SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2017] SC GLA 47

SA3155/16

NOTE BY SHERIFF S REID

In the cause

SCOTTISH WATER BUSINESS STREAM LIMITED

Pursuer

Against

MR CHRISTOPHER PHILLIPS

Defender

Pursuer: Usher; Brodies LLP, Glasgow
Defender: Party

Glasgow, 22 August 2017

Summary

[1] The pursuer is a water services provider and sewerage services provider, in terms of the Water Services etc. (Scotland) Act 2005. That means that it is authorised, under a statutory licence, to make arrangements with the occupier of any eligible premises for the supply of water and the provision of sewerage services through the Scottish public water supply and sewerage systems, respectively.

[2] The defender is a tattoo artist. He trades from a single room "suite" located on the second floor of large commercial premises in Glasgow city centre. These large commercial premises (which I shall refer to as "the Block") are sub-divided into various units (including the defender's room) occupied by a variety of trading entities. The defender occupies his

room in terms of a contractual licence dated 21 October 2014 granted by Dunaskin Properties Limited in favour of the defender (item 5/40 of process).

[3] There is a water supply to, and there are sewerage services to and from, the Block.

[4] However, the interesting feature of the present case is that there is no water supply to, and there are no sewerage services to or from, the room occupied by the defender in terms of his contractual licence. There is no tap, sink or water pipe, and no drain, sluice, or gutter of any description, into, out of or serving the defender's single room suite.

[5] In addition, the defender's contractual licence confers no *right* of access to, or use of, any other part of the Block served by any such water supply or sewerage services (such as communal toilets, kitchen facilities or the like).

[6] In this small claim, the pursuer seeks payment of £1,215.95, being charges levied by the pursuer upon the defender for the alleged supply of water and sewerage services to the defender at his Business Premises.

[7] The pursuer's power to levy and recover such charges (from non-domestic customers) derives from the Water Services etc. (Scotland) Act 2005 ("the 2005 Act"). It authorises the pursuer, under a statutory licence, *inter alia*:-

(a) 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
(b) to "fix, demand and recover charges for or in relation to the supply of water to any premises in respect of which the person has made such arrangements" (section 6(1)(a), 2005 Act).

A similar provision applies in relation to the provision of sewerage to, or the disposal of sewage from, any eligible premises (section 6(3)(a), 2005 Act).

[8] In this context, "eligible premises" means premises which are (or are to be) "connected" to the public water supply or public sewerage system (section 27(1)(a)&(b), 2005 Act).

[9] Separately, the Water Industry Commission for Scotland, which is the statutory regulator, is empowered to issue directions to licensed providers such as the pursuer. Such directions have been issued in a document known as the "Market Code". Paragraph 5.15 of the Market Code makes specific provision to determine the number of "supply points" at certain types of "eligible premises". In broad terms, the Code deems that, within certain types of "eligible premises" (being eligible premises that are in multiple occupancy as at the "Go Live Date"), any "tenantable unit" within such premises is deemed to have a supply point for water and sewerage services, notwithstanding that there is no sub-meter measuring water usage by that unit; and that the charges applicable to any such unit may be calculated by reference to the rateable value of that unit.

[10] Having heard evidence and submissions at proof, I concluded (i) that the premises occupied by the defender under his contractual licence are not "eligible premises" in terms of 2005 Act; (ii) that the pursuer has not made "arrangements" with the defender, as the purported occupier of any eligible premises, for or in relation to the supply of water to, or the provision of sewerage services to, or the disposal of sewage from, the premises; and (iii) that, on the evidence, it was not established by the pursuer that paragraph 5.15 of the Market Code applies in the present case.

[11] Accordingly, I granted absolvitor in favour of the defender. I gave an *ex tempore* judgement briefly explaining the basis of my decision. I issue this note in order to explain my reasoning more fully.

Formal findings

[12] Having heard and considered the evidence referred to below, I made the following formal findings in fact, findings in fact and law, and findings in law.

Findings in fact

[13] I made the following findings in fact:

(1) The pursuer is Scottish Water Business Stream Limited a company incorporated under the Companies Act having its registered office at 7 Lochside View, Edinburgh EH12 9DH.

(2) The defender is Mr Christopher Phillips, a sole trader, carrying on business as "Armory Custom Tattoo" from premises known as Suite 190/191, Flat 2-7, 12 Waterloo Street, Glasgow G2 6JX ("the Business Premises").

(3) The Business Premises are located on the second floor of a much larger building ("the Block") known as Central Chambers, 93 Hope Street, Glasgow (also known as, and accessible from, 12 Waterloo Street, Glasgow).

(4) On 21 October 2014, Dunaskin Properties Limited granted a licence to the defender ("the Licence to Occupy") authorising his occupation of the Business Premises, a true copy of which Licence to Occupy forms item 5/40 of process (pages 936 to 944 in the pursuer's composite volume of productions).

(5) The defender's occupation of the Business Premises in terms of the Licence to Occupy commenced on 24 November 2014.

(6) The Block is connected to the public water supply system and public sewerage system.

(7) The Business Premises are not connected to the public water supply system or public sewerage system.

(8) A bulk meter serves the Block, measuring the supply of water to the Block from the public water supply system.

(9) There are no sub-metered water supply points within, or serving, individual occupied units (such as the Business Premises) within the Block.

(10) Within the Block there are several communal toilets and coffee/tea facility points which, to the knowledge of the landlords and managing agents of the Block, are occasionally used, from time to time, by the defender, and by other tenants and licenced occupiers of units within the Block, as well as by customers, prospective customers, and members of the public.

(11) Such water as is used by the defender for the purposes of his business is purchased privately by the defender, every six weeks or so, in the form of sealed water containers dispensed from a stand-alone, self-contained unit owned by him and located within the Business Premises.

(12) On or about 15 September 2015, the pursuer first became aware of the defender's occupation of the Business Premises within the Block, whereupon the pursuer unilaterally opened an account for the defender, and issued to the defender (i) an invoice dated 15 September 2015 (number 2651466/1) demanding payment from the defender of the sum of £682.66 comprising water charges, waste water charges and drainage charges for the period from 24 December 2014 to 31 March 2016, and (ii) a standard generic marketing brochure entitled "Welcome Pack".

(13) Item 5/2 of process (on pages 4 & 5 of the pursuer's composite volume of productions) is a true copy of the pursuer's invoice dated 15 September 2015 (number 2651466/1); and item 5/38 of process (on pages 923 to 935 of the pursuer's composite volume of productions) is a true copy of the pursuer's marketing brochure.

(14) Upon receipt of the foregoing invoice and brochure, the defender immediately contacted the pursuer, by telephone, to dispute liability for the sum sought in the invoice.

(15) The defender was advised by the pursuer's staff to submit a "reassessment application"; the "reassessment application" was completed on-line by the pursuer's staff, on behalf of the defender, using information supplied by the defender over the telephone in response to questions asked by the pursuer's staff; and the reassessment application was submitted by the pursuer's staff on behalf of the defender.

(16) In the reassessment application, the defender confirmed his assertion that the Business Premises were not connected to the public water supply or public sewerage systems.

(17) In the course of his telephone discussion between the defender and the pursuer's staff, in which the defender disputed liability for the pursuer's charges, the pursuer's staff advised the defender that an "assessment team" would visit and inspect the Business Premises to ascertain whether they were connected to the public water supply system and/or public sewerage system; the defender paid to the pursuer a fee of £30, as stipulated by the pursuer's

staff, to allow that inspection visit to take place; but, in the event, no such visit or inspection has ever taken place.

(18) Item 5/41 of process (on page 945 of the pursuer's composite volume of productions) is a true copy of the reassessment application completed by the pursuer on behalf of the defender using information supplied by the defender over the telephone in response to questions from the pursuer's staff.

(19) Following upon the submission of the reassessment application (item 5/41 of process), and without further reference to the defender, the pursuer unilaterally issued to the defender a credit note (reference 2651466/2) dated 2 October 2015 in the sum of £280.85, purportedly reducing the defender's liability to the pursuer by applying a so-called "minimum banding" with effect from 23 September 2015.

(20) Item 5/3 of process (on pages 6 & 7 of the pursuer's composite volume of productions) is a true copy of the pursuer's said credit note.

(21) On 2 October 2015, the pursuer also issued to the defender a further invoice (number 2651466/3) in the sum of £207.17, purportedly for water charges, waste water charges and drainage charges, for the period from 23 September 2015 to 31 March 2016, bringing the total sum claimed by the pursuer from the defender (taking account of the said credit note) to £608.99.

(22) On 23 October 2015 and 11 November 2015, the pursuer issued two further invoices to the defender (numbered 2651466/4 and 2651466/5) demanding payment of the sums of £90 and £120, respectively, comprising "cost of recovery charges", bringing the total sum claimed by the pursuer from the defender, as at 11 November 2015, to £818.99.

(23) On 30 March 2016, the pursuer issued a further invoice to the defender (numbered 2651466/6) in the sum of £396.96, purportedly for water charges, waste water charges and drainage charges for the period from 1 April 2016 to 31 March 2017, bringing the total net sum claimed by the pursuer from the defender to £1,215.95 as at 30 March 2016, which is the principal sum sued for.

(24) Items 5/4, 5/5, 5/6 & 5/7 of process (on pages 8 to 15 of the pursuer's composite volume of productions) are true copies of the pursuer's said further invoices numbered 2651466/3, 2651466/4, 2651466/5 and 2651466/6, respectively.

(25) The defender disputes, and has throughout disputed, liability for the charges levied by the pursuer.

(26) Items 5/10 & 5/11 of process (commencing on, respectively, pages 97 and 113 of the pursuer's composite volume of productions) are true copies of, respectively, the pursuer's water services licence and sewerage services licence.

(27) Item 5/37 of process (on pages 901 to 921 of the pursuer's composite volume of productions) is a true copy of documents or "screen shots" forming part of the pursuer's Business records.

[14] I made the following findings in fact and law:

(1) The pursuer is a water services provider and sewerage services provider in terms of the 2005 Act, sections 6(2) & 6(4), respectively.

(2) The Block comprises "eligible premises" in terms of sections 6 & 27 of the 2005 Act.

(3) The defender is not the "occupier" of the Block in terms of section 6 of the 2005 Act.

(4) The defender is the occupier of the Business Premises in terms of the Licence to Occupy.

(5) The Business Premises are not "eligible premises" in terms of sections 6 & 27 of the 2005 Act.

(6) In terms of the Licence to Occupy, the Business Premises comprise (i) a single room of approximately 263 square feet known as Suite 190/191, Flat 2-7, 12 Waterloo Street, Glasgow G2 6JX, located on the second floor of a larger building ("the Block") known as Central Chambers, 93 Hope Street, Glasgow (known as, and accessible from, 12 Waterloo Street, Glasgow) and (ii) all legal rights in, to or over land appurtenant thereto.

(7) The Licence to Occupy confers upon the defender an implied right of access to, and egress from, the single room known as Suite 190/191, Flat 2-7, 12 Waterloo Street, Glasgow G2 6JX, located on the second floor of the Block.

(8) The Licence to Occupy does not confer upon the defender, expressly or impliedly, a right of access to, or right to use, communal toilets or communal kitchen facilities within the Block.

(9) The pursuer has not made "arrangements" with the defender, as the occupier of any eligible premises, for or in relation to (i) the supply of water to the Business Premises through the public water supply system or (ii) the provision of sewerage services to, or the disposal of sewage from, the Business Premises through the public sewerage system, in terms of section 6(1)(a)(i) and/or section 6(3)(a)(i) of the 2005 Act.

(10) The pursuer has failed to prove that the Block was occupied by a number of owners and/or tenants or other occupiers as at 1 April 2008 ("the Go Live

Date"), in terms of paragraph 5.15 of the Market Code issued by the Water Commission for Scotland.

[15] I made the following finding in law:

(1) The pursuer not having made arrangements with the defender, as the occupier of any eligible premises, for or in relation to the supply of water to such premises through the public water supply system, or for or in relation to the provision of sewerage services to, or the disposal of sewage from, such premises through the public sewerage system, the defender is entitled to absolvitor.

[16] Accordingly, I assoilzied the defender from the claim in the summons. I found no expenses due to or by either party.

The Evidence

[17] For the pursuer, I heard evidence from Thomas McDaid and Graham Guthrie Wiseman. The defender also testified. I summarise the evidence below.

Thomas McDaid

[18] Mr McDaid is employed by the pursuer as a "key account" manager. He has held this position for three years. He spoke to the statutory scheme for the supply of water and sewerage services through the public water supply and sewerage systems. He explained the role of Scottish Water as the owner of the infrastructure, responsible for the upkeep of the pipes and the cleaning of the water. He spoke to the role of the pursuer, as a subsidiary of Scottish Water, to make arrangements with the occupiers of non-domestic "eligible

premises" for, or in relation to, the supply of water to those premises through the public systems.

[19] He spoke to the pursuer's statutory water services licence and sewerage services licence granted by the Water Industry Commission for Scotland ("the Commission") (items 5/10 & 5/11 of process, pages 97 & 113, pursuer's composite volume of productions); to the directions issued to licensed providers (such as the pursuer) by the Commission (as amended to 2016/2017), specifically the Default Services and Default Maximum Tariffs and the "Market Code" (as at 31 October 2016), in particular paragraph 5.15.3 thereof (item 5/35 of process, pages 652 to 900 in the pursuer's composite volume of productions); to invoices and credit notes issued by the pursuer to the defender, and the component elements thereof; to extracts from the pursuer's business records (including item 5/37 of process, pages 901 to 921 in the pursuer's composite volume of productions); to the pursuer's brochure entitled "Welcome Pack" (item 5/38 of process, pages 923 to 934 in the pursuer's composite inventory); and to a reassessment application said to have been submitted to Scottish Water on behalf of the defender (item 5/41 of process: page 945, pursuer's composite inventory). He explained the procedure whereby such reassessment applications, though submitted to, and determined by, Scottish Water (not the pursuer), with no right of appeal, can be completed and submitted by the pursuer on a customer's behalf.

[20] Mr McDaid had never visited the defender's premises nor was he aware of the premises ever having been visited by other employees of the pursuer or Scottish Water. He did not know who, if anyone, occupied the Block (of which the defender's premises formed part) when the pursuer was first granted its water services licence and sewerage services licence on 1 April 2008 ("the Go Live Date", according to paragraph 5.15 of the Market Code). He explained that the Block has only a bulk meter and a single connection to the

public water supply and sewage system. There are no sub-meters within the Block to measure water supply to, or usage by, individually-occupied units within the Block. With reference to clause 5.15 of the Market Code, he opined that it was not concerned with "billing as such, but rather with a deemed supply point".

Graham Guthrie Wiseman

[21] Mr Wiseman is employed by commercial property managing agents called Stielman Limited. He is a chartered surveyor by profession, with responsibility, in his current employment, for the management of a portfolio of properties, including Central Chambers, Glasgow ("the Block", also known as 12 Waterloo Street). He explained that the Block is a large set of commercial premises with four separate entrances (from 11 Bothwell Street, 109 Hope Street, 93 Hope Street and 12 Waterloo Street), comprising six floors, currently occupied by multiple tenants, including offices, restaurants, bars, and various businesses and trades. There are communal toilets on each floor and tea/coffee points.

[22] Mr Wiseman confirmed that the defender occupies a unit within the Block in terms of a Licence to Occupy, a copy of which was reproduced at item 5/40 of process (pages 936 to 944, pursuer's composite inventory). He was referred to an email (item 5/39 of process) bearing to be from his colleague, Michelle Ryan, to the defender dated 14 October 2014, but he had not seen the email before and was unable to confirm its provenance. He confirmed his understanding that no charge was made by the landlord for use of the communal toilets by occupants (such as the defender). He also confirmed that no charge is included in the licence for water charges as these are treated as being the sole responsibility of the occupants (such as the defender). The witness was not cross-examined.

Christopher Phillips

[23] Mr Phillips, a tattoo artist, operates a small business from a single room suite within the Block. He chose his Business Premises with care in order that they did not attract liability for business rates given the limited extent of his turnover. He explained that one of the specific attractions of the Business Premises was that they were not served by the public water or sewerage supply systems. Accordingly, he considered that he would not be liable for water or sewerage charges. He explained how all his water needs are served by the purchase of large commercial bottles of water dispensed from a self-contained, stand-alone electric dispensing unit which he purchased for his suite at his own expense. He monitors his water usage carefully. He requires to replenish the bottles every six weeks or so. He took up occupation towards the end of 2014. He spoke to the circumstances on which he subsequently received a bill from the pursuer for water and sewerage charges. He immediately contacted the pursuer to dispute liability as his premises have no connection to the public water supply or sewerage systems. He disputed ever having made any arrangements with the pursuer for the supply of water or sewerage services. Any suggestion to the contrary was dismissed by him as ridiculous, on the basis that he did not have any water or toilet in his suite.

[24] He acknowledged that, as far as he is aware, communal toilets (both male and female) are located on at least some of the floors within the Block; he acknowledged that, from time to time, he may have used the communal toilets on the floor on which his suite is located; he explained that the communal toilets are available for use, and are used, indiscriminately by other tenants, customers and members of the public wandering into the Block.

[25] He spoke to his telephone communications with the pursuer's staff disputing his liability for the invoices rendered by the pursuer. His suite has no water supply, water pipes, tap, sink, drain or toilet. He had repeatedly disputed liability for the invoices sent by the pursuer. He was told by the pursuer's staff to submit a "reassessment" application and to submit a request, at a cost of £30, for a "physical" assessment of his premises by a "team" to check that there was indeed no connection to the public water supply and sewerage systems. While he did not recognise the document entitled "reassessment application" (item 5/41 of process), he acknowledged that at least some of the information on it appeared to have come from him. He was never advised of the outcome of any such "reassessment". No physical inspection of his premises has ever been carried out by the pursuer or Scottish Water.

Closing Submissions

[26] Very helpfully, the pursuer's agent tendered a thorough written submission, and a comprehensive bound volume of authorities (incorporating the relevant legislation and judicial decisions). I am grateful to her for her hard work in putting these together.

[27] For his part, the defender reiterated his dismay at being charged for a service and supply that he had never sought, agreed to, or received. He expressed frustration at the failure of the pursuer to engage with him, specifically its failure to inspect his premises to ascertain whether, in fact, they had any connection to the public water supply or sewerage systems. He criticised the pursuer for doggedly pursuing the claim on the basis of a fictional "deemed" supply point, when, in fact, there was no water connection to his premises.

[28] In a supplementary submission for the pursuer, the pursuer's agent highlighted that the claim was not simply about a deemed supply of water or sewerage services but also

about the recovery of "fixed charges" (for example, for the upkeep of pipes). The pursuer's agent submitted that the defender's liability had been re-assessed and he had been placed on the lowest tariff available.

Reasons for decision

[29] In my judgment, the pursuer's claim fails because (i) the premises occupied by the defender under his contractual licence are not "eligible premises" in terms of section 27 of the 2005 Act; (ii) the pursuer had not made "arrangements" with the defender, as the purported occupier of any eligible premises, for or in relation to the supply of water to, or the provision of sewerage services to, or the disposal of sewage from, the premises, in terms of section 6 of the 2005 Act; and (iii) on the evidence, the pursuer has failed to prove that paragraph 5.15 of the Market Code applies in the present case. I explain my reasoning below.

Assessment of the evidence

[30] Nothing in this case turns upon credibility or reliability. Indeed, on the key issues of fact, there were no material differences between the witnesses. The pursuer's witnesses, and the defender himself, impressed me as entirely honest men, doing their best to assist the court. I accepted their evidence, on issues of fact, as credible and reliable.

[31] The battleground lies upon issues of contractual and statutory interpretation, and in the application of the law to the largely uncontentious factual situation.

Is the defender "the occupier of any eligible premises"?

[32] In order to succeed in its claim, the pursuer must establish that it has made

arrangements with the occupier of eligible premises for or in relation to, firstly, the supply of water to the premises through the public water supply system (2005 Act, section 6(1)(a)(i)) and, secondly, for or in relation to the provision of sewerage services to, or the disposal of sewage from, the premises through the public sewerage system (2005 Act, section 6(3)(a)(i)).

[33] In this context, the term "eligible premises" is expressly defined in section 27 of the 2005 Act. It means:-

> "(a) in relation to the supply of water, premises which are (or are to be) connected to the public water supply system; and
>
> (b) in relation to the provision of sewerage or the disposal of sewage, premises which are (or are to be) connected to the public sewerage system…"

[34] It is not in dispute that the Block (i.e. the large commercial premises known as Central Chambers or 12 Waterloo Street) is connected to the public water supply and sewerage systems. Therefore, the Block comprises "eligible premises" for the purposes of section 27 of the 2005 Act.

[35] The pursuer's primary submission was that the defender is the "occupier" of the Block because the unit occupied by the defender (Suite 190/191) forms part of those larger "eligible premises". It was submitted for the pursuer that, by virtue of the defender occupying his single room suite, he was, in turn, to be regarded as the (or, perhaps, an) "occupier" of the Block.

[36] In my judgment, that primary submission is not correct.

[37] To the extent that the Block comprises "eligible premises", the defender is not the occupier of those "eligible premises". On the evidence, the defender is merely the occupier of a discrete part of those premises. The defender occupies merely that part of the Block that is defined, expressly and by implication, in the Licence to Occupy (item 5/40 of process). That is the limited measure of his occupation.

[38] The Licence to Occupy defines, very precisely, the "Premises" that are licensed to the defender – and, therefore, the extent of the defender's interest in the Block. The Licence to Occupy entitles the defender to occupy the "Premises" described as "Suite 190/191" (a single room, according to the evidence), located on the second floor of the Block, and extending to only "263 square feet".

[39] In ordinary language, it is absurd to suggest that the defender is the "occupier" of the entire Block. In ordinary language, he is merely the occupier of that distinct (and comparatively small) part of the Block as is defined by the Licence to Occupy in his favour.

[40] Besides, if the pursuer's primary submission is correct, then the defender, as the occupier of a tiny part of the Block, could, in theory, "make arrangements" with the pursuer as to the terms on which water, and sewerage services, were to be supplied to the entire Block, which arrangements might conflict with the wishes (or arrangements) of the landlord of the Block (or occupiers of other parts of the Block). That is illogical. On a practical level, the pursuer's interpretation would lead to confusion and conflicting arrangements. Accordingly, I rejected the pursuer's primary submission.

[41] But the pursuer advances a secondary argument. The secondary argument is that the defender's unit (Suite 190/191) within the Block is itself to be treated as "eligible premises" by virtue of the fact that the defender allegedly:

> "… benefits from a *right* [my emphasis] to use the communal facilities within the Building" (see paragraph 4.1, pursuer's written submissions).

This alternative submission was founded upon the decision of the Court of Appeal in *West Pennine Water Board* v *Jon Migael (North West) Ltd* 1975 73 LGR 420.

[42] The underlying logic is that "premises" occupied by a tenant or licensee means not only the principal subjects or physical land described in the lease or licence but also includes

any intangible interest in, to or over land such as (but not limited to) a servitude right or a (similar) non-servitudinal right of access or use. In the context of the *West Pennine Water Board* decision, this expansive definition of "premises" derived from section 59 of the Water Act 1945 (an English statute). In the present case, the pursuer's agent relied upon the broadly equivalent Scottish legislation (namely, section 109 of the Water (Scotland) Act 1980) ("the 1980 Act"), which defines "premises" as including "land", and further defines "land" as including "any interest in land and any right or servitude in, to or over land…". On this logic, the pursuer's secondary submission was that the defender had "an interest" in the communal toilets and communal coffee/tea facilities by virtue of his occupation of Suite 190/191. By this means, the "premises" occupied by the defender are said to be "connected" to the public water supply and sewerage systems (per section 27 of the 2005 Act) – and, therefore, become "eligible premises".

[43] In my judgment, this secondary submission is correct in principle. However, there is a flaw in the pursuer's application of that secondary submission to the facts of the present case, as explained below.

[44] In *West Pennine Water Board,* the defendant occupied a shop within the Arndale Shopping Centre. The centre comprised 50 or 60 shops. Some of the shops had water supplied directly into them by pipes. Others did not. No water or sanitary services were connected directly with the defendant's shop. However, the defendant did have the *right* (my emphasis) to use communal lavatories within the shopping centre. The Water Board sought to recover water charges from the defendant. The claim was successful. The Court of Appeal concluded that, although the defendant's physical shop was not itself connected to a water or sanitary supply, nevertheless the defendant also enjoyed the legal "right" to use water in and from the communal lavatories. This "right" formed part of the "premises"

that were, in law, occupied by the defendant. The "premises" occupied by the defendant included not only the principal physical premises (that is, the shop) but also all easements and rights that were pertinent to it (including, for example, the right to use lavatories in common with others). In this way, the water and sanitation services were indeed made available to the "premises" occupied by the defendant and the defendant was liable for a share of the water charges, based on the rateable value of the shop.

[45] In my judgment, the rationale in *West Pennine Water Board* would apply equally to the present case if it had been established that the defender had a "right" of access to, and use of, the communal toilets and coffee/tea-making facilities. As Lord Denning stated in *West Pennine Water Board, supra* (at page 432):

> "In my opinion shopkeepers who have the *right* [my emphasis] to use water in and from the lavatories in common with others are chargeable with the water rate on the premises."

Likewise, Scarman LJ in *West Pennine Water Board, supra* (at page 423) states:

> "It seems to me clear that, as a matter of property law, the premises [the defendant] occupied were the shop plus the *rights appurtenant to it – rights* which are set out in both the agreement and in the draft under-lease" [my emphasis].

Throughout the *West Pennine Water Board* decision, reference is made to the language of "rights", not to mere *de facto* use.

[46] In my judgment, the extent of the "premises" is indeed defined by the rights conferred by the related legal deed (whether it be a disposition, lease, licence or otherwise). If the Licence to Occupy had indeed conferred a "right" upon the defender – expressly or by implication – to access and use the communal toilet and kitchen facilities, then that right would constitute an "interest…. in, to or over land" (1980 Act, section 109); that interest would form part of the defender's "premises"; the defender's "premises" would thereby be

"connected" to the public water supply and public sewerage systems (2005 Act, section 27) serving those communal facilities; and the defender's premises would thereby properly be regarded as "eligible premises" for the purpose of sections 6 & 27 of the 2005 Act.

[47] Does the Licence to Occupy confer any such right? The answer is no. The Licence to Occupy carefully and explicitly defines the "Premises", to which it relates, as extending only to the 263 square feet comprising Suite 190/191 on the second floor of the Block. No express right is conferred upon the defender to access or use communal toilet or kitchen facilities.

[48] The careful, almost pedantic, manner in which the defender's "Premises" are defined in the Licence to Occupy is striking. Clause 1.13 of the Schedule attached to, and forming part of, the Licence to Occupy gives further express definition of the "Premises" that are licensed to the defender. The "Premises" expressly include the "*interior* facings and surfaces of the floors"; "window frames"; "window glazing"; "door frames"; and "internal and non-structural walls". Interestingly, the "Premises" defined in the Licence to Occupy also include:

> "1.13.3 the Licensors' fixtures, equipment and apparatus, and all water, soil, electricity, telephone and other services (*if any*)"

but, importantly, only so far as "*exclusively* serving said premises" [my italicised emphasis]. However, as the evidence discloses, there are no water services "*exclusively* serving" the defender's premises.

[49] From the foregoing, it can be seen that the Licence to Occupy confers no *express* right upon the defender to have access to, or to use, the communal toilets (or coffee/tea-making points), or, indeed, any other part of the Block that might happen to be served by, and connected to, the public water supply and/or sewerage systems.

[50] Although it was not explicitly argued, I inferred that the pursuer was seeking to advance an argument that such a right arose by implication from the Licence to Occupy. In my judgment, that argument is not persuasive. Firstly, a term can be implied in a contract only if it does not conflict with the express terms of the contract. In the present case, the Licence to Occupy expressly defines the defender's premises as including "water services" but only so far as "exclusively serving" the defender's premises. To imply that the defender's premises then includes the right to use water services (such as to the communal toilets or communal coffee/tea-making facilities) that are not "exclusively serving" the defender's premises would be inconsistent with the express terms of the Licence to Occupy. Secondly, a term can be implied in a contract only if it satisfies the stringent tests set out set out by the Supreme Court in *Attorney General of Belize* v *Belize Telecom Ltd* [2009] UK PC 10, as explained in *Marks & Spencer plc* v *BMP Paribas Securities Services Trust* Co *(Jersey) Ltd* [2016] AC 742 and approved most recently in *Trump International Golf Club Scotland Ltd* v *Scottish Ministers* [2016] 1 WLR 85. A term will only be implied if its nature is such that it must necessarily be implied to give the contract business efficacy (*McWhirter* v *Longmuir* 1948 SC 577 at 589 per Lord Jamieson). No doubt, the discontinuance of toilet facilities or coffee/tea-making points may be an inconvenience to some tenants and licensees in the Block – and it may well make the units less marketable to prospective commercial tenants/licensees by reducing the fringe benefits or "offering" that the commercial landlord may present to entice them to take up occupation – but it cannot be said that the implication of a right of access to such facilities must necessarily be implied to give the Licence to Occupy business efficacy. The Licence to Occupy can operate perfectly well without it. Indeed, as the defender's own testimony disclosed, a small business may be quite content to have no such access, for the very purpose of eliminating exposure to water and sewerage

charges, and to afford the opportunity to carefully manage and control water usage from within his premises. In contrast, notwithstanding the absence of express provision in the Licence to Occupy, it could readily be concluded that it is an implied term of the Licence to Occupy that the defender enjoys a right of access to, and egress from, Suite 190/191 on the second floor of the Block. Business efficacy would demand the implication of such a term. Otherwise, the whole purpose of the Licence to Occupy would be defeated, as the defender (and his customers) would be unable to gain access to the suite.

[51] The pursuer's case was founded principally upon the *de facto* availability of communal toilet or kitchen facilities to occupiers (such as the defender), and to the defender's conceded (albeit occasional) *de facto* use of the toilet facilities. True, by his own admission, the defender has used the communal toilets from time to time. But this is not a *right* conferred by his Licence to Occupy. He is not using those facilities in exercise of a right to do so. He has no greater legal right to use the communal facilities than a customer or supplier of, or visitor to, his premises or to any of the other tenants or licensees within the Building, or indeed any member of the public who happens to wander into the Block to use the toilet facilities (as spoken to by the defender in his testimony). To the extent that the defender uses those facilities, it is a mere indulgence on the part of the landlord/licensor. There is no evidence of any restriction on the public's access to any of these communal facilities – such as by the provision of a key, or pass, or code to permitted users, or through vetting by security, or even a physical obstruction such as a lock or gate.

[52] Mere *de facto* (as opposed to *de jure*) access to the communal toilets (or kitchen-type facilities) does not give rise to a liability for water charges. Consistent with the ratio of *West Pennine Water Board, supra,* in order to attract a liability for water charges, there must be a legal right to use the facilities because only then, returning to the present case, could the

defender's "premises" (which would include the appurtenant right of access to the communal toilets or kitchen-type facilities) be said to be "connected" to the public water supply and sewerage systems; and only then could the defender's premises be characterised as "eligible premises".

[53] For the foregoing reasons, I concluded that the defender is not "the occupier of any eligible premises" (in terms of sections 6 & 27 of the 2005 Act) because the premises occupied by him under the Licence to Occupy are not "connected" to the public water supply or sewerage systems.

Has the pursuer "made arrangements"?

[54] The pursuer submits that it has "made arrangements" with the defender (purportedly as the occupier of "eligible premises") for or in relation to the supply of water and/or the provision of sewerage services. These "arrangements" are said to have been made by virtue of the pursuer's conduct in sending to the defender the "welcome pack" and the related invoices.

[55] In my judgment, on the evidence the pursuer has plainly made no such "arrangements".

[56] In the first place, on the evidence, having discovered that the defender occupied a unit within the Block, the pursuer simply undertook a series of unilateral acts: it opened an account within its own computer system, it issued a standard generic marketing brochure (described as a "welcome pack") to the defender, and issued invoices to the defender (backdated to the date of first occupation). All of this was entirely unsolicited, unilateral and, somewhat ironically, most unwelcome. While I acknowledge that the use of the word

"arrangements" in this context is understood to connote something less formal than contract or "agreement", nevertheless notions of mutuality and an acceptance of relations are still required (*Re British Slag Ltd's Application* [1963] 1WLR 727; *Scottish Water Business Stream Ltd v Deodat Chataroo* [2015] SC EDINB 60). An interesting feature of the present case is that there is no evidence of any words or actions *by the defender* from which any mutuality or acceptance might be inferred concerning the imposition of the charges, still less of putting in order any relationship between the parties. For example, there is no evidence, in the present case, that the defender actually used, as of right, any water (or sewerage services) provided to his premises (as defined in his Licence to Occupy); or that such a water supply or such sewerage services were ever made available to the defender's premises (as defined by his Licence to Occupy); or that any invoices were ever paid by the defender. In circumstances where an occupier of premises that are connected to the public systems has available, and actually makes use of, the supply or services, those circumstances might readily justify the inference of "arrangement" having been made, especially where the statutory provider has issued its terms, conditions and invoices. In contrast, in the present case, all that has occurred is that the statutory provider has unilaterally issued a marketing brochure and a series of invoices, but the defender's premises (as defined under the Licence to Occupy) have received not one drop of water through the public water supply system, nor has one drop of sewage been removed from the defender's premises (as so defined) through the public sewerage system; and, all the while, the defender has disputed the existence of any relationship with, or liability to, the pursuer.

[57] In the second place, the pursuer can issue as many "welcome packs", brochures, invoices, statements and credit notes as it likes, but if it has failed to provide, or make available, to the premises a supply of water through the public water supply system (or has

failed to provide, or make available, to the premises sewerage services through the public sewerage system) because the defender's premises (as properly defined) are simply not "connected" to those public systems, then the supposed "arrangements" are futile and of no effect. The "arrangements" can only be made with the occupier of "eligible premises"; and "eligible premises" are premises that are "connected" to the public water supply or sewerage systems. That is not the case here.

[58] For these reasons, I concluded, on the evidence, that the pursuer had not made "arrangements" with the occupier of "eligible premises" for or in relation to the necessary supply of water or provision of sewerage services.

The Market Code

[59] Lastly, the pursuer advanced an ingenious argument to the effect that paragraph 5.15.3 of the Market Code empowered the pursuer to impose a charge upon the defender.

[60] In my judgment, this submission failed because the pursuer did not prove that paragraph 15 of the Market Code applied in the present case.

[61] In the first place, having regard to the preface, paragraph 5.15 applies only:

> "In relation to any eligible premises that is occupied as at the Go Live Date by a number of owners and/or tenants or other occupiers…"

While Mr McDaid confirmed that the "Go Live Date" was 1 April 2008, he candidly conceded in his testimony that he had no knowledge of the occupation of the Block at that date, in particular whether it was unoccupied, or occupied by a single occupier or by a number of owners and/or tenants or other occupiers. Accordingly, in my judgment, the qualifying criterion for the application of paragraph 5.15 was not established in evidence.

[62] The importance of this qualifying criterion is re-affirmed in paragraph 5.15.4 which states:

> "To avoid doubt, the above rules shall not apply to any eligible premises that have not been occupied by a number of owners and/or tenants or other occupiers prior to the go live date…"

This merely underscores the significance of the pursuer's failure to prove, in evidence, that the Block was indeed occupied by a number of owners and/or tenants or other occupiers as at 1 April 2008. No evidence was adduced as to the occupation of the Block at or prior to that key date.

[63] In the second place, on a proper reading, paragraph 5.15 deals with the situation where a building is connected to the public water supply and/or sewerage systems; the building is in multiple occupancy (in the sense that it is sub-divided into discrete "units within those eligible premises"); each of those units is also connected to the public water supply and/or sewerage systems *via* that principal connection into the building; but there are no sub-meters measuring the usage to each of those individual units. In that scenario, the purpose of paragraph 5.15 is, by a fiction, to deem each such discrete unit to have a point of supply for water and/or sewerage services – and to then create a methodology for each unit to be charged for that water/sewerage service. Otherwise, the liability of the occupiers of each unit could not be ascertained. Paragraph 5.15 creates a deemed supply point, but only in circumstances where the smaller discrete unit is "connected" to the public systems (albeit *via* the principal connection to the building, by internal connections). In his evidence-in-chief, Mr McDaid described paragraph 5.15 as creating a "pseudo-meter".

[64] Paragraph 5.15 of the Market Code does not entitle the pursuer to levy charges upon the occupier of a unit within a building merely because that unit is "capable of separate occupation". The unit must still be "connected" to the public water supply or sewerage

systems (*via* the principal connection into the larger building of which it forms part). In the present case, the defender's premises (as defined in his Licence to Occupy) are not "connected" at all to the public water supply or sewerage systems. Accordingly, paragraph 15 of the Market Code does not support the pursuer's claim.

[65] For all of the foregoing reasons, I granted absolvitor in favour of the defender.