SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2024] SC EDIN 24

EDI-A271-23

JUDGMENT OF SHERIFF CHRISTOPHER DICKSON

in the cause

(FIRST) JOHN VIVIAN BUSBY AND (SECOND) DR MARIE DONNELLY

Pursuers

against

(FIRST) MARK BLAIR AND (SECOND) KIM BLAIR

Defenders

Pursuers: C, Smith; Flexlaw solicitors

Defenders: Blane (sol adv); Urquharts

Edinburgh, 13 February 2024

Introduction

[1] This action concerns a residential property in Auchendinny, which consists of a four-bedroom dwelling house and about 6.25 acres of garden and other land. By missives dated 19 March to 26 May 2021 the parties concluded a contract whereby the pursuers agreed to buy the property for a price of £602,500, with a date of entry on 28 May 2021. On 28 May 2021 the defenders, by disposition, transferred the property to the pursuers and the pursuers took entry to the property. The disposition was subsequently registered in the Land Register, which now records that the pursuers are the *pro indiviso* owners of the property. On taking entry to the property the pursuers quickly became aware of the presence of Japanese Knotweed ("JK"). It was a matter of agreement between the parties that: (i) JK is a pest plant which blights gardens and damages structures; (ii) the defenders were aware,

during their ownership of the property, that the property contained JK; and (iii) that the defenders had attempted to treat the JK on the property by cutting it back, strimming it and spraying it.

[2] The missives incorporated the Scottish Standard Clauses, Fourth Edition (12 January 2021) (all references will be to the Fourth Edition of the Scottish Standard Clauses unless otherwise stated). Clause 2 of the Scottish Standard Clauses provided:

> **"2 AWARENESS OF CIRCUMSTANCES AFFECTING THE PROPERTY**
>
> 2.1 So far as the Seller is aware (but declaring that the Seller has made no enquiry or investigation into such matters) *the Property* (including in respect of Clause 2.1.3 the Building, if appropriate) is not affected by:
>
> > 2.1.1 any Notices of Payment of Improvement/Repairs Grants;
> >
> > 2.1.2 (nor has been affected by) flooding from any river or watercourse which has taken place within the last 5 years;
> >
> > 2.1.3 other than as disclosed in the Home Report for the Property any structural defects; wet rot; dry rot; rising or penetrating damp; woodworm; or other infestation [*my emphasis*]."

The Scottish Standard Clauses also provided the following interpretation:

> "The terms 'the Purchaser', 'the Seller', 'the Property', 'the Price' and 'the Date of Entry' have the meanings set out in the Offer or other document incorporating reference to these Clauses;
>
> […]
>
> 'the Building' means, where applicable, the larger building or tenement of which the Property forms part.
>
> "The masculine includes the feminine (and vice versa) and the words in the singular include the plural (and vice versa)."

The missives made clear that "the Property" was the whole property ultimately transferred to the pursuers and therefore included the garden and other land.

[3] The case called before me on 22 January 2024 in relation to a debate on the defenders' third plea in law, which stated: "The pursuers' averments being irrelevant, the action should be dismissed". The issue for the court at the debate was the contractual interpretation of clause 2.1.3 and in particular whether the words "other infestation" in clause 2.1.3 were wide enough to cover JK. The defenders contended that they were not and that their third plea in law should be sustained. The pursuers contended that they were and that the defenders' third plea in law should be repelled.

Submissions for the defenders

[4] The case turned on the contractual interpretation of clause 2.1.3. The correct approach to contractual interpretation had been most recently summarised by the Lord President (Carloway) in the recent case of *Lagan Construction Group (In Administration) and others* v *Scot Roads Partnership Project Limited and Another* [2023] CSIH 28 at paragraph 10 (where the Lord President cited, with approval, the case *Arnold* v *Britton* [2015] AC 1619 at paragraph 15). Clause 2.1.3, being part of the Scottish Standard Clauses, had been drafted by skilled professionals in conveyancing. When one looked to the ordinary meaning of that clause, the words "other infestation" could not be read to include JK. Under reference to *Minister of Pensions* v *Ballantyne* 1948 SC 176 at page 182 it was contended that "other infestation" ought to be read as relating to matters *ejusdem generis* with the matters set out earlier in the clause. When the clause was looked at in that manner it was clear that "other infestation" did not cover large plants that invade the garden and prove difficult to remove. Even at a general level the plain and ordinary meaning of the word "infestation" meant a large number of insects or animals causing damage. It did not mean a plant causing damage. In all the circumstances the words "other infestation" did not cover JK and as such

the defenders were not obliged to say anything to the pursuers about the presence of JK at the property. In such circumstances the pursuers' case was irrelevant, the defenders' third plea in law should be sustained and the pursuers' first and second plea in law ought to be repelled.

Submissions for the pursuers

[5] Under reference to *Rainy Sky SA* v *Kookmin* [2011] 1 WLR 2900 at paragraphs 21-23, *Arnold* at paragraphs 14-23, *SIPP Pension Trustees* v *Insight Travel Services Ltd* 2016 SC 243 at paragraph 17 and 44, *Hoe International Limited* v *Anderson* 2017 SC 313 at paragraph 19, *Wood* v *Capita Insurance Services Ltd* [2017] 2 WLR 1095 at paragraphs 10 to 14, *Investor Compensation Scheme* v *West Bromwich Building Society* [1998] 1 WLR 896 and *Chandris* v *Isbrandsten-Moller Co Inc* [1951] 1 KB 240 it was contended that the correct approach to contractual interpretation could be distilled to the following main principles:

(1) Loyalty to the text which required that it was the actual words in the document that were the starting point, and commonly the end point, for questions of interpretation;

(2) The task for the court was to objectively determine what a reasonable person with all the background knowledge reasonably available to both parties at the time of contracting would have understood the parties to have meant by the words they had used;

(3) The whole contract approach required that the document must be construed as a whole, in its context. The other terms must be considered. It was inappropriate to focus excessively on a particular word, phrase, sentence or clause; and

(4) The *ejusdem generis* rule meant that where a general phrase or sweeping up clause followed specific enumerations in a contract clause, the phrase would generally be interpreted as limited to other examples of the same type of genus.

[6] Clause 2.1.3 ought to be construed as having imposed on the defenders a duty to disclose the presence of JK. This was tolerably clear when one considered the plain and ordinary meaning of the words "other infestation" and in particular "infestation". An infestation was defined in the Concise Oxford Dictionary, 8th Ed as a harmful thing that overrun (a place) in large numbers and in the Oxford English Dictionary, 2nd Ed as follows:

> "The action of infesting, assailing, harassing, or persistently molesting; now used esp. of insects which attack plants, grain, etc. in large swarms. Also, with *an* and *plural*. An assault or attack of this kind. Also, the state or condition of being infested."

There was nothing in those definitions that limited "infestation" to insects. Rather it could be any harmful things that overrun a place in large numbers. Indeed the Royal Institute of Chartered Surveyors ("RICS") information paper entitled "Japanese Knotweed and Residential Property" (1st Ed, February 2022) stipulated that any amount of JK on a site, above or below ground, could be regarded as an "infestation". In the circumstances the plain and ordinary meaning of "other infestation" included JK.

[7] Such a construction was further supported when consideration was given to clause 3 of the Scottish Standard Clauses, which included the following:

> "**3 SPECIALIST REPORTS**
>
> 3.1 Any guarantees in force at the Date of Entry in respect of (i) treatments which have been carried out to the Property (or to the Building, if appropriate) for the eradication of timber infestation, dry rot, wet rot, rising damp or other such defects, …"

The use of the words "other such defects" made clear that it was intended that the *ejusdem generis* rule should apply to clause 3. The words "other *such* defects" in that clause made

clear that they should be limited to defects of the same genus as what came before those words. However, clause 2.1.3 did not follow the approach taken in clause 3 with the words being limited to "other infestations" as opposed to "other *such* infestations". That meant that the intention of parties was not to apply the *ejusdem generis* rule to clause 2.1.3 and therefore that clause was not limited to the genus of circumstances set out in the clause and again required the defenders to disclose the presence of JK.

Further written submissions

[8] After the debate had concluded and during the course of preparing this judgment I came across paragraphs 4-24 of Gretton and Reid, *Conveyancing*, 5th Ed, which is set out at paragraph 13 below. I considered that that paragraph had the potential to inform my view on the interpretation of clause 2.1.3 and in the circumstances parties were given the opportunity to lodge further written submissions after having considered that paragraph. Both parties highlighted that the learned authors were considering a clause in second edition of the Scottish Standard Clauses which was in identical terms to clause 2.1.3. The defenders contended that the learned authors' commentary supported their submissions that it could not be said that JK was of a similar genus to wet rot, dry rot, penetrating damp or woodworm. If the drafters of the Scottish Standard clauses had wished to include JK or other similar examples beyond those set out in the clause 2.1.3, they would have been free to do so. The pursuers contended that the learned authors' commentary was essentially neutral on the correct interpretation of the clause 2.1.3. The commentary did not make any reference to "structural defects" or "other infestations" and did not suggest that "other infestation" was limited to wet rot, dry rot, penetrating damp, woodworm or other

infestations of this genus. If this had been the view of the authors then the commentary would have said so.

Analysis and decision

[9] In the English Supreme Court case of *Arnold* Lord Neuberger set out, at paragraphs 14 to 23, the correct approach to the interpretation of contractual provisions. At paragraph 15 Lord Neuberger said:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn [1971] 1 WLR 1381, 1384-1386; *Reardon Smith Line Ltd* v *Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 995-997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky* [2011] 1 WLR 2900, paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC."

Lord Neuberger then went onto to emphasise seven factors that were important to consider when interpreting a contractual provision.

[10] In the recent Inner House case of *Lagan Construction Group Limited* the Lord President (Carloway), under reference to *Arnold* at paragraph 15, summarised, at paragraph 10, the correct approach to the interpretation of contractual provisions in Scotland:

> "10. The case falls to be determined according to the well-established rules on the interpretation of contracts, recently repeated in *Paterson v Angelline (Scotland)* 2022 SC 240 (LP (Carloway), delivering the opinion of the court, at para [32]) citing, *inter alia*, *Arnold* v *Britton* [2015] AC 1619 *(Lord Neuberger at para 15)*. Parties' intention is

> most obviously gleaned from the language which they have chosen to use. The court should not normally search for drafting infelicities in order to justify a departure from the natural meaning of that language. It should identify what the parties agreed, not what it thinks that common sense may otherwise have dictated. Contracts are made by what people say, not what they think in their inmost minds (*Muirhead & Turnbull* v *Dickson* (1905) 7F 686 (LP (Dunedin) at 694 cited in *Paterson* at para [37]). Where a contract is a complex and sophisticated one prepared and negotiated by skilled professionals, as is the case here, it may be successfully interpreted principally by textual analysis (*Wood v Capita Insurance Services* [2017] AC 1173, Lord Hodge at para 13)."

[11] Before applying that above well-established rules to the interpretation of clause 2.1.3 it is first necessary to consider whether I was entitled to have regard to the RICS information paper referred to at paragraph 6 above. The defenders contended that I was not entitled to consider the RICS information paper because it had not been referred to or incorporated into the pleadings. The pursuers contended that I was able to consider it as an aid to interpretation. Paragraph 13.06 of Macphail, *Sheriff Court Practice*, 4th Ed (edited by Cubie) provides:

> "Where it is proposed to ask the sheriff at debate to make a decision on the basis not only of the pleadings but also of the provisions of a document or documents, that can only be achieved in one of the following ways. (1) Where the critical provisions have been quoted verbatim in the pleadings. (2) Where the critical provisions have been accurately specified in the pleadings and have been expressly incorporated and held as repeated therein *brevitatis causa*, the document or documents having been lodged in process. (3) Where neither of these courses has been followed in the drafting of the pleadings, a joint minute must be lodged dispensing with probation of the document or documents and, if necessary, agreeing copies as principals. The sheriff cannot consider a document at debate unless one of these courses has been adopted. …"

The RICS information paper was not referred to or incorporated into the pleadings and its stated purpose was to provide information to RICS members. In the circumstances I did not consider that I could have regard to that document.

[12] I now turn to the interpretation of clause 2.1.3. I would point out *in limine* that whilst I accepted that in considering the correct interpretation of clause 2.1.3. I was entitled to have regard to other relevant clauses of the contract, I did not consider that I could have regard to

clause 3 of the Scottish Standard Clauses because that clause had been deleted (see qualification 3 of the defenders' agent's letter of 16 April 2021 at defenders' production number 1) and therefore did not form part of the contract between the parties. As clause 2.1.3 was part of the Scottish Standard Clauses it had clearly been drafted by skilled professionals and I considered that it could be interpreted by textual analysis. I considered that the ordinary and natural meaning of the clause was that parties had intended to include a clause in the contract which had the overall purpose of requiring the sellers (the defenders) to disclose matters, that they had an awareness of, which could adversely affect *the property* (so not just the physical building or buildings on the property). In other words the intention of the parties was the inclusion of a clause that required the sellers to warrant, as far as they know, that the property was not affected by matters that could adversely affect the property.

[13] Clause 2.1.3 detailed a list of matters which could commonly adversely affect a property, namely "any structural defects; wet rot; dry rot; rising or penetrating damp; woodworm; or other infestation." I considered that the list of matters set out what the parties intended to be the limits of what the sellers had to disclose. The *ejusdem generis* rule of construction provides that where a list of things of the same class is followed by general words, the general words may be limited to members of that class. That result is not inevitable because the rule is only one of construction and what the court is concerned with is the intention of the parties. I considered that if the *ejusdem generis* rule of construction did apply to the words "other infestation" that the parties' intention was simply to limit those words to a general class of matters which could commonly adversely affect a property. I considered that the use of the word "infestation" was not limited to insects or animals and that whilst a structural defect could not be described as an infestation, the remainder of the list could each be described an infestation (so the list was requiring the seller to warrant that,

as far as they know, that the property was not affected by structural defects or by infestations of wet rot, dry rot, rising or penetrating damp, woodworm or other infestation). I drew support for that view from Gretton and Reid, *Conveyancing*, 5th Ed at paragraphs 4-24 where the learned authors state:

> "**Infestation**
>
> An offer will typically require the sellers to warrant that, as far as they know, the property is not affected *by infestations such as* wet rot, dry rot, damp or woodworm, and that, if eradication work has been carried out in the past and guaranteed by the contractor, there is a valid guarantee which will be transferred to the buyers. The value of such clauses is usually slight, for the obvious reason that it is difficult or impossible to establish what the seller really knew or did not know. And the latter part is odd in as much as a seller who never obtained a guarantee is in a better position, in this respect, than one who did [*my emphasis*]."

[14] I considered that the entire list of matters was made up of harmful things that could commonly adversely affect a property and that "other infestation" meant other harmful infestation(s) that could commonly adversely affect a property. I considered the presence of JK on a property in sufficient numbers could properly be described as an infestation of JK and that a JK infestation was a harmful thing or matter which could commonly adversely affect a property (which included adversely affecting a physical building). Indeed the defenders admit that JK "is a pest plant which blights gardens and damages structures". In all the circumstances I came to view that the intention of the parties was for a JK infestation to fall within the words "other infestation". Further, I considered that even if the intention of the parties was that the words "other infestation" ought to be limited to harmful things that could commonly adversely affect a physical building that the intention of the parties was, in any event, for a JK infestation to fall within those words because, it was, as I have already pointed out, a harmful thing or matter that could commonly adversely affect a physical building.

[15] The paragraph I have quoted above from Gretton and Reid, *Conveyancing*, 5th Ed, highlights, in general terms, the potentially limited value of clause 2.1.3, however, in the present case the defenders admit that they were aware, during their ownership of the property, that the property contained JK. The pursuers aver that the property contained a substantial amount of JK, including JK that was near to the dwelling house on the property. The defenders do not, however, admit that that they were aware that there was a JK "infestation" and in the circumstances it may prove necessary, if the issue cannot be agreed, for evidence to be led that the JK that the defenders were of aware of on the property was indeed a JK "infestation".

Disposal

[16] In all the circumstances I consider that the pursuers have pled a relevant case and I therefore, for the reason given above, repel the defenders' third plea in law. A procedural hearing will now be fixed to determine: (i) further procedure; and (ii) the question of expenses.