



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 54

CA116/21

OPINION OF LORD CLARK

In the cause

SSE ENGERY SUPPLY LTD

Pursuer

against

STAG HOTEL LTD

Defender

Pursuer: Boni; Kennedys
Defender: Beynon; Lefevres

10 August 2022

Introduction

[1] The pursuer seeks payment for the supply of electricity to the Stag Hotel in Argyll, which is owned by the defender. Monthly invoices, issued from June 2017 until March 2022, have not been paid. The total final amount claimed to be outstanding is £168,382.04. The defender contends that the electricity meter on the premises did not function properly, was not properly calibrated and gave grossly excessive figures in the meter readings. The defender also states in its pleadings that for periods of several months during the Covid-19 pandemic the hotel was fully closed and at other times operated only on a limited basis. This is said to have resulted in a substantial decrease in the use of electricity, not reflected in

the bills. The defender offers to make payment in full of “a reasonable estimate of the electricity actually supplied and consumed at the premises”.

[2] At the procedural hearing, counsel for each party took issue with the relevancy and specification of the other party’s averments. A diet of debate was requested, at which the pursuer would seek decree *de plano* and the defender would seek dismissal. Given that each side argued that the case could be resolved by a debate, a diet was fixed. At the debate, counsel for the defender advised the court that it was now accepted that dismissal was not appropriate and that a proof before answer should be fixed. Counsel for the pursuer advanced arguments, on three grounds, for decree *de plano* being granted.

Ground 1

[3] The first ground is that the defender’s averments complaining about the meter are irrelevant and lacking in specification.

[4] Counsel for the pursuer argued that the presumption *omnia praesumuntur rite et solemniter acta esse* (ie that everything was done validly and in accordance with the necessary formalities) is applicable to the present case. In the result it was for the defender to prove that the meter was defective and not for the pursuer to prove otherwise. In the absence of proper averments or supportive evidence, the defender could not discharge the burden. Reference was made to Dickson, *A Treatise on the Law of Evidence in Scotland*, para 114(4); Walker and Walker, *The Law of Evidence in Scotland*, 5th ed, para 3.6.1 et seq; Keane and Davidson, *Raitt on Evidence: Principles, Policy and Practice*, 3rd ed, paras 7.17-7.19; *Bain v Assets Co* (1905) 7 F (HL) 104 at 106; *Scottish Solicitors Staff Pension Fund’s Trustees v Pattison & Sim* 2016 SC 284 at [19]-[21]; *Edinburgh District Council v MacDonald* 1979 SLT

(Sh Ct) 58 at 59; *Castle v Cross* [1984] 1 WLR 1372 at 1377-1380 and *Morris v Kanssen* [1946] AC 459 at 475.

[5] In any event, counsel submitted that it was for the defender to prove its averments: *Dickson*, supra, para 26; Stair Memorial Encyclopaedia, *The Laws of Scotland, Evidence* (Reissue), para 275. The defender's pleadings did not contain any averments which would allow it to adduce evidence as to the nature of any supposed defects with the meter. The defender provided no specification as to the nature, cause and extent of any such alleged fault with the meter and there is no expert report. The defender's averment that a representative of the pursuer advised him that the meter was defective gave no specification of the defect. The defender's pleaded position that meter readings could not be accessed on a "proper, reasonable and transparent basis", and this was breach of a statutory duty, failed to identify the statutory provision relied upon. The recent amendment by the defender did not sufficiently advance matters in terms of specification.

[6] Counsel for the defender argued that the presumption did not apply and that the cases cited were not in point. It was for the pursuer to prove that the meter had at all material times functioned properly. In relation to specification, it was argued that the defences set out a clear and specific case and this was supported by an affidavit from the director of the defender, Stanley Craig. Reference was also made to an affidavit from Alasdair Porter, a former employee of the pursuer and now of a sub-contractor to the pursuer.

[7] I do not accept the defender's argument that the pursuer must prove, by factual evidence, that the meter was functioning properly during the whole period of the claim. Practically speaking that goes too far, as the presumption *omnia praesumuntur rite et solemniter acta esse* may fall to be applied. It has been applied by the court in a number of

circumstances, including the functioning of mechanical instruments, devices or tools.

Perhaps the most relevant for present purposes is *Castle v Cross*, where the Court of Appeal in England, albeit in a criminal case, applied the presumption to an intoximeter, presuming it to be in order at the material time. However, in that case there was no challenge to it being in order and no allegation that it was defective. There is such an allegation here. The presumption falls to be made in the absence of evidence to the contrary and for the reasons given below such evidence is able to be led. This fits with the point made in *Morris v Kanssen* by Lord Simonds at p475, referred to with approval by the Inner House in *Edinburgh District Council v MacDonald* at [19], that “The wheels of business will not go smoothly round unless it may be assumed that that is in order which appears to be in order”. Appearing to be in order is an important factor.

[8] More generally, it may not be appropriate to apply the presumption to a device without some supporting evidence. For the pursuer, it was argued that there should be a presumption that the data was collected, processed and verified correctly and is accurate. The question of whether or not the presumption falls to be applied on these matters should be determined only after hearing evidence. That may include evidence, at least in general terms, on how the data in meters about consumption of electricity is in fact collected, processed and verified.

[9] Accordingly, I reject the defender’s position that the presumption does not apply, for the reason that it may well come to be applied, and I also do not accept the pursuer’s position that it falls to be applied here and now, for the reason that its application will depend upon further evidence.

[10] Turning to the specification of the defender’s case that the meter was defective, I see considerable force in the point made on behalf of the pursuer as to the main assertions (not

functioning properly, not properly calibrated and giving grossly excessive figures) being unvouched by adequate detail in the averments. However, the defender does aver that a representative of the pursuer's agents told the defender that the meter was defective. In its minute of amendment, the defender developed these averments by adding that Alasdair Porter, who had been employed by the pursuer and then its sub-contractor and who had dealt with the meter over the past 3 years, had advised that his colleagues had explained to him that the meter was faulty prior to his involvement. It is averred that

“The fault with the meter which persists is an inability to communicate and display an accurate reading as when any attempt to read the meter is made it simply displayed ‘Error 800’ and contacting the number a ‘busy’ signal is given. The fault is likely to be caused by an internal battery failure which prevents an essential communications link.”

The effect of proof of these averments remains at least to some extent unclear, in particular as to whether the data and the resulting charges were corrupted by the alleged fault. The pursuer has, in its answers and in the submissions on its behalf, explained why such a fault should not be viewed as relevant.

[11] It would, however, be plainly inappropriate to attempt to reach any view on the factual position at this point, that being entirely a matter for evidence. While the contention of the meter “not functioning properly” requires specification, an inability to communicate and display an accurate reading could potentially suffice in explaining why that is so, depending of course on the evidence. There is a greater degree of doubt about whether these further averments provide specification for the allegation of the meter not being “properly calibrated”. It might reasonably be said that calibration is about how an instrument, such as a meter, is configured and a specific basis for allegedly improper configuring is required. On balance, I conclude that the evidence about an inability to

communicate and display an accurate reading may potentially allow an inference to be drawn about improper calibration. The reference to an inability to communicate and display an accurate reading, and the battery failure are the only reasons asserted by the defender as to why the meter is not functioning properly or not properly calibrated, and producing grossly excessive results. To that extent only, those averments do not fall to be excluded, but evidence as to other reasons as to the nature of any defects and why it is that the meter it is not functioning properly or properly calibrated cannot, on the pleadings as they stand, be led as no fair notice of any such other reason has been given.

[12] In addition to the affidavit of Mr Craig, counsel for the defender referred to an affidavit of Mr Porter. While in commercial actions there can be circumstances in which sufficient specification is given in an affidavit or witness statement, the broad principle of the need for fair notice in the pleadings remains in place. In any event, there is nothing within the affidavits of Mr Craig or Mr Porter which adds any material weight to specification of the defender's case.

[13] The defender avers that as a consequence of the meter not functioning properly and not being properly calibrated, Mr Craig had complained that "it could not be accessed on a proper, reasonable and transparent basis". This failure is said to constitute a "material breach of duty by the Defenders [sic] in terms of the statutory provisions founded upon by the Pursuers". Taking this to be an alleged breach by the pursuer, if there had been a clear and specific reference in the pursuer's pleadings to a particular statutory provision dealing with the point it may have been arguable that the provision relied upon by the defender was plain and obvious. That is not the case as there is no such provision mentioned in the pursuer's pleadings. Without adequate notice of the specific provision founded upon, this averment is irrelevant and falls to be excluded from probative.

[14] I shall therefore refuse the pursuer's proposition that the defender's case is irrelevant, but subject to the qualification that its relevancy on the issue of reasons why the meter was not functioning properly or properly calibrated relates to the alleged inability of the meter to communicate and display an accurate reading and battery failure. The question of whether the charges were grossly excessive is linked to this alleged defect. There may also be evidence about the matters in the second ground raised by the pursuer, to which I will now turn, that assists in reaching a view on the issues of accuracy of the meter readings and the charges.

Ground 2

[15] The second ground concerns the defender's averments about the more limited use of electricity during the Covid-19 pandemic as a result of closure or restricted use of the hotel during particular periods. Counsel for the pursuer argued that it is apparent that there was significant occupation of the hotel by guests when it was purportedly closed to the public. It was inconceivable that no or little electricity was used. The fact that the hotel was not in operation did not of itself mean that electricity was not being used (or that a reduced amount of electricity was consumed). For example, if electrical equipment was plugged into electrical sockets, it could still be consuming electricity, even if the appliance was "switched off", irrespective of whether or not the hotel was "closed". There were no averments that the fridges and freezers were emptied, switched off and disconnected from the socket/wall. The defender had provided no specification for its contention that no electricity was consumed because of the closure to the public. Counsel for the defender contended that the pleadings made clear that even when there was full closure there was still a very high level of charge.

[16] It is not necessary to rehearse in any detail the defender's pleadings on this matter. It suffices to note the broad point that the defender alleges extensive periods of complete or partial closure and a consequent lack of, or restricted, use of electricity. If that is established, there could be a comparison between the charges in those periods and the charges in the periods when the hotel was fully open to the public. The defender's position in relation to reasons as to why the meter is said not to function properly or to be properly calibrated is limited to the matters discussed above in relation to ground 1, but it is at least possible that inferences as to accuracy of the meter readings may be drawn from such a comparison. In addition, evidence on the pursuer's points about electricity still being consumed when there is no disconnection will be needed. This is a stark example of a factual dispute that requires evidence before it can be resolved. I therefore refuse the pursuer's motion to exclude these averments from probation.

Ground 3

[17] The pursuer's third ground concerns the defender's averment that it would make payment in full of "a reasonable estimate of the electricity actually supplied and consumed at the premises". Counsel for the pursuer argued that the defender requires to pay the actual cost of the electricity supplied and so this averment was irrelevant. Counsel for the defender said that this averment reflected the terms of clause 6.4 in the deemed contract between the parties, set out in the pursuer's pleadings, and in any event indicated that if unjustified enrichment was put forward as a basis for the claim that would be accepted. On the latter point, this is purely a contractual claim and there is no averment for the pursuer in respect of unjustified enrichment, so that concept does not support the relevancy of the averment. However, on the first point, clause 6.4.1 states:

“6.4.1 If information for charging purposes under the Deemed Contract is not available for whatever reason or is inaccurate, or where the Customer's meter has not been read immediately before the Contract Start Date, SSE Energy Supply Ltd shall be entitled to make a reasonable estimate of Charges and send the Customer an estimated Bill. Appropriate adjustments to a subsequent Bill shall be made by SSE Energy Supply Ltd once all the necessary information has become available.”

In essence, the defender is averring that, if successful on the alleged defects or failures in the meter, this other contractual remedy should apply and the defender would accept the duty for payment under it. While not directly relevant to the issues between the parties, it is an averment which reflects the defender's position of how the contract should apply if the defender succeeds. For that reason, the averment is not excluded.

Disposal

[18] I shall sustain the first plea-in-law for the pursuer and exclude from probation the defender's averments on breach of an unspecified statutory provision. The remaining issues will be dealt with at a proof before answer. In the meantime, I reserve all questions of expenses.