SHERIFF APPEAL COURT

[2022] SAC (Civ) 18
AIR-A218-20

OPINION OF THE COURT

delivered by Sheriff Principal Aisha Y Anwar

in

Appeal by

PARKS OF HAMILTON (TOWNHEAD GARAGE) LIMITED

Appellant

against

ELIZABETH DEAS

Respondent

Appellant: Tosh, advocate; DWF LLP Solicitors
Respondent: Oliver, advocate; TC Young Solicitors

13 April 2022

Introduction

[1] On 17 February 2020, the respondent purchased a Bentley Bentayga motor vehicle from the appellant for the sum of £141,758. The respondent maintains that she made it known to the appellant that the vehicle would be used to tow a caravan and requested that a retractable towbar be fitted to the vehicle. The vehicle was supplied with a retractable towbar. The respondent maintains that because the towbar has been fitted with a height in operation of 500mm, the vehicle is not fit for the purposes of towing a caravan. She has sought to exercise her right to reject the vehicle in terms of section 24 of the Consumer

Rights Act 2015. She seeks various orders including declarators that the vehicle was not fit for purpose, that she validly rejected it and that the appellant has acted in breach of contract. She seeks repayment of the purchase price and payment of the sum of £3,000 in respect of loss and enjoyment of the vehicle.

[2] Following a diet of debate, the sheriff refused to dismiss the action and assigned a diet of proof before answer.

Grounds of Appeal

[3] Before the sheriff, the appellant had challenged the respondent's title to sue. No appeal is taken against the sheriff's decision in that regard. The appellant had also challenged the relevancy and specification of the respondent's averments on a number of grounds, all of which were rejected by the sheriff. Before this court, three grounds of appeal are advanced by the appellant. Briefly stated, these are as follows:

1. That the sheriff erred in holding that the following averments in article 5 of condescendence, were suitable for inquiry: "*any car supplied to tow a caravan must be fitted with a towbar with a height in operation of no higher than 420mm. The towbar fitted to the car has a height in operation of 500mm and as such the car is not fit for the contracted purpose of towing a caravan*" (ground of appeal 1);

2. That the sheriff erred in holding that the respondent's averments in article 10 of condescendence which sought to support the third crave for damages in the sum of £3,000 were suitable for inquiry (ground of appeal 2); and

3. That the sheriff erred in holding that the respondent's second plea in law was sufficient to support the respondent's third crave (ground of appeal 3).

Submissions for the appellant

[4] Counsel for the appellant adopted his note of argument. The appellant invited the court to allow the appeal, sustain the third and fourth pleas in law for the appellant (the former sought dismissal and the latter sought to exclude averments from probation), dismissal of the respondent's third crave and invited the court to refuse to admit to probation the respondent's averments in articles 5 and 10 of condescendence. The appellant acknowledged that if the appeal was successful, the action would require to proceed to a more limited proof before answer on matters which were not the subject of this appeal, namely the respondent's claims relating to the vehicle's paintwork and door mis-alignment.

[5] In relation to the first ground of appeal, it was submitted that the respondent had failed to relevantly aver why the vehicle was not fit for the purpose of towing a caravan simply because its height in operation exceeded 420mm. While this question remained unanswered, the averments lacked specification: *MacDonald* v *Glasgow Western Hospitals* 1954 SC 453. The sheriff had erred in her construction of the respondent's averments. The respondent's case was not simply that a towbar attached to this vehicle at a height of 500mm was too high to tow a caravan, but rather that no vehicle with a height in operation of 500mm is fit to do so. The respondent had failed to explain why the height of the towbar rendered it unfit to tow a caravan. The sheriff had concluded that there was no material prejudice caused to the appellant by this lack of specification on the basis that the appellant had instructed and lodged expert reports. However, those reports had been prepared on the understanding that the respondent advanced a case that any vehicle supplied to tow a caravan required to have a height in operation of no more than 420mm in terms of EU Directive 94/20/EC. At debate, the respondent had conceded that she did not advance a case under EU Directive 94/20/EC. The appellant is now unable to discern why it is said that any

vehicle with a height in operation of above 420mm is not fit for the purposes of towing a caravan. If the respondent relied upon a legislative or regulatory requirement that requires to be set out (Macphail, *Sheriff Court Practice,* 3rd ed, 2006). Absent any explanation, the respondent's averments are so lacking in specification that they are irrelevant, or at least, the appellant is materially prejudiced by the lack of fair notice: *Eadie Cairns* v *Programmed Maintenance Painting* 1987 SLT 777. Insofar as it may be argued that an explanation for the unfitness of the vehicle to tow a caravan can be found in the expert report lodged by the respondent, that report is not referred to in the pleadings nor incorporated; the court cannot have regard to it at debate: *Gordon* v *Davidson* (1864) 2 M 758; Macphail, paragraph 13.05. The present action was not a commercial action in which reliance might be placed upon an expert report to provide a greater degree of specification of a claim; it is an ordinary action to which traditional rules of pleadings applied.

[6] In relation to the second ground of appeal, it was submitted that the single averment relied upon by the respondent in support of her third crave for payment of £3,000 was entirely lacking in specification. If the loss claimed is patrimonial loss, the respondent is required to give fair notice of the nature and extent of the loss and claimed and how it is quantified: *Jamieson* v *Allan McNeil & Son WS* 1974 SLT (Notes) 9. If the loss is non-patrimonial, the nature and extent still requires to be explained; Macphail, paragraph 9.30. In any event, what the respondent seeks to be compensated for and how that loss is measured requires to be specified; *Hewer* v *Brown* 1990 SCLR 548.

[7] Moreover, if the respondent has validly rejected the vehicle, she is entitled to a refund, subject to any deduction for use; Consumer Rights Act sections 20(7) and 24(8). She may only claim damages in the circumstances set out in section 20(19). It was accepted that this argument had not been advanced before the sheriff, however it was submitted that this

court should exercise its discretion and consider this argument, it being a short point of law and the sheriff being in no better position to consider it than this court.

[8] Finally, in relation to the third ground of appeal, the respondent has not stated a plea in law which on the facts averred, would entitle her to decree in terms of her third crave.

Submissions for the respondent

[9] Counsel for the respondent adopted his written note of argument. The respondent invited the court to refuse the appeal and adhere to the sheriff's interlocutor.

[10] It was submitted that there was a risk that the purpose of written pleadings was being lost sight of in the appellant's numerous technical pleading points. The purpose of written pleadings is to provide fair notice: *Esso Petroleum Co* v *Southport Corp* [1956] AC 218; Macphail para 9.07. During the diet of debate a large number of pleading points had been advanced on behalf of the appellant. The three points advanced before this court might have been fully addressed by the sheriff, had they been the focus of the arguments presented at the diet of debate.

[11] The disordered nature of the appellant's pleadings had caused difficulties. The respondent has been hindered in identifying the key disputed issues between the parties.

[12] In answer to the first ground of appeal, it was submitted that the respondent had made succinct averments as to the why the vehicle did not conform to the implied terms that it be fit for the purposes of towing a caravan. When considering whether the respondent's averments give the appellant fair notice, the court requires to consider the pleadings broadly. The degree of specification will depend upon the circumstances of the case: Macphail, para 9.29. It is for the appellant to satisfy the court that the action should be dismissed; *Jamieson* v *Jamieson* 1952 SC (HL) 44.

[13] It is apparent from the appellant's own pleadings that the appellant understands the case made against it. The appellant avers that a reasonable person would make arrangements for the height of a caravan to be raised, to ensure a downward load on the tow ball of the tow bar. Moreover, the appellant had sight of expert reports lodged by both parties which addressed whether a vehicle can safely tow a caravan with a towbar operating at a height above 420mm. There are four reports lodged on behalf of the appellant and one for the respondent. The appellant's report may address the question of whether the towbar complied with various EU instruments however, no case relating to the application of any EU Directive was pled. The appellant is a national car retailer which operates at least one dealership for Bentley. It has direct access to specialist technical knowledge from Bentley who manufactured the vehicle. It does not require the same degree of specification that might be required by someone outwith the industry: *MacDonald* v *Glasgow Western Hospitals* 1954 SC 453.

[14] The appellant sought to argue before this court that no reference could be made to the expert reports lodged by the parties on the basis that these were not incorporated into the pleadings. However, both parties made extensive reference to these reports at debate. The sheriff made reference to these reports in her note. In any event, the sheriff and this court are entitled to look at the expert reports to establish whether a lack of fair notice in the pleadings is likely to cause material prejudice. Neither *Eddie Cairns* nor *Gordon* prohibit such an approach.

[15] In relation to the second ground of appeal, the respondent has provided adequate specification for what is a straightforward claim for loss of amenity and use. The claim is one of non-pecuniary loss which, much like a claim for solatium is a mixed question of fact and law. The loss of use was clearly the inability to tow a caravan and having a car with

defective paintwork. The respondent has averred the date of purchase and has averred the nature and period of the loss of use of the vehicle. The appellant is wrong to categorise the respondent's claim as patrimonial in nature; the claim is for general damages and compensates the respondent for the lack of advantage and the inconvenience caused by not having a vehicle able to perform the full recreational functions she bargained for: *Beechwood Birmingham Ltd* v *Hoyer Group UK Ltd* [2011] QB 357. Damages of the nature of loss of use or amenity in a consumer contract are not capable of precise quantification: *Ruxley Electronics* v *Forsyth* [1996] AC 344.

[16] The appellant's submission in relation to sections 20(7), 20(19) and 24(8) ought not to be entertained by the court. No explanation has been provided as to why this argument was not raised in the sheriff court at debate. In any event, the statutory remedies provided by the 2015 Act are not substitutionary to the respondent's pre-existing common law rights. Nothing in section 20(19) suggests that it restricts the circumstances in which damages can be claimed. The appellant's submission is premised on the proposition that any loss of use would be compensated by taking into account any deduction for use such that there cannot be a claim for damages. That is simply incorrect.

[17] Finally, in relation to the third ground of appeal, the respondent's first plea in law sets out that there has been a breach of contract. Her second plea in law is that the sum sued for is a reasonable estimate of her losses. This provides fair notice in what is a straightforward claim.

[18] Counsel for the respondent explained that a prevailing practice had developed for various technical and nuanced pleading points to be taken by defenders in motor vehicle rejection claims which are not designed to clarify the matters in dispute but instead have the effect of delaying resolution.

Decision

Ground of appeal 1

[19] At the diet of debate, the appellant had sought to persuade the sheriff that the respondent's averments were so lacking in specification that they were irrelevant. At paragraphs 66 to 72 of her note, the sheriff sets out in fairly brief terms, her decision in relation to what she described as the appellant's "third attack on the relevancy of the [respondent's] averments". The sheriff correctly identified the well-known test for relevancy set out by Lord Normand in *Jamieson* v *Jamieson* 1952 SC (HL) 44 at 50. She correctly noted by reference to Macphail (3rd edition) at paragraph 9.29, that when deciding whether a defender has been given fair notice of the pursuer's case, the court will consider matters broadly and will only regard a complaint of lack of fair notice as justifiable if it is likely to result in material prejudice to the defender.

[20] She concluded that the appellant had received fair notice of the respondent claim, namely that the respondent offered to prove that the towbar attached to the car, at a height of 500mm, was too high to tow a caravan.

[21] The appellant submitted that the sheriff had erred in her construction of the following averments in Article 5: "*It is not, specifically, any car supplied to tow a caravan must be fitted with a towbar with a height in operation of no higher than 420mm. The towbar fitted to the car has a height in operation of 500mm and as such the car is not fit for the contracted purpose of towing a caravan.*" I do not accept the appellant's argument that these two averments must be treated as being inextricably linked. The respondent's pleadings are undoubtedly inelegantly, perhaps even clumsily, expressed. The first averment is general in nature; the second is specific to what are said to be the facts of this case. On a broad reading, the material fact which the respondent offers to prove is tolerably clear, and correctly identified

by the sheriff, namely that the towbar fitted to the vehicle has a height in operation of 500mm rendering it unfit for the purpose of towing a caravan. The second averment is sufficiently specific to merit enquiry at proof before answer.

[22] I am not persuaded that the absence of any averments explaining why a vehicle with a height in operation of 500mm is not fit for the purpose of towing a caravan constitutes a fundamental lack of specification. A plea of lack of specification finds its proper application in cases where a defender does not know the case to be made against it and objects to being taken by surprise at the proof: *MacDonald* v *Glasgow Western Hospitals,* 1954 S.C. 453, per Lord Cooper at p465.

[23] As explained by Lord Brodie, delivering the opinion of the court in *Richards* v *Pharmacia Ltd* [2018] CSIH 31, at para [47]:

> "When what is in issue is specification, as is self evident, what is required will depend on the nature of the case but regard must also be had to the identity of whom the pleadings are primarily addressed: the other party; and what the other party is already aware of and what the other party may be taken readily to understand."

[24] The present case is a straight-forward, simple consumer claim, made complicated by the manner of pleading. The appellant can be taken to readily understand that which it has chosen to investigate, that upon which it has sought the opinion of an expert and that which it has chosen to aver in its answers. Viewed from that perspective, it cannot legitimately be said that the respondent has failed to aver her case with sufficient clarity and precision to allow the appellant to understand the case made against it.

[25] The respondent has lodged as a production a report of an engineer, Mr Percy (production 5/2). In his report, Mr Percy refers to EC Directive 94/20/EC which is said to impose a requirement that the towball height of a towing vehicle should be between 350mm and 420mm when in operation. Mr Percy also considers general safety concerns

independent of whether the vehicle is subject to the requirements imposed by EU legislation. At page 5 of his report he considers the effect upon braking and stability of the towing vehicle and the caravan, if the caravan is "nose high"; he sets out his opinion in relation to the "forces acting as the caravan 'pushes' into the rear of the braking vehicle"; at page 9, he refers to the height of the tow bar putting the "the caravan at an incline leading to a limited clearance at the rear" and to the position of the caravan while attached having an "adverse effect upon the vehicle's ability to brake properly". He concludes at page 9 that "in my opinion when the car and caravan are attached it's unsafe and likely to cause damage to the caravan and in the event of an incident cause a hazard to other road users."

[26] In response, the appellant has lodged three expert reports by Mr Reid, also an engineer (productions 6/29, 6/30 and 6/32). Mr Reid explains that in his opinion, the height requirement specified in EC Directive 90/24/EC does not apply to off-road vehicles. He was also asked by the appellant specifically to consider whether "the vehicle is not fit for purpose as it cannot safely tow a caravan due to the towbar operating at a height above 420mm [at 500mm]". In the body of his first report, Mr Reid addresses what he describes as the "pursuer's complaint" that the towball is too high causing the caravan to sit dangerously low at the rear. He suggests at page 7 of his first report that spacers are commonly used to raise the height of a caravan to ensure" that a caravan is towed in a level/horizontal position". In his second report, he states at page 14 that "a standard A frame spacer could easily be fitted" and that "the [respondent] can make simple, inexpensive arrangements to raise the height if her caravan which would allow it to be towed sufficiently level and safely by the vehicle". A video has been lodged purporting to demonstrate how this can be achieved (production 6/33).

[27] Having regard to these reports, the appellant in its answers has explained at length why the requirements of EC Directive 90/24/EC do not apply to off-road vehicles. That matter does not appear to be in dispute. The appellant however goes further. In Answers 5(v), the appellant avers "a reasonable person would make arrangements for the height of a caravan to be raised, if required, to operate with a towbar with an operational coupling height in excess of 420mm to ensure a downward load on the towball of the towbar in accordance with section 98 of the Highway Code." In Answers 5(xiii) the appellant makes reference to the respondent's complaint that "her caravan was sitting too high at the front end causing the rear end to be too low to the ground".

[28] It is clear from the appellant's pleadings and the reports lodged on its behalf that it had an awareness of, and readily understood the case it required to answer.

[29] During the diet of debate, notwithstanding a failure on the part of either party to refer to or incorporate their expert reports into their respective pleadings, the reports were referred to at length. Upon examining the expert reports, the sheriff concluded that the appellant was not materially prejudiced by a lack of fair notice of the case pled against it. She was correct to do so.

[30] During the appeal, the appellant sought to advance an argument which was not foreshadowed in the note of appeal. It was submitted that the sheriff had not been entitled to have regard to the expert reports. No explanation was tendered as to why this ground of appeal was only advanced at the appeal hearing and no motion was made to amend the grounds of appeal. That being the case, on one view, this further ground of appeal is not properly before the court and does not require to be considered further. However, as I was addressed by counsel for both parties on the issues arising, I will deal with the argument briefly.

[31] The appellant relied upon the opinions of the court in *Gordon v Davidson* (1864) 2 M 758 and *Eadie Cairns* v *Programmed Maintenance Painting* 1987 SLT 777. It was submitted that as the expert report for the respondent had not been referred to nor incorporated into the pleadings, it could not be referred to at debate.

[32] It was clear from the submissions made at the debate and from the sheriff's note that both parties had in fact made extensive references to the expert reports, without objection. It was thus rather surprising to find the sheriff's reference to the expert reports challenged upon appeal.

[33] In any event, in my judgement, this criticism of the sheriff's approach is misconceived. *Eddie Cairns* was concerned with whether the court could have regard at a diet of debate, to the terms of expert reports which had not been incorporated into the pursuer's pleadings, and were not the subject of agreement, for the purposes of testing the relevancy of pursuer's pleadings. In the present case, both parties had lodged expert reports and made reference to these without objection, at the diet of debate. In her note, the sheriff has referred to the appellant's expert reports, not for the purposes of testing the relevancy of the respondent's pleadings, nor for seeking clarity or a greater degree of specification of the respondent's case as pled on record. She has examined the terms of the respondent's expert reports to assess the question of whether the appellant's assertion of material prejudice was well founded. She was entitled to do so.

[34] Ground of appeal one is accordingly refused.

Ground of appeal 2

[35] In terms of her third crave, the respondent seeks payment of £3,000 together with judicial interest. The averment which supports that crave is found in Article 10 of condescendence, which is in the following terms:

> "The pursuer has suffered loss of use and enjoyment of her car since taking delivery and the sum sued for in [crave 3] is a reasonable estimate of those losses."

[36] At debate, the appellant had argued that this averment was so lacking in material specification that it was irrelevant; the respondent had failed to give fair notice of the amount claimed and the basis of quantification. It would appear that the sheriff had failed to address this attack on the respondent's averments. While this is regrettable, in light of the plethora of pleadings points the sheriff had been asked to determine, the oversight is understandable.

[37] The appellant sought to rely upon the decision of the sheriff court in *Hewer v Brown* 1990 SCLR 548. In that case, the pursuer sought damages related to the loss of use of a high value vehicle. The pursuer had been required to drive a replacement car. The sheriff found the pursuer's averments to be irrelevant as "no specification had been given either as to what the pursuer was seeking to be recompensed for or how said loss so far as it exists can be measured."

[38] As explained above, the degree of specification required will differ according to the circumstances of each case. Unlike the position in *Hewer,* what the appellant seeks recompense for is clear. The period of loss of use is readily ascertainable from the pleadings. The loss of use is clearly related to the inability to tow a caravan, and to the purchase of a high value vehicle which purportedly had a misaligned door and defective paintwork. Quantification of the loss may not be capable of being precisely averred; claims for damages

arising from the loss of use of amenity in consumer contracts are often stated in general terms. The courts are well accustomed in such cases to putting figures to intangibles in such low value straightforward claims. Counsel for the respondent submitted that what level of damages might be awarded was a mixed issue of fact and law. I agree. The degree of specification provided by the respondent is sufficient to merit enquiry and provide adequate notice to the appellant. The present claim for loss of use and amenity falls into the category of cases described by Lord Mustill in *Ruxley Electronics* v *Forsyth* [1996] AC 344 at page 360; the inability to quantify and precisely measure such claims should not be barrier, if that is what fairness demands.

[39] The appellant also sought to attack the relevancy of the respondent's pleadings by reference to section 20(19) of the Consumer Rights Act 2015. It was submitted that if the respondent had validly rejected the vehicle, she is entitled to a refund subject to a deduction for use, in terms of sections 20(7) and 24(8) of the Act. Her claim for damages does not fall within any of the circumstances envisaged by section 20(19) and as such, the third crave is irrelevant.

[40] This argument was not raised before the sheriff. It was not foreshadowed in the note of appeal. No explanation was provided as to why. In those circumstances, I am not persuaded to exercise my discretion to allow it to be considered on appeal. Had I been so persuaded, I would have had little difficulty in rejecting the appellant's argument. Section 20(19) does not restrict the circumstances in which damages can be claimed. The statutory remedies provided for by the 2015 Act are expressly supplementary to pre-existing rights at common law.

[41] Ground of appeal 2 is refused.

Ground of appeal 3

[42] This ground of appeal is refused. The respondent's second plea in law is in the following terms:

> "The sums sued for are a reasonable estimate of the pursuer's loss, injury and damages and decree should be granted as craved."

[43] As a general rule, a plea in law should be a distinct legal proposition applicable to the facts averred. A plea in law requires to be read together with the facts averred. In the present case, while the plea in law could be better expressed, it cannot legitimately be said that it fails to give fair notice of the respondent's case in law. It is perfectly clear from reading the respondent's pleadings that the respondent's claim is a contractual one. There is no question of the court or the appellant being required to "look through [the] pursuer's averments and then start to search to find a possible case in law" (*A Kelly Ltd* v *Capital Bank Plc 2004 SLT 483* per Lord Carloway at page 484).

Conclusion

[44] Accordingly, for the reasons stated, I shall refuse the appeal, adhere to the sheriff's interlocutor of 17 August 2021 and remit the cause to the sheriff to proceed as accords.

[45] Both parties sought sanction for the employment of junior counsel. In the event that the appeal was refused, counsel for the appellant sought a hearing on the expenses. I shall arrange for the clerk to assign a hearing on the question of the expenses of the appeal, unless parties are able to agree matters.

Postscript

[46] Counsel for the respondent suggested that lengthy pleadings and technical pleading points were becoming a feature of consumer claims involving the rejection of motor vehicles. If that is the case, those representing parties in such actions should bear in mind the terms of paragraph 9.43 of Macphail (4th edition);

> "The need for clear, concise and focussed pleadings cannot be over-emphasised. Unsurprisingly, judicial exasperation is commonly expressed when the court is faced with poor pleadings. A regrettable practice of unnecessarily lengthy pleadings which obscure rather than clarify the issues has developed. Such practices are to be avoided. A clear understanding of the principal rules of pleading . . . will equip pleaders to better serve those instructing them, and also assist the court in performing its function."

[47] The respondent has purchased a vehicle which she claims is not fit for purpose. The towbar has a height in operation of 500mm. She claims that the vehicle cannot be used to tow a caravan, the height of the towbar being too high for that purpose. She claims that the vehicle was supplied with various other defects including a mis-aligned door and mis-matched paint shades (with which complaints this appeal is not concerned). She seeks to reject the vehicle and claims repayment of the purchase price and other losses. Her claim is a straightforward consumer claim, the likes of which are commonplace in the sheriff courts. Her claim is capable of being articulated and answered in a few brief paragraphs.

[48] Yet, the Record in this action extends to 31 pages. The pleadings are disorganised and simply bewildering. Simple matters, such as the use of a defined term for the vehicle appear to have been incapable of agreement: the respondent refers to the vehicle as "the car" while the appellant refers to the vehicle as "the Used MIG Vehicle".

[49] Article 2 of Condescendence contains the usual averments in relation to jurisdiction, which is admitted. Answer 2 however extends to four and a half pages. It consists of sub-paragraphs numbered 2.1-2.10 each with its own heading and containing 18 separate

paragraphs further enumerated by roman numerals. None of the averments in sub-paragraphs 2.1-2.10 relate to the issue of jurisdiction. The appellant's averments are met with a general denial. Had these averments been answered by the respondent, it is difficult to envisage how that might have been achieved without the pleadings becoming entirely unmanageable. This style of pleading is repeated in most of the Answers.

[50] It was submitted on behalf of the appellant that the Answers required to address what the appellant understood to be the basis upon which the respondent had rejected the vehicle, namely that it did not conform to certain EU Regulations. The terms of the relevant EU regulations had been discussed in correspondence between agents and had been addressed by the experts in their reports. That is not however the case pled by the respondent. At the diet of debate, the respondent confirmed that she did not advance a claim based on a breach of EU law (see paragraph 36 of the sheriff's note). That was a matter which was capable of discussion and ought to have been clarified between agents and counsel prior to the closing of the record and certainly prior to the diet of debate.

[51] This is a consumer action. It is capable of being articulated and answered in simple and brief terms. Parties should consider putting their pleadings in order by deleting unnecessary, superfluous averments prior to the proof before answer.