SHERIFF APPEAL COURT

[2022] SAC (Civ) 4
EDI-CA7-20

Sheriff Principal M W Lewis
Appeal Sheriff A M Cubie
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in appeal in the cause

PHILIP SAMSON

Pursuer and Appellant

against

DC WATSON & SONS (FENTON BARNS) LIMITED and UK INSURANCE LIMITED

Defenders and Respondents

Pursuer and Appellant: Upton, advocate; Macdonald Henderson Limited
Defenders and Respondents: Cowan, advocate; Clyde & Co (Scotland) Limited

1 February 2022

Background

[1] DC Watson operated a storage facility at Fenton Barns Farm. The facility comprised eight separate units within a converted farm building. The conversion had taken place in 2001. Mr Samson leased unit 8 from DC Watson. He stored personal property in the unit, which he values at £300,000. On 5 December 2016 the whole building burned to the ground. The fire had been started deliberately in another unit and spread through the building. The lease, such as it was, was brief and silent in relation to fire safety.

[2] Mr Samson raised an action seeking damages for his loss plus a further sum representing repetition of the rent. The action is based primarily on a breach of an implied term of the lease effectively that the property was safe.

[3] After debate, the sheriff dismissed the action. He concluded that: (i) Mr Samson's averments of the terms implied by law into parties' lease were irrelevant; (ii) his averments of loss of a chance were irrelevant; and (iii) UK Insurance Limited should not have been convened as a party for any interest it might have.

The grounds of appeal

[4] Mr Samson challenges the decision and argues that the sheriff was wrong in relation to the three matters above. He seeks the recall of the sheriff's interlocutor and for the action to be appointed to a proof before answer.

[5] The first ground of appeal is that the sheriff erred by taking a restrictive approach to the scope of the implied terms; by concluding that building standards and the laws on the prevention and mitigation of fires in buildings are not relevant to the assessment of what is reasonable; and by determining that the implied terms did not apply to the other parts of the building insofar as the condition of the other parts was capable of affecting unit 8.

[6] The second ground of appeal relates to a subsidiary point pled in relation to an alternative case. Mr Samson offers to prove that if the premises had been constructed with reasonable fire resistance, the fire would have been contained and there was reasonable chance that the loss to Mr Samson would have been less.

[7] The third ground of appeal is brief. UK Insurance Limited is the insurer of DC Watson. It was convened by Mr Samson for "any interest it may have". The sheriff erred

in deciding that as there is no crave directed against UK Insurance Limited, the company ought not to have been convened.

Appellant's submissions

Implied terms

[8] Having accepted that the common law implies terms into the lease that subjects are reasonably fit for the purpose for which they are let and are in good tenantable condition, the sheriff ought to have recognised that the obligation is to provide subjects which are reasonably safe against the risk of fire regardless of whether the premises are residential or commercial. There are two common law terms implied into the lease - that unit 8 (1) required to be reasonably fit for the purpose for which it was let and (2) required to be in good tenantable condition. Counsel contended that for those implied terms to be met, unit 8 and the building of which it formed part required to comply with applicable building standards and had to be capable of being used safely. In that regard counsel provided numerous examples of the formulation of these implied terms (*Todd* v *Clapperton*, 2009 SLT 837; *Mearns* v *Glasgow City Council*, 2002 SLT (Sh Ct) 49; Rankine, Leases (3rd ed); *Harbison* v *Robb*, (1878) 1 Guthrie's Select Cases, 287; *Glebe Sugar Refining Co* v *Paterson*, (1900) 2 F 615; *Golden Casket (Greenock) Ltd* v *BRS (Pickfords) Ltd* 1972 SLT 146; and McAllister, Leases (5th ed)).

[9] Fire is a risk to the safety of any building and its users. The obligation therefore is to provide subjects which are reasonably safe against the risk of fire - ie to conform with the laws on the prevention and mitigation of fires in buildings with which the unit and the building had most recently to comply. The applicable building standards and fire safety measures are those which applied in 2001.

[10] The sheriff accepted that the common law implies terms relative to reasonable fitness for purpose and good tenantable condition; but he was said to have erred in assessing the scope of those terms particularly in distinguishing between their application to commercial and residential subjects. Reasonable fitness as a matter of law must include reasonable safety. The same types of hazard to life and limb, such as fire, can arise in both residential and commercial subjects.

[11] Counsel referred to a number of authorities in support of his contention that the scope of the landlord's obligation to provide subjects which are reasonably fit for purpose, and are reasonably safe against fire insofar as failure to do so may affect the subjects of lease, applies regardless of the difference in categorisation of building and the use to which it is put *(Rankine* on Leases (3rd ed) pp 240-242; *Paton and Cameron* on Landlord and Tenant p 130; *McAllister* on Leases, paragraph 3.14; *Gerber* on Commercial Leases in Scotland, paragraph 13-02; *McKinlay et al*, Dilapidations in Scotland (2nd ed) paragaph 1.4; *Liverpool CC* v *Irwin* 1977 AC 239; B*lackwell* v *Farmfoods (Aberdeen)* OH 6 December 1990 (unreported) 4; *Woodfall,* Landlord and Tenant at paragraph 13.007; *Mars Pensions Trustees Ltd* v *County Properties & Developments Ltd* 1999 SC 267).

[12] Counsel submitted that the sheriff was wrong to draw a distinction between the two types of lease; there cannot be two different sets of standard; the safety warranty could not be packaged for residential tenants specifically. *Gloag* on Contract (2nd ed) at p 316 ratifies that position in stating that the lease of shop, office or store implied a warranty that it was fit for occupation and wind and watertight; for a store, this extends to stability. By extension, the obligations were similar to residential premises. It does not matter what the purpose was; no one would want the building to burn down; that applied to any conceivable use of the business premises.

[13] Pulling this together counsel submitted there was no serious argument that reasonable fitness for purpose applies to commercial and residential property. As a matter of law, it was a non sequitur that a commercial premise does not need to be safe; reasonable fitness for purpose includes reasonable safety; the law cannot separate out the safety element from the reasonable fitness purpose.

[14] The standard warrandice includes a safety element. He sought support for this proposition by the fact that there is no contradictory authority. There is no difference in principle between the landlord's obligation of safety whether commercial, residential or even agricultural. Safety was an integral part of reasonable fitness (*Glebe* at p 474).

[15] The scope of the implied term is the same irrespective of the extent to which the landlord retains part of the building. The implied term extends not just to common parts but to all non-demised parts; the sheriff had erred at paragraphs 30 and 31 in concluding that the implied terms were limited to unit 8.

[16] Counsel noted that in *Liverpool CC* the scope of the implied obligation was limited to common parts but submitted that English law was more restrictive, drawing for example a distinction between furnished and unfurnished premises (see *Woodfall*). Scots law was more all-encompassing. In this case, the use of the other units in the building was affected by the corridor through which the fire was able to spread. Mr Samson's use was affected by his unit being burned to the ground. So a non-demised part was manifestly capable of affecting the let part.

[17] The assessment of reasonableness could also be informed by public standards of legality. (*Gilchrist* v *Asda Stores Ltd* [2015] CSOH 77 and *BSM Ltd* v *Simms* [1971] 1 All ER 317). It was relevant to ask whether DC Watson complied with the applicable public laws: the reasonable person obeys the law; it is unreasonable to break the law. The sheriff

said that there was no inevitable link between the happening of the fire and blame. However Mr Samson has averred in detail why the premises were a tinderbox. Mr Samson offers to prove that DC Watson chose to create a building with a number of breaches of fire and building regulations which was then leased for gain. These averments must be relevant and apt for probation.

[18] To reinforce his proposition that common law informs statutory interpretation counsel referred to *Todd* where it was held that a landlord could be found responsible for latent defects. In the present case the landlord created the building; they made it into a fire hazard and let it out in that state; a proof before answer should be allowed. In *Gerber* at paragraph 13-02 third bullet point the author considered that the landlord was responsible for any defect in design or construction of premises. Counsel submitted that the court should prefer the more contemporary decision in *Todd* to the decision in *Harbison*, where a ceiling fell on the tenant's head and the landlord was held not to blame.

The loss of chance

[19] The averments of loss of chance were pled as an alternative case. If the premises had been constructed with reasonable fire resistance, the fire would have been contained, a position supported by an expert. It is not irrelevant; Mr Samson can aver and claim a loss less than complete. Even if that was not established, Mr Samson was entitled to argue that there was reasonable chance that the loss would have been less; the sheriff erred in his assessment. It was subsidiary to the principal case; the loss of chance case was properly averred. Reference was made to *McGregor* on Damages (20th ed) at paragraph 10-048; *Stair Memorial Encyclopaedia* at paragraph 909 and as well as the 2009 Gill review at paragraph 60.

Sisting the insurer

[20] The sheriff had misunderstood the law; there did not require to be a crave convening the UK Insurance; the consequence is that no operational decree could be granted against them. *Macphail* Sheriff Court Practice (3rd ed) paragraph 4.116 recognised the competence of calling a defender for his own interest. The insurer had an ex facie interest; they should be called; it was not bound to appear and no operative decree can be granted.

First respondent's submissions

[21] Counsel highlighted that the sole basis of the action is breach of implied terms of contract and no delictual duty or nuisance claim is averred.

[22] Counsel agreed that there was an implied term as to the condition of the subjects; they had to be reasonably fit for their purposes. But it did not follow that the sheriff was in error in distinguishing residential and commercial premises on the safety issue, because the purpose of a residential lease was very different from a commercial lease. Subjects may be reasonably fit for storage but not for human habitation - and such a distinction stands to reason. There were good reasons for more exacting standards for residential leases in which one might expect to see detailed terms and conditions; a tenant is likely to be in a weaker position in a residential bargain, so it stands to reason to have minimum standards which are not imposed in commercial leases.

[23] There is no authority for the proposition that the obligation of safety is the same in commercial properties and that absence supported DC Watson's position, and none of the authorities upon which Mr Samson relied support the proposition that commercial and residential leases are to be treated the same in relation to the obligation of safety. For

example, in *Liverpool CC*, the duties related to common parts in a residential building and at most they support the proposition that duties in residential properties extend to common parts.

[24] It was accepted that the onset of a fire was bad regardless of the nature of the subjects, but where residential premises are concerned it was likely to be a greater hazard if eg people were sleeping. He submitted that safety was not part of the obligation unless the subjects were residential; he referred to *McAllister* at paragraph 3.32 where such duties flow from a need to protect the tenant from a personal injury. It was a very distinct obligation from those relating to commercial tenants.

[25] The thrust of the authorities was in relation to the preservation of "life, limb or injury to health" (*Summers* v *Salford Corporation* [1943] AC 283 p 289, referred to in *Mearns* and *Todd*); residential premises had to be reasonably fit for human habitation, which imposed a different tier of responsibility. A distinction was clearly drawn by the court: Lord Wright at p 293 said that premises provided for human habitation had to be distinguished from warehouses.

[26] The sheriff had looked at the purpose of the let; safety might form part of a common law duty but this case did not give rise to that. Not all leases fall to be treated in the same way but that is what the Mr Samson argues.

[27] Counsel moved to consider the neighbouring units argument; which was that the implied term extended beyond the subject let. He submitted that there was no authority to support the proposition that an implied term extends beyond subjects let and common parts. The authorities referred to by the appellant (*Blackwell*, *Mars*) deal with common parts; the implied duty does not extend beyond these parts.

[28] The respondents' position was vouched by *Golden Casket (Greenock) Ltd* where it was said that "the duty [of reasonable fitness] is confined by all to the maintenance of the actual subjects let" (at p 148). In that case a neighbouring property owned by the landlord gave rise to flood but that was held not to be actionable in terms of implied duty, which extended only to the subjects let. Reference was made to *Gerber* p 477: the landlord was not liable for damage due to a defect in nearby premises owned by him. Any implied duty can only apply to subjects let and common parts even if sub-divided; adjacent property or even one removed cannot extend the duty. There was no suggestion of any extension beyond common parts.

[29] The English authorities were of limited assistance. If the whole transaction is futile, then particular terms could be implied; for example the need to provide staircase, or lifts or lights; but this lease could not be rendered futile by condition of neighbouring units.

[30] The corridor might be a common part, but that was not enough. Deliberate fire-raising at unit three is alleged. Mr Samson's case appeared to be that the fire spread, and the spread was caused by construction defects, but there was no reference to common parts; rather the implied term was said to extend to everywhere in the premises.

[31] There is no obligation on a landlord to ensure that subjects are not dangerous.

[32] Counsel addressed the significance of the statutory regime which regulated fire safety, emphasising that Mr Samson is saying that in all leases the implied term imposes obligations of safety which requires compliance with building standard and fire safety provisions.

[33] Mr Samson avers that it is unreasonable to provide accommodation which does not comply with such conditions - all commercial leases should contain an obligation to comply

with building standards and fire safety regulations; but Mr Samson quoted no authority to vouch that proposition.

[34] The issue is not about whether the landlord acted reasonably but whether the premises were reasonably fit for purpose; the two matters are conflated by the appellant. It was accordingly irrelevant to determination of breach of any common law contractual term.

[35] Mr Samson argues that the premises ought to have complied with regulations at the date of the change of use - not at the date of letting to a pursuer, but an earlier date. So what would be the standard in considering fitness for purpose? The standard might be less now. The question is whether the premises are reasonably fit for purpose at time at which the lease is entered into.

[36] Mr Samson's case was periled on all three propositions being accepted: the existence of an extended implied term to include a warrandice about safety, the extension of that to the whole premises, (to include parts leased to others or retained by the landlord) and that the standard of reasonableness is judged with reference to statutory regulations; all three components of the argument have to be accepted before there could be success in establishing relevant case.

[37] Counsel submitted that *Todd* was of no assistance, as it related to statutory duty; similarly *Harbison* did not provide support; whether a landlord was liable for damages arising from a latent defect would depend on the nature of the subject let and the character of the defect (p 290).

[38] In the present case, there was a fire and the premises were destroyed. That materially impaired the use and possession. But before there was a fire, there was no defect which materially impaired use and possession. In any event *Harbison* dealt with a residential lease, but if the same approach was adopted rendering landlords responsible for

latent defects in commercial leases, it could never be met by a fire which was caused deliberately.

The loss of chance

[39] In relation to the averments about loss of chance, counsel referred to *McGregor* at paragraph 10.44. For Mr Samson to succeed he must show that the object of the implied term was to prevent fire damage, not a chance of fire damage. The pleading of a loss of chance is inconsistent with the alleged breach of the implied term. In what way was Mr Samson deprived of a chance to secure a more favourable outcome? The sheriff did not err.

Sisting the insurer

[40] So far as the convening of UK Insurance was concerned there was no reason for retaining the second respondent as a party, even if the appellant was justified in convening it. The sheriff did not err.

Reply

[41] Counsel for Mr Samson responded to the effect that it cannot be the law that a landlord has no safety obligations in a commercial context. More exacting standards make sense for residential leases but that is not an argument for no safety standards as regards commercial premises. Building regulations reflect that.

[42] Any tenant is vulnerable to fire breaking out in the non-demised parts and is entitled to be protected. It could be wilful fire-raising, a dropped cigarette, faulty wiring or a lightning strike; there should be protection provided by the implied term as described.

[43] He submitted that the *Golden Casket (Greenock) Ltd* case could be distinguished. In that case the non-demised subjects were nearby premises, not part of a single structure, so structure did not depend on non-demised premises. In this case it is the same building. The content of implied terms will vary but there was no case in which safety will not be part of reasonable fitness.

[44] If rights extend to common parts such as the roof and corridor, then that was two thirds of the case argued. We understood counsel to submit that it cannot be the law that only the common parts of lease are subject of implied terms.

Decision

[45] We remind ourselves that the issue is restricted to whether there is a contractual basis for the action, arising from a term which Mr Samson says should be implied into the lease. This decision is not concerned with any other cause of action which may arise.

[46] There is a superficial attractiveness to Mr Samson's submission that for premises to be reasonably fit for their purpose, they require to meet a certain safety standard; as it was put in submissions, no matter what the purpose of the lease was, no party would want the building to burn down. DC Watson did acknowledge that in some circumstances reasonable fitness for purpose might impose a safety obligation. Mr Samson submitted that it was a question of degree rather than principle, and that safety elements informed the nature of the term implied.

[47] The implied term that a property is reasonably fit for purpose is uncontroversial; that is a baseline requirement of all properties, residential or commercial. As the law has developed, the law has been content to recognise other elements of the reasonableness which apply to residential properties; they must be wind and watertight, fit for human

habitation, (*Paton and Cameron*), there must be ease of access and egress even for non-tenants (*Liverpool CC);* the landlord was responsible for even latent defects (*Todd*). But the authorities relied upon by Mr Samson do not vouch the extension of these elements to commercial premises generally.

[48] *Paton and Cameron,* reading on from the passage referred to by Mr Samson, and having dealt with the need for reasonable fitness for premises including "houses offices shops and stores" goes on to say at p 130:

> "There is, however, a variable element in the application of this standard, 'since the extent of this obligation will vary according to the value and rental of the subjects and the reasonable requirements of a tenant who hires a house of given accommodation and rental'" continuing at p 131 "…Where the sufficiency of a store is in question, the standard to be applied is sufficiency on the basis of reasonable use by the tenant".

Accordingly there is no absolute standard and a distinction is drawn between residential and other premises.

[49] *Gloag* at p 316, again reading beyond the passages referred to by Mr Samson, deals with implied terms in leases of *inter alia* stores; having indicated an obligation to undertake that the store is strong enough to bear the weight of what might reasonably be stored, the text continues:

> "It is conceived that the law goes no further, and that there is no general implication of fitness for any particular business which the tenant may require to carry on…The presumption is that a tenant is cognisant of the requirements of his own business, and that he has satisfied himself of the suitability of the subjects which he proposes to take on lease".

Again, there is no support for the proposition that residential and commercial leases give rise to identical implied terms.

[50] The authorities relied upon deal with either residential premises where there was a recognition of the need to protect people (*Liverpool, Todd*) or with commercial premises

where the cases did no more than vouch the existence of an implied term of reasonable fitness (*Blackwell, Mars*). None of these support the submission that residential and commercial leases give rise to the same implied terms.

[51] As DC Watson pointed out the thrust of the authorities in relation to safety is in relation to the preservation of "life, limb or injury to health" (*Summers* v *Salford Corporation* p 289, referred to in *Mearns* and *Todd*); the considerations of safety are designed for personnel, not premises.

[52] Any attractiveness of the proposition fades even further when it is put in the context of Mr Samson's argument; that such an implied term would arise in every commercial lease, as a term implied by law. We are not persuaded that any authority or text book supports the implication of the term sought by the appellant into this lease or any other commercial lease.

[53] We recognise that some of the textbooks do not distinguish between commercial and residential leases but that is clearly in the context of the existence of an implied term, that premises be reasonably fit for purpose. It offers no assistance in relation to the application of the test of what is reasonable fitness, in which context a clear distinction does exist.

[54] We conclude that the sheriff has not erred. The extension of the implied term to leases generally other than of residential subjects, and in particular to this commercial lease, is not made out. That is enough to dispose of the appeal but we deal with the other matters raised.

[55] So far as the extension of any implied term to non-demised premises is concerned, accepting that any such term would apply to common parts, we find that *Golden Casket (Greenock) Ltd* provides unequivocal support for DC Watson's position, that the landlord's responsibility is confined to the maintenance of the actual subjects let. The foundation of

Mr Samson's claim must be the existence of a defect or defects in the premises occupied by him under the lease. The implied term could not be extended to the non-demised premises. The fact that the subjects in this case formed part of the same building do not justify any departure from the thought process in *Golden Casket (Greenock) Ltd*. The sheriff did not err in rejecting Mr Samson's analysis.

[56] We reject the argument that statutory regulation can inform the court's determination of reasonable fitness. As DC Watson pointed out Mr Samson conflates two distinct matters - what the "reasonable person" would do and whether the premises were "reasonably fit for their purpose"; the issue is not about whether the landlord acted reasonably but whether the premises were reasonably fit for purpose. Such considerations might inform the analysis of a delictual claim. But the concept of "acting reasonably" is not of assistance in determining reasonable fitness. It is accordingly irrelevant to any determination of a breach of any common law contractual claim. In any event the fallacy of Mr Samson's argument is seen in the submission that the standard to be applied is at the date of the alteration of the premises; such a standard is arbitrary as a measure, or metric, of reasonable fitness for purpose at the time of any alleged loss, and as DC Watson point out, any statutory regime may have introduced reduced standards in the period between construction and the event giving raise to any claim.

The loss of chance

[57] We do not consider that the sheriff has erred. DC Watson rightly point out that Mr Samson's case is that the object of the implied term is to prevent fire damage, not a chance of fire damage. The pleading of a loss of chance is inconsistent with the alleged

breach of the implied term. It is not clear from the averments in what way Mr Samson was deprived of a chance to secure a more favorable outcome.

Sisting the insurers

[58] Finally we deal with the matter of the convening of UK Insurance; we consider that what the sheriff has stated in paragraph 44 is too bald. *Macphail* (3rd ed) at 4.116 does provide authority for the proposition that a party can be convened "for their interest". However given the stage of the procedure and the absence of a crave directed against the insurers and any interest by the insurers in entering the process, we consider that the sheriff was entitled to dismiss the case against the second defenders.

[59] The appeal accordingly fails; DC Watson having been successful are entitled to expenses.