OUTER HOUSE, COURT OF SESSION

[2021] CSOH 49

CA74/20

OPINION OF LORD CLARK

In the cause

ROCKFORD TRILOGY LIMITED

Pursuer

against

NCR LIMITED

Defender

Pursuer: Thomson QC; BTO Solicitors LLP
Defender: Lake QC, Burness Paull LLP

7 May 2021

Introduction

[1] The pursuer, as landlord, and the defender, as tenant, were parties to a commercial lease. In this action, the pursuer contends that the lease did not terminate on the due date but was continued as a result of tacit relocation and, as a consequence, the defender is liable to make payment of rent, interest, insurance and service charges. The defender argues that there was no continuation of the lease by tacit relocation, with the result that no further payments under the previous lease are due. The case called before me for a proof before answer.

Background

[2] The premises which were subject to the lease between the pursuer and the defender are known as Trilogy 2, located at Trilogy Business Park, Eurocentral, Woodhead, Motherwell. The lease was entered into on 27 March 2003, for a duration of seventeen years. It was due to expire on 26 March 2020. The pursuer seeks declarator that neither party served or otherwise gave notice to the other, forty days prior to the contractual ish of 26 March 2020, or otherwise, and so the lease was extended by the operation of tacit relocation until 26 March 2021. In passing, I note that one of the productions suggests that the defender remained in possession after 26 March 2020, but it is important to emphasise that any continuation of possession was not relied upon for any purpose by either party.

[3] From around June 2019, the parties engaged in discussions regarding the defender's occupancy of the premises. Savills, the agents for the pursuer, by email dated 3 June 2019 to Jones Lang LaSalle ("JLL"), agents for the defender, referred to "our recent discussion" and "outlined the general Heads of Terms for your client to remain in part of Trilogy Two". On the same date, Heads of Terms for potential occupancy of a different building (Trilogy Three) were also sent. Other correspondence about alternative arrangements followed. On 5 December 2019, the pursuer served a schedule of dilapidations on the defender.

[4] By email to JLL dated 20 January 2020, Savills stated:

> "… I have spoken to my client and they have confirmed that they are prepared to construct a 12 month agreement that lets your client remain in the building for Nil rent. Your client would still be responsible for all the other charges resulting from their occupation.
>
> Please present this proposal to your clients and let me know if this is a route that works moving forward."

[5] JLL replied on 21 January 2020:

> "…Thank you for your email yesterday and the landlord's offer.
> As we discussed NCR are ready to commit to a relocation nearby and have advised that the only way they would consider remaining at the building is if the dilapidations are capped at £300k together with the nil rent proposed for 12 months. Do you think this is something the landlord might agree to in order to retain NCR as an occupier of Trilogy?"

[6] On 24 January 2020, Savills suggested to JLL that the defender might be interested in a different building, Trilogy 1. By email dated 27 January 2020, JLL indicated that the defender was looking to proceed with a different landlord and in other premises and stated "I'll let you know if that changes of course". By email dated 31 January 2020, JLL stated:

> "Sorry to be a total pain but NCR have now come back to me to say that they are now looking at a 2 year term rather than the 12 months, not sure if this will help your clients steer their decision, but thought I'd let you know. They are a bit tight with time now and have to make a decision soon."

[7] In a further email on 31 January 2020, JLL said:

> "I have just confirmed with NCR, it is the proposed split floor they would be interested in taking for the 2 years not the whole floor.
>
> I think they are just looking for best and final offer from the landlord."

[8] By email dated 3 February 2020, Savills said that the pursuer "is prepared to grant a 2 year licence over the whole ground floor of the property – for Nil rent" and added some further details.

[9] In an email of 4 February 2020, JLL stated:

> "NCR would like some formal Heads of Terms for the deal to stay.
>
> Will this be a new lease or an amendment of the current lease?
>
> Sounds quite positive, so hopefully we can work something out."

[10] In their response, by email on 6 February 2020, Savills said "I have outline [*sic*] the general Heads of Terms" and set these out in seventeen sub-paragraphs. At the bottom of the email, in bold, it stated:

> "NOTE: These terms are not intended to form part of a legally binding contract and the correspondence of which it is part is expressly subject to completion of formal legal missives in accordance with Scottish Law."

[11] On or around 26 February 2020, the pursuer's solicitor wrote to the defender stating *inter alia*:

> "Our clients have been in touch with us today to advise that they have not received notice from [the Defender] to bring the Lease to an end as at the contractual expiry date, and that as the minimum notice period for service of a termination notice (40 days prior to expiry) has now elapsed, they are treating the Lease as continuing for a further period of one year from 27 March 2020 on the same terms and conditions (including rent), by virtue of the Scottish common law doctrine of *tacit relocation*.
>
> The next quarterly payment date under the Lease is 28 February 2020, and they will therefore be invoicing rent for the full quarter."

[12] The defender's in-house solicitor replied on 28 February 2020, stating:

> "… We are somewhat surprised by the landlord's assertion that notice of NCR's intention to bring the lease to an end has not been provided. NCR, through its JLL broker, has had regular communications with the landlord's agent since October 2019. NCR provided notice through the course of discussions and negotiation of Heads of Terms for the letting of a smaller area of the premises after termination of the current lease. In fact, the final draft of those Heads of Terms was sent to JLL by Savills on 6th February and is under final review by NCR."

[13] In a response by email later the same day, the pursuer's solicitor reiterated that tacit relocation had operated to continue the lease from 27 March 2020 for one year, stating that the prior discussions about proposed alternative arrangements were irrelevant and that no response to the Heads of Terms had been received.

[14] In a telephone call to David Cobban of Savills on the afternoon of 28 February 2020, Elizabeth McGregor of JLL left a message in which she stated that the terms contained in the Heads of Terms were agreed. It is not clear whether that message was left after the email from the pursuer's solicitor referred to in the previous paragraph had been received, but nothing turns on that point.

[15] On 3 March 2020, in an email to Savills, Ms McGregor of JLL stated:

> "… My colleague Angela White is off sick today, however I understand that she has confirmed that NCR wish to stay in place and these HOT's were accepted and NCR were expecting to see a lease amendment or annex to sign. I also left you a voicemail on Friday asking the same…"

Evidence

[16] The pursuer lodged a witness statement and supplementary witness statement from David Cobban of Savills. The defender lodged a witness statement from Elisabeth McGregor of JLL. Parties agreed that the witnesses did not require to be called and that their statements should be taken as their evidence, subject to certain objections on the part of the pursuer to the evidence of Ms McGregor which were dealt with in the final submissions.

[17] In broad terms, the witness statement of Mr Cobban dealt with the discussions between the parties as to what was to happen after 26 March 2020. He explained that the discussions they had were about various alternatives to continuing the existing lease of the premises, but the defender's agents JLL never confirmed what they wanted to do until after they had been told by the pursuer's solicitor that tacit relocation had operated. NCR did not give notice to quit by 14 February 2020. The email from the pursuer's solicitor on 26 February 2020, confirming that tacit relocation had operated, and that the pursuer was insisting upon payment of the rent which was by then due, seemed to have prompted a panic on the part of the defender. The voicemail from Ms McGregor on Friday 28 February 2020 was not very clear but the general tenor of it was that the defender wished to enter into the arrangement set out in the Heads of Terms issued on 7 February. In her email on 3 March 2020, Ms McGregor said that she understood that Angela White of JLL had previously confirmed that the defender wished to enter into the arrangement set out in the

Heads of Terms but Ms White had never confirmed any such thing to Mr Cobban. The draft Heads of Terms all made clear that there were important matters which would still require to be negotiated before there could be an agreement. The matters which would have required negotiation included dealing with the defender's liability for dilapidations and the consequences if the area of the building was to be split. While the discussions between the parties were about alternatives to the continuation of the existing lease, it was never stated that the defender would be leaving on 26 March 2020. In his supplementary witness statement, Mr Cobban commented on Ms McGregor's point that she had, in the voicemail, asked him to send through the paperwork the defender needed to sign. He could not recall the full detail of the message, but sending paperwork was not his role and would have been dealt with by the pursuer's solicitors.

[18] In her witness statement, Ms McGregor said that the defender began looking at its needs and requirements for office space in Eurocentral in 2018. There were discussions with the pursuer's agents in 2017, when it was acknowledged that the defender would not require the existing square footage in its entirety. Some eighteen months prior to the lease end date, the defender was sure that if the lease was to be renewed the space required would be drastically smaller. It was made clear to the pursuer that the defender did not want to renew the old lease on the same terms as there was no ongoing requirement for an area of 50,000 square feet for only 20 employees. So, discussions with the agents for the pursuer were around needing a much reduced demise in the current facility or a much reduced rent to compensate for not needing the full space. The defender had also looked at approximately eight or nine other potential properties in the area sourced by the brokerage team. The only offer from the pursuer that made financial sense was the nil rent one in early February 2020. She received confirmation on the afternoon of 28 February 2020 that the

defender's Capital Approval Committee had approved the new lease terms. She phoned Mr Cobban and left the voicemail in which she stated that the Heads of Terms had been approved and that the defender would be moving forward with the new lease terms. She asked that he send the paperwork that the defender needed to sign. He subsequently confirmed to her that he received the message.

Submissions

Submissions for the pursuer

[19] There was an objection to the admissibility of parts of Ms McGregor's evidence. There was simply no record for any attempt to adduce parole evidence from the surveyor witnesses as to any matters beyond the written correspondence itself. That correspondence, moreover, was the subject of agreement between the parties and did not require to be spoken to by the witnesses. The defender's position rested upon "correspondence" between the parties and an "agreement" between the parties, said to have been constituted by the acceptance in a "telephone call" (now understood to be a voicemail message) of the Heads of Terms. The court, in the minute of proceedings for the procedural hearing, had noted that if any parole evidence was required it would relate to the voicemail message from Ms McGregor to Mr Cobban on 28 February 2020, referred to in the pleadings. Further, as the correspondence spoke for itself, it was not open to the witnesses to place their own gloss on it. Nevertheless, Ms McGregor's witness statement trespassed into inadmissible matters. In particular, the witness did not identify how or by what means the position she mentions was "made clear to the landlord".

[20] Parties' agents began corresponding with each other from around June 2019 onwards. An examination of that correspondence made it clear that various possibilities

were canvassed and discussed, but that neither party took any step which definitely committed itself to any particular position so far as the lease was concerned. In summary, various options were the subject of negotiation between the parties' respective agents, but no agreement was ever reached between them as to the grant of any new lease or licence. The negotiations which took place between parties were against the assumed background knowledge of the law, including the doctrine of tacit relocation. The last date on which timeous notice to quit could be served by either party, so as to avoid the application of tacit relocation, was 14 February 2020. No formal notice to quit was ever served by either party (whether before or after 14 February 2020). On 14 February 2020, tacit relocation operated and the lease was extended on the same terms and conditions for a period of one year. Although it was unnecessary to do so (tacit relocation operating automatically as a matter of law) the pursuer's agents expressly intimated that tacit relocation had operated by email dated 26 February 2020.

[21] The defender's position changed from time to time in the course of the correspondence which passed between parties' agents. It did not ever commit itself to any position during the entirety of the negotiations and correspondence. It had *locus poenitentiae* at all times in relation to the proposals which were under consideration. At no stage during the correspondence between parties' agents was it ever stated on the defender's behalf that the lease was to come to an end at its contractual ish. The purported "acceptance" of the Heads of Terms, on 28 February 2020, was of no effect, in respect that: (a) tacit relocation had already operated from 14 February 2020; (b) the pursuer's agents had expressly intimated, on 26 February 2020, that the pursuer was henceforth holding the defender to the lease as extended by tacit relocation; (c) the pursuer had invoiced the next quarter's rent, on 21 February 2020; and (d) in any event the Heads of Terms were not contractual in effect,

and were not capable of being "accepted" so as to create a new agreement between the parties.

[22] In relation to the relevant legal principles, reference was made to *The Stair Memorial Encyclopaedia of the Laws of Scotland*, Volume 13, para 450. However, tacit relocation does not (at least in all cases) literally require "silence" before it will apply. The tenant had to give sufficient notice of his intention to leave: *Gilchrist* v *Westren* (1890) 17 R 363. In that case, the tenant had expressly intimated that he intended to vacate at the ish, albeit orally, and thus any of the *dicta* that might be taken as authority for the proposition that facts and circumstances amount to the giving of notice was necessarily *obiter*. In *Signet Group plc* v *C&J Clark Retail Properties Ltd* 1996 SC 444 (as indicated at 446H and 447D, *per* Lord Weir) the court was not called upon to decide in terms whether actings alone, or in combination with the parties' words, can operate so as to exclude tacit relocation. However, the court made clear that "some form of notice" is required, it being "very difficult" to countenance the exclusion of tacit relocation by actings alone. Tacit relocation, where it had not been excluded, applies automatically by operation of law: Paton & Cameron, *The Law of Landlord and Tenant in Scotland*, (1967, page 222).

[23] Whether there were words or conduct, on the part of one of the parties, which might be considered to amount to the giving of notice, it is generally only words or conduct up to the last date on which notice to quit could timeously be given that could be taken into account. After that, it was too late to exclude the operation of tacit relocation. Words and conduct after the last date on which timeous notice to quit may be given may, however, be relevant if a party has, by its actions, barred itself from insisting in a plea of tacit relocation: Paton & Cameron (page 227). In the present case, no plea of bar of any kind was advanced by the defender.

[24] One particular situation in which questions could arise as to whether tacit relocation has been excluded, in the absence of a formal notice to quit, was where parties had been discussing or negotiating the grant of a new lease or licence to occupy: Rennie, *Leases*, (2015), paragraph 11-09, citing *Blain* v *Ferguson* (1840) 2 D 546; *Morrison* v *Campbell* (1842) 4 D 1426; and *McFarlane* v *Mitchell* (1900) 2 F 901. On analysis of such authorities, however, it was quite clear that, at most, they support only the proposition that (it always being a question of fact in any given case) where parties have actually agreed a new lease or contract, tacit relocation may be excluded. Reference was made to *Kirkpatrick's Executrix* v *G & A Kirkpatrick* 1983 SLT 191 and *Buchanan* v *Harris & Sheldon* (1900) 2 F 935. Consistently with all of the other authorities, it was the making of an agreement which excluded the operation of tacit relocation.

[25] In the present case, there was no question of the parties having reached an agreement for the grant of a licence to occupy. The Heads of Terms were expressly stated not to have contractual effect and when accepted could not create an enforceable agreement between the parties. In any event, the purported "acceptance" of the Heads of Terms came on 28 February 2020, by which time tacit relocation had already operated by force of law. The pursuer had intimated that it was taking a stand on the operation of tacit relocation. There was nothing for the defender to "accept" on 28 February 2020. It was by then already bound by the effects of tacit relocation upon the lease. Accordingly, the defender's argument in so far as based upon the exclusion of tacit relocation, by virtue of an agreement between the parties "as to the terms of a licence to occupy", was unsound.

[26] Turning to the question of whether there was anything in the established facts which could be regarded as excluding the operation of tacit relocation, applying the approach in *Signet Group plc*, this involved an assessment of whether some kind of notice was given by

the defender to the pursuer that the lease was to come to an end at its contractual ish. Any such notice required to be found in the correspondence. While it was correct that the correspondence discloses that a number of options were considered and discounted before, latterly, proposed Heads of Terms were issued on 6 February 2020, at all times throughout that correspondence the defender had not committed itself (even unilaterally) to any particular position. The possibilities that remained open included that the defender might reach agreement with the pursuer as to the terms of a new lease or licence, or neither party might serve notice to quit and the lease would simply continue by virtue of tacit relocation, or the defender might serve notice to quit and vacate the premises. There was nothing to support the conclusion that the defender had taken a stand on quitting the premises at the ish, come what may. The very idea of negotiation meant that parties retained the ability to walk away from the negotiations. The parties' freedom of action, however, always fell to be viewed against the default position that tacit relocation would apply unless notice to quit was communicated in some form or another. Mere negotiation regarding new terms was not sufficient to amount to the giving of notice to quit.

[27] This case could not be resolved on the footing that the defender's commercial position appears to be that it was not minded to agree any extension of the lease. Matters might have turned out differently. If the defender was now minded to stay on in the premises, by the application of tacit relocation to the lease, the pursuer would not be able to point to notice to quit having been given based merely upon the fact that various options had been canvassed in correspondence, without any agreement ever having been reached. As put in *Bell's Principles*, paragraph 1271 (discussed in many of the authorities before the court) a notice to quit, break or renounce a lease (even if given informally) must be "clear and explicit". It was not possible, in the pursuer's submission, to identify any occasion on

which "clear and explicit" notice to quit was ever given by or on behalf of the defender. The need for such "clear and explicit" notice is obvious: parties must know where they stand. What parties are taken never to have been in any doubt about, however, is that absent the giving of notice to quit, the lease would continue by operation of tacit relocation. In the event, that is exactly what happened.

[28] The service of a schedule of dilapidations by the pursuer could be discounted. There was no basis upon which it could be found in fact that the pursuer had prepared and served a schedule of dilapidations because it had received (and considered that it had received) a notice to quit by the defender.

Submissions for the defender

[29] The circumstances leading up to the ish of the lease (26 March 2020) were such that it was not renewed by tacit relocation. That concept rested on a presumption and, as such, can be displaced by evidence to the contrary. The presumption is if the parties remain silent, they tacitly consent to continue their relationship on the same terms: Rennie, *Leases* (paras 11-04, 11-07 and 11-08).

[30] The relevance of implied consent led to the following propositions. A notice to quit indicates that there is no consent to stay. While the time of service of such a notice may have a bearing on the court remedies available to a party, provided that the notice is served before the end of the lease, it is sufficient to exclude the implied consent: Rennie, *Leases* (para 11-09), *O'Donnell* v *McDonald* 2008 SC 189. Because tacit relocation is dependent on implied consent arising from silence, intimation by one party that they do not consent to continuation suffices to mean that the necessary silence is not present and exclude the implied consent: *Smith* v *Grayton Estates* 1960 SC 349. There was no set procedure that must

be followed in order to exclude the implied consent. In particular, a notice that would be necessary for an action for removing is not required: *Craighall Cast-Stone Co Ltd* v *Wood Brothers* 1931 SC 66. While there must be some notice given of the intention not to continue with the lease on its existing terms: *Signet Group plc* v *C & J Clark Retail Properties*; formal notice is not required. Any overt intimation by a party that it did not consent to the continuation of the lease would suffice: *McDonald* v *O'Donnell* 2008 SC 189. What is necessary is that intimation is given that the tenant is not willing to stay in the premises on the same terms: *Gilchrist* v *Westren;* or that the landlord is no longer willing to let the property on the same terms: *McFarlane* v *Mitchell*. Such intimation is equivalent to a notice to quit. The implied consent to remain on the existing terms of a lease can be displaced by the express terms of an alternative lease even if that alternative is not binding. So, in both *Tod (Sutherland's Trustee)* v *Geddes* (1883 16R 10) and *Buchanan* v *Harris and Sheldon* it was sufficient that there has been an informal agreement as to new lease terms even although that agreement had not been translated into a formal lease.

[31] There was no reason why the necessary implication of consent should not be displaced after the period on which a notice to quit might have been given. While compliance with the 40 day period may be required where certain remedies are to be sought, it is not a requirement to exclude consent and therefore to exclude tacit relocation. Parties in an existing relationship of landlord and tenant could enter into a lease of property on terms different from the pre-existing lease after the date on which notice would have had to be given to terminate the lease. The necessary implied consent may be displaced within 40 days of the ish of a lease.

[32] In the present case, there was clear demonstration of an intention not to continue with the lease on the existing terms and that intention is sufficient to displace the presumed

consent which would be required for tacit relocation. The intention not to be bound by the existing lease was apparent in the communications prior to February 2020. The pursuer's agents were told in 2019 that it was certain that the defender would be relocating and, in an order to retain them, the landlord offered new terms in which both the duration of the lease and the rent would be reduced. This indicated a common intention that the lease would not continue on the terms then in place. Reference was made to the correspondence. By 27 January 2020, the position was that the landlord's agents said that they were determined to keep the defender as a tenant if they could but it was entirely clear that this would not be on the terms of the existing lease. At the same time, the defender's agents intimated that the defender would be relocating. These were sufficient to amount to notice to the pursuers that the defender did not consent to remaining bound by the terms of the lease.

[33] At the end of January 2020, the defenders' agents sought a "best and final offer" from the pursuers' agents. This led to an informal offer which was later incorporated in formal Heads of Terms. These were subject of verbal acceptance in a telephone call of 28 February. It was an error to suppose that by this time the lease had already renewed by tacit relocation because a notice had been served. It was possible to exclude the implied consent at any time up to the ish of the lease. It was not necessary that a lease be formally concluded as there was agreement prior to the ish as to the terms on which the defender would continue in the premises and that was sufficient to exclude any implied consent to staying on the terms of the former lease.

Decision and reasons

Objections to evidence

[34] In dealing with the pursuer's objection to parts of the evidence of Ms McGregor, I accept that the correspondence speaks for itself and any gloss placed upon its meaning is irrelevant. I also accept that the witness did not identify how or by what means the position she mentions was "made clear to the landlord". However, most of the evidence of Ms McGregor is simply of a general or background nature and it does not seek to identify or rely upon any specified exchange between the parties which is of direct relevance to the issues raised in the case. To the extent that it seeks to draw conclusions from the correspondence or from unpled or unspecified exchanges I regard it as inadmissible, but in any event (like the evidence for the pursuer) the matters covered in the witness statement turn out to shed little light on the issues that require to be resolved.

Relevant legal principles

[35] For present purposes, the key legal principles can be summarised as follows. The concept of tacit relocation, which originated from Roman law, is based upon presumed consent by silence (Rennie, *Leases*, SULI, at 144) and if neither party has given notice of his intention to terminate the lease at its ish, the parties are by their silence presumed to have agreed that the lease is to be prolonged: *Stair Memorial Encyclopaedia of the Laws of Scotland,* Volume 13, (para 450). The actings of the parties to the lease must show that they are consenting to the prolongation and for tacit relocation the law implies such consent if all the parties are silent on the matter: *Smith* v *Grayton Estates*, (*per* Lord Clyde at 354). Silence on the matter is, in effect, being silent about not consenting to prolongation. Put another way, it is silence on whether the lease is to come to an end. Thus, there may be negotiations

between the parties about other potential arrangements, but that can still constitute silence on the matter: see e.g. *McFarlane* v *Mitchell,* where Lord Young, along with the other judges, found that tacit relocation did not apply in that case because the parties had made a new agreement, but he also noted (at 904):

> "I am very far from thinking that there may not be tacit relocation although there have been meetings and conversations and even letters passing between the parties."

In order to show that there has not been silence as to whether a party is consenting that the lease is to be prolonged, the classic means of doing so is by service of a notice to quit, but informal notice that the lease is not to continue will suffice: *Signet Group plc* v *C & J Clark Retail Properties Ltd* (*per* Lord Weir at 446B – 447D). The notice must constitute sufficient notice of intention not to prolong the lease and it must satisfy the court that the party did not intend to continue with the lease on the same terms: *Gilchrist* v *Westren* (*per* Lord Justice-Clerk MacDonald at p 366; *per* Lord Young at 367). Unless another period is stipulated in the lease, not less than 40 days' notice of termination by a tenant will suffice to prevent tacit relocation: *Lormor Ltd* v *Glasgow City Council* 2015 S.C. 213. To constitute a sufficient notice, it must give "overt intimation by either party that he did not consent to the prolongation of the lease": *McDonald* v *O'Donnell (per* Lord Justice-Clerk Gill at para [32], under reference to *Signet Group plc* v *C & J Clark Retail Properties Ltd)*. Where parties have entered into an agreement that is inconsistent with consenting to prolongation on the same terms as before, that will exclude tacit relocation: *McFarlane* v *Mitchell; Buchanan* v *Harris and Sheldon; Kirkpatrick's Ex* v *G & A Kirkpatrick*; *Sutherland's Trustee* v *Miller's Trustee.* There is nothing in the authorities to suggest that such an agreement must be reached before the last date on which notice may competently be given, which is consistent with the simple principle that such an agreement, whenever reached, will supersede any implied consent to tacit

relocation. As to the nature of the agreement, "tacit relocation will not stand against express agreement": *Buchanan* v *Harris and Sheldon (per* the Lord President (Balfour) at 938, under reference to *Sutherland's Trustee* v *Miller's Trustee*). The "expression of a contract under the hands of both parties" or "a bargain as to the terms on which the tenant is to stay", even if not probative, will suffice rather than "a mere draft or paper of proposals for a lease" (*per* Lord Adam and Lord McLaren at 939). *Buchanan* v *Harris and Sheldon* was cited with approval in *Mexfield Housing Co-operative Ltd* v *Berrisford* [2012] 1 AC 955 at para [78]. It is to be noted that no issues of personal bar or the effect of the tenant continuing in possession were raised in this case. There had also been no previous tacit relocation. Accordingly, I need not comment upon any authorities relating to such matters.

Application of these principles

[36] It is therefore clear that while agents or solicitors will ordinarily be very alert to serving a notice to quit to seek to avoid tacit relocation, an overt intimation of not consenting to prolongation, before the last date for a competent notice, or an agreement between the parties to a different arrangement will suffice. In the present case, the defender contends that each of these occurred.

[37] Dealing firstly with intimation of not consenting to prolongation, there is no suggestion in this case of any formal notice to quit. Rather, the defender's position is that informal notice was given. The leading example of such informal intimation is *Gilchrist* v *Westren*, in which the Lord Justice-Clerk explained his decision thus (at 366):

> "The defender had been tenant of a shop in Frederick Street for some years prior to May 1889. His rent had fallen somewhat into arrear, and he had been under sequestration for rent. In January 1889 he went to the factor … and according to his own evidence, which there is no reason to disbelieve, intimated, after speaking about the amount of the rent, that 'my lease was out in 1889, and that I would be done with

> the premises in May.' If that were all that had passed I should have held that by that intimation the defender had given sufficient notice of his intention to leave. But he goes on to say,— 'I said at the same time that I wished to know if I could have a new lease, and upon what terms. He said he would write to Mackenzie, Innes, & Logan, and lay the matter before them, and as soon as he got an answer he would send it to me. I expected to hear within the next few days, but did not.' It appears, then, that he distinctly intimated that he had no intention of staying on at the same rent, and wished easier terms, and he never got any answer to his request to know whether he could have a new lease on better terms. We are therefore left with matters in their original position, which was, that he expected to be 'done with' the shop in May. Now, it is a question of circumstances whether a tenant has given sufficient notice of his intention to leave. Formal notice is not necessary, but only such notice as will satisfy a Court that the landlord was made aware that the tenant did not intend to stay on on the same terms."

The three other judges in the Second Division agreed. Lord Young stated (at 367):

> "I think he had told the factor that the rent, which was in arrear, was too high, and that he could not pay it, and that if it was not to be reduced his connection with the place would be over in May … The landlord knew that the defender was not to remain at the old terms. I think we should find in fact that sufficient notice was given of his intention to leave."

[38] In *McFarlane* v *Mitchell* the landlord's agents intimated that the rent would be increased and set out the conditions for occupancy in the forthcoming year, stating also that in the event that there was a failure by the tenant to comply with those conditions the tenant would be ejected. The tenant's agents stated that he did not agree to those terms but he then remained in occupation. Tacit relocation was excluded because the landlord's agents had stated that the tenant was not to be allowed to remain in the premises on the former terms.

[39] In the present case, the defender relied upon various pieces of correspondence starting from June 2019. I need not consider these in detail and it suffices to note that, until early 2020, these emanated largely from the pursuer's agent and within them there was no clear indication of any language used by the defender stating that it intended to leave the premises at the ish or would remain only on different terms. It is true that proposals for a

different arrangement were made on behalf of the pursuer but it is not possible to infer from the documents or the wider circumstances in 2019 that notice of termination had been given.

[40] In my view, the principal communication by the defender's agent for present purposes is that of 21 January 2020, which is quoted above. One can draw several obvious points from the language used in that email. The defender's point that it was ready to commit to relocation elsewhere is of no particular significance. However, the defender's agent advised that "the only way they would consider remaining at the building is if the dilapidations are capped at £300k together with the nil rent proposed for 12 months". This clearly stated that there was only one possible situation in which the defender would not leave and that it must be based on a different arrangement from the current lease. This is reinforced by the next sentence which asks whether "this is something the landlord might agree to in order to retain NCR as an occupier of Trilogy?" The clear message, which I regard as distinct and definite, is that unless the alternative arrangement is agreed to, the defender will not remain as occupier of the premises. Prior to this stage, there were expressions used by the pursuer's agent, referring to the defender, such as "if they are not renewing" and "if they are going" perhaps indicating that the pursuer had not, by then, been given a clear intimation of notice to leave. However, after the email of 21 January 2020 the discussions concerned features of the proposed new arrangement, including a duration of two years rather than one year, but still at nil rent. There was no indication from the pursuer that it did not know whether the defender would leave in the absence of the alternative arrangement. On the contrary, it is, in my view, clear that the pursuer, through its agent, knew that the defender was going to leave unless that new arrangement could be agreed. In any event, viewed objectively, the pursuer or its agent should have drawn that conclusion from the email of 21 January 2020.

[41] Accordingly, there was such notice that the pursuer was made aware that the tenant did not intend to stay on the same terms. Similar to *Gilchrist* v *Westren*, the pursuer knew or ought to have known that the defender was not to remain on the old terms as the defender had plainly stated that it was only prepared to stay if alternative arrangements could be agreed. As *McFarlane* v *Mitchell* illustrates, a statement (in that case from the landlord) that there will be no continuation of occupancy on the old terms and that staying on could only be on new terms will suffice to exclude tacit relocation. I therefore conclude that sufficient notice, or overt intimation, was given of the defender's intention to leave. Nothing that occurred thereafter changed that position. These circumstances suffice to support the defender's case. The further correspondence was about new terms. I would add that the pursuer's claim for rent in this action is for over £800,000. While of no direct relevance, it would seem unlikely that the landlord would make a proposal to allow the tenant to remain for two years at nil rent without having a clear understanding that tacit relocation on the existing terms was not accepted by the tenant.

[42] A landlord or tenant engaging in negotiations may of course during those discussions state that if its proposal is not accepted then the current lease is to end, but the fact that this is said in negotiations does not take away from the legal impact of the statement. Indeed, even service of a formal notice to quit may sometimes occur during a negotiation process. Where overt intimation has been given and the negotiations then fail, tacit relocation has been excluded. As is obvious, the prudent means of giving proper notice is by a notice to quit drafted by an appropriate adviser. Other means of intimation can create a risk of insufficient notice but, for the reasons given, in the present case it was sufficient.

[43] If I am wrong about sufficient notice having been given, the question arises as to whether there was a later agreement between the parties which superseded the prolongation that would otherwise have occurred by tacit relocation. I conclude, for two reasons, that there was no such later agreement. Firstly, the email from the pursuer's solicitors dated 26 February 2020 (quoted above) made clear that the pursuer was treating the lease as continuing for a further period of one year on the same terms and conditions (including rent) because of tacit relocation. In my view, this expressly states a position which is entirely inconsistent with the proposal in the Heads of Terms offered on 6 February 2020 and supersedes that offer, rendering it no longer capable of acceptance. Secondly, no express and binding agreement was reached between the parties. A new arrangement between parties to a lease could be entered into before the 40 day period or afterwards. Also, it may or may not be a legally binding agreement. On timing, in my opinion a distinction falls to be drawn between the terms of a notice required not less than 40 days prior to expiry and an agreement reached thereafter. An agreement reached prior to the commencement of the 40 day period will suffice to exclude tacit relocation if it provides the necessary intimation of a lack of consent to stay on the existing terms, by contradicting or being inconsistent with tacit relocation. It is of relevance to note that in all but one of the cases cited to me involving the effect of an agreement, it was reached prior to the commencement of the 40 day period. However, in *McFarlane* v *Mitchell* the landlord gave notice of new terms prior to the 40 day period and the tenant refused to accept these terms. The landlord adhered to his position and the tenant then remained in occupation after the date of expiry. By staying on, he was held to have agreed to the landlord's terms. Tacit relocation was excluded by the landlord's statement of his position, which, as Lord Young stated, if the tenant was not willing to agree to the new terms, was a notice to quit. This is therefore an example of conduct (staying on)

after expiry constituting an implied acceptance of the new terms, but when tacit relocation had already been excluded by sufficient notice. It is not an example of tacit relocation actually being excluded within the period of 40 days prior to expiry by an agreement, but it does illustrate a new legally binding agreement resulting in the exclusion of tacit relocation.

[44] In the cases where there was agreement not less than 40 days prior to expiry, there is some support for the view that an agreement that is not legally binding will suffice. For example, in *Buchanan* v *Harris and Sheldon* it was said that, on the facts, tacit relocation was excluded "whether the new written lease expressed in the letters is or is not valid in law" (at 938), the relevance of subsequently remaining in possession being to cure the otherwise improbative nature of the agreement. In *Sutherland's Trustee* v *Miller's Trustee,* a new bargain reached by verbal agreement between the parties for occupation at a reduced rent was set out in a letter before the 40 day period, which therefore excluded tacit relocation, and that agreement was then supported by *rei interventus*. In *Kirkpatrick's Ex* v *Kirkpatrick*, by entering into a different relationship by missives some 11 months before expiry, that new agreement, albeit that it was voidable, meant that there was no tacit relocation. But as noted these cases all involved agreements reached before the 40 day period. They also show that resiling from an improbative new arrangement would cause it to cease to be enforceable. But these cases do not suggest that tacit relocation would then be revived. On the contrary, it has already been lost by the informal agreement.

[45] If there has been no notice or agreement before the 40 day period commences, then tacit relocation comes into play, having effect after expiry of the current lease. It can of course be excluded or superseded by a subsequent agreement during the 40 day period or indeed, as in *McFarlane* v *Mitchell,* with consent implied by occupation after the 40 day period. However, this involves the need to depart from a legally binding agreement

between parties, even though arising by implication, in the form of tacit relocation. In order to depart from this legally binding agreement, a subsequent agreement that is legally binding is in my view necessary. Even if the intimation by the pursuer's solicitor on 26 February 2020 did not withdraw the offer in the Heads of Terms or exclude acceptance of them (which I have concluded it did), it was made clear in the offer that the terms were not intended to form part of a legally binding contract. If, contrary to the view I have reached, no earlier notice had been given, there would then be a legally binding agreement that the lease will be prolonged followed by a non-legally binding agreement that a new arrangement will be entered into. The first contract (for tacit relocation), even though it arose by implication, will remain binding unless there is a second contract that is inconsistent with it and is legally binding, but there was no such second contract in this case.

Conclusion

[46] For the reasons given, I conclude that sufficient notice of the defender's intention not to remain in occupation under the terms of the existing lease was given on 21 January 2020 and hence within the required period for notice. If there had been no such notice, tacit relocation would have occurred and would not have been displaced by the alleged agreement to the Heads of Terms, when such an agreement was no longer possible and in any event was not legally binding.

Disposal

[47] I shall sustain the second and third pleas-in-law for the defender and grant decree of *absolvitor,* reserving in the meantime all questions of expenses.