SHERIFF APPEAL COURT

[2023] SAC (Civ) 18
EDI-A49-22

Sheriff Principal N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

KIRSTIN PRENTICE SHERRIFF

Pursuer and Respondent

against

JAMIE O'ROURKE and LOUISA O'ROURKE

Defenders and Appellants

Defenders and Appellants: Howie KC; Campbell Smith LLP

Pursuer and Respondent: Burnet KC; Addleshaw Goddard LLP

13 April 2023

[1] The appellants reside in a private domestic residence owned by the respondent. There is a written contract between them. The respondent wants to remove the appellants and recover possession. The parties are in dispute about whether their contract is a licence or a lease. If it is a licence, then the sheriff court has jurisdiction to hear the case. If it is a lease, then parties agree that it would be a private residential tenancy in terms of the Private Housing (Tenancies)(Scotland) Act 2016 (the "2016 Act") and as a consequence the sheriff court would not have jurisdiction (2016 Act, section 71).

[2] Private residential tenancy is defined in section 1 of the 2016 Act:

> "(1) A tenancy is a private residential tenancy where:
>
> (a) the tenancy is one under which a property is let to an individual ("the tenant") as a separate dwelling,
>
> (b) the tenant occupies the property (or any part of it) as the tenant's only or principal home, and
>
> (c) the tenancy is not one which schedule 1 states cannot be a private residential tenancy."

[3] The case was appointed to a preliminary proof before answer, on jurisdiction. The sheriff heard evidence and considered the terms of the contract in dispute. He found that, on its terms, the contract was a licence. There was no ambiguity in meaning. He rejected evidence for the appellant that there had been supplementary verbal assurances. He found the evidence to be of no assistance in construing the wording of the contract. Some of the elements of a lease, essential at common law, were missing. These were payments of rent, exclusive possession and a period of rental. Further, as a matter of contract wording, the contract was intended to be a licence not a lease. He did not accept the appellant's submission that the written contract was a sham, designed to conceal the parties' true intentions.

[4] The pleadings narrate, by way of background, that there are separate court proceedings relating to enforcement of missives of sale of the property by the respondent to the appellant.

The terms of the contract

[5] The contract is dated 14 and 17 February 2020. It commences with a clear declaration that it is a licence and not a lease. It is entitled "Licence to Occupy" and refers to the parties as licensee and licensor. Clause one includes:

> "1.2 The Licensor allows the Licensee access for the purposes noted in this Licence and the Licensee takes the Property for the Term upon the terms and conditions of this Agreement.
>
> 1.3 This Agreement does not create a Scottish Private Residential Tenancy because the Property is not and is not to be the only or principal home of the Licensee who shall not reside in the Property."

[6] Clause 3 provides for a licence fee of £5,000 per month, with an initial lump sum payment. A non-refundable deposit was payable.

[7] Clause 5.1 contains detailed obligations on the licensee, under the heading of payments, with a lengthy list of payment obligations such as water, sewerage, rates and council tax. Clause 5.2 deals with repairs, with a list relating to occupation and use, particularly misnumbered sub-clauses 5.1.7, 5.1.8, 5.1.10 and 5.1.11. Clause 5.1.1 refers to maintenance in "tenantable condition".

[8] Clause 5.2 (misnumbered) is, somewhat vaguely, entitled "The Property", and contains a long list of further obligations, such as notification of defects, insurance claims, use of property, blockage of drains, changing locks and a variety of other provisions, numbering 26 in total. Clause 5.2.3 allows use only for redecoration and minor alterations. Clause 5.2.8 prohibits any visitor staying more than three weeks in any three-month period. Clause 5.2.19 requires the licensee to ensure that any television is correctly and continually licensed.

[9] Clause 5.3 (another misnumbering) is entitled "General", and imports further requirements, mainly relating to usage of the premises. Clause 5.3.2 prohibits noise between the hours of 10pm and 7am. Clause 5.3.3 prohibits use for trade or for paying guests, and allows use of the property "only as a private residence for the occupancy of the Licensee".

Clause 5.3.6 creates an obligation to notify the licensor "if the Property becomes the subject of proceedings under the Matrimonial Homes (Family Protection) (Scotland) Act 1981…".

[10] Clause 6.1 requires the licensor to allow the licensee "quiet enjoyment" of the property during the licence for the purposes specified "without any unlawful interruption from the Licensor".

[11] Clause 7 (ii) confirms that the licensee had not made false statements which might affect the licensor's "decision to grant the let".

Appellants' submissions

[12] Senior counsel for the appellant submitted that there are four, perhaps five, essential characteristics of a lease (*Gray* v *University of Edinburgh* 1962 SC 157; *St Andrews Forest Lodges Ltd* v *Grieve* [2017] SC DUN 25). If one of these was missing in a contract permitting the occupation of heritage, then the contract is, in law, a licence. To be a lease, the contract must disclose agreement as to parties, premises, duration, rent and, possibly, a right of exclusive possession. The first two elements here are not in dispute. The third, namely duration, is removed in the current context by provisions of the 2016 Act, section 4.

[13] The submission recognised that the terminology of the contract was that of licence, not lease. The language of license was used throughout. The nature of the contract depended, however, on the true construction as a matter of law, not the labels used. Much of the evidence was beside the point, because it mattered not what the parties considered the document to be. Correct construction was a matter for the court (*Street* v *Mountford* 1985 AC 809). It was not necessary to make findings of intention to mislead, or of misapprehensions by the parties. The sheriff had erred in finding that there was no payment of rent, as payments referable to occupancy had been made.

[14] There was a clear contradiction between clauses 1.3 (private tenancy not created) and clause 5.3.3 (use only as a private residence for occupancy of licensee), the former being repugnant to the latter. This repugnancy should be addressed, in an exercise of construction, by rejecting that clause which does not reflect the tenor of the document as a whole, namely clause 1.3. It was evident that this was not a licence, irrespective of what the parties intended. The appellants had paid rent in the form of continuing payments to cover the extensions of occupancy owing to the delay in concluding missives. Further, clause 6.1 provided for "quiet enjoyment".

[15] There were so many clauses - counsel counted 18 - which made sense only in the context of a lease, that they could not be dismissed as errors. The appellant's position was not that there was bad faith. It was that the parties had blundered into creating a lease. It was a matter of objective construction, irrespective of intention. The clauses founded on by counsel are summarised at the start of this opinion.

[16] Rent had been paid, in the form of £5,000 per month for the right to occupy. It mattered not what the payments were called (*Street* v *Mountford*, above). The construction exercise was as set out in Chitty; *Contracts* (33rd edition) at paragraph 15-080. It did not matter that the appellants had also resided elsewhere, as long as this was their principal residence. Counsel accepted there were no findings in fact on this. In any event, in the absence of ambiguity, the post-contract payment of rent could not change the nature of the contract. As to whether the lease then amounted to a private residential tenancy under the 2016 Act, it was necessary to show subsequent occupancy as an only or principal home.

[17] This was not a case of ambiguity. It was clear on the face of the document that it was a lease.

Respondent's submissions

[18] Senior counsel for the respondent noted the factual background. The licence was granted to allow the appellants to carry out certain approved decoration works prior to completing the purchase later in the year. The licence was terminated in August 2020 and the missives rescinded in December 2021. The appellants remained in occupation.

[19] The parties were in dispute about whether possession had been given, whether rent had been paid, and the extent to which a fifth element, namely exclusive possession, applied and was present.

[20] Counsel referred to Rennie: *Leases* at paragraph 2.15, and Robson and Combe: *Residential Tenancies: Private & Social Renting in Scotland* at page 83. A contract amounted to a licence only where the intention of the parties as disclosed in the document was to create a licence rather than a lease, subject to that not being a mere sham or pretence. Intention played a part, but was not determinative. Intention is to be found by contractual interpretation in the first place, unless the factual context showed the contract to be a sham. Alternatively, subsequent actings could be examined, but only where rendered necessary due to ambiguity in the document (*Brador Properties Ltd* v *BT plc* 1992 SLT 490; *Scottish Residential Estates Development Co Ltd* v *Henderson* 1991 SLT 490; Robson & Combe (above) at page 83).

[21] The appellants did not seek to challenge the findings in fact. These findings included that sums paid were attributable to other reasons than rent, that the appellants knew the terms of the contract were clear, and had not revised out any of the terms. This case was distinguishable on the facts from *St Andrews Forest Lodges Ltd* v *Grieve* [2017] SC Dun 25, because in that case, unlike here, primary residence was not in dispute. The sheriff found that this was not a sham.

[22] In any event, on examining the clauses founded on by the appellants, many of these were equally consistent with lease or licence. On the evidence, the intention of both parties was to conclude a licence. The appellant's position at proof was that there were other assurances, not that the licence itself was a lease. That evidence had been rejected.

Decision on lease or licence

[23] Although this preliminary dispute is based on jurisdiction, it engages the fundamental issue of whether the contract was a private residential tenancy in terms of the 2016 Act. Parties agree that resolution of that question will determine whether the sheriff court has jurisdiction.

[24] The 2016 Act created a statutory form of tenancy, namely the private residential tenancy. The 2016 Act takes as its starting point a tenancy, and creates conditions under which that tenancy will assume statutory private residential status. These provisions innovate on the common law requirements for the existence of a lease. For example, a period of lease is required under common law, but section 4 of the 2016 Act removes that requirement for qualification as a private residential lease. Similar refinements are made in relation to issues such as shared accommodation and the requirements of writing. Where the 2016 Act does not regulate the requirements of a lease, the common law requirements continue to apply.

[25] A licence to occupy is a contract for enjoyment of some aspect of property but which falls short of conferring the full rights of a lease. It is defined only in relation to not being a lease, and is no more than a residual category of agreements. In the context of rights over heritable property, a licence can be defined, for example, as not allowing exclusive

possession, not containing one of the cardinal elements of a lease, or not being intended to be a lease (see Rennie: *Leases* at paragraph 2-15).

[26] Whether or not an agreement amounts to a lease is a question of law, not subjective intention:

> "If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade." (*Street* v *Mountford* 1985 AC 809).

[27] Whether or not the parties have, inadvertently or otherwise, created a tenancy, is a matter of contractual construction. Where, as here, the dispute is created by inconsistent or repugnant clauses, effect must be given to that part which is calculated to carry into effect the purpose of the contract. The purpose is identified from the instrument as a whole and the available background. To be inconsistent, a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses. (Chitty: *Contracts* (33rd edition) at paragraph 15-080).

[28] The customary principles of construction apply. One such principle is that, while the circumstances surrounding the execution of the contract can be taken into account, the intentions of the parties cannot.

[29] The sheriff heard evidence from both sides, which covered a number of issues. From this he was able to establish that the parties did not enter into a sham arrangement, and that the appellants purported to rely on an extra-contractual, subsequent agreement with the respondent. The sheriff rejected the first appellant's evidence on the latter point. The first appellant accepted in evidence that he knew he was signing a licence and not a lease. The

sheriff separately carried out a construction exercise of the contract itself, and concluded that the contract was a licence. Neither party on appeal invited this court to revisit the findings in fact.

[30] It is not clear what the hearing of evidence added to the latter exercise. I agree with senior counsel for the appellant that the majority of the evidence was of little evidential value. Neither side submitted that this was a sham transaction. It is of some relevance, however, that the appellant did not attempt to rely, in evidence, wholly on the contract itself. He purported to rely on separate assurances allegedly given by the respondent, which evidence was rejected. In any event, I do not consider that the appellant's evidence of what he thought he was signing is evidence which can be taken into account, other than to establish the fact neither side thought it was a sham transaction. It would otherwise be parole evidence being used to explain the effect of documentary evidence, but without evidential justification.

[31] Turning to construe the contract on its terms, it is plain that it falls to be construed as a licence, not a lease.

[32] The terminology is of a licence. The title is "licence to occupy". The parties are described as licensor and licensee. Those terms are used throughout. On the authority of *Street* v *Mountford*, above, this is not determinative. It is the effect of the agreement which must be ascertained.

[33] The contract is poorly drafted. It has a number of obvious and careless errors, such as misnumbering. It has drafting inconsistencies, such as referring to purposes where no purposes are set out. The contract contains mainly obligations, not purposes, and any purposes which can be identified require to be teased out of long lists of prohibitions and obligations. Occasionally words of lease ("tenantable condition", "grant the let") creep in.

Some clauses are apparently absurd in the context of a licence (for example, a reference to the Matrimonial Homes (Family Protection) (Scotland) Act 1981). It is riddled with poorly-applied standard terms. The penalty for poor drafting is litigation.

[34] The grant is of "access for the purposes noted in this Licence" (clause 1.2). No words inferring lease are used in the grant clause. The "purposes noted" are not, however, set out in the contract. There is a clue, oddly set out under "Deposit" in clause 4, stating "As the Licensee will be carrying out alterations and redecoration works to the Property…". It appears that access was to be taken for those purposes. That clause does not exclude occupation at the same time. There is a further clue in clause 5.2.3: "Use the Property only for redecoration and minor alterations as aforesaid" - there is no preamble and no "aforesaid" terms. Together, these clauses are sufficient to inform the reader that some type of limited use is granted, and that the contract stops short of granting a full right of use as a residential tenancy.

[35] There is an express clause which, if effective, renders this degree of close inspection unnecessary. It is exclusive rather than descriptive. It bears to exclude the creation of any private residential tenancy. The clause reads:

> "1.3 This Agreement does not create a Scottish Private Residential Tenancy because the Property is not and is not to be the only or principal home of the Licensee who shall not reside in the Property".

[36] This clause is unambiguous, prominent in position on the first page of the agreement, and exclusive of lease. While the contract is unclear on the purposes of the contract, it is nonetheless clear on what are not the purposes. In my view it would require strong conflicting provisions to displace this as a clear objective statement of intention of the parties at the time of contracting. The appellants submit that the remainder of the contract

reveals a number of provisions which are repugnant to clause 1.3, and which require clause 1.3 to be disregarded.

[37] The submissions for the appellant relied most strongly on clauses 5.3.3 and 6.1. These provide:

> "5.3.3 Not carry on any trade or profession upon the Property nor receive paying guests but use the Property only as a private residence for the occupancy of the Licensee"
>
> "6.1 [the Licensor undertakes] to allow the Licensee quiet enjoyment of the Property during the licence for the purposes specified without any unlawful interruption from the Licensor…"

[38] In my view, repugnancy requires much more than inconsistency. It is defined as in conflict with or incompatible with (Oxford English Dictionary 11th edition). Clauses 5.3.3 and 6.1 are undoubtedly inconsistent with licence of occupancy for a limited purpose, but inconsistency is not enough. Whether they are repugnant depends on the purpose of the contract. The purpose is left opaque. The reader is forced to sift through a lengthy list of prohibitions and requirements to identify what that purpose might be. The exercise is not assisted by reference to, but absence of, an expressed purpose. Clause 1.3, which might be regarded as setting out an overall purpose, does so only in negative terms. It is, however, clear in its terms. Whatever the purpose of occupancy may be, there is no doubt that it was plain to the signatories that the purpose of the contract was not to create a private residential tenancy. On the principle in Chitty, above, effect must be given to that part of the contract which is calculated to carry into effect the purpose of the contract.

[39] The question is whether clause 5.3.3 is so repugnant to clause 1.3 that one of the terms requires to be disregarded, and secondly whether 5.3.3 is the one which ought to prevail, to the exclusion of clause 1.3.

[40] In my view, while there is apparent inconsistency between these clauses, there is no repugnancy. Clause 1.3 refers to residence. Clause 5.3.3 refers to occupancy. These are not the same rights. Occupancy is necessary for the limited purpose of renovating the property, and can be exercised without residency. "Use as a private residence" is consistent with merely reflecting that the property is a residential property. It is, at worst for the respondent, ambiguous. Even if it were construed to permit some element of residence, it does not bear to permit residence as a principal home. It does not prevent the operation of clause 1.3, which excludes the creation of a private residential tenancy.

[41] Even if these clauses were repugnant, my view is that clauses 5.3.3 and 6.1, whether separately or together, do not bear to confer any right capable of challenging, and vanquishing, the terms of clause 1.3. Rather, clause 1.3 would prevail to the exclusion of clause 5.3.3. That is partly because of the prominence and clarity of clause 1.3, and that its apparent purpose is to set out the limits of the contract. Clause 5.3.3 does not have that character. It is part of a long list of minor provisions, and has the character of an ancillary provision, not a purposive statement. Clause 5.3.3 covers three separate topics, namely trading, guests and residence. It does not attempt to define the parameters of the parties' relationship. In contrast, clause 1.3 appears to do so.

[42] Clause 6.1 is consistent with a right of occupancy under a tenancy. It is also, however, consistent with occupancy for limited purposes such as redevelopment. It is not, in my view, capable of being regarded as repugnant to clause 1.3. It is also an ancillary provision, and not of sufficient clarity to displace the primacy of clause 1.3.

[43] The remaining clauses relied on by counsel are of insufficient substance, whether individually or collectively, to show, far less to award, a right of residence under a lease. The language falls far short of such a result. Of the clauses identified by counsel, I regard

clauses 4, 5.2.9.3, 5.1.7, 5.1.8, 5.1.10, 5.1.1 (under "Repairs", misnumbered), 5.2.8, 5.2.22 and 5.3.1 as equally applicable to licences or leases, and accordingly of not capable of amounting to repugnancy.

[44] The appellant's submissions also founded on two further clauses which are capable of being in conflict with licence. These are clauses 5.3.6 and 7(ii), and provide:

> "5.3.6 Promptly notify the Licensor or Licensor's Agent if the Property becomes the subject of proceedings under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 or the Family Law (Scotland) Acts 1985 and 2006…"
>
> "7(ii) [in signing this declaration the Licensee] confirms that he has not knowingly or carelessly made any false or misleading statements (whether written or oral) which might affect the Licensor's decision to grant the let".

[45] These clauses appear to flatly contradict that there is only a licence. However, they are also ancillary clauses, and bear only to assume, not to award, rights of residence under any lease. In an assessment of the type advocated by Chitty (above) these clauses cannot be described as carrying into effect the purposes of the agreement, which is otherwise framed and agreed in terms of licence. They are merely inconsistent. One can speculate, in such a poorly revised contract, how they came to be there. If repugnancy arises, it is these two clauses which fall to be rejected as repugnant to the purposes of the contract.

[46] For these reasons, in my view the sheriff was correct in finding in law that the contract was a licence, not a lease. There is no requirement or entitlement to proceed to consider the evidence. That exercise would only be justified if there were sufficient ambiguity in the document to require the court to consider surrounding facts and circumstances. There is no such ambiguity.

[47] For completeness, I note the submissions made about, first, whether the payments made under the contract amounted to payments of rent and, second, the requirement for a

fifth cardinal element of leases, namely exclusive possession, discussed with considerable care in *St Andrews Forest Lodges Ltd* (above). Because the present case founders at the stage of considering the drafting of the contract, these points do not arise for decision.

[48] I note that evidence was led about events subsequent to the date of contract. While normally subsequent actings are of limited evidential relevance, I note that occupancy forms a central part of the test under section 1 of the 2016 Act, and is relevant for that purpose. I record that in the present case neither party founded on the nature of occupancy as completing a right of tenancy.

Disposal

[49] The appeal will be refused. Parties should attempt to agree a disposal of expenses. If this is not achieved within 14 days of issue of this opinion, the clerk will fix a hearing.