SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2017] SC GLA 54

CA176/16

JUDGEMENT OF SHERIFF ALAYNE E SWANSON

in the cause

SCOTTISH WATER BUSINESS STREAM LIMITED
a company incorporated under the Companies Acts, company number SC294924, having its registered office and a place of business at 7 Lochside View Edinburgh EH12 9DH

Pursuer

against

GSL PROPERTY MANAGEMENT LIMITED
a company incorporated under the Companies Acts, formerly having a place of business at 91 Bothwell Road, Hamilton ML3 0DW and now having a place of business at 27 Oswald Street Glasgow G1 4PE

Defender

Act: Mitchell
Alt: Campbell Corcoran

Glasgow, 30th May 2017

The Sheriff having resumed consideration of the cause repels the defender's first, second, third, fourth, fifth and sixth pleas in law; upholds the pursuer's first plea in law and allows parties a proof of their respective averments; fixes a case management conference on 5 July 2017 at 11 am to procced by telephone call before Sheriff Swanson to determine whether the proof should be a preliminary proof restricted to the issue of the making of arrangements; continues the consideration of the expenses occasioned by the debate to said case management conference.

Introduction

[1] This debate was concerned with competing interpretations of the Water Services Etc.

(Scotland) Act 2005 ("the 2005 Act"). The pursuer sues for charges for the supply of water and sewage services to the defender under licences granted to it under the 2005 Act. The defender argues that it is not the occupier of eligible premises and no arrangements have been made with it for the supply of water and sewage.

[2] The following facts are either admitted or accepted for the purposes of the debate:

1. The defender held the tenant's interest in a lease of Suite 3, 91 Bothwell Road, Hamilton, South Lanarkshire, ML3 0DW between 27 September 2011 and 27 November 2016
2. Suite 3 forms part of a larger building known as 91 Bothwell Road, Hamilton, South Lanarkshire, ML3 0DW
3. The larger building is connected to the public water and sewerage system via a series of internal connection points. One of those internal connection points supplies upper floor communal toilets and kitchens
4. The larger building is divided into various units and those units are occupied by separate tenants
5. There is a rateable value for one or more of the units within the building. The upper floor communal toilets and kitchen do not have a rateable value.
6. The defender had a right in common with the landlords and others for the use of those toilets and kitchens
7. There is no bulk meter measuring the supply of water to the building; the supply of water to the building is unmeasured
8. The unit occupied by the defender has no physical water or waste connections to the public system
9. There is no dispute between parties that the larger building is eligible premises for the purposes of the 2005 Act.

Submissions

[3] For the pursuer Mr Mitchell submitted that the defender's averment that there was

no direct water connection to the premises is irrelevant. In response to the defender's plea to specification and relevancy he submitted that the pursuer has pled a sufficient case to proceed to proof. A proof restricted to whether arrangements had been made with the defender would be the next step.

[4] It is admitted that the defender was the tenant of a suite of rooms which form part of a larger building. The upper floor had a communal toilet and kitchen which the defender had the right to use and did use. The building was divided into units; there was a rateable value for the units. There was no rateable value for the upper floor kitchen and toilet. Eligible premises are premises connected to the public water supply system. These words should be given their ordinary meaning. The larger building is connected. The defender is part of that with a right to the communal facilities. Premises can be occupied by several tenants. The obvious answer to the question: does the defender occupy that building is "yes". They do not occupy all of it; there are others there; the pipes do not go to them but there is nothing in the 2005 Act to say that the user has to occupy the whole building.

[5] In Mr Mitchell's submission the 2005 Act and the legislation governing the market code and the Scottish Water charges scheme together with the Water (Scotland) Act 1980 should be considered as a single code. On a proper construction of the 2005 Act with the delegated legislation charges will fall due in respect of part of the building. Reference was made to the Water Services Licence granted to the pursuer dated 11 January 2008 (Tab 16); the Sewerage Services Licence granted to the pursuer dated 11 January 2008 (Tab 17); the 2005 Act (Tab 1); The Water Services (Codes and Services) Directions 2007- Directions issued to Scottish Water pursuant to section 11 (2) of the 2005 Act by the Water Industry Commission for Scotland dated 26 September 2007 (Tab 10); The Market Code dated

16 March 2017 (Tab 11) and the Scottish Water Charges Scheme made under section 29A of the Water Industry (Scotland) Act 2002 effective from 1 April 2015 (Tab 13).

[6] Mr Mitchell also made reference to *Craies on Legislation* Eighth Edition, *the Stair Memorial Encyclopaedia* and *Bennion on Statutory Interpretation* Sixth Edition in support of his approach to the proper construction of the 2005 Act. The market code and the charging scheme are anticipated in the consultation document on the Principles of Charging for Water Services published by the Scottish Executive in July 2004 (Tab 14).

[7] In terms of the market code charges are made on a metered or unmetered basis. It is accepted that the premises in this case are unmetered. In that event supply must fall within paragraph 15.5.3 of the code which provides that, where there is a rateable value for one or more units within the eligible premises, the eligible premises will be regarded as having supply points for each unit for the supply of water and sewerage services. The charge is based on rateable value. The communal area has no rateable value. On the defender's interpretation that would mean that all the occupiers are entitled to use the services for free.

[8] Mr Mitchell discussed the canons of interpretation which can be gleaned from *Craies* and *Bennion.* In his submission the defender's interpretation fails to rebut these. The court can look at two constructions and decide which one will produce uncertainty, friction or confusion. If the interpretation means that there is no way of recovering charges then it must produce that result and should be rejected.

[9] Mr Mitchell also submitted that using the canon of consequential construction the court is entitled to consider the consequences of each interpretation. There would be serious consequences here if the defender is correct. Reference was made to *South West Water Authority* v *Rumble's Respondents* A.C. 609 (Tab 18) and to the relevant legislation for England which is discussed: the Water Act 1973 (Tab 19) in support of that proposition.

[10] The pursuer's *esto* position is that the defender's unit can itself be considered as eligible premises. The defender's lease gives it a right to the kitchen and toilets. Reference was made to *West Pennine Water Board* v *Jon Migael (North West) Ltd* 1975 73 L.G.R. 420 (Tab 6) in support of the proposition that access to communal facilities is part of the right of occupation. Reference was also made to the Water (Scotland) Act 1980 (Tab 12) which in Mr Mitchell's submission is still part of the code relating to the provision of water services in Scotland. The definitions of premises and land in the 1980 Act and the discussion in the *West Pennine* case support the argument that the definition of premises includes rights so the defender's right to the services means that they are supplied to their unit.

[11] Mr Mitchell sought to sustain the pursuer's first plea in law and repel the defender's answer 8. He then turned to the defender's challenge to the relevancy and specification of the averments anent arrangements between the pursuer and the defender. "Arrangements" is not a defined term in the 2005 Act. Reference was made to *Office of Fair Trading* v *Lloyds Bank plc* EWCA Civ 268 (Tab 2) which ascribes a broad meaning to the term "arrangements" to include things which are not expressly contractual. Parliament has chosen the word in light of the practical reality of water provision and the difficulties for providers in having a contract with each user. In Mr Mitchell's submission the term covers commercial arrangements short of a contract. Reference was made to *Re British Basic Slag Ltd's Application* 1 W.L.R. 727 (Tab 3) and to *Scottish Water Business Stream Limited* v *Mr Deodat Chataroo* SA978/14 2015 (Tab 4). The averments in article 9 about the defender's previous premises are relevant; it shows a knowledge of what the pursuer does, how it charges for the service and a previous contractual relationship. It is relevant that the defender acts with that knowledge. Article 9 sets out various facts which the pursuer offers to prove which the court can apply to the arrangement. One of these is that the defender contacted the pursuer

about the charges. This is denied but is a significant factor if proved. Reference was also made to *Scottish Water Business Stream Limited* v *James Forde* SA2065/14 2016 (Tab 5) and to *McMenemy* v *James Dougal and Sons Limited* 1960 SLT (Notes) 84 (Tab 20). In Mr Mitchell's submission the averments in article 9 lead to a broad interpretation of arrangements as the cases suggest. Proof will be needed to determine if all of that constitutes arrangements. Mr Mitchell sought to repel the defender's first, third and fourth pleas.

[12] In reply Mr Campbell Corcoran relied on the defender's note of argument in support of the defender's first, fifth and sixth pleas. With reference to the 2005 Act Mr Campbell Corcoran submitted that in order for the pursuer to succeed it has to satisfy the court that the defender is the occupier of eligible premises, that it made arrangements and those were in relation to the premises the defender occupies. The pursuer argues on two fronts: either the defender occupied the whole building (which is difficult to support) or the defender occupied the premises. Reference was made to the Interpretation Act 1978 section 6 which suggests that "premises" is singular for the purposes of section 6 (1)(a) of the 2005 Act. The difficulty with a multi-let is that the defender does not in fact occupy the building and should not be responsible for the other occupiers. Who is the occupier of the common parts? Reference was made to *McManus* v *City Link Development Company Limited and Others* CSOH 178 (Tab 1) where the landlord was described as the occupier of the common parts.

[13] It is accepted that the defender's premises do not have a physical connection pipe but the pursuer says that notwithstanding that the use of the toilet satisfies the connection test. "Connected" is not defined; the legislation does not use the expression "deemed to be connected". Reference was made to *Bennion on Statutory Interpretation* Sixth Edition (Tabs 2, 3 and 4); *Pinner* v *Everett* 1W.L.R. 1266 (Tab 5); *McCormick* v *Horsepower Ltd* 1 W.L.R.993 (Tab 6) and to *Cora Foundation* v *East Dunbartonshire Council* CSIH 46 (Tab 7). In the explanatory

notes to the 2005 Act the public water system is the physical infrastructure and so the word "connected" is used in the physical sense.

[14] The literal meaning should be used; Parliament is taken to mean what it says. Reference was made to *Bennion* (Tabs 8 and 10) and to the dictionary meaning of connected (Tab 9). In Mr Campbell Corcoran's submission the court cannot use delegated legislation to construct the 2005 Act as a whole. The 2005 Act, the Water (Scotland) Act 1980 (Tab 13) and the Sewerage (Scotland) Act 1968 (Tab 12) can be treated *in pari materia*. The 1968 and 1980 Acts both describe a physical connection. Reference was also made to *Lord Advocate* v *Stewart and Another* (1901) 8 SLT 403 (Tab 11).

[15] The court has to consider whether "connected" has a technical meaning. In Mr Campbell Corcoran's submission it does not, but if it does then it favours the defender. Reference was again made to *Bennion* and to *Battersea Borough Council* v *County of London Electric Supply Company Limited* 2 Ch. 248. Connected is a physical thing; the pursuer's interpretation that the right to use is the same as connected is absurd. Also the pursuer is not correct to say that the defender's interpretation is absurd and unworkable; the pursuer could turn its attention to landlords. The lease designs a service charge. If the tenant in the multi-let wishes to disconnect their property they are unable to do so if there is no pipe to their unit.

[16] Mr Campbell Corcoran then discussed the consequential construction, the purposive approach and the consideration of ultra vires by reference once again to *Bennion*. He also referred to *West Pennine Water Board* v *Jon Migael (North West) Ltd* 73 L.G.R. 420 (Tab 20) and to *Scottish Water Business Stream Limited* v *Mr Deodat Chataroo* SA978/14 2015 (Tab 21) both of which he sought to distinguish. He also made reference to *Daymond* v *South West Water Authority* 3 W.L.R. 865 (Tab 22) and to *Anglian Water Authority* v *Robert Arthur Castle* 1983

WL 216784 (Tab 23) neither of which in his view were helpful to the pursuer. He did not consider *South West Water Authority* v *Rumble's Respondents* A.C. 609 to be helpful to the pursuer either. Mr Campbell Corcoran sought decree of absolvitor in terms of his fifth plea in law.

[17] Mr Campbell Corcoran then turned to the arrangements issue. By reference to *Scottish Water Business Stream Limited* v *Mr Deodat Chataroo* SA978/14 2015 (Tab 21) he noted that the arrangements have to come before the charges. In Article 6 of condescendence the pursuer avers the issuing of invoices, telephone calls, a re-assessment and a letter and an email; there is nothing to indicate when the arrangements were effective from. The pursuer simply states that the services were charged from 27 September 2011. On the basis that the terms of the 2005 Act are clearly that the arrangements come first the pursuer cannot back-date the invoices. In any event there is no agreement to the pricing structure. The other issue is the provision of services. Section 16 of the 2005 Act talks about supply through the public water supply to the premises. If Parliament intended "supply" to mean what it means in the 1980 Act they have not done so. How can there be supply without a connection?

[18] The relevancy of the averments about the directions issued by WICS, the market code and the Scottish Water charges scheme 22015/2016 is not clear. Neither is the relevancy of the averments about the defender's previous occupation of premises. There is nothing to explain why the previous arrangements are relevant to establish the arrangement in respect of these premises. The onus is clearly on the pursuer to make the arrangements. The weaker alternative rule applies to the averments about the letters in Article 6 and the sequence of events in Article 9. Reference was made to *Scottish Water Business Stream Ltd* v *James Ford* (unreported Edinburgh Sheriff Court 30 November 2016) which Mr Campbell

Corcoran stated was not helpful to the pursuer. Finally he criticised the averments in Article 9.

[19] In reply Mr Mitchell addressed the 2006 letters mentioned in Article 6. There was no suggestion that the arrangements date from then; the letters were sent to all users at the time the pursuer entered into the transfer agreement with Scottish Water to explain their existence. There is nothing to say that arrangements crystallise on a specific date like the date of conclusion of missives. This is not a contractual offer and acceptance. The defender is correct to say that the arrangements have to come first but after that the charge can be retrospective. The pursuer is not seeking to import the previous arrangement into this; the position is averred to show knowledge on the part of the defender. The importance of "connection" is realised but the market code deems a supply. The connection makes the premises eligible. If the ordinary meaning is applied the question is how the supplier charges for the supply. Mr Mitchell urged the court to have regard to the following interpretation rules: not to contradict the existing system; the consequential interpretation and the absurd position.

Discussion

[20] The 2005 Act introduced retail competition for non-domestic customers. Anyone wishing to provide non-household customers with retail water and sewerage services requires to be licensed and to buy wholesale services from Scottish Water at rates set in charges schemes. The pursuer was established by Scottish Water as a separate undertaking to deliver water and sewerage services to non-household customers after the passing of the Act.

[21] Section 6 of the Act sets out the licence authorisation procedure:

"(1) The Commission may, subject to section 7 and paragraphs 1, 1A and 2 of Schedule 2, grant a licence authorising a person –

(a) to –

(i) make arrangements with the occupier of any eligible premises for or in relation to the supply of water to the premises through the public water supply system; and

(ii) fix, demand and recover charges for or in relation to the supply of water to any premises in respect of which the person has made such arrangements; and

(b) to make such arrangements with Scottish Water and such other persons as are necessary for the purposes of or in connection with the things mentioned in paragraph (a).

(2) A licence granted under subsection (1) is in this Act referred to as a '*water services licence*'; and a person who holds a water services licence is in this Act referred to as a *"water services provider"*.

(3) The Commission may, subject to section 7 and paragraphs 1, 1A and 2 of Schedule 2 grant a licence authorising a person –

(a) to –

(i) make arrangements with the occupier of any eligible premises for or in relation to the provision of sewerage to, or the disposal of sewage from, the premises through the public sewerage system; and

(ii) fix, demand and recover charges for or in relation to the provision of sewerage to, and disposal of sewage from, any premises in respect of which the person has made such arrangements; and

(b) to make such arrangements with Scottish Water and such other persons as are necessary for the purposes of or in connection with the things mentioned in paragraph (a).

(4) A licence granted under subsection (3) is in this Act referred to as a '*sewerage services licence*'; and a person who holds a sewerage services licence is in this Act referred to as a '*sewerage services provider*'.

(5) The references in subsections (1) and (3) to the occupier of premises are, if the premises are unoccupied, to be construed as references to the owner of the premises."

[22] The definition of "eligible premises" is set out in section 27:

"(1) In this Part, '*eligible premises*' means –

(a) in relation to the supply of water, premises which are (or are to be) connected to the public water supply system; and

(b) in relation to the provision of sewerage or the disposal of sewage, premises which are (or are to be) connected to the public sewerage system,

but not any dwelling.

(2) In subsection (1), '*dwelling*' means any dwelling within the meaning of Part II Council tax: (Scotland) of the Local Government Finance Act

1992 (c.14) except the residential part of part residential subjects within the meaning of that Part of that Act.

(3) The Scottish Ministers may by order modify subsection (2) so as to vary the meaning of 'dwelling'."

[23] I have before me two intelligible interpretations of "eligible premises" as used in section 6 of the 2005 Act. The meaning of that section is therefore not plain; there is an ambiguity which requires interpretation. One approach to the question of interpretation is to try to understand how the provision in question must have been intended to operate in the context of the statue as a whole. Given the nature of the 2005 Act and the part it plays in a wider scheme of legislation governing the provision of water and sewage services in Scotland I consider it legitimate to try to put the provision into context. In the case of *Scottish Water Business Stream Limited* v *Mr Deodat Chataroo* 2015 SCEDIN 60, Sheriff Principal Stephen talked about the suite of legislation underpinning the provision of non-domestic water supply and the framework for charging for such services.

[24] As a guide to interpretation the pursuer relies on the market code issued by the Water Industry Commission for Scotland (a body created by the 2005 Act) and the Scottish Water Charges Scheme which governs the way in which the licensed providers are charged wholesale prices by Scottish Water. The market code and the charging scheme are anticipated in the consultation document on the Principles of Charging for Water Services published by the Scottish Executive in July 2004. Mr Mitchell's argument was that the delegated legislation and the Act form a single code for interpretation purposes. In my view although these directions are not strictly part of the legislation or delegated by it they are useful as a cross-check to try to get a sense of what Parliament intended with its use of the words "eligible premises" within the new scheme for the provision of services to non-domestic premises.

[25] The market code recognises multi-occupancy of eligible premises. Schedule 1 of the market code defines "unit" as any distinct part of any eligible premises which is capable of separate occupation by a tenant or other occupier. At paragraph 5.15.3 the rules for determining the number of supply points within an eligible premises are set out:

> "where the supply of services to any eligible premises as a whole is unmeasurable or measurable and there is a rateable value for one or more units within that eligible premises the eligible premises will be regarded as having the following supply points:
>
> (i) one (1) for the supply of water services to each unit within the eligible premises and
>
> (ii) one (1) for the supply of such sewerage services as are provided to each unit within the eligible premises."

[26] Those rules sit within the section of the market code which deals with the market design and the high level duties which apply to all trading parties who are party to the market code. Licence providers are required to register the supply points which they service; this is designed to facilitate the transfer of supply points from one licensed provider to another. There are also provisions in the code for the registration of supply points for new connections and supply points and for cancellation and dis-connection of supply points.

[27] "Supply point" is defined in the code as the point at which water services or sewerage services are provided. There is a definition of "connection point" which is the point at which the private pipework supplying water to the supply point connects to the public water supply system. The definition of "rateable value" is the rateable value of any particular supply point.

[28] The pursuer avers in Article 10 of condescendence that the relevant criteria for the application of the market code in determining the number of supply points within the premises are met. The pursuer avers that there is an unmeasurable supply and that there

are individual units with separate rateable values within the larger building. The pursuer avers that there is a supply point for water to the unit and one for sewage both of which are registered to the pursuer. The invoices issued to the defender state the supply point identification numbers for water and for sewerage. No rateable value has been assigned to the communal toilet and kitchen within the building. Therefore, in terms of the Scottish Water Charges Scheme 2015/2016, the rateable value for the unit is considered to include the amenity associated with the communal areas. (Paragraph 1.7 of Appendix 3)

[29] It is clear from the Scottish Water Charges Scheme (at section 2.1.2) that the pursuer as licensed provider to the premises will be charged by Scottish Water for the supply of water and sewerage services to connected supply points registered to it. There is a footnote to the section which sets that out which reads: "This includes situations where the services are provided to communal areas which themselves are not supply points/discharge points but which are available for use by individual premises which are registered to a licensed provider."

[30] What we can glean from reference to these surrounding codes and schemes is that the concept of provision of services to a multi-occupancy building was contemplated. But does it assist us with on whom charges for the provision of services can be levied?

[31] The question of from whom charges may be levied has been a topic for discussion in a number of English cases. The first of these is a House of Lords case *Daymond* v *South West Water Authority* 3 W.L.R. 865. In that case their Lordships were concerned with the Water Act 1973. Section 30 (1) of the 1973 Act said that a statutory body could demand, take and recover charges for the services it performed, the facilities it provided and the rights it made available as it thought fit. At first instance the parties agreed that section 30 required that the person charged should actually be in receipt of the services and the judge found for

Mr Daymond. The Water Authority appealed. By majority the House of Lords dismissed the appeal and held that the Water Authority were not empowered to charge Mr Daymond for sewerage services of which he did not avail himself. The disagreement between the judges rested on whether those who benefitted from the service could be charged.

[32] Lord Wilberforce dissented. In his view there was a public benefit in a general charge for sewage disposal. He drew the analogy with payment of rates: "You cannot object to paying rates because you are childless or because your street is unlit or because your street gets flooded when it rains." A claim that Mr Daymond got no personal or specific benefit from the sewage system was not consistent with the system which has been in place for over 100 years. He concluded that the relevant section authorised a general services charge to be made on all rateable property.

[33] The other dissenting judge, Lord Diplock, traced the origins of the policy of charging on a rating basis rather than estimating the value of the actual benefit each occupier received. He noted that when this principle was first applied to services other than the cost of public sewers the judges in the first half of the nineteenth century had resort to the concept of "some benefit however small" as the criterion by which to determine who was to be liable for those services. He saw the question as being whether the Act their Lordships were considering prohibited the authority from charging on a rating basis.

[34] Lord Kilbrandon declared himself unwilling to spell out from what Parliament actually said in the relevant section a liability on all citizens to meet the cost of a general public improvement. In his view the wording did not allow the authority to charge persons who do not directly receive services, facilities or rights. Lord Edmund-Davies was also reluctant to say that the authority was entitled to impose sewerage charges upon ratepayers whose properties do not enjoy the benefits of sewerage services. Viscount Dilhorne agreed.

His view was that if that was what Parliament intended they would have said so; there is nothing in the section to suggest that benefit was to be the test of chargeability. He concluded that the authority could not make a charge on all owners and occupiers based on rateable value irrespective of whether use was made of the public sewers.

[35] After *Daymond* the 1973 Act was amended. It again came before the court in the Court of Appeal case of *Anglian Water Authority* v *Robert Arthur Castle* 1983 WL 216784. The amendment specified that the charges were to be recovered from the persons for whom the authority performed the services, provided the facilities or made the rights available. The facts in *Castle* were that Mr Castle, the owner of a farm which had undergone modernisation, had a trough and standpipe in his field connected to the water supply which he did not make use of. In addition water was supplied to adjoining cottages and industrial premises in the former farm buildings occupied by others. The whole water charge was demanded from Mr Castle which meant there was a charge levied for water actually used by others and in the words of Lord Justice Dillon "not water which is within the facilities provided for him or the rights made available to him." The court decided that Mr Castle was liable for the minimum charge but not liable to pay the charge for the water supplied to other people through the meter. The reason why he was liable for the minimum charge was that despite the fact he had not used any water there were rights available to him.

[36] The pursuer in this action argues that the right available to the defender to use the communal facilities either turns the defender into an occupier of the entire premises or, taken together with his right of occupation to the unit, turns the unit into eligible premises. Much of the discussion before the court concentrated on the interpretation of "occupier" and "connected." The word "connected" appears in section 27 in the definition of eligible premises. It is accepted that the only part of the building which is "connected" to the public

water and sewerage systems is the part of the building which contains the communal toilets and kitchen. That renders the whole building eligible premises in terms of the 2005 Act. The word "occupier" appears in section 6. In order to succeed the pursuer has to satisfy the court that the defender is an "occupier." The pursuer argues for a primary position that the defender is deemed to be an occupier of the whole premises by virtue of its access to and use of the part of the building to which water is supplied and sewerage is provided. The secondary position is that the suite occupied by the defender is itself eligible because of the right to use the communal parts. The defender contends that the right to use does not make it an occupier of the part of the building which is "connected" to the public water and sewerage systems.

[37] The defender takes issue that there is no supply of water to the unit through the public water supply system because there is no physical connection to the public water system within the unit. The position is similar in relation to sewerage services. The defender argues that the word "connected" should be given its ordinary meaning. Mr Campbell Corcoran made reference to the Sewerage (Scotland) Act 1968 and to the Water (Scotland) Act 1980 both of which envisage a physical connection.

[38] I was referred to the case of *McManus* v *City Link Development Company Limited and Others* CSOH 178 in relation to the concept of occupation of the building. I did not find it helpful. It deals with a personal injury claim in which *inter alia* tenants tried to allege a breach of an implied term of a tenancy agreement and certain statutory provisions by their landlords. In a discussion about the liability of another party the court referred to an English case in which a landlord was found to discharge his duty of taking care that premises were reasonably safe by employing a first class firm of lift engineers to inspect and report on the lift. The reference to the landlord as occupier of the lifts was made in passing.

A landlord could be the occupier of lifts within a building which he owned but so could other occupiers of the building.

[39] In my view, in order to examine the right available to the defender, the word on which we should focus is "premises". To what subjects has the landlord granted the tenant possession for the period of the lease? We have to ascertain what is included in the premises exclusively leased to the tenant.

[40] The lease by virtue of which the defender in this action is in occupation is production 6/1. Both "Building" and "Premises" are defined. "Building" is defined as the whole office building; "Premises" is the office suite on the upper floor delineated in red on plan 1 together with "a right in common with the landlords and others deriving right therefrom of use of the entrance hall, corridors, stairs and upper floor toilets and kitchen delineated in blue on the said plan 1. " Also included are (i) an exclusive right to five parking bays for employees' cars on the areas delineated red on plan 2; (ii) the whole parts, privileges and pertinents effeiring to the Premises and the fixtures and fittings therein and thereon; (iii) a right in common with the proprietors of the remainder of the Building to use the Common Parts; (iv) all common and other rights effeiring to the Premises; (v) pedestrian and vehicular access and egress; use of signage (vi) the right to the landlord to enter into and upon the Common Parts for repair purposes and (vii) the free passage and running of all utilities and services to and from the Premises through the service media, pipes, cables, conduits and other which are now laid or shall be laid in, under or through other parts of the Building so far as the same are necessary for the reasonable use and enjoyment of the Premises. The Common Parts are defined as the whole common parts of the Building including the physical and electronic structure and infrastructure, common entrances, hallways, corridors, stairs and toilets and all sewers, drains, water pipes, rones, conductors,

gas and electricity mains and other pipes or transmitters used in common and access for maintenance of common property.

[41] Lord Tyre has heard a series of cases about a dispute between the owners of the Gyle Shopping Centre and Marks and Spencer plc. He has issued three separate judgements. In the first of those judgments he examines the nature of the tenant's right to "benefits incidental to and essential to the enjoyment of the principal grant." [CSOH 59]. The issue with which Lord Tyre was concerned was whether the interest in the shared areas at the Centre (in that case a share of the car park) was a real right enforceable against successors. The pursuer argued that the right to the shared areas was not a separate tenement and was more akin to a licence. The defender maintained that the right to car parking was a condition of the lease and necessary to it.

[42] Lord Tyre referred to a 19th century House of Lords case *Campbell* v *McLean* (1870) 8M (HL) 40 where Lord Westbury said that if a right is enjoyed by virtue of the lease it is part of the lease itself. He said:" It is a thing made incidental to that which is granted by the lease. Common sense would be outraged if we did not hold that it is substantially part and pertinent of the principal thing granted and made an accessory to the thing so granted." Relying on that authority Lord Tyre found that the right granted to Marks and Spencer plc in respect of the car park was properly to be characterised as substantially part and pertinent of the principal grant. In his view the issue was not the characterisation of the condition in the lease but the more fundamental question of the extent of the grant.

[43] The issue in dispute here is whether the defender can be said to occupy eligible premises by virtue of the lease granted in its favour over Suite 3 in the larger building. Taking Lord Tyre's view of the tenant's rights in this case brings me to the conclusion that the defender's right to access and use the upper floor toilets and kitchen is part and

pertinent of the grant of lease. The extent of the grant includes the use of the toilets and kitchen; that right is necessary to the enjoyment of possession and part and pertinent of it. If the reasonable man was asked whether the defender occupied both its office space and the toilets and kitchen he would say that it did. Common sense would be outraged were it otherwise.

[44] In *Castle,* to which I have already referred, reference was made to the 1975 English Court of Appeal decision in *West Pennine Water Board* v *Jon Migael (North West) Ltd* 73 L.G.R. 420. The facts in *West Pennine* are similar to this case. The defenders in that action occupied a shop with a storeroom within an urban centre comprising 50 or 60 shops. No water or sewerage was connected directly to the defenders' premises but they had the right to use communal lavatories at the centre. The relevant legislation was the Water Act 1945 and the West Pennine Water Order. The Order allowed the Water Board to charge for "water supplied to any premises." "Premises" was not defined in the Order. In the Act "premises" was defined as including land and "land" was defined as any interest in land and any easement or right in, to or over the land. The court, having commented that the word "premises" must have the same meaning in the Order and the Act, made reference to the case of *Miller* v *Emcer Products Limited* 1 CH 304 which decided that the right to use lavatories in common with others is an easement. Using that interpretation the court was able to say that "premises" includes not only the physical shop itself but also the right to use the lavatories. In Lord Denning's words: "shopkeepers who have the right to use water in and from the lavatories in common with others are chargeable with the water rate on the premises."

[45] In his judgement in *West Pennine* Lord Scarman referred to an earlier unreported case called *Taunton Corporation* v *Broomhead & Saul* and quoted Judge Paton who said: "the test

therefore is not whether water is carried to a particular part of a building which is in the occupation of the person sought to be charged with a rate, but whether water is supplied in such a way that it is available to be taken out or used by another occupier of a part of the building by virtue of his occupation and is so taken or used." The pursuer in this case relies on the commentary in *West Pennine* and *Taunton Corporation*. Although I was not referred to it in submissions I have noted that The Water Scotland Act 1980 contains a similar definition. The 1980 Act defines "premises" as including "land". "Land" is defined as including any right or servitude in, to or over land.

[46] The point was considered again by the House of Lords in 1985. The case of *South West Water Authority* v *Rumble's* again concerned the levying of water charges on occupiers of a ground floor shop which had no water or drainage facilities. As in the case of *Castle* the legislation being considered is the 1973 Act after amendment following the House of Lords decision in *Daymond* to introduce the benefit test. The new provision offers two alternatives on which liability for charges can be based: the first is where the hereditament is drained by a sewer or drain connecting, either directly or through an intermediate sewer with a public sewer; the second is that the person liable to the charge has the use, for the benefit of the hereditament, of facilities which drain to a sewer or drain so connecting. Lord Scarman notes that whether the occupier has the use of drainage facilities is a question of fact. In the *Rumble's* case the occupiers had the use of the roof of the building and its drainage facility. Lord Scarman was clear that this meant that the occupiers were chargeable in respect of the benefit to their shop of the roof's drainage facility draining to a public sewer.

[47] The focus in the English cases to which I have referred is on, firstly, receipt of services and then availability or rights to services. In several of those cases although facilities existed and connection to the system was on offer those challenging the charges

maintained that they made no use of those facilities. In this case the argument is the other way round. It is agreed that services are supplied to the defender and used by it. The question is therefore similar to the one in *West Pennine*; it focusses on the defender's individual unit and the extent of the grant of possession. In my view that has to include the services available to it. If the nature of the defender's real right is examined it is apparent that it is similar both to the right in *West Pennine* and to the hereditament described in the *Rumble's* case where the occupiers had the use of the roof of the building and its drainage facility. That is part of the defender's right in this case also. There was a benefit to the shop of the roof's drainage facility draining to a public sewer. The defender here has a benefit which enhances its unit; in fact the defender would be unable to make use of his unit and employ staff there without the access to and use of the common area.

[48] The only consideration of this point in Scotland has been in the case of *Scottish Water Business Stream Limited* v *Mr Deodat Chataroo* 2015 SCEDIN 60 where it was not the point which decided the case. In the *Chataroo* case Sheriff Principal Stephen was concentrating on the making of arrangements, a topic to which I will return, and on jurisdiction.

Mr Chataroo's shop was supplied water from the water mains to a sink and had a waste drain from the sink to the external drain. The sink was never used. The Sheriff at first instance decided that although Mr Chataroo did not consent to the water supply or enjoy any benefit from that supply he could have water at any time by turning on the tap and the services provided by the licensed provider were available to him for instant use. Sheriff Principal Stephen did not agree that there was a statutory basis for charge. That seems to be because she held that the pursuer's averments and the sheriff's findings in fact were not sufficient to support the case. However she did say that the pursuers had a good statutory basis for charging for the supply of water which the defender could draw up even though he

chose not to do so. She did not consider that the defender's argument that he had not asked for and did not want the water/waste water services amounted to a complete defence. That view fits with the characterisation of the right to use the services being part and pertinent of the grant of lease. The right would remain so even if the defender did not avail itself of the services.

[49] The cases I have discussed have mainly concerned occupiers who have not made use of the facilities provided but have been liable nonetheless because the facilities were available to them. Here the facilities are available and are being used. The defender does not occupy the unit in isolation; it occupies the unit together with the right to the use of the communal facilities. In that event the right to use communal facilities turns the defender into an occupier of eligible premises.

[50] Given the definition which Parliament has seen fit to use I do not think that the pursuer's primary position is correct. A tenant in a unit not connected to the public water supply system and to the public sewerage system who happened to have a lease with no ancillary right to use services connected to those public systems might well be in a completely different position. In that case the physical unit occupied by the defender would probably not be an eligible premises. In this case my conclusion is that "premises" includes not only the physical unit but also the right to use the communal toilets and kitchen.

[51] In my view that interpretation accords with the canons of interpretation discussed in *Craies on Legislation* Eighth Edition and *Bennion on Statutory Interpretation* Sixth Edition. The judge's task in interpreting ambiguous legislation is to ascertain the legal meaning. There is a presumption that ancillary rules of law apply; in particular it is implied that an enactment imports any principle or rule of the law of real or personal property. Also if a word has a technical meaning in a certain branch of law, like that of commercial leases, and is used in a

context dealing with that branch, it is to be given that meaning unless the contrary intention appears. I am satisfied that the interpretation I have given to the 2005 Act adheres to the principles of property law enunciated by the Court of Appeal and by Lord Tyre. The interpretation also makes sense in the context of the scheme for the provision of water and sewerage services as a whole. Mr Mitchell referred to the opinion of Lord Shaw in the case of *Shannon Realties Ltd* v *Ville de St Michel* AC 185 which is quoted in *Craies on Legislation:* "that alternative must be chosen which will be consistent with the smooth working of the system which the statute purports to be regulation; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."

[52] I am satisfied that the defender is an occupier of eligible premises and the pursuer can make arrangements with it for the supply of water and sewerage services and recover charges for those supplies. That brings me neatly to the second point in the debate which is the relevancy and specification of the pursuer's pleadings anent arrangements.

[53] In Article 9 of condescendence the pursuer sets out what it offers to prove in relation to the making of arrangements with the defender. The defender says that these averments are lacking in specification and are irrelevant and should not be admitted to probation. "Arrangements" is not a defined term in the 2005 Act. The pursuers contend that the word has been purposely used by Parliament to include things which are not expressly contractual in light of the practical reality of water provision and the difficulties for providers in having a contract with each user.

[54] In *Office of Fair Trading* v *Lloyds Bank plc* EWCA Civ 268 the Court of Appeal was considering the use of the term "arrangements" in the context of consumer credit agreements. The facts of the case are highly complex but in the course of its decision the court noted that "arrangements" is capable of carrying a broad meaning and was chosen

deliberately to embrace a wide range of different commercial structures. Reference was made in that case to the case of *British Basic Slag Ltd's Application* 1 W.L.R. 727. That case was concerned with restrictive trade practices. Members of a company incorporated to form a common marketing organisation who made agreements to sell only to that company tried to argue that those agreements did not fall to be registered as agreements or arrangements within the Restrictive Trade Practices Act 1956. The definition of "agreement" is any agreement or arrangement whether or not it is intended to be enforceable by legal proceedings. In considering the question Lord Diplock in the Court of Appeal agreed with the judge at first instance and said that it is sufficient to constitute an arrangement between A and B if (1) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way (2) such representation is communicated to B who has knowledge that A so expected and intended and (3) such representation or A's conduct in fulfilment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way. In relation to what the members of the company had done in that case Lord Diplock said:" If this is not an arrangement I do not know what is."

[55] In *Scottish Water Business Stream Limited* v *Mr Deodat Chataroo* 2015 SCEDIN 60 Sheriff Principal Stephen was referred to the *British Basic Slag* case. Her view of what constituted arrangements in the context of the 2005 Act was this: "something must be done with a service consumer to put their relationship in some sort of order. This may simply be correspondence from the new licence provider setting out details of the provider, tariffs, rights etc. with a view to offering to carry on with the supply of water." That approach was echoed by Sheriff McGowan in *Scottish Water Business Stream Ltd* v *James Ford* (unreported Edinburgh Sheriff Court 30 November 2016) where he found that a telephone conversation

as a result of which commercial relations were restored and a continued supply thereafter satisfied the requirement that arrangements be made particularly when the defender contacted the pursuers in relation to other issues to do with water supply and paid for that supply.

[56] In this case the pursuer offers to prove correspondence with the defender in October and November 2006, the provision of services to the defender at its former premises, the sending out of an invoice once the defender was in the premises relevant to this action, regular invoices thereafter, contact from the defender by telephone in November 2011, a discussion about services in December 20111, another contact by telephone in May 2012 and one in June 2013, an application by the defender on 30 May 2013 for re-assessment of the charges and further correspondence thereafter. In my view such interaction between the parties satisfies the criteria enunciated by Lord Diplock and by Sheriff Principal Stephen. Even if each of those examples is not proved, provided that several of them are, then the pursuer will be able to show that arrangements were entered into. I do not consider the pleadings to be lacking in specification and irrelevant.

[57] Mr Campbell Corcoran also challenged the relevancy of the pursuer's averments in Article 10 of condescendence. I have found those averments about the scheme in existence for the provision of water and sewerage services relevant and helpful in the context of the debate. I will also allow these averments to procced to probation.

Decision

[58] I will repel the defender's first, second, third, fourth, fifth and sixth pleas in law. Although the written submissions only insist on the first, fifth and sixth pleas at the outset, within the document there are submissions about the second and third pleas and these were

discussed in oral submissions. I will allow parties a proof of their respective averments. Given certain submissions by Mr Mitchell about restricting any proof to the issue of the making of arrangements I will fix a case management conference for that matter to be discussed. In light of that hearing being fixed it is appropriate to continue consideration of all questions of expenses.