SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2021] SC EDIN 3

EDI-CA7-20

JUDGMENT OF SHERIFF N A ROSS

in the cause

PHILIP SAMSON

Pursuer

against

D.C.WATSON & SONS (FENTON BARNS) LIMITED and UK INSURANCE LIMITED

Defender

Pursuer: Upton, advocate
Defender: Cowan, advocate

Edinburgh, 14 January 2021

The sheriff, having resumed consideration of the cause, sustains pleas-in-law numbers one and two for the defenders, and dismisses the action; reserves all questions of expenses meantime.

Note

[1] The defender is, or was, the owner of the Turkeytorium, Fenton Barns Farm. The building, formerly a poultry farm, was converted in about 2001 into storage premises, and eight separate units were created for storage rental. The pursuer leased unit 8 from the defender. On 5 December 2016 the building burned to the ground as firefighters looked on, unable to extinguish the fire which had taken hold. A fire had been started deliberately in another unit, at the far end of the building, and spread to unit 8. In unit 8 was property

belonging to the pursuer, which he values at £300,000, and which was destroyed by fire. He seeks damages in that sum, together with a further sum representing repetition of rent paid.

[2] The pursuer's principal claim is that his loss is attributable to a breach of an implied term of the lease, that the premises required to and did not meet various building standards and other regulations relating to fire safety. He also pleads cases of misrepresentation and unjust enrichment. The defender challenged all these claims at debate. The facts set out here are assumed to be true for the purposes of debate.

The terms which the pursuer seeks to imply

[3] The lease dated 18 and 30 March 2015 is brief and relatively unsophisticated, and is in fact entitled Heads of Agreement. It extends to two pages, and sets out the parties, subjects, and various obligations imposed on each. At debate neither counsel founded on its terms, and so I will mention some of these but not analyse them further.

[4] The pursuer seeks to imply two terms. He relies on the recognised, and unchallenged, common law implied terms that the pursuer's unit required to be (i) reasonably fit for the purpose for which it was let, and (ii) in good tenantable condition. The first specific term which the pursuer seeks to imply, on the basis that it was required to meet either or both of these standards, is that "both the pursuer's unit and the building required to be compliant with the applicable building standards." The second is that it was an implied term that "both the unit and the building had to comply with the laws on the prevention and mitigation of fires in buildings with which the unit and the building had most recently to comply".

[5] The pursuer avers that these terms extended not only to unit 8 itself but also to the physical condition of the whole building of which the pursuer's unit formed part, insofar as

the condition of the building as a whole was capable of affecting the use of the pursuer's unit for the purpose for which it was let.

[6] The pursuer's reference to compliance with applicable building standards is not to the building standards in force at the date of the fire, but the standards "with which the building had most recently to comply". In this case, these standards are fixed at 2001. That is because the first defender applied for planning permission on 8 March 2001, for change of use from agricultural to business and storage. The building structure was altered to connect the eight units by means of a central corridor. That application for change of use "brought into application" the building standards current at that date. Those standards were to be found in various provisions of the Building (Scotland) Act 1959, the Building Standards (Scotland) Regulations 1990 and the provisions of the Technical Standards (5th amendment) issued under those Regulations, as well as under the Fire (Scotland) Act 2005 and the Fire Safety (Scotland) Regulations 2006. Alternatively, if the implied terms did not require compliance with these standards and regulations, then they still required that the unit was reasonably fit for purpose and in good tenantable condition, and those statutory and regulatory provisions would be relevant in assessment whether that common law standard had been met. That is, the pursuer asserts, because it is unreasonable to provide commercial accommodation which does not comply with the building standards and fire safety legislation with which it has most recently had to comply. These standards apply generally, but they were also the presumed intention of these parties, and were reasonable and necessary, did not contravene any express term, and related to latent defects.

[7] The pursuer thereafter proceeds to aver in detail the nature of the building's construction, the content of those statutory and regulatory provisions and the failure of the building to comply. At debate the defender made some detailed criticisms of the application

of these rules and regulations to the facts, but the main point was that they cannot justify implication of the terms condescended upon.

[8] The pursuer also countered the defender's submission that any terms were restricted to the leased premises, not the whole building.

[9] The defender set out a root-and-branch criticism of the pursuer's case, submitting that the case against the second defender should be dismissed; that there was no authority for the implication of terms in this manner; that on the facts no breach of these statutory provisions had been sufficiently pled (by reference to the detailed provisions); that even if there had been such a breach, no causal link with loss had been demonstrated, and that supplementary cases based in misrepresentation and separately in unjust enrichment were misconceived. Parties lodged many authorities and made fleeting references to these during debate, but I have recorded only those principally relied on in submission.

Decision on pursuer's implied terms

[10] Where a party to a contract asserts that a court should imply a term into the contract, the term can be implied in fact or implied in law. In the present case, the pursuer seeks to imply a term in law, and as a subsidiary argument that the term should be implied in fact. Terms implied in law are implied into all contracts of a particular class, as a necessary incident of the relationship concerned, unless the parties have expressly excluded them. By contrast, terms implied in fact depend on the specific facts of a particular contract, having regard to the express terms, commercial common sense and the facts known to the parties at the date of contract (Marks & Spencer plc v BNP Paribas Securities Services [2016] AC 742 at [15]).

[11] The pursuer seeks to imply two terms in this contract of lease of storage premises. The terms are that, first, it was an implied term that "both the pursuer's unit and the building required to be compliant with the applicable building standards" and, second, that "both the unit and the building had to comply with the laws on the prevention and mitigation of fires in buildings with which the unit and the building had most recently to comply".

[12] Those terms, the pursuer avers, would apply as incidents of leases generally. Because the pursuer relies on implication in law, this requires consideration not only of the particular relationship between these parties, but also the appropriateness of the term for implication of all contracts of this type (see Chitty: Contracts, 33rd ed, paras 14-005 et seq, 14-015). In my view neither of these terms falls to be implied, whether in law or on the facts of this case.

Whether the terms are implied in law

[13] The starting point is the common law of leases. Parties were in agreement that the common law implies a term that lease subjects are reasonably fit for the purposes for which they are let (*Mars Pension Trustees Ltd* v *County Properties* 1999 SC 267, at 268H-I) and in good tenantable condition. For urban subjects, the obligation is to provide subjects which are reasonably habitable and tenantable, and in a wind and watertight condition (Paton & Cameron: Landlord and Tenant pp 130, 131). The pursuer submits that this obligation means that the premises had to be capable of being used safely. It follows that they required to accord with the building standards and the laws on the prevention and mitigation of fires in buildings with which they had most recently required to comply.

[14] The pursuer's proposition is significantly hampered by the absence of supportive authority. The proposition exceeds anything to be found in the common law, which is notably restricted as to the obligations imposed on a landlord. The main obligations include being wind and watertight, free from damp and in a safe condition (Gloag; Contract, p316; McAllister: Scottish Law of Leases (4th ed, 2013) paras 3.29 to 3.32). Those cases which deal with safety relate only to the health and safety of tenants, and not to the protection of goods stored. The present case is not similar to, and does not raise the same issues as, the type of unsanitary or dangerous conditions referred to in the authorities, or unfitness for occupation. The pursuer's propositions in law go considerably beyond the authorities, which are (i) limited in number and (ii) relate to the safety of persons inhabiting the premises, not the safety of goods, or occasional visitors.

[15] Where reasonable fitness relates to the specific purpose for which the subjects are let, then reasonable fitness is assessed in relation to reasonable use by the tenant having regard to the general and recognised practice of the trade concerned *(Glebe Sugar Refining Co* v *Paterson* (1900) 2 F 615). The pursuer makes no averments about the general practice of the storage industry. Where the purpose of these premises was storage, and it is accepted that they were so used from April 2015 to December 2016 without apparent incident, it is difficult to conclude they were not sufficient for storage purposes. No complaint is made other than fire safety.

[16] There is no support for an expansion and development of the concept of sufficiency which the pursuer is attempting. That is particularly significant when the common law has been developed over centuries. Where the pursuer attempts to apply such a term to every contract of lease (and the pursuer does not restrict its purported application to leases of storage facilities), and where such a term would unavoidably place a significant financial

responsibility on one of the parties, such a development is not lightly to be contemplated. It is difficult to see why parties cannot freely agree to store goods in any premises they wish. No doubt the quality of facility will be reflected in the rent payable. If the parties are content with, for example, a ramshackle garden shed, then it is difficult to see the policy reason for the law to step in and impose stringent conditions. If the parties deem particular standards important, it is straightforward to introduce an express term.

[17] The pursuer's argument seeks to attach a statutory regime, or regimes, to private law contractual relations. The regulations and provisions relied upon create no such relationship. The common law has not hitherto created such a relationship.

[18] There is no inevitability about a link between safety and the provisions of fire regulations. While compliance with fire regulations might be sufficient to achieve an objective standard of safety, it is a matter of assumption only that such compliance is necessary to achieve such a standard. The occurrence of a fire does not prove that the premises were unsafe. Regulations may require very onerous standards, for policy or other reasons. It is not axiomatic that the common law requires premises to meet standards imposed by legislation from time to time. Accordingly, even if it were open to me on the authorities to infer such a term (and in my view it is not), I would not in any event do so.

[19] For these reasons, I cannot accept that the pursuer's case of terms implied in law is relevant for proof. The next consideration is whether these terms can be implied in fact, which is the pursuer's secondary case.

Whether the terms are implied in fact

[20] A term will only be implied between parties if it satisfies the test of business efficacy. This involves a value judgment. The test is not one of absolute necessity, but a term can

only be implied if, without the term, the contract would lack commercial or practical coherence (see Marks & Spencer plc (above) at para [21] per L.Neuberger).

[21] The pursuer's submission is that the parties would plainly have answered 'no' to the question: 'was the tenant accepting the subjects entirely regardless of whether the building was in an unlawful condition for the purposes of fire safety'. No doubt the answer to a question can be influenced by the way it is asked, but more fundamentally, this question invites scrutiny of the pleadings about the parties' agreement. The lease was not discussed at debate, but it is difficult to ignore the brief terms in which fire safety are discussed. These are:

> "3. Landlords will be responsible for the insurance of the property, and the tenants will be responsible for insuring the contents. If the tenants keep dangerous or inflammable materials, these must be declared to the Landlords Insurers.";

and:

> "4. Tenants must ensure fire-fighting equipment is available and correctly maintained."

[22] These provisions tend to show that the parties did indeed consider fire safety, but decided a lesser standard of fire precautions was appropriate than those desiderated by the pursuer. The parties to the agreement did not incorporate the detailed provisions of the regulations relied upon. It is not easy to see that such provisions were necessary for the commercial or practical coherence of the contract. There appears little reason to attribute such a view to a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances (Marks & Spencer plc, above, at [23]). There are no averments about the parties' knowledge or the surrounding circumstances which would allow relevant material to be introduced in evidence. Allowance of proof will accordingly not cure or

inform the point. That point alone would require disallowance of any case made on terms implied in fact.

[23] Further, however, not only is such a case unsupported by averment, but the averments tend to contradict the notion that such implied terms were necessary for business efficacy. As already stated, where the purpose of these premises was storage, and they were so used from April 2015 to December 2016, it is not possible to conclude they were not sufficient for that purpose, or that the contract lacked coherence for want of reference to fire regulations. Such an assessment might be influenced by factual considerations such as high value or fragility of goods, or the assumption of responsibility by a party, but there are no such averments.

[24] Further, as already discussed, even if an implied term about fire safety arose, it does not follow that the only commercially or practically coherent standard of fire safety was the standard fixed by relevant regulations. While fire regulations may provide an evidential guide to effective fire safety, it does not follow that they represent the minimum contractual standard. Once that point is recognised, it becomes clear that the pursuer's case, of compliance with the latest applicable fire standards, introduces an arbitrary standard. It is a matter of luck that the building underwent renovation in 2001, instead of some other date. There is no indication that the regulations of 2001 imposed an unduly desirable or recognised set of improvements. If the building were, for example, last altered in 1980, then the pursuer would be arguing for a quite different standard. There is no averment that the parties either knew or cared when the renovations were done, or what standard applied, or whether the building complied with any particular fire regulations. There is no support for the hypothetical question (above) being answered in the negative, at least prior to the fire.

[25] Finally under this head, I notice clause 5:

> "5. After initial works agreed by the Landlord, the tenant will have a full Repairing Lease ensuring that at the end of the Lease the property is returned in a similar state to that at the start."

[26] What this clause envisages is not particularly clear, not least because it appears to refer to a future lease, in a document headed only "heads of agreement", but it does introduce obligations of repair on the tenant. Where the extent of the obligations are unclear, it becomes more difficult to infer that a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would imply the terms desiderated by the pursuer.

[27] For all these reasons, the pursuer's case based on terms implied in fact must be refused probation.

Relevancy of implied term over the remainder of the building

[28] Unit 8 is a storage unit within a main building which contains eight units, arranged in two rows of four, each facing a central corridor. Each unit appears formerly to have been a separate building, with a short distance between the external side walls of each unit, and brought together under one roof.

[29] The lease of unit 8 represents a demise of a small area of the overall building. The pursuer avers that the duties to comply with fire regulations applies both to unit 8 and to the whole building, beyond the leased premises. The defender submits that this case is irrelevant – a landlord's obligations are restricted to the premises let, and not to a whole building or tenement. The pursuer's proposition is unvouched by any authority discoverable by the defender.

[30] The pursuer's averment of obligation is "That implied term also extended to the physical condition of the whole building of which the pursuer's unit formed part, insofar as the condition of the building as a whole was capable of affecting the use of the pursuer's unit for the purpose for which it is let." The pursuer referred to *Liverpool City Council* v *Irwin* 1977 AC 279 and *Blackwell* v *Farmfoods (Aberdeen) Ltd* (unreported, 6 December 1990, Lord Weir) in support of the proposition that the landlord is obliged to keep other parts of the building safe where that is necessary for the safety of the tenant.

[31] I do not accept that submission. Blackwell involved a claimed warranty of common parts, and I do not find it of assistance. Liverpool City Council concerned the common parts of a block of flats, and as such involved an entirely different factual position, where use of such common parts was necessary and unavoidable. In a high-rise tenement building it is not possible to gain access to an upper-floor flat without using common corridors, stairs or lifts. The present case involves, and avers, no such necessity. The fire started in a unit elsewhere in the building. There is no reason pled, or in logic, that the pursuer's use of unit 8 was affected by the use or construction of any other unit. No case is pled whereby the pursuer required to rely on, or even use, any other part of the building, either for personal safety or for the safe storage of goods. If there were a case based on defective fire safety within another unit, or in the rest of the building, it could not be based on breach of the parties' contract. The pursuer has not provided any authority to the contrary. Accordingly, even if I were to permit probation on implied terms, it would be refused in relation to the averments of obligation regarding any part of the building beyond the boundaries of the premises leased to the pursuer.

[32] Overall, in my view, the pursuer's case on implied terms does not set out a relevant case based on implied terms, whether implied in law or implied in fact, nor does it set out

such a case in respect of the building as a whole. The pursuer's case is not supported by the authorities or by recognised principles. His pleadings are therefore irrelevant and must be denied probation.

Breach of implied terms

[33] In the event I am wrong, and the pursuer has averred a relevant case on implied terms, it is necessary to consider the defender's further submissions. One of these related to the effect of breach of any implied term.

[34] The pursuer pleads a detailed case of failure to rely on a number of technical standards, being those set out in the Fifth Amendment of the Technical Standards issued under the Building (Scotland) Regulations 1990. These include clause D3.1 relating to adjoining parts of the building; clause D4.1 relating to cavity barriers; clause D6.3 relating to boundaries of buildings; E5.1 relating to fire doors and screens; E6.1 relating to protected zones; and clause E7.7 relating to emergency lighting. The defender identifies certain causal gaps in the pleadings, which fail to set out an explanation of how these regulations were breached, and invites dismissal of this part of the action. The pursuer in turn submits that the regime of abbreviated pleadings in commercial actions does not require pleadings of this detail, and invites the court to deprecate the use of debate for this purpose.

[35] I will do neither. The requirements of pleading in commercial actions are not less than in ordinary actions; they attempt to achieve the same result in a more efficient way. The same requirements of fair notice remain. Where a defender can be reliably informed of the case against it by use of means other than extensive averment, that route is open to the pursuer. The court will not require lengthy averments where fair notice can be found in original documents, or supporting materials such as schedules or maps, provided the

pursuer sets out fairly where its case is to be found. That does not absolve the pursuer of the need to be clear as to the case which the defender must meet.

[36] It is submitted for the pursuer that the case is clear, and I accept that the basis of the pursuer's case relying on the building regulations is fairly set out. The defender criticises a want of averments about how these regulations, if applicable, were breached. The pursuer relies on reference to other averments, and submits that any want of averment is remedied by reference to plans which show how, in the particular circumstances, the layout of the building was deficient in the material respects. It is difficult to reconcile the pursuer's current reliance on principles of abbreviated pleading, in an action where the pursuer has otherwise exhibited little restraint in pleading a case which runs to 13 articles of condescendence and 16 sub-articles. However, where I am told that the answers are to be found in diagrams of the building, and those diagrams are lodged, I consider I cannot say definitively following debate that the defender does not have fair notice of the case. Had this action been proceeding, I would not have refused probation to the detailed averments about how the regulations were breached.

Causation of loss

[37] The pursuer sets out the case of loss as follows:-

> "The building did not comply with the [relevant] standards…Had it done so it would not have burnt down in the time in which it did. The SFRS would have been able to extinguish the fire before it damaged the pursuer's property…it would in any event have been able to mitigate the extent of the loss of and damage to the pursuer's property."

[38] This case is evidently based on the transmission of the fire from elsewhere in the building to unit 8. As such, it relies substantially on the condition of the building, not the unit. It is, however, capable of being relevant to the fire precautions which, on the pursuer's

case, ought to have been applied to unit 8 itself, such as construction of walls, materials and the other matters set out in the pleadings. Accordingly, while the regulations and provisions do not directly provide the content for any common law duty, they are capable of being evidence as to what safety precautions might have been appropriate. I would not have refused probation solely on the basis of any inadequacy of these averments of causation (although, of course, the implied terms argument being irrelevant, it will not arise).

[39] It is a different matter in relation to the remainder of the causation case, which is:

> "Separatim, but for the stated breaches, there would in any event have been a material, real and substantial chance of the SFRS containing the fire and the pursuer's unit not being either damages or destroyed, or in any event of less of his property being damaged or destroyed. The first defender's breaches of the lease deprived the pursuer of the benefit of that chance."

[40] The defender identifies that the pursuer's case on record up to this point is not one of the loss of a chance, but rather full recovery of the actual loss of his property. I agree with that submission. On the pursuer's pleadings, no effort is made to quantify the loss of a chance, or how that might be identified. It is not possible to identify what alternative financial claim is being made to the principal claim, which is a claim for the full value of destroyed property. This alternative case is not supported in any coherent way by the existing pleadings. It is not possible to identify in advance what loss, short of full destruction, is claimed under this head, or why. If loss of chance is to be a separable head of loss, as is pled, these averments do not meet the criteria for relevancy. In a case based on past loss, the pursuer must show that the provision of the chance is the object of the duty (see McGregor: Damages (20th ed, para 10.048)). The object of the alleged implied term, as pled, was not to provide a chance of preventing fire damage, but actually to prevent fire

damage. I would refuse probation to the averments relating to a loss of a chance, as not supporting any relevant case.

Misrepresentation

[41] The pursuer pleads that:

> "the implied term that the building and the unit were in reasonably tenantable condition was a representation by the first defender that that was the case. It was a false and negligent misrepresentation. It induced the pursuer to enter into the lease."

The proposition is to the effect that a term which was not an express term, and which may never have been discussed (and there is no averment otherwise) can amount to a positive representation. No statement is identified in the pleadings. I am unable to find any analysis which supports that proposition. While a statement can be both a representation and a term of a contract (*Anwar* v *Britton* 2019 SLT (Sh Ct) 23) it is difficult to see how something that was never represented could amount to a representation, far less a misrepresentation. I would refuse probation to these averments, which are in article 10 of condescendence, as not supporting any relevant case.

Unjust enrichment

[42] The pursuer craves, in addition to the value of loss of stock, the sum of £8,625.06 as repetition of sums paid in rent from the commencement of the lease until the day of the fire. That is because during the period of breach of the implied term, "the pursuer was entitled to retain the whole rent." I am unable to accept that this is conceptually sound. There is an absence of principle in allowing the pursuer the benefit of storage facilities for over 18 months without any obligation to make payment. In any event, the ability to retain rent is not a claim for payment, but a form of set-off against claims against the landlord, or

possibly a security against performance by the landlord of a contractual obligation. No such pre-existing set-off claim is pled, and no performance was demanded by the pursuer of the defender. This appears to be a retrospective claim for a loss of security, rather than a claim for payment not legally due. Further, any equitable remedy would be available only if a contractual remedy was not open to the defender (Pert v McCaffrey 2020 SC 259 at para [18]). Where the claim is based in breach of contract, it is difficult to see that this requirement is satisfied. The case is not pled in the alternative to the contractual claim, but as an additional claim based on the same breach of contract. I would refuse probation to these averments, in article 13.

Action against the second defender

[43] The second defender is convened 'for any interest it may have'. It is the insurer of the first defender. The pursuer seeks no decree against it, but points out that there is no prejudice to any party in convening the second defender, and that the objection to such is academic.

[44] The short point is that if a party does not have a crave directed against it, it should not be convened as a defender. I will formally dismiss the case against the second defender, albeit there is no such case. This tends to illustrate the want of logic in convening the second defender.

Prescription

[45] A plea of prescription was raised late in an adjustment process and, although the defender placed reliance on this at debate, I was told by the pursuer's counsel that the response was not fully developed in the pleadings. Having regard to the overall disposal of

this action, I will defer to the pursuer's invitation not to decide this issue at this stage, as it is of no effect in the circumstances.

Disposal

[46] As a result of the foregoing, no relevant case remains on record. I will sustain plea-in-law number 1 and 2 for the defender(s) and dismiss the action. Parties should attempt to agree any award of expenses to follow, but if they are unable to do so they should contact the clerk who will arrange a hearing.