OUTER HOUSE, COURT OF SESSION

[2019] CSOH 17

CA95/18

OPINION OF LORD BANNATYNE

In the cause

PRIORY HEALTHCARE LIMITED

Pursuer

against

HIGHLAND HEALTH BOARD

Defender

Pursuer: Lindsay QC; Anderson Strathern LLP
Defender: Walker QC, Gardiner; Jones Whyte

20 February 2019

Introduction

[1] This matter called before me for a debate in the commercial court at the insistence of the defender.

[2] The defender sought dismissal of the action in terms of its first and second pleas-in-law which were pleas respectively attacking the relevancy and specification of the pursuer's action.

Background

[3] The pursuer is an independent healthcare provider. It has a number of facilities across the United Kingdom including a hospital and rehabilitation facility in Woking, England ("the pursuer's facility"). The defender is the health board for the Highland area. It was not disputed by the defender that for the purposes of section 25 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") it is a "local authority".

[4] Mrs AB ("the patient") prior to voluntarily leaving Nairn in or about early October 2016 was ordinarily resident there. She was at that time under the care of the social work department and the community health team. Said care was being provided in terms of section 25 of the 2003 Act.

[5] In or about early October 2016 the patient on her own volition took a taxi to Cambridge. On 2 October 2016 she was initially admitted to Addenbrookes Hospital, Cambridge. She was assessed at the time as being a vulnerable adult at risk of self-neglect due to non-compliance with medication and delusional beliefs. She was transferred to the pursuer's facility on 7 October 2016 by NHS Cambridgeshire ("Cambridge") who managed Addenbrookes Hospital.

[6] On or about 7 October 2016 a funding agreement ("the contract") in respect to the patient was entered into by Cambridge and the pursuer. Said document makes no reference to the defender.

[7] The patient when admitted to Addenbrookes Hospital on 2 October 2016 was detained under the Mental Health Act 1983 ("the 1983 Act"). She remained subject to said detention order until 31 October 2016. Since that date she has remained at the pursuer's facility.

[8] Sometime after her transfer to the pursuer's facility the defender started paying without challenge the pursuer's invoices in respect of the patient. This continued until 25 April 2017. At this point the defender advised the pursuer that it would not pay fees incurred by the patient after 31 April 2017.

The issue

[9] The dispute between the parties in summary is this: despite the defender expressly stating that it would not pay fees in respect of the patient incurred after 31 April 2017 the pursuer contends that the defender is contractually obliged to meet the continuing cost of the patient's care. The cost of that care is £540.00 per day. The defender denies that it is contractually bound to meet the said charges. The issue at debate was in short this: were the pursuer's averments anent first contract formation and secondly the contended for implied term (which I set out in full later in this opinion) irrelevant and separately lacking in specification?

The pursuer's case

[10] In summary the pursuer's case as to how the defender's obligation to make payment arose was this: it had three strands, the primary case was in contract and based on agency, the case in agency was pled in this way:

[11] The contract "was entered into by NHS Cambridgeshire on behalf of [the defenders]…"

[12] The second strand, was a fall-back position founded on adoption and was pled in this way:

> "The defender adopted and ratified the funding agreement by accepting all of the obligations imposed by the funding agreement and by paying the agreed cost of care for the patient without challenge until 25 April 2017."

[13] There was a third strand, being a further fall-back position, in this instance based on personal bar and founded in particular on the following averments:

> "…the defender is personally barred from now disputing its contractual liability to make payment for the patient's cost of care under the funding agreement."

[14] Thereafter on the basis of the contract thus formed the pursuer contended that a term as follows was implied into the contract:

> "That [the Contract] could not be terminated by the defender if such termination breached the statutory duties that it owed to the patient under section 25 of the 2003 Act and would place her at material risk of harm ['the implied term']."

[15] Mr Walker in his note of argument advanced detailed arguments in respect to the relevancy of each of the said three strands of the pursuer's case regarding contract formation. In addition he advanced substantial criticisms in respect to the relevancy of the implied term.

[16] The pursuer's principal response in respect to the contract formation arguments advanced by Mr Walker was a short one, and is perhaps best summarised at paragraph 25 of Mr Lindsay's note of argument:

> "…the defender's lengthy criticisms of the pursuer's averments relating to agency, adoption, ratification and personal bar are nothing to the point. All these averments relate to the formation of the contract between the parties. As the defender, in substance and effect, admits that there was a contract between the parties this is not a matter that is truly in dispute between the parties. It is the existence of the implied terms and whether or not the defender can terminate the contract in the circumstances averred by the pursuer that are in dispute between the parties."

[17] In addition to the above the pursuer advanced a short argument to the effect that in any event the averments were sufficient to found a case of agency of necessity. The pursuer's argument in brief was that when Cambridge entered into the contract with the

pursuer it was acting as an agent of necessity for the defender. Thus the contract was entered into on behalf of the defender. Mr Lindsay did not seek to advance any argument in response to the criticisms of the pursuer's case so far as founded on adoption or personal bar.

[18] Given the pursuer's position regarding contract formation I believe it appropriate to set out first the detailed submissions of the pursuer in support of its position on this issue and thereafter to look at the position developed by Mr Walker in response to this.

The pursuer's position regarding contract formation

[19] Mr Lindsay commenced his submissions by submitting that to understand the pursuer's position it was necessary to consider the defender's obligations in respect to the patient in terms of statute as this provided the essential background. The starting point for any such analysis is section 25 of the 2003 Act. It provides as follows:

> "(1) A local authority –
>
> (a) shall –
> (i) provide, for persons who are not in hospital and who have or have had a mental disorder, services which provide care and support; or
> (ii) secure the provision of such services for such persons; and
> (b) may –
> (i) provide such services for persons who are in hospital and who have or have had a mental disorder; or
> (ii) secure the provisions of such services for such persons.
>
> (2) Services provided by virtue of subsection (1) above shall be designed to –
>
> (a) minimise the effect of the mental disorder on such persons; and
> (b) give such persons the opportunity to lead lives which are as normal as possible.
>
> (3) In subsection (1) above, '*care and support*' –
>
> (a) includes, without prejudice to the generality of that expression –
> (i) residential accommodation; and

(ii) personal care and personal support (each of those expressions having the meaning given by [paragraph 20 of schedule 12 to the Public Services Reform (Scotland) Act 2010)]; but

(b) does not include nursing care."

[20] Applying this section to the circumstances of the present case Mr Lindsay submitted that when the patient was resident in Nairn, the defender provided care and support to the patient for her mental disorder under and in terms of section 25(1)(a)(i). Thereafter, the patient moved to the pursuer's facility, the defender secured the provision of care and support services by the pursuer in accordance with section 25(1)(a)(ii) of the 2003 Act. Section 25(3)(a)(i) makes clear that securing such care and support may also include residential accommodation.

[21] Although Cambridge was entered as the "responsible CCG" in the funding agreement, the defender continued to accept responsibility for the patient and paid all invoices for her care until 25 April 2017. These payments were made by the defender in fulfilment of the duties imposed upon it by section 25(1)(a)(ii) of the 2003 Act. There is no other statutory provision that would enable the defender to make such payments to the pursuer. The defender as a statutory body has no powers to make an ex gratia payment to a private body such as the pursuer. Accordingly it followed that there must have been a contractual relationship between the pursuer and the defender founded upon the foregoing section of the 2003 Act.

[22] The defender admitted on record that it made payments to the pursuer in respect of the patient until April 2017 and they clearly establish that there is a contract between the pursuer and defender in respect of the patient.

[23] Moreover, the defender's payment of the invoices until April 2017 was in accordance with the provisions of the Care Act 2014 ("the 2014 Act").

[24] In particular Mr Lindsay relied on the provisions contained in schedule 1 paragraph 3 of the 2014 Act which provide:

> "(1) Where a local authority in Scotland is discharging its duty under section 12 or 13A of the Social Work (Scotland) Act 1968 or section 25 of the Mental Health (Care and Treatment) (Scotland) Act 2003 by securing the provision of accommodation in England, the adult in question is not to be treated for the purposes of this Part of this Act as ordinarily resident anywhere in England."

[25] Mr Lindsay's position was that the above ensured that where a local authority in Scotland placed an adult in residential accommodation in England, in general, this does not result in the transfer of that authority's responsibility for that adult.

[26] Accordingly it was his position that the effect of the above provision in the present case was that the defender remains responsible for the provision of care and support services to the patient in fulfilment of its duties imposed by section 25 of the 2003 Act and that this statutory responsibility is unaffected by her transfer to the pursuer's facility. The patient is deemed to remain ordinarily resident in Highland and any duties that Cambridge would otherwise have owed to the patient are dis-applied.

[27] Mr Lindsay then moved to consider the Care and Support (Cross Border Placements and Business Failure: Temporary Duty) (Dispute Resolution) Regulations 2014 ("the 2014 Regulations).

[28] The particular provision upon which Mr Lindsay relied was in terms of Regulation 5 which provides:

> "(1) The authorities which are parties to a dispute must not allow the existence of the dispute to prevent, delay, interrupt or otherwise adversely affect the meeting of the needs of the adult ('the adult') or carer to whom the dispute relates.
>
> (2) This paragraph applies where a dispute concerns –
>
> (a) section 48(2), 50(3) or 51(3) of the Act (temporary duty to meet needs); or
> (b) any of paragraphs 1 to 4 of Schedule 1.

(3) Where paragraph (2) applies –

(a) the authority which is meeting any needs for accommodation of the adult on the date on which the dispute arises must continue to meet those needs; and

(b) if no authority is meeting those needs as at that date, the authority in whose area the adult is living as at that date must do so from that date.

(4) The duty under paragraph (3) must be discharged until the dispute in question is resolved.

(5) The meeting of an adult's needs by an authority pursuant to paragraph (3) does not affect the liability of that authority or any other authority for the meeting of those needs in respect of the period during which those needs are met."

[29] On the basis of the above provision it was his position that the responsibility for the patient remains with the defender pending the determination of any dispute between it and Cambridge. In addition he relied on Regulation 8 which provides:

"**8. Stage at which dispute must be referred**
If the authorities which are parties to a dispute cannot resolve the dispute between themselves within four months of the date on which it arose, they must refer it for determination to the appropriate Responsible Person or, in a case within regulation 2(6), to all persons who are Responsible Persons in relation to the authorities in dispute."

[30] Thus in the absence of any agreement with Cambridge, the defender could not unilaterally relinquish responsibility for the patient and is obliged to refer the dispute to the responsible person for determination within 4 months of the dispute arising.

[31] It follows from the above that if the defender considers that the patient is no longer ordinarily resident in Highland for the purposes of section 25 of the 2003 Act and that Cambridge has become responsible for the provision of care and support for the patient it is incumbent upon the defender to request that Cambridge assumes responsibility for the patient. If the defender is dissatisfied with the response to any such request it requires to

invoke the dispute resolution procedures within the 2014 Regulations. The pursuer is unaware of any such request.

[32] In conclusion having regard to the entire statutory background as above explained, the defender remains responsible for the patient and is subject to the duties imposed by section 25(1)(a)(ii) of the 2003 Act. The defender cannot release itself from its said obligations to the patient without reference to the 2014 Regulations.

[33] The patient's refusal of the care package provides no lawful basis for doing so. The refusal of the offer of a care package in Nairn, by a woman who suffers from dementia, schizophrenia and delusions, does not entitle the defender to effectively wash its hands of the patient and to abandon her to her fate of homelessness without any care and support. It would be a ludicrous and absurd interpretation of section 25 of the 2003 Act if that were so. Such a callous and inhumane outcome cannot have been the intention of Parliament.

[34] Mr Lindsay then, against that statutory landscape moved to consider the defender's contractual obligations and in particular the issue of contract formation.

[35] The primary argument Mr Lindsay advanced was this: the cumulative effect of the defender's admissions and positive averments in the defences is an acceptance that the defender and the pursuer were in a contractual relationship in respect to the provision of care to the patient from 7 October 2016 to 25 April 2017. In answer 8 the defender admits "that invoices were issued by the pursuer to, and paid by, the defender without challenge until 25 April 2017". The admission that invoices, for the cost of the care of the patient, were paid by the defender without challenge given that it has no power to make donations or ex gratia payments is, in substance and effect an admission that there was a contractual obligation to do so.

[36] Beyond that, the admission made by the defender that the invoices were not challenged amounted to an implicit admission that the amount invoiced was the agreed contractual sum. Lastly, the acceptance of a contract between the parties can also be seen in the carefully drafted nature of many of the defender's averments. For example, in answer 8 it is averred that "the defender incurred no contractual liability to the pursuer regarding [the patient's] care from 30 April 2017 onwards". Significantly, there is no averment the defender had no such contractual liability prior to 30 April 2017.

[37] It flowed from the above averments on behalf of the defender that when the relevancy of the pursuer's averments relating to the contract between the parties is being assessed by the court, it requires to be carried out on the basis that, in substance, there is no dispute between the parties that they were in a contractual relationship from 7 October 2016 to 25 April 2017. Thus what is in dispute between the parties is not whether there was a contract between them, but whether the defender could unilaterally terminate the contract with effect from on or about 25 April 2017.

[38] As a fall-back position Mr Lindsay submitted that in any event the pursuer's averments, relating to agency and the constitution of the contract between the parties, were relevant and provided adequate and reasonable specification. It was his position that it was obvious from these averments that an agency of necessity was created by the patient's emergency admission as a consequence of her urgent need for medical assistance. This he submitted was a category of agency long recognised by the common law.

[39] The general principles as regards formation of an agency of necessity were identified in the speech of Lord Goff in *In Re F (Mental Patient: Sterilisation)* 1990 2 AC 1 at page 74 where he opines:

> "That there exists in the common law a principle of necessity which may justify action which would otherwise be unlawful is not in doubt. But historically the principle has been seen to be restricted to two groups of cases, which have been called cases of public necessity and cases of private necessity. The former occurred when a man interfered with another man's property in the public interest – for example (in the days before we could dial 999 for the fire brigade) the destruction of another man's house to prevent the spread of a catastrophic fire, as indeed occurred in the Great Fire of London in 1666. The latter cases occurred when a man interfered with another's property to save his own person or property from imminent danger – for example, when he entered upon his neighbour's land without his consent, in order to prevent the spread of fire onto his own land.
> There is, however, a third group of cases, which is also properly described as founded upon the principle of necessity and which is more pertinent to the resolution of the problem in the present case. These cases are concerned with action taken as a matter of necessity to assist another person without his consent. To give a simple example, a man who seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death, commits no wrong. But there are many emanations of this principle, to be found scattered through the books. These are concerned not only with the preservation of the life or health of the assisted person, but also with the preservation of his property (sometimes an animal, sometimes an ordinary chattel) and even to certain conduct on his behalf in the administration of his affairs. Where there is a pre-existing relationship between the parties, the intervenor is usually said to act as an agent of necessity on behalf of the principal in whose interests he acts."

[40] It was in the third category identified by Lord Goff that Mr Lindsay said the present case, on the averments made on behalf of the pursuer, clearly fell.

[41] Lastly, turning to the question of specification, he submitted that in circumstances where the defender is fully aware of the nature of its relationship with Cambridge and has chosen not to aver on record the nature of this relationship no criticism can be made of the degree of specification provided by the pursuer's pleadings on this issue.

[42] In a further chapter of his submissions Mr Lindsay referred to the defender's duty to act intra vires. In particular he said this in his written submissions:

> "28. The defender's ability to terminate its contract with the pursuer is constrained by the statutory duties which are incumbent upon it. The defender is a statutory body. Unlike the Crown it does not have any common law powers. The defender can only act in accordance with its statutory powers. If it acts in a way which breaches its statutory duties or in circumstances where it has no

statutory power to do a particular act, it would be acting *ultra vires* and any such act would be unlawful.

29. In the present case, terminating the contract for the provision of care to the Patient in circumstances where: (*i)* no adequate arrangements had been made for her safe return to Nairn; (*ii)* no accommodation was available for the Patient in Nairn as she had lost her tenancy due to her long absence from the property; (*iii)* no care package was in place for the Patient in Nairn because of this loss of accommodation; (*iv)* no other local authority had accepted responsibility for providing care to the Patient; (*v)* no family members were willing or able to look after the Patient; (*vi)* the Patient's reasons for not wishing to return to Nairn are delusional; and *(vii)* the undisputed medical evidence was that the Patient was 'at considerable risk of harm without a very full support package on discharge from hospital care'; would be a clear breach of the duties owed by the defender to the Patient under and in terms of section 25 of the 2003 Act."

The defender's response in respect to contract formation

[43] Mr Walker maintained his position that the pursuer's pleadings in respect to this matter were irrelevant.

[44] He first turned to the issue of the statutory background.

[45] He made three, sharp points. First, that at all relevant points Cambridge was fulfilling its statutory obligations in terms of sections 2 and 3 of the Mental Health (Scotland) Act 1983 ("the 1983 Act").

[46] Sections 2 and 3 provide as follows:

> "**2. Admission for assessment**
>
> (1) A patient may be admitted to a hospital and detained there for the period allowed by subsection (4) below in pursuance of an application (in this Act referred to as *'an application for admission for assessment'*) made in accordance with subsections (2) and (3) below.
>
> (2) An application for admission for assessment may be made in respect of a patient on the grounds that –
>
> (a) he is suffering from mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; and

(b) he ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons.

(3) An application for admission for assessment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in subsection (2) above are complied with.

(4) Subject to the provisions of section 29(4) below, a patient admitted to hospital in pursuance of an application for admission for assessment may be detained for a period not exceeding 28 days beginning with the day on which he is admitted, but shall not be detained after the expiration of that period unless before it has expired he has become liable to be detained by virtue of a subsequent application, order or direction under the following provisions of this Act.

…

3. Admission for treatment.

(1) A patient may be admitted to a hospital and detained there for the period allowed by the following provisions of this Act in pursuance of an application (in this Act referred to as *'an application for admission for treatment'*) made in accordance with this section.

(2) An application for admission for treatment may be made in respect of a patient on the grounds that –

(a) he is suffering from [mental disorder] of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and

[…]

(c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section [;and]

[

(d) appropriate medical treatment is available for him.

]

(3) An application for admission for treatment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in subsection (2) above are complied with; and each such recommendation shall include –

(a) such particulars as may be prescribed of the grounds for that opinion so far as it relates to the conditions set out in paragraphs (a) and [(d)]of that subsection; and

(b) a statement of the reasons for that opinion so far as it relates to the conditions set out in paragraph (c) of that subsection, specifying whether other methods of dealing with the patient are available and, if so, why they are not appropriate.

[

(4) In this Act, references to appropriate medical treatment, in relation to a person suffering from mental disorder, are references to medical treatment which is appropriate in his case, taking into account the nature and degree of the mental disorder and all other circumstances of his case."

[47] The patient's admission to Addenbrookes was compulsory in terms of the above provisions. When she was transferred by Cambridge to the pursuer's facility she continued to be detained in terms of the above provisions. She continued to be detained in terms of the said provisions until 31 October. Thus the accommodation at the pursuer's facility was secured by Cambridge in fulfilment of its obligations in terms of the above provisions of the 1983 Act.

[48] Secondly, it was important to note that in terms of section 25(1)(b)(ii) of the 2003 Act there is no absolute obligation for a local authority such as the defender to provide care and support services to a relevant person who is in hospital. Rather in terms of section 25(1)(b)(ii) the wording is that the local authority "may" secure the provision of such services. At the date of entry into the contract the patient was in hospital.

[49] Thirdly, it was Mr Walker's submission that on a proper reading of paragraph 3(1) of the 2014 Act it applied where a local authority made a decision to fulfil its obligations in terms of section 25 by securing the provision of accommodation in England and transferred the patient to that accommodation in England. What the section did not cover was the situation in the present case.

[50] Thus he submitted that the statutory background did not support the relevancy of the pursuer's position in respect to the issue of contract formation.

[51] Turning to the issue of agency Mr Walker argued that generally there were no relevant averments of agency made on behalf of the pursuer.

[52] It was his general position that the pursuer failed to make any averments supporting its contention that Cambridge was the defender's agent. There was no basis on which the court could infer that it was. In particular he, in his written argument, made three points in support of his above position as follows:

> "i. No averments of any contact – much less agreement – between Highland HB and NHS Cambridgeshire prior to the Funding Agreement whereby the latter was appointed to act as the former's agent or that the latter agreed so to act.
> ii. No averments that Highland HB gave NHS Cambridgeshire express or ostensible authority or that the latter ever purported to be acting for and on behalf of the former.
> iii. No averments that Highland HB was even aware of the Funding Agreement at the time it was entered into nor that The Priory was aware of there being any connection between the Patient and Highland HB."

[53] In respect to the specific type of agency which Mr Lindsay had submitted was created, it was Mr Walker's position that:

- In securing the patient's place in the pursuer's facility Cambridge was not discharging obligations incumbent on the defender, for the reasons he had earlier argued. No agency of necessity thus was created.
- In any event the necessary elements for the creation of an agency of necessity were not present. In the circumstances as averred there was no urgency. When the contract was entered into and the accommodation was secured some days had passed after the patient had been detained by Cambridge. In these circumstances there were no circumstances justifying Cambridge acting without the authority of the defender.

- Moreover, the pursuer's argument conflated the position of the defender and the patient. In order for there to be an agency of necessity created the defender had urgently to require Cambridge to act not the patient.
- Thus he argued that the averments anent agency of necessity being created were irrelevant.

[54] In respect to the argument that there was an implied admission on the part of the defender that a contract had been formed Mr Walker argued that this was not correct. He submitted that on a fair reading of the pleadings the defender clearly denied the formation of the contract. He also strenuously denied that there was any lack of candour in the pleadings on behalf of the defender. In respect to this matter he particularly relied on the following averment made in answer 4 at page 9 of the record:

> "Explained and averred that there was no contract between the defender and the pursuer in terms of any funding agreement entered into between the pursuer and NHS Cambridgeshire."

He argued that given the above averment it could not be held that the defender had admitted the existence of the contract.

Discussion

[55] I initially found the arguments, very powerfully and eloquently advanced by Mr Lindsay, in respect of the primary issue of contract formation to be attractive ones. However, I believe, that on detailed consideration they have a number of fundamental flaws.

[56] First, it is Mr Lindsay's position that the defender entered into the contract in fulfilment of the duties imposed upon it by section 25(1)(a)(ii) of the 2003 Act, which obligation can include the securing of residential accommodation (see: section 25(3)(a)(i)).

[57] Section 25(1)(a)(ii) of the 2003 Act provides for care and support to be secured by a local authority for those: "who are not in hospital". However, at the date of entry into the contract the pursuer was in Addenbrookes Hospital and was being transferred from there to the pursuer's facility. Accordingly, the actings of Cambridge which the pursuer contends were in fulfilment of the defender's obligations in terms of section 25(1)(a)(ii) could not on that simple basis have fallen within the ambit of that provision.

[58] Rather the position of persons "who are in hospital" is dealt with separately in terms of sub-section(1)(b) of section 25 of the 2003 Act.

[59] Moreover, I observe that sub-section(1)(b) gives a discretion to the local authority to provide care and support for a patient. It is therefore fundamentally different from sub-section(1)(a) founded upon by the pursuer, which places an obligation on the local authority to provide care and support.

[60] Secondly, I am not persuaded that paragraph 3 of schedule 1 of the 2014 Act is applicable to the circumstances of the patient. On a sound construction I believe this section is intended to cover a situation where residential accommodation is being provided by a local authority to a patient in Scotland and that patient wishes to move to England where he or she will continue to require care and support in residential accommodation or where the local authority (in consultation with the patient) requires to move such a patient to residential accommodation in England. In those circumstances if the Scottish local authority secures, on the patient's behalf, provision of the accommodation in England then in terms of this provision the responsibility for the patient remains with the Scottish local authority. I do not believe Parliament in this provision intended to place a continuing obligation on the Scottish local authority where it had no control in respect of the patient's move to England and entry into residential accommodation.

[61] The circumstances in the present case are entirely different from that envisaged in the provision and accordingly this provision is not engaged.

- The patient was not in residential accommodation in Scotland before her move to England.
- The defender was not involved in arranging her move to England and thus did not secure "the provision of accommodation (for her) in England".
- Her admission to Addenbrookes Hospital was in terms of section 2 and 3 of the 1983 Act. Cambridge was obliged, given the patient's medical condition, in terms of the said provisions of the 1983 Act to take steps to have the patient compulsorily detained. It was not acting on behalf of the defender in terms of section 25 of the 2003 Act in detaining the patient. It was her presence in Cambridge and her mental condition which required Cambridge to admit her. That is how the patient became the responsibility of Cambridge.
- It would deprive the word "securing" of any meaning, if the circumstances of the present case were said to amount to the defender "securing" accommodation in England. The word "securing" applying its ordinary meaning requires some form of act on the part of the defender whereby the residential accommodation is obtained. There is, I think, no such act in the present case. It appears to me that Cambridge acting in terms of sections 2 and 3 of the 1983 Act cannot be said to be the defender "securing accommodation" in terms of section 25(1)(a)(ii) of the 2003 Act.

[62] Thirdly, and this overlaps with what I have said above at secondly, at the relevant time, namely: the date at which the contract was entered into Cambridge was fulfilling obligations which were incumbent on it in terms of the 1983 Act. It was Cambridge which

did not have a bed for the patient and which was not able to fulfil its obligations in terms of section 2 or 3 of the 1983 Act without the transfer of the patient to the pursuer's facility.

[63] Cambridge on its own volition decided that it was required to act in terms of the above provisions of the 1983 Act to safeguard the patient. It was not, in any sense, acting in terms of section 25 of the 2003 Act on behalf of the defender.

[64] The issue can perhaps be tested in this way: if the patient had been in Nairn when she had become unwell to the extent that she did in Cambridge the defender would not have relied on section 25 of the 2003 Act to deal with the situation. Rather, I think that it would have exercised the equivalent Scottish provisions in relation to the compulsory detention of the patient. This I believe illustrates why it cannot be said that what Cambridge was doing was acting on behalf of the defender.

[65] In conclusion it appears to me that when the contract was entered into the patient was still compulsorily detained in terms of the 1983 Act and thus in entering into it Cambridge was fulfilling its obligations which it owed to the patient in terms of the 1983 Act.

[66] I think the argument that what Cambridge was doing was acting on behalf of the defender in fulfilment of its section 25 obligations for the above reasons is misconceived.

[67] Now I turn to Mr Lindsay's argument in respect to agency of necessity. His argument in summary is this: an agency of necessity was created by the patient's emergency admission as a consequence of her urgent need for medical assistance.

[68] The underlying reason for the principle of necessity is to justify an action which would otherwise be unlawful or tortious thus in the third category of cases identified by Lord Goff an agency of necessity is created in the circumstances of a person of unsound mind, who cannot consent to necessary medical treatment. The hospital can by reliance on

an agency of necessity carry out the treatment on the patient which would otherwise be unlawful.

[69] Lord Goff made certain further observations in relation to agency of necessity in *R* v *Bournewood Community and Mental Health Board* [1999] 1 AC 458 at page 490 where he accepts that the principle of necessity could cover the following proposition:

> "That the common law permitted the detention of those who were a danger, or potential danger to, themselves or others in so far as this was shown to be necessary."

[70] Neither of the above situations, where Lord Goff holds that an agency of necessity could exist, covers the circumstances of the present case. The detention of the patient did not require an agency of necessity to justify it and to make it lawful and not tortious. Cambridge's actions were justified by its acting in accordance with the above provisions of the 1983 Act. The same applies in respect to any treatment which was given by Cambridge.

[71] Cambridge did not require the consent of the defender to act as it did. It had the authority to act in terms of the above provisions of the 1983 Act. It was in no sense acting unlawfully or in some way which would give rise to liability in delict in respect to the patient when it detained her. It was not acting unlawfully or in some way which could give rise to liability in delict when it obtained for the patient a bed at the pursuer's facility. It was not acting in terms of section 25 of the 2003 Act at the relevant time. Rather it was exercising entirely separate statutory powers in terms of the 1983 Act.

[72] I am of the view for the above reasons that no agency of necessity was created and thus Cambridge did not enter into the contract on behalf of the defender.

[73] In conclusion I am satisfied that when the statutory background is properly analysed there was at the relevant time no obligation in terms of section 25 of the 2003 Act incumbent

on the defender in respect to the patient and Cambridge was not acting as an agent of necessity for the defender at the relevant time.

[74] The pursuer separately argues that in any event the defences amount to an implied admission that a contract was created between the pursuer and defender.

[75] Before turning to look at the pleadings I would wish to make a preliminary observation relative to this argument. I earlier observed that in response to criticisms made by Mr Walker, in his note of argument, of the pursuer's case based on ratification and personal bar no argument was advanced by Mr Lindsay seeking to deal with these criticisms. I believe it is implicit from the approach of Mr Lindsay that these criticisms could not be answered except by saying that they were nothing to the point as there was a deemed acceptance of the existence of a contract. I note that in the pleadings the basis of both the ratification and personal bar cases is the payment of invoices by the defender until 2017. It is the admission of those payments which is said to found the argument that the defender accepts that a contract existed. I believe it would be a very odd result if that admission, which is insufficient to found a relevant case of ratification or adoption, could nevertheless amount to an admission of contract formation. I have also held that the contract formation case based on agency of necessity is also irrelevant. Thus, for the court to hold that there was an admission of contract formation it would have to do so where it had rejected the three bases on which it was pleaded that a contract had been formed. The foregoing consideration is I believe a powerful indicator that Mr Lindsay's argument is wrong. The defender has at no point in its pleadings accepted that any of the bases advanced by the pursuer for contract formation are relevant and accordingly cannot be said to have accepted that a contract has been formed.

[76] Turning to the detail of Mr Lindsay's argument under this head the first point made was this: the defender had to have a statutory basis to make the above payments. Thus acceptance of payment is acceptance that a contract was formed. I do not think that this is correct. I accept to an extent the first part of the argument: a statutory body making payments must in making such payments have believed when it made the payments that it had statutory authority to make them. However, the statutory body may have believed it had authority, at the time it made them, to make certain payments, yet at a later stage form the view that it was not obliged to make these payments. Thus acceptance of payment can sit perfectly happily alongside a position that it was not obliged to make these payments. Accordingly acceptance of payment does not inexorably lead to acceptance of contract formation.

[77] As regards the defender's averments anent payment I consider that these cannot be looked at in isolation. They have to be looked at in the context of the whole averments made on behalf of the defender. Thus these averments require to be read alongside the following averment:

> "Explained and averred that there was no contract between the defender and the pursuer in terms of any funding agreement entered into between the pursuer and NHS Cambridgeshire."

[78] It is the funding agreement which is averred by the pursuer to be the contract which has been entered into by Cambridge on the defender's behalf. Accordingly there is an explicit, clear and unequivocal denial of the core of the pursuer's case in respect of contract formation.

[79] When considering the defender's averments anent payment they must be looked at in the context of this explicit denial of the core of the pursuer's case. To hold that there was an admission in respect of contract formation I believe would be to ignore the said

averment. I would go further and say that to hold as the pursuer contends would be to turn a clear denial into an admission. I do not believe that in light of the said averment the defender's pleadings can be read as the deemed admission contended for by Mr Lindsay.

[80] Moreover, the defender's averments at page 18 of the record relative to payment state no more than this "The defender was willing to fund [the patient's] accommodation with the pursuer until 30 April 2017". The word "willing" in the said averment is not synonymous with the word "obliged". It amounts on an ordinary reading of the word to no more than the defender saying it was ready, disposed, prepared or inclined to make those payments for that period of time. In particular said word cannot be construed as amounting to "obliged" when viewed in terms of the background of the other averments made on behalf of the defender.

[81] Finally, I believe, that in considering whether the defender's averments could be said to amount to an implied admission of the formation of a contract, a matter which has to be considered is the fourth plea-in-law for the defender which is in the following terms:

> "In particular, there having been no relevant contract between the pursuer and defender, decree of absolvitor should be pronounced."

[82] Once more the above plea makes it clear that the defender does not accept that a contract was formed.

[83] In respect to the argument advanced by Mr Lindsay that there is a lack of candour in the defender's pleading regarding the formation of the contract I am not persuaded by this. It appears to me rather that the position is entirely clearly pled. The defender has denied outright any contract based on the funding agreement. In the course of its answer it makes it apparent that none of the bases of contract formation advanced by the pursuer are

accepted. In its note of argument and in oral submissions the defender has expanded upon that position.

[84] The defender's pleadings are undoubtedly carefully drafted. However, I do not think that they lack candour. The defender has explicitly answered the pursuer's case regarding contract formation. It has accepted making payments and not disputing these and advanced a clear argument in law that such payments could not amount to formation of a contract.

[85] The defender does not say why it made such payments. It perhaps could have done so. However, that failure does not I think amount to a lack of candour in its pleadings when it is properly seen in the context of the rest of its averments.

[86] For all of the above reasons I am satisfied that on none of the bases contended for on behalf of the pursuer has it averred on record a relevant case that a contract was formed between the parties. The foregoing conclusion is sufficient to decide the matters before me. However, I was addressed at some length on the issue of the incorporation of the implied term and accordingly turn to consider these.

The implied term

[87] Mr Walker began his submissions in respect of this issue by saying this: the law with regard to implied terms is set out by the Supreme Court in *Marks and Spencer Plc* v *BNP Paribas Security Services Trust Co (Jersey) Limited* [2016] AC 742. At paragraph 18, Lord Neuberger approvingly quoted the dictum of Lord Simon in *BP Refinery (Westernport) Pty Limited* v *Shire of Hastings* [1977] 180 CLR 266:

> "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."

[88] Lord Neuberger further, at paragraph 21, developed the above points. He stated that:

> "…a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term."

[89] The first branch of Mr Walker's argument was to stress the voluntary nature of the patient's continuing presence in the pursuer's facility. In particular since 31 October 2016, she has been perfectly free to walk out at any time. The pursuer does not aver that it had any legal compulsion to let her stay in its facility. Nor does it aver any legal or other obligation on the patient to accept care from the defender or, for that matter, any other public body. Instead the pursuer's case seems to be that it is reasonable and equitable for a term to be applied into the agreement which enables a private hospital and a private individual to voluntarily, and unilaterally, decide that the latter will stay in the former's private facility for as long as she wishes at public expense, despite the paying body having made clear that it is no longer willing to pay. He submitted that that is neither reasonable nor equitable.

[90] Secondly, given the statutory regime which governs mental health care, he described the proposition that underlay the pursuer's position that the only thing standing between the patient and harm was the implied term as fanciful.

[91] He submitted that there were a number of safeguards of the patient's position.

[92] The first safeguard to which he referred was this: the patient's care and support is provided for in terms of the 2014 Regulations. There is an overarching duty on the defender

and Cambridge not to allow care to be adversely affected by any dispute. There are detailed rules regarding which authority is to pay for care and support while any dispute is ongoing. He in particular referred to Regulation 5 which provides:

> "(1) The authorities which are parties to a dispute must not allow the existence of the dispute to prevent, delay, interrupt or otherwise adversely affect the meeting of the needs of the adult ("the adult") or carer to whom the dispute relates.
>
> …
>
> (3) Where paragraph (2) applies –
>
> (a) the authority which is meeting any needs for accommodation of the adult on the date on which the dispute arises must continue to meet those needs; and
>
> (b) if no authority is meeting those needs as at that date, the authority in whose area the adult is living as at that date must do so from that date."

[93] He submitted that in terms of Regulation 5(3)(b), by May 2017 Cambridge would clearly have interim responsibility. By then: the defender was not paying the pursuer and so was not meeting the patient's needs for accommodation, and the patient was living in the area of Cambridge and had been for several months.

[94] The second safeguard was this: in what he described as the wildly implausible event that Cambridge were willing to breach their statutory duties and allow care and support to be interrupted, the patient had public law remedies available to her. He noted that there is no averment that the patient has not got the capacity to issue instructions.

[95] The third safeguard was this: should the situation which the pursuer hypothesised occur then the patient would be detained either under section 2 or section 3 of the 1983 Act. That is what happened when the patient first arrived in Cambridge and she was detained and taken to Addenbrookes hospital.

[96] It was accordingly his position that the implied term is not necessary. Nor he submitted is it so obvious as to go without saying. No reasonable public authority would agree to the suggested term.

[97] In respect to business efficacy Mr Walker next argued that the implied term purported to serve the interests of the patient. However, the patient was not a party to the contract and her interests had nothing to do with the business efficacy of the contract.

[98] Mr Walker further argued that even if the implied term was incorporated the patient's discharge would not breach the term. In development of this he said:

- There would be no "material risk of harm" if discharged given the statutory safety net to which he had already referred.
- By May 2017 the patient was ordinarily resident in Cambridge and not within the defender's area, and thus on her discharge from at least that date onwards the defender could have no obligations in respect of her.
- He repeated his argument in respect of the non-applicability of the 2014 Act provisions and thus he submitted there could be no breach of the implied term.
- Lastly he sought to argue two points in respect of provision of services to the patient:
  (a) the patient's discharge did not result in breach as it was not an obligation incumbent on the defender to provide care at a place of the patient's choosing and
  (b) the 2003 Act only obliges the defender to make care available not to actually deliver care.

The pursuer's reply in respect to the implied term

[99] The way in which the breach of the statutory duty owed by the defender to the patient dovetails with the contract between the parties is that there is an implied term that the defender cannot terminate the contract if that would result in a breach of the statutory duties it owes to the patient in circumstances where such a breach would present a material risk of harm to the patient. Such a duty is implied by the common law into the contract on the grounds of business efficacy. This is because the contract between the parties would be completely unworkable without such a term being implied into it.

[100] He accepted that the law in respect to implying terms had been set out by the Supreme Court in *Marks & Spencer* v *PNB Paribas*. It was his submission that all five of the conditions identified in that case which are necessary for a term to be implied are present in the instant case. He submitted that the implied term would be reasonable and equitable, it is necessary to make the contract effective, it is obvious, it is capable of clear expression and it does not contradict any express term.

[101] In elaboration of this argument he made the following points:

> "33. In the absence of such a term, patients could be effectively abandoned in the care of the pursuer where their subsequent discharge would be hazardous to them; thereby making their discharge morally and ethically impossible. The pursuer provides medical and care services. Its employees are bound by the codes of conduct and ethics which apply to their respective professions. They are regulated by the responsible regulatory and professional bodies. Discharging, or effectively ejecting, the Patient without appropriate support and care would breach a multitude of such professional duties.
>
> 34. As a health board, the defenders are well aware that medical practitioners require to act in the best interests of their patients. In the circumstances averred by the pursuer, it is self-evident that discharging the Patient without accommodation and without a care package would not have been in her best interests. The Patient suffers from dementia, schizophrenia and delusions.
>
> 35. In other words, the absence of such an implied term would place the pursuer between Scylla and Charybdis: *incidit in scyllam cupiens vitare charybdim*. The

> pursuer could either accept liability to pay for the Patient's care indefinitely or it could abandon her to her fate thereby breaching the moral, ethical and professional duties discussed above. This impossible choice, between two equally unacceptable alternatives, demonstrates why it is necessary to imply such a term into the contract between the parties; and why the high test for the implication of a contractual terms on the grounds of business efficacy is met in the present case. The contract would be unworkable without this term being implied into it, as otherwise impossible and unworkable burdens would be placed upon the pursuer."

Discussion

[102] In respect to the issue of the implied term there was no dispute regarding the applicable law. It was accepted by both parties that the law regarding implied terms is authoritatively stated in the passages earlier quoted in the judgment of Lord Neuberger in *Marks & Spencer* v *BNP Paribas*.

[103] Even if I am wrong in respect to the issue of the formation of the contract, I do not believe that the implied term would be implied into the contract.

[104] In my view the conditions for the implication of the implied term are not satisfied.

[105] In particular I consider that it has not been shown that given the statutory framework to which I was directed, which protects persons such as the patient who have mental health difficulties, the term is necessary. It is my view that having regard to the statutory framework the implied condition is shown to be unnecessary.

[106] If it were judged that the patient would be at "material risk of harm" if she were to be released from the pursuer's facility then I am persuaded that this would engage the relevant provisions of the 1983 Act, namely: sections 2 and 3 and the patient would not therefore be placed "at material risk of harm".

[107] Moreover, if as argued by the pursuer the 2014 regulations are applicable then in terms of regulation 3 at the date of the hypothesised event a dispute in terms of the regulations would exist (if it had not earlier arisen when the defender stopped paying the

pursuer's invoices, namely: as at April 2017). In those circumstances regulation 5(3)(b) provides:

> "If no authority is meeting those needs as at that date, the authority in whose area the adult is living as at that date must do so from that date."

[108] Accordingly in those circumstances Cambridge would be bound to meet the needs of the patient.

[109] Beyond that the patient would at the date of the hypothesised event have public law remedies available to her and it is not averred on behalf of the pursuer that she has no capacity to issue instructions. This provides a further safeguard if neither of the first two safeguards properly protect the patient.

[110] I am unable against the above statutory background to envisage circumstances in which the hypothesised situation which underpins the alleged necessity for the implied term could occur. The patient is fully protected by the statutory safety net which is in place.

[111] Even if it is argued that the patient is not able to instruct that her statutory rights should be protected then of course steps could be taken to appoint a person to act on her behalf.

[112] Further looking to the issues of whether the condition is reasonable and equitable I believe that there is merit in the arguments advanced by Mr Walker.

[113] Lastly assuming that the implied term is incorporated Mr Walker argued that the person for whom the implied term is necessary according to the pursuer is the patient and not the pursuer. Therefore he argued that given that the patient was not a party to the contract this could not support a business efficacy argument. I think this is too narrow an approach. It seems to me that what the pursuer is saying is that it is placed in an impossible position by what would happen to the patient if an implied term was not put in place. It is

saying that it could not work the contract without that term for the reasons it explains in its averments. In my view Mr Walker's argument relative to this is wrong.

[114] Lastly, assuming that the implied term was part of the contract and the defender has any obligations in terms of section 25 as at the relevant date Mr Walker argued that there would be no breach of section 25 by her release. I agree that on a proper construction of section 25 it is not for the patient unilaterally to decide what care and support should be provided by the local authority and nor is it for the patient on her own to decide where such care and support should be provided. However, in the circumstances of this case if the defender in respect of section 25 owes duties to the patient at the date at which it was intended the patient should be released it seems to me (assuming I am wrong about the statutory safety net) that her release would breach the section 25 obligations in that according to the pursuer there are no other support and care provisions in place for her.

Decision

[115] Accordingly for the foregoing reasons I am of the view that the pursuer's case is irrelevant.

Disposal

[116] I have put this case out by order in order that I may be addressed on the orders that remain to be made in light of the terms of my opinion.