SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2020] SC EDIN 10

EDI-CA43-118

JUDGMENT OF SHERIFF N A ROSS

in the cause

THE ROYAL FORTH YACHT CLUB

Pursuer

against

GRANTON CENTRAL DEVELOPMENTS LIMITED

Defender

Pursuer: McColl QC
Defender: Thomson QC

Edinburgh, 10 February 2020

The sheriff, having resumed consideration of the cause, sustains the defender's second plea-in-law to the extent of denying probation to the pursuer's following averments: in article 3, "it was a matter of agreement between the pursuer and FPA that the pursuer's clubhouse would continue to receive a supply of water from FPA"; in article 8, "it was a derogation from the grant made to the pursuer as tenant under the lease"; quoad ultra allows the pursuer's case to proceed to probation on dates to be afterwards fixed; fixes a case management conference on a date to be afterwards fixed to discuss expenses, sanction for counsel and further procedure.

NOTE

[1] On averment, the pursuer has leased premises at 15A Middle Pier, Granton Harbour, Edinburgh since 1983, in terms of a lease dated 16 and 22 December 1983. The leased subjects comprised a plot of ground of approximately 0.79 acres, including a bosun's shed on Pharos pier and a harbour building which was subsequently demolished and replaced with a club house. The term of the lease was 99 years. The contracting landlord was Forth Ports Authority. In about June 2014 the landlord's interest was acquired by the defender. The defender is now the pursuer's landlord.

[2] The pursuer avers that the subjects were served by a water supply from the landlord from at least 1983 onwards. From June 2014 the subjects received a water supply from the defender through existing pipes. In October 2018 the defender sought to terminate the water supply, on the purported basis that the lease did not oblige the defender to supply water to the premises. On 26 October 2018 the defender's representative entered the subjects and closed and padlocked the water stop cock. The pursuer raised the present action for declarator, damages and interdict. The water supply has been restored pending the outcome of this dispute. The cause called for debate as to whether, under the terms of the lease, the defender is obliged to continue to provide a water supply to the subjects.

The lease terms

[3] There is no explicit term within the lease which grants or regulates a water supply. The pursuer founds on the following:-

> *"SIXTH: The Tenants accept the subjects in their present condition and state of repair and shall at their own expense carry out routine maintenance of the subjects and any building erected thereon to a standard no less than as at the date of entry and to the reasonable satisfaction of the* [Forth Ports] *Authority…the Tenants shall further relieve the Authority of any share of expenses attributable to the subjects of upholding, repairing, renovating and*

> *renewing gables, walls, sewers, drains and pipes and all other parts common to the subjects and the adjoining property for which the Authority might otherwise be liable exclusively or in common under its title to the subjects or otherwise…"*
>
> *"NINTH: The Tenants shall be bound at their own expense so far as not already done to construct and maintain in good order and repair all drains, pipes and cables required to serve the subjects DECLARING that the Authority shall have the right to use or connect to the said drains, pipes or cables without payment or compensation therefor…"*
>
> *"TENTH: The Tenants shall be responsible for and shall free and relieve the Authority 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 this lease."*

[4] The pursuer avers that these terms, in the context of the lease terms and the factual circumstances in 1983, should be construed as providing (a) that the tenant under the lease is entitled to make use of the drains and pipes serving the subjects let (and which enter the let subjects from other adjacent subjects of which the defender is the head tenant); (b) that the landlord under the lease will provide a supply of water to the subjects let by way of the water pipes serving the let subjects; (c) that the tenant under the lease will meet all charges for such water exigible in respect of the subjects let.

Submissions

[5] Both parties provided written submissions. In brief summary, their respective positions were as follows:-

[6] On behalf of the defender it was submitted that the lease did not impose any obligation on the defender, as landlord, to supply water, or any right for the tenant to receive it. It was therefore necessary, in the absence of express provision, for the pursuer to establish that such an obligation must be implied (*Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at 752). The pursuer's pleadings contained no such case based on implied terms, but only broadly referred to the need to

construe the lease in a particular manner. It was not enough that the lease referred to water supply infrastructure. No common sense or commerciality argument could be used to cure the absence of any such provision *(@SIPP Pension Trustees* v *Insight Travel Services Ltd* 2016 SC 243; *Arnold* v *Britton* [2015] AC 1619; *Wood* v *Capita Insurance Services* [2017] AC 1173).

[7] Reference to a pre-existing supply was similarly irrelevant, as that did not serve to impose any obligation or right. Similarly, averments about practice since 1983, both as to supply and payment therefor, could not operate to create any obligation. It was not self-evident that the subjects were unusable in the absence of a water supply. Further criticism was made of averments relating to the motive of the defender, certain communings between the parties, and quantum of damages.

[8] On behalf of the pursuer it was submitted that the lease fell to be construed in such a way as to create a right and obligation in relation to a water supply. Although the written note of argument focused primarily on construction of the lease terms, against a background of common law provisions, counsel's submission at the bar focused primarily on the common law position. It was submitted that at common law, a landlord is not entitled to derogate from its grant or take steps to oust the tenant (*Huber* v *Ross* 1912 SC 898 at 918). A landlord is also obliged to provide adequate drains and water supply to urban subjects (*Tennent's Trs* v *Maxwell* (1880) 17 SLR 463; Paton & Cameron: *Landlord and Tenant* p130; Stair Memorial Encyclopaedia Volume 13 at 254, 255). The case should be appointed to a proof before answer.

The premises and their purpose

[9] Assuming for the purposes of argument that the pursuer's pleadings are factually correct, the significant features of the claim appear to be:- (i) that the subjects had a

pre-existing supply of water from at least 1983 to 2014. The landlord is not being required to install, alter or increase this water supply arrangement; (ii) the supply of water does not require any action on the part of the defender. Although the pleadings give minimal information, it appears to be accepted that the water runs from neighbouring premises controlled by the defender, but through existing pipes. This action commenced when the defender's representative entered the lease subjects to turn off a stopcock and secure it with a padlock; (iii) the lease relates to urban subjects, which include both an area of ground and the buildings thereon. In 1983 the subjects included a bosun's shed and a harbour building, the latter subsequently demolished to be replaced by a club house; (iv) the lease subjects are "shown outlined and coloured red on the plan annexed…". That outlined and coloured area extends to "approximately 0.79 acres", and includes an area designated "site of new clubhouse". Accordingly, the contracting parties appear specifically to have contemplated that the tenant would develop the subjects by constructing a new building which would operate as a club house; (v) the user clause FOURTH is in wide and unspecific terms: *"…for the purpose of recreation and other activities of a like nature connected with yachting…"*. Accordingly the use of the subjects is not limited to boat-storage or maintenance, and the lease appears to contemplate that people will enter the subjects for recreational purposes of a relatively unrestricted nature; (vi) a clubhouse used for recreational purposes, on the pursuer's averments, is not able to function without services such as toilets and washing facilities , restaurant or bar hygiene, or drinking water. The pursuer offers to prove that a mains water supply is necessary for the subjects to function for their leased purpose.

Decision

[10] In my view, the pursuer has averred a sufficiently relevant case to proceed to a proof before answer.

[11] The question is whether the defender is obliged to continue to provide, and the pursuer is entitled to enforce, the supply of water to the subjects. In the course of submission, three distinct legal approaches emerged. These are (i) common law warrandice, namely terms implied into a lease by the common law unless excluded by agreement; (ii); implication of terms, namely terms implied as a result of the specific context and content of the contract; and (iii) construction of the lease terms.

[12] The defender's argument focused on the construction of the lease terms. It also relied on the absence of any case based on implied terms. It distinguished the authorities on common law warrandice on the basis that the statement of the law set out in Paton & Cameron (set out below) was not supported by the few authorities on which it relies. The pursuer's written submissions focused primarily on the construction of terms, but counsel's submission was much more focused on common law warrandice.

Construction of terms – obligation to supply water

[13] In relation to construction of the lease terms, the defender's argument is clearly to be preferred. The defender's position is based on the established authorities set out above, which deal with the interpretation of the wording of the contract. In my view the defender properly identified that this exercise is as set out in *Charter Reinsurance* v *Fagan* [1997] AC 313 at 384C-D:

> *"…the inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used."*

[14] The lease contains no words creating or even mentioning any obligation by the landlord to supply water. The only clauses which relate to water are clauses SIXTH, NINTH and TENTH, set out above. Clause SIXTH imposes an obligation on the tenant in relation to common parts with the adjoining property. That clause imposes no obligation on the landlord, but serves to allocate a repairing and maintenance burden. Clause NINTH imposes obligations on the tenant and not the landlord, and these are obligations of construction, maintenance and repair of all drains, pipes and cables "required" to serve the subjects. Although a commercial common sense approach might identify that pipes can only be required if water is to flow through them, that canon of interpretation can only be used to understand existing contract provisions, not as a foundation upon which to construct a new obligation (*Arnold* v *Britton*, above).

[15] The pursuer's argument, by contrast, sought to take a more expansive approach. It relied on reference to the common intention of the parties. It was submitted that, by analogy, there is nothing in the lease about handing over the keys, but it would be absurd to say that the lease did not require that to be done. The references to water infrastructure could only be consistent with the common intention of the parties that a water supply be maintained. The central question was what the lease means. That question involved taking a step back and looking at the lease as a whole. It was not always necessary to plead a specific implied term, because certain terms are implied by operation of law, such as an obligation relating to standard of care.

[16] I am unable to agree with the pursuer's approach. It does not fit into the approach to construction which is required by the authorities relied upon by the defender. The starting point is always the terms of the contract and what they mean. There is no contractual provision or wording here which falls to be construed. There are no competing rival

meanings to be considered. In the absence of any term relating to water supply, the pursuer's approach comes close to contravening the rule against considering the subjective intention of the parties. Further, the pursuer's argument started out as an exercise in construction of terms, but ended as an argument founding on implied terms. The analogy of the keys is not a good one, as the defender's counsel pointed out, as handing over keys would be covered by the express obligation to grant occupation and use.

[17] For these reasons, I accept the defender's argument that it is not possible in this case to construe the express wording of the lease as imposing an obligation on the landlord to supply water to the subjects. There are no such words to construe.

Implication of terms – obligation to supply water

[18] The pursuer does not plead a case relying on an implied term which obliges the landlord to supply water. A term will be implied if a reasonable reader of the contract, knowing all 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 & Spencer plc* v *BNP Paribas*, above, at para [23]).

[19] That process is not, however, the only means whereby a term is implied into a contract. A term can also be implied by operation of common law.

Common law warrandice

[20] The pursuer relied on Paton and Cameron: *Landlord and Tenant* (1967), an authoritative text book which sets out the following propositions:- at common law there is an implied warrandice that urban subjects are reasonably fit for the purposes of the lease;

the subjects must be reasonably habitable and tenantable, and in a wind and watertight condition; the extent of the obligation will vary according to the value and rental of the subjects and the reasonable requirements of the tenant; the standard of tenantability of services is measured by the ordinary efficiency for the purpose and not in relation to the best methods available (at pages 130 to 131). These propositions are not controversial.

[21] The pursuer's submission relied on a further proposition which the defender challenged, namely the following: *"But a landlord is clearly in breach of his obligation… where the drains and water supply are completely inadequate…"*. The proposition cites *Tennent's Trustees* v *Maxwell* (1880) 17 SLR 463 as authority. The defender challenged the proposition on the basis that *Tennent's Trs* does not support it, the latter case involving an express contractual term, not an implied term of law. The pursuer maintained that the proposition was and remains good law.

[22] *Tennents' Trs* involved the lease of a mansion house, with a lease term that the water and drains would be inspected and put in "thorough order" prior to entry. In the event, the drains were in a bad state and required repair. The tenant refused to take entry until the drains were repaired. The landlord raised an action for sequestration for rent. The action was dismissed and the First Division refused the appeal. The court founded on the impossibility for the tenant to take entry consistently with the safety of himself and his family. It accepted that, on averment, the condition was such that nobody could occupy it for its purpose, namely a place of residence. The condition was such that the tenant had to leave. Per the Lord President (Inglis):- *"…it is quite clear that with a subject in the condition that I have described, and with the impossibility of occupation by the tenant, the full year's rent could not be due."*

[23] The rubric states that the tenant's offer "*had contained a special stipulation that the water and drains should be put in thorough order at the sight of Dr Stevenson Macadam*". The landlord's defence was that the tenant got part-possession of the subjects and that the repairs were completed as soon as possible.

[24] In my view, the defender's challenge is not supported, and *Tennent's Trs* is authority for the statement in Paton & Cameron, for the following reasons:- first, the tenant's case did not found on any express term of the contract, and nor did the judgment; second, even if the contractual term had been relied upon, it would likely have been ineffectual, because the contractual term did not provide any consequence or remedy. A power of inspection is not equivalent to a power to refuse to take entry or to withhold rent; third, the landlord's position was that (without fault on their part) remedial works were carried out as soon as possible, but that defence went unexplored, and was thereby regarded as irrelevant, because; fourth, the First Division relied on a general principle, making no reference to the express terms of the lease, in terms of which Lord President Inglis stated:

> *"I think the case may be very shortly stated. The subject let by the pursuers to the defender was the mansion-house of Saint Germains, with the shootings, gardens, and a number of adjuncts of that particular kind, and the whole benefits to be derived by a tenant in the occupation of a subject to be used as a place of residence. It is therefore perfectly clear that if for any period of the lease he was kept out of the house as a place of residence he could not be called upon to pay rent…"*

[25] The defender's challenge that *Tennents' Trustees* does not support the proposition is not accurate, because in *Tennents' Trs* the express contract term was both irrelevant and not founded upon. I accept that *Tennents' Trs* properly vouches the proposition set out in Paton & Cameron (above), namely that common law warrandice that the lease subjects are reasonably fit for the purposes of the lease, is capable of including the obligation to provide an adequate water supply. Whether it does so is a matter of fact in all the circumstances,

and the extent of the obligation *"will vary according to the value and rental of the subjects and the reasonable requirements of a tenant who hires a house of given accommodation and rent*" (at p 130).

[26] I note that the facts in *Tennent's Trs* were discussed in relatively extreme terms. The court accepted that occupancy was "*impossible*", the condition such that "*nobody could occupy it as a place of residence*", it was "*impossible for the safety*" of the tenant and the house "*could not be made habitable*". Accordingly, it appears that the implied warrandice that the subjects are reasonably fit for the purposes of the lease will only include drains and water supply where the absence thereof makes residence (of a house) or use (of other subjects) "impossible". It appears to be a high test.

[27] Accordingly, it is not sufficient simply to claim a remedy based on warrandice. Whether or not reasonable fitness for purpose includes a water supply is heavily dependent on the facts. The pursuer is only entitled to lead evidence if it has averred that a water supply is necessary to render the subjects fit for purpose, or that occupancy is impossible in the absence of a water supply. In the present action, the pursuer has pled such a case. It avers that any power of the landlord to unilaterally disconnect the water supply "would have the effect of rendering the let subjects unusable for the purposes for which they are let". In my view, the pursuer has pled enough to allow probation. Although the pleadings do not refer to warrandice, there is sufficient record in article 4 of condescendence. Any lease must be understood against the background of the common law, unless expressly excluded, which was not done here. If lack of water means that occupancy would be rendered impossible for the lease purposes of *"recreational and other activities of a like nature connected with yachting*", then *Tennents' Trs* would appear to admit of a remedy based in common law warrandice. There are a number of averments capable of supporting that proposition:- there was a pre-existing supply; it is likely that recreational use requires

catering, toilet facilities and hygiene; and that a clubhouse was to be constructed for recreational purposes, for up to a 99-year period. It would be necessary to lead evidence before such a claim could be decided. The pursuer has made sufficient averments for that to be done.

[28] Separately, even if I were wrong to find that *Tennents' Trs* sufficiently vouched the said passage in Paton & Cameron, that proposition was nonetheless authoritatively stated by at least as early as 1967 and has been repeated in the *Stair Encyclopaedia* Volume 13 paragraph 154 and more recently in textbooks such as McAllister: *Scottish Law of Leases* (4th edition 2013) at 3.29. It has represented an apparently unchallenged statement of the law for at least 60 years, and 16 years at the date of the lease. It falls, in my view, to be accepted as a correct statement of the law of landlord's warrandice, irrespective of the status of *Tennents' Trs*.

[29] For these reasons, I am persuaded that the pursuer's pleadings are sufficient for a relevant case based on reasonable fitness for purpose, as implied by law.

[30] For completeness, the defender pointed out that modern businesses which lease multi-occupancy units might be faced with an unexpected liability to provide water and drainage. That does not follow. The textbooks referred to in argument make clear that it is well understood, and a near-universal practice, that common law warrandice should be considered and, in most circumstances, conventionally excluded. In any event, it would appear unlikely that premises which have no water or drainage, and are accepted by the tenant as such at entry, could be said subsequently to be impossible to use, and to need a water supply in order to meet the standard of reasonable fitness for purpose.

Derogation from grant

[31] The pursuer's argument placed some reliance on the principle that a landlord cannot derogate from its own grant. The proposition was authoritatively stated in *Huber* v *Ross* 1912 SC 898, in connection with operations on neighbouring premises causing loss. The application of the principle is restricted:-

> *"I think that the cases in which derogation from the grant can be successfully pleaded must be limited to these: first of all, structural damage, which everyone admits – structural damage in the proper and strict sense of the terms – and, secondly, I would also include any physical tangible injury which is done to the demised premises."* (per Lord President (Dunedin) at 913).

[32] In the present case it is unlikely, and it is not the subject of averment, that a claim based on the cessation of water supply would meet these strictures. I do not accept that the pursuer is entitled to rely on application of this principle. The case based on derogation from grant will be refused probation.

Water as lease subjects

[33] The tenor of the pursuer's pleadings is that the water supply is an integral part of the lease. The pursuer's submission was that the matter should be looked at as a whole, against a background of a loose definition of the lease subjects, and that the water supply was an integral part of the operation of the lease, as evidenced by the incidental references to maintenance of the supply infrastructure.

> "Rights closely connected with land such as fishings, game and water can be made the subjects of leases." (Paton and Cameron, p65).

[34] The pursuer did not go so far as to submit that the subjects should be construed as including the water supply, and accordingly the point need not be pursued.

Other pleading points

[35] I accept the defender's submissions in the following respects, and will refuse probation to the following averments:-

[36] First, the averments in article 3: "It was a matter of agreement between the pursuer and FPA that the pursuer's club house would continue to receive a supply of water from FPA". The averment is capable of setting up a separate contract, of indeterminate effect as regards the defender, without any adequate specification as to terms, circumstances and effect. It does not give fair notice for those purposes. It is not merely background.

[37] Second, the averment in article 8: "It was a derogation from the grant made to the pursuer as tenant under the lease". That averment is not relevantly supported by authority, as discussed above.

[38] I will make no further deletions. The defender challenged averments relating to surrounding circumstances, the defender's motivation, the reference to an arbitration clause, and damages. It must be borne in mind that this action is wider than simple declarator, and seeks interdict from interference with the water supply. I cannot say that these averments are irrelevant to this wider dispute, which will involve consideration of balance of convenience and other tests. The claim for damages is apposite to cover inconvenience, and therefore is suitable for proof to that extent. I would not view it as apposite to include any detailed claim for damages under other heads.

Disposal

[39] The matter will proceed to an evidential hearing. Expenses remain to be dealt with. Parties should please consider issues of expenses and further procedure and agree them if

possible. I will fix a case management conference by telephone to discuss all issues arising. Parties should please contact the clerk to identify a date.