



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 116

CA24/23

OPINION OF LORD RICHARDSON

In the cause

NICOL'S WORSTEDS LIMITED

Pursuer

against

HLT STAKIS OPERATOR LIMITED

Defender

Pursuer: Dean of Faculty, D Ford (sol adv); Brodies LLP

Defender: Thomson KC, R Anderson; CMS Cameron McKenna Nabarro Olswang LLP

11 December 2025

Introduction

[1] This is a dispute concerning the Grosvenor Hilton Hotel in Glasgow.

[2] The pursuer is the tenant of the premises in terms of a head lease dated 6 March 2001 between Stakis PLC ("Stakis"), as landlord, and RBS Hotel Investments Limited ("RBS"), as tenant. The pursuer became tenant under the head lease following an assignation in its favour by RBS dated 17 November 2011. The pursuer was also landlord in terms of a sub-lease of the hotel (the "Sub-Lease"). The defender was tenant under the Sub-Lease. Neither of the parties to the present action were parties to the original Sub-Lease. The original parties were RBS as landlord, Stakis as tenant and Hilton Group PLC as guarantor.

The defender became tenant on 6 November 2007 and the pursuer became landlord on 6 September 2011 both pursuant to assignments.

[3] The parties are agreed that, while tenant under the Sub-Lease, the defender operated the hotel as a first-class hotel under the Hilton brand. The Sub-Lease expired on 31 December 2021.

[4] A dispute has arisen between the parties as to whether the defender had complied with its repairing and maintenance obligations during the currency of the Sub-Lease and proceedings were commenced by the pursuer before me. In essence, the pursuer seeks damages on the basis that the defender has acted in breach of its obligations under the Sub-Lease. The pursuer's detailed allegations of breach are contained in a Scott Schedule which is incorporated into the pleadings. The parties have, with the benefit of expert assistance on both sides, set out and revised their respective positions in the Scott Schedule.

Preliminary proof before answer

[5] The parties were agreed that, prior to further inquiry into the matters detailed in the Scott Schedule, I should hear a preliminary proof before answer in order to resolve two related but discrete issues on construction of the terms of the Sub-Lease.

[6] The first issue is how the reference to "Schedule of Conditions" in Clause 3.5.1 in Sub-Lease ought to be construed.

[7] The second issue is how the provisions in the Sub-Lease relating to "fair wear and tear" particularly in Clause 3.5.1(b) fall to be construed.

[8] In the event, it was unnecessary for me to hear any evidence as, shortly before the preliminary proof diet, the parties entered into a joint minute of admissions in terms of

which the facts and evidence (including both documents and witness statements) upon which each party relied were agreed for the purposes of the diet.

Terms of the Sub-Lease

[9] For present purposes, the material parts of Clause 3.5 of the Sub-Lease provide as follows:

“3.5 Repair and Decoration

3.5.1 To keep the Hotel in good and substantial repair and condition and to remedy any inherent defects in the design or construction of the Hotel howsoever arising (fair wear and tear as defined below in paragraph (b) excepted and damage by any of the Insured Risks excepted to the extent that the insurance moneys are irrecoverable through any act or default of the Landlord) Provided that:

- (a) without prejudice to Clauses 3.5.3 and 3.5.4 nothing herein shall require the Tenant to deliver up the Hotel in a better state of repair and condition than that evidenced by the Schedule of Condition
- (b) damage will be deemed to be caused by fair wear and tear if any one or more items taken in aggregate would not be sufficient to prevent the Hotel from being used for the Permitted Use and in compliance with Clause 3.21 (Gross Turnover) having regard to the residue of the economic life of the relevant asset

3.5.2 To decorate or otherwise treat the Hotel (where appropriate in accordance with manufacturers' recommendations) in accordance with the Operating Standards.

3.5.3 The Tenant's liability under this Clause is expressly agreed to extend to carrying out any works necessary to make good any defect in the design or construction of the Hotel.

3.5.4 The Tenant:

3.5.4.1 agrees with the Landlord that it will pay and satisfy any and all liabilities (whether current or arising in the future, whether falling on the Landlord or the Tenant and whether arising under statute or common law and for the avoidance of doubt this shall include without limitation complying on behalf of the Landlord with any requirement imposed on the Landlord by any competent authority) to accept all liability in relation to any Hazardous Substances in on or under the Hotel at the date of this Sub-Lease and to make no claim of any nature (including without limitation a claim for

a contribution or indemnity) against the Landlord nor to take any step which is likely to lead to the imposition of any such liability on the Landlord in relation to any such Hazardous Substances;

3.5.4.2 accepts the hotel in its current condition;

3.5.4.3 undertakes to the Landlord that it will not by virtue of any use or works it may from time to time carry out on the Hotel cause any Hazardous Substance to migrate from the Hotel and will indemnify the Landlord for any liability in respect of any such migration provided always that the provisions of Clause 4.4 shall apply to any claim under such indemnity. [...]

3.5.4.5 nothing in this Clause 3.5.4 shall render the Tenant liable to carry out any remediation works save as may be required by law to enable the Hotel to be operated in accordance with the Permitted Use."

[10] Clause 3.19 of the Sub-Lease provides:

"3.19 Yield Up

Upon the expiration or sooner determination of the Term the Tenant shall:-

3.19.1 yield up the Hotel with all additions and improvements thereto in a state and condition consistent with due compliance by the Tenant with its covenants and obligations under this Sub-Lease

3.19.2 where reasonably required by the Landlord remove all of the Tenant's furniture and chattels (other than any Chattels belonging to the Landlord) and as soon as reasonably possible make good any damage to the Hotel caused by such removal to the reasonable satisfaction of the Landlord

3.19.3 give all keys of the Hotel to the Landlord
Provided always that nothing herein shall require the Tenant to deliver up the Hotel in a state and condition better than that evidenced by the Schedule of Condition"

[11] Clause 1 of the Sub-Lease contains the following definitions:

"Hilton Standards" is defined to mean:

"statements of operating and other standard procedures and policies set out in the document a copy of which has been supplied to the Landlord by the Tenant and means from time to time all such statements and documents issued by any part of the group of companies of which Hilton Group plc is part with a purpose substantially similar to the document mentioned above in this definition as modified or supplemented by any part of the group of companies of which Hilton Group plc is part from time to time to reflect standards applicable to a first class hotel of a type which a first class hotel operator could reasonably be expected to

operate having regard to the location and prevailing economic climate of the location in which the Hotel is situate"

"Operating Standards" is defined to mean:

"(a) whilst this Sub-Lease is vested in a company in the same group as Hilton Group plc, the Hilton Standards; and

(b) whilst the Sub-Lease is vested in a company not in the same group as Hilton Group plc such operating standards as may be reasonably required to enable the Hotel to be operated for the Permitted Use as a first class Hotel of the type that the assignee could reasonably be expected to operate having regard to the location and the prevailing economic climate of the location in which the Hotel is situate as the same may be modified or supplemented from time to time."

"Permitted Use" is defined as meaning:

"primarily use as a first class hotel of a type that the Tenant could reasonably be expected to operate having regard to the location and the prevailing economic climate of the location in which the Hotel is situate trading in accordance with the Operating Standards including: (a) an international booking system (b) all uses reasonably ancillary to such primary use including without limitation use as restaurant, casino, leisure club, conference facilities provided that nothing herein shall require the Tenant to use the Hotel for all of the ancillary uses specified in this definition of Permitted Use"

"Schedule of Condition" is defined as meaning:

"the video and accompanying explanatory statement prepared by Messrs Robert Brown Associates a copy of which has been initialed [sic] by the parties and marked 'Schedule of Condition dated March 2001' referred to in a lease made between (1) RBS Hotel Investments Limited (2) Stakis PLC and (3) Hilton Group plc"

The first issue: the Schedule of Condition

[12] The principal source of this first part of the dispute between the parties is the fact that an authenticated copy of the Schedule of Condition – a video and accompanying statement prepared by Messrs Robert Brown Associates, marked "Schedule of Condition dated March 2001" and initialed by the parties – is not currently available to either of the parties.

[13] However, following investigations, the defender has identified and produced a report prepared by Robert Brown Associates entitled "Overview Report on Video Schedules

of Condition on Hilton Hotels (11 No.)” and dated March 2001 (the “Overview Report”). Furthermore, shortly before the preliminary proof diet, the defender also found within its possession two VHS video cassettes which were both labelled “Hilton Hotel Glasgow Grosvenor Survey 6/3/01”. One was labelled “Copy 2 011184/4” (production 7/25) and the other “Copy 3 011184/4” (production 7/22). Prior to this discovery, the only evidence which either party had in respect of any video prepared by Robert Brown Associates was some video footage which had been extracted from two DVDs which the defender had located. The footage was partial as a result of what appeared to be corruption to one of the DVDs.

[14] Against this background, the parties advance competing contentions as to how Clause 3.5 falls to be construed and how the Overview Report and video cassettes produced by the defender should be treated.

The pursuer’s submissions

Introduction

[15] In essence, the pursuer’s position is straightforward. The Robert Brown Associates Overview Report and the video cassettes produced by the defender did not constitute the Schedule of Condition referred to in the Sub-Lease and, in the absence of the Schedule, the qualification to the defender’s repairing obligations simply flew off.

[16] On this basis, the pursuer sought two related declarators: first, that, in the absence of a Schedule of Condition as defined in the Sub-Lease the limitations on the defender’s repairing obligations referred to in Clauses 3.5.1(a) and 3.19 are of no effect. Secondly, the pursuer seeks declarator that neither the video footage produced by the defender nor the Overview Report constitutes the Schedule of Condition as referred to in the Sub-Lease and should not be taken into account when considering the defender’s repairing obligations

under the Sub-Lease. Consistent with these declarators, the pursuer also seeks the exclusion from probation of certain of the defender's averments.

The evidence

[17] The starting point for the Dean of Faculty's submissions was that there was no evidence that the Schedule of Condition, as defined in the Sub-Lease, had ever been created. He referred to the affidavits of three witnesses which had been produced on behalf of the pursuer.

- First, Mr Girish Sanger, a director of the pursuer, who had been involved in the acquisition of the Sub-Lease in 2011. During the acquisition process, Mr Sanger had never seen or obtained a copy of anything which was referred to as the Schedule of Condition or which would have fallen within the definition given in the Sub-Lease. He remembered being told by CBRE, who were the selling agent, that there was no schedule available because it had been destroyed.
- Second, Mr Amar Wali, a solicitor and current partner at Morton Fraser MacRoberts LLP. In 2011, Mr Wali had acted for the seller, RBS, during the sale to the pursuer. By reference to a number of contemporaneous documents, his evidence was that, at the time of acquisition by the pursuer, neither he nor his client were able to locate a copy of the Schedule of Condition. In particular, he referred to a document entitled "Bidder Note" dated 1 February 2011 which had been prepared on behalf of RBS and which contained the following statement in relation to the Schedule:

“The scope of the repairing covenant in the operating lease is limited by reference to a schedule of condition. The schedule of condition is defined as a video and accompanying explanatory statement. Despite an extensive search, the Seller, the Seller's solicitors and the Seller's managing agents have been unable to locate either the original or a copy of the schedule of condition. Enquiries have been made with Hilton, who are also unable to locate either the original or a copy. The Seller believes that its schedule of condition was destroyed in a fire. Accordingly, a copy of the schedule of condition cannot be provided and the original will not be provided on completion.”

- Finally, Mr James Roscoe, a solicitor and partner at Brodies LLP. In 2011, Mr Roscoe had acted on behalf of the pursuer during the acquisition process. Like Mr Wali and by reference to the same contemporaneous documents, Mr Roscoe had no recollection of ever having seen a copy of the Schedule. His understanding was also that, at the time of the acquisition, neither of the parties to the Sub-Lease had either an original or a copy of the Schedule.

[18] In relation to the evidence which had been produced by the defender, it was agreed that the footage contained on the two video cassettes had been shot on 6 and 7 March 2001, in other words, on the day that the Sub-Lease had been signed and the following day. The parties had also agreed that, although the footage on the two cassettes was similar, it was not identical.

[19] The Dean of Faculty submitted that these circumstances were of significance when one considered the evidence of Mr Stephen Freeth. Mr Freeth was a property professional who had known and worked with Robert Brown of Robert Brown Associates. He had not been involved in the work carried out in respect of the Grosvenor Hilton but was able to describe, from his experience, the process that Mr Brown would generally use. This involved the editing of the raw footage and formatting in accordance with the clients' requirements. Importantly neither Mr Freeth nor any other witness spoke to that editing

process having been carried out and a final version having been produced. It was reasonable to infer that that process might have involved negotiation between the parties. There was also no evidence that this had occurred or of the initialling and marking of that final version in accordance with the wording of the Sub-Lease. The Dean argued that the wording in the Sub-Lease could not be a reference to the footage contained in the two cassettes produced by the defender given that those cassettes post-dated the Sub-Lease.

[20] Robert Brown, the principal of Robert Brown Associates, had died in November 2024. The only evidence which the defender had produced from him was a set of written answers which he had prepared in 2023 in response to questions which had been posed to him by a solicitor acting for the defender. These answers did not refer to anything being initialled as set out in the Sub-Lease.

The arguments

[21] Against the background of this evidence, the Dean submitted that the defender had produced nothing which satisfied the requirements of the definition of “Schedule of Condition” set out in the Sub-Lease. There was nothing which showed, on its face, that it had been agreed by the parties to the Sub-Lease. That agreement was the reason for the stipulation for initialling within the definition of the Schedule of Condition. The Dean argued that, following the production of the survey by Robert Brown Associates, it would have been open to either side to refuse to initial it.

[22] The pursuer’s position was consistent with a consideration of the video footage that had been produced by the defender. The Dean submitted that at various points in the footage one could hear the surveyor commenting on the need for repair work to be carried out in the immediate short term. But, on the defender’s approach, there was no obligation

on either the landlord or tenant to carry out any of these works. As such, there would be no point in flagging the need for repair to be carried out in the immediate future. What this demonstrated was both that further discussion and agreement between the parties was required to constitute the Schedule of Condition and that the video footage produced by the defender was not the Schedule.

[23] The defender put forward two arguments to explain why the evidence of the two cassettes and the Overview Report was relevant. First, the defender argued that it was entitled to use this evidence to try to prove what had been contained in the Schedule of Condition. Second, in the alternative, the defender argued that, properly construed, the Sub-Lease only required the defender to hand back the hotel in the condition it had been let and the same evidence was relevant to determining this condition.

The first argument – what evidence could the defender adduce as to the content of the Schedule of Condition?

[24] In relation to the first argument, the Dean contended that what the defender was seeking to do was, essentially, to prove the tenor of the items it relied upon even though the defender had not advanced its case in that way. The pursuer was not taking a technical pleading point. Fundamentally, the reason that the defender had not taken this approach was that it could not. In the present case, the defender had produced no evidence proving either the tenor or the execution of the Schedule of Condition. In these circumstances, it would also be necessary for the defender to prove *causa amissionis* – explaining the reason that the principal document had been lost (*Promontoria (Henrico) Limited v Friel* 2020 SC 230 at paragraphs 40 to 43).

[25] Although recognising that some doubt had been cast on the decision by the Inner House in *Promontoria*, the Dean also relied upon the earlier decision of *Scottish & Universal Newspapers Limited v Gherson's Trustees* 1987 SC 27 and the statement of law in relation to the best evidence rule. The Dean founded, in particular, on the following passage of the opinion of Lord President Emslie (at page 47):

“From these passages I take the true rule applicable to a case such as this to be that secondary evidence of the contents of the missing records will be admitted only if it is shown that they have been destroyed or lost without fault on the part of the pursuers who had effective control of the records when the action began. A party in the position of the pursuers indeed will, according to Dickson, sec. 237, probably be required to show a special *casus amissionis* not attributable to any fault on his part. It must be recognised accordingly that the leading of secondary evidence to prove the contents of missing documents—a manifestly unsatisfactory expedient—is a privilege to be earned by a party in the position of the pursuers in this case. ... It must, I think, depend on the circumstances of each case whether the party tendering the secondary evidence has expended the appropriate amount of care and diligence, and the steps required of such a party will no doubt be affected by the nature and importance of the documents, the contents of which are of vital importance in the proof, to the ascertainment of the truth, and to the interests of all parties. The more important the documents the more necessary will it be for the party who has them to take all proper steps to preserve them.”

Applying this to the present case, the Schedule of Condition was essential for the defender and yet it did not appear to have been preserved and was not available.

[26] Therefore, whether one approached the issue as one of proving the tenor or by the application of the best evidence rule, the defender should not be allowed to prove the content of the Schedule of Conditions by secondary sources.

The second argument – what is the proper construction of the defender's repairing obligations under the Sub-Lease?

[27] As to the defender's second argument, the issue between the parties turned on the proper construction of the terms of the Sub-Lease. The pursuer accepted that the video

footage founded on by the defender did show the state of the hotel as at the date of let. The question was whether it was relevant to the parties' obligations in terms of the Sub-Lease. The Dean emphasised that the Sub-Lease was for a period of more than 20 years (Clause 2). The rent was to be calculated as a percentage of the turnover of the hotel (Schedule 2). This meant that both parties had a clear interest in the performance of the hotel.

[28] In terms of Clause 3.5.1, the defender had an obligation to keep the hotel in good and substantial repair and condition and to remedy any inherent defects in design and construction howsoever arising subject to two exceptions: first, "fair wear and tear" as defined and, second, damage by any of the Insured Risks. The second exception did not arise. That obligation was then subject to the two provisos contained in Clauses 3.5.1(a) and (b). The Dean noted that the clause did not simply say that the tenant's obligation was to hand back the hotel in the state in which it had been let. Given the duration of the Sub-Lease and the fact that it was assignable, that was not surprising.

[29] The proviso that the defender relied upon, Clause 3.5.1(a) which referred to the Schedule of Condition, was an exception to the primary obligation. It followed from this construction that it was incumbent on the defender to demonstrate, using the Schedule of Condition, if the condition in which the defender was being required to deliver up the hotel went beyond the scope of its obligation. This was consistent with Clause 3.5.4.2 in terms of which the tenant had accepted the hotel in its current condition. It followed that, insofar as the defender could, in the absence of the Schedule of Condition, not so demonstrate, the proviso then simply flew off.

[30] The Dean submitted that the wording of the Sub-Lease distinguished the present case from the provisions considered by Lord Hamilton in *McCall's Entertainments v South Ayrshire Council* (No. 2) 1998 SLT 1421 (at 1423B-C and 1427A-E). The Dean stressed the

absence in the Sub-Lease of the wording “and to leave at the expiry or termination of this lease the subjects in a condition no less good and substantial than their present condition ... to the satisfaction of the Landlords” (emphasis added). The Dean argued that the lease wording in the case of *@SIPP Pension Trustees v Insight Travel Services Limited* 2016 SC 243 was closer to that of the present case and, therefore, the approach taken in that case was of assistance.

[31] However, the case with a clause which contained the wording closest to the Sub-Lease was *Archyfield Limited v Network Rail Infrastructure Limited* [2024] LTS 6, a case decided in the Lands Tribunal for Scotland. The clause (quoted at paragraph 4) reads:

“The Tenants [Applicant] hereby accept the premises in their present condition as suitable for the purpose for which they are let and undertake to uphold, maintain and keep the premises in good and tenantable order and condition at all times during the currency of this Lease which obligation shall include the maintenance of the premises wind and watertight and the upholding of the water supply and drainage both within and without the premises all to the reasonable satisfaction of the Landlord [Respondent], provided however that the Tenants [Applicant] will not be obliged to maintain the premises in any better condition than they are at the date hereof, as such condition shall be evidenced by a Schedule of Condition in respect of the premises to be agreed by the parties or, failing agreement, to be settled by arbitration in terms of Clause THIRTY FIRST hereof ...”

In that case, it was unclear whether a Schedule of Condition had ever been agreed by the parties at the outset of the lease. What was clear was that, by the time of the hearing before the Lands Tribunal, neither party could point to the existence of one.

[32] The Dean urged me to adopt a similar approach to the Lands Tribunal which had concluded that the preparation of a Schedule of Condition was, in effect, a condition precedent to the operation of the qualification of the tenant’s repairing obligation. In other words, in the absence of a Schedule of Condition, the tenant could not rely on the wording “provided however that the Tenants [Applicant] will not be obliged to maintain the premises in any better condition than they are at the date hereof” (paragraph 14).

[33] Such an approach was equally appropriate when construing Clause 3.5.1 of the Sub-Lease. The Schedule of Condition was the necessary contractual comparator. This approach also accorded with common sense. The video survey relied upon by the defender did not cover the whole of the hotel. Yet, if the defender's approach was correct, it would be open to the defender to lead evidence in relation to parts of the hotel which were not covered by the survey. That was not what the clause said and could not be what the parties had intended.

The defender's submissions

The first argument – what evidence could the defender adduce as to the content of the Schedule of Condition?

[34] As a starting point, senior counsel submitted that the Overview Report prepared by Robert Brown Associates dated March 2001 was, as he put it, the only show in town: the Overview Report was the “explanatory statement prepared by Messrs Robert Brown Associates” referred to in the Sub-Lease (see above at [11]). It was apparent from the written answers prepared by Robert Brown prior to his death that this report was the only document prepared and submitted by Robert Brown Associates pursuant to the joint instructions of Hilton and RBS. Mr Brown also stated the following: “The schedules of condition were recorded and submitted in video format, a copy being forwarded to both RBS and Hilton along with our written overview report.”

[35] The Overview Report itself recorded that Robert Brown Associates had been jointly instructed by RBS and Hilton UK Hotels Limited to prepare Schedules of Condition recorded on video to reflect the general condition of 11 hotels including the Hilton Grosvenor. The author of the report also stated that they understood its preparation had

been connected with the proposed sale and lease back of the properties. The report contained the following section in respect of the hotel surveys:

“The following is a list of the Hotels surveyed together with the individual reference number used on each video tape. A separate video tape for each property has been prepared. Generally the running times of the videos are in the order of 90 minutes, although the video for Hilton Brighton Metropole is about 3.25 hours, the Hilton Glasgow Grosvenor 2 hours and the Hilton Glasgow William Street approximately 3 hours.

...

011184/4 Hilton Glasgow Grosvenor, Glasgow”

[36] Senior counsel drew my attention to the fact that the reference number noted in the Overview Report, 011184/4, was the same as that on each of the two video cassettes produced by the defender. He also highlighted that the running time of each of the two video cassettes was of the order of 2 hours – being 2:06:30 (copy 2) and 2:03:49 (copy 3). The date of the survey given in the Overview Report, 6 March 2001, was also the date marked on each of the video cassettes. Each copy contained date stamps for 6 March 2001 on the great majority of the footage and 7 March 2001 for the final 10 or so minutes. At the point of the change in date, on both copies, an audio introduction explains “This is an addendum to guest and public areas not accessible on previous day of survey, and deals with Bar One”.

[37] Although the pursuer was correct that it was a matter of agreement between the parties that the footage shown on the two video cassettes was not identical, the differences amounted to approximately 21 seconds out of more than 2 hours of footage. The difference in running time related primarily to periods of “blue screen” where the hotel could not be seen. This difference was inconsequential.

[38] Finally, in relation to the video footage, senior counsel referred to the evidence of Martin Long. He was the chief engineer at the Hilton Glasgow Grosvenor. He had worked

at the Hilton Grosvenor from 1996 until 2021 or so. He remembered being present in March 2001 when the video survey was being prepared. Mr Long was responsible for providing the surveyor carrying out the filming with access to the parts of the building he wished to see. Mr Long accompanied him during the process. Mr Long had viewed the footage contained on copy 2 of the video and confirmed that it showed the hotel. So far as he was able to recall, Mr Long also confirmed that the footage appeared to show a fair and accurate presentation of the condition of the hotel as he remembered it.

[39] Senior counsel submitted that this evidence provided an ample and compelling basis to enable the court to find that what had been produced by the defender were copies of the video and accompanying explanatory statement referred to within the definition of the Schedule of Condition in terms of the Sub-Lease. He emphasised that the reference to initialling within the definition contained in the Sub-Lease related only to a copy of the Schedule rather than the video or explanatory statement which made up the Schedule.

[40] Senior counsel submitted that the pursuer's own evidence did not support the contention that there had never been a Schedule of Condition in terms of the Sub-Lease. Rather, the evidence of Mr Sanger, Mr Roscoe and Mr Wali was to the effect that there had been a Schedule of Condition but certainly RBS' copy had been lost or destroyed in a fire which occurred prior to the acquisition of the Sub-Lease by the pursuer in 2011.

[41] Senior counsel submitted further that the evidence of Stephen Freeth did not support the inferences which the pursuer sought to draw from it. Mr Freeth was, on his own evidence, not involved in the surveying of the hotel which had occurred in 2001. He had only started working with Mr Brown in 2007. His evidence as to the editing process therefore related to a later point in time. In any event, Mr Freeth's evidence did not and

could not alter Mr Brown's evidence, contained in his written answers, that "the schedules of conditions were recorded and submitted in video format..."

[42] Senior counsel also rejected the suggestion made on behalf of the pursuer that the video evidence produced by the defender could not be the Schedule of Condition because it identified areas within the hotel which required attention (see [22] above). The fallacy in the pursuer's position was that it assumed that the parties would have addressed responsibility for every want of repair in the hotel. It was unremarkable that what the parties had agreed might turn out not to be exhaustive (see *Little Cumbrae Estate Limited v Island of Little Cumbrae Limited* 2007 SC 525). The fact the video survey bore to show that there were defects within the hotel at that point in time was precisely the purpose of it.

[43] Turning to the two legal points advanced by the pursuer, the submissions relating to proving the tenor were simply inapplicable and, therefore, irrelevant. That was not a remedy which the defender sought.

[44] In relation to the best evidence rule, senior counsel submitted that Scots law did permit, in certain circumstances, the use of secondary evidence when primary evidence was not available (*Scottish & Universal* at page 46, per Lord President Emslie). In the same passage, the Lord President explained the rationale underlying the rule by reference to Dickson on *Evidence* at section 204:

"In that section it is stated that: '[T]he reason is, that witnesses are extremely apt, from want of observation or memory, to mistake the terms of writings, the effect of which often depends on their precise words; and that, each document being intended to be read as a whole, its meaning would often be misunderstood if a statement of only a part of it were admissible'."

Senior counsel submitted that there was no suggestion in the present case of relying on parole evidence as to the content of either the video or the accompanying explanatory note.

[45] The Lord President's formulation of the rule as it applied in that case was that secondary evidence of the contents of missing documents was to be admitted only if it could be shown that they have been destroyed or lost without fault on the part of the party who was both relying on them and who had effective control over them since the action began (see page 47 quoted at [25] above). In the present case, there was no suggestion that the defender had ever had the principal of either the video or the explanatory statement, let alone after the commencement of the present action. The evidence of Mr Brown was that he had sent a copy to Hilton. That was what the defender had produced in the present action. The evidence, from the pursuer's witnesses, of the destruction of what had been in the possession of RBS cast no suspicion on the defender (*Glasgow City Council v First Glasgow (No. 1) Limited* 2022 SLT 164 at paragraphs 75 to 80).

[46] On this basis, senior counsel moved me to refuse the two declarators sought by the pursuer and, instead, to make certain findings in fact. (These were set out in a note which was subsequently lodged on behalf of the defender.)

The second argument – what is the proper construction of the defender's repairing obligations under the Sub-Lease?

[47] Senior counsel submitted that, insofar as the defender was correct in respect of the first argument, then the second point raised by the pursuer became academic because the only evidence that the defender sought to rely on was the videos and Overview Report prepared by Robert Brown Associates.

[48] In any event, in relation to the proper construction of the defender's repairing obligations, senior counsel submitted that, despite its protestations to the contrary, the

pursuer was essentially seeking to hold that the wording in Clause 3.5.1(a) was *pro non scripto*.

[49] The defender submitted that the Sub-Lease in general and Clause 3.5 in particular required to be construed against the background of the common law obligation which would be incumbent on the parties in the absence of contractual provision. Against this background, the defender sought to stress the difference in the obligations contained in Clause 3.5 and what one would normally find in a full FRI lease. The obligation imposed on the defender was only to “keep” the hotel in good and substantial repair - not renew, reinstate or rebuild. Given that in such leases, there was no obligation for a tenant to restore the premises “as new” at the end of the lease, there could be no tenable suggestion that Clause 3.5 imposed such an obligation on the defender.

[50] The defender’s limited obligation was then subject to two qualifications: first, nothing in the lease required the defender to deliver up the hotel in a better state of repair and condition than evidenced in the Schedule of Condition. Second, damage caused by fair wear and tear is excepted having regard to the residue of the economic life of the asset. Overall, the purpose of Clause 3.5 was to limit the repairing obligations of the tenant.

[51] Senior counsel submitted that the wording of Clause 3.5.1 was effectively indistinguishable from the clause in consideration in *McCall’s Entertainments*. Clause 3.5.1 had to be read together with the definition of “Schedule of Condition” which clearly referred, by way of the survey carried out by Robert Brown Associates, to the state of the hotel in March 2001. In *McCall’s Entertainment*, Lord Hamilton had been wholly unconcerned by the absence of the Schedule of Condition. Senior counsel also relied on the decision in *Dem-Master Demolition Limited v Healthcare Environmental Services Limited* [2017] CSOH 14 which had followed the approach in *McCall’s Entertainments* when construing a

similarly worded provision (see at paragraphs 209 and 213). The case of *@SIPP* relied on by the pursuer could be distinguished on the basis that the clause in consideration in that case imposed quite different obligations on the tenant – including replacing, renewing, reinstating and rebuilding (see paragraphs 2 and 20).

[52] In respect of *Archyfield*, senior counsel submitted that, although there were points of distinction, the defender's position was that the case was wrongly decided. Senior counsel submitted that the Lands Tribunal had erred in its construction of the clause before it and had apparently overlooked the fact that the Schedule of Condition was merely evidencing the condition of the premises at the date of the lease. The approach taken by the Lands Tribunal appeared to elevate the status of the Schedule to establishing that condition.

The second issue: Fair wear and tear

[53] As I have noted above, when the preliminary proof diet was fixed, the parties were agreed that, at the same time as dealing with the Schedule of Condition issue, I should hear argument as to the proper construction of the provisions in the Sub-Lease relating to "fair wear and tear" in Clause 3.5.1(b) and the related definitions. However, by the time of the diet itself, the position of the parties had changed. At the hearing before me, both parties considered that the disputed issues as to the construction of the "fair wear and tear" provision ought to be dealt with at proof before answer.

[54] In the event, the only point on which battle was joined concerned a challenge by the pursuer to the contention advanced by the defender that its obligation in respect of decoration contained in Clause 3.5.2 was qualified. For ease of reference, Clause 3.5.2 provides: "To decorate or otherwise treat the Hotel (where appropriate in accordance with manufacturers' recommendations) in accordance with the Operating Standards."

The pursuer's arguments

[55] The pursuer's position was again straightforward. Clause 3.5.2 was not, in itself, subject to any qualification. The defender argued that the clause was subject to the qualification contained in Clause 3.19 (see above at [10]). However, the Dean of Faculty submitted that there were two problems with the defender's position. The first was that the Clause 3.19 referred to the Schedule of Condition and, for the reasons set out above in respect of the first issue (at [15]), the pursuer submitted that the defender had not produced the Schedule of Condition and, in its absence, the defender could not rely on it as a qualification to its obligations under the Sub-Lease.

[56] Secondly, and in any event, the qualification at the end of Clause 3.19, properly construed, only related to that clause and not more generally. The Dean noted that there was no full stop before the qualification upon which the defender sought to found. Furthermore, although acknowledging that an argument based on redundancy was not particularly strong, the Dean asked, rhetorically, if the qualification in Clause 3.19 applied more generally what was the purpose of Clause 3.5.1(a)? If the qualification in Clause 3.19 was to apply more generally it would have been placed at the end of Clause 3 which set out the tenant's obligations.

[57] On this basis, the pursuer submitted that, insofar as the defender had relied upon the qualification in Clause 3.19 in respect of allegations of breach of Clause 3.5.2, the defender's position was irrelevant and ought not to be admitted to probation.

The defender's response

[58] Senior counsel for the defender submitted that the obligation in Clause 3.5.2 had to be read in the context of the whole of the Sub-Lease and, in particular, the whole of Clause 3. Viewed from that perspective, the defender's repairing obligation had twice been qualified by reference to the Schedule of Condition – in Clause 3.5.1(a) which set out the tenant's repairing obligation in general terms and Clause 3.19 which dealt with the tenant's obligations on yielding up the premises. The language of the qualification was clear and wide in effect. Senior counsel submitted that this repetition emphasised the significance of the qualification. As to Clause 3.19, senior counsel submitted that, given the subject matter of the clause, this was the logical place to re-state the qualification to the tenant's repairing obligation. The remaining provisions of Clause 3 dealt with unrelated matters.

[59] For these reasons, the defender submitted its averments in respect of Clause 3.5.2 were relevant and ought to be admitted to probation.

Decision

Introduction to the first issue

[60] During the course of this litigation, the competing positions of the parties in relation to the first issue concerning the Schedule of Condition have developed. This is, no doubt, in part because of the late discovery by the defender of the two video cassettes (see [13] above). However, be that as it may, by the time of the preliminary proof before me, it was apparent that this part of the dispute between the parties focussed on two related questions.

- First, is the premise underlying the pursuer's first and second declarators correct: namely, that the Overview Report and video cassettes produced by

the defender do not fall within the definition of the Schedule of Condition contained in the Sub-Lease?

- Second, on the assumption that the pursuer is correct in respect of the first issue, what effect, if any, does the absence of a Schedule of Condition have on the defender's repairing obligations under Clause 3.5.1 of the Sub-Lease?

The first question

The definition in the Sub-Lease

[61] The starting point in considering what has been produced by the defender has to be the definition of "Schedule of Condition" contained in the Sub-Lease. For ease of reference, that definition reads:

"the video and accompanying explanatory statement prepared by Messrs Robert Brown Associates a copy of which has been initialed [sic] by the parties and marked 'Schedule of Condition dated March 2001' referred to in a lease made between (1) RBS Hotel Investments Limited (2) Stakis PLC and (3) Hilton Group plc"

[62] I consider that the natural meaning of the words used is straightforward. The parties to the Sub-Lease have identified the video and accompanying explanatory statement prepared by Robert Brown Associates as constituting the Schedule. Importantly, and contrary to the submissions advanced on behalf of the pursuer, the wording does not require any further agreement between the parties to constitute the Schedule. I am not persuaded that the reference within the definition to the initialling and marking of a copy of the video and accompanying explanatory statement is for any purpose other than for facilitating the identification of a copy of the Schedule. Had the parties intended to stipulate that the Schedule itself required to be initialled or in some other way agreed by the parties

that could easily have been achieved. However, that is not what the wording of the definition provides.

[63] As well as being the natural meaning of the words used, this does not strike me as being a surprising conclusion. The parties to the Sub-Lease have agreed that the Schedule of Condition, which is to provide the base line for the tenant's repairing obligation, is to be prepared by a third-party expert who, the parties would have been aware, had been jointly instructed to carry out the survey in March 2001. The fact that this approach has been adopted to the Schedule of Condition is consistent with the approach adopted elsewhere in the Sub-Lease to the resolution of issues arising between the parties – *cf* Clause 8.

The Overview Report and the video cassettes

[64] It is next necessary to consider whether and, if so, to what extent, the Overview Report and video cassettes (7/22 and 7/25) which have been produced and relied upon by the defender fall within the definition of the Schedule of Condition contained in the Sub-Lease.

[65] The first obvious point is that neither the Overview Report nor the video cassettes are initialled and marked by the parties who executed the Sub-Lease. The pursuer founds on this fact to draw two inferences. First, the pursuer submits that the absence of the initialling means that the Overview Report and video cassettes cannot constitute the Schedule of Condition. Second, and more fundamentally, the pursuer submits that, in the absence of either an initialled document or an initialled video survey, there is no evidence that the Schedule of Condition ever existed.

[66] I reject both of these inferences. In respect of the first, the pursuer's argument is fatally undermined by the wording of the Sub-Lease. As I have noted above, the definition

of “Schedule of Condition” does not state that the Schedule itself is to be initialled and marked. Rather it states only that “a copy” of the video and accompanying explanatory statement is to be so identified.

[67] In respect of the second point, the pursuer’s submission falls into the trap of assuming that the absence of evidence constitutes evidence of absence. Furthermore, there is, in fact, a significant body of evidence supporting the conclusion that the Schedule of Condition was created and did exist. Needless to say, given the nature of the hearing before me (see [8] above), this evidence is unchallenged.

[68] First, the evidence of the pursuer’s witnesses, Mr Sanger, Mr Wali and Mr Roscoe, was to the effect that, at the time of the pursuer’s acquisition of the Sub-Lease no copy of the Schedule of Condition could be found but, importantly, that seemed to be largely because the only copy held by the seller, RBS, had been destroyed in a fire. Accordingly, this evidence undermines the pursuer’s contention that no Schedule of Condition was ever created.

[69] Second, there is the evidence of Robert Brown of Robert Brown Associates as recorded in the written answers he provided to the defender’s solicitors. I consider Mr Brown’s evidence to be of considerable significance given his involvement in the carrying out of a survey of the hotel in March 2001. The following points can be taken from Mr Brown’s evidence:

- Robert Brown Associates were jointly instructed by RBS and Hilton to carry out a survey of the hotel (along with a number of other hotels) in the context of negotiations of a sale and lease back.
- Robert Brown Associates recorded schedules of condition in video format.

- The only document prepared by Robert Brown Associates pursuant to that joint instruction was the Overview Report.
- A copy of the video schedule together with the Overview Report was sent by Robert Brown Associates to both RBS and Hilton.

Mr Brown's evidence has to be seen alongside the evidence of Martin Long. Mr Long was the engineer employed by, first, Stakis and, thereafter, Hilton. He gave evidence as to the carrying out of a video survey of the hotel over 2 days in March 2001.

[70] The question which arises from Mr Brown's evidence is whether the Overview Report is the "accompanying explanatory statement" referred to within the definition of the Schedule of Condition contained in the Sub-Lease. I am satisfied that, on the balance of probabilities, it is, for the following two reasons.

[71] First, I consider that there is force in senior counsel for the defender's characterisation of the Overview Report as being the "only show in town". The "explanatory statement" referred to in the Sub-Lease was to be prepared by Robert Brown Associates and to accompany a video. It was also dated March 2001. It is clear from the evidence of Mr Brown that the only document which could fulfil those criteria is the Overview Report. No other document was prepared by Robert Brown Associates in the course of their survey of the hotel.

[72] Second, a consideration of the Overview Report itself is also supportive of that conclusion. The report bears to have been prepared pursuant to a joint instruction by RBS and Hilton in connection with the proposed sale and lease back of a number of properties including the hotel. It is dated March 2001. The content of the report may also fairly be described as a statement which is explanatory of the content of a number of video surveys including one of the hotel.

[73] The remaining question is whether the videos produced and founded upon by the defender (7/22 and 7/25) are copies of “the video” referred to within the definition of the Schedule of Condition contained in the Sub-Lease. Again, I am satisfied that, on the balance of probabilities, they are. I reach that conclusion based on the following factors:

- The footage on each video bears to be a survey of the hotel.
- The date of survey, 6 March 2001, and the reference, 011184/4, marked on each video is consistent with the description contained in the Overview Report.
- The duration of the footage on each video is consistent with the description in the Overview Report of 2 hours: in each case, the footage runs to slightly more than 2 hours. (In this regard, I do not consider that slight difference in the footage shown on the two copies of the video, 21 seconds out of more than 2 hours, is material for present purposes.)

[74] In reaching that conclusion, I have considered and rejected each of the points put forward by the pursuer. First, the pursuer argued that the videos founded upon by the defender cannot be “the video” referred to in the Sub-Lease because they contain footage bearing to have been shot on 7 March 2001 which post-dates the signing of the Sub-Lease on 6 March 2001. I do not understand the logic of this argument. It is not clear to me on what basis either of law or of fact that it proceeds. I can see no reason, either as a matter of law or based on the wording of the Sub-Lease, why the parties were prevented from prospectively determining that the video survey being carried out, pursuant to their joint instruction, by Robert Brown Associates was to be the Schedule of Condition. In this regard, I consider it reasonable to infer that the parties to the Sub-Lease were aware of their joint instruction of Robert Brown Associates when the Sub-Lease was executed.

[75] Second, the pursuer argued, on the basis of the evidence of Mr Freeth, that Mr Brown generally used an editing process in finalising his video surveys and yet there was no evidence that such a process had occurred here (see [19] above). I do not consider that the evidence of Mr Freeth as to the general approach that Robert Brown Associates used in the preparation of video surveys is of any assistance on the sharp issue of whether the videos relied upon by the defender are copies of “the video” referred to in the Sub-Lease. To begin with, Mr Freeth is clear that he had had no involvement in the surveying of the hotel in 2001. Although he had known Mr Brown from an earlier date, he only began working with him from 2007. Further, and in any event, Mr Freeth does not, in any way, seek to challenge the evidence contained in Mr Brown’s answers that he completed the Schedule of Condition in video format and submitted it along with the Overview Report.

[76] Finally, the pursuer argued that a consideration of the content of the videos themselves indicates that they could not be part of the Schedule of Condition. This was because the commentary on the videos identified current wants of repair and yet, given the terms of Clause 3.5.1(a) of the Sub-Lease, neither party would be obliged to remedy them. The pursuer’s argument was that such an outcome was nonsensical and this demonstrated that the videos which the defender relied on could not be part of the Schedule of Condition. A further stage in the process was required in which the parties would negotiate and agree the Schedule (see para [22]).

[77] The principal difficulty I have with this argument is that it finds no support in the wording of the definition of the Schedule of Condition in the Sub-Lease. The pursuer’s argument also assumes that the provisions of the Sub-Lease, including the Schedule of Condition, must create an exhaustive scheme for addressing any pre-existing wants of repair. However, as I have noted above, the wording of that definition does not stipulate

that the video or the accompanying explanatory statement are to be agreed by the parties. Further, the definition contains no requirement as to the content of either the video or the accompanying explanatory statement. I consider that the wording of the Sub-Lease is clear in its effect: the parties have entrusted the task of preparing the Schedule to a jointly instructed third party expert. The fact that the Schedule of Condition, as defined in the Sub-Lease, when taken together with the provisions of the Sub-Lease, does not produce an exhaustive scheme for dealing with pre-existing wants of repair does not mean that it is not the Schedule of Condition. It means only that the parties have neither agreed to nor created an exhaustive scheme.

The pursuer's legal arguments

[78] As noted above, the pursuer advanced a number of legal arguments directed at challenging the defender's reliance on the Overview Report and the videos on which it founded (see [24] to [26] above). The pursuer first contended that the defender was essentially seeking to prove the tenor of the Schedule of Condition but had failed to lead the evidence necessary to entitle it to such a remedy. Second, the pursuer argued that the defender's reliance on the Overview Report and the videos was precluded by the best evidence rule.

[79] In light of the conclusions which I have reached, based on the evidence, in respect of the Overview Report and the videos founded upon by the defender, I consider that both of the legal arguments advanced by the pursuer are somewhat beside the point.

[80] First, I do not consider that the remedy of proving the tenor is at all relevant to the present case. Apart from anything else, senior counsel for the defender entirely disavowed any reliance upon it. More fundamentally, the pursuer's argument proceeds on the

assumption that the Overview Report and the videos founded on by the defender are not the Schedule of Condition. However, for the reasons I have set out above, I have concluded that the Overview Report together with each of the videos founded on by the defender do fall within the definition of the Schedule of Condition contained within the Sub-Lease and do, therefore, constitute it. In these circumstances, the remedy of proving the tenor is simply inapplicable.

[81] Secondly, for similar reasons, the defender's reliance on the Overview Report and the two videos (7/22 and 7/25) does not, in my view, fall foul of the best evidence rule. This is straightforwardly because, as they constitute it, they are the best evidence of the Schedule of Condition. In any event, even if the best evidence rule were to be applicable, I consider that there is force in the defender's argument that, by analogy with the reasoning of Lord Erich in *Glasgow City Council* (above at [45]), the evidence upon which the defender relies would be admissible.

The second question

[82] The second question, which relates to the first declarator sought by the pursuer, proceeds on the basis that the pursuer is correct about the first question. As I have decided that question against the pursuer there is, strictly, no need to deal with the second question. However, in deference to the submissions which I heard and lest the matter go further, my views are as follows.

[83] The dispute between the parties turns on the proper construction of Clause 3.5 of the Sub-Lease and, in particular, Clause 3.5.1. During the course of the hearing before me, neither party took up time in making submissions on the approach to be adopted in the proper construction of commercial contracts. This is unsurprising given that the correct

approach to this exercise is well-established (see *Paterson v Angelline (Scotland) Limited* 2022 SC 240 at paragraph 32 and the authorities cited there and *Lagan Construction Group Limited v Scot Roads Partnership Project Limited & others* [2023] CSIH 28 at paragraph 10). One well established rule of construction is that clauses and, indeed contracts, require to be read as a whole (see *The Law of Contract in Scotland*, W McBryde (3rd Edition) at 8-17; *Smith v Lindsay & Kirk*, 2000 SC 200 at 203C-D per Lord President Rodger; *McCall's Entertainment* at 1427A-B).

[84] Approaching Clause 3.5.1, therefore, as whole, I consider that the opening words which set out the obligation imposed on the tenant – “To keep the Hotel in good and substantial repair and condition and to remedy any inherent defects in the design or construction of the Hotel howsoever arising” are subject to three qualifications. The first two qualifications are, respectively, fair wear and tear and damage by any of the Insured Risks to the extent that insurance money is irrecoverable as a result of the act or default of the landlord. These are contained in brackets and fair wear and tear is further described in paragraph (b) of Clause 3.5.1. Neither of these qualifications was relevant to the parties’ arguments on this point. The third qualification, which lay at the heart of the parties’ dispute as to proper construction of the defender’s repairing obligation, is contained in paragraph (a) of Clause 3.5.1:

“(a) without prejudice to Clauses 3.5.3 and 3.5.4 nothing herein shall require the Tenant to deliver up the Hotel in a better state of repair and condition than that evidenced by the Schedule of Condition”

(The parties were also agreed that, for present purposes, nothing turned on the wording of Clauses 3.5.3 and 3.5.4.)

[85] Four observations can be made about Clause 3.5.1. First, contrary to the submissions of the pursuer, I do not consider that any particular significance can be attached to the fact

that the clause starts with the repairing obligation and then sets out the qualifications thereto. In other words, I reject the suggestion that this word order in some way imposes a formal onus on the tenant to demonstrate that the qualification contained in paragraph (a) applies. The pursuer's argument falls foul of the requirement to read the clause as a whole by seeking to impose a somewhat artificial structure on it. Furthermore, that approach would also run contrary to the "nothing herein" wording which occurs both in paragraph (a) as well as being repeated in Clause 3.19.

[86] Secondly, it is notable that the tenant's obligation refers only to keeping the hotel in good and substantial repair and condition and to remedying inherent defects. The language used to encapsulate the tenant's obligation does not include reference to replacement, renewal or rebuilding.

[87] Third, I note that paragraph (a) qualifies the tenant's repairing obligation by reference to the "state of repair and condition *evidenced* by the Schedule of Condition" (my emphasis). In other words, the Schedule of Condition evidences the relevant state of repair and condition rather than creating or constituting it.

[88] Fourth, taking the previous points together with the definition of "Schedule of Condition", I consider that, properly construed, the tenant's obligation does not require the hotel to be delivered up in a better state of repair and condition than existed in March 2001 when the video survey which constitutes the Schedule of Condition was carried out.

[89] In making these observations, I find myself respectfully in agreement with both the approach and observations made by Lord Hamilton in *McCall's Entertainments* (at 1427A-E) in respect of the similarly worded, but not identical, clause under consideration in that case (Clause Twelve quoted at 1423B-D). Whilst I of course accept the pursuer's submission that the wording considered in *McCall's Entertainments* was not the same as that which was

considered by me, I am not persuaded, based on the points I have noted above, that the differences are of such significance as to require a different outcome. In particular, both the second and third points I have noted were also true of the clause under consideration in *McCall's Entertainments*.

[90] As to the other authorities relied upon by the pursuer, I consider the wording of the clause under consideration in *@SIPP Pension Trustees* to be significantly different. In particular, as was noted in the opinion of the court (at paragraph 20), by contrast with both the present case and *McCall's Entertainments*, the tenant's obligation in that case included to renew, replace and rebuild as necessary.

[91] Finally, in relation of *Archyfield Limited*, I note that the Lands Tribunal attached significance to the fact that the wording (quoted above at [31]) envisaged the agreement of a Schedule of Condition occurring at some point in the future and included provision for arbitration in the event that no agreement could be reached (paragraphs 13 and 14 vi, vii and viii). That is a point of distinction from the wording which I require to consider in which the Schedule of Condition is identified and defined in the Sub-Lease. However, even leaving that point of distinction to one side, I do find myself, respectfully, struggling with the approach of the Lands Tribunal for two reasons. First, it is not clear to me how the approach to construction adopted by the Tribunal is consistent with the principle that clauses require to be construed as a whole. It seems to me that the Lands Tribunal has placed undue weight on what it has characterised as the "primary obligation" in the clause and the "qualification". Rather than reading them together to determine the effect of the clause, it seems to me that the Lands Tribunal has given primacy to the "primary obligation". Secondly, it is also not apparent to me that the Lands Tribunal has fully

appreciated that the condition of the premises as at the date of lease is *evidenced* by the Schedule of Condition and not constituted by it.

[92] For these reasons, had it been necessary to do so, I would have refused the pursuer's first declarator.

Conclusion and findings in fact

[93] In light of the evidence I have considered and on the basis of my conclusion in respect of the first question, I refuse the pursuer's first and second declarators. I also make the following findings in fact:

- 1) A Schedule of Condition, as defined in Clause 1.1 of the Sub-Lease, comprising a video survey and accompanying explanatory statement was prepared by Messrs Robert Brown and Associates on 6 and 7 March 2001.
- 2) A copy of the video and accompanying explanatory statement were provided by Messrs Robert Brown Associates to both RBS and Hilton.
- 3) Production 7/7 is a copy of the explanatory statement referred to in (1) above.
- 4) The VHS video cassettes, production 7/25 and production 7/22, are copies of the video survey referred to in (1) above.

The second issue

[94] As it came to be argued before me, the second issue, relating to the tenant's decorating obligations in Clause 3.5.2, raises only a short point. That point becomes even narrower in light of my conclusions on the parties' arguments in respect of the first issue as I have concluded, in the defender's favour, that it has produced the Schedule of Condition as defined in the Sub-Lease.

[95] The only remaining question is whether the tenant's obligation in terms of Clause 3.5.2 is qualified by reference to the Schedule of Condition. I am quite satisfied that it is so qualified.

[96] Before turning to the detail of the pursuer's arguments on this point, it respectfully seems to me that they somewhat miss the point. The pursuer argues, for a number of reasons, that the qualification at the end of Clause 3.19 relates only to that clause. The flaw in the pursuer's approach is that it overlooks the wording of Clause 3.19 itself.

[97] For present purposes, the basis of the pursuer's case is that the defender has failed to comply with its obligations in terms of 3.19 (see Article 16 of condescendence). In particular, Clause 3.19.1 provides that upon the expiration of the lease, the tenant shall "yield up the Hotel ... in a state and condition consistent with due compliance by the Tenant with its covenants and obligations under this Sub-Lease". In other words, the defender was obliged to yield up the hotel in a state which was consistent with the defender having complied with its obligations including, of course, the obligation to decorate in terms of Clause 3.5.2. The obligations contained in Clause 3.19 are then followed at the end of the clause by the qualification: "Provided always that nothing herein shall require the Tenant to deliver up the Hotel in a state and condition better than that evidenced by the Schedule of Condition." Accordingly, even if the pursuer is correct and the qualification at the end of Clause 3.19 relates only to that clause, it would still apply to qualify the state and condition of the hotel which the defender was required to achieve on yielding up the hotel.

[98] In any event, I find none of the pursuer's arguments persuasive. The reliance on the absence of a full stop involves placing significant weight on punctuation which a cursory consideration of the Sub-Lease undermines. There are numerous examples which show that the use of full stops both within and at the end of clauses is far from consistent. The

argument based on the redundancy is, at best, inconclusive. As senior counsel for the defender pointed out, the fact that the qualification in question is repeated could merely emphasise its importance to the parties. Finally, the location of the qualification in Clause 3.19 is, for the reasons I have set out above, obvious. The qualification has been included in the provisions relating to yielding up precisely because it is at the point of yielding up that the qualification is of importance.

[99] For these reasons, I reject the pursuer's argument on this point.

Disposal

[100] In light of the foregoing, I will sustain the defender's second and third pleas-in-law and dismiss the action *quoad* the first and second conclusions.

[101] I will now put the case out By Order so that the parties can address me on further procedure in light of my decision and, in particular, how further inquiry into the disputed items within the Scott Schedule ought to be approached. I will reserve all questions of expenses meantime.