



SHERIFF APPEAL COURT

**[2026] SAC (Civ) 35
JED-CA1-24**

Sheriff Principal N A Ross
Appeal Sheriff P A Hughes
Appeal Sheriff C M Shead

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL ROSS

in the appeal in the cause

MARCHMONT FARMS LIMITED

Pursuer and Appellant

against

**POLLYANNA SARAH WILSON, CATHERINE ELIZABETH BALL
and TIMOTHY ANDREW KEITH RODBER, the executors of the late
GILES THOMAS WILSON**

Defenders and Respondents

**Pursuer and Appellant: McMeeken, solicitor-advocate; Morton Fraser MacRoberts LLP
Defenders and Respondents: Garrity, advocate; Gillespie Macandrew LLP**

10 June 2026

[1] This action related to the lease of sporting rights for grouse shooting. The appellant is the landowner of a sporting estate at Kettelshiel Farm, Duns. It leased the sporting rights to the now deceased Mr Wilson from 1 October 2019 for a term expiring on 31 March 2030. Mr Wilson died on 16 February 2023 and the respondents are his executors. They instructed a notice of termination of the lease, which was served on the appellant with effect from 31 May 2024. The notice was served in terms of section 16(3) and (4) of the Succession

(Scotland) Act 1964. Section 16(5) preserves any right to damages which may arise. The appellant brought the present action, seeking damages in the sum of £1,057,335. It averred that, while the rent was only a nominal £1 per year, Mr Wilson had undertaken to manage the estate, which management it had since required to carry out at its own expense.

[2] The respondents did not dispute the operation of the 1964 Act. Their position was that the heads of claim were neither relevant nor sufficiently specified. The heads of claim did not arise under the lease or as a result of termination. They sought debate.

[3] Following debate, the sheriff refused to admit certain averments to probation, being six of the eight heads of claim. He allowed the claim to proceed to proof before answer on the remaining averments. The appellant sought reinstatement of those heads of claim. The respondents cross-appealed, seeking dismissal of the whole action.

The appellant's submissions

[4] The solicitor-advocate for the appellant submitted that the continuing costs of management were recoverable, as they would not have been incurred but for the termination. They were voluntary costs, but that was no bar to recovery (*BDW Trading Ltd v URS Corporation Ltd* [2025] 2 WLR 1095), and they were entirely foreseeable. The sheriff's textual analysis of the lease was in error. A contextual approach was required, applying commercial common sense (*Ashtead Plant Hire Co Ltd v Granton Central Developments Ltd* 2020 SC 244). Such an approach would render the claims relevant. The sheriff's reasoning for excluding the heads of claim was in any event insufficient to support the result. He had not properly related the claims to the lease terms. The sheriff had correctly rejected criticism of the relevancy and specification of the remainder of the appellant's averments. The claim

was for resultant foreseeable loss. The averments relating to loss of capital value were to underline the reasonableness of the expenditure.

The respondents' submissions

[5] Counsel for the respondents submitted that the action should be dismissed for want of specification or relevancy of the claims. While damages might have been available for the costs of remedying a breach, carrying out the tenant's obligations or loss of value, these were not claimed. The claim as presented covered matters for which the tenant was not responsible. Any expenditure was voluntary, and the appellant had the benefit of the reversion of the lease. There was no averment of breach of lease obligations. While parties had apparently intended to impose some obligation of maintenance, they had not signed the schedule which identified these. The clauses founded upon were therefore void from uncertainty. The action should be dismissed.

Decision

[6] The lease was poorly drafted and incompletely executed. It is an unstable basis for the appellant's claims. The relevancy of these depended on being able to make sense of the resulting defective documentation. The action was brought under section 16(5) of the Succession (Scotland) Act 1964, which does not create a statutory claim but rather preserves any common law claim following termination of a lease by executors under section 16(3).

[7] The appellant and Mr Wilson agreed both a Memorandum of Agreement (dated 30 September and 2 October 2019) and the Lease (of the same dates). While both documents were incorporated into the pleadings, the appellant disclaimed any reliance on the Memorandum, other than for context. That context included the fact that the appellant,

notwithstanding the grant of the Lease, would graze up to 500 sheep on Kettelshiel Farm, would let part of the farm for grazing, and also would “continue to manage Kettelshiel Farm including conservation plots on the in-bye ground...”. These provisions can only be understood as showing that the Lease, being of shooting rights, was not intended to impose a requirement to manage the whole heritable subjects at Kettelshiel Farm. That is confirmed by the Lease terms. The subjects of lease were: “the shooting rights over Kettelshiel Farm and associated fixed equipment...all as detailed in part 1 of the schedule”. Part 1 of the schedule defined the subjects as the “Sporting Rights” as shown in an accompanying map, plus Kettelshiel Farmhouse, No. 1 Kettelshiel Cottage, Kippetlaw lunch hut and Kettelshiel Steading and including adjacent buildings. There was no averment that the term “shooting rights” by itself implied any obligation of management.

[8] The Lease obligations, so far as relevant, included rent of £1 plus VAT per year, plus the obligations in clauses 6 and 8. Clause 6 redefined “fixed equipment” (a term which, oddly, incorporated mainly heritable subjects such as buildings), but added certain enclosures and drainage structures. It provided (which was never performed) that the parties would within 3 months agree a schedule of condition recording the condition of that equipment. It provided that Mr Wilson was liable to maintain the fixed equipment, but crucially to a standard set out in the separate schedule of condition, a document apparently never drafted. Clause 8 imposed obligations of management in relation to 11 items. In brief summary, the obligations on the tenant under clause 8 related to: responsible shooting practice; care of landlord’s property such as livestock, crops or equipment; keeping records of game and vermin taken; regulation of the tenant’s muirburn; reinstatement of damage caused by negligence; the right to use vehicles but not on cultivated farmland unless with the landlord’s consent; use of quarried stone; obligation to keep down vermin; compliance

with all agri-environment and other schemes entered into by the landlord; and ensuring no activity jeopardised any aspect of the Basic Payment Scheme and certain other funding schemes.

[9] Crucially, the Lease did not impose any general obligation on the tenant to manage the heritable subjects. This was consistent with the Memorandum (above), which provided context that the appellant, not the respondents, would “continue to manage Kettelshiel Farm...”. The appellant retained control over the areas which were not the buildings or other “fixed equipment”. The tenant had no right to plant crops, or erect or alter buildings. The appellant also retained considerable specific controls over the land, set out in the reservations clause. These reservations included: the right to carry on all normal agricultural and woodland operations; stipulation that a named individual be permitted to shoot; a sole right to use any of the water in streams or springs; an unrestricted right for the appellant to resume control of any parts of the subjects at any time; exclusion of woodland within the subjects; a right to take entry for repair and other purposes; and the right to entry for inspection. These retained rights represented considerable restraints on the tenant’s right or ability to manage the heritable subjects and, in the case of the apparently unrestricted right to resume control, represent an absence of secure tenure. Properly understood, the Lease terms undermined the appellant’s claim that the tenant had any general obligation of management, or anything close to it.

[10] It is necessary to assess the appellant’s claims by reference to the foregoing. The claim was very shortly stated and appears to be unconstrained by any reference to the Lease.

The entire claim was as follows:

“The costs which the pursuer will incur as a consequence of the defenders' termination of the lease include, but are not limited to: (a) employing staff to manage the estate (£50,000 per year); (b) the cost of vehicles, equipment,

machinery and fuel (£10,300) per year); (c) property costs including repair and maintenance (£23,000 per year); (d) vermin control and grit (£3,200 per year); (e) rates and licences (£3,000 per year); (f) fees of managing agents and other professionals (£17,500 per year); (g) cost of depreciation of equipment, machinery, vehicles (£20,000 per year); and (h) miscellaneous costs (£4,500 per year). The estimated annual cost to the pursuer is, therefore, £131,500. As the lease was due to run until 2030 these costs will be borne for 6 years. Taking into account the cost of inflation (index linking at 5% over the entire period of the lease) the pursuer's total loss as a consequence of the defenders' termination is £1,057,335 which is the sum sued for. *Esto* the foregoing costs had not been incurred by the pursuer there would have been a deleterious effect on the capital value of the land."

[11] This claim was challenged as being both irrelevant in the circumstances and so lacking in specification that it failed to give fair notice.

[12] The foundation and measure of any claim for damages is the legal relationship between the parties. The appellant's claim was based solely on the existence of the Lease. The action did not invoke any construction of terms of the Lease, and did not seek to imply any term. The claim was for damages following termination, a claim preserved but not enhanced by section 16(5) of the 1964 Act. It is accordingly to the Lease alone that any entitlement to damages must refer.

[13] That exercise does not, as explained above, assist the appellant. The claim as presented bore little or no resemblance to the terms of the Lease. The respondents had no obligation to employ staff, to maintain vehicles or equipment and machinery, to pay rates and licences, to employ managing agents and other professionals, to meet depreciation costs of machinery, or for payment of miscellaneous costs (respectively, claims (a), (b), (e), (f), (g) and (h) in the Initial Writ). The remaining claims (c) and (d) had some foreshadowing in the Lease obligations, but only for limited purposes. These last claims approximated to the claims which the sheriff permitted probation.

[14] We consider that the sheriff was correct to deny probation to the majority of the heads claimed. There appears to be little correlation between what the appellant lost on

termination, and the heads of loss subsequently claimed by the appellant. If there was any correlation it was unexplained and not capable of fair inference from the existing pleadings. The appellant's claim appeared to be for the total cost of management of the heritable subjects, including staff, professional fees, maintenance and depreciation of machinery and allied costs. The late Mr Wilson, and therefore the respondents, were not burdened with those responsibilities. The Lease was of shooting rights over heritable property, not of the property itself, save for the four identified buildings (and ancillary buildings) in part 1 of the schedule, and the additional permanent enclosure and drainage structures mentioned in Clause 6. The reservations, set out above, were eloquent of the tenant having relatively limited enjoyment of, or responsibility for maintaining, the heritable subjects. As identified already, the Memorandum stipulated that the appellant, not the tenant, would "continue to manage Kettelshiel Farm..."

[15] Accordingly, where the management of the heritable subjects was retained by the appellant, there is no discernible justification to claim £50,000 a year staff costs, or £17,500 for managing agents and other professionals. There was no mention within the Lease, despite the strange use of the term "fixed equipment", to any moveable equipment or machinery, so there was no logical claim for failure to provide or maintain these (£10,300 a year) or depreciation (£20,000 a year).

[16] In relation to property maintenance, the tenant's obligations did cover, at Clause 6 (iii) of the Lease, the liability to:

"...maintain the fixed equipment provided by the Landlord in as good a state of repair (natural decay and fair wear and tear excepted) as is specified by the highest standard applicable of (a) that specified in the schedule of condition, or (b) the condition of the fixed equipment specified in the schedule of condition after the Landlord has completed any works which he has agreed therein to carry out, or (c) the condition of the fixed equipment renewed or replaced by the Landlord as

a result of natural decay or fair wear and tear, or on any other basis, as at the date of renewal or replacement”.

[17] The botched preparation and execution of the Lease resulted in no schedule of condition being agreed or completed. The effect was that no standard of repair was ever specified. While the appellant argued that the parties must have intended that the “fixed equipment” be maintained in a state of good repair, that intent was never carried into existence. It is enough to notice the extremely brief claim made under head (c), the absence of explanation for why that sum equated to losses under the Lease and, this being a commercial action, the lack of any expert report which was capable of explaining the basis for such claims, particularly where the tenant was not responsible for wear and tear or natural decay. The Lease’s stipulation for maintenance to the “highest standard applicable” was not available to the appellant, the schedule never having been completed. We agree with the respondents’ submission that the Lease, in these respects, was void from uncertainty. The property claim was also so lacking in specification as to make no relevant claim.

[18] Of the remaining heads, (c) related to payment of rates and licences. The Lease imposed no obligation in relation to rates or licences. That left vermin costs (head (d)). There was a clear undertaking that: “The Tenant undertakes to keep down all moles, rats and other vermin on the subjects and spread all molehills”. Accordingly, head (d) vermin control was a relevant and adequately specified head of damages. A further claim for rates does not, in our view, form a stateable head of claim, because rates are payable by the occupier from time to time. The lease was lawfully terminated. The occupier, which now enjoys unrestricted use of the land, is the appellant.

[19] That is sufficient to address the appeal, which must be refused. The appellant placed reliance on certain authorities relating to construction of contracts, and it is appropriate that we address these.

[20] The appellant placed reliance on *Ashtead Plant Hire Co Ltd* (above), in seeking to construe the contract in context. Before reliance can be placed on the need for a contextual and objective approach, there must be some basis on which the context and objective of the contract can be ascertained. Such information was missing in the present claim. The Lease represented a series of stipulations, without context. The Memorandum did not assist in identifying the intended obligations of the tenant. The pleadings did not set out any informative context or objective. In oral submission the appellant's agent confirmed that the description of shooting rights did not import any technical meaning or mutual understanding. Accordingly, while the principles of contractual construction in *Ashtead Plant Hire Co Ltd* (above) are uncontroversial, there was no scope to apply them here. There was nothing within the Lease which would allow the construction urged by the appellant, a problem compounded by parties' failure to complete that part of the contract, the schedule, which would have given a degree of certainty as to the tenant's obligations. The present claim was largely thwarted by the failures in drafting and execution by the contracting parties. It was not enough, as the appellant submitted, to identify a general intention that the tenant would have some repairing obligation. The lease terms show that the parties intended this to be regulated by schedule, not by implication. They created a mechanism for that purpose. Unfortunately, the mechanism was left incomplete, because no schedule was prepared. It is unknown whether that was merely oversight, or reflected a deeper dispute between the parties about what obligations should be imposed on the tenant. This court had no basis to infer that the parties ever reached consensus on these matters, and therefore had

no basis on which to apply any objective test as to the standard, or scope, of repair. The appellant's submissions strayed from construction of known terms into the imposition of new terms upon the tenant.

[21] The appellant relied also on *BDW Trading Ltd v URS Corporation Ltd* [2025] 2 WLR 1095, an authority relating to the voluntary incurring of expense in order to avoid further loss. That, however, did not assist. Before the reasonableness of mitigating loss can be considered, the appellant required to explain why the wrongful act would lead to that loss. That information appears in neither the contract nor the pleadings.

[22] A party is:

“liable only for breach of an obligation, and the question is what the pursuer has lost because of that breach, not what the pursuer has lost because of expectations that the defender will do something which the defender was not obliged to do” (MacBryde: *Law of Contract in Scotland* (3rd Edition) paragraph 22-92).

Under reference to McGregor: *Damages* (22nd Edition) at paragraph 29-085 and 29-090, and *Tito v Waddell (No 2)* [1977] Ch 106, the respondents submitted that any loss was recoverable only if it consisted of doing work which in breach of contract the appellant had failed to do. The essential question was what loss had been wrongfully caused, a question the appellant did not resolve. While this submission was directed at the nature of the losses claimed, it was relevant to the more fundamental point - the appellant did not plead a relevant and sufficiently specific case that their claim was related to the failure of the late tenant to perform his obligations under the contract. That is fatal to the claim.

[23] The appellant's ultimate submission was that it merely wanted the opportunity to prove its loss. A report from an expert on grouse shootings had been commissioned. That would set out how the losses had been incurred, and how they related to the tenant's termination of the lease. This submission was not, however, one which could justify

probation. Fair notice of any claim must be given in the pleadings or, in a commercial action, in an expert report or other source. In any event, sources of evidence, expert or otherwise, cannot repair an absence of explanation as to the basis, legal or factual, on which the claim is presented. The opportunity for probation has to be earned by careful and adequate pleading. The pleadings in the present case were not adequate for the task, no doubt as a result of the underlying defects of the contract documentation.

[24] The importance of specification here was underlined by consideration of the individual claims. The costs were claimed because otherwise: “the land at Kettelshiel estate would have fallen into disrepair. It could not have been used for shooting. The capital value of the land would have been materially diminished.” The management of the land remained, however, the responsibility of the appellant. There was no obligation under the Lease to maintain the capital value of the land. There was no explanation of why the capital value of the land was in any way linked to the value of the subjects (the subjects being the shooting rights plus some buildings, not the land), far less that it was a foreseeable loss. That position was further undermined by the averment that: “there was no prospect of the pursuer being able to re-let the subjects to new tenants following termination.” If no re-letting was possible, on what basis could the expenditure on preserving the land be said to be reasonable or necessary? These fundamentals could not be left to revelation during evidence, but required to be adequately addressed prior to proof.

[25] Matters were not assisted by considering a further inventory of productions lodged at appeal. These vouched capital expenditure including binoculars, rifle scopes, two tractors, the sale of vehicles, a pickup truck and another tractor, at a total cost of £173,876.68. Relating these to the lease obligations, for an estate with no prospect of re-letting, did not reveal any relevant claim.

Disposal

[26] The appeal is refused. The cross-appeal is allowed to the extent of excluding head (e) only. The appellant tendered a minute of amendment prior to the appeal hearing but this was withdrawn. In relation to head (d), which formally remains available to the appellant, we will remit the cause to the sheriff to proceed as accords. Parties should please attempt to agree any question of expenses, failing which within 21 days the clerk will arrange for a further hearing by written submission.