OUTER HOUSE, COURT OF SESSION

[2017] CSOH 157

CA6/17

OPINION OF LORD CLARK

In the cause

WILLIAM JOHN BURNSIDE

Pursuer

against

PROMONTORIA (CHESTNUT) LIMITED

Defender

Pursuer: M S H Lindsay QC, Massaro; DAC Beachcroft Scotland LLP (for Dallas McMillan, Glasgow)
Defender: Duthie; Addleshaw Goddard

28 December 2017

Introduction

[1] The pursuer is a property investor and developer. He is the owner of 26 properties located in the Borders area of Scotland. Clydesdale Bank Plc ("Clydesdale") provided the pursuer with loan funding to enable him to purchase and develop those properties. The properties were rented out to tenants. In 2012, the pursuer became obliged to repay the loans. In August 2012, the amount due by the pursuer to Clydesdale in respect of the loans was £2,688,325.

[2] The pursuer and Clydesdale entered into an agreement, dated 24 and 31 August 2012 ("the Agreement"). Put broadly, in terms of the Agreement, Clydesdale was to arrange for

the properties to be sold, with agents being jointly instructed, and the pursuer was to fully co-operate in that regard. Clydesdale was then to retain the proceeds of sale in permanent reduction of the debt owed by the pursuer. After the sale, the debt was to be held as extinguished. Until the properties were sold, the pursuer was obliged to manage them and to remit the rental income to Clydesdale, subject to deduction of maintenance costs.

[3] In terms of an assignation in June 2015, Clydesdale assigned its rights in respect of the Agreement to the defender. Clydesdale also assigned to the defender the benefit of the standard securities held over the majority, if not all, of the properties.

[4] The properties have not been sold. By letter dated 10 March 2016, the defender purported to terminate the Agreement, on the basis that the pursuer had failed to account for the rent which he had received for the properties.

[5] In its Summons in this action, the pursuer seeks declarators to the effect that the Agreement has not been validly terminated by the defender and remains in force, that the debt referred to in the Agreement includes all sums (including interest) due to Clydesdale and to the defender, and that after the sale of the properties that debt will be extinguished. The pursuer also seeks specific implement of the defender's obligation in respect of arranging the sale of the properties.

[6] The pursuer founds upon the existence of an implied term in the Agreement, expressed in the pleadings as follows: "that the Properties would be marketed and then sold within a reasonable time". The pursuer contends that the failures by Clydesdale, and, following the assignation, by the defender, to comply with this implied term constitute a material breach of contract, entitling the pursuer to withhold performance of his obligations under the Agreement. The pursuer further contends that the purported termination of the Agreement by the defender had no effect, as it proceeded upon the basis of non-

performance by the pursuer of obligations in respect of which he was entitled to withhold performance, because of the defender's breach of the implied term.

[7] The defender's position in its Defences is that no such term falls to be implied into the Agreement and that the Agreement was validly terminated as a result of the pursuer being in material breach of contract by failing to account for the rental income received.

[8] In a Counterclaim, the defender seeks recovery of the outstanding debt, on the basis that the defender has validly terminated the Agreement. In its Answers to the Counterclaim, the pursuer denies that the Agreement has been validly terminated and avers that it remains in full force and effect. *Esto* it had been validly terminated, the pursuer's position is that the sums sued for in the Counterclaim are excessive and that the defender is personally barred from claiming interest.

[9] The case called before me for debate in respect of the principal action. The defender sought dismissal of the principal action, which failing the exclusion of certain averments from probation, by the sustaining of the first and/or second pleas in law for the defender. The central issue at debate was whether the Agreement contained the implied term founded upon by the pursuer.

The Relevant Terms of the Agreement

[10] In the Agreement, the pursuer is referred to as "the Debtor" and Clydesdale as "the Bank". The terms of the Agreement which are of relevance for present purposes are as follows:

> "2. UNDERTAKINGS OF THE DEBTOR
>
> …

2.1.3 to maintain and repair each of the Properties so that the same are at all times kept in good condition; …

2.1.5 that all rental income received in respect of the Properties will continue to be paid directly to the Bank in reduction of his debt to the Bank until transfer of title of all Properties has passed from the Debtor;

2.1.6 to observe and perform all covenants, requirements and obligations from time to time imposed on, applicable to or otherwise, affecting the Properties and/or the use, ownership, occupation, possession, operation, repair, maintenance or other enjoyment or exploitation of the Properties whether imposed by statute, law or regulation, contract, grant or otherwise, carry out all registrations or renewals and generally do all other acts and things (including the taking of legal proceedings) necessary or desirable to maintain, defend or preserve his right, title and interest to and in the Properties without infringement by any third party;…

2.2 At the sole discretion of the Bank, the Bank shall permit the release of the Rental Maintenance Costs to the Debtor from the rental income sums received in accordance with Clause 2.1.5 of this Agreement. Such release is conditional upon the Debtor providing the Bank with a schedule evidencing the Rental Maintenance Costs required and invoices as evidence of the level of the Rental Maintenance Costs required to be paid. The Bank shall, within 5 business days of receipt of such schedule and invoices, advise the Debtor whether the Bank will permit the release of the Rental Maintenance Costs. The Debtor will require written consent from the Bank before incurring any costs, other than the Rental Maintenance Costs, such consent not to be unreasonably withheld or delayed.

2.3 The Debtor acknowledges that agents jointly instructed in the interests of both parties will market the sale of the Properties as a portfolio sale and/or individually and/or in parts as agreed by the parties both acting reasonably. The agents will then recommend to the parties the preferred disposal strategy for the Properties. The parties will irrevocably consent to proceed with the disposal strategy based on the agent's recommendations…

3 UNDERTAKINGS OF THE BANK

The Bank, and the Bank's agents, shall arrange and facilitate the sale of the Properties. The Proceeds received from the sale of the Properties shall belong to the Bank in permanent reduction of the Debt. Once all the Properties have sold and the Proceeds received by the Bank, the Bank acknowledges that the Debt shall be held as extinguished…

5. REMEDIES FOR BREACH

In the event that the Debtor does not, to the complete satisfaction of the Bank, comply with its undertakings in Clause 2.1, the Bank shall be entitled to pursue the Debtor in respect of the whole amount of the balance of the Debt due to the Bank together with all accrued interest, charges and any other amounts due by the Debtor

> and take all and any action to enforce to the fullest extent permitted by law, its rights against the Debtor in respect of such balance…
>
> 8 ENTIRE AGREEMENT
>
> This Agreement forms the entire agreement between the parties relating to the subject matter of this Agreement. It is agreed that any future variation hereof may only take the form of a formal variation of this Agreement, referring in terms to this Agreement. In particular it is agreed that this Agreement supersedes all earlier meetings, discussions, correspondence, facsimile transmissions, letters and communications, understandings and arrangements of any kind in relation to its subject matter and that there are no collateral or supplemental agreements in relation to its subject matter at the time of conclusion of this Agreement.
>
> 9 SPIRIT, AIMS AND INTENT
>
> The parties to this Agreement undertake to do all acts and things and deliver all documents necessary to expedite or desirable to give effect to the provisions of this Agreement and the spirit, meaning and intent of the arrangements contemplated herein."

Submissions for the Defender

[11] In summary, the submissions on behalf of the defender were as follows. The pursuer's case was founded upon the pursuer being able to retain rental payments received by him in respect of the properties, notwithstanding clause 2.1.5 of the Agreement, which required him to remit such payments to the defender.

[12] The suggested implied term which the pursuer relied upon did not fall to be implied. Reference was made to the case of *Exxonmobil Sales and Supply Corporation* v *Texaco Limited* [2003] EWHC 1964 (Comm), in which it was held that the entire agreement clause was sufficient to exclude implied terms based upon usage or custom. The entire agreement clause in clause 8 of the Agreement in the present case excluded the possibility of implying the term founded upon by the pursuer.

[13] The implication of this term would very significantly change the nature of the Agreement. Such a term should not be considered to be intrinsic to the Agreement.

[14] The basis for the implied term was not stated on averment but it was understood that it was said to be implied as a matter of law. It was accepted that the court will often imply a reasonable period for the performance of an obligation, in quite a variety of contracts. However, in the present case the entire agreement clause in clause 8 of the Agreement excluded the implied term argument given that the implication of the term would change the nature of the agreement. In that regard, reliance was placed on *Marks and Spencer Plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, and its reference to the five-point test expressed in *BP Refinery (Westernport) Pty Ltd* v *Shire of Hastings* (1977) 180 CLR 266. It was argued that none of the five criteria identified in the latter case was met in the present case.

[15] The Agreement was about reallocation of risk in the context of a compromise. The pursuer had no substantial interest in the timescales for performance. The risk of any shortfall under the Agreement fell upon the Bank and the defender, while the risk of the Bank or the defender getting more from the sales than was due by the pursuer lay with the pursuer. In either event the debt would be discharged.

[16] In relation to the pursuer's argument that he remains subject to an onerous obligation to maintain the property, any prejudice in that respect was met by the application of clause 2.2 which permits maintenance costs to be deducted from the rent. The only obligations on the pursuer were those in clause 2. There were no onerous obligations.

[17] Any delay by the defender in not disposing of the properties was not of any real consequence to the pursuer. In cases in which a reasonable time for the performance of an obligation was implied, it was for the benefit of the party who was seeking to imply the term. That was not the position here. The sale of the properties would not give a benefit to

the pursuer. The purpose of the Agreement was to allow the defender to dispose of the properties and recover so far as possible to the extent of the pursuer's debt.

[18] Even if the court was prepared to imply the term, the pursuer's averments remained irrelevant for two reasons. Firstly, there were no averments of what a reasonable time would have been. The pursuer could not lead evidence about an unspecified breach, still less that this was material. The proposed implied term was therefore too nebulous. Secondly, on the pursuer's own averments the period during which he was entitled to withhold the rent ended in July 2016 (see Article 12 of Condescendence). That was so because it was clear from the letter produced by the defender, dated 14 July 2016, that the defender was taking steps to market the property. It was also plain on the pursuer's own averments that on 14 July 2016 marketing steps were under way. The continued retention of rental sums for two months by the pursuer occurred despite the pursuer being aware that the property would now be marketed. It was acknowledged that the appointment of the property agent at that time was not a joint one, but this made no real difference. Accordingly there was a material breach by the pursuer and no breach by the defender.

[19] The pursuer in its Note of Argument refers to interest potentially accruing and being due by him, and this therefore being one of the reasons why the term should be implied. The defender does, in the Counterclaim, seek interest but on the basis that the Agreement was validly terminated, not on the basis that the Agreement is continuing. Interest is therefore not relevant to the question of implication of the proposed implied term. In its Note of Argument the pursuer refers to the fact that no ultimatum was given to the pursuer. However, the letter of 14 July 2016 was a sufficient ultimatum. The pursuer was demonstrably in material breach of contract.

[20] The pursuer's averments were therefore irrelevant and the action should be dismissed.

Submissions for the Pursuer

[21] In summary, the submissions on behalf of the pursuer were as follows. The court should refuse the defender's motion for dismissal and allow a proof before answer on all averments, repelling the defender's first plea in law.

[22] In relation to the implied term, the pursuer's averments were relevant. Terms of that nature were consistently implied by the courts at common law into all contracts where there was no express timescale for the performance of an obligation. The basis for the implied term was the common law. What is a reasonable time was to be judged retrospectively. The question of the period of a reasonable time depended on the particular facts and circumstances and the relationship between the parties. The obligation in the implied term was a counterpart to the pursuer's obligation to remit rent to the defender and the principle of mutuality therefore applied. The innocent party could refrain from performing his obligations until the party in breach recommenced performance of his obligation. This allowed the pursuer to retain the rent. The defender's breach of the implied term was of sufficient materiality for that purpose.

[23] There was no obligation to account for rent which had been lawfully withheld if there was a period of time during which the defender was not performing its obligation. If a person could be in breach and eventually get round to performing his obligation, there would be no incentive to perform within a set timescale if re-engaging with the contractual obligations resulted in the other party having then to perform all of his obligations, including payment during the period when the defender was not performing. If the

defender had remedied its breach, going forward the rent would require to have been remitted, but there was no obligation to pay the arrears up to that date.

[24] However, senior counsel also submitted, in clarification of the pursuer's position, that at no point had the sums received in rent been sufficient to pay for the pursuer's costs in maintaining the properties in terms of the Agreement. There was therefore no sum which fell to be remitted to the defender.

[25] There was nothing in the Agreement which would exclude the implication of the term relied upon by the pursuer. The Agreement contained no express term that was contradicted by the proposed implied term. There was similarly nothing which would exclude the implied term by inference from any express terms. Reference was made to the speeches of Lord Watson and Lord Ashbourne in *Hick* v *Raymond & Reid* [1893] AC 22. The implication of such a term was of general application.

[26] The point that was made on behalf of the defender about the possibility of a collapse of the market, so that the defender had to have the time to select when to market the properties, was of no relevance, because the reasonableness of the time depends upon the whole circumstances, including any such circumstance. If marketing had been delayed because of matters beyond the defender's control, such as a poor market, there would be no breach of the obligation. A reasonable time period was a flexible concept and the court can take into account all relevant circumstances.

[27] The Agreement did not have any express timescale. The five points referred to in *BP Refinery (Westernport) Pty Ltd* v *Shire of Hastings* simply didn't apply. The context in that case was the implication of a term based upon business efficacy. In the present case the basis was implication at common law. That distinction was explained by Lord Neuberger in *Marks and Spencer Plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* (at para 15).

[28] The implied term argued for in the present case was not expressly excluded nor was it excluded by necessary implication. Every obligation must be performed within a reasonable time unless that was expressly or impliedly excluded. This was an agreement for the sale of properties, that sale being fundamental. The marketing of properties for sale was not a perpetual obligation - it was a fundamental purpose of entering into the Agreement.

[29] The pursuer did have an interest in the properties being marketed and sold within a reasonable period of time. Clause 5 was the proverbial sword of Damocles hanging over the pursuer. If he defaulted on his obligation under clause 2.1, accrued interest would be payable. An inadvertent breach by the pursuer could give rise to say, £1,000,000 of additional interest due by him. That was one reason why performance within a reasonable time was important to him. Further, he was effectively acting as the unpaid managing agent of the properties. This management of some 26 properties was a time-consuming and onerous task for the pursuer to undertake. This was another reason why it was very much in the pursuer's interests for the properties to be marketed and sold within a reasonable period.

[30] There was nothing in the structure or underlying purpose of the Agreement that would exclude the common law implied term to market the properties within a reasonable time. On the contrary the pursuer had a strong interest in not being exposed to the consequences of default in the form of additional interest and in not having to continue to manage and maintain the properties.

[31] Some of the express terms in the Agreement were in fact consistent with marketing within a reasonable time. For example, clause 9 speaks of things that are necessary to expedite the performance of the obligations. In *Whuan Ocean Economic & Technical Cooperation Company Ltd and others* v *Schiffahrts-Gesellschaft "Hansa Murcia" mbH and Co KG*

[2012] EWHC 3104, it was said (at para 24) that the obligation in question in that case had a temporal content, with the result that any time limit had to be implied. The court added that where parties impose a unilateral obligation, without specifying the limit in which it is to be done, there must be some implication of the time when it is to be done, because the parties cannot have intended the obligation to be of perpetual or indefinite duration. The unilateral obligation in that case was to extend the validity of a guarantee. Similarly in the present case the parties cannot have intended the obligation to be perpetual or indefinite. There must be some restriction implied by the common law: it was performance within a reasonable period of time.

[32] Turning to the question of whether the defender was in material breach of the implied term such as to justify retention, the obligations were plainly the counterparts of one another and the breach was of sufficient materiality. Reference was made to *Hoult* v *Turpie* 2004 SLT 308 (at paras 9 and 10), the presumption being that one obligation is the counterpart of the other and that there should be no artificial attempt to break up the unity of the contract. The obligation on the part of the pursuer to remit the rent was a counterpart of the defender's obligation to market and sell the property within a reasonable period of time, under the implied term.

[33] In relation to materiality, reference was made to *Inveresk Plc* v *Tullis Russell Papermakers Ltd* [2010] UKSC 19; 2010 SC 106 (per Lord Hope at para 43) and to the authorities quoted in McBryde, *The Law of Contract in Scotland*, 3rd ed, at 20.60. The concept of marketing properties encompassed the obligation to make the joint instruction for selling. The proposed implied term was wide enough to cover the commencement of marketing by making a joint instruction. The proposed implied term effectively mirrored the obligation on the defender in clause 3. That obligation was wider than simply sale; it was to arrange

and facilitate the sale. This tied in with the joint instructions for marketing, as referred to in clause 2.3, which set out what was to be done to arrange and facilitate the sale. In the present case the defender had done nothing. Jointly instructing the agent should have occurred very shortly after the contract was entered into. There was no reason why the process of joint instruction could not have been started at some earlier point. There was no need in the context of retention to meet the high threshold of materiality which the law required for the purposes of rescission.

[34] The question of whether a reasonable time had been exceeded required a broad consideration, with the benefit of hindsight (*Peregrine Systems Ltd* v *Steria Ltd* [2005] EWCA Civ 239, per Maurice Kay LJ at para 15).

[35] As to the alleged breaches, the pursuer adhered to the position referred to in Article 6 of Condescendence, that at no time was any balance of rent due to the defender, the repair and maintenance costs having consumed the sums received in rent. There was therefore no breach of any kind by the pursuer. Articles 12 and 13 of Condescendence explained why the engagement of the company Cairn as agents did not remedy the defender's breach. In any event Cairn had done nothing. These were matters which required to go to proof. Taking the pursuer's averments *pro veritate*, they did not show the defender no longer to be in breach.

[36] Turning next to the entire agreement clause, the authority relied upon by the defender (*Exxonmobil Sales and Supply Corporation* v *Texaco Limited*) did not support the proposition made that the entire agreement clause (in clause 8 of the Agreement) excluded the implied term. The implied term was an intrinsic part of the Agreement. Clause 8 referred to collateral or supplementary agreements, which were things extrinsic to the Agreement. In order to exclude the proposed implied term, the wording of any entire

agreement clause must make clear that the term cannot be implied on the basis sought, in this case the common law. In *Exxonmobil Sales and Supply Corporation* v *Texaco Limited* the express terms of the entire agreement clause prevented anything being implied of the kind argued for, which was to do with usage. Here, the entire agreement clause had nothing in it to prevent the term being implied by operation of the law. The authorities made clear that an implied term of this kind was an intrinsic part of the Agreement and express provision within the entire agreement clause is needed in order to exclude the implied term. In that regard, reference was made to *AXA Sun Life Services Plc* v *Campbell Martin Ltd and others* [2012] Bus L R 203 (per Stanley Brunton LJ at paras 13, 34, 35 and 36), to support the proposition that the question of whether an entire agreement clause excluded the implied term depended upon the precise wording of the clause. Reference was also made to *Barden* v *Commodities Research Unit International (Holdings) Ltd and others* [2013] EWHC 1633 (Ch) (per Vos J at paras 16 and 47) and to Lewison, *The Interpretation of Contracts,* 6th ed, at 3.16, which, it was said, summed up the position.

[37] In the present case the reference in clause 8 to collateral or supplemental agreements did not cover the implied term, which was not collateral or supplemental. It was intrinsic; it was part of the agreement. Clause 8 of the Agreement was no answer to the pursuer's case.

Reply for the Defender

[38] In reply, counsel for the defender explained that he had taken the pursuer's pleadings to mean that the pursuer was indeed withholding payment of rent, from 2014. In any event, there were no averments that the pursuer had satisfied the terms of clause 2.2 in the Agreement which provided that the release of sums was at the sole discretion of the defender, after the pursuer had undertaken the procedure laid down. Retention was not

available as of right. It was clear from Article 6 of Condescendence that the schedules required in terms of clause 2.2 were no longer provided by the pursuer after 2014. The pursuer was therefore in breach of contract.

[39] The cases of *AXA Sun Life Services Plc* v *Campbell Martin Ltd and others* and *Barden* v *Commodities Research Unit International (Holdings) Ltd and others* did not assist the pursuer. *AXA* was about collateral warranties and misrepresentations whereas the present case was about the implication of a timescale which fundamentally changed the nature of the agreement. *Barden* concerned the construction of a clause in a way that avoided absurdity, not the implication of a clause which would change the nature of the agreement.

The Issues

[40] The central issue raised in submissions is whether or not the implied term contended for by the pursuer forms part of the Agreement. As can be seen from the summary I have given of the submissions, the parties also raised related points. The defender argued that there was no specification of the duration of a reasonable time and also that the implied term changed the nature of the Agreement. Further, the defender argued that it had in fact, in July 2016, taken steps to market the property, with the result that, even if there had been breaches of the implied term prior to that date, they ceased at that point. The defender also contended that even if the pursuer was correct that there were no sums to be remitted to the defender because of the costs of maintenance, the pursuer was still in breach of clause 2.2 of the Agreement. The pursuer argued that the defender's breach of the implied term was of sufficient materiality to justify retention and that the obligations were counterparts of one another, so that any withholding of performance by the pursuer (had that occurred) was justified. The pursuer further contended that the purported termination of the Agreement

based on the alleged breach by the pursuer was invalid, in light of the pursuer's right to withhold performance.

[41] In my opinion, only the issues relating to the proposed implied term can be determined at this stage. The other points raised (alleged breaches of contract by either party and the effects of any such breach) cannot be determined on the pleadings alone. In relation to its purported termination of the Agreement, the defender avers (in Answer 11) that the specific breach of contract by the pursuer founded upon was the failure by the pursuer to pay all rental income received by him, as required by clause 2.1.5 of the Agreement. On the pursuer's averments, there is a factual issue as to whether there were any sums received in rent to be remitted to the defender, in light of the maintenance costs. There are no specific averments by the defender about an alleged breach of clause 2.2. It is therefore not surprising that the pursuer makes no averments of compliance with this obligation. In any event, the question of whether the pursuer met the terms of clause 2.2 and, if not, the effect of any such breach (in particular, whether it would justify rescission by the defender) must in my view be a matter for proof. Similarly, on the question of whether, if the term contended for by the pursuer indeed fell to be implied, a breach of it by the defender was of sufficient materiality to justify withholding of the pursuer's obligations, it will be necessary to hear evidence about the nature and circumstances of that breach in order to assess its materiality or otherwise. The question of whether the events in July 2016 (the instruction of Cairn estate agents and what, if anything, followed) amounted to performance of obligations under the implied term and the Agreement is also a matter for proof.

Decision and Reasons

Subject to the effect of the entire agreement clause (clause 8), does the implied term contended for otherwise fall to be implied?

[42] In *Hick* v *Raymond & Reid* the decision of the court was that where a bill of lading is silent as to the time within which the consignee is to discharge the ship's cargo, his obligation is to discharge it within a reasonable time. In his speech, Lord Watson stated (at page 32):

> "Where the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and it is not confined to contracts for the carriage of goods by sea."

This succinct statement explains the circumstances in which such a term falls to be implied, and also makes clear that it is implied as a matter of law, the rule being of general application. Lord Watson's *dictum* has not, so far as I am aware, been the subject of criticism or been departed from in later decisions.

[43] As was pointed out by Lord Neuberger in *Marks and Spencer Plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* (at para 15):

> "… there are two types of contractual implied term. The first, with which this case is concerned, is a term which is implied into a particular contract, in light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made. The second type of implied term arises because, unless such a term is expressly excluded, the law (sometimes by statute, sometimes through the common law) effectively imposes certain terms into certain classes of relationship."

Similarly, in *Geys* v *Société Générale London Branch* [2012] UKSC 63; [2013] 1 All ER 1061 at para [55], Lady Hale stated:

> "In this connection, it is important to distinguish between two different kinds of implied terms. First, there are those terms which are implied into a particular contract because, on its proper construction, the parties must have intended to include them: see *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 2 All ER 1127, [2009] 1 WLR 1988. Such terms are only implied where it is necessary

> to give business efficacy to the particular contract in question. Second, there are those terms which are implied into a class of contractual relationship, such as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, but the courts have implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded it: see *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, [1957] 2 WLR 158; *Liverpool City Council v Irwin* [1977] AC 239, [1976] 2 All ER 39, 74 LGR 392."

[44] While these comments about terms which are implied as a matter of law, rather than implied by fact, refer to certain classes of relationship, as Lord Watson makes clear the implied term of performance within a reasonable time is a term applied generally in contracts (absent express contrary provision). In any event, the idea of classes of contractual relationship for this purpose simply means a defined type of contract (one of a *genus* rather than being *sui generis*: *Ashmore* v *Corpn of Lloyd's (No 2*) [1992] 2 Lloyds Rep 620). There are plainly examples of contractual relationships which very regularly occur and where terms are implied by law (such as employment, carriage, sale of goods) but there are others of a particular class or type where the implication of the term will arise. The present case is one in which one party has agreed to arrange for the sale of certain property, in payment of a debt owed by the other party. That could in my view properly be regarded as a class or type of relationship for the purposes of implication of a term requiring performance within a reasonable time. However, the existence of such a class or type, is not, in terms of Lord Watson's *dictum*, a requirement for the implication of that particular implied term.

[45] Plainly, the law on the implication of terms has developed since the decision in *Hick* v *Raymond & Reid* but those developments have not affected the principle enunciated and applied by Lord Watson. The discussion in *Marks and Spencer Plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* about the implied term in that case, and its reference to the five

points stated in *BP Refinery (Westernport) Pty Ltd* v *Shire of Hastings*, is in the context of terms implied in fact.

[46] Where an obligation is to act within a reasonable period of time, that is an implication of law and it is then a matter of construction as to what is the duration of the reasonable time: see *CSSA Chartering and Shipping Services SA* v *Mitsui OSK Lines Ltd* [2017] EWHC 2579 (Comm), Popplewell J at para 21 J; *Evera SA Commercial* v *North Shipping Company Ltd (The North Anglia)* [1956] 2 Lloyd's Rep 367 (Devlin J at 375). I accept that the question of whether a reasonable time has been exceeded is a matter for broad consideration, to be viewed with the benefit of hindsight when the issue of alleged breach arises for determination, in all of the relevant circumstances of the case (*Peregrine Systems Ltd* v *Steria Ltd* [2005] EWCA Civ 239, per Maurice Kay LJ at para 15).

[47] Lord Watson's *dictum* does not, in terms, refer to the possibility of the implied term being excluded, for example by an entire agreement clause, but it is plain from the observations of the Supreme Court in *Marks and Spencer Plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* and *Geys* v *Société Générale London Branch* that exclusion by an express term is possible.

[48] Applying the authorities, the first issue is to consider whether (to use Lord Watson's words) the language of the Agreement does not expressly, or by necessary implication, fix any time for the performance of the obligation in question. This involves construction of the terms of the Agreement, on the well-established principles, including consideration of the natural and ordinary meaning of the language, having regard to the context and background as known to both parties and, where appropriate, considerations of business common sense. The Agreement does not contain any terms which indicate that it is perpetual or indefinite. Equally there is nothing in the Agreement or in the context or background, or indeed based

upon business common sense, which could indicate that the parties had left it entirely in the discretion of the defender as to when the defender wished to arrange for the sale of the properties. There is nothing to indicate that the parties intended to allow that the defender could take a period of time that was in all of the circumstances unreasonable for the performance of the obligation in clause 3.

[49] In short, there is no provision which, expressly or by necessary implication, fixes a time for the performance of the obligation, in clause 3 of the Agreement, to arrange for and facilitate the sale of the properties. The suggested implied term therefore meets the requirement stated in *Hick* v *Raymond & Reid*.

[50] There is no need, on the authorities, positively to identify features of the contract, or its context or background, or business common sense, which point towards the existence of such an implied term. But had it been necessary to do so, such features can plainly be identified. As it was put on the pursuer's behalf, he requires, in effect, to act as the manager of 26 properties and to perform a wide range of tasks in respect of them, all as encompassed within the terms of clauses 2.1.3 and 2.1.6 of the Agreement. He remains subject to those obligations for as long as the properties are not sold. He also remains subject to his other obligations, and there is some force in the pursuer's contention that in the event of an inadvertent breach of contract the pursuer could become exposed to a claim for additional interest. On the pursuer's averments, this could involve substantial sums. It is in his interests to become free from that possible liability and it is also of course very much in his interests to become free from the debt. From the defender's perspective, the debt requires to be paid off and it has accepted that the proceeds of the sale of the properties will suffice for that purpose. Clause 9 of the Agreement involves a mutual undertaking to do everything

"necessary to expedite or desirable to give effect to the provisions of this Agreement", which suggests that there is some form of temporal dimension to performance of the obligations.

[51] It is important to recognise that what is a reasonable period of time will depend upon all of the circumstances, as was made clear in *Hick* v *Raymond & Reid*. In an appropriate case, a reasonable time can be a period of years (see eg *McCall's Entertainments (Ayr) Ltd* v *South Ayrshire Council (No 2)* 1998 SLT 1421, at 1428 K-L). The factors noted in the previous paragraph may be relevant to the determination of that issue, but that is a matter for the court hearing the proof. If a party has averred reasons for having delayed in performance, these will certainly be considered. From the point of view of the defender, there may well be factors that point towards the duration of a reasonable period of time in which to perform its obligations, one possibility being market conditions. However, at present, the defender has no averments on such matters.

[52] As I have noted above, the averment by the pursuer in relation to the implied term contended for is in the following terms: "that the Properties would be marketed and then sold within a reasonable time". Clause 3 of the Agreement imposed on the defender the obligation that it "…shall arrange and facilitate the sale of the Properties…". Clause 2.3 refers to the properties being marketed for sale by agents jointly instructed by the parties, who would recommend the disposal strategy, to which the parties would be required to consent. On the face of it, it might be said that the proposed implied term introduces not only a requirement to perform an obligation stated in the Agreement within a reasonable time but an alteration to the language of the Agreement by requiring the defender to market and sell the properties within such a time.

[53] However, in the Summons, the pursuer concludes for specific implement "in terms of clause 3.1" of the Agreement (which must be reference to clause 3, there being no

clause 3.1) and refers to the appointment of jointly instructed agents. It therefore appears that the words "would be marketed and sold" in the proposed implied term are not being suggested by the pursuer to themselves form part of the contractual obligation. Rather, in my view, this averment as to the content of the implied term must be taken to mean that the obligation on the defender in terms of clause 3 falls to be performed within a reasonable time. *Hick* v *Raymond & Reid*, upon which the pursuer founds, of course contemplates an implied term as to performance of an existing obligation rather than alteration of the terms of that obligation.

[54] I conclude therefore, subject to the entire agreement clause, that the implied term contended for by the pursuer, to the effect that the obligation in clause 3 is to be performed within a reasonable time, would fall to be implied into the Agreement.

What is the effect of the entire agreement clause (clause 8)?

[55] It is obvious that the precise language of the entire agreement clause has to be considered and that, for the defender's submissions to be upheld, it requires to exclude the implied term, or at least the basis upon which it is sought to be implied (see eg *AXA Sun Life Services Plc* v *Campbell Martin Ltd and others*). Here, the language of the entire agreement clause in clause 8 of the Agreement simply does not do so.

[56] The statement in clause 8 that "This Agreement forms the entire agreement between the parties relating to the subject matter of this Agreement" of itself does not affect the implied term, the whole point of the implication of the term contended for being that it would already form part of the contract. Similarly, the reference to it being agreed that "…any future variation hereof may only take the form of a formal variation of this Agreement, referring in terms to this Agreement" doesn't affect an existing implied term.

This is followed by the reference in clause 8 to it being agreed, in particular, that "…this Agreement supersedes all earlier meetings, discussions, correspondence, facsimile transmissions, letters and communications, understandings and arrangements of any kind in relation to its subject matter and that there are no collateral or supplemental agreements in relation to its subject matter at the time of the conclusion of this Agreement". The implied term plainly does not constitute an earlier understanding or arrangement, nor is it a collateral or supplemental agreement, for the reason that it is intrinsic to and forms part of the Agreement.

[57] Accordingly, the implied term is not excluded by the terms of the entire agreement clause in clause 8 of the Agreement.

What is the effect of the absence of specification by the pursuer of the duration of a reasonable period of time?

[58] As is noted above, the pursuer avers that for each month since the Agreement was signed, the rent paid to the pursuer was less than the costs allowed to be deducted by him. The pursuer's position is that the Summons does not therefore proceed upon the factual basis that the pursuer is withholding performance of the obligation to account for rent. There are other indications in the pursuer's pleadings which might be taken to suggest the contrary (for example in Articles 12 and 14 of Condescendence) and he avers (in Article 6 of Condescendence) that clause 2.2 of the Agreement did not require him to pay over the rent if Clydesdale (and by implication the defender) did not comply with clause 3. Nonetheless, the pursuer maintains his position that no sum was in fact being withheld.

[59] The pursuer avers that Clydesdale and the defender breached the Agreement by failing to comply with their obligations in clause 3 within a reasonable time. It would

appear that the reliance upon this alleged breach is to support an argument that any subsequent alleged breach by the pursuer (which as I have indicated is not accepted by the pursuer to have occurred) was justified on the basis of mutuality. The pursuer also seeks implement of the obligations in clause 3, again on the basis that a reasonable time has elapsed.

[60] The pursuer does not aver the point in time at which Clydesdale or the defender breached the implied term, nor does he otherwise specify the duration of a reasonable time. His averment (in Article 8 of Condescendence) as to Clydesdale being in breach is as follows: "By failing to take any substantive steps to implement clause 3.1 of the Sales Agreement, Clydesdale was in breach of the Sales Agreement from 2012". In relation to the defender, it is averred (in Article 12 of Condescendence) that

> "Since the assignations, the Defender has taken no substantive steps to implement the obligations imposed on Clydesdale under the Sales Agreement. The Defender therefore continues to be in breach of the Sales Agreement".

[61] By inference from these averments, the pursuer offers to prove that a reasonable time has elapsed. He does not aver the duration of that period, but where that issue is one to be determined by the court in light of all of the relevant circumstances, I see no requirement for him to do so. He is effectively saying, at least in respect of the present defender, that however long such a period might be held to have extended, it is now over. The court can determine at proof whether that is correct. If it turns out to be the case that the sums of money received in rent were not lawfully retained by the pursuer (for example, because the rental maintenance costs did not exceed the rental income), the issue of precisely when the implied term was breached may well be relevant. Again, however, that is a matter to be determined by the court, at proof, in the whole circumstances. I do not consider that the

pursuer can be held to have failed to make out a relevant case by not averring the duration of the period of a reasonable time.

Conclusion

[62] For the reasons given, I conclude that the obligation in terms of clause 3 of the Agreement required to be performed within a reasonable time, by virtue of the existence of the implied term.

[63] Accordingly I shall exclude from probation the defender's averments to the effect that no such term fell to be implied (in Answer 4, from "Explained and averred…" to the end of the Answer), and I shall also repel the first and second pleas-in- law for the defender and appoint the cause to a proof before answer on the whole remaining averments of the parties.