SHERIFFDOM OF GLASGOW AND STRATHKEVLIN AT GLASGOW

[2020] GLA 45

CA84-19

JUDGMENT OF SHERIFF JOHN N McCORMICK

in the cause

(FIRST) FERN TRUSTEE 1 LIMITED
(SECOND) FERN TRUSTEE 2 LIMITED

as Trustees of The Buchanan House Unit Trust

Pursuers

against

SCOTT WILSON RAILWAYS LIMITED

Defender

Pursuer: Ellis QC; Gillespie Macandrew LLP
Defender: Sandison QC; Brodies LLP

Glasgow, 2 October 2020.

The sheriff, on resuming consideration of the cause, Repels plea-in-law number 1 for the pursuers in the principal action; on the defender's unopposed motion, Repels plea-in-law number 3 for the pursuers in the principal action; In the counterclaim, Repels plea-in-law number 1 for the pursuers and, in respect that crave 3 of the counterclaim is no longer insisted upon, Repels plea-in-law number 4 for the defender and Dismisses crave 3 of the counterclaim; *quoad ultra* Allows parties a proof of their averments before answer on a date to be hereafter assigned; Finds the pursuers liable to the defender in the expenses of the preparation for and attendance at the debate on 30 July 2020.

NOTE:

[1] By lease dated 1 February and 19 May 2005 and registered in the Books of Council and Session on 22 June 2005 the then heritable proprietors, Stannifer Developments Ltd leased heritable property at Sixth Floor, North Wing, Buchanan House, 58 Port Dundas Road, Glasgow to Scott Wilson Railways (Scotland) Ltd. The pursuers are the successors to the former landlords, Stannifer Developments Ltd. The defender is the tenant by assignation in their favour dated 30 June and registered in the Books of Council and Session on 3 August 2005. The lease terminated on 28 November 2019 having reached its ish.

[2] This case raises the scope of the equitable principle of abatement of rent in Scots law in a situation where (a) through no fault of either party substantial remedial work was required to the building, (b) the remedial work was to be completed by a contractor at no cost to either party and, in furtherance of that, (c) parties had entered into a Remedial Works Agreement which, in terms of clause 3.10.5, obliged all parties (including other tenants) to allow access to the premises.

[3] By clause 3.21 of the Remedial Works Agreement the contractor was to use reasonable endeavours to complete the remedial works within ninety three working weeks from commencement. The work overran.

[4] The right to abate rent is not a remedy analogous to the right to withhold or retain rent pending the performance of a counter-obligation by the landlord. Such rights

derive from the law of contract. The right to abate is a common law right arising from the equitable principle of failure of consideration.

[5] The pursuers have four craves each for payment of various sums with a fifth crave for expenses. The defender has three outstanding craves within the counterclaim, the first being for declarator that the defender is entitled to abate the rent and the second being for payment of £310,621.51 for unjustified enrichment between 2 July 2018 and May 2019. A further crave for £80,000 was withdrawn. The fourth crave is for expenses.

[6] Each party had instructed senior counsel. In advance of the debate the parties lodged the following written submissions. After the notes of argument were exchanged the pursuers submitted a supplementary note which is also included below. The defender revised its note and it is that revised note which is noted below. Each has been redacted to remove submissions relating to breach of contract and personal bar which are no longer before the court. The debate proceeded by telephone conference call on 30 July 2020 during which parties focused on their written notes of argument. As senior counsel for the defender spoke first, I narrate his note first.

Written submissions for the defender

PRINCIPAL ACTION

D1. The key to the resolution of the parties' dispute turns on (a) the scope of the equitable principle of abatement of rent in Scots law and (b) whether, if it is

otherwise applicable, the parties have contracted to exclude its application in the circumstances which have arisen.

Scope of Equitable Principle of Abatement of Rent

D2. A tenant is entitled at common law to equitable abatement of rent (and similar pecuniary prestations due under the lease) in any circumstances where he has not enjoyed the benefit of that which he contracted to pay for, on the ground of total or partial failure of consideration: *Renfrew District Council* v *Gray* 1987 SLT (Sh Ct) 70 per Sheriff Principal Caplan at 71L – 72B; 72E – J; 73 E, and the authorities therein reviewed; *Gloag on Contract* (2nd ed.), pp 628 (whole page) – 629 (first three lines). That is the case regardless of whether or not the tenant remains in occupation of the subjects of the lease: *Kilmarnock Gas-Light Co* v *Smith* (1872) 11 M. 58, per Lord Justice-Clerk Moncrieff at 61 (8 lines from the end of his Lordship's opinion).

D3. Contrary to the pursuers' submissions, there is no need for the interference with the defender's possession of the leased subjects to be the result of actions of the pursuers, far less that the pursuers require to be in breach of the contract of lease before the equitable right of abatement arises. On the contrary, the true principle is as set out by Lord President Inglis in *Muir* v *McIntyre* (1887) 14 R 470 at 472 – 3: "It is thus, I think, quite established that where, through no fault of his own, a tenant loses part of the subject let to him, he is entitled to an abatement of his rent, - that is to say, he ceases to be the debtor of his landlord to the extent to which he

is entitled to an abatement" (emphasis added). Although the formulation of the principle from case to case tends to reflect the facts of the case at hand (hence the reference to "unforeseen calamity" in *Muir*, addressing the particular circumstance of a disastrous fire there), there is no predefined list of types of factual situation in which abatement may or may not be claimed. It is a "principle…founded on the highest equity" (per Lord Shand in *Muir* at 473) and therefore is available when a tenant is deprived of some or all of the benefits of the lease for which he contracted in circumstances rendering it inequitable that he should be required to continue to pay his landlord in whole or in part for those now-elusory benefits.

D4. The defender offers to prove precisely that situation; as a result of extensive and intrusive repair works to the building of which the leased premises formed part, which works continued beyond the period which was contemplated by the parties as reasonably required for their execution, the defender was deprived of useful possession of the subjects of lease. It did not get what it bargained for; no one is suggesting that that was as a result of any fault on their part; the equitable principle of abatement is engaged.

D5. The pursuers rightly note that the fact that the remedial works were not complete by 1 July 2018 (being the date 93 weeks from their start referred to in clause 3.21 of the Remedial Works Agreement) does not represent any breach of contract on their part or on the part of the contractor carrying out the works. That, however, is to miss the point: the question is simply whether the defender lost meaningful

possession of the subjects through no fault of its own. Insofar as the RWA has any relevance, clause 3.21 indicates clearly that the parties to it (which include the parties to this action) contemplated that 93 weeks was a reasonable time for completion of the works, and the RWA provides no basis at all for any suggestion that, if ousted from possession for a longer period, the defender was waiving any right otherwise open to them to abate the rent, etc, that would thereafter otherwise fall due to the pursuers. The question of what was to happen about the rent, etc, if the execution of the works overshot the agreed target is simply not one with which the RWA even attempts to engage. That question is left to the common law, the relevant content of which has already been noted.

Common Law Right to Abate Excluded?

D6. In embarking upon an enquiry as to whether the lease between the parties excluded the application of the common law right to abate otherwise open to the defender, it is important to bear in mind that in this aspect of the law of leases, as in every other aspect where the common law provides a default rule or principle governing the relation of landlord and tenant, the common law rule will prevail unless the particular lease clearly negates that rule or principle: *Mars Pension Trustees Limited* v *County Properties and Developments Limited* 1999 SC 267, per Lord Prosser at 271. That is a special rule of construction, apart from and taking precedence over the basic rules of contractual construction in such circumstances

(ibid.). The "negation" which is required must either be express or at least by necessary (ie not mere possible) implication (ibid).

D7. Against that background, it is further important to bear in mind – as the pursuers are understood to accept – that the common law right to abate is not a remedy analogous to the right to withhold or retain rent pending the performance of some counter-obligation by the landlord. Rights of withholding or retention flow from an aspect of the law of contract – namely, the principle of mutuality of obligation – whereas the right to abate arises not out of the law of contract at all, but out of the equitable principle of failure of consideration already alluded to.

D8. Turning to the lease in this case, it says nothing expressly about any restriction or exclusion of the common law right to abate. The focus for any claim that any such restriction or exclusion is nonetheless effected by the lease must therefore depend on the concept of necessary implied exclusion – i.e. that what is expressly set out could not sensibly live with a subsisting right to abate.

D9. Clause 4.1 of the lease provides that, in discharging their obligation to pay the rent as a clear sum without deductions, the defender is not to be entitled "to exercise or seek to exercise any right or claim to withhold the rent or any other charges payable under this lease or any right of compensation or set off". What that clause provides is that the contractually-based rights to withhold, compensate or set off rent are not to be pled against the obligation to pay the rent. It says nothing about the right to abate, which does not operate to entitle deduction from or withholding

a rent otherwise payable, but which, rather, extinguishes the primary obligation to pay rent, etc., in the first place – see the dictum of Lord President Inglis in *Muir* cited *supra*. An agreement not to keep back (however one expresses that concept) rent otherwise payable is a fundamentally different thing from an agreement that a rent which the law regards as not payable at all should nonetheless be paid. Clause 4.1 is the former, not the latter. It certainly provides no basis for a necessary implication that, by excluding certain remedies from being resorted to by the tenant, the lease must be regarded as also having silently excluded the tenant from different remedies with an entirely different source in law and entirely different consequences for the very subsistence of the obligation to pay rent in the first place. Similar observations may also be made in connection with clause 7 of the lease.

D10. Clause 5 provides that the rent payable under the lease shall not cease to be payable in the event of damage to or destruction of the Premises. It thus singles out for express treatment only one of the many situations in which the law might otherwise provide a right to abate. Why the lease does that is clear: the landlord is obliged by clause 11.2 of the lease to insure both itself and the tenant for their respective interests against damage to the premises by Insured Risks, which are (as is usual) defined extremely widely in clause 1.2.5, and that insurance also has to cover Loss of Rent (defined by clause 1.2.7). In almost every imaginable situation where the premises are damaged or destroyed, then, the tenant will be reimbursed

by way of the insurance cover which the landlord is obliged to arrange for the rent which the tenant is obliged to continue to pay. The right to abate has to be excluded in such circumstances because, if the tenant could abate the rent in the event of damage to or destruction of the Premises, there would be no rent payable and thus the landlord would have nothing to insure against in that regard and would not receive any compensation for loss of rent in terms of the insurance. In short, the situation which is created is a slightly artificial one designed to ensure that (by way of insurance) the landlord's rental income continues, but the tenant is not financially disadvantaged, in the event of the Premises being damaged or destroyed. That is all well and good, but it is clear that clause 5 says nothing about situations other than damage or destruction of the Premises, and there is no reason to conclude that the fact that the parties have chosen to deal expressly with one situation where abatement would otherwise operate raises a necessary implication that they should be regarded as having also silently chosen to exclude its application in situations with which they have not dealt. On the contrary, the fact that one potential abatement situation has been raised and specifically dealt with raises the implication that other potential abatement situations have been left to be dealt with by the common law.

D11. The suggestion that, had they sought to do so, the pursuers could have exercised their reserved rights of access to the premises in terms of Part III of the Schedule to the Lease in order to carry out the repairs that were in fact carried out by someone

else and by way of an entirely different mechanism, is doubly irrelevant. Firstly, the pursuers did not seek to exercise any such rights, and so no question properly arises as to what might have been the legal consequences for them on the hypothesis that they had in fact attempted to do so. The question that has to be answered is what are the legal consequences of what actually happened, not what the legal consequences of what did not happen might have been? Secondly, given the fundamental common law right of a tenant to quiet possession of the leased premises (a right which, if taken away from it, would normally entitle it to abate the rent), the provisions of Part III of the Schedule cannot properly be construed as impliedly enabling the pursuers, by the exercise of a mere right of access, entirely to deny the tenant such quiet possession – which is what the defender offers to prove is the case here. Nor is it the case, as the pursuers argue, that any excessive use of the right of access by the pursuers could found only in a claim of damages by the defender. That notion proceeds upon the pursuers' misconception that the right to abate is much more circumscribed than in reality it is.

D12. In the foregoing circumstances, the only live question between the parties is whether the subjects of lease were in fact put in such a condition by the remedial works being carried out to the curtain walling as to amount to a complete deprivation of the defender of the beneficial enjoyment of that for which it had contracted. Proof in the principal action should accordingly be restricted to that issue alone.

COUNTERCLAIM

D13. The following issues raised by the pursuers in answer to the counterclaim are irrelevant for the reasons already stated: the suggestion that the terms of the RWA represent any bar to the exercise of the defender's right to abatement; the suggestion that the parties contracted out of the availability of the remedy of abatement and the suggestion that the defender is not in actual occupation of the subjects of the Lease for the period during which abatement is claimed.

D14. The pursuers' criticism of the specification of the second crave of the counterclaim is unfounded. It is trite law that making a payment by mistake when there is no ground for the recipient to retain the benefit so conferred is a situation entirely capable of founding a claim for repetition on the ground of unjustified enrichment. The nature and circumstances of the mistake are of no consequence – a mistake of law is now capable of founding such a claim as well as a mistake of fact – *Morgan Guaranty Trust Company of New York* v *Lothian Regional Council* 1995 SC 151. The pursuers' more substantive attack on the relevance of this crave (that the sums paid were due when paid, and so there was a lawful ground for the pursuers to retain the benefit thereby conferred on them, even if that benefit was conferred by mistake) is also misplaced, and again can be traced back to the pursuers' failure to appreciate that, in a case of abatement, the very obligation to pay rent is extinguished by the facts entitling the tenant to abate, so that (to adopt Lord

President Inglis' words in *Muir* quoted above) the tenant is no longer the landlord's debtor.

D15. The only live relevant question in the counterclaim, too, is that of whether the defender was deprived of the benefit of that for which it had contracted, and proof should be restricted to that issue.

Note of argument for the pursuers

Background

P1. The pursuers and defender were the Landlord and Tenant respectively under a probative lease originally entered into by different parties ('the Lease'). The premises leased were the north wing of the 6th floor of an office building at Buchanan House, 58 Port Dundas Road, Glasgow together with the Common Parts. The Lease was entered into in 2005. It came to an end in terms of a Notice of Removal from the defender effective on 28 November 2019. In two respects the pleadings have been overtaken by events. The Lease has come to an end. This is not fully reflected in the parties' pleadings. It is conceived that it does not prevent the current arguments being ventilated at debate. The current dispute arises out of remedial works to the Common Parts at Buchanan House. The affected part of the Common Parts was the curtain walling which had been defectively installed by the original contractor M & H Limited ('MCLH') prior to the commencement of the

Lease. To permit repairs to be carried out by MCLH both of the parties and others entered into a Remedial Works Agreement ('RWA') with MCLH.

P2. In the principal action the pursuers seek payment of a variety of sums said to be due under the Lease. These sums can be summarised as follows.

2.1. The first Crave seeks payment of contractual interest of £1,189.80 due on the balance of rental and utility payments due on 28 February 2019 which was not paid until 20 September 2019. The interest is calculated running from 7 March 2019 in accordance with Clause 7.6 of the Lease.

2.2. The second Crave seeks payment of the outstanding balance of rental and utilities payments due as at 28 May 2019 with interest at the contractual rate on the amount outstanding from 4 June 2019.

2.3. The third Crave seeks payment of a quarterly service charge payment due on 28 August 2019 with interest at the contractual rate from 4 September 2019.

2.4. The fourth Crave seeks payment of rent and utilities payments due on 28 August 2019 with interest at the contractual rate from 4 September 2019.

P3. In the Counter Claim the defender seeks –

3.1. In the first Crave a declarator of entitlement to abate rent. No specification is given in the declarator of the period affected. That information has to be gleaned from the pleadings and the monetary Craves.

3.2. In the second Crave payment of £310,621.51 which relates to sums paid by the defender in respect of charges due under the Lease from 2 July 2018 to May 2019 on the basis of unjustified enrichment.

P4. The quantum of the sums to be paid or which have been paid under the Lease does not in general appear to be in dispute. What is in dispute is the liability for said sums. The only qualification to this is that the extent of any right of abatement may affect quantum in the Counter Claim if the averments in support of that defence are held to be relevant.

Summary of the defender's averments in defence to the Principal Action.

P5. The pursuers seek payment of sums due under the terms of a probative deed between the parties. There is no dispute as to the quantum of the sum sought by the pursuers. The obligation to make payment is set up by the Lease. The onus rests on the defender to establish that payment was made or was not due notwithstanding its obligations under the Lease. The defender makes averments attempting to discharge this onus in its averments in Answer 12.

P6. The defender's averments in relation to its case that it is entitled to abate the rent begin in Answer 12(iii) at page 17 of the Record. The entitlement to abatement is said to be because of a breach of contract by the pursuer consisting of the fact that a remedial work on the cladding is to be carried out to the office block. The defender avers that the parties entered into the RWA. The RWA records that the

parties included not only the current pursuers and defender but also the other tenants in the block and the Contractor (MCLH) who was to carry out the remedial work. The RWA precedes the remedial works. It is dated 2016. The period for which abatement is sought commenced in July 2018.

P7. The defender also contends that the curtain wall cladding 'installed on the instructions' of the pursuers or their predecessors was defective. The defender also argues that had the original cladding work been carried out properly the remedial work would not have been necessary.

P8. The defender then, in Answer 12(iv) relies on an exception to the ability to recover Service Charge in relation to-

> "any costs attributable to any negligent or wilful act or omission by the Landlord or those for whom the Landlord is responsible".

P9. It is averred that the remedial works are only necessary because they were carried out by MCLH defectively. The pursuers are said to be responsible for those defective works because they instructed MCLH to carry out the original cladding work. Thus it is alleged that the remedial works are due to a "negligent or wilful act or omission by the Landlord or those for whom it is responsible". The defender also avers that the circumstances were such that it is not obliged to pay for repairs under Clause 9.1 of the Lease (which relates to repairs in the Premises as opposed to Common Parts) on the basis that the repairs were required "as a result of the act neglect or default of the Landlord … or those for whom it is responsible".

P10. In Answer 12(vi) the defender relies on paragraph 4 of Part III of the Schedule to the Lease and Clause 9.2 to argue that the entry into the premises by MCLH is to be regarded as the pursuers interfering with the defender's possession of the Premises and accordingly the carrying out the repair of the defective cladding has to cause "the least practicable increase in interference to the Tenant". It avers that the pursuers failed to comply because the works were not completed by 1 July 2018 and that they are in breach of Clause 9.2 and Clause 11.1 of the Lease which obliges the pursuers to allow quiet possession. These references to the Lease necessarily proceed on the basis that it is the pursuers as Landlord who are interfering with the defender's possession of the premises.

P11. In Answer 12(vii) the defender narrates that the works under the RWA were not completed by the estimated date of 1 July 2018. It argues that after that date it has been denied occupation and quiet enjoyment of the premises "because of the need to remedy defects in works which were instructed by the pursuers or their predecessors in title". It claims to have sought access on one occasion. The point about the denial of quiet and beneficial occupation is elaborated upon in averments at Article 12(ix). Again these averments depend on the proposition that it is the pursuers who are responsible for the interference with the defender's quiet possession of the subjects after 1 July 2018. It is contended by the defender that the works ought to have been completed by that date.

P12. In Answer 12(x) the defender avers that as a result of the foregoing it is abating the rent and other payments otherwise due under the Lease for as long as it is denied occupation of the premises. It seeks to distinguish abatement from withholding the rent or exercising a right of set off. It again avers that the denial of occupation is caused because of the defects in the Common Parts of the building which were a result of work instructed by the pursuers or its predecessors in title.

Submission on the defender's answers to the principal action

P13. The defender's averments are irrelevant and instruct no proper defence to the principal action for the reasons set out below. Insofar as the following arguments depend upon the interpretation of the Lease, it is submitted that the approach to the proper interpretation of commercial contracts is well understood. In construing a commercial contract a court must ascertain the intention of the parties by determining what a reasonable person, having the background knowledge of the parties, would have understood from the language selected by them: *Midlothian Council* v *Bracewell Stirling* 2018 SCLR 606 at paragraph [19]. The words used and the context are both tools which can be used to ascertain the objective meaning of the language used. The extent to which each tool assists in the exercise varies according to the circumstances of each particular agreement: *Capita* v *Wood* [2017] AC 1173 at paragraphs [10] to [14]. It would be normal to prefer an interpretation which makes more commercial sense: *Rainy Sky* v *Kookmin Bank* [2011] 1 WLR 2900

at paragraphs [29], [30] and [43]. The application of that approach to the interpretation of leases in Scotland is illustrated by the case of *@SIPP Pension Trustees* v *Insight Travel* 2016 SC 250 at paragraph [17].

The effect of the RWA and the defender allowing possession to the contractor under the RWA is that there was no interference by the pursuers with the defender's possession of the Premises.

P14. The repair work to the Common Parts was being carried out in terms of the RWA. The RWA is an agreement between not only the current pursuers and the defender but also the defender and MCLH. MCLH have access to the office block and the leased premises to carry out the remedial works to the Common Parts. The RWA is in place of, and for these works, replaces the normal methods in the Lease under which the Landlord carries out the repairs to common parts and recoups the costs from the Tenants. Clause 3.22 of the RWA expressly provides that MCLH shall carry out the works at its cost and that the pursuers shall not be entitled to use the Service Charge under *inter alia* the Lease in order to recoup the direct costs of the remedial works. Clause 3.10 (and in particular 3.10.4) record an express agreement between 'the pursuers' (in the RWA a defined term which includes the current defender) and MCLH that they will allow access to "their respective demises". That agreement was different from the Landlord's rights under the

Lease to enter into the premises as can be seen from the terms of both Clauses 3.11 and 3.12 of the RWA.

P15. The defender therefore allowed MCLH access to its premises to carry out the works. The 'interference' with the defender's possession was therefore as a result of its agreement with MCLH. It is more accurate to describe the situation as the defender allowing access to MCLH. There was no interference by the pursuers with the defender's possession. The defender countenanced such a situation because it avoided it being required to pay for the remedial works under the Lease as part of the Service Charge. The surrender of its possession to MCLH was a reasonable sacrifice to avoid liability towards the capital cost of the remedial works. That liability may now be contentious because of the (irrelevant in law) contention by the defender that the Remedial Works were caused by negligent or wilful acts of the pursuers. Nonetheless the possibility of it explains why the defender had an incentive to agree with MCLH that it may carry out the remedial works despite the inconvenience to the defender which they would cause. In addition, and in any event, at the very least if the works under the RWA were to be regarded as use of the Landlord's powers under the Lease or to be the Landlord's responsibility (both of which are denied) the RWA demonstrates agreement by the defender and consent to that interference with its possession. Any interference with possession is therefore not a breach of contract on the part of the Landlords.

P16. As the claimed "interference" with the defender's possession or occupation of the Leased premises (which is the basis for the claimed abatement) was a result of the RWA under which the defender agreed to allow access to the premises by MCLH for the works, that interference cannot be a breach by the pursuers of their obligations to the defender in respect of the period in which the premises were occupied for the remedial works. In any event, the RWA constitutes at least an agreement by the Tenant that its possession of the premises may be surrendered to or shared with MCLH for it to carry out the work under the RWA. There can be no question of entitlement to abatement of rent. The Tenant got what it bargained for from the Landlord ie possession. It then agreed, exercising its rights as Tenant, to allow MCLH access to the leased premises of its own volition. There can be no question of the ceding of possession being an act or omission for which the pursuers are responsible. The defender's case appears to be predicated on a breach of obligation by the pursuers. It therefore must fail. It is not pleaded but abatement can arise in the case of an unforeseen event causing deprivation of possession. It is emphasised that this ceding of possession could not be seen as an unforeseen event. It happened by prior agreement between *inter alia* the defender and MCLH.

P17. Further the defender seeks to abate not the whole period of the works under the RWA but only those from 2 July 2018 onwards. There is no warrant in the RWA for the concept that access to the defender's premises is time limited or that it

expires in the (common event) that the construction works over run. The RWA contains no obligation on MCLH to complete the remedial works within any given period. The obligations as regarding completion in paragraphs 3.26 to 3.32 of the RWA are all to do with the state of the work at completion. Such provisions as do exist about delay to the works, for example Clauses 2.3 and 3.9 are all concerned with not causing delay to MCLH. The same theme emerges in Clause 3.10. Clause 3.10.2 obliges MCLH to provide a programme before the works start (but note it was not intended to be in existence at the date of the RWA). The parties under Clause 3.10.1 are obliged to seek to agree on access dates or changes to access dates. It is clearly envisaged that those could change. The defender was able to give notice of changes it proposed to those dates. The Landlords and Tenants by virtue of Clause 3.10.5 are obliged to allow access in line with the access dates. These provisions are clearly all concerned with ensuring that access was available to MCLH when it needed it. There was no obligation on MCLH to complete the works within a set period. This was not surprising given the nature of remedial works and the inherent uncertainty in what a contractor will find when it opens up existing structures. The RWA clearly envisages that delay may be possible. The fact that work went on beyond July 2018 does not instruct any breach by the Pursuer of its obligations under the Lease. Nor does it mean that any agreement by the defender for MCLH to have access to its premises to carry out the works has expired. Further there is no hint in the RWA that it was

intended that the Pursuer would carry the risk of works overrunning. There is no basis for the assertion that the overrunning of the works was a breach of contract on the part of the pursuers. The access to the Premises for carrying out the remedial works was planned, made available by the defender and consented to by the defender.

***Esto* the Landlord is properly to be regarded as interfering with the Tenant's possession when MCLH carry out the works under the RWA (which is denied), the defender still has no right to abatement under the Lease in respect thereof.**

P18. The defender claims to be able to abate the rent. This is not a temporary remedy such as set off but rather a remedy which extinguishes the obligation to pay rent to the extent that the defender did not receive its rights under the lease. As argued earlier, is clearly not applicable in the event that the Tenant gave possession of the premises to MCLH and the Landlord did not interfere with the Tenant's possession. Even if that argument is unsuccessful abatement as a remedy is not available to the defender in the circumstances averred because:

18.1. the circumstances averred would not give rise to a right of abatement under this Lease; and

18.2. in any event, such a right is excluded by the terms of the Lease;

P19. Further and in any event the Lease excludes the common law right of abatement in the current circumstances. The common law right of abatement is separate from

retention of rent to enforce performance by a landlord. If a tenant is deprived of the beneficial use of a material part of the subjects leased by an unforeseen accident or breach of contract by the landlord, the tenant is entitled to abate rent: *Muir* v *McIntyre* (1887) 14R 470 per LP Inglis at page 472. The remedy is based on a *'partial failure of consideration'*. As it is available in cases of unforeseen accident as well as breach of contract by the landlord, it does not depend only on the landlord being in breach: the then Sheriff Principal in *Renfrew District Council* v *Gray* 1987 SLT (Sh.Ct.) 70 at pages 472E to 473E. It appears however that if the tenant has responsibility for repair of the part of the premises damaged he would not be entitled to an abatement: *Sharp* v *Thomson* 1930 SC 1092 per Lord Anderson at pages 1096 to 1098, Lord Ormidale at page 1100, and LJC Alness at pages 1102 to 1103, *Turner's Trustees* v *Steel* (1900) 2F 363 per Lord Adam at page 367.

P20. As the case of *Sharp* v *Thomson* makes clear the common law can always be altered by agreement by the parties (per Lord Anderson at page 1096). If the intention to exclude the common law is found in the words used then the common law will be excluded. Exclusion of common law may happen expressly or by necessary implication from the intention of the parties as shown in the words used. This is also illustrated, for example, by the exclusion of the common law in *Turner's Trustees* v *Steel* (1900) 2F 363. The question is one of construction of the Lease according to the normal canons of construction of a commercial document.

P21. The repairs being effected are repairs to the Common Parts. The Lease makes detailed provision for these circumstances. It also provides that the rent is to be paid without deduction.

P22. Clause 4.1 of the Lease binds the Tenant to pay the rent as a "clear sum" "without any deductions". It also states –

> "Declaring that the Tenant shall not be entitled to exercise or seek to exercise any right or claim to withhold the rent or any other charges payable under this lease or any right of compensation or set off".

P23. This indicates a clear intention that the stipulated rent must be paid. The Clause does not specifically mention 'abatement'. Nonetheless the requirement to pay the rent "without any deductions" and as a "clear sum" are wide enough to cover abatement. The term "to withhold the rent" might also reasonably be interpreted as wide enough to include abatement. It is accepted that abatement is not a right of compensation or set off. It seems clear that the intention of the Clause is to achieve the purpose that nothing will be allowed to interfere with the payment of rent (and other charges) on the due date. This is a common feature of commercial leases as mentioned in paragraph 26-14 of SULI – Leases.

P24. It is also worth highlighting that Clause 5 of the Lease reinforces this intention. It provides –

> "Save as otherwise provided in this lease the rent payable hereunder and the tenancy hereunder shall both continue in full force and effect notwithstanding any damage to or the destruction of the Premises or the Development or any part thereof by fire or any of the insured risks or by any other cause whatsoever."

P25. Further the obligation to pay outgoings including rates, insurance and Service Charge "as additional rent" is also provided by Clause 7 to be "without set off or deduction". The same argument applies to these items. The express provision for these items tends to reinforce the view that rent is to be paid without any common law right of abatement. As discussed in the preceding paragraph Clause 5 would appear to be an express exclusion of a common law right of abatement in circumstances where the whole or part of the leased subjects becomes unavailable for beneficial use by the Tenant.

P26. In any event other provisions in the Lease confirm that the intention was not to allow abatement for repair to Common Parts. The proper process of interpretation will take into account the whole terms of the Lease. Properly construed the Lease indicates that the common law doctrine of abatement would in any event have no application to the circumstances. This is because the need for repair of the Common Parts, whatever the cause of the disrepair, has been provided for by the Lease. The Landlord is obliged to carry out necessary repairs to the Common Parts and has the power to carry them out expressly reserved. Therefore the circumstances do not show either a Landlord breach or an unforeseen accident. The circumstances are foreseen as specific provision is made for the repair of Common Parts whatever the cause of disrepair.

P27. Clause 1.2.17 defines 'the Reservations' as the rights reserved to the landlord set out in Part III of the Schedule to the Lease. Clause 2 is the provision of the Lease

which effects the letting to the Tenant. The letting is said to be '*subjects [sic] always to the Reservations'*. As discussed elsewhere by virtue of Clause 11.4 the Landlord is obliged to provide the Services in Part IV of the Schedule. Paragraph 1 of Part IV of the Schedule to the Lease provides that the obligation to repair applies "irrespective of the cause of damage…or deterioration necessitating such repairs…" The obligation also requires that in the event of the Common Parts or any part thereof being destroyed or damaged they should be rebuilt or repaired "as soon as reasonably practicable".

P28. The responsibility for repair is therefore imposed on the Landlord. The Landlord is obliged by its contract with the Tenant to carry out the repairs. The Landlord is entitled to recoup the costs thereof from the Tenant. The Landlord is to carry out the repairs to Common Parts as soon as reasonably practicable. The system thereby introduced applies whatever the cause of the problem. The provisions are wide enough to encompass latent and inherent defects. The common law distinctions of ordinary and extraordinary repairs are excluded. The system expressed within the Lease is that the Landlord carries out the repairs to the Common Parts as he is obliged to do and the Tenant continues to pay rent.

P29. Further and in any event the Reservations in Schedule Part III paragraph 4 permit carrying out of works to carry out maintenance and repair of the Development (which includes the Common Parts). Paragraph 5 of the same Part of the Schedule allows the suspension of rights to the Tenants in respect of the Common Parts.

This seems designed to allow temporary discontinuance of the provision of other Services such as access or climate control. Clause 9.2 of the Lease sets out certain qualifications which apply to a right of entry. Whilst it provides for the manner in which the right is to be exercised it does not restrict the ability to exercise the right provided it is carried out in the right manner. The grant of possession to the Tenant under the contractual provisions of the Lease is therefore subject to reservation. Thus if it were to exercise the power to enter the premises to carry out repairs to Common Parts the Landlord is not giving the Tenant any less than it bargained for. Any logical justification for abatement is absent in those circumstances.

P30. The situation of repairs to the Common Parts in the current case do not fall within the two situations envisaged in *Muir* v *McIntyre* and later cases as justifying abatement. The repairs to Common Parts are to be effected through an agreed mechanism in the Lease to deal with disrepair in the Common Parts whereby the Landlord is obliged to carry out the repairs and the proper costs of repairs are paid by the Tenant. The repairs could be carried out by the Landlord under reservation under the Lease. There is no failure of consideration. The Tenant's rights which amount to the consideration in this context are always subject to the right of entry. The Tenant has not got less than it bargained for. There is no room in these circumstances for the remedy of abatement even when it is the Landlord who is properly to be regarded as carrying out repairs to Common Parts. If the Landlord

were to do so in an oppressive manner and thus be in breach of the right of access in Clause 9.2 the remedy of the Tenant would be to seek damages. The provisions against deduction from rent do not exclude a claim for damages although they would exclude setting off those damages against the rent. The existence of the contractual scheme for dealing with a situation is analogous to the contractual provision in *Sharp* v *Thomson* which, had it imposed the obligation of repair of the tenant would, it seems, have excluded abatement and in *Turner's Trustees* v *Steel* where they did exclude a defence based on abatement. Taken together with the expressed intention that rent and others are to be paid without deduction there is a clear intention that abatement would not be available in cases where repair is necessary to the Common Parts. As discussed above the current circumstances do not show that the Landlord is carrying out the relevant repair but rather show an agreement relating to this particular repair to the Common Parts which innovates on the terms of the lease. The RWA reinforces the point that it is not available in the current circumstances. Nonetheless even without it, abatement would be excluded as a remedy in relation to repairs to the Common Parts.

Conclusion on the defence to the principal action

P31. For all of these reasons, the defence to the principal action is irrelevant and decree *de plano* ought to be granted as craved. In the event that the defender's averments are not held to be irrelevant a Proof before Answer reserving all pleas will be

necessary in relation to the various averments of facts relating to the alleged right to abate from the payments due under the lease, the question of whether the interference with possession was more than reasonably necessary in the remedial works and the quantum of any abatement justified.

Counter Claim

P32. The first two Craves in the Counter Claim are based on the right to abate asserted by the defender in its defence to the principal action. If the defence to the principal action is irrelevant so are the averments supporting the first two Craves of the Counter Claim and these fall to be dismissed for the same reasons.

P33. The second Crave consists of sums which have been paid but in respect of which the defender now claims to be entitled to an abatement of rent. The repayment is sought on the basis of unjustified enrichment. The short averments in support of that are contained in Statement of Fact 3. The averments indicate that the defender intended to abate the payments but "mistakenly continued to pay rent, service charge, insurance and utilities to the pursuers". There is a failure to specify the nature and circumstances of the mistake. The payments were made over a period and there are no averments of the nature of the mistake or the person or persons who made the mistake on each quarterly occasion. The averments of mistake lack specification and ought to be excluded from probation. The case for repayment of unjust enrichment would therefore be irrelevant.

P34. Further and in any event the case of unjustified enrichment is irrelevant for a further reason. The remedy is based on the defender having the benefit of the sums paid and there being no "legal ground to justify the retention of the benefit' or there is 'no legal justification for the enrichment": *Dollar Land* v *CIN Properties* 1998 SC (HL) 90 at pages 98 – 99, Gloag & Henderson *Laws of Scotland* 11th edition at paragraph 24-01. A legal ground to retain the money may be those arising under a valid and subsisting contract: Gloag & Henderson (supra) at paragraph 24-07; Goff & Jones – Law of Unjust Enrichment 9th edition at paragraph 3-113. At the time of the payment there was a valid and subsisting contract under which the payments were made. The pursuers' rights under that contract to receive the payment, even if subject to argument, are a legal ground justifying the retention of the sums paid. This is the position in which a party finds itself if it makes payments due under an existing contract instead of exercising a purported right of abatement at the time the payments were due. It is sound legal policy. It allows for certainty. It avoids a party making payment apparently due under a contract and then retrospectively arguing for a different interpretation and seeking back what it has paid.

Conclusion in relation to Counter Claim

P35. For all these reasons the Counter Claim is also irrelevant and ought to be dismissed. If the decision of the court was that the Counter Claim was not

irrelevant a Proof before Answer with all pleas reserved would be necessary (i) on the same basis as in the principal action (ii) to allow evidence of the circumstances on which the defender relies for the remedy of unjust enrichment i.e. proving that the payments were made under mistaken; and (iii) for evidence about the causal connection of the breach with the payments to Glasgow City Council.

Reply for the pursuers to submissions on behalf of the defender

The remaining arguments

P36. The defender submits in paragraph D1 of their submissions that there are two key issues. They characterise these issues as (a) the scope of the equitable principle of abatement of rent in Scots law and (b) whether, if it is otherwise applicable, the parties have contracted to exclude its application in the circumstances which have arisen.

P37. The pursuers, whilst accepting that these approximately describe the remaining dispute in shorthand, do not agree with the formulations of the issues. The disagreement is that the first issue is about the availability of the remedy of abatement. The availability of the remedy of abatement depends not only on the scope of the common law remedy; but also on the circumstances and the contractual structure provided by the Lease. The second key issue is more properly whether the terms of the Lease mean that the remedy has no application in the particular circumstances quite apart from the provisions which seek to

exclude any such remedies. Thus the issue as to whether the defender has a remedy of abatement in the circumstances under the Lease is a prior issue which has to be considered before one considers whether any such remedy has been excluded. The terms of the Lease are relevant in consideration of both of the key issues as identified by the defender and the two categories are not entirely discrete. Failure on either key issue would render the defender's averments irrelevant. The defender ought to fail on both issues.

The remedy has no application to the circumstances (what the defender terms 'scope of the principle').

P38. Even on the defender's version of the scope of the principle (with which the pursuers do not agree) the principle has no application. As set out in the quotation from the case of *Muir* v *McIntyre* in paragraph D3 of the defender's submission, it applies where a tenant "loses part of the subject let to him". In paragraph D5 the defender's formulation is that it applies if "the defender lost meaningful possession of the subjects through no fault of their own".

P39. The word 'lost' is not the same as a tenant granting possession to someone else. This can be illustrated by a simple example. If a tenant for his own purposes wishes to carry out internal upgrading works and for that purpose allows contractors possession of the subjects to carry out works he has no ordinary use of the premises. There is no 'fault' on his part. He has however not lost the premises.

He has in reality used them for his own purposes. He has allowed their use to the contractors to achieve his purposes. In the present case the defender has allowed access to MCLH to achieve their (the defender's) purposes. It is necessary for the remedy to be available that the Tenant is deprived of possession.

P40. In the present case, the defender as Tenant has voluntarily given possession to MCLH, the contractors, to carry out works which the Tenant agreed should be carried out. This is done as a result of the agreement reflected in the RWA, as discussed at paragraph P14 of the pursuers' submission. As noted the defender as Tenant has thereby facilitated works being carried out for free which otherwise they would have been obliged to pay for. The Tenant has retained their possession and passed it on, for a time, to MCLH. The defender has not been deprived of possession.

P41. The pursuers' argument on 'interference' contained in paragraphs 14 to 17 of the pursuers' submission was drafted to meet an argument that the pursuers were in breach of contract in denying the defenders possession. The defender now abandons any attempt to argue a breach of contract or negligent or wilful act causing the loss of possession. But the arguments about the RWA therein do still remain of relevance.

P42. The pursuers also contend that the application of the remedy is more narrow than contended for by defender on the basis of the passages quoted from the case of *Muir* v *McIntyre* in paragraph D3 of the defender's submission. The cause of the

deprivation of possession is also an essential ingredient of the remedy. The defender quotes from Lord President Inglis' description of the remedy at the foot of page 472. However that is considering only one aspect of the availability of the remedy. Before that passage, at about two-fifths of the way down page 472, a fuller statement of the remedy of abatement is given by the Lord President in the following terms:

> "; but it is quite settled in law that an abatement is to be allowed if a tenant loses the beneficial enjoyment of any part of the subject let to him either through the fault of the landlord or through some unforeseen calamity which the tenant was not able to prevent".

That is the statement of the remedy which is quoted by Sheriff Principal Caplan in *Renfrew District Council* v *Gray* at page 72I. It is quite clear that the remedy applies only when a tenant loses possession (in other words he does not part with it as a voluntary act) and where that loss of possession is caused either by a breach of contract by the landlord or an unforeseen accident. These are the only causes for which the remedy has been recognised by the courts. This is not surprising as it is difficult to conceive of other circumstances where it could be equitable for the landlord to be deprived of the rent.

P43. At the heart of the remedy is clearly the question of providing a remedy for a tenant who does not get what he is obliged to pay for. He does not get what he is obliged to pay for if he is deprived of possession either because of a breach of contract on the part of the landlord or an unforeseen accident. This is also made

clear in the analysis of Sheriff Principal Caplan in *Renfrew District Council* at page 72F to H.

P44. In addition to the remedy requiring the deprivation of possession it is necessary that the cause is one of the two causes recognised by the cases. It is now accepted by the defender that no case of breach of contract is made against the landlord. Further the case also does not involve an unforeseen accident. The word 'unforeseen' is important. Because what is foreseen will be presumed to have been provided for. The reference to accident or calamity is clearly to one which deprives the tenant of what he pays for. There are no circumstances averred in the present case that amount to an 'unforeseen accident'. There is simply a voluntary giving by the defender to MCLH of possession of the subjects under the RWA. The terms of the RWA as discussed at paragraph P14 of the pursuers' submission make very clear that it is the defender as Tenants which allow the contractor MCLH to have possession.

P45. The giving of possession to the contractor was no accident. The event (there is no accident) which underlies that giving of possession is disrepair of the common parts which, failing breach of contract or fault on the part of the Landlords (no longer alleged), is a repair the cost of which is a liability of the defender as Tenant. The provisions of the Lease provide in Schedule IV paragraph 1 that the Common Parts are to be repaired 'irrespective of the cause of the damage, destruction or deterioration necessitating such repairs'. The Landlords have reserved under the

Lease in Schedule Part III paragraph 4 the right to enter into the premises to carry out works to any part of the Development (which includes the Common Parts). Clause 9.2 obliges the Tenant to permit entry where the Landlords have an entitlement to entry under the Lease. The parties have anticipated repairs to the Common Parts and reserved rights for the Landlords to carry out those repairs and made provision for the payment of the costs of those repairs. Thus there is no accident. The event which causes the repairs is not a matter which has been unanticipated.

P46. Another way of looking at this aspect of the issue is whether the Tenant has got what they have agreed to pay for. What they have obliged themselves to pay for is the right to occupy the premises subject to the various reservations and repair obligations. The defender has got what it bargained for. There is no question that it has been deprived of it by any breach by the Landlords or any unforeseen accident. The remedy of abatement of rent in these circumstances simply has no application. A state of disrepair of the Common Parts cannot amount to an unforeseen accident so as to engage the remedy.

P47. In the current circumstances as already emphasised the defender has voluntarily given to MCLH permission to carry out repairs under the RWA. The defender has kept their possession and voluntarily given it to the contractor. There is no question of breach of contract by the landlord. There is no question of possession being removed because of an unforeseen accident. The case is clearly outwith the

scope of the remedy because the defender got what it bargained for and voluntarily gave MCLH possession in order to improve the position beyond that which they had bargained for (in other words to get the repair works done for free rather than at their cost). The purported remedy is not available in the circumstances under the Lease. The defender's averments are irrelevant.

Do the terms of the Lease leave room for the remedy of abatement in the circumstances (including exclusion of the common law remedy of abatement)?

P48. As discussed at the beginning of this reply, as the Lease makes provision for the event which happened (disrepair to the Common Parts) and there is no breach of contract by the Landlords, there is no room for the application of the remedy of abatement if the foreseen eventuality occurs. The granting of the RWA is not something for which (as the defender now has refined their position) the Landlords are responsible. The question therefore is not simply whether the contract excludes an existing remedy but whether the remedy can apply in light of the circumstances and the terms of the contract. It is contended that looking at the Lease as a whole, it was clearly the parties' intention that the common law remedy of abatement would not be available in the case of disrepair to the Common Parts.

P49. The discussion of the preservation of common law remedies in the defender's submission at paragraph D6 is capable of leaving a mistaken impression. What Lord Prosser actually concluded in the case of *Mars Pension Trustees* is that all that

is required to exclude an existing common law remedy is clarity of intention. See in particular page 271F to I. If the intention to exclude the common law remedy is clear that can be done by implication rather than express provision. This does not mean that any possible ambiguity must be construed as allowing a common law remedy to continue before the construction exercise is gone through.

P50. As discussed in paragraph P20 of the Pursuers' submission the proper approach is to consider the terms of the Lease in context and to ascertain the parties' intention according to the normal rules of construction (as summarised in paragraph P13 of the Pursuers' submission). Only once that is done can one see whether the intention expressed is clearly inconsistent with the parties' relationship continuing to be governed by the common law. In the case of *Scottish Power* v *BP Exploration* [2016] EWCA Civ 1043 at paragraphs [28] and [29] it is made expressly clear that what one must do is go through the interpretation process and if as a result the answer becomes clear one must give effect to it even if it deprives the party of a right which it might otherwise have had at law. The exclusion of the common law rules of landlord and tenant commonly takes place in commercial leases. There is nothing exceptional in that being done.

P51. The pursuers' contention is that the terms of the Lease do not give rise to a remedy of abatement of rent in relation to repair of Common Parts. These arguments are set out in paragraphs P19 to P29 of the Pursuers' submission and paragraph P45 above. Part of that argument is that the Lease makes clear in Clause 4.1 that the

stipulated rent must be paid in full. This applies, at least, in the circumstances envisaged and provided for in the Lease. Those circumstances include disrepair of and repair of Common Parts and range as far as destruction of the Premises from any cause. Clause 4.1 of the Lease obliges the defender to pay the rent as 'a clear sum', 'without any deductions' and with no right to 'withhold the rent'. There is no specific mention of abatement but the terms are clearly wide enough to cover it. The right of 'retention' is not specifically mentioned either. The right to "withhold" is clearly differentiated from either 'compensation' or 'set off' both of which are expressly covered. The intention that the rent is to be paid at the sums agreed is clear from Clause 4.1. Abatement of rent it is submitted is clearly covered by the terms set out. Whether or not it would be effective to deprive the Tenant of the remedy of abatement in the case of a breach of contract may be a different question; because of questions about how far the principle whereby a party is not allowed to take advantage of its own breach of contract can be modified by conventional agreement. No concession is made on that point (which is arguable) and it is not necessary to consider it further because there is no allegation of breach of contract in the present case as the defender's submission makes clear. Any doubt about the intention as to the matters covered by the words of Clause 4.1 (and it is not accepted there is any) is, in any event, resolved once one applies the normal process of interpretation.

P52. It is a necessary part of the process of interpretation to take account of the terms of the remainder of the Lease. When that is done it is even more clear what the intention was in the words used in Clause 4.1. Under Clause 5 even if the premises are destroyed the rent is to be paid. This covers not just insured risks but all causes. Under Clause 10.7 there is specific provision for abatement of rent but only in defined circumstances which are in the event of Insured Risks. The express provision of abatement in respect of a limited class of risk clearly implies exclusion of it in other circumstances of damage. There is a parity of reasoning between the justification for not paying rent on destruction of premises at common law and the abatement of rent at common law as is made clear from the opinion of Lord President Inglis in *Muir* v *McIntyre* in the penultimate sentence of his opinion at page 473. Beyond that as already noted the Lease makes detailed provision for repair of common parts and the party who is to pay for them. The event which lies beneath the claim for abatement is anticipated and foreseen. It is clear that payment of the rent should continue in the event of disrepair of common parts and there is detailed provision for that to be carried out and for payment for those repairs.

P53. The Lease shows that the circumstance of necessary repairs to Common Parts was anticipated and provided for. There is no room for asserting that the necessity of carrying out repairs to them was an unforeseen accident. There is no room for asserting that the defender did not get what it contracted for. Further, looking at

the words used in Clause 4 and the remainder of the provisions in the Lease, the parties' intention is clear: that rent is to be paid notwithstanding destruction of the premises or circumstances causing repairs which might otherwise justify abatement. The purported remedy is not available in the circumstances under the Lease. The defender's averments are irrelevant.

Counterclaim

P54. It is accepted that a mistake of law can, in an appropriate case, be a ground for recovery of sums based on unjustified enrichment. But in order to avail themselves of such a remedy, the defender will need to lead evidence that someone authorised the payments under a misapprehension as to the defender's legal rights. There is no specification provided of what the mistake was. There is no specification of when, or by who, the decision was made. Specific evidence will be required on these points. The pursuers are entitled to notice of what circumstances the defender will prove in order to establish its entitlement.

P55. In respect of the argument in the second part of paragraph 16 of the defender's submission, the payments were actually made under and in relation to a valid and subsisting contract. No challenge was made to the payments at the time. Whatever the precise juridical analysis of the right of abatement, the payments were made as rent and others. It is therefore a valid ground for the Pursuers to retain those payments, even if it were later to be decided that the defender would

in fact have had a right of abatement. The case of *Stewart* v *Campbell* (1889) 16R 234 may be of assistance. In that case a right of abatement could not be exercised because of payment of the rent at the time (per the Lord President at page 348 and Lord Shand at page 349).

Decision

[7] I commence with the leading authority on the equitable principle of abatement. While subsequent cases have been decided having regard to the particular facts, the leading authority remains the opinion of Lord President Inglis in *Muir* v *McIntyre* (1887) 14 R 470 at page 472/3. In particular, at page 472 Lord President Inglis said:

> "…but it is quite settled in law that an abatement is to be allowed if a tenant loses the beneficial enjoyment of any part of the subject let to him either through the fault of the landlord or through some unforeseen calamity which the tenant was not able to prevent. There are many examples of this in the books".

He then outlined examples of where the principle had applied.

[8] At page 472/3 Lord President Inglis summarised the position:

> "It is thus, I think, quite established that where, through no fault of his own, a tenant loses part of the subject let to him, he is entitled to an abatement of his rent, - that is to say, he ceases to be the debtor of his landlord to the extent to which he is entitled to an abatement."

[9] In the same case Lord Mure opined (at page 473):

> "The simple question we have to deal with is whether in the circumstances the tenant of this farm is now in a position to be called on to pay his full rent".

On the same page, Lord Shand opined:

> "It would, I think, be most inequitable if the landlord could exact his full rent from the tenant who has been deprived of a large part of the subject let to him through no fault of his own. The position of the landlord is that he can no longer continue to give possession of the whole subject which he agreed to let. The principle on which the tenant is entitled to an abatement is founded on the highest equity…"

[10] If the above is a correct summary of the law, I turn to consider whether the tenant was denied "the beneficial enjoyment of any part of the subject let to him either through the fault of the landlord or through some unforeseen calamity which the tenant was not able to prevent" (my emphasis).

[11] In order, I will consider the words "unforeseen calamity" in the context here before addressing the second aspect, namely, whether the situation here was one "which the tenant was unable to prevent". Having completed that task, I will then turn to consider unjustified enrichment.

[12] It is common ground that the work which was contemplated in the Remedial Works Agreement was substantial (it had involved defective cladding and was scheduled to last 93 weeks) but the remedial work was not caused by the fault of either party. The tenant avers that as a consequence of the ongoing work it was denied access to part or all of the subjects let. The tenant claims not to have received the beneficial enjoyment it had contracted for in terms of the lease. If those averments are proved, in my opinion the circumstances here would represent an unforeseen calamity of the nature contemplated in *Muir* v *McIntyre*. It is not averred that the work was known to, or within the contemplation of, the parties when the lease was entered into or assigned.

[13] The pursuers submit that there are no averments of "an unforeseen accident" and they refer to the opinion of Sheriff Principal Caplan in *Renfrew District Council* v *Gray* 1978 SLT 70 at 72 F to H (a case where the tenant remained in occupation). I do not consider that this case assists the pursuers. In context Lord Caplan does not suggest that abatement applies solely to unforeseen accidents. On the contrary he opines that abatement is based on the fact that the tenant should not pay for rights he never enjoyed. I quote Lord Caplan at page 72E to H:

> "On my reading of the authorities there are three remedies open to a tenant who does not get full or effective possession of the subjects leased. In the first place he can retain the rent. However this measure is to secure performance or secure against the rent such rights as may ultimately be established and does not by itself govern the eventual obligation to pay rent. Secondly, the tenant may be able to claim damages if loss is incurred due to the landlord's breach of contract. Thirdly, the tenant may claim an abatement of the rent on the basis that he has not enjoyed what he contracted to pay rent for. Rights to abatement of rent and damages for loss due to breach of the lease may in many cases be equivalent in practical terms but they are different concepts. It is a prerequisite of damages that there has been a breach of contract and the quantification is based on established loss flowing from the breach. Abatement of rent as illustrated by the authorities is an equitable right and is essentially based on partial failure of consideration. That is to say, if the tenant does not get what he bargained to pay rent for it is inequitable that he should be contractually bound to pay such rent. This position results even if the failure to enjoy the subjects is through accident rather than breach of contract and the abatement really is based on the fact that the tenant should not pay for rights he never enjoyed rather than loss suffered although in certain cases loss sustained may be a suitable measure of the abatement due."

[14] The words "unforeseen calamity" in context mean some extreme unforeseen external reason (not necessarily a force of nature, as might be implied by the words; not an insured event or a common repair, as such events are provided for or contemplated

in terms of the lease) necessarily eroding in whole or in part the beneficial enjoyment of the premises by the tenant. Consider the following contrasting examples. First where a tenant occupies premises for use as an unmanned storage warehouse in terms of a lease. Conceivably the works contemplated by this Remedial Works Agreement might have had little, if any, effect on that tenant's beneficial enjoyment. Secondly where a tenant trades as a meditation centre in terms of its lease. In the latter example the same works might render the premises unusable (denying the tenant any beneficial enjoyment in terms of the lease).

[15] If I am wrong and the circumstances here do not engage the equitable principle of abatement and assuming that the defender can prove that its beneficial enjoyment was infringed in whole or in part; then the defender would have no remedy and would require to pay rent for premises to which it was denied access (being "a tenant [which] loses the beneficial enjoyment of any part of the subject let" in terms of *Muir* v *McIntyre*). Such a result would not be of the "highest equity".

[16] Of course the corollary result is that the landlord will not receive its rent but, again, that result has been caused through no fault of either party. The landlord has not provided the premises (or perhaps better expressed: the premises are no longer available for the tenant's beneficial enjoyment) in terms of the lease. The landlord may have had the building defects remedied at no cost (except the abatement of the rent) but that is a separate issue.

[17] The second issue is neat, namely, whether the unforeseen calamity was one which the tenant was able to prevent. The pursuers submit that all parties (there are other tenants) to the Remedial Works Agreement agreed to allow the contractors access to the property (including the premises let here). Therefore, according to the pursuers, the defender cannot now claim an abatement in their rent even where the anticipated timescale overran. This is because the defender agreed to have its right to occupy infringed to the extent, and for the duration envisaged, in the Remedial Works Agreement. The defender had voluntarily ceded occupation.

[18] I see the attractiveness of that argument. The defender did sign the Remedial Works Agreement. The defender had allowed access. The work has been completed. However, in my opinion the submission is flawed for the following reasons.

[19] Building works to the property had been instructed by a prior heritable proprietor. That earlier work required to be remedied. The contractor agreed to do so at no cost to the parties (the current landlord and tenant).

[20] The parties to this litigation entered into the Remedial Works Agreement (between the landlord, the tenant, the other occupiers and the contractors). Of course, the defender could have refused to sign, or refused access, or both.

[21] However, in article 12 iv of condescendence the pursuers aver "Had the RWA not been entered into, the remedial works would still have had to have been instructed or carried out by the pursuers pursuant to clause 11.4 and Schedule Part IV of the lease". That being so, the issue of abatement of rent would have arisen irrespective of any

consent to the works by the tenant. The significance of the defender's consent (by signing the RWA and allowing access) is therefore irrelevant to the issue of abatement. The work would have been done, access would have been taken and issues of abatement would have arisen irrespective of agreement by the tenant.

[22] As an aside, and because it was raised by the parties during oral debate, the pursuers also aver that if there had been a cost associated with the work, that cost would have been levied upon the defender in terms of the service charge partly on the basis that the original tenant had accepted the premises and common parts "as in all respects in good and substantial order and repair and in all respects as suitable and fit for the purpose for which they are let" (clause 8 of the lease). The current defender derives its title from that lease by way of an assignation.

[23] The words "in all respects as suitable and fit for the purpose for which they are let" have been superseded by events, namely, the requirement for these unforeseen remedial works. The works were required due to latent faults to earlier work which the contractor agreed to remedy at no cost. As such, had there been a cost associated with the remedial works, the defender would have defended that action and the issue of abatement would have risen in that context. At the debate it was explained that the Remedial Works Agreement had removed such a dispute. The averments had been inserted for background purposes. This is not the forum for me to express an opinion on a dispute not before the court. I will confine myself to the issues before me.

[24] For present purposes it is sufficient for me to reiterate that through no fault of either party substantial unforeseen remedial works were required. Those works could not be described as common repairs (I do not know whether the original works were common repairs). They were instead substantial works needed to remedy deficient earlier works completed before either party had taken title. The lease does not provide for such a scenario. Analogies to situations where a tenant allows contractors access for, for example, refitting or improvements, are not apt. There a tenant has a choice. Here the choice available to the defender was to agree to the works or to have the works carried out in the teeth of refusal. In relation to the equitable principle of abatement of rent the choice was illusory.

[25] Moreover, applying the principles of interpretation of leases as outlined in *@SIPP Pension Trustees* v *Insight Travel Services Ltd* 2016 SC 243 (at page 250, para [17] and the caution against a "search for infelicities" as outlined in paragraphs [18] and [19]), I do not agree that the defender had impliedly waived its common law right to claim abatement for an unforeseen calamity such as this, within the terms of the lease.

[26] The pursuers refer for example to clause 4.1 of the lease: "Declaring that the Tenant shall not be entitled to exercise or seek to exercise any right to withhold the rent or any other charges payable under this lease or right of compensation or set off". The principle of abatement, if established, means that rent is not due/chargeable. It is a common law equitable principle distinct from the parties' rights under contract (the lease). The remedies of retention of rent, set off or compensation are discrete to

abatement. Nowhere has the defender impliedly waived such a right (whether or not by necessary implication).

[27] To conclude on this topic, in principle, in my opinion the defender is entitled to an abatement of rent. The extent of any abatement is a matter upon which evidence will be required (whether, to what extent and the duration over which the defender was denied beneficial enjoyment of part or all of the subjects). There are averments that the work overran its anticipated duration on the one hand and, on the other, that the defender may have chosen to vacate the subjects (i.e. not out of necessity) and/or chosen not to re-occupy the subjects. These are matters which will require proof.

[28] I now turn to deal with unjustified enrichment.

[29] Here the defender avers that the payment of rent and other charges was made by mistake. The pursuers say that, even if the defender can properly claim abatement, the pursuers are entitled to retain the rent due and paid under the lease. The defender founds upon *Morgan Guaranty Trust Company of New York* v *Lothian Regional Council* 1995 SC 151 being a case involving money paid by mistake (the Roman law principle where a pursuer seeks to recover money paid by mistake, *condictio indebiti*). At page 166A Lord Hope opines: "In my opinion, however, it is not part of the law of Scotland that the error must be shown to be excusable".

[30] I am also swayed by the opinion of Lord President Hope in *Dollar Land (Cumbernauld) Ltd* v *CIN Properties Limited* 1998 SC (HL) 90 (a case where a landlord was enriched on the irritancy of a lease) and, in particular, where, at page 98F, he says: "It is

an important part of this reasoning to recognise that the obligation to redress the enrichment arises not from contract, but from the separate duty which arises in law from the absence of a legal ground to justify its retention: see Stair, *Institutions* I vii 7."

[31] *Dollar Land* is referred to in Gloag and Henderson, 14th Ed, at paragraph 24.07: "Enrichments fall to be reversed only if they are unjustified. The general approach is to say that an enrichment is unjustified when its retention can be supported by no legal ground".

[32] If, as I have concluded, the defender is entitled to abate the rent it follows that the defender has a relevant claim against the pursuers for unjustified enrichment. This is because, where entitlement to abatement is established, no rent is due in law. Abatement is founded on principles of the highest equity not on contract or on breaches of contract. To quote Lord President Ingles in *Muir* v *McIntyre* (1887) 14 R 470 at page 473 a tenant "ceases to be the debtor of his landlord to the extent to which he is entitled to an abatement".

[33] The averments in Article 12 xi of condescendence deal principally with the issue of personal bar, a point which is no longer insisted upon by the pursuers. However the pursuers had asked me not to remove those averments as they may have a bearing on whether recovery would be equitable. I have decided in the round to allow those averments to remain.

[34] Finally, the pursuers attack the specification of the defender's pleadings in relation to the mistake. In particular that there is no specification of what the mistake

was nor when or by whom the mistake was made. In my opinion the averments by the defender, though bare, are sufficient for inquiry. They are not so lacking in specification as to render them irrelevant.

[35] As the defender has been successful at debate, the expenses follow.