Neutral Citation Number: [2020] EWHC 1263 (Ch)

Claim No: CH-2019-000345

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (Ch D)

Royal Courts of Justice, Rolls Building
Fetter Lane, London EC4A 1NL

Date: 19 May 2020

Before :

Kelyn Bacon QC
(sitting as a Deputy Judge of the High Court)

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Between :

SARA & HOSSEIN ASSET HOLDINGS LIMITED **Appellant**

- and -

BLACKS OUTDOOR RETAIL LIMITED **Respondent**

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- -

Richard Fowler (instructed by **Pinsent Masons LLP**) for the **Claimant**
Morayo Fagborun Bennett (instructed by **Gateley Plc**) for the **Defendant**

Hearing date: 18 May 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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KELYN BACON QC

Kelyn Bacon QC (sitting as a Deputy Judge of the High Court):

Introduction

1. This is an appeal against a judgment of Deputy Master Bartlett on 9 December 2019, refusing to grant a money judgment on an application for summary judgment by the Sara & Hossein Asset Holdings Limited ("S&H"), the landlord of commercial premises in Liverpool, against its former tenant Blacks Outdoor Retail Limited ("Blacks"). The central question in the appeal is whether a clause in a lease that makes the landlord's certification of the amount of a service charge conclusive, absent manifest or mathematical error or fraud, is to be interpreted as excluding any defence that the tenant might put forward to the effect that the sums so certified did not properly form part of the service charge and were therefore not lawfully due under the lease.

2. At the conclusion of the hearing I indicated that I rejected the appeal. These are the reasons for that decision.

Factual background

3. The premises in question are retail commercial premises at Chicago Buildings, Whitechapel and Stanley Street, Liverpool. The landlord S&H is a property investment company; Blacks is a large retail chain selling outdoor and leisure clothing and goods. Blacks originally occupied the premises under a lease entered into in 2013 with IVG Institutional Funds GmbH. S&H was the successor in title of IVG from December 2016. The 2013 lease was for a term of 10 years with a break option after five years which Blacks exercised. Having done so, however, Blacks then entered into a lease for a further one-year term from May 2018 to May 2019. The lease was not renewed thereafter.

4. The 2018 lease provided that it was granted on the same terms as the 2013 lease, save as varied by the 2018 lease. Both leases provided for the payment of a main rental charge, plus further charges which included, in particular, a service charge. Regarding the service charge, Schedule 6 to the 2013 lease provided that the service charge should be calculated as a "fair and reasonable proportion" of the total cost of the services and expenses specified in the Schedule. Blacks was required to pay to S&H quarterly sums on account, which were calculated on the basis of written estimates of the service charge that would be due during that year. At the end of each service charge year, S&H was required to provide a certificate of the service charge actually due from Blacks for the year, as stipulated in paragraph 3 of Part I of Schedule 6 (referred to in these proceedings as the "Certification Provision") as follows:

> "The Landlord shall on each occasion furnish to the Tenant as soon as practicable after such total cost and the sum payable by the Tenant shall have been ascertained 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."

5. There was then a mechanism for a balancing payment to be made from Blacks to S&H or from S&H to Blacks, to reflect any difference between the sums payable on account and the sum certified as being payable by Blacks.

6. In the event of a dispute as to the proportion of the total costs of the services and expenses that were payable by Blacks, paragraph 6 of Schedule 6 provided for the dispute to be determined by "expert determination". The definitions in clause 1.1 provided that the expert in this case was to be an independent valuer, who in the absence of agreement was to be chosen by the President of the Royal Institution of Chartered Surveyors or their deputy, and the expert was required to give both parties an opportunity to make representations and counter-representations before determining the matter. There was, however, no provision in the Schedule for a similar expert determination in relation to the various costs and expenses that made up the total amount in relation to which that proportion was to be calculated.

7. A further relevant provision is clause 3.1(a) of the 2013 lease (referred to as the "No Set-Off Provision"), under which Blacks covenanted:

> "To pay the yearly rent reserved by this Lease at the times and in the manner required under clause 2.3 and not to exercise or seek to exercise any right or claim to withhold rent or any right or claim to legal or equitable set-off or counterclaim (save as required by law)."

8. The service charges due under the 2013 and 2018 leases were certified by the landlord's surveyor. By the time of the hearing before the Deputy Master, certificates had been provided for the year 2017–18 but not for the year 2018–19. Since the appeal was filed certificates have been provided for the year 2018–19.

9. The reason for the present dispute was that Blacks paid the main rent due under the leases, and certain other charges, but did not pay the service charges for 2017–18 and 2018–19. Between October 2016 and September 2017 S&H had charged Blacks a service charge of around £55,000; the following year S&H sought to charge Blacks over £400,000, in circumstances where S&H knew that Blacks would be terminating the lease in May 2019. Blacks' objection was that these service charges were excessive and were not properly due under the lease, for the reasons set out below.

S&H's claim

10. Following a letter of claim, in relation to which no response was received, S&H issued proceedings on 11 April 2019, about a month before the expiry of the lease, claiming the sum of £413,695.28 plus interest. This was subsequently corrected to £407,842.77 plus interest (but including VAT). With that correction, the entirety or virtually the entirety of the sum claimed represented unpaid service charges for the years 2017–18 and 2018–19.

11. Blacks served a Defence and Counterclaim on 14 May 2019, mounting a number of challenges to the sums claimed. Some of those were characterised as challenges to the charges themselves. These included complaints that some of the works were unnecessary or were not repair works within the meaning of the relevant repairing covenants, and that the cost of the work was increased by past failures to keep the premises in good repair. In addition, Blacks alleged various breaches that were relied

on by way of set-off or counterclaim, including some of the same matters giving rise to its challenges to liability, as well as additional complaints such as failure to progress the works with reasonable speed and failure to remove scaffolding promptly when the works were completed.

12. On 28 May 2019 S&H issued an application for summary judgment, which was heard by the Deputy Master on 20 August 2019. S&H's central contentions, as the Deputy Master recorded, rested on two propositions: first, that the certificates issued in relation to the service charges were conclusive pursuant to the Certification Provision; and secondly that even if any counterclaim could be made in relation to the service charges (or the works done that were the subject of those charges), that counterclaim could not be set off against the claim, by virtue of the No Set-Off Provision.

The judgment under appeal

13. In his judgment of 9 December 2019, the Deputy Master agreed with S&H that the no Set-Off Provision applied not only to the main rental charge but also to the service charges. Accordingly, in so far as Blacks' objections were properly characterised as counterclaims, rather than defences to liability for the service charges, they could not be set-off against the claims. That was the case for, among other things, the claim that the cost of the repairs was excessive due to historic failures to keep the premises in good repair.

14. The Deputy Master considered, however, that Blacks' challenges to whether certain works fell within S&H's repairing obligations (whether because they were unnecessary or because the works were not within the relevant repairing covenants) were properly characterised as defences to liability. Whether those defences could survive turned on whether the Certification Provision should be construed (as S&H contended) as making the landlord's certificate of the service charges conclusive absent manifest or mathematical error or fraud (which Blacks had not pleaded). The Deputy Master concluded that the Certification Provision should not be construed as having that effect:

    i) He noted that the 2013 and 2018 leases did not make any provision for an expert to assist in determining the cost of the services and expenses that were claimed by the landlord by way of the service charge. That being the case, he found that the parties could not have intended for the landlord to be able to decide conclusively the issues of law and principle that might arise in the course of determining the service charge payable. He therefore considered that the provision for the landlord's certificate to be conclusive applied only to routine accounting matters, and did not apply to the question of whether particular works fell within S&H's repairing obligations.

    ii) While Blacks' challenges to whether certain works fell within S&H's repairing obligations were pleaded in very general terms, the evidence did not suggest that these were spurious points and the Deputy Master considered that he could not say that they had no realistic prospects of success on the facts. S&H was therefore not entitled to summary judgment for the certified service charge.

iii) As to the uncertified sums payable on account, those would in due course be certified and Blacks would be entitled to advance the same defences as it had done in respect of the certified sums. Liability for all the service charges should therefore be determined at a trial, and the Deputy Master was not prepared to give summary judgment separately for the charges payable on account.

15. The Deputy Master nevertheless ordered that Blacks should make a payment into Court of £150,000 within 21 days, failing which its Amended Defence and Counterclaim would be struck out. Blacks failed to comply with that deadline and applied for relief from sanctions, to which S&H consented. Blacks did ultimately pay the £150,000 into Court, albeit late.

16. The Deputy Master also gave S&H permission to appeal in relation to his finding that S&H was not entitled to a money judgment now, both in relation to the sums claimed pursuant to certificates provided by S&H, and in relation to sums that had not yet been certified.

The issues in this appeal

17. Mr Fowler, for S&H, put his case in this appeal on two alternative bases. His primary contention was that the Deputy Master was wrong to find that the Certification Provision, properly construed, did not make the landlord's certification conclusive of the question of whether works properly fell within the scope of the service charges.

18. In the alternative, Mr Fowler submitted that even if the tenant could dispute the question of whether works fell within the scope of the service charges, that could only be done by way of a counterclaim and could not, pursuant to the No Set-Off Provision, be pursued by way of a defence to the claim.

19. S&H's appeal originally also put in issue the Deputy Master's analysis of the uncertified sums payable on account (i.e. for the year 2018–19). Since those sums have, however, now been certified, S&H accepts that this separate ground of appeal has fallen away, save as to interest and costs, and the outstanding sums for 2018–19 fall to be dealt with in the same way as the unpaid service charge for 2017–18.

Discussion

20. In support of his primary case, Mr Fowler referred me to various cases in which the courts have made clear that it is open to parties to reserve a point to an expert for binding determination, including points of law. He cited, in particular, the judgment of the Court of Appeal in *Jones v Sherwood* [1992] 1 WLR 277, and the judgment of Knox J in *Nikko Hotels v MEPC* [1991] 2 EGLR 103.

21. The *Nikko Hotels* case and the more recent judgment of the Court of Appeal in *Barclays Bank v Nylon Capital* [2011] EWCA Civ 826 were both discussed by the Deputy Master, who noted (on the basis of those cases) that there is no overriding principle of public policy which will invalidate a clause that reserves a question of law to an expert; rather the jurisdiction of the expert is a matter of construction of the clause in question to be determined on ordinary principles, without any presumption either way. The Deputy Master considered, however, that this line of authority was of

limited relevance to the present case, since there is no requirement in the lease that the certificates have to be prepared by an expert at all.

22. Mr Fowler accepted that in this case the obligation to prepare and provide the certificate was that of the landlord. While he submitted that the tenant could take some "comfort" from the fact that in practice the certification of the service charges was carried out by the landlord's managing agent, which was in each relevant period a firm of surveyors with professional expertise and subject to professional obligations, he rightly acknowledged that the surveyors were *not* acting in that regard as independent experts, but were acting in their capacity as the agents appointed by the landlord to manage the property.

23. Mr Fowler therefore rightly conceded that the line of authority concerning the validity of clauses assigning matters to be determined by independent experts was not directly applicable in this case where the lease made no provision for an expert determination. He submitted nevertheless that these authorities could be applied by analogy to a certificate issued by the landlord (or the landlord's agent).

24. That is, at its inception, a difficult proposition. There is to my mind a fundamental distinction between a contractual provision that assigns matters that might potentially be disputed to an independent expert, and a provision that is said to confer on one of the parties to the contract the power to determine conclusively (subject to limited exceptions for obvious errors and fraud) the question of whether that party has complied with its obligations under the contract. In this case, the lease provided a clear example of the former, in paragraph 6 of Schedule 6 which provided for an expert determination of the proportion of the total costs that were payable by the tenant. On S&H's case, however, the landlord has the power to decide conclusively all of the issues that might arise in determining whether certain costs were properly claimed as service charges under the lease at all, including issues of law and principle as to the correct construction of the lease.

25. As the Deputy Master noted, that would make the landlord judge in his own cause. Notwithstanding the express provisions in Schedule 6 excluding from the service charges matters such as (for example) costs caused or necessitated by the negligence of the landlord, or the cost of improvement or modernisation the premises, the tenant would be precluded from enforcing those provisions against the landlord, absent obvious errors or fraud. Mr Fowler was not able to identify any precedent authority that supported his position on this point.

26. The fact that in practice the service charge certificates were issued by the landlord's managing agent does not materially assist S&H, given that as Mr Fowler acknowledged the relevant surveyors were not acting as independent experts but were acting as the landlord's agents.

27. Furthermore, even if an analogy could be drawn with the cases on assignment of issues to independent experts, those authorities do not establish that a clause rendering the expert determination conclusive will always oust the jurisdiction of the courts. Rather the matter will turn on the construction of the contract in question (*Barclays Bank v Nylon*, §28).

28. In the present case, the Certification Provision provided for the landlord's certificate to set out "the amount of the total cost and the sum payable by the Tenant". The natural and obvious construction of that provision is that the certificate is conclusive as to "the amount of the total cost" of the services said to be comprised within the service charge. There is, however, a clear distinction between a certificate establishing "the amount" of a cost, and the question of whether that cost should properly have been incurred in the first place, within the scope of the obligations in the lease. As to that latter question, Schedule 6 makes no provision for any conclusive determination by the landlord or indeed anyone else. It follows that, in the ordinary way, that must be a matter which the tenant can put in issue and which is capable of determination by the court in the event of a dispute between the parties.

29. That construction is supported by the fact that, as I have already noted, paragraph 6 of Schedule 6 did expressly provide for an expert determination of a dispute as to the proportion of the total costs that were payable by Blacks. In that case the lease made clear that the expert would be an independent valuer, providing a mechanism for that valuer to be selected in the absence of agreement between the parties. There was also, as I have set out above, express provision for the expert determination to be made following representations by both parties. It would be inconsistent with that carefully-defined dispute mechanism if the (potentially far more significant) question of the headline figure of the total costs and services was construed as falling to be determined conclusively by the landlord, with no provision for an independent expert determination nor any provision for representations by the tenant.

30. Mr Fowler submitted that, if that were the construction given to the Certification Provision, that would render the word "conclusive" redundant, since there would be no matter that would indeed be conclusively determined by the landlord's certificate. I reject that submission. The certificate is conclusive as to the amount of the costs incurred, absent manifest or mathematical error, or fraud, but is not conclusive as to the question of whether those costs as a matter of principle fall within the scope of the service charge payable by the tenant under the lease. The Deputy Master's example of a routine accounting matter is one example of a matter on which the certificate might be conclusive. It is, as the Deputy Master noted, not necessary to define exhaustively the circumstances in which a certificate would or might be conclusive; rather it is sufficient for the purposes of this appeal to find that the landlord's certificate is not conclusive as to the various matters relied upon by Blacks which the Deputy Master considered were properly characterised as defences to liability.

31. While it is appropriate to have regard, as Mr Fowler submitted, to the factual matrix against which the relevant provisions were negotiated, I do not consider that any assistance is to be derived from the fact that there were, or may have been, concerns about the solvency of Blacks: whatever concerns may have arisen in that regard, they do not indicate that the Certification Provision should be given a construction that is inconsistent with both its natural meaning and the context of the agreement, when considered in light of the surrounding provisions.

32. I therefore reject S&H's primary case; the Deputy Master's construction of the Certification Provision was in my view entirely correct.

33. That leaves Mr Fowler's secondary case: that even if not entirely dispositive of the sums claimed by S&H, the effect of the Certification Provision read together with the

No Set-Off Provision is that any defence to liability to pay the service charge must be advanced by way of a counterclaim, and cannot entitle Blacks to withhold sums that have been certified as due under the service charge provisions. Mr Fowler relies, in that regard, on the fact that the No Set-Off Provision precludes the tenant from withholding rent on any basis, including any right of set-off or counterclaim.

34. The short answer to that is that while the Deputy Master agreed that the No Set-Off Provision extended in principle to "payments due from the Defendant in respect of service charges under both the 2013 and 2018 leases", that raises the question of what was indeed "due" under those leases. Blacks accepts that it cannot withhold the service charges on the basis of its counterclaims, if those service charges were properly due under the leases. If, however, there is a dispute as to the liability to pay the service charges at all, then whether or not the covenant to pay is engaged turns on the determination of that dispute. S&H's claim that the No Set-Off Provision precludes withholding of the service charge therefore relies precisely on that which must be proven at trial. The fact of certification by the landlord cannot change that analysis, since (as I have found) that does not render conclusive the question of whether the costs were properly within the scope of the obligations in the lease.

35. Mr Fowler raised the spectre of tenants, in that event, defeating the covenant to pay by raising spurious objections to the service charges certified by the landlord. As Ms Fagborun Bennett, for Blacks, pointed out that could be addressed expediently by way of proceedings to recover sums due under the lease (including services charges) and an application for strike out or summary judgment in relation to defences that were obviously unfounded. In the present case, however, the Deputy Master found that the evidence did not suggest that the points raised by Blacks were spurious points raised purely to avoid payment of the sums claimed.

36. The appeal must therefore fail. Blacks was entitled to raise, by way of defence, challenges to whether certain works fell within S&H's repairing obligations, such that they could properly be claimed by S&H under the service charge. The Deputy Master found that those defences could not be dismissed summarily as having no prospect of success, and there is no appeal against that finding. The claim should therefore proceed to trial.