SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2021] SC PER 38

COMMERCIAL ACTION

PER-CA25-20

NOTE RE DEBATE ON 26 FEBRUARY 2021 BY SHERIFF D HAMILTON

in causa

CASTLE WATER LIMITED

Pursuer

against

KEMBLE ESTATES LIMITED

Defender

Pursuer: Mr Sinclair; Addleshaw Goddard LLP
Defender: Mr Brown; Thorntons Law LLP

Perth 23 April 2021

The sheriff, having heard parties' procurators by WebEx event, Grants decree for payment by the defender to the pursuer of the sum of SEVENTEEN THOUSAND AND EIGHTY ONE POUNDS NINETY THREE PENCE (£17,081.93) STERLING together with interest thereon at the rate of eight *per centum per annum* from 15 September 2020 until payment; Having heard parties' procurators on the pursuer's motion (number 7/1 of process) Grants part 1 of said motion and in terms thereof; Finds the defender liable to the pursuer in the expenses of the cause as may be taxed; Allows an account thereof to be given in and remits same, when lodged, to the auditor of Court to tax and to report; In respect of part 2 of said motion; Grants the pursuer an increase in the charges to be allowed at taxation in respect of work carried out by the pursuer's solicitor in terms of this interlocutor of 50% in terms of Rule 5.2(6) (a) and (e) of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019.

NOTE:

[1] The Water Services etc (Scotland) Act 2005 (the 2005 Act) makes provision for, *inter alia*, the granting of licences to others to provide certain water and sewerage services. The pursuer is such a licensed provider. A licensed provider is obliged to provide certain services in terms of their licence. They have limited power to withhold services. A licensed provider will have obligations to the water authority to pay certain charges, referred to as "wholesale charges". Those charges are due whether or not the licensed provider recovers charges it makes on those who are supplied services. Certain services can be disconnected with the consent of the water authority (section 18 of the 2005 Act), but some services, such as sewerage, cannot be disconnected.

[2] A licensed provider can find itself in a situation whereby it has an obligation to pay wholesale charges to the water authority, but has difficulty in recovering those charges from its customer. It is a normal commercial risk when a business contracts for goods and services which it hopes to onward supply, that the end customer defaults on payment, thereby leaving the business in some difficulties. The difficulty for the licensed provider in terms of the 2005 Act is that it has no control over to whom it supplies its services and has no power to withhold services. That is the background to this case.

[3] The 2005 Act makes provision for the supply of water and sewerage to a premises where the occupier of the premises has not made arrangements with a provider for the supply of water or sewerage services or both. In such circumstances, the parties are, in terms of section 20A of the 2005 Act, subject to the Deemed Contract Scheme as regards the licensed provider's provision of water and waste services to the premises. The parties to the deemed contract are termed the "relevant parties". The terms and conditions of the Deemed

Contract Scheme in terms of section 20B of the 2005 Act, are incorporated into the parties' arrangement as if they had been agreed by them. In terms of the scheme the "customer" is the "occupier of particular eligible premises or if the premises are unoccupied, the owner of the premises". This mirrors section 20A(8)(b) of the 2005 Act relating to Deemed Contracts which states;

> "the reference to the occupier of premises are, if the premises are unoccupied, to be construed as references to the owner of the premises"

[4] In terms of the Deemed Contract Scheme, the liability for payment of water and waste services to the premises therefore falls primarily on its occupier as one of the relevant parties. In circumstances where the premises are unoccupied the liability for payment of water and waste services falls to its owner.

[5] The defender's position is that as the premises are leased, and as the lease has not been terminated, the tenant is the only one entitled to have possession. Its position is that if a party has a right to possession, no one else can occupy the premises, and the premises are effectively occupied by the tenant. I was referred by the defender to the Institutional writers and to a number of authorities on the meaning of the word "occupied". As I understand the defender's position, in short, it was that the terms "possession" and "occupation" were used interchangeably in Scots law. Without the right to possession there could not be occupation.

[6] The dispute in this case surrounds the meaning of the terms, "occupier", "unoccupied" and "acquired" as used in the 2015 Act. The defender submitted that the starting point in interpreting legislation is that legislation should be construed according to the intention expressed in the language used - *Craies on Legislation* paragraph 17.1.1, and that courts should give the words used their natural meaning - *Craies*, paragraph 18.1.2. I agree. As was noted however, the court is entitled to have regard to the statute as a whole to

determine which meaning was intended by the legislature - *Craies*, paragraph 20.1.20 and *Colquhoun* v *Brooks* (1889) 14 App Cas 493, per Lord Herschell at 506.

[7] This is relevant where there is confusion as to the meaning of the words. Where there is an ambiguity in the wording of a statute and one interpretation would produce a fair and reasonable result, and the other an absurd result, the former is to be preferred - *Craies*, paragraph 17.1.8 and Finnermore J, *Holmes* v *Bradfield* RDC [1949] 2 KB 1 at page 7, where he said:

> "… the mere fact that the results of applying a statute may be unjust or even absurd does not entitle this court to refuse to put it into operation. It is, however, common practice that if there are two reasonable interpretations … of the words in an Act, the courts adopt that which is just, reasonable and sensible rather than one which is, or appears to them to be, none of those things."

[8] Both parties submitted that the other party's interpretation of the 2005 Act would create an absurdity. Considering that for the moment, it is to be assumed that Parliament, in passing legislation, does not intend to create an absurdity.

[9] The pursuer's position is that it has no control over to whom it is obliged to supply services. If, the pursuer submits, the defender's interpretation of the 2005 Act was accepted that would mean that in a situation such as in this case, where a tenant is in liquidation, the pursuer cannot possibly recover the charges for the services it provides. That is often the case in commercial transactions where a party is in liquidation. The pursuer however has no control over to whom it provides services. If however the defender chooses to do nothing with regard to the lease with a tenant in liquidation, that difficulty for the pursuer could last for many years, depending on the length of the lease. An owner/landlord on the other hand would benefit from his own inaction in refusing say to irritate a lease, in that he, even as owner, would not be liable for the charges. That, says the pursuer, does not make commercial sense and the situation is easily open to abuse.

[10] According to the pursuer, the pursuer's interpretation of the Act on the other hand, means that there is in place a system whereby a licensed service provider, who is subject to a deemed contract with a party it has no knowledge of, is not caught up in a lengthy liability not of its own making. Payment can be obtained from an easily identifiable party; the owner.

[11] Applying the pursuer's interpretation, the owner on the other hand (who is the only party with control over whom he contracts with) has a remedy in his own hands. He can contract so that he can take back control of the property and do with it as he wishes. That it might seem makes commercial sense. There is no injustice in that, other than the normal injustice of consensually contracting with a party who subsequently turns out to be a risk and a liability.

[12] It seems to me that the defender's interpretation of the 2005 Act gives no protection to the pursuer and, further, provides no risk for the defender.

[13] The defender however submits that it is for the licensed provider when contracting for the licence to take steps to protect his interests in the event of default by an occupier. I think it unlikely that the pursuer when entering into a licensing agreement is somehow on the same commercial footing when dealing with the water authority as an owner might be when contracting with a proposed tenant.

[14] The pursuer's interpretation provides some safety to the pursuer in a situation where it has a statutory obligation to provide services. The defender will have been able to contract with his tenant to provide it with a possible remedy in the event of default by the particular tenant it has chosen to contract with.

[15] As the pursuer stated, the pursuer is a licensed provider of water services. Licensed providers ensure that water and sewerage services provided to non-domestic premises are

billed and paid for. The pursuer acquires these services from Scottish Water. Unless premises are disconnected, the licenced provider cannot escape the liability to Scottish Water. The wholesale charges are set under a charges scheme approved by the Water Industry Commission for Scotland. The specific wording used in the legislation, which refers to the "occupier" being liable for charges failing which the "owner", is in keeping with the intention to avoid a scenario whereby the licensed provider needs to absorb water and sewerage charges because properties are unoccupied as a result of a previous occupier being unable to meet their financial obligations. I agree with the pursuer that that scenario would undermine the purpose of the legislation.

[16] The defender's interpretation envisages a scenario whereby the owner, as landlord, is able to avoid liability for "empty" premises at the expense of the licensed provider.

[17] If there is any conflict in the wording of the 2005 Act, then the interpretation favoured by the pursuer would, it seems to me, produce a fair and reasonable result, whereas that favoured by the defender, whilst not perhaps providing an absurd result, certainly would create an unfair result.

[18] The defender sought refuge for its interpretation of the 2005 Act in, amongst other resources, dictionary definitions. Where there was more than one possible meaning, the defender sought to persuade me that the meaning which supported its submissions was one which I should adopt.

[19] As stated in *Craies on Legislation* at 27.1.2

> "Since, as has been said, the starting point for statutory construction is to give each word its natural meaning, a dictionary is likely to be a useful source of reference …
>
> But dictionaries are compiled by persons using evidence from colloquial and published usage of various kinds, which may result in their attributing to a word a meaning that is not apt in any legal context, or in any legislative context or perhaps, in a specific legislative context. The judges will trust their own legal intuition as to

> the most natural meaning of an expression, whether or not a technical legal expression, in the context of an Act, more than they will trust the opinion of the editor of a dictionary as to the "average" meaning of the expressions in general literature."

[20] The defender's interpretation of the 2005 Act relied heavily on the principles of rights and obligations of parties to a lease. The defender acknowledged that an "important rule for approaching the construction of a piece of legislation is to look at the provision concerned in the context of the legislation as a whole" (*Craies on Legislation* 20.1.20). I feel the defender did not follow that rule and relied too heavily on dictionary definitions and long standing principles regarding leases, and in respect of which the 2005 Act appears to have no concern. At no point does the 2005 Act refer to a person's property rights, other than ownership. It makes no mention of the sort of right relied upon by the defender, i.e. the right of possession. It simply uses the terms "owner" and "occupier". I agree with the pursuer that this concept of owner and occupier is simple and straightforward. The pursuer referred to the case of *Ansa Logistics Ltd* v *Towerbeg Ltd* [2012] EWHC 3651 (Ch): which provided;

> "41. Thus possession and occupation are separate legal concepts, although the distinction is "even to those experienced in property law, often rather elusive and hard to grasp": per Neuberger LJ, as he then was, in *Akici* v *L.R. Butlin Ltd* [2005] EWCA Civ 1296; [2006] 1 WLR 292. It is clear, however, that for the purposes of a covenant such as that in the present case, the parting with possession must be complete. The acid test for possession, as contrasted with mere occupation, lies in the right of the person in occupation to exclude others, including the tenant, from the premises. In *Clarence House Limited* v *National Westminster Bank plc* [2010] 1 WLR 1216 at 1230, Ward LJ, with whom Jacob LJ and Warren J agreed said:
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> > 'The hallmark of the right to possession is the right to exclude all others from the property in question. That is the ordinary and normal sense of the word and that is the meaning which it should be given in this covenant.'"

[21] The defender cautioned me against relying on English authorities, and submitted that the concepts of occupation and possession were interchangeable in Scots Law. I comment no more than to say the English authority simply lends support to the position the

pursuer has adopted in interpreting the Law of Scotland, and I do not find its interpretation runs counter to any principles of Scots Law. I was not referred to any recent Scottish authorities to suggest that the terms "possession" and "occupation" were interchangeable in the manner submitted by the defender.

[22] I was referred to the case of *P&O Property Holdings Limited* v *City of Glasgow Council* 2000 SLT 444 as authority for the defender's position. That case held that during the subsistence of a lease, entitlement to possession rested with the tenant to the exclusion of the landlord. That case was concerned with the Local Government (Scotland) Act 1966 (the 1966 Act) which provides for liability for rates of unoccupied property. That Act provides, in relation to liability for unoccupied premises, at section 24(3);

> "A person entitled to possession of lands and heritages which fall within a class prescribed by regulations shall be liable to pay a rate … which would have been payable if such lands and heritages had been occupied."

[23] The 1966 Act was perhaps more concerned with rights in property, as liability attached to a person "entitled" to possession. The defender founded on the decision in that case, that it was the person entitled to possession of lands that was liable. The person "entitled" therefore could not (where a lease was in existence) be the landlord. Having said that, I can see no difference in the use and meaning of the term "unoccupied" in the 1966 and 2005 Acts. Both Acts deal with the liability for certain public services, particularly in circumstances when the premises are vacant. This is expressed as the premises being unoccupied, and as shown in *P&O Property Holdings Limited* that can be where leased premises are lying empty.

[24] The case of *P&O Property Holdings Limited* dealt with the issue of who was responsible for the payment of rates. In terms of the 1966 Act, liability attached to the person who was entitled to possession. If there was a lease in place, then that person was the

tenant. The issue of the premises being unoccupied does not appear to have been in dispute. The issue on who was liable only arose because it appears to have been accepted that by the tenant going into liquidation and leaving the premises, the premises were therefore unoccupied. That is not consistent with the defender's position that if there is a lease in place with someone having a right to possession, then the premises cannot be unoccupied.

[25] As I have said, I have found the case of *P&O Property Holdings Limited* to be of little help to the defender's position, as the case proceeds on the basis that the premises (which were encumbered with a tenant in liquidation) were indeed unoccupied. It is of interest that the 2005 Act did not follow the wording of the 1966 Act in providing that liability fell to "a person entitled to possession". The 2005 Act adopted a different approach and stated that liability fell to the owner. In both Acts, liability fell to another when the premises became unoccupied. "Unoccupied" seems to have the same meaning in both Acts. It has nothing to do with entitlement to possession. The term "entitlement to possession" is relevant in respect of liability for rates when a property is unoccupied under the 1966 Act. It does not assist in defining "unoccupied".

[26] The defender submitted that if there was a lacuna in the 2005 Act, it was not for the Court to resolve that; it was for Parliament. I do not consider there is any lacuna in the 2005 Act. It could be thought that the case of *P&O Property Holdings Limited* showed an apparent lacuna in the 1966 Act. It showed circumstances where there could be a situation where a local government could not recover its charges from an impecunious tenant so long as a lease remained in place. It might be thought that Parliament recognised such a difficulty when it introduced the 2005 Act, as the 2005 Act is worded quite differently. It is not for me to speculate however. Quite simply, both Acts place primary liability for services on the occupier. The 2005 Act however specifically provides that if the premises are

unoccupied, the liability falls to the owner. The Act avoids any mention of persons entitled to possession. It could be said the 2005 Act is much more straightforward than the 1966 Act. There is no need to consider entitlement to possession, and it is easy to identify an owner. One does not require to consider leases or licenses etc. It seems to me the 2005 Act is much more straightforward.

[27] The 2005 Act clearly sets out who may be liable for the relevant charges. When acquiring the premises as occupier (e.g. as a tenant) that occupier becomes liable for the charges. The 2005 Act does not follow the wording of the 1966 Act. The 2005 Act does not say at what point someone acquires the right to possess. It specifically states "the occupier". To me that means someone who takes up occupation or is in occupation, rather than someone who simply has a right to possess. Whilst there may be joint and several liability for failure to notify of changes in occupation, only one party at a time is liable in terms of the Act for the relevant charges. In terms of section 20A (8) (b) the owner's liability in terms of the Act only comes into being when the premises are unoccupied. That is simple and straightforward.

[28] It is difficult to reconcile this statutory provision with the defender's interpretation of "unoccupied". The defender's argument, as I understand it, is that if someone is entitled to possession (e.g. a tenant), the premises cannot be unoccupied. Yet (section 24(3) of the 1966 Act) provides that such a person (i.e. someone entitled to possession) should (where premises are unoccupied – as per section 24 (1) and (2)) pay a charge (at a reduced rate) as if the premises were occupied. It is clear the Act intends that premises can be unoccupied notwithstanding someone has an entitlement to occupy.

[29] If there is any doubt as to what is meant by "unoccupied", then one can look for support to section 20C of the 2005 Act, which provides that notification of occupancy is to be

given in certain circumstances, one of those being where there is a change of occupancy because the premises have become "vacant". The emphasis therefore seems to be on the existence of a physical presence in the premises. In looking at what is meant by "vacant" the defender again sought refuge in the dictionary which included the wording "unoccupied". It also said it meant "not in use". Whilst a dictionary search might produce a number of possible meanings for "vacant", a common meaning is that something is empty or not in use. That definition is consistent with "unoccupied" as set out in the Act. That definition is also consistent with what must be the intention of the 2005 Act, to aid in the recovery of charges for empty property or where the occupier has deserted the premises.

[30] I find the pursuer's argument, that the word "because" ties the words "change in occupancy" to the words "have fallen vacant" in section 20C(2) of the 2005 Act, to be attractive. Plainly this means that if premises have "fallen vacant" that means there has been a change in occupancy (as that concept should be understood in terms of the 2005 Act). There need be no change in the person entitled to occupy or indeed in the title itself, e.g. the lease does not require to be irritated. With heritable property, someone is always entitled to possession, be that the owner or perhaps a tenant. To accept the defender's argument (that if someone is entitled to possession the premises were classed as occupied) would mean that premises could never be unoccupied, as someone would always have the entitlement to possess.

[31] It was submitted that as the word "acquired" was used in the legislation, it must have a role. Clearly where unoccupied premises change ownership, the new owner would only be liable from the date he "acquired" ownership. There is support for that in paragraph 17 of the Deemed Contract Scheme. Paragraph 17 does not sit well with the defender's interpretation of "acquired". Paragraph 17 provides;

> "17. … For the avoidance of doubt, for the purpose of this paragraph 17, (a) 'acquired' by **an occupier shall mean where an occupier takes occupation of a premises** or where an occupied premises which was previously disconnected is reconnected, and (b) 'acquired' by an owner shall mean where an owner takes ownership of a vacant premises, or where **a premises which the owner already owns becomes vacant by virtue of an occupier ending their occupation of such premises where no new occupier takes occupation** or where a vacant premises which was previously disconnected is reconnected …"

[32] It was submitted by the defender that I could not use paragraph 17 as to an aid to interpretation of the Act, as only Part B of the Scheme had been incorporated into the Act. Without reaching a conclusion on that, I can see no difficulty in looking at the scheme to see if it lends support to a particular and reasonable interpretation of the Act. Paragraph 17 deals comprehensibly with the term "acquired". It is entirely consistent with the pursuer's interpretation of when an owner becomes liable in terms of the 2005 Act. It is entirely at odds with the defender's more strained interpretation of the term "acquired".

[33] I do not see any difficulty with the use of the word "acquired" in the Act when referring to an owner if a common sense approach is adopted. Section 20A(6) provides that the "arrangements" (for the provision of services, which would include liability for payment) are effective;

> "(6) … as from the later of—
>
> (a) the day on which the premises began to receive those services,
> (b) the day on which the occupier acquired the premises,
> (c) the day on which section 32 of the Water Resources (Scotland) Act 2013 came into force."

[34] The owner of premises is the heritable proprietor. There can be no doubt that he will have "acquired" ownership when he took title to the property. The Act provides for an occupier acquiring the premises; "(b) the day on which the occupier acquired the premises,". In cases where the relevant person concerned is not the owner, this would be the point at which they take physical occupation of the premises. In cases where section 20A(8)(b) of the

2005 Act applies, in that the relevant person is an owner, this would be the point at which they either take title to the premises or where premises previously occupied by another party become unoccupied. I am satisfied that the defender's definition of "acquired" stretches the English language when applied to ownership of heritable property to fit with the defender's interpretation of "unoccupied". I prefer the plain, ordinary use of the word when applied to the time when an owner obtains heritable property, i.e. when title is transferred into his name. There is no difficulty in applying that interpretation. An owner will be liable from the date he took title in his name, other than for periods when someone else is in occupation.

[35] The defender states that in dealing with the issue before the Court it is essential to have in mind what the concept of a lease involves. The defender may very well be right in what it says about the competing interests in leases, and the owner's lack of right to possession, and indeed the pursuer appears in the main to accept the defender's view on the principles of leases. Not only is a lease something which the owner contracted for but it is also something which the owner has a remedy for when there is a difficulty with the lease. I do not consider however that that is relevant to the issue before this Court.

[36] The defender states that so long as a lease is in place the owner is restrained from using the subjects as his own. That is a matter of contract, and where the tenant physically departs from the property, then in normal commercial agreements the tenant is likely to be in breach of the lease and any restraint of use by the landlord is likely to be caused by self-restraint.

[37] The defender submitted that the Court should be cautious about distinguishing "possession" and "occupation", as suggested by the pursuer. But that seems to be exactly what the 1966 Act did when providing for liability for rates. It provided that once a state of

occupation (i.e. unoccupied) had been reached, the focus was switched to possession, i.e. to the person who was entitled to possess.

[38] The defender submitted that if the intention of the legislature had merely been that premises become unoccupied when they become physically empty, there would have been no requirement for the owner to acquire the premises under section 20A(6)(b) before the liability to pay the water and sewerage charges is triggered. In my view, it is the position however that if the intention of the legislature had been that premises become "unoccupied" when they become physically empty then, without the legislation providing that liability for an owner commences only when he acquires the premises, it could be argued that a new owner who acquires premises which are subject to a lease, but are physically empty, becomes liable for the whole of the period the subjects were vacant, rather than for simply the period of vacancy during his ownership.

[39] Whilst there is clearly a dispute between the parties as to how they interpret the wording of the 2005 Act, I am satisfied that there is no ambiguity in the wording of the legislation. Giving the terms used in the Act their ordinary and natural meaning as explained above, produces, as might be expected, a fair and reasonable result. There is no need to delve into the writings of the Institutional writers or to various alternative dictionary definitions of particular words. Not only is there no confusion that makes that necessary, to do so and to interpret matters as the defender does, would in fact, in my view, lead to an unfair, and possibly bordering on an absurd, result in a modern commercial world.

[40] The premises are currently vacant. I am satisfied that notwithstanding the premises are subject to a lease, they are currently unoccupied for the purposes of the 2005 Act. In those circumstances, the premises being unoccupied, the defender as owner of the premises,

is liable to the pursuer for the outstanding water and waste charges during the period of the defender's ownership for the period when the premises were vacant, i.e. "unoccupied" as I have found the term to mean.