



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2014] CSIH 43

XA73/13

Lord Eassie
Lord Drummond Young
Lord Wheatley

OPINION OF THE COURT

delivered by LORD DRUMMOND
YOUNG

in the cause

GROVE INVESTMENTS LIMITED

Pursuers and Respondents;

against

CAPE BUILDING PRODUCTS LIMITED

Defenders and Appellants:

Act (Appellants): Sandison, QC; Thomson; Brodies LLP
Alt (Respondents): Mure, QC; McMillan, Solicitor Advocate; Burness Paull

13 May 2014

[1] The parties are in dispute as to the construction of the dilapidations provisions that apply on the termination of a commercial lease. By a lease originally concluded in August 1986 and subsequently varied in certain respects, the appellants leased a unit on Germiston Industrial Estate, Glasgow, from the Scottish Development Agency. Ownership of the property and the landlord's interest under the lease were subsequently transferred to the respondents. The term of the lease expired on 15 May 2011. By then a number of defects and wants of repair or maintenance had developed in the premises. Surveyors acting for the landlords prepared a schedule of dilapidations in October 2007.

This was served on the tenants on 19 September 2008 with a notice requiring them to carry out the works detailed in the schedule of dilapidations. The work so specified had not been performed by the tenants prior to the expiry of the lease in May 2011, and the landlords aver that that amounted to a breach of contract by the tenants. On that basis they claim damages amounting to £10,229,912. That is the figure brought out in the schedule of dilapidations as the total cost of remedying the defects that are said to exist in the premises.

[2] The obligation to make good dilapidations on the termination of the lease is found in article Twelfth, which provides as follows:

"The tenants bind themselves to flit and remove from the premises at the expiry or sooner termination of this lease..., to repair any damage done by the removal of fittings belonging to them and to pay to the landlords the total value of the Schedule of Dilapidations prepared by the landlords in respect of the tenants' obligations under Articles Fifth and Sixth hereof declaring that the landlords shall be free to expend all moneys recovered as dilapidations as they think fit and the tenants may, with the prior written agreement of the landlords, elect to carry out the whole or any part of the said Schedule of Dilapidations but that provided such work is completed to the landlords' reasonable satisfaction".

Article Twelfth makes reference to articles Fifth and Sixth of the lease. Article Fifth concerns alterations and additions made by the tenants, which are to be removed on the expiry of the lease and the premises made good by the tenants. Article Sixth deals with the tenants' obligation in respect of repair and maintenance. So far as material it provides as follows:

"... the tenants bind themselves to accept the premises... as in good and habitable condition and repair and to keep and maintain the same in like good and habitable condition and repair during the currency of this lease and to leave them in good and habitable condition and repair at the expiry or sooner termination thereof all to the sight and satisfaction of the landlords".

That obligation is then specified in greater detail, and thereafter the lease continues:

"Declaring further that in the event of the tenants (sic) failing to execute promptly any repairs and renewals to the premises which the landlords shall reasonably consider necessary or failing to observe or to perform any of the other obligations hereinbefore described and referred to in this Article the landlords shall be entitled, but shall not be bound, to execute or have executed the same as the case may be and the tenants shall be bound on demand by the landlords to repay to the landlords the amount or amounts disbursed or expended by the landlords in consequence of the same.... Further declaring that on expiry or earlier termination of this lease the landlords may require the tenants to make a financial settlement with the landlords in lieu of their obligations under this Article which the landlords consider to be outstanding at the date of expiry or earlier termination".

[3] The landlords' argument is that under article Twelfth of the lease the tenants are obliged to make payment of a sum representing the total value brought out in the schedule of dilapidations, subject

only to any challenge by the tenants as to the proper ascertainment of that value. They have a further argument based on reparation for breach of the tenants' obligation to keep the premises in good repair, but that is not relevant for the purposes of the present opinion. On the first of these arguments, the critical averments by the landlords are as follows:

"[P]roperly construed Clause TWELFTH is a payment clause which binds the [tenants] on the expiry of the lease to pay to the [landlords] the value of a schedule of dilapidations duly prepared in accordance with the terms of the lease. The clause does not have the effect so as to oblige the [tenants] to make payment to the [landlords] of whatever sum happens to be a total value of the schedule of dilapidations produced by the [landlords]. Rather, the clause obliges the [tenants] to pay the total value of a schedule of dilapidations duly prepared in accordance with the terms of the lease. The [tenants] would be entitled to challenge that total value if they believe that it had not been so duly prepared. Clause TWELFTH reflects the parties' agreement that a duly prepared schedule of dilapidations based on the 'cost of repairs' measure of loss would be used to calculate the monetary value of compensation for damages caused by the [tenants'] failure to comply with the repairing and maintenance obligations under the lease. It does not matter whether the 'cost of repairs' measure of loss accurately reflects the [landlords'] true loss or would be disproportionate. There is nothing unusual about agreeing such a method of calculation. Clause TWELFTH provides for payment of liquidated damages by the defenders on the expiry of the lease. It is not a penalty. It does not amount to the payment of money as stipulated *in terrorem* of the [tenants], nor is it extravagant and unconscionable in amount by comparison with the greatest loss that could conceivably be proved to have been suffered by the [landlords] in consequence of the [tenants'] breach. On the contrary, the total value of a schedule of dilapidations duly prepared in accordance with the tenant's obligations under a lease is a genuine covenanted pre-estimate of damage, and is an appropriate and not uncommon method of fixing the monetary recompense to flow from a tenant's failure to comply with its repairing and maintenance obligations under a lease.... With reference to the [tenants'] averments anent construing the provisions of clause TWELFTH as reflecting and reinforcing the common law, to construe the clause as merely reflecting the common law would render much of the wording otiose".

[4] The tenants, by contrast, submit that on its proper construction article Twelfth meant that the tenants were only obliged to make payment to the landlords of the loss actually suffered by them in consequence of the tenants' failure to implement their repair and maintenance obligations under article Sixth and their obligation to make good the removal of any alterations and additions under article Fifth. To construe the clause in the manner contended for by the landlords might result in a recovery that bore no relation to any loss in fact suffered by the landlords as a result of the failure of the tenants to comply with their repairing and redding up obligations under the lease. Consequently the tenants were not obliged to make payment to the landlords of whatever sum happened to be the total of the various cost estimates contained in the schedule of dilapidations produced on behalf of the landlords. Instead, the clause was intended to reflect and reinforce the common law, under which the landlords would be entitled to the actual loss sustained by them,

which might be calculated using a number of different methods. The critical averments for the tenants are as follows:

"[P]roperly construed, the passage within clause 12 of the lease condescended on by the [landlords] does not have effect so as to oblige the [tenants] to make payment to the [landlords] of whatever sum happens to be the total of the various cost estimates contained in the Schedule of Dilapidations produced by or on behalf of the [landlords]. A total of the various cost estimates contained in a schedule of dilapidations might or might not represent the true loss actually suffered by a landlord as a result of a breach of repairing obligations by a tenant. That would have been known to and in the contemplation of parties entering into a lease such as the Lease. Such parties would not sensibly have agreed that, come what may, the [landlords] would be entitled to payment of the total of the various cost estimates contained in the Schedule of Dilapidations. Such a construction would not give to the lease the business common sense which the parties must be taken to have intended that it should have. Rather, on a proper construction of the Lease, and that part of Clause 12 founded on by the [landlords], provision was simply made to reflect and reinforce the fact that, on the basis of the law as it stood at the date of execution of the lease, the landlord... would probably not be entitled, at the expiry or earlier termination of the Lease, to insist upon specific implement of any outstanding repairing obligations and that, instead, the appropriate remedy would be a claim for damages. Moreover, on a proper construction of the relevant contractual provisions, the landlord... would be entitled to seek payment of the total of the various cost estimates contained in the Schedule of Dilapidations by way of damages but only if the figure in question truly represented the actual loss suffered by the landlord by reference to a breach of the repairing obligations by the tenant".

[5] In support of their claim the landlords have lodged the schedule of dilapidations prepared by surveyors on their behalf. In the schedule a large number of alleged defects in the condition of the premises are identified. In addition, a sum is placed against each of them as an indication of the cost of making good the defect in question. The landlords' claim is accordingly based exclusively on an estimate of the cost that would be incurred if the landlords wished to reinstate the premises to the condition required by the terms of the parties' lease. It is obvious that this might not represent the landlords' actual loss. For example, if they were to let the premises to another tenant who required very substantial alterations, most of the reinstatement work might not be carried out, thus reducing the landlords' loss. Alternatively, the landlords might decide that the best course was to demolish the existing premises and to dispose of the site, or to construct a new building and let it. In such a case the loss would again be reduced. The landlords' position is accordingly that the sums due under article Twelfth are debts that are due regardless of what happens to the premises, whereas the tenants contend that liability under article Twelfth should be treated as akin to damages, designed to compensate the landlords for the loss that they have actually suffered as a result of the tenants' breaches of clauses Fifth and Sixth.

[6] The action proceeded to debate before the sheriff, who refused probation of the tenants'

averments set out in paragraph [4] above, together with certain ancillary averments that are not relevant to this appeal. The sheriff expressed the view that the language of article Twelfth did not sit naturally with the tenants' contention that the clause had preserved the position at common law that a party who has suffered a breach of contract may resort to a variety of measures for assessing damages. A schedule of dilapidations was simply an exercise in describing defects requiring remedial works. That would be competent at common law, and there would be no need for a provision such as article Twelfth. What was specified in article Twelfth was "the total value of" the schedule, which was not the same as requiring the tenants to pay damages for breach of their repairing obligations. The word "value" denoted the cost or price of remedying the defects contained in the schedule. Whether those works were carried out was immaterial; that explained the "free to expend" provision found in article Twelfth. The sheriff did not consider that such a construction flouted business common sense; landlords were entitled to quantify a dilapidations claim by reference to the cost of work that the tenants had failed to perform. In the circumstances of the lease, it was highly likely that damages would be assessed on a cost of repair basis. Thus it could not be suggested that the language of the clause was commercially irrational. Nor did the tenants' reading of the clause represent a more commercial construction than that of the landlords. The common law did not necessarily represent business common sense, as was evidenced by cases where it was the universal practice of conveyancers to reverse common law rules.

[7] The tenants appealed to the sheriff principal, who refused the appeal. He stated that the fundamental problem with the tenants' argument was that it was based on the view that the parties had resorted to clause Twelfth with a view to preserving the common law. The clause should rather be construed as effecting a broad transfer of common law risk from the landlords to the tenants. Furthermore, if the existing common law were to apply, there was no purpose in linking compensation to a schedule of dilapidations, rather than merely stipulating for damages. Furthermore, the tenants' argument attached too much significance to the word "value" in article Twelfth; that word might be appropriate in a case where there is no actual cost to the landlords should they decide not to expend monies on repairs.

[8] The tenants have subsequently appealed to the Court of Session. The parties have maintained the positions summarized in the averments set out at paragraphs [3] and [4] above. Before we deal with the detailed construction of article Twelfth, however, we think it necessary to say something about the general approach that courts must take to the construction of commercial contracts. We note that this is a matter that does not appear to have received detailed consideration in the operative parts of the opinions of the sheriff and sheriff principal, as against the narration of

counsel's arguments. The general approach is, however, of great importance in approaching the construction of a provision such as article Twelfth, which is readily capable of bearing more than one meaning.

Construction in general

[9] The general approach to the construction of contracts is now well settled. The provisions of the contract must be construed in context and in accordance with the purposes that the contract is intended to achieve. A helpful exposition of the law is found in the opinion of Lord Clarke in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, at paragraphs 14 and 20-30. First, "the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant... [T]he relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" (paragraph 14).

Thus a contract must invariably be construed contextually. Contractual disputes usually centre on wording that is capable of having more than one meaning. In this connection, conflict may arise between the most literal meaning of a word or phrase and an alternative meaning that may appear to make better sense in context and according to the fundamental purposes of the contract. In this connection,

"It is not... necessary to conclude that, unless the most natural meaning of the word produces a result so extreme as to suggest that it was unintended, the court must give effect to that meaning.

The language used by the parties will often have more than one potential meaning. I would accept... that the exercise of construction is essentially one unitary exercise of which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other". (paragraphs 20-21).

A similar point is made subsequently (paragraphs 29-30), where Lord Clarke adopted statements by Longmore LJ in *Barclays Bank PLC v HHY Luxembourg SARL*, [2011] 1 BCLC 336, at paragraphs 25 and 26:

"[W]hen alternative constructions are available one has to consider which is the more commercially sensible... If clause is capable of two meanings,... it is quite possible that neither meaning will flout common sense. In such circumstances, it is much more appropriate to adopt the more, rather than the less, commercial construction".

Furthermore, such an approach is not subject to additional qualifications, for example that a literal construction would produce an absurd result. At paragraph 43 Lord Clarke states:

"[I]f the language is capable of more than one construction, it is not necessary to conclude that a particular construction would produce an absurd or irrational result before having regard to the commercial purpose of the agreement.... 'But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement'" (quoting Hoffman LJ in *Co-operative Wholesale Society Ltd v National Westminster Bank PLC*, [1995] 1 EGLR 97).

Thus in any case where a contractual provision is capable of more than one meaning, the court should adopt the meaning that best accords with commercial common sense. This is an important point in the construction of all commercial contracts. It is significant in the present case for reasons that will be discussed subsequently.

[10] In a number of cases warnings have been given against "excess of confidence that the judge's view as to what might be commercially sensible coincides with the views of those actually involved in commercial contracts": *Credential Bath Street Ltd v Venture Investment Placement Ltd*, 2008 Housing LR 2, at paragraph [24] per Lord Reed. That is clearly correct. In particular, in construing contracts it is important to recognize that an unfortunate result for one party may simply be the result of a bad bargain, and apparent anomalies may be the result of trade-offs made during the negotiation of the contract. The court cannot correct a bad bargain, and it must respect the substance of the transaction that the parties have actually entered into. Nevertheless, many judges tend to develop considerable experience of commercial contracts over the years, both in practice in the legal profession (where they may have advised on the terms of contracts as they were being concluded) and on the bench. For that reason, although they must be sensitive to the possibility of trade-offs and bad bargains, they will usually be in a good position to decide what is commercially sensible. *Rainy Sky* establishes that, if a contractual provision is capable of bearing two meanings, it is normally the commercially sensible meaning that should be chosen.

[11] In construing contracts it is also important to bear in mind that a contract is a cooperative enterprise, entered into by parties for their mutual benefit. It is intended to achieve objectives that are common to both parties; that is why a purposive construction must be adopted. Thus a contract should be construed in such a way that the benefits that may reasonably be expected from the contract accrue to both parties. It should likewise be construed in such a way that an excessive or disproportionate burden does not fall on one party through the application of a contractual provision. By "excessive or disproportionate", we mean results that are objectively excessive or

disproportionate according to what would be the expectations of reasonable parties in the particular contractual context. Further, commercial predictability is usually regarded as an important feature of any contract. We are accordingly of opinion that a contract should normally be construed in such a way as to avoid arbitrary or unpredictable burdens or impositions, and conversely arbitrary or unpredictable benefits, in the nature of windfalls; to do otherwise would frustrate one of the most elementary commercial objectives.

[12] A further factor that may be important in construing a commercial contract is the rules of the common law. In giving a contract a contextual interpretation it is clear that the legal context must be considered as well as the factual context. The relevance of the common law goes beyond that, however, because in the field of contract its rules represent the considered attempts of judges, over many years, to strike a fair balance between the interests of contractual parties. Usually, therefore, the common law will achieve a result in accordance with commercial common sense. For this reason, when a contract is interpreted, the common law can often serve as a benchmark against which considerations of fairness can be measured. If a particular construction of a contractual term achieves a result that is radically different from the rules of the common law, that is a factor that may in some circumstances indicate that that construction is commercially unreasonable. Such a factor is unlikely to be of great importance in construing the main terms of a contract, dealing with the parties' substantive rights and obligations, since these will almost invariably be the subject of specific negotiation. With many of the subsidiary terms, however, such as a term providing for a payment that does not form part of the main consideration, the consequences of the wording used may not have been well thought through and there may be no active intention either to abrogate or to follow the common law rule. In a case of that sort the common law may provide considerable assistance in deciding what is commercially sensible.

[13] In construing article Twelfth of the parties' lease, one aspect of the common law appears to us to be relevant. This is the approach taken by the common law to the measure of damages for breach of contract, found in *Duke of Portland v Wood's Trustees*, 1926 SC 640, as stated by LP Clyde at pages 651-652:

"The tendency of our law is probably less favourable than that of England to the formulation of judge-made rules for the assessment of damages... The measures employed to estimate the money value of anything (including the damage flowing from a breach of contract) are not to be confounded with a value which it is sought to estimate; and the true value may only be found after employing more measures than one - in themselves or legitimate, but none of them necessarily conclusive by itself - and checking one result with another as Lord Stair puts it...: 'It is rather in the arbitrament of the Judge to ponder all circumstances'".

That case concerned an obligation of the tenant in a mineral lease to redeliver the subjects at the end of the lease in a good condition and without accumulation of water, in such a way as to enable the landlord or incoming tenant to carry on the workings. The workings were in fact seriously flooded. The tenants maintained that the sole measure of damages recoverable from them was the capitalized royalty value of the estimated amount of mineral is left. The court rejected that contention, holding that other legal measures might be appropriate; proof was required to decide the amount due. The view that a range of different approaches can be taken to the calculation of damages is important in the present case, because it tends to indicate that the amount brought out in the schedule of dilapidations would not at common law be regarded as the only possible measure of damages for breach of articles Fifth, Sixth and Twelfth of the lease.

Construction of the lease

[14] The terms of the material clauses have been quoted at paragraph [2] above. Article Twelfth imposes three obligations on the tenants: to remove from the premises; to repair any damage caused by the removal of fittings; and "to pay to the landlords the total value of the Schedule of Dilapidations prepared by the landlords in respect of the tenants' obligations under Articles Fifth and Sixth hereof". The third of those obligations makes use of three basic concepts: dilapidations, a schedule of those dilapidations, and the value of the schedule. Dilapidations are physical defects in a building that appear over time, whether as a result of ordinary wear and tear or in consequence of more specific acts that cause damage. In article Twelfth the relevant dilapidations are those that the tenant is obliged to make good under articles Fifth and Sixth of the lease. They are accordingly physical defects that arise either from the removal of tenants' alterations, fixtures and fittings or from a failure to keep the building in good condition and repair.

[15] A schedule in this context is merely a list. The schedule of dilapidations prepared by the landlords' surveyors included estimated costs, but the basic concept of a schedule does not require this. Moreover, article Twelfth clearly envisages that the schedule of dilapidations will be prepared before any works are carried out. On that basis, any costs included in the schedule would necessarily be an estimate. It is notoriously difficult to predict the precise cost of building works in advance; thus the figures in the schedule might be considerably removed from the actual cost of carrying out the necessary works. Counsel for the landlords recognized this by conceding that the tenants would be entitled to challenge the individual items in the schedule. Nevertheless, the basic fact remains that the schedule is unlikely to provide an accurate prediction of the cost of works.

[16] Article Twelfth uses the word "value", and the significance of this word is a major point of

dispute between the parties. For the landlords it is contended that the clause is a payment clause which binds the tenants to pay the sums specified in the schedule, subject to a right to challenge individual items and the estimated amounts attributed to those items. On that basis, it is immaterial whether the landlords have actually suffered a loss of that amount; a debt is due and must be paid. For the tenants, by contrast, it is contended that the use of the word "value" indicates that the obligation is not to pay the costs of repair estimated in the schedule but to compensate the landlords for the loss that they suffer in consequence of the tenants' failure to implement the obligations contained in articles Fifth and Sixth. In our opinion both of these constructions are possible constructions of the clause; when article Twelfth is read in context, neither can be described as unreasonable, or manifestly contrary to the wording that is used in the clause. In favour of the tenants' construction it can be said that, if it had been intended that the schedule of dilapidations should include binding estimates of the costs of repair, it would have been more natural to use the expression "costs of repair" rather than "value"; that would have made it clear that the schedule was intended to include estimates of cost and that those estimates were to be used to determine how the breach of the tenants' obligations in articles Fifth and Sixth was to be quantified, subject to a right to challenge individual items. "Value", however, is a word of more general signification than "cost". Moreover, the purpose of the relevant part of article Twelfth is to deal with breaches of other clauses by the tenants. In that context, we are of opinion that the use of the word "value" can be taken to indicate that the schedule of dilapidations is not an end in itself but a means to an end, namely the ascertainment of what is required to put the landlords in the position that they would have been in if the tenants had fulfilled their obligations under articles Fifth and Sixth. Put another way, this means that the function of the relevant part of article Twelfth is to provide the landlords with a remedy for the failure of the tenants to fulfil certain other obligations, and that would normally be done by quantifying the loss caused by that failure. This factor tends to favour the tenants' construction.

[17] Nevertheless, it is enough for present purposes to hold that either of the constructions advanced by the parties is a possible construction of the relevant part of article Twelfth. On that basis, it is necessary to decide which of the two constructions accords best with commercial common sense, in the manner described in the passages quoted above from *Rainy Sky* and *Barclays Bank PLC v HHY Luxembourg SARL*. On this question, we are of opinion that the tenants' construction of the clause is to be preferred. We reach this conclusion for the following reasons. First, the contractual context is the termination of a lease where the tenants have not fulfilled obligations of repair, maintenance and reinstatement imposed under other provisions of the lease.

That is obviously a breach of contract, and the function of the clause is on any view to provide the landlords with contractual rights in respect of that breach of contract. The most natural way of providing such a remedy is to compensate the landlords for their loss as a result of that breach, and that involves a remedy akin to damages. Secondly, in a case where the landlords intend to reinstate premises in full, such a construction provides full recovery for the costs of reinstatement. The amount due would usually be calculated after the works had been carried out, for the obvious reason that that is the point when the true financial cost of the tenants' breaches of contract is known. If, as the landlords contend, the sum payable by the tenants were based on the estimated costs in a schedule of dilapidations, it would not be known with any precision what the true costs were, as the schedule must be prepared before the remedial work is carried out.

[18] Thirdly, in cases where the landlords do not intend to reinstate the property, the result of the landlords' construction of article Twelfth would be that they might recover very much more than the actual loss sustained by them through the tenants' breach of contract. For example, the landlords might decide following the termination of the lease that the most economically advantageous course was to demolish the buildings, or substantial parts of the buildings, and rebuild. Modern commercial buildings on industrial estates are not built with a view to a very long life, and many such buildings are constructed with a particular occupier's needs in mind. In these circumstances demolition and reconstruction is entirely foreseeable. Alternatively, the landlords might reconstruct parts of the buildings, or might decide that a total refit was required; in the latter event much of the making good of dilapidations would be quite unnecessary. It might also be that aspects of the building, even if repaired, would be technologically obsolete. In these circumstances the loss caused to the landlords by the tenants' breach of contract may be non-existent, in the case of demolition, or much less than the sum recovered, in the case of reconstruction or refitting.

Consequently the effect of the landlords' construction of article Twelfth would be a level of recovery that was arbitrary and disproportionate, not related to any loss sustained. That in itself appears contrary to commercial common sense. In this connection, we note that wherever possible a contract should be construed in such a way as to avoid results that are arbitrary or disproportionate, whether by way of benefit or burden: see paragraph [11] above. In our opinion the landlords' construction of article Twelfth might result in a benefit to them and the corresponding burden on the tenants that is essentially arbitrary, unrelated to the true significance of the tenants' breach of contract for the landlords. That is an important reason for preferring the tenants' construction.

[19] Fourthly, the tenants' construction provides full compensation to the landlords for the loss that

is ultimately suffered by them. In our opinion that is in accordance with commercial common sense; it satisfies the important requirements of proportionality and predictability. Furthermore, it furthers the fundamental commercial purposes of the lease in a much more effective manner than the landlords' construction. The fundamental purposes of the lease, which are common to both parties, are that the tenant should have possession of the subjects for the term of the lease and thereafter should return the subjects to the landlords in such a condition that the landlords can then relet them (or sell them if so advised). If the subjects are returned in a defective condition, the harm done to the landlords depends on what they then intend to do. The tenants' construction gives the landlords compensation for the true financial consequences of the tenants' breach of contract. That is a result that is similar to the common law approach, as explained in *Duke of Portland v Wood's Trustees*, *supra*: see paragraph [13] above. The common law approach is designed to provide true compensation for a breach of contract, rather than a windfall or other arbitrary recovery. That appears to us to be a sound commercial policy, which will normally produce results that are fair and proportionate as between the parties.

[20] Counsel for the landlords argued that, if all that the relevant part of article Twelfth did was to restate the common law rule, it would not serve any useful purpose. This argument found favour with both the sheriff and the sheriff principal. Nevertheless, it is not uncommon for leases and other contracts to repeat common law rules, usually in order that the document may provide a reasonably comprehensive written statement of the parties' respective rights and obligations. In that way parties' rights can be readily ascertained without recourse to legal textbooks or reports. It also serves to protect the parties against doubts and uncertainties in the law, and also future changes in the law. Article Twelfth is concerned to set out the tenants' obligations on termination of the lease; the payment of compensation to the landlords is an important aspect of what the tenants must do at that point, and there is obvious clarity in having this stated expressly in the clause dealing with the termination of the lease. Furthermore, the reference to a schedule of dilapidations makes clear that the landlords must take steps to identify their loss in order that the tenants can pay compensation; thus the clause imposes a significant procedural requirement. Counsel for the tenants submitted that the clause could be regarded as providing certainty in one area where the common law was unclear, namely whether a tenant was entitled or could be compelled to carry out repairs after the lease was terminated; reference was made to *PIK Facilities Ltd v Shell UK Ltd*, 2003 SLT 155, at paragraph [23]. Article Twelfth specifically provides that on termination of the lease the tenants are not to have an opportunity to enter the property in order to perform remedial works without the landlords' consent. That is correct so far as it goes, but in our opinion the primary purpose of a

clause such as article Twelfth is to set out the parties' rights and obligations in a clear and comprehensive manner within their lease or other contract. Unless there are definite indications to that effect, it cannot in our view be presumed that the parties meant to alter the common law. As we have indicated above at paragraph [12], the common law represents the accumulated views of judges, built up with the assistance of argument from counsel over many years, and for that reason it is likely to be broadly in accordance with commercial common sense.

[21] It was further submitted for the landlords that the lease effected a "broad transfer of common law risk", and that article Twelfth should be interpreted in such a way as to further that transfer of risk rather than to preserve the common law right to damages. This argument found favour with the sheriff principal in particular. It is quite correct that the lease transfers the responsibility for the repair and maintenance of the property, which at common law would fall on the landlords, to the tenants; that is the purpose of article Sixth. Nevertheless, it does not follow that article Twelfth must be construed in such a way that the schedule of dilapidations is given decisive effect in determining how much the tenants must pay the landlords. The transfer of risk is entirely consistent with the view that the tenants' liability is measured in a manner broadly similar to the common law right to damages.

[22] Article Twelfth specifically states that the landlords shall be free to expend all monies recovered as dilapidations as they think fit, and the sheriff found some support in this provision for the view that that article was properly categorized as a payment provision, as it indicated a departure from the common law in relation to intention to repair and the assessment of damages. We do not agree that such an inference can be drawn. In our view the fact that the landlords are entitled to spend monies recovered under article Twelfth as they think fit is consistent with the view that we have adopted; it recognizes that on the termination of the lease the landlords may not want to repair and relet the property in its existing state, but may demolish the buildings or radically alter them. Nevertheless, we regard this as essentially a neutral feature of article 12.

Conclusion

[23] For the foregoing reasons we are of opinion that the tenants' arguments are correct, and that their case as set out in the passage quoted above at paragraph [4] is relevant. We are for the same reasons of opinion that the case for the landlords, as set out in paragraph [3] above, is irrelevant. The sum due by the tenants to the landlords in accordance with article Twelfth must be quantified in accordance with that approach; as we have indicated, in some circumstances this might amount to the cost of the repairs set out in the schedule of dilapidations and in others might be a sum

calculated in a totally different manner. We will accordingly allow the appeal, recall the interlocutors of the sheriff and sheriff principal, hold the disputed averments for the tenants to be relevant, and remit to the sheriff to proceed as accords.