OUTER HOUSE, COURT OF SESSION

[2019] CSOH 94

CA75/19

OPINION OF LORD ERICHT

In the cause

DRUM INCOME PLUS LIMITED

Pursuer

against

LS BUCHANAN LIMITED

Defender

Pursuer: Thomson QC; Brodies LLP
Defender: Richardson QC; CMS Cameron McKenna, Nabarro and Olswang

26 November 2019

Introduction

[1] On the termination of a lease of office premises the landlord raised an action against the tenant for payment of the costs of the work of cleaning the premises and leaving the premises in such repair and condition as required by the lease. Neither the tenant nor the landlord had carried out the work. There was no averment that the landlord intended to do so.

[2] The case called before me for a debate on two issues:

(1) Whether on a proper construction of the lease the landlord was entitled to payment of a sum equal to the fair cost of the work regardless of whether the landlord had carried out, or intended to carry out, such work.

(2) Whether the landlord had waived the right to payment of such sum.

The lease structure

[3] The pursuer was the landlord and the defender the tenant of the Fifth and Sixth Floor of office premises at Monteith House, 11 George Square, Glasgow. There was a separate lease in respect of each floor. Each lease was dated 13 February and 4 March 2015. I refer to these leases as respectively the "Fifth Floor Lease" and the "Sixth Floor Lease" (together "the Leases"). Both Leases were substantively in the same terms, and so for simplicity I shall follow the example of parties in debate and focus in this opinion on the Fifth Floor Lease. However it should be understood that what I say about the Fifth Floor Lease applies equally to the Sixth Floor Lease.

[4] The defender in turn granted licences to occupy each of these floors to Abellio Scotrail Limited ("Abellio"). This was taken into account in the lease structure. Clause 5.22.1 specifically provided that the defender was entitled to grant a personal licence to a Nominated Company. Nominated Company was defined in clause 1.1 so as to mean members of the Scotrail or Abellio groups of companies or the holder of the Scotrail franchise, and therefore included Abellio.

[5] The original term of each of the Leases and licenses was extended by agreement from 18 January 2018 to 18 January 2019. Notices to quit in respect of each of the Leases and licences were served dated 4 October 2018. Accordingly, each Lease and licence was terminated on 18 January 2019.

[6] It would appear that Abellio adapted the premises to suit their requirements. I was referred to a schedule of dilapidations prepared by chartered surveyors on behalf of the pursuer. The schedule refers to numerous items (such as solid partition systems forming various offices) which would require to be removed to reinstate the premises to their original open plan layout. Each of the Leases made provision for the defender leaving the premises cleaned and in such repair and condition required by the Lease, which would require reinstatement to the original layout.

[7] Thus far the situation has been straightforward. The structure of landlord-tenant-licensee created by the Leases and licenses came to an end when the Leases and licenses came to an end on 18 January 2019. When the Leases came to an end on 18 January 2019 the subjects were to be returned in their original condition: for example the internal partitionings installed for the benefit of Abellio would require to be removed.

[8] However the complicating factor, which has given rise to the issues in this case, is that at the end of the Leases the landlord did not resume possession of the premises. Instead by a licence for each floor dated 18 January 2019 the pursuer entered into a fresh licence direct with Abellio. Accordingly, the structure of landlord-tenant-licensee was replaced with a structure of landlord-licensee. In effect, the pursuer has cut out the defender and entered into a direct relationship with Abellio. Abellio continue to use the premises. The premises having been adapted internally to suit the requirements of Abellio, Abellio continue to use the premises in the adapted form.

The terms of the Leases

[9] The relevant clauses of the Fifth Floor Lease are as follows.

"**3. Grant of Lease, Entry, Period, Initial Rent etc**

3.4 The Tenant shall also pay to the Landlord from time to time during the Period of this Lease:

3.4.1 within fourteen days of written demand the Service Charge Percentage of the premiums and all other normal costs which the Landlord properly incurs from time to time for keeping in force the Building Insurance;

3.4.2 within fourteen days of written demand therefor the Service Charge Percentage of the premiums for keeping in force the Loss of Rent Insurance; and

3.4.3 at the times specified in Part 4 of the Schedule the Service Charge as the same

shall be ascertained from time to time in terms of Part 4 of the Schedule.

…

4 Tenant's Obligations: Rent and other annual or recurring sums income

4.1 The Tenant HEREBY UNDERTAKES to the Landlord and binds and obliges itself throughout the Period of this Lease to pay the rent and all other sums payable to the Landlord pursuant to this Lease and that at the times and in the manner herein specified and in each case except as otherwise provided in this Lease clear of all deductions whatsoever and agrees that except as otherwise provided in this Lease or required to be made by law it shall have no right of set-off or retention for any reason against the Landlord in respect thereof.

4.2 Without prejudice to any other right remedy or power herein contained or otherwise available to the Landlord if any sum due in terms of this Lease (including without prejudice to the foregoing generality rent) shall not be paid on the due date by the Tenant and shall remain unpaid for fourteen days thereafter the Tenant undertakes to pay on demand to the Landlord interest on such sum at the Prescribed Rate from the date when the same became due as aforesaid until payment thereof including any period after any decree or judgement.

…

5 Tenant's Obligations: Maintenance and repair etc

The Tenant HEREBY UNDERTAKES to the Landlord: not in Lease

5.1 To repair and renew

At all times throughout the Period of this Lease at the Tenant's expense to keep the Premises in good and substantial condition and without prejudice to the foregoing generality well and substantially to uphold, repair, maintain, and where necessary for such repair and maintenance renew, rebuild, and reinstate the Premises and every part thereof regardless of the age or state of dilapidation of the Premises and irrespective of the cause or extent of the damage or other want of repair, and including any such as maybe rendered necessary by any latent or inherent defect in the Premises and in addition to carry out all necessary regular maintenance and cleansing in respect of the Premises; …

5.7 To keep the Premises clean and tidy

At all times during the Period of this Lease to keep the Premises in a clean and tidy condition, to clear away waste, and to clean at least once every month the inside of

the windows and window frames of the Premises and all the glass (if any) in the entrance doors thereto.

…

5.9 To comply with Landlord's notices

Subject.to the terms of Clauses 5.1, 5.4 and 5.6 to make good all wants of repair and decoration for which the Tenant is responsible in terms of this Lease and to comply with any other matters which the Tenant is liable to make good and to comply with, and as are specified in a notice in writing given to the Tenant by the Landlord or the Managing Agent, and that within such reasonable period as shall in the circumstances taking into account the wants of repair and decoration in question as .may be stated in such notice (the Landlord being bound to act reasonably); and if the Tenant fails to comply with any such notice, the Landlord shall be entitled at its option (without prejudice to any other right or remedy available to the Landlord pursuant to this Lease) to enter upon the Premises with workmen and to make good all wants of repair and decoration and to carry out any other works specified in such notice and the costs properly and reasonably incurred by the Landlord in pursuance thereof shall be repaid by the Tenant to the Landlord within fourteen days of written demand(and provided that the Tenant is giving along with such demand a statement of costs incurred for the same) together with all Managing Agents and Solicitors' charges and other expenses which may be properly and reasonably incurred by the Landlord in connection therewith together with interest thereon at the Prescribed Rate in each case from the date 7 days after written demand by the Landlord. PROVIDED ALWAYS that any such notices of alleged wants of repair and decoration must be served at least 1 week before the expiry of the Period of this Lease.

5.24 Costs of enforcing Tenant's obligations

To pay to the Landlord all reasonably and properly incurred fees, costs, charges, expenses and disbursements, incurred to the Managing Agent and where applicable any Solicitors, Counsel, Architects, Surveyors, Messengers at Arms or Sheriff Officers or any other persons properly engaged or employed by or on behalf of the Landlord, plus VAT except in so far as recoverable by the Landlord on all such fees and costs of an in connection with procuring the performance of the Tenant's obligations under this Lease and including without prejudice to the foregoing generality costs incurred in relation to the preparation and service of any schedule of dilapidations or other notice relating to wants of repair or requiring the Tenant to remedy any breach of any of the obligations of this Lease and that whether the same are served during or up to the date of expiry or sooner determination of the Period of this Lease;

5.25 Landlord's Costs

To pay within fourteen days of proper written demand to the Landlord all reasonably and properly incurred fees and outlays (a) incurred by the Landlord in connection with the negotiation, preparation and completion of any deed of assignation, transfer, mortgage, subtenancy or other deed of transmission permitted by the Landlord together with any stamp duty land tax payable in respect thereof and the costs of registration in the Books of Council and

Session and of obtaining three Extracts (two of which will be for the Landlord's purposes) and
(b) of the Landlord's Surveyor or the Managing Agent and the Landlord's Solicitors, all as maybe applicable in connection with any application for consent or approval (whether or not consent or approval is properly refused in accordance with this Lease or the application withdrawn and if consent or approval is given in connection with or incidental to the preparation of any licence or other document used to record such consent or approval)-
[…]
5.34 To remove
Immediately prior to the expiration or sooner determination of the Period of this Lease at the cost of the Tenant:-

(a) to renew and replace any of the Landlord's fixtures and fittings which shall be missing, broken, damaged or destroyed with others of a similar character, condition and quality;
(b) to remove every moulding, sign, writing or painting of the name or business of the Tenant from the Premises and from any other part of the Building and to remove any alterations or additions, other than those to which the Landlord has given its consent, and do not constitute Tenant's trade fixture and/or fittings and all Tenant's fixtures and fittings, furniture and effects from the Premises making good to the reasonable satisfaction of the Landlord all damage caused by such removal; and
(c) if so requested by the Landlord as a condition of the giving of its consent thereto and if and to the extent so required as notified to the Tenant within three months prior to the expiry of the Lease by the Landlord to remove and make good alterations or additions made to the Premises and to reinstate the Premises in such condition so as to comply with the obligations of the Tenant under the Lease.

5.35 At the expiration or sooner determination of the Period of this Lease without any warning away or process of removal to that effect to remove from and leave the Premises empty and cleaned and in such repair and condition as shall be in accordance with the obligations of the Tenant under this Lease together with all fixtures and fittings (excepting Tenant's fixtures and fittings) and improvements and additions in the Premises save such as the Tenant has been required to remove pursuant to Clause 5.34(c); Provided that if at such expiration or sooner determination the Premises shall not be empty and cleaned and in such repair then at its sole option the Landlord shall be entitled to require that either (a) the Tenant carries out at its cost the works necessary to put the Premises into such condition or (b) the Tenant pays to the Landlord such sum being equal to the fair cost of carrying out such work and if the Tenant shall pay to the Landlord the sum within fourteen days of demand the Landlord shall accept the same in full satisfaction of the Tenant's liability under this sub-clause *quoad* the work referred to in this proviso."

First Issue: obligation to pay regardless of whether works carried out

Submissions for the defender

[10] Counsel for the defender invited me to uphold his plea to the relevancy and dismiss the action.

[11] He submitted that the pursuer did not offer to prove that it had carried out or had any intention of carrying out the works, and it was reasonable to infer that it had no such intention. The construction of clause 5.35 was an exercise of contractual interpretation to be carried out in accordance with well recognised principles (@*SIPP Pension Trustees* v *Insight Travel Services* 2015 SC 243 at [17] and [36], *Grove Investments Limited* v *Cape Building Products Limited* [2014] CSIH 43 at [9] to [13], *Wood* v *Capita Insurance Services Limited* [2017] AC 1173 at [10] to [15]). Approaching clause 5.35 on this basis, the pursuer's entitlement to payment in terms of the proviso was limited to costs of works which had been or were going to be carried out by the pursuer. That was in accord with the structure of the clause. It recognised that payment was an alternative to leaving the premises in the proper condition, as opposed to being a free standing right to payment. Counsel contrasted clause 5.35 with clauses 3.4, 5.9 and 5.25 which provided for a right to payment. He drew attention to the reference to "the fair cost of carrying out such work" and submitted that the parties intended that pursuer's entitlement required to be evaluated against notions of fairness which would include whether the work has been or will be carried out. Under the defender's construction, the pursuer's entitlement was to compensation for a breach by the defender of its obligations, which was consistent with other clauses such as clause 5.24. Further, this construction recognised that, unlike the free standing rights to payment contained in the Lease, the pursuer's entitlement under the proviso to clause 5.35 made no provision for a notice or calculation of the sum paid, which was to be contrasted with the

pursuer's entitlements to payments of Service Charge (in terms of clause 3.4 and part 4 of the schedule) and Landlord's Costs (in terms of clause 5.25). Finally he submitted that to construe the pursuer's entitlement in terms of the proviso to clause 5.35 as being unrestricted by the actual losses incurred would result in potentially arbitrary and disproportionate recovery by the pursuer and would be contrary to commercial common sense (*Grove Investments Limited* at [17] to [23]). Esto the pursuer's construction was correct, the question of whether the work had been carried out was relevant to whether the cost was "fair".

Submissions for the pursuer

[12] Counsel for the pursuer submitted that on a proper construction of proviso (b) to clause 5.35, the defender was bound to pay (as a contractual debt) the "fair cost" of the works required to put the premises into the condition required by the Leases, whether or not such works have been, or are to be, carried out. That construction was produced by the application of both the established general principles of contractual construction (*Midlothian Council* v *Bracewell Stirling Architects* 2018 SCLR 606, 615; *Wood* v *Capita Insurance Services Ltd* [2017] 2 WLR 1095, paras [8]-[15]) and by directly relevant authority *(@SIPP Pension Trs* v *Insight Travel Services Ltd* 2016 SC 243, 254 257; *Tonsley (Strathclyde) Limited and another* v *Scottish Enterprise* [2016] CSOH 138, paras [20]-[25]. The wording of clause 5.35 was materially different from wording which resulted in a different outcome in *Grove Investments Ltd* v *Cape Building Products Ltd*. It followed from the foregoing that the defender's averments as to the construction of proviso (b) to clause 5.35 were irrelevant and should be excluded from probation. It also followed that the averments made by the defender (in support of its preferred construction of proviso (b)) to the effect that no works have been, or

will be, carried out by the pursuer, were likewise irrelevant and should be excluded from probation.

Discussion and decision

[13] The issue is whether on a proper construction of the lease the landlord was entitled to payment of a sum equal to the fair cost of the work regardless of whether the landlord had carried out, or intended to carry out, such work.

[14] That issue turns on the wording of the particular lease which the court is asked to consider in any given case. So, for example, in *Grove Investments* v *Cape Building Products Limited* an Extra Division found that on the wording of the particular lease the tenants were only obliged to make payment to the landlords of the loss actually suffered by them. On the other hand, an Extra Division in *@SIPP Pension Trustees* found that the wording of the particular lease in that case could readily be distinguished from that in *Grove Investments* (para [42]). In *@SIPP Pension Trustees* the Extra Division concluded that the wording clearly indicated that parties intended that if the subjects were not at termination in the condition they would have been in if the tenant had complied with its repairing obligations then the landlord was to be entitled payment of a sum equal to the cost of bringing them up to that standard (para [38]). In *Tonsley* the Lord Ordinary distinguished the wording of the lease from that in *Grove Investments* and followed *@SIPP Pension Trustees*.

[15] Guidance as to how to go about the interpretation of the wording of the Leases was given by the Extra Division in *@SIPP Pension Trustees* as follows:

> "17. The task for the Lord Ordinary when interpreting the lease was to have, as his ultimate aim, the determination of what the parties meant by the language used, doing so by ascertaining what a reasonable person with all the background knowledge available to the parties would have understood the parties to have meant: (*Rainy Sky SA v Kookmin Bank*, at para 14 per Lord Clarke of Stone - cum - Ebony;

and *Arnold v Britton* at para 15), where the task was distilled by Lord Neuberger of Abbotsbury as being that:

> 'The meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provision of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. '"

[16] In undertaking this task, it is helpful to compare the wording in the Leases with the wording considered in *@SIPP Pension Trustees*, *Grove Investments* and *Tonsley*.

[17] The relevant clause in the current case was as follows:

> "5.35 At the expiration or sooner determination of the Period of this Lease without any warning away or process of removal to that effect to remove from and leave the Premises empty and cleaned and in such repair and condition as shall be in accordance with the obligations of the Tenant under this Lease together with all fixtures and fittings (excepting Tenant's fixtures and fittings) and improvements and additions in the Premises save such as the Tenant has been required to remove pursuant to Clause 5.34(c); Provided that if at such expiration or sooner determination the Premises shall not be empty and cleaned and in such repair then at its sole option the Landlord shall be entitled to require that either (a) the Tenant carries out at its cost the works necessary to put the Premises into such condition or (b) the Tenant pays to the Landlord such sum being equal to the fair cost of carrying out such work and if the Tenant shall pay to the Landlord the sum within fourteen days of demand the Landlord shall accept the same in full satisfaction of the Tenant's liability under this sub-clause *quoad* the work referred to in this proviso"

[18] The relevant clause in *@SIPP Pension Trustees* was as follows:

> "(Seven) At the expiry or earlier termination of the foregoing Lease and subject to the Tenant carrying out, to the satisfaction of the Landlord, all restoration works called for by the Landlord in terms of Clause (Twelve) of this part of this Schedule quietly and without any warning away or other process of law notwithstanding any law or practice to the contrary to surrender to the Landlord the leased subjects together with all additions and improvements made thereto and all fixtures (other than trade or tenant's fixtures affixed by the Tenant or any sub- tenant which shall be removed by the Tenant) in or upon the leased subjects or which during the foregoing lease may have been affixed or fastened to or upon the same that in such state and condition as shall in all respects be consistent with a full and due performance by the Tenant of the obligations herein contained. Without prejudice to the foregoing generality at his own cost and expense to repair and make good to the satisfaction of the Landlord all damage including damage to paint work caused by the removal of trade or tenant's fixtures affixed to the leased subjects by the tenant or any sub-tenant; Provided

> Always that if the Landlord shall so desire at the expiry or sooner termination of the foregoing Lease they may call upon the Tenant, by notice in writing (in which event the Tenant shall be bound), to pay to the Landlord at the determination date (with interest thereon as provided in Clause One (b) hereof), a sum equal to the amount required to put the leased subjects into good and substantial repair and in good decorative condition in accordance with the obligations and conditions on the part of the Tenant herein contained in lieu of requiring the Tenant himself to carry out the work."

[19] The relevant clause in *Tonsley*, which the Lord Ordinary found to be very similar to *@SIPP Pension Trustees*, was as follows:

> "3.38.2 At the expiration or sooner determination of the Period of this Lease without any warning away or process of removal to that effect to remove from and leave void and redd the Premises in such good and substantial repair and condition as shall be in accordance with the obligations on the part of the Tenant contained in These Presents together with all fixtures and fittings (excepting Tenant's fixtures and fittings) and improvements and additions which now are or may at any time hereafter be in or about the Premises save such as the Tenant has been required to remove pursuant to Clause 3.38.1.3; Provided always that (a) if at such expiration or sooner determination the Premises shall not be in such good and substantial repair and condition then at the option of the Landlord either (i) the Tenant shall carry out at its entire cost the works necessary to put the Premises into such repair and condition or (ii) the Tenant shall pay to the Landlord the sum certified by the Landlord as being equal to the cost of carrying out such work and if the Tenant shall pay to the Landlord the sum as certified together with any surveyor's fees incurred by the Landlord in connection with such Certificate within fourteen days of demand the Landlord shall accept the same in full satisfaction of the Tenant's liability under this sub-clause *quoad* the work referred to in this proviso and (b) if the Landlord elects to require the Tenant to carry out the works foresaid and the Tenant defaults in doing so the Landlord shall be entitled to carry out such works at the entire cost of the Tenant and whether such works are carried out by the Tenant or in default by the Tenant as aforesaid, by the Landlord there shall in addition be paid to the Landlord by the Tenant a sum equivalent to the rent which the Landlord would have received had These Presents subsisted until the date that all such necessary works had been completed to the satisfaction of the Landlord such sum to be paid on a date being seven days from the date of the Landlord informing the Tenant that all such works have been so completed."

[20] The relevant wording in *Grove Investments*, which was distinguished in both *@SIPP Pension Trustees* and *Tonsley*, was as follows:

> ""The tenants bind themselves to flit and remove from the premises at the expiry or sooner termination of this lease to repair any damage done by the removal of fittings belonging to them and to pay to the landlords the total value of the Schedule of

> Dilapidations prepared by the landlords in respect of the tenants' obligations under Articles Fifth and Sixth hereof declaring that the landlords shall be free to expend all moneys recovered as dilapidations as they think fit and the tenants may, with the prior written agreement of the landlords, elect to carry out the whole or any part of the said Schedule of Dilapidations but that provided such work is completed to the landlords' reasonable satisfaction".
>
> "... the tenants bind themselves to accept the premises... as in good and habitable condition and repair and to keep and maintain the same in like good and habitable condition and repair during the currency of this lease and to leave them in good and habitable condition and repair at the expiry or sooner termination thereof all to the sight and satisfaction of the landlords……'Declaring further that in the event of the tenants (sic) failing to execute promptly any repairs and renewals to the premises which the landlords shall reasonably consider necessary or failing to observe or to perform any of the other obligations hereinbefore described and referred to in this Article the landlords shall be entitled, but shall not be bound, to execute or have executed the same as the case may be and the tenants shall be bound on demand by the landlords to repay to the landlords the amount or amounts disbursed or expended by the landlords in consequence of the same.... Further declaring that on expiry or earlier termination of this lease the landlords may require the tenants to make a financial settlement with the landlords in lieu of their obligations under this Article which the landlords consider to be outstanding at the date of expiry or earlier termination'".

[21] It is immediately apparent that the wording in the current case is very similar to that in *@SSIP Pension Trustees* and *Tonsley*. For example, the court in these cases placed particular emphasis on "cost", in contrast to the ambiguous word "value" used in *Grove Investments (@SIPP Pension Trustees* at para [42], *Tonsley* at para [23]). The Leases in the current case also use the word "cost". It follows from the close similarity and the use of the word "cost" that I should come to the same result as *@SSIP Pension Trustees* and *Tonsley* unless there is good reason to distinguish them.

[22] In seeking to distinguish *@SSIP Pension Trustees* and *Tonsley*, counsel for the defender placed reliance on the word "fair". The Leases require the tenant to pay "such sum being equal to the fair cost of carrying out such work". By contrast, the wording in the *@SIPP Pension Trustees* lease required the tenant to pay "a sum equal to the amount required to put the leased subjects into good and substantial repair and in good decorative condition in

accordance with the obligations and conditions on the part of the Tenant." The wording in the *Tonsley* lease required the tenant to pay "the sum certified by the Landlord as being equal to the cost of carrying out such work". In my opinion the use of the word "fair" is not a valid ground of distinction. The word "fair" does not import into the clause any general meaning or ambiguity. It is merely an adjective qualifying the word cost in the phrase "cost of carrying out such work". Its purpose is merely to ensure that the costs claimed are fair, thus protecting the tenant from a landlord who claims extravagant or inflated costs. It goes no further than that, and certainly does not open up the prior question of the fairness of whether the tenant should be paying for the work in the first place.

[23] Counsel for the defender also invited me to assess clause 35 in the light of various other provisions of the lease. He drew my attention to provisions for payment of service charge (clause 3.4 and schedule 4), repairs (5.9) and Landlord's Costs (5.25). I did not find these clauses of assistance in the task of construing clause 5.35. In modern practice a commercial lease deals with a variety of ancillary matters beyond the essential elements of subjects, rent and duration. There is no need for all questions in relation to ancillary matters to be dealt with in the same way. Parties are entitled to provide different mechanisms for different matters. In my opinion in this particular case the other clauses to which counsel referred deal with other ancillary matters and are of no assistance in construing clause 5.35.

[24] Another factor to be taken into account in assessing the meaning of clause 5.35 is the facts and circumstances known or assumed by the parties at the time that the document was executed. The Leases were drafted on the basis of the tripartite landlord-tenant-licensee structure and made specific provision for that structure, allowing for occupation by the licensee rather than the tenant. The parties must have known at that time that any fitting out of the premises would be to suit the requirements of Abellio as occupier rather than the

defender. I do not accept the submission by counsel for the defender that the construction contended for by the pursuer would result in potentially arbitrary and disproportionate recovery by the pursuer and would be contrary to commercial common sense. In my opinion it is not arbitrary or against common sense to provide that the tenant (who is the only person in a legal relationship with the landlord) is liable for the reinstatement costs at the point at which the tenant leaves the tripartite structure, even if there is no change of occupier and no actual reinstatement at that stage. By contrast, the defender's construction would have the following result. The pursuer would require to remove Abellio's alterations in order to recover the cost of that from the defender, then immediately put back Abellio's alterations in order that the premises continued to be suitable for occupation by Abellio. Such wasted expenditure could not be said to make commercial common sense. In any event, as in *@SIPP Pension Trustees* (see para [44]), there being no room for the defender's alternative construction, questions of which of two possible constructions best accords with commercial common sense do not arise in the current case.

[25] Accordingly on the wording of the particular Leases in this case, the pursuer is entitled to payment of a sum equal to the fair cost of the work although the pursuer has not carried out nor intended to carry out the work.

[26] I now turn to the defender's *esto* argument. The argument was that even on the pursuer's construction the defender was not liable as the cost of works which had not been undertaken were not a "fair" cost for the purposes of clause 5.35: the question of whether the works had been carried out was relevant to the question of fairness. In my opinion, this is not a separate argument but essentially the same point about fairness made in the defender's primary submission but expressed in a different way, and it falls with the primary submission. The full phrase in clause 5.35 is "fair cost of carrying out such work".

"Such work" is a reference back to "the works necessary to put the Premises into such condition". There is no requirement that the works be done, merely that they are "necessary" to put the premises into the appropriate condition. The word "fair" does not import a requirement that the works be done: it merely ensures that the cost of the necessary work is not extravagant or inflated.

[27] For the reasons set out above, I shall exclude from probation the following averments in Answer 7:

> "As a result of the agreement between the pursuer and Abellio, no cleaning or any other works have been carried out to the Property by the pursuer, the defender or any other party. As a result of the agreement between the pursuer and Abellio, no such works are going to be carried out. Properly construed, clause 5.35(b) of the Leases only entitles the pursuer to payment by the defender of a sum in respect of works which have been or are going to be carried out by the pursuer. Accordingly, the pursuer has no entitlement to the sums concluded for."

Second Issue: Waiver

Pleadings on waiver

[28] The defender's fifth plea in law was as follows:

> "The pursuer having waived its right to payment in terms of clause 5.35 of the Leases of the sums first and second concluded for, the defender should be assoilzied."

[29] In support of that plea in law, the defender averred:

> "*Separatim* in conducting negotiations with and, ultimately, by entering into agreements with Abellio in terms of which the pursuer has allowed Abellio to continue to occupy the Property without carrying out any cleaning or other works, the pursuer has waived its rights to the carrying out of works in terms of clauses 5.34 and 5.35(a) of the Leases and to claiming payment *quoad* the works in terms of clause 5.35(b) of the Leases. As a result of being aware of the negotiations and, ultimately, the agreements between the pursuer and Abellio, the defender has conducted its affairs on the basis that the pursuer had waived its rights in terms of clauses 5.34 and 5.35 of the Leases. Following receipt of the schedules of dilapidations from the pursuer's agents, the defender instructed surveyors to review the schedules on its behalf. The defender also intimated the schedules to Abellio by email dated 4 January 2019. The defender sought to have the works identified in the schedules carried out by Abellio. Also, on or about 4 January 2019, Abellio advised the

> defender that it was in the process of negotiating a licence agreement with the pursuer in terms of which it would continue to occupy the Property. On 17 January 2019, Abellio confirmed to the defender that it had concluded such a licence agreement. Upon discovering that an agreement had been reached between the pursuer and Abellio, the defender instructed its surveyors to stop reviewing the schedules of dilapidations. Upon discovering that an agreement had been reached between the pursuer and Abellio, the defender stopped insisting that Abellio carry out the works identified in the schedules..." (Answer 7)

Submissions for the pursuer

[30] Counsel for the pursuer submitted that a plea of waiver, based upon conduct, depended on proof of conduct from which it might be implied that the rightholder had abandoned the right for all time, so that the right was extinguished (Gloag and Henderson, *The Law of Scotland*, (14th Ed, 2017), paragraph 3.10) and implied waiver required inconsistent conduct. (Reid & Blackie, *Personal Bar*, (2006), paragraph 3-08). The defender's pleadings did not identify inconsistency. The plea of waiver failed *in limine* because it necessarily depended upon the defender's construction of the proviso being the correct one, namely, that payment could not be due unless the works had been, or were to be, carried out. If on a proper construction of the proviso payment was due whether or not the works were to be carried out there simply could not be any inconsistency and, without any inconsistency, there could not be waiver.

[31] Counsel further submitted that the terms of the licences were *res inter alios acta* in a question between the pursuer and the defender (*Haviland* v *Long* [1952] 2 QB 80; *Tonsley*) and could not support a plea of waiver.

[32] Counsel further submitted that the defender's averments concerning what it was told by Abellio, rather than the pursuer, were irrelevant and should be excluded from probation. Reid & Blackie, paragraph 3.34, 2.25/2.26).

[33] Counsel also submitted that the waiver plea could not be sustained as the defender did not offer to prove prejudicial reliance (Reid & Blackie, paragraphs 3.26/3.29).

Submissions for the defender

[34] Counsel for the defender invited me to allow a proof before answer in relation to waiver. He submitted that the inconsistency on the part of the landlord was concluding the license with Abellio and yet still claiming payment. He referred to *City Inn* v *Shepherd Construction* 2010 SC127. The defender had been seeking to carry out the works until the day before the lease came to an end. Prejudice was not necessary to establish waiver, but if it was then it was a matter for proof as to whether works could have been done by then. The pursuer had abandoned its right by carrying out negotiations with Abellio.

Discussion and decision

[35] In *Evans* v *Argus Healthcare (Glenesk) Limited* 2001 SCLR 117 Lord Macfadyen set out the law of waiver in a series of propositions which were subsequently approved by the Inner House in *City Inn* v *Shepherd Construction* (at para [73]). Lord Macfadyen said at paragraph 11:

> "It is, in my view, sufficient for the purposes of the present case to take from those authorities the propositions that (1) that waiver is constituted by the giving up or abandonment of a right; (2) that such abandonment may be express or may be a matter of inference from the actings of the party in whom the right in question was vested; (3) that determination of whether abandonment is to be inferred requires objective consideration of the facts and circumstances of the case; and (4) that circumstances which are also consistent with retention of the right in question will not support an inference that the right has been abandoned. It appears also to be necessary, for the purpose of relevantly supporting a plea of waiver, to aver that the party taking the plea has conducted his affairs on the basis that the right has been abandoned, but the issues between the parties in the present case does not turn on that aspect of the matter."

[36] It is clear from the first of these propositions that in order to plead a relevant case of waiver the defender requires to plead that the pursuer gave up or abandoned a right.

[37] The effect of my decision on the first issue is that the pursuer has a right to claim payment for the works under clause 5.35(b) even although the pursuer has not carried out nor intends to carry out the work. The defender pleads that the right to claim payment has been waived by the pursuer:

> "in conducting negotiations with, and ultimately entering into agreements with Abellio in terms of which the pursuer has allowed Abellio to continue to occupy the Property without carrying out any cleaning or other works, the pursuer has waived its rights to claiming payment *quoad* the works in terms of clause 5.35(b) of the Leases."

[38] It is possible for a landlord to waive such a right. For example, the landlord might write to the tenant to say that although he was entitled to payment despite the works not being done, he was not insisting on his legal rights and had taken a commercial view that payment should not be made. If that happened, there would be an inconsistency which might be founded upon in relation to waiver if the landlord later sought payment. Whether in any particular case a landlord has waived the right to payment will always be a matter of fact and circumstance. Here there is no express waiver, so the defender's case depends on inferences from the actings of the pursuer. The actings of the pursuer upon which the defenders rely on record for such inferences are that the pursuer has allowed Abellio to continue to occupy the Property without the works being carried out. The difficulty with the defender's position is that these actings are not inconsistent with the right. Allowing Abellio to occupy when the works have not been carried out is entirely consistent with a contractual right to payment when the works have not been carried out. The actings founded on by the defender, being consistent with the retention of the right, cannot support

an inference that the right has been abandoned. It follows that the defender has not pled a relevant case of waiver.

[39] In his oral submissions, counsel for the defender referred to a notice served by the pursuer on the defender on 15 November 2018 enclosing a schedule of dilapidations and requiring the defender to do the works before the termination of the Leases. He pointed out that the pursuer had then entered into negotiations with Abellio which lasted until 17 January. The Leases came to an end on 18 January, so the defender had only one day to do the works. However, in my opinion, there is no inconsistency here either. The pursuer has a contractual right to request the defender to carry out the work prior to the termination of the Lease, and if the defender fails to do so, to be paid the fair cost of the work whether or not the work is thereafter carried out by the pursuer. Asking the defender to do the work, then seeking payment when the defender does not, is entirely consistent with that right.

Order

[40] I shall repel the defender's fourth and fifth pleas in law. I shall exclude from probation the defender's averments on construction of clause 5.35(b) in Answer 7 set out in para 27 above. I shall exclude from probation the defender's averments on waiver in Answer 7 set out in para 29 above. I shall put the case out by order for discussion of further procedure.