SHERIFF APPEAL COURT

[2025] SAC (Civ) 24
GLW-CA91-19

Sheriff Principal S F Murphy KC
Sheriff Principal N A Ross
Appeal Sheriff B Mohan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL ROSS

in the appeal in the cause

HILLINGTON CASH & CARRY LIMITED

Pursuer and Respondent

against

SHINDO KAUR KOONER

Defender and Appellant

Defender and Appellant: Bowen KC, Anderson; DWJ Law
Pursuer and Respondent: McConnell KC, Ram; East End Law

3 September 2025

[1] In 2014 the respondent operated a cash and carry business, and was looking for new premises. The sole director, Mr Marwaha, identified warehouse premises at Lancefield Street, Glasgow, which appeared suitable to trade from. The premises were owned by the appellant. They had been vacant for 2 years. He viewed the premises in March 2014 and noted their condition was dilapidated, and in particular that the roof required substantial repair.

[2] Mr Marwaha arranged with the appellant that the respondent would instruct a condition survey. The survey report identified the need for substantial roof repair to render the premises wind and watertight. The parties discussed entering into a lease, but only on condition that the appellant carried out works to repair the roof to render the premises wind and watertight. The appellant agreed.

[3] The parties concluded missives of lease on 5 June 2014. The missives included:

> "4.1 The landlords undertake to the Tenants (a) to render the roof of the Property fully wind and water tight and (b) to remove all debris from gutters and internal rainwater pipes to ensure these are running clear; all work shall be carried out to the reasonable satisfaction of the Tenant's surveyor".

[4] The parties subsequently concluded a lease, which included:

> "5.4…(c) while the Tenant under this Lease is the said Hillington Cash & Carry Ltd the Landlord will be responsible for the repair and maintenance of the roof of the Premises but only for a period of five years from and after the Date of Entry..."

[5] The respondent took entry on 14 May 2014. The appellant carried out no remedial works to the roof. The respondent commenced trading, but due to the dilapidated condition of the roof there was considerable and ongoing water ingress. The condition of the premises posed a danger to customers and staff. The respondent required frequently to close the premises to trading. Stock was damaged and rendered unsaleable.

[6] Mr Marwaha repeatedly contacted the appellant to complain. The appellant instructed intermittent and minor patch repairs, which were of limited effect. The minor repairs did not avoid the need to repeatedly cease trading due to water ingress, or to dispose of unsaleable stock. In June 2015 the respondent instructed a surveyor to inspect the roof and report. The report concluded that patch repairs were not a feasible option and that complete roof recovering was necessary. On 10 July 2015 Glasgow City Council Environmental Health Department carried out an unannounced inspection, and

subsequently issued two improvement notices. The notices founded on the dangerous state of the premises, caused by water affecting storage areas, walkways and office space, and coming into close proximity with electrical systems.

[7] The respondent ceased trading on 12 July 2015 and vacated the premises. They had been in occupation for approximately 13 months, but had managed to trade for only about 2 months in total. There was substantial wasted expense, in start-up costs, lost stock and wasted running costs of the premises. The present action was raised and, after proof, the sheriff awarded damages in respect of (i) rent payments; (ii) professional fees; (iii) return of a rent deposit of £21,250; (iv) start-up costs of the business; (v) insurance premium; (vi) running costs of the business and (vii) damaged stock. The appellant disputes both liability and the recoverability of these losses.

Appellant's submissions

[8] Senior counsel for the appellant submitted that liability was not established, because the sheriff had conflated two separate obligations arising from the missives and, separately, from the lease. The missives obligation was to carry out work to the satisfaction of the tenant's surveyor, and no evidence had been led from the surveyor. Breach was therefore not established. Clause 5.20 of the lease required notice of any defect to be given to the landlord. This was further regulated by clause 9.14, which required written notice, sufficiently served if sent by designated means. No such notice of defect had been established in evidence.

[9] The sheriff erred in accepting the losses were relevantly established. The normal measure of damages was the sum necessary to put the wronged party in the position, so far as money can, as if their rights had been observed (*Victoria Laundry (Windsor) Ltd* v *Newman*

Industries Ltd [1949] 2 KB 528). The object was not to indemnify the respondent, or transfer the whole risk to the appellant. There was no evidence of trade, far less successful trade. The respondent sought recovery of sums it would have spent in any event. Further, it was not a term of the contract that the respondent would be able to trade from the premises. On analysis, each of the heads of loss was irrelevant, and served only to wrongfully indemnify the respondent. The court should require evidence of losses due to inability to trade.

Respondent's submissions

[10] Senior counsel for the respondent noted that the sheriff's findings in fact were not under appeal. Any claimed distinction between the obligations in the missives and in the lease had not been analysed or founded upon at proof, because the appellant's pleadings accepted there was an obligation to repair the roof. The appellant's submissions mis-analysed the notice provisions and no notice was required. The condition dealing with the surveyor's satisfaction related to remedial works, not the breach. In any event, lack of notice had not been raised in the proof. Had it been, the evidence and findings showed written correspondence between the parties about the state of the roof.

[11] The heads of claim were relevant. While the appellant correctly identified the normal measure of damages for breach of contract, there was an accepted alternative ground, namely wasted costs (Chitty; *Contracts* (35th Edition, 2023) Vol 1, paragraph 30-025; MacGregor; *Damages* (22nd Edition) paragraphs 5-025 to 5-028). The respondent's wasted expenditure flowed directly from the appellant's breach.

Decision

[12] The parameters of a proof are formed by the parties' pleadings. In the present case, the respondent averred the terms of clause 4.1 of the missives, and clause 5.4 of the lease (above). These averments were met by:

> "Admitted that the contract was formed when the missives were concluded. Admitted it was a term of the contract that the Defender put the roof into a wind and water tight condition and thereafter maintain and repair it for a period of 5 years."

[13] The appellant's submissions on appeal sought to draw a distinction between the obligations in the missives and those in the lease, to claim a difference in what would amount to breach of each, and to fault the sheriff for not sufficiently analysing the distinction. This point was not taken in submission following proof. The question is whether the point can be belatedly made on appeal.

[14] In our view, the answer is clearly in the negative. The appellant's answers accepted that the obligation arose on conclusion of missives, together with the content of the obligation. The sheriff was justified, and indeed had little option, in finding that the obligation was thus admitted and required no further analysis.

[15] The appellant's further submission, identifying the "reasonable satisfaction of the tenant's surveyor" as a necessary trigger for liability, is in any event not a sound one. The clause is set out above. It is clear from its terms that the discretion of the surveyor related to the nature of the repairs. It did not detract from the underlying obligation to "render the roof of the property fully wind and water tight", but served only as a limitation on what the tenant could reasonably demand by way of performance. The obligation did not require notice, or evidence of satisfaction, but was already established under clause 4.1. The terms of clause 5.4(c) of the lease were not founded upon by either party at proof. In light of this, and the appellant's admission on record, the sheriff was justified in regarding the obligation

to repair as established, and not in dispute. After hearing evidence as to the breach, he found liability established.

The basis for the awards of damages

[16] We accept the respondent's submission that wasted expense was a relevant basis on which to claim damages. The appellant's submission did not attempt to engage with that position, but only urged that the normal rule of damages fell to be applied (*Victoria Laundry (Windsor) Ltd*, above). The respondent relied on authority of English origin, but the principles are recognised by Scots law. Chitty (above) states:

> "30-025 In an action for damages for breach of contract, the claimant is permitted to claim damages for expenditure which he incurred in reliance on his expectation that the defendant would perform his undertaking, if the breach results in that expenditure being wasted, at least in part."

[17] MacGregor (above) acknowledges the normal rule for recovery, as urged by the appellant, but also that the law has developed to allow claims of wasted expenditure. These can only be alternative, not additional, to a claim for loss of bargain (at paragraph 5-025 and following). Both sources found on *Anglia Television* v *Reed* [1972] 1 QB 60 as an early recognition of this principle, as does McBryde: *The Law of Contract in Scotland* (3rd Edition, 2007, paragraphs 22-96, 97). The latter acknowledges this head of damages, and specifically that expenses incurred prior to the breach can be recovered. McBryde sets out general principles: that it is the pursuer's particular circumstances which are relevant; and that assessment of loss is largely a "jury question" for the finder in fact to determine, with various measures of loss being used as a cross-check on each other. The court is not bound by rigid rules, but any award must be based on evidence (at paragraph 22.93).

[18] Neither party embarked on a detailed consideration of these authorities. The appellant submitted that only the normal rule of damages was applicable. It is difficult, however, to see how the respondent could advance any reliable claim for loss of benefit. The breach of obligation caused trading to falter, to the extent that it was possible for only 2 months out of 13 months of occupancy. No general trading position is easily identified. The prospects for the business at the new locus are unknown. Start-up expenses are generally incurred before profit can be realised. The appellant did not identify any mitigating or limiting factor to show that the sums claimed, for wasted expense, would result in over-recovery. The respondent was left in much the same position as a non-profit organisation, which might suffer losses for which a loss of benefit claim would be all but impossible.

[19] On general principles the recoverability of wasted expenditure is limited by considerations of remoteness, ceilings on recovery, double counting, bad bargains and other grounds, which are discussed in the works cited. In the present case such considerations do not arise. The causal connection between breach and loss was stark. The respondent's claim was for quantified, vouched losses, directly related to the breach of a fundamental obligation. Mr Marwaha, on behalf of the respondent, was only prepared to enter into a lease if the appellant agreed to make the roof wind and watertight. Breach of the obligation to repair the roof rendered the contract pointless and unworkable, and the respondent's costs entirely wasted. We therefore accept that the claim for wasted expense was available to the respondent.

[20] On that basis, we move to consider the nature and recoverability of the contested heads of loss:

The heads of loss (i) repayment of rent

[21] The respondent vouched payment of rent for 13 months amounting to £85,000. The sheriff made a deduction of 16% to reflect that approximately 2 months of trading from the premises was not wasted, and awarded £71,400. The appellant submitted that rent was the counterpart of vacant possession, which they had given, and therefore no recovery was justified. The respondent referred to McBryde at paragraph 22-93, discussed above, that there was no rule of thumb for damages, that the court had all the necessary facts to calculate loss, and that the loss was relevant.

[22] In our view the breach of contract went to the heart of the bargain, in that use of the premises in any ordinary business sense was rendered impossible by the breach of contract. This was a relatively extreme case, where water ingress was sufficiently copious not only to prevent trading but actively to create danger to the occupants. The payment for that occupancy, the rent, was wasted expenditure, save for the relatively short periods when trading was possible.

[23] As to the sum awarded, the sheriff did apply a discount which represented the time when the premises were useable (approximately 2 months) as a proportion of the total period of occupation (approximately 13 months). He applied a discount of 16%. Neither side sought this. The respondent maintained that a full award should have been made, but accepted that both applying a discount, and the figure chosen, were within the discretion of the sheriff. For that reason the respondent had not cross-appealed. We agree with that approach. The sheriff applied a reasoned, evidence-based approach in attempting to do justice between the parties. Quantification of damages is not a precise science and is highly fact-dependent, and the sheriff explained the reasoning behind the award. The calculation

of both the loss and the discount was reasoned, principled and supported by the evidence. There is no basis to interfere with the award.

(ii) outlays

[24] The sheriff was prepared, on the evidence, to make three awards under this head. The assessment of evidence was not criticised, but the appellant submitted that the heads of loss were unrecoverable.

[25] The first award was for payment of a fee note for £1,440 to DM Hall, surveyors, for an inspection of the roof and reporting on the condition, carried out in around June 2015, some 13 months after the lease commenced. This was awarded as expense directly incurred due in assessing the existence and extent of the failure to repair the roof.

[26] This award raised a number of inter-connected issues, discussed on appeal. Some confusion was caused by the respondent's motion to the sheriff, and award, that the surveyor be certified as a skilled witness. The first question was whether there was double-counting, with the same work being claimed both as a head of loss and also as a judicial expense. Senior counsel for the respondent expressly disclaimed any intention to claim the surveyor's fee in the account of expenses, and accepted that seeking certification as a skilled witness had been misconceived. The claim for this fee is presented as a head of loss only.

[27] The second question was whether this fee formed expenses of litigation, as the appellant submitted, and could not form a relevant head of loss. Senior counsel submitted that the surveyor's report could only be regarded as prepared in contemplation of litigation, as demonstrated by the fact it was presented in evidence at proof. For the respondent it was submitted that the report was prepared, and paid for, with a view to the contract continuing,

not to litigation. The inspection pre-dated the respondent's rescission. The matter was not fully ventilated before the sheriff. In our view, it was for the respondent to elect whether to claim this fee as a head of loss, and thereafter for the sheriff to adjudicate on the relevancy of the claim. We do not see any error in the sheriff's analysis. The invoiced work pre-dated the rescission, and pre-dated the commencement of litigation by some 4 years. The fee can be viewed as a wasted expense, incurred as a result of the breach. The contention that it might alternatively have been analysed as a litigation expense did not prevent such an award. The sheriff required to assess the claim as presented.

[28] An incidental question was whether the surveyor was an aligned expert, assisting the respondent in proving the claim, or an independent expert, assisting the court on matters of professional practice and subject to the more stringent duties of an expert witness. The matter was not pressed. The question is of academic interest only, because it does not affect the claim as presented.

[29] The second claim under this head was for a sum equivalent to the stamp duty paid on the transaction. The sheriff allowed this as it was incurred only after the repair obligation was accepted by the appellant. It is a wasted expense, which would not have been wasted but for the breach, and there is no error in this award.

[30] The third claim here was payment of a fee note to Stewart Beaton Associates of £1,200, for onsite inspection and preparing a photographic schedule of condition. The fee note was dated 14 May 2014. It therefore related to preliminary inspection prior to contract, not assessment of damages following breach of contract. In our view, while this may have been a wasted expense, it cannot be categorised as wasted as a result of the breach of obligation. It would have been incurred, and wasted, if the transaction had never

subsequently proceeded. There is no causal connection with the breach. Allowing this expense was therefore in error. We allow the appeal under this head to the extent of £1,200.

(iii) repayment of deposit

[31] The parties entered into a Deposit Agreement dated 28 August and 28 November, both 2014. The respondent paid a deposit of £21,250 to be held by the appellant during the term of the lease. There was provision for administration, withdrawal and repayment. Notwithstanding this, repayment of the principal sum was presented as a head of claim for breach of the lease, not a separate claim under the Deposit Agreement.

[32] For the appellant, it was submitted that the latter would be the appropriate basis of claim, and it was not available in this action. The claim would cause considerable conceptual problems, for example with the question of what happened to the accrued interest on the account. The only remedy was a separate claim to enforce the Deposit Agreement.

[33] In our view, while the appellant is justified in pointing to legal complexities and the availability of a principled alternative remedy, that did not prevent this being a relevant head of claim. It is another wasted expense incurred as a result of the breach. The heads of claim are presented as a unitary obligation to make reparation. Had a separate action been raised, it may have been opposed as premature in light of the current litigation. While the more predictable remedy may have been a separate action for enforcement, again the sheriff required to assess the claim as presented, as a claim of damages for breach. The appellant did not make any relevant challenge on record. We do not find any error in fact or law in the conclusion reached by the sheriff.

(iv) start-up costs

[34] The sheriff awarded a sum for start-up costs, which are not further itemised and the quantification of which is not challenged. The appellant submitted that it was inappropriate to award compensation for what were, in effect, trading costs. These were properly to be viewed as a counterpart to a claim for loss of profits. The respondent submitted that these were just more examples of wasted costs due to the breach.

[35] We agree with the sheriff's approach. Again, while the appellant may be correct in identifying that these might have been treated as deduction to a claim for loss of profits, the respondent elected not to present a profits-based claim. The sheriff required to assess the claim as presented. We find no error in his approach, particularly as he applied the same 16% discount to reflect the relatively limited period of achievable trading.

(v) insurance premium

[36] The respondent required to indemnify the appellant, who retained responsibility for insuring the premises. The same submissions and observations apply as for start-up costs. There was no error.

(vi) running costs

[37] The same submissions and observations apply as for start-up costs. There was no error.

(vii) damaged stock

[38] Although this was a ground of appeal, senior counsel accepted that this was a relevant head of claim, so far as directly related to the breach of contract.

Disposal

[39] From the foregoing, we are able to agree with the appellant's submissions only in respect of the relatively insignificant sum of £1,200 awarded for the preliminary inspection. It was apparent that the appellant's position was that the whole claim should have been a claim for loss of profits. The basis of claim was an election for the respondent to make, then attempt to prove. They duly succeeded. The fact they might have chosen a different, or more traditional, basis of claim and quantification does not invalidate that result, and does not permit this court to take a different approach. We do not accept the appellant's submission that this amounted to indemnity to the respondent.

[40] We will allow the claim only to the very limited extent of disallowing the sum of £1,200. We will therefore recall the award of £147,701.73 and substitute the figure of £146,501.73. For the avoidance of doubt, we do not regard this award as material in the context of the omnibus challenge to the sheriff's award. We were not addressed on expenses. Parties should attempt to agree this disposal, failing which within 21 days the clerk will arrange for further submissions.