SHERIFFDOM OF LOTHIAN & BORDERS AT EDINBURGH

[2017] SC EDIN 51

CA16/14

JUDGMENT OF SHERIFF WILLIAM HOLLIGAN

In the cause

SCOTTISH WATER BUSINESS STREAM LIMITED
a company incorporated under the Companies Acts (Company No SC294924),
having its registered office at 7 Lochside View, Edinburgh, EH12 9DH

Pursuer

Against

MR PETER SHARMA
having a place of business at 39-47 Albany Street, Edinburgh, EH1 3QY

Defender

Pursuer: Hall; Brodies LLP
Defender: Wilson; Ennova Law

Edinburgh, 23 December 2016

The sheriff, having resumed consideration of the cause finds in fact:

[1] The pursuer is a company incorporated under the Companies Acts, having its registered office at 7 Lochside View, Edinburgh.

[2] The defender is a hotelier. He owns and operates The Albany Hotel, Albany Street, Edinburgh ("the hotel").

[3] The defender owns or occupies premises at 39-47 Albany Street, Edinburgh ("the premises").

[4] The pursuer is a licensed provider of water services and sewerage services.

[5] The pursuer is the licensed provider of water services and sewerage services to the premises and entitled to demand payment therefor.

[6] The pursuer issues annual charging statements which set out the unit prices and methods of calculating charges for water and sewerage. Document 19 is a copy of the pursuer's annual charging statements for the years 2015/16.

[7] The premises are townhouses linked together to form a hotel. There are approximately 42 bedrooms.

[8] The defender acquired his interest in the premises at various times during 2007.

[9] When the defender took occupation of the premises there was already a water supply.

[10] The water supply continued after he took occupation. The defender did not make particular arrangements with the pursuer to continue the water supply to the premises.

[11] At all material times there were three water meters and associated pipework situated within the boundaries of the premises.

[12] One of the meters was situated below ground level in or nearby the cellar within number 43 Albany Street, Edinburgh ("the disputed meter").

[13] The first invoice received by the defender from the pursuer for water and other charges is dated 19 October 2010 ("the first invoice"). The first invoice covers the period from 1 April 2009 to 25 August 2010.

[14] The first invoice is divided into three parts, each relating to water recorded by a specific meter.

[15] That part relating to the disputed meter amounted to £16,262.43.

[16] The sum relating to the disputed meter was significantly higher than the other two meters. It is also significantly higher than would have been expected for a hotel of that size.

[17] On receipt of the first invoice the defender contacted the pursuer who advised him to carry out a check of the plumbing.

[18] The defender instructed plumbers, JSB Plumbing & Sons ("JSB") to investigate whether there was a problem with the plumbing and pipework of the hotel.

[19] JSB carried out work on or about October 2010. Document number 3 is a copy of their written report and is dated 21 October 2010. JSB found that a ball float required to be replaced in the storage tank but found no evidence of any other leak or default.

[20] By letter dated 11 October 2011 (document number 1) the defender wrote to the pursuer to complain about the amount of the first invoice in relation to that part concerning the disputed meter. The defender challenged the accuracy of the reading. He drew comparisons with other similar properties.

[21] The disputed meter could be seen to be spinning at a fast rate.

[22] The defender instructed Rainbow International ("Rainbow International") to carry out a thermography and moisture report in relation to the disputed meter.

[23] Document number 5 is a copy of the report from Rainbow International and is dated 1 December 2011. Rainbow International found that the premises had more than one water meter feeding the building. One was found to be spinning excessively. There was no visible evidence or physical sign of water damage; the conclusion was that either water was escaping into the surrounding area outside the property or there was a defective meter. It was recommended that there be further investigation to follow the water pipe into the building to assess if there was a break in the pipe.

[24] At or about the end of June 2012 the defender instructed H&C Mechanical Services Ltd ("H&C"), plumbers and engineers, to carry out further investigations.

[25] H&C carried out investigations and their conclusions are recorded in documents number 7 and 8.

[26] H&C found that, having located the water meter (the disputed meter), it was turning very quickly. The diameter of the water meter was only 15mm. Pipes with such a diameter are not used to provide mains water supply.

[27] H&C turned off the supply to the meter and checked that all mains outlets in the hotel continued to operate. Attempts were made to trace the route of the mains water but without success. H&C concluded that, after the supply had been turned off for 24 hours, there was no adverse effect on the supply of water to the hotel. They concluded that the pipe must serve some other property or be capped underground in a burst condition.

[28] H&C carried out further investigations on or about 30 June 2012. The cellar area to number 43 Albany Street was dug up and a leak discovered which was discharging into a drain. The leak was then rectified. H&C turned off the valve. The disputed meter was to be removed.

[29] It is not unusual for pipework under one property to supply a different property.

[30] The disputed meter and related pipework did not carry water to the premises or any part thereof. Turning off the water supply to the disputed meter had no effect upon the supply of water to the premises.

[31] The water supply to number 43 Albany Street is delivered by supply from the other two meters.

[32] After it was turned off at or about the end of June 2012 or the beginning of July 2012 the disputed meter (and its replacements) measured zero supply of water.

[33] It would have been possible for the defender to cause to have taken a supply of water from the pipes connected to the disputed meter. He did not do so and has received no supply therefrom.

[34] Between July 2012 and July 2014 the disputed meter was replaced and later removed by or on behalf of Scottish Water. The pipework and meters are not owned by the pursuer.

[35] If lawfully due, the sum owing by the defender to the pursuer amounts to £66,293.37 pursuant to the relevant invoices and charges levied by the pursuer.

[36] The sum of £66,293.37 includes within it the sum of £53,519.30 which relates to the disputed meter.

[37] The defender paid the sum of £10,000 to the pursuer in order to avoid disconnection of the water supply.

Finds in Fact and in Law

[1] By their conduct the parties entered into a contract.

[2] The terms of the contract were that the pursuer contracted with the defender (as occupier of the property) for or in relation to the supply of water to the property through the public supply system and that the pursuer could fix, demand and recover charges from the defender for or in relation to the supply of water to the premises.

[3] The pursuer did not supply water to number 43 Albany Street, Edinburgh and is not liable for payment therefor.

THEREFORE sustains the pursuer's first plea in law but only to the following extent; repels parties' remaining pleas; grants decree for payment by the defender to the pursuer in the sum of TWELVE THOUSAND SEVEN HUNDRED AND SEVENTY FOUR POUNDS AND SEVEN PENCE STERLING (£12,744.07) with interest thereon at the rate of eight per cent per annum from date of decree; finds the pursuer liable to the defender in the expenses of the

action; allows an account thereof to be lodged and remits the same to the Auditor to tax and report.

Note

[1] This matter proceeded to a proof before answer following a debate in which I issued a judgment dated 20 July 2016 ("the debate judgment"). In short, the pursuer seeks payment from the defender for supply of water and other associated charges. The sum sued for was amended on the first day of the proof and is £66,293.37. The defender accepts, and has always accepted, that he is responsible for part of the sum sued for. I will return to this later.

[2] I heard evidence from five witnesses: the defender; Mr John Leal, who specialises in water damage claims; Mr James Hamilton, Plumbing and Heating Engineer and Director of H&C Mechanical Services Ltd; Dr Helen Murphy, an Account Manager employed by the pursuer; and Mr Raymond Smith, a Field Service Adviser employed by Scottish Water.

[3] The parties entered into two joint minutes of admission; a joint bundle of documents was agreed. When I refer to a "document" it is a reference to the joint bundle of documents. The two joint minutes are quite lengthy. The first joint minute was prepared in advance of the debate. The joint minutes record matters some of which are no longer an issue now or, at the end of the day, not relevant to my decision. Some of the matters agreed seem to me to be more matters of law than fact. I intend to include within my findings in fact such parts of the joint minutes as are necessary for my decision. In relation to the witnesses this is not a matter in which there are any issues as to credibility and reliability. Quite properly, there is no major criticism of any of the witnesses. Much of the evidence is not in dispute.

[4] The pursuer has its registered office at 7 Lochside View, Edinburgh. I set out much of the statutory background to this matter in the debate judgment. Although it is repetition, I summarise the position as follows. Scottish Water is a body corporate established pursuant to part 3 of the Water Industry (Scotland) Act 2002 ("the 2002 Act") and is the principal provider of wholesale water and sewerage services in Scotland. The Water Services etc. (Scotland) Act 2005 ("the 2005 Act") introduced competition to the water market. That market is regulated by the Water Industry Commission for Scotland ("WICS"), a body corporate established by the 2002 Act. Section 6(1) of the 2005 Act allows the WICS to grant a licence authorising a person to make arrangements with the occupier of any eligible premises for or in relation to the supply of water to the premises through the public water supply system and to fix, demand and recover charges for and in relation to the supply of water to any premises in respect of which the person has made such an arrangement. The same section authorises such person to make arrangements with Scottish Water and such other persons as are necessary for the purposes of and in connection with the foregoing matter. Similar provisions are contained in section 6 relating to the provision of sewerage. Scottish Water was required to establish an undertaking to become a water services provider and a sewerage services provider and for such body to apply for licences in terms of section 6 of the 2005 Act. The pursuer is that undertaking. Licences have been granted to the pursuer by the WICS. The pursuer is thus a licensed provider and these licences in turn authorise the pursuer to make arrangements for the occupier of any eligible premises for and in relation to the provision of water and sewerage and the disposal of sewerage from premises through the public sewerage system and to demand and recover charges for and in relation to any eligible premises in respect of which arrangements have been made. There is no dispute that the premises are "eligible premises" as defined in section 27 of the 2005 Act.

[5] The defender is the owner of the Albany Hotel which operates from 39-47 Albany Street, Edinburgh. Documents 15, 16 and 17 are copies of the relevant title certificates for numbers 39, 41-43 and 45-47 Albany Street respectively. Number 39 is leased to the defender. Otherwise title is in the name of the defender. For present purposes there is no distinction between properties occupied and owned by the defender. The premises comprise a number of connected townhouses. The defender acquired his interest in the properties in 2007. He acquired the majority of his interest from Swallow Hotels, then in administration. The defender did not acquire the properties all at once. As I understand the evidence, with the exception of numbers 45-47 Albany Street, he acquired his interest in April 2007; 45-47 were acquired later in the year with a date of entry December 2007. I understand from the defender's evidence that there are approximately 42 bedrooms. There was a small amount of evidence that certain work was done in or about 2007. There was no evidence as to what works were actually done and it is not open to me to make any findings in fact in relation thereto.

[6] On taking entry there was already a water supply to the premises. The defender did not make particular arrangements for its continuation. The properties are Georgian townhouses and have cellars. The cellars are situated underneath the main street. There were three water meters situated within the premises. There is no dispute that the three meters are within the boundary of the respective properties. This dispute concerns the water meter situated in 43 Albany Street which I will refer to as "the disputed meter". It is situated under street level, in or by the cellar. Although the defender was in occupation from 2007, it appears that the first bill which the defender received from the pursuer was dated 19 October 2010 and covered the period from 1 April 2009 until 25 August 2010. The invoice details are contained in document 18 which is a spreadsheet showing the various

invoices and charges over the material time. The amounts referred to in the first invoice are divided into three parts, each relating to a particular meter: 01A13476 ("the disputed meter"), £16,262.43; 00A346071, £1,821.67; 00A249091, £4,145.39. The amount for the disputed meter was very significantly higher than the other two meters. The defender contacted the pursuer who advised him to have plumbers check the plumbing because there may be a leak within the premises. The defender instructed plumbers, JSB Plumbing & Sons. They carried out work and provided a brief letter which is document number 3. The letter is dated "21 October" but it is a matter of agreement that the letter is dated 21 October 2010. That letter narrates that water storage tanks in the cellars were overflowing. Ballcocks were removed and capped off. No other leak or problem was found. The defender saw the disputed meter which he described as "spinning at a silly number". As I understand the defender's evidence, the pursuers did not change their position that payment was still due. The defender wrote to the pursuer to complain about the charges and a copy of his letter, dated 11 November 2010, is document number 1. In short, as he confirmed in evidence, the defender compared the very high charge for the disputed meter (in excess of £16,000) with much lower figures relating not only to the Albany Hotel but other hotel interests which he had within Edinburgh. He summarised the findings of JSB & Sons. The pursuer did not change its position.

[7] The defender was told, presumably by the pursuer although this was not clear, that there may be an underground leak. The defender instructed, or caused to have instructed, Mr John Leal of Rainbow International. Mr Leal has particular expertise in identifying the source of water leaks which may not otherwise be visible to the naked eye. He used a thermal imaging camera. He prepared a report which is document number 5. The report is

dated 1 December 2011; the work was carried out on 30 November 2011. He set out his conclusions on page 10:

> "**Review**
> We have been asked to assist with investigating high water charges at Tha (sic) Albany Hotel.
> The hotel has more than one water meter feeding the building. I was shown all meters and one in particular was spinning excessively in relation to the others. The meter in question is housed within a room which is under the front entrance of the property. This is a small room which has a thin boarded construction on the ceiling and walls and a suspended floor…
> Apart from the water meter spinning excessively I could find no visible evidence or physical signs of water damage. This would lead me to believe that either water is escaping into the surrounding area outside the property or there is a defective meter. There seems no other reason for this meter to be running at such a high level in comparison to the others. Further investigation is required which may require following the water pipe into the building to assess if there is a break in the pipe. It would also be beneficial for the customer to meet with the water supplier to discuss any possible issues".

[8] In short, as he confirmed in evidence, Mr Leal found no signs of moisture or any significant variation in temperature which might have indicated the presence of water. Mr Leal carried out the test himself. It was his evidence that it was not easy to follow where the pipework led to. Mr Leal's test would not detect if there was water underneath the ground: if water escapes it tends to travel downwards and therefore would not show up on a surface thermography and moisture investigation. Mr Leal's report is particularly helpful as it has a number of photographs (on pages 7 and 8) which show the pavement, underneath which the cellar is situated. The defender caused to have a copy of that report sent to the pursuer. The pursuer remained unmoved and threatened disconnection of supply. Document number 6 is a copy of an e-mail sent by the defender to the pursuer who by this time was regarding the matter as one of debt recovery. The defender's unchallenged evidence is that he paid to the pursuer the sum of £10,000 in order to avoid disconnection.

[9] The defender continued to investigate the matter. At some point towards the end of June 2002 he instructed H&C Mechanical Services Ltd ("H&C") to investigate the matter further. Mr Hamilton, a director of H&C, gave evidence. H&C are plumbers. The engineer who carried out the work is no longer employed by H&C. Documents 7 and 8 are letters sent to the defender by H&C. No dispute was taken as to the substance of the letters. Both agents relied upon them. It is worth quoting from the two letters:

> "28/6/12-1.20pm
> Arriving on site and locating water meter. As meter was turning very quickly it was assumed that it served the hotel and was filling up tanks etc.
> After investigating further it was found that the meter was only 15mm and was unlikely to be the mains water supply to the hotel.
> Turning off supply to meter and checking all mains outlets in hotel which were all operating.
> Spending considerable time trying to trace route of mains water, but there was no sign of pipe near or in the hotel.
> As there is now 24 hours since the supply has been turned off and the hotel still has mains water it is assumed that the pipe must serve some other property or is capped off under the ground with a burst on it".

[10] Document number 8 is as follows:

> "30/6/12
> On further investigation at site, over the weekend, the cellar area was dug up and a leak was discovered which was discharging into a drain. This has now been rectified.
> Also, as no water was actually servicing the hotel properties the valve was being closed off and the meter is to be removed".

[11] The significance of "15mm" is that it describes the diameter of the pipe. Mr Hamilton's evidence was to the effect that a pipe of that diameter would not be big enough to supply a hotel. Mr Hamilton would have expected a pipe with a diameter of 32mm. In Mr Hamilton's experience it is quite common for a pipe to run under one property and serve another, especially with older buildings. Mr Hamilton was asked about the turning off of the water supply for 24 hours. In his opinion, given that the disconnection had no effect on the water supply to the premises, the pipe did not serve them. He described it as being a

"dead supply". That was why removal of the meter was recommended. In cross examination, Mr Hamilton accepted that, as a matter of fact, had he wanted to do so, the defender could have taken supply from the pipe servicing number 43.

[12] It is clear from the evidence that the water meter was turned off in or about July 2012 and has never been turned on since. Initially, the water was turned off using a hand valve which I took to be by the meter. Mr Hamilton thought it may also have been turned off using a "toby" at a point somewhere in the street. Whether the latter was actually done was not clear but I do not think anything turns on that. The defender's position in evidence was, and remains, that he is willing to pay for legitimate charges, particularly in relation to the other two meters but not for charges relating to the disputed meter. It follows that the main part of this dispute concern charges for water supplied and recorded by the disputed meter between the period 1 April 2009 to a point sometime in July 2012.

[13] There was limited evidence as to events between 2012 and 2014. The disputed meter was replaced and then later removed altogether. The volume of water recorded by the meter remained at zero. The evidence of Mr Smith confirmed that when he came to remove the disputed meter the water supply to number 43 was unaffected; it was fed from the supply coming to numbers 45 and 47. Mr Smith was of the opinion that the pipework from the disputed pipe continued into number 43 but he accepted that that was an assumption on his part. He confirmed his understanding that the obligations of a supplier of water ended at the boundary of a customer's property. As a matter of fact the meter which he removed was within the cellar of number 43 and was well within what he took to be the defender's boundary. Mr Smith said that it would have been possible for the defender to connect to the supply to number 43 had he chosen to do so.

[14] Dr Murphy gave some evidence as to the commercial background to this matter. The pursuer is a wholly owned subsidiary of Scottish Water; it operates independently from Scottish Water and has its own governance and finance. Dr Murphy confirmed that the pursuer had based its charges to the defender on the three meter readings. There are fixed charges for each meter and volumetric charges. The fixed charges relate to the size of the meter; the volumetric charges relate to the quantity of water supplied. The pursuer's charges are set out in a statement of charges. Document number 19 is a copy of the charging statement for the year 2015/16. The charges are reviewed annually. As there is no issue in this case as to quantum I need not go into the matter further. The meters and pipes belong to Scottish Water; the pursuer does not own any "in ground" assets. It is Dr Murphy's understanding that, where a meter is situated within the boundary of a property, Scottish Water owns the pipework up to the boundary, but the owner of the property owns the pipework lying within the boundary. The meter remains in the ownership of Scottish Water. Dr Murphy accepted that that it was just her understanding of the position, set out in the website of Scottish Water, but she was not in a position to give any authoritative explanation for that. It follows that if there is any fault in the pipework lying within the boundary it is the responsibility of the owner. As I understand the defender's evidence, he accepted that if there was a fault in pipework lying within the boundary and the pipework formed part of the supply to the hotel, he would accept responsibility for its repair. By reference to documents 11, 12 and 13, when, in 2013, Scottish Water replaced the disputed meter it was not recording a supply. The assumption is that if a meter is not recording a supply it is faulty. The meter was removed completely in or about June 2014. It was removed because it was no longer required; as long as it was *in situ* the defender would incur a fixed meter charge. Dr Murphy's evidence is that, at a point between April and

August 2012 water was no longer being supplied via the disputed meter. Given the evidence as to the work done by H&C the most likely date as to cessation of supply is in or about the end of June 2012. The water was turned off then and has never been turned back on. In cross examination, Dr Murphy accepted that there can be cases in which a water meter may be on the premises of one property but supplying water to a different set of premises. In her view, not I think shared by Mr Hall, if the supply went entirely to another property then it would be the owner of the other property who would be billed for the supply: in order to determine who is charged the issue is not where the meter is situated but who receives a supply.

Submissions for the pursuer

[15] Mr Hall submitted that the issue is straightforward: was there a supply of water for which the defender is liable to pay? Mr Hall went through the factual position which I need not record here. There is no issue as to quantum. The principal dispute concerns the defender's liability to pay for water measured by the disputed meter during the period April 2009 to July 2012. The evidence as to the period from 2012 to 2014 is relevant simply to show that after 2012 there was no volumetric charge. The leak in the pipe may be an explanation for the charge but it does not provide a defence to the pursuer's claim. Mr Hall accepted that, on the evidence, the water measured by the disputed meter did not supply the premises. Mr Hall submitted the question was whether there was a supply provided to the defender's premises, on or through the disputed meter for which the defender was liable to pay. He accepted that there is no clear definition of "supply". The parties are agreed that the matter proceeds by way of implied contract. The court should interpret the "supply" in accordance with its natural and ordinary meaning. Reference was made to paragraph 8.10

of McBryde on *Contract* (3rd Edition). The shorter Oxford English Dictionary defines "supply" as being akin to making something available at a distance. The interpretation of supply has been considered in previous authorities. Mr Hall referred to *West Pennine Water Board v Jon Migael (Northwest) Limited* 1975 73 LGR 420 ; *Scottish Water Business Stream Limited* v *Chataroo* 28 August 2015; 2015 SC EDIN 60 and *Anglian Water Authority v Castle* 1983 WL 216784. Mr Hall relied upon certain *dicta* in these authorities which define "supply" as making water available to a person who is then able to use it. On the facts of this case there is no doubt that water was made available to the defender who was able to use it. The pursuer has no mechanism to enable it to identify who ultimately uses the water. In Mr Hall's submission, supply by the pursuer ends at the boundary of the defender's property. In his evidence the defender had said that he was willing to pay for water supplied by the other meters even in circumstances where there may have been a leak on his premises. The same reasoning applies to the water supplied to the disputed meter. In 2012, by use of the hand valve, the water was turned off. The defender alone could turn off the supply and he alone could determine where the supply went to. The leak, the cellar and the pipework were all within the defender's premises. All of the factors which led to the charges took place within the defender's premises. The defender could have stopped the supply at any point prior to 2012 if he wanted to. Water could be made available to the defender allowing him to draw on that supply where it enters his premises. The pursuer is therefore entitled to succeed.

Submissions for the defender

[16] Mr Wilson began his submission by reference to the factual position and in particular whether the water pipes related to the disputed meter supplied water to the defender's

property or some other property. On a balance of probabilities the court could and should conclude that wherever else the water went, it did not supply the premises. It is clear from the evidence that when the supply was turned off it had no effect whatsoever on the hotel. The other two meters fully satisfied the defender's need for water. The evidence of both Mr Hamilton and Dr Murphy was that it was not uncommon for pipes on one property to run through that property taking supply to another property. It was more likely than not there was a leak below the cellar of number 43 and that leak took place within the confines of the defender's title. That is essentially neutral because it does nothing to prove where the pipe itself terminated. Although the defender does not prove who, if anyone eventually received the benefit of the supply, on any view, it was not a supply which benefitted the defender. The court would be entitled to draw the inference that the leak was the cause of the large usage. The evidence as to what had actually happened from 2012 to 2014 was not particularly relevant.

[17] The case for the pursuer is based upon an implied contract. There are no express terms. The parties have agreed in the supplementary joint minute of admissions the substance of what the contract is but that, in itself, does not determine what is meant by "supply". The position in *Chataroo* was different; in that case water was supplied prior to the pursuer becoming licensed to provide it. Mr Wilson referred to McBryde on *Contract* and in particular paragraphs 9.23, 9.25 and 9.46. The issue was what was the consensus of the parties, such consensus being derived from their actings? There was no consensus that the defender would pay for water running through the disputed meter which did not provide part of the service from which the defender derived benefit. The court can imply terms from the actings of the party themselves. The pursuer requires to prove a consensus that the defender would pay for the water in the present circumstances. The overall result

must be reasonable. It would not be fair for the defender to pay for something for which he derived no benefit. The contract works perfectly well on the basis that he pays for water supplied via the other two meters. It does not go without saying that the occupier would pay for water travelling across his property. The onus is on the pursuer to prove facts from which the court should infer there was a consensus that the defender would pay for water through the disputed meter. There is no legal authority for the pursuer's practice of proceeding upon the basis that their responsibility ends at the boundary. Dr Murphy made reference to the website which is not authoritative; in any event the website belongs to Scottish Water, not the pursuer. The defender accepted that the pursuer's obligation to supply ends at the boundary of the defender's property and that there is a supply of water to number 43; that supply is routed via other pipes, not the disputed meter. The subjective views of the parties are not relevant for the purposes of determining consensus. Objectively, each party could have a different idea as to what the defender is liable to pay for. There is nothing in the evidence or the joint minute to establish a factual basis from which the court can infer objectively an intention on the part of the defender to pay for water through that meter. Mr Wilson submitted that on its facts *Chataroo* dealt with an entirely different situation. He also referred to the Shorter Oxford English Dictionary for the definition of "supply" which included something which was "needed or wanted". The other authorities referred to by Mr Hall dealt with the statutory provisions which were entirely different to the present circumstances.

[18] Both Mr Hall and Mr Wilson were agreed as to what decree ought to be granted in relation to their respective clients' interests. If the pursuer succeeds, it would be entitled to decree in the sum of £66,293.37 with interest thereon at the judicial rate from the date of citation. The parties agreed in terms of the supplementary joint minute of admissions that,

within the sum of £66,293.37, there is the sum of £53,519.30 which relates to the disputed meter. The defender accepts that he is responsible for payment of the difference between these two figures which I calculate as amounting to £12,774.07. In the event of decree being granted for that sum interest at the judicial rate would only run from the date of decree.

Decision

[19] There is really little factual dispute in this case. The issue is the conclusion to be drawn from the facts. I have set out the statutory scheme which enables the pursuer to levy the charges it has. No issue is taken in relation thereto: parties are agreed in relation to quantum. Put shortly, the defender acquired the Albany Hotel and the associated heritable subjects in or about 2007. Nothing turns on the interest of the defender *qua* tenant of number 39 Albany Street. The disputed meter is situated within the boundary of the defender's property at number 43. So much is not challenged. There is pipework which runs from the boundary of number 43 to the meter. In my opinion, on a balance of probabilities, wherever the pipework goes it does not carry water to number 43 or any part thereof. There was no evidence as to where the pipework did go. At best there was conjecture on the part of Mr Smith. Wherever it did go, it was not to number 43 or any other part of the premises. The water supply was turned off by H&C with no adverse consequence to the premises, then or subsequently. The disputed meter measured a zero supply before being removed altogether. The evidence of Mr Hamilton is that it is not unusual for old properties such as the premises to have pipework which does not provide supply to the premises themselves. It is not necessary for the defender to prove where the supply did go, if indeed it went anywhere at all. He has established that it did not come to him. There is a water supply to number 43 but that is taken through the other two meters

and not the disputed meter. The diameter of the pipe to the disputed meter provides some support, albeit slight, for that conclusion, given that 15mm is not a width normally associated with a mains supply. It is axiomatic that if there was a supply to number 43 via the disputed meter, turning it off would have affected the hotel and the residents. It did not.

[20] Mr Hall was at pains to take from the witnesses that, had he wished to do so, the defender could have drawn a supply of water from the disputed meter and its associated pipework. As a matter of fact I accept that he could have done so. Equally, also as a matter of fact, he did not.

[21] Right from the receipt of the first invoice, dated 19 October 2010, the defender took exception to the amount charged in relation to the disputed meter. It was his evidence, which I accept, that the amount was wholly out of line with what he would have expected for similar properties. As a simple matter of arithmetic, when compared to the other two meters, the volume measured by the disputed meter was very much higher. The defender challenged the amount. On a balance of probabilities, the cause of the high reading was the leak identified by H&C when they carried out their inspection in the summer of 2012. After the leak was repaired the disputed meter measured no volumetric supply. In summary, the disputed meter (I include within that the relevant pipework) lies within the boundary of the premises and more particularly number 43, which is in the ownership of the defender. Water passes through the disputed meter. It does not provide any supply to the defender. He has not taken any supply from the disputed meter. There was a leak within number 43. Water has been recorded passing through the disputed meter. The pursuers have levied charges therefor in accordance with their scale of charges. The defender has not paid the charges for the disputed meter.

[22] I turn now to the legal issues. The parties presented the argument upon the basis of implied contract. They set out the relevant parts thereof in the supplementary joint minute. I have some reservations as to whether this is truly a matter of fact as opposed to a matter of fact and law but I shall proceed upon the basis of what is in the minute. The relevant part of the joint minute is as follows:

> "The contract between the Pursuer and Defender was implied by the conduct of the parties….
> The terms of the implied contract are reflective of the terms of the legislation, namely that the Pursuer contracted with the Defender… for or in relation to the supply of water to the Premises through the public supply system; and that the Pursuer could fix, demand and recover charges from the Defender for or in relation to the supply of water to the Premises".

[23] Although both agents agree that the implied contract reflects the legislation they differ as to how the contract falls to be interpreted, and in particular "supply". Whether by reference to the statutory provisions or the contract, there is no definition in either of what is meant by "supply". One could view this matter as to which of the two parties should carry the risk of damage to the pipework and leakage of water. The defender quite fairly accepted that, if there had been damage to pipework supplying the other two meters, he would accept responsibility therefor. Mr Hall submitted that this admission on the defender's part should apply to the disputed meter. I do not accept that. The defender was quite clear that his acceptance of liability proceeded upon the basis that he was deriving benefit by way of usage from such supply which was not the case in relation to the disputed meter. Much was made as to the respective liabilities of parties where pipework passes beyond the boundary of a property. It was assumed that ownership of, and responsibility for, pipework within the boundary lies with the owner. As part of the law of property that may well be the case but I

am not persuaded that it answers the different question as to whether there has been "supply".

[24] In the debate judgment I expressed the view that whether or not there has been supply is a mixed question of fact and law and I remain of that view. The provision of a safe and consistent supply of water has, for many years, been considered a core function of public administration. As I have said, the mechanism for defraying the cost of such provision has changed. The reason I make this observation is that, in my opinion, each of the authorities to which I was referred deal with a specific statutory regime; the various *dicta* need to be read in the context of the regime then in force.

[25] Leaving aside the contract cases and taking them in date order, I turn to consider the cases of *West Pennine Water Board v Jon Migael (North West) Ltd*; *Anglian Water Authority v Castle and Scottish Water Business Stream Limited v Chataroo*. The *West Pennine Water Board* case involved occupation of a shop in a shopping centre. The shop had no water or sanitary services connected directly with the premises but the tenants had the right to use communal lavatories situated within the centre. The legislation then under consideration was the Water Act 1945 which gave to the local authority the power to levy a water rate on an "occupier". The relevant statutory definitions made clear that the definition of "premises" included appurtenant rights and easements. The right to use the lavatories was a right in the nature of an easement; therefore the water was supplied to the defendants for use in connection with a shop by virtue of a right appurtenant to it and the water rate was properly charged. The question was not whether there was "supply" but what was included within the definition of "premises". In my opinion that case is of no assistance to the present issue.

[26] Of the authorities, *Anglian Water Authority* is perhaps the nearest on its facts to the present case. However, as the Sheriff Principal noted in *Chataroo*, one cannot read *Anglian*

Water Authority without reference to *Daymond v South West Water Authority* [1976] AC 609. *Daymond* concerned the interpretation of section 30 of the Water Act 1973. Section 30(1) provided:

> "…a water authority shall have power to fix, and to demand, take and recover such charges for the services performed, facilities provided or rights made available by them… as they think fit".

[27] The case concerned liability for sewerage charges. In that case the owner of a property declined to make payment of a sewerage charge upon the basis that he was not connected to the sewerage system. By a majority, the House of Lords held that section 30(1) did not extend to someone who did not avail themselves of the services, facilities and rights provided by the relevant authority. Put very crudely, section 30(1) was defective because it did not specify from whom the authority could demand payment. Unsurprisingly, the legislation was amended and it was in its amended form that it fell to be considered in the case of *Anglian Water Authority*. The amended subsection provided:

> "… a water authority shall have power to fix such charges for the services performed, facilities provided, or rights made available by them … as they think fit, and to demand, take and recover such charges (a) for services performed, facilities provided or rights made available in the exercise of any of their functions, from the persons for whom they perform the services, provide the facilities or make the rights available".

[28] The facts of *Anglian Water Authority* are instructive. It involved an action by the water authority for recovery of monies in respect of a metered supply of water. The defendant, Mr Castle, was the owner of certain real property burdened by a series of easements which included wayleaves for water. In short, there was a water supply to a number of properties not owned by Mr Castle. The water for these properties was taken through a meter by a private supply pipe which passed through Mr Castle's land. The practice of the local authority was to charge Mr Castle who, in turn, recovered the costs from

the occupiers. The practice of the local authority changed. They began invoicing the occupiers directly. Mr Castle then decided not to pay the bills which he continued to receive from the local authority. As a matter of fact, he took no water through the pipe. The Court of Appeal (Lawton & Dillon LJJ) held that Mr Castle was not responsible for payment of the authority's demand for volumetric supply but he was liable for a fixed charge. Dillon LJ said:

> "Beyond a peradventure a facility is provided to Mr Castle in the sense that, there being a metered supply and a pipe in his land from that supply, he could draw water from that pipe either to the existing trough and by the existing standpipe in his field or by putting in other connections and drawing off water for other agricultural buildings or whatever he was entitled to construct on his land. But the water for which he is being charged, *on the finding that none of it has been used by himself*, [my emphasis] is water actually used by other people and not water which is within the facilities provided for him or the rights made available to him. It is water passing to others, which he has no right to cut off, but does not use himself".

[29] I turn now to the case of *Scottish Water Business Stream v Chataroo*. The defender in that case was the occupier of a shop premises in Coatbridge against whom proceedings were raised by the pursuer as a small claim. The pursuer sought recovery of charges for water, waste water and drainage services. The shop premises were served by a water supply and waste drain. The defender had never used, or permitted the use of, the sink and had never wanted to be supplied with the water services. The pursuer based its case upon the making of "arrangements" with the defender pursuant to the statute and also by way of contract. The pursuer failed on both grounds. (There was a further issue in relation to jurisdiction which is not relevant.) In the present case the parties have agreed that there is a contract. Both Mr Hall and Mr Wilson made reference to paragraph [27] of the judgement of the Sheriff Principal. Having concluded that there was no "arrangement" it seems to me that dicta of the Sheriff Principal in paragraph [27] are obiter. In *Chataroo* there was a sink and a waste water pipe within the subjects. That distinguishes it from both *Anglian Water* and the

present case where there were and are no established fittings within the premises other than the pipework itself. The Sheriff Principal does refer to "a supply of water which the defender could draw upon even though he chose not to do so". It was that passage upon which Mr Hall relied; in the present case the defender could have drawn upon the supply. In my opinion, that is to read too much into the sentence. Firstly, the Sheriff Principal expressly approved *Anglian Water* which concluded with a finding of no liability on the part of Mr Castle for volumetric supply; he could have drawn upon the supply. Secondly, the drawing of supply in *Chataroo* referred to the sink and the waste water pipe which were both on site and available for immediate use. On any interpretation there was a "supply" which the defender could either use or have disconnected. Parliament has not ventured a definition of "supply" or set out a mechanism for determining liability similar to section 30 of the Water Act 1973 and I see no need to offer one. I reach my conclusion on the facts of the case. In short, there was no supply to number 43 via the disputed meter: it came from the other pipework. I do not consider that the mere potential to be connected to the pipework or meter is sufficient to qualify as supply nor that it is the test as to whether there is supply. Put another way, the transit of pipework across an occupier's land does not, of itself, give rise to supply. As a matter of fact there has been no supply via the disputed meter and pipework to number 43. In the penultimate sentence in paragraph [27] the Sheriff Principal makes reference to what I understand to be the terms of section 30, as interpreted in *Daymond* and *Anglian Water*. I confess I am not certain whether the Sheriff Principal intended that it be the test as to the interpretation of "supply" in Scotland. As I have said the dicta are obiter. However, if it was so intended, then it seems to me that the defender in this case is not, in relation to the disputed meter, a "person for whom the services are performed, facilities provided or rights made available" and thus I would have reached the same conclusion.

[30] I do not consider that the reference to the various passages in McBryde lead to any different conclusion. If anything it points to a similar conclusion. It is not difficult to see that the continued usage of the water supply after 2007 by the defender would give rise to an implied contract for him to pay for such usage. He does not contend otherwise. It is much more difficult to see how one could imply a contract, the terms of which would oblige the defender to pay for water which was not in any meaningful sense supplied to the hotel and from which he derived no benefit.

[31] Accordingly, for the foregoing reasons, in my opinion, the defender has been successful. The appropriate disposal in this case is to grant decree for payment by the defender to the pursuer of the agreed sum of £12,774.07 with interest thereon at the judicial rate from the date of decree. Parties were also in agreement that, in that event, the pursuer should be found liable in the expenses of the action.