OUTER HOUSE, COURT OF SESSION

[2024] CSOH 75

CA83/23

OPINION OF LORD RICHARDSON

In the cause

RENFREWSHIRE COUNCIL

Pursuer

against

HR 150 LIMITED

First Defender

ASTON DARBY HARBOUR PROPERTY LIMITED

Second Defender

and

TDEH LIMITED

Third Defender

Pursuer: Wolffe KC, Massaro; Ledingham Chalmers LLP
First Defender: Dean of Faculty KC, Breen; Brodies LLP

2 August 2024

Introduction

[1] This case concerns a question as to the nature of an obligation contained in the lease of a disused car park in Paisley.

[2] The background to the lease is relatively involved.

[3] The third defender is the owner of the carpark at Harbour Road, Paisley. The third defender purchased the land on 28 March 2022 for £155,000. The previous owner of the land, Drake Estates Property Company Limited ("Drake"), from whom the third defender purchased the land, was then in liquidation. The third defender was not represented in the proceedings before me.

[4] The second defender was the owner of the car park before Drake. When the second defender was the owner, it entered into a purchase agreement with the first defender and a company related to the second defender called Aston Darby Sterling Limited ("ADSL"). The agreement was signed on 20 June 2018. The second defender and ADSL share the same sole director and shareholder – Mr Leigh Heywood. In essence, the purchase agreement regulated an investment scheme whereby the first defender invested money into a carpark venture owned and operated by members of the group of companies of which the second defender and ADSL were both part.

[5] In terms of clause 2 of the purchase agreement, the second defender agreed to grant the first defender a lease of 150 parking spaces within the carpark for a term of 175 years in exchange for a Purchase Price of £3,750,000. The purchase agreement provided that the second defender would deliver a lease in agreed terms to the first defender. The first defender agreed to enter into a management agreement (again in agreed terms) with a company called Aston Darby Harbour Parking Limited ("ADHPL"). At the time, ADHPL was also related to the second defender with Mr Heywood being its sole director and shareholder. In terms of the purchase agreement, the first defender also undertook to grant a sub-lease (in agreed terms) of the same 150 parking spaces in favour of ADSL.

[6] The lease was signed by the first and second defenders on 20 June 2018 and was registered in the Books of Council and Session on 18 October 2018. The lease bears to have

commenced on 20 June 2018 and is due to terminate on 19 June 2193. In terms of the lease, it was granted in consideration of payment of a premium by the first defender of £3,750,000. The rent payable by the first defender under the lease is £1 per annum. There is no provision within the lease for rent review. The first defender's title as tenant was registered in the Land Register on 12 July 2018 under title number REN148006.

[7] The sub-lease granted by the first defender to ADSL commenced on the same day as the lease. The term of the sub-lease was: 5 years for 50 of the parking spaces (shown coloured pink on a plan annexed to the sub-lease) and 3 years for the remaining 100 spaces (shown coloured blue on the annexed plan). The rent payable under the sub-lease was £137,500 per annum for the pink spaces and £275,000 per annum for the blue spaces. The term of the sub-lease has now expired.

[8] In terms of the management agreement concluded with the first defender, ADHPL undertook to manage and maintain the car park. ADHPL was, among other things, to market the car park and to maintain a shuttle bus between the car park and Glasgow Airport. At the expiry of the sub-lease, the first defender was entitled to become both a member and a director of ADHP. Also, once the first defender became such a member, ADHPL was obliged to pay the first defender a fair and equitable proportion of the profits generated by the car park.

[9] The plan to develop the car park proved unsuccessful. The second defender, ADSL and ADHPL all appear now to be dormant companies with no accounts having been lodged with Companies House for several years. Two other companies trading under the Aston Darby brand, Aston Darby Group Limited and Aston Darby Limited, which were owned and operated by Mr Heywood, were wound up by the High Court in England on 3 July 2020

and 9 August 2023 respectively. The second defender was not represented in the proceedings before me.

The lease

[10] Clause 2.1 of the lease provides: "In consideration of the Premium paid by the Lessee (receipt of which is hereby acknowledged by the Lessor), the Lessor leases to the Lessee the Property…". "Lessee" and "Lessor" are defined in the instance of the document as being the first and second defender respectively. Neither of those definitions makes reference to successors in title. The "Premium" is defined in clause 1 as being £3,750,000 exclusive of value added tax.

[11] Clause 3 sets out the Lessee's obligations which include: paying and indemnifying the Lessor from all rates, assessments, duties and charges (clause 3.1.1); maintaining, repairing and keeping the Property in substantial repair (clause 3.2); indemnifying the Lessor in respect of third party claims (clause 3.23); and paying a proportion of the insurance costs (clause 3.35). Clause 3.11 makes provision in respect of assignation by the Lessee: the Lessee is entitled to assign all or part of its interest in the lease without the Lessor's consent.

[12] Clause 2.2 of the lease is in the following terms:

> "2.2 The Lessee [the first defender] will have the option ('Option') to surrender its interest in this Lease in the following circumstances:
>
> 2.2.1 By giving written notice to that effect to the Lessor [the second defender] within the period of not earlier than one hundred and eighty days (180) days and not later than ninety (90) days before the tenth anniversary of the date of commencement of the Term [20 June 2018] (time being of the essence, failing which such notice will be of no effect);

> 2.2.2 In the event that the Financial Conduct Authority ('FCA') issue guidance or otherwise determine that the car park investment scheme to which this Lease and the Management Agreement is incompatible with the FCA's rules, the Lessee may at any time thereafter exercise the Option by giving written notice to that effect to the Lessor
>
> Such notice exercised under Clause 2.21 or 2.2.2 will be hereinafter referred to as a 'Termination Notice'. In the event that the Lessee services [sic] a Termination Notice, the terms of Part 3 of the Schedule will apply."

"Management Agreement" is defined in clause 1 as being the management agreement entered into between the first defender and ADHPL (see [5] above).

[13] For present purposes, the material parts of Part 3 of the Schedule are as follows:

> "In this Schedule the term 'Purchase Price' means THREE MILLION SEVEN HUNDRED AND FIFTY THOUSAND POUNDS (£3,750,000) STERLING exclusive of VAT
> In the event that the Lessee serves a Termination Notice (as defined in Clause 2.2 of the foregoing Lease) pursuant to Clause 2.2 of the foregoing Lease, the following provisions will apply
>
> 1. On the date 12 months after receipt by the Lessor of the Termination Notice (in the case of the Option being exercised pursuant to Clause 2.2.1 of the foregoing Lease) or the date one month after receipt of the Termination Notice (in the case of the Option being exercised pursuant to Clause 2.2.2 of the foregoing Lease) ('the Option Completion');
>
> 1.1 The Lessor will deliver to the Lessee a sum equal to 125% of the Purchase Price (in the case of the Option being exercised pursuant to Clause 2.2.1 of the foregoing Lease) or a sum equal to the Purchase Price (in the case of the Option being exercised pursuant to Clause 2.2.2 of the foregoing Lease);"

[14] Paragraph 1.2 of Part 3 of the Schedule make provision for the process whereby the lease is renounced by the Lessee (as defined). This involves the service on the Lessor (as defined) of various documents by the Lessee.

The purchase agreement

[15] As noted above, prior to entering the lease, the first defender entered into a purchase agreement with the second defender and ADSL. In terms of the purchase agreement, the first defender is defined as the "Buyer"; the second defender is defined as the "Seller"; and ADSL as the "Sub-tenant". In terms of clause 1, the "Purchase Price" is the sum of £3,750,000 exclusive of value added tax. "Lease" is defined as being a lease of the property in terms of the draft in Schedule Part 2 to the agreement. Clause 2.1 of the purchase agreement provides:

> "2.1 Subject to the terms of this Agreement, the Seller agrees to grant and the Buyer agrees to take the Lease of the Property in exchange for payment by the Buyer to the Seller of the Purchase Price."

[16] The provisions of clause 2.2 and Schedule Part 3 of the lease are mirrored in clause 6 of the purchase agreement which provides the first defender with a buy back option enforceable against the second defender in materially the same terms.

[17] Clause 2.3.2 of the purchase agreement provides that the first defender will grant ADSL a sub-lease and that the second defender will procure that ADSL will accept the sub-lease. "Sub-Lease" is defined in clause 1 as being a sub-lease of the Property in terms of the draft in Schedule Part 3 of the purchase agreement. In terms of clause 11 of the purchase agreement:

> "Notwithstanding any terms of the Sub-Lease:
>
> the Sub-Tenant will on Completion pay to the Buyer the sum of £1,512,500 (together with any VAT properly chargeable thereon) to the Buyer's Account, which sum represents full payment of the Rent (as defined in the Sub-Lease) for the Term (as that is defined in the Sub-Lease) and the Buyer agrees and declares that on receipt of said payment from the Sub Tenant, there shall be no liability on the Sub-Tenant to pay further sums in respect of the Rent…"

[18] It was a matter of agreement between the parties that on or around 20 June 2018, the first defender paid the second defender the sum of £2,237,500, that being the "Purchase Price" of £3,750,000 minus the sum owed to the first defender in terms of clause 11 of the purchase agreement.

The dispute

[19] The pursuer is the local authority responsible for Paisley. The pursuer is presently attempting to facilitate a proposed regeneration project known as the "Advanced Manufacturing Innovation District Scotland, South." The pursuer avers that the only viable route for the project involves the use of the car park. Accordingly, the pursuer intends to use its compulsory purchase powers under the Land Clauses (Scotland) Act 1845. Were the pursuer to acquire the car park using its compulsory purchase powers it would acquire the land subject to any condition of the lease which was binding on singular successors of the Lessor.

[20] Against this background, the pursuer has brought the present action seeking declarator that any liability to pay a sum pursuant to paragraph 1.1 of Part 3 of the Schedule to the lease was a liability personal to the contracting parties and, therefore, not a liability binding on successors in title to the second defender. The action is contested by the first defender who maintains that both the break clause and the associated payment obligation are *inter naturalia* of the lease and, therefore, are so binding.

The proof

[21] I heard the case at proof before answer.

[22] The parties entered into two Joint Minutes of Admissions in terms of which they agreed the factual background and the terms of the various documents which I have summarised above in paragraphs [3] to [18].

Kenneth Gerber

[23] The only witness, Kenneth Gerber, was led by the pursuer. Mr Gerber is a solicitor who qualified in 1980. He has been accredited by the Law Society of Scotland as a specialist in commercial leasing since 1994. He has over 35 years' experience in commercial property, leasing and property development. He wrote and is currently senior tutor in the Commercial Property Course on the Diploma of Legal Practice Course at the University of Glasgow. He is also the author of *Commercial Leases in Scotland: A Practitioner's Guide*, currently in its fourth edition.

[24] Mr Gerber gave evidence by reference to a report he had prepared for the pursuer's agents dated 10 October 2023. Essentially, Mr Gerber had been asked to give his opinion on whether the break option contained in clause 2.2 of the lease together with the consequent payment provisions were "normal rights and obligations in a commercial lease".

[25] As a matter of generality, Mr Gerber was aware, from his experience, of leases of car parks being marketed as investment opportunities. However, he had never previously seen a break option similar to that contained in clause 2.2 of the lease. Furthermore, this was the first occasion on which he had seen an option exercisable by the tenant which triggered a payment by the landlord to the tenant. Mr Gerber considered that clause 2.2 was unusual in this regard. He considered the magnitude of the payment to be made by the landlord, which could include a 25% uplift, was also not normal.

[26] In his experience, it was common for break options exercisable by a tenant to be conditional on the tenant having complied with its obligations under the lease (both financial and otherwise) up to the date on which the break option was to be exercised. Mr Gerber was asked about clauses which provided for the repayment of advance payments of rent (such as that which featured in *Marks & Spencer plc* v *BNP Paribas* [2016] AC 742). He recognised the logic of such situations in which pre-payments of rental and service charges were repaid following the exercise of a break option. But he considered that such situations were different from the present case. In this case, the rent was £1 per year but the tenant had benefit of rent payable under the sub-lease (see [7]).

[27] Under cross-examination, Mr Gerber accepted that he had never come across a lease for a car park with a term of 175 years like that which featured in the present case. He also accepted that clauses which required, following the exercise of a break clause, the repayment of advance pre-payments of rent and service charges were standard and featured in the style leases prepared by the Property Standardisation Group. To that extent, Mr Gerber conceded that he had overstated the position in his report where he had said:

> "the wording of the break option which imposes on the landlord the obligation to pay money, is highly unusual and removes any aspect of it being 'an ordinary and normal' obligation."

However, he maintained his opinion that the obligations contained in clause 2.2 were unusual. It was not merely the size of the payment which the landlord was to pay to the tenant but its nature. As I understood it, Mr Gerber's opinion was that the abnormal feature of the arrangement under consideration was the fact that the tenant had both the right to exercise the break option which would relieve it of its obligations under the lease and also the right to receive a significant sum from the landlord. Mr Gerber recognised the commercial sense of a landlord requiring to repay a tenant all or part of a grassum following

the exercise of a break option by the landlord but considered that this too would be abnormal.

Pursuer's submissions

[28] Senior counsel began his submissions by making two preliminary points.

[29] First, he emphasised that it was no part of the pursuer's case to argue that the payment obligation contained in Part 3 of the Schedule to the lease was not enforceable as a matter of contract. The pursuer's position was that the obligation on the landlord to repay the Purchase Price was only a personal obligation which had therefore remained with the original landlord. Senior counsel submitted further that the issue of the severability of the break option from the payment obligation should be understood to arise in the context of whether either or both of those obligations were transferable as a matter of property law.

[30] Second, senior counsel submitted that it was a fundamental feature of the law of property that there were controls and limits on the extent to which obligations were "real" in the sense that those obligations ran with the land. It was common ground between the parties that the question of whether an obligation was real or not fell to be determined by reference to the nature of the obligation being considered. However, senior counsel submitted that it was wrong to approach this question by reference to the intention of the parties. Such an approach was inconsistent with the basic structure of the law. Parties might have freedom of contract but that freedom did not extend to making obligations "real" which were not in their nature property obligations.

[31] In respect of the transaction of which the lease formed part, senior counsel submitted that, at its heart, it was primarily concerned with an investment by the first defender. The net value of the first defender's investment was the sum which had been paid on or about

20 June 2018 – £2,237,500 (see [18] above). The return on that investment was regulated by the terms of the various agreements between the parties: the purchase agreement, the sub-lease, the management agreement and the lease itself. In terms of the legal structure, for the first 5 years, the return was characterised as rent under the sub-lease. For the following 5 years, the first defender had a right to participate in any "Surplus" under the management agreement. Thereafter, by virtue of the first defender's right to terminate (contained in both the lease and the purchase agreement), the first defender was entitled to repayment of £3,750,000 if the Financial Conduct Authority ruled against the scheme and, in any event, after 10 years, the first defender could recover that sum plus 25%. In support of this submission, senior counsel pointed to a sales brochure which had been produced by Aston Darby (the group of companies of which the second defender, ADSL and ADHPL were all part).

Legal submissions

[32] As a starting point, senior counsel submitted that, subject to the provisions of the Registration of Leases Act (Scotland) 1857, it was a matter of agreement between the parties that a term of lease which was not *"inter naturalia"* of the lease did not transmit to singular successors. The general law, therefore, drew a distinction between obligations which were personal to the original parties and obligations which properly transmitted to their successors.

[33] Senior counsel submitted further that he did not understand it to be disputed between the parties that the key to determining whether an obligations was *inter naturalia* was the nature of the obligation concerned. In support of this senior counsel referred to the opinion of Lord Macfadyen in *Optical Express (Gyle) Limited* v *Marks & Spencer plc* (OH) 2000

SLT 644 at 650G-H. His Lordship had required to consider the question of whether an obligation was *inter naturalia* in the context of a motion for interim interdict.
Lord Macfadyen's opinion also gave support to the proposition that one factor relevant to determining whether an obligation was *inter naturalia* was whether it was customary and usual.

[34] Senior counsel emphasised that the intention of the original parties was not, in itself, relevant to the issue. In support of this senior counsel referred to the opinion of Lord Drummond Young in *The Advice Centre for Mortgages* v *McNicoll* (OH) 2006 SLT 591 at paragraphs 37 to 39. In that case, Lord Drummond Young had been considering whether an option to purchase could be regarded as *inter naturalia.* Having surveyed a number of prior authorities, his Lordship considered that it was clear that an option to purchase was not to be regarded as *inter naturalia* because such an option involves converting the rights of a tenant into a wholly different relationship. His Lordship did accept that this rule might be subject to exceptions including most notably that it was custom and practice in leases of a particular type in include such a term. However that had not been averred in the case before him. The point which senior counsel took from Lord Drummond Young's analysis was that notwithstanding the original parties' intention in respect of the option, if the nature of that obligation meant that it was not *inter naturalia,* it did not transmit to singular successors. In this regard, senior counsel also referred to what was said in paragraph 15.03 of *Leases* by Professor Robert Rennie.

[35] In seeking to flesh out the nature of the test for whether an obligation ought to be regarded as *inter naturalia,* senior counsel also referred to *Montgomerie* v *Carrick* (1848) 10 D 1387 and, in particular, to the opinion of Lord President Boyd in that case. In that case, the Inner House was considering whether an arbitration clause was enforceable against a

singular successor. In concluding that it was, the Lord President noted the distinction which fell to be drawn between obligations which were extrinsic to the lease, on the one hand, and, on the other, those which were "embodied in the essence of the lease" and which were "essential to the lease" (at page 1395).

[36] Senior counsel submitted that so far he had been unable to identify any authority which indicated that an obligation like that at issue in the present case involving the repayment of a premium or the repayment of a premium together with a 25% uplift fell to be regarded as *inter naturalia* (see, for example, Webster's *Leasehold Conditions* at 3-70 to 3-71). In this regard, senior counsel drew attention to a number of examples in which a personal obligation incumbent on a landlord to make a payment to a tenant at the end of a lease was not regarded as *inter naturalia* of the lease – *McGillivray's Exrs* v *Masson* (1857) 19 D 1099 (IH); *Ross* v *Duchess-Countess of Sutherland* (1838) 16 S 1179 (IH); *Younger* v *Traill's Trs* 1916 1 SLT 397 (OH).

Pursuer's arguments

[37] On this basis, senior counsel advanced the following three arguments.

The Registration of Leases (Scotland) Act 1857

[38] Senior counsel submitted that the fact that the lease in the present case was registered in terms of the Registration of Leases (Scotland) Act 1857 made no difference to the analysis. Read short, section 1 of that act made it lawful to register probative leases for a period of over 20 years in the Land Register of Scotland. Section 2 of the Act provided as follows:

> **"2. Registered and recorded leases effectual against singular successors in the lands let.**
>
> Leases registerable under this Act, and valid and binding as in a question with the granters thereof, which shall have been duly registered or recorded, as herein provided, shall, by virtue of such registration, be effectual against any singular successor in the lands and heritages thereby let, whose title is completed after the date of such registration:
> Provided always, that, except for the purposes of, and subject to section 20C of, this Act, it shall not be necessary to record any such lease as aforesaid, but that all such leases which would, under the existing law prior to the passing of this Act, have been valid and effectual against any such singular successor as aforesaid, shall, though not recorded, be valid and effectual against such singular successor, as well as against the granters of the said leases."

[39] Senior counsel submitted that the effect of section 2 was to make leases, which were valid and binding in any question with the granter and which had been registered under the Act, effectual against singular successors. In this way, registration had the same effect as possession in leases under the 1449 Act. This was confirmed by the wording of section 16(1) of the 1857 Act. Senior counsel submitted that this was one of the purposes of the 1857 Act: namely, to enable leases which did not satisfy the requirements of the 1449 Act to be made real and, therefore, binding on singular successors. This would apply to leases which had a nominal rent.

[40] However, section 2 was not intended to make real obligations which were not otherwise *inter naturalia.* In this regard, senior counsel drew attention to section 20B(1) of the 1857 Act which provided as follows:

> **"20B Effect of registration in the Land Register of Scotland**
>
> (1) Registration in the Land Register of Scotland has the effect of—
>
> > (a) vesting in the person registered as entitled to the lease a real right in and to the lease and in and to any right or pertinent, express or implied, forming part of the lease, subject only to the effect of any matter entered in that register so far as adverse to the entitlement,

> (b) making any registered right or obligation relating to the registered lease a real right or obligation, and
>
> (c) affecting any registered real right or obligation relating to the registered lease,
>
> in so far as the right or obligation is capable, under any enactment or rule of law, of being vested as a real right, of being made real or (as the case may be) of being affected as a real right."

Senior counsel stressed the "in so far as the right or obligations is capable" wording and submitted that this was consistent with his construction of the Act.

[41] Senior counsel also drew my attention to paragraphs 3-55 to 3-57 of Webster's *Leasehold Conditions*. The learned author's researches had identified only one case in which the distinction between personal and real obligations had arisen in the context of a registered lease – *Bisset* v *Magistrates of Aberdeen* (1898) 1 F 87 (IH). In that case, the tenant had argued, in part on the basis that the lease was registered in the Register of Sasines, that the obligation in question – an obligation to grant a feu charter – should transmit (at page 89). The Inner House, although not referring to the fact of registration directly, had rejected the tenant's argument. Senior counsel noted that, although recognising that a contrary argument had been put forward, Dr Webster agreed.

The obligation to repay the Purchase Price

[42] Second, as a matter of generality, senior counsel submitted that in a lease an obligation to repay a Purchase Price, premium or grassum was not an obligation which would transmit to singular successors. That was so because, as a matter of analysis, such an obligation arose as a result of, or in the context of, a payment to the original grantor of the lease. A singular successor to the original grantor has no connection with the payment or its repayment.

[43] Furthermore, senior counsel submitted it was wrong to characterise the payment of a premium or Purchase Price as being an advance payment of rent. Such a payment should be properly understood to be a capital payment for the grant of a lease with all of its incidents including the actual stipulated rent. Senior counsel advanced this submission as a matter of generality but contended that the position was even clearer where, as in the present case, the nature of the obligation could be seen from the way in which it was framed within the purchase agreement. That agreement established personal obligations between the first and second defenders.

[44] Viewed solely from the perspective of the lease, the repayment obligation in the present case was extraordinary. After 10 years, during which the tenant had occupied the carpark in return for a nominal rent, the landlord required to repay the tenant not only the entire Purchase Price but a 25% uplift as well. This was the opposite of a lease in which a tenant obtained the right to occupy the land in return for the payment of rent. In short, senior counsel submitted that when it was understood in its proper context, this obligation had nothing to do with the essence of the lease.

[45] Senior counsel was careful to emphasise he was not suggesting that the obligation was not enforceable between the original parties to the arrangement – the first and second defenders. Viewed from the perspective of the original parties to those arrangements, one had an agreement whereby the first defender had made an investment and the recipient of the investment, the second defender, was obliged, at the investor's option, to return the investment together with an uplift. The true nature of the transaction as an investment was also demonstrated by clause 2.2.2 of the lease which enabled the tenant to exercise the break clause in the event that the Financial Conduct Authority indicated that the scheme was not

compatible with its rules. These were inherently personal obligations which, by their nature, did not transmit to singular successors.

[46] The defender did not seek to argue that the obligation in question was either customary or usual. The defender had advanced no evidence in support of such a position and it ran contrary to the evidence of Mr Gerber. Senior counsel submitted that the fact that Mr Gerber had recognised the commercial sense of the repayment of a grassum following the exercise of a break option by a landlord was irrelevant to the issues in the present case. That was not the situation in the present case where the break option was being exercised by the tenant. Moreover, the key point was that, whatever its commercial sense, Mr Gerber did not consider that the present clause was customary or usual.

[47] For these reasons, senior counsel submitted that the obligation to make repayment of the Purchase Price in terms of Schedule Part 3 of the lease was not *inter naturalia* and did not transfer to singular successors.

Severability – the break clause

[48] Finally, senior counsel submitted that paragraph 1.1 of Schedule Part 3 of the lease, which contained the obligation on the "Lessor" to repay the Purchase Price, could be separated from the remainder of the Schedule which contained the mechanism whereby the break option was exercised. He pointed out that no violence required to be done to the language of the remainder of Schedule Part 3 in order to make it workable. On this basis, senior counsel's primary position was that, although the repayment obligation did not transmit to singular successors, there was no reason why the break option did not.

[49] In the event that the repayment obligation could not be extricated from the remainder of Schedule Part 3, the pursuer's position was that none of it fell to be regarded as being *inter naturalia* of the lease.

Defender's submissions

[50] The Dean of Faculty made three preliminary points.

[51] First, the Dean of Faculty accepted that although parties had freedom to contract their own contractual obligations, they did not have the same freedom to create property rights. He submitted further that the answer to the critical question as to whether the payment obligation in issue was *inter naturalia* of the lease fell to be found within the four corners of the lease itself. To adopt the language of the case law, in order to determine whether an obligation bore reference to the landlord and tenant as opposed to being extrinsic to the lease, one required only to consider the lease itself. The other documents which had formed part of the transaction were irrelevant.

[52] If he was wrong about this and regard did have to be had to the other documents, then the Dean of Faculty submitted that they supported the first defender's case. Had the parties' intention been simply to create personal obligations, those obligations could have been left within the purchase agreement. However, the payment obligation had been included in the lease itself.

[53] Secondly, the Dean of Faculty noted the pursuer's argument that, whether the obligation to make payment was real or not, the first defender could still demand payment from the original landlord, the second defender. In this regard, the Dean of Faculty highlighted the wording in Schedule Part 3. The payment obligation contained in paragraph 1.1 was incumbent on the "Lessor". In the same way, the obligations set out

elsewhere in the lease, including those relating to the renunciation of the lease in paragraph 1.2 of Schedule Part 3, were incumbent on the "Lessor". It was nonsensical to suggest that these two references were intended to refer to different parties – the first remaining the second defender whereas the second was the singular successor. Accordingly, so the Dean argued, if the pursuer was correct that the payment obligation in paragraph 1.1 did not transfer to singular successors, it would cease to operate.

[54] Third, the Dean of Faculty highlighted the acceptance by the pursuer that, in terms of clause 3.11 of the lease, the tenant was entitled to assign its interest. Such an assignation would transfer the right to receive payment payable on the exercise of the break clause. This was fatal to the pursuer's argument as there was no basis for suggesting that the landlord's interest should be treated differently from that of the tenant. The Dean recognised that the way in which a tenant conveyed his or her rights (by assignation) was different from the way in which a landlord did so (by disposition) but submitted it would be strange if the nature and extent of the rights transmitted in each case were significantly different.

The Registration of Leases (Scotland) Act 1857

[55] On the 1857 Act, the Dean of Faculty's position was straightforward. Section 2 made clear that leases which were binding in a question with the granters, and which were registered, were "effectual" against singular successors. The operative part of section 2 was subject to a proviso but that merely ensured that the pre-existing law under the 1449 Act was preserved. In this case, "effectual" meant what it said – enforceable. This construction of section 2 was not affected or qualified by the terms of sections 16 and 20B of the Act.

[56] In respect of section 20B, the Dean noted the proviso:

> "in so far as the right or obligation is capable, under any enactment or rule of law, of being vested as a real right, of being made real or (as the case may be) of being affected as a real right."

This proviso could not be said to have the effect of excluding leases which, prior to the 1857 Act, could not have been made real: for example, leases which did not fall within the 1449 Act because of containing a peppercorn rent. So, on the same basis, if section 2 was construed as he contended it ought to be, such personal rights were capable of being made real by the 1857 Act in the same way. Properly construed, the proviso to section 20B was designed to exclude rights and obligations which could not be made real – a right for the landlord to dance a jig for example. Section 20B should not be read as re-introducing rules of law – *inter naturalia* – which had been expressly excluded by the earlier part of the Act.

[57] The Dean accepted that this approach to the statutory provisions would have the effect of enabling the parties to make personal rights real. However, he pointed out that that was precisely the case when one was dealing with a lease which was a personal contract between parties which created real rights. This argument had been recognised in academic writing (see S Brymer *"Enforcing commercial lease terms against successor landlords"* (2000) 49 Property Law Bulletin 4 and (2001) 50 Property Law Bulletin 5).

[58] In respect of the *Bisset* case (see [41] above), the Dean informed me that, having considered both the report and the documentation available in Session papers, he could find no reference to any consideration of either the 1857 Act or its terms. Accordingly, he submitted that the question could not be said to have been determined by *Bisset.* The Dean also drew attention to the fact that *Montgomerie* (see [35] above) had been decided in the years running up to the 1857 Act and therefore might be said to have formed the background to it, albeit he recognised that there was no reference to this in Hansard.

[59] The Dean of Faculty also submitted that section 3 of the 1857 Act which provided that the party with the right in the lease could assign that right supported his argument. In terms of section 3, the effect of registering or recording the assignation is to "fully and effectually vest the assignee with the right of the granter thereof in and to such lease to the extent assigned." The Dean noted that there was no qualification of the rights assigned. There was no reference to any issue of *inter naturalia.*

***Inter naturalia* – the test**

[60] The Dean of Faculty submitted that there was not a significant difference between the parties as to the correct test to be applied. The Dean focussed upon the reference by Lord President Boyd in *Montgomerie* to obligations which are "extrinsic to the lease" on the one hand and those obligations which are "embodied in the essence of the lease" on the other (both on page 1395). He also referred to the formulation of Lord Wark in *Norval* v *Abbey* 1939 SC 724 (IH) at 731 that obligations which "bear reference to the general relation of landlord and tenant and not to the private relation of the contracting parties" are those which are transmissible against singular successors.

***Inter naturalia* – application**

[61] The Dean of Faculty submitted that however the test was formulated, it was met in this case.

[62] The starting point for the analysis was clause 2.2 of the lease. That created a break option in favour of the tenant, the "Lessee". There was well-established authority that such a right could be transmissible in favour of singular successors and, indeed, a strong presumption that it would be so in the absence of clear wording to the contrary (see

Rankine, *Law of Leases in Scotland* (3rd ed) at 528 and the authorities there cited; Rennie, *Leases* at 15-08; and Webster, *Leasehold Conditions* at 5-40). Clause 2.2 was both mandatory and clear in its language as to the application of Schedule Part 3. The Dean of Faculty highlighted the fact that the process was initiated by the service of a notice on the "Lessor". This was the same party who was under an obligation to make payment of the "Purchase Price" in terms of Schedule Part 3. "Lessor" could only properly be understood to be a reference to the landlord at the time as opposed to the second defender itself. The parties did not need to include a broader definition of "Lessee" or "Lessor" because they knew that the lease could be transferred. In relation to Schedule Part 3, the Dean of Faculty emphasised the fact that the mechanism in terms of which the Lessor was to make payment of the Purchase Price was tied into the process whereby the Lessee renounced the lease. Both of these processes were driven by the service of the Termination Notice in terms of clause 2.2. It was not possible, so contended the Dean, somehow simply to strip out the payment mechanism from this process without doing violence to the language of the lease. The renunciation was plainly the counterpart to the payment.

[63] In terms of clause 2.2.1, that event was to occur after less than 6% of the term had expired. In this regard, the Dean submitted that the option to break contained in clause 2.2.2 – which related to the Financial Conduct Authority – was entirely separate and one could anticipate would have occurred early in the course of the lease.

[64] The Dean of Faculty submitted that the pursuer's real complaint was the sum of money concerned. He argued that a more accurate perspective of the payment could be obtained if, instead of characterising the payment as £3.75 million to be received for the exercise of the break, one asked why the landlord should be able to recover the property for free after only 6% of the 175 year term. A substantial sum of money had been paid by the

first defender to secure the lease. There was nothing uncommercial in that sum requiring to be repaid in the event of a break being exercised.

[65] The Dean pointed to the evidence of Mr Gerber who had recognised that there was nothing unusual in requiring, following the exercise of a break clause, the repayment of advance pre-payments of rent and service charges. On this basis, the Dean submitted that the true issue was not as to the nature of the required payment but rather its magnitude. The Dean submitted that the distinction drawn by Mr Gerber was not a valid one.
Mr Gerber had sought to distinguish between the repayment of advance payments of rent following the exercise of a break clause, which Mr Gerber accepted were standard, and the present case which involved the repayment of a grassum in those circumstances. The Dean submitted that the payment of a grassum had to be seen in the context of the fact that the lease only required payment of a peppercorn rent and, accordingly, the payment of the grassum ought to be properly characterised as an advance payment of rent.

[66] In this regard, the Dean of Faculty referred to an authority in the valuation context in which grassum had been treated as advance rental (*Mark* v *Assessor for Edinburgh* 1911 SC 974 (IH) at 986). The Dean also produced, for the first time during the course of argument, a lengthy report of a decision of the House of Lords from 1819 – *Case of the Queensberry Leases* 4 ER 127. This decision bore to involve restrictions on an heir of tailzie in granting leases over parts of the entailed estate. In that context, their Lordships had considered that grassum fell to be regarded as anticipated rent.

[67] Against this background, the Dean of Faculty submitted that the obligation to pay contained in Schedule Part 3 ought properly to be characterised as *inter naturalia* of the lease. The payment was a necessary consequence of the break clause which was central to the relationship of landlord and tenant. The payment was referable to the grassum which the

first defender had paid to obtain the lease. On this basis, it could not be argued that the payment of this sum was "extrinsic to the lease".

Severability – the break clause

[68] On the issue of whether the break clause could be separated from the obligation to make payment, the Dean of Faculty's primary submission was, as I have noted above, that the two contractual mechanisms were inextricably linked. The Dean submitted that I should follow a similar approach to Lord Tyre in *Gyle Shopping Centre General Partners Limited* v *Marks & Spencer plc* [2014] CSOH 59 in considering whether a right ought to be considered a pertinent to a right granted under a lease. In addressing this issue, Lord Tyre had regarded the decision of *Campbell* v *McLean* (1870) 8M (HL) 40 as authoritative. His Lordship stated:

> "Nevertheless the principle is clear: a right which is granted as a pertinent of a lease conferring a real right upon the tenant, transmissible against the granter's successor, is itself enforceable against that successor."

The Dean submitted that, by analogy, the same approach should be applied to the relationship between the break option and payment obligation.

Decision

[69] Resolution of the dispute between the parties as to the nature of the obligation to pay pursuant to paragraph 1.1 of Schedule Part 3 of the lease requires two separate issues to be addressed. These are:

- First, determining the effect, if any, on that obligation of the registration of the lease in the Land Register under the Registration of Leases (Scotland) Act 1857; and

- Second, determining whether, at common law, that obligation would transmit to be enforceable against the singular successor of the original granter, the second defender.

[70] I deal with these in turn.

The Registration of Leases (Scotland) Act 1857

[71] The argument of the first defender as to the effect of the 1857 Act essentially turns on the correct construction of section 2 of that Act. The first defender contends that the obligation in question here is "effectual against any singular successor" simply by virtue of the fact that it is included as part of the lease which has been registered under the Act.

[72] The first defender contends further that this conclusion is unaffected by the provisions of either sections 16 or 20B. The former, which makes clear that registration is the equivalent of possession, is essentially neutral in respect of the first defender's argument. In respect of the latter – section 20B – the first defender argues that the critical wording "in so far as the right or obligation is capable, under any enactment or rule of law" must be subject to the provisions of the Act itself. In other words, so argues the first defender, just as the rights created under a lease which fell outside the scope of the 1449 Act, can be made real by registration in terms of the 1857 Act, just so can the other personal obligations contained in the lease.

[73] In argument, the Dean of Faculty did also rely on section 3 of the 1857 Act in support of his argument. However, insofar as that section relates to the assignation of registered leases, it does not seem to add anything. The section makes clear that when an assignation has been effected in accordance with the section, the registration of the assignation will "fully and effectually vest the assignee with the right of the granter thereof in and to such

lease to the extent assigned" (emphasis added). As a result, this section does not assist in addressing the effect of section 2 on personal obligations contained within the registered lease. It deals with the effect of registration on an assignation of those rights.

[74] Although simple, the first defender's argument is radical. On this construction, any personal right which happened to be contained in a document which also let land and heritage in Scotland for a period exceeding 20 years, would, following registration, become real and, thereby, enforceable not only as between the original parties to the contract but as against singular successors and, indeed, the world.

[75] As a starting point in considering this part of the first defender's argument, it is striking that the wording of the Act itself does not indicate expressly any change to the then pre-existing law in respect of the distinction in stipulations in leases between those which were extrinsic and non-transmissible stipulations, on the one hand, and those essential stipulations which were transmissible, on the other. This distinction was described by Lord President Boyd in *Montgomerie,* 9 years before the 1857 Act, as "plain and obvious".

[76] Thereafter, notwithstanding the passage of 165 years since the coming into force of the 1857 Act, the first defender's argument would appear, prior to this case, not to have attracted much attention beyond what may, not unfairly, be referred to as the fringes of legal academic writing (see S Brymer *"Enforcing commercial lease terms against successor landlords"* (2000) 49 Property Law Bulletin 4 and (2001) 50 Property Law Bulletin 5). (In this regard, it is also interesting to note that the author of those articles, Professor Brymer (as he now is), appears to have developed his views on this point. He is one of the co-authors of Rennie's *Leases* (2015) in which the argument presented to me on behalf of the first defender is described as "untenable" (at 15-06).)

[77] In any event, that notwithstanding, I certainly do not consider that the first defender's argument is foreclosed by authority. In that regard, I accept the Dean of Faculty's submission that the decision of the Inner House in *Bisset* does not bind me to reject his argument. It does not appear that an argument focussing on the terms of the 1857 Act was either advanced or considered in that case. (Albeit that, given both the simplicity and apparently decisive nature of the argument, this omission is somewhat surprising when the calibre of counsel involved is considered. The unsuccessful pursuer was represented by Mr Guthrie QC – the future Lord President – and Mr Glegg, advocate – noted author of the eponymous textbook on Reparation.)

[78] Accordingly, I consider the argument falls to be resolved essentially as an issue of statutory construction. As such, I consider that the flaw in the first defender's argument is to assume that the reference to "leases" in section 2 of the 1857 Act means the entire bundle of rights contained in the contract of lease including whatever rights the parties may, in their ingenuity, have included therein. I consider that this construction is far broader than is merited by the language of the statute itself. Properly construed, I consider that by "leases", the section is referring more narrowly to the "contract of location by which the use of land or any other immoveable subject is let for a period of time to the lessee in consideration of a determinate rent…" (Paton and Cameron, *Law of Landlord and Tenant* (1967) at pages 4 to 5). As the learned authors Paton and Cameron also point out the term "lease" can be used both to refer to the contract itself and the right created by that contract. On this construction, section 2 is making the contract of lease *qua* lease effectual against singular successors.

[79] This narrower construction of "leases" in section 2 is also consistent with section 16(1). That section, entitled "Registration equivalent to possession", provides that registration shall "complete the right under the same" as if the tenant had entered into

actual possession of the subjects. In this context, the reference in section 16(1) to possession is of relevance to the completion of the right of lease under the then pre-existing law. As such, consistent with section 2 having a narrower scope than argued for by the first defender, the reference to the right under the lease in the singular and to possession in section 16(1) places the focus on the right of lease as opposed to any other unrelated personal rights.

[80] An analysis of section 20B produces the same conclusion. In terms of subsection 20B(1), the effect of registration is, to vest "a real right in and to the lease and in and to any right or pertinent, express or implied, forming part of the lease" (paragraph (a)); to make "any registered right or obligation relating to the registered lease a real right or obligation" (paragraph (b)); and to affect "any registered real right or obligation relating to the registered lease" (paragraph (c)). This effect is then qualified by the words:

> "in so far as the right or obligation is capable under any enactment or rule of law, of being vested as a real right, of being made real or (as the case may be) of being affected as a real right."

It is clear from the wording of section 20B(1), that effect of registration in the Land Register is focussed on the right of lease together with the rights and pertinents which relate to that right of lease as opposed to any other personal rights which happen to have been incorporated in the parties' original contract.

[81] When section 2, and the remainder of the 1857 Act, is construed in this way it becomes apparent that the Act did not have the radical effect contended for by the first defender. This result is also, of course, consistent both with the decision in *Bisset* as well as current academic writing (see Rennie at 15-06 to 15-07; Webster at 3-55 to 3-56).

[82] In summary, the effect of the 1857 Act is, through the process of registration, to enable leases to which it applies to be made real even if those leases fall outwith the scope of

the 1449 Act. Insofar as a right or obligation relates to the registered right of lease it too becomes real through the process of registration. On this approach, the 1857 Act preserves the pre-existing distinction between stipulations which are extrinsic to the lease and do not transmit against singular successors and those which are *inter naturalia* of the lease.

[83] For these reasons, I consider that the fact that the lease in the present case has been registered pursuant to the 1857 Act has no impact, in and of itself, on the resolution of the question as to whether the payment obligation is transmissible against singular successors. The resolution of that question depends on the second issue to which I now turn.

Transmissibility at common law

The test

[84] In order to address this second issue, it is first necessary to identify from the authorities the correct legal test for determining whether or not an obligation is *inter naturalia* of the lease. In this regard, the parties were agreed that the starting point for this determination must be the nature of the obligation in question. That was clearly the approach of Lord Macfadyen in *Optical Express* (see [33] above) at 650. The parties agreed further that Lord President Boyd in *Montgomerie* had encapsulated the essence of the distinction between transmissible and non-transmissible obligations as being:

> "It is no doubt most plain and obvious… that there is a distinction between those stipulations which are extrinsic to the lease, and do not transmit against singular successors, and those other stipulations which are of the essence of the contract, and do therefore of necessity transmit against them." (at 1395)

In addition, it is clear from the opinion of Lord Moncrieff in *Bisset,* that one factor in making this determination is whether an obligation commonly occurs within the particular class of leases in question (at 90). This factor was highlighted both by Lord Macfadyen in *Optical*

Express and Lord Drummond Young in *The Advice Centre for Mortgages* (see [34] above). Finally, I consider that Lord Wark's formulation in *Norval,* referred to by the Dean of Faculty (above at [60]), is also helpful. His Lordship referred to the key factor being whether the obligation in question bore reference to the general relation of landlord and tenant and not to the private relation of the contracting parties (at 731).

[85] In considering the question of the appropriate test for determining whether an obligation is *inter naturalia* of the lease, I note for completeness that quite different considerations arise when dealing with the conveyance of personal rights by way of assignation. As such, contrary to the submission of the Dean of Faculty, I do not consider that the existence of a right on the part of the tenant to assign its rights under the lease (clause 3.11) is of relevance to the issue of whether the payment obligations are *inter naturalia.*

The correct approach

[86] The next step in the analysis is to apply this test to the payment obligation contained in paragraph 1.1 of Schedule Part 3 of the lease. At this stage, it is necessary to resolve a difference of approach between the two parties.

[87] The first defender's primary position was that the assessment of the payment obligation fell to be made solely on the basis of the lease itself. The Dean of Faculty contended that it was only by assessing the obligation within the four corners of the lease that one could properly determine whether it was extrinsic to or was of the essence of the lease. By contrast, the pursuer submitted that it is necessary to consider the lease in the context of the suite of agreements including, in particular, the purchase agreement.

[88] I consider that the first defender's approach is misconceived for two reasons. First, simply as a matter of construing the lease, it would be highly artificial not to consider that document in the context of the "car park investment scheme", which is referred to in clause 2.2 of the lease, as a whole. There would seem no justification for restricting one's consideration to only one part of a suite of inter-related agreements. Secondly, and more fundamentally, I consider that such an approach would hinder the proper assessment of the obligation in question from the perspective of "the private relation of the contracting parties" (as Lord Wark put it in *Norval*).

The nature of the obligation

[89] Approached at its most basic level, paragraph 1.1 of Schedule Part 3 imposes on the Lessor an obligation to make payment to the Lessee following the exercise by the Lessee of the break option contained in clause 2 of the lease. Both the amount to be paid and the time period for making payment differ depending on whether the Lessee exercised its option in terms of clauses 2.2.1 or 2.2.2 respectively.

[90] If the Lessee has exercised its option in terms of clause 2.2.1, it means that notice will have been served not earlier than 180 days and not later than 90 days before the tenth anniversary of the commencement of the term of the lease. In these circumstances, the Lessor is obliged to make payment of a sum equal to 125% of the "Purchase Price" which is defined in Schedule Part 3 as being £3,750,000 exclusive of VAT, twelve months after receipt of a Termination Notice. (Interestingly, the term "Premium", which is used in clause 2 and is defined in clause 1 of the lease as being the same amount, is not used.)

[91] Clause 2.2.2 provides the Lessee with an option to surrender its interest in the lease at any time after:

> "the Financial Conduct Authority… issue guidance or otherwise determine that the car park investment scheme to which this Lease and the Management Agreement relates is incompatible with the FCA's rules".

If the Lessee exercises the option under this clause, the amount to be paid is solely the Purchase Price and it is to be paid within one month of notice having been served.

[92] In short, the pursuer's position was that the obligation to make a payment contained in paragraph 1.1 of Schedule Part 3 arises from and relates to the contractual arrangements between the parties regulating the car park investment scheme of which the lease is one part.

[93] In response, the first defender essentially put forward two related arguments.

[94] First, it is argued that the obligation to make payment cannot be separated from the break option which triggers that obligation. This argument was based on the way in which the lease had been drafted. On this basis, the Dean of Faculty submitted that, as there was clear authority that a break option was an obligation *inter naturalia* of a lease, it should follow that the payment obligation also fell to be treated as such. Second, the first defender contends that the payment obligation actually falls to be characterised as the repayment by the Lessor of a grassum or lump sum paid in lieu of rent by the Lessee at the outset of the term of the lease. As such, the payment obligation, arising out of and as a consequence of the exercise of the break clause, ought properly to be characterised as being *inter naturalia* of the lease.

[95] I prefer the pursuer's characterisation of the obligation in paragraph 1.1 of Schedule Part 3.

[96] I consider the argument based on the alleged inseparability of the obligation to make payment in paragraph 1.1 of Schedule Part 3 and the break option in clause 2.2 of the lease itself, to be unfounded. The flaw in the first defender's argument is that it approaches the question of the transmissibility of the payment obligation as though it were an issue of contractual construction where the principal question confronting the court is seeking objectively to establish the intention of the parties from the language they have used (see *FES Limited* v *HFD Construction Group Limited* [2024] CSOH 20 at paragraphs 50 and 51 and the authorities cited there). However, the present question is one of the law of property and not of contract. When considering which obligations in the lease are real and transmissible, the parties are not, to use Lord Bingham's memorable phrase, "masters of their contractual fate" (referred to in *Pagnan SpA* v *Feed Products Limited* [1987] 2 Lloyd's Rep 601). In resolving the present question, the intention of the parties is not directly relevant.
That follows from the way in which the test for determining whether an obligation is *inter naturalia* of a lease is formulated and in which no reference is made to the intention of the parties (see the authorities referred to at [84] and [85]).

[97] Accordingly, I do not consider that it assists the first defender's argument to point to the language used in the lease to link the exercise of the break option, in terms of clause 2.2, with the payment obligation in Schedule Part 3. It is necessary, instead, to consider whether the very nature of the payment obligation is inextricably linked to the exercise of the break option. Viewed from this perspective, I do not consider that it is. Objectively, one can see that, although the payment obligation is triggered by the exercise of the break option, it is freestanding. That is most obvious from the fact that the successful exercise of the break option is neither dependent nor conditional upon the making of the payment.

[98] In respect of the first defender's second argument, I reject the first defender's attempt to characterise the payment obligation as either being the repayment of an advance payment of rent or, at least, as being analogous to such a repayment. Neither the form nor the substance of the payment obligation supports the first defender's argument.

[99] Looking at the form, it is notable, as a starting point, that the obligation does not describe or calculate the sum to be paid as rent. On the contrary, the sum to be paid is calculated by reference to the "Purchase Price". That is the same term used in the purchase agreement where Schedule Part 3 is mirrored in clause 6. Within the purchase agreement, the Purchase Price is what is to be paid in return for the grant of the lease, not a payment made under that lease (clause 2.1). Furthermore, it is apparent that the calculation of the sum to be paid is unrelated to the amount of the lease's term that has expired. That is clear from a consideration of the inter-relationship between the break option contained in clause 2.2.2 and the payment obligations. Clause 2.2.2 provides that in the event that the Financial Conduct Authority issues guidance or otherwise determines that the car park investment scheme is incompatible with its rules, the Lessee is entitled to renounce the lease. In those circumstances, in terms of paragraph 1.1 of Schedule Part 3, whenever that event occurs, the Lessor is obliged to pay the Lessee the Purchase Price. By contrast, if the break option is exercised under clause 2.2.1, which requires to occur around the tenth anniversary of the commencement of the lease, the amount which the Lessor is obliged to pay is 125% of the Purchase Price.

[100] When these provisions are considered in detail, the Dean of Faculty's characterisation of the sum to be paid as a repayment of advanced rent appears highly artificial. Despite the Dean's valiant attempts to persuade me otherwise, any connection between the provisions of Schedule Part 3 and the type of situation which arose in *Marks &*

Spencer plc v *BNP Paribas* (see [26] above) would appear tenuous in the extreme. I consider that, in substance, the payment provisions are a means of ensuring that the first defender is provided with a return on "the car park investment scheme".

[101] In reaching this conclusion, I have considered the two cases referred to by the Dean of Faculty which addressed the question of whether, in different circumstances, a grassum ought to be regarded as an advanced payment of rent – *Mark* and the *Queensberry Leases* case (see [66] above). I did not find either of these cases to be of assistance. In part that was because in each the question was approached against the background of a quite different legal framework – valuation for rates and entails respectively. However, the principal basis upon which I distinguish those cases is that, on the facts and for the reasons I have set out above, I do not consider that the payment obligations in paragraph 1.1 of Schedule Part 3 of the lease, properly fall to be characterised as representing the repayment of an advance payment of rent. It is apparent that the characterisation of a lump sum payment will turn on the particular circumstances and will not always be regarded as implied rent (see *Mann* v *Houston* 1957 SLT 89).

[102] It follows from my conclusion as to the characterisation of the payment obligations in paragraph 1.1 of Schedule Part 3 to the lease, that I agree with the pursuer that these obligations are, to adopt the formulation in *Montgomerie,* extrinsic to and do not form part of the essence of the lease. That is because these obligations derive from and form part, not of the lease itself, but of the larger contractual arrangement between the defenders which regulates the car park investment scheme. To put it another way, using Lord Wark's formulation in *Norval*, I consider that these obligations plainly bear reference to the private contractual relations between the defenders relating to the investment scheme rather than to the general relation of landlord and tenant. I consider that the obligation on the Lessor to

make payment is akin to those personal payment obligations which were cited by the senior counsel for the pursuer (at [36] above). On this basis, I conclude that the payment obligations in paragraph 1.1 of Schedule Part 3 to the lease are not *inter naturalia* of the lease.

[103] For completeness, although both parties made reference, following *Bisset,* to the possibility of arguing that an obligation fell to be treated as *inter naturalia* because it commonly occurred within the particular class of leases in question, I did not understand this argument actually to be advanced by the first defender. I did not find this omission surprising because there was no evidential basis to advance it. Whatever his position as to the commerciality or otherwise of the arrangements, I understood Mr Gerber to be clear that the obligations involved in the present case were "unusual" and "abnormal".

Severability – the break clause

[104] The conclusion I have reached in respect of the payment obligation is sufficient to deal with the declarator sought by the pursuer in the present action. However, as I have noted above (at [48], [49] and [68]), both parties also made submissions as to whether the payment obligations in paragraph 1.1 of Schedule Part 3 could be separated from the break options contained in clause 2.2 of the lease and the consequences on the break options of a finding that the payment obligations were not *inter naturalia* of the lease.

[105] As I have noted above (at [96] and [97]), I consider that the payment obligations are separable from the break options. It follows that I agree with the pursuer's submission that the fact that the payment obligations are personal to the parties to the lease (and the purchase agreement) does not, in itself, affect the transmissibility of the break options. As the Dean of Faculty highlighted (at [62]), there is clear authority to support the proposition

that such rights do transmit against singular successors. I see no reason why it would not apply in the present case.

[106] On this basis, contrary to the first defender's submissions, I do not consider that Lord Tyre's approach in *Gyle Shopping Centre* (see [68]) is apt to apply to the present situation. His Lordship was dealing with the issue of whether a right granted as a pertinent to a real right was enforceable against a singular successor. On the basis of my conclusions both as to the nature of the payment obligations and their separation from the break options, the same considerations do not apply.

Disposal

[107] In light of the foregoing reasons, I will sustain the pursuer's first plea in law and grant declarator as first craved. I will reserve all questions of expenses meantime.