



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 93

CA43/21

OPINION OF LORD ERICHT

In the cause

SRB CIVIL ENGINEERING UK LIMITED

Pursuer

against

RAMBOLL UK LIMITED

Defender

Pursuer: Ellis KC; BTO Solicitors LLP

Defender: Barne KC; CMS Cameron McKenna Nabarro Oslwang LLP

20 December 2022

Introduction

[1] The issue in this case is whether when a contract is novated the obligations under it are extinguished or transferred to a new party.

[2] SRB Civil Engineering Limited (“SRBCE”) and Scottish Ministers entered into a Design and Build Agreement (the “Design and Build Agreement”) for the design and construction of up-grading works to Junction 1A of the M9 at the Queensferry Crossing. The defender contracted with SRBCE (the “Ramboll Contract”) to provide design services to SRBCE in relation to the Design and Build Agreement. As a result of a company reorganisation, there was a wish for the pursuer and not SRBCE to be the party to the

Design and Build Agreement. A Novation Agreement was entered into by SRBCE, the pursuer and the Scottish Ministers substituting the pursuer for SRBCE in the Design and Build Agreement, and an Assignment was entered into between SRBCE and the pursuer.

[3] In this action the pursuer is seeking damages from the defender for breach of contract and breach of duty in respect of the Ramboll Contract. The pursuer pleads a Principal Claim, a First Alternative Claim, and a Second Alternative Claim. The case called before me for debate on the defender's motion for dismissal. Various other legal issues had been raised by the parties, but parties were agreed that these other issues should be dealt with by proof before answer should the case survive the debate.

Facts and contractual terms

[4] The background to the dispute, as averred by the pursuer, is as follows.

[5] SRBCE as Contractor and the Scottish Ministers as Employer entered into the Design and Build Agreement on 20 July 2011. SRBCE was operated as a vehicle for a joint venture between the John Sisk Group and the Roadbridge Group. The defender played a central role in assisting SRBCE to formulate its tender. The conceptual or tendered design produced, adopted, put forward and certified by the defender was an essential part in SRBCE being able to formulate a tender. The defender was also responsible for and undertook the detailed design of all elements on the Junction 1A Works. The Ramboll Contract was formed between SRBCE and the defender in respect of all of these services.

[6] From about July 2012 onwards SRBCE planned to transfer to the pursuer its whole right title and interest in the Design and Build Agreement. From 28 September 2012 onwards all invoices for the defenders' services were rendered to the pursuer. Thereafter all payment of the agreed fee for those services was made by the pursuer. On or about

19 November 2012 a letter on notepaper headed with logos of the stakeholders in the joint venture and in the name of the pursuers was sent to all suppliers of SRBCE, including the defender. It was headed "Corporate Structure Changes". It related specifically *inter alia* to the M9 works which SRBCE was obliged to perform. It advised that from November 2012 the UK business was to be conducted through the pursuer which was itself a joint venture between John Sisk and Roadbridge. It said that the pursuer would be working with "the same terms and conditions". It requested that all invoices relating to SRBCE orders be addressed to the pursuer. It made known to the defender that the pursuer would be responsible for fulfilment of SRBCE obligations to the Scottish Ministers and that the services the defender were obliged to provide to SRBCE should thereafter be and would have to be provided to the pursuer. The pursuer's position is that the defender did not object and by its conduct accepted the substitution of the pursuers as the contracting party; that the defender took instruction from and provided services to the pursuer and that the parties acted on the basis of the substitution of the pursuers from November 2012 onwards.

[7] A Novation Agreement was entered into between SRBCE, the pursuer and the employer dated on 12 July and 7 November 2013 (the "Novation Agreement").

[8] The recitals were in the following terms:

"RECITING

A. By an Agreement dated 20 July 2011 (the "Agreement") made by the [Scottish Ministers] and [SRBCE, SRBCE] agreed to design, execute and complete the works described in the Agreement ("the Works").

B. The Works to be performed under the Agreement have by way of certificates issued for Section A on the 19 June 2012, Section B on the 1 February, 2013 and Section C on 29 March, 2013 been completed (with the exception of the list of defects attached to the relevant Certificate), but [SRBCE's] obligations relating to the Defects Notification Periods (as defined by the Agreement) remain outstanding.

C. [SRBCE] and [the pursuer] have agreed, with the consent of [Scottish Ministers], that [the pursuer] will take over the rights, obligations and liabilities of [SRBCE] under the Agreement.

D. The parties to this novation agreement have agreed to novate the Agreement from [SRBCE] to [the pursuer] upon and subject to the terms of this novation agreement.”

[9] The operative part of the Novation Agreement included the following clauses:

“2. RELEASE BY [SRBCE] OF [SCOTTISH MINISTERS]

[SRBCE] releases and discharges the [Scottish Ministers] from the further performance of the [Scottish Ministers] duties and obligations under the Agreement.

3. RELEASE BY THE [SCOTTISH MINISTERS] OF [SRBCE]

[Scottish Ministers] releases and discharges [SRBCE] from the further performance of [SRBCE's] duties and obligations under the Agreement save for any obligations in the Agreement as to confidentiality.

4. ACCEPTANCE OF LIABILITY OF [SRBCE] BY [THE PURSUER]

[The pursuer] undertakes to perform all the duties and to discharge all the obligations of [SRBCE] under the Agreement and to be bound by the terms of the Agreement in every way as if [the pursuer] was and always had been named as a party to the Agreement in lieu of [SRBCE] and as if all acts and/or omissions of [SRBCE] under or pursuant to the Agreement prior to the last date of execution of this novation agreement were the acts and omissions of [the pursuer].

5. ACCEPTANCE OF LIABILITY TO [THE PURSUER] BY [SCOTTISH MINISTERS]

[Scottish Ministers] undertakes to perform all the duties and discharge all the obligations of [Scottish Ministers] under the Agreement and to be bound by the terms and conditions of the Agreement in every way as if [the pursuer] was and always had been named as a party to the Agreement in place of [SRBCE].

6. VESTING OF REMEDIES AGAINST [SCOTTISH MINISTERS]

All rights of action and remedies against [Scottish Ministers] under and pursuant to the Agreement vested in [SRBCE] will from the last date of execution of this novation agreement vest in [the pursuer].

7. VESTING OF REMEDIES AGAINST [SRBCE]

All rights of action and remedies under or pursuant to the Agreement vested in [Scottish Ministers] will from the last date of execution of this novation agreement lie against [the pursuer] and not [SRBCE].

8. AFFIRMATION OF AGREEMENT

The terms and conditions of this novation agreement represent the entire agreement between the parties relating to the novation of the Agreement and, except as specifically amended by the provisions of this novation agreement, all of the terms and conditions of the Agreement remain in full force and effect.

9. RIGHTS OF THIRD PARTIES

A person who is not a party to this novation agreement will have no right at common law to enforce any term of this novation agreement.”

[10] On 20 July 2018, SRBCE as assignor and the pursuer as assignee entered into an

Assignment (the “Assignment”). The recitals to the Assignment stated:

“WHEREAS

A. The Assignor entered into a contract with the Scottish Ministers on or about 20 July 2011 (the “D&B Contract”) for the design and construction of upgrading works to Junction 1A of the M9 (the “Works”);

B. The Assignor entered into contractual relations with [the defender] (“Ramboll”) whereby Ramboll provided design services to the Assignor in respect of the tender stages and to ultimately fulfil its obligations in the D&B Contract (the “Ramboll Contract”);

.....

D. The Assignor novated its rights and obligations in the D&B Contract to the Assignee as formally recognised in a novation agreement in November 2013;

E. Defects in the pavement of the motorway which formed part of the Works caused by breaches of the Ramboll Contract and failures in the delictual duty of Ramboll first became apparent in about August 2013;

F. The Assignee paid substantial costs, expenses and liability in relation to the said defects and carrying out of remedial works thereto;

G. The Parties hereto consider Ramboll to be liable and wish Ramboll to make good the loss and damage caused by its breaches of the Ramboll Contract and its failures in its delictual duty;

H. The Assignee stepped into the Ramboll Contract in or about September 2012 but said agreement was not embodied in a formal document at the time. An assignation of various rights and interests of the Assignor to the Assignee may assist in recovery of the true extent of that said loss and damage;

...”

[] In terms of the Assignation SRBCE and the pursuer agreed as follows:

“1. ASSIGNATION

1.1. The Assignor hereby assigns to the Assignee with immediate effect:

1.1.1. its whole right, title and interest, past, present and future in and to the Ramboll Contract.....;

1.1.2. all claims past, present and future competent to it and/or which it has title to bring for damages for its own loss and/or losses sustained as a result of breaches of any contractual or delictual obligations incumbent on Ramboll as a result of or arising from the Ramboll Contract....;

1.1.3. all claims, past, present and future, competent to it, and/or which it has title to bring, to claim damages for, and/or recover loss and damage suffered by, the Assignee as the party vested in the rights and obligations in the D&B Contract after 7 November 2013, which were formerly held by the Assignor, whether on behalf of the Assignee or otherwise, resulting and/or arising from any breaches of contractual or delictual obligations incumbent on Ramboll as a result of or arising from the Ramboll Contract.....”

The Principal and Alternative Claims

[11] The Principal and Alternative Claims are set out in article 1 of condescence.

“Principal Claim

The principal position of the Pursuers is that the damages sued for in the circumstances hereinafter averred are a measure of a loss sustained by [SRBCE]. The Pursuers sue for recovery of that loss as assignee of SRBCE’s whole right title and interest to the contractual relations between SRBCE and the Defenders averred in this action and of all SRBCE claims against the Defenders arising therefrom... under paragraphs 1.1.1 and 1.1.2 of the Assignation .. The Pursuer contends that the loss sustained by SRBCE is properly measured by the measure of damages averred,

notwithstanding substitution of the Pursuers as the contracting party in the [Design and Build Agreement]. It was not the intention of the parties to the contractual relations with the Defenders hereinafter averred that any loss caused to SRBCE would disappear because of an internal reorganisation of the structure of the joint venture by the stakeholders which substituted the corporate vehicle for the joint venture with another for the performance of obligations in the contract with the Scottish Ministers.

'First Alternative Claim

Alternatively failing recovery of the damages claimed on the basis of the principal claim, the Pursuers seek payment of the damages claimed as loss suffered by them as the party which was obliged under the terms of the contract with the Scottish Ministers having been substituted as the contracting party and which has actually incurred the costs of the works and others which form the measure of the damages claimed and which (a) succeeded to the right and title of SRBCE in the contractual relations between SRBCE and the Defenders in the circumstances hereinafter averred and had done so at the time the relevant costs were incurred; and (b) enjoys the benefit of an assignation of any right title and interest of SRBCE in said contractual relations under paragraph 1.1.1 of the Assignation.'

'Second Alternative Claim

Alternatively failing recovery of the damages on the basis of either the primary claim or the first alternative claim, the Pursuers seek recovery of the damages claimed in the circumstances averred as assignee of SRBCE under Clause 1.1.3 of the Assignation in respect of any right which SRBCE has to claim damages on the Pursuers' behalf as a loss suffered by the Pursuers as a party subsequently vested in SRBCE's rights and liabilities under the D&B contract with Scottish Ministers hereinafter averred.'"

Submissions for the defender

[12] Senior counsel for the defender did not insist on his plea of no title to sue but invited me to dismiss the action, which failing to put the case out by order for discussion of deletion of pleadings to give effect to my decision.

[13] He submitted that the nub of the dispute was the Novation Agreement. SRBCE's obligations under the Design and Build Agreement had been extinguished. Any loss which SRBCE may have suffered was avoided and therefore not recoverable in damages. This was

the legal effect of SRBCE being discharged from all liabilities under the Design and Build Agreement in terms of the Novation Agreement (*Swynson v Lowick Rose* [2018] AC 313).

[14] In relation to the First Alternative Claim, counsel submitted that the pursuer could not recover loss suffered by SRBCE in its own right. There were no averments that indicate that the breach occurred after the pursuer stepped into the Ramboll Contract.

Paragraph 1.1.1 of the assignment was irrelevant since SRBCE could not assign a right to the pursuer for the pursuer to recover what on the pursuer's analysis was pursuer's own loss.

The substitution did not transfer anything to the defender in relation to past breaches. The pursuer had failed to plead how substitution had taken place (*MRS Distribution Ltd v DS Smith (UK) Ltd* 2004 SLT 631, *Blyth and Blyth v Carillion* 2002 SLT 961).

[15] In relation to the Second Alternative Claim, Counsel for the defender submitted that clause 1.1.3 of the assignment was intended to assign to the pursuer any right that SRBCE may have had to recover losses suffered by the pursuer as the party vested in the Design and Build Agreement. The pursuer voluntarily gave up the ability to seek damages by entering into the Novation Agreement. The loss suffered by SRBCE was avoided as a result of the Novation Agreement. There was, therefore, no question of there being a transferred loss recoverable by SRBCE. This was not a situation where the law allowed one party to recover loss suffered by another party in order to avoid a legal black hole. The black hole had been created by SRBCE's own actings. (*Alfred MacAlpine Construction Ltd v Panatown Ltd (No.1)* [2001] 1AC 518, *Swynson v Lowick Rose*, *BV Nederlandse Industrie v Rembrandt Enterprises Inc* [2020] QB 551, *McLaren Murdoch & Hamilton Ltd v Abercromby Motor Group Ltd* 2003 SCLR 323).

Submissions on behalf of the pursuer

[16] Senior counsel for the pursuer invited me to allow a proof before answer with all pleas standing.

[17] The averments as to the substitution of the pursuer for SRBCE depended on the defender starting to invoice the pursuer for its services in September 2012, a letter in about November 2012 and acceptance by conduct. The presumption against delegation could be displaced by informal arrangements (*WJ Harte Construction v Scottish Homes* 1992 SC 99). Analogous situations depended on the facts (*Skene v Greenhill* 1825 4S 25; *Blyth and Blyth v Carillion*).

[18] All the losses averred were sustained by SRBCE and it was appropriate for the loss measured by these investigations and remedial works to be recovered by the pursuer. The transfer of the interest in the Design and Build Agreement to the pursuer was irrelevant to the claim against the defender (*McLaren, Murdoch & Hamilton v Abercromby Motors*). The damage had already occurred before SRBCE transferred its interest to the pursuer by the Novation Agreement (*GUS v Littlewoods* 1982 SC (HL) 157). As assignee the pursuer may recover SRBCE's losses to the extent that SRBCE could have recovered damages if it had not granted the assignation and had not transferred the interest in the Design and Build Agreement (*Offer-Hoar v Larkstore* [2016] 1 WLR 2926, followed in *Pegasus Management v Ernst & Young* [2012] PNLR 24). The Novation Agreement did not remove the loss already sustained by SRBCE and sued for by the pursuer's assignee. The Novation Agreement was a transfer not a discharge.

[19] Counsel submitted that the First Alternative came into question only if the expenditure incurred by the pursuer itself was not recoverable as a measure of loss suffered by SRBCE. The pursuer could recover that expenditure as losses of the pursuer in its own

right as successor to SRBCE in the Design and Build Agreement. The pursuer incurred the expenditure. If the loss was not that of SRBCE it was that of the pursuer. The loss in relation to the detailed design failures may, after the facts are elucidated, have been incurred after the “substitution in” of the pursuer for SRBCE in the contract with the defender. If it turned out that the substitution invested in the pursuer all rights of SRBCE including those to claim for prior breaches, the pursuer would be able to sue in its own right for the losses which it incurred in respect of pre-substitution breaches. This would be inherently more likely in the event that the losses were not those of SRBCE. In the circumstances it was appropriate for the averments to remain on record as a fall back pending determination of the facts.

[20] Counsel submitted as a fall back that if the loss was not recoverable on the Principal or First Alternative basis, it was recoverable on the basis that SRBCE had the right to recover losses incurred by subsequent parties’ vested in the rights and obligations of the Design and Build Agreement (*McLaren, Murdoch & Hamilton* at paragraph 42; *Alfred McAlpine v Panatown; Axon Well v Craig* [2015] CSOH 4). If the loss was not recoverable on the Principal Claim or the First Alternative Claim, a breach of contract (and associated breach of duty) had produced a loss which the pursuer had no direct right to recover. The law would not tolerate that such a loss should go unrecovered. The transfer of rights and obligations to the pursuer and to the Design and Build Agreement was irrelevant to the measure of loss (*GUS v Littlewoods* at page 177).

Analysis and decision

[21] The defender seeks dismissal of the action on the basis of the following argument. As a result of the Novation Agreement, the Scottish Ministers have no claim for past or

future breaches of the Design and Build Agreement against SRBCE. This was because the Novation Agreement effected a novation by delegation in terms of which a new debtor is substituted and the obligations that lay on the original debtor are discharged. Since SRBCE's liability to the Scottish Ministers under the Design and Build Agreement was discharged in relation to any past breaches, any corresponding obligation on the defender to relieve SRBCE from the consequences of those breaches was also discharged. Any loss that SRBCE may have incurred to the Scottish Ministers was discharged and as therefore SRBCE had suffered no loss there was nothing for the pursuer to recover. The loss suffered by SRBCE was avoided as a result of the Novation Agreement and there was therefore no question of there being a transferred loss recoverable by SRBCE. Therefore the action fell to be dismissed.

[22] I do not accept that argument. The legal effect of the Novation Agreement is not, as the defender submits, that the obligations and liabilities of SRBCE to the Scottish Ministers disappear, but that they are transferred to the pursuer.

[23] The Novation Agreement is an example of delegation. Delegation is a form of novation. The nature of delegation is apparent from the following:

“Innovation is the turning of one obligation into another; and if it be a **third person becoming debtor** for relief of a former debtor, it is called Delegation “(Stair *Institutions of the Law of Scotland* I.18.8) (emphasis added)

“Obligations are also dissolved by novation or innovation, which, in the strict acceptance of the word, denotes the change of one obligation to another in such manner that both the debtor and creditor continue the same. The first obligation being thus extinguished by novation, the cautioners in it must necessarily get free; and all the penalties or damage arising from it are understood to be purged or rather discharged: so that the debtor remains bound only by the new obligation....Delegation, which may be accounted a species of novation, is **the changing of one debtor for another**, by which the obligation laid on the first debtor is discharged.”(Erskine's *Institutes* III.iv.22). (emphasis added)

“Delegation is the extinction of the liability of one party by the substitution of the liability of another. It is a form of novation – the extinction of one debt by **the substitution of another**”. (Gloag on *Contract* (2nd Edn) p 258) (emphasis added)

“Delegation is a kind of novation, by which the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged **in his stead** to the creditor..” Pothier *Treatise on the Law of Obligations* part III Chapter II Article VI.1 (emphasis added)

[24] Where there is delegation the obligations owed by the original party under the contract are extinguished, but that is not all that happens. A new party is substituted for the original party. The new party takes over these obligations and becomes obliged in the original party’s place.

[25] These two elements - extinction and substitution - are found in the Novation Agreement in this case.

[26] Extinction is dealt with in clause 2 in respect of the obligations of the Scottish Ministers and clause 3 in respect of the obligations of SRBCE. Clause 3 states:

“3. RELEASE BY [SCOTTISH MINISTERS] OF [SRBCE]

The [Scottish Ministers] releases and discharges [SRBCE] from the further performance of [SRBCE’s] duties and obligations under the Agreement”

[27] Substitution is dealt with in clauses 4 and 5, which impose obligations on the pursuer in substitution of the extinguished obligations of SRBCE. The new obligations replicate the extinguished obligations and are retrospective:

“4. ACCEPTANCE OF LIABILITY OF [SRBCE] BY [THE PURSUER]

[The Pursuer] undertakes to perform all the duties and to discharge all the obligations of [SRBCE] under the Agreement and to be bound by the terms of the Agreement **in every way as if [the pursuer] was and always had been named as a party** to the [Design and Build] Agreement in lieu of [SRBCE] **and as if all acts and/or omissions of [SRBCE] under or pursuant to the Agreement prior to the last date of execution of this novation agreement were the acts and omissions of [the Pursuer].**

5. ACCEPTANCE OF LIABILITY TO [THE PURSUER] BY [SCOTTISH MINISTERS]

[Scottish Ministers] undertakes to perform all the duties and discharge all the obligations of the [Scottish Ministers] under the Agreement and to be bound by the terms and conditions of the Agreement **in every way as if [the pursuer] was and always had been named as a party to the Agreement in place of [SRBCE]** (emphasis added)."

[28] The effect of the substitution in respect of rights of action and remedies is set out in clauses 6 and 7. Clause 6 provides that rights of action and remedies against Scottish Ministers vest in the pursuer. Clause 7 provides:

"7. VESTING OF REMEDIES AGAINST [SRBCE]

All rights of action and remedies under or pursuant to the Agreement vested in [Scottish Ministers] will from the last date of execution of this novation agreement lie against [the pursuer] and not [SRBCE]".

[29] The legal effect of the Novation Agreement is that the pursuer has been substituted for SRBCE. The pursuer is are liable to the Scottish Ministers as if the pursuer and not SRBCE had been the original party to the Agreement. SRBCE's obligations to Scottish Ministers have been extinguished, but liability to Scottish Ministers has not vanished: SRBCE's obligations to Scottish Ministers have been replaced with new obligations of the pursuer to the Scottish Ministers. Under these new obligations, the pursuer is liable to Scottish Ministers in respect of breach of contract and breach of duty in respect of the Design and Build Agreement as if the pursuer, and not SRBCE, was the original party to that Agreement.

[30] Nor has the loss suffered by Scottish Ministers for any breach of the Design and Build Agreement vanished. The Scottish Ministers are no longer entitled to recover their loss from SRBCE. SRBCE's obligations have been extinguished and so damages cannot be recovered from SRBCE for breach of these obligations. However, the actions or omissions of

SRBCE are now to be treated as actions or omissions of the pursuer. Scottish Ministers are entitled to recover from the pursuer the same damages which they could have recovered from SRBCE had the Novation Agreement never been entered into. The liabilities to Scottish Ministers under the Design and Build Agreement remain, but are now liabilities of the pursuer and not SRBCE.

[31] In the present action, we are one step removed from the Novation Agreement. The pursuer is suing the defender for breach of contract and breach of duty in relation to the Ramboll Contract.

[32] The original parties to the Ramboll contract were the SRBCE and the pursuer. This action has been raised not by SRBCE but the pursuer. In respect of title to sue, the pursuer founds on the Assignment. The Assignment provides

“1.1. [SRBCE] hereby assigns to the [the pursuer] with immediate effect:

1.1.1. its whole right, title and interest, past, present and future in and to the Ramboll Contract.....;

1.1.2. all claims past, present and future competent to it and/or which it has title to bring for damages for its own loss and/or losses sustained as a result of breaches of any contractual or delictual obligations incumbent on [the defender] as a result of or arising from the Ramboll Contract...;

1.1.3. all claims, past, present and future, competent to it, and/or which it has title to bring, to claim damages for, and/or recover loss and damage suffered by, [the pursuer] as the party vested in the rights and obligations in the D&B Contract after 7 November 2013, which were formerly held by [SRBCE], whether on behalf of the [pursuer] or otherwise, resulting and/or arising from any breaches of contractual or delictual obligations incumbent on [the defender] as a result of or arising from the Ramboll Contract...”

[33] The pursuer has title to sue under the Assignment. If the legal effect of the Novation Agreement had been no more than the extinguishing of SRBCE’s obligations, then there would have been force in the defender’s argument that the pursuer had suffered no loss for which it should be compensated. But that is not what happened here. There was delegation

in terms of the Novation Agreement. SRBCE's obligations to Scottish Ministers were replaced by the pursuer's obligations to Scottish Ministers. The effect of the Novation Agreement is that the pursuer became liable to the Scottish Ministers to make good the Scottish Minister's loss from the start of Design and Build Agreement.

[34] When it comes to quantifying the loss, there is no practical difference in the amount of the loss which would have been sustained by SRBCE under its extinguished obligations and the loss sustained by the pursuer. The pursuer is liable to Scottish Ministers as if it had always been a party, so the amount of the pursuer's loss in respect of the period prior to the date of the Novation Agreement is the same as SRBCE's loss would have been.

[35] In addition to its averments on the Novation Agreement, the pursuer also pleads that there was substitution from November 2012 on the basis of letters and the actings of the parties. Although it can be difficult to establish delegation on the basis of letters and actings as there is a presumption against delegation (*WJ Harte Construction Limited v Scottish Homes, MRS Distribution Ltd v DS Smith*) the appropriate time to assess whether that presumption has been overcome is after hearing the facts. That issue is best dealt with after the facts have been established.

Order

[36] I shall repel the defender's first plea in law (no title to sue) for want of insistence, refuse the defender's motion to dismiss the action, and allow a proof before answer. I shall put the case out by order for discussion of further procedure.