OUTER HOUSE, COURT OF SESSION

[2021] CSOH 124

CA138/19

OPINION OF LORD CLARK

In the cause

PACCOR UK LIMITED

Pursuer

against

UNITED UK PROPCO 8 SARL

Defender

Pursuer: Jones QC sol-adv; Brodies LLP
Defender: Garrity; DWF LLP

14 December 2021

Introduction

[1] The pursuer is the tenant of premises, leased from the defender. The premises are located in an industrial estate known as Brucefield Industry Park, Livingston. This action concerns units 3 and 4 Young Square, in the industrial estate. These units are let under two separate leases which have very similar terms. Another action (CA139/19) has been raised by the pursuer in relation to units 5, 6, 7 and 8 Young Square, also let by the defender, covered by a different lease. That lease contains terms which are also materially similar to those in the leases for units 3 and 4. The two cases called together before me for a debate, with each party challenging the relevancy and specification of the other's pleadings. There

are several common issues and a number of the decisions reached in this Opinion apply also to the other action. My reasoning in respect of each of the points is set out below. As a result, the Opinion in that other action merely summarises the decisions on the common issues, although it also deals with additional matters in that case.

Background

[2] The relevant terms of the leases for units 3 and 4 are considered when dealing with each of the issues, but at this point it is convenient to note, in broad terms, certain key provisions. Under each lease, the landlord is obliged to maintain insurance (clause 8.1.1). Any "policy monies" are to be laid out in respect of repairing or rebuilding the premises following insured risk damage (clause 8.1.4). If the premises or any part thereof are destroyed or damaged by any of the insured risks, so that the premises are unfit for or incapable of occupation or use then the rent and service charge, or a fair proportion thereof according to the nature and extent of the damage sustained, shall be suspended until the premises are rendered fit for or capable of such occupation or use by the tenants or until the expiration of three years from the date of such destruction or damage (clause 8.3.1).

[3] The pursuer occupied the premises until around December 2015. The leases remained in force and the pursuer continued to pay the rent. The pursuer claims that between 16 and 18 April 2019 travellers who had camped on the estate damaged each of the units and in particular damaged parts of the premises covered by the defender's insurance obligations. The damage is said to have been caused by malicious actions and theft. The pursuer seeks the following orders: declarator that the damage occurred as a result of an insured risk (which will result in abatement of rent and service charges); repayment of an amount of rent paid after the damage; that the defender as landlord must lay out the policy

monies under the insurance policy; and declarator that if the premises remain unrepaired the lease will come to an end. The defender argues that it has no such liability and the remedies sought should not be granted. In its counterclaim, the defender seeks payment of rent which the pursuer ceased to make as a result of the alleged damage to the premises.

Relevancy and specification issues raised by the defender

The pursuer's averments about damage to the premises

Submissions for the defender

[4] The pursuer's pleadings about damage to the units were irrelevant and lacking in specification. There was no proper distinction made between unit 3 and unit 4. Damage to one did not mean that the other was damaged. The averments of damage to services, if applicable to both units, must necessarily be to common services and therefore would not form part of either of the subjects let under the two leases. No specification was offered as to whether the items damaged formed part of the subjects let or were tenant's additions/fixtures and fittings, which were not covered by the landlord's obligations.

[5] Images of the premises showed that various items of equipment, such as a transformer, an electricity sub-station and a water sprinkler hopper, did not form part of the premises. The pursuer's pleaded case failed to take cognisance of the fact that the leases specified what the premises comprised. The pursuer did not make clear whether allegedly damaged items formed part of the premises for the purpose of the lease. In relation to each unit, the lease defined "the premises", as including the landlord's fixtures and fittings and services which exclusively served the subjects let. The clear intention was that common services did not form part of the premises leased, which were in turn subject to the insurance obligation. For further items (such as fixtures and fittings added by the tenant)

to fall within the insurance obligation, the landlord required to be notified of those items. There were no averments of notification. Several licences for works were granted to the tenant by the landlord for alterations by the pursuer, which included additional common services. In the absence of clarity as to what was said to be damaged, it was impossible to analyse whether damage was to the premises let and what that would mean for the purposes of the tenant's use and enjoyment of the premises and the extent to which the tenant might be entitled to an abatement of rent. Fair notice was not given. It is the premises that have to be unfit for occupation or use. Here, full abatement was sought but it was not clear why full abatement was appropriate.

[6] In its pleadings the pursuer made reference to its expert reports, said to fully detail the damage caused. However, the reports did not make any distinction between the leases and did not apply the definition of the premises. The report from March 2020 dealt with events in 2017, which had previously been averred but were no longer relied upon, and identified damage to the external switchroom and transformer, affecting electricity supply. The expert also assumed that the tenant's additions and alterations formed part of the property. Even though the defender had made clear in its pleadings that there was an issue in that regard, the matter was not dealt with. In the further reports lodged concerning units 3 and 4 (but not units 5-8) reference was again made to damage to the electricity supply.

[7] The reference to a schedule which listed the damage, but not applying the definition of the premises, meant that the defender was effectively being asked to figure out what was relevant and what was not. For the pursuer just to say there were photographs of a dilapidated building was not sufficient. It was necessary to identify when and in what respect damage had occurred. Proper specification was not provided.

Submissions for the pursuer

[8] The suggestion that the works carried out under the licences did not form part of the premises for the purposes of the leases was a startling one. It was not advanced in the defender's pleadings in both actions and it also contradicted the wording of the licence for work agreements. Indeed, the defender made reference to those agreements in its pleadings in both actions, in effect as additions to the premises. The licences made clear that the tenant bears the cost of any increased insurance premium as a result of the altered state of the premises, indicating that the works done form part of the premises. The main point was that the leases each contained full insuring and repairing obligations on the landlord. The pursuer was offering to prove that the items listed in the pleadings and expert reports all formed part of the leased premises.

[9] In relation to common services, the pursuer was offering to prove that the miscreants went into the premises and ripped out piping and wiring, sinks and water containers rather than damaging items outside. The landlord had to put in place the insurance, paid for by the defender as tenant, which the pursuer avers should have covered at least pipes and electrical equipment inside the premises, whether that was original or added material under the licences. Accession could be pertinent if something else was attached or done, not under a licence. Lengthy pleadings were discouraged in commercial actions and fair notice was given here.

[10] The reports from March 2020 were no longer relied upon. The pleadings referred to later reports. There were ample averments about the damage to the premises and the expert reports listed the damaged items for each of the units. It was not for the experts to interpret the lease. The defender's own expert had also examined the premises and must have seen

the voluminous evidence of damage. Reference was made to one report in which the expert identified a lot of the damage to the premises. This contradicted the defender's point about a lack of fair notice. The defender had advice on the issues of additions and alterations and could challenge evidence led for the pursuer.

[11] If the pursuer discharged the provisional onus to establish that damaged items were parts of premises let, then the onus of rebutting that is on the defender. It was surprising not to have an indication from the defender of what it was required to insure. It was not for the pursuer to give a history of every single addition or alteration. Experts on each side speak to a large amount of cable stripped out from inside the premises. The pursuer offered to prove this formed part of the premises. The defender would require to show why it did not. It was not for the pursuer to disprove averments not made against it. There was expert evidence of the age of the wiring and other damaged items.

Decision

[12] The terms of the lease for each unit regarding the insurance obligations of the defender, as landlord, are clear. Clause 8 binds the landlord to insure the development area and the premises, each of which are defined. As is obvious, fixtures or additions which come to be made by the incoming tenant do not form part of the existing development area or the premises. However, the following are included in the insurance obligations:

> "8.1 (i)…and all fixtures of an insurable nature (including additions and fixtures made by the Tenants and other tenants of the Development Area in accordance with the provisions of their several leases so far as the Landlords shall have been made aware of the same and of which, in the case of those made by the Tenants details and an insurance reinstatement value shall have been given to the Landlords in writing by the Tenants) against loss or damage by the Insured Risks…
>
> (iii) …(b) all boilers, heating plant and fixed mechanical equipment and apparatus in or forming part of the Premises and the Development Area against breakdown,

> damage and failure provided full details of such fixed mechanical equipment, if installed by the Tenants, shall have been given to the Landlords by the Tenants in writing".

[13] The licences for works are also of relevance. While the wording of each of them is not identical, they make the same point. It suffices to quote this example of what the tenant undertook:

> "To pay to the Landlords any increased or extra premium payable for insurance of the Premises and any other adjoining or neighbouring premises against the risks referred to in the Lease in consequence of the Works."

Thus, the defender as landlord is obliged to insure against loss or damage caused by insurance risks not only in respect of the development area and premises as let at the beginning of the lease, but also in respect of the stated additions and fixtures and plant and equipment, subject to the notification requirements as set out. The pursuer as tenant will require to pay any increased insurance premium in consequence of works which have been licensed.

[14] The pursuer's averments give reasonable notice of the damage and make reference to the expert reports from September 2020, which list the individual points of damage. The pursuer is contending that the damage did concern the subjects let under the lease. As I understand it, the pursuer is proceeding on the basis that the items listed in the pleadings and expert reports were either there from the outset or added by work done under the licences. In relation to items which form part of the tenant's fixtures and fittings, the nature and scope of these is a factual issue which can only be determined after proof. In relation to any damage to common property, not forming part of the premises let, it is not clear to me that the pleadings or the expert reports found upon any such damage. But if there is such an issue it also requires to be dealt with at the proof. I do not regard it as necessary for the pursuer to identify, in its pleadings, whether or not each item of damage was to the tenant's

fixtures or additions, or common parts, and to aver that appropriate notification had been given to the landlord. It suffices that fair notice of the damage is given and these other underlying details and issues, including the application of the terms of the leases and the licences of works to the factual circumstances, can be dealt with at the proof. The fact that full, rather than partial, abatement is sought is also something that falls to be dealt with in evidence and submissions.

[15] The expert reports from March 2020 referred to by counsel for the pursuer are not relied upon. I do not accept that the pursuer's expert was required to carry out, or even be advised upon, interpretation of the lease. On the other hand, the fact that the defender's expert has embarked upon an analysis of the alleged damage and offered a view on fixtures and fittings by the tenant, does not of itself assist the pursuer. It is the pursuer's pleaded position upon which it needs to rely, but as I have noted that suffices for the case to go to proof.

Intimation of damage

[16] The insurance risks include "malicious damage" (clause 1.8). When the premises or any part of them are destroyed or damaged by insurance risks, the pursuer is required "to intimate that fact to the landlords as soon as reasonably practicable" (clause 8.2.3).

Submissions for the defender

[17] The pursuer's averments about purported intimation to the defender of insured risk damage were irrelevant. Intimation required to be either in writing (under clause 9.11) or, if not, at least more formal than brief discussions between two lay persons. It had to be sufficiently clear and from, for example a solicitor or principal person in the pursuer

company, so that the defender would be under no misapprehension that the tenant considered itself free of its repairing obligation in respect of that damage or destruction.

Submissions for the pursuer

[18] The defender had now conceded that intimation does not necessarily mean a written notice in terms of clause 9.11 of each lease. That was correct, there being no basis in the terms that written notice was required. There were no prescribed formalities and whether there was intimation could be established by reference to the facts and circumstances: *Christie Owen & Davies Plc* v *Campbell* [2009] SC 436. There was no need to set out in the pleadings the content of the discussion that took place.

Decision

[19] It is clear that the terms of the lease occasionally use the word "notice" but in the context of clause 8.2.3 the reference is to "intimation". No basis exists for concluding that these words were intended to mean the same thing. I adopt and follow the view reached by the Inner House that where there are no prescribed formalities the word "intimate" simply means "make known": *Christie Owen & Davies Plc* v *Campbell* (at para [14]). The pursuer avers that "on 16, 17 and 18 April 2019 the Pursuer's David Gordon liaised with the Defender's David Fry" intimating the damage caused to the premises on those dates. There is also a reference to correspondence between the parties' agents at that time. The issues of what is said to have been made known, when, by whom and to whom, are all matters for proof. The defender's argument on irrelevancy of the averments in question is not accepted.

Implied term

[20] The pursuer avers that: "It was an implied condition of the Leases that the Defender would take reasonable care to prevent squatters remaining in the Park".

Submissions

[21] The pursuer's position was that, as averred, the defender was responsible for the maintenance and security of the park. The averment about reasonable care concerned the standard of care which the defender required to meet in dealing with security and hence was not about the existence of a separate implied term. The defender argued that there was no proper basis for such an implied term.

Decision

[22] In my view, the averments of the pursuer regarding an implied condition are irrelevant. If there already exists a contractual duty in respect of security arrangements then it is that term that has to be construed and applied. However, the pursuer does not identify any specific term in that regard, other than a reference to clause 9.13 (which does not deal with security) and a broader reference to schedule 4. The latter does contain some reference to security, in paragraph 15, which requires the landlord to provide such other services which, in its opinion, "it is reasonable…to provide for maintaining and securing the facilities and amenities of the Development Area". That contractual term sets its own standard. No other specific term was identified. I therefore accept the defender's position on the irrelevancy of this point.

Waiver

[23] In its answers to the defender's counterclaim, the pursuer relies upon the terms of a letter dated 2 September 2019, from the defender's agents to the pursuer's agents, as an express waiver of any right to insist upon payment of rent and service charge (answer 12). The letter refers to receipt of a draft summons and goes on to say:

> "The First lease and the Second Lease
>
> We note your comments regarding the above Leases and the averred overpayments by the Tenant. Our client does not agree that these were overpayments. The Tenant, whether consciously or mistakenly, opted to continue to pay rent and service charge under both the First Lease and the Second Lease. They later chose to exercise their option to abate both rent and service charge. Time was of the essence when choosing to exercise this right and they failed to exercise it immediately.
>
> The Landlord has not taken any issue with the choice of the Tenant to exercise this right, albeit they have failed to do it timeously. The rent and service charge paid by the Tenant up until the cessation of payments will not be returned by our client."

The First and Second Leases referred to are the leases in respect of units 3 and 4.

Submissions for the defender

[24] Such a waiver would amount to a fundamental variation of the lease. It would effectively entitle the pursuer to occupy the premises free of charge for the remaining duration of the lease. The letter was incapable of being construed as waiving or abandoning the defender's right to future payments under the lease. Moreover, the lease was a contract and to vary it unilateral abandonment was not allowed; there required to be a written agreement varying the lease. In terms of section 1(2) of the Requirements of Writing (Scotland) Act 1995, express waiver of a real right to obtain rent and service charge would have required formal writing between the parties in order to vary the lease in that respect.

In any event, on no analysis could the letter be taken to amount to an express waiver of rent and service charge, effectively amounting to abandonment of the lease by the landlord.

Submissions for the pursuer

[25] The right being waived was the right to payment of the rent and service charge during the period when it should be suspended. The relevant terms of the Requirements of Writing (Scotland) Act 1995 were met, as the document was signed by an authorised agent. A waiver is a unilateral act and it does not require an acceptance. This was not being characterised as an amendment or variation of the lease. The terms of the letter sufficed to establish waiver.

Decision

[26] As is stated in *Reid and Blackie, Personal Bar* (2006) (at paragraph 3-08 *et seq*), waiver is the voluntary abandonment of a right. It requires the creation of a misapprehension that the right is not to be enforced. It can be constituted by the abandonment of a defence. Waiver is a matter of fact and the conduct or statement in question requires to be viewed objectively in order to ascertain whether it is consistent with a continuing intention to exercise the right (paragraph 3-10). As is also stated in the same work (at paragraph 3-43) a waiver of a real right in land must comply with the formal validity requirements of section 2 of the 1995 Act.

[27] Parties' submissions proceeded upon the basis that this issue concerned waiver of a real right in land. While a tenant's right in a lease is a real right in land, it was not explained to me why I should view the landlord's right to payment of rent as equating with a real right for the purposes of the 1995 Act. But even if for some reason the provisions of the Act are relevant, its requirements are met in the signed letter. In addition, waiver is a unilateral act

and no formal agreed variation of the lease was required: see *Minevco Ltd* v *Barratt Southern Ltd* 2000 SLT 790 at 791, where it was observed in the Inner House that counsel accepted that the requirements of averment and proof for a case of waiver were less exacting than for a variation of the term of a written contract.

[28] However, the fundamental point is the proper interpretation of the wording of the letter. It was sent following receipt of the draft summons. Its terms are not, when viewed objectively, sufficient to mean that there was a voluntary abandonment of a right or a defence. It focuses principally upon overpayments. The words "the Landlord has not taken any issue with the choice of the Tenant to exercise this right" merely refer to what the defender has not, up to that stage, done. It would be inappropriate to view those words as meaning (as the pursuer asserts) that the defender would not in the future, including in defence to the action just intimated to it, take any such issue and had waived its right to payment of rent and service charge during the alleged period of abatement. The pursuer's averments on waiver are therefore irrelevant.

Relevancy and specification issues raised by the pursuer

Duty to exercise reasonable care

[29] The defender avers:

> "Ans 8 The pursuer failed to put in place adequate security measures to prevent unauthorised break-ins at the Premises over a lengthy period of time. The pursuer failed to take adequate measures to prevent or deter damage, destruction or theft during the occurrence of any break-in. As a result, travellers took entry to the Premises in April 2019 for a period of 2-3 days and caused damage to the Premises. This was not the first or only time that the pursuer failed to take reasonable care of the Premises such that travellers took entry to the Premises and caused damage...
>
> Ans. 9 The pursuer ceased its business operations at the Premises in or around December 2015, and has not occupied the Premises thereafter. The Premises were subject to break-ins and/or damage/destruction during 2016, 2017, 2018 and 2019

> Believed and averred that the pursuer has failed to take reasonable care of the Premises since it vacated the Premises in December 2015. Further believed and averred that the averred damage to/destruction of the Premises would not have occurred had the pursuer taken reasonable care of the Premises. In the circumstances condescended upon, (a) the obligation to make good any damage to the Premises rests with the pursuer and is not an obligation of the defender's in terms of the Leases and (b) the pursuer is not entitled to any rent or service charge abatement under the Leases".

Submissions for the pursuer

[30] The duty was said to arise from an implied term, but the lease terms made clear what liabilities arose and in particular the liability of the defender for matters covered by the landlord's insurance obligation. That insurance obligation did not exclude damage caused by negligence on the part of the tenant. Further, the defender offered no explanation as to how it suffered any loss or damage in circumstances where it was contractually obliged to have put in place insurance cover, paid for by the tenant, that would indemnify the defender in respect of such loss and damage.

[31] The insurance premium was paid by the pursuer as tenant. The obligation to repair was on the tenant. But each lease indicates that if damage is caused by an insured risk then the tenant is relieved of that repairing obligation because the landlord has the insurance to address that matter. A problem with the defender's position was that if there is a duty of reasonable care on the pursuer, the logical outcome is that the landlord is entitled to require the tenant to repair and keep the insurance proceeds for himself. The leases say in terms that if the tenant has done something or not done something to cause the insurers to void the policies then the repairing obligation falls back on the tenant. There was no suggestion that the tenant has done anything to cause the policies not to be paid out. The broad thrust of the defender's averments was that the pursuer owed such a duty, was in breach of it, and so the obligation to make good the damage rested with the pursuer, who had no entitlement

to abatement or suspension of rent, and there was no obligation on the defender to reinstate or repair.

Submissions for the defender

[32] There was long-standing authority supporting, at common law, an implied obligation on the part of the tenant to take reasonable care of the premises, including commercial premises. That common law duty applied unless it was excluded, either expressly or clearly by implication. The landlord's implied repairing obligation was excluded but there was no exclusion of the tenant's implied obligation on repair. Parties having contracted for insurance was not a displacement of any implied obligation. The insurer might wish to exercise rights of subrogation. If the defender was to be made liable, that loss was caused by the pursuer's breach of duty. So far as fair notice was concerned, the defender's pleadings were adequate and made clear why there had been a breach of the duty.

Decision

[33] In terms of clause 6.6, the pursuer, as tenant, was obliged

> "…to repair, maintain, and, if necessary, reinstate, renew and keep the exterior and interior of the Premises and all additions thereto and all boilers, heating plant and fixed mechanical equipment forming part of the Premises (including the Landlords' fixtures belonging to the Premises) and all drains, soil and other pipes, sewers, sanitary and water apparatus in so far as exclusively serving the Premises and all walls, fences and railings, forming part of the Premises and the whole parts and pertinents of the Premises in good and substantial repair and maintained, tidy and cleansed in a satisfactory condition in every respect, which obligations shall subsist irrespective of the cause of damage or destruction necessitating such repair, renewal or reinstatement as aforesaid. Provided that to the extent only that the obligations under this Clause are obligations of the Landlords under Clauses 7 or 8.1 hereof, the Tenants shall not be liable under the foregoing provisions of this Clause."

Under clause 7.2, the landlord has a duty to comply with its obligations relating to insurance contained in clause 8.1. The insurance obligations set out in clause 8.1.1 include to keep insured

> "…for such sum as the Landlords shall (acting responsibly) from time to time consider sufficient to cover the cost of completely rebuilding the same …the Development Area and the whole erections of which the Premises form part…"

As noted earlier, that clause goes on to include additions and fixtures made by the tenants and it then states:

> "Provided that any shortfall in such insurance cover shall be the responsibility of the Landlords (subject however to the Tenants fully and timeously complying with their obligations under Clause 8.2.2)."

Under clause 8.2.1, the pursuer was obliged to pay the insurance premium. Clause 8.2.2 states:

> "8.2.2 Not to do or suffer to be done any act, matter or thing whatsoever whereby the insurance of the Premises, the Development Area, the whole erections of which the Premises form part and any fixtures of an insurable nature or of any adjoining or contiguous property belonging to the Landlords shall be made void or voidable in whole or in part or whereby the insurers may decline to cover any of the Insurance Risks or whereby the premiums payable in respect of such insurance shall be increased beyond the normal rate; and in the event of default by the Tenants of the provisions of this Clause 8.2.2 but without prejudice to any other remedy of the Landlords in respect thereof, to make good any shortfall in the proceeds of such insurance and any increase in such premiums."

[34] The principle that the common law position on a particular matter can be altered or qualified by the terms of a lease, whether expressly or impliedly, is well-recognised in the authorities. In this case, the landlord has to take out the insurance cover and the tenant pays the premium. Clause 6.6 of the lease imposes an obligation on the tenant to repair, which is not qualified by only having to do so where the tenant has not acted with reasonable care. The obligation applies regardless of the cause of the damage. It is of course subject to the proviso that the obligation does not apply to insurance risks which are to be dealt with by

the landlord under clause 8.1. If, however, the tenant has caused the insurance to be void or voidable or caused the insurers to decline to cover any of the risks, clause 8.2.2 requires the tenant to make good any shortfall.

[35] The effect of the defender's approach, if a duty to exercise reasonable care by the tenant is implied in these leases, is that breach of that implied term gives rise to a loss on the part of the landlord. That loss is to have to make payment to the tenant when the landlord has not carried out its insurance obligations. It would make no commercial sense for the landlord to be contractually liable in that respect but to be able to avoid that liability by reliance upon this implied term. That is particularly so when the tenant is liable for all repairs, but is relieved from that liability in respect of insured risks to be insured by the landlord, the premium for which is paid by the tenant. The tenant's payment of the insurance premium to relieve it of liability for repair following insured risks would be rendered meaningless if the tenant became liable under this implied term. The tenant would be liable for the landlord's loss arising from the landlord's own breach of the lease obligations. In my view, the common law obligation on the tenant to exercise reasonable care is impliedly excluded, in respect of acts or failures to act which give rise to the need for repairs.

[36] In any event, there is no fair notice of any alleged breach of a duty to exercise reasonable care. The pleadings refer to the pursuer having failed to take adequate measures to prevent or deter damage, destruction or theft during the occurrence of any break-in. Fair notice is required of what measures ought to have been taken and why they would have prevented the damage. The reference in answer 9 to what is "believed and averred" in relation to breach of duty is unsupported by any proper basis elsewhere in the averments.

[37] The reference in submissions for the defender to the insurer perhaps wishing to rely upon a right of subrogation to seek recovery from the pursuer is of no relevance for present purposes. In any event, it does not in my view arise where the tenant has paid for the insurance cover and is contractually entitled to rely upon the landlord having performed its insurance obligations. If the insurer wished to avoid liability for damage caused by a failure to exercise reasonable care on the part of the tenant, the wording of the policy could no doubt have sought to achieve that end, although that would be rather unlikely.

Written intimation

[38] As noted earlier, the defender makes reference in its averments in relation to intimation to clause 9.11, which provides that "Any notice under this Lease shall be in writing."

Decision

[39] For the reasons given above, intimation is not the same as notice and accordingly the defender's averments on clause 9.11 are irrelevant.

The defender's purchase of the subjects

[40] The defender avers (in answer 10):

> "Further explained and averred that the defender acquired the landlord's interest in the Premises on the basis that the pursuer had continued to pay the rent and service charge prior to its acquisition, and would continue to do so thereafter. Further explained and averred that, in the circumstances averred, it would be inequitable to compel the defender to repay any rent and service charge already paid by reference to the Leases."

Counsel for the pursuer submitted that while equitable factors can be relevant to unjustified enrichment, the mere fact that the pursuer had continued to pay the rent and service charge could not make it inequitable that it be repaid. Mistakenly paying sums was not a basis for excluding recovery.

[41] On behalf of the defender, it was submitted that a party who acquires a commercial interest is buying it for a financial return. In this case that was payment of rent and fulfilment of the tenant's other obligations. An unjustified enrichment claim is fact-sensitive and relevant considerations were set out.

Decision

[42] I accept the submission for the defender that unjustified enrichment is an issue that should be decided after hearing evidence on the factual circumstances. This argument for the pursuer, seeking exclusion of the averments from probation, is therefore rejected.

The defender's averments about the pursuer's fixtures and fittings

[43] As noted earlier, the defender has averments about the licenses for works. Counsel for the pursuer argued that there was no notice that the defender would take the line that these additions did not form part of the premises. If the defender wished to establish that certain fixtures and fittings were not part of the premises, its pleadings should identify those items. There was no basis for the defender leading evidence on such matters.

[44] Counsel for the defender referred to averments (in answer 1) about the landlord having no obligation to insure additional or tenant's fixtures and fittings/plant and equipment unless and until the conditions of clauses 8.1.1(i) and/or clause 8.1.1(iii)(b) are

met. It is also averred that such fixtures and fittings do not form part of the premises in any event, under reference to clause 1.12.

Decision

[45] Having regard to the defender's averments, there is no merit in the assertion for the pursuer of a lack of fair notice on this matter.

Disposal

[46] I shall fix a by-order hearing to deal with further procedure and to determine the specific averments which require to be excluded from probation as a consequence of my findings above. In the meantime, I reserve all questions of expenses.