SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2023] SC GLA 3

GLW-CA2-21

JUDGMENT OF SHERIFF S REID

in the cause

LUJO PROPERTIES LTD

Pursuer

against

GRUVE LTD

Defender

Pursuer: Mr R. Anderson, Advocate; Dentons UK & Middle East LLP, Edinburgh
Defender: Mr R. McIlvride K.C.; Whyte Fraser & Co, Motherwell

GLASGOW, 23 December 2022

The sheriff, having resumed consideration of the cause:

1. Sustains the pursuer's objection to the admissibility of the unsigned and undated documents purporting to be witness statements of Leyla Linda Reda and Ammar Reda, items 24 & 25 of process respectively; and Excludes the same from probation;

2. Sustains the pursuer's objection to the admissibility of the content of the email communications between the parties dated 9, 10 & 11 July 2020 (items 6/1 & 6/2 of process, as reproduced in the paginated joint bundle ("JB"), 196–200); and Excludes the same from probation;

3. Sustains the pursuer's objection to the admissibility of the content of the email communications between the defender and the pursuer's solicitors dated 20 & 22 November 2020 (items 6/3, 6/4 & 6/24 of process; JB, 202–206 & 286–288); and Excludes the same from probation.

4. Repels the pursuer's objection to the admissibility of the signed but undated documents bearing to be witness statements of Leyla Linda Reda and Ammar Reda (JB, 315–316 & 317–331, respectively);

5. Sustains the defender's objection to the admissibility of the testimony of Sheena Coburn *quoad* (i) her expressions of opinion in oral testimony as to the likelihood of the pursuer securing a replacement tenant had the defender removed from the Premises, and the rent that the pursuer might reasonably have achieved in that event; (ii) paragraph 9 of her signed witness statement dated 22 June 2022 (JB, 293–295); and (iii) paragraph 2 of her signed supplementary witness statement dated 18 July 2022 (JB, 296–299); and Excludes the same from probation; *quoad ultra* Repels the defender's objection to the admissibility of the testimony of Sheena Coburn;

6. Sustains the defender's objection to the admissibility of the testimony of Andrew Britton *quoad* (i) his expressions of opinion in oral testimony as to market conditions and rental values within the commercial property rental sector in Glasgow; the likelihood of the pursuer securing a replacement tenant had the defender removed from the Premises; and the rent that the pursuer might reasonably have achieved in that event; (ii) paragraphs 6 & 7 of his signed witness statement dated 4 July 2022 (JB, 303–304); and (iii) the terms of a letter dated 26 January 2022 from Andrew Britton (item 5/28 of process; JB, 189);

THEREAFTER, MAKES the following findings-in-fact:

(1) The pursuer is the heritable proprietor of a commercial property comprising the ground floor and basement premises situated at and forming 404 Sauchiehall Street, Glasgow ("the Premises").

(2) In terms of a lease between the parties dated 14 & 16 December 2015 and registered in the Books of Council and Session on 14 January 2016 ("the Lease"), the pursuer let the Premises to the defender.

(3) In terms of the Lease, the defender agreed to pay to the pursuer an annual rent in the sum of £21,000 (exclusive of VAT) for its occupation of the Premises; the rent was to be paid to the pursuer quarterly, in advance, on 28 February, 28 May, 28 August and 28 November each year; and the defender was also obliged to pay a proportionate share of the common charges and insurance premiums applicable to the Premises, as set out in the Lease.

(4) In terms of a deposit agreement between the parties also dated 14 & 16 December 2015 and registered in the Books of Council and Session on 14 January 2016 ("the Deposit Agreement"), the defender agreed to lodge with the pursuer the sum of £5,250 ("the Deposit") to be held by the pursuer in an interest-bearing account in the name of the pursuer ("the Deposit Account") as security for the due performance by the defender of its obligations under the Lease.

(5) Items 5/1 & 5/2 of process are true copies of, respectively, the Lease and the Deposit Agreement.

(6) In terms of clause 2.3 of the Deposit Agreement, the defender agreed to maintain the balance (including any interest) of the Deposit Account at any given

time (therein referred to as "the Deposit Fund") in an amount not less than the sum of £5,250;

(7) In terms of clauses 2.2 & 5.1 of the Deposit Agreement, the pursuer was entitled, at any time, to withdraw and to pay to itself from the Deposit Fund, on each occasion that the defender failed to pay the rent or other sums (whether or not any formal demand therefor had been made) for which the defender was responsible under the Lease, an amount equal to such rent or such other sums due plus any VAT chargeable and interest due on them as provided for in the Lease.

(8) In terms of clause 2.3 of the Deposit Agreement, the defender agreed that if the pursuer withdrew any part of the Deposit Fund (or, for any other reason whatsoever, the Deposit Fund became fell below the sum of £5,250), then the defender was obliged to lodge with the pursuer, within five working days after a written demand from the pursuer to do so, such further sums as represented the difference between the Deposit Fund (that is, the balance, including any interest, of the Deposit Account at any given time) and the sum of £5,250 at the time in question.

(9) In terms of clause 7.1 of the Deposit Agreement, the parties agreed that any breach by the defender of the Deposit Agreement would constitute a breach of the defender's obligations under the Lease, and that the pursuer would be entitled to exercise its right of irritancy and other rights under the Lease in relation to any such breach of the Deposit Agreement.

(10) In terms of clause (S) of the Lease, the pursuer was entitled, by notice in writing to the defender, to terminate the Lease if *inter alia* the defender at any time allowed any rent or any other sum due under the Lease to be in arrears for 14 days (whether demanded or not), provided that the pursuer shall have first given to the

defender written notice, under threat of irritancy, specifying the breach complained of, and the defender has failed to remedy such breach within 14 days thereof.

(11) As at 3 June 2020, arrears of rent (and other charges) in the total sum of £5,371.72 were owed by the defender to the pursuer under the Lease ("the Arrears").

(12) The Arrears comprised the following sums: (i) rent of £5,250, for the quarter commencing on 28 May 2020; (ii) service charge arrears of £427, overdue since 28 May 2020; (iii) service charge arrears of £7, overdue since 29 February 2019; (iv) service charge arrears of £0.73, overdue since 28 May 2019; (v) service charge arrears of £40, overdue since 7 October 2019; (vi) service charge arrears of £20, overdue since 28 November 2019; all of which amounted to £5,744.73; to which sum the pursuer applied and deducted £373.01, being funds then held on account, leaving a total indebtedness of £5,371.72.

(13) By letter dated 3 June 2020 from the pursuer's agents to the defender ("the Deposit Fund Demand Letter"), the pursuer notified the defender of the following: (i) the nature and extent of the Arrears; (ii) the pursuer's intention to uplift from the Deposit Account the sum of £5,316.97, being the total Deposit Fund (inclusive of interest) as at 3 June 2020; (iii) the pursuer's demand that the defender replenish the Deposit Fund by lodging with the pursuer, within five working days, the sum of £5,250; (iv) the pursuer's demand that the defender pay the sum of £54.75, being the balance of the Arrears owed by the defender, following application of the Deposit Fund towards part-payment thereof; and (v) that failure to comply with the foregoing demands would constitute a breach of the defender's obligations under the Deposit Agreement and the Lease.

(14) The Deposit Fund Demand Letter was sent to the defender by first class recorded delivery post, by first class ordinary post, and by email, all on 3 June 2020; the letters sent by email and by first class ordinary post were both duly delivered to the defender, on 3 & 4 June 2020, respectively; but the letter sent by first class recorded delivery post was not delivered, receipt thereof having been refused on 16 July 2020 when delivery was sought to be effected by Royal Mail at the Premises; and the recorded delivery letter was returned to the pursuer's agents on 17 July 2020.

(15) True copies of the Deposit Fund Demand Letter, as sent by recorded delivery post and ordinary post, are produced as item 5/3 of process (JB, 74–75 & 83–84); and a true copy of the Deposit Fund Demand Letter, as sent by email (together with a copy of the cover email thereto) is produced as item 5/8 of process (JB, 93–96).

(16) The defender did not replenish the Deposit Fund.

(17) The defender did not pay the balance of the Arrears.

(18) By letter dated 27 July 2020 from the pursuer's agents to the defender ("the Pre-Irritancy Notice"), the pursuer notified the defender of the following: (i) the pursuer's reiterated demand that the defender replenish the Deposit Fund (by payment of the sum of £5,250); (ii) the pursuer's reiterated demand that the defender pay the sum of £54.75, being the balance of the Arrears; (iii) the pursuer's demand that the defender pay the sum of £666.74, being arrears of insurance charges that had fallen due since the date of the Deposit Fund Demand Letter; (iv) the pursuer's demand that the defender make payment of the foregoing sums (hereinafter referred to cumulatively as "the Increased Arrears") within 14 weeks of the date of service of the Pre-Irritancy Notice; (v) that the Pre-Irritancy Notice was served in terms of clause (S) of the Lease and sections 4 & 5 of the Law Reform (Miscellaneous

Provisions) (Scotland) Act 1985; and (vi) that, in the event of non-compliance by the defender, the Lease may be terminated by the pursuer.

(19) The Pre-Irritancy Notice was properly addressed, pre-paid, and duly posted to the defender on 27 July 2020, by first class recorded delivery post.

(20) On 30 July 2020, the Pre-Irritancy Notice was returned, undelivered, to the pursuer's agents by Royal Mail.

(21) To the knowledge of the pursuer, the Pre-Irritancy Notice was not actually delivered to, or received by, the defender.

(22) To the knowledge of the pursuer, the defender was unaware of the existence and terms of the Pre-Irritancy Notice prior to 17 November 2020.

(23) The 14 week period specified in the Pre-Irritancy Notice expired on 4 November 2020.

(24) Prior to 17 November 2020, the pursuer did not notify the defender, by any other means, of the existence or terms of the Pre-Irritancy Notice.

(25) As at 16 November 2020, the Increased Arrears remained outstanding in part.

(26) By 16 November 2020, a further quarter's rent, payable as at 28 August 2020, had fallen due by the defender to the pursuer under the Lease.

(27) By letter dated 16 November 2020 from the pursuer's agents to the defender ("the Irritancy Notice"), the pursuer notified the defender of the following: (i) that the Lease was terminated with immediate effect, in exercise of the pursuer's power of irritancy thereunder, and (ii) that the defender required to remove from the Premises and to return the keys to the pursuer.

(28) The Irritancy Letter was properly addressed, pre-paid, and duly posted to the defender on 16 November 2020; and it was delivered to the defender on 17 November 2020, in the ordinary course of post.

(29) Between 27 July 2020 and 16 November 2020, the parties had been in regular, direct email communication with each other (specifically, by emails dated 8, 9, 10, 11 & 29 July 2020 and 31 August 2020: items 6/1 & 6/2 of process; JB, 196–201).

(30) Between 27 July 2020 and 16 November 2020, the defender made a number of payments to the pursuer to account of the Increased Arrears, namely: (i) the sum of £2,000 on 31 July 2020; (ii) the sum of £1,000 on 27 August 2020; and (iii) the sum of £1,000 on 5 October 2020; all of which were indefinite payments made by the defender without allocation to any specific indebtedness.

(31) As at 21 December 2020, the outstanding balance of the Increased Arrears was £1,358.39.

(32) Thereafter, the pursuer received further erratic and indefinite payments from the pursuer, as follows: (i) on 21 December 2020, the sum of £1,000; (ii) on 7 January 2021 the sum of £2,000 (of which the pursuer allocated £358.39 to arrears of rent and retained the balance to account of its damages claim in respect of the defender's alleged wrongful occupation of the Premises); and (iii) on 12 February 2021, the sum of £2,397.74 (which was also retained by the pursuer to account of the pursuer's damages claim in respect of the defender's alleged wrongful occupation of the Premises).

(33) Unknown to the pursuer, on 30 November 2020, an indefinite payment of £2,397.74 was made by the defender into a bank account operated by a third party called Savills, being an account nominated for the collection only of service charges;

the defender failed to notify the pursuer that this payment had been made, or to which debt it related; and the sum was not transferred by Savills to the pursuer until February 2021.

(34) The defender failed timeously to pay the rent due under the Lease for each of the quarters commencing on 28 May 2020, 28 August 2020 and 28 November 2020.

(35) Even if the defender had been made aware timeously of the existence and terms of the Pre-Irritancy Notice, the defender would not have settled the Increased Arrears in full prior to expiry of the period specified in the Notice.

MAKES THE FOLLOWING FINDINGS-IN-FACT AND IN-LAW:

(1) As at 3 June 2020, the defender was in material breach of the Lease by reason of its failure timeously to pay the Arrears.

(2) As at 3 June 2020, the pursuer was entitled to withdraw from the Deposit Fund the sum of £5,316.97, being the balance of the Deposit Fund at that date, and to apply the same in part-payment of the Arrears, in terms *inter alia* of clauses 2.2 & 5.1 of the Deposit Agreement.

(3) As at 3 June 2020, in terms of the Deposit Fund Demand Letter, the pursuer was entitled to, and did, demand that the defender replenish the Deposit Fund, by lodging with the pursuer the sum of £5,250 within five working days after the date thereof, in terms *inter alia* of clause 2.3 of the Deposit Agreement.

(4) The Deposit Fund Demand Letter was received by the defender on 3 June 2020 (by email) and on 4 June 2020 (by ordinary first class post).

(5) By failing to replenish the Deposit Fund in compliance with the demand in the Deposit Fund Demand Letter, the defender was in material breach of the Deposit Agreement and the Lease.

(6) On 27 July 2020, the Pre-Irritancy Notice was validly served upon the defender by virtue of being posted on that date by Royal Mail recorded delivery service in compliance with section 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, notwithstanding that the Notice was not actually received by the defender.

(7) The Pre-Irritancy Notice was not validly given to (that is, served upon) the defender in compliance with clause (S) of the Lease, in respect that the Notice was not actually received by the defender.

(8) The Irritancy Notice dated 16 November 2020 was invalid and ineffective, in respect that the Pre-Irritancy Notice was not first given to (that is, served upon) the defender in compliance with clause (S) thereof.

(9) *Separatim* the Irritancy Notice dated 16 November 2020 was invalid and ineffective in respect that the exercise of the pursuer's contractual power of irritancy was oppressive, by virtue of the following circumstances: (i) to the pursuer's knowledge, the Pre-Irritancy Notice, though validly served for the purposes of section 4 of the 1985 Act, was not actually received by the defender; (ii) to the pursuer's knowledge, the defender was unaware of the existence and terms of the Notice throughout the period specified therein; (iii) to the pursuer's knowledge, there was available to it other (ready and effective) means of communication with the defender throughout the period specified in the Notice; and (iv) throughout that period, the pursuer failed to take reasonable steps, by such other (ready and

effective) means, to notify the defender of the existence and terms of the Pre-Irritancy Notice.

(10) In posting the Pre-Irritancy Notice, the pursuer's solicitors were acting within the scope of the express authority conferred upon them by the pursuer.

(11) In receiving return of the Pre-Irritancy Notice from Royal Mail on 30 July 2020, the pursuer's solicitors were acting within the scope of the implied authority conferred upon them by the pursuer.

(12) The knowledge of the pursuer's solicitors, as at 30 July 2020, that the Pre-Irritancy Notice had not actually been received by the defender, and had instead been returned, undelivered, to the pursuer's solicitors, is imputed to the pursuer.

(13) The communications between the parties in the emails dated 9, 10 & 11 July 2020 are privileged, being communications in the course of negotiations aimed at settling a dispute between the parties.

(14) The pursuer did not waive (i) its contractual right to insist upon replenishment of the Deposit Fund under the Deposit Agreement or (ii) its contractual right to found upon the defender's failure to do so as a ground of irritancy under the Lease.

(15) The pursuer is not personally barred from exercising (i) its contractual right to insist upon replenishment of the Deposit Fund under the Deposit Agreement or (ii) its contractual right to found upon the defender's failure to do so as a ground of irritancy under the Lease.

(16) The sum of £1,358.39, being the balance of the Increased Arrears, which was due and owing by the defender to the pursuer as at 21 December 2020, was subsequently settled by the defender by means of payments on 21 December 2020 (of

£1,000) and 7 January 2021 (of £2,000, of which £358.39 was allocated to the said balance).

(17) The defender is, and has been, in lawful occupation of the Premises since 16 November 2020.

MAKES THE FOLLOWING FINDINGS-IN-LAW:

(1) The pursuer not having validly or properly exercised its power of irritancy under the Lease, decree as first to eighth craved should not be granted;

(2) The defender not being in unlawful occupation of the Premises, decree as eighth craved should not be granted;

(3) The defender not being due and resting owing to the pursuer in the sum seventh craved, decree therefor should not be granted;

THEREFORE, Sustains the second, sixth, seventh, ninth and tenth pleas-in-law for the defender; *quoad ultra* Repels the remaining pleas-in-law for the defender; Repels the pleas-in law for the pursuer;

ACCORDINGLY, Grants decree of absolvitor in favour of the defender *quoad* craves 1 to 8 of the writ, whereby Assoilzies the defender from the said craves; meantime, Reserves the issues of expenses; Assigns Monday 9 January 2023 at 11am as a Hearing on the issue of expenses and to determine the proper treatment of the sums previously consigned by the defender in the hands of the sheriff clerk as conditional payments towards the pursuer's damages claim as eighth craved, said Hearing to proceed by way of telephone conference call before Sheriff S. Reid.

NOTE

Summary

[1] When a notice requires to be served, under a statute or a contract, is the notice validly served when it is posted or only when it is delivered? This is the vexed question at the heart of this commercial action.

[2] As regards statutory notices, the issue is one of statutory construction. The common law rule is that delivery (that is, actual receipt) of a statutory notice is required. However, Parliament intervened, in the shape of section 7 of the Interpretation Act 1978 ("the 1978 Act") and its legislative predecessor, to subtly alter that common law rule by creating a rebuttable evidential presumption in favour of receipt, if the statutory notice is proved to have been duly posted. But section 7 of the 1978 Act does not apply if "the contrary intention appears". Therefore, the essential primary question boils down to this: on a proper interpretation, is section 7 of the 1978 Act displaced by section 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ("the 1985 Act"), under which the statutory notice in the present case must be served?

[3] As regards contractual notices, the issue is one of construction of contract. Again, the common law rule is that delivery (that is, actual receipt) of a contractual notice is required. At common law, a rebuttable evidential presumption in favour of receipt has developed, upon proof of due posting (*Chaplin* v *Caledonian Land Properties Ltd* 1997 SLT 384; Dickson, *Evidence* (3rd ed.), Vol 1, paragraph 28). It is broadly similar to the statutory intervention under the 1978 Act. But that common law rule and rebuttable presumption can be displaced by agreement to the contrary. Therefore, the essential secondary question is this: on a proper construction of the contract, have the parties agreed to displace the common law rule

and rebuttable presumption that would otherwise apply, by substituting their own agreement as to the method and date of service of notices under their contract?

[4] The present dispute concerns the validity of a pre-irritancy notice purportedly served by a landlord upon a tenant by reason of a monetary breach of a lease. The landlord sent a pre-irritancy notice to the tenant by recorded delivery post. The notice was never received by the tenant. It was returned by Royal Mail to the landlord's solicitors three days after it was posted.

[5] During the notice period specified in the pre-irritancy notice, the landlord and tenant were in frequent and direct communication by email. Those communications were aimed at seeking to resolve the parties' dispute. However, no clear disclosure was made by the landlord in any of those communications that the pre-irritancy notice had been sent, still less of its terms. In the event, the parties' negotiations failed to reach any resolution; the (14 week) pre-irritancy notice period expired; and the landlord proceeded to serve an irritancy notice, purportedly terminating the lease.

[6] In this commercial action, the landlord seeks *inter alia* declarator that the lease was validly terminated; an order for removal of the tenant, with a warrant to eject; an order for payment of arrears; and decree for payment of damages for violent profits by reason of the defender's alleged unlawful occupation of the Premises. For its part, the tenant refuses to vacate. It claims that the irritancy notice is invalid, because the pre-irritancy notice was not served upon it; that the landlord has waived its entitlement to found upon the alleged monetary breach on which the irritancy proceeds; that the landlord is personally barred from founding upon that alleged breach; and, in any event, that the exercise of the landlord's right of irritancy was oppressive.

[7] In summary, I have concluded that, on a proper construction, section 4 of the 1985 Act displaces section 7 of the 1978 Act, and creates an irrebuttable presumption that a pre-irritancy notice that is properly addressed, pre-paid and posted in compliance with section 4(4) thereof is deemed to have been served on the day of posting. On the evidence, the Pre-Irritancy Notice in this case was so posted. Therefore, in law, it is deemed to have been validly served on 27 July 2020, notwithstanding that, in fact, it was never received. Accordingly, the statutory pre-irritancy requirements under the 1985 Act were complied with.

[8] In contrast, under the Lease, the landlord's power of irritancy cannot be exercised unless a pre-irritancy notice is first "given" to the tenant (Clause (S)). On a proper construction of the Lease, the pre-irritancy notice must actually be received by the tenant, not merely sent. On a proper construction, the Lease (in particular clause (X) thereof) does not displace the common law rule and rebuttable evidential presumption that would otherwise apply; rather, it merely reflects that common law position. On the evidence, the landlord duly posted the Pre-Irritancy Notice, thereby creating a rebuttable presumption of receipt by the addressee in the ordinary course of post; but the tenant has rebutted that presumption by producing (uncontested) evidence that the Notice was in fact returned to the landlord's solicitors, undelivered, on 30 July 2020, just three days after it was sent. Accordingly, the contractual pre-irritancy procedure has not been complied with, in respect that the Pre-Irritancy Notice was not validly served upon (that is, "given" to) the tenant as required by the Lease.

[9] Further, even if the contractual pre-irritancy procedure was complied with, I conclude that the landlord acted oppressively in exercising its right of irritancy because it knew that the statutory Pre-Irritancy Notice (though validly served for the purposes of the

1985 Act) had not actually been received by the tenant; it knew that the tenant was unaware of the existence or terms of the Notice; the landlord had available to it other (ready and effective) means of communication with the tenant throughout the period specified in the Notice; and, despite this, the landlord failed to take reasonable steps, by those other (ready and effective) means, to notify the tenant of the existence and terms of the Notice.

[10] Lastly, I have concluded that the content of certain email communications between the parties (and between the pursuer's solicitors and the defender) are privileged and inadmissible, in respect that they were communications made in the course of negotiations with a view to settling a dispute between the parties. I explain my reasoning more fully below.

The evidence

[11] For the pursuer I heard evidence from Sheena Coburn, Andrew Britton and Sarah McCormick. For the defender, I heard evidence from Ammar Reda and Mrs Leyla Linda Reda. The evidence-in-chief of all witnesses was provided by way of signed witness statements lodged pursuant to earlier interlocutors, supplemented by oral testimony elicited at proof by supplementary examination-in-chief, cross-examination and re-examination. The evidence can be summarised as follows.

Sheena Coburn

[12] In her principal written statement, Ms Coburn, a director of the pursuer, spoke to the Lease and Deposit Agreement, the circumstances in which arrears had accrued, the posting of the Deposit Fund Demand Letter (dated 3 June 2020), Pre-Irritancy Notice (dated 27 June 2020) and Irritancy Notice (dated 16 November 2020), and the content and context of her

direct communications with the defender (through Mr Ammar Reda). She also spoke to the losses said to have been suffered by the pursuer as a result of the defender's failure to vacate the Premises. She opined that, had the defender removed, the pursuer would have secured an alternative tenant at a rent of £57 per day. She adopted the calculation of losses set out in a spreadsheet (number 5/29 of process).

[13] In her supplementary written statement, Ms Coburn spoke to the random manner of payment adopted by the defender (often by way of cash counted in the pursuer's office) which made it difficult to track the intended allocation of the payments. Random payments to account continued to be made by the defender after service of the Irritancy Notice. Communications with the defender (regarding late rental payments) failed to produce any agreement. The Deposit Fund was never replenished by the defender.

[14] In cross-examination, she confirmed that between 27 July 2020 (the date of the Pre-Irritancy Notice) and 16 November 2020 (the date of the Irritancy Notice) she had "regular" contact by email with the defender in an effort to resolve the parties' dispute. She insisted that the defender was "aware" that the Pre-Irritancy Notice had been served because she had "told [the defender] in emails". She referred to her email dated 31 August 2020 (at 15.57 hours) to Mr Reda which states *inter alia*: "…be aware the legal notice is in place and will be acted on if arrears are not paid in full" (item 6/2 of process; JB, 200). She acknowledged that email "doesn't give any detail whatsoever". She spoke to various invoices issued to the defender by Savills (as property agents) (JB, 99-100) and to confusion as to the provenance and allocation of payments received from the defender from time to time, notably a payment of £2,397.74 on 30 November 2020 to Savills, received by the pursuer on 12 February 2021 (item 6/26 of process; JB, 291). There was said to be "no structure or coherence" to payments made by the defender.

Sarah McCormick

[15] In her affidavit, Ms McCormick, a solicitor formerly employed by Dentons UK & Middle East LLP ("Dentons"), spoke to the circumstances in which the Deposit Fund Demand Letter, Pre-Irritancy Notice and Irritancy Notice were issued by Dentons to the defender on the pursuer's instructions. The first was sent by first class ordinary post and by first class recorded delivery post to the defender's registered office, and by email to the defender's email address. The second and third were sent by first class recorded delivery post only. Ms McCormick deponed that she did not recall having any discussion with the defender (by telephone or email) about the existence or terms of the Pre-Irritancy Notice, prior to sending the Irritancy Notice, a position reiterated in supplementary oral evidence-in-chief.

[16] In cross-examination, she acknowledged that the "posting receipt" handwritten by Dentons' mail room disclosed the wrong postcode for the defender for the Deposit Fund Demand Letter (JB, 97) but explained that the letter would have been posted in an envelope with a window disclosing the correct address and postcode. She acknowledged that the Royal Mail "track and trace" receipt (item 6/19 of process; JB, 263) related to the Pre-Irritancy Notice and recorded that the Notice had been "returned" to Dentons by Royal Mail. She did not specifically recall the Notice being returned to Dentons but, in the course of her preparations for the proof, she had become aware of that fact.

Andrew Britton

[17] In his principal written statement, Mr Britton, a partner at Culverwell, testified that he had around 13 years' experience of "the retail and leisure market, focusing on disposals

and acquisitions". He stated that he had been asked for his opinion on certain matters, namely (i) on the impact of the Covid-19 pandemic and subsequent lockdowns on "the market" in Glasgow (paragraph 3); and (ii) on whether the pursuer would have had any difficulty in securing new tenants for the Premises in November 2020 (paragraphs 6 and 7). His statement incorporates the terms of a separate letter dated 26 January 2022 sent by him to the pursuer (item 6/28 of process; JB, 189). In that letter, Mr Britton expresses "our strong view" that Culverwell would have been able to re-let the Premises in around 20 November 2020, for reasons set out in that letter.

[18] In his supplementary oral evidence-in-chief, Mr Britton testified that he was a qualified chartered surveyor and member of the Royal Institute of Chartered Surveyors since 2011. He had previously been engaged by the pursuer to carry out professional work for them, but did not consider that that relationship prevented him from providing an independent and impartial opinion in this litigation.

[19] Mr Britton was cross-examined on the opinions expressed by him. I shall not rehearse the detail because, in the event, in its closing submissions, the pursuer elected not to insist on the admission of Mr Britton's opinion evidence at all, objection having been taken to it.

Ammar Reda

[20] In his signed written statement, Mr Reda stated that he had been "involved in running the [defender's] business" since 2015 and had been the "sole point of contact" with the pursuer (via Ms Coburn) throughout the period from 2015 to date. He was appointed as the defender's director on 12 December 2020; between 29 March 2016 and 12 December 2020, his wife (Leyla Linda Reda) was the sole director; and prior to March 2016, Mr Reda's

brother was the sole director. Mr Reda denied that the defender had called upon to "replenish" the Deposit Fund "at any point prior to [the] court action being raised" (paragraph 16). He stated that the service charges and insurance due under the Lease "have always been in full and on time". He insisted that the defender had a "zero balance" (paragraph 18) and "no outstanding balance" (paragraph 41) due to the pursuer as at the date of the Pre-Irritancy Notice, and that, even if some arrears of service charge were due, they were "really minor sums". He spoke to emails with the pursuer between July and August 2020; to emails with Dentons in November 2020; and to Royal Mail "track and trace" receipts lodged in process by the defender. He denied receipt of the Pre-Irritancy Notice and Deposit Fund Demand Letter. He stated that the Premises were unoccupied from mid-March 2020 to the beginning of August 2020, due to the pandemic lockdown (paragraph 32); that the Premises did not open for trading until around 3 August 2020 (paragraph 34); and that, during that period, Mr Reda and his brother would visit the Premises from time to time only, to check on security, freezers and the like. It was only after receipt of the Irritancy Notice that Mr Reda was prompted by a friend to check his email "junk box" and, having done so, in around March 2021 he discovered in that "junk" folder the email dated 3 June 2020 from Dentons attaching a copy of the Deposit Fund Demand Letter. With reference to the pursuer's email dated 10 July 2020, Mr Reda confirmed his understanding that the pursuer was "content" that the defender did not have to replenish the Deposit Fund (paragraphs 39 and 41). He stated that if the defender had been asked to replenish the Deposit Fund, it would have done so (paragraph 43). In her email communications with the defender, Ms Coburn never disclosed that the Pre-Irritancy Notice had been issued (paragraph 40).

[21] In cross-examination, Mr Reda agreed that, in his communications with the pursuer, he had insisted on deferring the rental payments due as at 28 May 2020, 28 August 2020 and 28 November 2020. He acknowledged that between June and July 2020 "normal" mail addressed to the defender had been received at the Premises (being mail that did not require to be signed for). He did not know who had "refused" delivery of the Deposit Fund Demand Letter. He acknowledged he was not a director of the defender when the emails were sent, but they were authored and sent by him. He had never experienced any difficulty in communicating by email with the pursuer or Dentons. He insisted that Ms Coburn's email dated 10 July 2020 amounted to a "waiver" of the right to demand replenishment of the Deposit Fund. He took it to mean that the defender was not required to pay it back, hence why the defender had a "zero balance" as at 27 July 2020. He denied the defender could not afford to replenish the Deposit Fund. A loan from another business could have been obtained to replenish the Deposit Fund, if required. He confirmed he had been sequestrated in 2015, but that his sequestration was concluded in January 2019.

Mrs Leyla Linda Reda

[22] In her signed written statement, Mrs Reda testified that she was the defender's sole director between 29 March 2016 and 12 December 2020, but that her husband, Ammar Reda, "has always been the key person within the business and he has always been the key contact with [the pursuer]". She helped her husband in running the defender, principally with paperwork, correspondence and administration. She was "party" to the emails. She was "involved" in considering and helping to draft them. She spoke to her belief that the pursuer had, by its email dated 10 July 2020, waived the replenishment of the Deposit Fund. But for that waiver, she said, the defender would have replenished the Fund. She stated that

the defender "kept up its payments under the Lease". She was unaware of the existence of the Deposit Fund Demand Letter and Pre-Irritancy Notice until after receipt of the Irritancy Notice. In her supplementary oral testimony, Mrs Reda denied having seen her husband's signed witness statement (or a draft thereof) prior to signing her own witness statement.

[23] In cross-examination, she acknowledged that her husband was the "main person" who dealt with all communications to and from the defender; she "assisted with administration"; her husband was in charge of filings at Companies House; her husband was the "front man"; her husband "did everything really"; but that she and her husband worked on emails together. She knew how to access the "junk" folder in the defender's email account, but had not done so until after termination of the Lease. She conceded that rent had not been paid timeously by the defender for the quarter commencing 28 May 2020, but that the circumstances of the pandemic were "very unusual"; she was "not entirely sure" whether rent for the quarter commencing 28 August 2020 and 28 November 2020 had been paid timeously, but thought that all rent arrears had been cleared by the end of November 2020, though she would have go through the defender's accounts to check the position. The defender had "tried to keep up". There were times when arrears had accrued but that the defender "kept paying when we could".

Preliminary objections

[24] The pursuer objected to the admissibility of two significant tranches of evidence: (i) the whole testimony in the signed witness statements of Ammar Reda and Leyla Linda Reda, and (ii) the content of the parties' email communications between 8 and 11 July 2020 (item 6/2 of process) and parts of the email communications (so far as containing offers to settle) dated 20 November 2020 (items 6/3 & 6/24 of process; JB, 202-203 & 286-287) and

22 November 2020 (item 6/4 of process; JB, 205-206). Separately, objection was taken in the course of the proof to questioning that sought to elicit from the defender's witnesses their alleged subjective understanding of the meaning of the email communications. All of this evidence was allowed at the time under reservation.

[25] For its part, the defender objected to the admissibility of the opinion evidence of Andrew Britton and Sheena Coburn, pertaining to the likelihood of the pursuer finding a replacement tenant in the event that the defender had timeously vacated the Premises and the achievable rental therefrom. This testimony was relevant to the pursuer's claim of damages for violent profits (crave 8).

[26] Looking first at the admissibility of the witness statements of Mr and Mrs Reda, the circumstances in which those statements came to be lodged were odd and unsatisfactory. To explain, in my interlocutor dated 16 March 2022, I appointed parties to lodge in process, within eight weeks, signed statements of all witnesses (lay and expert) to be called by them at the proof, setting out the whole evidence-in-chief of each such witness, under declaration that the content of each statement was deemed to constitute the sworn testimony, and to comprise the evidence-in-chief, of the signatory thereto; subject to and under reservation of the right of each party (subject to the direction of the court) to elicit further testimony from each witness by supplementary examination-in-chief, cross-examination and re-examination, as the case may be, at the proof diet; and under reservation meantime of all questions of relevancy, competency and admissibility of all such evidence. In the same interlocutor, I ordered that, except with the prior leave of the court, no part of any such witness statement, whether in draft or in final form, was to be disclosed, divulged or copied to any person who is, or who may be, a witness in the cause. (By interlocutor dated 4 May

2022, the deadline for the lodging of *inter alia* the signed witness statements was extended to 20 June 2022.)

[27] In the event, on 23 June 2022, the defender's agents lodged *unsigned* (and undated) documents in process each bearing to be "opening witnesses statement[s]" [sic] of Ammar Reda and Leyla Linda Reda (items 25 & 24 of process, respectively; JB, 306-312 & 313-314). Thereafter, on 12 July 2022, *signed* (though still undated) documents bearing to be witness statements of Mr Reda and Mrs Reda (each entitled "opening witness statement") were intimated to the pursuer's agents. These signed documents were subsequently incorporated into the joint bundle (at 315-316 & 317-331), tendered at the bar on the first day of the proof (on 28 July 2022), and, on the defender's unopposed motion, formally received in process on 5 August 2022, under reservation of all issues of competency, relevancy and admissibility.

[28] The pursuer's first objection was that the lodging of these documents created the risk of duplication and inconsistency, with no clarity as to whether the later statements were supposed to supersede the earlier ones. This complaint is readily dealt with. The first documents (lodged on 23 June 2022) do not constitute evidence at all. My interlocutor of 16 March 2022 appointed parties to lodge "signed" witness statements in process, the content of which would constitute the evidence-in-chief of the signatories. The first documents (items 24 & 25 of process) are not signed; they were never formally received in process, having been tendered late; they do not comply with the terms of my interlocutor dated 16 March 2022; therefore, they do not form part of the body of testimony available to me.

[29] The pursuer's second objection was that the signed statements of Mr & Mrs Reda failed to comply with the principles in *Luminar Lava Ignite Ltd* v *Mama Group plc* 2010

SC 310, [71]-[75] per Lord Hodge for the composition and lodging of such witness statements in commercial actions. The specific concern was that by proffering these (signed) witness statements late the defender's witnesses may have seen, or been informed of, the evidence of the pursuer's witnesses (comprised within the pursuer's timeously-lodged witness statements). The criticism was particularly acute in respect of the evidence of Mrs Reda because, in the first document lodged (her unsigned statement) (item 24 of process), paragraph 3 reads: "I adopt the witness statement of my husband, Ammar". On the face of that (unsigned) document, it appeared that Mrs Reda had already seen her husband's statement. (Interestingly, this sentence does not appear in Mrs Reda's signed statement.)

[30] In the event, I have concluded that the objection, while entirely understandable in the circumstances, falls to be repelled because I am prepared to accept the oral testimony of both Mr & Mrs Reda, in supplementary examination-in-chief at the proof, that neither had seen the witness statement of the other, in final or draft form, or any of the pursuer's signed statements, prior to signing their respective witness statements. In particular, Mrs Reda insisted that the unsigned document had been lodged without her authority, and that she had not used the words that appear in paragraph 3 of the (unsigned) document. I am prepared to accept that evidence at face value. That said, it remains an unhappy state of affairs, not least because unsigned and apparently incomplete documents were intimated and tendered late.

[31] The pursuer's third objection relates to the evidence of Mr & Mrs Reda's subjective understanding of the contentious email communications. This objection is also repelled. It is correct that an objective approach must be adopted to ascertain the meaning of these communications. The subjective understanding of the author or recipient is irrelevant to the

question of interpretation. However, the defender's subjective understanding of the meaning of the communications is relevant to the defences of waiver and personal bar. Detrimental reliance is an essential component of waiver; reliance is an essential feature of personal bar. For those purposes, it is relevant to know what the defender (through its representatives) understood the communications to mean at the time, rightly or wrongly, in order to ascertain whether and why it allegedly relied upon them.

[32] The pursuer's fourth objection related to the admissibility of email communications that were said to attract the "without prejudice" privilege. In my judgment, that objection was well-founded. The content of the email communications dated 9, 10 & 11 July 2020 (part of item 6/2 of process), and parts of the emails dated 20 & 22 November 2020 (items 6/3, 6/4 and 6/24 of process), are privileged and inadmissible. I set out my reasoning more fully below in the context of the discussion concerning the pleas of waiver, personal and oppression.

[33] Turning to the defender's objections, I have sustained the objection to the admissibility of the evidence of Mr Britton and Ms Coburn (so far as such evidence comprised opinion evidence). As regards Mr Britton, the defender challenged his independence and impartiality on the basis that he (and his firm) had, and continued to have, business dealings with the pursuer. In the event, the point was not contested at length because the pursuer, in its written closing submissions, elected not to insist upon Mr Britton's opinion testimony. Accordingly, I have sustained the defender's objection and excluded this opinion testimony from probation. For the avoidance of doubt, this ruling extends to the content of the letter dated 26 January 2022 from Mr Britton (JB, 189) which was sought to be incorporated by reference within his signed statement. With this opinion testimony excised, nothing of substance was left of Mr Britton's evidence. As regards

Ms Coburn, the defender also challenged her independence, impartiality and qualifications to proffer opinion evidence on the marketability of the vacant Premises. In light of the Supreme Court dicta in *Kennedy* v *Cordia (Services) Ltd* 2016 SC (UKSC) 59, the objection was unanswerable. Though she was an entirely honest and impressive witness, Ms Coburn's expert qualifications (beyond being a director of the pursuer) were not set up; and she was plainly neither independent of the pursuer nor impartial. Likewise, I have excluded her opinion testimony from probation.

Closing submissions

[34] Parties lodged extensive written closing submissions, supplemented by oral submissions. In response to a request from me, the parties kindly lodged supplementary written submissions addressing the interaction between section 7 of the 1978 Act and section 4 of the 1985 Act. I summarise them as follows.

Submissions for the pursuer

[35] For the pursuer, decree was sought as first to eighth craved. I was invited to conclude that the Deposit Fund Demand Letter had been sent by three methods: by email, by first class ordinary post, and by first class recorded delivery post. The emailed letter was successfully delivered, notwithstanding that it had been filed in the defender's "junk folder", because it had thereby entered the defender's "sphere of control" (*Brinkibon Ltd* v *Stahag Stahl Und Stahlwarenhandelsgesellschaft GmbH* [1983] AC 34, 43). I was invited to find that the letter sent by first class ordinary post was duly delivered "in the days following 3 June [2020]", there being no credible or reliable evidence to the contrary. The recorded delivery letter could also be treated as having been received because, on the evidence of the

Royal Mail "track and trace" receipt (JB, 198), delivery had been "refused". It was also submitted that the defender had "actual knowledge" of the obligation to replenish the Deposit Fund, as disclosed in the email correspondence dated 8 and 10 July 2020.

[36] It was submitted that the Pre-Irritancy Notice had been validly served in terms of the 1985 Act. On a proper construction, section 7 of the 1978 Act had been displaced (at least in respect of the second statutory presumption therein) by the express wording of section 4 of the 1985 Act, to the effect that mere posting was "sufficient" to constitute service of the notice, without proof of delivery. Reference was made to *Kodak Processing Companies Ltd* v *Shoredale* Ltd 2010 SC 113, [28]; *UKI (Kingsway) Ltd* v *Westminster City Council* [2018] UKSC 67. On similar logic, the Pre-Irritancy Notice was said to have been validly served for the purposes of clauses (S) & (X) of the Lease. The parties had expressly agreed that any notice would be "sufficiently served" if sent by recorded delivery post to the tenant's last known registered office and that such a notice was deemed to be "duly served" three days after the date of posting. The Lease contained no provision allowing proof to the contrary (cf. *Edinburgh Tours Ltd* v *Singh* 2012 Hous LR 15). The parties were bound by that deeming provision. The commercial purpose of the clause was to protect the party serving the notice from the risk of non-delivery (*UKI (Kingsway) Ltd, supra.)*

[37] The email communications between the parties (in July, August and November 2020) were said to attract "without prejudice" privilege and were inadmissible. This included the email dated 10 July 2020 from Ms Coburn which formed the crux of the defender's waiver and personal bar pleas. Reference was made to *Daks Simpson Group Plc* v *Kuiper* 1994 SLT 689, 690-692; *Richardson* v *Quercus Ltd* 1999 SC 278, 283-284, 289-290; *Berkley Square Holdings Ltd* v *Lancer Property Asset Management Ltd* [2021] 1 WLR 4877, [27]; *Unilever plc* v

The Proctor & Gamble Co [2000] 1 WLR 2436; *Ofulue* v *Bossert* [2009] 1 AC 990, [36]-[38] & [43].

[38] In any event, waiver was not established. The email dated 10 July 2020 did not amount to an unqualified abandonment of a right. At best, it was a conditional proposal that had been rejected. There was no evidence of detrimental reliance or unfairness. The plea of personal bar was similarly unfounded.

[39] The plea of oppression fell to be repelled. Already narrow in scope (*CIN Properties Ltd* v *Dollar Land (Cumbernauld) Ltd* 1992 SC (HL) 102, 125), it was said that the extension of the pre-irritancy notice period from 14 days to 14 weeks during the pandemic meant that the scope for any residual common law doctrine of oppression to operate must be extremely limited. A landlord need not be wholly altruistic in exercising its right to irritate a lease (*Aubrey Investments Ltd* v *DSC (Realisations) Ltd* 1999 SC 21). The pursuer had complied with its statutory and contractual pre-irritancy obligations. It did not matter that the recorded delivery pre-irritancy notice may not have been received by the defender. Besides, Ms Coburn's disclosure in her email to the defender dated 31 August 2020 (that "the legal notice" was "in place" and that "legal action" would follow) could only sensibly be interpreted as referring to the posting of the Pre-Irritancy Notice. On the evidence, the defender would not have replenished the Deposit Account anyway, even if it had timeously received the Pre-Irritancy Notice. No attempt was made by the defender to settle the arrears in full even after termination (cf. *Dollar Land (Cumbernauld) Ltd*, *supra*).

[40] Decree was sought for each of the remedies craved (including the monetary craves 7 & 8). Crave 7 was said to represent the balance of the sums outstanding (as at 16 November 2020) under the Lease, having given due credit for an aggregate sum of £4,000 paid by the defender. Crave 8 comprised damages for violent profits for the unlawful occupation of the

Premises from 17 November 2020 to 5 August 2022, at a notional rent of £57 per day (which equated to the existing rent payable under the Lease). Reference was made to *HMV Fields Properties Ltd* v *Skirt 'n' Slack Centre of London Ltd* 1996 SC 114, 120. A revised calculation of the sum sought was tendered in submissions.

Submissions for the defender

[41] For the defender, I was invited to grant decree of absolvitor on various alternative bases. First, it was submitted that the Pre-Irritancy Notice was not served in compliance with the 1985 Act because, on the evidence, it was never received, having been returned to the pursuer's solicitors. Section 4 of the 1985 Act did not displace section 7 of the 1978 Act. Therefore, the pursuer's proof of due posting merely created a rebuttable presumption of delivery; and that presumption had been duly rebutted by evidence that the Pre-Irritancy Notice was in fact returned to Dentons on 30 July 2020 (item 6/19 of process; JB, 263). Accordingly, the Irritancy Notice was invalid. Reference was made to *Edinburgh Tours Ltd, supra; Blythswood Investments (Scotland)* v *Clydesdale Electronic Stores Ltd* 1995 SLT 150; *UKI (Kingsway) Ltd, supra; CA Webber (Transport) Ltd* v *Railtrack* [2004] 1 WLR 320; *Freetown Ltd* v *Assethold Ltd* [2013] 1 WLR 701. Second, for the same reasons, the Pre-Irritancy Notice was not validly served in compliance with clause (X) of the Lease because it was never received by the defender. The defender had rebutted the common law presumption of delivery (arising from proof of posting) (*Chaplin* v *Caledonian Land Properties Ltd* 1997 SLT 384). The solicitors' knowledge that the recorded delivery letter had been returned by Royal Mail was to be imputed to the pursuer as principal (*El Ajou* v *Dollar Land Holdings plc & Anr* 1994 BCC 143, 156B & 157B). Third, even if the Pre-Irritancy Notice was validly served under statute and contract, the pursuer had, by its email dated 10 July 2020, waived its right to

insist on the replenishing of the Deposit Fund and the continued operation of the Deposit Agreement (or, alternatively, the pursuer waived its right to found upon the defender's failure to replenish the Deposit Fund). That is because, in her email dated 10 July 2020, Ms Coburn allegedly stated in unqualified terms: "We [the pursuer] will not demand the Deposit is replenished. The Deposit Agreement will fall". Fourth, the pursuer was said to be personally barred from founding upon the defender's failure to replenish the Deposit Fund (on which the Pre-Irritancy Notice was founded) because the defender had, to its prejudice, arranged its affairs in reasonable reliance upon the wording of the pursuer's email dated 10 July 2020. Reference was made to *McBryde, The Law of Contract in Scotland* (3rd ed), 25.15-25.17; *Vaughan* v *Edinburgh District Council* 1988 SC 24, 27; *Gatty* v *Maclaine* 1921 SC (HL) 1; *Ben Cleuch Estates Ltd* v *Scottish Enterprise* 2008 SC 252, [85] & [87]. Fifth, the exercise by the pursuer of its right of irritancy was said to be oppressive in circumstances where, to the pursuer's knowledge, the defender did not actually receive the Deposit Fund Demand Letter and/or the Pre-Irritancy Notice. Reference was made to *Dorchester Studies (Glasgow) Ltd* v *Stone* 1975 SC (HL) 56; *Lucas' Executors* v *Demarco* 1968 SLT 89, 96. Sixth, by the date of service of the Irritancy Notice, the defender had already paid all arrears claimed in the Pre-Irritancy Notice. Therefore, the Irritancy Notice was invalid. Seventh, the arrears sought in crave 7 were no longer outstanding. Eighth, the damages claim in crave 8 was said to be unfounded because there was no admissible expert evidence to support a finding as to the likelihood of re-letting the Premises, and at what rent.

Discussion

[42] Lujo Properties Ltd is the landlord, and Gruve Limited is the tenant, of commercial premises at 404 Sauchiehall Street, Glasgow. The tenant is in occupation of the Premises under a Lease dated 14 and 16 December 2015.

[43] On 27 July 2020, the landlord sent, by recorded delivery post, a Pre-Irritancy Notice to the tenant at the Premises, purportedly in terms of both section 4 of the 1985 Act and clause (X) of the Lease. That Notice was never actually delivered to the tenant. It was instead returned to the pursuer's agents by Royal Mail on 30 July 2020, three days after it was posted.

[44] Notwithstanding the non-delivery of the Pre-Irritancy Notice, the landlord served a further notice dated 16 November 2022 on the tenant ("the Irritancy Notice") purportedly terminating the Lease in exercise of its right of irritancy.

[45] The landlord now sues for declarator that the Lease has been validly terminated and *inter alia* for a warrant for removal of the tenant. Multiple layers of defence are advanced for the tenant. The non-receipt of the Pre-Irritancy Notice has been a live issue throughout the proceedings, though the emphasis on that issue appears to have diminished following a pre-debate amendment procedure, and much of the proof was taken up exploring other lines of defence.

[46] On the evidence there can be no serious dispute that the Pre-Irritancy Notice was never actually received by the tenant (prior to service of the Irritancy Notice). It was posted by the recorded delivery service on 27 July 2020; it was correctly addressed to the tenant at the tenant's registered office; but it was returned, undelivered, to the pursuer's solicitors by Royal Mail on Thursday 30 July 2020. I was referred to the copy of the Pre-Irritancy Notice (number 5/4 of process; JB, 76–79) and the Royal Mail receipt bearing an identifying

tracking reference number for the same item (number 5/4 of process; JB, 80), both of which, including the posting, were spoken to by Ms McCormick, whose unchallenged evidence on this issue was accepted by me. I was also referred to the copy Royal Mail "track and trace" record relating to the Pre-Irritancy Notice (item 6/19 of process; JB, 263), bearing to record the return of that same Notice to Dentons (the "sender") on 30 July 2020, as spoken to by Mr Reda, whose unchallenged evidence on this particular issue was also accepted by me. The fact that the Pre-Irritancy Notice was returned to the pursuer's solicitors was also conceded in the oral testimony of Ms McCormick and in the written statement of Ms Coburn dated 22 June 2022 (paragraph 8, page 294), albeit neither witness was specific as to the precise date when they first became aware that the Notice had been returned.

[47] The primary issue in dispute, though, is more subtle. The landlord contends that, on a proper interpretation of section 4 of the 1985 Act and of the Lease, service of the Pre-Irritancy Notice was validly effected merely by posting the Notice by means of the Royal Mail's recorded delivery service. Actual delivery (or non-delivery) of the Notice is irrelevant. The tenant disagrees.

Was the Pre-Irritancy Notice validly served under statute?

[48] The first question to be answered is whether the Pre-Irritancy Notice was validly served in compliance with section 4 of the 1985 Act. This issue arises because section 7 of the Interpretation Act 1978 states:

> "7. References to service by post
>
> Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and,

> unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

[49] It is necessary to go back to basics. The common law rule is that if a statutory or contractual notice requires to be "served" upon, or "given" or "sent" to, a person, then the notice must actually be received by that person (*Freetown Ltd* v *Assethold Ltd* [2013] 1 WLR 701). The rule was explained in *Sun Alliance & London Assurance Co Ltd* v *Hayman* [1975] 1 WLR 177, 185 and approved by the Supreme Court in *UKI (Kingsway) Ltd* v *Westminster City Council* [2019] 1 WLR 104. In the former, Lord Salmon stated:

> "According to the ordinary and natural use of English words, giving a notice means causing a notice to be received. Therefore, any requirement in statute or a contract for the giving of a notice can be complied with only by causing the notice to be actually received – unless the context or some statutory contractual provision otherwise provides…"

No distinction is drawn in the English cases between "serving" and "giving" a notice (*UKI (Kingsway) Ltd, supra*, per Lord Carnwath). To similar effect, in *Tadema Holdings Ltd* v *Ferguson* (1999) 32 HLR 866 at 873, Peter Gibson LJ stated:

"Serve is an ordinary English word connoting the delivery of a document to a particular person".

The common law rule makes sense. If a notice is to be "given" to or "served" on, or "sent" to a person, all of these expressions connote the communication and delivery of the notice to the person. One does not naturally speak of giving a notice to someone remotely, or by leaving it with an acquaintance, or with a carrier or messenger (who is not the recipient's agent), or by leaving it in a pub that the person happens to frequent.

[50] The common law rule was then altered very subtly by section 7 of the 1978 Act (and its legislative predecessor). That provision is purely evidential in nature. What section 7 creates is a fairly intricate mechanism of shifting burdens of proof leading to a single

rebuttable presumption that service by post has been effected on a particular date. The mechanism works as follows: the initial burden lies on the sender to prove that the notice was properly addressed, pre-paid and posted; having done so, a rebuttable presumption arises that service was indeed effected and that it was effected in the ordinary course of post; and the burden of proof then shifts to the addressee to prove "the contrary", namely either that the notice was not delivered at all or that it was delivered on another date. The Court of Appeal in *Freetown Ltd, supra* (at [37] per Rix LJ) observed that section 7 is "a complex alteration" of the common law rule, but that the ultimate formula is to maintain the essence of the notion of actual delivery, albeit within a landscape of shifting burdens of proof.

[51] Section 7 applies "unless the contrary intention appears". Therefore, one has to decide whether section 4 of the 1985 Act displaces the application of section 7 of the 1978 Act. The issue is one of statutory interpretation. No other question can have precedence because it is the intention of Parliament that, "unless the contrary intention appears", the shifting burdens of proof and rebuttable presumption created by section 7 shall apply. As was explained by Rix LJ in *Freetown Ltd,* one must imagine that section 7 is about to be written into section 4 of the 1985 Act, and then ask oneself whether section 4 creates, by its express language or by necessary implication, a situation where section 7 would be incompatible (contradictory or inconsistent) with section 4 of the 1985 Act (*supra,* [36]).

[52] At first blush, nothing in the express language of section 4 of the 1985 Act appears to be incompatible with the application of section 7 of the 1978 Act. Everything about the language points in the direction of service taking effect upon receipt. First of all, that is the common law rule against which any statutory language must be measured. Secondly, section 4 uses the words "service" and "served" which, as a matter of ordinary English

usage, *prima facie* point to the necessity for actual receipt. Thirdly, the notion of actual receipt is fortified by the statutory requirement that the tenant must comply with the demand in the notice, a concept which seems illogical if the notice is never received. It is hard to conceive of a recipient being in a position to comply with a demand, if the notice is not actually communicated to him. Thus far, at least, the statutory language in section 4 does not appear to manifest any "contrary intention" to the incorporation of section 7 of the 1978 Act.

[53] However, then we come to section 4(4) of the 1985 Act. It expressly states that any notice served under the section "shall be sent by recorded delivery" and "shall be sufficiently served" if it is "sent to the tenant's last business or residential address in the United Kingdom known to the landlord" (or to the last address in the United Kingdom provided to the landlord by the tenant for the purpose of such service). This wording is significant in two ways.

[54] First, it prescribes a single, exclusive and mandatory method by which service is to be effected, namely by the Royal Mail recorded delivery service. No other method of service is competent (*Kodak Processing Companies Ltd* v *Shoredale Ltd* 2010 SC 113). In my judgment, that mandatory provision is a game-changer because the recorded delivery service, for all its other merits, cannot guarantee delivery. The advantage of the recorded delivery service is that (i) the day of posting will be recorded, (ii) the fact (and date) of delivery will be recorded, and (iii) if the letter cannot be delivered, it will be returned to the sender, and the sender will thereby be informed more or less promptly (*Freetown Ltd, supra*, [45]; *R* v *County of London Quarter Sessions Appeals Committee ex parte Rossi* [1956] 1 QB 682, 691-692). However, it is this latter strength of the recorded delivery service that is also its weakness. A notice that is sent by recorded delivery will never be delivered unless the addressee is

available and willing to sign for it. That is an intrinsic and lauded feature of the service. However, the fact that Parliament has prescribed a mandatory and exclusive method of service (which explicitly envisages the possibility of non-delivery of the notice in many circumstances) means that the landlord is potentially stymied, if the common law rule requiring actual delivery were to be retained. The landlord cannot attempt delivery by an alternative method. He may be trapped in a vicious cycle of posting one pre-irritancy notice after another, only to find that they repeatedly bounce, delivery having failed for varying reasons which impute no fault on the part of the tenant. In such circumstances, the landlord, through no fault of his own, may be prevented from exercising his right of irritancy for an indefinite and perhaps prolonged period. It would not be difficult to fashion a principle that an addressee who refuses to accept a recorded delivery letter (by "casting it from him") should nevertheless be deemed to have received it (*Freetown Ltd, supra*, [38]), but the fiction of deemed delivery becomes increasingly strained in the context of other common circumstances in which delivery is defeated. For example, the premises may be shut when the postman calls (due to part-time business hours, staffing pressures, industrial action, or, as this case may illustrate, government order); the addressee may be absent, fleetingly or otherwise (due to bereavement or pressing business commitment); the addressee may have gone away permanently; a less-than-diligent postal worker may fail to record the reason for the failed delivery. None of these circumstances necessarily justifies the imputation of fault on the part of the addressee.

[55] Such a consequence is unlikely to have been intended by Parliament when it sought to temper the harshness of the common law on conventional irritancies with what is generally regarded as a fairly modest legislative intervention (see below). Instead, what it points to is that, in prescribing the recorded delivery service as the single, exclusive and

mandatory mechanism by which to "serve" the new statutory pre-irritancy notice, Parliament intended to displace the common law rule (requiring actual receipt) and the statutory embellishment on that rule (namely, the shifting burdens and rebuttable presumption of delivery under section 7 of the 1978 Act). A new rule must have been intended.

[56] Second, according to the express wording of section 4(4) of the 1985 Act, the pre-irritancy notice is deemed to be "sufficiently served" if it is "sent" to the tenant's last business or residential address. The dominant concept in the wording is that of posting, not delivery; sending, not receipt.

[57] In my judgment, on a proper interpretation of section 4 of the 1985 Act, by necessary implication Parliament intended to displace the application of the common law rule requiring actual receipt (and its ancillary statutory mechanism of shifting onus and rebuttable presumption, in terms of section 7 of the 1978 Act), and to replace it with a simple and conclusive mechanism of effecting service, namely by the act of posting. Proof that the notice was not actually delivered is irrelevant.

[58] Provided the landlord can prove that it posted the pre-irritancy notice, duly addressed, by the Royal Mail recorded delivery service, an irrebuttable presumption of delivery arises.

[59] Of course, any statutory or contractual procedure for the service of notices (especially time-critical notices) can lead to hardship in particular cases. Notices can go astray; they can be posted under a door and concealed by a mat; they can be given to persons who fail to hand them over to the addressee; the addressee may be absent from the premises, for long or short periods, through illness, bereavement, or pressure of business; and many a notice may have been eaten by a dog. Nevertheless, in some circumstances an addressee may be

bound by a notice of which he was unaware, if the notice was posted. Such conclusions have been reached in several persuasive English decisions, albeit upon the interpretation of other statutes (*Commercial Union Life Assurance Company Ltd* v *Moustafa* [1999] L&T 89; *Lex Services plc* v *Johns* [1990] 1 EGLR 92); *Beanby Estates Ltd* v *Egg Stores (Stamford Hill) Ltd* [2003] 1 WLR 2064; *CA Webber (Transport) Ltd* v *Railtrack* 2004] 1 WLR 320). As Neuberger J, as he then was, acknowledged in *Beanby Estates Ltd*, *supra*, [76], such conclusions may be an example of "occasional harsh or unfair results" which may have to be tolerated in any system.

[60] I am fortified in my conclusion as to the interpretation of section 4 of the 1985 Act by dicta in *Kodak Processing Companies Ltd*, *supra*. Admittedly, this Inner House decision was concerned with a different question, namely whether service of the statutory pre-irritancy notice could be effected by some means other than by consigning the notice to the Royal Mail's recorded delivery service. The Extra Division was emphatic: section 4 prescribed an exclusive and mandatory method of service. As a result, it did not matter that the notice had, in fact, been delivered and communicated to the tenant by another means (namely, by sheriff officer). However, in my judgment, it is implicit in the Division's reasoning that actual delivery of the 1985 Act statutory notice is irrelevant (at least to the question of service). In *Kodak*, deliveries by the Royal Mail had been suspended due to industrial action. The landlord's counsel submitted that "read literally" all that section 4 required was for the notice to be sent "but not necessarily that it ever arrive" (*supra*, [23]). Nevertheless, counsel argued that the landlord was on "the horns of a dilemma" because it was exposed to the criticism that it was acting oppressively if it had proceeded to invoke the irritancy, knowing that the notice had been posted but not delivered (due to the strike action). The argument was given short shrift by the Inner House. No such dilemma existed, it said, because the

statutory notice could simply have been posted (that is, consigned into the hands of the Royal Mail recorded delivery service) - and, in order to address any residual concern regarding the common law defence of oppression, the landlord could have intimated to the tenant "by other means" a copy of the notice "with an explanation as to the possibility that it might be received late".

[61] The implication from the Division's reasoning is that the act of posting is the essential issue, not delivery. I acknowledge that *Kodak* did not expressly consider the inter-relationship between the 1985 Act and the 1978 Act. Nevertheless, proof of non-delivery (or significantly delayed delivery) appears to have been viewed by the Inner House as irrelevant to the effective service of the notice (though it may have been viewed as relevant to a plea of oppression, if the non-delivery or delayed delivery was known to the landlord and he did nothing "by other means" to alert the tenant to the posting of the notice.) I shall address the plea of oppression later.

[62] I also draw comfort for my conclusion on the interpretation of section 4 of the 1985 Act from the historical background to the legislation. Section 4 was enacted, on the recommendation of the Scottish Law Commission, in light of the perceived harshness to tenants arising from the operation of conventional irritancies in Scots law for non-payment of rent. Such irritancies are non-purgeable at common law. *Dorchester Studios (Glasgow) Ltd* v *Stone* 1975 SC (HL) 56 illustrated the resulting perceived unfairness to tenants in the operation of such rights. However, section 4 was never intended to eliminate that perceived unfairness. Rather, it was aimed only at alleviating some of the harshness. Commentators have come to regard the legislative intervention, while welcome, as relatively modest. The tenant is not afforded the *right* to be warned of an impending irritancy, but merely the *chance* to be warned, by means of a duly addressed notice posted by the recorded delivery service.

Given the inherent limitations of that method of service, the notice might never arrive or it might be delivered long after the period for compliance has expired. But it does not matter to the validity of service. The purpose of section 4 is not to ensure actual receipt of the pre-irritancy notice, only its posting. Interestingly, section 4 is further limited in that it does not even apply to all commercial tenants. If the tenant does not have an address in the United Kingdom known to the landlord, no statutory pre-irritancy notice requires to be served at all, and the full rigour of the common law applies (s. 4(5)).

[63] For the foregoing reasons, I conclude that the Pre-Irritancy Notice was validly served in compliance with section 4 of the 1985 Act, notwithstanding that it was never actually received by the tenant.

[64] If I am wrong in that conclusion, it would follow, on the evidence, that the Pre-Irritancy Notice was not validly served; that the subsequent Irritancy Notice was therefore invalid; and that the defender would be entitled to be assoilzied from craves 1 to 6 and 8 of the writ.

[65] For completeness, I should mention the case of *Edinburgh Tours Ltd* v *Diaman Singh* 2011 WL 6329065, a decision of the Sheriff Principal at Edinburgh. At first blush, it seems to be similar to the present case. A landlord sent a pre-irritancy notice to the tenant, purportedly in terms of the 1985 Act and the sub-lease; the notice was sent by recorded delivery post; an irritancy notice was then served, terminating the sub-lease; the landlord commenced proceedings to remove the tenant. The tenant's defence was that the pre-irritancy notice was not, in fact, received by him. At debate, the landlord argued that the defence was irrelevant. The sheriff (and, on appeal, the sheriff principal) disagreed, and a proof before answer was allowed on the tenant's defence. In my respectful judgment, the ultimate outcome was correct, subject to this clarification. The tenant's defence was relevant

quoad the validity of service of the notice under the contract, but it was irrelevant *quoad* the validity of service of the notice under statute. Under the sub-lease, the parties had expressly agreed that any notice sent by recorded delivery post was deemed to have been duly served two business days after the date of posting "unless the contrary can be proved". So the tenant was expressly entitled to have the opportunity to prove the contrary at proof. The case was concerned with the construction of the contract, not with the interpretation of the statute (*supra*, paragraphs [27]-[30]).

Is section 7, 1978 Act displaced in part only?

[66] The pursuer's counsel advanced an interesting alternative argument that section 7 of the 1978 Act might be displaced in part only. He submitted that section 7 created two discrete presumptions: the first was an irrebuttable presumption that service had been effected (which would be established by evidence of the due posting of the notice); the second was a rebuttable presumption as to the precise date on which service had been effected. Counsel argued that only the latter was rebuttable by proof to the contrary.

[67] In my judgment the argument is not persuasive. Conceptually, it is unwieldy. It creates too fine a distinction. I find it difficult to conceive of a situation where the date of service of a statutory notice is not a material, if not the essential, element of a notification process. It is pointless to say that a pre-irritancy notice has been served, without knowing the date of service, because the date of service determines the start and end dates for compliance by the tenant. The pursuer's submission sought to divide section 7 in two, to obtain the benefit of an irrebuttable presumption of delivery (on some unspecified date) arising merely from proof of posting, while leaving only the precise date of delivery open to contention at proof. In my judgment that sort of cherry-picking is unworkable. Section 7

either applies in full or it does not apply at all; it is not readily capable of being salami-sliced.

Was the Pre-Irritancy Notice validly served under contract?

[68] The second question to be answered is whether the Pre-Irritancy Notice was validly served in terms of the parties' contract. This is a question of contractual construction. In my judgment, in contrast with the statutory requirement, on a proper construction of the parties' Lease the Pre-Irritancy Notice must be actually be delivered ("given", per clause (S)) to the tenant, not merely posted.

[69] On the evidence, the Notice was not delivered ("given") to the tenant; so the contractual pre-irritancy notice procedure was not complied with; and the subsequent Irritancy Notice was therefore invalid.

[70] The law relating to the validity of contractual notices is clear. When a contract confers on a party a right (such as a right of irritancy or an option) by notice unilaterally to bring the contractual relationship to an end, or to alter it in some way, then the party seeking to exercise that right must comply strictly with the agreed conditions and requirements attached to the exercise of the right. The formal validity of the notice must be ascertained before the court moves on to construe the meaning of the notice (*Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd* [1997] AC 749; *Scrabster Harbour Trust* v *Mowlem plc* 2006 SC 469, 479-480; *Ben Cleuch Estates Ltd* v *Scottish Enterprise* [2006] CSOH 35 [122]; *Batt Cables plc* v *Spencer Business Parks Ltd* 2010 SLT 860, [24]; *West Dunbartonshire Council* v *William Thompson and Son (Dumbarton) Ltd* 2015 CSIH 93; *Gateway Assets Ltd* v *CV Panels Ltd* [2018] CSOH 48, [66]). The pre-conditions attaching to the exercise of such a right are generally construed as conditions-precedent, which must be complied with if the option is to be

validly exercised (*Ben Cleuch Estates Ltd*, *supra*, [122]). So, for example, if the requisite notice is to be in writing, oral notice will not suffice; if the notice is to be given within a specific period, then a late notice will not be effective; if the notice is to be sent on blue paper, then pink paper will not do (*Mannai Investment Company Ltd*, *supra*). The reason for the rule is to enable the parties to be certain whether the event which alters the parties' rights or legal relationship has or has not occurred (*United Scientific Holdings Ltd* v *Burnley Borough Council* [1978] AC 904, 929 & 945; *Muir Construction Ltd* v *Hambly Ltd* 1990 SLT 830, 843-844).

[71] In the present case, the contractual pre-irritancy procedure is set out in clause (S) of the Lease. It states, so far as material:

> "If, at any time during the currency of this Lease, the Tenants shall allow any rent or any other sum due hereunder to be in arrears for 14 days (whether demanded or not)…then…the Landlords may, in their option, at any time by notice in writing to the Tenants bring this Lease to an end…Provided always that the landlords shall not exercise the foregoing option of irritancy (a) in any case of a breach or non-observance which is capable of being remedied unless the landlords shall have first given written notice to the Tenants…under threat of irritancy specifying the breach complained of and the Tenants…shall have failed to remedy such breach within such reasonable time as the landlords shall prescribe in such notice, which in the case of non-payment of rent or other charge or any other monetary sum due under this Lease shall be 14 days only…"

Further provision is made in clause (X) of the Lease. Again, it is a familiar form of wording. It states, so far as material:

> "Any notice…under this Lease shall be in writing. Any notice to the Tenants shall be sufficiently served if sent by Recorded Delivery Post (if the Tenants shall be a body incorporated in the United Kingdom) to their last known registered office and to the premises… Any notice sent by Recorded Delivery Post shall be deemed to have been duly served at the expiry of 3 days after the day of posting. In proving service it shall be sufficient to prove that the envelope containing the notice was duly addressed to the Tenants…and posted to the address to which it was addressed".

[72] It will be noted that an express pre-condition to the exercise of the irritancy right is that the landlord must first have "given" written notice to the tenant, specifying the breach

complained of, and prescribing a period (of not less than 14 days) for the breach to be remedied, under threat of irritancy. The wording is fairly common-place.

[73] Firstly, the use of the word "given" in clause (S) is significant. On a plain reading, the word "given" indicates actual delivery, actual receipt. The clause does not say that the notice is to be "sent" or "posted" to the tenant. Second, that interpretation is, of course, entirely consistent with the common law rule, discussed above, which is that if a notice is to be given to or served on a contracting party the notice must actually be delivered to that party. Third, clause (S) does not specify or restrict *how* the written notice is to be "given" to the tenant. Multiple options for service are available.

[74] The pursuer's argument was founded upon a different clause, namely clause (X). Again, its wording is familiar. On an ordinary reading of clause (X), it does no more than make specific provision about one particular method by which a notice may be "given" to the tenant (that is, by recorded delivery post). Crucially, the clause is permissive only (*Blythswood Investments (Scotland) Ltd* v *Clydesdale Electrical Stores Ltd (in receivership)* 1995 SLT 150, 153; *EAE (RT) Ltd* v *EAE Property Ltd* 1994 SLT 627, 628). In contrast with the 1985 Act, it does not prescribe the recorded delivery postal service as the exclusive, mandatory mechanism by which a notice is to be served on the tenant. True, it allows a notice to be served in that manner. True, it records the parties' agreement that a notice will be "sufficiently served" if sent by recorded delivery post. True, it even facilitates that particular method of (remote) service by creating what is, in effect, a form of presumption that the notice shall be "deemed" to have been "duly served" three days later, provided the notice was "duly addressed" and "posted".

[75] However, in my judgment, read in context, the clause does not preclude proof to the contrary. It does not create an irrebuttable presumption of service.

[76] Clause (S) reflects the common law rule that a contractual notice must actually be delivered to the addressee, if it is to have effect. Clause (X) reflects the common law rebuttable presumption that would normally apply to any notice served by post. At common law, a rebuttable presumption of delivery in the ordinary course of post arises from proof of the due posting of a letter, and throws the onus on the addressee to prove non-delivery or late delivery (*Chaplin* v *Caledonian Land Properties Ltd* 1997 SLT 384; Dickson, *Evidence (3rd ed.)*, Vol. 1, 28; *Stewart* v *Wright* (1821) 1S 203; *Robertson* v *Gamack* (1835) 14S 139; *Mackenzie* v *Dott* (1861) 23D 1310). If clause (X) were omitted, a broadly similar presumption of delivery from due posting would have applied in any event. (A minor difference, perhaps, is that the common law presumption is of delivery "in the ordinary course of post", a concept flexible enough to cater for different classes of postage or destination; whereas clause (X) prescribes a uniform and rigid deemed date of service "three days after the day of posting"). The pursuer argues that clause (X) goes further and excludes proof of non-delivery or late delivery. In effect, the pursuer seeks to interpret the deeming provision in the clause as creating an irrebuttable presumption of delivery arising from proof of due posting. I disagree. In the first place, the clause does not say as much. It does not state that proof of posting is to constitute "conclusive" or "irrebuttable" proof of service. Rather more lamely, under clause (X), the notice is merely "sufficiently" served if posted by recorded delivery. Contrast that tepid wording with clause 10 of the Deposit Agreement. It speaks of a certificate signed on behalf of the landlord as being "conclusive and binding on the parties, except in the case of manifest or demonstrable error", which sets an altogether higher evidential burden than the merely "sufficient" proof of service in clause (X). In the second place, the clause must be read in the context of the Lease as a whole. Clause (X) is ancillary in function to clause (S) - the former serves the latter. Since

multiple methods of service are available by which the pre-irritancy notice may be "given" to the tenant (all importing the notion of actual delivery of the notice), it is illogical that one particular method of service (namely posting by recorded delivery) would not also retain that essential ingredient of actual receipt. This tends to point to the conclusion that the deeming provision in clause (X) goes no further than to create a rebuttable presumption of delivery arising from proof of posting. Interpreted in that way, consistency is achieved across all methods of service, in that, in every case, the notice must be delivered.

[77] Turning to the evidence, as explained above, it is incontrovertible that the Pre-Irritancy Notice was not delivered to the defender. Accordingly, on the evidence, the defender has rebutted the contractual presumption of delivery arising from the pursuer's proof of due posting; the contractual Pre-Irritancy Notice was not "given" in compliance with clause (S) of the Lease; therefore, the Irritancy Notice is invalid.

The "without prejudice" privilege and its exceptions

[78] The defender advances common law pleas of waiver, personal bar and oppression. They are founded upon the content of the parties' email communications between 8 July 2020 and 31 August 2020 (item 6/2 of process; JB, 196-200), especially an email dated 10 July 2020 from Ms Coburn. The pursuer claims that these communications are privileged and inadmissible, and, in any event, that the pleas are not made out on the evidence. The defender disagrees.

[79] The "without prejudice" privilege and its exceptions were considered by the House of Lords in three leading English cases: *Rush & Tompkins Ltd* v *Greater London Council* [1989] AC 1280; *Bradford & Bingley* p*lc* v *Rashid* [2006] 1 WLR 2066 and *Ofulue* v *Bossert* 2009 1 AC 990. Though not strictly binding on me, this impressive trilogy is highly persuasive, not

least because of the comparative analyses of the English and Scottish approaches to the privilege as undertaken by Lords Hope and Rodger.

[80] The so-called "without prejudice" rule is a rule governing the admissibility of evidence. The rule applies to exclude the content of all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence (*Rush & Tompkins Ltd*, *supra*, 2442). It has two justifications. First, there is a strong public policy in encouraging parties to negotiate and settle their disputes out of court. Second, there is said to be an implied agreement arising from an offer to negotiate "without prejudice". In some cases, both of these justifications are present; in others, only one (*Muller* v *Linsley & Mortimer* [1996] PNLR 74, 77 per Hoffmann LJ). The first justification is the dominant one. The second justification is subordinate, as illustrated by the fact that privilege can attach to communications with a different party from the opponent in the litigation (*Rush & Tompkins Ltd*, *supra*).

[81] The "guiding principle" (*Rashid*, *supra*, [24], per Lord Hope) is that parties should be encouraged so far as possible to resolve their dispute without resort to litigation and that they should not be discouraged by the knowledge that anything that is said in the course of such negotiations may be used to their prejudice in the course of legal proceedings. In deciding whether the privilege applies, the question is whether the communication was made *(Rashid*, *supra*, para [23]):

> "… in an attempt to compromise actual or pending litigation and, if so, whether it can be inferred from its terms and its whole context that it contained an offer in settlement for which the party who made the offer can claim privilege."

The rule is said to be "generous in its application" (*Ofulue*, *supra*, [12], per Lord Hope). It recognises that:

> "…unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement…"

The public interest in encouraging parties to speak frankly to one another in aid of reaching a settlement (that is, "to put their cards on the table": *Scott Paper Co* v *Drayton Paper Works Ltd* [1927] 44 RPC 151, 156) is very great and ought not to be sacrificed save in truly exceptional and needy circumstances (*Savings & Investment Bank Ltd* v *Fincken* [2004] 1 WLR 667, 684; *Rashid*, *supra*, [23]). Attempts to convert offers of compromise into admissions of fact prejudicial to the party making them have been deplored (*Rashid*, *supra*, para [24]).

[82] The Scottish courts have "adopted the same guiding principle" (*Rashid*, *supra*, [25], per Lord Hope).

[83] Over the years, exceptions to the privilege have been recognised. These were summarised by Robert Walker LJ in *Unilever plc* v *The Procter & Gamble Co* [2000] 1 WLR 2436, and approved in *Rashid* and *Ofulue*. The following are the most important exceptions:

i. When the issue is whether "without prejudice" communications have resulted in a concluded compromise agreement, those communications are admissible;

ii. Evidence of the negotiations is admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence;

iii. A clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel;

iv. Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in "without prejudice" negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety", but this exception should be applied only in the clearest cases of abuse of a privileged occasion;

v. Evidence of negotiations may be admissible in order to explain delay or apparent acquiescence, though this exception may be limited to the fact that such communications have been made and the dates on which they were made (though occasionally fuller evidence may be allowed in order to give the court a fair picture of the rights and wrongs of the delay);

vi. Evidence may be admitted of an offer expressly made "without prejudice except as to costs".

[84] For completeness, it should be noted that Lords Hope and Rodger recognised that, in one particular respect, the approach of the Scottish courts to the "without prejudice" rule is "inconsistent" with the general approach endorsed by the House of Lords in the three leading English cases (*Ofulue*, [39]; *Rashid*, [25]). The difference lies in the willingness of the Scottish courts to carve out an exception to the privilege in respect of (*Rashid*, [25]):

"[c]lear admissions or statements of fact which, although contained in the same communication, did not form part of the offer to compromise…".

If such admissions, or statements of fact, can be "clearly identified as such", the Scottish Courts have shown themselves to be "more willing" to allow the other party to rely upon them, as exceptions to the "without prejudice" rule (*Daks Simpson Group* v *Kuiper* 1994 SLT 689; *Watson-Towers Ltd* v *MacPhail* 1986 SLT 617; *Richardson* v *Quercus Ltd* 1999 SLT 596). There is some English authority to the same effect (*Rush & Tompkins Ltd, supra*,

1300D-G), but the House of Lords trilogy discloses no appetite to carve out such an exception more formally (*Ofulue*, *supra*, [39]). Happily, in the present case, I do not require to grapple with this cross-border tension, as the defender does not found upon this contentious exception. Instead, the defender founds upon supposed exceptions relating to waiver, personal bar and oppression.

[85] Though I was referred to no Scottish authority on the specific point, I am persuaded, on the basis of the House of Lords trilogy (including the helpful summary in *Unilever plc*, now twice approved by the Law Lords), that exceptions to the "without prejudice" rule do, in principle, exist where waiver, personal or oppression are established. Estoppel (the English term for personal bar) is already clearly recognised as an exception. Waiver, which can be characterised as a specific form of personal bar (or, at least, to have similarities with it) (Reid & Blackie, *Personal Bar*, 3-01; Gloag, *Contract*, 281), may reasonably be seen as an extension of the existing recognised exception in relation to personal bar. As for the plea of oppression, given that it requires evidence of "impropriety of conduct", it can fit relatively easily within the existing recognised exception for other "unambiguous impropriety" (*Forster* v *Friedland*, 10 November 1992, Court of Appeal (Civil Division), Transcript No 1052 of 1992, per Hoffman LJ, cited in *Unilever plc*, *supra*, 2444).

[86] In those circumstances, it is perfectly proper to look at the disputed communications to decide if the privilege attaches and, if it does, whether the exception applies. (*Rashid*, *supra*, [25]: "Scrutiny of the communication is permitted to determine the extent of the protection that was being claimed"; *Transform Schools (North Lanarkshire)* v *Balfour Beattie* 2020 SCLR 707, [32]).

Principles to be applied when reviewing "without prejudice" communications

[87] In embarking upon an analysis of the parties' communications, I have applied the following principles. Firstly, the onus lies on the party asserting privilege (in this case, the pursuer) to show that the communication, in its terms and read in context, is indeed made in an attempt to settle a dispute between the parties. Once this is established, the onus then shifts to the party relying on the exception (in this case, the defender) to establish the application of the exception.

[88] The privilege is not strictly dependent upon the use of the phrase "without prejudice" if it is clear from the surrounding circumstances that the parties were seeking to compromise a dispute.

[89] However, where a communication is made expressly "without prejudice" the protection will generally apply, unless the party resisting the privilege can show that there is a good reason for not doing so (*Ofulue*, *supra*, [2], per Lord Hope). Busy practitioners are entitled to make "the general working assumption" that the "without prejudice" rule, if not sacred, has a "wide and compelling effect" (*Unilever plc*, *supra*, 2443). In this context "linguistic technicalities" are not appropriate (*Ofulue*, [7]). Negotiations between parties (especially at face-to-face meetings) may well contain a mixture of admissions and half-admissions against a party's interest; more or less confident assertions in a party's case; and offers, counter-offers, and statements about future plans and possibilities, which might be characterised as threats or just "thinking aloud" (*Unilever plc*, *supra*, 2444). To seek to "dissect out", and withhold protection from, parts of without prejudice negotiations may not only create huge practical difficulties, but would be contrary to the underlying objective of giving protection to the parties so that they could speak freely about all issues in a dispute when seeking to compromise. In short, a broad brush approach is to be adopted.

The Emails

[90] Copy emails between 8 July 2020 and 22 November 2020 were lodged by the defender (items 6/1-6/4 of process; JB, 196-206). The pursuer objected to the admissibility of some of these communications. I set out below material parts of the emails to which objection was taken, as well as certain others which are relevant to context. They read as follows:

1. Email dated 8 July 2020 (1937 hours) from defender to pursuer:

"Hi Sheena

I hope you are well. Thank you for your email. Unfortunately I am in no position to comment on the matter, other than to say it is a difficult situation for all and that should you be taking the route of going through your lawyers, I too will need to seek legal advice on the matter."

2. Email dated 8 July 2020 (1955 hours) from defender to pursuer:

"Hi Sheen [*sic*]

As you are aware we have another premises, the landlord for which has given us free rent from 28 March until 28 June to assist us during this difficult time, and this will again be reviewed in July.

We have always stayed on top of the rent until this pandemic. I hope we can find a fair solution. As you know offices are still closed, nightclubs are still closed also and we have no way of trading. The government has made it illegal for us to open."

3. Email dated 9 July 2020 (1255 hours) from pursuer to defender:

"Dear Reda

WITHOUT PREJUDICE
STRICKTLY PRIVATE AND CONFIDENATIAL [*sic*]

I note what you write below and can offer you below terms which are made are STRICKTLY WITHOUT PREJUDICE [*sic*] in return for entering into a lease

variation whereby the landlord…can terminate the lease at any time giving 6 month notice. Lujo Properties will grant rent free period 28/05/20 – 27/08/20 to Gruve Ltd.

Service charge arrears of £427 and insurance for year 01/06/20 – 31/05/21 £667. Total £1,094 will need to be paid to Lujo Properties on signature of variation.

Lujo Properties will pay the expense of drawing up the lease variation.

Lugo Properties will pay the legal expenses incurred in serving initial Notice re non-payment of rent.

Let me know if this is of interest and please keep this strictly private and confidential."

4. Email dated 9 July 2020 (1307 hours) from defender to pursuer:

"Hi Sheena

Thank you for your email. I am not prepared to enter into a variation on the lease. I find this suggestion very harsh. However your offer of a rent free period would be most helpful and should this still be on offer I would be more than happy to pay the amount you note for insurance and service charge."

5. Email dated 9 July 2020 (1438 hours) from pursuer to defender:

"Hi

Strictly without prejudice

Rent free Period will be given if Landlord termination variation is agreed at no cost to you. No variation no rent free. Let me know if your position changes by 5 pm as I will proceed legally first thing Friday.

Remember you have been given a rate holiday and a £10,000 non refundable grant from the Government which should be used appropriately not pocketed whilst your landlord struggles on. I would call your position the harsh one."

6. Email dated 9 July 2020 (2116 hours) from defender to pursuer:

"Hi Sheena

Strictly without prejudice

I am sorry to hear the landlord is struggling, however the £10,000 grant awarded to my business, has and is being used for the purposes outlined in the guidelines to preserve my business, jobs and so the economy. I hope the landlord will be receiving some assistance during this difficult time also.

Please note post Coronavirus closure I have paid two months rent in full and service charges to the landlord, which amounts to £3,784.60 of that £10,000 grant you say I am pocketing inappropriately.

Surely you must appreciate that I do and will have other expenses such as for example ongoing electricity charges (to maintain frozen stock) as well as costs to restock perished goods and costs also to put into place appropriate safety measures when we can finally reopen. I too am struggling on.

I do not appreciate your suggestion that I am pocketing the grant inappropriately while my landlord struggles on, I find this offensive and unprofessional given that I have previously highlighted all the above to you, and have paid the two months rent in full post Coronavirus closure.

I can confirm that I will not be signing the variation on the lease you have suggested."

7. Email dated 10 July 2020 (1357 hours) from pursuer to defender:

"Dear Reda

WITHOUT PREJUDICE
STRICKTLY PRIVATE AND CONFIDENTIAL [*sic*]

Noted what your [*sic*] write and I hope to continue now in a courteous and professional matter.

The rent due for the period 28/05/20 – 27/08/20 has been paid from the deposit held as per the terms of your lease and the deposit agreement.

To assist you we will not demand that the deposit is replenished. The deposit agreement will fall. The full deposit currently held is £5,317. £5,250 has been put to rent and the balance £67 will be taken off the insurance for the year 01/06/20 – 31/05/21 £666.

This means a balancing payment for insurance of £599 is due and should be paid to Lujo Properties directly and Lujo Properties has paid the premium on behalf of all the tenants and needs refunded ASAP.

The service charge £427 should be paid to Savills as usual or to Lujo for onward transmission to Savills whatever suits you.

At present we are in our West Nile Street office sporadically. We will be available between 2pm and 3pm Monday and Tuesday of next week if you choose to agree to this final proposal and make payment of £1,026."

8. Email dated 11 July 2020 (1244 hours) from defender to pursuer:

"Hi Sheena

I hope you and your family are well.

Given that we are going through a pandemic I do not agree with you taking the deposit or your proposal."

9. Email dated 29 July 2020 (1401 hours) from defender to pursuer:

"Hi Sheena

I hope you are well. I will cover the insurance and service charges now. However, given my current position I will need to defer rent until everything is back to normal. I hope this of assistance."

10. Email dated 31 August 2020 (1457 hours) from pursuer to defender:

"Dear Reda

I refer to your email below and note no payments have been made.

Your rent £5,250 due directly to Lujo Properties Ltd and service charge £427 due to Savills for quarter from 28/08/20 are outstanding. Can you confirm what your intentions are and be aware the legal notice is in place and will be acted on if arrears are not paid in full."

11. Email dated 31 August 2020 (1540 hours) from defender to pursuer:

"Hi Sheena

I have already paid Savills two payments, one of £2,000 and another of £1,000. With regards to the legal action I have made my position clear, in the previous email,

THAT I WILL DEFER RENT ARREARS UNTIL THINGS ARE BACK TO NORMAL."

[91] Having analysed these communications, I conclude that Emails numbered 1 and 2 (dated 8 July 2020) do not attract any form of privilege. They contain no proposal, offer, or concession, aimed at seeking to negotiate the dispute. They contain nothing that could be characterised as a negotiation.

[92] In contrast, Emails numbered 3, 5 and 7 (being the two emails dated 9 July 2020 (at 1255 hours & 1438 hours) and the email dated 10 July 2020 (at 1357 hours) (JB, 197, 198 and 199, respectively) are in a different category. *Prima facie* these communications attract the "without prejudice" privilege. First, all three open with the heading "without prejudice" (in capitals, in two of the emails). Of course, the use of that familiar wording is not conclusive. Sometimes letters are headed "without prejudice" in the most absurd circumstances (*Tomlin* v *Standard Telephones & Cables Ltd* [1969] 1 WLR 1378, 1384) but where (as here) communications are not so headed unnecessarily or meaninglessly (*Ofulue*, *supra*, [2]:

"…the court should be very slow to lift the umbrella [of privilege] unless the case for doing so is absolutely plain".

Second, looking at the content of these three emails (dated 9 and 10 July 2020), they plainly comprise proposals aimed at seeking to negotiate settlement of an extant dispute with the defender.

[93] Take the email dated 9 July 2020 (at 1255 hours) (JB, 197). After the "WITHOUT PREJUDICE" heading, the first sentence contains an express "offer" of "terms… in return for entering into a lease variation…" The first sentence then reiterates that "offer" is made "STRICKTLY [*sic*] WITHOUT PREJUDICE". The email goes on to set out the proposed

terms. Conditions apply to the offer. The pursuer ends by asking the defender to confirm "if this is of interest". The defender's reply, twelve minutes later, is swift and unequivocal. In Email number 4, the defender summarily rejects the pursuer's proposal. But the defender continues the negotiation, stating that the pursuer's "offer" of a rent-free period would be "most helpful" and that, should this still be "on offer", it would be willing to pay certain arrears. Just one and a half hours later, the pursuer replies (again with an email headed "without prejudice") reiterating that the rent-free period will only be given if the proposed variation (which contains a landlord's option to terminate) is agreed: "no variation, no rent free" (Email number 5). The pursuer asks the defender to clarify its position "by 5 pm" under threat that the pursuer "will proceed legally first thing Friday". The conversation continues. In Email number 6 (interestingly, the only communication from the defender that bears the docquet "strictly without prejudice"), the defender rejects the pursuer's "suggested" lease variation.

[94] But still the negotiation goes on.

[95] In Email number 7, the pursuer responds. Again, it opens with the heading "without prejudice" (in capital letters). It confirms that the rent for the quarter commencing 28 May 2020 has been taken from the Deposit Fund. It then states:

"To assist you we will not demand that the deposit is replenished. The deposit agreement will fall".

These are the key words on which the defender's pleas of waiver and personal bar (and to a lesser extent, oppression) are founded. Read in isolation, these words are capable, I suppose, of bearing the meaning advanced by the defender. Read in isolation, they could, I suppose, be read as an abandonment of the landlord's right to demand replenishment of the Deposit Fund or as a representation that a failure to do so would not be founded upon.

However, in my judgment it would be wrong to do so. These words cannot reasonably be isolated from the immediate context of the Email number 7, of which they form part, nor indeed from the wider context of the preceding email chain of which they also form part. In the context of a communication forming part of a negotiation (particularly one that is expressly prefaced as being "without prejudice"), it is not appropriate to forensically "dissect out" (*Unilever plc*, *supra*, 2448) individual words, and to present them as unqualified admissions, or undertakings, or stand-alone promises, or waivers, disembodied from the negotiation of which they form part. On a fair reading, the sentences in the Email number 7 relating to the Deposit Agreement formed part of a new proposal advanced by the pursuer in the ongoing negotiation, whereby the Deposit Fund, already withdrawn by the pursuer, was proposed to be applied in discharge of certain obligations of the defender under the Lease, with a "balancing payment" of £599 to be paid as soon as possible ("ASAP") and with a further service charge of £427 to be paid to the managing agents (Savills). The final paragraph of the Email number 7 makes clear that it is merely part of the ongoing negotiation. It invites the defender to "make payment of £1,026" by a stated deadline if the defender agrees to "this final proposal". The entire content of the Email number 7 is a "proposal", an offer in a negotiation, including those parts anent replenishment of the Deposit Fund. This can also be seen from the fact that the "balancing payment" (of £1,026) is calculated by taking account of the sum withdrawn from the Deposit Fund and applied in the manner proposed by the pursuer. Two further points should be noted. First, the pursuer's proposal was explicitly conditional upon the timeous payment by the defender of the balancing sum of £1,026. On the evidence, that sum was not paid by the stated deadline, so the condition was never purified. Second, in any event, the defender expressly rejected

the proposal. The following day, by Email number 8 dated 11 July 2020 (JB, 200) the defender replied stating:

"Given that we are going through a pandemic I do not agree with you taking the deposit *or your proposal*" [my emphasis].

The "proposal" in the defender's Email number 8 must be referring to the "final proposal" in the immediately preceding Email number 7, which "final proposal" was both conditional and time-limited.

[96] The *prima facie* conclusion from this review of the Emails is that the "without prejudice" privilege attaches to the parties' emails dated 9, 10 and 11 July 2020.

[97] The onus then falls on the defender to establish that one of the exceptions to the privilege applies. In my judgment, it has failed to discharge that onus, for the reasons explained below. I shall address each in turn.

The plea of waiver

[98] Waiver is the voluntary, informed and unequivocal abandonment of a right for all time, expressly or by implication, so that the right is extinguished (*Armia Ltd* v *Daejan Developments Ltd* 1979 SC (HL) 56; McBryde, *The Law of Contract in Scotland*, 25-15). Detrimental reliance is a component part of waiver (*Armia Ltd, supra*, 69; *Lousada & Co Ltd* v *JE Lesser (Properties) Ltd*, 1990 SC 178, 189 and 193). In other words, the party founding upon the alleged waiver must demonstrate that it acted in some way (that is, that it altered its position in some way) in reliance upon a belief induced by the alleged conduct of the other party. There is no need for the party relying on the alleged waiver to show that it suffered prejudice, but it must demonstrate that it has changed position in some way in reliance on the alleged waiver. Lastly, unfairness is an essential component part of waiver (*McMullen*

Group Holdings Ltd v *Harwood* [2011] CSOH 132, [69] per Lord Hodge). That is because waiver and personal bar belong to the same genus, in which the law seeks to prevent one person's inconsistent conduct from unfairly affecting another person. Waiver is based on elementary considerations of justice.

[99] The problem for the defender is that it has failed to establish all of the essential components of the plea of waiver. On a plain reading of the Email number 7 (dated 10 July 2020), in context, it cannot reasonably be understood as constituting an abandonment by the pursuer of its right to insist upon replenishment of the Deposit Fund. For a start, for the reasons explained above, references to the Fund and the Deposit Agreement are properly understood as integral parts of a single, indivisible "final proposal" by the pursuer, which is both conditional and time-limited. The supposed abandonment of the pursuer's right is neither unequivocal, nor unconditional, nor unqualified. Second, on the evidence, the defender has not "relied" upon the supposed abandonment of the pursuer's right. On the contrary, in its Email number 8, the defender summarily rejected the pursuer's proposal (of which the non-replenishment of the Deposit Fund formed part). Indeed, somewhat curiously, that Email number 8 records the defender's ongoing refusal to agree even to the withdrawal of the Deposit Fund from the Deposit Account, a position which sits uneasily with the notion that the defender simultaneously believed that the Deposit Agreement had fallen. Third, and for similar reasons, the whole circumstances lack the element of "unfairness" (*McMullen, supra*, [73]) that is essential to justify the conclusion that the pursuer should be precluded from exercising its contractual right to insist on replenishment of the Deposit Fund. The supposed abandonment of that right appears in a communication that plainly forms part of a "without prejudice" negotiation aimed at settling a dispute; the references to the Deposit Agreement, properly interpreted, are not free-standing or discrete,

but form an integral part of a single settlement proposal in that negotiation, which is both expressly conditional and time-limited; the condition was never purified; the time-limit was not met; the entire proposal was rejected out-of-hand by the defender. In these circumstances, I struggle to see why it would be unfair to allow the landlord to exercise its *ex facie* contractual rights under the Deposit Agreement and Lease. If there is any "unfairness", it is that the defender should be allowed to cherry-pick isolated sentences from the pursuer's "without prejudice" communication. For these reasons, the plea of waiver (and the exception to the privilege) are not established.

The plea of personal bar

[100] For similar reasons, the plea of personal bar fails. In *Gatty* v *Maclaine* 1921 SC (HL) 1, Lord Birkenhead LC set out the requirements of the plea as follows:

> "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to a firm against B that a different state of facts existed at the same time".

For present purposes, the most important word in that dictum is "justified" (as it was in *Ben Cleuch Estates Ltd* v *Scottish Enterprise* 2008 SC 252). To found a plea of personal bar, the defender must establish not only that it believed that the pursuer had represented that the Deposit Agreement had fallen (and that replenishment of the Deposit Fund was not being sought) but that that belief was "justified" by the representation. The representation must be interpreted objectively. To attain the necessary standard, the representation must be such that a reasonable man would have regarded it as intended to be believed and relied upon (*supra*, [87]).

[101] As explained in the context of the waiver plea, in my judgment there was no objective justification for the defender to believe that the landlord no longer insisted on its contractual right to demand replenishment of the Deposit Fund (or to found upon the defender's failure to do so). Interpreted objectively, and in context, a reasonable person would not have understood the pursuer's Email number 7 in that sense. It featured as one indivisible part of a conditional settlement proposal in a negotiation. Besides, the defender's summary rejection of the pursuer's "final proposal" in that email is inconsistent with the concept of detrimental reliance, an essential component element of personal bar. Accordingly, on the evidence, the plea falls to be repelled and the privilege attaches to the pursuer's Email number 7.

The plea of oppression

[102] The defender avers that the exercise of the pursuer's contractual right of irritancy is oppressive. The plea is founded on four circumstances set out in Answer 4(vi): (i) that the pursuer was aware that its Email number 7 would have induced the defender to believe that it was not required to replenish the Deposit Fund and that the Deposit Agreement had fallen; (ii) that the pursuer knew that the defender had not received the statutory Pre-Irritancy Notice (in which, the pursuer purportedly changed its position in relation to the Deposit Fund); (iii) that the pursuer took no steps between the date of the Pre-Irritancy Notice and the date of the Irritancy Notice to the alert the defender to the threatened irritancy; and (iv) having allowed the 14 week period of notice to expire, the pursuer purportedly irritated the Lease on the basis of alleged arrears that had already been paid in full.

[103] For the reasons set out above (anent the pleas of personal bar and waiver), I am satisfied on the evidence that the first circumstance is not established because no such alleged belief was objectively justified. Accordingly, the defender has failed to establish an exception to the "without prejudice" privilege that otherwise attaches to the pursuer's Email number 7. That disposes of the plea to the limited extent that it is founded upon that Email.

[104] To the extent that the plea is founded upon the alleged non-existence of arrears at the date of the Irritancy Notices, the evidence does not support such a conclusion. In his written and oral testimony, Mr Reda insisted that any arrears that may have been due under the Lease at the date of the Pre-Irritancy Notice had been cleared by 16 November 2020. I rejected that evidence as unreliable. It is unvouched by documentary evidence of the alleged payments. It is lacking in any detail as to when the payments were supposedly made. Further, the reliability of Mr Reda's evidence in this respect was undermined by the chaotic nature of the defender's business. Even on Mr Reda's evidence, payments of rental and service charges due under the Lease were random, irregular and piecemeal. None of the defender's payments corresponded to due dates under the Lease or to any particular invoices. This disorderly state of affairs is borne out by Ms Coburn's oral testimony that there was "no structure or coherence" to the defender's payments, which were often made in cash at the pursuer's offices, a slightly irregular arrangement euphemistically described by her as "a unique way of [the defender] managing their rent account with us" (witness statement, para 4). In truth, the proper conclusion to be drawn from the evidence is that the defender's payments were chaotic and irregular, due to financial pressure on the defender. I preferred the testimony of Ms Coburn for the pursuer on the issue of the outstanding arrears of rent and service charges due as at the dates of the Pre-Irritancy Notice and Irritancy

Notice. She impressed me as a careful and well-informed witness, who had exercised some considerable patience and restraint with a difficult tenant.

[105] This leaves two circumstances on which the plea of oppression is founded. The defender's argument is that the pursuer acted oppressively by pressing ahead with the termination of the Lease in circumstances where it knew that the defender had not received the Pre-Irritancy Notice, under statute or contract, and that the pursuer had taken no steps to alert the defender to that Notice during the 14 week notice period. This remnant of the defender's common law defence of oppression has caused me some difficulty.

[106] There is a considerable body of authority to the effect that the court has power to grant relief to a tenant against the oppressive use by a landlord of a right of irritancy in relation to a monetary breach (*Lucas's Executors* v *Demarco* 1968 SLT 89; *Dorchester Studios (Glasgow) Ltd*, *supra*). On two occasions, the Inner House has acknowledged that the power has survived the enactment of the 1985 Act (*CIN Properties Ltd* v *Dollar Land (Cumbernauld) Ltd* 1992 SC (HL) 104, 108-114; *Kodak Processing Companies Ltd* v *Shoredale Ltd* 2010 SC 113, 122-124). Though elusive, the plea of oppression is not yet extinct nor, according to the Lord Justice-Clerk (Ross) in *CIN Properties Ltd* (*supra,* 109) has it been interpreted by the Scottish Courts in "an extremely narrow manner" (contradicting the view expressed by the Scottish Law Commission and others).

[107] "Oppression" infers that there has been some "impropriety of conduct" or "misuse of rights" or "abuse" on the part of the landlord. These are different expressions of the same idea. Mere hardship to the tenant is not sufficient. The plea is concerned with the landlord's conduct, not with the motives behind the landlord's acts (*Lucas's Executors*, *supra*, 97). The landlord must have acted oppressively in exercising its rights or otherwise abused its

powers. Either way, the landlord must have "contributed to the occurrence of the irritancy by actings on [its] part which were unfair or irregular" (*CIN Properties Ltd*, *supra*, 114).

[108] In my judgement, the peculiarity of the present case is that, not only did the landlord's agents have actual knowledge (and, by extension, through ordinary principles of agency, the landlord had imputed knowledge) that the Pre-Irritancy Notice, though validly served for the purposes of the 1985 Act, had not actually been received by the tenant, but the pursuer (and its agents) had a ready and effective means of communication with the tenant throughout the period specified in the Notice; and, despite having that ready and effective means of communication with the tenant, it failed to alert the tenant both to the fact that the Pre-Irritancy Notice had been served and to the terms of that Notice. Strikingly, at no point in any of the email communications between 8 July and 31 August 2020 (JB, 196-200) did the pursuer *clearly* disclose to the defender that the statutory Notice had been posted, still less did it disclose the terms and import of that Notice.

[109] Much reliance was placed by the pursuer on its Email number 10 (dated 31 August 2020) to the defender. In that email, Ms Coburn says:

"…be aware the legal notice is in place and will be acted on if arrears are not paid in full."

The pursuer submitted that this represented a sufficient disclosure to the defender, if that were required at all, that the statutory Pre-Irritancy Notice had indeed been posted. I disagree. First of all, the reference to a "legal notice" being "in place" is inherently vague. Prior to 31 August 2020, a "notice" of a legal nature had already been served upon the defender. This was the Deposit Fund Demand Letter dated 3 June 2020. That letter expressly describes itself as a "notice" (page 2, final paragraph). It also bears a docquet which describes the letter as a "notice". The body of the letter also bears to give the defender "notice" (page 1, paragraph 6) that the pursuer was going to uplift the Deposit

Fund from the Deposit Account. The cover email dated 3 June 2020 from the pursuer's agents to the defender (which enclosed a copy of the Deposit Fund Demand Letter) also states:

"Please find attached a scanned copy of a *notice* issued today on behalf of [the pursuer] in relation to unpaid sums under the Lease of [the Premises]." [my emphasis]

Against that background, the reference to a "legal notice" in the pursuer's email dated 31 August 2020 would reasonably be understood by the defender as referring to the "notice" of 3 June 2020 (that is, the Deposit Fund Demand Letter), and not to some other "legal notice" which, on the evidence, it had never received.

[110] Even if I am wrong in that conclusion, and if the email of 31 August 2020 was sufficient in its terms to alert the defender to the service of some other "notice", the pursuer's email does not communicate to the defender the import or terms of that other notice. For example, it does not disclose when the notice was supposedly put "in place" (or served, if that is what is meant); it does not specify what period of "notice" was being given to the tenant; when it started; when it finished; to which debt (or obligation) it related; or what the defender was being required to do in response. The unilluminating reference to a "legal notice" does not specify whether it is concerned with the arrears for the quarter commencing 28 May 2020, or the quarter commencing 28 August 2020, or both. (The question is a fair one, and the ambiguity real, because it will be noted that the email dated 31 August 2020 refers expressly only to the 28 August quarterly rental, which had then recently fallen into arrears).

[111] Overall, in my judgment, the vague and ambiguous reference in the pursuer's Email number 10 to a "legal notice" being "in place" was not sufficient to alert the defender to the service and terms of the statutory Pre-Irritancy Notice.

[112] Therefore, in the peculiar circumstances of the present case, where (i) the landlord knew that the statutory Pre-Irritancy Notice had not been delivered to the tenant, and (ii) throughout the notice period, the landlord had available to it a ready and effective means of communication (by email) with the tenant, the failure of the landlord to utilise those other means to clearly notify the tenant of the existence and terms of the Notice has the consequence that the exercise by the landlord of its right of irritancy was oppressive at common law.

[113] I draw support for that conclusion from dicta in *Kodak Processing Companies Ltd*, *supra*. In that case, the landlord had chosen not to send a notice by recorded delivery notice because, at the time, the Post Office was subject to industrial action with the result that deliveries of mail were delayed. The landlord argued that it could in theory have consigned the statutory notice to the Post Office recorded delivery service, but that, in that event, the delivery of the notice would have been delayed, thereby shortening the period of time available to the tenant to clear the arrears and avoid the irritancy. The landlord said it was on "the horns of a dilemma". If it had proceeded to post the notice by recorded delivery, it was "open to the suggestion that [it] had been acting oppressively" (page 122), knowing that the notice would not actually be delivered due to the strike. For that reason, it chose to serve the statutory pre-irritancy notice direct upon the tenant by sheriff officer. The Inner House said that the supposed dilemma was "illusory". It said that the landlord could easily have sent the notice by recorded delivery (that is, by consigning the notice with the Post Office), notwithstanding that this might mean that it would be delivered late – and, at the same time, "by other means", intimate to the tenant "a copy of that notice, with an explanation as to the possibility that it might be received late".

[114] In my judgment, two conclusions are to be drawn from the *Kodak* case. The first conclusion is that, for the purpose of section 4 of the 1985 Act, actual delivery of the notice is not required. Instead, all that is required is the posting of the notice by the recorded delivery service. That much was discussed earlier. The second conclusion is that the Inner House, by implication, acknowledged that the landlord might well have been "acting oppressively" (to use the words of the landlord's counsel: page 122) if it had proceeded to exercise its right of irritancy, knowing that the notice, though posted, had not actually been received by the tenant due to industrial action. The Division's creative solution that a landlord, aware of such non-delivery, should "by other means" simply intimate "a copy of that notice" to the tenant "with an explanation as to the possibility that it might be received late" discloses that the Inner House considered that some sort of action was indeed incumbent upon the landlord to alert the tenant to both the existence and terms of the statutory notice, before proceeding to exercise its power of irritancy.

[115] Accordingly, on the evidence in the present case, I have concluded that the common law plea of oppression is established.

Quantification of damages for violent profits

[116] Standing my conclusions, it follows that the pursuer is not entitled to damages for violent profits for the alleged unlawful occupation of the Premises, as eighth craved.

[117] If I had concluded that the defender's occupation of the Premises had been unlawful following service of the Irritancy Notice, I would have been faced with a situation where, following the exclusion of the opinion testimony of Mr Britton and Ms Coburn, there would have been very little evidential foundation to reach the findings necessary to support an award of damages for violent profits.

[118] However, notwithstanding the exclusion of that opinion evidence, if the defender's occupation of the Premises had been unlawful, I consider that I would have been entitled to make an award of damages for violent profits based upon the rent which the parties had actually agreed at the time, in terms of the Lease. This is the best guide to a reasonable rent for the subjects (*HMV Fields Properties Ltd* v *Skirt 'N' Slack Centre of London Ltd* 1986 SC 114, 120). The agreed rent under the Lease was £21,000 per annum, which equates to a rate of £57 per day. Therefore, I would have awarded damages at that reasonable rent (of £57 per day) from and including 17 November 2020 to the date of decree, under deduction of the sum of £5,397.74 being the aggregate sums paid post-termination by the defender.

[119] I would have had greater difficulty in relation to service charges and insurance. While the Lease does make provision for those charges to be paid, they are not quantified in the Lease and I had no adequate evidential material on which to reach a reliable view as to the precise extent of the service charges and insurance. The pursuer's submissions on this issue founded exclusively on the document attached to Mr Britton's purported expert opinion (JB, 190) which was excluded from evidence for the reasons set out above.

Arrears of rent and service charge

[120] In crave 7, the pursuer seeks payment of arrears of rent and service charge said to be due for the period up to 16 November 2020.

[121] In my judgment, this monetary claim fails because, on the evidence, payments (though irregular and indefinite) were made by the defender after the date of the Irritancy Notice which ultimately had the effect of clearing the residual balance of the Increased Arrears. Further payments by the defender have expressly thereafter been held to account

of the claim of damages for violent profits. Accordingly, I have granted decree of absolvitor in respect of the sum seventh craved.

Decision

[122] For the foregoing reasons, I have sustained the second, sixth, seventh, ninth and tenth pleas-in-law for the defender. *Quoad ultra* I have repelled the defender's pleas-in-law and I have repelled the pleas-in law for the pursuer. This results in decree of absolvitor in favour of the defender *quoad* craves 1 to 8 of the writ. The issue of expenses is reserved meantime.