SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2020] EDIN 49

EDI-CA62-19

JUDGMENT OF SHERIFF N A ROSS

in the cause

THE GLASGOW ANGLING CENTRE LIMITED

Pursuer

against

(FIRST) GRANTON CENTRAL DEVELOPMENTS LIMITED

(SECOND) GRANTON CENTRAL MANAGEMENT LIMITED

(THIRD) PIP ASSET MANAGEMENT LLP

Defenders

Pursuer: Anderson, advocate; Gilson Gray LLP
Defender: Thomson QC; Turcan Connell

Edinburgh, 5 November 2020

The sheriff, having resumed consideration of the cause sustains the defenders' first and second pleas-in-law and dismisses the action; fixes a hearing on a date to be afterwards fixed for discussion of expenses.

NOTE

[1] The pursuer is the tenant of premises at West Harbour Road, Granton, Edinburgh in terms of a lease dated 24 and 30 November 2009 (the "Lease") between Forth Ports plc and P.S.Properties (No 2) Limited. The tenancy was assigned to the pursuer in March 2018. The first defender acquired the landlord's interest in June 2014, as part of a wider acquisition of

property at Granton Harbour, but in the same month disponed it to British Overseas Bank Nominees Limited and others, who are now the landlord. The lease premises are subject to the terms of a Deed of Conditions registered in the Land Register on 24 December 2003. The pleadings set out details of some complexity about the history of, and proprietary interests in, the title. The pursuer has called the three defenders on the basis of its own understanding of which parties are entitled, on behalf of the landlord, to demand payments of common service and other charges. The pleadings do not explain the formal relationship between the defenders inter se, or with the landlord, but the defenders aver that "all three defenders are accordingly parties whom [the landlord] has directed the pursuer to pay", and accept that the third defender had made demands for payment on behalf of the first and second defender. It is sufficient for present purposes that the defenders do not dispute they are properly called.

[2] Clause 4.4 of the Lease obliges the tenant:

> "To pay to the Landlords or to such other party as the Landlords may direct on written demand the proportion applicable to the Subjects in terms of the title deeds or by statute, common law or otherwise of the costs and expenses of repairing, maintaining, renewing, rebuilding, lighting and cleansing of all roads, pavements, sewers, drains, pipes, water courses, walls, fences and any other structure or facility owned or used in common by the Subjects and other adjoining, neighbouring or nearby properties".

[3] The Deed of Conditions also permits a "promoter" to demand various payments in respect of the area forming Granton Harbour Estate, subject to various further provisions, such as the designation of a Public Realm Area or "PRA", in respect of which service charges may be levied.

[4] The pursuer has made payments to the third defender, which purports to act on behalf of the first and second defenders, in respect of three invoices dated 7 June 2018, 7 December 2018 and 1 August 2019 respectively. The pursuer now claims that these payments were

wrongfully demanded, and paid in error, and seeks (first) declarator in respect of the absence of a prerequisite, namely the designation of a PRA, under the Deed of Conditions which would trigger its liability for payment; (second) reduction of the relevant three invoices; and (third) repayment of the sum of £20,023.65, the total of the three invoices.

[5] Each of the invoices demanded payment of service charge in the percentage of 4.58% of an unspecified budget. By process of deduction, explained in the pleadings, the pursuer identifies and avers that these sums were demanded by reference to the provisions of the Deed of Conditions. The defenders deny that was the basis of demand. They aver that the proportion of liability was calculated as a proportion of the area of the leased premises (1.23 hectares) to the total Granton Harbour estate (26.8 hectares), applied to the service charge budget for the whole estate. The defenders aver that they did not rely on the Deed of Conditions. They state that demand for payment was made under the Lease terms.

Declarator

[6] The pursuer seeks declarator that no Public Realm Area has been designated under or in terms of the Deed of Conditions. The defenders plead that they did not levy any charge in reliance on the Deed of Conditions. The sums demanded by the defenders were demanded on reliance on the Lease, not the Deed of Conditions. If that is correct, then averments which purport to support the declarator are misdirected and therefore irrelevant. If it is not correct, the defenders nonetheless claim no entitlement (in this respect) under the Deed of Conditions, and the declarator does not relate to any live dispute.

[7] The pursuer has lodged the correspondence from which the pursuer purported to deduce otherwise. That correspondence, unfortunately, refers both to the Deed of Conditions and the Lease. I express no view on whether the inference drawn by the pursuer

was supportable or not, save to notice that any demand letter which fails to state unequivocally the bases for liability, for calculation and for apportionment respectively, is liable to create exactly this sort of difficulty.

[8] What is clear, and accepted by the defenders, is that the pursuer is attacking a proposition of fact which the defenders do not make or rely upon. There is therefore no live or immediate dispute before the court in this respect. As Macphail: Sheriff Court Practice (3rd ed) states at paragraph 20.01:

> *"The pursuer must have an interest to have declared to be his – some particular right which is not clear or which some other person is challenging, or to have it declared that the defender is not entitled to exercise a right claimed by him. The court will only grant declarator in respect of a live, practical issue having a sufficient degree of reality and immediacy…"*

[9] The defences make clear that the defenders do not claim the right which is the subject of the declarator, which is therefore no longer a competent or relevant remedy. I will repel the first plea-in-law for the pursuer, and refuse probation to the averments which support the first crave. These are: in article 4, the last 14 lines after "insofar as coinciding herewith", and the whole of articles 6, 7 and 8 of condescendence.

Reduction

[10] The pursuer seeks reduction of the three invoices. Normally reduction of an invoice would not be sufficient to address questions of liability, as an invoice customarily serves only to trigger a liability which is created by separate mechanism. An effective remedy would require reference also to the underlying source of liability. Here, however, the pursuer's counsel explained that reduction of the invoices was sought because payment had already been made. It would avoid any unnecessary obstacle to reclaiming the sums sought.

The defenders do not argue that reduction is incompetent, and I will accept the pursuer's position as uncontroversial for present purposes.

[11] The defenders' position was that the averments made in support of the crave for reduction are irrelevant.

[12] Once reference to the Deed of Conditions becomes irrelevant, as it must following the foregoing analysis, it is necessary to reassess the remainder of the pursuer's case directed against the validity of the invoices. The pursuer's position is that:

> "no written demand has been received by the Tenant from the Landlord (BOBNL) to make payment of any sums in terms of clause 4.4 of the Lease",

and:

> "Clause 4.4 of the Lease does not provide for payment of a service charge by the Pursuer. Clause 4.4 creates no obligation on the Pursuer to pay a service charge to the third defender or any other party. The payment of a service charge is provided for in a Deed of Conditions" (Article 4).

[13] The final article number 15 of condescendence states that:

> "In respect of the paid invoices, the pursuer made payments in the mistaken belief that the sums claimed were due under the Lease and that they accurately reflected the pursuer's liability in terms of the Deed of Conditions and the Lease".

[14] The pursuer's remaining case is that it paid the invoices under the mistaken belief that the Lease created a liability to pay service charges. Crucially, the case is not that the liability for a share of common service charges was calculated in terms of the Lease, but rather that the Lease imposed a liability to pay common service charges which were calculated under the Deed of Conditions. The pursuer's case is that the Deed of Conditions, not the Lease, is the source of liability, and the Lease merely reflects this liability to pay. They expressly deny there is any liability under the Lease. The relevant plea-in-law, the second, makes no reference to the Lease. The defenders' position is that the Lease both creates and imposes this liability, and payment was rightfully demanded under the Lease terms.

[15] The question which remains is – has the pursuer pled a stateable and sufficiently specific case in support of its plea-in-law and the second crave for reduction. The case on record is firmly, and solely, directed against the Deed of Conditions. It does not contemplate any liability calculated (as opposed to liability imposed) under the Lease. The pleadings in the final article do, however, tend to support a claim that the pursuer made payment in mistaken reliance on a non-existent (in their view) liability under the Lease. That is theoretically capable of lending some support to a case for reduction. Now this case has reached debate, the question is whether the present pleadings are sufficient to present a relevant case which supports, and gives fair notice of, such a position.

[16] In my view, while the pursuer may be able to state an argument in opposition to the defender's position, it has not presently done so. The pleadings are neither relevant nor relevantly specific for that purpose, for a number of reasons. The relevant plea-in-law contains no claim, and no fair notice of a claim, that reduction is justified by reference to the Lease terms. The Lease terms received scant attention during the debate. Further, the single sentence in article 15 (set out above) is not supported by the remainder of the pleadings. The pursuer's case is not, on a fair reading of the pleadings, that they relied on the terms of the Lease, or that they thought the defenders were attempting to enforce the Lease. The sole complaint is that the defenders relied on the Deed of Conditions. The pursuer has set out its case, by reference to clause 4.4 of the Lease, in terms that can only be fairly understood as reflecting liability to pay under the Deed of Conditions. That is quite different from founding on or attacking clause 4.4 as a basis to create liability to make payment. The case for reduction of the invoices, as it appears on record, does not relevantly aver, or give fair notice of, any case based on liability arising solely under the Lease.

[17] For those reasons, the few averments tending to support the second plea-in-law must be denied probation, and the second plea-in-law repelled.

[18] That is not to say that there could never be an arguable case. The defenders' position at debate reflected this. Their position is that they are entitled to levy such charges by reference to the terms of clause 4.4 alone. They found on the provision that the pursuers are obliged: "To pay to the Landlords or to such other party as the Landlords may direct on written demand the proportion applicable to the Subjects in terms of the title deeds…or otherwise… ", the term "or otherwise" being sufficient for the purpose. There was some brief discussion of this proposition during the debate, but it was not fully argued. The defenders' position was to the effect that it is indisputable that the pursuer enjoyed the benefit of common services such as roads, sewerage, security and lighting, that an argument they should have no liability to contribute financially would be extraordinary, and that clause 4.4 served to create such liability.

[19] It is enough for present purposes to note that the pursuer does not make any case on record attacking clause 4.4 as a basis for such liability. It would require at least a plea-in-law. It is not sufficient simply to refer to no liability arising, in the course of an argument directed elsewhere. I express no view on the merits of such a case. It is not made in the pleadings. It follows that there is no relevant remaining case on record for reduction, as this is perilled entirely on the Deed of Conditions which is now irrelevant. I will therefore refuse probation to the averments in article 14 of condescendence.

Unjust enrichment

[20] The third and last crave is for repayment of sums paid under the three invoices. The merits of the claim are dependent on the rationale set out in the pleadings. As discussed, the

detailed averments about the want of power under the Deed of Conditions to levy such charges is now redundant. The defenders have disclaimed any such entitlement. The existence of any such power under the Lease is not the subject of any sufficient pleading by the pursuer to put the matter fairly before a court. The defenders maintain that, were their entitlement under the Lease to levy charges to be challenged, they would maintain a full and principled defence.

[21] The claim for repetition of sums paid is therefore unsupported by the averments, and must fail. I have considered whether the bald claim for payment might survive the present challenge, and allow the pursuer to further amend their pleadings. I have concluded that it would not be just to do so, for several reasons. The pursuer has not offered to amend, or indicated that would be a preferred course. The claim itself is not one for which there can be said to be a clear prima facie argument, as there is a dispute to be had on the effect and meaning of the wording of clause 4.4. That argument, while touched upon during the present debate, is not focused in the pleadings. No factual context is pled, and as such no aids to construction are advanced for consideration. Further, there are no pleadings about the reasons why the payments amount to unjust enrichment of the defenders. It is the defenders' position that they have not benefited from any such payments, but instead required to use them to pay for common services such as road maintenance, sewerage, security and lighting which the pursuer benefited from. Further, the pursuer does not plead that there is no legal justification for levying of charges for common services *(Dollar Land (Cumbernauld) Ltd* v *CIN Properties Ltd 1999* SC(HL) 90). Separately, even setting the pleadings to one side and looking at overall equities, there is (at least within the present pleadings) no prima facie equitable case that one tenant should be excused payment of a contribution to common services enjoyed by them and paid for by the other tenants.

[22] For completeness, I note that article 12 contains the proposition that: "esto there is a basis for issuing the invoices (which is denied), the amounts contained in the invoices issued using this calculation are also incorrect." This might tend to support a case for reduction on the basis of excessive sums demanded, but the proposition is based on the same misconceived reliance on the Deed of Conditions, and is not developed, sufficiently specified or supported by a plea-in-law, and there is no fair case for the defender to answer.

Disposal

[23] For all these reasons, no relevant or sufficiently specific case is advanced and the action falls to be dismissed. There is no requirement, as a result, for the interlocutor to specify the averments which are to be refused probation, and I have set these out above for clarity only. I will sustain the defenders' first and second pleas-in-law and dismiss the action.

[24] For completeness, I note that the pursuer has a variety of complaints – that they do not know the legal basis for their liability for the charges; that they do not know the relationship between the defenders and the landlords; that they do not know whether the defenders have locus to issue demands; that there is no contract between the defenders and themselves. These issues may be of concern, but I must deal with the action as it is presented, not as it might have been pled. The pursuer has made inferences of fact from the invoices, and has averred that these inferences are correct and justify a remedy. The defenders have pled that they did not rely on the grounds identified by the pursuer, and that payment was demanded solely on the basis of the entitlement which they claim clause 4.4 confers. If there is fault with the defenders' analysis as it is now presented, the pursuer may have an alternative argument upon which to seek a remedy. In order to

foreshadow the course of any such future argument, counsel for the defender submitted briefly that the defenders' analysis was consistent with a commercial construction of clause 4.4 and the Lease as a whole, under reference to *Rainy Sky SA* v *Kookmin Bank Co Ltd* [2011] 1 WLR 2900, *Grove Investments Ltd* v *Cape Building Products Ltd* [2014] CSIH 43, *Wood* v *View Capita Insurance Services* [2017] AC 1173 and *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Ltd* [2020] SC 24. Because this issue was not raised in the pleadings counsel did not and could not press this point, the discussion was not developed in relation to clause 4.4, and is accordingly not available for me to decide in these proceedings. For present purposes it is sufficient to note that, at present, the pursuer's pleadings are misdirected and do not support the remedies they claim.

[25] Parties agreed that expenses should be reserved for later discussion. Parties should attempt to agree the position about expenses, failing which they should contact the clerk to arrange a hearing.