SHERIFF APPEAL COURT

[2018] SAC (Civ) 27
[FAL-A101-17]

Sheriff Principal M M Stephen, QC
Sheriff Principal M W Lewis
Appeal Sheriff P J Braid

OPINION OF THE COURT

in the appeal

SHAHZAD WASEEM ANWAR AND AISHA ANWAR

Pursuers and Respondents

against

DAVID BRITTON AND LINDA BARCLAY

Defenders and Appellants

Appellants: Clancy QC; Burness Paul LLP
Respondents: Howie QC; Manson, advocate, Dentons UKMEA LLP

8 October 2018

Introduction

[1] The primary question of law raised in this appeal, from the sheriff at Falkirk, is the correct construction to be placed on two clauses which appear in the Scottish Standard Clauses (Edition 2) issued by the Convenor of the Law Society of Scotland Property Law Committee on 14 March 2016 and registered in the Books of Council and Session on 15 March 2016 ("the standard clauses").

[2] The standard clauses are frequently, if not invariably, incorporated into missives for the sale and purchase of heritable property in Scotland and, as such, their meaning is we assume a matter of no little importance to the legal profession in Scotland, as well as to the parties in this action, not least as the purpose of having standard clauses is, presumably, so that the terms on which heritable property is bought and sold are clear and unambiguous, in order that litigation as to their meaning is avoided. As this case shows, in that regard, at least, the exercise has not been entirely successful.

[3] The clauses the meaning of which is the subject of controversy are clauses 27.1 and 2.1.3.

[4] Clause 27.1, a so called entire agreement clause, is in the following terms:

> "27 ENTIRE AGREEMENT
>
> 27.1 The Missives will constitute the entire agreement and understanding between the Purchaser and the Seller with respect to all matters to which they refer and supersede and invalidate all other undertakings, representations, and warranties relating to the subject matter thereof which may have been made by the Seller or the Purchaser either orally or in writing prior to the date of conclusion of the Missives".

[5] As the numbering suggests, clause 2.1.3 forms part of clause 2, that clause being in the following terms:

> "2 AWARENESS OF CIRCUMSTANCES AFFECTING THE PROPERTY
>
> 2.1 So far as the Seller is aware (but declaring that the Seller has made no enquiry or investigation into such matters) the Property (including in respect of Clauses 2.1.3 and 2.1.4 the Building, if appropriate) is not affected by:
>
> 2.1.1 any Notice of Potential Liability for Costs registered in terms of the Tenements (Scotland) Act 2004 or the Title Conditions (Scotland) Act 2003;
>
> 2.1.2 any Notices of Payment of Improvement/Repairs Grants;

> 2.1.3 flooding from any river or watercourse which has taken place within the last 5 years;
>
> 2.1.4 other than as disclosed in the Home Report for the Property any structural defects; wet rot; dry rot; rising damp; woodworm; or other infestation."

The issues

[6] The principal issues which fall to be determined in the present case, which turn on the proper construction of the above clauses, are: first, having regard to clause 27.1, are the pursuers and respondents (hereinafter "the pursuers") entitled to found an action of reduction on an alleged misrepresentation made prior to the conclusion of missives; and, second, did clause 2.1.3 require the defenders and appellants (hereinafter "the defenders"), as sellers, to disclose *any* flooding within the previous five years of which they were aware, or only flooding which still affected the property at the date of conclusion of missives? There is also a subsidiary issue as to whether or not an action for reduction of a contract can be founded upon a representation which has been incorporated into the contract as a term of that contract.

Background

[7] The circumstances leading to the litigation are conveniently set out in the sheriff's note which we summarise as follows. The pursuers have brought an action for reduction of missives of sale and a subsequent disposition of heritable property in Strathblane. They seek repetition of the purchase price, and damages. The basis for reduction is said to be negligent or alternatively innocent misrepresentation. Damages are sought in the event that negligent misrepresentation is established.

[8] The alleged misrepresentation concerns whether or not the subjects were affected by flooding. A formal written offer to purchase was submitted on behalf of the pursuers on 24 May 2016. That offer incorporated the standard clauses (some of which, but not the critical clauses in this appeal, were modified in terms of the missives). The offer to purchase was conditional upon, among other things, a flood risk report in satisfactory terms being obtained. The pursuers aver that the issue of flooding was important to them and that they made the defenders aware of their intentions regarding development of the property. They further aver that a flood risk report was exhibited which classified the flood risk as low but that it recommended that the pursuers speak to the sellers to confirm whether the property or surrounding area had flooded before.

[9] By email dated 14 July 2016 the defenders' solicitors confirmed that the defenders had no experience of flooding at the subjects and the missives were concluded on 3 August 2016.

[10] The pursuers then aver, to state it briefly, that they subsequently discovered that in November 2015 the stream which passed through the subjects had overflowed and that the first defender, at least, was aware of flooding in the garden "from time to time".

[11] Following a debate on the parties' preliminary pleas, the sheriff decided the first two issues which we have identified in paragraph [6] in favour of the pursuers. He determined, first, that clause 27, properly construed, did not exclude reliance on a misrepresentation which pre-dated the contract and, accordingly, that the pursuers' averments regarding the email of 14 July 2016 were relevant and, second, that clause 2.1.3 should be read as warranting that the property "has not been affected by flooding from any river or water course which has taken place within the last five years". He therefore allowed a proof

before answer on the whole of the pursuers' averments and excluded certain of the defenders' averments from probation.

[12] As regards the third issue – whether, *esto* clause 2.1.3 had the meaning contended for by the pursuers, it amounted to a misrepresentation upon which the pursuers could found an action of reduction – the defenders' position before the sheriff was that if he found against them on the construction of clause 27, as he did, the point became academic and was not insisted upon. As the sheriff did find against the defenders on the meaning of that clause, he therefore did not require to reach any decision on the third issue. However, he did express the view that, if he was wrong as to the meaning of the clause, reduction was not necessarily barred simply because the representation was embodied in a term of the contract, in circumstances where the clause was introduced at a stage prior to the conclusion of the missives.

[13] The defenders have appealed against all three aspects of the sheriff's decision. Their first ground of appeal relates to the correct construction of clause 27; their third to the correct construction of clause 2.1.3 and their second to the question of remedy in the event that the representation contained in that clause turns out to be false. Those grounds of appeal were dealt with by counsel in that order, and we do likewise in this judgment.

Approach to contractual interpretation

[14] Before turning to consider those three grounds of appeal we will first say something about the approach to contractual interpretation, since both the first and third grounds of appeal directly turn on how the clauses in question ought to be interpreted. The parties were not in dispute as to the principles governing the interpretation of contracts in Scotland. It was common ground that those principles are derived from the following authorities:

Rainy Sky SA v *Kookmin Bank* [2011] 1WLR 2900 per Lord Clarke at paras 21-23; *Arnold* v *Britton* [2015] AC 1619 per Lord Neuberger at paras 14-23 and Lord Hodge at paras 76-77; & *@SIPP Pension Trustees* v *Insight Travel Services Ltd* 2016 SC 243 at paras 17 and 44; *Hoe International Ltd* v *Andersen* 2017 SC 313 at para 19; and *Wood* v *Capita Insurance Services Ltd* [2017] 2 WLR 1095 per Lord Hodge at paras 10-14. Counsel for the pursuers summarised the principles as follows (counsel for the defenders taking no issue with this formulation):

> i. The task for the court is to seek to objectively determine what a reasonable person with all the background knowledge reasonably available to both parties at the time of contracting would have understood the parties to have meant by the words they have used.
>
> ii. The court should be concerned to give effect to the natural and ordinary meaning of the words used by the parties.
>
> iii. In circumstances where there are ambiguities or rival meanings, the court is entitled to test the competing constructions with reference to business common sense.
>
> iv. Finally, the "internal context" of the contract at issue should be considered in seeking to construe a particular term. The court should therefore be concerned to read the contract as a whole in a coherent and consistent way with the result that terms complement rather than contradict one another.

[15] We now go on to consider each of the disputed clauses, and grounds of appeal, in turn. We will begin with clause 27, to which the first ground of appeal related.

First ground of appeal: clause 27. The issue here is whether clause 27 prevents the pursuers from founding on the email of 14 July 2016, which predated the conclusion of missives.

Submissions for the defenders

[16] Senior counsel for the defenders adopted his written note of argument (as did senior counsel for the pursuers in relation to his note) and, for the avoidance of doubt, we have had

regard both to the notes of argument and submissions made at the bar. We simply narrate a summary of the submissions made by each party. Counsel for the defenders submitted that the clause had dual effect. The first part of the clause prescribed what constituted the contract. The second part (from the words "supersede and invalidate" to the end) had the effect of excluding reliance by the pursuers on any representations which were not contained within the missives. The key words were "understanding" and "representations". "Understanding" must signify something other than an agreement; and "representations" were to be distinguished from contractual terms and also from an undertaking and a warranty. The email, which related to flooding, clearly referred to the same matter as clause 2.1.3 and therefore to the subject matter of the contract. It formed part of the understanding of the pursuers but did not form part of the missives. Accordingly, the end product was that the pursuers were unable to rely upon it. The words "supersede" and "invalidate" did not prevent the clause from having that meaning and the sheriff erred in so far as he found otherwise. The word "supersede" was the more apposite of the two. It made perfectly good legal sense to say that the email was superseded by the terms of the contract. It was simply a question of contractual interpretation as to whether or not a clause had the effect of preventing a party from relying on a misrepresentation. There did not have to be an express reference to non-reliance, for a clause to have that effect. While the wording of the clauses in the case law referred to non-reliance, those words did not require to appear. Other wording could equally have the same effect. In support of his submission, counsel referred to *Deepak* v *Imperial Chemical Industries plc* [1998] 2 Lloyd's Rep 139 and [1999] 1 Lloyds rep 387, and to *Watford Electronics Ltd* v *Sanderson CFL Ltd* [2002] FSR 19. In *Deepak,* at first instance, the judge had placed significance on the omission from the clause in that case of the word "representation". By contrast, that word appeared in clause 27.

Submissions for the pursuers

[17] Senior counsel for the pursuers referred to *Inntrepreneur Pub Co (GL)* v *East Crown Ltd* [2000] 2 Lloyds Rep 611 at paras [7] to [8] and to *Watford Electronics*. He submitted that the basic object of clauses such as the present was to obviate collateral warranties – to denude something of the legal effect which it would otherwise have had. Nothing could be taken from use of the phrase "agreement and understanding" since, as the cases illustrated, that was a phrase which was frequently used. While an entire agreement clause *could* also have the effect of preventing a party from relying on misrepresentations by the other, there were tried and tested means of doing that, which had not been adopted in the present case. One must assume that the Law Society of Scotland drafters were aware of those formulae. Bearing in mind the wide use to which the clause would be put and the different circumstances in which it would apply, the clause could not bear the construction put on it by the defenders. The courts construe this type of entire agreement clause strictly and in a manner which is predictable for the large number of users of the standard conditions. Turning to the wording of the clause, and having regard to the grammar of it, counsel pointed out that it was a single sentence. It led with the thing of most importance and then gave further examples of it. It was significant that the reference to "representations" fell between undertakings and warranties, which suggested that all three should be regarded as matters which were of some contractual significance. The clause had nothing to do with *mis*representation. It made no sense to speak of a representation being "invalidated".

Discussion

[18] Although parties tended to focus on the principles of contractual interpretation, which we have set out above, in relation to how clause 2.1.3 should be approached, those

principles apply no less to the construction of clause 27. With that in mind, it is hard to see that the natural and ordinary meaning of the words used is that contended for by the defenders. Reading the clause as a whole, it appears to be conveying one message rather than two, as signified by the absence of a comma or any other separator between the opening phrase – "The Missives will constitute the entire agreement and understanding between the Purchaser and the Seller with respect to all matters to which they refer" – and the rest of the sentence.

[19] Second, the natural and ordinary meaning of the words used is not that the parties are giving up the right to rely on any misrepresentations which may have been made. In particular, the words "supersede" and "invalidate" do not sit happily with such an interpretation. As counsel for the pursuers submitted, those words convey the meaning that the parties agree that something which otherwise would have had legal effect should not have that effect, rather than an intention to surrender a potential legal remedy which would otherwise be available in respect of a wrong which may have been committed. Those are two entirely different concepts. It is true that the word "understanding" would appear to signify something which is not an agreement, but as counsel for the pursuers also pointed out "agreement and understanding" appears to be a tried and trusted phrase which crops up time and again and is, we suspect, more due to the innate prolixity of conveyancers and a tendency to use two words where one might do, rather than a tightly worded but oblique attempt to state that both parties agree not to rely on misrepresentation in support of any remedy which they might seek. As regards use of the word "representations", which is the other word on which the defenders hang their argument, that argument loses much of its force when the positioning of the word in the sentence is noted, namely, between undertakings and warranties both of which do signify matters of contractual significance.

This positioning makes it even more unlikely that the intention of the draftsman was that "representations" was intended to include something which had induced the contract or that the clause achieves two different consequences: the deprivation of legal effect from a representation which may otherwise have had that effect, and an exclusion of any entitlement to rely on a representation which turned out to be false. The natural and ordinary meaning of the words, therefore, points towards the construction contended for by the pursuers. However, to the extent that the tautology in the clause, or the other language used, does give rise to ambiguity or rival meanings, we then turn to consider the context. We note that this is a standard form contract designed to be used for many years in a variety of situations in contracts for the purchase and sale of residential property in Scotland. It is unlikely that the drafters intended that a purchaser of heritable property should, in ordinary course, not be entitled to pursue a legal remedy which he would otherwise have had. Had that been the intention, one would have anticipated that it would have been made crystal clear. It is one thing to provide for certainty as to what the contract comprises; quite another to agree not to rely on a pre-contractual misrepresentation. It is also pertinent to have in mind that, as counsel also submitted, the drafter can be taken to be aware of the pre-existing case law and of formulae which were known to work; and had it been the intention that the clause not only be an entire agreement clause but also one which excluded the right to rely on pre-contractual misrepresentations, it is not unreasonable to proceed on the basis that had the intention been as the defenders contend, wording would have had to be used which put the matter beyond doubt and had withstood the scrutiny of the courts rather than leave the matter to chance.

[20] This point is reinforced by the further submission made by counsel for the pursuer, with which we also agree, that, in effect, the construction of the clause contended for by the

defenders is to exclude liability which one party would otherwise have together with the corresponding surrender of rights by the other party. As such, we agree with the dictum of Mr Justice Jacob in *Thomas Witter Ltd* v *TBP Industries Ltd* (1994) 12 Tr L 145 at 168C, cited with approval by Mr Justice Rix, the first instance judge in *Deepak*, at page 168 that:

> "…if a clause is to have the effect of excluding or reducing remedies for damaging untrue statements then the party seeking that protection cannot be mealy-mouthed in his clause. He must bring it home that he is limiting his liability for falsehoods he may have told".

[21] Finally, one of the principles of contractual interpretation is that contracts should be read as a whole. We note that clause 26 of the standard clauses expressly provides for limitation of liability and it is therefore unlikely that clause 27, which immediately follows that clause, is also intended to have that effect, by implication.

[22] Accordingly, we consider that the sheriff was correct in interpreting clause 27.1 as he did. Insofar as the first ground of appeal is concerned, we will adhere to the sheriff's interlocutor.

The third ground of appeal: clause 2.1.3

[23] The issue over clause 2.1.3 is a narrow one. The difference between the parties is whether the clause amounts to a warranty only as to the current condition of the property and no more, or whether it amounts to a warranty as to the defenders' knowledge of any history of flooding at the property, within the last five years. The defenders contend for the former. They argue that the plain meaning of the clause is that it is a statement as to a present state of affairs – ("that the property <u>is</u> not affected by") which has been caused by a past state of affairs – ("flooding from any river or water course which has taken place within the last five years"). The pursuers argue that the sheriff's interpretation of the clause was

correct and that it should be read as a warranty that the property has not been affected by flooding within the last five years. Underlying these different approaches is a difference in the application of the relevant principles set out above, and, in particular, a dispute as to the whether the application of commercial common sense has any role to play in the interpretation of the clause.

Submissions for the defenders

[24] Counsel for the defenders submitted that business common sense had no role to play in a case where the natural and ordinary meaning of the words was clear. Here, there was no ambiguity and hence no need to resort to commercial common sense. In any event the court should always be very wary about attributing that label to any proposed construction since it was a nebulous concept. The defenders' proposed construction, counsel submitted, was more sensible than the pursuers' in any event. The pursuers' example of a property flooding every other day was fanciful. It was inconceivable that a property which flooded every other day would not be affected by flooding. It would equally be draconian to require a seller to disclose a single incident of flooding which occurred four years and eleven months ago. It would be obvious to a seller what he had to disclose since the property would require to have been affected to a material extent.

Submissions for the pursuers

[25] Counsel for the pursuers submitted that the leading authority which advocated the use of commercial common sense as a tool in interpreting a contract was *Rainy Sky*. Commercial common sense had in no way been departed from as a principle of construction. Counsel accepted that the factual context was of no assistance where the court

was dealing with a standard form of contract, as here, but submitted that there were rival and competing meanings, which precluded a wholly literalist approach. Was the clause talking about the present physical state of the property or its propensity to flood? Did the words "is not affected by flooding" mean no more than flooding is not to be expected? If a literalist approach reached a result that was absurd, it was unlikely to be correct, particularly in a standard form contract; and the defenders' proposed construction did verge on the absurd. It would result in a purchaser having a remedy if the house had flooded once, last week and was still wet, but not if it had flooded multiple times in the last five years but was currently dry. What a purchaser was concerned to know was the propensity of a property to flood. The clause also had to be construed so as to give some content to the reference to a five year period.

Discussion

[26] The most recent and authoritative guidance as to the approach to contractual interpretation was that given by the Supreme Court in *Wood* v *Capita Insurance Services*. In his judgment, Lord Hodge (with whom the other justices agreed) said the following (from para.13):

> "13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and

> coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions and contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 All ER 571, para 12, assist the lawyer or judge to ascertain the objective meaning of disputed provisions.
>
> 14. On the approach to contractual interpretation, the *Rainy Sky* and *Arnold* cases were saying the same thing".

[27] Thus, it is clear that the court's task is to ascertain the objective meaning of the words used, having regard to the language used – textualism – and the consequences of the rival constructions – contextualisim. It is an iterative process, by which the court arrives at the correct meaning.

[28] Turning to clause 2.1.3, the first thing to note is the clause heading, "Awareness of Circumstances Affecting the Property". We observe that "circumstances" is extremely broad, as indeed is the phrase "affecting the property". Indeed, if one read the heading and turned to see what the circumstances were, the reader would see that one of those circumstances was "flooding from any river or watercourse which has taken place within the last five years", which is at least a factor pointing towards the pursuers' interpretation. There then follows the statement that "so far as the seller is aware the property is not affected by "any of the circumstances that follow". We observe that the phrase "affected by" is also extremely broad. It appears in a number of places in the contract. It does not necessarily mean "adversely affected by" but could mean affected in a less pejorative sense "none of the following applies to the property", as opposed to "none of the following has had a lasting effect on the property". This latter meaning is also suggested by the heading.

[29] We further observe that the word "materially" – as in, "materially affected by": a phrase which counsel for the defenders used at one stage of his submissions – is conspicuous by its absence, and indeed would make no sense when applied to the matters referred to in clauses 2.1.1 and 2.1.2.

[30] Accordingly, applying a literalist approach, the clause could have either of the meanings respectively contended for by the parties. Turning then to check those potential meanings against their consequences – that is, adopting the iterative approach referred to by Lord Hodge – the meaning contended for by the defenders makes little sense. It is unlikely that a purchaser would wish to have a warranty that the property is not presently affected by flooding when such a circumstance might be expected to be obvious to the purchaser or his surveyor in any event. It is also unlikely that he would not wish to know about the propensity to flood. The defenders' construction also gives rise to uncertainty, since it introduced an element of subjective assessment into what must be disclosed. How is a seller to judge whether the property is or is not affected by flooding, assuming he knows what "affected by" means. Does it mean "materially affected"? If so, how is a seller to know the property is presently affected by flooding to a material extent and, if so, whether that is due to flooding which occurred in the last five years. Suppose the property had been severely flooded six years ago and less severely flooded four years ago. Would the seller be entitled to say that the remaining effect on the property was down to the earlier flood, not the latter and therefore not disclose it?

[31] Conversely, the pursuers' interpretation not only makes sense but is easy for a seller to comply with. All they need to do is disclose any flooding which, to their knowledge, has occurred within the last five years. Whether it was big or small makes no difference. The risk will then be a matter for the purchaser to take an informed decision on.

[32] It was submitted for the defenders that draconian results would arise if the purchaser became entitled to resile due to a minor flood nearly five years ago but we do not consider that to be draconian at all. All the seller has to do to avoid that situation is to disclose flooding of which he is aware.

[33] We therefore consider that the draftsman intended that clause 2.1.3 should have the meaning contended for by the pursuers, and that the sheriff was correct in so holding. Insofar as the third ground of appeal is concerned, we also adhere to the sheriff's interlocutor in this regard.

The second ground of appeal: remedy

[34] The remaining (second) ground of appeal relates to the issue of whether, in the event that clause 2.1.3 has the meaning contended for by the pursuers, and the defenders were aware of flooding within the last five years which had not been disclosed, the pursuers are entitled to regard that not only as a breach of contract but also as a misrepresentation which entitles them to the remedies of reduction of the contract and to repetition of the purchase price (and, perhaps, damages). As we have already observed, before the sheriff this became something of a non-issue, since the defenders conceded that if they were unsuccessful on the meaning of clause 27, and the pursuers were entitled to rely on the email as containing a misrepresentation, the point became academic. Before us, however, the defenders' counsel insisted on this ground of appeal and sought to have certain averments excluded even if the defenders' first ground of appeal failed (as it has done).

Submissions for the defenders

[35] The argument before us was striking inasmuch as each counsel sought to persuade us of the correctness of their respective positions by reference to first principles, there being little authority on the point: certainly, no direct authority. In the defenders' written note of arguments, it was submitted that the remedy of reduction was available where the consent of a party to the existence or terms of a contract was impaired to an extent recognised in law as properly requiring that party to be afforded the opportunity of having the contract set aside and be restored to his pre-contractual position. It was a fundamentally different remedy from rescission. That latter remedy was a means provided to enable a contract to be brought to an end because it had been breached. Unlike reduction it was a remedy which a party could invoke without recourse to legal authority. The pursuers' case ignored those basic legal points. The remedy of reduction was not competent for a breach of clause 2.1.3. The pursuers' consent to enter the contract was in no way impaired by the existence of terms of clause 2.1.3. The fact that the clause contained a statement about a quality or attribute of the subjects of sale did not transform it into a pre-contractual misrepresentation capable of giving rise to a defect in consent on the part of the pursuers. At the hearing before us, counsel also drew a distinction, under reference to *McBryde*, The Law of Contract in Scotland 3rd Edition, para. 5.45, between a term of a contract, and a representation which was part of the negotiation leading up to the contract. A statement could be one or the other but not both. The pursuers' argument that a pre-contractual representation could acquire an additional status as a contractual term was ingenious, but untenable. The clause in question was first introduced into the contract by the pursuers' offer and could not amount to a representation by the defenders.

Submissions for the pursuers

[36] As anticipated by counsel for the defenders, it was indeed the basic submission of counsel for the pursuers that a pre-contractual representation could become, also, a term of the contract. That did not deprive it of its status as a representation. If found to be false, the contract could then be reduced. A contract was a record not only of obligations but of statements as to particular facts or states of affairs which were material to the parties (*McBryde, op cit*, para 20.10). The pursuers' position was that even had the misrepresentation contained in clause 2.1.3 stood alone, they would not have contracted. The remedies available to them for misrepresentation did not change, even though they also had different remedies available for breach of contract. Nothing in *McBryde* at para 5.45 detracted from the pursuers' argument. If anything, the statement there that an aggrieved party would *normally* prefer to sue for breach of contract supported the pursuers' position since it implied that the alternative of suing for misrepresentation was also available. As regards the time at which the representation was made, it was when the qualified acceptance was issued.

Discussion

[37] We do not consider it helpful to focus on the differing nature of the remedies available for negligent misrepresentation on the one hand, and breach of contract on the other. We accept, of course, that the remedies are different, and it is trite law that a breach of contract, *per se*, does not entitle the innocent party to reduce the contract. To that extent the defenders are correct in submitting that reduction is not a competent remedy for any breach of clause 2.1.3. However, to an extent, that is to miss the point, since the pursuers do not base their case on breach of contract and to acknowledge those fundamental principles does not assist in resolving the core issue raised by the second ground of appeal which is whether

a statement can be both a representation upon which a party relies in deciding to contract and also, subsequently, a term of the contract itself. We see no reason in principle why that should not be the case. Indeed, it would appear to follow from the defenders' argument in relation to the meaning and effect of "the entire agreement clause" that, as a matter of law, that is possible. If the missives constitute the entire agreement and *understanding* and supersedes all prior *representations* (emphases added) it must follow that it is open to a party to insist that a pre-contractual representation upon which he has relied should become a term of the contract. It does not follow from the fact that the contract duly contains that term that the party has ceased to rely upon the representation. (Whether he has in fact relied upon the representation, of course, is a question of fact but we are here dealing with the question of principle as to whether a statement can be both.) To give an example, if A represents to B that his car has done only 5,000 miles, and on that basis B agrees to purchase the car, and the parties subsequently contract for the purchase and sale of a car which has done 5,000 but it transpires that the car has in fact done 50,000 miles, we see no reason why that could not give rise to either a claim for breach of contract or a claim based upon misrepresentation. There are many situations where the same facts give rise to a choice of remedies. We do not see anything in *McBryde* which suggests that our statement of principle is wrong. It is nothing to the point to say what remedy a party would prefer to pursue. Of course, in relation to many contractual terms, in particular those which give rise to an obligation on a party to do something, the question will simply not arise. But in relation to terms which warrant a particular state of affairs, such as in clause 2.1.3, we can see no reason, in principle, why the pursuers might not have a choice of remedy, if the warranty turns out to be false, as they aver.

[38] The question remains as to whether the pursuers have averred a relevant case, since it would not be enough simply to aver that the clause has been breached. Such an averment would amount to no more than an averment of breach of contract. The pursuers' position in submissions was that the representation, and therefore misrepresentation, was made as soon as the qualified acceptance was issued. The defenders' counsel sought to make something of the fact that the standard clauses were first mentioned by the pursuers in their offer, and that the representation was therefore made by them, but we do not consider that to be a correct analysis. To go back to the example of B buying a car from A, if B says to A "I will buy your car but only if you tell me that it has done no more than 5,000 miles" and A says "I agree to sell it to you on that basis" that then becomes a representation by A, and the position is no different here. The pursuers offered to purchase the subjects on the basis (as we have found) that the defenders were unaware of any flooding within the previous five years, and as soon as the qualified acceptance accepting that term was issued, that did become a representation by the defenders to that effect (whether the pursuers themselves were aware of the standard clauses is of course a different matter, but that goes to reliance rather than to the question of whether a representation was made). As far as the pursuers' averments are concerned, we concede that they might be clearer insofar as the timing of the misrepresentation is concerned. However, on balance we consider that they are sufficiently specific to found a case based upon reliance on the representation constituted by the issuing of the qualified acceptance. In particular the averment that "But for the misrepresentations the pursuers would not have entered into the missives of sale" in article 12 of condescendence makes the pursuers' position clear.

[39] The defenders' second ground of appeal must therefore also fail.

Decision

[40] For all of the foregoing reasons, we propose to refuse the appeal and adhere to the sheriff's interlocutor of 11 December 2017.