Browne Jacobson

Kensquare Ltd v Boakye [2021] EWCA Civ 1725

Time was of the essence for the purposes of a landlord's notice to increase a tenant's interim service charge contribution.

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Facts

The tenant (B) held a 125 year lease of a flat. Under the lease, B was obliged to pay an interim service charge of £360 per annum by equal half yearly payments on 1 April and 1 October in each year. The lease went on to provide that this sum could be revised by the landlord:

"to such amount as it shall deem necessary in the light of expenditure reasonably anticipated for that year notice of such revision and adjustment to be served on the Lessee not less than one month prior to the commencement of that financial year."

The financial year started on 1 April. The landlord (K) sent a letter to B in August 2019 requesting payment of half yearly instalments in excess of £180 per half year for periods running from 1 April 2018, 1 October 2018, and 1 April 2019.

Issue

Was time of the essence in relation to the letter sent by K to B revising the amount of the interim service charge payable by B (meaning that K was out of time to increase the amount payable by B)?

Decision

The presumption against time being of the essence was displaced in this case. The language clearly stipulated that notice was to be given "not less than one month" before the start of a financial year, the notice was in respect of "expenditure reasonably anticipated" for the year ahead and once notice was given, the revised sum would be payable half yearly during the financial year. It was therefore likely that the parties intended the advance notice requirement to be strictly adhered to.

Points to note/consider

1. The Court of Appeal's decision in this case was heavily influenced by the decision of the House of Lords in United Scientific Holdings Ltd v Burnley Borough Council [1977] 2 All ER 62. In that case, the House of Lords decided that there is a presumption in rent review clauses that time is not of the essence. Part of the rationale for that decision was that a landlord would be severely (and disproportionately) prejudiced if it was prevented from implementing a rent review just because it had failed to stick to a strict timescale set out in a lease.
   In relation to interim service charges, a landlord would not be similarly prejudiced, since although it may not be able to increase the interim payments due from a tenant, time would not be of the essence for demanding payment of the final service charge at the end of the financial year (so the landlord would not actually be out of pocket). By contrast, for budgeting purposes, it is important that a tenant can be certain in advance of any service charge year how much it is going to have to pay on account for that year.
2. Following the United Scientific case, it has become common to state expressly in rent review clauses that time is not of the essence. In the light of this decision, where a service charge clause contains a timetable for what is to happen when, it might be sensible to

state expressly whether time is or is not of the essence in relation to that timetable.

Contact

David Harris

Professional Development Lawyer

david.harris@brownejacobson.com

+44 (0)115 934 2019

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