

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

JUDGEMENT

of Sheriff N.A.Ross

in the cause

ONE STOP ROOFING SUPPLIES LIMITED

PURSUER

against

TIXWAY UK LIMITED

DEFENDER

Act: Clark Q.C

Alt: Morgan

Glasgow 9 February 2012: the Sheriff, having resumed consideration of the cause, finds in fact as follows:-

- 1 The pursuer trades as a supplier of roofing materials and has its registered office and place of business in Govan, Glasgow. The defender is a non-trading company and has its registered office at 65 Bath Street, Glasgow. The pursuer's directors are Robert Jenkins and Paul Martin. The sole director of the defender is Craig Whyte. Mr Whyte's father, Tom Whyte, also assists in the defender's business affairs. The pursuer operates an established practice of obtaining credit risk insurance for each customer. Each new customer requires to sign a credit application, and the pursuer then applies for credit risk insurance for that customer. The insurer then stipulates a credit limit appropriate to the customer's financial standing. The pursuer will then allow trade credit up to that credit limit. A new customer also requires to sign terms and conditions of contract.
- 2 Snowcast Limited was a roofing contractor which traded between 2006 and approximately early May 2008. It was founded by its director, Chris Keatings, and its operations manager, James Snowball. In about 2008 Snowcast Limited was awarded a potentially lucrative sub-contract by Connaught, who were contractors to Glasgow Housing Association. The contract was for roofing

works to various housing developments, and required a large amount of roofing supplies. Between January and April 2008 it purchased such supplies from the pursuer. Snowcast Limited ceased trading on about 30 April 2008. The business, and the said sub-contract, was immediately transferred to a new company, Snowcast UK Limited, in about late April 2008. The business continued without interruption, and Mr Keatings and Mr Snowball continued to act on behalf of the new company.

- 3 The pursuer commenced trading with Snowcast Limited on about 15 January 2008. In accordance with the pursuer's customary practice, Snowcast Limited signed the pursuer's terms and conditions of sale (production 5/6/9) and insurance application (5/6/8). A credit limit of up to £8,000 per month was obtained, and the pursuer made supplies on credit up to that limit. This level of credit was inadequate for the amount of supplies required to perform the said roofing sub-contract. In addition, Snowcast Limited delayed its payments to the pursuer.
- 4 Mr Keatings had discussions with Mr Jenkins in early 2008 about how to resolve the limitation in supply. Mr Jenkins has a long-standing acquaintance with the defender's director, Craig Whyte. Mr Whyte indicated to Mr Keatings that he was prepared to give some financial assistance to Snowcast Limited. Mr Whyte had a meeting with Connaught, to solicit increased orders from Connaught to Snowcast Limited.
- 5 In April 2008, Mr Keatings introduced Mr Whyte to Mr Jenkins. On about 29 April 2008, a meeting took place in the pursuer's offices in Govan, Glasgow. Present were Mr Jenkins, Mr Keatings, Mr Craig Whyte and Mr Snowball. Mr Martin and Mr Brown were in the premises but not in attendance. During the course of that meeting, the Snowcast Limited supply limit was discussed. As a solution, Mr Whyte agreed that the defender would become the customer of the pursuer in place of Snowcast Limited, and that the pursuer could accordingly rely on the defender's credit rating. Mr Keatings was not party to that discussion. The defender has material assets. At the meeting Mr Whyte signed the pursuer's terms and conditions (5/4/5 of process) and authorised a credit application for the defender, which Mr Keatings had previously filled

out (5/4/4). Mr Whyte stipulated that all invoices were to be sent to him at his home, Castle Grant, in Grantown-on-Spey. He instructed Mr Snowball that all orders were also to be copied to him there.

- 6 On 29 April 2008 the pursuer applied for a credit rating for the defender to their insurer, Euler Hermes, and obtained a rating of £75,000 the same day (production 5/6/10) by fax.
- 7 In reliance on that position, the pursuer immediately recommenced supply to "Snowcast", as the parties referred to the business. In fact, the supply was now requested by and made to Snowcast UK Limited, in place of Snowcast Limited, but the distinction was of no importance to any party. In effect, trading went on as before, but with the defender as the customer, albeit orders were placed by, and paid for, by Snowcast UK Limited, and were delivered to sites in Glasgow. In accordance with Mr Whyte's request, all invoices were addressed to the defender, and sent to Castle Grant. Accurate copies of the relevant invoices, and site delivery notices, are produced at 5/6/1 to 5/6/1748.
- 8 Trading continued until at least 1 May 2009. Mr Whyte's staff received and kept the relevant invoices, and Mr Whyte was aware of this throughout. Snowcast UK Limited made payment without seeing the invoices. Craig Whyte had unrestricted access to the bank account of Snowcast UK Limited, and was able to move funds into and out of the account. The defender paid various funds to that company by way of loan payments, and withdrew various payments. This was done at the discretion of Craig Whyte, according to the state of the company's finances. The nature of the defender's interest in Snowcast UK Limited is not clearly proved, and nor is the amount of money which passed between the defender and that company.
- 9 By at least November 2008 Snowcast UK Limited had significant cash flow deficit caused by the failure by the main contractor, Connaught, to make timeous payment. As a result, they started to make late payment to the pursuer. Mr Jenkins spoke to Craig Whyte and Tom Whyte at a meeting in London, and they both reassured him that the payments would be made. Separately, Paul Martin met Tom Whyte, and received similar assurances. As

a result, the pursuer did not call up the credit insurance. Eventually, in about early 2009, Mr Whyte agreed to ensure a regular payment by Snowcast UK Limited of £5,000 per month. One such payment was made, in February 2009, and no further payment was made. At no time did the defender or Mr Whyte deny that any debt was due by the defender to the pursuer.

- 10 In March 2009, Tom Whyte contacted Mr Jenkins to request that invoices no longer be sent to Castle Grant but instead to the defender's registered office at 65 Bath Street, Glasgow. Mr Jenkins duly complied, and the invoices reflect that change.
- 11 By early June 2010 payments by Snowcast UK Limited to the pursuer stopped entirely. The pursuer's directors asked for Craig Whyte's help in resolving the situation, and in particular the meeting of the defender's debt. The text of 16 July 2010 (5/6/12) and subsequent email correspondence (5/6/13) accurately reflect events, and represent requests for payment in accordance with the contract. Despite these repeated requests by the pursuer, no payment was subsequently made. The defender has since, wrongfully, denied liability to make payment.
- 12 The sums invoiced by, and paid to, the pursuer are accurately set out in production 5/3/3. The sums were paid from the account of Snowcast UK Limited. The principal sum of the invoices unpaid and outstanding for payment is £86,127.18. That sum is due and resting owing by the defender to the pursuer.

Finds in fact and law that:-

- 1 On 29 April 2008 Craig Whyte, on behalf of the defender, and Robert Jenkins, on behalf of the pursuer, entered a verbal agreement whereby the defender would assume liability for the payment of all supplies of roofing and ancillary materials by the pursuer to the defender's order, namely to Snowcast UK Limited.
- 2 The pursuer having supplied such goods to the value of £89,127.18 to the defender's order in terms of the said contract, and having demanded payment

therefor, and payment in each case being contractually due within 30 days of the date of supply, the said sum is due and resting owing and pursuer is contractually entitled to payment of the said sum from the defender.

Therefore: sustains the second and third pleas-in-law for the pursuer, repels the defender's pleas-in-law and grants decree for payment by the defender to the pursuer of the sum of £86,127.36, with interest at the rate of eight per cent a year from the date of citation of the present action until payment, being the sum first craved; fixes a case management conference on a date to be afterwards fixed for discussion of expenses, certification of counsel and any other relevant issue.

ABs.

Note:-

- 1 This is an action for payment for roofing materials supplied by the pursuer to Snowcast (UK) Limited. Snowcast Limited traded as a roofing contractor from 2006 until late April 2008, when its business and assets were transferred to Snowcast (UK) Limited. Although the defender's submissions sought to recognise a distinction between these two entities (discussed later), none of the parties at proof recognised any practical difference. For that reason I will refer to them both interchangeably as "Snowcast", except where otherwise indicated.
- 2 The pursuer seeks payment of unpaid sums from the defender, the claim being based on an alleged agreement that the defender would formally accept liability for payment of roofing materials supplied to Snowcast. The action called for proof before answer on 12 and 13 December 2011, and 19 January 2012. The pursuer was represented by Mr A. Clark, QC, and the defender by Ms C. Morgan, solicitor. The pleadings are the Initial Writ (adjusted to 6 April 2011) and defences (adjusted to 1 November 2011).

The pursuer's evidence

- 3 The pursuer led evidence from Robert Jenkins and Paul Martin, its directors, and from James Snowball, a founder and former employee of Snowcast.

- 4 Robert Jenkins is a director of the pursuer. His co-directors are Paul Martin and William Brown. The pursuer started trading on 4 January 1993 and trades in sheeting and cladding, roofing and tiling and bituminous membranes. It also supplies timber, felting, rainwater goods and other ancillary roofing items.
- 5 Mr Jenkins spoke to the pursuer's approach to trading with its customers. The pursuer operates an insurance policy, renewed each year through a broker, for insuring trading debts. Such an insurance policy is designed to protect the pursuer against bad debts. Exceptionally, the pursuer would trade with a business for whom no cover was available, but it would involve an assessment of who was involved, and an assessment of the commercial risks involved. For each customer, the pursuer would fill in a credit application form, and forward this to their insurer. The insurance company would decide a financial limit for the credit insurance they were prepared to provide to that customer.
- 6 The pursuer's standard terms for payment was 30 days, which meant that a debt incurred on the first day of a month would be payable on the last date of the subsequent month. The insurance would cover 30 days beyond that date.
- 7 Mr Jenkins spoke to meeting Chris Keatings, a director of the Snowcast, in early 2008. Snowcast had obtained a roofing sub-contract from "Connaught", a main contractor to Glasgow Housing Association ("GHA"), and approached the pursuer for supplies of roofing materials. The contract was to retile roofs for GHA. The pursuer applied for a credit limit for Snowcast from their insurer, and obtained an £8,000 limit for supplies on credit, per month. Production 5/6/8 is a copy of the credit application for Snowcast Limited, dated 15 January 2008. They then signed Snowcast up to the pursuer's terms and conditions of sale (production 5/6/9), which the pursuer signed on 17 January 2008 and returned. Trading then commenced.
- 8 Overall, Mr Jenkins thought that Snowcast was a bit slow in paying, and the credit limit of £8,000 was inadequate to cover the quantity of materials which Snowcast required. In April 2008 Mr Keatings contacted Mr Jenkins to discuss ways of procuring larger amounts of supplies. At one stage he suggested the pursuer take a shareholding in Snowcast, but this was declined.

9 At the end of April 2008 Mr Keatings introduced Craig Whyte to Mr Jenkins. Mr Whyte is a director of Tixway UK Limited, the defender. Mr Jenkins spoke to a meeting at the pursuer's offices in Govan. Mr Whyte was introduced by Mr Keatings as a successful entrepreneur with whom he had dealt in the past, and who would provide backing for Snowcast. They discussed the credit problem, and Mr Whyte understood immediately the problem, and that this was a chance to secure volume of supply. Mr Jenkins said that Mr Whyte offered the defender's credit limit for the pursuer's insurers to check. Mr Whyte agreed that the defender would be the debtor, in place of Snowcast. Mr Jenkins subsequently (the same day) applied for a credit limit of £60,000 to £70,000 which was approved (5/6/10), and Snowcast's was rescinded (5/6/11) on 8 May 2008.

10 Mr Jenkins was happy to increase supply to Snowcast to this limit, on the basis that the defender was now (at least formally) the customer. Mr Jenkins was not prepared to trade to anywhere near that limit on Snowcast's credit. Mr Jenkins spoke to productions 5/4/4 (the credit limit application dated 28 April 2008, plus credit search and company accounts), 5/6/10 (the acceptance by the insurer, Euler Hermes, of a £75,000 credit limit for the defender) and 5/4/5 (the pursuer's terms and conditions, signed by the defender). Mr Whyte signed the terms and conditions, as director of the defender, on 29 April 2008. Mr Jenkins then instructed the pursuer's accounts department to start invoicing Snowcast roofing supplies to the defender, at Castle Grant, their registered office. On 8 May 2008 the insurer reduced the permitted limit, for Snowcast Limited, to nil (5/6/11).

11 Mr Jenkins refuted any suggestion that the defender's acceptance of the terms and conditions related to a separate, personal supply to the defender of materials for Castle Grant. The materials were primarily mass-produced concrete roof tiles, suitable for council houses but not a listed castle. These tiles cost £6,000 to £7,000 for 1000 tiles, so £75,000 would buy a very large amount of concrete. It was not necessary to have a credit limit of that amount for Castle Grant, in his view.

12 Mr Jenkins was not aware of the distinction between Snowcast Limited and Tixway Limited. He never asked for any credit reference in relation to

- 13 Thereafter the pursuer increased supplies to Snowcast. Snowcast would phone and/or fax an order to the pursuer's office. Delivery would be made as requested to site in Glasgow, a delivery note signed, and, at Mr Whyte's request, an invoice sent to Castle Grant, addressed to the defender. No duplicates were sent to any other party.
- 14 Mr Jenkins had prepared a schedule of payment of these invoices (5/3/3) dating from April 2008 to May 2009, when supply ceased. This showed the invoices being duly paid for many months, having been sent to Castle Grant. The pursuer had never invoiced Snowcast. During this period relations were good, and Mr Jenkins met Mr Keatings socially from time to time.
- 15 Payments stopped in 2009, and invoices were left outstanding, as shown in the schedule 5/3/3. Mr Jenkins contacted Mr Keating, who said that there was a problem with being paid by the main contractor, Connaught. Mr Jenkins contacted Mr Whyte, and Tom Whyte, who is Craig Whyte's father and colleague. They reassured Mr Jenkins that they just needed time to sort out payments from Connaught, and that the pursuer had "*nothing to be concerned about*". The invoices were therefore left unpaid, in effect supplying significant financial support by the pursuer for the defender.
- 16 Eventually, Mr Jenkins pressed for payment, and a payment plan of £5,000 per month was agreed with Craig Whyte and Tom Whyte. One payment was made on 13 April 2010, before the arrangement broke down (- objection was taken to any further questions, and the line was not pursued).
- 17 Mr Jenkins arranged to meet Craig Whyte at his offices in London. He met both Craig Whyte and Tom Whyte. No further offer of payment was made, but both men assured him that they were good for the debt. Mr Jenkins had checked the defender's returns on the Companies Register, and viewed the defender as "cash positive", so he was given comfort by this assurance. Only later, after making further contact, and receiving further assurances, did Mr Jenkins start to lose patience, due to the size of debt. Craig Whyte at no time denied the defender was liable for the debt.

18 Mr Jenkins spoke to the pursuer's first and second inventories of productions, comprising many hundreds of invoices (estimated at 600 to 800) and delivery notes. These were not examined in detail in evidence, but there was no dispute that the invoices were properly rendered for materials supplied. He spoke to sample invoices, as addressed to the defender at Castle Grant. These were VAT invoices, but he did not know who reclaimed the VAT. He accepted that some delivery notes (not invoices) referred to Snowcast Limited, and some to Snowcast UK Limited, but was not aware of any distinction, and the same individuals were involved, principally Jim Snowball, Snowcast's operations manager. The invoices were, in any event, to be made out to the defender.

19 By invoice 5/2/1660 (dated 31 March 2009) the invoices were addressed to Bath Street, Glasgow, not Castle Grant. Mr Jenkins said that this was because Tom Whyte had requested that they be redirected, without giving any reason. Mr Jenkins complied, but did not query this.

20 He confirmed that the sum outstanding for roofing supplies was the sum brought out in the schedule 5/3/3, namely £86,127. The arithmetical working was shown. He did not claim this from his insurer, and it was now too late as the insurance policy had lapsed. He had not made a claim against the defender as he had, in discussion with Mr Whyte, chosen to support their customer, not to activate a claim.

21 In cross-examination, Mr Jenkins confirmed he had a good relationship with Mr Keatings, but not a close one. They discussed the delays in payment and the Connaught delays. They did not discuss any distinction between the two Snowcast companies. Mr Keatings was not the main man at Snowcast – rather Jim Snowball ran the operations part, and Tom Whyte was involved. The three of them influenced Snowcast's decisions.

22 He confirmed Snowcast Limited had been a good customer for three months between January and April 2008. Their orders had been within the £8,000 credit limit. Mr Keating introduced Mr Whyte when the credit problems commenced in April 2008. Mr Whyte offered a credit account with the defender, as he'd seen the business opportunity in the volume of work available for GHA. Mr Jenkins had

not previously heard of Craig Whyte or the defender. He agreed that Mr Keatings had suggested, prior to their meeting with Mr Whyte, that the invoices might be sent to the defender.

23 Mr Whyte signed the pursuer's terms and conditions at their meeting, which was on 29 April 2008. There was no mention then of renovation works at Castle Grant, and Mr Jenkins was not aware that he owned a castle.

24 The defender did not place orders. That was done by Snowcast. It was simply a continuation of the existing supply to Snowcast. Mr Jenkins did not "pick up" on the change of order from Snowcast Limited to Snowcast UK Limited. He thought it was the same company.

25 He was invited to compare payments from the bank statement of Snowcast UK Limited (6/1/1) to payments shown in the schedule (5/3/3), and accepted that many of the payments matched. Mr Jenkins was "content" to accept that in fact Snowcast had paid the invoices. He could not explain how Snowcast came to pay these invoices. He would not concern himself with this, while payments were being made.

26 He reiterated that the invoices had been sent to Castle Grant at Mr Whyte's request.

27 The defender's agent started to question whether deliveries had been made as invoiced for, but under objection withdrew the point. It is not part of the defence that these deliveries were not made, or that the sum sued for is not genuinely accrued for supplies sold.

28 In re-examination, Mr Jenkins accepted that 5/4/4 (credit account application) appeared to have been completed by Mr Keatings the day before the 29 April 2012 meeting, but had not been party to this. They'd discussed this the day before, but no decision had been made. That had only been done in discussion with Craig Whyte. Mr Whyte had signed the terms and conditions (5/4/5) as "director" of the defender on 29 April 2008. The company search showed he'd been appointed on 1 April 2008. Mr Whyte supported the plan as there was a large project, with opportunity for significant volume, and profits.