SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2020] SC EDIN 6

EDI-A758-18

JUDGMENT OF SHERIFF T WELSH QC

in the cause

GRANTON CENTRAL DEVELOPMENTS LIMITED, a company incorporated under the laws of Jersey (Registration Number 110289) and having its registered office at PO Box 771 Colomberie Close, St Helier, Jersey, JE4 0RX

Pursuer

against

LEN LOTHIAN LIMITED, a company incorporated under the Companies Acts (Company Number SC042919) and having its registered office at 11 Granton Square, Edinburgh, EH5 1HX

Defender

Pursuer: Thompson QC; Turcan Connell, Edinburgh
Defender: McGregor; Gilson Gray, Edinburgh

Edinburgh, 24 January 2020

The Issues

The crave for payment

[1] In part, this case is an action for payment for past water charges. It called before me for debate on preliminary pleas taken by both parties. The defender challenges the lack of specification given by the pursuer in respect of the basis upon which the water charge is calculated. The pursuer seeks to restrict the scope of proof that the defender has laid a basis for in the pleadings.

The craves for declarator

[2] More fundamentally, the case is also an action for certain declarators sought by the pursuer to resolve a dispute between the parties about the legal basis upon which the pursuer is obliged to supply and the defender is entitled to receive a supply of water to commercial premises at Granton harbour. It is not disputed that the pursuer [the lessor] has acquired title by assignation to a full repairing and insuring, 40 year lease, over substantial commercial premises in Granton, Edinburgh. On the property let, the defender [the lessee] operates a warehouse business. The pursuer currently supplies water to the premises. The pursuer craves two declarators from the court. They overlap but at debate the issues focused around two matters; (1) the rights and obligations which arise from a grant of lease at common law and (2) specifically what rights and obligations were agreed expressly in, or, implied in the lease between the parties in respect of the obligation to supply and the right to receive water to the warehouse and offices let. The first declarator sought, is that in terms of the lease there is no contractual obligation on the lessor to supply water to the premises let, nor does the lessee enjoy any concomitant right to receive or demand a water supply from the lessor. The second declarator sought is that, in terms of the lease there is no term, express or implied, that obliges the lessor to provide or entitles the lessee to receive or demand water on the premises let nor does any such right or obligation arise on any other basis [the common law was the only other basis discussed at the debate] and that therefore the pursuer is at liberty to cut off the water presently supplied to the premises, if so advised.

[3] At the outset of the debate, in respect of all matters, the pursuer offered proof before answer. The defender insisted upon the preliminary plea and sought dismissal with expenses.

The Arguments

The defender's argument in relation to dismissal of the crave for payment

[4] The defender challenged the lack of specification given by the pursuer in respect of the basis upon which the water charge is calculated. Mr McGregor stated that nowhere in the pursuer's case was the basis of the calculation of the water charge specified.

The defender's argument for dismissal of the craves for declarators sought

[5] With regard to the declarators, McGregor invited me to sustain his third plea in law and dismiss the action. Further, he asked that I repel the pursuer's preliminary pleas. Mr McGregor informed me that the pursuer is now the titular successor to a full insuring and repairing commercial lease entered into between Forth Ports plc and the Defender dated 24 December 1992 and 6 January 1993 in respect of warehouse premises in Granton. He indicated that there are two central issues in the litigation: (1) whether the pursuer is entitled to cut off the water supply to the premises the defender occupies in terms of the lease; and (2) whether the pursuer is entitled to payment of two invoices it has sent to the Defender in relation to service charges.

[6] According to Mr McGregor, it is well established that for office and storage premises to be tenantable and fit for purpose, the landlord must provide water and drainage. This is implied at common law. Furthermore, the defender maintains that the only commercially sensible construction of the lease between the parties is that it contains an obligation on the part of the landlord to maintain a water supply to the premises. He said a supply of water was critical in order that there is basic sanitation at the premises. Therefore, according to Mr McGregor, the pursuer is not entitled to either of the declarators craved.

[7] In support of his submission based on the common law Mr McGregor stated that there is an implied warranty that subjects let are in a tenantable condition. He said a landlord is under an obligation to provide subjects that are reasonably fit for the purpose for which they were let. He referred to Paton and Cameron, *The Law of Landlord and Tenant in Scotland*:

> "In the case of urban subjects, houses, offices, shops and stores must be reasonably habitable and tenantable and in a wind and watertight condition…A landlord is clearly in breach of his obligation…where drains and water supply are completely inadequate…" (pages 130 -131)

He said the same observation is made in *The Stair Memorial Encyclopedia*, volume 13, at paragraphs 254 to 255. To vouch his case at common law he relied on *Tennent's Trustees* v *Maxwell* (1880) 17 SLR 463 and referred me to a passage from the opinion of the Lord President:

> "It is sufficient to say that the subject was in fault at the term of entry, and it was so much in fault that it was impossible for the safety of the defender…to enter into possession of it until the drains and the water supply were put in a proper state of repair."

The crux of his submission was that a water supply is a critical part of basic sanitation. Without a supply of water, the premises are not fit for purpose. They are not in a tenantable condition. He concluded that in these circumstances, at common law, the pursuer requires to maintain the water supply to the premises. Accordingly, there is no basis for the Court to grant the declarators craved. The pursuer's action, insofar as it relates to the severance of the water supply is irrelevant. That limb of the case should be dismissed and the supporting averments excluded from probation.

[8] In relation to the terms and meaning of the lease itself he argued that the only commercially sensible construction of the lease is that it includes an obligation on the part of the Pursuer to maintain the water supply to the premises. Without the water supply, the

premises would not be in a tenantable condition. In relation to the meaning of the lease he said that when interpreting a contract, the court is seeking to ascertain the intention of the parties at the time the contract was made. The key issue in contractual interpretation is the objective construction of the words used in a contract, according to the standards of a reasonable third party who is aware of the commercial context in which the contract occurred. He relied on *Arnold* v *Britton* [2015] AC 1619, *Wood* v *Capita Services* [2017] AC 1173, *Scanmudring AS* v *James Fisher MFE Ltd* 2019 SLT 295.

[9] In relation to the specific terms of the lease he argued a number of clauses made the intention of the parties obvious that a water supply was implicit in the grant of occupation under this lease. He referred to Clause FOURTH of the lease which provides that the defender is entitled to occupy and use the subjects in connection with their business of warehousing and open storage and ancillary purposes with associated offices. Further he said clause FIFTH (a) of the lease provides that the defender accepted the subjects "in their present condition". As at the date of conclusion of the lease, he said, the "condition" of the premises included a supply of water and drainage. The remainder of Clause FIFTH (a) makes specific reference to obligations to maintain, repair and replace "sanitary and water apparatus". The wording, he asserted, clearly indicates that the premises were serviced by, and required to be serviced by, water and drainage. That the obligation to supply and right to receive and demand a water supply under this lease was put beyond any doubt he argued by the terms of clause ELEVENTH of the lease which makes provision in relation to the allocation of charges for services. It states:

> "The Tenants shall be responsible for and shall free and relieve the Landlords of all rates, taxes and assessments, and all charges for water, heating, lighting, power and other services exigible in respect of the subjects during the currency of this lease."

[10] Properly understood he maintained the lease imposes an obligation on the pursuer to provide a water supply to the premises. At the very least, the pursuer is not entitled to do anything to interfere with the water supply to the premises. Mr McGregor argued that the fact the lease imposes an obligation on the lessee to maintain and repair "…..all drains, soil and other pipes, sewers, sanitary and water apparatus…." and pay a proportion of the cost of such ongoing maintenance and repair and indemnify the landlord for such continuing expense is highly suggestive that a supply of water was implicit in the grant of a right of occupancy. The same he argued can be said of clause NINTH which imposes a continuing obligation on the lessee to maintain the drains and watercourses to and from the premises.

[11] In conclusion Mr McGregor said that taking the provisions of the lease together with the circumstances pertaining on the ground at the time of the grant in 1993, the lease falls to be construed as providing: (a) that the tenant under the lease is entitled to make use of the drains and pipes serving the subjects let (and which enter the let subjects from other adjacent subjects); (b) that the landlord under the lease will provide a supply of water to the subjects let under the lease by way of the water pipes serving the let subjects; and (c) that the tenant under the lease will (in terms of clause ELEVENTH of the lease) meet all charges for such water exigible in respect of the subjects let.

The pursuer's reply in relation to the crave for payment

[12] Mr Thomson stated that the defender was well aware of the basis of the calculation of the water charge and referred to 2 letters in process claiming payment and setting out the basis of the calculation.

The pursuer's reply in relation to the declarators

[13] In relation to the declarators, Mr Thompson for the pursuer vigorously challenged the defender's arguments that the declarators sought were contrary to common law and further that, in any event, the lease in this case must be read so as to include an implied right to the supply of water.

[14] He opened his reply by stating that the defender's entire case for dismissal is based on a fallacious assertion that it is a self-evident truth that by the law of Scotland, a grant of a right to occupy land inherently includes a right to receive water as part of the grant and imposes a corresponding duty to supply water on the landlord. He stated that all of the averments made by the defender, that the pursuer is legally obliged by the common law to supply water to the subjects are unsupported by authority, irrelevant and should be excluded from probation. So far as the lease itself is concerned, on a proper construction of its terms, he said, it nowhere imposes any obligation on the pursuer (as landlord), nor confers any corresponding right on the defender (as tenant) in respect of the provision of a supply of water. He stated that the defender, in this case, does not even attempt to identify any words within the lease which give rise to the supposed obligation on the part of the pursuer to provide a water supply. He stated that the defender does not aver that any terms fall to be implied into the lease; rather, the defender simply adopts the approach that the lease should be construed in a particular manner. In light of the defender's failure to identify any provision or provisions within the lease which can actually bear the meaning and effect contended for by it the argument must fail *in limine.*

[15] He argued that although the lease contains certain provisions which could apply, in the event, a water supply is in fact provided by the pursuer as landlord (such as, for example, clause ELEVENTH) and which, more generally impose certain obligations on the

defender (such as, for example, clauses (FIFTH) and (NINTH)), there is no clause in the lease which, on any construction, could be said to impose any such obligation on the pursuer to actually supply water, or confer any such right on the defender to receive an actual supply of water. In this respect, he was critical that the defender does not, in its averments, identify any clause or clauses which might actually be said to have such effect; rather, the defender's averments are to the effect that taking these provisions together with the wider terms of the lease and the circumstances pertaining on the ground at the time of the grant of the lease in 1983, the lease falls to be construed as providing the rights and obligations desiderated by the defender.

[16] He argued that by application of the established principles of contractual construction the correct conclusion is that the objective meaning of the language which the parties have chosen to express their agreement does not impose any obligation (nor create any correlative right) to the effect set out in the defender's averments. He stated that it follows that the defender's averments, concerning the alleged proper construction of the lease, are irrelevant and should be excluded from probation. In summary he stated that properly understood the common law does not impose on the pursuer any obligation to provide a supply of water; and even if it did, the defender is not in a position to enforce any such obligation standing the express terms of the lease. He relied on a number of authorities including Fleming et al, *Dilapidations in Scotland*, (2nd Ed., 2003), paragraph 1.1; McAllister, *The Scottish Law of Leases*, (4th Ed., 2013), paragraphs 3.12; 3.26-3.33; *SIPP Pension Trustees* v *Insight Travel Services Ltd* 2016 SC 243; *Arnold* v *Britton* [2015] AC 1619, 1629 ; *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173; *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900; *Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2016] AC 742, 752

Discussion and decision

The crave for payment

[17] Mr McGregor stated that he was unaware of the basis of the calculation of the water charges in this case. The closed record states at condescendence 4:

> *"…..the Defender has unlawfully permitted occupation of the Subjects (or part thereof) by third party sub-tenants and others, including those using the following trading names (1) Autism Scotland, (2) Blackhall Moving and Storage, (3) Capital Movers, (4) Heart of Scotland Tours, and (5) Clockwork Removals and Storage. Further believed and averred that the third party occupiers of the Subjects have increased the usage of the Pursuer's water supply which the Defender refuses to pay for. The Defender is called upon to specify and produce all sub-leases, licences for occupation and like agreements for occupation of the Subjects (or part thereof) by third parties in existence at or created since June 2014. The Pursuer's supply is provided to the Pursuer by Scottish Water at Middle Pier, Granton Square, Edinburgh. Scottish Water Business Stream issue bills to Granton Central Management Ltd (agents for the Pursuer) for the water used. The Pursuer is the party ultimately liable to pay the sums sought under those invoices. The Pursuer re-charges costs incurred to individual tenants by reference to metered usage of the Pursuer's supply. The Defender's water meter was inoperative for the period to October 2018, although all other tenants had operational meters recording their usage. The Pursuer is unaware of any material leakage of water from the supply pipework at any material time. The Pursuer has calculated the sums incurred for the water utilised by the Defender (as invoiced in terms of the invoices hereinafter condescended upon) by deducting from the total payable by the Pursuer the sums billed to all other tenants utilising the supply as per their meters. The Pursuer (through its agents, PIP Asset Management LLP) confirmed this to the Defender by letter dated 5 July 2018, a copy of which is produced and its terms incorporated herein brevitatis causa…. PIP Asset Management LLP have issued two invoices to the Defender in respect of water charges incurred by the Pursuer in respect of the Subjects as follows: - invoice number 2861 dated 14th September 2018 in the sum of £8,066.06 for the period January 2015 to 30th June 2017; and invoice number 2862 dated 19th October 2018 in the sum of £8,813.96 for the period from 1st July 2017 to 30th June 2018. Said invoices are lodged in process and are referred to for their terms which are held to be incorporated herein brevitatis causa."*

Having examined the letters and invoices sent to the defender, which are lodged in process and relied upon by the pursuer, I am entirely satisfied that the basis of the calculation is known to the defender. The only issue is whether the methodology stated therein is sound and, separately, accurate in this particular case. I am satisfied there is sufficient specification

of the *modus calculi* to warrant inquiry. Accordingly, I shall allow a proof before answer of that question.

The craves for declarator

The case for dismissal based on the common law

[18] In relation to a commercial lease, there appears to be a dearth of authority which states clearly what the implied obligations, at common law are on a lessor:

> "Since there is not a great deal of statutory regulation of leases (apart from agricultural and residential leases) in Scotland, the rights and obligations of the landlord and tenant are largely to be found in the terms of individual leases. Nevertheless, where the lease is silent certain implied rights and obligations apply to every lease." Rennie, *Leases,* page 175.

With regard to the landlord's silent or implied obligation to provide subjects reasonably fit for the purpose they are let, Professor Rennie further states:

> "In earlier texts, this obligation is defined in fairly general terms. In modern commercial leases this warranty is usually specifically excluded. A standard commercial lease will contain a clause to the effect that the landlord does not warrant that the subjects let are appropriate for the tenant's business, even where that business is the stipulated user in the lease. Landlords also attempt to insist that the tenant accepts the subjects let as being in good and tenantable order and repair at the commencement of the lease. Even where the implied obligation does apply, it relates to the physical structure of the subjects leased and, accordingly, cannot apply to agricultural lands. ……..The obligation as it applies to urban subjects such as houses and commercial properties implies that the subjects must be reasonably habitable and tenantable at the date of entry. The extent of this obligation may vary depending on the type of property let, but it does include an obligation to provide subjects which are wind and water tight……. Each case is of course decided on the basis of its own facts and circumstances and there is certainly a variation in the way the standard is applied. ……Inadequate drains appear to have featured in the case law, with the landlord being held to be in breach of the obligation where the drains and water supply were hopelessly inadequate, (*Tennent's Trustees v Maxwell* (1880) 17 S.L.R. 463) but not where the drainage system was adequate, although perhaps not the most modern." Rennie *op cit* pages 181-182.

As I understood Mr McGregor's argument for dismissal, he appeared to me to infuse a 'lessee's right' at common law, which he asserted exists in Scots law, to receive a supply of

water, into the implied common law obligation on the lessor to provide subjects reasonably fit for the purpose they are let, in respect of the let of commercial premises. At times he positively asserted a common law water right, in a commercial lease, taking his argument at its highest. The argument was based on the authority of *Tennent's Trustees* v *Maxwell* (1880) 17 SLR 463 (a case relating to the urban lease of a residential property) which is perilously slim authority for such a broad principle. However, in the present case the subjects are let for a specified purpose, namely, warehousing and open storage and ancillary purposes with associated offices. While I readily understand that a commercial warehouse can function without access to a water supply, depending on the circumstances, I would find it difficult but not impossible to conclude that in the 21st century, the let of an office which serves a commercial warehouse can do so, for obvious reasons of basic sanitation, health and comfort of the warehouse operatives, if there be any. Much would depend on the facts of the case, the kind of warehouse and office in question and the purpose and use made of the office. Were it not for the conclusion I have reached in relation to the meaning and construction of the lease itself and certain necessary implications flowing therefrom, I would have allowed a proof before answer, with some reluctance, prior to reaching a concluded view on the obligations on the landlord and the concomitant rights claimed by the lessee, arising from the common law, in this case.

The case for dismissal based on the agreed lease

[19] In his alternative argument for dismissal, Mr McGregor argued it was an implied term of the lease in this case that the lessor agreed to supply and the lessee was entitled to receive a supply of water. Mr Thompson QC disputed that reading of the contract because there was no express term to that effect. I was referred to powerful recent authorities which

explain how a contract such as a lease has to be read and construed in relation to implied terms. Two passages have informed my decision in this case:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101 , para 14. And it does so by focussing on the meaning of the relevant words…….. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) *commercial common sense*, but (vi) disregarding subjective evidence of any party's intentions. In this connection….." from *Arnold v Britton and others* [2015] A.C. 1619 [Emphasis added].
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> "18. In the Privy Council case *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 , 283, Lord Simon of Glaisdale (speaking for the majority, which included Viscount Dilhorne and Lord Keith of Kinkel) said that:
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> > "for a term to be implied, the following conditions (which may overlap) must be satisfied: (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." from Lord Neuberger in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2016] A.C. 742 [Emphasis added]

[20] To these modern authorities I would only add the observations of Bowen LJ in *The Moorcock* (1888) 13 PD 157

> "Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws *from what must obviously have been the intention of the parties*, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving, to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men….." [Emphasis added]

[21] It seems to me to be irrefutable that if men of commerce insert into the commercial lease of a warehouse and associated premises (which contract they presumably intend to regulate efficaciously the agreement between them) specific clauses that impose on the lessee the obligation to (1) maintain, repair and replace "all drains, soil and other pipes, sewer, sanitary and water apparatus" in the subjects let [Clause FIFTH (a) and Clause NINTH] and (2) relieve the lessor of "all rates, taxes and assessments, and all charges for water, heating, lighting, power and other services exigible in respect of the subjects during the currency of this lease." [Clause Eleventh] then, *a fortiori,* they must necessarily have intended that the lessee receives a supply of water to use and pay for, a factor which was so obvious given the terms of the lease, that it goes without saying. I found the pursuer's argument that the maintenance and payments clauses are only triggered if water is actually supplied by the lessor to beg the question as to the meaning of the express terms of the lease agreed between the parties and the necessary implications flowing therefrom. Further the lease contains no clause which shows the parties agreed any such suspensive condition, as suggested by the pursuer's counsel, which states how and in what circumstances it should apply.

[22] Accordingly I shall sustain the defender's third plea-in-law and dismiss craves 2 and 3 only. I shall repel the pursuer's second, third and fourth pleas-in-law and allow a proof before answer on the limited question of the *quantum* of the debt owed for past water supplied. The case will be listed on a date to be arranged, after consultation with parties, for a proof before answer to be fixed.

Expenses

[22] Since there was mixed success I will order no expenses due to or by either party.