EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2015] CSIH 91
CA148/12

Lord Menzies
Lady Smith
Lady Clark of Calton

OPINION OF THE COURT

delivered by LADY SMITH

in the reclaiming motion

by

@SIPP PENSION TRUSTEES

Pursuers and reclaimers;

against

INSIGHT TRAVEL SERVICES LIMITED

Defenders and respondents:

Act: Ellis QC, J Brown; Morisons LLP
Alt: Sandison QC; Brodies LLP

11 December 2015

Introduction

[1] The reclaimers were landlords and the respondents were tenants in a lease of commercial premises which came to an end on 31 May 2012. The dispute which gives rise to the current litigation relates to the nature and extent of the tenants' obligations under the lease in relation to repair, maintenance and renewal during its subsistence and at expiry. The premises are Gareloch House, an office block on an industrial estate in Port Glasgow, together with its car parking area and common parts. They had, to a greater or lesser extent, been tenanted by the defenders since the 1980's. The reclaimers acquired the premises in 2007 and thereby also acquired the landlord's interest in a lease dated 22 June and 18 July 2005.

The lease

[2] The tenants' obligations are specified in Part III of the Schedule to the lease and include:

"(Three)

a. 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 or 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 the dilapidation of the buildings or others for the time being comprised in the leased subjects: ……

b. 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 earlier 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 tenant's 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 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."

Clause (Twelve) provides that the tenant may not make alterations or additions to the premises or erect new buildings, fences or walls without the consent of the landlord and it binds the tenant, at the expiry of the lease, to reinstate and restore the premises to the condition they were in prior to the carrying out of any such works.

[3] The lease did not have attached to it any schedule or other record – such as photographs - of the condition of the premises at its commencement.

The issues

[4] In answer 11, the respondents aver that they are not liable for:

"..what would be material improvements to the state of the Premises over and above their state at the date of entry under the Lease, beyond the repairing obligations thereof."

Following debate, the Lord Ordinary concluded that an obligation to keep premises in good and substantial repair did not necessarily import an obligation to put them into that condition and then construed clause 3(a) (above) as meaning 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." (para 23)

By way of consequential amendment, the Lord Ordinary deleted the words "put and" from a sentence in article 10 of Condescendence which, prior to that amendment, read:

> "The Defenders were obliged to effect all repairs, maintenance and renewal necessary to put and keep the Premises in good and substantial repair and maintained in at least as good a condition as they were accepted by them."

In this reclaiming motion, the **first issue** is, accordingly, whether the Lord Ordinary erred in his construction of the tenant's obligations under clause 3.

[5] In answer 13, in response to the reclaimers' averments explaining that the sum sued for (£746,903.99 plus VAT) is the cost of putting the premises into good and substantial repair in accordance with the tenant's obligations under the lease, the respondents aver:

> **" …**the sum sued for greatly exceeds such sum as may properly be due. If defenders had carried out the works they accept ought to have been carried out before Lease expiry, the capital value of the Premises as at the date the Lease terminated would have increased by £75,000. *Esto* the defenders should have carried out all the works listed in the Schedule of Dilapidations amounting to £1,261,303.50 by Lease expiry (which is denied), the capital value of the Premises as at the date the Lease terminated would only have increased by £175,000. The pursuers are presently marketing the Premises for sale. No reasonable landlord would carry out, and it is believed and averred that the pursuers do not intend to carry out, the works to the Premises, as to do so would not bring about an increase in the capital value of the Premises, and thus the price obtained when the Premises are sold, commensurate with the cost of the works. The true value of the pursuer's loss in the circumstances condescended upon should be measured by the diminution in the capital value of the Premises, and thus the reduction in the price they are likely to achieve upon a sale, which is materially less than the cost of carrying out the works the defenders accept ought to have been carried out."

The relevance of those averments was also an issue in the debate before the Lord Ordinary. He construed the proviso to clause 7 as being an obligation to make payment for the cost of the works that was:

> "conditional upon the pursuer intending to carry out the repair works, and not as a liquidate damages provision" (para 28).

That being so, he added:

> " 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." (para 29)

[6] The **second issue** is, accordingly, whether the Lord Ordinary erred in construction of clause 7. According to what we were told by senior counsel for the respondents in the course of the hearing, it is this issue that gives rise to, potentially, the most substantial difference between parties' respective quantifications of the reclaimers' claim.

First issue: the tenant's obligations under clause 3(a)

The Lord Ordinary's opinion

[7] In concluding as he did, the Lord Ordinary was critical of the grammar of the clause and critical of its draughtsmanship. He said that it was not – on a forensic analysis of the language - possible to identify a construction which gave a meaning to every word and that allowed him to give "less priority" to the order in which the words appeared. He held that the words "in at least as good condition as they are accepted by the Tenant" were the key element of the clause and applied to all aspects of the tenant's obligations. He concluded that that excluded any obligation to leave the premises in a state of improvement from their condition at the commencement of the lease. He agreed with the respondents that such a construction was commercially sensible.

[8] The Lord Ordinary could not see that there was any 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 obligations to replace, renew and rebuild and he was not persuaded that the direction to disregard the "age or state of dilapidation of the buildings, the repeated use of the phrase "all to the satisfaction of the landlord" or the absence of a schedule of condition of the premises at commencement indicated that a reasonable person would have reached a construction which entitled the landlord to have the premises returned at the end of the lease in any better a state than they were in at the outset.

Submissions

[9] Senior counsel for the reclaimers, under reference to *Arnold* v *Britton* [2015] UKSC 36, [2015] 2 WLR 1593 (at paras 15,16, 17 - 20), in an overarching submission, cautioned the court against construing the lease so as to relieve one party of having made a bad bargain under the guise of what a reasonable person with the parties' background knowledge would have understood it to mean (see also: *Chartbrook Ltd.* v *Persimmon Homes Ltd* [2009] AC 1101 at para 14 per Lord Hoffman).

[10] The reclaimers' contentions, as spoken to in oral submission and in the note of argument which senior counsel adopted, can be summarised as follows. When clause 3 was construed in context - which included that the respondents had in fact been tenants of the premises for many years - it was clear that the Lord Ordinary had fallen into error. The purpose of providing that the respondents accepted the leased subjects in their present condition was nothing more than to exclude the landlord's obligation at common law to put them into tenantable condition. The obligation to repair and keep in good and substantial repair - an objective standard - included an obligation to put them into that state of repair; absent their doing so, they would not be keeping the subjects in good and substantial repair. Indeed, in a context such as this lease, the obligation "to keep" the subjects in a particular state of repair comprehended an obligation to put them into that condition: *L Batley Pet Products Limited* v *North Lanarkshire Council* [2014] SC (UKSC) 174; *Taylor Woodrow* v *Strathclyde Regional Council unrepd,* Lord Penrose, 15th December 1995; *Credit Suisse* v *Beegas Nominees Limited* [1994] 4 All ER 803. The words "at least as good condition as they are accepted by the Tenant" - which were not the key element of the clause - did not excuse them from that or import a lesser standard for any aspect of the subjects that was not in good and substantial repair at the start. Further, those words applied only to the obligation to replace, renew or rebuild as was clear from their position in the clause; even if they applied to the whole of the repair, maintenance and renewal obligations, they provided a minimum baseline below which the overriding standard of good and substantial repair could not fall. The repeated references to "all to the satisfaction of the landlord" supported that conclusion as did the reference to the obligation being "regardless of the age or state of dilapidation of the buildings", as did the absence of a schedule recording the condition of the subjects at the commencement of the lease.

[11] The wording of clause 3(b) and clause 7 supported the reclaimers' construction. Clause 3(b) obliged the tenant to carry out work to, for example, put lighting into good working order even if was not working at the commencement of the lease. It also required the tenant to replace any item falling within the clause 3(b) description even if in good working order whenever the landlord reasonably required it to be replaced by a

modern version. The tenor of these obligations was certainly not tied to the condition of the subjects at entry and that was of relevance when determining what parties intended under clause 3(a), 3(b) being a set of provisions relating to the overall maintenance obligation provided for in 3(a). Clause 7 referred to the tenant being required to put the subjects "into good and substantial repair" prior to surrendering them to the landlord at the end of the lease; parties were unlikely to have chosen that wording if the clause 3(a) repairing standard was in fact the condition of the subjects at the date of entry.

[12] The Lord Ordinary's construction, conversely, failed to give meaning to the entirety of the clause. It had the effect of restricting the repairing standard to the condition of the subjects as at the date of commencement but if that was correct, the reference to "good and substantial" would be otiose as would the references to "all to the landlord's satisfaction" since the landlord's dissatisfaction or satisfaction would be irrelevant to the purely factual question of whether the subjects were in the condition they were in at the start. He was wrong to conclude that the reclaimers' construction did not make commercial commonsense.

[13] Regarding the authorities relied on by the Lord Ordinary, the factual circumstances surrounding the lease construed in *McCall's Entertainments (Ayr) Limited* v *South Ayrshire Council (No. 2)* 1998 SLT 1421 were not at all comparable to those in the present case and in *Scottish Widows Services Ltd* v *Harmon/CRM Facades Limited (in liquidation)* 2010 SLT 1102, it was not the nature of a tenant's repairing obligation that was under consideration; the finding that the tenant was not obliged to remedy latent or inherent defects which had given rise to a claim under a collateral warranty in a building construction contract could not reasonably be read as affirming any general proposition that an obligation to accept subjects in their present state, coupled with an obligation to keep them in good and tenantable repair, limited a tenant's obligation to matching the condition of the subjects at entry. Neither case was of assistance.

[14] The respondents' contentions, again as in oral submission and in the note of argument adopted by senior counsel, can be summarised as follows.

[15] The Lord Ordinary did not err. Whilst the clause was less than 100% clear, a reasonable person would regard it as commercially sensible to see it as containing a composite obligation under which the tenant was obliged to accept the subjects as they were at the date of entry (thereby relieving the landlord of his common law obligations) and to carry out works as and when specified circumstances came to pass but all with a view to returning the premises at the end of the lease in no worse a condition than they were at the start. The clause was simplicity itself - "here is an asset and when you are finished you don't give back anything that was not given to you". The phrase "good and substantial repair" did not have a meaning in law; it meant whatever the context indicated it meant and in this case all that was required was the condition at date of entry. There was no good reason for "at least as good condition as they are accepted" only applying to the latter part of the clause. The Lord Ordinary had been correct not to find himself bound by the decision in *Batley* but *McCall's Entertainments* was helpful as it concerned analogous circumstances; reliance was, accordingly, placed on Lord Hamilton having, in that case, observed that it would be remarkable if the obligation to repair imported an obligation to significantly improve the subjects and maintain them in that condition when the obligation at expiry was restricted to leaving them in a condition that was no less good and substantial than their condition at the outset.

[16] Senior counsel did not accept that clause 3(b) or clause 7 were of any assistance when construing clause 3(a). The former was simply different. The latter did not advance matters.

Decision in relation to the first issue:

[17] The task for the Lord Ordinary when interpreting the lease was to have, as his ultimate aim, the determination of what the parties meant by the language used, doing so by ascertaining what a reasonable person with all the background knowledge available to the parties would have understood the parties to have meant: *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900, at para 14 per Lord Clarke of Stone - cum - Ebony; and *Arnold* v *Britton* at para 15, where the task was distilled by Lord Neuberger of Abbotsbury as being that:

> "The meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provision of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and

circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.."

It is relevant for the purposes of the present case to note the emphases placed by Lord Neuberger thereafter, in paragraphs 17 - 20, on four matters - namely that commercial common sense should not be invoked to undervalue the importance of the language used by parties in the contractual provision being construed; that whilst poor drafting makes it easier to depart from the natural meaning and clear drafting makes it more difficult to do so, the court is not thereby justified in embarking on an exercise of searching for or constructing drafting infelicities so as to facilitate such departure; that commercial common sense is only relevant to how matters would have been perceived at the time of contracting and is not to be invoked retrospectively; and that although commercial common sense is very important the court should be slow to reject the natural meaning of a provision as correct simply because it seems to be a very imprudent term for one of the parties to have agreed, the purpose of interpretation being not to identify what the court thinks that parties ought to have agreed but what they have in fact agreed.

[18] We are, however, satisfied that the Lord Ordinary's approach involved a forensic analysis of the type that may be appropriate to statutory construction but redolent of the sort of search for infelicities warned against by Lord Neuberger. Whatever drafting deficiencies there may be in clause 3(a) they are not, in our view, such as to entitle the court readily to depart from the natural meaning of the clause.

[19] We accept that the grammar of the clause is not perfect. However, we are satisfied that it is clear that the natural meaning of the language used is not that contended for by the respondents. The construction they urged upon the Lord Ordinary - and which was accepted by him - would involve a substantial and unjustified departure from that natural meaning. As senior counsel for the reclaimers submitted, the words "good and substantial repair", "all to the satisfaction of the landlord", and "regardless of the age or state of dilapidation of the buildings or others for the time comprised in the leased subjects" would all be otiose; all that would matter would be what, as a matter of fact, was the state of the leased subjects at the commencement of the lease. Yet parties did not append, to this modern lease, a schedule or any other record of the condition of those subjects at that stage; on any view, their failure to do so weighs significantly against the construction contended for by the respondents.

[20] We are satisfied that it is clear that the natural meaning of the words used by parties demonstrates that their intention was that the overriding - and minimum - repairing standard was to be that of "good and substantial repair". Thus the standard to which the leased subjects, any additions to them and the other items in the list in the clause must be repaired, maintained, renewed, replaced and/or rebuilt is good and substantial repair but, if the condition of any aspect of them at the commencement of the lease is better than that, then the standard to which it must be maintained (and thereby the condition in which it must be delivered up at the end of the lease) is that condition; in that sense, there is a minimum baseline. If, on the other hand, the condition at the commencement of the lease is not that of good and substantial repair then the tenant must, when performing his obligation "to repair and keep in good and substantial repair" do so in such a way as achieves that standard. The obligation "to repair" is of itself indicative of that but if there were any doubt about that, we agree with senior counsel for the reclaimers that the balance of authority (*Credit Suisse* v *Beegas Nominees Ltd,* as followed in *Taylor Woodrow Properties Ltd* v *Strathclyde Regional Council* and *Lowe* v *Quayle Munro Ltd* 1997 SC346*; L Batley Pet Products Limited* v *North Lanarkshire Council*) supports the conclusion that an obligation to keep subjects in good and substantial repair carries an obligation to put them into that state of repair. If there is no obligation to renew, replace and rebuild as necessary - as was the position in the *McCall's Entertainments* case - a different conclusion might be drawn but such an obligation was clearly stated in the present case.

[21] We consider that the repeated references to "the satisfaction of the landlord" not only supports the above construction and confirms that "good and substantial repair" is to be assessed by reference to the landlord's interest in the subjects being maintained to and being delivered up in at least tenantable standard. Further, the phrase "regardless of the age or state of dilapidation of the buildings" confirms that the tenant is not to be excused of its obligation to repair, maintain and renew etc to at least "good and substantial repair" standard by

reason of them being below that standard at the commencement of the lease or, indeed, them falling below that standard during it. The absence of a schedule or other record of condition provides further cogent support for that construction.

[22] As regards clause 3(b), whilst we accept that it could be regarded as standing alone and thereby not inconsistent with the Lord Ordinary's construction of 3(a), it seems to us that the more natural meaning is to read (a) and (b) together with the latter giving more specification in relation to the items listed in it. That also avoids the apparent contradictions which would otherwise arise in respect of items mentioned expressly in both (a) and (b) - drains, for example; on the respondent's construction of 3(a), if the drains were in less than good and substantial repair at the outset, the tenant would not be obliged to effect any improvements to them under that provision at all whereas under clause 3(b) the tenant would be obliged not only to repair them but to replace them with modern drains if the landlord reasonably required it to do so.

[23] As regards the significance of clause 7, we agree with senior counsel for the reclaimers that reference to the tenant's obligation under the lease as being to put the leased subjects into good and substantial repair also supports the landlord's construction of clause 3(a). We consider that it provides ample support; if parties had intended that the repairing standard could be less than that, the reference to good and substantial repair in clause 7 would have made no sense.

[24] We should add that we have considered whether the Lord Ordinary's construction accords with commercial commonsense but cannot conclude that it does, not only for the above reasons but because the clause bears all the hallmarks of a full repairing lease and his construction would involve such a departure from that, that parties could have been expected to make it quite clear that that was what was intended.

[25] The circumstances of this lease can be contrasted with those in the *McCall's Entertainment* case. The provision under consideration there was one whereby the tenant was bound to "leave the subjects in a condition no less good and substantial than their present condition" at the end of the lease and, unlike clause 3(a) in the present lease, did not include any obligation to replace, renew or rebuild. The factual matrix - which influenced the Lord Ordinary's construction - was that the subjects ("The Pavilion" in Ayr) were in such an advanced state of dilapidated condition at the start of the lease that the works which the landlord sought to have funded by the tenant would have amounted to substantial renewal and would, at common law, have been extraordinary repairs for which the landlord would have been responsible. In those circumstances, the absence of an express obligation to replace and renew was fatal. Those were the circumstances in which the Lord Ordinary made the observations relied on by senior counsel for the respondents; they do not lend themselves to being read across so as to apply to the circumstances of the present case.

Second issue: the tenant's obligations under clause 7

The Lord Ordinary's opinion

[26] The Lord Ordinary approached his consideration of clause 7 bearing in mind certain observations made in the case of *Grove Investments Ltd* v *Cape Building Products Ltd* [2014] CSIH 43 which he took as requiring him to regard a commercial lease as a co-operative enterprise entered into by parties for their mutual benefit that ought normally to be construed so as to avoid arbitrary or unpredictable burdens or benefits and that if a particular construction involves radical departure from the common law that might indicate that such a construction is commercially unreasonable. He regarded the circumstances in *Grove Investments* as being indistinguishable from those in the present case. He found that the words "a sum equal to the amount required to put the leased subjects into good and substantial repair" were amenable to two possible constructions and that the words "in lieu of requiring the Tenant himself to carry out the work" afforded a clear indication that the payment obligation contained in the clause was activated only if the landlord intended 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. He was persuaded that that construction was one which best accorded with commercial common sense because it would have required very clear wording before it could be concluded that a tenant had entered into an obligation to pay a sum which might bear no relation to the loss actually suffered by the landlord.

Submissions

[27] Senior counsel for the reclaimers submitted that the wording of clause 7 was clear and obliged the respondents to pay the repair costs sought. It was not open to two possible constructions. In particular, it was not capable of being construed so to impose an obligation to pay not the sum specified but some other unspecified sum that was to be differently measured; to do so would be to stretch the words to a meaning beyond that which they could reasonably bear. There was no ambiguity and questions of what might or might not make commercial common sense did not, accordingly, arise.

[28] The clause was clearly one which provided not for damages but for a contractual right to payment and the reclaimers' action was for implement of the defender's contractual obligation to make that payment. The whole point of the clause was to avoid the necessity of traversing the difficult questions of the use to which the premises might be put in the future; parties must be taken to have known, at the time of contracting, that neither could accurately predict what the landlord might decide to do with the premises at the end of the lease and to have appreciated that the position could be difficult and uncertain depending on a number of variables. It was, accordingly, not at all surprising that the parties might have chosen to anticipate and contract out of that uncertainty, particularly in a context whereby during the currency of the lease, the landlord was entitled to call on the tenant to carry out repairs irrespective of any effect they may or may not have had on the capital value of the premises.

[29] It was, of course, open to the landlord, as expiry of the lease approached, to serve a Schedule of Dilapidations - such a schedule had been served about five months prior to expiry in the present case - and call on the tenant to carry out the repairs specified in it but that was not the only tool in the landlord's armoury on which parties had agreed. The other was the option of electing for payment of a sum of money calculated in accordance with the provisions in the lease; that made perfect commercial sense, particularly as expiry of the lease - and the landlord's consequent inability to insist on specific implement (*PIK Facilities Ltd* v *Shell UK Ltd* 2005 SCLR 958 at paras 29 - 45) - drew near. Fixing on that option could readily be seen as the likely product of the overall process of negotiation.

[30] The *Grove Investments* case was materially different. It concerned a clause which provided for parties to "make a financial settlement" according to the "value" of the Schedule of Dilapidations and that led the court to conclude that "value" was to be ascertained by principles analogous to those which would apply to a claim for damages. The tenant's obligation to pay did not, in that case, depend on the landlord making an election and serving a notice. By contrast, the clause in the present case concerned not a claim for damages but for a contractual debt comparable to that which was claimed by the landlord in *Jervis* v *Harris* [1996] Ch 195 where Millet LJ, as he then was, drew that distinction in relation to a claim arising from a tenant's failure to fulfil a repairing obligation. There was no room for the importation of concepts applicable to damages claims and none for construing a clause conferring an express contractual entitlement as though it was a claim for damages. It was also significant that the landlord's right to payment under clause 7 depended on his making an election and serving a notice at termination; that accorded with the right to a contractual payment.

[31] Further, the context in which the clause had to be construed was that the tenant's underlying obligation was to keep the subjects in good and substantial repair throughout the currency of the lease and to return them to the landlord at termination in that condition, regardless of whether or not repair was uneconomic; during the currency of the lease the election as between implement and damages lay solely with the landlord. That accorded not only with the lease but with the common law. Against that background, it was logical and rational for parties to have agreed that in lieu of requiring the tenant to do the work before termination, the landlord would, at termination, be entitled to call on the tenant to pay a sum equivalent to the repair costs. It was difficult to see what would be the purpose of the landlord electing and serving a notice unless it made a difference to the landlord yet on the respondents' construction, the landlord's position would be the same whether or not notice was given; the right would be only the right to damages to be calculated in exactly the same manner as it would if the landlord had decided to claim damages for breach of contract rather than the sum due under clause 7.

[32] Senior counsel for the reclaimers submitted that, overall, the respondents' construction had no proper basis in the words used in clause 7 or in its context; rather, it was an attempt to have the court make a better bargain for them contrary to the guidance in *Arnold* v *Britton* at paras 20 (per Lord Neuberger) and 77 (per Lord Hodge).

[33] Senior counsel for the respondents - contrary to what might have been thought to be the position articulated in his note of argument - accepted that clause 7 was a payment clause. However, the reasoning in *Grove* could nonetheless, be applied to the present case with the result that the Lord Ordinary's conclusion was correct.

[34] The clearest construction of clause 7 was that the only sums that required to be paid were those required for work which the landlord in fact intended to carry out; that gave meaning to the word "required" and accorded with the reference to payment being in lieu of requiring the tenant to do the work. If the landlord did not intend to do any repair work then he did not require any sum. The respondent's common law right to have damages limited to real loss actually suffered (*Ruxley Electronics and Construction Ltd* v *Forsyth* [1996] AC 344*; Tito* v *Waddell (no. 2)* [1977]1 Ch. 106) was not excluded by the terms of clause 7 and, accordingly, loss of capital value was the relevant measure of loss. Thus put, senior counsel appeared to accept that payment of something might be due and that the obligation to pay was to be found in clause 7.

[35] Even if the reclaimers' construction was a possible one, that was, according to senior counsel for the respondents, neither here nor there. All that meant was that there were two possible constructions. Standing *Grove* - on which he placed considerable reliance - a sensible commercial construction of a clause of this type in the context of leasehold repairing obligations required that the court be allowed to assess loss by reference to common law principles. The Lord Ordinary had not erred in law.

Decision in relation to the second issue:

[36] As with clause 3(a), the Lord Ordinary's task was to determine what the parties meant by the language used, doing so by ascertaining what a reasonable person with all the background knowledge available to the parties would have understood the parties to have meant, looking for the natural and ordinary meaning. As with clause 3(a) the relevant background did not extend beyond a consideration of the terms of the repairing obligation apart and the fact of the present claim being made in circumstances where service of a Schedule of Dilapidations had not caused the tenant to effect the repairs listed in it.

[37] The respondents accept that one meaning of clause 7 is that for which the reclaimers contend, namely, that it is a payment clause not a damages clause, that the sum due is the repair costs and questions of whether and to what extent the subjects are worth less in capital terms are irrelevant. We would go further. We are satisfied that that is the only natural and ordinary meaning to be given to the terms of the clause. To do otherwise and entertain the meaning urged upon us by senior counsel for the respondents would do such violence to the clause as to produce an incomprehensible result namely that, despite wording which provides only for the sum due to be measured in terms of repair costs and despite the requirement for the landlord to elect and notify, parties could be taken to have intended nothing more than that the landlord's claim be restricted to damages for breach of contract. That result would, we consider, fly in the face of commonsense so as to exclude it from the possibility of being an alternative construction: *Rainy Sky SA* v *Kookmin Bank* at paras 29 - 30; *Barclays Bank PLC* v *HHY Luxembourg* SARL [2011] 1 BCLC 336, at para 25.

[38] We consider it to be clear from the wording of clause 7 that there is no doubt about the measure to be employed and that that measure is a single one, namely the cost of putting the leased subjects into a condition which conforms with the standard of repair, maintenance and renewal etc provided for by clause 3(a) and (b). In short, the words clearly indicate that parties intended that if the subjects were not, at termination, in the condition in which they would have been if the tenant had complied with its repairing obligations then the landlord was to be entitled to payment of a sum equal to the cost of bringing them up to that standard.

[39] The language used connotes no alternative to assessing loss. We see no potential for importing into the words "a sum equal to the amount required" a meaning to the effect that the landlord must intend to use the

money to carry out the works, failing which repair costs become wholly irrelevant and actual capital loss suffered, to which no reference is made at all, becomes the only matter of any relevance at all. That conclusion is supported by the questions that would immediately arise if the landlord had to establish intention to repair - but are unanswered by clause 7 - such as (i) at what point must the landlord have that intention (at the date of the notice? continuing thereafter? if so, for how long?); (ii) if the landlord has that intention at the date of the notice, will it be invalidated if the intention changes later? (iii) does the landlord have to declare the intention in the notice? (iv) is payment conditional on demonstration of the intention? if so, how? and to whose satisfaction? and (v) is the sum refundable if, after payment, the intention changes or the subjects are not in fact repaired or are only partly repaired? In all the circumstances, we agree with senior counsel for the reclaimer that to regard the word "required" as importing the meaning contended for by the respondents would be to stretch the words to have them bear a meaning which they cannot, in the circumstances, reasonably bear.

[40] We are not persuaded that the reference to the call for payment of the repair costs being in lieu of requiring the tenant to carry out the work permits the respondents' construction. On the contrary, it accurately reflects the context which is that prior to termination the landlord has the option of a different remedy (one which does not involve the payment of money but involves requiring the tenant to carry out the repairs) but in the event that they are outstanding at termination, that option disappears (whether as a matter of law or practicality). The contract provides for what happens then and it is that the landlord is entitled, on giving due notice, to the contractual payment provided for and is clearly not that the landlord is, in effect, restricted to a claim of damages for breach of contract.

[41] We would add that we detect, in the respondents' approach, the application of a retrospectoscope once it became apparent, according to their averments, that the landlord might sell rather than repair. However, it is parties' intentions at the time of contracting that matters, not what happens later. At that time, as senior counsel for the reclaimers submitted, there were good and clear reasons for providing that the landlord should have the option of requiring payment of the cost of the repairs that the tenant ought to have carried out in lieu of having had the tenant do the work or having to sue for damages for breach of contract.

[42] The present case can readily be distinguished from the circumstances in *Grove*. There, the clause under consideration contained no notice provision and was, in terms, concerned with parties reaching a "financial settlement" in relation to the "value" of the Schedule of Dilapidations without any reference to the "cost" of repairs. Further, the tenant's position, as averred, was that the lease reflected parties having agreed that, if the repairing obligation was unimplemented, the landlord's remedy would be a claim for damages. That approach was regarded by the court as a possible construction largely because the word "value" was of more general signification than the word "cost". The tenant's approach as averred in *Grove* is not the respondent's position in the present case.

[43] The Lord Ordinary read some of the observations in *Grove* as being stand alone statements of principle namely that a contract is a co-operative enterprise entered into by parties for the mutual benefit, that it should normally be construed in such a way as to avoid arbitrary or unpredictable burdens, that the common law often serves as a benchmark against which considerations of fairness can be measured and that radical departure from the common law could indicate that that construction is commercially unreasonable (*Grove* at paras 11 and 12; Lord Ordinary at para 27). *Grove* clearly exerted considerable influence on the Lord Ordinary's reasoning and ultimate conclusion.

[44] We have, however, a number of observations. First, the general observations in *Grove* ought not, we consider, to be taken as indicating that the considerations of co-operation and mutuality that would be appropriate to, say, partnership or joint venture apply across the board. Commercial contracts may, equally, be hard fought with each party intent on securing their own particular objective. As senior counsel for the respondents accepted in the course of discussion, parties enter into contracts for their respective benefit. Care must also be taken to avoid reading anything said in *Grove* as being to the effect that the court can correct a bad bargain or even an unfair one; there is no general rule that a commercial contract requires to be fair. As Lord Hodge observed in *Arnold* v *Britton* at paragraph 77, it is not legitimate to re-write parties' agreement

because it was unwise of one party to gamble on future outcomes; the question is not whether a reasonable tenant would have entered into the obligation. Further, the observations in *Grove* predated the guidance provided by the Supreme Court in *Arnold* and must, accordingly, be regarded with an appropriate degree of caution. Finally, it is important to note that *Grove* did not lay down any general rule to the effect that the landlord in a commercial lease is, at termination, if repairs are outstanding only entitled to be compensated for capital loss actually suffered. Whilst the court concluded, in *Grove,* that that was the outcome that accorded with commercial commonsense, the context was its interpretation of the relevant clause in that lease as having provided the landlord with a right to compensation for breach of contract and that parties had thus agreed on a remedy akin to damages (see paragraph 17). The respondents' fundamental difficulty in the present case is that clause 7 is quite different and admits, we consider, of no room for any such construction. Insofar as the Lord Ordinary regarded the clauses as akin to one another, he erred. There being, in the present case, no room for the respondents' alternative construction, questions as to which of two possible constructions best accords with commercial common sense do not arise.

Disposal

[45] We will, accordingly, pronounce an interlocutor allowing the reclaiming motion, and reversing the Lord Ordinary's interlocutor of 16 February so as to (i) reinstate the words "put and" in article 10 of Condescendence; and (ii) exclude from probation those averments in answers 11 and 13 detailed in part 2 of that interlocutor. We will, in due course, remit to the Lord Ordinary to proceed as accords but meanwhile, will put the case out By Order to deal with any outstanding matters including expenses.