Scottish Courts

OUTER HOUSE, COURT OF SESSION

[2014] CSOH 137

CA148/12

OPINION OF LORD TYRE

In the cause

@SIPP (PENSION TRUSTEES) LIMITED

Pursuer;

against

INSIGHT TRAVEL SERVICES LIMITED

Defender:

Pursuer: Reid QC, Brown; McClure Naismith LLP

Defender: Sandison QC; Brodies LLP

4 September 2014

Introduction

[1] The pursuer is the proprietor of a commercial building known as Gareloch House, Port Glasgow, having acquired it in 2007. The defender was formerly the tenant of the building under a lease that was granted by the pursuer's predecessor in 2005, although the defender had been in occupation of the subjects under leases which had subsisted continuously since 1988. The 2005 lease was granted for a period of five years to 31 December 2009 and was renewed by tacit relocation until it came to an end on 31 May 2012, when the defender gave up possession. The pursuer avers that at the date of termination of the lease the subjects were not in good and substantial repair. The parties are in dispute as to the nature and extent of the tenant's obligations in terms of the lease. The case came before me principally for debate of two issues of interpretation.

[2] The first issue is whether, on a proper construction of the lease, the defender's obligation at termination is limited to putting the premises into the condition in which they were accepted by it at the commencement of the lease.

[3] The second issue is whether, on a proper construction of the lease, the pursuer is entitled to payment of a sum equal to the cost of putting the premises into the relevant state of repair, regardless of whether it actually intends to carry out any such work.

[4] The defender raised a number of other issues concerning the relevancy and specification of aspects of the pursuer's claim. With one exception, the pursuer's response was to invite me to issue my decision on the two principal issues debated, and to allow the pursuer time to consider whether, in the light of that decision, amendment was necessary with regard to any or all of the aspects challenged. I shall accede to that invitation. The exception was a challenge by the defender to the pursuer's claim for interest at the judicial rate from

31 May 2012 until payment. I understood senior counsel for the pursuer to concede that the pursuer was entitled only to interest at the rate specified in the lease, both pre-and post-decree.

The relevant provisions of the lease

[5] The tenant's obligations are set out in part III of a schedule annexed to the lease. So far as material, they include the following:

"(Three)

1. To accept the leased subjects in their present condition and at their own cost and expense to repair and keep in good and substantial repair and maintained, paved, heated, aired and cleansed in every respect all to the satisfaction of the Landlord and to replace or renew or rebuild whenever necessary the leased subjects and all additions thereto and all drains, soil and other pipes, sewers, sanitary and water apparatus, glass, pavings, access roads, (other than public roads serving the leased Subjects) parking areas, walls, fences, railings, vaults, pavement lights, landscaped areas and parts, pertinents and others therein and thereon in at least as good condition as they are accepted by the Tenant all to the satisfaction of the Landlord and that regardless of the age or state of dilapidation of the buildings or others for the time being comprised in the leased subjects: Declaring however that there shall be excepted from the Tenant's liability under this and the two following Clauses works for the repair of damage to the extent the reinstatement of the same is the Landlord's responsibility under Clause 5 (One)(a) of the foregoing Lease.

2. Without prejudice to the foregoing provisions of this Clause, to keep all lighting, heating, ventilation, security and drainage systems, all water supply, gas and other installations, all fire fighting equipment and all other machinery in or serving the leased subjects (including, without prejudice to the foregoing generality, electric wiring, gas and oil and other necessary pipes) in good working order, repair or condition to the satisfaction of the Landlord and, from time to time, when requisite or when reasonably required by the Landlord, to replace the same or any of them by suitable articles or equipment of similar and modern kind, all to the satisfaction of the Landlord.

…

(Seven) At the expiry or sooner termination of the foregoing Lease and subject to the Tenant carrying out, to the satisfaction of the Landlord, all restoration works called for by the Landlord in terms of Clause (Twelve) of this Part of this Schedule quietly and without any warning away or other process of law notwithstanding any law or practice to the contrary to surrender to the Landlord the leased subjects together with all additions and improvements made thereto and all fixtures (other than trade or tenants' fixtures affixed by the Tenant or any sub-tenant which shall be removed by the Tenant) in or upon the leased subjects or which during the currency of the foregoing lease may have been affixed or fastened to or upon the same that in such state and condition as shall in all respects be consistent with a full and due performance by the Tenant of the obligations herein contained. Without prejudice to the foregoing generality at his own cost and expense to repair and make good to the satisfaction of the Landlord all damage including damage to paint work caused by the removal of trade or tenant's fixtures affixed to the leased subjects by the tenant or any sub-tenant: Provided Always that if the Landlord shall so desire at the expiry or sooner termination of the foregoing Lease they may call upon the Tenant, by notice in writing (in which event the Tenant shall be bound), to pay to the Landlord at the determination date (with interest thereon as provided in Clause (One) (b) hereof), a sum equal to the amount required to put the leased subjects into good and substantial repair and in good decorative condition in accordance with the obligations and conditions on the part of the Tenant herein contained in lieu of requiring the Tenant himself to carry out the work."

The pursuer's claim and the defender's response

[6] The pursuer has produced a schedule of dilapidations listing the works which it considers are required to put the subjects into good and substantial repair and good decorative condition. The total estimated cost of these works, inclusive of professional fees, is £1,051,086.25 plus VAT. The pursuer claims to be entitled, in terms of the proviso at the end of clause seven above, to payment of this sum. The defender avers that if it had carried out works which it accepts ought to have been carried out before the termination date, the capital value of the subjects would have increased by £75,000, and that, even if it had carried out all of the works in the schedule of dilapidations, the capital value would only have increased by £175,000. The defender avers that no reasonable landlord would carry out these works and that it is believed and averred that the pursuer does not intend to do so. The pursuer's claim should accordingly be quantified by reference to diminution in capital value and not the cost of carrying out the works. I understand that, in financial terms, the second of the two issues identified above accounts for most of the difference between the parties; the first issue gives rise to a relatively modest difference of around £8,000.

The first issue: relevance of condition at time of acceptance

Argument for pursuer (landlord)

[7] The lease fell to be interpreted in accordance with the modern approach to construction of commercial contracts. The test was what the reasonable objective person, aware of the context, would have understood the parties to the lease to have meant by the language they used (*Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900, Lord Clarke of Stone-cum-Ebony at paragraph 14). The only relevant aspect of the factual matrix was that the lease was the last in a line dating back to 1988. It required to be read as a whole and content given, so far as possible, to all of its provisions. As the exercise depended upon the words used in a particular lease, analysis in other cases might be of little assistance. Clause three (b) was unambiguous: it imposed an objective standard – good working order, repair or condition – but with an ostensibly subjective qualification that the condition must be to the landlord's satisfaction, although there was an implied obligation of reasonableness on the part of the landlord. There was no reference in this sub-clause to actual condition at the date of commencement of the lease and nothing to tie the repairing obligation to such condition. Clause three (a) was more ambiguous. The reference to the subjects being replaced, renewed or rebuilt in at least as good a condition as they were accepted did not sit easily with the remainder of the clause which imposed clear and familiar obligations to repair and to keep in good and substantial repair and maintained etc in every respect to the landlord's satisfaction. All of the other elements of the clause, however, were internally consistent with one another, with clause three (b), and with other clauses in the lease. The words "regardless of the age or state of dilapidation…" connoted, in isolation, an express disregard of the condition of the subjects at the commencement date and had the effect of making the tenant liable for works which would be extraordinary repairs according to Scots common law. Inclusion of the words "in at least as good a condition as they are accepted by the Tenant" did not compel a different conclusion. If they connoted an obligation only to keep the subjects in their state of repair at commencement of the lease, the words "good and substantial repair" were rendered otiose. There would be no purpose in requiring works to be done to the landlord's satisfaction. Weight had to be placed on the order of words used: the clause contained two separate obligations: (i) to repair and keep in good and substantial repair; and (ii) to replace or renew or rebuild, with different trigger events. The words "in at least as good condition…" where they appeared for the second time were sandwiched between two conditions which governed only the second obligation, indicating that they too applied solely to that obligation. Only by construing the clause in this way could all of the words be given content and meaning. The terms of clause seven suggested that there could be an obligation to put the subjects into good and substantial repair at termination even if they were not in that condition at commencement. If the parties had intended to use the condition of the subjects at commencement as the benchmark, one would have expected them to provide in the lease for that condition to be recorded in a schedule, yet no such provision had been made. The pursuer's construction, derived from analysis of the clause, was also the more commercially sensible because it avoided the adoption of different standards for different parts of the building for no apparent

commercial reason, and explained the absence of a schedule of condition. It provided a practical test for surveyors and minimised subjective assessment of hypotheses.

[8] In so far as it had been held in some of the older Scottish case law (e.g. *Napier* v *Ferrier* (1847) 9D 1354) that an obligation to keep subjects in good and substantial repair did not connote an obligation to put them into that condition, those authorities required to be reconsidered in the light of the judgment of the Supreme Court in *L Batley Pet Products Ltd* v *North Lanarkshire Council* [2014] UKSC 27. The *Batley* judgment was consistent with two decisions by Lord Penrose in *Taylor Woodrow Property Co* v *Strathclyde Regional Council*, 15 December 1995, unreported, and *Lowe* v *Quayle Munro Ltd* 1997 SC 346, but certain observations by Lord Hamilton in *McCall's Entertainments (Ayr) Ltd* v *South Ayrshire Council (No 2)* 1998 SLT 1421 and by Lord Drummond Young in *Scottish Widows Services Ltd* v *Harmon/CRM Facades Ltd* 2010 SLT 1102 might now require qualification. The defender's submission that the obligation in clause three (a) to keep premises in good and substantial repair did not oblige it to put them into that condition ran contrary to *Batley*.

Argument for defender (tenant)

[9] It was not disputed that the lease fell to be interpreted in accordance with the modern approach to the construction of commercial contracts, nor that the clause in question required to be read as a whole with content given to every part of it if possible. So far as commercial leases were concerned, however, each case was likely to turn on the wording of the clause under consideration. The essential features of the obligation accepted by the tenant in clause three (a) were (i) to accept the premises in their present condition, and (ii) to carry out certain works in circumstances which might or might not arise, all with a view to (iii) returning them at the end of the term of the lease in no worse condition than they were at commencement. The clause should be construed without an artificial disconnect after the first reference to the satisfaction of the landlord. The obligation to "replace or renew or rebuild whenever necessary…" did not impose an independent repairing obligation or a wider free-standing criterion of necessity: it was merely part of the repairing obligation and went no further than it. There was good reason why clause three (b), which in effect dealt with the mechanical and engineering installations within the building, would specify different criteria; those elements either did or did not work properly, and it might also be reasonable to renew or replace them even though the existing system was still in working order. The lease in *Lowe* v *Quayle Munro Ltd* had contained no reference to the condition of the subjects at commencement, and was distinguishable for that reason. No case had been cited in which such wording was found yet where the tenant had been held liable to carry out repairs to some higher standard. It might have been desirable for the parties to have agreed a schedule of condition at the commencement of the lease, but the fact that this was a continuation of previous leases might explain why it was not done.

[10] There was no proper basis in law for the proposition that the obligation to "repair and keep in good and substantial condition and repair" imported a requirement that the subjects be put into a condition, conform to any particular objective standard. *Batley* had been concerned with the particular issue of the need for written notification of the requirement to repair and reinstate before the end of the lease; there was nothing in it to suggest that the Supreme Court had intended to effect a significant change in the law. In any event, whatever may have been decided in *Batley*, the obligation in the present case to return the premises at the end of the period of the lease in no worse a condition than they were at the outset gave clear content to the concept of "good and substantial condition and repair" in a way which was absent from leases in which there was no limitation on the obligation of the tenant at the conclusion of the relationship. Whether the obligation to keep in good and substantial condition and repair was wider than the obligation to repair would depend on the circumstances of a particular case.

Does "keep" imply "put"?

[11] I address firstly the pursuer's submission that the decision of the Supreme Court in *Batley* effected a significant change to the law of Scotland regarding the scope of an obligation to "keep in good and substantial repair". I am not persuaded that it did. The point at issue in *Batley* is focused in the following passage at paragraph 14 of the judgment of Lord Hodge, with whom the other Justices agreed:

"Clause 3.12 of the head lease, which obliges the tenant to repair, maintain and where necessary reinstate the premises in order to keep them in a tenantable condition at all times during the period of the lease, is an obligation to keep the premises in (and put them into) a good condition. It imposes a continuing obligation on the tenant which does not require any notice from the landlord to activate it. It is well established that clauses of that nature have this effect."

The authority cited by Lord Hodge in support of the last sentence quoted above is *Crédit Suisse* v *Beegas Nominees Ltd* [1994] 4 All ER 803.

[12] The ratio of this part of the *Batley* decision is that notice by the landlord is not required to trigger a tenant's obligation to carry out works required in order to keep the premises in a good condition. The question is whether, by including the four words in parentheses, the Supreme Court equated an obligation to keep premises in a good condition with an obligation to put them in a good condition. Such a proposition, if stated as a generality, would not be consistent with certain previous Scottish case law in so far as it draws a distinction between ordinary repairs, for which the tenant is liable, and extraordinary repairs, which are the responsibility of the landlord. In *McCall's Entertainments (Ayr) Ltd* v *South Ayrshire Council (No 2)* (above) Lord Hamilton noted at page 1427 that the common law of Scotland and of England were not identical in this field, and that English authority, including *Crédit Suisse*, was to be used with caution.

[13] *Crédit Suisse* was not concerned with the narrow issue of whether notice was necessary to activate a repairing obligation, but rather with whether an obligation to "keep in good condition and repair" could be wider than an obligation to "repair". The passage quoted by Lord Hodge is from the judgment of Lindsay J at 821:

"Next, whilst I accept the inevitability of the conclusion of the Court of Appeal in *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055 that one cannot have an existing obligation to repair unless and until there is disrepair, that reasoning does not apply to a covenant to keep (and put) into good and tenantable condition. One cannot sensibly proceed from 'no disrepair, ergo no need to repair' to 'no disrepair, ergo no need to put or keep in the required condition'. Leaving aside cases, such as this, where there is special provision for there to have been prior knowledge or notice in the covenantor, all that is needed, in general terms, to trigger a need for activity under an obligation to keep in (and put into) a given condition is that the subject matter is out of that condition."

It is worth noting that the repairing obligation with which the court in *Crédit Suisse* was concerned was imposed on the landlord, not the tenant.

[14] *Batley* is not the first Scottish case in which Lindsay J's dictum has been referred to with apparent approval. In *Taylor Woodrow* (above), Lord Penrose agreed (at page 24) with Lindsay J's conclusion that an obligation to keep in good condition and repair could be wider than an obligation to repair, and did not need a state of disrepair to trigger it. He held, applying other English authority including *Lurcott* v *Wakely & Wheeler* [1911] 1 KB 905, that an obligation to repair might include partial renewal of the subjects. He did not require to decide whether an obligation to keep in good condition connoted, as a generality, an obligation to put it into that condition. His decision ultimately turned on the wording of the lease in question. In *Lowe* v *Quayle Munro Ltd* (above), Lord Penrose acknowledged (at page 351) that there were distinctions between Scottish and English authorities and that there would be cases in which one would hesitate to apply English thought in the context of a Scottish lease. He construed the clause in that case as imposing liability upon the tenant for repairs which would typically be categorised by Scots law as extraordinary repairs falling outwith the tenant's obligation.

[15] In *McCall's Entertainments*, the lease included an obligation on the tenant "to leave at the expiry or termination of this lease the subjects in a condition no less good and substantial than their present condition". Lord Hamilton held that the tenant was not obliged to carry out works which would be categorised by Scots law as extraordinary repairs to a building that was in an advanced state of dilapidation at the date of entry. He distinguished *Lowe* on the ground that the lease in the case before him contained no express obligation to make good the dilapidated state of the building, in particular by imposing an obligation on the tenant to replace or renew or rebuild as necessary, regardless of the age or state of the building. In *Scottish Widows Services Ltd* v *Harmon/CRM Facades Ltd* (above), Lord Drummond Young referred to a number of authorities, including *Crédit Suisse*, *Taylor Woodrow*, *Lowe* and *McCall's Entertainments* before concluding (paragraph 33) that each case turns on the wording of the clause under consideration, that an attempt must be made to give effect to each word in a repairing clause, and that the clause must be read as a whole. He considered (paragraph 34), on the basis of the authorities discussed, that an obligation in the lease in the case before him to maintain and keep the subjects in good and tenantable repair did not amount to an obligation to improve them in any way, but merely to maintain them in the same condition as they were in at the start of the lease. In the event, however, this was not significant in relation to the tenant's right to make a claim under a collateral warranty in respect of building defects.

[16] It is helpful to bear in mind the following observations by Lord Reed in *Westbury Estates Ltd* v *Royal Bank of Scotland plc* 2006 SLT 1143 at paragraph 17:

"…The common law of Scotland in relation to repairing obligations in leases is however different from that in England: in particular, the distinction drawn in Scots law between ordinary and extraordinary repairs appears to have no direct parallel in English law. In consequence, it is questionable whether some of the English authorities relied on would have been decided the same way in Scotland (the decisions in *Proudfoot v Hart* and *Lurcott v Wakely*, for example, might be contrasted with the opinions in *Napier v Ferrier*). Counsel however explained that the repairing covenant in the lease with which the present case is concerned was typical of the form of covenant which had evolved in England since the 19th century, and which was now generally adopted in commercial leases throughout the United Kingdom. Since such covenants were the result of a practice which had developed in England, and had evolved in the light of the decisions of the English courts, it was those decisions which were relevant."

Acknowledging this English influence on the drafting of Scottish commercial leases, Lord Reed held, as Lord Penrose had done in *Lowe*, that the terms of the lease in the case before him had imposed upon the tenant responsibility for what Scots common law would have regarded as extraordinary repairs, and accordingly that the distinction between the two types of repair was not relevant to his decision.

[17] My conclusion, based upon these authorities, is that when the court is asked to construe a commercial lease drawn in the modern style, which is lengthy and tends towards comprehensiveness rather than comprehensibility, the terms of the lease in question will be regarded as more important than the underlying common law of liability for what Scots law has traditionally categorised as extraordinary repairs. Where the parties have addressed in detail the issue of liability for putting and/or keeping the premises in good and substantial repair, the common law distinction may well, as Lord Reed observed, become irrelevant. Returning to the passage from Lord Hodge's judgment in *Batley*, it seems to me that this was not, and was not intended to be, anything more than a commentary on the terms of the clause with which the Supreme Court was concerned in that case. If the court had intended to overrule the long-standing distinction made at common law in Scotland between ordinary and extraordinary repairs, one would have expected it to say so. I therefore approach the task of construction of clause (three) (a) in the present case on the basis that I am not bound by authority to hold that an obligation to keep premises in good and substantial repair necessarily imports an obligation to put it into that condition, regardless of its condition at the commencement of the lease.

Decision: construction of clause (three) (a)

[18] A traditional approach to the construction of clause (three) (a) might have focused upon the structure of the clause, observing in particular that the words "all to the satisfaction of the Landlord" appear twice. This repetition might suggest that the clause should be read as consisting of two discrete obligations, the first of which ends with these words where they first appear, so that the obligations contained within the first part, including the obligation to keep the subjects in good and substantial repair, are not qualified by the reference to the condition of the subjects as accepted which appears later in the clause. In my opinion that would not be the correct approach to adopt. Purely at a grammatical level, it does not seem to me that the draughtsmanship of the clause deserves such exaggerated respect. When one attempts to find the verb qualified by the words "in at least as good condition as they are accepted by the Tenant", the only grammatically correct candidate is the word "maintained". That word, however, is accompanied by a series of others ("paved, heated, aired and cleansed") which sit uneasily with "at least as good condition". In order to make sense of the clause, it is necessary to read it as a whole rather than to try to break it down into constituent parts. It is not, in my opinion, possible to identify any construction of this clause, let alone a commercially sensible one, which gives effect to every word in it in the order in which they appear. In any event, the modern approach to the construction of commercial contracts requires the court to ascertain what a reasonable person would have understood the parties to have meant by the language they used, rather than to impose upon them an interpretation which, although not necessarily the commercially sensible one, appears to the court to be the grammatical result of the language they have chosen to use.

[19] I therefore approach the task of construction by reading the clause as a whole, seeking an interpretation which gives content to all of its provisions but with less priority being given to the order in which the words appear. In my opinion the clause imposes three obligations, each in relation to "the leased subjects and all additions thereto" (and everything else down to "therein or thereon"):

- to repair;
- to keep in good and substantial repair and maintained, paved, heated, aired and cleansed; and
- to replace or renew or rebuild whenever necessary.

I see no commercially sensible reason to construe the words "in at least as good condition as they are accepted by the Tenant" as applying only to the third of these obligations. It would make little commercial sense to construe the lease as requiring necessary rebuilding works to be carried out to a standard referable to the condition of the premises at commencement of the lease, while requiring repair and maintenance works to be carried out to a different and higher standard. In my opinion, the inclusion of these words is the key element of the clause. As with the lease in the *McCall's Entertainments* case, and in marked contrast to the various cases concerning leases which contained no reference to the condition of the subjects at the time of acceptance by the tenant, I consider that the inclusion of these words excludes any obligation to leave the premises in a state of improvement from their condition at commencement of the lease.

[20] I do not regard this construction as inconsistent with the disregard of "the age or state of dilapidation of the buildings". In my opinion these words recognise the likelihood that deterioration of the subjects will occur during the period of the lease, and make clear that such likelihood does not excuse the tenant from maintaining the premises in their condition at commencement. The only words in the clause which are not given specific effect by this construction are the words "all to the satisfaction of the landlord" where they appear for the first time. It may be that these words were inserted twice out of an abundance of caution: be that as it may, I do not regard their inclusion in two places as an indication that the construction which I favour does not accord with what a reasonable person with the background knowledge available in 2005 would have understood the parties to the lease to have meant.

[21] Senior counsel for the pursuer submitted that the words "in at least as good condition" were a reference back to the opening words of the clause, which should be read as deeming the premises to be in good and substantial repair at acceptance. It seems to me that this submission proceeds upon an assumption that the subjects were not in fact in good and substantial repair at acceptance, but that is not a matter of admission nor, in my opinion, a necessary implication from the wording of the clause. The defender's obligation is to maintain the subjects in at least as good condition as they were accepted, not to maintain them in at least as good condition as they were deemed to be accepted, if different. As regards the absence of agreement of a schedule of condition at commencement of the lease, I agree that this would have been a desirable step to take, but I do not regard the fact that it was not taken as indicating, contrary to the express wording of the clause, that condition at the outset was not a significant benchmark. This was, after all, a relatively short lease which followed on from a series of others and it may be that parties simply did not consider a schedule to be necessary.

[22] The pursuer's argument that the defender's construction does not accord with commercial common sense is based upon the difference between adoption of a standard based on actual condition at commencement for some parts of the building and adoption of a more onerous and objective standard under clause (three) (b) for others. On this point I accept the defender's submission that there is a sound commercial basis for adoption of a different standard, in that clause (three) (b) applies to mechanical and engineering elements which either work or not, thereby providing an obvious benchmark for an obligation to carry out work. In my opinion the construction advanced on behalf of the defender is a commercially sensible one which accords with the words that the parties to the lease have chosen to use.

[23] I therefore hold that the pursuer's claim, in so far as based upon an obligation at termination to put the premises into a condition better than they were in at commencement, is not relevantly stated.

The second issue: measure of the pursuer's claim

[24] The parties are largely in agreement as to the usual consequences of a breach by a tenant of its obligation to return the subjects to the landlord in a specified condition at the end of the period of the lease. As this constitutes a breach of contract, the landlord is entitled to claim damages for the loss sustained. The landlord will ordinarily assert that the proper measure of its loss is the cost of the works required to put the subjects into the specified condition. That, however, is not the only possible measure: in certain circumstances, the proper measure could be the diminution in capital value of the subjects as a consequence of the tenant's breach of the terms of the lease. Where, for example, the landlord has no intention of carrying out repairs to the building because it is to be extensively renovated, the cost of repairs may not provide a satisfactory measure of loss. Indeed, where the subjects are to be demolished to make way for a new building, for reasons unconnected with the tenant's breach, the landlord may be unable to prove any loss at all. Authority for these propositions may be found in *Duke of Portland* v *Wood's Trs* 1926 SC 640, Lord President Clyde at 651-2 and *Prudential Assurance Co Ltd* v *James Grant & Co (West) Ltd* 1982 SLT 423, Lord McDonald at 424. English law is to similar effect: see eg *Ruxley Electronics and Construction Ltd* v *Forsyth* [1996] AC 344. The issue is whether, on the terms of the lease in the present case, the defender is entitled to contend that the proper measure of loss is something other than the cost of repairs.

Argument for pursuer (landlord)

[25] The pursuer's contention was founded upon the proviso at the end of clause (seven) of the Schedule to the lease. This clause conferred upon the landlord an express option to serve notice on the tenant requiring payment of a sum equal to the amount required to put the lease in good and substantial repair, in lieu of requiring the tenant to carry out the work. The pursuer had exercised that right. The present claim was not for damages: it was a claim for payment, in implement of an express contractual right. While the lease subsisted, and in

circumstances where there were admitted breaches of the tenant's obligations, the landlord had a right to enforce those obligations by means of an action of implement. But the landlord also had a contractual right to demand instead a payment equal to the cost of the works required. The wording of the proviso yielded a single obvious meaning which was rational and commercially sensible. The wording of the clause under consideration in the case of *Grove Investments Ltd* v *Cape Building Products Ltd* [2014] CSIH 43, on which reliance was placed by the pursuer, was materially different. Moreover, even if a question of appropriate measure of damages arose, clause (seven) was a straightforward liquidate damages provision by which the parties agreed in advance that the appropriate measure would be the cost of repair.

Argument for the defender (tenant)

[26] On behalf of the defender it was submitted that the pursuer's construction of clause (seven) could only prevail if the terms of the lease clearly negated the application of the tenant's common law entitlement as regards measure of loss: cf. *Mars Pension Trustees Ltd* v *County Properties and Developments Ltd* 1999 SC 267 at 271. It was accepted that if the landlord exercised its option, the tenant's obligation would simply be to make payment. However, the formulation of the clause left uncertain whether what was referred to was (a) the sum that *would be* required to put the subjects into the specified condition, on the hypothesis that the work was going to be done; or (b) the sum that *was* required to do work that the landlord in fact intended to do in order to put the subjects into the specified condition. A clear indication that the latter alternative was what was intended was afforded by the reference to the payment being "in lieu of requiring the tenant himself to carry out the work". If, for whatever reason, the landlord did not intend to require the tenant to carry out work, then payment could not sensibly be described as being in lieu of carrying out that work. The present case was on all fours with *Grove Investments Ltd* v *Cape Building Products Ltd.* That, too, was a case in which the landlord's claim was for payment rather than damages. In *Grove Investments*, the tenant's obligation was to pay to the landlord the total value of the schedule of dilapidations prepared by the landlord; use of the word "value" was held to indicate that the obligation was to compensate the landlord for loss suffered in consequence of the tenant's failure to implement its repairing obligations. Clause (seven), though not in identical terms, should be similarly construed. So long as this was at least a possible construction, it should be adopted as the commercially sensible one, as well as being the one that accorded with common law principles.

Decision: construction of Clause (Seven)

[27] In addition to reiterating the general approach to construction enunciated in *Rainy Sky* and other, earlier decisions, the court in *Grove Investments* identified certain matters which should be borne in mind when construing contracts. These included:

- A contract is a co-operative enterprise, entered into by parties for their mutual benefit, and should normally be construed in such a way as to avoid arbitrary or unpredictable burdens or benefits.
- The common law can often serve as a benchmark against which considerations of fairness can be measured: radical departure from the rules of the common law might indicate that that construction is commercially unreasonable.

Despite the fact that the landlord's claim in that case took the form of an action for payment, not damages, the court held that the tenant's construction of the clause in question, allowing for calculation of the sum due to the landlord in a manner other than by reference to the cost of repair, was to be preferred. This was for four reasons. Firstly, the tenant's failure to implement its obligations of repair etc was a breach of contract for which the natural remedy was something akin to damages. Secondly, the schedule of dilapidations could only provide an estimate of the cost of repair in advance of remedial work being carried out. Thirdly, in a case where the landlord did not

intend to reinstate the property, the result of the landlord's proposed construction would be that it might recover very much more than the actual loss sustained by it. Where, for example, the building was to be reconstructed or demolished, or refitted to remove obsolete technology, quantification of damages by reference to cost of repair would afford a level of recovery that was arbitrary and disproportionate, unrelated to any loss sustained. Fourthly, the tenant's construction provided full compensation for the loss actually sustained by the landlord as a consequence of the tenant's breach of contract.

[28] I have quoted the reasoning in *Grove Investments* at length because it falls to be applied to the circumstances of the present case unless the two are distinguishable by virtue of differences in the terms of the respective leases. In my opinion there is nothing in clause (seven) of the lease with which this case is concerned that compels the construction favoured by the pursuer. I accept the defender's submission that the words "a sum equal to the amount required to put the lease into good and substantial repair" are amenable to either of the two possible constructions set out above. But the final words of the clause, ie "in lieu of requiring the Tenant himself to carry out the work" afford a clear indication that the payment obligation contained in the clause is activated if, but only if, the defender intends to carry out the work required to put the subjects into the condition in which they ought to have been left at termination of the lease. That indicator in favour of the tenant's construction appears to me to be at least as strong as the use of the word "value" in the *Grove Investments* lease. More importantly, however, I am satisfied that the defender's construction accords best with commercial common sense. It would, in my view, require very clear wording in order to conclude that a tenant had entered into an agreement which might have the consequence of it having to pay a sum which bore no relation to what was required to compensate the landlord for loss (if any) actually sustained as a result of the tenant's breach of its repairing obligation. In this instance it seems to me that the common law, as derived from *Duke of Portland* v *Wood's Trustees* and the other cases to which I have referred does accord with commercial common sense and is of assistance in deciding what the parties to the present lease meant by the words they used. In my opinion the proviso to clause (seven) is properly characterised as an obligation to make payment which is conditional upon the pursuer intending to carry out the repair works, and not as a liquidate damages provision.

[29] It follows that the proviso to clause (seven) does not, in my opinion, preclude the defender from offering to prove that the appropriate measure of the pursuer's loss is something other than the cost of repair. I leave open the question whether it would be sufficient, in order for the pursuer to succeed, to prove an intention to carry out the works required to put the subjects in the specified condition regardless of the extent to which the cost would exceed the resultant increase in the capital value of the subjects, as this issue did not fall within the scope of the debate.

Disposal

[30] I shall put the case out by order to be addressed on further procedure.