SHERIFF APPEAL COURT

[2020] SAC (CIV) 1
GLW-CA187-17

Sheriff Principal D C W Pyle
Appeal Sheriff W Holligan
Appeal Sheriff AG McCulloch

OPINION OF SHERIFF PRINCIPAL D C W PYLE

in the cause

CAITHNESS FLAGSTONE LIMITED, a company incorporated under the Companies Acts (Registration No SC465433) and having its registered office at Westerlea, Miller Avenue Wick, Caithness, KW1 4DF

Pursuer and Appellant

against

BALLYVESEY HOLDINGS LIMITED, a company incorporated under the Companies Acts (Registration No 03067227) and having its registered office c/o Montracon Limited, Carr Hill, Doncaster, South Yorkshire, DN4 8DE

Defender and Respondent

Act: McIvride QC, instructed by Harper McLeod LLP
Alt: Borland QC and Manson, advocate, instructed by MacRoberts LLP

28 January 2020

Introduction

[1] The appellant is based in Wick. It extracts Caithness stone and manufactures products from it. The quarrying produces stone waste. The appellant became aware of a number of major infrastructure projects in the north of Scotland. It decided that there was an opportunity for it to supply crushed stone for these projects. To do so it needed to acquire a stone crusher. It hired one from the respondent by way of a hire purchase

agreement. The appellant avers that the stone crusher was not of satisfactory quality in that it kept breaking down and even when operated was incapable of the volume of crushed stone the appellant had expected. It became aware that the crusher was not owned by the respondent, which the appellant regarded as a breach of contract. The appellant rescinded the contract and now seeks damages for loss of profit and return of instalments paid under the agreement.

[2] The action began in Wick Sheriff Court but was transferred to the Commercial Court in Glasgow. A preliminary proof was held. The sheriff found in favour of the respondent. That interlocutor is now appealed to this court.

[3] The appeal concerns two principal matters: first, the sheriff's findings in fact on the exclusion of liability and her approach to the application of the Unfair Contract Terms Act 1977 to those findings; secondly, the correct construction of certain provisions contained within the Supply of Goods (Implied Terms) Act 1973.

[4] The sheriff was not invited to determine as a matter of fact that the stone crusher was or was not of satisfactory quality. This was because the question would be academic if she decided that the statutory warranty had been excluded by the hire purchase agreement. That was the first issue. The second was whether the appellant was entitled to rescind the contract because of what it avers was a breach by the respondent of the 1973 Act.

The Unfair Contract Terms Act 1977

[5] The respondent is the parent company of a group of companies, one of whom is Scotia Plant Limited which supplied the stone crusher. The respondent has a trading division which trades under the name of Ballyvesey Finance. Clause 8 of the hire purchase agreement is in the following terms:

"8 Exclusion of Liability

We both recognise that there is risk that the Goods may not perform as expected and may not be satisfactory. When Goods are financed the risk of them not working satisfactorily or according to any representations made may be assumed by you, us or the supplier of them.

You and we both appreciate that the allocation of risk is a matter of agreement and have decided that you shall bear the risk on the terms set our herein as you acknowledge that we are only a financier of goods and you yourself have chosen the Goods from the supplier.

Accordingly, you and we both agree:

8.1 That the supplier you have chosen is not our agent and is not our agent [*sic*] and is not authorised to make statements or representations binding upon us;

8.2 That you will obtain any warranties relating to the suitability or performance of the Goods which you require direct from the supplier. If we have the benefit of any such warranties, then we shall transfer the benefit of them to you if you so request;

8.3 That save in the event of death or personal injury caused by our negligence we shall have no liability for the description, state, condition, suitability or performance of the Goods and any term otherwise implied by law are [*sic*] expressly excluded to the full extent permitted by law;

8.4 If contrary to clause 8.3 above, the law requires terms to be implied into this Agreement, then you and we both agree that we not [*sic*] liable for any breach of them because if the breach of any such term had been allocated differently, then we would have charged higher Payments or we would not have entered into this Agreement;

8.5 In on [*sic*] event will we be liable to you in contract or other area of law including any liability for negligence (save in the event of death or personal injury caused by our negligence) for any loss of revenue, anticipated savings or profits or any loss of use or value or for any indirect or consequential loss; and

8.6 Notwithstanding the above, our maximum liability is limited to:

> (a) in respect of indirect or consequential loss an amount not exceeding the Cash Price (exc. VAT) of the Goods as shown in the Financial Details overleaf;
>
> (b) in respect of any other form of loss, the lesser of the cost of repairing the Goods, their dilution in value or the total of the Payments outstanding at the date you suffer the loss. You agree that it is both reasonable and acceptable for us to exclude or limit our liability to you in this way…"

Also of relevance is the Customer's Declaration, which was signed by two of the appellant's directors:

> "By signing this Agreement you confirm that:
>
> 1 The Terms and Conditions of this Agreement have been read and understood by you.
> …
>
> 4. You understand and agree that it is both reasonable and acceptable that our liability to you in respect of the goods is excluded or limited as set out in Clause 8…"

[6] The relevant parts of section 10 of the Supply of Goods (Implied Terms) Act 1973 (as it was at the time the parties entered into the contract) are in the following terms:

> "10. Implied undertakings as to quality or fitness.
>
> (1) Except as provided by this section…, there is no implied term as to the quality or fitness for any particular purpose of goods… hired under a hire-purchase agreement.
>
> (2) Where the creditor… hires goods under a hire-purchase agreement in the course of a business, there is an implied term that the goods supplied under the agreement are of satisfactory quality…"

[7] [1] Section 17 of the Unfair Contract Terms Act 1977 (as it was at the time the parties entered into the contract) provides:

> "Control of unreasonable exemptions in… standard form contracts
>
> (1) Any term of a contract which is… a standard form contract shall have no effect for the purpose of enabling a party to the contract –
>
> (a) who is in breach of a contractual obligation, to exclude or restrict any liability of his to the… customer in respect of the breach;
>
> (b) in respect of a contractual obligation, to render no performance, or to render a performance substantially different from that which the… customer reasonably expected from the contract;
>
> if it was not fair and reasonable to incorporate the term in the contract.

[1] The sheriff fell into error in that she referred to section 6 and section 11(1) of the 1977 Act, which apply only in England and Wales (para [8] of her judgment), but parties were agreed that in substance nothing turns on that.

(2) In this section 'customer' means a party to a standard form contract who deals on the basis of written standard terns of business of the other party to the contract who himself deals in the course of a business…"

[8] Sub-section 20(2) of the 1977 Act (as it was at the time the parties entered into the contract) provides:

"Any term of a contract which purports to exclude or restrict liability for breach of the obligations arising from –

(a) section 13, 14 or 15 of the said Act of 1979 (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);
(b) section 9,10 or 11 of the said Act of 1973 (the corresponding provisions in relation to hire-purchase),

shall –
…

(ii) in any other case, have no effect if it was not fair and reasonable to incorporate the term in the contract."

[9] Section 24 of the 1977 Act provides:

"The 'reasonableness' test.

(1) In determining for the purposes of this Part of this Act whether it was fair and reasonable to incorporate a term in a contract, regard shall be had only to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties to the contract at the time the contract was made.

(2) In determining for the purposes of section 20 or 21 of this Act whether it was fair and reasonable to incorporate a term in a contract, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection shall not prevent a court or arbiter from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

(2A) In determining for the purposes of this Part of this Act whether it is fair and reasonable to allow reliance on a provision of a notice (not being a notice having contractual effect), regard shall be had to all the circumstances obtaining when the liability arose or (but for the provision) would have arisen.

(3) Where a term in a contract or a provision of a notice purports to restrict liability to a specified sum of money, and the question arises for the purposes of this Part of this Act whether it was fair and reasonable to incorporate the term in the contract or

whether it is fair and reasonable to allow reliance on the provision, then, without prejudice to subsection (2) above in the case of a term in a contract, regard shall be had in particular to—

(a) the resources which the party seeking to rely on that term or provision could expect to be available to him for the purpose of meeting the liability should it arise;

(b) how far it was open to that party to cover himself by insurance.

(4) The onus of proving that it was fair and reasonable to incorporate a term in a contract or that it is fair and reasonable to allow reliance on a provision of a notice shall lie on the party so contending."

[10] Paragraph 1 of Schedule 2 provides:

"The matters to which regard is to be had in particular for the purposes of sections 6(3), 7(3) and (4), 20 and 21 are any of the following which appear to be relevant—

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
(d) where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
(e) whether the goods were manufactured, processed or adapted to the special order of the customer."

The sheriff's judgment

[11] The sheriff concluded that on the evidence clause 8 of the agreement was fair and reasonable in its terms and accordingly excluded the warranty. The sheriff has a discursive style of writing, but looking at it broadly her reasons for that conclusion were:

1. Experienced business people of equal bargaining power should be taken to be the best judge on the question of whether the terms of the agreement are reasonable (*Photo Production Limited* v *Securicor Transport Limited* [1980] AC 827, at 853; *Watford Electronics Ltd* v *Sanderson Cfl Ltd* [2002] FSR 19; *Granville Oil & Chemicals Limited* v *Davis Turner & Co Limited* [2003] EWCA Civ 570; [2003] 2 CLC 418, at p 430; *Goodlife Foods Limited* v *Hall Fire Protection Limited* [2018] EWCA Civ 1371; [2018] CTLC 265, at p 281) (para [24] of the sheriff's note);
2. The respondent's associated company was not the only supplier with whom the appellant could have contracted; nor was the respondent the only means by which the appellant could have obtained finance for the purchase price (para [12]);
3. Clauses like Clause 8 were not unusual; indeed were fairly standard. The appellant had routinely entered into other contracts containing clauses of the same type. Other finance companies with which the appellant had contracted had similar terms. Indeed, prior to the agreement, the appellant had entered into a finance agreement with the respondent for the purchase of other equipment on exactly the same terms (para [13]);
4. Mr John Sutherland, the appellant's director who had negotiated the agreement with the respondent, was "an experienced business man who knows the asset finance industry inside out" (para [17]);
5. The preamble to Clause 8 indicates that the parties were "commercially savvy" and "agreed to this exclusion with their eyes open to the consequences of not so agreeing" (para [32]).

The appellant's submissions

[12] Counsel for the appellant submitted that the sheriff erred in law in finding that it was fair and reasonable to incorporate Clause 8 into the agreement. The revised ground of appeal in relation to Clause 8 is in the briefest of terms. That is unsatisfactory. Indeed, if it were not that a written note of argument was ordered and produced the respondent and the court would have little or no idea of the basis upon which the sheriff's judgment was being attacked. I have also found the note of argument difficult to follow. There is only a limited effort at identifying exactly what each criticism was and the reasons for it. Nevertheless, I have been able to identify three separate grounds of appeal, which I deal with as follows.

[13] First, counsel submitted that the sheriff ought to have found that the parties were not of equivalent bargaining strength, for the following reasons:

a. The appellant was a relatively recently incorporated company whose financial position was such that it was unlikely it would meet other lenders' criteria;

b. The respondent is the holding company for a number of established companies;

c. The appellant required a crusher as a matter of urgency;

d. Although it might have been possible for the appellant to obtain a crusher from another supplier, another lender would have insisted on exclusions or limitation of liability provisions in substantially the same terms (*Balmoral Group Limited* v *Borealis (UK) Ltd* [2006] 2 CLC 220; *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] 2 AC 803, at p 817);

e. In any event, the appellant was unlikely to be able to obtain finance elsewhere because of its financial position.

[14] Secondly, counsel submitted that the sheriff failed to take into account the following factors:

a. On the evidence, it was established that notwithstanding the existence of exclusion clauses in the same or similar terms, finance companies in general will intervene to press the supplier of the equipment to remedy defects and that the respondent conforms to that practice (*Mitchell*, p 817);

b. The parties must be held to have contracted on the assumption that Scotia would supply a crusher of satisfactory quality (*Balmoral*, para [421]);

c. Scotia and the respondent were a "one stop shop", in that Scotia was a wholly owned subsidiary of the respondent, they share common directors and the employees of both companies acted in unison in securing the appellant's agreement to purchase the crusher on the basis that finance would be provided by the respondent;

d. In any event, the inclusion of Clause 8.5 was not fair nor reasonable given that its effect is that even if the crusher was of unsatisfactory quality the appellant would still be liable to continue to make the hire purchase payments for equipment which was incapable of performing the function for which it had been hired;

e. In any event, the inclusion of Clause 8.6 was not fair nor reasonable because no evidence was adduced to demonstrate that some limitation in the resources of the respondent made it fair and reasonable to limit its liability; nor was evidence adduced to establish that insurance was either unavailable

to the respondent or was difficult to obtain or at a disproportionate cost or, indeed, was available to the appellant and at a reasonable cost (sec 24(3) of the 1977 Act).

[15] Thirdly, it was inherently improbable that it is fair and reasonable to include an exclusion provision where the agreement otherwise requires defects to be notified within two days of delivery (Clause 3.6; para 1(d) of Schedule 2 of the 1977 Act).

Discussion

[16] Counsel for the appellant did not dispute what was said by Lord Bridge of Harwich in *Mitchell* (p 816A-B) that (1) in deciding whether it was fair and reasonable to incorporate a particular term into a contract a range of considerations will require to be taken into account by the court and weighed in the balance; (2) that there can quite legitimately be differences of judicial opinion as to whether the incorporation of a term is fair and reasonable; (3) that the appellate court should treat the decision of the first instance judge with the utmost respect, and (4) that it should interfere with the decision only if it satisfied that the first instance judge proceeded on some erroneous principle or was plainly and obviously wrong. That is of course consistent with the general line of authority for all reviews of fact finding courts.

[17] I am satisfied that the sheriff was not plainly wrong in her conclusion that it was fair and reasonable to include Clause 8 in the hire purchase agreement, in the sense that her decision cannot be reasonably explained or justified (*Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203, at p 220).

[18] I gratefully adopt, as did the sheriff (para [11] *supra*), the approach taken by the English authorities that experienced business people of equal bargaining power should be

taken to be the best judge on the question of whether the terms of the agreement are reasonable. I also accept the submission of senior counsel for the respondent that where a party who is well able to look after itself enters into a contract and willingly accepts terms which provide for an apportionment of risk, it is very likely that the inclusion of those terms will be held to be fair and reasonable (*Salvage Association* v *CAP Financial Services Limited* [1995] FSR 654, at p 656 (cited with approval in *Watford*, paras 63-65); *Granville* at para 31; *Goodlife*, paras 63 and 103).

[19] The starting point is the content of the clause itself. It sets out in clear non-technical terms not only the extent of the exclusion or limitation of liability, but also the reasons for it in the context of risk and why parties accept that the respondent as the supplier of finance for the purchase of goods which have been chosen by the appellant should not bear that risk. Moreover, it expressly provides that the appellant will obtain any warranties it requires from the supplier of the goods and that the appellant expressly agrees that if the risk was to be allocated differently, ie in whole or in part upon the respondent, it would have charged higher payments or not have entered into the agreement at all. Moreover, at the place where the agreement was to be signed by the hirer specific mention is made of the exclusion or limitation of liability under reference to Clause 8.

[20] Turning to the first ground of appeal, I acknowledge that the bargaining position of the parties to a commercial contract is of importance. That was also accepted by the sheriff. The appellant proposes further new findings in fact which it maintains are pertinent to this issue:

1. That the respondent provided the appellant, by email, with the hire purchase agreement. (This, it was submitted, was relevant in showing that the terms of the agreement were presented on a take it or leave it basis.);

2. That when the agreement was entered into the appellant was a recently incorporated company which was able to provide limited evidence of its financial standing and, as a result, was unlikely to be able to obtain funding for the transaction from another company.

In my opinion, the difficulty for the appellant is that even if these findings in fact were added, the sheriff still had a basis upon the findings to conclude, as she does, that the parties were on an equal bargaining position. In particular, the sheriff found:

> "42. The pursuer was refused finance by the defender in December 2014 because Mr John Sutherland would not provide a personal guarantee; he found finance for the pursuer elsewhere
>
> 43 Mr John Sutherland knew that he could obtain a machine from a dealer and organise finance separately".

Neither of these findings is challenged. Moreover, the sheriff discusses at length the evidence of Mr John Sutherland and concluded (para [17]) that she had:

> "no doubt that if Mr Sutherland had wanted to purchase a different crusher or obtain finance from a different provider he would have done just that. He is not a man who would leave himself with no options as the pursuer avers."

The sheriff was entitled on the evidence to reach these conclusions. Thus, in my opinion, the adding of these proposed findings in fact would not assist the appellant. In particular, their addition would not entitle this court to conclude that the sheriff was plainly wrong.

[21] Counsel for the appellant, before this court and before the sheriff, relied upon the approach of the judge at first instance in the English case of *Balmoral*. This case, submitted counsel, showed the correct approach which should be taken where the evidence is that the use of the exclusion or limitation clause is common throughout an industry and that the approach of Sheriff Principal Ireland QC in *Denholm Fishselling Ltd* v *Anderson* 1991 SLT (Sh Ct) 24 was incorrect. Counsel relied upon two passages in *Balmoral*:

> "409. So, in relation to *price*, the parties were on at least an equal footing (indeed Balmoral may have had slightly the upper hand), but on *terms* they were not. Borealis was only prepared to supply borecene, which became, as Borealis no doubt wished, Balmoral's primary raw material, on its terms. *Other suppliers, whether of borecene or ZN material were also likely to be willing to supply only on their similar standard terms* [italics added], save that Matrix's terms provided for liability of up to £1 million if negligence could be proved."

> "423. But commercial parties habitually make agreements amongst themselves that allocate risk; and the Court should not lightly treat such agreements as unreasonable. The present case is not, however, one in which the contracts made were the result of a serious negotiation as to the incidence of risk: cp the *Watford* case where that was exactly what took place. Borealis's terms were presented on a take-it-or leave it basis and Balmoral's scope for going elsewhere on any better terms was very limited (on the evidence before me to Matrix and, even with them, obtaining any substantial sum would depend on proving negligence). Whilst Borealis UK's terms were standard in the trade they are not the product of any agreed process of negotiation between representatives of sellers and buyers."

In *Denholm*, the sheriff principal dealt with the issue of non-negotiable terms as follows (p 25):

> "It was argued on behalf of the defenders that in considering the strength of the bargaining positions of the parties the sheriff had failed to have regard to the fact that the fishsellers of Peterhead have what was described as a monopoly, in the sense that they all contract on the standard conditions of sale, so that anyone who wants to buy fish at Peterhead has to do so on these terms. Since similar standard conditions apply at neighbouring ports, the intending buyer must buy fish on the standard conditions or go without. In such circumstances all the bargaining strength is on the side of the sellers, and it is unfair to allow them to take advantage of that by forcing buyers to give up the protection which they enjoy under the Sale of Goods Act. The argument is at first sight attractive, but I have come to the conclusion that it is unsound. The objection to a monopoly is not that all sales are subject to the same contractual terms, but that buyers are compelled to buy from the same seller. If that were the case at Peterhead, it might well be that buyers were in a disadvantageous bargaining position. But the fishsellers of Peterhead have no monopoly in that sense. The fact that one party tenders to the other a set of non-negotiable contractual terms is not in itself evidence of inequality of bargaining power or that the terms themselves are unfair and unreasonable. The buyer may not be able to buy fish except on the standard conditions, but he is not forced to purchase fish from a single fish salesman or prevented from discriminating between one vessel and another when deciding whether or not to buy from a particular catch. It is implicit in the 1977 Act that there can be non-negotiable contractual terms which are fair and reasonable. In the present case both buyers and sellers are substantial organisations, employing skilled and experienced staff who are capable of looking after the interests of their employers when deciding whether or not to enter into contractual

> relations. The fact that when they have decided to enter into a contract the terms of that contract are not negotiable does not show that there is a preponderance of bargaining power in favour of the seller or that the conditions are unfair or unreasonable."

It has been pointed out that the passages from *Balmoral* are *obiter* (*Goodlife*, at p 283). But, of more importance in my view, relying upon passages from previous cases can be misleading when each case must by definition turn upon its own facts and circumstances. That approach has been encouraged by Parliament which has not set out the factors in Schedule 2 as an exhaustive list of the circumstances to be taken into account. Indeed, I can envisage a circumstance where the fact that all the members of an industry group have individually decided to exclude or limit liability could of itself be evidence that the exclusion was fair and reasonable. In any event, on the facts before him in *Denholm*, I cannot fault the approach taken by the sheriff principal. In the instant case, the sheriff has considered both authorities. She has correctly identified some of the differences in the facts of each case. I cannot fault her reasoning, nor her conclusion that the fact that the terms were on a take-it-or-leave-it basis was not decisive.

[22] Turning to the second ground of appeal, I accept that there can be circumstances in which the behaviour of parties or the industry of which the supplier is a member might be a relevant consideration, where there is a recognition by their actings that suppliers regard the imposition of an exclusion or limitation of liability as not to be fair and reasonable. *Mitchell* is an example of that. The sheriff found in fact (no 77) that there is a practice within the industry, despite the wording of the agreements and the legal position, that where a customer has a complaint about a machine the finance company will try to facilitate a solution with the supplier. But implicit in that finding is, first, an acceptance of the legal position of contractual exclusion or limitation of liability and, secondly, an

acknowledgement that the finance company can only attempt to persuade the supplier to remedy any defect. It is different from the circumstances in *Mitchell* where the suppliers themselves acted in a manner inconsistent with the exclusion terms in *their* contracts and provided a remedy for *their* customers. That is in contrast with the instant case where the respondent was once removed from the contract between supplier and customer. I do not accept that this finding is of assistance to the appellant.

[23] I accept that the parties assumed that Scotia would supply a crusher of satisfactory quality, but that misses the point. The whole purpose of Clause 8 is to cover the *possibility* that, no matter the assumption of the parties, the crusher is not of such quality. The clause goes into great detail about the risk of that occurring. I do not understand how this assumption assists the appellant.

[24] I do not accept the appellant's characterisation and relevance of the respondent as part of a "one stop shop", being the close legal relationship between the respondent and Scotia, the supplier of the crusher. I agree with senior counsel for the respondent that this submission is misconceived. That individual limited liability companies are by definition separate legal entities is not to be dismissed as merely a technical point. They are, instead, a fundamental matter of UK company law (*Bank of Tokyo Limited* v *Karoon* [1987] AC 45, at p 64; *Adams* v *Cape Industries plc* [1990] Ch 433). In any event, the express terms of Clause 8 make clear that the supplier of the crusher, Scotia, is different from the provider of the finance, the respondent. The appellant could therefore be in no doubt that it was contracting with two separate legal entities. Counsel for the appellant submitted that we should make a number of additional findings in fact. Of immediate relevance are the following findings proposed:

1. The respondent is the holding company of a range of subsidiaries operating *inter alia* in the field of construction equipment and plant sales;
2. At all material times Alan Thomson and Harold Hugh Montgomery were directors of Scotia Plant Limited;
3. Mr Thomson is the "Group Finance Director" of the respondent;
4. Mr Montgomery and his family trusts own the controlling interest in the respondent;
5. Salespersons employed by those companies in the Ballyvesey group of companies which supply plant and equipment, such as Scotia, are instructed to inform potential customers that finance for the transaction is available from the respondent;
6. The respondent makes a profit in transactions in which it provides finance;
7. The plant and equipment salespersons receive a bonus from the respondent, in the form of vouchers, if the customer enters into a finance agreement with the respondent;
8. The respondent does not pay a bonus to those salespersons if the customer's finance agreement is with another provider.

I accept that there was evidence before the sheriff which would entitle this court to make all of these findings. But this court also has to be satisfied that they are relevant to the findings in law which the sheriff made or should have made. In my opinion, each of them offers no assistance to the appellant. They show that there is a direct link between the trading practices of the respondent and of Scotia, but they do not undermine the conclusion I have reached. Indeed, as senior counsel for the respondent observed, there was no evidence to the effect that Scotia would supply the crusher to the appellant only on the basis that the

latter took finance from the respondent. The sheriff found in fact (no 23) that while Scotia's Mr Nicolson was instructed generally to advise customers that finance would be available from the respondent, he could not recommend it. That significantly dilutes the import of the proposed findings in fact, even if they were relevant in law.

[25] I do not understand the relevance of the points the appellant makes about Clauses 8.5 and 8.6. The question before the sheriff in relation to Clause 8 was whether Clause 8.4 validly and effectively excluded liability for any breach of the satisfactory quality term relied upon by the appellant. Doubtless, to answer that question the sheriff had to consider Clause 8 as a whole, but that did not require her to conduct a detailed analysis of these two sub-clauses. As senior counsel for the respondent pointed out, no evidence was led by either party, nor any argument advanced by either of them, as to the validity or otherwise of either sub-clause; nor indeed in his submissions before this court did counsel for the appellant point to any section of the sheriff's judgment in this connection, nor suggest that she had made any error. That was because she was not required to consider them.

[26] I do not consider it necessary or appropriate to consider the third ground of appeal. It was not a matter raised before the sheriff; nor was evidence led about it. In any event, as a matter of law I do not consider it to be relevant. Clause 3.6 of the agreement provides that the appellant must thoroughly check the goods and notify the respondent of any apparent problems within two working days of delivery, in the absence of which the respondent will assume the appellant's complete satisfaction with the goods. The factor provided for in paragraph 1(d) of Schedule 2 of the 1977 Act is where the limitation or restriction of liability is excluded by reason of the condition with which, *ex hypothesi*, it is impractical to comply. But in the instant case, the exclusion is a blanket one, not dependent upon a failure to

comply with Clause 3.6. Indeed, it might be said that the clause should be treated for the purposes of this contract as *pro non scripto*, standing the blanket exclusion of liability.

Conclusion

[27] In the whole circumstances I am satisfied that the sheriff was entitled to come to the decision that the respondent's exclusion of liability was fair and reasonable. I can detect no error in law.

The Supply of Goods (Implied Terms) Act 1973.

The respondent's title to the goods

[28] The respondent did not own the stone crusher. Instead, it was owned by Santander Asset Finance Limited. In terms of a Master Deed of Assignment Santander agreed that the respondent could sub-hire goods to its customers. The hire purchase agreement provided, per clause 2, that provided the appellant was not in breach of its obligations under the agreement it might exercise its option to purchase the crusher on the date on which the final basic rental was due. There is no finding in fact which provides the date when the final basic rental was due. There is a finding in fact that the date of the agreement is 26 August 2014 and that a copy of it was produced as no 5/41 of process, although I observe that the production is in fact a copy of an agreement signed only by the directors of the appellant, not the respondent, and that the date when the rental payments were due is not given. Nevertheless, it is plain that given that the basic rentals, as they are described, were 60 in total and payable monthly the final basic rental would not be due until August 2019. The significance of the Master Deed is that title in the goods remained with Santander. The sheriff found in fact (1) that the respondent has had a relationship with Santander for

25 years during which time Santander has funded many £millions of assets for the respondent on the basis of sub-hire agreements – or back to back deals, as they are known; (2) that the hire purchase agreement was a sub-hire agreement in terms of the Master Deed; (3) that the appellant was unaware of the deal, but that that is normal practice; (4) that the respondent has business relationships with five banks, including Santander, who provide funding by way of back to back deals, such arrangements being standard within the industry; (5) that an earlier hire purchase agreement (in June 2014) between the parties was funded by Barclays Bank on the same back to back basis; (6) that the use of the Master Deed allows the respondent and the funding bank to treat each asset as an additional item on the Master Deed, rather than replicating full terms and conditions for each transaction; (7) that title to the asset in question does not transfer to the respondent's customer until all payments are made and the end of the agreement's term is reached; (8) that the customer or end-user has a right of quiet possession over the asset provided the customer is not in default; (9) that as is required in terms of the Master Deed the respondent completed a certificate dated 11 September 2014 for Santander in relation to the crusher; (10) that Santander was fully aware of the sub-hire agreement between the parties; (11) that Santander has and had no intention of preventing the appellant from enjoying its rights under the contract with the respondent provided there was no default; (12) that the appellant's quiet possession of the crusher was not in jeopardy; (13) that the appellant could not exercise its option to purchase the crusher until the end of the hire purchase agreement on 15 August 2019; (14) that as at 26 May 2017 the appellant had 27 payments still to make in terms of the agreement with the respondent; (15) that the respondent's practice is to pay off the funder a month or two before the end of the term of the back to back deal and to obtain the clearance certificate from the funder prior to the final payment being made by the

customer; (16) that the respondent intended to follow that course of action in relation to its agreements with Santander and with the appellant, and (17) that title to the crusher would not pass to the appellant unless and until it had exercised its option to purchase and paid the relevant fee.

[29] By letter dated 26 May 2017 to the respondent's agents, the appellant's agents gave notice of rescission of the agreement. Two reasons were given. The second reason averred a breach of section 8(1)(a) of the Supply of Goods (Implied Terms) Act 1973, but is no longer insisted upon. The first reason was in the following terms:

> "We note from the terms of the hire purchase agreement between your client and Santander Asset Finance plc ('Santander') in respect of the Parker crusher (in respect of which your client has entered into a hire purchase agreement with our client) your client is expressly prohibited from selling, underletting, or otherwise dealing with the crusher, in terms of clause 5.9. Breach of that term entitles Santander to terminate the agreement and repossess the Crusher.
>
> The existence and terms of the hire purchase agreement in respect of the crusher between your client and Santander *ex facie* is a charge/encumbrance over the crusher. This charge/encumbrance was not disclosed to our client at the time the contract between it and your client was entered into. We have repeatedly called upon you to produce vouching that the crusher is free from any charge or encumbrance. You have failed to do so.
>
> Your client is, and has from the outset of the contract between our clients, accordingly [sic] in breach of the term implied by Section 8(1)(b)(i) of… ("the 1973 Act"), which breach is plainly material. This material breach has persisted from the outset of the contract. You will appreciate that this implied term cannot be excluded by any contractual term."

The respondents did not accept the purported rescission. The question before the sheriff was whether or not the purported rescission was lawful.

[30] Section 8(1) of the 1973 Act (as it was at the time the parties entered into the contract) is in the following terms:

> "Implied terms as to title.
> (1) In every hire-purchase agreement, other than one to which subsection (2) below applies, there is—

(a) an implied term on the part of the creditor that he will have a right to sell the goods at the time when the property is to pass; and

(b) an implied term that—

(i) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the person to whom the goods are bailed or (in Scotland) hired before the agreement is made, and

(ii) that person will enjoy quiet possession of the goods except so far as it may be disturbed by any person entitled to the benefit of any charge or encumbrance so disclosed or known."

Sheriff's decision

[31] The sheriff considered that the terms of section 8(1)(b) must be taken together, because the word "term" was in the singular and the two parts of the sub-section are linked by the word "and". Parliament's intention was to prevent the situation where the hirer has his quiet possession of the goods disturbed by a third party with rights about which the hirer has no knowledge. The appellant had no option to exercise a right to purchase the goods as at the date of the notice. In the absence of a clear indication to the appellant that the respondent would be unable to pass title once the option was exercised, there was no anticipatory breach of contract which would justify rescission. Indeed, on the evidence the opposite was more probable.

The appellant's submissions

[32] Counsel for the appellant submitted that the sheriff's construction of section 8(1)(b) was wrong. The correct construction was that section 8(1)(b)(i) and section 8(1)(b)(ii) create separate obligations. The respondent was therefore in breach of contract in failing to disclose the existence of the back to back agreement with Santander, such breach being material (*Scotmore Developments Ltd* v *Anderton* 1996 SC 368). The sheriff's construction necessarily means that section 8(1)(b)(i) is redundant. "Encumbrance" denotes some

restriction on the respondent's ability to pass title not amounting to a charge over the goods. It is difficult to conceive a greater restriction than the respondent being unable to pass title because it rested with Santander (*Robertson* v *McGregor* (1840) 3D 213).

Discussion

[33] The relationship between Scots Law and the statutory provisions for the sale of goods has never been a comfortable one. By no means the least of the problems for Scottish sensibilities was that the draftsman, Sir Mackenzie Chalmers, had as his intention the reproduction of the existing English law (*"Codification of Mercantile Law"* (1903) 19 LQR 10). There have been many Scottish critics, not least Professor T B Smith and Professor Gow. The latter was moved to write in 1964 (*The Mercantile and Industrial Law of Scotland*, p 75):

> "At first sight it would appear as if any reconciliation between our law and the provisions of the [Sale of Goods Act 1893] is impossible. This must be so if we are content passively to accept the Act and actively to forget our own. This need not be so if in the knowledge that our law is much better suited to current mercantile conditions we begin to remember and apply it. The Act, even on its own merits, looks to the past. Our common law with its healthy instinct for simplicity and efficiency is always current if we choose to make it so."

Section 12 of the 1893 Act introduced statutory warranties on title in similar terms to (but not exactly the same as) the warranties contained in section 8(1) of the 1973 Act. Professor Gow (op cit, p 144-145) considered that section 12(2) and section 12(3), which introduced the concepts of the "enjoyment of quiet possession" and "charge or encumbrance", in the context of Scots Law could not be given a distinct and separate meaning from section 12(1) which introduced the concept of the right to sell. He concluded that so far as Scots Law is concerned "the whole of section 12 is an excrescence, adding nothing to but rather both in thought and language confusing the common law".

[34] "Charge or encumbrance" may well be a term of art in English Law (*Stroud's Judicial Dictionary*, 2nd edition, pp 289- 291; p 953). It seems to encompass, for example, a lien, a garnishee order and a lease. Two of these are known in Scots Law, but their substance may – and probably does – differ. In Scotland, a charge, ignoring its relevance in criminal law or the law of diligence, is a general term for a bond and floating charge. An "incumbrance" is generally known in the context of the transfer or the grant of a fixed security over heritable property by way of a search in the Register of Sasines (before land registration) and the Register of Inhibitions and Adjudications. The terms may well have other uses, but for present purposes the important point is that the historical derivation and development are likely to have been different as between Scotland and England. The only authority cited to us on this issue was *Robertson* v *McGregor*, a case about a search in the Register of Sasines.

[35] We did not have the benefit of a full citation of authority on the terms "charge" and "encumbrance". As regards senior counsel for the appellant, that was understandable given his submission, which the sheriff accepted, that the two parts of section 8(1)(b) are part of the one term. Counsel for the appellant merely submitted, as I have said, that having no right to sell is by definition an encumbrance and is relevant because section 8(1)(b) contains two divisible warranties. The extent to which the terms should be treated as having the same meaning under Scots Law as under English Law is therefore an argument for another day. All that I would say at this juncture is that the Sale of Goods Act 1893 and its successors did not, whether intentionally or by mere advertence, abolish the Scots common law which preceded it. It is therefore still open for Scottish courts not to accept English definitions of the terms without a close study of their derivation and nature and a consideration of whether they should be adopted as the law of Scotland.

[36] For the purposes of this appeal, in my opinion section 8(1)(b) has no application to the facts. I have reached that view for the following reasons.

[37] First, by definition a hire purchase agreement is a contract for the hiring of goods under which there is conferred on the purchaser an option to purchase the goods. In practice, hire purchase is a device which gives the hirer possession and the use of the goods over a period during which the seller retains title to the goods as security for the unpaid price. It is not a contract of sale until the hirer exercises the option to purchase the goods. Accordingly the law on sale of goods has no application to it and authorities on the construction of that law, to which Sheriff Holligan has referred, in my opinion must be viewed with caution when considering their relevance to a hire purchase agreement. Section 8(1)(a) makes sense because it warrants that the seller owns the goods and has title to sell at the date when the option is to be exercised. It does not make sense that the seller must warrant to the purchaser that he has title to sell before that date. Indeed, I would go further: if Parliament had wanted the seller to warrant that he had the right to sell during the whole period of the agreement it would surely have said so in section 8(1)(a). To construe section 8(1)(b) as imposing such a warranty makes no sense, either intellectually or commercially, standing the underlying character of a hire purchase agreement. It also follows that an encumbrance must be something which prevents the transfer of ownership but which falls short of being no right to sell. There might, for example, be a right to sell which is subject to some underlying right in favour of a third party, which undermines the elements of ownership to which the purchaser would otherwise be entitled, such as a competing right of possession. A lien might be an example of that. In any event, as senior counsel said, by definition an encumbrance must *prevent or hinder* something. In the present context that can only be the exercise of the option to purchase. That cannot be prevented or

hindered until the end of the agreement because it provides that the option cannot be exercised before then.

[38] Secondly, as the sheriff decided, the wording of section 8(1)(b) does not support the appellant's construction. Section 8(1)(b) uses the word "term", not "terms", and the two parts of the sub-section are linked by the word "and".

[39] Thirdly, the punctuation in section 8(1)(b) does not support the appellant's construction. Section 8(1)(a) is intended to be a stand-alone implied term. It ends with a semi colon before the word "and" which links it to section 8(1)(b). In contrast, section 8(1)(b)(i) ends with a comma before the word "and" which links it to section 8(1)(b)(ii).

[40] Fourthly, as the sheriff concluded, Parliament's intention was to prevent the situation where the hirer has his quiet possession of the goods disturbed by a third party with rights about which the hirer has no knowledge - and that being during the period of the agreement from its commencement until the date when the hirer exercises the option to purchase.

[41] It necessarily follows from that analysis that there was no breach by the respondent, never mind a material one (sec 12A). Nor was there any evidence that the respondent would be unable to pass title on the date that the appellant exercised its option. Indeed, on the sheriff's findings in fact, which the appellant does not dispute, all the evidence pointed in the other direction.

[42] I have considered the helpful analysis by Sheriff Holligan of the history of the relevant provisions and his conclusions from it. I am however not persuaded that they defeat the reasons I have given for my conclusion that there was no breach.

Summary

[43] The sheriff was invited to answer seven questions and answered each of them as follows:

1. Whether the parties' contract carried the "satisfactory quality term" relied upon by the appellant or whether said term was validly and effectively excluded by the express terms of the parties' contract.

Answer: The parties' contract carried the "satisfactory quality term" relied upon by the appellant, but said term was validly and effectively excluded by the express terms of the parties' contract.

2. In the event that said term forms part of the contract, whether Clause 8.4 validly and effectively excluded liability for any breach.

Answer: Clause 8.4 of the contract validly and effectively excluded liability for any breach of the implied term as to quality.

3. Whether the parties' contract carried a term which required that the respondent would have the right to sell the goods at the time when the property was to pass to the appellant.

Answer: The parties' contract carried a term which required that the respondent would have the right to sell the goods at the time when property was to pass to the appellant.

4. In the event that said term was included, whether the respondent was likely to breach it come the relevant time.

Answer: The respondent was not likely to breach that term come the relevant time.

5. Whether the respondent was in material breach of contract as at 26 May 2017.

Answer: The respondent was not in material breach of contract as a result of the breach of the implied term implied by section 8(1) of the Supply of Goods (Implied Terms) Act 1973.

6. Whether the appellant was entitled to purport to rescind the contract on 26 May 2017 or whether the appellant by doing so was in material breach of contract.

Answer: The appellant was not entitled to rescind the contract on 26 May 2017 as a result of any breach of the implied term as to title and was in material breach of contract by so doing.

7. Whether, if the appellant was in material breach of contract, the respondent is entitled to damages.

Answer: The appellant being in material breach of contract by reason of its rescission on 26 May 2019, the respondent is entitled to damages for any loss arising therefrom.

I agree with all of the sheriff's answers. Accordingly, I would refuse the appeal. Expenses should follow success. Parties were agreed that sanction be allowed for the instruction of senior and junior counsel.

SHERIFF APPEAL COURT

[2020] SAC (Civ)
GLW-CA187-17

Sheriff Principal Pyle
Appeal Sheriff W Holligan
Appeal Sheriff AG McCulloch

OPINION OF APPEAL SHERIFF W HOLLIGAN

in the cause

CAITHNESS FLAGSTONE LIMITED, a company incorporated under the Companies Acts (Registration No SC465433) and having its registered office at Westerlea, Miller Avenue Wick, Caithness, KW1 4DF

Pursuer and Appellant

against

BALLYVESEY HOLDINGS LIMITED, a company incorporated under the Companies Acts (Registration No 03067227) and having its registered office c/o Montracon Limited, Carr Hill, Doncaster, South Yorkshire, DN4 8DE

Defender and Respondent

Act: McIvride QC, instructed by Harper McLeod LLP
Alt: Borland QC and Manson, advocate, instructed by MacRoberts LLP

28 January 2020

[44] I am grateful to Sheriff Principal Pyle for setting out the issues in this matter. I gratefully adopt his exposition of the facts. I agree with the conclusion as to the Unfair Contract Terms Act 1977. As I differ as to the interpretation of section 8 of the Supply of Goods (Implied Terms) Act 1973 ("the 1973 Act") I require to explain my reasons.

[45] Section 8 has undergone significant amendment since its original enactment. As first enacted section 8 provided as follows:

"**Implied terms as to title**

(1) In every hire – purchase agreement, other than one to which subsection (2) below applies, there is –

(a) an implied condition on the part of the owner that he will have a right to sell the goods at the time when the property is to pass; and

(b) an implied warranty that the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the hirer before the agreement is made and that the hirer will enjoy quiet possession of the goods except so far as it may be disturbed by any person entitled to the benefit of any charge or encumbrance so disclosed or known".

[46] Section 8(1) was entirely recast by paragraph 35 of schedule 4 to the Consumer Credit Act 1974 ("the 1974 Act") so as to read:

"**Implied terms as to title**.

(1) In every hire – purchase agreement, other than one to which subsection (2) below applies, there is –

(a) an implied condition on the part of the creditor that he will have a right to sell the goods at the time when the property is to pass; and

(b) an implied warranty that –

(i) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the person to whom the goods are bailed or (in Scotland) hired before the agreement is made, and

(ii) that person will enjoy quiet possession of the goods except so far as it may be disturbed by any person entitled to the benefit of any charge or encumbrance so disclosed".

[47] The most obvious change is the breaking down of section 8(1)(b) into two parts so as to form section 8(1)(b)(i) and (ii). Quite why the subsection was so divided is not clear and why it was done by the 1974 Act is equally unclear. The section was further amended by paragraph 4(2)(b) of schedule 2 to the Sale and Supply of Goods Act 1994 ("the 1994 Act"). Section 8(1) and (3) provided as follows:

"**Implied terms as to title**.

(1) In every hire-purchase agreement, other than one to which subsection (2) below applies, there is –

(a) an implied term on the part of the creditor and he will have a right to sell the goods at the time when the property is to pass; and

(b) an implied term that –

> (i) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the person to whom the goods are bailed or (in Scotland) hired before the agreement is made, and
> (ii) that person will enjoy quiet possession of the goods except so far as it may be disturbed by any person entitled to the benefit of any charge or encumbrance so disclosed or known".

[48] One of the changes brought about by this amendment was to substitute the word "term" for condition and warranty. Another was the introduction of section 12A into the 1973 Act (see paragraph 4(8) of schedule 2 to the 1994 Act) which deals with material breach of contract in contracts to which the law of Scotland applies and to which I will refer later in more detail. Section 12A is the hire-purchase equivalent of section 15B of the Sale of Goods Act 1979 ("the 1979 Act"). The amendments, up to and including those brought about by the 1994 Act, comprise the text relevant to the present case. Section 8 has been yet further amended by the Consumer Rights Act 2015 but those amendments are not applicable to the present case given the dates of the relevant contract.

[49] The key issues in this part of the case relate to the interpretation of section 8(1) and, in particular, section 8(1)(b)(i) and (ii). Section 8 of the 1973 Act is very similar to section 12 of the Sale of Goods Act 1893 ("the 1893 Act") (later section 12 of the 1979 Act). As originally enacted, section 12 of the 1893 Act contained three separate provisions as to title: (1) the right to sell the goods when property is to pass; (2) an implied warranty that the buyer shall have and enjoy quiet possession; (3) an implied warranty that the goods shall be free from any charge or encumbrance. Section 12 of the 1979 Act now reflects a layout similar to section 8, having undergone amendments similar to those I have outlined above.

[50] In relation to hire-purchase contracts, similar provisions were to be found in section 8 of the Hire–Purchase Act 1938 (1 and 2 Geo 6.C.53) and, of more importance,

section 17 of the Hire-Purchase (Scotland) Act 1965 ("the 1965 Act"). It is worth setting out section 17(1) and (5) which provided as follows:

> "**Implied stipulations**
> 17(1) In every hire-purchase agreement and in every conditional sale agreement there shall be implied –
> (a) a stipulation on the part of the owner or seller that he shall have a right to sell the goods at the time when the property is to pass;
> (b) a stipulation that the hirer or buyer shall have and enjoy quiet possession of the goods;
> (c) a stipulation that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass.
> …
> (5) In relation to every hire-purchase agreement and every conditional sale agreement the stipulations referred to in subsections (1)(a)… shall be deemed to be material to the agreement."

It is noteworthy that the three conditions in section 17(1) are clearly separate and that section 17(1)(c) uses the words "shall be free from" any charge or encumbrance, suggesting a future tense.

[51] At the basic level, a hire-purchase contract provides for regular payments by the hirer to a finance company, the latter being the owner of the goods. At some point, upon satisfaction by him of his obligations pursuant to the contract, the hirer is entitled to purchase the goods. A good example of that basic structure is to be found in a case referred to by the sheriff: *Karflex Limited* v *Poole* [1933] 2 KB 251. Put shortly, in that hire-purchase contract, it transpired that the person from whom the finance company (plaintiff) had acquired the goods had done so dishonestly and that the finance company accordingly did not have title to the goods (car). The defendant (the hirer) failed to maintain regular payments. The finance company then rescinded the agreement and took action against the hirer for the losses which it said it had suffered. The defendant pleaded that as the plaintiff had no title it was in breach of the hire-purchase agreement and was not entitled to damages from the defendant, furthermore, the defendant was entitled to the return of his deposit.

The plaintiff argued that any obligation as to title arose only at the point of sale which had not occurred. The defendant succeeded. The agreement (clause 15(b)) provided that the hirer was entitled to exercise his right to purchase the goods at any time. As it was a condition of the contract that the plaintiffs were the owners of the goods from the date of the agreement the plaintiff was in breach of the agreement.

[52] It seems to me that there are three issues to consider in this matter:

(1) Whether section 8(1)(a) and section 8(1)(b)(i) and (ii) provide separate implied terms?

(2) The meaning of the words "goods are free and will remain free…"; and

(3) The meaning of "charge or encumbrance".

[53] Before turning to the legal issue, I return to what I consider to be the key facts relevant to this aspect of the case. We were referred to the terms of the hire-purchase contract between the parties (5/2/41 of process; number 20 of the appeal print) ("the HP agreement"). It does not appear however that the contract between the respondent and Santander (6/1 of process) was produced to us ("the master agreement"). We are therefore dependent upon the sheriff's summary of the master agreement and its background which is found in findings in fact 59-71. What strikes me is that the HP agreement does not say, in terms, that the appellant is the owner of the goods although that is the clear implication. The HP agreement provided for 60 monthly payments (5 years); £1,249.75 for the first 12 months and for the remainder, payments of £4,998.99. Unlike the *Karflex* case, the hirer's option to buy was not exercisable until payment of all of the rental sums. That would not occur until August 2019 (finding in fact 72). The appellant would then be entitled to purchase the goods on payment of an option fee of £30 (provided it had otherwise complied with the terms of the HP agreement). The letter of rescission was dated 26 May 2017, well

within the five year period. The master agreement was dated 2 July 2012 which predates the hire-purchase agreement. The hire-purchase agreement ended on August 2019 but the master agreement *quoad* this contract would not end until October 2019. The master agreement provided that title would remain with Santander during the currency of the master agreement as it applied to the HP agreement. We were told that the arrangement in this case by which a party such as the respondent, in effect, "offloads" the financing of the transaction to another finance company is very common commercial practice. As a matter of fact, the sheriff held that, had the appellant exercised the option to purchase, an arrangement to transfer title would have been reached. Also, as a matter of fact, the appellant's right to quiet possession of the goods was never interfered with, either by the respondent or a third party, nor was its right to quiet possession threatened.

[54] Returning to the legal issues, I agree with senior counsel for the appellant that section 8(1) and (2)(i) and (ii) imply different conditions into the contract. In particular, paragraphs (i) and (ii) are disjunctive not conjunctive. Section 8(1)(a) and (1)(b)(i) both deal with events prior to the passing of property. That is what the wording clearly says. In my view, section 8(2)(b)(ii) is not so limited. Once property has passed, should quiet possession be challenged, the now owner will have a right of recourse against the seller. It seems to me that section 8(1)(a) and (b)(i) and (ii) deal with different things (for a similar analysis of section 12 of the 1893 Act see *Microbeads AG* v *Vinhurst Road Markings* [1975]1 WLR 218 per Roskill LJ at p 225F-H). For example, I do not think it follows that interruption of quiet possession necessarily requires there to be an undisclosed charge or an encumbrance. That would be to narrow the effect of section 8(1)(b)(ii). Although it is speculation on my part I wonder whether that is the explanation as to why the draftsman divided up section 8, to make clear the separate components of section 8. Section 17 of the 1965 Act was careful to

keep separate the three implied conditions. I find it difficult to see why the latter two would be combined with the effect of restricting their ambit. I am also not persuaded that the punctuation in section 8 is material in this context.

[55] In my opinion, the second and third questions can be taken together. Put shortly, the appellant's argument seems to me to be that the existence of the master agreement and its application to the HP agreement means that when the HP agreement was entered into the respondent never had title to the goods and was therefore in breach of section 8. It seems to me there is no getting away from the fact that that the use of the words "are free, and will remain free…" suggest a state of affairs as at the date of the hire-purchase agreement, namely August 2014. Referring back to *Karflex*, if the hirer could at any time exercise the right to buy I can see the purpose in providing a condition which protects the hirer, should he exercise the right to purchase the goods at his discretion but that is not the case here. The hirer's right to purchase was not exercisable by it until five years after the commencement of the contract. The construction maintained by the appellant means that, should there be an encumbrance or charge over the goods at the date of the agreement, there would be a breach by the finance company of section 8(1)(b)(i). The editors of *Chitty on Contracts* ((32nd Edition) at paragraphs 44-078) rather tentatively suggest such a conclusion. (That the paragraph refers to sale of goods does not appear to me to be material on this point.) However, it seems to me that the words "charge or encumbrance" are the vocabulary of security or heritage and do not, I suggest, sit easily with the law of Scotland as to corporeal moveables. I do not find the case of *Robertson* v *McGregor* (1840) 3D 213 to be helpful. That was the only authority referred to as to the meaning of "charge or encumbrance". In the same passage in Chitty the editors comment that, in English law, interpreting the section by reference to analogies with land law may not be helpful (see also *Microbeads* above). I also note that the

subsection relates to "the goods" which must be free from a charge or encumbrance: it does not refer to title. As I say, the appellant's complaint is one of ownership, not security. The ownership, and the right to convey ownership, is dealt with in section 8(1)(a) and that only becomes an issue at a point later than the execution of the agreement. It seems to me it would be odd if ownership was, in this context, covered both by section 8(1)(a) and 8(1)(b)(i) and (ii). I am not persuaded that the facts of this case lead to the conclusion that the goods were subject to a charge or encumbrance by reason of the master agreement. If that is correct there is no breach of section 8(1)(b)(i). It follows that, on the evidence, there was no breach of section 8(1)(b)(ii). In her judgement the sheriff concluded (at paragraph [36]) that section 8(1)(b) contains one condition and that section 8(1)(b) deals with the situation where the hirer has his quiet possession disturbed by a third party with "rights he does not know about". For the reasons I have given I respectfully disagree.

[56] If one then applies this analysis to the facts of this case, nonetheless on this issue, it appears to me that the appellant fails. The evidence is that, at the point at which the appellant would be entitled to purchase the goods, the respondent would have "a right to sell the goods" (section 8(1)(a)). The goods were not charged or encumbered and the appellant's quiet enjoyment was not disturbed.

[57] In the event that I am wrong there remains the issue of whether a breach would amount to a material breach of contract entitling the appellant to rescind (see section 12A of the 1973 Act). In contract conditions, English law maintains a distinction between conditions and warranties, a distinction maintained in section 8(3). Section 8(1)(a) was a condition; section 8(1)(b)(i) and (ii) were warranties. Scots law has no such distinction. Section 17(5) of the 1965 Act expressly provided that breach of section 17(1)(a) (the right to sell when property is to pass) is a material stipulation of the contract. By extension it seems

to me the section intended that breach of the other two conditions was not a material breach. There is no such express provision in the 1973 Act. Section 12A avoids the condition/warranty distinction but it does not, in terms, say whether breach of a particular term would amount to a material breach of contract. I agree with counsel that the general common law rules apply and that attention should focus on the nature of the breach rather than its consequences (*Scotmore Developments Ltd* v *Anderton* 1996 SC 368). On this issue the sheriff concluded, as a matter of fact, that the breach was not material and set out at paragraph [52] her reasons for so doing. In short, the mere existence of the master agreement was not a material breach of contract. I cannot fault either her conclusion or her reasoning on this point.

[58] It follows, although for different reasons, I agree with the conclusion reached by the sheriff on this point. Overall, I agree that the appeal falls to be refused.

SHERIFF APPEAL COURT

[2020] SAC (Civ)
GLW-CA187-17

Sheriff Principal Pyle
Appeal Sheriff W Holligan
Appeal Sheriff AG McCulloch

OPINION OF APPEAL SHERIFF AG MCCULLOCH

in the cause

CAITHNESS FLAGSTONE LIMITED, a company incorporated under the Companies Acts (Registration No SC465433) and having its registered office at Westerlea, Miller Avenue Wick, Caithness, KW1 4DF

Pursuer and Appellant

against

BALLYVESEY HOLDINGS LIMITED, a company incorporated under the Companies Acts (Registration No 03067227) and having its registered office c/o Montracon Limited, Carr Hill, Doncaster, South Yorkshire, DN4 8DE

Defender and Respondent

Act: McIvride QC, instructed by Harper McLeod LLP
Alt: Borland QC and Manson, advocate, instructed by MacRoberts LLP

28 January 2020

[59] I have had the opportunity of considering the opinions of Sheriff Principal Pyle and of Sheriff Holligan. For the reasons primarily stated by the Sheriff Principal, I too would refuse this appeal.