OUTER HOUSE, COURT OF SESSION

[2024] CSOH 49

CA93/23

OPINION OF LORD BRAID

In the cause

B & M RETAIL LIMITED

Pursuer

against

LXI COWDENBEATH LIMITED

Defender

Pursuer: D Ford (sol adv); Brodies LLP
Defender: Thomson KC; DWF LLP

14 May 2024

Introduction - the issue

[1] In terms of a lease between the parties dated 3 and 18 September 2019, the pursuer is the tenant, and the defender the landlord, of a retail unit, Unit 2 ("the property"), which forms part of North End Retail Park, High Street, Cowdenbeath, owned by the defender ("the development"). A footpath runs along the front of the property. It forms part of a longer footpath which encircles the car park for the retail park. A second footpath lies to the rear of the property. It runs from the rear of the unit, past a service yard, before merging with the front footpath when it reaches the car park. Both footpaths are in a poor state of repair. The issue for resolution in this action is: on a proper construction of the lease, which

party is responsible for the maintenance and repair of the footpaths? That turns on whether the footpaths form part of the property, or of the common parts, it being accepted by both parties that they must form part of one or the other, and that in the event that they are common parts, it is the defender which is responsible for their maintenance and repair.

[2] The controversy between the parties centres on the description of the property in the lease by reference to an area delineated by a broken blue line on a plan annexed to the lease, reproduced below. Both footpaths indisputably lie within that area. The pursuer contends that, nonetheless, having regard to the respective definitions of the property and of the common parts in the lease, the footpaths form part of the latter, the subjects of the lease merely being those coloured blue and lilac in the plan. It seeks declarators to that effect. The defender responds that the plan definitively shows that the footpaths form part of the property, and that the pursuer is responsible for their repair and maintenance. The case called before me for debate on the parties' respective arguments.

The lease

[3] The key definitions in the lease are as follows. The property is defined as:

> "the property known as Unit 2, in the Development shown for identification purposes only delineated in a broken blue line on the Plan, and includes for the avoidance of doubt the Garden Centre Area, and the areas marked 'Plant Zone' and 'Refuse Area' on the Plan and further includes (without limitation):
> (a) the foundations, front and fascia (including for the avoidance of doubt the shop front and all glazing therein);
> (b) roof (declaring for the avoidance of doubt that the air space above the roof is not included within the Property) and the outer walls and one half of the walls so far as dividing the unit from adjoining units;
> (c) such Conduits as are within and serve solely the said unit;
> (d) all additions, alterations and improvements thereto which may be carried out during the Term; and
> (e) all Landlord's fixtures and fittings from time to time in and about the same, but excluding in each case tenant's fixtures and fittings and the Common Parts".

"Plan" is defined as the plan annexed and executed as relative to the lease.

"Common Parts" means:

> "all parts of the Development (but excluding all parts of the Lettable Units and any trolley bay area which is exclusively demised to any occupier of a Lettable Unit), including, but not limited to:
> ...
> (c) all service roads and lanes, turning areas, hammer heads, footpaths, pedestrian ways and others not forming part of the Car Park Common Parts".

"Lettable Units" means:

> "those parts of the Development leased, capable of or intended to be leased to occupational tenants whether or not actually let or occupied from time to time but excluding any parts of the Development leased or intended to be leased to statutory undertakers for the purposes of the carrying out of their statutory obligations".

"Garden Centre Area" means:

> "that area of ground comprising part of the Property and shown coloured lilac and within the broken blue line on the Plan".

The law - approach to construction of contracts

[4] Although they differed as to the relevance of all the cited authorities, the parties were at one as to the applicable legal principles in construing a contract. The approach to construction has recently been restated by the Inner House in *Lagan Construction Group Ltd (in Administration)* v *Scot Roads Partnership Project Ltd and Ferrovial Construction Ltd* [2023] CSIH 28, referring to *Paterson* v *Angelline (Scotland) Ltd* 2022 SC 240 at paragraph 32 which in turn referred to *Network Rail Infrastructure Ltd* v *Fern Trustee 1 Ltd* 2022 SLT 997. The court's task is to ascertain the intention of the parties by determining what a reasonable person, having the background knowledge of the parties, would have understood from the language selected by them (*Network Rail* at paragraph 28). The court should not search for drafting infelicities in order to justify a departure from the normal meaning of that language, but should identify what the parties agreed, not what common sense may otherwise have dictated; a complex and sophisticated contract prepared and negotiated by skilled professionals may be successfully interpreted principally by textual analysis: *Lagan Construction*, paragraph 10, referring to *Wood* v *Capita Insurance Services* [2017] AC 1173, Lord Hodge at paragraph 13. The court must not, under the guise of construing a contract, rewrite the terms of the contract: *Angelline (Scotland) Ltd*, above, at paragraph 34.

[5] Other authorities refine the foregoing broad approach, depending on the nature of the provision being construed, and the competing arguments being advanced. In *HOE International Ltd* v *Andersen* 2017 SC 313, Lord Drummond Young, delivering the opinion of the Inner House, observed at paragraph 23 that the central terms of a contract will usually be considered and drafted with scrupulous care, whereas terms dealing with less central features are likely to receive less attention. Lord Drummond Young made a comment to similar effect in *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Ltd* 2020 SC 244

at paragraph 11. As senior counsel for the defender submitted, this has the consequence that, on occasion, in construing a central term as parties must have intended, some slight violence may require to be done to other terms in order to give effect to the parties' (main) objectives: *Aberdeen City Council* v *Stewart Milne Group Ltd* [2010] CSIH 81, paragraph 13, also per Lord Drummond Young. On a slightly different tack, as a general rule the court should have regard to the whole contract in construing it, and an interpretation that renders words tautological and meaningless should where possible be avoided: *Taylor* v *John Lewis Ltd* 1927 SC 891 at 898. On the other hand, as Lord Hoffman pointed out in *Beaufort Developments (NI) Ltd* v *Gilbert-Ash (NI) Ltd* [1999] AC 266 at 274, one has only to read a traditional lease to realise that draftsmen lack inhibition about using too many words (an example of litotes if ever there was one). The same point is made in *Dŵr Cymru Cyfyngedig (Welsh Water)* v *Corus UK Ltd* [2007] EWCA Civ 285, paragraph 13: while one starts from a presumption that every clause in a contract is to have contractual effect, surplusage in commercial contracts is by no means uncommon.

[6] Finally, the court can ascribe to a document the meaning which it would convey to a reasonable person aware of the context, notwithstanding mistakes in the written expression; but it may only do so where it is plain that something must have gone wrong with the language used: *Credential Bath Street Ltd* v *Venture Investment Placement Ltd* 2008 House LR 2, Lord Reed at paragraph 18; *Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] 1 AC 1101.

Submissions

Defender

[7] Senior counsel for the defender adopted, and elaborated upon, his note of argument. Founding upon Lord Drummond Young's various observations, above, he submitted that

identification of the subjects of let was a central provision of the lease; and the parties had chosen to define it by reference to the plan annexed to the lease. The court should have regard to that in ascertaining the parties' intentions with regard to the scope of the property which was to be the subject of the lease, rather than "rake around" in other provisions of the contract, as the pursuer did, in an attempt to fathom what the contract meant by "the property". The word "shown" was of critical importance: *prima facie* the parties had agreed that the subjects of let were shown on the plan, and were the subjects delineated by the broken blue line. One would not expect the parties to have agreed that the plan was referred to only with a view to identifying at a level of generality where the property was, while at the same time intending to identify, definitively, certain other features within the development by reference to the plan. If that was the correct understanding of the lease, the definition would have failed to identify the property in any meaningful sense. The flaw in the pursuer's approach was that the pursuer was unable to point to any provision of the lease (other than the plan) which defined the property. The various provisions of the lease upon which it relied all had contractual effect, on the approach of either party, and so *Welsh Water*, above, was nothing to the point; nor were cases such as *Taylor* v *John Lewis*, above: surplusage in the lease, if not to be expected, was by no means unusual.

Pursuer

[8] The solicitor advocate for the pursuer likewise adopted and elaborated upon his note of argument. He laid much emphasis on the words "for identification purposes only", and in particular the word "only", in the definition of the property. The ordinary meaning of those words was to identify, at a level of generality, where within the development the property lay. The high test for correcting any mistake in the parties' expression of their

objective had not been met. He contrasted the manner in which the property had been described - by reference to a plan for identification purposes only - with the references to other areas within the development, (namely, the Garden Centre Area, the Plant Zone, the Refuse Area and the Trolley Bays) which were defined exhaustively and exclusively by reference to the areas shown in the plan, and were not qualified by "for identification purposes only". The use of "only" signified that whatever was shown delineated by the broken blue line was not to be definitive. This interpretation was confirmed by the definition of common parts, which expressly included all footpaths. He then referred to a pot pourri of provisions within the lease: clause 4.17 read in conjunction with the definition of permitted user; clauses 4.8, 4.36 and 7.12, regulating the landlord's right of access to the property; clause 4.22.7 and schedule Part 1, clause 1.5(i), regulating the pursuer's right to use the trolley bays; and schedule Part 1, clause 7 (the right to install an ATM machine in the frontage of the property). All of these provisions, he submitted, showed that the parties intended that the front footpath should not form part of the property but were common parts, otherwise the provisions were unnecessary, made no sense or had no contractual effect. For the court to hold that the front footpath formed part of the property would be to rewrite the contract impermissibly. In relation to the rear footpath, the plan showed that it was to be used as an emergency exit footpath "from" the property, of which it could not, therefore, form part.

Decision

[9] Although, out of deference to the submissions made by the solicitor advocate for the pursuer, I have referred to *Credential Bath Street* and *Chartbrook* above, I do not view this as a case where the court is being invited to correct a mistake in expression, or to conclude that

something has gone wrong with the language used; nor, despite references in the pleadings to correspondence which took place in the course of the conclusion of missives, is it a case where the factual matrix is relied on as an aid to construction; nor is commercial common sense prayed in aid by either party. Further, the solicitor advocate for the pursuer disavowed any suggestion that there had been a mistake in drawing up the plan, and it is no part of the pursuer's case that the broken blue line has been drawn in the wrong place. Rather, the court must determine, by reference to the language used, what parties intended by defining the subjects of the lease as "the property known as Unit 2, in the development shown for identification purposes only delineated in a broken blue line on the Plan"; and, in particular, what they meant by the phrase "for identification purposes only".

[10] At the outset, it must be said that whichever construction is preferred, the drafting of the lease is far from perfect. If the pursuer is correct, the purpose of referring to a plan for identification purposes, which does not in fact identify the property, is unclear. If the defender is correct, many of the provisions of the contract, as the solicitor advocate for the pursuer submitted, read somewhat unhappily. Further, it is unhelpful, to put it no higher at this stage, if part of the footpath which runs round the car park is not part of the common parts, that the definition of common parts on the face of it includes all footpaths.

[11] That leads on to the first matter which must be addressed in construing the lease, which is how the common parts are defined. If, as the pursuer submits, the matter is as simple as concluding that the footpaths must be common parts because they are mentioned in the definition of common parts, then, whatever the precise extent of the property, it could not include the footpaths. However, that is to approach the problem from the wrong end of the telescope as it were. The definition of common parts expressly excludes all parts of the Lettable Units. Lettable Units in turn means those parts of the development leased, capable

of or intended to be leased to occupational tenants. Thus, as senior counsel for the defender put it, the common parts are everything that is left - everything other than the parts of the development leased to tenants. In other words, one determines the extent of the common parts after determining the extent of the property leased (or intended to be leased), not the other way round.

[12] Turning then to consider what is the correct construction to place on the definition of the property, the pursuer's case is that the ordinary meaning of the language used is that the purpose of the plan was merely to identify the property at a level of generality, and that while the property lay within the area delineated by the blue line, it did not comprise the whole of that area. The linguistic logic of that approach is difficult to follow. First and foremost, I do not agree that the word "only" carries the significance attributed to it by the pursuer. There is no difference in meaning, simply one of emphasis, between the statements "the plan is referred to for identification purposes" and "the plan is referred to for identification purposes only". The key words in each case are "for identification purposes": in other words, the purpose of the plan is to identify the extent of the property. All that "only" does is to place it beyond doubt that the plan may not be referred to for any other purpose than that of identifying the property; but since the defender does not seek to refer to it for any other purpose, the point is perhaps academic. What "only" does not do is to convey to the reader an intention that whatever was delineated by the broken blue line was not to be regarded as definitive, or that the plan was to be used to identify the subjects only at a level of generality, whatever that means (on several occasions, in an apparent, but possibly telling, slip of the tongue, the solicitor advocate for the pursuer referred to the plan as being referred to for "illustrative" purposes, but that is a different concept entirely; the

two words are not synonymous, and it was not argued by the pursuer that when the parties said "identification", they in fact meant "illustrative").

[13] The pursuer submitted that the defender's approach entailed ignoring the words "for identification purposes only", but since the defender does refer to the plan for the purpose of identifying the property, that criticism is not well made. Conversely, the pursuer's approach attaches no significance whatsoever to the reference in the definition to the broken blue line, or to the words "delineated in", it being the pursuer's position that the property comprises only part of what is within the blue line but not all of it, and in particular that it includes neither the footpaths, nor the Service Yard, both of which fall within the blue line. If it had been the parties' intention simply to refer to the plan to identify where within the development Unit 2 was at a level of generality, and to distinguish it from Unit 1 (the only other unit in the retail park) there would have been no need to refer to the broken blue line at all.

[14] The next problem with the pursuer's approach is that there is no alternative definition of the property within the wording of the lease, and so it would leave it unclear precisely which parts of the area within the blue line lie within the property and which do not. In paragraph [8] above I refer to those provisions of the lease founded upon by the pursuer as showing, in its submission, that the front footpath cannot form part of the property, but these do not apply with the same force to the Service Yard or indeed to the rear footpath. Aside from the retail store itself, and the Garden Centre area, Refuse Area and Plant Zone, it would be uncertain which other parts of the area within the blue line were part of the leased property.

[15] Further, the solicitor advocate for the pursuer conceded that, on the pursuer's approach, it was possible for the court to find that the front footpath did not form part of

the property but that the rear footpath did. However, that makes no real sense and ties into an additional point made by senior counsel for the defender, which was that there is an illogicality to the pursuer's use of the plan, which is to treat the blue line as definitive for some purposes but not others. For example, in relation to the Garden Centre area, it would define the property, but as soon as the line moved past that area, it would not. It is equally illogical that the blue line to the rear of the property should define the boundary but that the line to the front should not.

[16] I therefore conclude that in the only provision of the lease which expressly sets out to identify the property which is to be the subject of the lease, the parties have clearly and unambiguously defined that property as being the whole of the area within the broken blue line. There is no ambiguity in the words used, to which I have ascribed their normal meaning. It follows that neither footpath falls within the definition of common parts, because they form part of the property, which in turn forms part of the Lettable Units.

[17] That being the plain meaning of the definition clause, it is not for the court to search around in the contract for drafting infelicities elsewhere, in order to arrive at a different meaning: *Lagan Construction*, above. It is true that the provisions of the lease founded upon by the pursuer are consistent with the pursuer's suggested construction of the lease, insofar as they stipulate what the pursuer may or may not do on certain areas which on the pursuer's construction would lie outwith the property; but as senior counsel for the defender submitted, it is not wholly surprising that the parties chose to regulate how the pursuer should use the property which had been leased to it, which, after all, remains within the ownership of the defender. Further, it cannot be said that any of the provisions in question have no contractual effect on the defender's interpretation of the lease; and in any event, as the authorities show, surplusage in a commercial lease is by no means unheard of.

In summary, any violence to other provisions of the lease is slight by comparison with the damage to the parties' objectives, as expressed in the definition clause of the lease, that would result from a contrary view: cf *Stewart Milne Group*, above, Lord Drummond Young at paragraph 13.

[18] The consequence of this decision is of course that the pursuer will find that the lease incorporates a larger area of ground than it had hitherto thought (in particular, the Service Yard). Whether that will confer any unexpected benefits remains to be seen.

Disposal

[19] I will sustain the defender's first plea-in-law and dismiss the action. Parties having agreed that expenses should follow success, I will award the expenses of the action to the defender.