SHERIFF APPEAL COURT

[2024] SAC (Civ) 9
ABE-CA20-21

Sheriff Principal A Y Anwar
Sheriff Principal N A Ross
Appeal Sheriff P A Hughes

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in the appeal in the cause

RELIANCE (AB) LIMITED

Pursuer and Appellant

against

QUANTUM CLAIMS COMPENSATION SPECIALISTS LIMITED

Defender and Respondent

Pursuer and Appellant: D M Thomson KC; BBM Solicitors Limited
Defender and Respondent: Dean of Faculty (Dunlop KC), McWhirter; Lefevres (Scotland) Limited

18 March 2024

Introduction

[1] The respondent owns property at 70 Carden Place, Aberdeen. It leased part of the property, comprising a restaurant and bar on the lower floor with a separate roof terrace, to the appellant. The appellant traded as "Dizzy's Bar & Diner". The term of the lease expires on 21 May 2035. The entire building was destroyed by fire on 23 December 2019. Fire was an insured risk under the parties' lease. The insurers accepted liability.

[2] Clause 6.4.2 of the lease imposed certain obligations upon the respondent to lay out the net proceeds of insurances in the rebuilding and reinstatement of the building.

Clause 6.6 of the lease provided that if the respondent shall have failed to complete the necessary works of reinstatement within three years of destruction, then either party may terminate the lease. The respondent did not reinstate the building and purported to terminate the lease following expiry of the three year period. The appellant formed the view that the respondent had deliberately failed to reinstate the building, contrary to its lease obligations, and raised the present action.

Background

[3] The lease between the parties comprises a lease dated 23 March and 6 April 2016 between the respondent and Quatro Venture Limited and an assignation and variation dated 12 and 15 February 2018 between the appellant, respondent and Quatro Venture Limited.

[4] The appellant avers that at the time of raising proceedings in June 2021, no application for planning permission or other consents for the rebuilding or reinstating of the property had been lodged by the respondent. The appellant had sought information from the respondent regarding the steps it had taken towards applying for permission. On 17 September 2021, the appellant was granted commission and diligence for the recovery of documents. The planning application was signed on 20 September 2021, the next working day, and was lodged on 23 September 2021. A commission hearing was attended by the respondent's managing director on 6 October 2021. The appellant avers that the documents recovered by way of commission and diligence show no evidence that he - the sole person responsible within the respondent's company for overseeing the reconstruction of the property - had taken any active role in advancing the reinstatement of the property until that time. Detailed planning permission was granted on 14 February 2022. Tenders were

issued and approved. The appellant avers that the respondent had shown no intention of proceeding with the reinstatement in terms of this permission. To the contrary, the respondent demonstrated an intention to build a larger office block, including building an office block on the semi-flat roof where the appellant's roof terrace was located, as reflected in a new planning application submitted in February 2022, contrary to its obligation under clause 6.4 of the lease. Recovered documents demonstrated the respondent's ultimate goal was to "get rid of the tenant" and to not reinstate the property in accordance with the planning permission granted in February 2022. The insurer does not insist on reinstatement. The appellant apprehends that the respondent may decide to sell the property as a vacant site and profit to the extent of more than £1.25 million. The appellant had lodged an expert report, which opined that, had the respondent undertaken the reinstatement in an ordinarily commercially driven manner, the premises would have been reinstated by February 2022.

[5] The respondent avers that it used reasonable endeavours to progress the rebuilding work as soon as practicable. Planning permission for demolition works was secured and the demolition works were substantially completed by August 2020. Following the respondent's loss adjuster confirming acceptance of a reinstatement budget, the planning application was submitted on 23 September 2021. A tender was submitted for the first phase of the reconstruction work, limited to the townhouse part of the property only, in April 2022 and accepted in May 2022. Construction for the first phase of the work was due to commence on 18 July 2022. It applied for planning permission for the second phase of the work which would include reinstatement of the restaurant premises with reasonable variations. It avers that the restaurant premises will be reinstated substantially as they were before the fire and that insurance monies will be used to do so.

[6] On 12 August 2022, the respondent provided an undertaking to the court, put shortly, that it will lay out the net proceeds of insurance, making up any shortfall from its own resources, in the rebuilding and reinstatement of the property substantially as the same was prior to the destruction. The sheriff found the respondent liable to the appellant for the expense of the action to date.

[7] On 17 November 2022, the respondent provided an undertaking that it would not give notice to terminate the lease in terms of clause 6.6 during the currency of these proceedings (without four weeks prior notice). On the same date, a diet of debate was assigned on the proper interpretation of clause 6.6 of the lease.

Terms of the lease

[8] The relevant terms of the lease for the purposes of this appeal are as follows:

> **"2 INTERPRETATION**
> 2.1 Unless there is something in the subject or context inconsistent therewith:
>
> …
>
> 2.1.7 the titles or headings appearing in this Lease are for reference only and shall not affect its construction…
>
> **6 INSURANCE**
> **6.1 Landlords to insure**
> The Landlords shall insure and keep insured…:
> 6.1.1 the Building in the Reinstatement Cost against loss or damage by the Insured Risks; …
>
> …
>
> **6.4 Destruction of the Property**
> If the Building or any part thereof is destroyed or damaged by any of the Insured Risks so as to render the Property unfit for beneficial use and occupation or inaccessible then:

6.4.1 to the extent that payment of the insurance moneys shall not be refused in whole or in part by reason of any act or default of the Tenants or any subtenant or any person under its or their control;
6.4.2 subject to the Landlords being able to obtain any necessary planning permission and all other necessary licences, approvals and consents which the Landlords shall use their reasonable endeavours to obtain but shall not be obliged to institute any appeals: and
6.4.3 subject to the necessary labour and materials being and remaining available which the Landlords shall use their reasonable endeavours to obtain as soon as practicable;
6.4.4 subject to Clause 6.5:
the Landlords shall lay out the net proceeds of the insurances referred to in Clauses 6.1.1 and Clause 6.1.3 making up any shortfall from their own resources in the rebuilding and reinstatement of such part of the Building so destroyed or damaged substantially as the same was prior to any such destruction or damage (but not so as to provide accommodation identical in layout if it would not be reasonably practical to do so) and with such variations as the Landlords may reasonably require provided the Property as reinstated affords comparable premises in terms of size and quality to the Property existing prior to such damage or as may be requisite in accordance with the requirements of the planning or any other statutory authority.

6.5 Option to terminate

If during the last year of the Term, the Building or any part thereof shall be so destroyed or damaged by any of the Insured Risks as to render the Property unfit for use and occupation and the Landlords do not wish to rebuild or reinstate the same then the Landlords may terminate this Lease by giving to the Tenants not less than six months' written notice to be given at any time within 12 months after such destruction or damage (notwithstanding that such notice may expire before or after expiry of the said 12 month period) and such termination shall be without prejudice to any claim by either party against the other in respect of any antecedent breach of this Lease. If this Lease shall be terminated by the Landlords in terms of this Clause 6.5, then the Landlords shall not be required to lay out the proceeds of such insurance and shall be solely entitled to all the insurance moneys.

6.6 Where reinstatement is prevented

If by the expiry of three years after such damage or destruction the Landlords shall have failed to complete the necessary works of reinstatement so as to render the Property fit for such beneficial use and occupation and accessible, either party may at any time after the expiry of such three years by written notice given to the other party terminate this Lease but such termination shall be without prejudice to any claim by either party against the other in respect of any antecedent breach of this Lease in which case the Landlords will be entitled to retain the insurance monies.

6.7 Cessor of rent

If the Building or any part thereof (other than the plate glass) shall be destroyed or damaged by any of the Insured Risks so as to render the Property unfit for beneficial use and occupation or inaccessible then to the extent that the insurances effected by the Landlords under this Lease shall not have been vitiated or payment of the policy moneys refused or withheld in whole or in part as a result of some act or default of the Tenants or any subtenant or any person under its or their control, then the yearly rent for the time being payable under Clause 3.1.1 or a fair proportion thereof, according to the nature and extent of the damage sustained, shall be suspended until the Property or the part destroyed or damaged shall be again rendered fit for use and occupation and accessible or until the expiration of three years from the date of the destruction or damage (whichever is the earlier) . . . .

7 UNINSURED RISK, DAMAGE

7.1 If:

7.1.1 the Property, or

7.1.2 any part of the Building upon which the Property depend for access, fire escape, egress or other necessary purposes,

are damaged or destroyed by an Uninsured Risk, to the extent that the Property is unfit for beneficial occupation or use (such extent of damage or destruction by an Uninsured Risk being in this Lease called the 'Material Uninsured Damage'), then the Rent (or a fair proportion, according to the nature and extent of the damage) shall be suspended until the earlier of (1) the Property being rendered fit for occupation and use; and (2) this lease being terminated in terms of Clause 7.5.

7.2 The Landlords shall be entitled, within six months after the date of occurrence of the Material Uninsured Damage, to decide and notify the Tenants:

7.2.1 whether or not and

7.2.2 to what extent,

the Landlords intend to reinstate the parts of the Building which were affected by the Material Uninsured Damage.

7.3 If the Landlords serve notice on the Tenants:

7.3.1 within six months of the occurrence of the Material Uninsured Damage (time being of the essence); and

7.3.2 to the effect that the Landlords intend to reinstate the parts of the Building which were affected by the Material Uninsured Damage, at least to the extent required to render the Property fit for beneficial occupation and use (the extent of such reinstatement being proposed by the Landlords being in this Clause 7 called the 'Uninsured Damage Reinstatement' and such notice being called the 'Uninsured Damage Reinstatement Notice'),

then the Landlords shall carry out the Uninsured Damage Reinstatement, at its own cost as soon as reasonably practicable but subject to clause 7.4.

…

8 PROVISOS
IT IS HEREBY AGREED AND DECLARED as follows:…

8.5 **Exclusion of representations and warranties.**
8.5.3 Nothing in this Lease shall render the Landlords liable (by implication of law or otherwise) for the doing of anything which the Landlords have not expressly obliged themselves in this Lease to carry out, provide or do."

The sheriff's judgment

[9] The sheriff held that the respondent could invoke clause 6.6. He considered the language used was clear, unambiguous and straightforward. The words in the clause were not qualified in any way. The sheriff considered the question was whether the respondent had "failed to complete" the reinstatement work within the three year period provided for. It was clear the respondent had failed to do so. That being so, it was entitled to invoke clause 6.6 and terminate the lease. He also held that the appellant was precluded from implying any terms into the lease due to clause 8.5.3. While it was not what would conventionally be described as an "entire agreement" clause, it did prevent the implication into the lease of obligations beyond those expressly contracted for. In any event the sheriff considered there was no basis to imply a term, sought by the appellant, that "any reinstatement requires by implication to be undertaken within a reasonable time" into the lease. No such term was necessary for the lease to operate. Implying such a term would directly contradict the three year period set down in clause 6.6. The failure of the appellant's argument to imply that term into the lease meant, in turn, that there had been no breach of contract and that the "prevention principle" was not applicable.

Grounds of appeal

[10] The appellant contends that the sheriff erred by dismissing the action at debate; he ought to have reserved the respondent's preliminary pleas and fixed a proof before answer. The following grounds of appeal are advanced:

(i) That the sheriff erred by treating the express wording of clause 6.6 as his starting point and interpreting the word "failed" by reference only to the ordinary meaning of words and without reference to the wider contractual context;

(ii) The sheriff erred in finding that there was no express requirement that the respondent must "set about the task of reinstatement in any particular way or, indeed…set about it at all". In so finding, he overlooked the terms of clause 6.4;

(iii) He erred by focussing only upon whether an obligation to reinstate the subjects "within a reasonable time" could be implied into clause 6.6; he ought to have considered whether such a term could be implied into clause 6.4;

(iv) The sheriff erred in finding that there had been no causative breach of contract by the respondent without allowing proof before answer;

(v) The sheriff ought to held that a proof before answer was required to establish whether the planning permission obtained by the respondent on 14 February 2022 fulfilled its obligations under clause 6.4.2;

(vi) The sheriff erred in failing to find that, having regard to the entirety of the appellant's averments, it was not bound to fail in establishing that the respondent could not rely upon clause 6.6, by the application of the prevention principle; and

(vii) The sheriff erred in his approach to clause 8.5.3.

Submissions for the appellant

[11] Senior counsel invited the court to recall the sheriff's interlocutors of 26 May 2023 and 7 July 2023 and to thereafter allow a diet of proof before answer. He submitted that the pleadings gave fair notice of the appellant's case, namely that the respondent has been acting on its stated ultimate goal of getting rid of the tenant and has done so in a number of ways, including: a "dummy" planning application; minimal tendering; exploring other options including sale of the site, and submitting a revised planning application for a materially different building. The respondent had made no meaningful effort to reinstate the appellant's restaurant premises and had brought about the passage of three years since the date of the fire. The respondent should not be entitled to rely on its own engineered delay as the basis for bringing the lease to an end under clause 6.6.

[12] Senior counsel noted that clause 6.4.4 contained the word "shall" which demonstrated that it was an obligation that, in the event of destruction of the property by reason of an insured risk, the respondent had to lay out the net proceeds of the insurances and make up any shortfall in the reinstatement of the property. Thereafter, clause 6.6 must be read in the context and knowledge of clause 6.4. The sheriff had failed to consider clause 6.4 when he considered the meaning of clause 6.6. When clause 6.6 was drafted it was plainly intended that the respondent would comply with its obligation under clause 6.4. This was a clear case where the court should give effect to the appellant's contention that there was an implied term at clause 6.4 that any reinstatement works would be undertaken and completed within a reasonable time: *Arnold* v *Britton* [2015] AC 1619 per Lord Neuberger of Abbotsbury PSC at 1629 and Lord Hodge JSC at 1638 and *Aberdeen City Council* v *Stewart Milne Group Ltd* 2012 SC (UKSC) 240 per Lord Hope DPSC at 246 - 247. Whether that meant implying that term into the lease or construing clause 6.4 such that it

included a requirement to reinstate in a reasonable time was open to question given the differing views expressed in *Aberdeen City Council* (*supra*) by Lord Hope and Lord Clark. Lord Hope viewed the matter as one of construction, whereas Lord Clark considered it a matter of implying a term. On either approach, however, clause 6.4 contained a requirement that planning applications and reinstatement be made within a reasonable time.

[13] Properly construed, clause 6.6 should be read as applying only where the delay in reinstatement has not been caused, or engineered, by the conduct of the respondent. A party cannot take advantage of its own wrong (otherwise known as the "prevention principle"): *Bidoulac* v *Sinclair's Trustee* (1889) 17 R 144; *New Zealand Shipping Co* v *Société des Ateliers et Chantiers de France* [1919] AC 1 and McBryde, *The Law of Contract in Scotland*, 3rd ed, (2007), paragraph 20-21. Even if one were to apply the ordinary use of the language in clause 6.6 it would be artificial to say the respondent "failed to achieve" reinstatement when, in fact, it had not even made attempt to reinstate. As such, it was submitted that the word "failed" in clause 6.6 carried with it a degree of culpability or fault. The appellant offered to prove such culpability at a proof before answer.

[14] Moreover, the obligation for the respondent under clause 6.4 was to use "reasonable endeavours" to (i) obtain planning permission and (ii) undertake the reinstatement work, both within a reasonable time. It cannot have been the presumed intention of the parties that the respondent must use reasonable endeavours to obtain planning permission but then have no obligation to make any effort to reinstate the property. If the position were as the respondent submits, then the respondent is free to take advantage of their own neglect.

[15] Clause 8.5.3 did not excuse the failure of the respondent to obtain planning permission in a reasonable time. Clause 8.5.3 was only intended to negate any obligation extrinsic to the lease.

Submissions for the respondent

[16] The Dean of Faculty submitted that the sheriff had correctly interpreted clause 6.6. The language used was simple and unambiguous. It was not qualified. If parties have used unambiguous language then the court must apply it: *Rainy Sky* v *Kookmin Bank* [2011] 1 WLR 2900 per Lord Clark JSC at 2908H - 2909C. The appellant's construction would involve this court rewriting the bargain made between the parties. In other words, commercial common sense would be invoked retrospectively. That has been cautioned against by the Supreme Court: *Arnold* (*supra*) per Lord Neuberger PSC at 1628B - 1629F.

[17] Clause 6.6 did not say that the respondent had to have made reasonable attempts to complete the works or that failure was through no fault of their own. It did not expressly require the respondent set about the task of reinstatement in any particular way. The respondent had failed to complete the reinstatement work within the three year period provided for. That being so, the respondent was entitled to exercise clause 6.6.

[18] The prevention principle did not apply as there was no antecedent breach of contract by the respondent. It in any event only arose as an implied term, which was excluded. While two antecedent breaches were alleged, no causal link had been pled between any failure to obtain planning permission and the failure to reinstate, and there was no room for an implied term which contradicted the express term of clause 6.6. Implication of such a term was precluded by clause 8.5.3. In any event, it was not necessary to imply the term sought as the lease could operate adequately without its implication: *Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2016] AC 742 per Lord Neuberger PSC at 755D - 757H.

[19] Clause 8.5.3 was not an entire agreement clause. It was an express exclusion clause which excluded implication of a term by law. The distinction between extrinsic and intrinsic was therefore irrelevant. The meaning of clause 6.6 was clear and unambiguous. In any event, the interpretation of clause 6.6 by the sheriff fitted with commercial common sense. Reliance on the prevention principle, so far as based on breach of clause 6.4.2, was flawed due to the reasons given by sheriff. The argument for implication of a term of reasonable time at clause 6.4 was flawed as the test for implication is not met. The implication of reasonable time was excluded by clause 8.5.3. The implication of the prevention principle was precluded by the terms of clause 8.5.3. The appeal should be refused.

Decision

The principles of construction

[20] There was no dispute as to the principles of construction to be applied either during the debate before the sheriff or before this court. Those principles have been considered in many cases and are well understood (*Rainy Sky (supra*), *Arnold* (*supra*), *Wood* v *Capita Insurances Services Ltd* [2017] AC 1173 and *HOE International Ltd* v *Anderson* 2017 SC 313):

(i) The task for the court is to seek to determine objectively 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. In doing so, the court must have regard to all the relevant surrounding circumstances;

(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) The court should 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.

Clause 6.6

[21] The sheriff noted that there was no express requirement that the respondent "must set about the task of reinstatement in any particular way or indeed, as was suggested for the [respondent], set about it at all." He did not accept that "failing to" achieve something requires that a party made an effort and fell short of their objective; a party can fail to achieve something when they make an effort and fall short or when they neglect to do something or make no effort at all. He regarded the words used in clause 6.6 to be clear, unambiguous, unqualified and straightforward.

[22] The sheriff's analysis of clause 6.6 was exclusively textual and did not consider the terms of clause 6.6 having regard to the contract as a whole. He relied on the often quoted passages at paragraphs 16 to 20 of Lord Neuberger's speech in *Arnold.* We note, however, as explained by Lord Hodge in *Wood,* that *Arnold* did not involve a recalibration of the approach summarised in *Rainy Sky*. His Lordship noted (at para 10);

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focussed solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

[23] We take as our starting point, the language used. The heading to clause 6.6 reads "Where reinstatement is prevented"; however, in terms of clause 2.1.7 that cannot be used as an aide to interpretation.

[24] Applying the ordinary use of language, the word "failed" means having not succeeded in achieving an objective. It does not ordinarily import notions of fault. One can fail having attempted to achieve an objective or having made no attempt to do so, whether by choice, neglect or omission. The dictionary definition of the word "fail" includes "to fall short in performance or attainment" (*The Oxford English Dictionary*, 2nd ed, Volume V, (2004), Clarendon Press: Oxford, pp 665-666). It is capable of including "to omit to perform" but it is also capable of including "to be at fault; to miss the mark; to come short of". When used as an intransitive verb it can mean "to be unsuccessful in an attempt". We conclude that the phrase "failed to complete" in clause 6.6 does not have a single, or plain, or unambiguous meaning. The competing meanings, which respectively do and do not impute fault, are the fault line which this case straddles. The question of which is correct cannot be resolved by a short semantic definition.

[25] The word "failed" in clause 6.6 has been linked with completion. The ordinary and natural meaning of the words "failed to complete" is "to not finish something which has been started". To start involves an attempt; a degree of effort. Had the parties intended the word "failed" to encompass neglect, lack of effort or no effort at all on the part of the landlord, in what is a carefully drafted commercial lease, one might have expected the word "failed" to be linked to commencement rather than completion of the reinstatement works.

[26] The word "failed" and the words "failed to complete" are capable of being interpreted as both the appellant and the respondent contend; as requiring some effort on the part of the landlord before clause 6.6 can be invoked, or as requiring no effort at all.

Taking a strictly literal approach to the terms of clause 6.6, in isolation, the language used is not so clear and unambiguous that the court must apply it (per Lord Clarke in *Rainy Sky* at para 23).

[27] We turn then to consider the language used in clause 6.6 having regard to the other relevant provisions of the lease. The respondent correctly points out that clause 6.6 is not expressed as being subject to any other provision in the contract. Had the parties intended that to be so, it could easily have been achieved. That would indicate an intention that clause 6.6 should be read in isolation and without reference to the other provisions of the lease. On the other hand, the obvious and immediate context for clause 6.6 is that it forms part of clause 6. Read as a whole, clause 6 creates a scheme which becomes operative in the event of the property being destroyed by an insured risk. Clause 6.6 cannot readily be understood if it is divorced from that scheme. Indeed, to understand the words "such damage or destruction" and "necessary works of reinstatement" in clause 6.6 involves the reader requiring to make reference to the preceding parts of clause 6.

[28] Put shortly, the scheme of clause 6 obliges the landlord to use "reasonable endeavours" to obtain any necessary planning permission, licenses, approvals and consents (clause 6.4.2); to use "reasonable endeavours" to obtain as soon as practicable, the necessary labour and material (clause 6.4.3); and, importantly, obliges the landlord to:

> "lay out the net proceeds of the insurances…making up any shortfall from their own resources in the rebuilding and reinstatement of such part of the Building so destroyed or damaged substantially as the same was prior to any such destruction or damage…" (clause 6.4.4).

The respondent's submission correctly identified that clause 6.4 does not expressly provide that the landlord must use "reasonable endeavours" to reinstate the property, nor does it provide any timescale for reinstatement. However, it places obligations upon the landlord

in respect of all of the significant components of the reinstatement works; planning permission, labour, material and funds. While clause 6.6 may not specify when the reinstatement works are to be carried out, it rests on a preceding series of obligations, and places a further positive obligation upon the landlord to reinstate.

[29] Where the property is destroyed or damaged by an insured risk in the last year of the term of the lease, or it is destroyed or damaged as a result of an uninsured risk, other clauses (being 6.5 and 7 respectively) provide the landlord with complete freedom in terms of whether, when and in what form to reinstate the property and how to use its funds. Clause 6.4 restricts that freedom where the property is destroyed prior to the last year of the term. It obliges the landlord not only to apply the insurance monies to the reinstatement of the property, but also to commit its own resources to any shortfall. That onerous obligation is conceived entirely in favour of the tenant. Clause 6.4 is intended to provide the tenant with a degree of protection in relation to the continuity of the business it operates from the property, which is not afforded to it upon the occurrence of the events referred to in clauses 6.5 or 7.

[30] The language used in clause 6.5 can be contrasted with that used in clause 6.6. In terms of clause 6.5, the landlord may serve notice if it does "not wish to rebuild or reinstate" the property. The parties did not include such a provision in clause 6.6. The language is quite different, and the landlord's preference is not accommodated. Clause 6.6 is invoked where the landlord has "failed to complete" the "necessary" reinstatement works. It is inherently unlikely that the parties, having carefully set out the obligations incumbent upon the landlord in terms of clause 6.4, and having provided a degree of protection for the tenant in those circumstances, would have intended by the use of the words "failed to complete" in clause 6.6, to provide a mechanism for the landlord to do nothing or very little, or

deliberately engineer a delay in reinstatement works (as the appellant offers to prove) and serve notice to terminate the lease three years later. Such a mechanism would afford the landlord the freedom of choice it enjoys in clause 6.5 by "the back door". Such an interpretation would relieve the landlord of its obligations in terms of clause 6.4 in any practical sense (save in relation to liability for any antecedent breach). It would render clause 6.4 practically redundant, leading to incoherence and contradiction between the terms of clauses 6.4 and 6.6. Having regard to the terms of the contract as a whole, the appellant's construction of clause 6.6 is to be preferred.

[31] The rival constructions are tested by examining the commercial consequences and by considering if either accords with business common sense. As explained by Lord Steyn in "Contract Law: Fulfilling the reasonable expectations of honest men" 113 LQR 433 at p441, with whom Lord Clarke agreed in *Rainy Sky* (at para 25):

> "Often there is no obvious or ordinary meaning of the language under consideration. There are competing interpretations to be considered. In choosing between alternatives a court should primarily be guided by the contextual scene in which the stipulation in question appears. And speaking generally, commercially minded judges would regard the commercial purpose of the contract as more important than niceties of language. And, in the event of doubt, the working assumption will be that a fair construction best matches the reasonable expectation of the parties."

[32] Lord Neuberger cautioned against invoking commercial common sense retrospectively (*Arnold* (*supra*) at p1628):

> "The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date the contract was made."

[33] The appellant had been using the property to run its business and has an interest in maintaining the continuity of that business. The lease sets out what is to happen if the

property is destroyed by an insured risk, by an uninsured risk or if the property is destroyed in the last year of the term of the lease. These provisions appear to represent a commercially negotiated compromise which balances the interests (or reflects the bargaining strengths) of the tenant and the landlord in each of those events.

[34] Neither of the rival constructions of clause 6.6 can be said to flout commercial common sense. The appellant's construction prevents the mischief of the landlord engineering the termination of the lease. The respondent's construction allows termination of a non-functioning lease. In our view, however, only the appellant's construction is consistent with the scheme of clause 6. The effect of clause 6 as a whole is to compel the landlord to reinstate the property for the purpose of creating the conditions in which the tenant is able to trade from the property again. It would not accord with that scheme if the landlord were to be permitted by clause 6.6 to deliberately delay or make no effort to reinstate the property for a period of three years, notwithstanding that payment of rent is suspended in the interim. At best, that would leave the tenant in a state of uncertainty; at worst, the tenant may be arranging its affairs on the assumption that it will again occupy the property ignorant of the landlord's intentions. The respondent's construction of clause 6.6 contradicts the clear intention of the parties, as set out in the remainder of clause 6. That might leave both parties locked into the lease and unable to invoke clause 6.6, however, as senior counsel for the appellant submitted, the remedy in that event lay in their own hands; they can agree otherwise.

[35] Having regard to (i) the terms of clause 6.6; (ii) the contract as a whole and (iii) having tested the competing constructions with reference to commercial common sense, in our judgment, a reasonable person would have understood the parties to have meant that the words "failed to complete" did not include a deliberate intention to bring about

termination of the contract, particularly in breach of the terms of that contract. A reasonable person would have understood the parties to have intended that the landlord would require to have complied with its obligations in terms of clause 6.4 before being in a position to invoke the right to serve notice to terminate the lease in terms of clause 6.6.

[36] We note the sheriff's criticism of the appellant's pleadings as "confused and confusing"; however, in our view, they give fair notice of the fundamental facts relied upon and the legal consequences. These being commercial proceedings, elaborate pleadings are not necessary (*John Doyle Construction Ltd* v *Laing Management (Scotland) Ltd* 2004 SC 713). The appellant offers to prove that the respondent has "failed to complete" the necessary reinstatement works in breach of clause 6.4. More particularly, the appellant avers that:

> "Notwithstanding the lodging of the planning application and the approval of tenders, [respondent] has shown an intention to apply the insurance proceeds other than in accordance with its obligation under clause 6.4"

and that it has stated its intention "to get rid of the tenant". The planning permission resulted from an alleged "dummy application" unconnected to the respondent's obligation to reinstate. A second application did not accommodate the leased roof terrace. The appellant claims that planning permission was obtained solely to demonstrate to insurers that reinstatement was achievable and tenders were obtained to estimate cost. The respondent avers that construction work in respect of the first phase was due to commence in July 2022. The appellant contends that as at November 2022 no substantial work was undertaken. There is a factual issue as to whether the respondent has complied with its obligations in terms of clause 6.4. Having regard to the proper construction of clause 6.6, we do not consider that it can be said at this stage that the appellant has failed to plead a relevant or specific case.

[37] The sheriff erred in his construction of clause 6.6 and in dismissing the action. He ought to have reserved the respondent's preliminary plea and assigned a proof before answer.

[38] It is unnecessary to address the remaining arguments advanced during the appeal, however as we heard lengthy submissions, we will address these briefly.

The prevention principle

[39] The appellant sought to rely upon the prevention principle as an aide to the proper construction of clause 6.6. It is a well-established principle that no person can take advantage of its own wrong; a party is not entitled to take advantage of its own breach as against the other party (McBryde, *The Law of Contract in Scotland*, 3rd ed, (2007) at 20-21; Lewison, *The Interpretation of Contracts*, 7th ed para 7.108 to 7.113 and the authorities cited therein).

[40] The appellant sought to rely upon breaches of two terms of the lease in order to invoke clause 6.6, one an express term, the other implied. In either case, the appellant requires to establish a causal link between the breach and the failure to complete the reinstatement works (*BDW Trading Ltd* v *JM Rowe (Investments Ltd* [2011] EWCA Civ 548*).* In relation to the first of these, the appellant avers that the respondent was in breach of its obligation to use "reasonable endeavours" to obtain planning permission within a reasonable time. We agree with the sheriff that the appellant's averments are insufficient to establish a causal link between the alleged breach of the obligation to use reasonable endeavours to obtain planning permission and the failure to reinstate. The question thus is whether the term contended for falls to be implied.

Does the implied term contended for fall to be implied?

[41] The appellant avers breach of an implied term within clause 6.4, namely that the reinstatement works would be undertaken within a reasonable time. The conditions which require to be satisfied for a term to be implied into a contact have been set out in a number of opinions, most notably that of Lord Simon in the decision of the Privy Council in *BP Refinery (Westernport) Pty Ltd* v *Shire of Hastings* (1977) 180 CLR 266 (at p283):

> "(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it 'goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

[42] In *Marks and Spencer plc,* Lord Neuberger discussed the conditions summarised by Lord Simon. He noted that when considering what the parties would have agreed, the correct approach is to consider what notional reasonable people in the position of the parties at the time they were contracting would have agreed. He also explained that necessity for business efficacy involved a value judgment; the test is not one of "absolute necessity"; a term can be implied if without the term, the contract would lack commercial or practical coherence.

[43] There is no express requirement in either clause 6.6 or 6.4 obliging the landlord to reinstate the property within a reasonable time. Again, in a professionally drafted lease, had parties wished to impose such an obligation, they could have done so. That may be the result of a deliberate decision or an oversight. We are mindful of comments made by Bingham MR in *Philips Electronique Grand Public SA* v *British Sky Broadcasting Ltd* [1995] EMLR 472, cautioning against the temptation to fashion a term which reflects the merits of the situation as they now appear, with the benefit of hindsight.

[44] In our view an obligation to reinstate the property within a reasonable time falls to be implied into clause 6.4. Clause 6.4 obliges the landlord to use its "reasonable endeavours" to obtain planning permission, to use its "reasonable endeavours to obtain as soon as practicable" the necessary labour and materials and thereafter mandates the landlord, by the use of the word "shall", to both lay out the net proceeds of the insurances and make up any shortfall from its own resources in the rebuilding and reinstatement of the property. Without an obligation to reinstate within a reasonable time, having carried out the preparatory work envisaged by clause 6.4, having obtained labour and materials "as soon as practicable", and having committed funds to the reinstatement works, the landlord would be at liberty, to delay the reinstatement works until the expiry of the lease at its term in May 2035. The parties could not sensibly have intended such a result which would frustrate their contractual intentions and render the scheme set out in clause 6.4 ineffective. The parties clearly intended to provide the tenant with a degree of protection and to create the conditions in which it may resume trading from, and occupying the property. The implied term sought is consistent with that intention. If, as MacKinnon LJ suggested in *Shirlaw* v *Southern Foundries (1926) Ltd* [1939] 2 KB 206, while the parties had been drafting the lease an officious bystander has suggested the implied term, "they would testily suppress him with a common 'Oh, of course'!". The term, in our view, is both obvious and reasonable. On behalf of the respondent, it was submitted that the lease had provided a remedy in the event the property was not reinstated - either party could terminate it in terms of clause 6.6 and rent was suspended in the interim in terms of clause 6.7. That is undoubtedly correct; however, termination of the lease was not the primary outcome intended by the parties. Clause 6.7 provides that in the event the property is destroyed rent:

> "shall be suspended until the Property or the part destroyed or damaged shall be again rendered fit for use and occupation and accessible or until the expiration of three years from the date of the destruction or damage (whichever is the earlier)".

The parties plainly intended the property to be fit for occupation and for payment of rent to resume. While the lease might be effective without the implied term contended for, without it, the lease would lack commercial and practical coherence for all the reasons we have stated and thus the implied term is necessary to give it business efficacy.

[45] It was submitted by the respondent that such an implied term contradicted clause 5 which sets out the landlord's obligations. We do not regard that argument as persuasive. Firstly, clause 5 does not set all of the landlord's obligations; notably, the obligations set out in clause 6.4 are not listed in clause 5. It is not exhaustive and the heading of clause 5 cannot be used as an aid to its construction. Secondly, it was said that the sheriff had been correct to conclude that a requirement to reinstate within a reasonable time was inconsistent with a failure to reinstate within three years. We note that the sheriff had erroneously focussed upon whether the implied term to reinstate the property could be implied into clause 6.6, not clause 6.4. In our view, the implied term to reinstate within a reasonable time is not inconsistent with clause 6.6. Clause 6.6 allows parties the option to terminate where the landlord has failed to complete the necessary reinstatement works within three years. The parties may choose whether or not to exercise that option.

Clause 8.5.3

[46] The respondent contended that clause 8.5.3 expressly excludes the implied term sought by the appellant. Clause 8.5.3 reads as follows:

> "Nothing in this Lease shall render the Landlords liable (by implication of law or otherwise) for the doing of anything which the Landlords have not expressly obliged themselves in this Lease to carry out, provide or do."

[47] The sheriff was correct to conclude that this clause is not an "entire agreement" clause in the conventional sense. Accordingly, we do not consider it appropriate or helpful to consider the effect of clause 8.5.3 in the context of the discussions in the authorities or textbooks dealing with the distinction between implied terms which are intrinsic or extrinsic to a contract.

[48] The relevant question is simply, what does clause 8.5.3 mean? Does it oust the implied term contended for, it being a "cardinal rule" that no term can be implied into a contract if it contradicts an express term (*Marks and Spencer plc* (*supra*) at p757)? In terms of clause 6.4, the landlords expressly obliged themselves to use reasonable endeavours to obtain planning permission, to use reasonable endeavours to obtain as soon as practicable the necessary labour and materials and to lay out the funds to reinstate the property. Properly construed, the landlords are obliged, in the event that planning permission, labour and materials are available, to reinstate the property. The particular implied term contended for does not impose an additional obligation; it elucidates how the express obligation to reinstate is to be performed, or put another way, it fixes a time for the performance of an existing obligation. Clause 8.5.3 accordingly does not exclude the implied term contended for.

[49] The respondent contended separately that clause 8.5.3 operates to exclude the prevention principle, it being an implied term. The principle is referred to as a "general principle of construction of words" (McBryde, (*op cit*: para 20-21). Lewison (*op cit;* para 7.108 – 115) concludes that it continues to be treated as a general principle of construction. It is, in our view, a principle of construction, not an implied term. The passage in the decision of Patten LJ in *BDW Trading Ltd* v *J M Rowe (investments) Ltd* [2011] EWCA Civ 548 (para 34) relied upon does not analyse the status of the prevention principle

as an implied term. In any event, it is not a view expressed following a careful analysis of the authorities to the contrary. The weight of judicial dicta continues to support the classification of the principle as one of construction. While parties can contract to exclude the principle (*BDW* and *Petroplus Marketing AG* v *Shell Trading International Ltd* [2009] EWHC 1024 (Comm)), clause 8.5.3 does not purport to do so. The prevention principle does not impose obligations; it prevents a party taking advantage of its own breach of existing contractual obligations.

Disposal

[50] We will allow the appeal and recall the interlocutor of 26 May 2023 in which the sheriff upheld the respondent's preliminary plea and dismissed the action. It follows that we will also recall the interlocutor of 7 July 2023 to the extent that it granted the expenses of the diet of debate in favour of the respondent.

[51] We shall allow the parties a proof before answer and remit to the sheriff to proceed as accords. Parties were agreed that expenses should follow success. We find the respondent liable to the appellant in the expenses of the appeal and in relation to the expenses of the diet of debate before the sheriff. We will certify the appeal as suitable for the employment of senior counsel.