SHERIFF APPEAL COURT

2021 SAC (Civ) 7
EDI-A758-18

Sheriff Principal Lewis
Appeal Sheriff N Ross
Appeal Sheriff L Drummond QC

OPINION OF THE COURT

delivered by Appeal Sheriff Drummond QC

in appeal in the cause

GRANTON CENTRAL DEVELOPMENTS LIMITED

Pursuer and Appellant

against

LEN LOTHIAN LIMITED

Defender and Respondent

Pursuer and Appellant: D Thomson QC; Turcan Connell
Defender and Respondent: J MacGregor QC; Gilson Gray

26 January 2021

Introduction

[1] The pursuer and appellant (the "pursuer") claims payment for water supplied to the premises of the defender and respondent ("the defender"), together with two declarators to the effect that (i) there is no obligation to provide, or right for the defender to demand, a water

supply, and (ii) on that basis, the pursuer may lawfully cease to provide a water supply to the defender's premises.

[2] The pursuer holds the landlord's interest in the lease between Forth Ports Plc and the defender dated 24 December 1992 and 6 January 1993 of an area of ground extending to 4.55 acres of land lying to the west of Middle Pier Road, Granton Harbour, Edinburgh ("the lease" and "the subjects" respectively.) The subjects are let as a warehouse and office. The defender operates a warehouse storage business from the subjects. The pursuer currently supplies water to the subjects and supplied water to the subjects at the date the lease was entered into.

[3] After debate, the sheriff refused probation to the averments supporting the declarators, and the pursuer appeals that decision.

The Sheriff's Decision

[4] The sheriff found that the pursuer had provided sufficient specification of the way that the water charges had been calculated to warrant inquiry and allowed a proof before answer in relation to that. However he concluded that as matter of construction of the express terms of the lease itself, and the necessary implications flowing therefrom, the pursuer is obliged to supply water to the subjects. On an esto basis the sheriff found that, had he not reached the conclusion on the construction of the contract, he would, with reluctance, have allowed a proof before answer on the obligations of the pursuer and concomitant rights of the defender arising from implied obligations at common law to provide subjects reasonably fit for the purpose they are let.

The Grounds of Appeal

[5] Briefly the pursuer criticises the sheriff's approach to the principles on contractual interpretation and implied terms, and his application of those principles to the lease. The pursuer challenges the sheriff's analysis of the common law on implied warranties and derogation of grant. In relation to each of these issues, the pursuer maintains that the sheriff erred in finding that the defender's pleadings are relevant and specific. The residual issue is a change to the sheriff's refusal to exclude from probation certain averments of the defender.

Minute of amendment

[6] After the grounds of appeal were lodged, this Court allowed the pleadings to be amended in terms of the defender's Minute of Amendment which added in the following averments as an alternative argument:

> "..it is an implied term of the Lease that the Pursuer as landlord will provide water to the Subjects. As at the date of the Lease, water was supplied to the Subjects. The original lessor was aware that the Subjects would be used for warehousing and office facilities. Drinking water and toilet facilities were, and still are, required to allow the Subjects to be used for these purposes. Basic sanitation and hygiene requires the provision of water to the Subjects. The Lease makes specific references to pipes, drains and water courses. Reference is made to clauses Fifth and Ninth of the Lease. Clause Eleventh of the Lease specifically states that the Defender and Respondent will pay the landlord for water that is provided to the Subjects during the currency of the Lease. It is an implied term that the landlord would provide a supply of water to the Subjects and would refrain from taking any steps to interfere with the supply of water. An implied term that requires the landlord to provide water to the Subjects is reasonable and equitable. It is necessary to give business efficacy to the Lease. Water was supplied to the Subjects as at the date of the Lease. Pipework and drainage for the supply of water was in place. The location of the subjects means that it is not possible for a tenant to arrange a connection to the public water supply. Without water, the Subjects cannot be used for their intended purpose. As water was provided to the Subjects at the date of the Lease, the original parties to the Lease knew of the intended purpose that the subjects would be utilised for by the Defender, the parties made specific reference to pipes, drains, and water courses in the Lease, and for payment to

be made by the tenant to the landlord for water utilised at the Subjects, it was so obvious that water was to be supplied to the Subjects by the Landlord, and that the Landlord was to take no steps to sever the supply of water, that it went without saying that the Landlord would maintain the supply of water to the Subjects for the duration of the Lease. The implied term is capable of clear expression. A term requiring water to be provided to the Subjects does not contradict any express term of the Lease. There is no prejudice to the landlord by the implication of such a term as the landlord is entitled to reimbursement for water supplied to the Subjects in terms of clause Eleventh of the Lease.".

Submissions

[7] Both parties lodged written notes of argument in advance of the hearing of the appeal and supplemented those with oral submissions. The parties' submissions are summarised below.

Pursuer's submissions

[8] Senior counsel invited the court to recall the interlocutor of 24 January 2020, to sustain the second plea in law for the pursuer to the extent of excluding certain averments from probation and to remit the action to the sheriff to proceed as accords.

[9] He submitted that the sheriff proceeded on the basis that he considered the lease to contain an implied term in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made (*Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, paragraph 15 per Lord Neuberger PSC). However, the defender had no averments in support of an implied term of any kind, far less a term which fell to be implied in that manner, such that the result had to be that the pleaded defence was irrelevant (*Marks and Spencer plc*, page 752 per Lord Neuberger PSC), as it could not be supported on the basis of the express terms of the lease alone. The defender was not entitled to succeed on a line it had not pled. There were no words within the lease

capable of being construed as imposing an obligation on the pursuer or of conferring any right on the defender. (*Wood* v *Capita Insurance Services Ltd* [2017] AC 1173 followed and applied by the Scottish Courts in *British Overseas Bank Nominees Ltd* v *Stewart Milne Group Ltd* 2019 SLT 1253; *Royal Forth Yacht Club* v *Granton Central Developments Ltd* [2020] SC EDIN 10).

[10] Counsel recognised that the defender, through the recent amendments to the pleadings, seeks to imply a term into the contract in light of the express terms, commercial common sense and the facts known to the parties at the time the contract was made. However, the law imposes strict constraints upon what is considered to be an extraordinary power to imply a term: (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 and (5) it must not contradict any express term of the contract (*Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* at paragraph 15 per Lord Neuberger and *BP Refinery (Westernport) Pty Ltd* v *Hastings Shire Council* (1977) 52 ALJR 20 at p26). A particular term cannot be implied where there are a number of different terms to which the parties might have agreed (*Trollope & Colls Ltd* v *North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601; *Moyarget Developments Ltd* v *Mathis and Ors*, [2005] CSOH 136, 20th October 2005, (unreported*); Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, page 482 per Lord Bingham MR). It is difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue (*Philips Electronique Grand Public SA* v *British Sky Broadcasting Ltd,* pages 481-482, per Lord Bingham). If the formulation of the proposed implied term involves vagueness and ambiguity, with the result that it is not capable of clear expression, it will not be implied: *Shell UK Ltd* v *Lostock Garage Ltd* [1976]

1 WLR. 1187, at page 1201 per Ormrod LJ. Counsel submitted the implied term contended for fails all these tests.

[11] The defender's averments about the common law are also irrelevant. They are not averred to represent any term of the lease: *Mars Pension Trustees Ltd* v *County Properties and Developments Ltd* 1999 SC 267, at p273. In the case of urban subjects, the substantive content of a common law obligation to provide premises which are "reasonably fit for purpose", if it has not been excluded by the express terms of the lease in question, is simply to provide subjects which are habitable in the sense of being wind and watertight (Fleming et al, *Dilapidations in Scotland*, (2nd Ed., 2003), paragraph 1.1; McAllister, *The Scottish Law of Leases*, (4th Ed., 2013, paragraphs 3.12; 3.26-3.33). The warranty in question is capable of being excluded by the express terms of a lease and has been so excluded in the case of the Lease by Clause FIFTH(a) of the Lease (Fleming et al, paragraph 2.16), or, alternatively, as duly fulfilled (*Mars Pension Trustees Ltd* v *County Properties and Developments Ltd).* An averment that the pursuer is under an obligation to place the defender in full possession of the subjects is irrelevant. The defender does not aver that it does not have possession of the subjects as so defined. It is necessary to identify the scope of the grant in relation to the subjects actually let before one can then determine whether there has been any derogation from that grant (McAllister, paragraphs 3.10-3.11). The pursuer also submitted that certain ancillary averments ought to be refused probation.

Defender's Submissions

[12] Senior counsel submitted that the pursuer had failed to identify any material error in law in the decision of the sheriff and, accordingly, the appeal should be refused.

[13] The sheriff had decided that the obligation arose as a matter of contractual interpretation. Even if the decision of the sheriff is based on the law on implied terms, any

such error is not material because, properly construed, the lease obliges the pursuer to supply water or not to take any steps to interfere with the water supply to the subjects.

[14] Counsel relied on Clauses FOURTH (that the defender is entitled to occupy and use the subjects in connection with their business of warehousing and open storage and ancillary purposes with associated office); FIFTH (that the defender accept the subjects "in their present condition" which included a supply of water and drainage and an obligation to repair and replace "sanitary and water apparatus"), and ELEVENTH (providing that the Tenants shall be responsible for and shall free and relieve the Landlords of all rates, taxes and assessments, and all charges for water, heating, lighting, power and other services exigible in respect of the subjects during the currency of the lease). The purpose of the lease was to ensure that the defender could operate a storage warehouse and office from the premises as recorded in Clause FOURTH. The premises could not be utilised for this purpose without a water supply. Basic sanitation would not be possible. Counsel submitted that there would be no need for other terms within clauses FIFTH or NINTH which make reference to water and drainage if the parties had not anticipated, at the date of contracting, that there would be a supply of water to the premises. The pursuer's contention that there is a requirement to pay for water provided to the premises in terms of clause ELEVENTH but no corresponding right to receive water, would not accord with commercial common sense. The subjects would not have basic sanitation. That would not be a commercially sensible construction of the lease. It would be contrary to common sense (and to any concept of commerciality) for the provisions of the lease to be construed in a manner which would entitle the pursuer unilaterally, and at any time, to disconnect the water supply to the subjects and render them unusable for the purposes for which they are let. It would allow the pursuer to derogate from the grant. At

the very least, the Court could not reach any contrary determination without evidence being adduced as to the factual matrix within which the parties contracted.

[15] The imposition of a term that requires the landlord to provide water, and to refrain from interfering with the supply, is appropriate and complies with all of the relevant legal requirements for an implied contractual term (*Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd*, paragraphs 15-21; 67-69 and 76). The imposition of such a term is reasonable and equitable. It is necessary to give business efficacy to the lease. It is so obvious that it goes without saying. It is capable of clear expression. Such a term would not contradict any express term.

[16] Counsel submitted that the sheriff was correct to hold that the defender's averments based on the common law were relevant. At common law, a landlord grants an implied warranty that the subjects are let in a tenantable condition. A landlord is under an obligation to provide subjects that are reasonably fit for the purpose for which they are let. In the case of urban subjects, a landlord is clearly in breach of his obligation where drains and water supply are completely inadequate (Paton and Cameron, *The Law of Landlord and Tenant in Scotland* pages 130-131 and *The Stair Memorial Encyclopaedia*, volume 13, at paragraphs 254 to 255; *Tennent's Trustees v Maxwell* (1880) 17 SLR 463).

[17] A landlord is not entitled to derogate from the grant. A landlord is also not entitled to take any steps to oust the tenant from the subjects (*Huber v Ross* 1912 SC 898 at 918). The Court would require evidence as to the condition of the premises as at the date of the lease and, in particular, whether running water and sanitation was provided before this issue could be determined. The *"present condition"* of the premises included water supply. Any attempt to sever the water supply to the premises would be a blatant attempt to deprive the defender of occupation of full possession of the subjects. There is no common law principle, or

provision of the lease, which would permit the pursuer to take any such step. The sheriff's analysis of the law on derogating from the grant was not a material part of the decision. In any event, the analysis set out by the sheriff was an accurate statement of the law.

[18] The sheriff allowed a proof before answer in relation to the crave for payment. No material error in law is identified by the pursuer and in any event these averments are relevant to the dispute. Given the lack of specification as to the volume of water the pursuer contends the defender has utilised, the history of invoices being rendered for erroneous sums is highly relevant to the accuracy of the calculation purportedly made by the pursuer in the present case.

Decision

[19] The proper approach to construction or interpretation of contracts is summarised by Lord Clarke of Stone-cum-Ebony in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at paragraph 21. The court must consider the language used and ascertain what a reasonable person, who has all the background knowledge which would reasonably have been available to the parties at the time of the contract, would have understood the parties to have meant. If there are two possible constructions the court is entitled to prefer the construction which is consistent with business common sense. The starting point is the words the parties have chosen to use. The words must be construed in the context of the agreement as a whole, and having regard to the admissible background knowledge, which is often called the factual matrix (*L Batley Pet Products Ltd* v *North Lanarkshire Council* 2014 SC (UKSC) 174 at paragraph 18 per Lord Hodge). The Court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but

that the court must consider the contract as a whole and, depending on their nature, formality and quality of drafting of the contract, give more or less weight to the elements of the wider context in reaching a view as to that objective meaning (*Wood* v *Capita Insurance Services Ltd* [2017] AC 1173 at paragraph 10 per Lord Hodge. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement (per Lord Hodge at paragraph 13 of *Wood)*. *Wood* has been followed and applied by the Scottish courts (see *British Overseas Bank Nominees Ltd* v *Stewart Milne Group Ltd* 2020 SC 24).

[20] Nowhere in the lease are there words which oblige the pursuer to supply water to the defender or give the defender a right to receive a water supply from the pursuer. Although the starting point is the wording, the court must consider the context, read the contract as a whole and ascertain the objective meaning. This is not a situation where there are competing interpretations of a clause in the lease and the court must consider which of the two or more interpretations fit with business common sense. The defender's position is that the provisions of the lease together with the knowledge of the parties at the time of the grant require the imposition of an implied term that the landlord is obliged to continue to supply water to the defender. There is in our view no language in the lease which imposes such an obligation. Clause ELEVENTH imposing an obligation on the defender to pay for water supplied says nothing about any obligation to supply the water. Similarly Clause FIFTH imposing an obligation on the defender to repair and replace "sanitary and water apparatus" says nothing about any obligation to supply water. The lease is a professionally drafted contract but

contains no clauses imposing any such obligations or rights. There are no words which might be capable of being construed in that way.

[21] The sheriff appears to have approached the question on the basis that it was an implied term that the lessor agreed to supply, and the lessor was entitled to receive, a supply of water (paragraph 19). Although the sheriff begins by quoting from *Arnold v Britton* [2015] AC 1619 on interpretation of a written contract he also refers to authorities which are relevant to when a term can be implied into a contract (*Marks and Spencer plc* v *BNP Parabis Securities Services Trust Co (Jersey) Ltd and another)*. He concludes that because the parties have inserted specific clauses (clauses FIFTH, NINTH and ELEVENTH) imposing on the lessee obligations to maintain pipes, sewers and water apparatus, and to relieve the lessor of charges for water, they must necessarily have intended that the lessee receives a supply of water to use and pay for. This was, according to the sheriff, a factor so obvious given the terms of the lease, that it goes without saying. In so doing, the sheriff conflated the exercise relative to construing the express terms of the contract with an exercise on what may or may not have been implied into the contract. The process of implication is different from that of construction (*Marks and Spencer plc* v *BNP Parabis Securities Services Trust Co (Jersey) Ltd and another* per Lord Neuberger at paragraph 29). The defender pled no case on implied terms. Having departed from the pleadings, it was an error of law for the sheriff to conclude that the obligation was so implied. He did not consider whether the obligation arose as a matter of construction of the express terms of the contract alone. For the reasons we have given above, we do not consider that it does. Accordingly, the appeal in relation to the argument about construction of terms will require to be sustained. The pursuer has relevantly pled a case that the lease cannot be construed in the manner set out. As the pursuer seeks proof before answer on this point, we will remit the matter to the sheriff to proceed as accords.

[22] Matters are complicated by the defender amending its pleadings after debate and prior to this appeal. Following amendment to the pleadings before this court, the defender has introduced an additional case on implied terms as set out above. The pursuer made various criticisms of the case as pled and submitted that it is bound to fail. The pursuer submitted that the defender had failed to meet any of the conditions required for an implied term. A term will be implied into a contract if a reasonable reader of the contract knowing all of its provisions and the surrounding circumstances, would understand it to be implied, provided that test is applied at the time of contracting, and that the term is so obvious to go without saying or to be necessary for business efficacy (*Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* per Lord Neuberger at paragraph 23). The defender has averments in support of these conditions being fulfilled. The defender offers to prove that it was so obvious that water was to be supplied by the landlord, and that the landlord was to take no steps to interfere with the water supply, that it went without saying. The defender also offers to prove that the water supply is necessary to give business efficacy to the contract because without it, the premises could not be operated and the defender could not connect to a water supply. In our view the defender's averments on implied terms are relevant for probation.

[23] It is well established in the authorities relied upon that in the case of urban subjects, the landlord is obliged to provide premises that are reasonably habitable and in a wind and watertight condition. This obligation may be breached where drains and water supply are completely inadequate (Paton and Cameron, *The Law of Landlord and Tenant in Scotland* pages 130-131; *The Stair Memorial Encyclopaedia*, volume 13, at paragraphs 254 to 255; *Tennent's Trustees v Maxwell* (1880) 17 SLR 463). The defender seeks to imply into this lease an obligation to continue to provide an existing water supply. Whether the lease does include such an

obligation is dependent on the facts as proved. The defender offers to prove that the pursuer as landlord is under an obligation to place the defender in full possession which includes ancillary rights to supply of water. The defender also relies on derogation from grant. Whether that submission is relevant in the context of this lease will fall to be also decided following proof.

The claim for payment

[24] The pursuer seeks reimbursement from the defender of water charges paid by it all as set out in invoices 2861 and 2862. Whether other invoices (not the subject of this action) are due and payable and whether other tenants have complained about invoices, is irrelevant to this action which concerns only these two specified invoices issued to the defender. To allow averments about other invoices and tenants to stand would permit the defender to lead evidence about matters which are not in dispute in this case and are therefore in our view irrelevant. The issue in dispute is whether the defender is liable to the pursuer for payment of the charges made on the specified invoices. We shall therefore exclude averments that relate to the other invoices and tenants from probation. We agree with counsel for the pursuer that the sheriff erred in refusing to exclude from probation as irrelevant the following averments:

> "Since the Pursuer acquired the landlords' interest in the Lease, it has repeatedly issued invoices to the Defender for which the Defender has no liability".
>
> "Other occupiers at Granton Harbour dispute the usage figures ascribed to them by the Pursuer".

We will refuse probation to those averments. Otherwise we are not persuaded that the other averments on implied terms identified by counsel for the pursuer are irrelevant and we shall not interfere with the sheriff's decision in that regard.

Disposal

[25] We will recall the interlocutor of the sheriff dated 24 January 2020 so far as it dismisses craves 2 and 3 and repels the pursuer's second, third and fourth pleas-in-law. We will also sustain the second plea in law for the pursuer to the extent of excluding certain averments identified above from probation, and remit the action to the sheriff to proceed as accords.

[26] We will find the defender liable to the pursuer in the expenses of the appeal, as the pursuer has been substantially successful in this appeal. We consider it reasonable to sanction the employment of counsel for the purposes of these proceedings, the criteria in section 108 of the Courts Reform (Scotland) Act 2014 having been met.