OUTER HOUSE, COURT OF SESSION

[2023] CSOH 15

CA89/21

OPINION OF LORD BRAID

In the cause

WILLIAM DALE HILL AND ROWANMOOR TRUSTEES LIMITED AS TRUSTEES FOR THE HFD MANAGEMENT SERVICES LLP FAMILY PENSION TRUST

Pursuers

against

APLEONA HSG LIMITED

Defender

Pursuers: Barne KC; Pinsent Masons LLP
Defender: G Walker KC, Massaro; Curle Stewart Limited

21 February 2023

Introduction

[1] The pursuers and defender were respectively landlords and tenant of heritable property owned by the pursuers at Hamilton International Park, Blantyre, by virtue of a lease which ended on 25 September 2020 (the material date). Clause 4 of the lease, read with Part V of the Schedule, imposed various repair and maintenance obligations on the defender during the currency of the lease. It also imposed further obligations on the defender at the expiry of the lease, including an obligation to remove all alterations and additions made to the property and to reinstate it to its condition before the carrying out of alterations.

[2] The pursuers aver that the defender breached these obligations, causing loss. They served a schedule of dilapidations on the defender following the expiry of the lease. A Scott Schedule has been lodged in process identifying (a) the wants of repair which the pursuers aver existed at the material date; (b) the works said to be necessary to remedy those wants of repair; and (c) the cost of so doing. The schedule has been marked up by the defender's surveyor, identifying points of agreement and disagreement (mainly the latter).

[3] The action was raised as a commercial action as long ago as July 2021. Subsequently the pursuer carried out some of the repair work identified in the schedule of dilapidations (referred to in the pleadings as the Restricted Works), at a cost said to be £125,605.21. The pursuers aver that the cost of the remaining outstanding works is £155,637.49, both these sums being exclusive of VAT. Those are the sums now sued for.

[4] A number of legal issues arise for decision, including what is the appropriate measure of any loss suffered by the pursuers. However, when the action was relatively young and still proceeding at a lively pace, the parties agreed at a procedural hearing in November 2021 that it may be expedient to "hive off", to a person of skill, the factual issues arising out of the Scott Schedule, including the extent to which wants of repair existed at the material date, and the remedial costs. Subsequently, they agreed that a suitable person of skill would be Mr Joseph Dobson, a surveyor (the reporter). The advantages of this procedure appeared to be that it would avoid the need for spending days of expensive court time trawling through the Scott Schedule, debating such matters as whether (to take two random examples) the defender had installed floor coverings of "lesser quality" to the ground and first floor office accommodation (item 1.06), and whether window handles and frames were grubby (item 8.02). Following submission of the report, the court could then focus on the high level legal issues in light of the established facts. While querying

(although with the benefit of hindsight, perhaps with insufficient rigour) the extent to which anyone, no matter how skilled, could identify, in 2022, what the condition of a building was in September 2020, particularly in relation to complaints such as grubbiness, I recognised that this was a problem which might arise whichever mode of inquiry was adopted, and so I continued the case to allow parties to agree the terms of a joint remit, which was eventually achieved by March 2022. By interlocutor of 9 March 2022 I remitted to the reporter to investigate and report on the matters detailed in the joint remit, and, with what turned out to be unfounded optimism, sisted the case for eight weeks for the remit to be implemented.

[5] Unfortunately, the remit has not turned out to be the speedy panacea that the court had envisaged. A regrettable delay in the reporter being instructed (which ought to have been done immediately, but was not done until 4 May 2022, the date of expiry of the sist) followed by an equally regrettable delay in agreeing the reporter's fee (which one might think could have been done in the three or so months it took to agree the terms of the remit) resulted in the reporter, due to other commitments, being unable to complete his draft report until the end of November 2022. No blame attaches to him for that. However, to compound that delay, the draft report, rather than simplifying matters, has fanned the flames of the dispute. The parties are now also at odds over whether the reporter has exhausted his remit (or otherwise failed to comply with it) and whether the case should be remitted back to him for further enquiry.

[6] The case called before me for argument on that issue. In a nutshell, the point of controversy between the parties arises out of the reporter's having found that there was insufficient material before him to substantiate a large part of the pursuer's claim. The pursuers contend that rather than find a large part of the claim, in effect, not proven the reporter ought to have adopted a more inquisitorial role, by exercising his power under the

joint remit to seek further evidence. The defender retorts that the reporter was under no such duty and that it was entirely open to him to adopt the course that he did.

The joint remit

[7] Clause 5 of the Joint Remit required the reporter to address and report on the following, insofar as not already agreed by the parties:

(i) Whether the individual wants of repair identified in the Scott Schedule (a) presently exist; and (b) existed as at 25 September 2020;

(ii) What works, if any, (a) are reasonably required to remedy those wants of repair identified in response to question (i) that remain outstanding, and (b) were reasonably required to remedy those wants of repair that existed as at 25 September 2020 but have subsequently been remediated (the "Restricted Works");

(iii) In light of the answers to question (ii), (a) whether the costs of effecting works sued for by the pursuers are or, in relation to the Restricted Works, were reasonable and, (b) if not, what would be a reasonable cost?

(iv) Whether or not three months is a reasonable period of time within which to complete the Outstanding Works [which, despite the capitalisation, was not a defined term] and, if not, what timeframe would be reasonable; and

(v) What are the reasonable and proper costs, charges and expenses incurred by the pursuers in respect of surveyors' fees covered by paragraph 20 of Part V of the schedule to the lease.

[8] Clause 6 required the reporter to issue his report in draft to the parties, who then had fourteen days to intimate any objection concerning any issue of law arising from the terms of

the report, in which event clause 11 was to apply. That clause required the reporter, in those circumstances, to apply to the court for a direction in relation to any question of law raised in such an objection, before finalising his report.

[9] Clause 7, headed "Primary Documentation", required the reporter to have regard to (i) the lease; (ii) the pleadings; (iii) the productions lodged in process for the parties; (iv) the Scott Schedule; and (iv) "such further submissions/representations/evidence as may be made to the reporter by the parties, the arrangements for the provision of such further material being a matter for the Reporter to determine." Insofar as this clause required the reporter to have regard to productions, it is noteworthy that by interlocutor of 19 January 2022, the parties had been appointed (that is, required) to lodge in process by 2 February 2022 such documents as they wished to be in process for the reporter to consider.

[10] Clause 8 is of some importance, and I will quote it in full insofar as material:

> "8. In order that the Reporter has sufficient material to allow him to reach an opinion, it is open to him to do some or all of the following, as he reasonably considers proper:
>
> (i) to carry out an inspection or inspections of the Property;
>
> (ii) to interview any individual that he considers may be able to provide information which will assist him in reaching an opinion on the matters remitted to him …; and
>
> (iii) to ask the parties to produce such other evidence as he may consider available or appropriate and to have regard to the same when forming his view."

[11] Clause 9 required the report to be in writing and to include reasons, and finally, in clause 10 the parties acknowledged that, in respect of the matters covered, the remit was in place of probation by the parties of their respective averments.

[12] Before embarking upon a critique of the draft report and the pursuers' objections to it, it is worth reflecting on the terms of the joint remit in the context of what it is that the

pursuers must prove, and the consequences which flow from that. There are three essential facts they must prove: which wants of repair existed at the expiry of the lease, that is, on the material date; what remedial works reasonably required (or still require) to be carried out to remedy those wants; and what are (or were) the reasonable costs of carrying out those works. While the joint remit also directed the reporter to consider which wants of repair presently exist, and the cost of repairing them, that is beside the point. It may be, depending on the nature of a want of repair, that an inference could be drawn one way or the other as to whether it existed on the material date, but the presence today of a want of repair has no other significance. To hark back to the grubbiness example[1], window handles could have become grubby between September 2020 and November 2022. Putting all of that another way, unless a particular want of repair was found to have existed at the material date, the costs of remedying it are irrelevant. It follows that further inquiry into such costs would be futile. When this is appreciated, much of the pursuer's objection to the draft report flies off. With hindsight, the terms of the joint remit should have been more focussed, rather than requiring the reporter to consider the reasonableness of costs which have no relevance to the action.

The draft report

[13] The reporter was sent, and told parties that he had read, the primary documentation, which included all the documentation in process by the time of his instruction. He must be assumed to have understood the terms of the remit, and the extent of his powers. He made

[1] Lest it be thought that this item is *de minimis*, the total cost claimed for deep cleaning is in excess of £1,500.

certain, admittedly relatively basic, enquiries of the parties. He carried out two inspections of the property and commented on each of the alleged wants of repair. Although in the text of his report he has provided a commentary, his actual findings are set out in two appendices annexed to his report. In appendix 1, which is a schedule based upon the Scott Schedule, save to the extent discussed below at paragraph [28], he expressed an opinion on each want of repair claimed for. As he has explained at paragraph 4.02 of the report, the comments in column two of that schedule were based on site observations and reflected his findings during an inspection on 11 November 2022. In column three he has answered question 5(ii), expressing his opinion (or as he put it, a statement) as to whether the wants of repair existed at the material date. As he has explained at paragraph 4.03 this was based on information provided by the parties by the various productions, and there were instances (in fact, a large number) where no information or evidence existed to enable a statement to be made that the want of repair in question existed. In column four, he has provided comments as to whether remedial work was required to remedy wants of repair which remained outstanding. Column five was devoted to comments on the Restricted Works. Appendix 1 therefore tells us which wants of repair the reporter has found existed at the material date.

[14] Appendix 2, as the reporter explained at 4.24, included a copy of the Scott Schedule in which the reporter has included a colour categorisation of costs. In green are those which he considered reasonable, amounting to £22,479.51; those in amber are "costs for items which require further information" amounting to £199,933.41; and those in red are costs for items which the reporter considered were not required, totalling £43,136.30. Probably due to the fact that, as discussed above, the terms of the remit required the reporter to consider the costs of repair of items which presently exist, irrespective of whether they existed at the

material date, it is not a quick or easy exercise to identify which of the items appearing in each colour relate to wants of repair which the reporter found existed at the material date, but many of them do not. In particular, many of the orange items are items which the pursuer has failed to prove to the reporter's satisfaction existed at the material date. To that extent, it is fruitless to ask whether further inquiries might have elicited further information about those costs. In some other instances, the reporter has also expressed an opinion on matters which had already been agreed by the parties and, as such, fell outwith the terms of the remit.

[15] The report also contains a commentary, parts of which I have quoted above, other parts of which are more discursive and, I confess, not altogether easy to follow. The reporter discusses various figures to do with the cost of the Restricted Works at 4.07 to 4.20 before commenting, at 4.21, that the information provided on costs is confusing and does not correlate. At 4.22, he comments on question 5(iii) that without a detailed scope of work, quantities and drawings, he is not able to fully advise if costs were reasonable, or what a reasonable cost would be.

[16] At 4.26, the reporter has considered question 5(iv), concerning the extent of the outstanding works. He has observed that certain items require to be clarified by the provision of further information, before concluding that until there is an agreed and defined scope of work the duration for procurement, mobilisation and site implementation are unable to be determined.

[17] Finally, at 4.27, the reporter has considered the question in clause 5(v) of the remit. Here, he has done no more than narrate the terms of clause 20. He has not expressed an opinion one way or the other as to whether the surveyor's fees claimed were reasonable or not.

The pursuers' Letter of Objection

[18] In their Letter of Objection to the reporter dated 14 December 2022, the pursuers' agents set out a number of alleged errors in the draft report. These were to an extent repetitive but, in summary, the pursuers' objections (insofar as still insisted in) are, first, that the reporter has not complied with the remit, in particular by not utilising his powers under clause 8 to seek further evidence where he considered that the information with which he had been provided was insufficient to enable him to form an opinion; and, second, that he has failed to reach a final determination on some or all of the matters remitted to him. In essence, the pursuers' complaint was that it was not open to the reporter to reach a view that the evidence adduced by them was insufficient, but that he should have made further inquiries of his own. Following receipt of the Letter of Objection, the reporter applied to the court for directions, all pursuant to clause 6 of the remit.

The law

[19] The parties were not entirely at one as to the extent to which cases concerning the jurisdiction of an adjudicator (eg, *Diamond* v *PJW Enterprises Ltd* 2004 SC 430) or an expert appointed by parties (eg, *Eastern Motor Co Ltd* v *Grassick* 2021 SLT 340; 2022 SC 100) were applicable to the case of a court-appointed person of skill executing a remit. In summary, an error by an adjudicator or expert is challengeable only where it is *ultra vires* – for example, asking the wrong question – but not where it is an *intra vires* error – asking the correct question but arriving at the wrong answer. Senior counsel for the defender submitted that there was no difference between an adjudicator, an expert and a person of skill and that the same approach should be taken to all three. Senior counsel for the pursuers agreed that

there were certain analogies but submitted that different regimes applied, and that in the present instance the court should look no further than *BAM Buchanan Ltd* v *Arcadia Group Ltd* 013 Hous LR 42, in which Lord Hodge clearly set out the scope of the court's jurisdiction where questions of fact had been remitted to a skilled person. The latter case might suggest there are some differences in the court's treatment of errors made by a person of skill, on the one hand, and by an adjudicator or expert on the other, but since it is agreed that the court always has jurisdiction to remit a case back to a person of skill where there has been a failure to exhaust or to comply with a joint remit, and since the principal question before me is whether there has been such a failure, I do not consider it necessary to explore what these might be. Suffice to say that the following uncontroversial propositions can be derived from the authorities:

(i) Parties are bound by the terms of the joint remit, which prescribe the procedure to be followed, and the questions to be addressed by the person of skill: *Williams* v *Cleveland and Highland Holdings Ltd* 1993 SLT 398, Lord Penrose at 401B;

(ii) Where parties have remitted to a person of skill to determine a question of fact, and that remit has been performed, the court will not allow another mode of proof: *BAM Buchanan*, at 43. (Here of course, the parties have expressly agreed to renounce probation in relation to the questions posed.) It follows that the reporter's decision on matters of fact is final.

(iii) The court has jurisdiction to order further enquiry where a reporter has failed to exhaust or to comply with the terms of the remit: *BAM Buchanan,* at 43.

Submissions for the pursuer

[20] Developing the points made in the Letter of Objection, senior counsel for the pursuer submitted that the reporter had an inquisitorial function, such that if he found himself unable to answer a particular question he was under a duty to exercise his power to request more material. The reporter had erred by addressing matters which the parties had already agreed, which was outwith the terms of his remit. In section 4 of his report, the reporter had complained that figures were confusing, contradictory and unvouched, but explanations could have been given had he asked. He had simply not made any determination in respect of the majority of the claim, and to that extent had not followed his instructions. The court should remit back to him, with further directions. Counsel spent some time drawing my attention to passages in the report where the reporter had found the information submitted to him confusing, but where the confusion could have been dispelled had the productions been explained to him. There was also an inconsistency in some instances between the two appendices. It was not simply a case of the reporter not having carried out the remit particularly well: he had failed properly to implement it as required. Much of counsel's submissions were devoted to the reporter's failure to seek further information in relation to the orange items in the second appendix to his report, many of which related to defects which had not been proved to exist at 25 September 2020.

Submissions for the defender

[21] Senior counsel for the defender submitted that the reporter had exhausted his remit and had not erred. He had returned a decision amounting to "not proven" in relation to most of the items claimed by the pursuers. That he was entitled to do. In effect, he had upheld the defence, which was that there was insufficient evidence that the wants of repair

existed at the material date. The pursuers were not entitled to unlimited bites at the cherry in proving their claim, yet that was the logical outcome of the pursuer's approach. Their objections did not raise issues of law.

Decision

[22] It is not for me to interrogate the reporter's factual findings. He is the final arbiter on questions of fact and as senior counsel for the defender pointed out, there is no rationality challenge. Nor does it matter that he has reported in relation to matters which the parties had already agreed; those purported findings can simply be ignored. The only legal issues raised in relation to the draft report are whether the reporter has failed to comply with the joint remit by failing to make further inquiries, and whether he has failed to exhaust its terms. To an extent these issues overlap, but I will consider them in turn.

Ought the reporter to have conducted further inquiries?

[23] The pursuers argue that while there was no absolute duty to make further inquiries, the confusing nature of the material was such that the reporter became bound to carry out further inquiries, either by interviewing witnesses, or by asking parties to produce such other evidence as he may consider available or appropriate, in order that he might express an opinion. At least in relation to the fundamental question of which wants of repair existed at the material date, I disagree. While the reporter, as a skilled person, might have been able to draw an inference from the presence of an existing defect as to whether it is likely to have existed some two years previously, whether or not to draw such an inference was a matter for him. While he had the power to elicit further information, I do not consider that the remit required him to embark upon a voyage of discovery in relation to every item claimed

by the pursuer, in order to establish, by uncovering who knows how many witnesses, whether or not, say, (to take the same example as before) grubbiness existed some two years ago. Clause 8 left it entirely to his discretion as to whether he should make further enquiries or not. Moreover, the pursuers knew that it was for them to prove the essential fact that the wants of repair in the Scott Schedule existed at the expiry of the lease. They had been ordered to lodge all material upon which they relied. It was incumbent upon them to provide the reporter with such evidence as they considered necessary, whether in the form of witness statements or photographs, to establish that the wants of repair had existed. It cannot have been in the contemplation of the parties that the reporter was under an open-ended duty to interview witnesses or to seek further information which the pursuers themselves had been unable to uncover in order to prove that a particular want of repair existed. Ultimately, it was for the reporter to decide whether or not to exercise his clause 8 power, and it is not contended that his choice not to do so was irrational.

[24] There is in any event an inherent inconsistency in the pursuers' approach. Counsel for the pursuers accepted that if the case were remitted back to the reporter, it would be inappropriate to direct him that he must make further inquiries: that would be to innovate upon the terms of the joint remit. If that is correct, and it must be, then it cannot be said that the reporter erred in not making inquiries in the first place.

[25] For all these reasons, I do not consider that it can be said that by choosing not to seek further evidence as to the existence of a want of repair, the reporter failed to comply with the terms of the remit.

Has the reporter failed to exhaust the remit?

[26] Whether the reporter has exhausted the terms of the remit is a more complex and nuanced question, the answer to which must be found by asking whether he has addressed himself to, and answered, the questions put to him. If he has, then he will have exhausted the remit (irrespective of whether or not a different answer might have been given if further enquiries had been carried out).

[27] It is convenient to deal with questions (i) and (ii) together. In the main, the reporter has addressed and answered these questions in the second, third and fourth columns of the schedule contained in the first appendix. He has adopted a discerning approach. Some items he found to presently exist and to be likely to have existed at 25 September 2020; others, to presently exist but there to be no evidence confirming whether or not they existed at the earlier date (and so the pursuer has failed to prove that they existed at the material date); and others not to presently exist but to have existed at the earlier date. Echoing the point made above, the only items of relevance are those which the reporter has found existed at 25 September 2020. Insofar as he has stated that there is no evidence to confirm if a want of repair existed at that time, he was entitled to reach that view. To that extent, the reporter has answered question (i) and (ii).

[28] However, there are some items where the reporter has failed to address the questions, but has stated that he is unable to comment, because he is unable to identify the area where the want of repair is said to exist or because drawings showing a previous layout have not been exhibited. The items in question are: 10.01 (tenant-installed welfare accommodation and first aid room, where the reporter has stated that, in effect, he does not know where that accommodation is) and items 12.04 to 12.09, (all relating to a dedicated first aid and toilet block). There is a difference between finding no, or insufficient, evidence that

a defect existed at a particular location which the reporter has inspected for himself, and being unable to express a comment because the reporter has been unable to identify what is being complained of. To take an extreme example, if the reporter had said that he was unable to find the premises at all because he had not been provided with a map showing their whereabouts, and had consequently reported that he was unable to comment on any of the defects, that would not have amounted to compliance with the remit. I do not consider, in relation to these items, that the reporter has given a proper answer.

[29] Items 10.01 and 12.04 to 12.09 therefore require to be remitted back to the reporter for further consideration (making such further enquiries as he sees fit).

[30] The third question is directed towards the works identified in the answer to question (ii) as being required. Part (a) of the question is binary, and must be answered yes or no. If the answer is no, the reporter must state what, in his opinion, would be a reasonable cost. Here again, the reporter has not fully answered the question. I have identified the following items where he has opined both that the defect in his opinion existed at 22 September 2020, at least to some extent, and that remedial works are or were reasonably required, but where he has not stated whether the cost claimed is reasonable, nor has he stated what would be a reasonable cost: 3.02 (where it is unclear what view the reporter is expressing but where he has found that the defect existed to a limited extent); 4.02; 4.03; 7.07; and 8.07. In relation to these items the reporter does not have the option of saying he has insufficient information. If he is not satisfied that the costs claimed are reasonable, then he must use his skill, knowledge and experience to state what costs would be reasonable. To that extent, this question must be remitted back to him. Question (iii) may also require further consideration in relation to items 10.1 and 12.04 to 12.09, depending on how the reporter eventually answers those questions.

[31] Turning to the question in clause 5(iv), to do with timescale, at first sight the reporter has answered the question by saying that he has insufficient information to proffer an opinion. However, on closer analysis, the examples he gives are of two items of work where it has not been established to his satisfaction that the want of repair existed at 25 September 2020. In relation to one of those items – the floor coverings – he has positively stated that no works are required. If no works are required, then the length of time to take them is immaterial. This illustrates why it would have been helpful had a definition of Outstanding Works been given. However, mindful of what the issues in the action are, what question 5(iv) is directed to is how long will it take to complete the outstanding work to rectify those defects which the reporter has found existed as at 25 September 2020. That question has not been answered.

[32] Finally, the reporter has not properly addressed himself to the question posed in clause 5(v). Even if further information is required, he has not said that. This question also requires to be remitted back to him for that question to be addressed and answered.

Disposal

[33] I propose that the case be remitted back to the reporter with a direction that he give renewed consideration to all of the questions posed to the extent set out above, and after taking such of the steps as are set out in clause 8 of the remit as he considers appropriate. Before pronouncing such an order I will give parties the opportunity to address me further, if they so wish, on its precise wording and the case will be put out by order for that purpose.

Concluding remarks

[34] Rather discouragingly, counsel for each party said that if their position was held to be wrong, that would discourage them from using the joint remit procedure in the future. It would be a pity were that so, since the problems faced by the reporter stemmed, at least in part, from the questions posed and the nature of the evidence provided to him. If parties wish a reporter to be under a duty to make further enquiries, they should say so in the joint remit. If not, it is incumbent upon them to ensure that the reporter is provided with sufficient evidence to prove the facts they must establish.

[35] Finally, I mention again the regrettable delay in instruction of the reporter. Commercial actions should proceed quickly and efficiently. Where a remit is made to a reporter, as here, and the case sisted to enable the report to be prepared, the court expects the reporter to be instructed forthwith, not at the end of the period of sist.