FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 41
XA22/23

Lord President
Lord Pentland
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the appeal against a decision of the Scottish Land Court under section 88 of the Agricultural Holdings (Scotland) Act 2003

in the cause

THE TRUSTEES OF THE ROXBURGHE SECOND DISCRETIONARY TRUST

Appellants

against

ROBIN DOUGLAS LINDSAY BATCHELOR

Respondent

Appellants: Sutherland; Anderson Strathern LLP
Respondent: Frain-Bell; Blackadders

10 November 2023

Introduction

[1] The appellants are the landlords of a farm at Easter Muirdean, Kelso. The respondent is the tenant. The appellants contend that the respondent breached the terms of his lease by failing to carry out repairs to fences. On 6 December 2021, the appellants served

a notice to quit on the respondent, founding on this alleged breach. They applied to the Land Court craving his removal.

[2] On 12 April 2023 the Land Court granted decree of absolvitor. The appellants challenge that decision. Two questions of law are posed: (1) whether the Land Court erred in its construction of the respondent's repairing obligations under the lease; and (2) whether the Land Court erred in determining that, if there were any ambiguity in the terms of the obligation, business common sense supported the Court's construction.

The Conditions of Let

The Lease

[3] The lease was entered into on 18 February 1983 by the appellants and the respondent's father, namely Peter Batchelor. Under the heading "MAINTENANCE OF FIXED EQUIPMENT", clause 6 provides:

> "The Tenant shall pay to the Proprietor one-half of the cost of maintaining the fences, gates and gateposts … on the [farm]."

The lease states that it is subject to the Regulations and Conditions for the Let of Farms on the Roxburghe Estates dated 21 August 1954.

The Regulations and Conditions

[4] Regulation XXXVI reads:

> "The Tenant shall enter into a formal Lease containing the above Conditions and any other Conditions agreed on...".

Regulation VIII is as follows:

> "The Tenant shall accept as being in a thorough state of repair the whole Fixed Equipment (as the same is defined in Section 93(1) of the Agricultural Holdings (Scotland) Act 1949) … and the Proprietor hereby undertakes to have the said defective equipment…put into a thorough state of repair as soon after the

> commencement of the Tenancy as is reasonably possible and the Tenant shall be bound to maintain the Fixed Equipment as provided by Section 5(2)(b) of the said Act."

The definition of "Fixed Equipment" in the 1949 Act includes "all permanent fences …". The obligation on a tenant under section 5(2)(b) of the Act is to maintain the equipment in as good a state of repair as it was, once the landlord had put it into a "thorough state of repair", at the commencement of the lease.

Facts

[5] The original tenant, the respondent's late father, was the factor on the Roxburghe Estates. The respondent succeeded to the tenancy upon his father's death. He intimated his succession to the appellants on 26 January 2021. In response, on 8 March 2021, the present factor, namely Roderick Jackson, wrote to the respondent. Among other things, his letter said that repairs were needed to certain buildings and fences. A schedule of repairs was enclosed. The court has not seen that schedule. The letter stated that the 1954 Deed of Regulations governed the repairing obligations in relation to buildings. The respondent was asked to provide a programme of works and to complete the building repairs by 1 October 2021.

[6] The letter went on to say that, in terms of clause 6 of the lease, the respondent was responsible for one half of the cost of maintaining the fences. A surveyor's report stated that most of the necessary work was due to a failure to repair the strainer posts timeously. On that basis, the appellants considered that the respondent should be wholly liable for the costs of the repairs, other than the strainer posts. The appellants would arrange for the works to be executed by a fencing contractor. On completion, they would invoice the respondent for "your share of the cost".

[7] The respondent emailed the factor on 22 April 2021, stating that he would telephone him to discuss the repairs. The appellants say that this phone call did not happen. This prompted them, on 25 May 2021, to serve notice on the respondent, demanding that he remedy "the undernoted breach" of the conditions of his tenancy within six months. The appellants say that this notice superseded their offer to execute the works in the 8 March letter.

[8] By 6 December 2021, the repairs were still outstanding. The appellants served the respondent with a notice to quit. It read:

> "This notice is given in terms of section 22(2)(d) of the Agricultural Holdings (Scotland) Act 1991 on the ground that you have failed to remedy a breach … of a term or condition of your tenancy … namely your failure to repair items of fixed equipment as set out in the Schedule of Repairs to the buildings and fences … issued to you by recorded delivery letter dated 8 March 2021 issued on behalf of the landlords, which Schedule was annexed to the notice requiring you to remedy dated 25 May 2021."

[9] The respondent disputed that he is in breach of the lease. He accepted that certain repairs were required, and that he has to pay half of the cost. He did not accept that this amounted to an obligation to carry out the works. He relied upon the terms of the letter of 8 March and clause 6 of the lease. In addition, at the time of the notice to quit, there was a dispute between the parties about the extent of the subjects. The respondent did not accept that the buildings which required repair formed part of his holding. That matter was resolved in his favour at an arbitration on 8 September 2022. It is no longer in issue.

The Land Court's decision

[10] The Land Court noted that the principles governing the construction of contracts were well-established. The contract must be interpreted as a whole. The intention of the

parties required to be ascertained by considering what a reasonable person, having the background knowledge of the parties, would understand from the language selected. If there were two possible constructions, the court was entitled to prefer the one which was more consistent with business common sense (*Network Rail Infrastructure* v *Fern Trustee 1* 2022 SLT 997).

[11] Neither party argued that evidence was required in order to interpret the lease. There were no averments of relevant surrounding facts and circumstances, other than that the previous tenant had been the factor on the estate. It was not open to the court to have regard to the terms of the letter of 8 March 2021 in order to assist in interpreting the lease. The letter did not demonstrate that the present factor had adopted the respondent's interpretation of clause 6. Even if it had, that did not mean that his interpretation was correct. Apart from the one averment about the factor, the court had nothing to rely on but the ordinary and natural meaning of the language.

[12] Both clause 6 and Regulation VIII were clear, when looked at in isolation. The issue was how they interrelated. Regulation XXXVI made it clear that the Regulations were applicable to all of the tenancies on the Roxburghe Estates. They did not exclude the possibility that other conditions could be agreed, including those which diverged from the Regulations. The landlord was to provide the fixed equipment in a thorough state of repair. The obligation to maintain that equipment was on the tenant. For whatever reason, the parties had chosen to make special provision in relation to the maintenance of the fences, the gates and gateposts.

[13] The appellants could not provide a satisfactory explanation for the respondent paying them half of the cost of maintenance when, on their interpretation, it was the tenant's responsibility to carry out that maintenance. The appellants had tried to explain that the

tenant would give any invoices to the appellants to settle, along with half of the costs. This did not make sense. Clause 6 could not be construed as a concession that the appellants would pay one-half of the cost of maintenance; that was the direct opposite of what the clause expressly provided. It was not argued that clause 6 could be interpreted as though the words "Tenant" and "Proprietor" had been exchanged.

[14] There was no ambiguity. The appellants had not demonstrated that there was a basis for identifying a rival meaning (*Arnold* v *Britton* [2015] AC 1619 at para 77). The only tenable interpretation of clause 6 was that the obligation on the respondent was limited to paying to the appellants' half of the cost. It was a necessary corollary of the payment obligation that the maintenance would be done by the party receiving payment; ie the appellants. Clause 6 and Regulations VIII were not in conflict. This was simply an example of the general (the Regulations) yielding to the particular (the lease). Regulation XXXVI allowed for such an outcome.

[15] Even if the court had identified an ambiguity, the respondent's position was more consistent with business common sense. Ordinarily, routine and minor maintenance work on a small farm would be carried out by the tenant. However, once it was appreciated that the tenant was the factor on a large estate, of which the holding formed a part, the "probable reason for the somewhat unusual nature of the contractual arrangements pertaining to the fences … become (*sic*) obvious". The estate would have workers and contractors who might assist the factor with repairs. The parties would have:

> "had some incentive to agree to an arrangement whereby the [appellants] effected the maintenance work to the fences, … when the need arose and this had been brought to [the appellants'] attention by the tenant and the tenant would defray part of the cost to the [appellants] of so doing."

As a specialist court, the court's experience led it to conclude that such an eminently practical and mutually beneficial arrangement was what clause 6 was intended to achieve.

Submissions

The appellants

[16] The principles governing the construction of a lease were not in dispute. The court's task was to ascertain the objective meaning of the language used. The contract had to be considered as a whole. Where there were rival meanings, the court could reach a construction that was more consistent with business common sense (*Wood* v *Capita Insurance Services* [2017] AC 1173 at para 11).

[17] The Land Court failed to adopt the proper approach to construction. It did not look at the lease, which included Regulation VIII, as a whole. The Court stated that the two provisions were clear in their terms when looked at in isolation. The issue was whether clause 6 overrode Regulation VIII. The Court failed to consider whether the two provisions could both have effect when read together.

[18] The Land Court erred in holding that the only possible interpretation of clause 6 was that the respondent's obligations were limited to paying to the appellants half of the cost of maintenance. That was not what clause 6 said. Clause 6 did not have any effect on the respondent's obligation under Regulation VIII. It concerned only the sharing of the cost of repair. Regulation VIII governed the respondent's obligation to repair. If the appellants were responsible for carrying out the maintenance of fences, gates and gateposts, but not any other types of fixed equipment, this would have been expressly stated. There was no obvious benefit in making the appellants responsible for repairs of some items, when the

respondent was responsible for all other fixed equipment. The respondent was best placed to see when a repair might be required.

[19] The Land Court's reasoning, that the original contracting parties had an incentive to agree to a variation in the obligations under Regulation VIII, amounted to an exercise in speculation. The Court was entitled to take into account its specialist knowledge of the applicable law, and its agricultural member's knowledge of agricultural practice. However, the intention behind clause 6, and its relationship with Regulation VIII, was not a matter to be determined by reference to specialist knowledge of agricultural practice.

The respondent

[20] The Land Court's decision was clear. There was no error in law. The case fell to be determined according to the well-established rules on the interpretation of contracts. The parties' intention was most obviously gleaned from the language used. Contracts were made by what people said, not what they thought in their inmost minds (*Lagan Construction Group* v *Scot Roads Partnership Project* [2023] CSIH 28 at para [10]).

[21] The Land Court had not erred in finding that the only tenable interpretation of clause 6 was that the respondent's obligation, in relation to the repair of fences etc., was limited to paying to the appellants half of the associated cost. It was a necessary corollary of that payment obligation that the appellants would carry out the maintenance, as the party entitled to receive payment for so doing. There was no ambiguity. There was no conflict between clause 6 and Regulation VIII. Regulation XXXVI made it clear that the parties were entitled to agree upon "any other Conditions". Clause 6 was one such "other Condition". The Land Court was entitled to conclude that there was no basis in the language used, or in the factual matrix, for identifying a rival meaning for clause 6. As there was no ambiguity,

there was no basis upon which to use any other aid to construction (*Lagan Construction Group* at para [11]).

[22] If there were an ambiguity, the respondent's position was more consistent with business common sense. When a tenant was the factor and knew that estate workers or established contractors were available to assist with maintenance tasks, different considerations were likely to apply, distinct from the usual arrangement whereby the tenant was considered to be best placed to maintain fixed equipment. The original contracting parties would have had some incentive to agree that the appellants effected the maintenance and the tenant reimbursed them. The court should be reluctant to interfere with the findings of a specialist court (*El-Huseini* v *General Medical Council* [2021] EWHC 2022 at paras 70-71).

Decision

[23] The terms of the lease, and the incorporated Regulations and Conditions, fall to be construed according to the well-established rules on the interpretation of contracts. These were recently set out in summary in *Lagan Construction Group* v *Scot Roads Partnership Project* [2023] CSIH 28 (LP (Carloway), delivering the opinion of the court, at para [10]) citing *Paterson* v *Angelline (Scotland)* 2022 SC 240 (at para [32]) in turn citing, *inter alia*, *Arnold* v *Britton* [2015] AC 1619 (Lord Neuberger at para 15). The intention of the parties is most obviously gleaned from the language which they have chosen to use in the context of the contract as a whole. The court should not normally search for drafting infelicities in order to justify a departure from the natural meaning of that language. It should identify what the parties agreed, not what it thinks common sense may otherwise have dictated. Contracts are made by what people say, not what they think in their inmost minds (*Muirhead & Turnbull* v *Dickson* (1905) 7 F 686 (LP (Dunedin) at 694).

[24] Regulation VIII is to the effect that the tenants on the Roxburghe Estates accept the fixed equipment, including the fences, in a thorough state of repair. They then become liable to maintain the fences in as good a state of repair as they were at the start of the tenancy (Agricultural Holdings (Scotland Act 1949) s 5(2)). That then is the general position, but it is possible to modify it (*ibid* s 5(3)).

[25] In this lease, clause 6 provides that the respondent is to pay to the appellants one half of the cost of maintaining the fences. How, then, does that fit in with the provision of Regulation VIII which applies to all the Roxburghe Estate leases? It is certainly different from it. The intention must have been to modify it, as is permitted by Regulation XXXVI. That is clear also from the preamble to the lease, where express reference is made to the tenant taking the lease "at the rent and under the following conditions". The phraseology of clause 6, in imposing an obligation on the respondent to pay one half of the costs, presupposes that the appellants have already incurred a cost in relation to fence maintenance. That in turn must mean that it was intended that the maintenance would have been instructed, or carried out, by the appellants. Put another way, as the Land Court determined (para [32]), the obligation on the respondent is limited to paying to the appellants the costs of maintenance. It is a necessary corollary of that payment obligation that the maintaining itself is to be done by the party to whom the respondent is directed to make payment, namely the appellants. The appellants' construction makes no sense since it would oblige the respondent not only to maintain the fences, gates and gateposts, but also to pay the appellants one-half of the costs of doing so.

[26] The appeal is refused on this basis. The court will answer the two questions in the negative and affirm the order of the Land Court dated 12 April 2023.

[27] It is not necessary to ascertain what business, in the sense of farming, common sense might have dictated. Nevertheless, the language does have to be interpreted against the background of the parties' agreed common knowledge at the time the lease was entered into (*Network Rail Infrastructure* v *Fern Trustee 1* 2022 SLT 997, LP (Carloway), delivering the opinion of the court, at para [28]; *Wood* v *Capita Insurance Services* [2017] AC 1173, Lord Hodge at para 10). The peculiarity of clause 6 in this lease was that, at the time of the lease, the tenant was also the factor on the estate. Although this may not involve specialist knowledge, it does provide an explanation for the divergence from the norm. The parties had agreed that the cost of maintenance was to be divided, rather than imposed solely on the tenant. Since the appellants already had their own estate workers and established contractors *in situ*, it was easier for the appellants to instruct (and control) the work and then to charge the respondent for his agreed half share.