Scottish Courts

OUTER HOUSE, COURT OF SESSION

[2015] CSOH 29

CA195/14

OPINION OF LORD DOHERTY

In the cause

MAPELEY ACQUISITION CO (3) LIMITED (In Receivership)

Pursuer;

against

CITY OF EDINBURGH COUNCIL

Defender:

Pursuer: Sandison QC; Brodies LLP
Defender: Dean of Faculty, D Thomson; Burness Paull LLP

24 March 2015

Introduction

[1] The pursuer is the proprietor of the office premises known as and forming Chesser House, 500 Gorgie Road, Edinburgh. It is the successor to the landlord's interest in a lease of the premises between Boland Chesser Properties Limited and Lothian Regional Council for the period 1 July 1994 to 29 June 2014. The defender, as the statutory successor to Lothian Regional Council, is the successor to the tenant's interest in the lease. The defender gave up possession on the expiry of the lease.

[2] In this commercial action the pursuer seeks payment from the defender of the sum of £8,062,006.91 with interest from 15 July 2014 until payment. Of that sum approximately £3 million relates to a claim for the replacement of items of plant and equipment. The pursuer avers that during the currency of the lease the defender did not discharge the repairing obligations which were incumbent upon it; and that on the expiry of the lease the premises were not in the state and condition they ought to have been had the defender performed its obligations under the lease. The parties are in dispute as to the nature and extent of the tenant's obligations under the lease. The matter came before me for debate on two issues of interpretation.

[3] The first issue is whether, on a proper construction of the lease, clause 3.37.2 entitles the landlord 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 second issue is whether clause 3.37.1.1 obliges the tenant to replace at expiry or termination of the lease all items of plant and equipment which were on the premises at the date of entry, whatever the condition of those items at expiry or termination; or whether the tenant's obligation is restricted to replacing, at expiry or termination, such items as are missing, broken, worn, damaged or destroyed.

[5] A third issue in relation to VAT was raised in the pleadings and in the notes of argument. Both parties indicated a preference for the court to issue an Opinion dealing with the first two issues with the third issue being left over for argument at a later stage should it prove necessary.

The lease

[6] Clause 1.2.5 defined "the Premises" under reference to Part I of the Schedule to the lease "together with"

certain other matters including "all plant and equipment … from time to time in and about the same". The tenant's obligations were set out in clause 3. Those parts thereof relevant to the discussion before me were:

"3. TENANT'S OBLIGATIONS

The Tenant HEREBY UNDERTAKES with the Landlord and binds and obliges itself and its successors and assignees whomsoever all jointly and severally without discussing them in their order throughout the period of this Lease as follows:-

…

Re plant and equipment and service systems

3.5.1 To keep in good and substantial repair and condition and where necessary to renew and replace the plant and machinery which is within the Premises from time to time…

3.5.2 Without prejudice to Clause 3.6.1 at the cost of the Tenant to enter into such contracts as the Landlord may consider advisable with persons of repute previously approved in writing by the Landlord … for the regular maintenance, inspection, care and servicing of all such plant and machinery …

…

To repair, maintain and renew:

3.7 At all times throughout the Period of this Lease at the Tenant's expense well and substantially to repair, maintain, renew, rebuild, and reinstate and generally in all respects keep in good and substantial condition the Premises and every part thereof with all necessary maintenance and cleansing and rebuilding and renewal works and amendments whatsoever (regardless of the age or state of dilapidation of the buildings for the time being comprised in the Premises) …

To decorate exterior

3.8 Regularly (but no more frequently than once in every five years unless the Tenant so requires) and also during the last year thereof (howsoever the same shall be determined) to paint in a proper and workmanlike manner…all outside parts of the Premises which are painted … and …to polish all outside parts of the woodwork usually polished and to restore, point and make good the brickwork, stucco and stonework where necessary…PROVIDED that the landlord shall have the option (in lieu of requiring the Tenant to carry out the work in this sub-clause provided to be done in the last year of the Lease) of requiring the Tenant to pay to the Landlord such reasonable sum as shall be certified by the Landlord's Surveyors as being equal to the cost of carrying out such work and if the Tenant shall pay to the Landlord the sum as certified together with the Surveyors' fees of and in connection with such Certificate within twenty eight days of demand the Landlord shall accept the same in full satisfaction of the Tenant's liability under this sub-clause quoad the work referred to in this proviso.

To decorate interior

3.9 Regularly (but no more frequently than once in every seven years (but every three years in the case of kitchens, toilets and public areas …) unless the Tenant so requires) and also during the last year thereof (howsoever the same shall be determined) to paint … and well and sufficiently to grain, varnish, paper, plaster, whiten and distemper all the interior parts of the premises as are usually or ought to be grained, varnished, papered, plastered, whitened and distempered and generally to redecorate throughout, restoring

and making good the Premises … PROVIDED that the landlord shall have the option (in lieu of requiring the Tenant to carry out the work in this sub-clause provided to be done in the last year of the Lease) of requiring the Tenant to pay to the Landlord such reasonable sum as shall be certified by the Landlord's Surveyors as being equal to the cost of carrying out such work and if the Tenant shall pay to the Landlord the sum as certified together with the Surveyors' fees of and in connection with such Certificate within twenty eight days of demand the Landlord shall accept the same in full satisfaction of the Tenant's liability under this sub-clause quoad the work referred to in this proviso.

…

To remove:

3.37.1 Immediately prior to the expiration or sooner determination of the Period of

this Lease at the cost of the Tenant:-

3.37.1.1 to renew and replace any of the Landlord's fixtures and fittings, and the forementioned items of plant and equipment which shall be missing broken , worn, damaged or destroyed with others of a similar character, condition, and quality and, without prejudice to the foregoing generality, to renew and replace the items which were present in the Premises at the Date of Entry with others of a character, condition, and quality which at the determination hereof are the modern equivalents of those provided at the Date of Entry by the Landlord.

…

3.37.2 At the expiration or sooner determination of the Period of this Lease … to remove from and leave void and redd the premises in such good and substantial condition as shall be in accordance with the obligations on the part of the Tenant contained in These Presents together with all fixtures and fittings, (excepting Tenant's fixtures and fittings) and improvements and additions which now are or may at any time hereafter be in or about the Premises save such as the Tenant has been required to remove pursuant to Clause 3.38.1.3; Provided that if at such expiration or sooner determination the Premises shall not be in such good and substantial repair and condition then at the option of the Landlord either (i) the tenant shall carry out at its entire cost the works necessary to put the Premises into such repair and condition or (ii) the Tenant shall pay to the Landlord such reasonable sum as shall be certified by the Landlord's Surveyors as being equal to the cost of carrying out such work and if the Tenant shall pay to the Landlord the sum a certified together with the Surveyors' fees of and in connection with such Certificate within twenty eight days of demand the Landlord shall accept the same in full satisfaction of the Tenant's liability under this sub-clause quoad the work referred to in this proviso. If the Landlord elects to require the Tenant to carry out the works foresaid and the Tenant defaults in so doing the Landlord shall be entitled to carry out such works at the entire cost of the Tenant and whether such works are carried out by the Tenant or in default by the Tenant as aforesaid, by the Landlord there shall in addition be paid to Landlord by the Tenant a sum equivalent to the rent which the Tenant would have received had the These Presents subsisted until the date that all such necessary works had been completed to the satisfaction of the Landlord such sum to be paid on a date being seven days from the date of the Landlord informing the Tenant that all such works have been so completed. "

The pleadings

[8] The pursuer avers that upon the expiry of the lease the premises were not in such a state of repair and condition as was in accordance with the performance of the tenant's obligations under the lease. By letter dated 15 July 2014 the landlord exercised option (ii) of the proviso to clause 3.37.2 to seek payment from the tenant in

respect of what it avers to be a sum equal to the cost of rectifying wants of repair and failure of the tenant to remove alterations and additions which it had been called upon to remove by the end of the lease. The letter enclosed a certificate by the landlord's surveyor and a Schedule of Dilapidations. The sum certified was £8,039,113.45. The pursuer claims to be entitled to payment of that sum.

[9] The defender admits that upon expiry of the lease the premises were not in such a state or condition as accorded with the tenant's obligations under the lease. It avers:

> "…[P]roperly construed , however clause 3.37.2 of the Lease does not entitle the Pursuer to claim any payment where the Pursuer has not carried out and does not intend to carry out the works in question. The Pursuer does not aver that it has carried out, or that it has any intention of carrying out, the works in question. In these circumstances, the Pursuer has no entitlement under the terms of the Lease to claim the sums concluded for (whether certified or not by its surveyor)… Separatim and in any event a substantial quantity of the sum claimed by the pursuer (approximately £3 million) relates to the replacement of plant and equipment. On a proper construction of clause 3.37.1.1 of the Lease, the Defender was obliged to replace only those fixtures and fittings and plant and equipment (whether present in the Premises at the Date of Entry or not) which, at the expiration of the let, were 'missing, broken, worn, damaged or destroyed'."

The defender has prepared its own Schedule of Dilapidations in accordance with its construction of the relevant provisions of the lease.

Construction of clause 3.37.2

Submissions for the defender (tenant)

[10] On behalf of the tenant it was submitted that on a proper construction option (ii) of clause 3.37.2 does not entitle the landlord to payment where the landlord has not undertaken and does not intend to undertake the works in question. In the absence of averments that the landlord has undertaken or intends to undertake the works the pursuer's averments were irrelevant. The proviso to clause 3.37.2 only came into play if the tenant was in breach of its obligations under the lease. The landlord could claim damages for the breach: the pursuer did not suggest that the terms of the lease precluded it bringing an action for damages at common law to recover any losses it had sustained as a result of the failure of the tenant to perform its obligations. The proviso gave the landlord two further options (over and above its right to sue for damages): to require the tenant to undertake the work (option (i)); or, if the landlord has undertaken or intends to undertake the work itself, to exercise option (ii). The natural reading of option (ii) was that it was a provision which enabled a landlord who itself intended to, or had, carried out the works, to recover the cost of those works. The payment sum was to be "equal to the cost of *carrying out such work*" (*i.e.* the work necessary to put the premises in the requisite state) and was to be accepted by the landlord "in full satisfaction of the Tenant's liability under this sub-clause quoad *the work* referred to"; all of which implied that the liability to make payment was in respect of work which had been done or would be done. Option (ii) enabled the landlord to recover payment of the costs of the works carried out or to be carried out by means of certification rather than having to sue for and prove its loss in the ordinary way. That was a benefit. It provided a convenient means of crystallising the tenant's liability in respect of those works. Even if it was not accepted that the defender's construction was the natural reading it was at the very least a possible construction of option (ii). In those circumstances the proper approach was to have regard to the considerations discussed by the Inner House in *Grove Investments Limited* v *Cape Building Products Limited* [2014] CSIH 43 ("*Grove Investments*"). The defender's construction was the commercially sensible construction. On the other hand the pursuer's construction did not accord with commercial common sense. It could produce arbitrary and extravagant results, and could place a disproportionate burden upon the tenant. The extravagant nature of the pursuer's position was illustrated by the fact that it claimed VAT on the cost of the work - a charge which, if the works were not in fact undertaken, would never be levied. Reference was also made to *@Sipp (Pension Trustees) Limited* v *Insight Travel Services Limited* [2014] CSOH 137, but it was accepted that perhaps only a limited amount could be taken from that case because of the different wording of the relevant provisions. The fact that on one construction a clause in a lease might produce largely the same result as the common law was not a good reason for favouring an alternative construction. Provisions in leases often restated the common law (*Grove Investments*, at para. 20).

Submissions for the pursuer (landlord)

[11] Mr Sandison accepted that *Grove Investments* set out the legal principles which fell to be applied where a provision in a lease could bear more than one possible construction: but he cautioned against an undiscriminating application of those principles. The language which had been under consideration in *Grove Investments* (and in particular the reference to "value") had been more amenable to bearing the construction contended for by the tenant than was the case here. The language in *@Sipp (Pension Trustees) Limited* v *Insight Travel Services Limited*, *supra*, had also been more open to the tenant's construction. Payment was to be made "in lieu of" requiring the tenant itself to carry out the work, which clearly suggested that the payment was to be a surrogate for actual work done or to be done. The court should not be eager conclude that the defender's construction of option (ii) of the proviso was a possible construction. Where, as here, the contracting parties had expressed their agreement sufficiently clearly the words of the agreement ought to be given effect to. The remedies provided in the proviso were separate and additional to the right to claim common law damages. The proviso permitted the landlord to exercise an option either to require the tenant to carry out the requisite works (option (i)); or, alternatively, to require the tenant to pay the landlord "such reasonable sum as shall be certified by the Landlord's surveyors as being equal to the cost of carrying out such work" (option (ii)). "Such work" was "the works necessary to put the Premises into such repair and condition". In turn "such repair and condition" was "such good and substantial repair and condition as shall be in accordance with the obligations on the part of the Tenant". Option (ii) was a surrogate for what would otherwise be the tenant's liability in respect of its breach of contract. If it was exercised by the landlord it required the tenant to pay a sum reasonably certified as being equal to the cost of carrying out certain work. That work was the work that was "necessary" to put the premises into a particular state of repair. It mattered not whether that meant the work which was necessary to put the premises into that state or the work which would be necessary if the works in question were executed. The state in which the tenant had agreed to leave the premises was the touchstone for the extent of the payment. Option (ii) was a very convenient form of remedy for the landlord. It was a claim for payment of a contractual debt. There was no need for the landlord to prove loss. If the tenant complied with its obligations during the currency of the lease it could minimise (though not wholly avoid) a claim for payment on the expiry of the lease. On the other hand the defender's construction was "a wholly implausible (if not quite impossible) reading of the clause". It required the redrafting of option (ii) to read in words which it did not contain. That was not a legitimate exercise (*Gilbert-Ash (Northern) Limited* v *Modern Engineering (Bristol) Limited* [1974] AC 689, per Lord Morris at p. 703; *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900, per Lord Clarke at paras. 19 and 23). The defender's construction left it far from clear what commercial purpose option (ii) was designed to serve. If the landlord intended to have all or even some of the "necessary" works carried out it could achieve that by exercising option (i) (thereby requiring the tenant to do them). That tended to suggest that option (ii) had been provided to deal with those instances where, for whatever reason, the landlord did not wish the necessary works to be carried out in whole or in part. The tenant had accepted that bargain. On the defender's construction, the suggestion that option (ii) was there to provide a convenient mechanism for crystallising the landlord's claim might have been more cogent if the certificate had been conclusive. The fact that certification was to be of "such reasonable sum" meant that the benefit of certification suggested by the tenant - crystallisation of the sum due - was illusory. It would do no more that replicate the common law claim for damages which the defender accepted that the landlord continues to possess. The wording of the proviso in clause 3.37.2 fell to be contrasted with the wording of the provisos in clauses 3.8 and 3.9. The option conferred on the landlord by each of those provisos was "in lieu of" requiring the tenant to carry out its decorating obligations during the last year of the lease (*cf.* the language of the option in *@Sipp (Pension Trustees) Limited, supra*). It was an option to require the tenant to pay "such reasonable sum as shall be certified by the Landlord's Surveyors as being equal to the cost". It was arguable on that different wording that if no work was in fact to be done no sums were to be recoverable. Different wording had been used in clause 3.37.2 because the parties were describing a different pattern of liability. If the pursuer's construction was not the correct one it was nonetheless incorrect to suggest that option (ii) only applied where work had actually already been done. The "cost of carrying out such work" was capable of being determined prospectively or retrospectively.

Decision and reasons

[12] The first question is whether each of the constructions contended for is at least a possible construction of option (ii). There was really no dispute that the pursuer's construction is a possible construction. It is, perhaps, the more natural reading of the provision. However, I am not persuaded that the language of the option is unambiguous. I do not accept that the words used are so clear that the pursuer's construction is the only possible interpretation. In my opinion, the words "such reasonable sum as shall be certified by the Landlord's Surveyors as being equal to the cost of carrying out such work" are open to construction. They may mean, as the pursuer submits, the cost of carrying out the works which would be necessary to put the premises into such good and substantial repair and condition as would be in accordance with the tenant's obligations under the lease, whether those works are to be carried out or not. But I agree with the defender that another possible meaning is that the sum to be certified and paid is a sum which is equal to the cost of such of those works as have been, or are to be, carried out. That meaning appears to me to be one which the provision is at least capable of bearing, without rewriting its terms. It is not a meaning which is unreasonable or manifestly contrary to the wording of option (ii). Both constructions are possible constructions of the option.

[13] That being so the focus becomes examination of the competing constructions in light of the principles discussed in *Grove Investments.* It is those principles of construction which are important, not their application to the differently worded lease in that case. The same observation applies to *@Sipp (Pension Trustees) Limited.* It is not particularly helpful to compare and contrast the language of the lease provisions in those cases with the language of option (ii).

[14] In general, where a contractual provision is capable of more than one meaning the court should adopt the meaning which best accords with commercial common sense (*Grove Investments*, paras. 9-10). Since a contract is a co-operative enterprise entered into by the parties for their mutual benefit, it should normally be construed in such a way that the benefits that may reasonably be expected from the contract accrue to both parties; and so that the results are not objectively excessive or disproportionate judged by the expectations of reasonable parties in the particular contractual context (*i.e.* no arbitrary or unpredictable burdens, impositions or benefits) (*Grove Investments*, para. 11). In giving a contract a contextual interpretation both the factual and the legal context should be considered. Usually the common law will achieve a result in accordance with commercial common sense. The common law can often serve as a benchmark against which considerations of fairness can be measured, particularly where the contract term is a subsidiary term and the consequences of the wording may not have been well thought through. If a construction achieves a result that is radically different from the common law that is a factor that may in some circumstances indicate that the construction is commercially unreasonable (*Grove Investments*, para. 12).

[15] I agree with the defender that the application of these principles points to the defender's construction being the correct one. It is more in keeping with commercial common sense; more akin to the remedy which the common law would provide; more in accord with the fundamental commercial purposes of the lease; and less prone to produce results which are objectively excessive or disproportionate.

[16] The relevant dilapidations are those that the tenant is obliged to make good under the terms of the lease. The contractual context is the termination of a lease where the tenant has not fulfilled its obligations and is in breach of contract. The proviso to clause 3.37.2 provides the landlord with remedies for the tenant's breach. Option (i) enables the landlord to insist that the tenant carries out the works necessary to put the premises into the condition they would have been in had the tenant performed its obligations. If that option is exercised and the tenant defaults in carrying out the works, the landlord is empowered to carry them out at the cost of the tenant. Both of these scenarios involve the necessary work actually being done, with the tenant being liable for the cost. However, there will be circumstances where the landlord may not wish to have the premises reinstated. The expectations of reasonable parties in those circumstances would be that the landlord would be entitled to recover such loss as it had suffered, but that it ought not to be entitled to payment of the notional cost of reinstatement works which were not to be carried out. The tenant's construction of option (ii) is consonant with the common law in that it does not enable the landlord to recover notional costs which it has not and will not incur. By contrast, the landlord's construction of option (ii) would be a radical departure from the landlord's

entitlement at common law. Such a departure would require to be clearly indicated - which it is not. Comparison of the language of option (ii) with the language of the options in clauses 3.8 and 3.9 does not assist the pursuer: for present purposes the differences are not significant. The landlord's construction might result in a level of recovery which is not related to any loss which it sustained. The benefit to it, and the corresponding burden on the tenant, might be arbitrary and disproportionate, unrelated to the true significance for the landlord of the tenant's breach (*Grove Investments*, para. 18). The tenant's construction provides full compensation to the landlord. In the event of the landlord reinstating, that is its loss and that is the measure of damages it recovers. The certification procedure provides a useful mechanism for crystallising that loss. I do not accept the contention that that benefit is rendered illusory by virtue of the fact that the sum to be certified is to be a "reasonable" sum. In the event of no reinstatement being required of the tenant or carried out by the landlord the landlord's remedy for the breach would be a common law claim for damages if it had suffered any loss. As the court observed in *Grove*:

> "19. …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 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."

[17] In arriving at my conclusions I do not attach any weight to the fact that VAT has been included on the various items in the Schedule of Dilapidations. At first blush it seems odd for VAT to be levied where work is not actually to be done. However, I was not addressed as to the legal basis upon which VAT might be payable in those circumstances. (If it was legally payable then clause 3.38 would oblige the tenant to make payment of VAT along with the sums upon which VAT was payable.) As already indicated, both parties asked that this issue be left over for future consideration should the need arise. I am content to accede to that request.

The proper construction of clause 3.37.1.1

Submissions for the defender (tenant)

[18] The Dean of Faculty indicated that of the total sum sued for approximately £3 million represented the cost of items of plant and equipment which the pursuer maintained the defender had been obliged (in terms of clause 3.37.1.1) to renew and replace immediately prior to the expiry of the lease. He submitted that on a proper construction of the clause it obliged the tenant to replace only those fixtures and fittings and plant and equipment (whether present in the premises at the date of entry or not) which, at the expiration or sooner termination of the let were "missing, broken, worn, damaged or destroyed". The word "items" in the second part of the clause referred back to "the forementioned items of plant and equipment which shall be missing, broken, worn, damaged or destroyed". The purpose of the latter part of the clause was to specify the standard which is to be met in the renewal and replacement of those items which were present in the premises at the date of entry. The two parts of the clause were tied together, not only by the repetition of the word "items" but also by the phrase "without prejudice to the foregoing generality". That phrase excluded any argument that the second part of the clause cut down the scope of the first part, but it also implied an overlap between the two parts of the clause. Unlike the position here, in *Caledonia North Sea Limited* v *British Telecommunications plc* 2002 SC (HL) 117 some of the words which had followed that phrase in an indemnity clause had clearly not been particular examples of a previously expressed generality (see per Lord Mackay of Clashfern at paras. 32, 37, 38). There was no such problem with the defender's suggested construction of clause 3.37.1.1. The natural reading of the clause was that what follows the phrase dealt with one particular type of plant and equipment which was missing, broken, worn, damaged or destroyed at the termination of the lease. The defender's construction was a tenable construction of the clause, and it was the construction which ought to prevail when regard was had to the context of the clause and to business common sense. The tenant was bound during the currency of the lease to keep in good and substantial condition and where necessary to renew and replace plant and machinery (clause 3.5.1); and to enter into contracts for maintenance of such plant and machinery (clause 3.5.2). However, the landlord's construction would oblige the tenant to replace all plant and equipment which had been on the premises at the commencement of the lease, whatever its condition at the expiry or earlier termination of the lease. Thus even if the tenant had

complied with its obligations in terms of clauses 3.5.1 and 3.5.2, on the pursuer's construction the tenant would nonetheless be obliged to replace each and every item of plant and equipment which had been in the premises at the date of entry, regardless of whether the items had been properly maintained or whether they were in good and substantial condition. That did not accord with business common sense.

Submissions for the pursuer (landlord)

[19] Mr Sandison submitted that the obligation "to renew and repair any of the landlord's fixtures and fittings" was a reference to the whole landlord's fixtures and fittings in and on the premises at the commencement of the lease (Part I of the Schedule to the lease). The "forementioned items of plant and equipment" were "the plant and machinery which is within the Premises from time to time" (clause 3.5.1). (I note in passing in this connection that clause 1.2.5 appears to be the more appropriate previous (and first) reference to "all plant and equipment and landlord's fixtures and fittings from time to time in and about" the premises: but nothing much turns on this). Such plant and equipment which was "missing, broken, worn, damaged or destroyed" required to be renewed or replaced "with others of a similar character, condition and quality". The final part of the clause imposed a free-standing obligation. It was not an obligation which was qualified by the previous parts of the clause. It obliged the tenant to renew and replace all items of plant and equipment which were present in the premises at the date of entry with others of a character, condition and quality which are the modern equivalents of those provided at the date of entry. In this part of the clause "items" meant the "forementioned items", which in turn meant "the plant and machinery which is within the Premises from time to time" (clause 3.5.1). The phrase "without prejudice to the foregoing generality" meant that nothing which followed was to cut down or exclude any matter which fell within the previous part of the clause, but it did not carry the implication that the words which followed the phrase were but particular examples of and within the more general matters dealt with in the previous part of the clause (*Caledonia North Sea Limited* v *British Telecommunications plc, supra,* per Lord Mackay of Clashfern at para. 38). There was nothing contrary to commercial common sense in the pursuer's construction. Replacement of items with modern equivalents at termination was perfectly understandable.

Decision and reasons

[20] The construction of the clause up to the words "and without prejudice" would have been clear beyond peradventure had it not been for the comma after the word "fittings". The obligation would have been to renew and replace any of the landlord's fixtures and fittings which were missing, broken, worn, damaged or destroyed and any of the plant and equipment on the premises which were missing, broken, worn, damaged or destroyed with others of a similar character, condition and quality. The presence of the comma opens up an argument that the phrase "which shall be missing, broken, worn, damaged or destroyed" does not qualify the words which precede the comma, and that it qualifies only "the forementioned items of plant and equipment". I am not persuaded that that consequence should follow. The punctuation throughout the lease is variable (compare, for example, the placing of a comma in clause 3.5.1 after the words "but without limitation" with the absence of a comma after those words in clauses 3.5.2 and 3.5.3). In those circumstances I do not attribute significance to the presence of the comma here (see *e.g Lewison, The Interpretation of Contracts (4th ed.)*, para. 5.14; *Chitty on Contracts (31st ed.)*, para. 12-080; and the authorities there discussed including *Possfund Custodial Trustee Ltd* v *Kwik-Fit Properties Ltd* 2009 SLT 133, at para. 15). In any event, it is clear to me from reading the clause as a whole that the phrase is intended to identify not only the plant and equipment which should be renewed or replaced but also those of the landlord's fixtures and fittings which are to be renewed or replaced. In my opinion, read in context, the words "any of" mean "such of". It is any of the landlord's fixtures and fittings which are missing, broken, worn, damaged or destroyed, and any of the plant and equipment which are missing, broken, worn, damaged or destroyed, which the tenant is obliged to renew or replace. The alternative construction is that "any of the Landlord's fixtures and fittings" means all of those fixtures and fittings. That is not the natural reading of the phrase when read in context. The alternative construction would not accord with the fundamental commercial purposes of the lease. It would produce a result which is objectively excessive and disproportionate judged by the expectations of reasonable parties in the particular contractual context. It would be a radical departure from the common law without clear provision having been made to make plain that that

was the parties' intention. Unlike the former construction, the alternative construction is not in accordance with commercial common sense.

[21] I turn to the second part of the clause. It is common ground that the words "without prejudice to the foregoing generality" direct that the second part of the clause is not to be taken to cut down the first part. The more difficult question is whether the first and second parts are connected, and if so, what the nature of that connection is.

[22] Both parties approached interpretation of the second part on the basis that the "items" referred to were items of plant and equipment. The landlord maintained that the reference should be read as being to "the forementioned items", the foremention having been in clause 3.5.4 to "the plant and machinery which is within the Premises from time to time". The tenant submitted that the word "items" in the second part referred to the items of plant and equipment which had been described in the first part (*i.e.* items of plant and equipment within the premises from time to time which shall be missing, broken, worn, damaged or destroyed). On the landlord's approach there was some overlap between the two parts. Some of the items described in the first part would have been items which were present at the date of entry; but the second part dealt not just with them but with all plant and equipment which had been present at that date, whatever its state at the determination of the lease. On the tenant's construction items referred to in the second part were a species of the items referred to in the first part; the second part made specific provision that in relation to those items which had been present at the date of entry and were missing etc. at termination, the obligation to renew and replace with an item of "similar" character, condition and quality was to be fulfilled by renewing and replacing with modern equivalents of the items present at the date of entry.

[23] The tenant's construction appears to me to be the ordinary reading of the second part of the clause. Given that a category of items of plant and equipment is described in the first part, the natural reading of "items" in the second part is that it refers to the same category. I do not consider that any assistance one way or the other is obtained from the use of the phrase "without prejudice to the foregoing generality". The phrase means that nothing in the provisions of the clause following that phrase are to cut down or exclude any matter that would fall within the provision before that phrase (*Caledonia North Sea Limited* v *British Telecommunications plc, supra,* per Lord Mackay of Clashfern, at para. 38). The use of the phrase is consistent with either construction here (*cf. Caledonia* where some of the classes listed after the phrase were definitely not species of the class which preceded it).

[24] While the tenant's construction appears to me to be the natural reading of the second part, the landlord's construction is a possible reading. However, here too the application of the principles of construction discussed in *Grove Investments* points to the tenant's construction being the correct one. The fundamental purposes of the lease, common to both parties, are that the tenant should have possession of the subjects for the term of the lease and should return the subjects to the landlord in such a condition that the landlord can then relet them (or sell them if so advised) (*Grove Investments,* para. 19). The tenant's construction is more in keeping with those purposes than the landlord's construction. On the landlord's construction the tenant would be obliged at termination to replace with a modern equivalent each and every item of plant and equipment which had been present in the premises at the date of entry, regardless of whether the item had been properly maintained by the tenant and whether or not it was in good and substantial condition at the date of termination. Judged objectively by the expectations of reasonable parties in the particular contractual context, that would be an excessive and disproportionate consequence. Judged in that way the tenant's construction produces a result which is fairer to both parties (in what is, after all, a co-operative enterprise). The tenant's construction produces a result which is much more akin to the remedy which the common law would provide for breach of a tenant's repairing obligation than the landlord's construction does. In my opinion these considerations point to the tenant's construction being the construction which is more in accordance with commercial common sense.

Conclusions

[25] As requested by the parties I have set out my views as to the proper construction of clauses 3.37.2 and 3.37.1.1. In each case, for the reasons outlined, the defender's construction of the clause appears to me to be the correct one.

Disposal

[26] Since I have held that the defender's construction of clause 3.37.2 is correct, and since the pursuer does not aver either that it has carried out or that it intends to carry out the works certified in terms of that clause, the pursuer's averments are irrelevant. However, Mr Sandison suggested that, whatever the outcome of the debate, it would be preferable for the case simply to be put out by order to discuss the appropriate interlocutor in light of the court's conclusions. He raised as a possible scenario that the pursuers might indeed propose to carry out some of the works. The Dean of Faculty did not object to the matter being put out by order for further discussion after this Opinion was issued. Accordingly I shall put the case out by order to discuss the appropriate interlocutor and all other matters arising from my decision.