OUTER HOUSE, COURT OF SESSION

[2023] CSOH 4

CA1/22

OPINION OF LORD HARROWER

In the cause

DALTON GROUP LIMITED

Pursuer

against

CITY OF EDINBURGH COUNCIL

Defender

Pursuer: R Dunlop KC, Dean of Faculty, McKinlay; Ennova Law
Defender: P O' Brien KC; Morton Fraser LLP

26 January 2023

The issue

[1] The pursuer carries on business in recycling. The defender is a local authority operating a number of recycling centres. The parties entered into a contract in terms of which the pursuer was appointed the defender's exclusive purchaser of scrap metals from 2 October 2017 to 3 October 2020. Members of the public would deposit scrap metal in skips, marked for that purpose, and maintained by the defender at its recycling centres. During the course of 2018, a dispute arose over the degree of contamination of the scrap being purchased by the pursuer. By January 2019, the defender had begun processing scrap metal from its recycling centres through a third party. In this commercial action, the

pursuer argues that the defender wrongfully repudiated the contract and seeks to recover its lost profits over the remainder of the contract term. While it is accepted that this is a matter that cannot be determined without first hearing evidence, the defender has raised a preliminary issue for debate concerning the effect of a provision in the contract allowing the defender to terminate it at any time by giving three months' written notice to the pursuer. In short, should damages be assessed on the basis that the contract would have continued for the remainder of the contract period, or, as the defender argues, on the basis that the defender could have exercised the termination provision, bringing the contract to an end within three months?

The pleadings

[2] The pursuer avers that from July 2018, it complained to the defender about excessive levels of contamination present in the scrap. It raised a specific concern over the presence of pressurised gas canisters. On 7 September 2018, representatives from both parties met to discuss the issue. Despite the pursuer raising its concerns, the issue was not resolved, and by email sent on 15 January 2019 to the defender's Mr Brown, the pursuer's Mr Dalton Senior complained of "numerous incidents" of hazardous gas-pressurised canisters being delivered, stating that "this must stop". By email sent later that day, Mr Brown replied that he would be instructing the site supervisor to hold the skips on site until the issue of contamination had been dealt with. Mr Dalton confirmed by email shortly thereafter that he would await Mr Brown's response. The pursuer then avers that, as a result of Mr Brown's email, it received no further deliveries of scrap. By email sent on 28 January 2019, Mr Dalton asked whether the defender was seeking to terminate the contract, but received no reply. At no stage, the pursuer avers, did the defender exercise any of the termination provisions of

the contract, whether it be the three months' notice provision, or any of the provisions for termination with immediate effect by service of a written notice upon the occurrence of certain specified events. Indeed, at no stage prior to the action being raised did the defender state that it was treating the contract as having been terminated.

[3] Since the pursuer's averments must be taken *pro veritate* for the purposes of this debate, it is unnecessary to set out the details of the defender's response, other than to note that it places an entirely different complexion on the correspondence exchanged between parties in January 2019. According to the defender, with effect from 16 January 2019, the pursuer stopped accepting loads altogether from the defender. This, it says, amounted to a wrongful repudiation, upon the defender's acceptance of which, the contract was lawfully terminated (although the defender does not aver by what means that acceptance was brought to the attention of the pursuer).

The submissions

[4] The contract incorporated the defender's terms and conditions, clause 31 of which provided that the defender could terminate the contract at any time by giving three months' notice to the pursuer. Separate provisions allowed the defender to terminate for cause with immediate effect. Mr O'Brien, who appeared for the defender, argued that, where the alleged breach consisted in a wrongful repudiation of a contract containing a power to terminate the contract lawfully, damages fell to be assessed by reference to the least burdensome method of lawful termination. In this case, that would have been to have given three months' notice under clause 31 or (if grounds existed, which Mr O'Brien accepted could not be determined without proof) to terminate summarily. Accordingly, the pursuer could not recover damages for lost profits extending beyond the three month period or, if

earlier, the date when the contract could lawfully have been terminated for cause, including material breach. Mr O'Brien relied on the cases of *Morran* v *Glasgow Council of Tenants Associations* 1997 SC 279, *Abrahams* v *Herbert Reiach Ltd* [1922] 1 KB 477, *Lavarack* v *Woods of Colchester Ltd* [1967] 1 QB 278, *Mackenzie* v *AA Ltd* [2022] EWCA Civ 901, and *Gunton* v *Richmond-upon-Thames LBC* [1981] 1 Ch 448.

[5] The Dean of Faculty, who appeared for the pursuer, argued that the principle that damages fall to be assessed by reference to the least burdensome method of lawful termination had no application where the relevant contract has not been terminated. A party faced with a repudiatory breach of contract is entitled to elect to treat the contract as remaining in force. The pursuer offers to prove that it did not accept the defender's repudiatory breach. For the purposes of this debate, therefore, it must be assumed that the contract remained in force and that the pursuer remained ready and willing to receive the defender's scrap metal waste, by maintaining the necessary equipment and capacity at its scrap metal sites. None of the authorities relied on by the defender supported the application of the least burdensome performance principle where the contract remained afoot. In addition to the above authorities relied upon by the defender, the pursuer referred to *Geys* v *Société Generale, London Branch* [2013] 1 AC 523, *Rigby* v *Ferodo Ltd* [1988] ICR 29, and *Chitty on Contracts* (34th edn) at paragraph 29-092.

Decision

[6] In an action for damages for breach of contract, the pursuer is entitled to recover damages which would put him in the position that he would have been in had the defender fulfilled its contractual obligations. Where, therefore, the breach of contract consists in a wrongful termination, the pursuer's damages will be assessed on the basis that the defender

would have lawfully terminated the contract. It is in these circumstances that the court asks itself, "What was the least burdensome method by which the defender could have terminated the contract?" It does not follow that damages should be assessed by reference to the least burdensome method of terminating the contract where the contract has never been terminated at all, whether lawfully or unlawfully. This might explain why the editors of *Chitty On Contracts* frame the relevant principle in the way that they do:

> *"if the claimant accepts the anticipatory breach of the defendant as a ground for terminating the contract,* but the defendant could have exercised his option to terminate the contract so as to extinguish or reduce the loss caused by the anticipatory breach, the court will assess the damages for the breach on the assumption that the defendant would have exercised the option" (para 29-092, emphasis supplied).

[7] In this action, the pursuer contends that the contract was not terminated at all, either lawfully or unlawfully, the pursuer never having accepted the defender's wrongful repudiation. No doubt the defender *could* have exercised the termination provisions of the contract, but it chose not to. In these circumstances there is simply no room for the principle contended for by the defender, that damages fall to be assessed by reference to the least burdensome method of lawful termination.

[8] The same conclusion may be reached by considering the rationale for the principle that damages fall to be assessed on the basis of the least burdensome method of performance. That rationale was succinctly put by Scrutton LJ in the following triple negative: "a defendant is not liable in damages for not doing what he is not bound to do" (*Abrahams*, p814). The principle can be illustrated by an example, figured by Atkin LJ (as he then was) in *Abrahams,* and frequently referred to in the authorities. If the contract were to carry goods to one of two alternative ports at different distances from the port of loading at rates of freight differing accordance to the distance, then the only contract on which the shipowner could sue would be a contract of carriage to the nearer port (*Abrahams*, p483). So

if, prior to loading, say, the contract were repudiated by the carrier, and that repudiation accepted by the ship-owner, damages would fall to be assessed by reference to the cost of shipping to the nearer port. Further, if the ship-owner refused to accept the repudiation, he would be unable to have the carrier ordained to take the goods to the more remote port, since that is not something the contract specifically required the carrier to do.

[9] Contrast this with the present case, where, unless and until the contract is terminated, the defender is contractually obliged to provide waste exclusively to the pursuer for the remainder of the contract term. The contract is not one that provides for either A *or* B; rather, it provides for A *unless* B. Unlike the freight example, there is no lack of clarity in what the contract requires of the defender that would prevent the pursuer obtaining specific implement, assuming that such a remedy were otherwise available to it. This is because, properly understood, the contract provides for a single method, rather than alternative methods, of performance.

[10] I turn now to the authorities to see whether they admit of any different conclusion.

[11] The pursuer in *Morran* raised an action for damages for breach of contract following his summary dismissal by his employer. The pursuer argued that the employer's failure to give him four weeks' notice deprived him of the opportunity to accumulate the two-year period of employment that would have allowed him to bring an unfair dismissal claim. The court held that, properly understood, the contract only required the employer either to give the pursuer four weeks' notice or to make a payment in lieu. Critical to an understanding of this case, however, is the fact that parties had agreed that the contract of employment had been terminated, when the pursuer was summarily dismissed (p280). Accordingly, it is of no assistance to the defender in the circumstances of the present case, where the parties are in dispute precisely over the question of whether the contract was ever terminated. Much

the same might be said of *Lavarack* and *Mackenzie*, which were also termination cases. *Abrahams* is of no assistance since in that case the court held that the contract provided for a single method of performance, namely, to publish a book, albeit that the court would require to make an assessment of what constituted reasonable publication.

[12] The cases of *Gunton, Geys,* and *Rigby* all support the proposition that an unaccepted repudiation will not bring about the termination of the parties' contract (thereby upholding the so-called "elective" theory of termination). Indeed, in the case of *Gunton,* where the plaintiff had been employed on a contract of service terminable by one month's notice, the employer purported to dismiss the employee on disciplinary grounds, but had failed to follow the contractual procedure. The employee was held entitled to insist on the agreed disciplinary procedure being followed, with the result that the period by reference to which his damages fell to be assessed included a reasonable period for carrying out that procedure, calculated from the date of his exclusion, as well as a period of one month, being the contractual period of notice (*Gunton,* Buckley LJ, p470E). *Gunton* is therefore inconsistent with the theory being advanced by Mr O'Brien, according to which the plaintiff's damages would require to be assessed solely by reference to the one-month period of notice, that being, as he would have it, the least burdensome method of performing the contract. The real question for Buckley LJ, was one of how long the plaintiff could have insisted at the date of commencement of his cause of action upon being continued by the employer in employment (p470B). However, that would be a question for proof, and is an altogether different kind of question from the one I am presently required to resolve.

[13] The decision in *Gunton* was approved in *Geys*, subject only to the criticisms made by Lord Hope and Lord Wilson regarding Buckley LJ's, suggestion that acceptance of a wrongful repudiation should easily be inferred (*Geys*, paras 17 and 92). Although *Geys*, like

Gunton, was an employment case, the elective theory of termination had been settled as a matter of general principle in both Scotland and England at least as early as 1848 (*White and Carter (Councils) Ltd* v *McGregor* [1962] AC 413, Lord Reid, at p427). Lord Wilson discussed the application of the principle to contracts for services under reference to the case of *Decro-Wall International SA* v *Practitioners in Marketing Ltd* [1971] 1 WLR 361, in which the defendant agreed to be the exclusive marketeers in the UK for the plaintiff's tiles (*Geys*, para 86). The claimant in *Decro-Wall* had suggested, relying on well-known dicta of Lord Reid (*White and Carter (Councils) Ltd* v McGregor, p429), that where, following a wrongful repudiation of a contract for the provision of services, the completion of the contract by the innocent party would have required the repudiator's co-operation, then the repudiation automatically brought the contract to an end. However, as Lord Wilson observed, that proposition was roundly rejected by the Court of Appeal in *Decro-Wall*. The plaintiff having repudiated the contract by appointing a substitute marketeer, and that repudiation never having been accepted by the defendant, the judge at first instance, in a decision upheld on appeal, granted the defendant's counterclaim for a declaration that the contract subsisted and could only be determined on a reasonable period of notice, which, in the whole circumstances, he assessed as being twelve months.

[14] During the course of the debate, Mr O'Brien sought to persuade me that the elective theory of termination should not apply where there has been a complete cessation of performance. As the Dean of Faculty pointed out, this was not necessarily an accurate description of matters in this case, since, at least on the pursuer's averments, the pursuer continued to hold itself out as available to perform the contract. More fundamentally, perhaps, the Supreme Court's judgment in *Geys* gave absolutely no encouragement to the view that there might be a special class of "outright" repudiatory breach to which the

elective theory should not apply, and which would result in the automatic termination of the contract (paras 15, 42 and 96).

[15] Finally, in *Rigby*, the employer sought to impose a unilateral reduction in wages. The employee, who had continued to work and receive a reduced payment under protest, sought to recover his unpaid wages as a debt. The employer argued that the claim was in reality one for damages rather than debt, and that the least burdensome principle applied. Since the employer could have terminated the contract on twelve weeks' notice, so the argument ran, it must be treated as if it had done so, with the result that the damages should be limited to the shortfall in wages during that period. Lord Oliver, with whose speech the other members of the appellate committee of the House of Lords agreed, derived no assistance from the distinction between damages and debt. "On either view," he said,

> "the argument advanced is … based on a fallacy. It assumes the very proposition which has already been rejected, namely, that the employment under the contract of service has come to an end" (p36A-B).

Mr Rigby's claim was one for sums due,

> "under a continuing contract which never was terminated, either lawfully or unlawfully, and there simply is no room in such a case for the application of the principle referred to" (p36B-C).

Mr O'Brien sought to distinguish *Rigby* as a case of merely "defective" performance, rather than complete non-performance, but it is difficult to see how a failure to pay wages can be characterised as anything other than a fundamental, repudiatory, breach entitling the employee to terminate his contract of employment (compare Lord Wilson in *Geys*, at para 96(d)).

[16] On my reading of the authorities, therefore, they are consistent with the conclusion I had reached earlier, that in a case where the contract has not been terminated, damages do not fall to be assessed by reference to the least burdensome method of terminating the

contract. It follows that the defender's attack on the relevancy of the pursuer's averments of loss must fail.

Disposal

[17] I shall grant the pursuer's motion to allow a proof before answer, with all pleas standing. I shall reserve any question of expenses.