OUTER HOUSE, COURT OF SESSION

[2019] CSOH 49

CA133/18

NOTE OF LADY WOLFFE

In the cause

GATSBY RETAIL LIMITED

Pursuer

against

THE EDINBURGH WOOLLEN MILL LIMITED

Defender

Pursuer: T Young; Pinsent Masons LLP
Defender: D Thomson QC; DLA Piper Scotland LLP

28 June 2019

Pursuer's action for recovery of damages for breach of tenant's repairing obligations

Background

[1] The parties were, respectively, landlord and tenant of commercial premises at 95-96A Princes Street ("the premises") under a lease ("the Lease") which terminated on 30 April 2016 ("the ish"). From 1 May 2016 the defender occupied the premises under a licence ("the Licence") which imported the parties' obligations under the Lease. In due course the defender vacated the premises. The pursuer instructed the preparation of a schedule of dilapidations ("the schedule"), served on the defender on 22 May 2017, which identified tenant's works ("the dilapidation works") totalling about £170,000. The dilapidations works

were said to include removal of the defender's fit out works, repairs to the damaged fabric of the premises, certain internal and external cleaning, the removal of redundant cabling and replacing damaged carpets.

The pursuer's subsequent grant of the Nero Lease of the premises

[2] Meanwhile, the pursuer granted a lease of the premises to a new tenant, Nero Holdings Limited (respectively, "the Nero Lease" and "Nero") following missives concluded between it and Nero by two letters dated 31 March 2017 ("the missives"). As part of those arrangements, the pursuer paid Nero £110,000 (hereinafter "the Nero payment", referred to in the missives as "the Landlord's Contribution"). The figure £110,000 is averred to be supported by a Building Report detailing wants of repairs and which repairs Nero would undertake in return for the Nero payment. This is the principal sum sued for. (The pursuer also seeks payment of professional fees incurred, but that part of the pursuer's case was not discussed at debate.)

Outline of defender's relevancy challenge

[3] The defender challenges the relevancy and specification of the pursuer's averments of loss. Its challenge arises from the pursuer's subsequent dealings with the premises and, in particular, the terms of the missives and of the Nero Lease. In short, it contends that the pursuer has no relevant averments to establish that the Nero payment was a loss sustained by the pursuer or recoverable as a consequence of any breach of obligation by the defender.

The terms of the missives between the pursuer and Nero

[4] The defender refers to several terms of the missives, including the following:

(1) Clause 1.1: the definition of "Landlord's Contribution" was:

"…the sum of One Hundred and Ten Thousand Pounds (£110,000) Sterling as a contribution towards the costs of the Tenant's Works exclusive of VAT"

And the definition of "Tenant's Works" was:

"…the fitting out works to the Property."

(2) Clause 1.4: this is headed "Whole contract" and provides:

"The Missives represent and express the full and complete agreement between the Landlord and the Tenant relating to the Lease of the Property at the Conclusion Date and will supersede any previous agreements between the Landlord and the Tenant relating to the lease of the Property."

(3) Clause 5.1.4:

"The Landlord will pay the Landlord's Contribution by cleared funds direct to the Tenant on the Date of Entry…."

(4) Clause 9: Under the heading "The Tenant's Works", this provided:

"9.1 The Tenant's Works are to be approved by the Landlord. The Tenant will, within 21 days of the Conclusion Date, submit drawings and specifications of the proposed works to the Landlord to be approved in writing (such approval not to be unreasonably withheld or delayed).

9.2 Upon the Landlords approval of the Tenant's Works, the Landlord's Solicitor will complete the Licence for Works by inserting any relevant information required (including any modification to reflect the Missive terms), engross it and sent it to you with the engrossed Lease for execution by the Tenant.

[…]

9.6 The Tenant must carry out the Tenant's Works strictly in accordance with the Licence for Works."

Clause 1.4 was referred to by the parties in their submissions as an "entire agreement" clause.

The parties' pleadings

The pursuer's averments

[5] The pursuer's averments in Article 7 of condescendence were subject to detailed scrutiny. It is necessary to set these out. For ease of reference I have numbered each sentence:

> "(1) By letter dated 22 May 2017 the Pursuer's agents served the Schedule of Dilapidations on the Defender. (2) The Defender did not remedy any of the wants of repair identified in that Schedule. (3) The Pursuer reasonably estimated that it would cost one hundred and seventy thousand, eight hundred and forty five pounds (£170,845) sterling, exclusive of VAT, to correct the wants of repair. (4) The Pursuer agreed a price of one hundred and ten thousand pounds (£110,000.00) sterling to be paid by the Pursuer to the new tenant of the Property, [Nero], in respect of the wants of repair detailed in a Building Report which was prepared by Riley Consulting. (5) The Building Report is produced herewith and held to be incorporated herein for the sake of brevity. (6) This sum was paid by the Pursuer in respect of Caffe Nero performing the works identified in the Building Report. (7) The Pursuer's agent prepared a comparison between the works and costs contained in the Schedule of Dilapidations and the Building Report in July 2018. (8) A copy of this comparison document is produced herewith and held to be incorporated herein for the sake of brevity. (9) The works contained in the Building Report are all works which are found within the Schedule of Dilapidations served on the Defender as hereinbefore condescended upon. (10) The payment of £110,000.00 to Caffe Nero represents the Pursuer's loss arising from the Defender's failure to discharge its repairing obligations under the terms of the Lease and Licence as hereinbefore condescended upon. (11) This is the sum first concluded for. (12) A meeting between the Pursuer's agent and the Defender's agent took place on 5 September 2017. (13) On 6 September 2017, an offer to settle the sum due by the Defender was made by the Pursuer's agent to the Defender's agent in respect of the works contained in the Schedule of Dilapidations at £110,000.00, in addition to £25,007.81 due for professional fees. (14) The Defender's agent required instructions from the Defender before agreement could be reached. (15) However, that agent, the specialist surveyor instructed in the matter by the Defender and having had a full opportunity of considering all material relevant to the matter indicated, in what was presumably his professional view, and without qualification, that what was proposed was a 'good deal'. (16) The Pursuer's agent requested an update from the Defender's agent by emails dated 18 September 2017, 3 October 2017, 16 October 2017, 23 October 2017, 24 October 2017 and 3 November 2017. (17) Copies of these emails are produced herewith and held to be incorporated herein for the sake of brevity. (18) The Defender's agent provided no update despite the Pursuer's agent's repeated requests. (19) By agreeing a sum with the new tenants of the Property in respect of wants of repair, which was materially less than the cost of the Pursuer remedying those wants of repairs, the Pursuer acted reasonably. (20) With reference to the Defender's averments in answer, the letters

dated 22 December 2017 and 15 February 2018 are referred to for their terms beyond which no admission is made. (21) The missives entered into between the Pursuer and Nero Holdings Limited dated 31 March 2017 (the 'Nero Missives') are referred to for their terms beyond which no admission is made. (22) The lease entered into between the Pursuer and Nero Holdings Limited, registered in the Books of Council and Session on 9 April 2018 (the 'Nero Lease') is referred to for its terms beyond which no admission is made. (23) *Quoad ultra*, the defender's averments in answer are denied save insofar as coinciding herewith. (24) Explained and averred that, as hereinbefore condescended upon, the Pursuer identified that it would cost £170,845 to complete the works necessary to remedy the wants of repair caused by the Defender's actions. (25) The Pursuer sought to mitigate its losses by entering into a commercial arrangement with Nero Holdings Limited. (26) The sum of £110,000 was paid by the Pursuer to Nero Holdings Limited in order for the incoming tenant, [Nero], to put the property back into the state it ought to have been in when the Defender quit the premises. (27) But for the actions of the Defender upon quitting the premises, the Pursuer would not have had to make a payment of £110,000 to the incoming tenant. (28) The losses thus incurred by the Pursuer were a direct consequence of the actions and breach of the Lease and Licence terms by the Defender. (29) It was in the reasonable contemplation of the parties that if the Defender did not comply with its obligations under the terms of the Lease and Licence, the Pursuer would suffer a loss. (30) Specifically, it was reasonably foreseeable that failure to comply with Clause FIFTH of the Lease, Clause (Three) (a) of Part III of the Schedule to the Lease, Paragraph (Eight) and (Eleven) of Part III of the Schedule to the Lease, together with Clause 9.2 of the Licence, the Pursuer would suffer a loss. (31) The Pursuer acted reasonably when mitigating its losses as a result of the Defender's failure to meet its obligations under the terms of the Lease and Licence."

The defender's answers

[6] The latter part of Article 7 comprises the pursuer's response to the defender's own averments *inter alia* in respect of the missives. It is helpful to understand how the defender put this in issue. It admitted service of the schedule and the fact of the meeting on 5 September 2017 and the pursuer's offer to settle the next day. In respect of the latter, it avers that there were "without prejudice" discussions and it makes additional averments that no binding agreement was reached. The defender then makes the following averments:

(1) The defender refers to correspondence passing between the parties' agents:

"By letter dated 22 December 2017, the Pursuer's agents demanded payment of the sum of £170,845 on the stated basis that, as a result of the alleged breaches of the Lease and the Licence by the Defender the Pursuer 'has been under the necessity of entering into an arrangement with its new tenant and have [*sic*] incurred losses amounting to £170,845'. By further letter dated 15 February 2018, the Pursuer's agents stated *inter alia* as follows:

> 'Pending conclusion of the works narrated within the schedule of dilapidations it was impossible for our client to re-let the Property. In order to resolve matters a commercial agreement was reached with the incoming tenant, Nero, and in lieu of our client completing the works. In terms of this agreement a payment of £110,000 (Clause 5.1.4 of the Missives [between the Pursuer and Nero]) was made by our client to the new tenant of the Property when it took entry to meet the cost of the works to be completed by the tenant, identified within the Riley Report and which were not undertaken by [the Defender].'

The letter dated 15 February 2018 went on to demand payment of the sum of £135,007.81. It is apparent from the terms of the foregoing letter that the Pursuer has neither carried out any of the works detailed in the schedule of dilapidations nor will it carry out any such works. On that basis, the alleged estimated cost of repairs cannot represent a loss to the Pursuer. Notwithstanding the foregoing, the Pursuer now seeks to recover from the Defender damages quantified with reference to the alleged cost of repairs which have not been, and will not be, carried out."

(2) After an averment that the pursuer "has not incurred (and, for completeness, will not incur)" any costs in respect of the dilapidation works, the defender makes averments about the missives:

> "Further and in any event, as to the Pursuer's averments to the effect that it paid the sum of £110,000 "in respect of the wants of repair detailed in a Building Report which was prepared by Riley Consulting", it is demonstrably untrue that the Pursuer did so."

(3) After quoting the clauses from the missives set out above (at para [3]), the defences continued:

> "Accordingly, the Nero Missives alone comprehensively set out the terms on which the Pursuer agreed to pay the sum of £110,000 to [Nero]. Having regard to the terms of the Nero Missives, as set out above, it is indisputably the case that that sum was paid (assuming, which is not known and not admitted that it has been paid) as a contribution towards the 'Tenant's Works'. The 'Tenant's Works', in terms of the Nero Missives were yet to be identified and were instead agreed to be fitting out works which were to be proposed by the Tenant [Nero]. In the circumstances, the Pursuer's agreement, in terms of the Nero Missives, to pay the 'Landlord's

> Contribution', of £110,000, does not constitute or represent a loss incurred by the Pursuer as a result of any breach of contract on the part of the Defender. The Pursuer is in any event called upon to specify the co-relationship between the individual wants of repair set forth in the schedule of dilapidations and the sum of £110,000. *Esto* (which is not known and not admitted) the Pursuer ~~agreed to pay~~ has paid the sum of £110,000 to [Nero], payment of that sum (a) was not a loss incurred by the Pursuer as a result of any breach of contract on the part of the Defender~~res inter alios acta in a question between the Pursuer and the Defender~~; (b) was not reasonable et separatim was too remote from any breach of contract on the part of the Defender; and (c) accordingly does not represent a recoverable loss from the Defender."

The parties' submissions

Scope of the debate

[7] It is helpful first to clarify what was not, or was no longer, at issue.

1) First, the pursuer's action is an action of damages for breach by the defender of the tenant's obligations in respect of the premises (it matters not for present purposes whether those obligations derive from the Lease or the Licence). This was made clear by the pursuer's amendment at the outset of the debate to insert a new plea-in-law. As a consequence, the defender departed from the first three paragraphs of its note of argument.
2) The defender no longer argued that the missives were *res inter alios acta*. That contention had been deleted from Answer 7.
3) This is not a case concerning transferred loss. The defender's counsel clarified this in his reply. Accordingly, I do not set out the pursuer's counsel's submissions and the cases he referred to on that issue.

[8] Mr Thomson QC, senior counsel for the defender, reserved the defender's position on the issues of remoteness and foreseeability (see the end of Answer 7 (quoted at

para [6(3)], above), which therefore did not form part of the debate. Again, I need not record the pursuer's submissions on those issues.

[9] Mr Thomson accepted as a generality that a party who sustained loss and who incurred expenses trying to mitigate it may recover those expenses. For the purposes of the debate, the defender was content to assume the following:

1) that the pursuer had a relevant offer to prove that the premises were left in a dilapidated condition at the expiry of the Lease,
2) that it was the defective state of the premises which caused the pursuer's loss,
3) that the proper measure of the pursuer's loss was the cost of remedial works to restore the premises to the state they would have been in had the defender complied with the tenant's obligations.

It was noted that the pursuer did not contend that the principal sum represented a contractually certified sum or one derived from a payment clause in the Lease (eg of the kind considered by Lord Doherty in *Tonsley (Strathclyde) Limited and Tonsley (Strathclyde No 2) Limited* v *Scottish Enterprise* [2016] CSOH 138). Its position was that this was a claim for damages arising from the defender's (assumed) breach.

Submissions on behalf of the defender

[10] The defender's motion was to sustain its first three pleas-in-law, seeking (i) dismissal of the action, (ii) deletion of the averments anent a meeting between agents on 5 September 2017 and the subsequent correspondence, and (iii) deletion of the pursuer's averments on quantum. The pursuer's action fell to be dismissed if the court sustained either of the defender's first or third pleas-in-law.

Pursuer's case as pled

[11] Mr Thomson outlined what he understood to be the pursuer's position (as set out in Articles 6 and 7 of condescendence): it offered to prove that the defender left the premises in a dilapidated state; that this constituted a breach by the defender of the tenant's obligations; that the estimated costs of the dilapidation works was about £170,000; that the pursuer agreed with the incoming tenant that it (Nero) would carry out and remedy some of the defects in exchange for the pursuer paying the Nero payment to it. That payment is said to represent the loss arising from the defender's breach. He also referred to, and criticised as irrelevant, the pursuer's averments about the meeting and subsequent correspondence (in sentences 12 to 19, the subject of his second plea-in-law), its "formulaic" averment of causation (sentence 27) and its averments of foreseeability.

Pursuer's position as revealed in the missives and Nero Lease

[12] Mr Thomson contrasted the foregoing with what was agreed in the missives, noting in particular the definitions of the "Landlord's Contribution", the "Tenant's Works" - which he stressed were for "fitting out", and the entire agreement clause (quoted at para [4(1) and (2)], above). By reason of the entire agreement clause, the missives (and its definition of "the Tenant's Works") were conclusive as regards what the pursuer actually agreed with Nero. The Nero payment, defined as the Landlord's Contribution, was a contribution toward "the Tenant's Works", which were the fitting out works (*per* clause 9.1 of the missives). He also noted that the scope of those works was not agreed as at the date of the missives; they *were to be* agreed.

[13] From the Nero Lease, Mr Thomson highlighted clause 2.3 (in which Nero accepted the premises "in their present condition and state of repair", and which was said to displace

the landlord's warranty in respect of the premises under the common law), clause 2.5 (expressly excluding the landlord's common law warranty), clause 4.6 (the tenant's obligations) and clause 4.22 (under which Nero undertook to return the premises at the end of the Nero Lease having complied with its repairing obligation). In summary, as the incoming tenant, Nero had assumed a full repairing obligation and it was not limited by reference to a schedule of conditions. He also noted *en passant* the agreement between the pursuer and Nero in respect of the incoming works.

Case-law on common law damages

[14] Mr Thomson turned to the case-law, commencing with the discussion in *Prudential Assurance Co Ltd* v *James Grant & Co (West) Ltd* 1982 SLT 423 (at p 424), including its consideration of the well-known case of *Duke of Portland* v *Wood's Trustees* 1926 SC 640. He accepted that there may be alternative ways to measure damages and, further, that *prima facie* in a landlord's dilapidations claim this included the estimated cost of repairs. That was the starting point in the pursuer's case and its reference to the sum of £175,000. The pursuer then said it mitigated its loss by entering into a new agreement with a third party (Nero) to remedy the want of repairs. He also accepted the observations in *Prudential* that it is for the defender to establish if the wrong measure of loss had been adopted or if the landlord's loss was less than claimed. The defender did so in this case, by looking at the actual contract the pursuer entered into with Nero in the form of the missives.

[15] Mr Thomson next referred to the more recent case of *Grove Investments Ltd* v *Cape Building Products Ltd* 2014 Hous LR 35 (at paragraphs 12 to 20), as an illustration of the proper approach of the common law, which is to strike a fair balance. He also noted that, critically, landlord's loss depended on what it actually did (see paragraph 18). The purpose

of the common law rules was to compensate the pursuer for its true loss, not to give it a windfall (paragraph 19). This approach was further vouched by the textbook discussion in *Dilapidations in Scotland* (2nd ed, by Fleming et al) at paragraph 5.16. From these authorities, he stressed that the pursuer's loss depended upon what the pursuer in fact did with the premises. Considered generally, if the pursuer had re-let the premises without a reverse premium or a rent-free period, then *prima facie* there was no loss. By contrast, if a landlord had to pay a reverse premium, that *might* constitute a relevant loss (see sentences 4 and 24 in Article 7 (above, at para [5])).

[16] In Mr Thomson's submission the Nero Lease categorically showed the pursuer did not pay the sum of £110,000 to remedy any want of repair flowing from the defender's breach. *That* sum, he argued, was paid toward "fitting out" works that had yet to be agreed with the new tenant (Nero). Fitting out works were, paradigmatically, not works that were the product of loss. If one tenant leaves, having fulfilled its obligations, the incoming tenant will always having fitting out works. In this case, the outgoing tenant had operated the premises as a woollen mill shop; the incoming tenant operated a well-known chain of cafés.

[17] Although the pursuer asserts that Nero, as incoming tenant, was going to restore the premises to the condition that they should have been, the terms of the missives showed that this was not correct. Section 1(3) of the Contracts (Scotland) Act 1997 ("the 1997 Act") meant that the missives were conclusive that the Nero payment was for the new tenant's fitting out works. It was not to "cure" the defender's breach. The terms of the missives flatly contradicted any assertion by the pursuer that the Nero payment was paid to put the premises in the position they should have been in. If the court excluded the pursuer's averments, to the extent that they were inconsistent with the missives, and its formulaic

averment on causation, no relevant case of loss flowing from any breach on the part of the defender's remained.

Submissions on behalf of the pursuer

[18] Mr Young, Advocate, who appeared for the pursuer, summarised its case as follows: the defender's breach of contract entitled the pursuer to take steps to mitigate its loss and to recover the cost of doing so. That was what the pursuer was offering to prove. The schedule of dilapidations was its primary loss and it had arranged for the incoming tenant to do the works for a fixed sum of £110,000. Whether that was right, or whether that was the reason for payment, went to the issues of reasonableness, remoteness and causation which were all matters for proof.

[19] The defender was wrong to say that the relevancy of the pursuer's case could be judged at this stage. There was a difference between suffering a loss and quantifying it. The defender accepts the issue in this case is one of quantification. The pursuer offers to prove that the Nero payment was a reasonable and prudent step that arose directly from the defender's breach. He accepted that there must be a causal link between the defender's breach and the pursuer's payment of the Nero payment. However, there was no rule of law that that must be demonstrable from the face of the contract.

[20] Mr Young expanded his submissions under reference to (i) paragraphs 29 and 34 of *Mclaren Murdoch & Hamilton Ltd* v *The Abercromby Motor Group Ltd* 2003 SCLR 323 (for the propositions that the primary measure of loss is the cost of repair (so long as that is not disproportionate) and that loss exists independently of remedial works) and to (ii) *Grove* (for the general observations that ascertainment of the actual loss is fact-dependent). In this case, the defender's breach had resulted in dilapidated premises, and the cost of dilapidations

works brought out by the schedule was *prima facie* the quantum of the pursuer's loss and recoverable. What the pursuer did next was relevant (for the reasons explained in *Grove*). None of this changed the fact that the pursuer had sustained a loss or that the pursuer had a duty to mitigate its loss. In the context of a landlord pursuer, its other head of loss would usually include loss of rent. The pursuer had mitigated that, too. The context was relevant and the missives enabled the pursuer to avoid any gap in the rent. The whole assessment of loss was intensely factual.

[21] Furthermore, what the pursuer was offering to prove was a relevant payment of a contribution which was a reasonable and prudent step arising out of the defender's breach. If a party in fact avoided suffering loss, then the law did not allow it to pretend that it did. The law looks at the substance of what a party has actually suffered. If, however, a party has only avoided loss by incurring expenses, those expenses are recoverable. Contrary to what the defender argued, the pursuer had sufficient averments (reading sentences 10 to 11 and 24 to 28 together) that linked in a commercial sense the pursuer's loss and its entering into the missives and making the Nero payment as part of that arrangement. If the tenant did the work it would prove the cost of what was required. If the situation were reversed, ie if the pursuer did not refer to the missives and just sued for the whole figure brought out by the schedule, the court would nonetheless be entitled to look at the new arrangements to prevent the pursuer recovering more than it should. The pursuer should not, he submitted, be in a worse position because of the mitigatory steps it took.

[22] In relation to the entire agreement clause, the pursuer was not seeking to argue there was another term of the missives or an implied term. Mr Young went through the terms of the missives and the Nero Lease. He accepted that Nero had entered into a full repairing lease and that there was no qualification because of the state of the premises. The tenant's'

works under the Nero Lease went beyond what had been encompassed in the defender's repairing obligation. The sequence was that the £110,000 was a contribution and then the tenant (Nero) undertook more elaborate works. The effect was to mitigate the pursuer's claim down from £170,000 to £110,000. The only question for the court was the causal link between the defender's breach and the Nero payment of the £110,000. None of the other terms was relevant to the enquiry. The entire agreement clause was irrelevant. Just because the link that the pursuer avers was not apparent on the face of the documentation does not mean it was precluded from proving that link.

The defender's reply

[23] After noting what was not in issue (which I have recorded above, at para [7]), Mr Thomson submitted that the defender's short complaint was that, having regard to the approach of Scots law, as explained in *Grove* and other cases, the pursuer was under an obligation relevantly to identify its loss. The case did not involve any broad principle of law: it was a more prosaic question of the deficiency in the pursuer's pleadings. The defender's criticism was of the pursuer's *pleaded* case. The correct question to ask was whether there was a relevant offer to prove that the Nero payment is a recoverable loss flowing from the breach of contract by the defender. The contractual basis on which the pursuer made the Nero payment cannot be dismissed.

[24] While the pursuer purports to say "ignore the terms of the missives" and look at the averments setting out the purpose of the Nero payment, its averments do not in fact do this. The pursuer's averments amount to an offer to prove an agreement with an incoming tenant. That, Mr Thomson submitted, had nothing to do with stepping back and looking at causation. He maintained that on no view did the pursuer's averments say what the

missives or Nero Lease say. The pursuer appeared to offer to prove a different agreement. In light of the entire agreement clause, the pursuer's averments must be irrelevant. Any coincidence between the works Nero carried out and the dilapidation works was mere happenstance. It did not make this a recoverable loss. While the pursuer might have averred that the premises were so dilapidated that there was a need to offer an incentive (such as the Nero payment), the pursuer does not aver this. A "but for" averment (see sentence 27) was not sufficient. The pursuer must aver why there was a causative relationship between its loss and the missives. There was an irreconcilable tension between the averment about the dilapidations works and the Nero payment which was referable to "the Tenants' Works".

[25] The pursuer was not entitled to disregard the entire agreement clause. While one may presume that the statutory provision was directed at the parties to the contract, here the pursuer wants to recover a sum of money paid pursuant to a contract. The pursuer was not entitled to depart from that contract and to say that the payment was for a different purpose and in different terms. The missives and Nero Lease refer to the payment as referable to the tenant's fitting out works; that is wholly at odds with the cost of the dilapidation works. If these are to be relevant surrounding circumstances, it must be in the common contemplation of the parties.

Discussion

[26] The common position between the parties which emerged by the end of the debate was that it was presumed that the state in which the defender left the premises was such as to cause loss to the pursuer, and for which *prima facie* the measure of its loss was the cost of repair of the dilapidation works in the schedule. It was also accepted that expenses incurred

in mitigating loss were recoverable in principle. Furthermore, the defender confirms that it does not argue that the missives discharged the loss; they are not founded on as constituting *res inter alios acta*; and the defender is not contending for any new black hole.

[27] The narrow point, as the defender framed it, was whether the pursuer had relevantly averred a causal link between the Nero payment and its loss as measured by the schedule. The gravamen of the defender's criticism is the disjunction (it is said) between the Nero missives, whose entire agreement clause is said to be preclusive of any other explanation inconsistent with it, and the pursuer's pleaded case. Indeed, this submission is critical to the defender's argument that (in effect) the court must at debate accept the terms of the missives (and Nero Lease) and must perforce disregard anything in the pursuer's pleadings inconsistent with those deeds. This argument is predicated on the entire agreement clause in the missives having the effect Mr Thomson contended for, and it is also the basis on which the pursuer's "but for" averment of causation is challenged.

[28] I am not persuaded that section 1(3) of the 1997 Act compels this approach. I gratefully adopt Lord Reed's analysis in *Macdonald Estates plc* v *Regenesis (2005) Dunfermline Ltd* 2007 SLT 791 (at paragraphs 126 to 131) of section 1(3), which included consideration of the Scottish Law Commission Report (Scot Law Com No 152). It is apparent that the principal purpose of an entire agreement clause is to preclude parties to an agreement containing such a clause subsequently contending that there is, in fact, an implied term or some collateral agreement additional to the one in which the entire agreement clause was contained. I accept Mr Young's submission that in this case the pursuer is not seeking to augment the terms of the missives or the Nero Lease.

[29] In light of the arguments the defender advanced, it must be stressed that the entire agreement clause precludes *the parties to the contract* in which it is contained from seeking to

invoke extraneous matters or evidence to contend for an additional term. In my view, a simple entire agreement clause (such as the one in the missives) does not preclude consideration of the commercial rationale or underlying purpose for which an agreement was entered into, at least in a question between one of the parties (ie the pursuer) and a third party (ie the defender in this case, who is not a party to the missives or the Nero Lease). Even in respect of the parties to a contract containing an entire agreement clause, I note that in *Macdonald Estates plc* Lord Reed did not consider that an entire agreement clause (or one as simple as the one under consideration in that case) barred consideration of the surrounding circumstances for the purpose of interpreting the agreement at issue in that case. (It may be noted that the entire agreement clause Lord Reed was considering in that case was expressed in simple terms (see paragraph 126), as is the entire agreement clause in the missives.)

[30] It should also be noted that the pursuer does not itself rely on the missives and Nero Lease as part of *its* case. As can be seen from the latter part of Article 7 (sentences 20 to 23), averments in relation to those deeds arose *in response to* the defender's averments invoking their terms. Accordingly, the tension that Mr Thomson identifies is not between features of the pursuer's case (ie its pleaded case versus the missives and Nero Lease); it arises because of the pursuer's and defender's discrete arguments about the import and effect of those deeds. In other words, a matter that is classically resolved at proof. (The pursuer does no more than refer to those deeds for their terms; they are not self-proving.) It would be a novel position if averments of deeds in the defences, which are not admitted by the pursuer (and whose terms are not agreed), could nonetheless be used at debate to negate or override a pursuer's positive averments which are contended to be inconsistent. Accordingly, I do not accept Mr Thomson's submission on the effect of the entire agreement clause in the

missives. Putting it another way, I do not regard the definition of "the Tenant's Works" in the missives as necessarily precluding proof in a case between the pursuer and the defender (i) that the work *de facto* comprehended within that definition overlapped with the dilapidations works, or (ii) that the Nero payment was referable to the state of the premises faced by the incoming tenant.

[31] Turning to the pursuer's pleadings, I do not find that these are as limited as Mr Thomson contends. The pursuer avers that it took steps to mitigate its loss and that this informed the terms of the missives and Nero Lease (sentences 24 to 26). (While Mr Thomson complained that the pursuer did not plead that the dilapidated state of the premises meant it was difficult to re-let the premises, its agents did assert precisely that (referring to the "impossibility" of doing so) in their letter of 15 February 2018 whose terms are quoted in Answer 7 (see para [6(1)], above).)

[32] The pursuer also avers that the Nero payment was agreed and paid "in respect of the wants of repair" of the premises as detailed in the Building Report (sentence 4). It avers that the Nero payment was paid by the pursuer to the incoming tenant "to put the [premises] back into the state [they] ought to have been in" when the defender quit the premises (sentence 26). Further, the pursuer offers to prove a comparison between the dilapidation works and those in the Building Report, and that all works in the Building Report were contained in the schedule of dilapidation works. The Nero payment is averred in terms to represent the pursuer's "loss arising from" the defender's breach of the repairing obligations under the Lease and Licence (sentence 10). Finally, the pursuer makes the requisite averment of causation, that "but for" the defender's breach, the pursuer "would not have had to make" the Nero payment to the incoming tenant (sentence 27). This is augmented by the averment that this was a "direct consequence" of the defender's breach of the Lease and

Licence (an averment no doubt directed to countering the defender's argument about remoteness of damage).

[33] In relation to Mr Thomson's criticism of the pursuer's averment of causation, it is not possible to resolve this (or, generally, any issue of causation) on the pleadings at debate. Causation, like remoteness, is pre-eminently a matter of fact and on which evidence is almost always required. The pursuer avers that it entered into these third party arrangements to mitigate its loss; the very nature of it as a mitigatory step has the potential to reinforce the causative link between that expenditure (which the defender accepts is in principle recoverable) and the defender's breach.

[34] This is sufficient in my view to constitute a relevant averment of a causal link between the defender's breach and the Nero payment. The pursuer avers that the terms of the missives, and the Nero payment, were driven by the need to mitigate its loss. That raises an issue about the commercial rationale or imperative that led the pursuer to conclude the missives and Nero Lease when it did, and in the terms that it did. In my view, proof of the underlying purpose is a discrete issue from the terms of those deeds. Consideration of that matter does not, for the reasons already explained, constitute an impermissible disregard of the entire agreement clause in the missives. In relation to Mr Thomson's reliance on the definition in the missives of the "Tenant's Works" as constituting "fitting out", the pursuer is (as already noted) offering to prove that there was in fact a considerable overlap between the works Nero was to undertake in order to restore the premises to the state that they should have been in (and defined as the tenant's fitting out works) and the dilapidation works. That does not amount to the pursuer seeking to alter the definition of the "Tenant's Works" in any question with Nero; nor in my view does the entire agreement clause render that necessarily impermissible.

[35] The foregoing accords with the case-law. As the discussion in *Grove* makes clear, and which both parties accepted, a landlord's subsequent dealings in relation to dilapidated premises consequent upon breach by the tenant of a repairing obligation may be highly relevant to the question of whether the landlord sustained any loss. In circumstances where the landlord is able to re-let the subjects without a diminution in the rent received or without having to make a reverse payment or to provide a rent-free period, it may not suffer a loss. Lord Drummond Young in *Grove* canvassed some of the reasons why an incoming tenant may be unconcerned by the dilapidated state left by the defaulting outgoing tenant. Nor is this the kind of case where the landlord is seeking sums for work it will never carry out (eg because it has disposed of the dilapidated premises without diminution in value or it simply does not intend to apply any damages recovered on remedying the dilapidations flowing from its tenant's default). *Prima facie* this is not a case where there is no loss; the defender accepts this (for the purposes of the debate). Nor is it suggested that the pursuer is seeking to obtain a windfall.

[36] Read short, the pursuer avers that its lease of the premises in a dilapidated state to Nero was not without a cost to it, in the form of the Nero payment, and it expressly relates the Nero payment to the defender's default. In my view, the pursuer pleads a relevant case and the defender's relevancy challenges fail.

Averments anent a meeting and correspondence between the parties

[37] Mr Young did not seek to defend his averments anent a meeting and correspondence between the parties contained in sentences 12 to 19 of Article 7. In any event, in my view they are patently irrelevant. I will therefore uphold the defender's second plea-in-law and exclude these averments from probation.

Decision

[38] It follows from the foregoing that, apart from the averments at which the defender's second plea is directed, the defender's criticisms made in support of its first and third pleas-in-law fail. I shall repel the defender's third plea-in-law. As I understand there are other matters which may fall within the defender's preliminary plea, after proof, I shall reserve its first plea-in-law at this stage. I shall put the matter out By Order to discuss further procedure. I reserve the question of expenses meantime.