SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT FALKIRK

[2018] SC FAL 31

FAL-A101-17

JUDGMENT BY SHERIFF JOHN K MUNDY

in the cause

SHAHZAD WASEEM ANWAR and AISHA ANWAR

Pursuers

against

DAVID BRITTON and LINDA BARCLAY

Defenders

Act: Howie QC
Alt: Sandison QC

Falkirk, 11 December 2017

The sheriff, having resumed consideration of the cause, excludes from probation the defenders' averments in Answer 12 beginning with and including: "(a) In relation to the email of 14 July 2014…" to and including: "Further and separately" on line 19 of page 9 of the Record; sustains the fifth plea in law for the pursuers to that extent; reserves all questions of expenses and appoints parties to be heard thereon and on further procedure on a date to be afterwards fixed; continues consideration of pursuers' motion number 7/3 of process to said hearing.

NOTE

Background

[1] This is an action at the instance of the pursuers for reduction of missives of sale and a

subsequent disposition relating to heritable property in Strathblane. They also seek repetition of the purchase price and damages. The basis for reduction is said to be negligent or alternatively innocent misrepresentation inducing the contract. Damages are sought in the event that negligent misrepresentation is established.

[2] The alleged misrepresentation in this case is concerned with whether or not the subjects were affected by flooding. The formal written offer submitted on behalf of the pursuers on 24 May 2016 to purchase the subjects incorporated the *Scottish Standard Clauses* (Edition 2) issued by the Convenor of the Law Society of Scotland Property Law Committee on 14 March 2016 and registered in the Books of Council and Session on 15 March 2016 ("the Standard Clauses"). Some of those terms were modified in terms of the missives, but not the critical clauses which were the subject of discussion at debate. The offer to purchase was conditional upon a flood risk report in satisfactory terms being obtained and upon the defenders warranting that planning permission to demolish the existing house had never been refused. It is averred in Article 4 of condescendence that the issue of flooding was important to the pursuers as they intended to demolish the existing house and to build one or more homes on the subjects. It is averred that the defenders were made aware of the pursuers' intentions with regard to the development of the subjects. It is averred in Article 5 of condescendence that a flood risk report dated 1 June 2016 was exhibited on behalf of the defenders, the report classifying the flood risk as "low". The pursuers further aver that the report recommended that the pursuers "speak to the seller to confirm whether the property or surrounding area has flooded before". The pursuers' solicitors wrote to the defenders' solicitors and requested confirmation of whether the defenders had experienced flooding at the subjects. By email dated 14 July 2016 the defenders' solicitors confirmed that the

defenders had no experience of flooding at the subjects. Missives were concluded on 3 August 2016.

[3] Clause 2.1.3 of the Standard Clauses which form part of the contract provides *inter alia*:

> "So far as the Seller is aware (but declaring that the Seller has made no enquiry or investigation into such matters) the Property… is not affected by… flooding from any river or watercourse which has taken place within the last 5 years…"

[4] It is averred that the pursuers visited the subjects on 28 August 2016 and met with a neighbouring proprietor who, it is said, asked them if they were aware of "flooding problems" with the subjects. It is averred that the neighbour went on to explain that "he had moved into the neighbouring property in August 2015 and that in November 2015 the stream at the subjects had overflowed and reached the garage on the opposite end of the subjects." The neighbour further explained that he had been advised by the first defender that the stream running through the subjects had overflowed and flooded the garden "from time to time". There followed an exchange of correspondence between the parties' solicitors. The pursuers commissioned a detailed flood risk assessment which it is averred highlighted a risk of flooding and it is against that background that the present action has been raised. It was lodged in court on 10 March 2017.

[5] One further clause requires to be noted at this stage. It is Clause 27.1 of the Standard Clauses. It provides as follows:

> "The Missives will constitute the entire agreement and understanding between the Purchaser and the Seller with respect to all matters to which they refer and supersede and invalidate all other undertakings, representations, and warranties relating to the subject matter thereof which may have been made by the Seller or the Purchaser either orally or in writing prior to the date of conclusion of the Missives."

[6] After sundry procedure the cause was appointed to a debate on the parties' preliminary pleas. Each party had lodged a Note of a basis of their plea in terms of OCR

22.1. The diet of debate called before me on 17 November 2017. Mr Howie QC appeared for the pursuers and Mr Sandison QC for the defenders.

[7] I should add that also before the court was the pursuers' motion number 7/3 of process for summary decree. This motion had been lodged shortly prior to the diet of debate, but by agreement was held over pending decision on the preliminary pleas.

[8] For present purposes it is relevant to note that it is averred on behalf of the pursuers that the defenders' representations regarding prior flooding incidents at the subjects were made firstly in their agents' correspondence of 14 July 2016 (the email of that date) and secondly in terms of Clause 2.1.3 of the Standard Clauses and that they were false. It is averred that the defenders knew that there had been prior flooding incidents at the subjects and that notwithstanding that knowledge they represented through their solicitors that they had no such knowledge. It is averred that those representations were negligent failing which they were innocent. It is averred that the representations of the defenders induced essential error in the minds of the pursuers and that but for the defenders' misrepresentations the pursuers would have declined to contract. The averments pertinent to the arguments are to be found in Article 12 of Condescendence.

Defenders' Submissions

[9] The submissions on behalf of the defenders were in three parts and followed the first three paragraphs of their rule 22 Note.

[10] Firstly it was submitted that the effect of Clause 27.1, which was described as an "entire agreement clause", was that any representations preceding the conclusion of the parties' contract were not capable of being relied upon as a matter of law and had no effect. Secondly it was submitted that if that was correct then there was no basis for the pursuers

seeking reduction, the only appropriate remedy in relation to Clause 2.1.3 being a contractual one to rescind the contract in the event of a material breach and/or a claim for damages. Thirdly it was submitted that the pursuers had not pled a relevant or specific case for breach of Clause 2.1.3.

[11] In relation to the first argument, as background, Mr Sandison referred me to section 1(3) of the Contract (Scotland) Act 1997 to the effect that where one of the terms of a document is to the effect that the document comprises all the express terms of contract then that term shall be conclusive in the matter. So, by virtue of the entire agreement clause, the email was not a term of the contract between the parties. In relation to entire agreement clauses generally I was referred to *Inntrepreneur Pub Co. (GL)* v *East Crown Ltd*. [2000] 2 Lloyds Rep 611 and in particular Mr Justice Lightman at page 614. That case illustrated the effectiveness of such clauses which constituted a binding agreement between the parties that the full contractual terms were to be found in the document containing the clause and not elsewhere. An entire agreement provision did not preclude a claim in misrepresentation. However, as in that case, such a clause may contain further provision designed to exclude liability for misrepresentation or breach of duty. In the instant case Clause 27.1 was effectively in two parts the first being an entire agreement clause and the second from the words "and supersede and invalidate all other undertakings, representations and warranties relating to the subject matter thereof…" being effective to exclude liability for misrepresentations.

[12] Mr Sandison also referred to *Chitty on Contracts* (32nd Edition 2015) at paragraph 13-107 as to the purpose of such a clause i.e. to exclude liability for statements other than those set out in the written contract. The authors pointed out that the effect of the clause would necessarily depend upon its precise wording. Reference was also made to

McBryde, *The Law of Contract in Scotland* (3rd Edition 2007) paragraph 5-56. This vouched that it was possible to exclude liability for misrepresentations except for fraudulent misrepresentations. In this case it was said that the misrepresentations were negligent or innocent. None of the limits set forth in the passage of that text applied so as to prevent exclusion of liability. Mr Sandison also referred to *Watford Electronics Ltd* v *Sanderson Cfl Ltd* [2002] FSR 19, a decision of the Court of Appeal. That was a case where the claimant brought proceedings and damages claiming that it was induced to sign documents as a result of representations made by the defendant which were false. There was an entire agreement clause, the effect of which was set out from paragraph 38 of the judgment of Lord Justice Chadwick. The clause had an acknowledgment of non-reliance on pre-contract statements or representations. The rationale for such a clause, it was explained, was certainty and the balancing of risk. In the instant case, it was submitted that the issue of flooding related to the subject matter of the missives. Two questions required to be asked. Firstly, did the pursuers' claim for misrepresentation depend on the "undertakings, representations or warranties given by the pursuer prior to conclusion of the missives"? In relation to the email of 14 July the answer was "yes". Secondly, does the representation relate to the subject matter of the missives? The answer to that was also "yes" under reference to condition 2.1.3. Inevitably therefore it was submitted that the representation in the email was superseded and invalidated by the missives themselves.

[13] In anticipation of the arguments for the pursuer it was submitted by Mr Sandison that the idea that the clause in the present case was a basic clause only was misconceived. It was, he submitted, functionally the same as the clause in the *Watford Electronics* case, and so apt to exclude reliance on pre-contract misrepresentations, and that the alternative construction was a malign one which was not open on an objective test.

[14] He invited the court to exclude from probation certain passages in the pursuers' pleadings which proceeded on the basis of the email of 14 July 2016.

[15] In the second part of his submissions Mr Sandison argued that if the email of 14 July was set aside all that the pursuers had in relation to alleged misrepresentation was the contract term in Clause 2.1.3. The appropriate remedy there was for breach of contract with either damages and or the right to rescind the contract. Reduction would be available in the context of pre-contract misrepresentation as a result of which a party was induced to enter into a contract. In that event consent would be impaired. A contractual warranty is a contractual term and entirely different. The pursuers should only be seeking damages (and possibly declarator that they were entitled to rescind the contract). Mr Sandison submitted that this argument only arose in the event that I was with him on his first argument.

[16] The third part of his submissions involved a challenge to the relevancy of the pursuers' case for breach of contract in relation to Clause 2.1.3. The terms of that clause have been noted. He submitted that the clause was perfectly clear in its terms the provision that "So far as the Seller is aware… the Property… is not affected by… flooding from any river or watercourse which has taken place within the last 5 years" was a statement as to the present state of affairs ("the Property <u>is</u> not affected") which has been caused by a past state of affairs ("flooding from any river or watercourse which has taken place within the last 5 years"). It was not a statement that the property <u>has</u> not been affected by flooding from any river or watercourse which has taken place within the last 5 years although that would have been a proposition which would have been easy to express had it been what the parties intended. He submitted that the pursuers do not offer to prove that the property is affected by flooding. They say, in short, that the property has been affected by flooding within the past 5 years.

[17] As to the question of construction here I was referred to certain authorities namely *Rainy Sky* SA v *Kookmin Bank* [2011] 1 WLR 2900; *Arnold* v *Britton* [2015] AC 1619 and *Wood* v *Capita Insurance Services Limited* [2017] UKSC 24; [2017] 2 WLR 1095.

[18] Under reference to those authorities it was submitted that the court required to ascertain the objective meaning of the clause, and where there was careful drafting by professionals less weight should be given to its wider context. Where, as here, there was a standard condition drawn by a committee of professionals, which was not the subject of negotiation or compromise, a textual approach rather than a contextual approach was likely to be the principal tool. One required to look at the ordinary meaning of the text rather than considering other factors. Adopting such an approach and looking at the words objectively the issue was "is the property affected by something that has occurred in the last 5 years", not whether the property "has been affected by flooding over the past 5 years". If he was wrong in adopting a textual approach, then the contextual approach was a unitary exercise and there was no reason to suppose that the meaning would be any different. The commercial sense of the clause was not concerned by the mere occurrence of any flooding in the last 5 years but only with flooding of such a degree of seriousness as to have a more than merely transitory effect on the property.

[19] Therefore it was submitted that the claim insofar as based on Clause 2.1.3 was irrelevant and the averments in relation to that clause ought to be excluded from probation.

[20] Mr Sandison submitted that if I was with him in relation to parts 1 and 3 of his arguments then the case should be dismissed. If the case was not to be dismissed and if there was to be further proof, he was content with proof before answer in relation to his arguments in paragraphs 4, 5 and 6 of his Note, which were not argued before me.

Mr Sandison clarified that all of his arguments were being presented under the umbrella of

the first plea in law for the defender in relation to relevancy and specification. That included the argument as to the competency of the craves for reduction on the basis that there were no relevant averments to support such craves.

Pursuers' Submissions

[21] In reply Mr Howie responded to each of the defenders' three arguments in the same order.

[22] In relation to the entire agreement Clause 27.1 of the Standard Clauses incorporated in the parties contract, it was submitted that such clauses came in various forms. Expressed terms could potentially exclude misrepresentation with the exception of fraudulent misrepresentation (and possibly implied terms). The entire agreement clause (14.1) in the *Inntrepreneur* case and the one in *Deepak* v *Imperial Chemical Industries plc* [1998] 2 Lloyd's Rep 139 which was referred to in *Inntrepreneur* were apt to exclude collateral warranties but not misrepresentations. It was said by the defenders that the clause in the instant case goes beyond the basic clause. However it did not do so. The clause in the *Watford Electronics* case contained an acknowledgement of non-reliance and as such it was apt to exclude misrepresentation. There was no acknowledgement of non-reliance in the instant case. The words in this case "supersede" and "invalidate" and the phrase "undertaking, representations and warranties" did not refer to misrepresentations but related to collateral obligations and the like which might otherwise form the basis of a contractual liability. Clause 27.1 was simply a larger version of the basic type of clause. In essence, the terms of the clause excluded collateral warranties.

[23] If I was with the pursuers thus far it was submitted that the defenders' second argument fell away. In any event there was still an alleged misrepresentation in the terms of Clause 2.1.3 which could legitimately form the basis of reduction.

[24] Mr Howie then responded to the third argument advanced for the defenders on the issue of the proper construction of Clause 2.1.3 of the Standard Clauses. As for the manner of drafting of the clause, the fact that it was drawn by committee was not necessarily a guarantee of the quality of the draft. Mr Howie referred to the speech of Lord Hodge (at paragraph 13) in *Wood* to the effect that there may be provisions in a detailed and professionally drawn contract which lacked clarity and that assistance in construing the provisions might be obtained from considering the factual matrix and the purpose of similar provisions in contracts of the same type. Mr Howie submitted that there was no cloak of infallibility. He also referred to paragraph 76 of the judgment in *Arnold* where Lord Hodge referred to the judgment of Lord Clarke of Stone-cum-Ebony in *Rainy Sky* SA which commended a construction which was consistent with business common sense. With that in mind Mr Howie submitted that the provision in 2.1.3 should be construed as stating that the property "has not been affected by… flooding from any river or watercourse which has taken place within the last 5 years…". He submitted that otherwise the results would be bizarre. The condition concerned the susceptibility of the property to flooding. It was not whether the property was affected today but whether it has been affected within the past 5 years. He appealed to a construction which had regard to commercial purpose.

[25] It was submitted that if I was with the pursuers then the pleadings in Answer 12 of Condescendence relating to the above matters should be excluded from probation and this under the umbrella of the pursuers' fifth plea in law to the relevancy and specification of the defenders' averments.

[26] Mr Howie acknowledged that the motion for summary decree on behalf of the pursuers' number 7/3 of process would not be relevant at this point and that it would be appropriate to appoint the cause to a hearing following decision with a view to *inter alia* dealing with that and further procedure. Mr Sandison on behalf of the defenders agreed with that approach in the event that the case was not dismissed.

Discussion

[27] I will deal with the various arguments in the order they were put forward.

[28] The issue around the entire agreement clause was whether it simply provided that the full contractual terms were to be found in the concluded missives and not elsewhere, which would exclude reference to such as collateral warranties (a so called basic clause) or whether it went further and precluded a party founding on misrepresentations.

[29] It is accepted that each such provision requires to be construed having regard to its own terms. I was advised that there was no other authority in relation to the construction of Clause 27.1 of the Standard Clauses. The cases of *Inntrepreneur* and *Watford Electronics* are examples of entire agreement clauses in different contexts but are helpful nonetheless. In the *Inntrepreneur* case the entire agreement clause provided:

> "14.1 Any variations of this Agreement which are agreed in correspondence shall be incorporated in this Agreement where that correspondence makes express reference to this Clause and the parties acknowledge that this Agreement (with the incorporation of any such variations) constitutes the entire Agreement between the parties."

[30] In his judgment at page 614 Mr Justice Lightman said (at paragraph 7):

> "The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such

search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence… it is to denude what would otherwise constitute a collateral warranty of legal effect."

[31] He went on (at paragraph 8):

"Entire agreement clauses come in different forms. In the leading case of *Deepak* v *Imperial Chemical Industries plc* [1998] 2 Lloyd's Rep 139… the clause read as follows:

10.16 Entirety of Agreement

This contract comprises the entire agreement between the Parties… and there are not any agreements, understandings, promises or conditions, oral or written, express or implied, concerning the subject matter which are not merged into this Contract and superseded thereby….

Mr Justice Rix and the Court of Appeal held in that case (in particular focusing on the words 'promises or conditions') that this language was apt to exclude all liability for a collateral warranty. In *Alman & Benson* v *Associated Newspapers Group Ltd*, June 20, 1980 (cited by Mr Justice Rix at page 168), Mr Justice Browne-Wilkinson reached the same conclusion where the clause provided that the written contract 'constituted the entire agreement and understanding between the parties with respect to all matters therein referred to' focusing on the word 'understanding'. In neither case was it necessary to decide whether the clause would have been sufficient if it had been worded merely to state that the agreement containing it comprised or constituted the entire agreement between the parties. That is the question raised in this case, where the formula of words used in the clause is abbreviated to an acknowledgement by the parties that the agreement constitutes the entire agreement between them. In my judgment that formula is sufficient, for it constitutes an agreement that the full contractual terms to which the parties agree to bind themselves are to be found in the agreement and nowhere else and that what might otherwise constitute a side agreement or collateral warranty shall be void of legal effect. That can be the only purpose of the provision… An entire agreement provision does not preclude a claim in misrepresentation for the denial of contractual force to a statement cannot affect the status of the statement as a misrepresentation. The same clause in an agreement may contain both an entire agreement provision and a further provision designed to exclude liability e.g. for misrepresentation or breach of duty. As an example cl.14 in this case, after setting out in Clause 14.1 the entire agreement clause, in Clause 14.2 sets out to exclude liability for misrepresentation and a breach of duty…"

[32] The further provision (14.2) referred to above followed an acknowledgment that certain parties had been given the opportunity to take professional advice –

> "…and accordingly they have not relied upon any advice or statement of the Company or its solicitors."

[33] In the *Watford Electronics* case the entire agreement clause was in the following terms:

> "The parties agree that these terms and conditions (together with any other terms and conditions expressly incorporated in the Contract) represent the entire agreement between the parties relating to the sale and purchase of the Equipment and that no statement or representations made by either party have been relied upon by the other in agreeing to enter into the Contract."

[34] The effect of that clause was explained by Lord Justice Chadwick at paragraphs 38 to 41. It is sufficient to say that the clause required to be construed on the basis that the parties intended that their whole agreement was to be contained or incorporated in the document which they had signed and, on the basis of the second part of the clause, on the basis that neither party had relied on any pre-contract representation when signing that document.

[35] In the instant case Clause 27.1 does not have an acknowledgement of non-reliance as might be apt to exclude a party founding on misrepresentation. The question then becomes whether or not the words which are used are apt to exclude a party founding on misrepresentation. It is worth repeating the terms of the clause:

> "The Missives will constitute the entire agreement and understanding between the Purchaser and the Seller with respect to all matters to which they refer and supersede and invalidate all other undertakings, representations and warranties relating to the subject matter thereof which may have been made by the Seller or the Purchaser either orally or in writing prior to the date of conclusion of the Missives."

[36] I am not persuaded by the argument advanced on behalf of the defenders that this clause has two distinct parts, the first up to the word "refer" being effective to constitute and entire agreement clause and the second part being effective to exclude *inter alia* prior misrepresentations. It may well be that the formula of words used in the opening passage of

the clause would be quite sufficient to constitute an agreement that the full contractual terms are to be found in the missives and nowhere else (*Inntrepreneur)*, but it is not obvious to me that the words used subsequently in the clause are designed to be read separately or as an extension to the first part. It seems to me that the clause was designed to be read as a whole. The words

> "and supersede and invalidate all other undertakings, representations and warranties relating to the subject matter thereof which may have been made by the Seller or the Purchaser either orally or in writing part of the date of conclusion of the Missives"

are arguably unnecessary, but make it clear that any understandings which may have otherwise formed the basis of a contractual obligation are superseded and invalidated. The clause is not dissimilar to that in issue in the case of *Deepak* referred to by the court in *Inntrepreneur* which, in addition to expressing that the contract comprised the entire agreement between the parties provided that "there are not any agreements, understandings, promises or conditions, oral or written, expressed or implied, concerning the subject matter which are not merged into this Contract and *superseded* thereby…" (my emphasis). It was not suggested that the clause in *Deepak* was anything other than a "basic" entire agreement clause in effect. It was held to exclude all liability for collateral warranty. The words in Clause 27.1 to the effect that all other undertakings, representations and warranties are *superseded* and *invalidated* would suggest that what is being referred to as being superseded or invalidated is something which has contractual or potentially contractual force were it not for the clause. To say that a statement amounting to a misrepresentation is capable of being *superseded* or *invalidated* does not make legal sense.

[37] The example of an entire agreement clause given in *Chitty* at paragraph 13-107 is as follows:

> "This Agreement contains the entire and only agreement between the parties and supersedes all previous agreements between the parties respecting the subject matter thereof; each party acknowledges that in entering into this agreement it is not relied on any representation or undertaking, whether oral or in writing, save such as are expressly incorporated herein".

[38] Such a clause clearly has two parts, the acknowledgement of reliance in the second part being similar to that in the *Watford Electronics* case and being effective to exclude prior misrepresentations (other than fraudulent ones). Similarly the second part of the clause in the *Inntrepreneur* case which acknowledges non-reliance on *inter alia* statements has a similar effect. Such a provision is clearly apt to cover misrepresentation either innocent or negligent as there would be no remedy if no reliance was placed on the representation. No doubt other words could be used to exclude reference to misrepresentations but the formula which acknowledges non-reliance would appear to be a neat way of covering the situation.

[39] The fact that the word "representations" appears in the clause is not sufficient in my view to alter the meaning of the clause. As indicated, its inclusion along with "undertakings" and "warranties" suggest to me that reference has been made to things which are capable of giving rise to contractual obligations. In my view, in order to achieve the effect for which the defenders contend, there would require to be clear words such as an acknowledgment of non-reliance. Such words are absent. I accordingly agree with the submission on behalf of the pursuers that the clause in this case goes no further than providing that the full contractual terms are to be found in the concluded missives and not elsewhere and that any collateral warranties are of no legal affect. In other words, Clause 27.1 goes no further than what Mr Sandison described as a "basic" entire agreement clause. I conclude therefore that the argument upon which the first part of the submissions made on behalf of the defenders is based is not well-founded.

[40] In light of that conclusion, the issue raised on behalf of the defenders in the second part of Mr Sandison's submissions does not arise. There is no issue that reduction of the missives and subsequent disposition would be a competent remedy in the event of a pre-contractual misrepresentation inducing essential error. If however I am wrong in my conclusion in relation to the first part of the defenders' submissions and if therefore we are only concerned with the "representation" as to flooding in Clause 2.1.3 of the Standard Clauses, I am not persuaded that reduction is necessarily barred simply because the representation is embodied in a term of the contract, in circumstances where the clause was introduced at a stage prior to the conclusion of the missives and the entitlement to the remedy is dependent on whether the misrepresentation induced the contract. No doubt, the clause could have formed the basis of a contractual claim for damages following rescission in the event of a material breach, but that is not the remedy the pursuers have chosen.

[41] Of more importance is the third part of the defenders' submissions in relation to the construction of Clause 2.1.3 of the Standard Clauses which provides *inter alia*:

> "So far as the Seller is aware (but declaring that the Seller has made no enquiry or investigation into such matters) the Property… is not affected by… flooding from any river or watercourse which has taken place within the last 5 years…"

[42] As outlined above I was offered two alternative constructions of this particular clause. I was also asked to consider for that purpose the proper approach to construction given the authorities, in other words whether it should be a textual approach or a contextual approach. As the authorities referred to demonstrate, it is not necessarily a question of taking one approach or the other. In the case of *Wood* Lord Hodge said, at paragraph 10 of his judgment:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular

> clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

Lord Hodge referred with approval to the approach to construction adopted by Lord Clarke in the *Rainy Sky* SA case who said at paragraph 21:

> "the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

[43] Lord Hodge in *Wood* went on (at paragraph 11):

> "… in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause… and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest… Similarly the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms."
>
> And at paragraph 12:
>
> "This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold* para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

[44] At paragraph 13, he said:

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of

> their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions. …"

[45] With the foregoing guidance in mind, I am not persuaded by the submissions advanced on behalf of the defenders that, as this was a clause of a standard kind drafted by skilled professionals, it should necessarily be construed literally, applying a purely textual approach. I agree with Mr Howie when he suggested that there was no cloak of infallibility. This I think becomes clear when one considers the terms of the clause itself. The seller warrants that the property <u>is</u> not affected by flooding which has taken place within the last 5 years. Construed literally, the clause bites only if the property is presently affected by flooding, where that flooding has occurred within the last 5 years. Construed literally it does not bite where there has been flooding within the last 5 years but the property is not currently affected. So for example if there was flooding say 6 months prior to the sale the effect of which had subsided by the time of the contract of sale then this would not come within the terms of the clause and the sellers' warranty would not apply. If one considers, as submitted on behalf of the pursuers, that this provision is about the susceptibility of the property to flooding, rather than whether it is physical**ly** affected at the time of sale, then it would be sensible to ask the question "has the property been affected by flooding within the last 5 years?" rather than "is the property (currently) affected by flooding which has

occurred within the last 5 years?" It is true that the provision requires to be looked at in its context and in its place within the contract. Clause 2 of the Standard Clauses, which is headed: "AWARENESS OF CIRCUMSTANCES AFFECTING THE PROPERTY" begins by stating that so far as the seller is aware the property is not affected by various things which are listed, one of which is the flooding mentioned in 2.1.3. Also mentioned are notices of potential liability for costs, notices of payment of improvement/repair grants and structural defects; wet rot; dry rot; rising damp; woodworm; or other infestation. It may be that the other items listed are directed to a present state of affairs. However, it does not necessarily follow that the clause in relation to flooding is so directed. It is possible that the drafters of the clause found it convenient to include with those items the provision as to flooding in this way. However, that drafting technique does not persuade me that the provision as to flooding has to be read in the way contended for on behalf of the defenders.

[46] Given the purpose of the provision, I am driven to the conclusion that it must, essentially adopting the approach of Lord Clarke in *Rainy Sky*, be construed in a way which is consistent with commercial common sense. I accordingly agree with the pursuers that the clause should be read as warranting that the property "has not been affected by flooding from any river or watercourse which has taken place within the last 5 years." In my view, that is the construction which a reasonable person would have understood the parties to have meant. To read the clause as contended for by the defenders would be giving undue weight to the literal terms of the text and insufficient weight to the purpose of the clause and commercial common sense. I accordingly conclude that the argument underpinning the third part of the defenders' submissions is not well-founded.

[47] In light of my conclusions I have issued an interlocutor excluding from probation those passages of the defenders' averments in answer 12 paragraph (a) and paragraph (b)

which cover their arguments. There remains the question of expenses, which I have reserved meantime, and further procedure. I have appointed a hearing on a date to be fixed in relation to those matters and continued consideration of the pursuers' motion for summary decree, number 7/3 of process.