OUTER HOUSE, COURT OF SESSION

[2021] CSOH 39

CA91/20

OPINION OF LORD TYRE

In the cause

COAL PENSION PROPERTIES LIMITED

Pursuer

against

TECHNIP UK LIMITED

Defender

Pursuer: Barne QC; DLA Piper Scotland LLP
Defender: P O'Brien QC; Eversheds Sutherland (International) LLP

14 April 2021

Introduction

[1] The pursuer is the landlord, and the defender is the former tenant, of business premises ("the property") at Westhill, Aberdeenshire. The term of the lease to the defender expired on 15 July 2018. This action is concerned with the defender's liability to the pursuer, at the end of the term, for the cost of work required to put the property in the state of repair and condition required by the lease. The principal issue raised is one of interpretation of the relevant provisions of the lease and, in particular, of the proper construction of the tenant's obligation to "pay to the landlord the reasonable sum certified by the landlord's surveyor as being equal to the cost of carrying out such work".

The terms of the lease

[2] In terms of clause 6.1.1, the defender was obliged to keep the property in good and substantial repair and condition throughout the term of the lease. The defender was not, however obliged to put the property into any better repair and condition than that shown in a Schedule of Condition prepared in 2011 at about the time of the commencement of the lease, except in relation to specific obligations to re-carpet and redecorate the property immediately prior to the expiry of the lease.

[3] Clause 17.1 (entitled "To Remove") provided, so far as material, as follows:

> "17.1.1 At the end of the Term the Tenant must return the Property to the Landlord in the state of repair and condition required by this Lease. The Tenant shall be obliged to re-carpet the Property immediately prior to the expiry of the Lease using carpet approved by the Landlord whose approval shall not be unreasonably withheld or delayed. The Landlord and Tenant agree that this obligation to re-carpet, and also the obligation to decorate in terms of Clause 7.1, shall be complied with notwithstanding the Schedule of Condition....
>
> 17.1.2 If at the end of the Term the Property is not in the state of repair and condition required by this Lease then at the option of the Landlord either:
>
> (a) the Tenant must carry out at its own cost the works necessary to put the Property into such repair and condition; or
>
> (b) the Tenant must pay to the Landlord the reasonable sum certified by the Landlord's surveyor as being equal to the cost of carrying out such work and if the Tenant pays to the Landlord the sum as certified together with the surveyor's reasonable fees in connection with such certificate within twenty Working Days of written demand the Landlord will accept that in full satisfaction of the Tenant's liability under this Clause 17 (*To Remove*).
>
> …
>
> 17.1.5 If the Tenant does not comply with its obligations in this Clause 17 (*To Remove*), then, without prejudice to any other right or remedy of the Landlord, the Tenant must pay the Landlord an amount reasonably equivalent to the Annual Rent at the rate payable immediately before the end of the Term apportioned *pro rata* for the period that it would reasonably take to put the Property into the condition it

> would have been in had the Tenant performed its obligations under this Clause 17 (*To Remove*). This amount will be a debt due by the Tenant to the Landlord on demand.
>
> 17.1.6 This Clause 17 (*To Remove*) will continue to be binding on the parties even after the end of the Term until the terms of this Clause 17 (*To Remove*) have been complied with."

The landlord's demand for payment

[4] After the lease came to an end, the pursuer served a terminal schedule of dilapidations on the defender, and intimated that it was electing to claim payment under clause 17.1.2(b), as opposed to requiring the defender to carry out the works under clause 17.1.2(a). The pursuer also demanded payment of sums in terms of clause 17.1.5. Over the following months, the parties discussed the pursuer's claim. The defender did not accept that the sum claimed by the pursuer was a reasonable one. In particular, the defender considered that the pursuer's claim did not sufficiently account for the condition of the property as evidenced by the Schedule of Condition, and did not reflect a correct understanding of the extent of the works that the defender was liable to carry out in terms of the lease. Following negotiations, carried out under reference to a Scott Schedule, the difference between the parties' surveyors' estimates of costs for the remedial works narrowed but remained significant.

[5] By letter dated 11 March 2020, the pursuer's solicitors gave a further notice to the defender, reiterating that the pursuer had elected for payment under clause 17.1.2(b) of the lease. The letter enclosed a revised Scott Schedule which now included, at its foot, a certificate dated 10 March 2020 by the pursuer's surveyor. The certificate was in the following terms:

> "I certify that this Scott Schedule and the costs totalling £380,207.27 is an accurate statement of the costs being equal to the cost of carrying out such repair and

> remedial works in accordance with the Tenant's repairing obligations together with the sum of £214,219.70 being the reasonable sum in connection with loss of rent costs arising from the carrying out of such repair and remedial works and the surveyor's reasonable fees in connection with the certification of same, all in accordance with the obligations contained in the Lease between HXRUK 3 (2010) Scotland Limited and Technip UK Limited dated 27 June and 26 August and registered in the Books of Council and Session on 4 October, all 2011 as amended, varied and assigned."

[6] The letter itself referred to the lease, to the notices previously served, and to the surveyor's certificate, and then stated:

> "In accordance with clause 17.1.5, you require to make payment of the certified sums within 20 Working Days (as such expression is defined in the Lease) of this said written demand. Payment of the demanded amount totalling £594,426.97 should be made by way of bank transfer to the undernoted account…"

The defender replied, disputing its liability to make payment of the demanded amount.

[7] In this action, the pursuer concludes for payment of the sums of £380,207.27 and £214,219.70, with interest thereon at the contractual rate from 11 March 2020. In the alternative, the pursuer concludes for damages consisting of (i) the sum of £380,207.27; (ii), the sum of £178,194.80, being the pursuer's alleged loss of rent; (iii) the sum of £36,024.90, being the surveyor's fees for preparation of the schedule; and (iv) the sum of £4,860.00, being other costs incurred by the pursuer in preparing and serving the notices and schedules of dilapidations on the defender; all with interest.

Argument for the defender

[8] The defender's argument was presented as four propositions. Firstly, it was submitted that no valid demand for payment had been made, because the certificate was defective. Both the certificate and the accompanying letter proceeded on the basis that the surveyor had certified a figure of £594,426.97. The certificate purported to certify not merely the cost of required works under clause 17.1.2(b), but also the lost rent claim potentially

arising under clause 17.1.5. The clause 17.1.5 claim was not properly included within the certificate, and indeed was not payable at all if the tenant paid a reasonable demand within the specified period. Nor could it be argued that the reference to the clause 17.1.5 claim was severable. The contractual scheme was that the landlord demanded a certified sum for repair works; then, if the tenant paid that sum within 20 days of demand, it obtained a discharge of any obligation under clause 17.1.5 to pay a sum in respect of lost rent. The commercial purpose was to encourage prompt payment and discourage disputes, and did not allow the possibility of a partially valid certificate. The pursuer's approach would undermine this purpose.

[9] Secondly, it was submitted that on a proper construction of clause 17.1, the surveyor's certificate was not conclusive as to the tenant's liability under clause 17.1.2(b). The pursuer's interpretation was highly literal and did not accord with commercial common sense. The tenant would be unable to argue that an item of work was overpriced, or that it ought not to have been included at all. He might not even have the opportunity to identify that an error had been made, since the clause did not require the surveyor to give reasons for the figure he certified. This could result in a tenant becoming liable for a certified sum significantly larger than its underlying repair obligations would justify, without the right to a hearing before a court or the opinion of an independent expert. A non-literal interpretation that accorded with commercial common sense and with the parties' fundamental purposes was to be preferred to one that did not. Parties were unlikely to have intended the disproportionate burden, arbitrariness and potential windfall that could flow from the pursuer's interpretation: cf *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Ltd* 2020 SC 244. The word "certificate" was not decisive: *Beaufort Developments (NI) Ltd* v *Gilbert Ash NI Ltd* [1999] AC 266, Lord Hoffmann at page 275, especially where, as here, the

certificate could have been given on the basis of incomplete information, and was given by an agent of one of the parties. For these reasons, on a proper construction of the clause, ascertainment of the amount payable by the defender in respect of repair costs remained at large for the court.

[10] Thirdly, in any event, even if the correct amount payable in respect of repair costs was not at large for the court, the scope for challenge of the certificate was broader than simply bad faith and subjective unreasonableness. The tenant at least had to be entitled to challenge the sum certified on the basis that it was not objectively reasonable, having regard to the true facts and the true underlying legal obligations. This followed from the reference in clause 17.1.2(b) to "the *reasonable sum* certified by the Landlord's surveyor…" The demanded sum had to be both certified and reasonable. The natural meaning of the words was that the sum had to be reasonable, and not merely the procedure by which it was calculated. Moreover, the question entrusted to the surveyor was limited to the cost of the works, and did not extend to any dispute about what the underlying repair obligations actually were, or what works were required. This reflected the language of the provision: the words "such work" referred back to clause 17.1.2(a), which in turn referred to the opening words of clause 17.1.2: "the state of repair and condition required by this Lease". The contract thus provided for the surveyor to place a figure on the cost of "such works", which did not imply authority to decide antecedent questions, such as what works were required.

[11] Fourthly, the action was premature. No claim could be made for payment under clause 17.1.5 until there had been a valid demand for payment under clause 17.1.2(b) and the tenant had had the opportunity to meet the demand within 20 days and discharge its remaining liability under the clause. Nor could the landlord avoid the clause 17.1 procedure

by framing its claim as one for common law damages instead. Properly construed, where the landlord opted for payment under clause 17.1.2(b), that clause set out an exhaustive procedure for claiming damages for repair costs and lost rent. The parties cannot have intended that a parallel claim at common law in respect of the same costs would survive the discharge provided for by clause 17.1.2(b). That would defeat the purpose of the discharge. A contract could be construed as excluding common law remedies where it would be incoherent for them to exist alongside the terms that the parties agreed: cf *Scottish Power UK plc* v *BP Exploration Operating Co Ltd* [2016] EWCA Civ 1043.

Argument for the pursuer

[12] On behalf of the pursuer it was submitted that a valid demand had been made. The lease did not require any particular formality for the surveyor's certificate or for the demand. Service of the Scott Schedule, including the certificate, made it clear to the defender that the pursuer was opting for clause 17.1.2(b). The letter and the certificate itself made clear that the sum demanded in respect of repair costs was £380,207.27. In order to avoid liability for lost rent under clause 17.1.5, the defender also had to make payment of "the surveyor's reasonable fees in connection with such certificate". Accordingly, the level of those fees required to be intimated to the tenant. It was accepted that the lease did not provide for certification of the lost rent, but the wording of the certificate, properly construed, both certified the remedial works in terms of clause 17.1.2(b) and provided the defender with other requisite information. If necessary, the part of the letter demanding payment of lost rent was severable.

[13] The key issue was whether certification under clause 17.1.2(b) was binding on the parties. That was a question of contractual interpretation. On a proper construction of this

clause, the certification was binding. Certification by the surveyor was both a condition precedent of the tenant's obligation to pay and a definition of the debt. Without it, the obligation to make payment did not arise because the tenant's liability was what the landlord's surveyor said it was. That was the ordinary and natural meaning of the words used, and made commercial sense. It provided an expedited method by which the tenant's terminal liability could be assessed by an expert. It was unclear on the defender's approach what role the court could play on review. There was no room for the court to redefine a liability that, by contractual agreement, was to be defined by the surveyor: cf *Beaufort Developments (NI) Ltd* v *Gilbert Ash NI Ltd* (above), Lord Hoffman at page 273. On the defender's argument, the certificate served no purpose at all.

[14] The position under the lease could be contrasted with certain certificates encountered in construction contracts where the presence or absence of a certificate did not prevent a party from arguing before an adjudicator, arbitrator or court that a liability existed under the contract. It could also be contrasted with those leases where the tenant's obligation to pay a service charge was calculated on a particular basis under reference to the landlord's actual costs as certified by the landlord In both of these types of case, the liability existed independently of the certification procedure. Nor was it an objection to the pursuer's approach that the expert in question was the landlord's surveyor. This did not automatically constitute a conflict of interest. The surveyor would be expected to carry out his duty with professionalism. Bad faith would be a ground of challenge.

[15] Properly construed, the jurisdiction conferred upon the surveyor extended to both identifying and valuing the requisite remedial works. The defender's alternative construction was unworkable: if the certificate was not conclusive as to the works required, the 20 day period would not begin to run until after the parties had been to court to obtain a

decision in relation to the scope of the works required, and/or the valuation thereof. That would be an absurd interpretation and contrary to commercial common sense.

[16] The defender's averment that the amount certified was grossly excessive was not a valid objection in the absence of any suggestion of bad faith, fraud or failure to follow instructions. There was nothing in the pleadings or in the Scott Schedule to suggest that differences between the pursuer's and defender's surveyors' valuations were anything more than disagreements in the exercise of professional judgement. There was no basis for the suggestion that the certificate had to be "objectively reasonable". The word "reasonable" was an instruction to the surveyor; it did not provide a ground of challenge. It would not accord with commercial common sense for the court to be able to scrutinise every element of the Scott Schedule in order to pronounce on whether the amount certified was reasonable.

[17] As regards the alternative claim for damages, there was a presumption that parties did not intend to give up rights or claims given to them by the general law: *Gilbert-Ash (Northern) Ltd* v *Modern Engineering (Bristol) Ltd* [1974] AC 689. Clear words were required to exclude or limit that right. In the present case, it was clear that clause 17 did not provide a complete code since clause 17.1.5 began by stating: "If the Tenant does not comply with its obligations in this Clause 17 (To Remove), then, without prejudice to any other right or remedy of the Landlord…" Clause 17 did not merely replicate common law rights; for example, clause 17.1.2(a) had no common law counterpart. The alternative claim for damages was made on the basis that there was no valid certificate and therefore no entitlement under clause 17. There would have been nothing to prevent the pursuer from ignoring clause 17 and simply claiming damages.

[18] If the pursuer's argument that the certificate was binding was accepted, the pursuer was at least entitled to interim decree for the lower of the surveyors' respective valuations of the lost rent, which amounted to £123,961.60.

Decision

(i) Has there been a valid demand for payment?

[19] It is unfortunate that the pursuer's solicitors' letter of demand dated 11 March 2020 was not drafted with more careful attention to the terms of clause 17.1. The demand was clearly disconform to the pursuer's entitlement under that clause, in that it failed to allow for the defender's right under clause 17.1.5 to discharge its entire liability under the clause by making payment within 20 days of the amount certified by the landlord's surveyor as being equal to the cost of the repair works, plus the surveyor's reasonable fees in connection with the certificate. On any view, a total sum of £594,426.97 was not due on the date when the letter was sent. As a subsidiary point, the letter also failed to specify the sum demanded by way of the surveyor's reasonable fees.

[20] In my opinion, however, it does not follow that no valid demand for payment was made. The letter was sent under specific reference to the Scott Schedule, which contained the surveyor's certificate. Although the terms of the certificate are also open to criticism in that it bears to certify not only the amount of the repair costs but also a further sum consisting of lost rent and reasonable fees, for which additional certification no provision was made in the lease, the first two lines (ie to the words "in accordance with the Tenant's repairing obligations") contain a clear and unequivocal certification in the terms required by clause 17.1.2(b). It was also clear from the Scott Schedule how the amount of £214,219.70 divided as between lost rent and surveyor's fees; the latter amounted to £36,024.90. The

defender was, of course, well aware that there had been a process of negotiation between the parties' respective surveyors. At the time of receipt of the demand, the defender can have been in no doubt that it was being made under clause 17.1.2(b), that the pursuer's surveyor had certified the cost of repair works as £380,207.27, and that a further £36,024.90 was being demanded in respect of surveyor's fees. Although the demand was (incorrectly) made for a single sum of £594,426.97, that did not in my view mean that the defender's only options were to pay the whole of that sum or to refuse to pay anything at all. If the defender had been minded, despite being of the view that either or both of those sums was excessive, to obtain the benefit of the discharge from liability in clause 17.1.5, it could have done so by paying those two sums and resisting any further (ill-founded) claim by the pursuer for the balance. For these reasons, I reject the argument that no valid demand for payment was made.

(ii) What was the contractual scope of the certification?

[21] I find it logical next to address this issue, which falls within the defender's third proposition. The question is whether the certification authority given by clause 17.1.2(b) covers only valuation of required repair works, or whether it extends to determination of what repair works are required. The matter is of importance because it is clear from the terms of the Scott Schedule that a significant part of the surveyors' disagreement was in relation to what works were required in order to meet the defender's obligation under clause 17.1.1 to return the property to the pursuer in the state of repair and condition required by the lease, as opposed to the cost of works required.

[22] It was common ground that when construing the provisions of the lease, I should apply the principles enunciated by Lord Drummond Young, delivering the opinion of the

court in *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Ltd* (above) at paragraphs 9-17. I need not set these out at length, but for the purposes of the present case it is worth emphasising the following points that emerge from that analysis:

1. A contract must be construed contextually.
2. The exercise of construction is objective: the meaning of any particular provision is what a reasonable person in the position of the parties would have understood it to be.
3. The court should adopt a purposive approach, ie it should have regard to the fundamental objectives that reasonable persons in the parties' position would have had in mind.
4. The court may have regard to what is generally referred to as commercial (or business) common sense. In any case where a contractual provision is capable of bearing more than one meaning, the court should adopt the construction that best accords with commercial common sense.
5. In relation to commercial common sense, three features of general business conduct will frequently be relevant: (i) the notion of *quid pro quo*, ie that the obligations of one party are broadly equivalent to the obligations of the other; (ii) the principle *pacta sunt servanda*, which implies that parties will normally avoid the risk of unreasonable or disproportionate burdens; and (iii) the importance of predictability, which is achieved by the use of a contextual and purposive construction of the words used, with the application where appropriate of commercial common sense.

[23] Needless to say, both parties submitted that the principles thus enunciated supported their interpretation of clause 17.1.2(b) in relation to the scope of the surveyor's

certification. I have come to the conclusion that the pursuer's interpretation is to be preferred. The defender submitted that by providing for the surveyor to place a figure on the cost of "such works", it did not confer authority to determine the antecedent question of what works were required. It seems to me that the clause is capable of bearing either meaning, and that when one considers context, purpose and commercial common sense, the opposite interpretation is preferable. The threshold requirement for clause 17.1.2 to have any application at all is that at the end of the term the property is not in the state of repair and condition required by the lease. The sub-clause recognises that this has two consequences: firstly, that expenditure is required on repair works and, secondly, that the property may not be in tenantable condition until the works have been carried out, and that there will be a consequential loss of rent. In that context, the incentive afforded to the tenant by clause 17.1.2(b) is important in relation to interpretation: any liability for lost rent can be discharged by making payment of the sum certified for repair works within 20 days. This incentive would make no commercial sense if disputes as to what works were required were excluded from the scope of the surveyor's certification and reserved for determination by the court. As the pursuer submitted, that would mean that the 20 day period would not begin to run until after any such court proceedings had come to an end. The purpose of the incentive to pay the certified sum promptly, and thereby to allow the repair works to proceed and the rent loss to be minimised, would be defeated.

[24] The point made in *Ashtead* about the notion of *quid pro quo* is also of relevance in the context of the present case. Discharge of the tenant's liability for a sum equal to lost rent is a significant financial benefit to the tenant (indeed the landlord's surveyor's valuation of lost rent exceeded the ultimate difference between the two surveyors' valuations of the repair works required). The *quid pro quo* of that benefit is that the tenant will forego any

entitlement to dispute either the "reasonable sum" certified by the landlord's surveyor for repair costs or the sum claimed by way of reasonable fees. In my opinion this is the appropriate purposive approach to interpretation of the clause, giving effect to the parties' objective of achieving a speedy end to any argument about the tenant's liability in relation to the condition of repair of the property at the end of the lease.

[25] The inclusion of the word "reasonable", in relation to both the sum certified and the surveyor's fees, is also significant. The parties to the lease have envisaged that only a reasonable certification will start the running of the 20 day period. Assuming that the landlord was as keen as the tenant to obtain prompt agreement to the amount payable by way of repair costs, it would not have been in the landlord's interest to risk delaying the running of the 20 day period by making a demand based upon certification of an unreasonably excessive amount. As the defender submitted, the clause does not provide that whatever sum is certified by the surveyor must be taken to be reasonable: it provides rather that the sum must be reasonable, ie within the reasonable range of sums that might be arrived at by a surveyor acting in good faith and exercising professional skill. It is noteworthy that in the present case the sum eventually certified was not the sum that the pursuer's surveyor proposed initially, but one arrived at after negotiation. Although the clause does not oblige the landlord's surveyor to participate in a process of negotiation, it seems to me to have been a sensible way to reduce the risk of the sum certified being challenged as, and after litigation determined to be, unreasonable, resulting in the landlord losing the benefit that he stood to gain from the clause 17.1.2(b) procedure.

(iii) Is the sum certified binding on the parties?

[26] Subject to what I have just said regarding the meaning and application of the word "reasonable", I consider that, properly construed, clause 17.1.2(b) provides for a certification that is binding on the parties. I agree with the pursuer's submission that the certificate would otherwise, in the circumstances of this case, serve no purpose. It is the certification that creates the landlord's entitlement to payment and the tenant's obligation to pay. This is not a case in which the obligation subsisted independently of the certification; having opted for clause 17.1.2(b), the pursuer's entitlement rested upon the certification by its surveyor of a reasonable sum. The case is distinguishable from those where certification is simply part of the process for obtaining payment, such as an architect's certificate in the course of construction works, where it remains open for a party to claim an entitlement to payment even though no certificate has been issued.

[27] I accept that treating the certificate as conclusive creates the possibility that the tenant's liability could be conclusively determined to be for an amount that is factually incorrect (one way or the other) because it contains a latent error or because it was arrived at on the basis of incomplete information. But, as Lord Denning MR observed in *Campbell* v *Edwards* [1976] 1 WLR 403, the parties are nevertheless bound by the certification because they have agreed to be bound by it. They must be taken to have accepted the risk of such error in return for the benefit (to both parties) of obtaining an expeditious determination of the amounts payable by the tenant in respect of repair costs and fees. It is important to emphasise once again that the "reasonableness" qualification operates as a control: if the effect of an error were to render the sum certified unreasonable, there would be no valid certification and the 20 day period would not begin to run. The same control, in my opinion, provides an answer to the defender's point that the certificate is being provided by the

landlord's agent. Despite being appointed by only one of the parties, the surveyor's obligation is to certify a reasonable sum. Even if, hypothetically, the surveyor were to certify a sum towards the upper end of the range of reasonable figures, that could still be regarded as part of the *quid pro quo* for the tenant's discharge from liability for lost rent, and accords with the purpose of the clause and with commercial common sense.

[28] It is also worth emphasising that in clause 17.1.2(b) the words "sum" and "cost" appear in the singular. This seems to me to confirm that the parties did not envisage that the sum certified would be open to dissection with a view to identifying components with which one or other party disagreed. Again that would defeat the contractual purpose of speedy resolution to the benefit of both parties. On a proper construction, the parties have agreed that the figure that is binding upon them, and which must be reasonable, is the total amount certified by the surveyor.

(iv) Is the pursuer's alternative claim for common law damages relevant?

[29] In my opinion, clause 17.1 provided an exhaustive remedy for the pursuer in the event of the property not being in the state of repair and condition required by the lease at the end of the term. It provides remedies that are not the same as the landlord's remedies at common law, and in my view it would make no commercial sense to interpret the lease as conferring upon the landlord an option either to exercise its contractual remedies or to ignore them and sue for damages at common law instead. In *Scottish Power UK plc* v *BP Exploration Operating Co Ltd* (above), Christopher Clarke LJ, delivering a judgment with which the other members of the court concurred, referred to the presumption that parties do not intend to give up rights that the general law gives them, but continued (at paragraph 30):

> "[The judge] concluded that the contract only made coherent sense if Article 16.6 provided the sole remedy for under deliveries because Article 16 represented a contractually agreed mechanism, and because it was inherently improbable in the light of the scheme and the language of Article 16.5 that, in the case of a breach of Article 7.1, there should be a different right to compensation. Further the strength of the presumption is reduced in proportion to the degree of derogation from the common law position. Article 16.6 is not a pure exclusion clause. It is a clause which replaces common law rights with a different contractual remedy, which may, in certain circumstances, be more valuable than the right to damages."

In my opinion, a similar approach is apposite here. In particular, the opportunity afforded to the tenant to obtain a discharge of any liability for lost rent is a key element of the parties' bargain, materially departing from the common law, and it cannot have been intended by the parties that the landlord could deprive the tenant of that opportunity simply by choosing to make a claim for common law damages. Nor, in my view, are the words "without prejudice to any other right or remedy of the Landlord" which appear in clause 17.1.5 of assistance to the pursuer's argument; they relate solely to the claim for lost rent and do not indicate that any right has been reserved to bypass the remainder of clause 17.1.

[30] Senior counsel for the pursuer argued that he was not trying to have his cake and eat it, but merely to obtain some cake in the eventuality that the landlord's claim under clause 17.1.2(b) was unsuccessful. The point is academic because I have effectively held in favour of the landlord on the previous three issues. If, however, hypothetically, the landlord were to fail in a claim under clause 17.1, there would have to be some reason for that, and it does not seem to me to accord with the parties' agreement that a common law claim should simply be allowed to proceed by way of substitution.

Disposal

[31] For these reasons, it would appear that the pursuer is entitled to decree for payment of the sum certified by the surveyor in respect of repair costs, and also to payment of sums in respect of (a) the surveyor's fees and (b) lost rent. There may however be further issues to determine in relation to the latter sums. I shall, as requested, put the case out by order before pronouncing any interlocutor. Questions of expenses are reserved.