

IN THE SUPREME COURT OF THE UNITED KINGDOM

on Appeal from

the First Division of the Inner House of the Court of Session

BETWEEN

FORTHWELL LIMITED

Appellant

-and-

PONTEGADEA UK LTD

Respondent

STATEMENT OF FACTS AND ISSUES

Introduction

- 1 This appeal is taken against an interlocutor of the First Division of the Court of Session (the Lord President (Carloway), Lord Malcolm and Lord Pentland) dated 31 October 2024, allowing in part and by a majority, a reclaiming motion at the instance of the Respondent against a decision at debate by the Commercial Judge (Lord Braid) in the Outer House on 13 June 2024
- 2 It concerns the circumstances in which a party to a contract can recover damages for a breach of that contract in respect of losses that were sustained, not by the contracting party itself, but by a subsidiary.

Reports and duration of proceedings below

- 3 The Opinion of the Commercial Judge in the Outer House is reported as: [2024] CSOH 59, 2024 SLT 657. The debate before the Commercial Judge took 1 day.
- 4 The Opinion of the First Division of the Inner House of the Court of Session is reported as: [2024] CSIH 38, 2025 SC 127, 2024 SLT 1245. The reclaiming motion before the First Division took one day.

The parties

5 The Appellant is Forthwell Limited.

6 The Respondent is Pontegadea UK Ltd.

The facts

7 For the purposes of testing the relevance of the Appellant's case at debate and on appeal, the Appellant's pleadings are taken to be true. The essential features of the Appellant's pleadings are as follows.

8 The Appellant and Respondent are respectively the present tenant and landlord of premises at 11 Exchange Place, Glasgow, in terms of a lease dated 18 and 29 March 1996 (the '**Lease**'). Neither the Appellant nor the Respondent was party to the Lease at its inception.

9 In August 2013, the tenant's interest in the lease was assigned to the Appellant by Lynnet Leisure (Properties) Ltd.

10 Since the Appellant took entry to the premises in August 2013, its wholly owned subsidiary, Lynnet Leisure (Rogano) Limited, has traded therefrom as the Rogano Restaurant and Bar, a well-known Glasgow eating establishment, under a "Licence to Occupy" from the Appellant. Clause 8 of the licence, provides that the licensee cannot oblige the Appellant to carry out any repairs or other works to the premises and that the Appellant will at no time become liable to the licensee for any loss, injury or damage which the licensee might sustain from any deficiency in any part of the licence subjects.

11 The Lease prohibits both sub-letting, and the parting with or sharing or possession, of part of the premises (cl 5.3.2). The Lease makes provision for assignation of the whole of the tenant's interest in the Lease, subject to certain conditions (cl 5.3.3.1). The Appellant does not aver that the Respondent was aware of the licence.

12 On 9 and 14 December 2020 and 10 January 2021, the premises was damaged by flooding and water ingress. An electrical fire broke out after the first flood. This rendered the electrics unsafe. The premises were left without heating. There is ongoing water ingress.

13 Clause 13.2 of the Lease requires the Respondent to rebuild any part of the premises which has been destroyed or damaged by any insured risk (such a risk being defined to include flooding) (clauses 1.1, 13.2). Parties are in dispute as to the nature and scope of the repairs required and as to liability for certain aspects of the repair. Repairs have not been carried out and it has not been possible to reopen the restaurant in its present state.

14 The Appellant seeks implement of the Respondent's obligation to repair in clause 13.2 which failing damages in respect of the work required to repair the premises (the first to third conclusions of the summons). This aspect of the case forms no part of the present appeal. The Appellant also claims that as a result of the Respondent's failure to discharge its obligation to repair damage caused by an

insured risk and what is said to be the Respondent's breach of its obligation to maintain the common parts, Lynnet has been unable to trade from the premises, thereby sustaining a loss of profits. The Appellant sues for the past and anticipated future loss said to have been suffered by Lynnet (the fourth and fifth conclusions of the summons).

- 15 The Respondent *inter alia* disputes the Appellant's entitlement to recover damages in respect of losses suffered by Lynnet (the Transferred Loss Issue). Consequently, the Respondent seeks dismissal of the fourth and fifth conclusions of the summons.

Procedural History

- 16 By interlocutor dated 13 June 2024 the Commercial Judge in the Outer House of the Court of Session rejected the Respondent's arguments and allowed the case to proceed to a proof before answer.
- 17 By interlocutor dated 31 October 2024, the First Division of the Inner House of the Court of Session (Lord Malcolm dissenting) allowed the Respondent's reclaiming motion in so far as it related to the Transferred Loss Issue.
- 18 The Appellant applied to the First Division for permission to appeal. The First Division granted permission to appeal on 21 March 2025.
- 19 A separate challenge by the Respondent to the Appellant's ability to sue for damages in a case of mutual insurance was rejected by the Commercial Judge and by the Inner House. That issue does not form part of the present appeal.

The issues in the present appeal

- 20 The issues for determination by the Supreme Court are a matter of agreement and are as follows:

Q1: In what circumstances does Scots law allow a pursuer to recover a third party's loss on the basis of the doctrine of transferred loss? In particular, are these circumstances restricted to the 'narrow' or 'broad' grounds identified in the English authorities, or does Scots law provide for a separate doctrine of transferred loss in which a pursuer may recover the third party's loss where it sues on behalf of the third party and must account to the third party for the damages recovered?

Q2: In consequence, was the majority of the Inner House correct to determine that the only damages that can be recovered by the Appellant as a result of the Respondent's breach of the rebuilding obligation under the Lease are damages that will place the Appellant, as the innocent party, as near as possible in the same position as if the obligation had not been breached; and, on that basis, the Appellant's claim for damages in respect of losses sustained by its subsidiary must fail because, "in accordance with the general rule of contract law, [it has] not sustained those losses"?

- Q3: Was the majority of the Inner House correct to consider that, even if, contrary to the foregoing, the Transferred Loss Claim had been relevant in law, as a matter of substance, it was not properly invoked by the Appellant on its pleadings as a result of (i) standing the terms of the conclusions, the Appellant was in any event “not suing on behalf of the subsidiary” and (ii) the Appellant had not convened the subsidiary as a defender for any interest that it might have?

- Q4: Was the majority of the Inner House correct to consider that if damages were recovered, there would be no obligation to account, the mere recovery of damages by the Appellant (if allowed) not being such as would create an obligation to account to Lynnet?

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