

SCOTLAND / JUDGMENT

NDT Eye Ltd v Servtech Ltd [2004]

ScotSC 64 (23 September 2004)

[2004] ScotSC 64

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[2004] ScotSC 64 [New search] [Help] SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN A1083/03 INTERLOCUTOR of SHERIFF DOUGLAS J CUSINE in the cause N D T Eye Limited Pursuers And SERVTECH LIMITED Defenders Act: McDonald Alt: Clark, Advocate ABERDEEN: 23 September, 2004. The sheriff, having resumed consideration of the cause, Repels the Pursuers' 3 rd , 4 th , 5 th and 6 th pleas-in-law; before further answer, Allows parties a proof of their respective averments; Finds the Pursuers liable to the Defenders in respect of the debate heard on 31 st August 2004; Refuses to sanction said debate as suitable for the employment of junior counsel; Allows the Defenders to give in an account of these expenses and remits the same, when lodged, to the Auditor of Court to tax and to report; Finds the Defenders liable to the Pursuers in the expenses of the previously-discharged debate and the amendment procedure following thereon; Allows the Pursuers to give in an account of these and remits the same, when lodged, to the Auditor of Court to tax and to report; Continues consideration of the cause to the Procedure Roll on 18 October 2004 at 11 am within the Sheriff Court House, Castle Street, Aberdeen. NOTE This action is one of three related actions, the others being AB Solutions (Scotland) Limited v Servtech Limited (A1082/03) and Dynamic Access Limited v Servtech Limited (A1081/03). Parties went to debate on the Further Note on Preliminary Pleas for the Pursuers (No. 18 of process), but it was agreed that the submissions in this case would be adopted in the other two actions.

Background

The Pursuers contracted with the Defenders to supply the services of their employee, a Mr Bentley, to go to Nigeria to carry out work on the Transocean unit, MC Hulme. The Defenders had agreed to do work for the owners of that unit. Two other companies, A B Solutions (Scotland) Limited and Dynamic Access Limited each provided an employee to work along with Mr Bentley. The Pursuers aver that when Bentley and the others arrived in Nigeria, they were asked to carry

out additional work on the unit and were advised that instead of the work lasting one week, it would last three. Because Bentley and the others had commitments in the UK after the week for which they had been contracted, they were not able to do the whole work required by the Defenders and accordingly they were told by the Defenders to return to the United Kingdom. The Pursuers seek payment from the Defenders for their expenses and for the time that Mr Bentley spent going to and coming from Nigeria. The Defenders have counterclaimed for the cost of a piece of their equipment-a loadcell-- and the loss of revenue from its hire. They aver that Mr Bentley and two others took the loadcell as "security" for payment. When this was discovered, the Defenders say that the three conspired to throw the loadcell overboard which was done. As a result of the destruction of that loadcell, the Defenders aver that they lost revenue from the hire thereof. The Defenders in Statement of Fact 2, aver that it was an implied term of the Pursuers' contract with the Defenders that the Pursuers and Mr Bentley would not intentionally destroy or dispose of the Defenders' property namely the loadcell, given to the Pursuers by the Defenders in connection with the contract. That is admitted by the Pursuers in Answer 2. The Defenders aver in Statement of Fact 3 that the Pursuers, through "Mr Murray," intentionally and unlawfully conspired with Mr Murray and Mr Hatch and their respective employers (the Pursuers in the other actions), to destroy or dispose of the Defenders' property, namely the loadcell. I assume that "Mr Murray" as first mentioned in Statement of Fact 3 that should in fact be Mr Bentley. Submissions for the Pursuers Mr McDonald, the solicitor for the Pursuers submitted that the Defenders' case based on either contract or delict could not competently be brought by way of a counterclaim. Breach of contract So far as the breach of the contract was concerned, his submission was that the Pursuers were not the only persons in breach of the implied term. The other two companies were also in breach. The Defenders in their pleadings do not attribute different losses to the several companies involved in respect of the disposal or destruction of the loadcell. It was submitted on behalf of the Pursuers that there could be only joint and several liability, and accordingly the other two companies ought to have been called. That therefore ruled out the possibility of the Defenders proceeding by way of a counterclaim. In support of this branch of the argument, Mr McDonald referred to Rule 19(1) of the Ordinary Cause Rules, McBryde on Contract , (nd ed .) para. 11.27 and Neilson v Wilson

(1890) 17R 608. The relevant part of Rule 19(1) states, "In any action other than a family action ... or an action of multiplepinding, a defender may counterclaim against a pursuer-(a) where the counterclaim might have been made in a separate action in which it would not have been necessary to call as defender any person other than the pursuer; and (b) in respect of any matter-(i) forming part, or arising out of the grounds, of the action by the pursuer; (ii) the decision of which is necessary for the determination of the question in controversy between the parties...." McBryde at para. 11.27 quotes from Walker on Delict (2 nd ed.) page 111). Walker says, "Where two or more persons have contributed, either equally or in varying proportions, to the commission of a delict, they are liable jointly and severally The injured person may in such a case sue all persons responsible in one action, or any one of them, holding that one liable for the whole damage done and may recover full damages from that one, or the damages from all in what proportion he

chooses." However, McBryde goes on to say, "The matter is not so simple in the law of contract because of the effect of the decision of a majority of seven judges in *Neilson v Wilson*. If the obligation is not constituted by writing or decree, all the obligants within the jurisdiction of the Scottish Courts must be called on the one action." Mr McDonald cited a passage from the opinion of Lord President Inglis in *Neilson v Wilson*. After citing a number of authorities, the Lord President said, "The rule established by this series of cases appears to me to be that when a plurality of persons are alleged to be bound, conjunctly and severally, no one of them can be sued separately for payment or performance of the whole debt or obligation till the debt or obligation has been constituted by writing or by decree." (p. 614) Mr McDonald's submission based on these authorities was that the alleged breach of contract involved joint and several liability on the part of the Pursuers in all three actions and accordingly a counterclaim was incompetent. Delict Mr McDonald accepted that in the case of joint wrongdoing in delict any one of the wrongdoers could be sued and that the others could be brought in by way of third party procedure. He went on to submit, however, that the Pursuers' claim was for payment arising out of a contract, whereas this part of the Defenders' counterclaim as set out in Statement of Fact 3, arose out of an alleged intentional delict and accordingly was outwith the terms of Rule 19(1)(b)(i). The Defenders could try to bring themselves within the terms of Rule 19(b)(ii), but the Pursuers' entitlement to payment was a different matter from any losses sustained by the Defenders as a result of an alleged delict. He therefore invited me to repel the Pursuers' 3rd plea-in-law and sustain their 4th plea-in-law in so far as that relates to the Defenders' 2nd and 3rd craves and sustain the Pursuers' 5th and 6th pleas. He invited me also to repel the Defenders' 5th plea-in-law and repel their 3rd, 4th, 6th and 7th pleas-in-law in respect of the sums sued for in the Defenders' 2nd and 3rd craves. Submissions for the Defenders. Mr Clark submitted that in Statement of Fact 2 in the counterclaim, the Defenders' position is clear namely that it was an implied term of the Pursuers' contract that they would not dispose of or destroy the property belonging to the Defenders which had been supplied to the Pursuers in connection with the contracts. The existence of such an implied term is accepted by the Pursuers. The fact therefore that Mr Bentley may have been acting along with others was irrelevant as is the issue of joint and several liability. Mr Clark referred also to paragraphs in McBryde on Contract, namely 11.27 to 11.29. At paragraph 11.29 McBryde expresses the view that the application of the decision in *Neilson v Wilson* "should be restricted as far as possible" and that "any inconvenience arising from having more than one action may be mitigated by third party procedure." At paragraph 11.29 he says, "In cases to which *Neilson v Wilson* does not apply (such as a debt constituted in writing) a person may sue one or several persons jointly and severally responsible. Following the principles established in the law of delict there is no reason why the creditor could not discharge part of his claim against some debtors and pursue his action for the balance against the others nor why he could not obtain decree against one, and when the decree is not satisfied raise a further action against the other debtors." In Mr Clark's submission, *Neilson v Wilson* does not apply because the Pursuers' obligation is not and is not stated to be joint and several. The Defenders are entitled to

counterclaim because their claim arises out of an implied term of the Pursuers' contract and they are also entitled to counterclaim against each Pursuer without calling the others, because the precise involvement of the three employees can only be established at any proof. He accepted that the Defenders could not recover more than the total loss from any one person or from all three should all three be involved. He went on to refer to Rule 19(1)(b)(ii) and accepted that the Defenders could sue any joint wrongdoer in delict. He referred to McBryde para. 11.27 and Macphail on Sheriff Court Practice (2 nd ed.) para. 4.38. He submitted that the Defenders' counterclaim in respect of the loss of their equipment arises out of the Pursuers' claim that the Defenders owe them money for expenses incurred in connection with the contract. Response by the Pursuers Mr McDonald submitted that Neilson v Wilson applied and is binding, that the position is set out by McBryde in paragraph 11.27 was clear, namely that there was joint and several liability and that appears from the Defenders' pleadings when they say that they believe and aver that there was a conspiracy among the three parties. He submitted that a proof before answer was inappropriate and that the matter should simply go to proof. Expenses Parties were agreed that the Defenders should be liable for the expenses of the previously-discharged debate and the amendment procedure following thereon. I was invited by Mr Clark to sanction this debate as suitable for the employment of junior counsel, but that was opposed by Mr McDonald. Mr Clark's submission was that although there were a relatively small number of authorities, the matter turned on the technicalities of Rule 19 and the complexities of joint and several liability. Mr McDonald's submission in response was that the matter could easily be dealt with by a solicitor of reasonable competence. Decision In my opinion, there is substance in the Defenders' submissions and I am therefore of the opinion that they can competently proceed by way of a counterclaim in respect of their averments based on an implied term of the contract and delict. In my opinion, the next appropriate step is a proof before answer, given that the Defenders' 1 st plea-in-law is still extant. Rule 19(1)(b)(i) and (ii) The first matter to be addressed is whether the counterclaim (a) forms part, or arises out of an action by the Pursuers, and (b) whether the decision is necessary for determining the matter between the parties. The Pursuers sue for expenses incurred in sending their employee to work for the Defenders in Nigeria and for the time that he spent there. They accept that it is an implied term of that contract that neither the Pursuers nor their employee would dispose of, or destroy, property supplied by the Defenders to the Pursuers for the performance of that contract. That being so, there is no doubt in my mind that the claim by the Defenders for losses sustained by them as a result such a disposal or destruction arises out of the claim by the Pursuers and that it is necessary to adjudicate upon the Defenders' claim in order to ascertain whether the Pursuers are resting owing to the Defenders or vice versa . Whether the Defenders base their counterclaim on a breach of an implied contractual term or on delict is in my opinion of no consequence. Accordingly, the Defenders' counterclaim comes within the terms of Rule 19(1)(b) and (i) and (ii), it being accepted that (b)(iii) has no application. Rule 19(1)(a) The more difficult issue is whether, in the counterclaim, it is necessary to call only the Pursuers. At this juncture, I would observe that if it is competent

to counterclaim by way of a delictual claim as I have decided, it would be odd to conclude that a counterclaim based on an implied term of the contract arising out of exactly the same facts was nevertheless incompetent and would therefore require a separate action to be raised. That might involve the sisting of one action pending the outcome of another, and could involve witnesses having to give evidence on two separate occasions. That said the decision in *Neilson v Wilson* is binding upon me. That was a case in which it was accepted that the parties were jointly and severally liable. All three had instructed a solicitor who was seeking to recover litigation expenses from them. In my opinion, this is not a case to which *Neilson* applies. The contractual case in the present action is not pleaded on the basis of joint and several liability, and unless it is clear as a matter of law that there is joint and several liability (and that was not argued), I can proceed for the purposes of this debate only on the pleadings as they stand. The pleadings in all three actions are identical in this point. In the counterclaims, the Defenders sue the respective employers of three named persons. They aver that each employer was in breach of the implied contractual term referred to above. The Pursuers do not have a plea of "all parties not called," nor have they sought, as they could, to have the other two companies brought in by the third party procedure. The Defenders in this action having chosen to base their pleadings on the activities of this Pursuer and their employee, it was not necessary, in my opinion, for them to call as the defender anyone other than the Pursuers in each action. It would not be open to the Defenders to argue that it was an implied term of the contract with the Pursuers in this action that employees of other Pursuers would not destroy or dispose of property belonging to the Defenders, or conspire with others so to do. The Pursuers in this action would have no control over these other employees, unless there was *pro hac vice* employment, and there is no averment to that effect. It follows therefore that the Defenders bring themselves within the terms of Rule 19(1)(a). Expenses It was agreed that the Defenders should bear the expenses of the previously discharged debate and the amendment procedure following thereon. It was agreed that expenses should follow success in this debate and accordingly, I have made an award of expenses in favour of the Defenders. Mr Clark submitted that the debate was suitable for the employment of junior counsel. He conceded that there were relatively few authorities but because the matter turned on the construction of Rule 19 and the issue of joint and several liability, the debate was suitable for the employment of counsel. I do not accept that proposition because the case was ably argued by Mr McDonald for the Pursuers. A reasonably competent solicitor could therefore have presented the debate on behalf of the Defenders.

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