



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 20

CA97/21

OPINION OF LORD HARROWER

In the cause

ASHTENNE CALEDONIA LIMITED

Pursuer

against

DENNY ENTERPRISES INT'L LIMITED

Defender

Pursuer: A Jones KC (sol adv); Brodies LLP

Defender: M Steel; Harper Macleod LLP

8 March 2023

[1] This is one of three dilapidations claims raised by the landlord of certain warehouses at Nethermains Industrial Estate in Kilwinning. The property which is the subject of the present dispute is at Units 6-8, Simpson Place (“the premises”). The other two actions concern Unit 2, Kelvin Avenue (CA95/21), and Unit 4, Kelvin Avenue (CA96/21). The procedural background to all three claims was summarised in my opinion in CA95/21, and issued of even date with this opinion.

[2] Parties agreed that objections 1 and 2 in this action were in identical terms, and fell to be decided in the same way, as objections 1 and 2 made by the pursuer in the

action CA95/21. Having repelled these objections in my opinion in CA95/21, I shall repel objections 1 and 2 here also.

Objection 3

[3] Objection 3 concerned item 4.1 in the Scott Schedule. Section 4 of the Scott Schedule was headed "Statutory Compliance". Item 4.1 purported to require the tenant to "Demonstrate compliance with the Control of Asbestos Regulations 2012". It continued:

"Register not available on site. Provide copy of a current asbestos register, management survey and most recent cyclical inspection of all known ACM's [asbestos containing materials]".

In the column headed, "Did the breach exist on 30/4/20?", the reporter has concluded, "No. Burden of proof is not on the Defender."

[4] In this objection, the pursuer now complains that, if the defender had performed its repairing obligations under the lease, before carrying out the works listed in the Scott Schedule it would have been obliged by the relevant asbestos regulations to instruct a refurbishment survey to establish if there were any ACMs in the property. It says that the ACM Report will be required before the pursuer can undertake the remedial works that should have been carried out by the defender in terms of the lease. As such, it is a loss incurred as a result of the defender's breaches of the lease; not because the defender failed to provide an asbestos report required by statute.

[5] In the reporter's letter to the court, in which he sought directions, he provided the following explanation:

"I have made the assumption that the burden of proof, in respect of a [sic] demonstrating that an alleged breach of obligation, lies with the Pursuer.

I note that the Pursuer's solicitor states that the Pursuer had not submitted that the burden of proof rested with the Defender. However, the wording of item 4.1 in the

Scott Schedule does appear (to my reading at least) to be making an allegation about compliance with a statutory obligation, without proof that the statutory obligation had been breached. The Pursuer's Surveyor's comments on 24th June 2020 go further by suggesting that the '*Tenant has failed in his obligation to demonstrate compliance*'. To my reading, this appears to be attempting to pass the burden of proof to the Defender.

The Pursuer's Solicitor's comments at paragraph 2.14 of the Objections (which refer to paragraphs 5.23 to 5.25 of the Pursuer's submissions) [summarised above] relate to a different matter. In broad terms, asbestos has to be managed on a day to day basis, and this is what the Pursuer is claiming has not happened properly at item 4.1 of the Scott Schedule.

I agree with the Pursuer's Solicitor that a refurbishment asbestos survey should be carried out prior to commencing works at this property, but that is not what is being claimed at item 4.1 of the Scott Schedule.

Naturally, I will follow the Court's directions."

[6] In my opinion, the reporter was clearly correct, for the reasons he gave, in his interpretation of item 4.1. I therefore repel this objection.

[7] So far as the pursuer's remaining objections 4 to 11, inclusive, are concerned, the parties have agreed these items in the sum of £11,608.90, and that the reporter should be directed to apportion that sum among the items that are the subject of these objections as he sees fit. I shall therefore direct the reporter accordingly.

[8] Meantime, I shall reserve all question of expenses.