OUTER HOUSE, COURT OF SESSION

[2019] CSOH 40

CA10/19

OPINION OF LORD BANNATYNE

In the cause

EOP II PROP CO III S.A.R.L.

Pursuer

against

CARPETRIGHT PLC

Defender

Pursuers: Thompson, QC; Brodies LLP
Defender: Masarro; Davidson Chalmers LLP

17 May 2019

Introduction

[1] This matter came before me for a debate in the Commercial Court. Each party insisted on its general preliminary plea directed to the relevancy of the other party's pleadings.

Background

[2] The pursuer is the owner of subjects known as the Auldhouse Retail Park, Cogan Street, Glasgow ("the subjects"). Its title is registered in the Land Register under title number GLA2036. It is now the landlord under the lease.

[3] The defender is the tenant of the subjects by virtue of a lease granted in its favour by BLCT (51560) Ltd dated 19 June and 8 July 2001. Its interest in the lease is registered in the Land Register under the title number GLA 162892 ("the lease"). The lease term is from 10 January 2001 to 10 January 2026.

[4] The defender trades from the subjects, operating a store selling carpets, other flooring and beds. It continues to occupy the subjects and traded from it as at the date of the debate.

[5] The defender entered into a Company Voluntary Arrangement ("the CVA") on 12 April 2018. For the purposes of the CVA, the lease is a "category B lease", and the pursuer is a "category B landlord" and the subjects are a "category B premises". The objectives of the CVA with respect to category B leases are set out in paragraph 1.6.2 of the CVA.

[6] The pursuer sought to serve notices on the defender to exercise its termination rights under clause 10.8 of the CVA. Clause 10.8 provides as follows:

> that in order to exercise that right, the pursuer must deliver to the defender a "Notice to Vacate '...' on any date on or after the Effective Date and until the date which is six months after the Effective Date".

[7] Parties are agreed that the last date for delivery to the defender of a Notice to Vacate was accordingly 29 October 2018 (see: article 9 and answer 9). The Notice to Vacate could have been delivered by post, fax, email or hand delivery (clause 35.1).

[8] Two notices were sent, both by Recorded Delivery post.

(a) The first was sent to the defender at its registered office and at the address specified in part II of schedule 8 to the CVA. The notice was delivered to the defender on 12 November 2018. It is admitted by the pursuer that the notice was therefore "of no effect" (see: article 9 of condescendence).

(b) The second was sent to the Supervisors at their offices at the address specified in part II of schedule 8 to the CVA. The pursuer offers to prove that a copy of the notice it sent to the Supervisors is production 6 in its first inventory of production, and that this was delivered to the Supervisors on 18 October 2018.

The issues

[9] The issues argued at debate were as follows:

a. What is the correct interpretation of clauses 10.8, 25 and 35 (as read with Schedule 8) of the CVA?

b. Specifically, did the Notice to Vacate require to be delivered from the Pursuer directly to the Defender?

c. Is service on the CVA Supervisors by the Pursuer service on the Defender?

d. If service on the Defender is required, do the terms of the CVA appoint the Supervisors the Defender's agent entitling the Pursuer to serve the Notice on the Supervisors as the Defender's agents?

e. Did the content of the Notice to Vacate comply with clause 10.9?

Submissions on behalf of the defender

[10] In respect to issues a-c Mr Masarro began his submissions by addressing the role of the Supervisors. First, in terms of the Insolvency Act 1986, section 7(2) when read with section 1(2) their role is to supervise the implementation of the CVA. In terms of the CVA itself it provides that the defender and its business affairs, assets and properties continue to be managed by the defender's directors in the ordinary course of business. He directed the

court's attention to clause 4.3 which provides that the Supervisors are to have no involvement in the ongoing trading activities of the defender. A similar provision is made in clause 25 of the CVA. Having analysed their role he submitted that the Supervisors are not therefore the defender, as for example might be the case in an administration or liquidation.

[11] He then turned to clause 10.8 of the CVA. He accepted that it entitles the pursuer to serve a break notice for the lease notwithstanding the lease itself does not contain that provision. He emphasised that the clause provides that a Notice to Vacate must be given to "the Company" within the prescribed time period. "The Company" is a defined term and he referred to Schedule 1 to the CVA. It is defined as the defender, with further specification given in Schedule 2. He submitted that the law is clear that strict adherence to such a requirement is necessary for the notice to have effect and referred the court to *West Dunbartonshire Council* v *William Thompson & Son (Dumbarton) Ltd* 2016 SLT 125 at paragraphs (22) to (27) where a summary of the law given by Lord Hodge in *Batt Cables Plc* v *Spencer Business Parks Ltd* 2010 SLT 860 paragraphs (24) to (27), was adopted by the Inner House.

[12] He then contrasted the requirements in clause 10.8 with other provisions in the CVA where notice requires to be given to the Supervisors rather than the Company. He referred to examples of this at clauses 17.5 and 18.2. The "Supervisors" are separately a defined term in schedule 1 to the CVA. From the foregoing he submitted that it makes no sense for the CVA to distinguish between notices requiring delivery to the Company, and notices requiring delivery to the Supervisors, as it does, if notice delivered to the Supervisors would in any event be notice delivered to the Company.

[13] He then moved on to examine the pursuer's argument. It is to this effect: Clause 35.1 of the CVA means that service on the Supervisors is service on the defender, specifically because of the wording of clause 35.1(e). He submitted that argument is misconceived. He accepted that the clause must be given its natural meaning applying the usual rules of contractual interpretation. However, having accepted that, he argued nevertheless the pursuer's interpretation of the clause is wrong for the following reasons:

- Clause 35.1(e) does not specify that service on the Supervisors is service on the defender.
- Clause 35.1(e) refers to the need for service to be to the address in schedule 8. Schedule 8 includes addresses for both the defender and the Supervisors. Part II of schedule 8 makes no sense if it is not necessary to serve notices on the defender in certain cases.
- The interpretation does not make sense when the clause is considered in light of the other provisions of the CVA, he had set out where some notices require to be served on the Company and some on the Supervisors.
- The interpretation does not make sense when read with clause 10.8 which is clear that service is to be on the Company.
- In addition the interpretation does not make commercial sense, as the defender is the one trading from the subjects and retains responsibility for managing the business. In these circumstances it is the defender that requires to know if its lease is to end in a matter of days.
- Clause 35 is not one of the central terms of the contract and as such may have received less attention from the parties than other clauses, such as clause 10.8. the court therefore ought to be careful in attaching too much weight to the

deemed intention of the parties in relation to this provision as compared with the parties' intention relating to clause 10.8.

[14] Mr Masarro thereafter advanced his position regarding the correct construction of clause 35(1) and how this should be arrived at. His position was that the court had several options regarding the correct interpretation of clause 35.1(e). These options are as follows:

- The first is that the clause relates only to how a notice has to be delivered when being sent to the Supervisors. It says nothing about how the notice has to be delivered to the defender.
- The second is that there are missing words. Accordingly he submitted it ought to read: "must be addressed to the Supervisors or the Company ...". Or alternatively, the words "the Supervisors" are meaningless and ought to be ignored. He submitted that the meaning of clause 35 is clear, it does not dispense with the need for delivery of a notice under clause 35.1 on the defender, and the words require to be read accordingly.
- The third is that the clause imposes an additional requirement, namely: it requires service on the Supervisors in addition to service on the defender.

[15] He submitted that the defender's interpretation of the CVA coincides with what the pursuer in fact did in this case. It did attempt to deliver a Notice to Vacate to the defender. The document delivered to the Supervisors bore to be a duplicate sent in accordance with clause 35 and part 1 of schedule 8. It did not bear to be the Notice to Vacate. It is not addressed to the defender c/o the supervisor. The notice served on the defender does not therefore comply with clause 10.8.

[16] In respect to issue d it was his position that there is nothing in the CVA which establishes that the defender authorised the Supervisors to receive a notice served in terms

of clause 10.8. He advanced this argument under reference to clause 25.11 of the CVA. In terms of that provision the Supervisors are the defender's agent for the restrictive purpose of "exercising their powers under the CVA". He then made a short submission: receiving notices under clause 10.8 is not one of the supervisor's powers under the CVA. The pursuer does not plead what powers it contends the Supervisors can exercise that would give them such authority. Otherwise, the CVA is clear that the Supervisors are not the defender's general agent. This submission was made under reference to the parts of the CVA to which he had earlier referred when looking at the earlier issues.

[17] So far as the last issue is concerned he argued clause 10.9 requires action on the part of the pursuer during the notice period. In particular, clause 10.9.2 requires the pursuer to request that the defender vacates the subjects during that period, it cannot have done so in the Notice to Vacate, as the Notice to Vacate was not served on the defender.

[18] In any event, simply requesting a renunciation is of itself not sufficient to comply with clause 10.9. It requires the defender to execute a renunciation. The terms of that renunciation require to be agreed and must in particular include the three matters mentioned in clause 10.9.2. The defender is obliged to act reasonably in relation to accepting the terms, which by necessary implication means that the terms must be proposed by the pursuer. The clause is clear that action on the part of the pursuer is required. The pursuer did nothing during the notice period. It has not therefore complied with clause 10.9. Delivering a draft renunciation after the expiry of the notice period is of no effect, the clause is clear that this must be done "prior to the expiry of the notice.". Again strict compliance is necessary.

The response for the pursuer

[19] In respect to the interconnected issues a to c he submitted that they turned on the application of the principles of contractual construction to the CVA.

[20] In the context of applying these principles in the present case, Mr Thomson attached particular importance to the guidance of Lord Clarke of Stone-cum-Ebony in *Rainy Sky SA* v *Kookmin Bank Co Ltd* (2011) 1 WLR 2900 at paragraphs (14) and (20-30). In particular he directed the court's attention to the following at paragraph [23]:

> "[23] Where the parties have used unambiguous language, the court must apply it. This can be seen from the decision of the court of appeal in *Co-operative Wholesale Society Ltd* v *National Westminster Bank Plc* [1995] 1 EGLR 97. The court was considering the true construction of rent review clauses in a number of different cases. The underlying result which the landlords sought in each case was the same. The court regarded it as a most improbable commercial result. Where the result, though improbable, flowed from the unambiguous language of the clause, the landlords succeeded, whereas where it did not, they failed. The court held that ordinary principles of construction applied to rent review clauses and applied the principles in *Antaios Cia Naviera SA* v *Salen Rederierna AB (The Antaios)* [1985] AC 191. After quoting the passage from the speech of Lord Diplock quoted above, Hoffmann LJ said, at page 99:
>
> > 'This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement.'"

[21] The application of the principle enunciated above by Lord Clarke to the CVA and in particular clause 10.8 he described as straightforward.

[22] He submitted that it was plainly a matter of considerable importance to all parties that, in the event that any notice was to be served by a landlord or creditor, there should be certainty as to the requirements for the valid service of any such notice. The parties to the CVA turned their attention specifically to that matter in clause 35. As Lord Hoffman put it

in *Arnold* v *Britton* (2015) AC 1619 "the parties must have been specifically focussing on the issue covered by the provision when agreeing the words of that provision."

[23] Looking at clause 35.1 Mr Thomson made the following points:

- first, the Notice to Vacate is without doubt a notice to which clause 35.1 of the CVA applies, it is a notice served under the CVA rather than a notice served under the lease;
- secondly, clause 35 makes provision both in respect of what might be described as "mandatory" and "directory" aspects of service. Thus, a notice to the Company or to the Supervisors must (i) be in writing and (ii) be addressed to the Supervisors, and may be sent by various specified methods, a provision which is plainly to be regarded as "directory"; and
- thirdly, clause 35 makes no distinction, so far as service is concerned, between notices to the Company and notices to the Supervisors: notices to both must be served on the Supervisors and the Supervisors alone.

[24] He contended that the language of clause 35.1 could not possibly be clearer. The only available construction of that language is that notices to both the Company and to the Supervisors must be served on the Supervisors.

[25] He said this with respect to the defender's submissions: it must always be understood, in this connection that the task of contractual construction is "not a game with words" (*Jumbo King Ltd* v *Faithful Properties Ltd*) (1999) 2 HKCFAR 279, paragraph 59 per Lord Hoffman quoted with approval by Lord Reed in *Credential Bath Street* v *Venture Investment Placement Ltd* (2007) CSOH 208. The alternative constructions of the CVA, as advanced by the defender wholly fail to recognise this critical point.

[26] In summary, the simple fact of the matter is that, when the parties to the CVA turned their attention to the critically important question of the service of notices, they did so in terms which are absolutely clear and unambiguous.

[27] Moreover, he made this point: any alternative construction of clause 35 would create more problems than it would solve. Thus, although the defender takes its stand, principally, on the proposition that service on the defender itself was required, one can readily appreciate that, had a landlord taken that approach it might well have found itself facing an argument that such service was invalid, because clause 35.1 required service upon the Supervisors.

[28] So far as references to the "Company" in the CVA and in schedule 8 this was explained by for example clause 8 making it clear that depending on the termination mechanism which is resorted to it may be necessary to serve notices in addition to the "Notice to Vacate" eg a notice of irritancy.

[29] Further, in respect to the various alternative constructions put forward by the defender, he submitted that the matters founded upon do not come close to the type of situation which might justify a court in deciding that "something has gone wrong" with the language, and thereby to undertake some kind of "red line" exercise to "correct" the CVA by the process of construction. In support of this submission he generally referred to *Credential Bath Street*; and *Chartbrook Ltd and Another* v *Persimmon Homes Ltd and Another* (2009) 1 AC 1101.

[30] Lastly, he submitted that the mere fact that the pursuer served a further notice on the defender itself is nothing to the point: the issue which is in dispute between the parties is one of law. A construction exercise cannot be properly carried out by reference to such conduct.

[31] As regards the agency issue, Mr Thomson submitted generally having regard to the terms of the CVA, that it is clear that the Supervisors were indeed to be regarded as the agents for the Company so far as the receipt of a "Notice to Vacate" was concerned. He referred in particular to clause 25 of the CVA which conferred various powers and authorities on the Supervisors including *inter alia* as follows:

> "25.4 The supervisors shall have, in addition to any powers conferred on them under the Act or the rules or otherwise as a matter of law, such power as are necessary or expedient to enable them to carry out their functions under the CVA in accordance with its terms. Without limitation to the generality of the foregoing, the Supervisors may carry out all acts and exercise all discretions, authorities, powers and duties required to be carried out in order to facilitate the implementation of the CVA.
>
> ...
>
> 25.11 The Company shall not hold out the Supervisors or their firm as agents of the Company or its business save that, in exercising their powers under the CVA, the Supervisors shall act as the Company's agent ...
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> ...
>
> 25.14 The Supervisor shall have the power to do all things ancillary to the matters referred to in this clause 25 or which are otherwise required to be done by the Supervisors in accordance with the CVA."

[32] He submitted that having regard to the foregoing provisions, so far as the CVA is concerned, the CVA Supervisors are indeed appointed as agents for the defender.

[33] Support for that argument is found in noting that in terms of clauses 35.2 and 35.4 that the person who was charged with the consideration of and, if so advised, in making any challenges to, notices served under the CVA, such as the Notice to Vacate, were the Supervisors rather than the Company.

[34] Lastly, regarding the final issue he submitted that specifically this issue required consideration of whether the averments made by the defender concerning the substantive

content of the "Notice to Vacate" are relevant. Mr Thomson directed the court's attention to answer 9 where the defender avers, *inter alia*:

> "*Separatim esto* there has been timeous delivery of a Notice to Vacate, which is denied, the Pursuer did not comply with clause 10.9. Clause 10.9 required further action on the part of the Pursuer after service of a Notice to Vacate and before the expiry of the 60 day Notice Period specified in the Notice to Vacate. The term 'Notice Period' is defined in clause 10.8 as the period specified in the Notice to Vacate. The purported Notice to Vacate founded upon by the Pursuer provides that the Notice Period ended on 18 December 2018. Clause 10.9 therefore required action from the Pursuer after 18 October and prior to 18 December 2018. The Pursuer failed to confirm the terms on which the Defender was to surrender the Lease during the Notice Period, which the Defender could then consider whether they were reasonably acceptable to it. A renunciation in the form specified in Schedule 20 is the form which the Defender required to complete if it chose to exercise its rights under clause 10.10 of the CVA. Reference is made to clause 10.11.5 of the CVA. It does not necessarily apply to clause 10.9 unless the Pursuer so specified within the Notice Period. In any event, it does not comply with clause 10.9.2 as it does not contain (as a minimum) provision in the terms set out in the three paragraphs in that clause. The Defender is not required to surrender the Lease as the Pursuer did not request it to [do] so, and did not set out the terms it proposed for that renunciation (including incorporating, as a minimum, the provisions in clause 10.9.2), within the required Notice Period."

[35] It was Mr Thomson's position that these averments are irrelevant.

[36] In elaboration of the above submission he argued as follows:

What clause 10.9 of the CVA requires a Category B Landlord (such as the pursuer) to do is clear from the plain and unambiguous terms of the clause, thus:

> "Following the delivery of a Notice to Vacate but prior to the expiry of the Notice Period, the relevant Category B Landlord (whether in the Notice to Vacate or otherwise) shall confirm to the Company one of the following means by which it wishes to determine or assign the relevant Category B Lease ..."

From this Mr Thomson submitted that the action which is to be taken "Following the delivery of a Notice to Vacate but prior to the expiry of the Notice Period" can actually be taken in the Notice to Vacate itself: "whether in the Notice to Vacate or otherwise".

It can also be seen that the action which is to be taken is confirmation of "one of the following means by which it wishes to determine of assign the relevant Category B Lease". It is, accordingly, the act of "confirmation" of one of several means which must take place within the "Notice Period".

[37] Further the "Notice to Vacate" upon which the Pursuer founds (and which was in the form set out in Schedule 19 to the CVA) does exactly what it was required to do in terms of clause 10.9: that is to say, it confirmed which of the "following means" it wished to invoke, namely, the mechanism set out in clause 10.9.2. Clause 10.9.2 itself does not impose any obligation on the Pursuer, far less does it do so subject to the time limit referred to in clause 10.8. there is simply no warrant in the language of clause 10.8 and 10.9.2 for construing those provisions to the effect contended for by the Defender

[38] Lastly and in any event, the effect of the CVA, and clause 10.9.2 in particular, was that the Defender was irrevocably bound to surrender the Lease on the terms set out in clause 10.9.2. The draft produced at Schedule 20 was apt to be applied having regard to the terms of clause 10.9.2(a)-(c).

[39] For these reasons the Notice to Vacate is valid. It complied with the mandatory requirements of clauses 10.8 and 10.9.2 and its terms were such that the reasonable recipient would be in no doubt as to its meaning and effect. It thus complied with *Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd* [1997] AC 749 and *Ben Cleuch Estates Ltd* v *Scottish Enterprise* 2008 SC 252.

Discussion

The First Issue

[40] In the present case the determination of whether the Notice to Vacate served upon the Supervisors was valid and effective for the purposes of clause 10.8 raises the second question identified by the Second Division in *Hoe International Ltd* v *Andersen* 2017 SC 313 at paragraph [17]:

> "[17] The second question, whether the notice conforms to the requirements of the parties' contract, will normally involve the direct application of the general principles of contractual interpretation. The issue may take various forms. Does a particular provision governing the notice require strict compliance, and if so how strict? What degree of formality does the provision require? If the specified formalities are not followed but the notice is received and is clear in its intention, is it nevertheless invalid? In each case the answer must turn ultimately on the meaning of the underlying contract. Thus the general principles of contractual interpretation are important in determining the validity and effect of a contractual notice. ..."

[41] Thus the answer to the question before the court turns on "the application of the general principles of contractual interpretation" to the provisions of the CVA.

[42] The principles of contractual interpretation are well understood and are set out generally in the following cases: *Rainy Sky SA* v *Kookmin Bank Co Ltd* at paragraphs 14 and [20] to [30]; *Arnold* v *Britton* at paragraphs [14] to [22], [76] and [77]; and *Wood* v *Capita Insurance Services Ltd* (2017) AC 1173 at paragraphs [9] to [14].

[43] I agree with Mr Thomson that as a first step when considering the proper construction of the relevant provisions in the present case, it is important to bear in mind the guidance given by Lord Clarke of Stone-cum-Ebony in *Rainy Sky* at paragraph [23] as earlier set out in full.

[44] What I take from the above guidance, is that where the language of the provision is clear and unambiguous then recourse to commercial common sense and surrounding

circumstances will not undermine or overturn that clear language. (See: also Lord Hoffman in *Arnold* v *Britton* at page 1628, paragraph 17.)

[45] Having regard to the above, the first question that requires to be answered by the court is this: is there any ambiguity in the relevant provisions?

[46] The pursuer was seeking to serve a notice in terms of clause 10.8 of the CVA. Clause 35 deals explicitly with the issue of service of such a notice.

[47] I am unable to identify any ambiguity in the language used in that provision. On the contrary as argued by Mr Thomson the language could not be in clearer terms.

[48] The first thing to notice is that clause 35.1 relates to:

> "A Voting and Notice of Claim or other notice to be given to the Supervisors or the Company".

Accordingly in respect to the service of notices, no distinction is made between notices to the Company or the Supervisors. In both cases for an effective and valid notice to be served, the requirements are set out at paragraphs (c), (d) and (e) of clause 35.1.

[49] Secondly, the clause clearly draws a distinction between "mandatory" and "directory" requirements. Sub-paragraphs (c) and (e) are, clearly given their language, mandatory requirements (the use of the word "must") and (b) is equally clearly given its language, a "directory" requirement (the use of the word "may").

[50] Sub-paragraph (e) provides: a "notice" ... to the Supervisors or the Company:

> "must be addressed to the Supervisors at the address, fax number and/or email address as set out in schedule 8 ..."

[51] Thus in plain language the clause provides that the notice which is the subject of the present case must "be addressed to the Supervisors".

[52] On the plain wording of the provision, there is absolute clarity. Notices both to the Supervisors and the Company must be addressed to the Supervisors. On looking to the plain wording of the provision, no alternative construction is I think possible. On the contrary it appears to me that to adopt a different construction would be to ignore the plain language of the provision.

[53] In addition it is noteworthy that the construction contended for by the pursuer requires nothing to be added or taken away from the plain language of the clause unlike when the defender's contended for construction is considered.

[54] The above approach to the construction of the provision is not to adopt an overly liberalist approach to the provision rather it simply applies its clear language.

[55] Moreover, when regard is had to the rest of clause 35, that tends to support the foregoing construction. In particular I note the terms of 35.2 and 35.4 to which I was directed by Mr Thomson. 35.2 provides that in respect to "a voting and notice of claim or other notice" ... "The Supervisors shall be deemed to have rejected a Voting and Notice of Claim or other notice which is expressed in any other language unless, in any particular case, they given written notice of their acceptance thereof to the sender."

[56] Clause 35.4 provides that "a Voting and Notice of Claim or other notice" ... "may be rejected by the Supervisors ...".

[57] Thus it is the Supervisors, rather than the Company itself, which have the entitlement to challenge or accept the validity of any notice served, whether a notice to the Company or the Supervisors themselves. I believe that this is a strong indication that the pursuer's contended for construction of clause 35 is the sound one. These provisions only make sense in the context of clause 35.1 having the meaning contended for by the pursuer.

[58] The defender's whole approach to clause 35 is to ignore the plain wording of the clause. It is argued that clause 35.1(e) does not specify that service on the Supervisors is service on the defender. However, that is exactly what it says. It says that a "notice" ... "to be given to the Supervisors or the Company" ... "must be addressed to the Supervisors". I cannot see how that language can support the position advanced by the defender.

[59] The next argument advanced is that schedule 8 includes addresses for both the Company and the Supervisors and this makes no sense if notices are only to be served on the Supervisors. The answer to this point is as argued by Mr Thomson that notices may require to be served on the Company by landlords other than those referred to in the CVA namely; those arising in terms of the lease and this gives an address for the service of such notices.

[60] The defender goes on to argue that the pursuer's construction makes no sense given the distinction drawn elsewhere in the CVA between notices to the Company and to the Supervisors. This distinction I do not think throws any doubt on the pursuer's construction of clause 35. First for the reasons advanced by Mr Thomson. Secondly, although such a distinction has been made, when the parties have turned to consider specifically how service of any such notice should effectively and validly be achieved, they have decided that a single place for service should be the procedure to be followed. This makes sense in the context of a CVA where if the issue was not dealt with explicitly there could be doubt as to how effective and valid service could be achieved and given the general nature of the duties and functions of Supervisors. The identification of a single point at which service can effectively be achieved provides the necessary certainty regarding what amounts to valid service, the importance of which was identified in *Hoe International* at paragraphs [32] to [38]. It seems to me that if the pursuer's construction is incorrect there would for the

reasons advanced by Mr Thomson be considerable uncertainty as to what would amount to valid and effective service of notices.

[61] The next point made by the defender is that the interpretation put forward by the pursuer does not make sense when read with clause 10.8 which is clear that service is to be on the Company. This appears to be the same point made in the previous argument and my answer to it is as I have already set out.

[62] Thereafter it is argued that the pursuer's interpretation does not make commercial sense. For the reasons which I have already advanced, the defender is not entitled to have recourse to the concept of commercial sense. There is no necessity to have regard to commercial sense when the language of the provision is unambiguous. Moreover, I do not believe there is any lack of commercial sense in having a single repository for the service of notices.

[63] An argument was advanced on behalf of the defender that clause 35 is not a central term of the contract and therefore may have received less attention from the parties and the court should be for that reason careful in attaching too much weight to the deemed intention of parties. I am not persuaded by this argument: from a landlord's point of view, the effective service of notices is clearly a highly important matter. Equally it is important to the Company to know where such notices are to be sent. In light of that it is a matter to which parties have explicitly applied specific attention and then used clear wording to express their intention. I do not believe there is any merit in this argument. Moreover the defender's argument is I think entirely artificial in that in essence it contends that clause 10.8 is significant (namely, the circumstances in which a notice can be served) but clause 35 dealing with how such a notice can effectively be served is not of significance and therefore

has received less attention than clause 10.8. I can see no basis for such a distinction and this shows the lack of soundness in this argument.

[64] The defender's position is that something has gone wrong with the language of clause 35.1 and it requires to be rewritten. The hurdle which the defender requires to get over in order to be successful in such an argument is a high one. As explained by Lord Hoffman in *Chartbrook* at paragraph 15:

> "It clearly requires a strong case to persuade the court that something must have gone wrong with the language".

Nowhere near such a strong case has been advanced by the defender for the reasons I have given. There is nothing in the construction advanced by the pursuer which can be said to be so irrational as to suggest a linguistic mistake in the clause.

[65] Further at paragraph 25 in *Chartbrook* Lord Hoffman goes on to give further guidance as to the circumstances in which correction by construction is appropriate:

> "25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied."

Had I been persuaded that there was a strong case that something had gone wrong there is I believe a further problem which arises for the defender. I do not think that it is "clear what a reasonable party would have understood the parties to have meant". This is clearly illustrated by the defender offering no less than three possible options as to what such a reasonable person should have understood.

[66] Overall the observations made by Lord Reed in *Credential Bath Street Ltd* at paragraph 36:

> "[36] It appears to me that the commercial considerations on which the pursuers rely come nowhere near the standard set by the authorities. This is not a case in which it can be said, in the language used by Lord Hofmann in the *Investors Compensation Scheme* case, that 'something must have gone wrong with the language', or that the natural reading of cl 3.4 would 'attribute to the parties an intention which they plainly could not have had.'"

are equally applicable to the present case and support the view I have reached that there is no basis in the instant case for rewriting as contended for by the defender. There is first no strong case that anything has gone wrong with the language of the clause; secondly, there is nothing which shows that the natural reading of the words of the clause attributed "to the parties an intention which they plainly could not have had"; and thirdly, in any event there is no clarity as to what a reasonable party would have held was the intention.

[67] Lastly the pursuer's service of two notices is entirely irrelevant to the construction issue before the court. Construction is not affected by such conduct.

[68] I accordingly answer the first issue in favour of the pursuer.

The second issue

[69] Answering the first question in favour of the pursuer means that I do not require to turn to the second issue. However, I was addressed in detail in respect of this and so turn to give my opinion thereon. It was not contentious that service of a notice upon a party may validly be affected upon an agent who has the necessary authority to receive such a notice (see: *Batt Cables Plc* v *Spencer Business Parks Ltd* 2010 SLT 860 at 866).

[70] The argument in relation to this issue can I think be dealt with reasonably quickly having regard to the terms of the provisions in the CVA to which I was directed by Mr Thomson, namely: 25.4, 25.11, 25.14, 35.2 and 35.4. It is in my view apparent from a consideration of these provisions that the Supervisors were agents for the defender in

respect of the receipt of a "Notice to Vacate". In particular I am persuaded that the provisions at 35.2 and 35.4 cannot be understood on any other basis than that Supervisors are agents for the Company regarding receipt of such a notice. As I have said, the Supervisors are responsible for the consideration, and if so advised, the making of any challenges to notices served under the CVA. It is the Supervisors who are given that power rather than the Company. This establishes that the Supervisors are agents for the Company at least in so far as the service of notices are concerned. Accordingly had I answered the first question in favour of the defender I would nevertheless have answered the second question in favour of the pursuer.

The Third issue

[71] Clause 10.9 of the CVA provides:

> "**10.9** Following the delivery of a Notice to Vacate but prior to the expiry of the Notice Period, the relevant Category B Landlord (whether in the Notice to Vacate or otherwise) shall confirm to the Company one of the following means by with it wishes to determine or assign the relevant Category B Lease:
>
> **10.9.1** if the relevant Category B Landlord specified that it wishes to forfeit or irritate (as the case may be) the relevant Category B Lease, the Company irrevocably undertakes for the benefit of such Category B Landlord that it shall not prevent or seek relief against the forfeiture or contest the irritancy of that Category B Lease, as the case may be. Upon such forfeiture or irritancy:
>
> (a) the relevant Category B Lease shall come to an end and all of the Company's rights and obligations (whether past, present or future) under the relevant Category B Lease shall come to an end; and
>
> (b) each of the relevant Category B Landlords and the Company shall bear its own costs in connection with any such forfeiture or irritancy proceedings.
>
> **10.9.2** if the relevant Category B Landlord so requests, the Company irrevocably undertakes that it will surrender the relevant Category B

> Lease upon terms reasonably acceptable to the Company which provide:
>
> (a) for a full release of the Company from all covenants, obligations and liabilities (whether past, present or future) in respect of the relevant Category B Lease or arising out of or in connection with the occupation of the relevant Category B Premises (including the grant of any sub-lease of all or part thereof) and from all actions, proceedings, costs, claims, demands and expenses arising from such covenants, obligations and liabilities;
>
> (b) that the relevant Category B Landlord shall, with the object of affording the Company a full and sufficient indemnity (but not further or otherwise), comply with the landlord's covenants in any sub-lease subordinate to the relevant Category B Lease; ..."

[72] I am satisfied that Mr Thomson is correct for the detailed reasons which he advanced that the pursuer has complied with the terms of clause 10.9. In particular it is clear on the plain words of the provision that the pursuer is entitled to give the confirmation in the "Notice to Vacate" and what the pursuer is to do is to carry out an act of confirmation of the "means by which it wishes to determine ... the ... lease". The pursuer has set out the mechanism namely that contained in clause 10.9.2. The other obligations said to be incumbent upon the pursuer are not incumbent upon it as the plain language of the clause imposed no such obligations. I accordingly find in respect of this last issue in favour of the pursuer.

Conclusion

[73] For the foregoing reasons the defenders averments are irrelevant as regards the various issues.

Disposal

[74] Parties requested that I should express my opinion on the issues but not pronounce any final interlocutor and that the matter should be put out by order in order that I could hear further submission on disposal in light of my decision. I accordingly will have the matter put out by order.