Browne Jacobson

Sara & Hossein Asset Holding Ltd v Blacks Outdoor Retail Ltd [2020] EWCA Civ 1521

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Facts

The tenant (B) held a one year lease granted in 2018 which incorporated by reference the terms of an earlier lease granted in 2013. In relation to service charge, the leases provided that:

"*The Landlord shall…furnish to the Tenant…a certificate as to the amount of the total cost and the sum payable by the Tenant and in the absence of manifest or mathematical error or fraud such certificate shall be conclusive.*"

The lease provided for expert determination if there was a dispute as to the proportion of the overall costs for the building payable by the tenant, but there was no equivalent provision if there was a dispute as to the amount of the landlord's total costs.

The landlord (S&H) issued a certificate for the service charge year 2017/18 certifying that over £400,000 was due. This sum was substantially larger than in previous years (the figure for the service charge year 2016/17 was £55,000). B claimed, amongst other things, that the costs of some of the works included were unnecessary or were not strictly repair works (within the meaning of the relevant repairing covenants) and that the cost of the works was increased by past failures to keep the property in good repair.

The High Court decided that S&H's certificate was conclusive as to the costs incurred in providing the services, but not as to whether it was entitled to charge for such services in the first place (otherwise, a landlord would, in effect, be a judge in its own cause).

Issue

Was the High Court correct in its interpretation of the relevant service charge provision?

Decision

The High Court's interpretation was not correct. As a matter of ordinary language, the identification of the services and expenses properly falling within the service charge could not be separated from the total costs incurred in respect of those services and expenses. The service charge provision made S&H's certificate conclusive as to the "total cost" and both elements make up that single figure. Any other interpretation would require either express words to that effect or a necessary implication. There were no such express words and no grounds for such a necessary implication.

Points to note/consider

1. This is a worrying decision for tenants as provisions similar to the one at issue in this case are common in commercial leases. Whilst some things may clearly fall within the definition of 'manifest error' (for example, where a landlord seeks to include in the service charge calculation the cost of works that have been expressly excluded in the lease drafting), other matters will not be so clear-cut and would ideally require the input of independent and suitably-qualified specialists to resolve them (for example, whether certain works

did fall within the scope of a landlord's repairing obligation). However, a provision such as this will tie a tenant's hands and mean it has no remedy if it disagrees with the landlord's interpretation.

Lord Justice David Richards (who spoke on behalf of the whole Court of Appeal) specifically advised tenants to be very careful before agreeing a service charge provision in these terms (particularly where a tenant's service charge liability is not capped). This is important because, as the judge acknowledged in this case, it is not the job of contractual construction to save a party from an imprudent term. As Lord Neuberger said in the case of *Arnold v Britton [2015] UKSC 36*:

"*The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed.*"

2. Lord Justice David Richards did however acknowledge that the provision makes sense for landlords. In particular, it avoids what could be protracted and very detailed arguments about whether particular pieces of work and expenses do or do not fall within the relevant service charge remit.

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