OUTER HOUSE, COURT OF SESSION

[2025] CSOH 25

CA17/24

OPINION OF LORD SANDISON

In the cause

RUTLAND COURT REAL ESTATE

Pursuer

against

ANDERSON STRATHERN LLP

Defender

Pursuer: MacColl KC; Davidson Chalmers Stewart LLP
Defender: Thomson KC, Boffey; Burness Paull LLP

7 March 2025

Introduction

[1] In this commercial action for damages and payment, the pursuer claims that a substantial office property owned by it in Edinburgh and previously leased to the defender was not, at the end of the lease, left in a state consistent with due performance of the defender's repair and maintenance obligations. Certain elements of that claim – in particular whether alleged wants of repair were indeed present at the termination date of the lease, whether their presence on that date was the result of breach of contract on the part of the defender, whether the remedial works suggested by the pursuer are necessary to remediate any such wants of repair, and what the reasonable costs of remediation are – were

remitted to a chartered building surveyor for determination in the light of his professional knowledge and experience, and he provided a draft report to the court on 10 January 2025. Other aspects of the dispute, partaking of a more peculiarly legal nature, will remain for adjudication by the court, in particular whether the cost of necessary repairs is a proper measure of any loss in fact suffered by the pursuer. The pursuer objected to certain aspects of the draft report. The defender did not accept the criticisms, the reporter requested the court to issue such further directions as it thought appropriate, and the matter came before me for discussion and a decision as to what should be done in those circumstances.

Background

[2] The process of remitting to a reporter was initiated by a motion to that effect enrolled by the defender. The court having heard parties and having indicated that it saw the benefits of that course of action and proposed to grant the motion, parties agreed on the particular terms of the remit and on the identity of the reporter. Minor adjustments to the terms of the proposed joint remit were made by the court, and by interlocutor dated 14 October 2024 the reporter was appointed to examine and report in terms of the joint remit as so settled. The Joint Remit was accompanied by a Schedule of Dilapidations converted into a Scott Schedule populated with the respective positions of the parties as to the presence and nature of claimed wants of repair, the appropriate means (if any) of remediation therefor, and the estimated cost of such remediation. The ability and willingness of the reporter to deal with the matters remitted to him had previously been checked and confirmed with him by the parties and the court.

[3] The salient terms of the remit for present purposes were as follows:

"3. The Remit

3.1 The Reporter is appointed to address in the Report the matters listed in 3.2 below:

3.2 Subject to the exception identified in paragraph 3.3, in respect of each item in the Schedule of Dilapidations, to determine:

3.2.1 whether and the extent to which the wants of repair identified in the column of the Schedule of Dilapidations headed 'Breach Complained of' existed at the Termination Date;

3.2.2 whether some, any or all of the wants of repair at 3.2.1 constitute breaches of the lease

3.2.3 if the answer to 3.2.1 and 3.2.2 is yes, in each case whether the works listed in the column of the Schedule of Dilapidations headed 'Remedial Works Required' were necessary (and, if so, whether in whole or in part) to remediate that want of repair; and

3.2.4 if the answer to 3.2.1 and 3.2.2 is yes, the reasonable costs for performing the necessary works to remediate the want of repair.

3. For the avoidance of doubt, the Reporter shall not:

3.3.1 attempt to determine whether any item in the Schedule of Dilapidations has been, or may be, 'superseded' or 'diluted.'

3.3.2 attempt to determine whether the Pursuer failed to give reasonable notice of a need for reinstatement.

…

6. Other evidential material

In order that the Reporter has sufficient material to allow him to reach an opinion on the matters remitted to him:

(a) The Reporter shall carry out at least one inspection of the Leased Subjects. It shall be open to the Reporter to carry out additional inspections of the Leased Subjects if he reasonably deems such additional inspections appropriate.

(b) The Reporter shall seek to interview any individuals that the Reporter, in his reasonable opinion, considers may be able to provide information which will assist the Reporter in reaching an opinion on the matters remitted to him. So far as within the power of the parties to do so, the parties shall facilitate such interviews taking place. To the extent that the Report proceeds on the basis of information supplied to him in such an

interview he shall state in his Report the substance of the information conveyed to him, the identity of the individual with whom the interview was conducted, and the date of the interview.

(c) The Reporter may (but is not required) to ask the parties to produce such other evidence or material as the Reporter may reasonably consider necessary, available or appropriate and to have regard to the same when forming his view on the maters remitted to him.

7. Status of the Reporter's Report

7.1 The Report shall be in writing and include reasons.

7.2 The parties acknowledge and agree that, in respect of the matters covered, the remit is in place of probation by the parties of their respective averments.

7.3 The parties acknowledge and agree that any determination in respect of an item in the Schedule of Dilapidations is entirely without prejudice to the parties' right to lead evidence and to make submissions as to whether or not any these items will be superseded or diluted by any works likely to be carried out by the Pursuer.

8. Direction from the Court

8.1 The Reporter may apply to the court for directions in relation to any specific question of law or construction of the Lease or for any other direction that they may reasonably require.

8.2 In the event that a party intimates any objection … the Reporter must forthwith apply to the Court for such a direction in relation to any question of law or construction of the Lease raised in such an objection, and the Report shall not be finalised until the Reporter has received such directions from the Court."

[4] In November 2024 the reporter indicated that he would prefer to instruct expert advice in relation to certain issues arising out of the mechanical and electrical works identified in the Schedule. The matter was brought before the court at the instance of the pursuer and on 26 November 2024 a commercial judge refused to authorise the engagement of such assistance and issued a brief explanatory note setting out that it was not for the court to rewrite the remit but simply to interpret it. The judge did not consider that the remit

empowered the reporter to employ third party assistance, and gave that direction, further drawing the reporter's specific attention to clause 6 of the remit, setting out how he was to obtain sufficient material to enable him to express the opinion required of him.

Submissions for the pursuer

[5] On behalf of the pursuer, senior counsel adopted the terms of the Note of Objections which had been lodged. As the draft report stood, the reporter had failed to exhaust his jurisdiction. In particular, despite determining that, in a number of cases, there had been wants of repair existing at the termination date that constituted breaches of the lease, the reporter had failed to determine the reasonable costs for performing the necessary works to remediate those wants of repair as he was required to do under and in terms of clause 3.2.4 of the remit. He had expressly said that he could not provide answers to all of the questions remitted to him on cost and consequentially had merely set out certain views on a number of items contained within the Schedule sent to him as gathering and setting out the parties' own respective views on the subject-matter of the remit. Those items included the curtain walling and the mechanical and electrical elements of the remit. In relation to the curtain walling, he had stated that he was not convinced that the technical solution proposed by the pursuer was correct because of the presence of neoprene fins which had not been taken into account by it, and further that costs had been extrapolated into the Schedule without proper justification, concluding that, whereas wants of repair existed and remedies were required, the project design and specification had not been satisfactorily worked through and the costs presented were based upon wider works planned to the exterior of the property, as well as having been sourced from a single contractor. As a result, he did not supply his own opinion on costs for certain items in the Schedule, observing that some at least of those costs

could only be derived by a contractor's quantity surveyors in the full knowledge of what was being asked of them, and considering any cross-over in relation to the wider works. Turning to the mechanical and electrical works, he had concluded that as many as four of the boilers in the building were faulty during the final months of the lease, and that whilst it would seem more than likely that remedial works and costs should have been incurred, he was unable to place a cost against this item as he did not have sufficient information from the pursuer to do so. Further, he had identified a potentially significant issue with the chillers in the building, but noted his view that the pursuer had not sought to validate the problem through a series of further investigations and a designed solution. He had expressed the view that in those circumstances, it was not possible for anyone to comment on cost. All of these issues would, he had acknowledged, feed into the ultimate figures required for preliminaries and professional fees.

[6] In such circumstances, the reporter had failed to do that which the court (and the Joint Remit) had tasked him to do. He had not, to use formal language, exhausted his jurisdiction. At best, the present draft of his report was incomplete. The reporter required to address all the matters that had been remitted to him (including those contained in paragraph 3.2.4 of the joint remit) and to use his skill (together with the information provided to him) to quantify "the reasonable costs for performing the necessary works to remediate the want of repair". Reference was made to *Blantyre* v *Glasgow, Paisley and Greenock Railway Co* (1851) 13 D 570; to *Williams* v *Cleveland and Highland Holdings Limited* 1993 SLT 398; and to Maxwell, Practice of the Court of Session, p 314ff.

[7] On a separate point, certain determinations made by the reporter seemed illogical and were not explained by him. The draft report contained a number of determinations where he had failed to adopt costings for wants of repair that had been agreed between the

parties or to provide any quantification of remedial cost where the parties were agreed that there was a want of repair requiring remediation, and that without providing any (or, at least, any proper) reasons for doing so. One matter appeared simply to have been omitted from the report in error, or at least without any explanation. Such an approach was illogical, irrational as a matter of law and failed to comply with the reporter's obligation (expressed in clause 7.1 of the joint remit) to provide reasons. A list of supposed examples of that approach having been taken was set out. They required to be revisited.

[8] Having seen the pursuer's objections, the reporter emailed parties and the court. He stated that he accepted that in some respects he had not complied with his remit, and that further reasons should have been stated generally in responding to the questions posed and in particular in relation to the amending of some of the costs put forward in the Scott Schedule which he considered contained pricing errors. On the question of the curtain walling, he reiterated the concerns expressed by him in the draft report and put forward three options which, he thought, would assist him in arriving at figures in which the parties and the court could have confidence. The first such option was for him to discuss the work necessary to comply with the tenant's repairing obligations with a specialist contractor. However, that would not necessarily be straightforward and would probably take some considerable time, easily a few months, firstly to identify not only a suitable contractor, but also to source one willing to take the time and effort retrospectively to price a project that was very unlikely to proceed because of the pursuer's apparent determination to pursue a quite different solution. Alternatively, the reporter repeated his earlier rebuffed suggestion that he be allowed to engage an independent quantity surveyor. The final option in these circumstances would be for him to proceed alone, but the clear subtext of his position was that this mode of proceeding would be at best sub-optimal.

[9] Turning to the chiller units, the reporter repeated the difficulty in this connection which he had identified in the draft report. Both parties were aware that there was an issue, but no one knew how it could be addressed at this stage and so he could not confirm how much work might be involved, nor place a cost against it. The only positive solution he could suggest was for the two engineers respectively appointed by the parties to discuss the matter and report back to him a sum sufficient to address the matter. Alternatively, if he was to remain tasked with deriving a cost for what amounted to unknown works, he would probably request a further tripartite discussion with the engineers to assist him to arrive at some kind of reasoned cost. He requested further directions from the court on all of the matters of difficulty.

[10] In light of the reporter's position in response to the Note of Objections, the pursuer indicated that, as previously, it was content to allow him to engage a quantity surveyor to assist him in relation to the curtain walling, but wished him to determine the issues concerning the chiller units on his own. It was content for the court to ignore matters upon which he had expressed an opinion as to costs which was at odds with any agreement (or at least was not the subject of active disagreement) between the parties.

Submissions for the defender

[11] On behalf of the defender, senior counsel submitted that the reporter had discharged his function appropriately and in line with the nature of the joint remit.

[12] The reporter had not failed to exhaust his jurisdiction. The proceedings before him were fundamentally adversarial in nature. The onus of proving, firstly, that there were wants of repair at the termination date constituting breaches of the lease, and secondly, what the reasonable costs for performing such works as were necessary to remediate those wants

of repair might be, fell squarely on the pursuer. To the extent that the pursuer failed to produce reliable or cogent evidence of its reasonable costs before the reporter, it was entirely unsurprising that he was not able to confirm a figure constituting a loss. He was entitled to say that he could make nothing satisfactory out of what had been presented to him. Putting matters another way, if he was not able to answer the question posed by paragraph 3.2.3 of the joint remit positively, at least in part, he had no jurisdiction to attempt to answer the question posed by paragraph 3.2.4, and not answering it did not constitute a failure to exhaust his jurisdiction. The same result would have been occasioned if the proceedings had been at probation before the commercial judge. Proof of a breach, but a related failure to prove loss, was fatal to recovery. A finding by the reporter that he could not assess the pursuer's loss, due to lack of cogent and reliable evidence, was not a failure to exhaust his jurisdiction, but a consequence of the deficiencies in the pursuer's evidence before him. The pursuer had been given every opportunity to persuade the reporter, including the opportunity presented by inquisitorial interviews of its experts. It had failed to do so.

[13] Dealing with the curtain walling, the reporter had explained that the nature of the work was specialist in nature and that he lacked reliable cost information from the pursuer on its losses in that regard. That was suggestive not of a failure to exhaust any jurisdiction, but of failings in the presentation of the pursuer's case. He had set out cogently his reasoned basis as to why the pursuer's assertions on cost were incorrect. The problems which befell the curtain walling element of the pursuer's claim stemmed from its reliance on a single-sourced tender from one contractor which appeared to have proceeded on an erroneous basis regarding the appropriate technical solution and how costs were to be apportioned accordingly. In relying upon that single source of evidence, without either supportive or corroborative evidence from another source, the pursuer took the risk that it

might not discharge the burden of proof it bore before the reporter. The reporter had not been persuaded that the evidence tendered by the pursuer was correct, nor appropriate. His reasoning for that view was detailed and cogent, setting out the many deficiencies which arose in the presentation of the relative chapter of evidence, notwithstanding the opportunities the pursuer had been afforded. He had ultimately set out why the pursuer's curtain walling claim had failed before him, and what would have been required to advance it. That represented not a failure to exhaust jurisdiction, but a finding of a failure to lead cogent evidence in support of the pursuer's case. The findings arrived at by the reporter were the necessary consequence of that failing.

[14] In relation to the mechanical and electrical aspects of the claim, the reporter had similarly identified where the pursuer had failed to present evidence to him in relation to the faulty boilers. That could not be criticised. With respect to the chillers, where the pursuer had failed to present cost information to the reporter, the result arrived at was the necessary consequence, as it would have been before this court. In the absence of cogent and reliable evidence to support a finding, it would have been inappropriate for the reporter to innovate or conduct his own investigations on the pursuer's behalf. The reporter's position in relation to preliminaries and professional fees was clear and did not constitute a failure to exhaust any jurisdiction, but rather, merely a disagreement on the part of the pursuer with the reporter's findings.

[15] The criticism made of the reporter by the pursuer was misplaced and unfounded. He had discharged the joint remit conscientiously, diligently, and fairly. He had given the pursuer and its experts the benefit of many doubts where they erred in their presentation of the case, and did not exclude certain wants of repair due to failures and errors in that presentation. Ultimately, however, the deficiencies in the presentation of the pursuer's

claim for loss had given rise to consequences. Had such deficiencies also been before the court at probation, there would have been no different result. *Blantyre* v *Glasgow, Paisley and Greenock Railway Co* dealt with a quite different set of circumstances, where a reporter had died and where all parties were agreed he had failed to exhaust his remit.

[16] In *Williams* v *Cleveland and Highland Holdings Limited*, the court was clear that the scope for objections to a reporter appointed by joint remit was restricted. Only cogent and articulate objections relating to the performance by the reporter of his duty, or to some issue of principle identifiable *ex facie* of the draft report would do (1993 SLT 401J-K). The pursuer here offered neither. Rather, its complaint was, in reality, a disagreement with findings which arose solely as a result of its own failures in the presentation of its case and the justification of its claim. The reporter was not obliged to embark upon a "voyage of discovery": *HFD Management Services LLP Family Pension Trust* v *Apleona HSG Ltd* [2023] CSOH 15, 2023 Hous LR 30 at [12], [22], [23], [26], and [30], applying the reasoning in *BAM Buchanan Ltd* v *Arcadia Group Ltd* 2013 Hous LR 42 at [4].

[17] Turning to the further objections by the pursuer, to the extent that the reporter did not adopt costs for wants of repair previously agreed between the parties, that was irrelevant. It was not for the court to interrogate the reporter's factual findings. He was the final arbiter on questions of fact. Any purported agreement by the parties on certain findings could be ignored by him: his joint remit did not oblige him to accept them. That constituted neither illogicality nor irrationality: *HFD* at [22].

[18] The reporter had included reasons in his report. That the pursuer did not like, or was dissatisfied by, his findings in fact did not equate to any failure on his part. In many instances complained of by the pursuer, the reporter had allowed costs for a want of repair, simply not at the level sought by the pursuer. That was not a failure on his part, but merely

his determination of what the reasonable costs for performing those works were, in answer of the joint remit made to him. The complaints of the pursuer in this regard focused on a series of relatively low value items, where the defender elected for commercial, economic or pragmatic reasons not to challenge the rate claimed by the pursuer in the Scott Schedule. However, the joint remit obliged the reporter to determine the reasonable costs. That was a function he had fulfilled, albeit the pursuer was in many instances disappointed at the result. In some cases the costs allowed had been increased above those suggested by the pursuer. In others the difference was *de minimis* or appeared to represent only minor typographical or transposition errors. In one or two instances, no breach of the repair and maintenance terms of the lease had been found by the reporter, inevitably meaning that there was no applicable cost of repair. The defender invited the court to repel the objections of the pursuer to the draft report and to direct the reporter to finalise it and issue it to the court.

[19] In response to the reporter's comments on the Note of Objections, the defender did not support him being allowed to engage third-party assistance. That would go beyond the terms of the joint remit.

Decision

[20] Three questions are raised by the content of the pursuer's Note of Objections, all of which can and must be resolved by way of a proper construction of the joint remit against the background of the general law on remits to reporters of this kind. The first question is whether the reporter has, as matters stand, exhausted his remit. The second is whether his jurisdiction extends to assigning a value to the cost of appropriate remedial works where the parties have agreed upon (or at least have not disagreed about) a different value. The third

is whether he is entitled to engage the further expert assistance which he seeks in order to resolve some of the more complex issues in dispute.

Exhaustion of remit

[21] The question raised in this connection, put in the very clear words used by Lord Wood in *Blantyre* at 571, is whether the report is "conclusive upon the matters of fact required to be ascertained". The matters of fact required to be ascertained are those set out in section 3.2 of the joint remit set out above. No issue arises for present purposes out of the matters carved out of the remit by section 3.3. In essence, then, the reporter was to determine, in respect of each matter identified as a want of repair in the Scott Schedule, whether and to what extent it existed at the date of termination of the lease (question 1); in respect of each such matter which did so exist, whether its existence as at that date constituted a breach of the lease (question 2); if the answers to questions 1 and 2 were positive in respect of any such matter, whether the works suggested in the Schedule by the pursuer were necessary to at least some extent in order to remediate the relative lack of repair (question 3); and, again if the answers to questions 1 and 2 were positive in respect of a matter, to state the reasonable costs for performing the necessary works to remediate the relative want of repair (question 4). It is important to note that an answer to question 4 is clearly required when questions 1 and 2 are answered positively, irrespective of the answer to question 3.

[22] It follows that those criticisms of the draft report which turn on the absence of an answer to question 4 despite questions 1 and 2 having been answered positively by the reporter are valid criticisms that he has, in those respects, failed to exhaust his jurisdiction.

He has not answered questions which he was required to answer, and he must now be directed to do so.

[23] If the material presented to the reporter, together with such further enquiries as he saw fit to make, had failed to persuade him that positive answers fell to be given to either question 1 or question 2 in respect of any particular claimed want of repair, then there would have been no need to proceed to answer question 4 in that respect. That was the situation figured in *HFD* at [23]. However, any want in the material made available to the reporter, or otherwise sought out by him in terms of the joint remit, which led to him being unable to answer question 3 positively in respect of any matter, did not absolve him from the responsibility of answering question 4. As has been seen, an answer to that question is required regardless of the answer to question 3, and furthermore that answer must be given regardless of the adequacy of the material before the reporter. In this context, no question of any burden of proof on the pursuer arises. While the remit to the reporter took the place of a proof before the court of the matters so remitted, it did not involve the provision by the reporter of a simulacrum of such proof. The reporter is not some variety of deputy judge; rather, where the terms of his remit permit or indeed require, his appointment entails the deployment of his skills and experience so as to provide a more efficient (and potentially more accurate) determination of the remitted matters than a judge could reasonably be expected to furnish. Whether or not that was quite the situation subjectively contemplated by both parties when the terms of the joint remit were settled, an objective construction of its terms permits of no other result.

Agreed values

[24] The issue of the extent of the reporter's jurisdiction in instances where parties do not disagree on the face of the Scott Schedule about the cost of remedying any claimed want of repair set out therein is not a particularly acute one, since in most if not all of those instances the apparent agreement brought out by the Schedule is in reality the product of the cost in question being so minor that the defender has not troubled to dispute it. Nonetheless, the answer in principle to the question posed is clear. The task of the reporter was to provide answers to the four questions posed in the joint remit, including (where appropriate in the sense already discussed) question 4. The fact (if fact it be) that the parties were agreed amongst themselves as to what the answer to any question should be in no way absolved the reporter from stating his views on the matter. Given that the remit involves the substitution of his views for any other mode of proving the remitted matters, those views furnish the definitive answers as to the facts to which the questions posed relate. Directions to that effect will be issued.

[25] To the extent that certain observations in *HFD* at [23] may suggest that the reporter's views on matters of apparent agreement on the face of the Schedule between the parties may simply be ignored so far as inconsistent with such agreement (and I am not sure that they do), I disagree with them. It will in due course be open to the parties jointly to ask the court to pronounce a decree consistent with a shared view of certain facts rather than with the view taken on those facts by the reporter, and the court would be likely to accede to such a request, but in the absence of any such approach it must proceed on the basis that the reporter's views provide the factual basis informing its own disposal of the case.

External assistance

[26] The question of whether the reporter may engage external assistance in dealing with the matters remitted to him again falls to be determined by construction of the joint remit. Section 6 thereof entitles the reporter to interview any individuals whom he reasonably considers may be able to provide him with information which will assist him in reaching the opinions required of him, and may also ask the parties to produce such other evidence or material as he may reasonably consider appropriate to that end. The facility of interviewing individuals so as to obtain relevant information would not in my view extend to the length of engaging persons to consider matters and express their own professional opinions to him. However, if he thinks that asking the parties to instruct more or different professional advisers in order to produce material (including in the form of opinions) which he reasonably considers necessary, available or appropriate to enable him to discharge his functions, then he may do so. Directions to that effect will be provided to him.

[27] It is to be hoped that some expedient within the terms of the joint remit which will enable the reporter to state his views on the matters on which he is currently in doubt can be identified and deployed. It will be recalled that his ultimate views on those matters do require to satisfy certain legal standards in order to be valid, and in particular in the current context require to have a factual basis, to take into account relevant matters and to exclude irrelevant ones, to be *Wednesbury* rational, and to be supported by adequate reasons: see *BAM Buchanan* at [5]. If the reporter is quite as adrift on the issues of the curtain walling and the mechanical and electrical installation as his communication to the court suggests, then it may prove very difficult for him to steer a safe course amongst each such Scylla and every such Charybdis capable of wrecking his enterprise, especially if parties are unwilling to provide reasonable assistance to him. If matters come to that, interesting questions may

arise as to how best to deal with the resulting situation. Although in former times the practice of remitting technical matters to a reporter was adopted by and with the consent of the parties, supplemented if need be by resort, plausible to a greater or lesser extent from case to case, to the concept of acquiescence in an appointment favoured by the court, I am far from satisfied that nowadays it is beyond the powers of the court to impose a mode of resolving any difficulties which may manifest themselves in the working out of an established remit without the agreement of the parties. However, that is not a question which yet requires to be addressed, and with the application of some good sense and cooperation where needed, it may still be avoided in this case.

[28] Directions will be issued to the reporter along the lines set out.