SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 40

A629/17

JUDGMENT OF SHERIFF PETER J BRAID

in the cause

JANICE HALVORSON, residing at 19 Whitehouse Way, Gorebridge, EH23 4BF

Pursuer

against

PERSIMMON HOMES LIMITED, a company incorporated under the Companies Acts (Company Number 04108747) and having their registered office at Persimmon House, Fulford, York, YO10 4FE

Defenders

Pursuer: Welsh;
Defenders: McCormick;

Edinburgh, 28 June 2018

The Sheriff, having resumed consideration of the cause, sustains the defender's first plea in law to the extent of refusing to admit to probation the following of the pursuer's averments: (1) the whole of article 12 of condescendence; (2) the averment in article 11.1 of condescendence that: "It was an implied term of the missives that the garden ground pertaining to the property would be conveyed to the pursuer in a condition that was fit for the purpose for which the garden ground would reasonably be used by the pursuer; (3) the averment in each of articles 12.1 and 12.2 that: "Reference is made to regulations 5, 6, 7 and 8 of the Unfair Contract Terms in Consumer Contracts Regulations 1999 and schedule 2 thereto"; *quoad ultra*, reserves all pleas in law; allows parties a proof before answer thereon on a date to be afterwards fixed; assigns 30 July 2018 at 10.00am within the Sheriff Court

House, 27 Chambers Street, Edinburgh as a hearing on expenses and as a procedural hearing to fix the date of the proof and to assign a pre-proof hearing.

NOTE

Introduction

[1] In this action, the pursuer seeks damages of £25,000 from the defender, from whom she purchased a new-build house in 2012, conform to missives dated 6, 25 and 26 September 2012. The action is founded upon both breach of contract and delict. The pursuer's main (although not her only) complaint is that her garden is waterlogged to the extent it is unusable, the current waterlogging said to have been caused by drainage work carried out by the defender in 2014. The pursuer avers that she has sustained loss as a result.

The debate

[2] A debate took place before me on 9 May 2016. Mr Welsh, advocate, appeared for the pursuer; and Ms McCormick, solicitor, for the defender. The debate came to focus on four main issues, as follows:-

i whether the defender owed the pursuer a duty of care not to cause her economic loss (the first issue);

ii whether it was an implied term of the missives that the garden[1] be fit for purpose (the second issue);

iii whether the action is barred by passage of time by virtue of a non-supersession clause in the missives (the third issue);

[1] Originally, the pursuer contended for an implied term regarding the fitness for purpose of the whole subjects, but in the course of the debate, counsel moved to amend the pleadings so as to restrict the implied term to the fitness for purpose of the garden, which motion was granted unopposed.

iv whether any liability on the part of the defender is excluded by the terms of the missives between the parties (the fourth issue).

Consideration of the third and fourth issues involves consideration not only of how the clauses in question fall to be construed, but also of the impact, if any, of the Unfair Contract Terms Act 1977 ("the 1977 Act") and the Unfair Terms in Consumer Contracts Regulations 1999 ("the 1999 Regulations").

The factual background

[3] While strictly speaking the court should not have regard, at a debate, to facts other than those admitted on record or in a joint minute, and must take the pleadings under discussion as being *pro veritate,* the defender's solicitor gave the following summary of the factual background, which counsel for the pursuer accepted as being accurate and I am therefore content to repeat it, if only to set what follows in a factual context. In September 2012, the parties entered into a contract for the purchase by the pursuer from the defender of the property at 19 Whitehouse Way in Gorebridge ("the property"), the construction of which at that stage had not been completed. The contract was constituted by missives comprising (1) an offer dated 6 September 2012 from the defender's agent, incorporating a minute of agreement ("the minute of agreement"); (2) a conditional acceptance dated 25 September 2012 from the pursuer's agents; and (3) an unconditional acceptance dated 26 September 2012 from the defender's agent. Construction of the property was duly completed and the pursuer took entry in or around December 2012. The property benefits from the National House Building Council's ("NHBC") "Buildmark" warranty scheme. As is reasonably well known, the NHBC is a body which house builders or developers may join (and most do). The NHBC produces standards for the construction of new houses, which

are laid down in considerable technical detail (the 2011 NHBC standards which apply in respect of the property are lodged as production 4 in the defender's second inventory of productions). The Buildmark scheme which covers the property requires the builder to rectify any defects (that is, anything, falling short of the NHBC standards) materialising in the first two years after completion. NHBC provides a resolution service and a guarantee in respect of any remedial works which the builder fails to carry out. The scheme also includes a 10 year structural guarantee period in terms of which the NHBC undertakes to pay to the purchaser the cost of remedying any major structural defects which materialise within 10 years of completion. Following completion of the purchase of the property, the pursuer reported certain defects to the defender and to NHBC. It is unnecessary to record here what they were, but rectification works were carried out, and on or around 18 December 2013 the NHBC confirmed that all the defects which they had identified had been completed to the correct standard. Various other problems are averred by the pursuer but, as previously narrated, the only relevant one for present purposes is the alleged waterlogging of the garden, which the pursuer avers continues to subsist. NHBC investigated that issue and produced a report in February 2015 concluding that the matters raised by the pursuer did not constitute a breach of the NHBC standards. It should be observed in relation to this last point that it follows that there is no express term of the contract which the purser is able to aver has been breached. Hence, for the pursuer's claim in relation to the waterlogging even to get off the ground, she must establish either that the defender breached a delictual duty owed to her, or that the defender has breached an implied term of the contract. If she does establish one or both of those, then the other issues raised by the defender come into play.

The missives

[4] At this stage, it is appropriate to have regard to the relevant terms of the missives. As a general initial comment, it is pertinent to note that not only did the minute of agreement provide for the disposition of the property to the pursuer, but it also provided for the disposition of the pursuer's then house to the defender in part payment of the consideration. As such, the contract between the parties imposed obligations on both parties in relation to each of those transactions, and, to some extent at least, catered for the possibility that the contract might be breached by either party in relation to the property owned by them at the time of conclusion of missives to be transferred to the other. This may be a relevant factor when it comes to considering the construction of the key clauses in the contract, or the fairness of incorporating various clauses into the contract. The following provisions of the minute of agreement are relevant:-

> "2.1 The Company will sell to the Purchaser and the Purchaser will purchase from the Company the Company's Property at the Company's Property Price and the Purchaser shall pay for the Company's Property by (a) payment of the Reservation Fee and the Balance and (b) a transfer and conveyance to the Company of the Purchaser's property which has the Purchaser's Property Value. The Company's Property Price shall include a share of the cost of the completion of the roads, sewers and other infrastructure works…if the roads, sewers and other infrastructure works or any of them are not completed on the Completion Date, the Purchaser shall not be entitled to retain any part of the Company's Property Price against their completion, but shall pay over the whole balance against the Company's obligation to complete the roads, sewers and other infrastructure works as aforesaid as soon as soon as reasonably practicable.
> …
> 6.5 The Company's property will be completed in accordance with the requirements of NHBC and to the satisfaction of the Local Authority and in accordance with the plans thereof approved by the Local Authority.
> 6.6.1 Subject to condition 6.6.2 hereof, the Company reserves the right and shall be entitled without the Purchaser's consent to vary the materials or fitments, fittings and fixtures used in the construction of the Company's property as the Company may deem necessary due to shortage, lack of, delay or difficulty in obtaining materials and/or labour without affecting the price to be paid for the Company's property, provided the substitutions are of at least equal cost or value, and provided also that any substituted materials and/or equipment shall as nearly as practicable be

of the same standards and design and (if required) shall have been approved by the relevant Local Authority. The Company will notify the Purchaser of any such changes as soon as reasonably possible.

6.6.2 Where any change to the design, construction or materials to be used in the Company's Property would significantly and substantially alter its size, appearance or value the Company will notify the Purchaser of such changes and seek the Purchaser's consent thereto as soon as reasonably possible following the Company decision to undertake those changes (such notification being the "Variations Notice"). In the event of such changes being unacceptable to the Purchaser then the Purchaser shall have a period of 14 days from the date of receipt of the Variations Notice within which to resile from the missives…but that shall be the Purchaser's only remedy and failing that the Purchaser shall be deemed to have accepted the said changes and the remaining terms of the Variations Notice.

…

6.9 The Company shall not be bound by the layout or general scheme of the development of the Estate as may be shown on any plans at any time prepared in regard to such Estate and may alter such layout or general scheme of development in such manner as the Company may deem fit and extend development to land adjoining such Estate and the Purchaser shall have no right or title to object to or make claim against the Company.

…

6.11 The Company undertakes to register the Company's Property with The National House Building Council for cover under its Scheme prior to the Completion Date in the Company's name/that of an associated company of Persimmon Plc, and shall provide the Purchaser with documents in the form provided by such Council and the Purchaser will accept the offer contained therein.

…

6.13 The Company shall be bound to make good any defects which become apparent in the structure of the Company's Property attributable to faulty materials or workmanship with the exception aftermentioned provided any such defects are advised to the Company's Maintenance Inspector in writing at Unit 1, Wester Inch Business Park, Oldwell Court, Bathgate within two years of the Completion Date and certified as such by him. The Company will not be liable for any defects in the decoration or walls or ceilings attributable to chemical reaction of the brick or plaster or the drying out of the plaster and any defects due to normal shrinkage or drying out.

6.14 In the event of the Company being required to carry out maintenance or repair work in or on the Company's Property all necessary access during normal working hours will be given and in such an event it will be the Purchaser's responsibility either to remove furniture and furnishings in the Company's Property if the Company considers that necessary and/or to take such steps as may be required to protect the furniture, furnishings and decoration (including uplifting and relaying at the Purchaser's expense any fitted carpets, vinyl, wooden or tiled floor surfaces or other floor coverings) and the Purchaser shall have no right of compensation arising from the carrying out of such work or the need for the same.

…

> 8.2 The Contract will constitute a continuing contract which will remain in full force and effect and shall not be terminated merely by reason of a Disposition or Dispositions having passed in terms hereof insofar as any provisions hereof remain unfulfilled but only (with the exception of clauses 4.1, 5.1 and 5.2 hereof and this clause 8.2) in respect of matters raised in court proceedings commenced within two years of the Completion Date. For the avoidance of doubt said clauses 4.1, 5.1 and 5.2 and this clause 8.2 will remain in full force under threat until implemented without specific limit of time. Clauses to such effect may be incorporated in the said Dispositions.
>
> 8.3 In the event of either of the Company or the Purchaser failing to fulfil any obligations incumbent on the Company or the Purchaser respectively hereunder or breaching any warranties in the Contract whether before or after settlement, the Purchaser or the Company as the case may be will in addition to any other right or remedy open to the Purchaser or the Company be entitled to claim damages as compensation for the non-fulfilment of the obligation or obligations or breach of the warranty or warranties.
>
> …
>
> 8.8 The contract will constitute a continuing contract which shall not be terminated merely by reason of a Disposition or other deed having passed in terms thereof in so far as any provisions hereof remain unfulfilled but said contract shall not be capable of being referred to in any court proceedings commenced after the expiry of a period of two years from the Completion Date."

[5] I now propose to consider each of the four issues identified above, in turn, as follows.

The first issue: delictual duty

Submissions for the defender

[6] While the defender's submissions focussed on the averments in article 12 of condescendence, which it was submitted ought not to be admitted to probation, the defender's solicitor also attacked certain of the averments in article 11. I do not propose to repeat any of those averments at length. In brief, in article 11, although the averments could be more clearly worded, the pursuer's case appears to be, applying a fairly liberal interpretation to the language used, that in 2014, that is after she had acquired the property, the defender carried out further work as part of a "drainage solution", which work is averred to have been carried out without reasonable care, thereby causing damage to the

property. In article 12, by contrast, the pursuer avers that the pursuer relied upon the defender's skill in constructing the house, thereby giving rise to a duty of care on the part of the defender, which is also said to have been breached, thereby causing the pursuer loss.

[7] The nub of the defender's submission was that the type of loss claimed by the pursuer was properly characterised as pure economic loss. Reference was made to paragraphs 273 and 276 of the Stair Memorial Encyclopaedia, volume 15, and to the cases of *Hedley Byrne and Co Ltd* v *Heller and Partners Ltd* [1964] A3465 and *Henderson* v *Merritt Syndicates Ltd* [1995] 2AC145. In particular, reliance was placed upon the speech of Lord Goff of Chieveley in the latter case at 178D and 180C to 181F. It was submitted that a duty of care to prevent pure economic loss arose only where (i) the defender had voluntarily assumed responsibility for the economic interests of the pursuer, (ii) the defender was aware that the pursuer was relying on the defender's expertise and (iii) the terms of any contract did not negative delictual reliability. That test was not met in the present case. There had been no voluntary assumption of responsibility by the defender for the economic interests of the pursuer, in the sense of the principle established in *Hedley Byrne.* Further, this court should follow the decision of the Court of Appeal in *Robinson* v *PE Jones (Contractors) Ltd* [2011] EWCA civ9; [2012] QB 44. The leading judgment of Jackson LJ in that case contained a helpful summary of the development of the law as regards the existence of a duty of care to avoid economic loss, at paragraphs 37 to 69. In particular, at paragraph 68, Jackson LJ said that: "Absent any assumption of responsibility, there do not spring up between the parties duties of care co-extensive with their contractual obligations." He concluded that in that case (the facts of which were broadly similar to those in the present case) there was nothing to suggest that the defendant had resumed responsibility to the claimant in the *Hedley Byrne* sense. That reasoning, and conclusion, were in line with the *obiter dicta* of

Lord Keith of Kinkel and Lord Bridge in the case of *Murphy* v *Brentwood District Council* [1991] 1AC 398. Finally reference was made to paragraph 4.23 of Thomson, *Delictual Liability*, where it was said (at the end of paragraph 4.24):

> "neither a local authority nor a builder owes the owner of a house a duty of care in respect of pure economic loss arising from the defective construction of the property; and pure economic loss includes the cost of repairs or the loss of the property's value."

Applying all of that to the present case, the missives here, as in *Robinson,* were an ordinary contract whereby the defender was to complete the construction of a house to an agreed specification and the purchaser was to pay the purchase price. The defender was not engaged as the pursuer's professional advisor and was not providing advice to the pursuer which would be relied upon but was instead the counterparty in a contract of sale. There were no averments which would demonstrate that the defender had assumed responsibility to the pursuer in the *Headley Byrne* sense. Accordingly the averments regarding the existence and breach of delictual duties were irrelevant and should not be admitted to probation.

Submissions for the pursuer

[8] The principal submission by counsel for the pursuer was that, at least in relation to the averments in article 11, these were averments of damage to other property, in as much as the pursuer's position was that it was the defective installation of a so-called drainage solution which had damaged the pursuer's property. That was a recognised exception to the principle that damages for pure economic loss could not be recovered. Accordingly the averments in article 11 should be allowed to go to proof before answer. The case of *Robinson* was not authority for the removal of all delictual responsibilities where parties had entered

into a contract, as the *dictum* of Jackson LJ at paragraph 68 made clear. Even if the court followed that decision, which it was not obliged to do, the proposition for which it was authority was narrower than that suggested by the defender. The decision did not restrict in any material manner the delictual duties to take reasonable care not to cause personal injury or damage to other property. As regards the averments in article 12, the pursuer had sufficient averments that the defender had special skills not possessed by the pursuer and that the defender knew or ought to have known that the pursuer would rely on the defender's special skill and that it was reasonable for her to do so. There clearly was an exercise of special skill involved in the construction of residential property on which the purchaser of that property was entitled reasonably to rely. If it was said by the defender that such concurrent liability (i.e. in contract and in delict) was owed to clients only by professionals, and that builders and construction workers ought not to be regarded as professionals (which in many ways was the reason for the finding in *Robinson*), such a distinction was no longer acceptable. Reference was made to the following passage from the 13th edition of Hudson's Building and Engineering Contracts:-

> "To treat different limited companies differently in law because one is a "professional" and another is a "contractor" is to apply outdated categories and ignore the real nature of the relationship…at some stage the court will have to decide whether the relationship of professional advisor is indeed the important factor in the imposition of a concurrent duty or whether…it is enough for there to be a contractual duty to exercise skill and care.

Finally, the court should be slow to make any determination at debate on a question of this nature: *Parkhead Housing Association* v *Phoenix Preservation Ltd* 1990 SLT812.

Discussion

[9] Various of the underlying principles at play here can be plainly stated. First, there is no doubt that a party *can* owe concurrent duties in contract and delict (or tort) to the counterparty in a contract. In this regard, I can do no better than refer to the speech of Lord Goff of Chieveley in *Henderson* v *Merritt Syndicates Ltd*, pages 184 to 194. The question is whether in the present case there *were* such concurrent duties. Second, I accept the submission of the solicitor for the defender that the test for determining whether a delictual duty is owed, in circumstances such as the present, is generally recognised as being determined by whether there has been an assumption of responsibility by the defender and if so whether the pursuer has relied upon such assumption of responsibility with the knowledge of the defender: *Hedley Byrne*; *Henderson*. Third, as a general rule, a builder does not owe a purchaser a duty not to cause pure economic loss: *Robinson*; *Murphy*. While it is strictly correct that *Robinson* is not binding on me, I find Jackson LJ's reasoning in that case to be persuasive. The determining factor, it seems to me, is that the purchaser of a new-build house does not rely upon the expertise of the builder, in the sense that reliance is used in cases such as *Hedley Byrne* or *Henderson*. In the latter category of case, the claimant relied upon something that was said, in deciding to do something or pursuing a certain course of action. However, that is not the sense in which the pursuer says that she relied upon the skill and expertise of the defender. She may have had an expectation that the defender would have, and exercise, skill and expertise in their performance of the contract but that is not the same. In a sense, whenever one contracts with a third party to provide goods, or services, one can be said to be relying on that party to provide satisfactory goods or services. However that is different from receiving advice or information and acting in reliance upon it. It seems to me that that is the true distinction between professional entities

on the one hand and purveyors of services on the other. It is not because one is a professional and one is a builder that there can be duty in the one case and not the other; but because in the one case advice is given or a statement is made which is the direct cause of the person to whom it is given or made taking some action in reliance thereon, thereby suffering loss; and in the other there is merely acquisition of an item of property with a defect in it, which the law deems to be irrecoverable economic loss, for policy reasons. It simply so happens that advice tends to be given by professionals, rather than builders, but that is not the reason for the distinction.

[10] For these reasons, in relation to the averments in article 12, I prefer the submissions of the defender to those of the pursuer. The averments in article 12 are irrelevant and should not be admitted to probation.

[11] The position is different, however, as regards the averments in article 11. I should say that I still harbour some doubts as to the clarity of those averments. However I am prepared to accept that they can be read as averring that after the property had passed into the pursuer's ownership, further work was done on it by the defender which caused the property to suffer further damage. To that extent, that damage is not in my view truly pure economic loss, or at any rate, if it is, it is recoverable derivative economic loss: see Stair Encyclopaedia, Volume 15, paragraph 276, which states:

> "If a defender causes physical harm to a pursuer's property, as a result of which the value of the property is diminished...the loss is recoverable in the normal way as an example of derivative economic loss".

I recognise that that was not quite the pursuer's position, which was that the damage had been caused to "other" property although I confess I am unclear as to what the "other" property is said to be. Nonetheless, the passage just quoted in *Stair* seems to me to be sufficient to entitle the pursuer to a proof before answer of the averments in article 11, the

main difference between those averments and the averments in article 12 being that in the latter case, the pursuer avers that the property fell into her ownership already damaged, and in the latter, that it suffered damage after she had acquired it.

The second issue: implied term

[12] The implied term contended for by the pursuer was amended at the Bar, without opposition during the course of the debate, and now reads as follows (at article 11.1 of condescendence):

> "It was an implied term of the missives that the garden ground pertaining to the property would be conveyed to the pursuer in a condition that was fit for the purpose for which the garden ground would reasonably be used by the pursuer."

Submissions for the defender

[13] Ms McCormick submitted that the law on implied terms was considered in detail by the Supreme Court in *Marks and Spencer plc* v *BNP Paribas Securities Services Trust (Jersey) Ltd and Another* [2016] AC 742. Under reference to Lord Neuberger's opinion at paragraphs 16-21 she submitted that six principles could be derived therefrom which were to be applied by a court when determining whether terms should be implied into a contract. Of those, the following were relevant to this case, namely:

(a) A term will be implied into a detailed commercial contract only if that is necessary in order to give the contract business efficacy;

(b) A term will not be implied if the contract is effective without it;

(c) A term can only be implied if, without the term, the contract would lack commercial or practical coherence.

[14] The starting point for determining whether any term was to be implied into a contract was what the parties had expressly agreed in the contract itself. In the present case, clause 6 of the minute of agreement imposed a number of rights and obligations on both parties in respect of the property. In particular, clauses 6.5 and 6.11 were of particular relevance. The missives were effective without the implied terms sought by the pursuer. The NHBC standards, referred to in clause 6.5, set out in very significant detail the technical requirements to which the property should be constructed. Further, it contained detailed conditions in relation to the garden. The additional standard contended for by the pursuer would lie uneasily beside the express terms of the missives. The missives as drafted did not lack commercial or practical coherence. The contract had business efficacy without the need for implication of the term contended for. In terms of the NHBC standards, waterlogging 3 metres away from the house was considered to be acceptable. There was no basis for implying into the contract something which was contradictory of that express term.

Submissions for the pursuer

[15] Counsel for the pursuer also referred to *Marks and Spencer plc* v *BNP Paribas Securities Services Trust (Jersey) Ltd and another*; and to the five-part test set out by Lord Simon of Glaisdale in *BP Refinery (Western Port) PTY Ltd* v *Shire of Hastings* (1977) 180 CLR 266, which was referred to with approval by Lord Neuberger in *Marks and Spencer* at paragraph 18. The five parts of the test were:

1. The term must be reasonable and equitable;
2. It must be necessary to give business efficacy to the contract;
3. It must be so obvious that it goes without saying;
4. It must be capable of clear expression;

5. It must not contradict an expressed term of the contract.

[16] Lord Neuberger in *Marks and Spencer* clarified certain aspects of that test, in six distinct comments. The question for this court was whether a notional reasonable person in the position of the pursuer and defender would have agreed that it would be an obligation under the contract between the parties that the defender would provide to the pursuer a garden that was fit for use as a garden. Without such a term, the contract would lack practical coherence.

Discussion

[17] The starting point is to consider Lord Simon of Glaisdale's five-part test, set out above, in the light of Lord Neuberger's comments in *Marks and Spencer* v BMP *Paribas Securities Services Trust (Jersey) Ltd and another.* I do not consider it helpful to attempt to reformulate the test as Ms McCormick did; but it is helpful to have regard to Lord Neuberger's six distinct comments on the test, at paragraph 22, which can be summarised as follows:

> 1. One is not strictly concerned with the hypothetical answer of the actual parties [to the question of what they would have agreed], but with that of notional reasonable people in the position of the parties at the time when they were contracting.
>
> 2. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. These are necessary but not sufficient grounds.
>
> 3. It is questionable whether Lord Simon's first requirement, reasonableness and equitableness, usually, if ever, adds anything.
>
> 4. Business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied.

> 5. It is vital to formulate the questions to be posed by [the officious bystander] with the utmost care.
>
> 6. It may well be that a more helpful way of putting Lord Simon's second requirement is that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

[18] Approaching the circumstances of the present case with these comments in mind, the first point to make is that whereas, at first sight, it may appear fair to imply a term that the garden be fit for the purpose for which it would reasonably be used by the pursuer, that is not the test: Lord Neuberger's second observation. It is not so obvious a term that it goes without saying, particularly since it is somewhat vague. The term is not necessary to give business efficacy to the contract, which is primarily for the sale of a house rather than a garden (I will discuss the precise nature of the contract in more detail below). Ultimately, both parties formulated the test as being whether the contract would lack practical coherence without the implied term. It seems to me that it would not. However, the death knell for the implication of the term is the fact that the contract, through reference to the NHBC standards, does in fact contain detailed conditions regarding the standard to which the garden is to be constructed. These relate (section 9.2-D4) to the stability of garden areas; (9.2-D5) to the fact that in garden areas within 3 metres of the habitable part of the home waterlogging should be prevented by drainage or other suitable means; (9.-D6) that access by steps or other suitable means should be provided to garden areas where appropriate; with other detailed provisions regarding patios, timber decking and landscaping. These are very specific conditions with regard to the standard of the garden. The implication of the term contended for would either contradict those provisions or add a degree of uncertainty which the contract seeks to exclude. In my view the test for implication is simply not satisfied.

[19] Accordingly, the averment introduced by amendment in article 11.1, referred to above, should not be admitted to probation.

The third issue: time bar

[20] The non-supersession cause is repeated above at paragraph 4 (the defender founding upon clause 8.2 of the agreement rather than 8.8, although it is worthy of note that the clauses appear to be striving for the same end in different ways, and the fact that both appear in the minute of agreement perhaps speaks eloquently for the degree of care shown in drafting the minute of agreement). Broadly speaking, the two issues which arise are whether the clause has any application at all; and, if it does, whether the defender is prevented from relying on it by the 1977 Act or the 1999 Regulations.

Submissions for the defender

[21] Ms McCormick submitted that the effect of the clause was simply that the missives cannot be enforced after a period of two years from the Completion Date, which was 17 December 2012. The action was not commenced until 1 December 2017 and so the action was time-barred.

[22] In relation to whether the 1977 Act or the 1999 Regulations applied, it was accepted that the missives were a consumer contract for the purposes of the 1977 Act. However, the effect of section 15(2) of the 1977 Act was that section 17 did not apply because the contract was one which amounted to the grant of a right which amounted to an estate or interest in the land. That phase was not defined but in McBryde, *The Law of Contract in Scotland (3rd Edition)* at paragraph 18.07 it was stated that contracts for the sale of heritable property were excluded from the scope of sections 16 and 17 of the 1977 Act. It was incorrect to categorise

the missives as a contract for building services rather than as purely a contract for the sale and purchase of heritable property. The pursuer had simply offered to convey the property to the defender once built rather than to provide building services. If section 17 did apply, it was further submitted that it was fair and reasonable to incorporate the clause into the missives, and reference was then made to a number of factors.

[23] Insofar as the 1999 Regulations were concerned, it was accepted that the non-supersession clause was not individually negotiated within the meaning of those regulations. However, the clause did not cause a significant imbalance in the parties' rights and obligations, nor was it contrary to the requirements of good faith, being fully, clearly and legibly expressed and given appropriate prominence in the contract. It was not unfair within the meaning of regulation 5 of the 1999 Regulations. It was necessary to show both that the good faith requirement had been breached and that a significant imbalance had been caused: *UK Housing Alliance (Northwest) Ltd* v *Francis* [2010] EWCA Civ 117, paragraph 21.

Submissions for the pursuer

[24] In an apparent attempt to suggest that the non-supersession clause did not apply at all, counsel for the pursuer submitted, first, that the Inner House case of *Smith* v *Lindsay and Kirk* 2000 SLT 287 fell to be distinguished since that was a professional negligence action by individuals against a firm of solicitors, in which the non-supersession clause related to a standard set of missives between an individual seller of heritable property and an individual purchaser. Neither party in that sale was acting in the course of a trade and the property in question was already in existence at the time of conclusion of missives.

[25] However, the main thrust of counsel's submission on this issue was that both the 1977 Act and the 1999 Regulations applied and that the question, thereafter, of whether it was fair and reasonable to incorporate the term in the contract, or whether the non-supersession clause gave rise to a significant imbalance, contrary to the requirement of good faith, were questions of fact which could only be properly resolved after a proof before answer. The minute of agreement was a standard form of contract and section 17 of the 1977 Act clearly applied. The contract was not simply one for the transfer of land. It was a mixed contract, partly for sale and partly for the provision of building services. The pursuer averred at article 12.1 of condescendence that: "The missives are a mixed contract for the purchase of land and the provision of building services". That was a question of fact which could be decided only after proof before answer. If decided in favour of the pursuer that was sufficient to bring the pursuer within the ambit of section 17 of the 1977 Act. In *Harrison* v *Shepherd Homes* [2011] EWHC 1811 and in *Robinson* v *P E Jones (Contractors) Ltd* [2012] QB44, the court in each case had considered that the 1977 Act applied in similar factual circumstances.

Discussion

[26] Leaving aside for the moment the fact that there are not one but two non-supersession clauses, and I do not see that it is open to the defender simply to choose which one to apply (albeit 8.2 seems less extreme in its terms than 8.8, which purports to prevent the missives even being referred to: the fact that they are being referred to in the current action would appear to show the futility of that clause). As regards whether the non-supersession clause 8.2 has the effect contended for by the defender, I can see no valid basis for distinguishing this case from *Smith* v *Lindsay and Kirk*, certainly not on the grounds

contended for by counsel for the pursuer. The decision in that case turned on the construction of the particular clause in question but I can see nothing in the reasoning of the court which suggests that it was any part of that reasoning that the contract was merely one for the sale of land between private individuals. Rather, it was implicit in the court's reasoning that it was open to the parties in any contract to agree that the provisions in it would cease to become enforceable after a certain period of time. It is noteworthy that the clause in that case had the effect that even collateral obligations, which would not otherwise have been superseded by the disposition, ceased to be enforceable after the two years had expired, from which it must follow that parties may agree that any obligation will cease to be enforceable after a given period.

[27] That said, it is difficult to reconcile clause 8.2, or for that matter, clause 8.8, with clause 6.13, which requires the defender to make good any defects which become apparent in the structure of the company's property attributable to fault in materials or workmanship (subject to exceptions) provided any such defects are advised to the company's maintenance inspector in writing within two years of the completion date. Again, this would suggest that perhaps not a great deal of thought has gone into the drafting of the minute of agreement. For example, if a defect were intimated on the last day of the two years provided for in 6.13, it would be practically impossible for the defender's obligation to make good the defects to be enforced in any court proceedings, if clause 8.2 has the meaning contended for by the defender.

[28] Having drawn attention to that anomaly, the next question which falls to be decided in relation to the third issue is whether the 1977 Act has any application. Section 17 of that Act is in the following terms:

> "17(1) Any term of a contract which is a consumer contract or a standard form contract shall have no effect for the purpose of enabling a party to the contract –
>
> (a) who is in breach of a contractual obligation, to exclude or restrict any liability of his to the consumer or customer in respect of the breach;
>
> (b) in respect of a contractual obligation, to render no performance, or to render a performance substantially different from that which the consumer or customer reasonably expected from the contract;
>
> if it was not fair and reasonable to incorporate the term in the contract".

[29] Section 24 sets out the reasonableness test, insofar as material, as follows:

> "24(1) In determining for the purposes of this part of this Act whether it was fair and reasonable to incorporate a term in a contract, regard shall be had only to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties to the contract at the time the contract was made.
>
> …
>
> (4) The onus of proving that it was fair and reasonable to incorporate a term in a contract… shall lie on the party so contending".

[30] Section 15 sets out the extent to which section 17 applies to any contract, and provides that it so applies:

> "… only to the extent that the contract –
>
> …
>
> (e) relates to a grant of any right or permission to enter upon or use land not amounting to an estate or interest in the land".

[31] In McBryde, *The Law of Contract in Scotland, (3rd Edition)* at paragraph 18-07, the author expresses the view that the phrase "estate or interest in the land" is not defined but probably means in general real rights to land. He goes on to state that the Act does not apply to missives to purchase land.

[32] It was not suggested by counsel for the pursuer that Professor McBryde's view should not be followed and the question which arises is whether or not the contract in this case should be regarded as purely for the sale and purchase of land or whether, as the pursuer contends (and avers), it was a mixed contract for the provision of building services and the sale of land.

[33] While counsel for the pursuer submitted that this was a question of fact to be determined after proof before answer, it seems to me that that is not correct. There are no facts averred on record which require to be proved for that question to be decided. It is a question of law as to how the contract falls to be categorised. Perusal of the contract, in particular part 6, shows that it clearly contains conditions which do not relate to the sale of the property but which impose other obligations on the defender. Clause 2.1 refers to the defender's obligation to complete the roads and other infrastructure. Clause 6.5 refers to the defender's obligation to complete the property to a certain standard. 6.13 imposes an obligation on the defender to make good any defects arising out of its materials or workmanship, which goes far beyond a mere warranty as to the condition of the property when sold. I have already drawn attention to the apparent incompatibility of clause 6.13 and the non-supersession clause currently under discussion. It would make a nonsense of the contract if not only was the non-supersession clause held to exclude any claim after two years but the contract was categorised wholly as a contract for the sale of land such as to deny the pursuer the opportunity even to argue that it was not fair and reasonable to incorporate that clause in the contract. Further, although this is not determinative of the issue, I note that in relation to the first issue, discussed above, the defender submitted in the context of arguing that there were no delictual duties that the contract was one "whereby the defender was to complete the construction of a house to an agreed specification". My view is that the contract is a mixed contract and is therefore one to which the 1977 Act, section 17 may apply or at least to those parts of it (such as clause 8.2) which do not apply exclusively to the clauses which do deal with the sale of land. Accordingly, the pursuer's averments about the 1977 Act are relevant.

[34] Thereafter, however, it seems to me that the question of whether it was fair and reasonable to incorporate clause 8.2 into the contract is a question of fact which can only be resolved after a proof before answer.

[35] The final matter which arises under this issue is whether the 1999 regulations apply, it being accepted by the defender that the supersession clause was not individually negotiated.

[36] Regulation 5 provides as follows:

> "5(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
> (2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.
> …
> (4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.
> (5) Schedule 2 to these regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair".

[37] Schedule 2 includes terms which have the object or effect of -

> "(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier… in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations…";
> …
>
> "(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy…"

[38] Regulation 6 provides:

> "6(1) Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent".

[39] The problem which the pursuer faces in relation to the 1999 Regulations is that her averments, and indeed submissions, are predicated upon regulation 5 imposing a single requirement for a term, if not individually negotiated, to be regarded as unfair, namely, that it causes a significant imbalance in the parties' rights and obligations. On that reading of regulation 5(1), the breach of the requirement of good faith would follow automatically from the significant imbalance. However, such a construction gives no content to the words "contrary to the requirement of good faith" and it is clear from *UK Housing Alliance (Northwest) Ltd* v *Francis* that the existence of an imbalance is not enough on its own. The pursuer's pleadings contain no averments as to how the good faith requirement is said to have been breached. Accordingly, I have reached the view that there is insufficient in the record as it stands to justify any reference to the regulations (either in relation to the clause currently under discussion or in relation to the exclusion clause considered in the next section) and I propose not to admit the last averment of article 12.1 or the last averment of article 12.2 (which are in identical terms) to probation.

The fourth issue: exclusion clause

[40] Now that the 1999 Regulations have gone, so to speak, the live issues which remain here are, first, how the exclusion clause 6.14 falls to be construed and, second, whether the 1977 Act applies to it. To a large extent, parties adopted the submissions already made in relation to clause 8.2. However, the following additional submissions were also made.

Submissions for the defender

[41] As regards the interpretation of clause 6.14, Ms McCormick referred to *Arnold* v *Britton* [2015] AC 1619 per Lord Neuberger at paragraph 17. The court was required to

identify what the parties meant through the eyes of a reasonable reader and that meaning was most obviously to be gleaned from the language of the provision. The natural and ordinary meaning of the words "the purchaser shall have no right to compensation arising from the carrying out of such work or the need for the same" was that any right of compensation (arising in delict) which the pursuer may otherwise have had arising from either the way in which maintenance or repair work had been carried out or the fact that such work was required (i.e. the defective completion of the property in the first place) was excluded. There was express provision in the contract to the effect that damages for breach of contract were recoverable (subject of course to the two year time limit), and reference was made to clause 8.3 which is set out above.

[42] It followed that clause 6.14 must necessarily mean that liability for compensation arising due to negligence (being the only other type of compensation which might conceivably arise) was excluded. If that interpretation were correct, the clause was not unenforceable, by virtue of section 16 of the 1977 Act.

Submissions for the pursuer

[43] Counsel for the pursuer also referred to *Arnold* v *Britton*, in particular to the following passage from Lord Neuberger's judgment, at paragraph 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'… and it does so by focussing on the meaning of the relevant words… 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 document], (iii) the overall purpose of the clause and [the document], (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."

[44] That was effectively a restatement of Lord Clarke's decision in *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900. Following both those approaches, the Inner House in *HOE International* v *Anderson* 2017 SCC 13 decided (at paragraph 23) that courts should avoid adopting an over-strict and over-literal approach to contractual interpretation. Any ambiguity in an exclusion clause should be read *contra proferentem*: *Dairy Containers* v *Tasman Orent CV* [2005] 1W LR 215. In the instant case the defender's interpretation of the clause required the court to ignore all of the words in the clause from (and including) "and in such an event" up to and including "other floor covering". The words that the defender sought to have the court ignore clearly contextualised and demonstrated the true purpose of the clause. The clause was clearly intended by the defender at the time of drafting to restrict or limit its liability for damage caused to furniture, furnishing, decoration and floor covering, etc., caused as a result of necessary additional works at the property. Given that reading, clause 6.14 began to look more reasonable between the parties. Read alongside the agreement as a whole it was objectively much more reasonable to read the clause as restricting liability for damage to furnishings as part of secondary work being carried out. It made no sense for the clause to be interpreted as widely as the defender sought to have the court do. If the clause had been intended to be a general exclusion clause why would it not be worded in the usual clear and concise manner for such exclusion clauses and without reference to furniture, furnishings and the like? However, if the court did prefer the defender's interpretation then the cause was unenforceable by reason of the 1977 Act. Reference was made to sections 16 and 24(1) of that Act.

Discussion

[45] The first task is to attempt to construe the clause and, in particular, decide whether it is a general exclusion clause as contended for by the defender (in which case, the fairness of the clause will require to be considered), or whether it has the more restricted meaning contended for by the pursuer, in which case fairness does not arise.

[46] As far as the approach to construction is concerned, the starting point is undoubtedly *Arnold* v *Britten.* However, it is also instructive to have regard to what the Inner House said in commenting on that case in *HOE International* v *Anderson* from paragraph 18. In essence, what it said was that Lord Neuberger's judgment set out a check list of factors which were generally held to be relevant in construing a contract; but that the intellectual process involved in interpreting a contract was more usefully set out by Lord Hodge at paragraphs 76 and 77 of *Arnold,* referring to Lord Clarke in *Rainy Sky* at paragraph 21, where he said:

> " …the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other one."

Applying that approach to clause 6.14, the starting point is to consider the language used. The key words are "…the Purchaser shall have no right of compensation arising from the carrying out of such work or the need for the same". The reference to "such" work is to maintenance or repair work which the company has been "required" to carry out. An ambiguity immediately arises, since it is unclear what "required" means. Does it mean work which the defender was contractually obliged to do, or does it mean required in the

sense of having been asked to do it and agreed? Leaving that aside, the clause excludes any right of compensation not only arising from the carrying out of the work but arising out of the need for the work, that is, the need for the work which the defender has been required to do. It seems to me that the ordinary meaning of those words is that the clause must exclude more than simply damage to furniture, furnishing and decoration. It is obvious that those are things which might be damaged by the maintenance or repair work; less so that they would have been damaged by the need for the maintenance or repair work in the first place. In other words, the pursuer's proposed interpretation would appear to give no content to the final six words of the clause. On the other hand, the clause does not appear to be one which excludes liability in all circumstances, since it applies only where the defender is required to carry out maintenance or repair work; and it is possible to envisage circumstances where the defender might be in breach of duty but not be required to carry out maintenance or repair work.

[47] While I am mindful of the comments also made in *HOE International* v *Anderson* that evidence of surrounding circumstances may not always be necessary for a court to construe a contract, and it is far from obvious what disputed facts require to be proved to enable this clause to be construed, nonetheless I have come to the conclusion that construction of the clause should be attempted only after a proof before answer. There is no purpose in attempting to construe the clause in a vacuum, before it is known in what circumstances the defender is found to have breached any duty, how the so-called drainage solution came to be installed and whether or not the defender can be said to have been required to have undertaken such work. All of those facts, and more, require to be determined before the court can properly decide whether the exclusion clause might have any application to the particular circumstances of this case. In other words, before deciding whether the clause

excludes liability for breach of any particular delictual duty, it is essential to know precisely how that duty arose and in what circumstances.

[48] Finally, and for completeness, section 16 of the 1977 Act provides:

> "(1)… Where a term of a contract… purports to exclude or restrict liability for breach of a duty rising in the course of any business… that term… (b) shall… have no effect if it is not fair and reasonable to incorporate the term in the contract…"

Again this is a question of fact, which can only be resolved after proof before answer.

Summary

[49] I have allowed the pursuer a proof before answer in relation to the delictual case pled in article 11, but not that in article 12. I have refused to allow the implied term case to be admitted to probation. The non-supersession clause, 8.2, has the effect of rendering the action time-barred but I have determined that the contract was not simply one for the transfer of land, and consequently that the 1977 Act also applies, and the question of whether it was fair and reasonable to incorporate it in the contract will require to be determined after proof before answer. I have refused to allow the pursuer's averments about the 1999 regulations to be admitted to probation. The correct construction of the exclusion clause, and whether it was fair and reasonable to incorporate it in the contract, also require to be determined after proof before answer.

[50] I have assigned a hearing on expenses at which the proof dates, and a pre-proof hearing, can also be fixed.