes "AGGREKO" and the insertion of "Nat Gas" before "QSK60", when compared to the subject-line of the defender's first email (quoted at para [4], above). This feature of the pursuer's offer emerged only in the course of Mr Reekie's submissions in reply on behalf of the pursuer.

[7] The significance of this is that the text of the body of the defender's first email (which I have reflected in italics in the pursuer's offer) was copied and pasted into this email, and therefore forms part of the pursuer's offer. The import of that will become clear.

The defender's acceptance

[8] The defender's reply on 18 December 2018 ("the defender's acceptance"), was as follows:

> "Hi Mr. Bagot,
>
> This offer of $140,000 each for the QSK60 gas sets has been accepted. If you would like to send your P/O and your details for invoicing we can send you a pro forma invoice.
>
> Please note that the balance paid before 1st January, is this acceptable?
>
> Best regards, Declan"

Mr Brown described this as a *de plano* acceptance, a description I understood Mr Reekie to accept.

The debate

[9] When this case called before me at a continued preliminary hearing, on 18 February, the defender moved to sist a mandatory on the basis that the pursuer was a foreign-domiciled company and in a jurisdiction which did not require disclosure via a public register of its financial documents. However, that motion was dropped when the Court offered a diet of debate 2 weeks later, on 2 March 2021.

The legal bases of the pursuer's case

[10] The pursuer's primary case against the defender was for breach of contract. Its contractual case has two strands:

1) The first is that, by reason of the defects the pursuer identifies, the generators did not meet the description of them as having been "reconditioned". It is also averred that the word "reconditioned", together with other terms such as the "refurbished" and "rebuilt", is well-recognised in the second-hand generator industry and means that "the generator is ready to deploy without any servicing or repairs being required". (The defender does not admit those averments.); and
2) The second basis is that the condition of the generators was such that it breached an implied term of the Contract that the generators were of a "satisfactory quality".

Separate from its contractual case, the pursuer also has a case based on misrepresentation. That branch of the pursuer's case was not challenged at debate.

Scope of the debate

[11] Both parties sought a debate with a view to ascertaining the Court's ruling on the interpretation of the Contract terms. To that end, they confined their submissions to the emails quoted above and the agreed background (noted below). They otherwise asked the Court to put the matter out after debate for the parties to identify, at that stage, which averments (if any) fell to be excised. Accordingly, I need not set out the pleadings.

[12] In advance of the debate, parties produced notes of argument, a joint minute, a joint statement of agreed legal principles and a bundle of productions and authorities. I have had regard to all those materials. Given the focus of the argument on the phrase "AS IS WHERE IS", I queried with parties at the outset if there was any settled meaning to that phrase or any similar phrases as might be derived from the case law (see, eg, the observations of Robin Knowles J in *Smiths Interconnect Group Ltd* v *Quintel Technology Ltd*, [2018] EWHC 3913 (Comm) at paragraph 10, which I mentioned to parties), but their common position was that no assistance was to be derived from the case law. I also raised with parties whether, given that this was a contract concluded between (or on behalf of) a purchaser in Canada from a seller in Scotland of goods situated in Dubai, any choice of law issue arose. Again, their united position was that no point of foreign law was taken or averred in the pleadings and the case was being argued purely on common law grounds. For completeness, I note that there is no reliance on any statutory case.

The agreed background

[13] It was agreed that the parties had not previously had contact or contracted with the other prior to the Contract with which this action is concerned. They were also agreed that

the Contract between them was comprised of two emails, being the pursuer's offer and the defender's acceptance. It was also agreed that prior to the exchange of those emails, Mr Bagot had arranged for a contact on the ground in Dubai to inspect the generators. However, the generators had not been "load tested", in the sense that they were not at that stage turned on or powered up. It was not feasible to do so, given the location of the generators.

Submissions

The submissions on behalf of the defender

[14] Mr Brown, who appeared for the defender, invited the Court to conclude that the Contract did not contain any warranty as to the condition or fitness of the generators and that this part of the pursuer's case was irrelevant.

[15] The principal basis for the defender's position were the words "AS IS WHERE IS" in the pursuer's offer. Mr Brown's submissions, founding strongly on the particular words "AS IS", may be summarised as follows:

1) Not all words in a contract carry the same weight. The use of the word "reconditioned" in the subject-line of the pursuer's offer was of marginal significance and purely descriptive. It meant no more than "these" generators. Used in that context it did not import a term into the Contract as to the quality of the generators. As a word in the subject-line, it could not displace words in the body of the email.
2) If a purchaser wished to insert a condition that the goods being purchased should meet a certain standard, it should do so by clear words. If the purchaser was concerned about the state of the generators, it could have stipulated for the

service records. It did not do so. If the pursuer was unwilling to take the risk of generators as they were, then it could have expressly stipulated that they were in a state ready to hire. It did not do so.

3) The pursuer's reliance on "reconditioned" had the effect of diluting the words "AS IS WHERE IS". The words "AS IS" meant 'sold as seen; no questions asked' and those words governed all matters concerning the condition or state of repair of the generators.

4) The capital letters indicated the emphatic quality of these words, the effect of which was to tilt the balance in favour of the seller if there was any problem with the condition of the generators.

5) From these words the reasonable seller would infer that the purchaser was content to assume the risks arising from the condition of the generators. The pursuer's interpretation constituted an impermissible dilution of these words, which were clear words.

6) In its most robust form, Mr Brown's submission was that there was a "fundamental inconsistency" between the words "AS IS" and the pursuer's interpretation of the word "reconditioned", whether embodied in the description of the generators or as a warranty as to their state.

7) In addition, these words had been accompanied by a price "chip", in the form of an offer which was US$10,000 lower per generator than the price sought in the defender's first email. In Mr Brown's submission this was to incentivise the defender. From that it could be inferred that the purchaser was accepting the inherent risk that something could go wrong.

[16] Mr Brown also prayed in aid other features from the surrounding circumstances:

1) This was the first time the parties had dealt with each other. If the word "reconditioned" had a particular meaning in the industry which the pursuer ascribed, it would be remarkable for the pursuer to take this on trust, given that this was the first time the parties had contracted;
2) The generators had been inspected on behalf of the pursuer. They had not been load-tested (in the sense of switched on or fired up), in part because it was not feasible to do so given their location in a shipping container in Dubai, and in part because the costs of doing so amount to around US$20,000 per unit; and
3) The terms of the Contract were such that the seller did not anticipate long-tail liabilities to flow from it.

[17] In support of this submission, Mr Brown referred to the case of *ACG Acquisition XX LLC* v *Olympic Air SA* [2010] EWHC 923 (com), [2010] 1 CLC 581 ("*ACG*"). In that case, an airplane had been leased on the basis that it complied with detailed provisions about the condition and airworthiness of the aircraft, which was the subject of the contract between the parties. In response to the lessor's motion for summary judgment in its action for unpaid rent, the lessee contended that the condition of the aircraft failed to meet some of these provisions; it was not airworthy. The court held that the lessee had a real prospect of establishing a breach of contract. The detailed stipulations in the contract in that case were to be contrasted with the Contract in this case, in which there was no specification as to the standard the generators had to meet.

[18] The Contract should not be overanalysed. It was a short sharp exchange between commercial people, not lawyers, in a crisp context. The Court should give effect to the plain meaning of the words. In his submission "AS IS" precluded there being any term of the

Contract regarding the quality or state of the generators. The pursuer's interpretation was to import into the Contract a term as to the condition of the generators, according to some industry benchmark, but this was inimical to the words "AS IS". The two interpretations the parties offered could not both simultaneously be right. The defender's interpretation was to be preferred as it was consistent with the pursuer's assumption of risk in exchange for "the price chip". Its interpretation was in no way repugnant to commercial common-sense.

The submissions on behalf of the pursuer

[19] The pursuer offers to prove that the term "reconditioned" is a term of art in the second-hand generator industry. The pursuer avers that in that context, it means a generator that can be deployed without servicing or further repairs. Mr Reekie noted that the context was limited: there were no negotiations; the emails are short and not drafted by lawyers, and there was no incorporation of any standard terms.

[20] Mr Reekie observed that the whole body of the defender's first email had been copied and pasted into the body of the pursuer's own offer. From this it may be inferred that this was a deliberate act on the part of its author to make an offer for reconditioned generators as described by the seller. A reasonable person with the background knowledge of the parties would understand that the state of the generators as reconditioned was a term of the Contract. In essence, the pursuer offered to take the generators as they were; but that was on the express basis that they were reconditioned generators. The defender was obliged to deliver generators that had been reconditioned. If they did not deliver generators in a state that the industry would recognise as reconditioned, the defender would be in breach of contract.

[21] In relation to the defender's reference to *ACG*, this case was for summary judgement and was of limited utility. The use of the words "AS IS" did not displace as a term in the contract the requirement that the generators were to be reconditioned. The defender's challenge should be repelled, and these averments should be allowed to go to proof.

Discussion

[22] The principles for the interpretation of commercial contracts are well understood and parties were agreed that these were authoritatively articulated by Lord Clarke of Stone-cum-Ebony in *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900 at paragraphs 14 and 20 to 30 (as cited with approval by the Second Division in *Hoe International* v *Andersen* 2017 SC 313) and that, in applying these principles, the Court ought also to have regard to the guidance given by Lord Hodge in *Wood* v *Capita Insurance Services Limited* [2017] AC 1173 at paragraphs 10 to 13. Applying the approach enjoined by these cases, I conclude that the pursuer has pled a relevant case that it was a term of the Contract that the generators to be supplied had to be reconditioned, meaning that they had to meet a particular standard understood in the second-hand generator industry, and which the pursuer offers to prove. I have come to this view for the following reasons.

[23] In the course of submissions at debate, the term that the pursuer avers is a term of the Contract (that the generators had been reconditioned), was on occasion characterised as a 'warranty'. It should be noted that, in contrast to English law, 'warranty' is not a term of art in Scots law (cf 'warrandice', which is a recognised concept in the transfer of ownership of heritable property). Scots contract law does not draw a distinction between a condition, term or warranty. (It is for that reason that provisions concerning warranties in the Sale of Goods Act 1979 do not apply in Scotland.) It may be the case that an obligation as to the

state or quality of goods may be embodied in a term described as a 'warranty', but there is no formal requirement in Scots law that such a stipulation must be embodied in that kind of term. Whether or not parties contract on the basis that the standard of the goods supplied is a term of their contract is simply approached as a question of construction untrammelled by this kind of nomenclature.

[24] I should also comment on a feature of Mr Brown's submission which appeared to be premised on a binary approach to a "description" of goods sold versus a term in the contract as to their "condition", the implication being that somehow the former could not include the latter. However, the description of goods offered for sale may, or may not, include words that reflect their quality or state. If the goods supplied disconform with that description, at least in a material respect, that is capable of giving rise to a breach of contract. It is all a question of construing the contract, as a whole, and having regard to the shared background knowledge (or context) of the parties at the time they contracted. A focus on nomenclature carries the risk of obscuring that interpretive task.

[25] So, for example, generators may have been described as green, whereas the ones delivered are in fact blue. Leaving aside any particular requirement (or cultural significance of their colour (cf *Simaan General Contracting Co* v *Pilkington Glass Ltd (No 2)* [1988] QB 758, a case where green glass was specified, the colour green being of cultural significance, but where the units supplied did not have the requisite uniformity of colour)), that kind of disconformity with a contract description is likely to be immaterial and therefore unlikely to give rise to any claim for breach of contract. On the other hand, goods sold might be described by reference to their output capacity, eg "2000 kWh gas generators", but what are delivered are "200 kWh capacity gas generators" (ie with only one-tenth of the capacity of those described). That is likely to constitute a material breach of contract, whether the

specified capacity was part of the description of the goods or a stipulation as a term of the contract as to their having the requisite performance quality (on this example, power output).

The pursuer's offer construed as excluding the body of the defender's first email

[26] I turn to Mr Brown's characterisation of the word "reconditioned" as purely descriptive. In making that submission, Mr Brown endeavoured to empty the word "reconditioned" of any content. However, Mr Brown accepted that for the purposes of identifying the particular generators, their serial numbers and years of manufacture sufficed. In that event and given the use of that word by both parties, it may be inferred that it was intended to have some content, even if it was only descriptive of the goods to be sold.

[27] In my view, the word "reconditioned" was not (as the defender contends) a mere redundancy in the description of the generators, and for which the year and serial number would have sufficed, but was understood and intended to extend to the state of the generators. Even if the body of the defender's first email had not been incorporated into the pursuer's offer, its substance was part of the shared context in which the Contract fell to be construed, a point that Mr Brown accepted. In that context, and without resort to the pursuer's averments of any industry understanding of "reconditioned", the defender's statement, that the generators had been "extensively repaired and reconditioned by Aggreko", would give colour and content to the use of the word "reconditioned" in the subject-line of the pursuer's offer. Further, the use of the word "reconditioned" would also necessarily inform the parties' understanding of the state of the generators to be supplied - the "AS IS" used in the pursuer's offer.

[28] Phrases such as "as is" might, in the absence of any context or other words in a contract to the contrary, be construed to mean 'as is', 'in their present state', or 'take it or leave it' and therefore as preclusive of a term or warranty that they met any particular standard. However, on the particular facts of this case, it was Mr Bagot, acting on behalf of the *purchaser,* who inserted this stipulation. In other words, in the shared background knowledge of the parties to the Contract, the state of the generators accepted "AS IS" falls to be construed as second-hand generators which had been reconditioned by Aggreko. Indeed, the inclusion of "Aggreko" into the subject-line of the pursuer's offer lends support to this reading of the Contract because, as both parties stressed in their submissions that Aggreko is the world-leader in the provision of temporary power supplies. It may be inferred that the inclusion of "Aggreko" in the subject-line was a feature which was not irrelevant to the description in the pursuer's offer.

The price chip and the balance of risk

[29] Mr Brown also submitted that the insertion of the words "AS IS", construed as meaning no warranty as to the condition of the generators and that the purchaser thereby accepted the risk, was to incentivise the sellers to accept what he described as "the price chip". I am not persuaded that this inference, based on only two elements of the Contract, can properly be made. The defender's first email was an offer to treat, a characterisation Mr Brown advanced (perhaps with a view to excluding the words "extensively repaired and reconditioned by Aggreko" from forming part of the Contract). As such, it was no more than an opening of negotiations and which is suggestive of the person issuing the invitation being open to movement on the price. Having regard to other terms of the Contract, it could equally be argued that the pursuer's offer of a very early settlement, with the offer of an

immediate down-payment and the balance to be paid in a short timescale, was the trade-off for the price chip.

[30] There is a further difficulty with this submission. In the absence of information about the market price for second-hand generators, it is difficult to assess parties' competing submissions that the lower price offered and accepted was material or not. In mathematical terms, the price chip was no more than about 6.67% lower than the price sought in the defender's first email. That does not suggest a strong incentive for which a purchaser would willingly assume the risk as to the state of the generators. I am not persuaded by Mr Brown's 'balance of risk' argument.

The pursuer's offer construed as including the body of the defender's first email

[31] I return to a feature of the pursuer's offer identified by Mr Reekie. As Mr Reekie observed in his reply, in my view correctly, the entire body of the defender's first email was copied and pasted into the pursuer's offer. The consequence was that the statement contained in the defender's first email, that "[the generators] have been extensively repaired and reconditioned by Aggreko…", was elevated from forming part of the shared background knowledge of the parties (because contained in the defender's first email) and became a term of the Contract. Once it is appreciated that this statement of the *condition* of the generators is a term of the Contract, the tension Mr Brown identified between the words "AS IS" and the description "reconditioned" dissipates. The emphatic use of capitals "AS IS", and on which Mr Brown laid great stress, is equally consistent with the pursuer's concern to contract on the basis that the generators were as described in the defender's first email: that these were *reconditioned* generators it was offering to purchase. This, in my view, is made clear by the pursuer having imported the body of the defender's first email

wholesale into its own offer. That necessarily informs the content of the words "AS IS". Construing the Contract as a whole, reasonable person with the background knowledge of the parties would understand the object of the phrase "AS IS" to be the four generators in a reconditioned state.

[32] As I understood Mr Brown's final submission, while there was no challenge to the relevancy of the pursuer's averments that "reconditioned" was a term of art in the second-hand generator market, he submitted that this was an inherently difficult exercise as it imported questions of degree. Of course the pursuer will require to prove that there is an industry standard for "reconditioned" and that the generators failed to meet that in some way, but these are issues of evidence, not relevancy.

Decision

[33] It follows that the defender's first plea in law falls to be repelled *quoad* the pursuer's contractual case. As requested by the parties, I shall put the case out By Order and I shall reserve all question of expenses meantime.