SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2017] SC EDIN 50

A340/16

JUDGMENT OF SHERIFF WILLIAM HOLLIGAN

In the cause

THE CITY OF EDINBURGH COUNCIL

Pursuers

Against

X

First Defender

and

Y

Second Defender

Pursuer: Mathieson; Morton Fraser LLP
Second Defender and Lay Representative for the First Defender: Party

Edinburgh: 2 May 2017

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

[1] The parties are as designed in the instance.

[2] The pursuers are a local authority.

[3] Between 27 September 2004 and 10 June 2015 the pursuers were the landlords and the defenders the tenants of ….("the property") pursuant to a lease between the parties dated 13 September 2004. Number 5/2 of process is a copy of the foregoing lease ("the lease").

[4] The property is situated in a block of six properties.

[5] The accommodation comprises three bedrooms, a living room, kitchen and bathroom (with shower and bath).

[6] In or about early June 2015 the defenders and their younger son were on holiday in Finland. Their older son remained in the property.

[7] On or about 5 June 2015 a bulge appeared in the ceiling of the bathroom of the property. Water was leaking.

[8] The defenders' older son rang the first defender who, in turn, rang the emergency number provided by the pursuers for the carrying out of urgent repairs.

[9] The pursuers sent employees to inspect the condition of the property.

[10] On or about 18 June 2015 the pursuers brought down the ceiling of the bathroom on account of its poor condition.

[11] The pursuers disconnected the electricity supply to the bathroom. The ceiling was covered with plastic. The toilet was useable. The rest of the bathroom was not useable. The sink and the bathroom were blocked with debris. It was anticipated that the pursuers would return to complete the repair.

[12] The defenders and family used public showers. They were given access to bathroom facilities by a next door neighbour. The absence of the bathroom caused the defenders and their family inconvenience and distress.

[13] The pursuers and the second defender exchanged communications as to the repair of the bathroom.

[14] The pursuers did not return to complete the repair of the bathroom.

[15] At some unspecified date in January 2015 the pursuers and the defenders entered into missives for the purchase of the property by the defenders from the pursuers.

[16] Settlement of the foregoing transaction took place on or about 10 June 2015 at which date the defenders became the heritable proprietors of the property.

[17] In September 2015 the defenders caused to have repairs to the bathroom carried out at their expense.

[18] Number 6/12 of process is an invoice in the sum of £3,599.82 for the supply and fitting of a bathroom, ceiling, panels and tiles.

[19] Number 6/11 of process is an invoice in the sum of £428 in relation to the purchase of tiles.

[20] The sums comprised within invoices numbers 6/11 and 6/12 of process were paid by the defenders.

[21] At all material times the rent payable by the defenders to the pursuers in relation to the property was £233.52 per fortnight.

[22] As at 10 June 2015 the sum owing by the defenders to the pursuers on the rental account for the property amounted to £713.22 which is the sum sued for.

[23] The defenders withheld payment of rent amounting to the sum sued for on account of the pursuers' failure to repair the bathroom and the inability of the defenders to make full use of it.

Finds in fact and in law

[1] At material times the pursuers were in breach of clause 5.3 of the lease.

[2] The causes of action of the respective parties in this action and counterclaim were not extinguished by confusion.

THEREFORE

Sustains the pursuers' first plea in law; sustains the defenders' first and second pleas in law to the following extent; repels parties' remaining pleas in law; finds that the pursuers are entitled to payment of the sum of SEVEN HUNDRED AND THIRTY TWO POUNDS AND TWENTY TWO PENCE (£732.22); finds that the defenders are entitled to payment of the sum of TWO THOUSAND AND THREE HUNDRED POUNDS (£2300); grants decree for payment by the pursuers to the defenders of the sum of ONE THOUSAND FIVE HUNDRED AND EIGHTY SIX POUNDS AND SEVENTY EIGHT PENCE (£1586.78) with interest thereon at the rate of eight per cent per annum from the date of service of the counterclaim until payment; reserves all questions of expenses and assigns 10 am on 1 June 2017 at the Sheriff Court, 27 Chambers Street, Edinburgh as a diet therefor.

Note

[1] This action began as a small claim in which the pursuers sued the defenders for payment of the sum of £713.22. The sum sued for relates to rent pursuant to a tenancy agreement dated 13 September 2004 which is number 5/2 of process ("the lease"). … which I will refer to as "the property".

[2] The defenders defended the action and lodged a counterclaim for £8,500. The matter was remitted to the ordinary cause roll. It is not in dispute that the bathroom of the property fell suddenly into disrepair. The pursuers, as landlords, were called upon to repair the property. Although they carried out initial investigations and temporary repairs the property was fully repaired by the defenders at their cost. They withheld payment of rent and sought damages against the pursuers. The action came before me for proof having been to debate before Sheriff McFadyen on an earlier occasion. The second defender conducted the proof on his own behalf and on behalf of his partner, the first defender.

[3] I heard evidence from four witnesses: the defenders' son, E; the second defender, Y; a neighbour of the defenders; the first defender, X; and Mr A, an employee of the pursuers. There are no significant issues of credibility and reliability. At the end of the day the facts are not really greatly in dispute.

[4] The property comprises a flat in a block of six. It is situated in the middle of the block and comprises three bedrooms, a living room, kitchen and bathroom with a shower and bath. The bathroom is at the back of the house.

[5] In early June 2015 the defenders and their younger son were on holiday in Finland visiting the first defender's family. E was in the property studying for exams. On or about 5 June 2015 E noticed a bulge in the ceiling of the bathroom which concerned him. Water was leaking. It was about 9.00pm. He rang the first defender who rang the pursuers' emergency repairs number. She reported the problem. The second defender returned shortly thereafter from Finland. The pursuer sent inspectors. Exactly when the property was visited is not clear. Numbers 6/8 and 6/9 of process are cards from the pursuers' inspectors. They are undated.

[6] During the first visit the inspector instructed that half the ceiling in the bathroom be removed. On 18 June 2015 (at which occasion I took the second defender to have been present) the whole ceiling was brought down because of its poor condition. The electricity supply to the bathroom was disconnected. The ceiling was covered with plastic. The defenders described the bathroom as having been left in a mess. The sink and bath were blocked with debris. There was no electricity. The bathroom was not useable. There was some suggestion in the evidence that, by their conduct, the pursuers had in effect made a bad situation worse. I do not have any expert evidence to tell me whether that is the case

but there is no dispute that as a consequence of the actions of the pursuers the use of the bathroom was severely compromised.

[7] The defenders' state of mind was that the pursuers would return and the property would be repaired. It was not. The second defender wrote to the pursuers asking for the work to be done. Number 6/1 of process is a letter to the building services manager of the pursuers dated 16 July 2015. The building services manager replied to the first defender by letter dated 23 July 2015 which is number 6/4 of process. That letter promised to dispatch an operations manager to investigate the matter.

[8] It is not disputed that no work was undertaken by the pursuers in the property. The explanation for this is straightforward. On 10 June 2015 the defenders became the heritable proprietors of the property. From the record (article 2 and answer 2) and the evidence of the second defender, the defenders entered into missives to purchase the property in or about January 2015. Settlement did not take place until 10 June 2015, a matter of days after the incident involving the ceiling. Why settlement took place on the date in which it did was not explained. The pursuers' position was, and remains, that because the defenders are the owners of the property, the pursuers are not liable to undertake the repairs or to reimburse the defenders therefor. Neither party lodged either the missives, or any document from the land register. The pursuers' position is set out in a letter dated 31 July 2015 addressed to the first defender (number 6/3 of process). The relevant part of the letter is as follows:

> "I discussed the required remedial repairs that will need to be completed within your bathroom and advised you that as you are the owner of your property, you will need to contact your insurance company to deal with these repairs. You did mention that you were informed by an Edinburgh Building Services operative that EBS would carry out these works as the fault of the flood was from the council owned flat above. However, as discussed with you, I am afraid that this information was incorrect and apologise for any misunderstanding, I have reiterated to all EBS employees the correct procedure when dealing with any similar situations in the future".

[9] The letter makes reference to work being done at the property on 5 June 2015. It is the second defender's evidence (which I accept) that there was more than one visit by the pursuers. As I have said, it was his evidence that there was a further visit and work undertaken on 18 June. The defenders did not accept the pursuers' position as to liability for the repairs but, as it was clear the pursuers would not undertake the works, the defenders did so themselves.

[10] The work was undertaken in or about September 2015. Number 6/12 of process is an invoice amounting to £3,599.82, the narrative of which is "supply and fit bathroom and supply and fit ceiling panels and tiling". Number 6/11 of process is an invoice in relation to the purchase of tiles: it amounts to £428.40. In his judgment dated 29 August 2016 Sheriff McFadyen excluded from probation certain averments in relation "to replacement of the bathroom suite and tiling". There was no evidence as to the breakdown of the invoice amounting to £3,599.82. However, in his submissions to me, the second defender stated he was prepared to restrict his claim for the cost of the repair of the bathroom to £2,000 which, as a matter of quantum, the pursuers were content to accept.

[11] In relation to the pursuers' claim for rent there is no dispute that the defenders have not paid the sum sued for. From the evidence of Mr A and numbers 6/5 and 5/1 of process the rent for the property at the material time was £233.52 per fortnight. As at 28 April 2015 the balance outstanding was £96.06. No payment was made thereafter and, as at 10 June 2015 (the date of settlement) the outstanding rent amounted to £713.22. The exact composition of the sum of £713.22 was not made clear but, as I say, as a matter of arithmetic, liability therefor is not disputed.

[12] There is evidence from both the first and second defenders that during the period between June 2015 and September 2015, with the exception of the toilet, the bathroom was

not usable. The defenders have a younger son. They had no bath or shower. They visited public showers. …, a neighbour, kindly allowed them the use of her bathroom. I have no hesitation in saying that the absence of a usable bathroom, the requirement to go elsewhere and the state in which the bathroom existed must have caused inconvenience and distress to the defenders and family. Quite properly, I did not understand Mr Mathieson to dispute that general proposition.

[13] At the close of the proof I heard submissions from both parties. The second defender lodged written submissions running to some seven pages and comprising 35 paragraphs. He made reference to in excess of 30 authorities. The submissions for the pursuers were oral. Having taken the matter to avizandum I issued a short note dated 6 March 2017. It seemed to me that a fundamental issue in this case (and one which was relied upon by both parties) was the legal consequences of the purchase of the property on 10 June 2015. I was not referred to any authority by either party on that issue or any analysis thereof. As it seemed to me to be crucial to my decision I invited parties to make further submissions on that issue. I assigned a diet therefor. The first defender lodged further written submissions. The pursuers' submissions were again oral.

[14] The first issue is the characterisation of the purchase by the defenders of the heritable interest in the property. Correctly in my view, both parties analysed this matter by reference to the doctrine of confusion or merger. Put shortly, the pursuers' position is that confusion does apply and that as a consequence of the purchase of the property by the defenders, the lease was, and is, no longer effective. Consequently, that means neither party has any claim against the other in relation to matters arising out of the lease; the appropriate disposal is decree of absolvitor in both the claim and counterclaim. The first defender's initial position

was that confusion does not apply or, if it does, it does not operate to extinguish the present claim.

[15] On the subject of confusion I was referred by the pursuers to the following authorities: *Motherwell* v *Manwell* (1903) 5F 619; *Lord Blantyre* v *Dunn* (1858) 20D 1188; Rankine, *The Law of Leases (third edition)* page 525; Gloag, *The Law of Contract (2nd Edition)* pages 725-727; Paton & Cameron, *Landlord and Tenant* page 102. For the defender I was referred to: *Healy and Young's Trustee* v *Mair's Trustees* 1914 SC 893; *Motherwell* v *Manwell* (*supra*); *Murray* v *Parlane's Trustee* (1890) 18R 287; Halliday, *Conveyancing Opinions* pages 379-380; *Lord Blantyre* v *Dunn* (*supra*); *Howgate Shopping Centre Limited* v *Catercraft Services Limited* 2014 SLT 123. There were other authorities referred to in the written note but I do not think that they are of particular assistance.

[16] Both parties agreed that none of the authorities referred to is directly on point. As I read them there is some uncertainty in the authorities as to whether confusion suspends a lease or, in the words of Rankine, obliterates it. For present purposes it seems to me it does not matter because there is no suggestion that the lease has revived: the interests merged in June 2015 and nothing has changed. From the authorities, the merger of the interests of landlord and tenant do not affect a sublease (*Howgate*) and where there are interests governed by the law of property, such as ground annuals, confusion has no application (*Healy & Young's Trustees* v *Mairs Trustees*). A number of the older authorities concern the application of the peculiarities of feudal conveyancing. *Lord Blantyre* v *Dunn* is an example. Without going into the details, the issue there was the amount of compensation payable by a vassal to a superior at the point to which the vassal entered into the lands. For present purposes the significance of that case is that the analysis centred on the date of the vassal's obligation to pay composition; that depended upon whether, at that moment, there existed

the relationship of landlord and tenant. The court held it did not exist because the tenant had become the proprietor. So far as I can see none of the authorities cited deal directly with the situation where there is a cause of action in existence at the date of the merger. In the present case, the landlord has a claim for unpaid rent and the tenant has a claim for damages for breach by the landlord of the landlord's obligation of maintenance and repair. On one view of the authorities, by virtue of the merger of the interests of the landlord and tenant both sets of obligations fly off. The *dictum* of Lord Kinnear in *Motherwell v Manwell* (at page 63) appears in a number of the authorities:

> "Confusion does not operate either payment or discharge. It prevents the possibility of a debt arising. It extinguishes the *jus crediti.* From the moment that the inconsistent characters of debtor and creditor are combined in the same person both debtor and creditor cease to exist; there is no longer any debt or any relation of debtor and creditor at all".

[17] I can see that, as regards the future, the merger of interests means that there are no obligations pursuant to the lease exigible by either party. I am less clear about any past obligations. In his opinion in *Lord Blantyre v Dunn*, the Lord President said (at page 1195) "It does not seem to me to be necessary now to resolve all possible questions as to the total extinction of these leases to every imaginable effect". I cannot help but think that the Lord President was alert to the wider consequences of holding that a lease is, for all purposes, to no effect. It may be that the doctrine of confusion is no more than a statement of the obvious, namely if separate interests merge that is an end of an existing legal relationship, at least so far as future obligations are concerned. There are, in the authorities, various *dicta* to the effect that, given that its application is a question of law, confusion either applies or it does not.

[18] The second defender referred to the opinion of the Lord President in *Healy & Young's Trustee* to the effect that confusion is a "highly artificial doctrine"; the Lord President was

unhappy to apply it to any case in which it has not hitherto been held to operate (at page 902). Professor Halliday, in his *Conveyancing Opinions* to which I was referred, made a number of observations as to the uncertainty surrounding the doctrine and a number of comments about the statements contained in some of the textbooks referred to above. In my opinion, I do not see it necessarily follows that existing causes of action, including existing obligations to make payment or to make reparation for past delinquency are, *ipso jure* extinguished. I see no reason in principle why that should be the case. Indeed such a conclusion could lead to injustice. It may be open to parties to make specific provision for existing causes of action when negotiating a merger but, as that is not an issue in this case, I express no opinion on it. It follows that, in my opinion, neither claim is extinguished by the principle of confusion.

[19] That takes me to the respective claims of the parties. As a matter of fact, the defenders were due and resting owing to the pursuers in the sum sued for. The second defender submitted that the defenders had no liability therefor. I have to say that the submissions for the defenders on this point were somewhat confused. The written submissions include references to personal bar, abatement, retention and breach of contract. There was some confusion on the part of the second defender as to which version of the lease he was relying upon and whether the claim was pursuant to statute or the lease. As I understand it, at the end of the day, there was a broad measure of agreement between the parties that, read short, the pursuers had a contractual obligation to repair and maintain the property. Clause 5.3 of the lease provides:

> "During the course of your tenancy, [the pursuers] will carry out repairs or other work necessary to keep the house in a condition which is habitable, wind and watertight and, in all other respects, reasonably fit for human habitation. We will carry out all repairs within a reasonable period of becoming aware that the repairs

> need to be done. Once begun, the repairs will be finished as soon as reasonably possible".

On any view of clause 5.3, the collapse of the ceiling and the state of the bathroom was a breach of clause 5.3.

[20] The defenders have retained the rent. They were entitled to do so because in their view the pursuers had failed to comply with their obligations to repair and maintain the property. As a matter of fact, the damage to the ceiling took place on 5 June and the sale of the property took place on 10 June. It follows, in the pursuers' submissions that, if there was a right to retain rent, it could only be for a period of some five days. That amounts to £83.40. As a general proposition, the right of retention is usually held to exist until such time as the landlord discharges its responsibilities pursuant to the lease. Again, as a matter of fact, that has never happened. In the present case, the lease has come to an end by reason of confusion. The right of retention is a compulsitor to secure performance by the landlord of his obligations or to satisfy a counterclaim. As I understand the law if, for whatever reason, the lease is at an end the right to retain payment of the rent ends. However, there is a counterclaim in which the defenders seek damages and that does endure (see *Pacitti v Manganiello* 1995 SCLR 557).

[21] The amount of the repairs undertaken by the defenders is not now in dispute. That leaves the question of damages for what I will loosely describe as inconvenience. I was referred to a volume of authority. The pursuers referred to *Perry v Sidney Phillips & Son* [1982] 1WLR 1297; *Eiles v London Borough of Southwark* [2006] EWHC 1411 (TCC); *Berent v Family Mosaic Housing* [2012] EWCA Civ 961. As I have said earlier, the second defender referred to a large number of cases. The difficulty is that, in the absence of citations, it has been difficult to identify them. It seems to me that the most relevant ones (which I have

been able to find) are as follows: *Wallace v Manchester City Council* 1998 HLR 1111; *English Churches Housing Group v Shine* 2004 HLR 42; *Calabar Properties Limited v Stitcher* [1984] 1WLR 287; *Farley v Skinner* [2002] 2 AC 732; *Earle v Charambous* 2007 HLR 8 and *Moorjani v Durban Estates Limited* [2016] 1WLR 2265. All of these cases deal with amounts to be awarded for inconvenience and distress. All of the authorities are English. I was not referred to any Scottish authority on this issue. There is a substantial gap between the parties. In Mr Mathieson's submission, relying upon the cases to which he referred, a figure by way of damages for inconvenience should be in the region of £250-£300. The second defender's initial submission was that the sum of £4,000 was appropriate; that he later reduced to £2,000.

[22] The starting point in deciding this issue is the correct analysis of the claim for damages. The claim is one for breach of contract, namely the landlords' failure to keep the property in an appropriate state of repair. As a matter of general principle, damages for breach of contract should, so far as possible, put the innocent party in the position he would have been had there been no breach of contract. I have looked at a number of the English authorities to which the second defender referred. I found the judgment of Briggs LJ in *Moorjani v Durban Estates Limited* to be helpful. The judgment reviews earlier authorities, many of which were referred to by the second defender. In the course of his judgment, Briggs LJ referred to the judgment of Carnwath LJ in the case of *Earle v Charalambous* in which his Lordship said that distress and inconvenience caused by disrepair are not freestanding heads of claim but are symptomatic of interference with the lessee's enjoyment of the asset. A number of the English authorities deal with long leases in which the tenant has paid a premium to acquire the interest and has an asset of some value. However, it is clear that the analysis of the loss is not limited to leases having a particular value but

includes what I might describe as much more modest tenancies (see paragraph [31] of the judgment of Briggs LJ). Reference was also made to the case of *Shine v English Churches Housing Group* in which it was said, at paragraph [105], that the calculation of the award of damages for stress and inconvenience should be related to the fact that the tenant is not getting proper value for the rent which has been paid for defective premises. The approach of the English courts appears to have been to analyse the landlord's breach as causing the tenant impairment to the rights of amenity. If there is complete loss of the right of use then the tenant is entitled to a sum by way of damages which is described as being a notional rent to which, in some cases, a discount is then applied. It appears that in some cases, the courts have awarded lump sums for loss of amenity and in others by reference to notional rents. It is unfortunate that no reference was made to any Scottish authority on this matter. I am aware from my own researches that there is Scottish authority in cases where the tenant has brought proceedings against the landlord because of damp or water penetration; a situation similar to the present case. These are conveniently summarised in Robson, *Residential Tenancies (Third Edition)* at pages 203-205. I decided not to put the matter out again for submissions on this point as I consider it unnecessary to do so. So far as I am aware, the Scottish cases have tended to approach the matter very much in general terms and without reference to rent or capital value. None of the cases relied upon by Mr Mathieson relate to landlord and tenant cases as such. On the present facts, the defenders and family remained in occupation of the property throughout the period from June to September 2015. The restriction on their use of the bathroom must have been significant. They continued to pay rent until 10 June 2015. If I were to approach the problem by reference to rent and a proportion thereof, the result would be an award of a negligible sum. If I am correct in my analysis that the landlord's obligation to make reparation continued (particularly as the

work undertaken by the landlords post-dated 10 June 2015) then the claim for loss of amenity endured during the period between June to September. However, it does seem to me that I ought to take into account that from 10 June until September the defenders paid no rent to the pursuers. There was however, a genuine loss of amenity. Purely as a matter of arithmetic, when one examines the amounts awarded for inconvenience and loss of amenity, however they are analysed, all the sums are modest. Even the English cases do not contain awards of significant sums. I am not inclined to analyse the arithmetic of this matter too finely but to apply a broad approach. Balancing matters as best I can, I conclude that an award for loss of amenity in favour of the defenders should be £300. It follows that the pursuers are entitled to demand payment of rent of £713.22 and the defenders are entitled to the sum of £2,300. In accordance with OCR 19.4(c) I shall pronounce decree in favour of the defenders in a sum representing the difference between the two claims namely £1586.78. Interest will run thereon at the judicial rate from the date of service of the counterclaim. I shall reserve all questions of expenses and assign a hearing therefor.