SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT STORNOWAY

[2022] SC STO 35

STO-CA1-21

JUDGMENT OF SHERIFF GORDON LAMONT

in the cause

(FIRST) IAIN DAVID HINGSTON, (SECOND) GRAEME BRUCE MURRAY, and (THIRD) LOUISE ELIZABETH SUTHERLAND

Pursuers

against

CRAIGELLEN ASSETS LIMITED

Defender

Pursuers: Garioch, solicitor advocate, Gilson Gray LLP
Defender: E MacLean, advocate; on behalf of Blackadders LLP

Stornoway, 31 October 2022

The sheriff, having resumed consideration of the cause, sustains the defenders' preliminary plea-in-law number 2, dismisses crave 1 for the pursuers and repels plea-in-law 1 for the pursuers; quoad ultra allows parties a proof before answer of their respective averments; fixes a case management conference at a date to be hereinafter assigned; meantime reserves the question of expenses.

Sheriff Gordon Lamont

NOTE

Introduction

[1] In 2009 the pursuers were partners in the firm of solicitors Graeme Murray & Co. They entered into a lease with the defender for commercial premises at 10-12 Chapel Street, Aberdeen. The lease was dated 24 November 2009, 26 November 2009 and 3 December 2009. In terms of the lease the pursuers as individuals were jointly and severally liable with the firm in respect of all obligations on the tenant's part arising under the lease.

[2] The pursuers aver that the firm of Graeme Murray and Co was sequestrated on 8 December 2016. The first pursuer is averred to have thereafter purchased the assets of the firm. He is said to have used these assets to set up Hingston's Law Limited (hereinafter referred to as "HLL"). He was the sole director and shareholder of HLL. The second and third pursuers are employees of HLL. It is averred by the pursuers that following the purchase of the assets of Graeme Murray & Co the new entity HLL occupied 10-12 Chapel Street, Aberdeen. It is averred that HLL implemented all obligations of the tenant identified within the lease including payment of rent and insurance premiums.

[3] The said lease contained a break option. This was set out in clause 2 of the lease in the following terms:

> "….DECLARING that the Tenant shall be entitled to terminate this Lease as at the Twenty Fourth day of November, Two thousand and Fourteen and as at the Twenty Fourth day of November Two Thousand and Nineteen subject to providing the Landlord with not less than six months prior written notice to this effect"

[4] In this action the pursuers seek, inter alia, a finding and declaration that the lease was terminated on 24 November 2019. In terms of the break option the pursuers as tenants had until 6 months before 24 November 2019 to exercise the option (24 May 2019). A termination notice was issued on 8 March 2019. The termination notice was issued by Grant

Smith Law Practice (5/2 of process). The notice indicates underneath the signature that they are "Agents for and behalf of Hingston's Law Limited". The body of the correspondence contains the phrase "…our client Hingston's Law Limited". It refers to the lease between the pursuers (not HLL) and the defender. It purports to terminate the lease.

[5] The case called before me at a diet of debate on 10 and 11 November 2021, 23 February 2022, 28 April 2022 and 6 June 2022. The defender seeks to have the action dismissed in respect of the relevancy of the pursuers' pleadings concerning (i) the termination of the lease by the exercise of the break option and (ii) personal bar.. The pursuers take issue with the relevancy of the defenders' pleadings. I deal with each of these issues in turn.

Contractual terms

[6] As indicated above, the lease contained a break clause (clause 2)

> "….DECLARING that the Tenant shall be entitled to terminate this Lease as at the Twenty Fourth day of November, Two thousand and Fourteen and as at the Twenty Fourth day of November Two Thousand and Nineteen subject to providing the Landlord with not less than six months prior written notice to this effect;"

[7] The lease defined a tenant at clause 1.2(b) as follows:

> "The Tenant and its permitted assignees or sub-tenants…"

At clause 1.1.b the lease specifically dealt with the issue of who was the tenant in the case of a partnership as follows:

> "…in the case where the Tenant is a firm or partnership the obligation of the Tenant hereunder shall be binding jointly and severally on all persons who are or become partners of the firm at any time during the Period of this Lease,…"

[8] Clause 2 defined the grant of the lease to the tenant as follows:

> "In consideration of the rents and other prestations hereinafter specified by the Landlord hereby Lets to the Tenant (but excluding always assignees and sub-tenants

> legal or voluntary …in any form except where permitted in accordance with the terms of this lease) the Premises;"

[9] The lease included a prohibition on alienation at clause 3.24 in the following terms:

> "3.24(a) - Not at any time to assign, charge, sub-let or otherwise dispose of or for any other purpose in any way deal with the Tenant's interest in or part with or share possession or occupation of part only of the premises
>
> 3.24(b)(i) - Not to assign, charge, sub-let or otherwise in any way or for any purpose dispose of or deal with the Tenant's interest in or part with or share possession or occupation of the whole of the Premises without the prior written consent of the Landlord which consent shall not be unreasonably withheld subject always to paragraphs (ii), (iii) and (iv) if this sub-clause."

[10] The lease also provided at clause 5.6 that any notice under the lease "…shall be in writing".

Letter of termination

[11] The pursuers rely on a notice of termination dated 8 March 2019 (5/2 of process). The notice was issued by Grantsmith Law Practice. The heading of the letter was as follows:

> "Partners and Trustees for the firm of Graeme Murray & Co
> Craigellen Assets Limited
> Lease of 10-12 Chapel Street, Aberdeen AB10 1SP"

The first paragraph of the notice of termination correctly identifies the pursuers and defenders and the lease between them. The second and final paragraph is in the following terms:

> "Considering that the said Firm of Graeme Murray & Co ceased to trade with the event of the sequestration of Graeme Bruce Murray on 8th December 2016 and our client, Hingston's Law Limited, occupied the Premises in good faith, and to trade therefrom from and after that date, assuming that the same terms as the Lease were in effect, and that no formal agreement has been entered in to between you, the Landlord, and our said client to this effect, on behalf of and as instructed by our said client, we hereby serve notice terminating the Lease with effect from the 8th December 2019."

The document is signed by a director of Grantsmith Law Practice. Under the signature the following wording appears:

> "Grant Smith Law Practice Limited
> Agents for and on behalf of Hingston's Law Limited"

Termination of lease - order of contract issue and notice

[12] At debate the defender argued that the pursuers' case was doomed to fail. The case should be dismissed at debate. It relied on an invalid notice. The matter could be determined without proof. The termination notice relied on by the pursuers was invalid on the basis that it was not sufficient to convey the necessary information to the recipient ("the notice issue"). It was invalid as it did not sufficiently give notice in accordance with the requirements of the parties' contract ("the contract issue").

[13] It was submitted on behalf of the defender that the contract issue required to be determined as a prior and separate question. If the notice did not sufficiently give notice in terms of the parties' contract then the construction of the contract is irrelevant. How a reasonable recipient might have understood it is also irrelevant. Support for this proposition was found in *Batt Cables* v *Spencer Business Parks Ltd* 2010 SLT 860 (following the Inner House case of *Ben Cleuch Estates Ltd* v *Scottish Enterprise* 2008 SC 252). At paragraphs 26 and 27 Lord Hodge stated:

> "[26] Thirdly, before the court construes the meaning of the notice by use of the device of the reasonable person in the position of the contractually specified recipient, it must first carry out the test of which Lord Clyde spoke in *Mannai Investments*. If the notice fails that test because one or more of the contractual requirements for the exercise of the power have not been fulfilled, the court does not go on to apply the reasonable recipient test to construe the notice. That is because it is invalid: *Ben Cleuch* (Inner House) at p 268, para 64.
> [27] Thus, fourthly, the fact that a notice finds its way into the hands of the contractually specified recipient and a reasonable person in his shoes would readily appreciate that the sender of the notice intended to exercise the relevant contractual power is nihil ad rem if the notice itself is invalid. As Lord Macfadyen

> stated in delivering the judgment of the Inner House in *Ben Cleuch* (at p 268, para 64): 'Nothing turns in this case on the construction of the notice. It was invalid because it was not given to the landlord, but to a third party. The stage of considering how the notice would be understood by the recipient is not reached.'"

[14] In response it was submitted on behalf of the pursuers that the correct approach was to follow the more recent Inner House authority of *Hoe International Ltd* v *Andersen* 2017 SC 313. It was submitted that the authority considered a number of previous authorities. It focused on principles. One should concentrate on what matters rather than a mass of details. Strict compliance was not what the modern guidance said - it required to ask the question "was there prejudice?". At paragraph 27 Lord Drummond Young stated:

> "[27] As we have noted, two distinct issues may arise in relation to the giving of a contractual notice: first, whether the terms of the notice itself are sufficient to convey the necessary meaning to the recipient; and, secondly, whether the method of sending the notice is in accordance with the provisions of the parties' contract. Both of these issues arise in the present case. The first is the subject of the respondents' cross-appeal: whether the notice sent on behalf of the reclaimer contained all of the information required by cl 8.5 of the share purchase agreement. The second is the subject of the reclaiming motion: whether the notice was sent in the manner required by cl 19 of that agreement. We consider the law on each of these issues separately. Nevertheless, the general approach that has been taken in case law demonstrates that the questions are to some degree interrelated, and both turn on the approach that the courts take to general contractual interpretation. In general, it can be said that recent cases disclose reluctance to adopt an over-formal attitude, provided that the notice itself is sufficiently clear and is actually received by a responsible person."

It was submitted that *Hoe* had considered *Batt* and *Ben Cleuch* and was the start and end point. It addressed the notice issue prior to the contract issue. It stated in terms that the questions are to some degree interrelated. It identified that recent cases disclosed reluctance to adopt an over-formal attitude.

[15] I do not consider the case of *Hoe* to prevent an approach which deals with the contract issue first and thereafter the notice issue. It may depend on the nature of the criticisms made of any particular notice. This point was specifically considered by the Inner

House in *Our Generation* v *Aberdeen Council* 2019 SLT 1164 by the Lord President at paragraph 24 where he stated:

> "It is usually more convenient and logical to determine the formal validity of a notice first, before examining what the reasonable recipient would make of its content (*West Dunbartonshire Council* v *William Thompson and Son (Dumbarton) Ltd*, Lord Menzies, delivering the opinion of the court, at p.129 (p.11) para.22)."

[16] Given the circumstances of the current case it makes more sense to consider the contract issue ("formal validity") as the prior issue. In the event that the notice does not meet the requirements of formal validity there would be no need to consider the notice issue. The stage of considering how the notice would be understood by the recipient would not be reached.

Contract issue

Defender's submissions

[17] On behalf of the defender it was submitted that proper construction of the break clause in clause 2 required that it be given by "the Tenant". On the pursuers' pleadings it was incontrovertible that it was given by HLL. The pursuers expressly avoid averring who gave the notice. The notice relied on was the termination notice at 5/2 of process. It was issued by Grant Smith Law practice. In support of this the following points were highlighted:

a. The correspondence in the second paragraph refers to "…our client, Hingston's Law Limited…"

b. It mentions that no formal agreement had been entered into between the defender and "…our said client."

c. It specifically stated "…as instructed by our said client, we hereby serve notice terminating the Lease…"

d. Under the signature it stated "Grant Smith Law Practice Limited Agents for and on behalf of Hingston's Law Limited."

Counsel for the defenders developed his argument as follows: the pursuers do not aver that they (the pursuers) served the notice. HLL is a limited company. It is accordingly a separate legal person from its members, officers and employees. It is separate from the first pursuer as director and shareholder and the second and third pursuers as employees. Only HLL gave notice. HLL could not be considered "the Tenant" in terms of the lease. The pursuers specifically aver that there was no assignation of the pursuers' interest in the lease nor a sub-lease granted in favour of HLL. Thus, in terms of clause 1.1.2b of the lease HLL could not be considered the tenant. Any sub-lease or assignation would have required the consent of the defenders. This had not happened. There were no averments by the pursuer to this effect. At best, on the pursuers' averments, HLL had occupied and carried on business from the premises. This is not sufficient for it to become the tenant in terms of the lease. HLL was not a permitted occupier. Even if it was, the pursuers have no valid case for consent for occupation. Clause 3.24(b)(i) expressly prohibits such occupation without written permission. Accordingly, the notice had been given by a third party not by the Tenant.

[18] In addition, it was submitted that, in general, the more drastic the contractual consequences of a notice, the greater the need for strict compliance. Where a notice would effect a fundamental change in the parties' relationship (such as bringing a contract to an end) the greater the need for strict compliance with the agreed requirements. That was

necessary for certainty in commercial contracts. A break clause had the effect of terminating the lease between parties. It had a fundamental impact on their relationship.

[19] By way of authority in relation to the contract issue, the defender relied in particular on *Ben Cleuch Estates Limited* at paras 59-64, *Hexstone Holdings Ltd* v *AHC Westlink Ltd.* 2010 *L&TR 22* at paras 31-33, *Batt Cables PLC* v *Spencer Business Parks Ltd* 2010 SLT 860 at paras 22-27 and *Hoe International Ltd* v *Andersen* 2017 SC 313 at paras 16-17. In discussing the contract issue in *Hoe* break clauses were specifically considered as at the drastic end of the scale. They required a greater need for strict compliance. Reference was made to paragraph 34 where Lord Drummond Young stated:

> "In general, it may be said that the more drastic the consequences of a notice, the greater the need for strict compliance with what is prescribed in the contract. Thus a notice may bring about a fundamental alteration in the parties' legal relationship, as with a break clause in a lease, which brings the contract to an end, or an option to purchase. Notice of revocation of a contract also has major consequences, as (if well founded) it relieves the parties of future performance. Notice invoking the right of retention is a lesser remedy, as it does not purport to do more than suspend future performance. A range of less drastic notices are found: for example, a notice submitting a dispute to arbitration or adjudication. In the present case the notice in dispute is intimation of a pending claim by a third party. That can be regarded as an issue that is at the lower end of the scale of importance. The actual dispute is likely to be disposed of by litigation or arbitration, and the purpose of giving prior notice is to permit the defenders to decide whether they want to defend any claim made by Chambers against Speyside. For present purposes, we think it significant that the consequences of the notice in question fall at the less drastic end of the scale, with the result that there is no overwhelming argument in favour of rigid formality."

In summary, the defenders submitted that the current case concerned a break clause. This relieved parties of further performance. It was therefore at the more "drastic" end of the scale. It was specifically identified in *Hoe* as such. Accordingly, there was a greater need for strict compliance. The notice had not been given by the tenant. It had been given by a third party namely HLL. It therefore did not comply with a strict contractual requirement and was therefore invalid.

Pursuers' submissions

[20] On behalf of the pursuers it was submitted that there was a complex factual matrix. By the time the notice was issued the firm of Graeme Murray & Co had been dissolved. What comprised the tenant was fluid and subject to change from time to time. In the lease the pursuers were identified as three individuals in their capacity as partners and trustees. Clause 1.1 (6) does not extend the definition of tenant - it simply imposes joint and several liability on the current and future partners of the firm. There was a complex factual background. The case of *Hoe* was the start and end of the matter. Reference was made to paragraphs 32-35 where Lord Drummond Young set out the following:

> "[32] The interpretation of the contractual requirements for the sending of a valid notice must also be determined in accordance with the ordinary principles of contractual construction; what requires to be construed is a term of the contract itself rather than the notice sent under the contract. There is considerable case law in this area, and we were referred to a number of previous decisions, which were to varying effect. We do not think it necessary to consider those cases in detail. The traditional approach of Scots law is based on principle rather than analogy. We endorse such an approach, and we are accordingly of opinion that it is more important to determine the underlying principles that should govern the validity of contractual notices rather than the details of individual cases. In this connection we note that individual cases generally turn on the particular form of contract that is in issue; that is not a helpful guide to other forms of contract.
> [33] As a matter of principle, the crucial question is normally whether strict compliance is required with one or more requirements of the clause that empowers the sending of a notice. This is sometimes phrased as involving the question whether a contractual requirement is mandatory or directory (see, e.g. Yates Building Co Ltd v RJ Pulleyn & Sons (York) Ltd). We think, however, that the more helpful formulation is whether strict compliance is required. In determining that question we are of opinion that the ordinary principles for the construction of contractual contracts are applicable: regard must be had to the terms of the relevant clause, which must be construed in the context of the document where it is found and in the general contractual context where the parties are operating; the requirement must be given a purposive construction; and where appropriate commercial common sense should be applied.
> [34] In this area the need for a purposive construction appears to us to be particularly important. Such an approach requires the court to focus on the core obligation or requirement that is at issue, concentrating on what really matters rather

> than being preoccupied with a morass of detail that is of at most peripheral importance to the critical question. In relation to the validity of a contractual notice, two distinct purposes are potentially relevant: the purpose of the notice itself and the purpose of any particular requirement that has not been complied with. The purposes of contractual notices vary greatly. In general, it may be said that the more drastic the consequences of a notice, the greater the need for strict compliance with what is prescribed in the contract. Thus a notice may bring about a fundamental alteration in the parties' legal relationship, as with a break clause in a lease, which brings the contract to an end, or an option to purchase. Notice of revocation of a contract also has major consequences, as (if well founded) it relieves the parties of future performance. Notice invoking the right of retention is a lesser remedy, as it does not purport to do more than suspend future performance. A range of less drastic notices are found: for example, a notice submitting a dispute to arbitration or adjudication. In the present case the notice in dispute is intimation of a pending claim by a third party. That can be regarded as an issue that is at the lower end of the scale of importance. The actual dispute is likely to be disposed of by litigation or arbitration, and the purpose of giving prior notice is to permit the defenders to decide whether they want to defend any claim made by Chambers against Speyside. For present purposes, we think it significant that the consequences of the notice in question fall at the less drastic end of the scale, with the result that there is no overwhelming argument in favour of rigid formality.
>
> [35] The purpose of particular requirements can likewise vary greatly, and their importance will vary accordingly. It is obviously of the utmost importance that any notice should arrive in the hands of someone with authority to act on behalf of the recipient; otherwise the purpose of the notice is frustrated. Provided that the notice arrives in the hands of such a person, however, other requirements may not be important, especially if they are of an essentially formal nature. The fundamental question is perhaps: if a particular formal requirement is not complied with, is the would-be recipient prejudiced, in a practical sense? If there is in fact no prejudice, the court should in our opinion be slow to hold that failure to comply with a formal requirement is fatal. That is so even in cases where the purpose of the notice is drastic, as with a notice invoking a break clause or an option to purchase. If there is no prejudice, insisting on strict compliance for its own sake serves no useful purpose."

[21] It was submitted that in this case the principles set out in *Hoe* above should be applied here. A purposive approach was required (paragraph 34). In the current case there was no prejudice to the defender (paragraph 35). If there was no prejudice then insisting on strict compliance for its own sake served no useful purpose (paragraph 35). Rather than strict compliance the court should focus on what matters rather than a morass of details (paragraph 34). There is a high degree of correlation between the notice issue and the

contract issue. The defender understood what the termination notice meant. They took steps consistent with the notice being terminated. The defender understood the effect of the notice and organised their affairs accordingly (eg it is averred the defenders negotiated for the lease to continue and they showed the property to a prospective tenant). There was a complex factual matrix surrounding the fluidity of the position regarding the pursuers, the terms of the notice and the communications surrounding the notice. The notice identified the lease and the parties to the lease. As said, the defender understood the purpose of the notice. They were simply seeking to exploit a situation that had arisen. Evidence required to be led. Accordingly, the matter should proceed to a proof before answer.

Contract issue - discussion and decision

[22] The issue before me is neatly summarised at paragraph 33 of *Hoe* in that the crucial question is whether strict compliance is required with one or more requirements that empowers the sending of the notice.

> "As a matter of principle the crucial question is normally whether strict compliance is required with one or more requirements of the clause that requires the empowers the sending of a notice…In determining that question we are of the opinion that ordinary principles for the construction of contractual contracts are applicable; regard must be had to the terms of the relevant clause, which must be construed in the context of the document where it is found and in the general contractual context where the parties are operating; the requirement must be given a purposive construction; and where appropriate commercial common sense should be applied."

In determining that question the ordinary principles for the construction of contractual contracts are applicable. Regard must be had to the terms of the relevant clause which must be construed in the context of the document where it is found and the general contractual context. Where appropriate a purposive construction should be adopted and a common sense applied.

[23] The notice which is under discussion in the present case relates to a break clause. The effect of a valid notice would have been to bring to an end the parties relationship. It brings about a fundamental change in the parties' relationship. A break clause in a lease is specifically mentioned in *Hoe* as an example of a notice with more "drastic" consequence. As stated at paragraph 34, "In general it may be said that the more drastic the consequences of a notice, the greater the need for strict compliance with what is prescribed in the contract." Accordingly, the nature of the notice in this case requires a greater need for strict compliance.

[24] In this case clause 2 of the lease requires that notice of exercise of the break option is given by "the Tenant". The notice that is relied upon clearly states that it is given on behalf of HLL. HLL was not the tenant at the time. It did not become the Tenant. The notice indicates underneath the agent's signature that the solicitors are "Agents for and behalf of Hingston's Law Limited". The body of the correspondence (as set out above) contains the phrase "…our client Hingston's Law limited". Although it refers to the lease between the pursuers and the defender the notice is clearly correspondence on behalf of HLL. Accordingly, the notice was not issued by the tenant of the lease. It was issued on behalf of HLL. It is admitted by the pursuers that there was no assignation of the pursuers' interest in the lease to Hingston's Law Limited. It is further admitted by the pursuers that there was no sublease granted by the pursuers in favour of Hingston's Law Limited. The pursuers do not assert a right of assignation or sublease. This is expressly admitted in the pursuers' pleadings in article 4 of condescendence

[25] The issue in the current case surrounds whether the requirement that the notice is issued by the tenant requires strict compliance. There is no direct authority on this point. However, there is considerable authority on issues surrounding the identity of the recipient

and whether it has been properly received by them. For instance, in *Ben Cleuch Estates Ltd* at para 60 Lord Macfadyen stated:

> "[60] The matter turns, in our opinion, on the proper application of Clause FOURTH (B). That clause confers on the tenants an option to bring the lease to a premature end after 14 instead of 25 years. It provides that, in order to exercise that option, the tenants must 'give to the Landlords' at least one year's written notice of termination. It was accepted on the defenders' behalf, rightly in our opinion, that for a break notice to be effective, it required to comply with that requirement (Muir Construction; Capital Land Holdings; Scrabster Harbour Trust: we note that, in Mannai Investment, pp 781B–C, Lord Clyde identified the requirement in that case that the notice had to be served on the landlord or its solicitors as part of the substance of the power to serve the break notice). The dispute was as to whether what occurred constituted such compliance. In our opinion, that dispute can be resolved very shortly: a notice addressed to a party other than the landlord and sent to the registered office of that other party cannot be regarded as a notice given to the landlord."

Applying the same logic to the current case, a notice sent on behalf of a party other than the Tenant cannot be regarded as a notice from the Tenant.

[26] Was the notice given in terms of the contractual requirements of the lease? The simple answer is that it was not. It was not given by the pursuers (tenants). It was given by a firm of solicitors on behalf of a limited company (HLL) who were not a party to the lease. The lease is between two specified parties who had agreed contractual terms in a commercial matter. In order for notices to have certainty in an area which brings about a fundamental change in the parties' relationship, strict compliance requires that the notice requires to be sent on or on behalf of the tenant. It might simply be said what does it matter if a third party sends such a notice? Arguably, it is of little or no relevance whatsoever. What matters is the parties' contractual relationship and the steps taken in accordance with the contractual terms. If notices from third parties who were not party to the contact were to be considered relevant when considering break clauses then this leads to a considerable degree of ambiguity and uncertainty in the commercial world. A contracting party in

receipt of such a notice would be left wondering whether this could have any impact on their contractual relationship. That is an absurd result. Parties had expressly contractually agreed how a break clause was to be given effect. It was for the pursuers as the Tenant to properly give notice in terms of clause 2. It was a simple step for them to take. They did not do so.

[27] Accordingly, in assessing the contract issue I consider the Notice to be invalid. It was not sent by the Tenant as required. The Notice from HLL does not exercise the break clause between the parties to the lease. This is not a matter that requires evidence to be led. I will accordingly sustain plea-in-law 2 for the defenders and dismiss crave 1 for the pursuers.

Notice issue

[28] Given my decision in relation to the contract issue there is no necessity to consider the notice issue. However, having had lengthy discussion at debate it is useful to comment further briefly.

Defender's submissions

[29] It was submitted on behalf of the defender that the notice would have left a reasonable recipient in substantial doubt as to whether the notice conveyed the in formation required by the break clause and whether the event terminating the lease had occurred. The submission was based in three parts;

1. the notice was not from the tenant but from HLL;
2. the notice made no mention or explanation of the break clause or option.

3. the date given for the termination of the lease was 8 December 2019 rather than 24 November 2019.

Accordingly, a reasonable recipient would have been left in doubt as to whether the notice had been given on behalf of the tenant, whether it was in exercise of an option to terminate and whether it was under the lease at all given the terms of the notice by HLL. The pursuers' case must fail on this basis.

Pursuers' submissions

[30] On behalf of the pursuers' it was submitted that the construction of the notice required to be approached objectively - the issue is how a reasonable recipient would have understood the notice. In addressing this, the notice requires to be taken it its objective context. The purpose of the notice was important. A break notice does not fall into a unique category. Such notices fall within a general class of unilateral notices served under contractual rights reserved. Reference was made to *Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd* 1997 AC 749 and *Hoe*. The case of *Hoe* adopted the approach adopted in *Mannai* (which involved consideration of whether a notice given by a tenant pursuant to a break clause in a lease was effective). At paragraph 28 Lord Drummond-Young stated:

> "[28] The meaning of a contractual notice is governed by the general principles that govern construction of commercial contracts. This is clear from the majority opinions in *Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd*. The leading speech for the majority was delivered by Lord Steyn, who set out his reasoning in a series of propositions (pp 767D–769B). First, a distinction was drawn between cases that turn on the meaning conveyed by the notice and the contractual requirements of sending a valid notice (the distinction drawn above at para 16). *Mannai Investment* itself did not involve 'a contractual right to determine which prescribes as an indispensable condition for its effective exercise that the notice must contain specific information'; in other words it fell into the first category rather than the second. Secondly, in relation to the first category, the question was not how the recipient understood the notices. The construction of the notices had to be approached objectively, and the issue was how a reasonable recipient would have understood

> the notices. In addressing this question, the notices were to be construed taking into account the relevant objective context. As authority for such an approach Lord Steyn cited Reardon *Smith Line Ltd* v *Hansen-Tangen*, a case in which Lord Wilberforce developed the general approach to contractual interpretation that he had set out in Prenn v Simmonds and which was continued and further developed by Lord Clarke in *Rainy Sky*.
> [29] Thirdly, the purpose of a contractual notice is important. *Mannai Investment* involved a break clause, and a notice under such a clause served one purpose only: to inform the landlord that the tenant had decided to determine the lease in accordance with the right reserved. That purpose was relevant to the construction and validity of the notice. Fourthly, there was no justification for placing notices under break clauses in leases in a unique category. Such notices belonged to the general class of unilateral notices served under contractual rights reserved. The foregoing tests were then applied to the facts of the case: a reasonable recipient of the notice had to be credited with knowledge of the terms of the lease, and on that *327 basis a mistake in the notice in specifying the anniversary when the break was exercisable would not have misled the recipient, who would have understood what the notice was intended to do."

[31] It was highlighted that the defender specifically avers in answer 9 "In all the circumstances, David Henderson, not unreasonably, thought the notice to be valid." Accordingly, there was a factual issue to be addressed which could only be dealt with at a proof before answer.

Discussion

[32] This point is taken at a diet of debate. The issue surrounds how a reasonable recipient would have understood the notice. This is a matter which is extremely sensitive to the facts and circumstances of the case. It is not asserted by the defenders that there is no room for doubt given the three areas relied upon by them ("or, at the very least , would have had substantial doubt…"). There is a considerable factual background surrounding the operation of the lease, the parties, the involvement of HLL, the factual background and the communications between parties. The pursuer avers that the director of the defenders thought it was a valid notice of termination and makes averments regarding specific

conduct consistent with this position. To ascertain whether a "reasonable recipient" would have understood the notice requires to be placed in context. It would be wrong to reach a concluded view on this point in the absence of evidence as to that context.

[33] Given the above, I would have taken the view that the notice issue would have required evidence to be led and, but for my decision on the contract issue, I would have fixed a proof before answer on this point.

Personal bar

[34] In addition, the defenders attacked the pursuers' pleadings in so far as they related to personal bar. The defender asserts that they are not personally barred from asserting that the notice was invalid and that the pursuers' pleadings are inadequate to properly set up a case of personal bar.

[35] There was no significant difference between parties as to the applicable law. The two primary elements of personal bar were inconsistency and unfairness to the obligant (Gloag and Henderson "*The Law of Scotland*" 14th edition 3.05-07). Both accepted the law as set out by Reid and Blackie "*Personal Bar*" Chapter 2 in relation to the requirements for inconsistency and unfairness. These are set out in a useful table at paragraph 2-03 as follows:

> Inconsistency
>
> The table sets out that <u>all five elements</u> of inconsistency <u>must be found</u> in all cases as follows (my emphasis):
>
> 1. A person claims to have a right, the exercise of which the obligant alleges is barred.

2. To the obligant's knowledge the rightholder behaved in a way which is inconsistent with the exercise of the right. Inconsistency may take the form of words, actions or inactions.
3. At the time of so behaving the rightholder knew about the right
4. Nonetheless the rightholder now seeks to exercise the right
5. Its exercise will affect the obligant.

Unfairness

The table sets out that any of the following is an indicator of unfairness (my emphasis):

1. The rightholder's conduct was blameworthy
2. The obligant reasonably believed that the right would not be exercised,
3. As a result of that belief the obligant acted, or omitted to act in a way which is proportionate
4. The exercise of the right would cause prejudice to the obligant which would not occur but for the inconsistent conduct.
5. The value of the right barred is proportionate to the inconsistency.

Inconsistency: inconsistent behaviour - defender's submissions

[36] In relation to inconsistency the defenders submitted that elements 2 and 3 above (inconsistent behaviour and rightholder knew about the right) were in issue. In relation to element 2 issue was taken with the pursuers' pleadings. In particular, it was submitted that the positive conduct averred related only to 2 occasions. This amounted to a telephone call on 14 March 2019 involving Mr Henderson and the first pursuer acknowledging the

termination of the lease, thanking the pursuers for being a good tenant and enquiring about access for a potential tenant to view the property. The second occasion involved an email on 15 March 2019 by Mr Henderson as to whether the first pursuer would be prepared to enter the new lease on reduced rent and improved terms. If not, the defender would arrange for a schedule of dilapidation under the lease. At no point did the representative of the defender David Henderson make an express representation that the notice was valid or notwithstanding the notice was invalid that he accepted it as being valid.

[37] There were no averments that David Henderson made an express representation that the notice was valid or any averments from which it could be inferred that there was any such representation. However, defender's counsel conceded (correctly in my view) that there was limited positive conduct from which an implied representation of validity might be drawn if taken in isolation. In addition, it was submitted that representation of the notice's validity is the only aspect founded for personal bar. As it was opinion, it was unable to found a case for personal bar (reference was made to, inter alia, *Cantors Properties (Scotland) Ltd* v *Swears & Wells Ltd* 1978 SC 310. Accordingly, the pursuers' case for personal bar was irrelevant.

Inconsistency: inconsistent behaviour - pursuers' submissions

[38] In response the pursuers highlighted with reference to their pleadings the following:

- The defender had acknowledged the notice of termination was valid
- The defender acknowledged the notice of termination terminated the lease
- The defender thanked the pursuers for being good tenants during the term of the lease

- The defender enquired whether access could be arranged for a potential tenant to view premises
- The defender arranged for the potential tenant to view the premises
- The defender asked the pursuer to renegotiate the contract prior to expiry. This proposed the potential reduction of rent and other incentives.
- The defender confirmed that, in the event that the contract could not be renegotiated, they would prepare a schedule of dilapidations
- The defenders conduct was inconsistent with any intention that the pursuers remain in occupation for a further 5 year.

It was submitted that the above conduct was entirely inconsistent with the lease remaining in force to the termination date.

Inconsistency inconsistent behaviour - discussion

[39] The discussion in Reid and Blackie specifically set out that inconsistency may take the form of words, actions or inactions (eg para 2-11). The Stair Memorial Encyclopaedia Volume 16 at paragraph 1612 states that "representation may be made in various ways". The pursuers rely on two aspects of personal bar 1) that the notice of termination was valid and 2) in any event that the lease would terminate on the break date. The defenders take issue with the assertion that the notice to termination was valid on the basis that it was a misleading statement of law and therefore of opinion. The pursuers argue that there is service of a notice and averments of clear factual representations that the lease will terminate.

[40] The pursuers case of personal bar is said to be the defenders behaved in a way which was inconsistent with the right in question, namely the right to insist that the

pursuers remain in occupation until the termination date within the lease. This is subtly different from an assertion that the defender is asserting that the notice of termination was valid which might be a representation of opinion. The actions averred by the pursuer concerning the defender's representatives conduct includes renegotiating the lease, offering to prepare a schedule of dilapidation and asking for arrangements to show a prospective new tenant around the leased premises. Looking at the current case it is clear that the assessment of conduct in terms of the behaviour of the rightholder is one which is fact sensitive. On the face of it the averments set out by the pursuer on the face of it set up a basis for leading evidence that the defenders acted in a way which was inconsistent with the lease terminating in November 2019. In addition, it is conceded by the defender that there might be scope for arguing limited positive conduct and a short period of inaction. Taking the pursuers' pleadings at their highest the matter requires evidence to be led.

[41] Accordingly, in relation to the element of inconsistent conduct, a proof before answer is required.

Inconsistency: knowledge of right - defender's submissions

[42] On behalf of the defender it was submitted that a rightholder must have known of the right barred. A party cannot be barred from asserting a right of which it was innocent. It requires, inter alia, that the person barred must have understood the legal implications as they affected that person. This could not be inferred and this was especially so where the rightholder was disadvantaged relative to the rightholder. In the current case, the director of the defender (Mr Henderson) was not legally qualified and the notice had been served by specialist solicitors. In the circumstances the defender's director reasonably thought the notice to be valid. Reference was made to Reid and Blackie *Personal Bar* at

Chapter 2 paragraphs 28-37, *Lauder* v *Millars* (1859) 21 D 1353 at 1357, *Porteous's Trustees* v *Porteous* 1991 SLT 129 at 132 and *Strathclyde RC* v *Persimmons Homes (Scotland) Ltd* 1996 SLT 176 at 180.

Inconsistency: knowledge of right - pursuers' submissions

[43] In response, on behalf of the pursuers it was submitted that the defender is deemed to have had the required knowledge at the material time. The defender was a party to the lease in question. They had constructive knowledge of the terms of the lease and their rights in terms of the lease. The defenders aver that David Henderson was a director of the defender and, as such was aware of the terms of the lease. It is averred that he was a property manager with 15 years' experience in the private sector of commercial leasing. He was in a position to properly consider the notice against the backdrop of the terms of the lease. It could not be said he was ignorant as to the rights available. Reid and Blackie at paragraphs 2-30 - 2-31 sets out that a degree of knowledge may come from a course of dealing between the parties particularly where the extent of their rights were a matter of express negotiation. Knowledge might be constructive in the sense that the situation may have been such to put the rightholder on their enquiry. The requisite knowledge is normally presumed except in exceptional circumstances (Gloag and Henderson, *The Law of Scotland* 14th edition 3.06). The circumstances here were not exceptional as the defender was a commercial landlord, the lease was a negotiated lease and the Director dealing with it had experience in the commercial lease sector. Evidence required to be led.

Inconsistency: knowledge of right - discussion

[44] Again, this is matter which the court will be slow to determine without evidence being led. The issues surrounding knowledge and deemed knowledge are fact-specific and, in my opinion, can only be resolved at proof and facts established. In particular, whether the level of knowledge can be presumed requires evidence to be led on the precise factual background relating to the circumstances between parties. Accordingly, it is appropriate for evidence on this matter to be led.

Unfairness

[45] It was a matter of agreement that only one of the elements highlighted in Reid and Blackie was required to demonstrate unfairness. The defenders took issue with all 5 requirements. The pursuers submitted that elements 2-5 (they did not rely on element 1) were present and required proof. I will deal with each element before the court in turn. However, it should be noted at the outset that the textbook makes it clear that "the measure of unfairness is highly dependent upon context and the relative importance given to each of the five listed factors varies according to circumstances."

[46] "The pursuers reasonably believed that the right would not be exercised". The defender submitted that reasonable belief was either absent or weak and was not expressly founded upon. The defender had not indicated he had sought legal advice on the notice. The pursuers had not inquired if he had done so. In response it was submitted on behalf of the pursuers that although not expressly averred this was a product of the averments in article 6. The article includes averments setting out:

- A director of the defender acknowledged the lease was terminated
- He thanked the first pursuer for being a good tenant and for his conduct during the lease
- He advised he had a potential new tenant for the property
- He enquired whether access could be made available to let the potential new tenant view the premises
- Access was so arranged for 14 March 2019
- On 15 March 2019 the director sought to regear the terms of the lease through to expiry - if that was of interest then he would have been prepared to reduce the rent and provide other incentives
- The director indicated that if that was not acceptable he would continue with preparation work concerning the serving of the terminal dilapidations

Against this background, the belief was entirely reasonable.

[47] While it would have been more accurate for the pursuers to have made an averment specifically stating that the pursuers reasonably believed that the right would not be exercised and the precise basis for it, I consider that the above averments are potentially capable as being read in such a way. The pursuers make averments from which it can be inferred that their position is that they reasonably believed the right would not be exercised. They are capable of providing a basis to lead evidence on this matter. At paragraph 3.07 of Gloag and Henderson it states that the unfairness requirement may be readily satisfied if the conduct upon which bar is based is clearly inconsistent with the assertion of the right in question. It goes on to state "since unfairness depends on context, there is no uniform test which can be applied in all the multifarious circumstances in which bar may arise". The averments made here may be said to highlight conduct inconsistent with the lease not

terminating at the break date on 24 November 2019. Again, I consider this is a matter which cannot be determined until after evidence is led.

[48] "As a result of that belief the pursuers acted, or omitted to act, in a way which was proportionate". In article 7 of condescendence the pursuers aver "As a consequence of having terminated the aforesaid lease, the first pursuer arranged for HLL to conclude missives to lease new premises". It is not averred that the pursuers entered a new lease. Nor that HLL did so as an agent or trustee for the pursuers. The defenders position was that this was not an act of the pursuers but an act of HLL. In any event, this was a disproportionate act without checking the defender had been legally advised on the notice and termination. The pursuer sought to suggest that the averments are that "the pursuers secured a new lease to operate from" (although what is averred relates to the "first pursuer" not the "pursuers"). The absence of serving a fresh notice was proportionate given the defender's treatment of the original notice. Given the above, it is clear that the relevant averments relate to HLL. The use of the wording "first pursuer" illustrates that this was not an act of the pursuers but an act of the first pursuer in his capacity as director of HLL. Put simply, no real act of the pursuers is relied upon (although an act of the first pursuer is). Accordingly, I am doubtful whether there are sufficient averments in respect of setting this head up as an element of unfairness.

[49] "The exercise of the right would cause prejudice to the obligant which would not occur but for the inconsistent conduct". The pursuers aver in article 9:

> "The new lease entered into by HLL is for a five year term at an annual rent of £18,000. Having entered this new lease, this entity no longer required to occupy 10-12 Chapel Street. It was no longer in a position to pay, as it had been doing, the rent and other charges due in respect of 10-12 Chapel Street. As a consequence the pursuers have been deprived of the opportunity of having this entity pay the rent and other charges they would otherwise have to pay….Further the pursuers were deprived of the opportunity of serving a fresh notice of termination."

[50] It was submitted on behalf of the defender that any prejudice to HLL being a person separate to the pursuers is irrelevant. The company's loss is not its members or officers loss. In addition, it was submitted that there were no averments to suggest that had there only been silence in response to the notice the pursuers would have then served a further notice.

[51] On behalf of the pursuer it was submitted that averments existed concerning the mechanism by which rent under the lease was paid. HLL was unable to fund rent on two properties. The result of HLL entering a new lease caused financial difficulty for the pursuers as payments to the rent under the original lease would no longer be made. The pursuers are accordingly prejudiced.

[52] I am not immediately persuaded that the loss of the opportunity of serving a fresh notice can be said to cause prejudice to the pursuers. Had the defenders not done anything then the pursuers would have been left in exactly the same position regarding the notice. However, taking the pursuers' pleadings at their highest there are sufficient pleadings to set up a case of prejudice to the pursuers. While care must be taken to separate out the pursuers and HLL as separate legal entities, the averments set up a basis that the pursuers (not HLL) lost a vehicle by which payments to the lease were made as a matter of fact. The averments can be read as the pursuers were therefore prejudiced by the loss of this vehicle. Accordingly, this matter requires evidence to be led.

[53] "The value of the right barred is proportionate to the inconsistency". The defender submitted that the pursuer did not found on this as a ground of unfairness. Where the right allegedly barred was of great value then the personal bar was not readily imposed (Reid and Blackie *Personal Bar* 2-60 - 2-61, *William Grant & Sons* v *Glen Catrine Bonded Warehouse Ltd No.3* 2001 SC 901). In response the pursuers submitted that a new lease had been entered

into as a consequence of the defenders representation that the lease would end. It was proportionate that the defender should be barred. The right involved is valuable as the lease has five years left to run after 24 November 2019. Given that, clear and specific averments concerning proportionality are required in circumstances where personal bar would not be readily imposed. These are not immediately identified. Accordingly, I am doubtful there are sufficient averments in respect of setting this head up as an element of unfairness.

[54] In summary, regarding personal bar, taking the pursuers' averments at their highest, I find that there are sufficient pleadings to merit a proof before answer into inconsistency. In addition, in relation to unfairness, I find that there are sufficient pleadings to merit a proof before answer in relation to two elements; namely a) that the pursuer reasonably believed the right would not be exercised and b) prejudice. While I have doubts about the other two 2 elements of unfairness it is appropriate not to exclude these from a proof before answer given there would be no real saving in court time.

Pursuer's preliminary please re relevance

[55] In addition to the above, the pursuers initially sought to attack certain averments of the defenders in relation to specification and relevancy. However, as I understood the position at debate, these were not forcibly advanced and there was a general acceptance that they might be relevant to personal bar. In any event, a close reading of them makes the points more appropriate to be dealt with at proof before answer. They are clearly matters relevant to the issue of personal bar and the issues previously discussed in this opinion. Accordingly, I make no deletions to the defender's pleadings.

In summary

[56] Accordingly, I will sustain plea-in-law 2 for the defender in so far as it relates to invalidity of the notice. I will dismiss crave 1 for the pursuers and repel plea-in-law 1 for the pursuers. Thereafter I will fix a proof before answer on personal bar and other remaining matters.

[57] I was not addressed on the subject of expenses. I will reserve that matter meantime. I will fix a case management conference at a date to be hereinafter assigned.