OUTER HOUSE, COURT OF SESSION

[2018] CSOH 43

CA138/16

OPINION OF LORD DOHERTY

In the cause

BUMPERS LIMITED

Pursuer

against

BROXBURN MOTORZONE LIMITED

Defender

Pursuer: M A Stuart QC; MBM Commercial LLP
Defender: D M Thomson QC; Harper Macleod LLP

26 April 2018

Introduction

[1] The pursuer is the heritable proprietor of commercial premises at 67 Inglis Green Road, Edinburgh. The premises comprise a showroom, a forecourt and a workshop.

[2] By a Lease dated 27 October 2003 ("the Lease") the pursuer let the premises to Royal Mile Motor Company Limited ("Motor") on a 10 year lease commencing on 15 April 2003. The Lease provided for a rent of £42,500 per year with provision for a rent review after 5 years. The tenant undertook to pay rates and utility charges.

[3] Motor assigned the Lease to Redpath and Maclean Motor Company Limited ("Redpath") with effect from 1 December 2004 "IN CONSIDERATION of" £85,000 paid to it

by Redpath. By Sub-Lease dated 30 November 2004 ("the Sub-Lease") Redpath sub-let the workshop to Royal Mile Service Centre Limited ("Service") for the period 1 December 2004 to 14 April 2014. In terms of the Sub-Lease the rent was £28,800 per year with provision for a rent review on 14 April 2008, and Service undertook to fulfil all the obligations of the mid-landlord under the lease (in so far as relating to the workshop). Service was granted the right to shared use (along with the mid-landlord) of a kitchen adjoining the workshop, but the kitchen was not part of the subjects sub-let. At the 14 April 2008 Sub-Lease rent review Service's rent was increased to £36,000 per year. At the Lease rent review of 15 April 2008 Redpath's rent was increased to £54,000 per year.

[4] By Minute of Extension and Variation of the Lease dated 19 and 30 June 2008 the term of the Lease was extended until 14 April 2018. By an Assignation of the tenant's interest under the Lease "in consideration of the Price" of £85,000 paid by the pursuer, Redpath assigned its interest under the Lease to the pursuer with effect from 1 February 2010.

[5] By Minute of Variation of the Sub-Lease dated 7 April and 14 May 2014 the term of the Sub-Lease was extended until 14 April 2016 and the rent was increased to £42,000 per year with effect from 15 April 2014.

[6] None of this is contentious. The controversy relates to a Minute of Extension and Variation of Lease between the pursuer and the defender dated 20 and 28 August 2015 ("the Minute"). The Minute bore (i) to substitute the defender as the tenant under the Lease as varied by the Minute with effect from 1 September 2015; (ii) to extend the term of the Lease until 14 April 2035; (iii) to vary the rent to £42,000 per year from 1 September 2015, with provision for the rent being reviewed to the open market rent on 15 April 2020, 15 April

2025, and 15 April 2030; (iv) to remove the landlord's right to terminate the Lease on 6 months' notice in the event of it wishing to redevelop the subjects or change their use.

[7] The pursuer maintains that during discussions between its Mr Iain Adam and the defender's Mr Deryck Barnes in March and June 2015 it was agreed that the subjects to be let to the defender were the showroom and forecourt. The agreed terms were for a lease of only those subjects. The defender disagrees. It maintains that the parties agreed terms for a lease of the whole subjects including the workshop.

[8] In this commercial action the pursuer seeks rectification of the Minute. It maintains that its terms did not give effect to the common intention of the parties at the time of their agreement in June 2015. It contends that the parties' common intention was that only the showroom and forecourt were to be let by the pursuer to the defender. Alternatively, it seeks reduction of the Minute on the grounds that the parties failed to reach *consensus in idem* at the time the Minute was entered into; or that the defender knew at the time drafts of the Minute were being adjusted that the workshop had mistakenly been included within the subjects to be let, and the defender had taken advantage of that error. The pursuer also seeks recompense from the defender in respect of rent which Service has paid to the defender since October 2015. The matter came before me for a proof before answer on the commercial roll. The parties were agreed that the issue of recompense should not be determined at the proof but should be held over for further procedure in the event of the pursuer establishing that the Minute ought to be rectified or reduced.

The evidence

[9] The pursuer led evidence from Iain Adam and Paul Lynch. The defender led Deryck Barnes and Andrew Thomson. Signed witness statements or affidavits were lodged

in respect of each witness, and these were adopted and formed part of the witnesses' evidence-in-chief.

Iain Adam

[10] Mr Adam was aged 66 at the proof. He has been in the motor trade for over 40 years. He is a director of the pursuer. The pursuer was incorporated in 1983 and it began business in Glasgow. In 1986 it acquired the premises at 67 Inglis Green Road, Longstone, Edinburgh. Between 1986 and 1998 it carried on business there from the whole premises. In 1998 it let the premises to Motor. Motor carried on business from the showroom and forecourt, but it immediately sub-let the workshop to Service who used it for its repair, servicing and MOT business. In 2003 the new Lease of the premises was entered into between the pursuer and Motor, but in late 2004/early 2005 Motor assigned the tenant's interest in the Lease to Redpath. Mr Adam described the premium of £85,000 which Redpath paid to Motor for the assignation as being in respect of goodwill. Similarly, he regarded the premium which he paid to Redpath for the assignation in 2010 as having been for goodwill. In his view Redpath had done very well and had built up a good business. From 2010 the pursuer used the showroom and forecourt for the sale and purchase of used cars, and Service continued to occupy the workshop.

[11] By 2014 Mr Adam was contemplating retirement. When the Sub-Lease was reviewed in 2014 the term fixed was only 2 years because he thought that by April 2016 he might be retired and might want to lease the whole premises to a tenant. However, by early 2015 he wished to cease trading and to let out the showroom and forecourt. He told Kevin McGarrity, a business contact at the Scottish Motor Auction Group, that he was looking for a tenant. Mr McGarrity suggested that Mr Barnes might be interested.

Mr Adam contacted Mr Barnes, confirmed Mr Barnes' interest in having a meeting, and arranged to meet him at the premises.

[12] The first meeting took place in March 2015. After some initial discussion in the showroom office Mr Adam showed Mr Barnes around the showroom. Then he took him through the workshop to the shared kitchen. After that he took him around the back of the building and showed him parking spaces. In the course of the tour Mr Adam introduced Mr Barnes to Mr Lynch. After the tour Mr Adam and Mr Barnes returned to the office. During the course of their discussions in the office Mr Adam made it clear that what was being offered for let was the showroom and forecourt, with shared use of the kitchen. He told Mr Barnes that the workshop was sub-let to Service until April 2016 at a rent of £42,000 per year; that the pursuer intended to continue to sub-let the workshop to Service for as long as Mr Lynch wished to continue in business; but when Mr Lynch retired the pursuer envisaged giving the defender the option of letting the workshop. Mr Barnes indicated that not having the workshop would not be a difficulty for the defender because it had facilities to prepare cars at its Broxburn premises. Mr Adam and Mr Barnes discussed the possibility of a 10 year lease of the showroom and forecourt at a rent of £36,000 per year with a rent review after 5 years, and with the defender being responsible for rates and general overheads. Mr Adam indicated that rates for the showroom and forecourt were about £1,200 a month, but there was no specific discussion of the costs of other overheads. Discussions foundered when Mr Adam indicated that the pursuer was seeking a payment of £85,000 in respect of goodwill. He had said that the pursuer wished to recoup the £85,000 payment it had made to Redpath. Mr Barnes was not prepared to make any such payment.

[13] Mr Adam's evidence was that Joint Bundle no 11 ("JB 11") is a copy of notes made by him. He had supplied the principal to his current solicitors, but he understood it had been

lost. Most of the entries in the notes had been made prior to the first meeting with Mr Barnes, but some of the entries were made later, mostly during the second meeting. Some details were added after the second meeting. Two of the entries in the notes were:

"• Workshop From May 2016 (£42,000 per annum)
Lease to be reviewed with Royal Mile
…
• Option of workshop? From April 2016"

Both of those entries had been made before the first meeting. Mr Adam had used his notes as an aide memoire at the first meeting. He had gone through the points. He accepted that Mr Barnes would not have been able to read his notes during the meetings.

[14] Following the meeting the pursuer instructed letting agents, Knightsbridge, to market the showroom and forecourt. On Knightsbridge's recommendation a premium of £120,000 was sought. The upshot of the marketing was that one party was interested in letting the subjects for use in a cleaning business, but there was no interest from any party wishing to let the subjects for their existing use. Mr Adam was not interested in having a cleaning business as a tenant. In June 2015 he contacted Mr Barnes and a further meeting at the premises took place. Mr Adam and Mr Barnes had simply taken up where they had left off at the previous meeting. There had been no further discussion about the extent of the subjects to be let or about the workshop. Mr Barnes had confirmed that he was not prepared to pay any capital sum for goodwill. However, he proposed a longer lease term - 20 years - and a rent of £42,000 per year with five-yearly rent reviews. Those terms were acceptable to Mr Adam. They had shaken hands on the deal. Mr Adam had said that they would both need solicitors to agree the necessary documentation.

[15] Mr Adam then instructed Mr Semblay of Pagan Osborne Solicitors to act for the pursuer in relation to the proposed transaction. He told him that it was only the showroom

and the forecourt which were being let to the defender. He also informed Mr Lynch that a deal had been done to let the showroom and forecourt. The defender instructed Andrew Thomson of McGregor Thomson Solicitors to act on its behalf. Mr Semblay sent draft documentation to him. Before the process of adjustment and agreement of the documentation was complete Mr Semblay went on holiday. His colleague Ian Fraser took over. Mr Adam did not repeat to Mr Fraser the instructions he had given to Mr Semblay. He did not communicate to him that the subjects let were to be only the showroom and the forecourt. Mr Fraser informed Mr Adam that the defender was not prepared to accept a provision that the proposed lease could be terminated by the pursuer on 6 months' notice in the event of it wishing to redevelop the subjects or change their use. Mr Adam suggested a compromise of 12 months' notice, but the defender resisted the inclusion of any break option. Mr Adam agreed not to insist on it. He said that he was not sent a copy of the draft documentation by Pagan Osborne and that the first he saw of the Minute was when Pagan Osborne sent it to him for signature. Pagan Osborne gave him no written or oral explanation as to the terms and effect of the Minute. Mr Adam had read it ("but not carefully enough") and had not seen anything untoward. He had signed it. His recollection was that just after he signed it Mr Barnes telephoned him to enquire if he had signed it yet. After signing the Minute Mr Adam contacted the utility companies to let them know that the defender was now the responsible party. He informed the rating authority that the defender was now the tenant and occupier of the showroom and forecourt.

[16] Shortly after the defender took occupation Mr Barnes' father suggested to Mr Adam (during a conversation at the premises) that Mr Barnes' understanding was that the whole premises - including the workshop - had been let to the defender. Mr Adam told him that was not correct. However, he contacted Mr Fraser to check the position. When Mr Fraser

indicated that was indeed the effect of the Minute Mr Adam suggested there must be a mistake. Mr Fraser said he would contact Mr Thomson to try and sort things out. Mr Adam was then made aware by Mr Lynch that the defender had written intimating that it was now Service's landlord, and that the sub-rent should be paid to it. Mr Adam contacted Mr Barnes and a meeting took place between them on about 8 September 2015. At the meeting Mr Adam told Mr Barnes that Pagan Osborne had made a mistake and that the Minute was wrong. Mr Barnes' response was that he had signed what the pursuer's lawyers had asked him to sign. He did not assert that the Minute properly reflected what had been agreed. He acknowledged that Pagan Osborne had made a mistake, and he had empathised to some extent with Mr Adam, but as far as the defender was concerned it was not its problem. Mr Barnes suggested that the pursuer would be all right because the insurance company would pay out. He expressed surprise that Mr Adam was not "more frustrated".

[17] Mr Adam stressed that both parties were clear at the time the deal was done that it was only the showroom and forecourt which were being let. It would have made no commercial sense at all for him to have agreed to let the whole subjects for a rent of £42,000 per year with no payment for goodwill. The sub-rent alone was £42,000. While it included rates and electricity, there were no rates payable for the workshop because Service obtained small business rates relief. Electricity for the workshop was about a quarter of the total consumption - about £150 per month. The rent paid by Redpath for the whole subjects had been £54,000. Had the mid-tenancy not been assigned by Redpath to the pursuer it is likely that there would have been a rent review under the Lease in 2013 and an increased rent would have been fixed at that time. In the discussions Mr Barnes had asked nothing about the workshop. He had not asked what the rates for it were or who owned the workshop equipment.

Paul Lynch

[18] Mr Lynch was aged 60 at the proof. He has known Mr Adam for more than 20 years. They are friends. He is a director of Service. His wife is the other director. He envisaged continuing carrying on business from the workshop for at least another 5 years, subject to obtaining a further extension of the Sub-Lease. The rent paid by Service had always been inclusive of rates and utilities (other than telephone), but there had been no rates payable because the workshop was exempt as a small business. During the summer of 2015 Mr Adam had explained to him that the defender would be leasing the showroom but that that would not affect Service's position as sub-tenant of the workshop. Nothing would change in relation to the workshop. Service's landlord would continue to be the pursuer, to whom Service would carry on paying the rent. That would remain the position for as long as Service wished to let the workshop. Later, on about 4 September 2015, after the defender had moved into the showroom, Mr Lynch had received a letter from MacGregor Thomson enclosing a new lease and directing him that the rent for the workshop should be paid to the defender. He had telephoned Mr Adam who had advised him not to sign the lease and not to pay rent to the defender. At about the end of September Mr Lynch had been invoiced by the defender for rent due. He had telephoned Mr Barnes and explained that Mr Adam had told him previously that the rent was due to the pursuer, and that he was not going to pay anything until he had had the opportunity of speaking once more with Mr Adam. Mr Barnes said his lawyer had said Service "had to pay because they had found a mistake in the paperwork." Mr Barnes had also said "Iain's lawyer f***ed up and my lawyer found it when looking over the paperwork and told me it was up to Iain's lawyer to fix it."

Mr Barnes had definitely said these things to Mr Lynch. There was no possibility that Mr Lynch was mistaken.

Deryck Barnes

[19] Mr Barnes was aged 47 at the proof. He is a director of the defender. The defender buys and sells used cars. Mr Barnes set up the business in January 2014. His career started out with him "fixing up" cars. That was followed by some years in car sales, and then about 10 years in other sales work. During cross-examination he volunteered that his work history also included a period of about 5 years when he had been a professional poker player.

[20] In 2015 the defender operated from premises in Broxburn where there were workshop and showroom facilities. Mr Barnes wanted the defender to expand into Edinburgh. When he heard through Mr McGarrity that Mr Adam was considering semi-retirement he indicated he was agreeable to being contacted by telephone by Mr Adam. The first meeting had been set up. At that meeting Mr Adam had given him a tour of the whole premises, including the workshop. He had introduced Mr Lynch as the sub-tenant of the workshop. After the tour Mr Barnes and Mr Adam had returned to the office and discussed possible lease terms. As far as Mr Barnes was concerned the discussions related to a lease of the whole premises. At no stage during the tour or in the office had Mr Adam said that the workshop would not form part of the leased subjects. Mr Adam had said he was looking for a 5 or 10 year lease at a rent of £3,000 per month. He had said that the Sub-Lease to Service was due to expire in April 2016; and that the defender would therefore not have immediate use of the workshop. Mr Barnes had replied that that would not be a problem and the defender could prepare its cars at Broxburn until it got the workshop in April 2016. He understood that he would get actual occupation of it as

soon as Service vacated. Mr Barnes had asked what the rates were in response to which Mr Adam had been vague and said they could be looked up on the assessors' website. At the first meeting Mr Adam had not said what the rent under the Sub-Lease was. Mr Adam did not suggest that the defender would need to enter into a further lease for the workshop in April 2016. The discussions were based on the understanding that the defender would be leased the whole premises albeit it would not be getting actual occupation of the workshop until April 2016. The negotiations had reached an impasse when Mr Adam had proposed a payment of £85,000 for goodwill. Mr Adam had explained that he had paid that sum to Redpath and previous tenants had also paid the same sum. Mr Barnes was not persuaded any such payment was justifiable. The meeting ended with Mr Adam saying that the offer remained on the table.

[21] In June 2015 Mr Adam had telephoned and asked if Mr Barnes was still interested in the premises. Mr Barnes had replied that he was, but not if the goodwill payment was going to be insisted on. The second meeting was arranged. At the meeting the parties picked up where they had left off. Mr Barnes put forward a compromise proposal for a 20 year lease at a rent of £42,000 with 5 yearly rent reviews. Agreement was reached on those terms. On this occasion Mr Adam mentioned that the rent under the Sub-Lease was £42,000. Once the deal was reached Mr Adam said that his lawyers would prepare the documentation. He said he already had a lease in place and that it would save them money to use it.

[22] At each of the meetings Mr Adam appeared to have notes. Mr Barnes had not seen the contents of those notes. Mr Adam had not discussed all of the matters in JB 11. In particular, there had been no mention of an option to rent the workshop in April 2016. Mr Barnes was sceptical about the contemporaneity of JB 11. It looked to him as if it had been "doctored" or "fabricated". In the top right hand corner it looked as if something -

possibly a date - had been tippexed out. Other entries looked as if they had been made at different times in different pens.

[23] Andrew Thomson had discussed the first draft of the Minute with Mr Barnes. Mr Thomson explained that the effect of the Minute was that the defender would become tenant of the whole subjects with the right to receive the rent due under the Sub-Lease. He also explained to Mr Barnes that the Sub-Lease would not necessarily come to an end in April 2016 and that it could continue by tacit relocation. Mr Barnes had not been aware of that possibility. Mr Thomson flagged up the landlord's option to end the lease for redevelopment or change of use. Mr Barnes was not happy with the pursuer having such a break option, and he instructed Mr Thomson to indicate that he would not agree to it. Otherwise as far as Mr Barnes was concerned there had been no mistake in the Minute. It was consistent with Mr Barnes' understanding of the agreement which had been reached.

[24] Mr Barnes' recollection of the meeting with Mr Adam in September 2015 was that Mr Adam said his lawyers had made a mistake and that they ought not to have included the workshop in the lease. Mr Adam had said the inclusion of the workshop did not reflect what had been agreed. Mr Barnes had not said that the pursuer's lawyers had made a mistake, or that he knew the pursuer's lawyers had made a mistake. He had said that he just signed what the pursuer's lawyers had prepared; and that if the pursuer's lawyers had made a mistake Mr Adam should take it up with them. He had not said that the insurers would sort it out for Mr Adam. Mr Barnes recalled having three telephone calls with Mr Lynch in September 2015, the first when Mr Lynch had received correspondence from the defender in relation to the change of the mid-landlord, the second when Mr Lynch indicated that he could not get in touch with Mr Adam because he was on holiday, and the third after Mr Lynch had spoken to Mr Adam. During none of these telephone calls had

Mr Barnes said that his lawyer had found a mistake in the lease or that the pursuer's lawyers had "f***ed up". Mr Barnes had told Mr Lynch that the sub-rent ought to be paid to the defender and that it should be done by bank transfer rather than by cheque.

[25] Mr Barnes did not accept that the agreement which the Minute gave effect to made no commercial sense for the pursuer. The pursuer was getting a long lease. The rent under the Sub-Lease was a short term rent. It included rates and utilities. The electricity bills for the subjects were more than £2,000 a quarter and most of that related to the workshop. He accepted that there had been no discussion about the equipment in the workshop. He had assumed that it belonged to Service or was leased by it from a supplier. The defender could either bring in equipment of its own or make arrangements with Service to take over the existing equipment. As far as he was concerned what had been much more important was that the workshop had an MOT licence. That confirmed its compliance with the necessary standards, and that the defender would also be likely to obtain such a licence in respect of the premises if it applied for one. Mr Barnes also observed that if, as Mr Adam contended, the agreement had been to let only the showroom and forecourt to the defender, it was surprising that there had been no discussion of the consequences of such an arrangement. Service had a reception desk within the showroom. Moreover, the electricity supply and water supplies for the showroom and the workshop were single meter systems. Since the defender took entry it has paid for all electricity, water and rates for the subjects.

Andrew Thomson

[26] Mr Thomson qualified as a solicitor in 1991. He is the principal solicitor at MacGregor Thomson Solicitors, Stirling. Mr Barnes contacted him in June 2015 and asked him to act on the defender's behalf in respect of a commercial lease. On 14 July 2015

Mr Thomson spoke with Mr Semblay. Mr Semblay indicated that draft documentation would be sent by mail that evening. After it arrived Mr Thomson met Mr Barnes to go over it with him. The first thing which Mr Thomson asked Mr Barnes to clarify was the perimeter of the subjects. After that had been done Mr Thomson explained to Mr Barnes the terms of the proposed lease. He indicated that the workshop was sub-let to Service. Mr Barnes confirmed he was aware of that. He also confirmed that it had been agreed that the defender was taking over the whole subjects. He knew he was not going to get any use of the workshop until after April 2016. He was aware (i) that he was leasing the whole premises; (ii) that the workshop was subject to the Sub-Lease; (iii) that he would not have immediate occupancy rights to the workshop; (iv) that the Sub-Lease was due to come to an end in April 2016; and (v) that when it did he would be entitled to occupy and use the workshop. Mr Thomson explained to Mr Barnes that he was entitled to payment of the sub-rent. He also explained that the Sub-Lease might be renewed by tacit relocation. Mr Barnes instructed Mr Thomson to make a counter-proposal for a 10 year lease with a tenant's option to extend for a further 10 years; for a rent review after 10 years; and to remove the landlord's option to break for redevelopment or change of use. The pursuer did not agree to the first two proposals but it accepted the third. By this time Mr Fraser was dealing with the transaction during Mr Semblay's absence on holiday. Mr Fraser proposed adding to the definition of "Lease" in the Minute by making reference to the Sub-Lease, which change Mr Thomson was happy to accept. Mr Barnes approved the revised draft documents on 18 August 2015 and he signed the engrossments on 20 August 2015. Thereafter the documents were executed by the pursuer. The transaction settled on 3 September 2015. Mr Thomson sent notices to Service confirming the change in mid-landlord and that the sub-rent was due to the defender. He advised Mr Fraser of that in

an email on 7 September 2015. On the same day Mr Fraser telephoned him. He seemed to indicate that he had not expected the sub-rent to be paid to the defender. He raised the possibility of a mistake having occurred. He indicated that he would clarify matters with the pursuer. Mr Thomson reported his conversation with Mr Fraser to Mr Barnes. Mr Barnes confirmed that it had been agreed he was leasing the whole premises. Mr Thomson passed that information back to Mr Fraser. On 10 September 2015 Mr Fraser replied to the effect that the pursuer was absolutely clear that only a lease of the showroom had been agreed.

Senior counsel for the pursuer's submissions

[27] Senior counsel for the pursuer's primary submission was that rectification of the Minute should be granted (Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 8(1)(a)). The Minute had been intended to give effect to the agreement that Mr Adam and Mr Barnes had reached at the second meeting, but it failed to express accurately the common intention of the parties. Reliance was placed on *Patersons of Greenoakhill Ltd* v *Biffa Waste Services Ltd* 2013 SLT 729, per Lord Hodge at paragraphs 32 to 47. Looking objectively at what Mr Adam and Mr Barnes said and did at their two meetings, the court should conclude that the agreement which was reached was that the subjects to be let were the showroom and forecourt. Where the accounts of Mr Adam and Mr Barnes differed Mr Adam's versions should be preferred. Mr Adam had been open and candid in his evidence whereas, by contrast, Mr Barnes' evidence had been unsatisfactory. Mr Adam's account was supported by his contemporaneous notes. It was also supported (i) by the evidence of what Mr Adam had said to Mr Lynch before the Minute was executed; (ii) by Mr Adam's reaction to the suggestion by Mr Barnes' father that the workshop formed part

of the subjects let; (iii) by the evidence of Mr Fraser's immediate reaction on being informed by Mr Thomson that the pursuer was entitled to the sub-rent; (iv) by Mr Adam's reaction to Mr Fraser informing him of the defender's position; and (v) by Mr Adam's conduct in notifying the assessor that the tenant of the showroom was the defender. Mr Barnes' evidence as to his understanding conflicted with his subsequent conduct. He had acknowledged to both Mr Lynch and Mr Adam that there had been a mistake by the pursuer's solicitors. Moreover, his account of events resulted in a scenario where Mr Adam would have agreed to a deal which made absolutely no commercial sense for the pursuer. Both Mr Barnes and Mr Adam had known that the workshop was sub-let to Service until at least April 2016 and that the rent was £42,000 per year. In those circumstances it defied belief that Mr Adam would have agreed to let the whole subjects for a rent of only £42,000 per year. It also defied belief that such an agreement would have been reached without there having been any discussion about ownership of the workshop equipment and what would happen to it on the Sub-Lease coming to an end.

[28] Alternatively, counsel's secondary submission was that the court should be satisfied that the pursuer executed the Minute in the erroneous belief that its effect was to let only the showroom and forecourt; that the pursuer's error was essential error on its part which was known to and taken advantage of by the defender at the time it signed the Minute; and that accordingly the Minute was executed by the defender in bad faith and it should be reduced. Reliance was placed upon *Steuart's Trustees* v *Hart* (1875) 3 R 192, per Lord President Inglis at p 200, Lord Deas at p 200, Lord Ardmillan at p 201; *Angus* v *Bryden* 1992 SLT 884, per Lord Cameron of Lochbroom at pp 886F-887L; *Wills* v *Strategic Procurement (UK) Ltd* [2013] CSOH 26, per Lord Malcolm at paragraphs 9-22. *Separatim*, if the court concluded that, looking at matters objectively, there had not been *consensus in idem* at the time the contract

was concluded, reduction would be the appropriate remedy. Reference was made to *Gloag on Contract* (2nd ed.), pp 441-447; *MacQueen & Thomson, The Law of Contract* (4th ed.), paragraph 4.38; *Buchanan* v *Duke of Hamilton* (1878) 5 R (HL) 69; *Sutherland* v *Bremner's Trustees* (1903) 10 SLT 565; *Mathieson Gee (Ayrshire) Ltd* v *Quigley* 1952 SC (HL) 38; and *Specialist Insulation Ltd* v *Pro-Duct (Fife) Ltd* 2012 CSOH 79.

Senior counsel for the defender's submissions

[29] Senior counsel for the defender submitted that it was for the pursuer to satisfy the court that the common intention of the parties had been that the subjects to be let were the showroom and forecourt rather than the whole subjects. There was a strong presumption that the Minute embodied the parties' agreement (*Rehman* v *Ahmad* 1993 SLT 741, per Lord Penrose at p 746). It was common ground that the relevant legal principles were those set out by Lord Hodge in *Patersons of Greenoakhill Ltd* v *Biffa Waste Services Ltd, supra,* at paragraphs 33-44. Convincing evidence was needed that the common intention had been as the pursuer suggested. It was a stiff hurdle which the pursuer had to overcome. Applying the relevant principles to the evidence, the court should conclude that the pursuer had failed to prove its case on the balance of probabilities.

[30] While it was possible that Mr Adam's subjective intention had been that only the showroom and forecourt should be let, the objective facts did not support the conclusion that that had been the common intention of the parties. The court should find that nothing Mr Adam said or did at the time of his discussions with Mr Barnes communicated to him an intention that only the showroom and forecourt were to be let. That was certainly the import of Mr Barnes' evidence. Where the evidence of Mr Adam and Mr Barnes differed, Mr Barnes' evidence should be preferred. Mr Barnes' position had been consistent:

Mr Thomson's evidence demonstrated that from the outset of his dealings with Mr Barnes his position had been that the whole subjects had been let. While it was true that soon after the execution of the lease Mr Adam had raised the issue of a mistake, that was probably due to a dawning appreciation of the full legal consequences of the Minute. Mr Adam had mentioned the Sub-Lease and the sub-rent paid, but he had not said that the workshop was not to be included in the lease. Rather, the discussion had been about actual occupation and availability for use. Mr Adam might have thought that mentioning the existence of the Sub-Lease was enough to make clear that the workshop was not included in the subjects let, but that was plainly not correct. He had communicated to Mr Barnes his wish to recoup the goodwill payment which he had made to Redpath at the time of Redpath's assignation to him. Given the history of the lease of the whole subjects having been assigned, with premiums being paid to reflect goodwill, the attempted recoupment of the goodwill payment had been consistent with an intention that the whole subjects were to be let.

[31] While Mr Adam maintained that he had instructed Pagan Osborne that the workshop was not to be included in the lease, the inescapable fact was that those solicitors had prepared a Minute in terms of which the whole subjects were let. It was very significant indeed that the pursuer had chosen not to lead Mr Semblay and Mr Fraser as witnesses. In the absence of evidence from them as to what Mr Adam's instructions to them had been, the court should not accept Mr Adam's evidence on the point (*cf Liquidator of Letham Grange Development Co Ltd* v *Foxworth Investments Ltd* 2011 SLT 1152, per Lord Glennie at pp 1168-1169; *Walker and Walker, The Law of Evidence in Scotland* (4th ed.) paragraph 5.13.3). On the contrary, the only reasonable inference in the circumstances was that Pagan Osborne were acting in furtherance of the pursuer's instructions. The fact that Pagan Osborne acted as they did must cast considerable doubt on the reliability of Mr Adam's account of events.

It called into question his evidence that at the time of the agreement he believed that the workshop was not included. It ought to make the court extremely cautious about accepting his evidence that he clearly communicated to Mr Barnes that the workshop was not part of what was being let to the defender.

[32] The evidence of Mr Adam and Mr Lynch that Mr Barnes accepted that there had been a mistake in the Minute was not credible or reliable. It was wholly implausible that Mr Barnes would have made the suggested statements. In Mr Adam's case it might be a case of him convincing himself over time that Mr Barnes had said more than he in fact said *viz* that he had signed what he was asked to sign, and that if Mr Adam thought that his lawyers had made a mistake that was a matter for him to take up with them. It was possible that something along the same lines was said to Mr Lynch (although Mr Barnes did not think so) but that it too had grown arms and legs over time. In any case, it should be borne in mind that Mr Adam and Mr Lynch were friends who had discussed matters since the controversy began. Mr Lynch was in Mr Adam's camp.

[33] On the facts known to both parties at the time of their discussions it could not be said that a lease of the whole subjects on the terms agreed made no commercial sense for the pursuer. Mr Adam wished to retire. Despite advertising by Knightsbridge for a number of months the defender was the only realistic contender for the tenancy. Under the proposed lease the pursuer obtained the security of a 20 year lease with open market rent reviews every 5 years. The Sub-Lease rent of £42,000 was inclusive of all rates and charges and it was not certain to continue after April 2016.

[34] The pursuer's alternative cases for reduction had also not been made out. Firstly, it had not been established that the pursuer had been mistaken, or that the defender had known of the mistake but taken advantage of it. In order for the defender to have been

aware of and taken advantage of a mistake the court would have to be satisfied that the parties had had the common intention that only the showroom and forecourt should be let. As already outlined, the court ought not to be so satisfied. In any case, if taking advantage of such a mistake was established the appropriate remedy would be rectification not reduction (*Macdonald Estates Plc* v *Regenesis (2005) Dunfermline Ltd* 2007 SLT 791, per Lord Reed at paragraph 169; *cf Angus* v *Bryden, supra,* per Lord Cameron of Lochbroom at p 888F-H). Secondly, it had not been shown that there had not been *consensus in idem.* What was relevant was not the subjective beliefs of the parties, but whether applying an objective approach there was *consensus* at the time of contracting. Applying such an approach there was no proper basis for concluding that there was an absence of *consensus.* Rather, the only reasonable conclusion was that the parties were each advised by solicitors to whom they had given instructions; that the Minute was prepared and adjusted in furtherance of those instructions; and that the parties executed the Minute having taken legal advice and in full knowledge of the Minute's terms.

The legislation

[35] Section 8 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 ("the 1985 Act") provides:

> "**8.— Rectification of defectively expressed documents.**
> (1) Subject to section 9 of this Act, where the court is satisfied, on an application made to it, that—
> (a) a document intended to express or to give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made;
> …
> it may order the document to be rectified in any manner that it may specify in order to give effect to that intention.
> (2) For the purposes of subsection (1) above, the court shall be entitled to have regard to all relevant evidence, whether written or oral.

…"

Decision and reasons

[36] It is common ground that the principles outlined by Lord Hodge in *Patersons of Greenoakhill Ltd* v *Biffa Waste Services Ltd* at paragraphs 33-44 are an accurate statement of the law relating to rectification. There is a strong presumption that the Minute properly reflects the parties' intentions, ascertained objectively (*Rehman* v *Ahmad, supra,* per Lord Penrose at p 746). It is accepted that the onus is very firmly on the pursuer to satisfy all the requirements of s 8(1)(a) of the 1985 Act, and that the standard of proof is the balance of probabilities.

[37] Both parties approach the case on the basis that an agreement was reached at their second meeting. However, the pursuer says it was agreed that the subjects of let were the showroom and forecourt, whereas the defender maintains they were the whole premises. Each maintains that the Minute was intended to express and give effect to the prior agreement which its principal (in the pursuer's case Mr Adam, in the defender's, Mr Barnes) describes.

[38] Here the defender led its solicitor, Mr Thomson. It is clear from his evidence that the draft Minute prepared by Pagan Osborne related to the whole subjects. The draft and the final revised Minute were prepared by Pagan Osborne in purported furtherance of the pursuer's instructions. Mr Adam says that the pursuer's instructions were not complied with and that he was not advised by his solicitors as to the effect of the Minute.

[39] In a case such as the present, where parties are said to have agreed certain matters informally but then concluded a formal written agreement with the assistance of solicitors, the solicitors' evidence might be important - one way or another. It might tend to confirm or

support the client's account of its understanding of the informal agreement, and that the written agreement was intended to express or give effect to it. On the other hand that evidence might conflict with the client's account, or raise questions as to whether the written agreement was intended to express or give effect to it. It might undermine the client's credibility or reliability in relation to those matters, or indeed more generally. Such conflicts, if they existed, might ultimately be resolved, after a full evaluation of all the evidence, by preferring (in whole or in part) the client's account to the solicitors' account, or vice versa.

[40] I had the benefit of hearing from the defender's solicitor, Mr Thomson. I did not have the advantage of hearing from the pursuer's solicitors, or of listening to Mr Adam's account being tested under reference to their evidence. While both Mr Semblay and Mr Fraser were on the pursuer's list of witnesses, a conscious decision was taken not to call them to give evidence. I was told that they had not been precognosced. In the result, I have not heard from them (i) what their instructions were; (ii) what, if any, advice they may have given the pursuer; (iii) whether the culmination of the transaction in the Minute is consistent with the Minute having been intended to express or give effect to an informal agreement along the lines described by Mr Adam, as opposed to one along the lines described by Mr Barnes. Their evidence might have cast light on Mr Adam's subjective understanding of the informal agreement which had been reached. It might also have shown just how Mr Adam described and expressed what had been agreed informally, and what in his view ought to be done to give effect to that agreement. Evidence from Knightsbridge as to the extent of the property marketed by it might also have been of interest (albeit of less significance in my view).

[41] While the lack of evidence from Mr Semblay and Mr Fraser is noteworthy, I am not persuaded that it ought to result in an inference adverse to the pursuer being drawn. Nor do I think it appropriate to treat it as something which undermines Mr Adam's credibility or reliability on the critical disputed issues. Instead, I prefer to focus on the evidence which was adduced. For the reasons which I set out below I have been able to reach clear conclusions in relation to that evidence.

[42] Mr Thomson's evidence was not the subject of any material challenge. I accept it. The following are the two main things which I derive from it. First, Mr Barnes confirmed to Mr Thomson at an early stage his understanding that the agreement had been to lease the whole subjects. That evidence does tend to support Mr Barnes' account of what took place at the two meetings, although the support provided would have been more compelling had Mr Barnes confirmed his understanding before Mr Thomson had outlined the terms of the draft documentation to him. The evidence was that Mr Thomson's explanation of the Minute's terms came first. Second, Mr Thomson's evidence provides no support for the propositions that he told Mr Barnes that there was a mistake in the documentation and that it was up to the pursuer's solicitors to remedy it. Indeed, no such suggestions were put to Mr Thomson at any stage in his evidence.

[43] Mr Lynch's evidence is more controversial. He has had a long-standing business relationship with Mr Adam, and the two are friends. It seems likely that the dispute has placed Mr Lynch in an awkward position. Nonetheless, I am satisfied that he did his best to be truthful and to assist the court. Mr Lynch's evidence of his discussions with Mr Adam shortly after the latter's meetings with Mr Barnes does tend to support Mr Adam's evidence as to his understanding of the agreement which had been reached. I accept this part of Mr Lynch's evidence. I have more difficulty with his evidence about the telephone

conversation with Mr Barnes. I am prepared to accept that (contrary to Mr Barnes' recollection) some mention of the dispute with the pursuer may have been made by Mr Barnes to Mr Lynch during that conversation. However, I find it implausible that Mr Barnes would have said what Mr Lynch recalls him saying. It would have been an extraordinary thing for him to have volunteered to Mr Lynch (all the more extraordinary given his rather terse manner (see para 44 below)). As already noted, Mr Thomson's evidence provides no support for the suggestions that he told Mr Barnes that he had found a mistake in the documentation and that it was up to the pursuer to fix it. All things considered, while I do not doubt that with the passage of time Mr Lynch has convinced himself that Mr Barnes made the disputed statements, I think it much more likely that what was said by Mr Barnes to Mr Lynch was along the same lines as Mr Barnes' communication to Mr Adam - *viz* that if Mr Adam thought his lawyers had made a mistake it was a matter for the pursuer to take up with them (see paragraph 54 below) - and that Mr Lynch's recollection of the conversation has grown arms and legs since September 2015. In any case, in so far as Mr Lynch's evidence goes further than the matters which I have indicated I accept, I am not convinced that it is reliable.

[44] Mr Adam and Mr Barnes came across as having very different personalities. Mr Adam was more expansive and discursive than Mr Barnes. Mr Barnes was rather terse. Having heard their evidence, and having considered the evidence of Mr Lynch and Mr Thomson, I do not have any material reservations as to the credibility of either Mr Adam or Mr Barnes. In my view both witnesses did their best to give evidence according to their recollection of events.

[45] However, I found some aspects of Mr Adam's evidence to be implausible. For example, initially he maintained that he was "pretty sure" it had been made clear during the

first brief telephone call with Mr Barnes that only the showroom and forecourt were available to let. In cross-examination he conceded that he might be wrong about that.

[46] At times the delivery and content of Mr Adam's evidence suggested a degree of doubt - even on his part - as to the clarity with which he had identified to Mr Barnes the subjects to be let. For example, during cross-examination it was put to him that if what he said was correct there should not have been any doubt on Mr Barnes' part that the position was as Mr Adam indicated. There was a significant pause before Mr Adam replied, somewhat hesitantly, "I don't think so." Again, towards the end of cross-examination, he was asked whether he had made it absolutely clear to Mr Barnes that the let was to be only of the showroom and forecourt. He answered, once more somewhat tentatively, "I thought so."

[47] It is not difficult to see that, if it was attainable, an arrangement whereby the pursuer would let the showroom and forecourt to the defender but would remain both mid-landlord and head-landlord of the workshop might have been attractive to Mr Adam. At the end of the day I am inclined to accept that his subjective intention was to let only the showroom and forecourt to the defender. While the absence of evidence from Mr Semblay and Mr Fraser causes me to pause before reaching that conclusion, I am swayed by the fact that Mr Adam's evidence on this point is supported by Mr Lynch's evidence of their discussions soon after the agreement between Mr Adam and Mr Barnes was reached. The evidence of Mr Adam's reaction when, after the Minute was executed, the defender's position became apparent to him also tends to confirm that he did indeed hold the belief which he says he did.

[48] However, Mr Adam's subjective intention is not relevant unless he communicated it to Mr Barnes by statement or conduct. The court requires to assess objectively whether the

suggested antecedent agreement and common intention exist (in *Patersons of Greenoakhill Ltd* v *Biffa Waste Services Ltd, supra,* at paragraphs 37-44).

[49] In my opinion Mr Adam's evidence that he made it clear to Mr Barnes that only the showroom and the forecourt were being let was unconvincing. I am not satisfied that he communicated to Mr Barnes that only those parts of the premises were to be let. Where Mr Barnes and Mr Adam's accounts of what was said differ, I regard Mr Barnes' account as being more reliable. He was a straightforward witness and his evidence gave me no cause to doubt his reliability on this issue or on any other material matters. His account of events is consistent with what he told Mr Thomson not long after the second meeting with Mr Adam. As already indicated, I do not doubt Mr Adam's candour, but for the reasons already given and for the reasons which follow, I do doubt his reliability on the disputed matters.

[50] I accept that at the first meeting there was discussion of the existence of the Sub-Lease, of the passing sub-rent of £42,000, and of the fact that the defender could not obtain use of the workshop while the sub-tenant was in occupation. Nonetheless, I am not persuaded that there was any talk of the defender being offered an option to lease the workshop when the Sub-Lease ended; or that it was otherwise made clear to Mr Barnes that the workshop did not form part of the subjects being let. The parties were discussing the existence of a Sub-Lease. The reasonable and natural inference was that on the proposed lease being granted the sub-tenant would become the sub-tenant of the defender. In my opinion nothing said or done by Mr Adam or Mr Barnes at the meeting was indicative of a different outcome being intended. Rather, I am left with the strong impression that Mr Adam thought drawing the existence of the Sub-Lease to Mr Barnes' attention was one

and the same thing as saying that the workshop was not part of the subjects to be let. Plainly, it was not the same thing.

[51] In reaching my conclusions I have considered Mr Adam's evidence that he went through the items listed in his notes. I accept that he did indeed have notes at both meetings and that the two entries in JB 11 already mentioned were present in those notes at the time of the first meeting. However I am not satisfied that Mr Adam relayed the contents of those entries to Mr Barnes in the terms noted. In particular, I am not persuaded that Mr Adam made clear that the workshop was not to be included in the lease, but that it might become available to be leased in the future. I accept Mr Barnes' evidence that such discussion of the workshop as there was was to the effect that the sub-tenant would occupy it until at least April 2016 and that it was not immediately available for use by the defender.

[52] It does not strike me as remarkable that Mr Adam and Mr Barnes did not discuss ownership of the workshop equipment at either of the meetings. They were endeavouring to reach agreement on the broad outline terms of a lease of heritage. They envisaged that any necessary further detail could be added when the lease was drafted and revised. As Mr Barnes indicated, the important thing for the defender was that the workshop was suitable for MOT work. Whether the defender brought in its own equipment or arranged to take over the sub-tenant's equipment was something he envisaged being worked out in due course.

[53] Nor am I persuaded that the defender's version of the discussions and agreement reached made no commercial sense for the pursuer. So far as the discussions at the first meeting are concerned, Mr Adam proposed a 10 year lease at rent of £36,000 per year (with a rent review after 5 years) and payment of a capital sum of £85,000. The sub-rent payable under the Sub-Lease was £42,000 per year. The pursuer was aware that that sub-rent was

inclusive of rates and expenses (but that was not a matter within Mr Barnes' knowledge at the material time). The term of the Sub-Lease was due to expire in April 2016, although there was a possibility of the sub-tenant wishing to continue in occupation. It is far from obvious on those facts that the rent and capital payment discussed only made commercial sense to the pursuer if the subjects let excluded the workshop. In my opinion it is also far from clear that the terms agreed at the second meeting only made sense if the subjects let excluded the workshop. The pursuer obtained the security of a 20 year lease. The initial rent was £42,000 per year, with the landlord having the right to an upwards-only rent review to the open market rental level every 5 years. Even if the bargain might be thought to be more favourable to the tenant than to the landlord during the initial 5 years, I am not satisfied on the evidence I heard that the bargain as a whole made no commercial sense for the pursuer.

[54] I find Mr Barnes' account of the discussion at the meeting on about 8 September 2015 to be more plausible and more reliable than Mr Adam's account. I accept that Mr Barnes indicated that he had just signed what the pursuer's lawyers had asked him to sign; and that he said that if Mr Adam thought that his lawyers had made a mistake that was a matter for him to take up with them. I am not convinced anything was said by Mr Barnes about insurance. No mention of that was made in Mr Adam's affidavit or in his rebuttal witness statement. Even if insurance was adverted to by Mr Barnes, I would not have been inclined to treat it as being of any great significance (given that the context was one where Mr Adam was maintaining that his solicitors had not complied with his instructions). I am not persuaded that Mr Barnes said anything which connoted acceptance by him that the extent of the subjects let did not reflect the prior agreement.

[55] In those circumstances it is not essential to determine what the pursuer's instructions to its solicitors were; or what, if any, advice they gave the pursuer as regards the legal effect of the Minute. However, I would have had very significant reservations about accepting Mr Adam's evidence on these matters in view of the absence of any evidence from the pursuer's solicitors and the lack of any of the contemporaneous documentation.

[56] It follows that the pursuer's case for rectification of the Minute fails. It has not established that the parties' common intention at the time of the antecedent agreement was that only the showroom and forecourt be let. On the contrary, in my opinion on an objective assessment of the evidence their common intention at that time was that the whole premises be let.

[57] It is unnecessary to say much about the pursuer's cases for reduction. Neither case has been made out. Mr Adam's subjective intention may have been to let only the showroom and forecourt, but, on an objective assessment of what he and his solicitors said and did, in my opinion the only reasonable conclusion is that the pursuer's contractual intention was to let the whole subjects. There was *consensus in idem.* Moreover, the pursuer has failed to prove bad faith on the part of the defender. It has not established that at the time of the execution of the Minute the defender was aware that Mr Adam believed that only the showroom and forecourt were being let and that it took advantage of that mistaken understanding.

Disposal

[58] I shall sustain the second, third, fourth, and fifth pleas-in-law for the defender, repel the pursuer's pleas-in-law, and assoilzie the defender from the first and second conclusions of the summons. I reserve meantime all questions of expenses.