OUTER HOUSE, COURT OF SESSION

[2019] CSOH 3

CA73/18

OPINION OF LADY WOLFFE

in the cause

CINE-UK LIMITED

Pursuers

against

UNION SQUARE DEVELOPMENTS LIMITED

Defenders

Pursuers: Bowen QC; Brodies LLP
Defenders: D Thomson QC; Dentons UK and Middle East LLP

10 January 2019

Background

[1] The pursuers and defenders are, respectively, the tenants and landlords of premises comprising a multiplex cinema in Aberdeen ("the Property") under a lease ("the Lease"). The Lease provided for rent reviews every five years, to be determined in accordance with part 4 of the schedule to the Lease ("part 4"). The parties were unable to agree upon a revised rent, which then fell to be determined by an independent surveyor as provided for by clause 4.2 of part 4. The Lease stated that the determination of the independent surveyor was to be "final and binding on the parties hereto both on fact and law": see clause 1.23 of

the Lease ("the finality provision"). In due course a surveyor ("the Surveyor") was appointed and a determination ("the Determination") issued.

[2] Notwithstanding the finality provision, in these proceedings the pursuers seek to challenge the Surveyor's Determination on the basis that she erred in law. The defenders resist this on the following grounds:

1) The jurisdictional challenge: The defenders' principal challenge was that this action was incompetent because the court had no jurisdiction. This followed from the finality clause ("the jurisdictional challenge"). The Surveyor's decision was one issued by her in her capacity as an expert, in circumstances where the parties to the Lease agreed that her decision was to be "final and binding on the parties…both on fact and law". The court simply does not have jurisdiction to entertain the pursuers' claim for reduction on the ground of a supposed error of law on the part of the Surveyor.
2) The construction point: The defenders also challenged the relevancy of the pursuers' case. They did so on the basis that the interpretation the pursuers contended for as the proper one, and which they say the Surveyor erred in not following, is not an available interpretation of the Lease. Further, there was no basis in either the pursuers' averments, or the Surveyor's Determination, for the conclusion to be drawn that the Surveyor did in fact err in law in the manner alleged by the pursuers ("the relevancy challenge")
3) The pleading point: Lastly, the defenders challenged the pursuers' conclusions (1a and 1b) as too vague to be granted ("the pleading point"). By reason of the pursuers' substitution of new conclusions (amending conclusions 1a and 1b), just before the debate began, Mr Thomson QC, who appeared for the defenders, did

not insist on this challenge. However, after a motion made by Mr Bowen QC in the afternoon to amend these conclusions further, which Mr Thomson QC opposed, Mr Thomson renewed his challenge to the conclusions as further amended (if amendment were allowed). (I reserved the question of amendment to enable the debate to be concluded.)

The matter called before me for debate in the commercial court on the defenders' first and third pleas to the competency and relevancy of the pursuers' action.

The Lease

[3] I note below the provisions of the Lease material to the issues debated. Passages emphasised by the defenders are highlighted in bold; those highlighted by the pursuers are indicated by italics. The finality clause (as I have termed it) is found in the definition of "Independent Surveyor".

Definition of "Independent Surveyor"

1) Clause 1.23: This defined "Independent Surveyor" as a "single chartered surveyor **experienced** in assessing rental levels of property **similar to the Property** in city centre locations in the United Kingdom… who shall **act as an expert**,… and whose decision shall **be final and binding on the parties hereto both on fact and law**, and such chartered surveyor, who *shall be entitled to seek professional advice on matters of law and other issues if he thinks fit, shall have the power to refer any matter to the Court* in accordance with the Administration of Justice (Scotland) Act 1972". The defenders relied in particular on the words highlighted in bold; the pursuers also referred to the words in italics.

Part 4 of the schedule to the Lease

Part 4 is headed "Rent review". Clause 1 of part 4 ensures that rents may only be revised upwards on a rent review.

2) Clause 2 of part 4 of the schedule: provided

> "2. The open market rent for the Property at any Review Date shall be such an amount as may be agreed between the Landlords and the Tenants or determined as representing the yearly rent which would reasonably be **expected to become payable** in respect of the Property, **after the expiry of a rent free or concessionary rent period or receipt of an inducement** of such length or amount as would normally be negotiated in the open market at the relevant Review Date to *allow premises such as the Property to be fitted out for the permitted trade* (and that notwithstanding that the Property is assumed by virtue of the assumption contained in sub-paragraph 2.1.1 below to have been fitted out only to the shell condition in which the Property was at the commencement of the Period)
>
> 2.1 on the following assumptions at that date:-
>
> [I need not set out the seven assumptions listed]
>
> […]
>
> 2.2 but disregarding:-
>
> […]
>
> 2.2.6 for the purposes of applying to the Property evidence of rents passing in the open market, the *value of any rent free period or other concession or consideration which might normally be given to any tenants* in the open market in respect of premises such as the Property for a use such as the permitted trade *to compensate such tenants for the time likely to be taken to fit out such premises*;…"

Parties were agreed that the disregard in clause 2.2.6 of part 4 was to address the anomaly identified in *Bishopsgate No 99* v *Prudential Assurance* (1984) 270 EG 950 (of giving a tenant credit for a notional fitting out period on each rent review which

would not in fact occur) and further discussed in *Co-operative Wholesale Society Ltd* v *National Westminster Bank plc* [1995] 1 EGLR 97 at 98ff.

The Surveyor's Determination

Appointment of the Surveyor

[4] As noted above, clause 4.2 of part 4 provides that if the tenants and landlord "shall be unable to agree upon the amount of the revised rent payable on and from any Review Date by the relevant Review Date then the same shall be determined by the Independent Surveyor at the option and on the application of either party. On 16 December 2016 Angela Warr King was appointed as the Independent Surveyor ("the Surveyor") by the President of the Royal Institute of Chartered Surveyors (in the absence of parties' agreement as to the surveyor) to determine the revised rent as at 29 October 2014 ("the Review Date"). By reason of her appointment, there was no letter of appointment of her.

Surveyor's Determination

The Determination

[5] By written determination dated 2 May 2017 ("the Determination") the Surveyor determined the open market rent of the Property as at 29 October 2014 (ie the Review Date) at £755,375 *per annum*. The pursuers had contended for a revised rent of £563,750 *per annum* whereas the defenders had contended for a revised rent of £834,000. The determination comprises three pages and an appendix of four pages containing her "Explanatory Reasons" for her rental valuation. She narrated at paragraph 6 of the Determination that there was no reference in the Lease requiring the expert to give reasons but that, at parties' request, she provided her explanatory reasons in the appendix.

Appendix of Explanatory Reasons to the Determination

[6] After dealing with matters of the location/competition (in section 1), the cinema market and market conditions in Aberdeen (in section 2), the Lease terms (in section 3) and layout of the building and car parking (in section 4), she turned to consider "Comparable Evidence" (in section 5). In paragraph 5.1 (which I need not set out) she identified two premises as comprising the "most helpful comparable evidence" to open market lettings. In paragraph 5.2 she proceeded to explain in brief terms how she approached the evidence of comparable lettings. This was the only part of the Determination which was subject to detailed submissions. Those parts emphasised by the defenders and pursuers are shown in bold and italic font, respectively. Paragraph 5.2 in the Appendix to the Determination stated:

> "5.2 However, I am mindful **there is no consensus nor methodology as how to analyse/devalue the capital contributions given by the Landlord to the Tenant upon new lettings and more importantly how they are to be treated at rent review**. [The Landlord's expert report] has adopted headline rents and [the Tenant's expert report] has analysed the comparable letting evidence over a 20 year term (being the hypothetical term of the leases). [The Tenant's expert] has provided four cinema operators' letters in support of his view, which may be thought subjective in content. **I have carefully considered the Parties['] surveyors['] arguments and am now aware of the recent differing decisions on this point in Arbitration Awards relating to cinemas in Scotland and England**. I am aware that both [of the two comparable lettings she identified in para 5.1] were established retail parks prior to the cinema lettings (indeed [one of these] previously had a UCI cinema) but, in my view, the additional restaurants and retail were dependent upon the new cinema tenants. *In my opinion the Landlord's capital contribution should not be devalued to reduce the headline rents on [the two comparable lettings she selected] (or on other lettings) in the circumstances of the subject rent review."*

The Law

[7] The following legal propositions concerning the principles of contractual construction and the court's jurisdiction and ouster clauses were uncontroversial.

Contractual construction

[8] In relation to commercial leases, it was accepted that "there are no special rules for the construction of rent review clauses" (*Co-operative Wholesale Society Ltd* v *National Westminster Bank plc*, 99C-D); instead, the general principles of contractual construction apply. On the question of construction generally, the court must ascertain the intention of the parties by determining what a person, having the background knowledge of the parties, would have understood from the language selected by them. The meaning of the words used must be assessed having regard to other relevant parts of the contract. In the event that there are two possible constructions, the court is entitled to prefer one which is consistent with business common sense (*Midlothian Council* v *Bracewell Stirling Architects* [2018] CSIH 21, paragraph [19]). Furthermore, once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each (*Wood* v *Capita Insurance Services Ltd* [2017] AC 1173, paragraph [12]).

The Court's jurisdiction and ouster clauses

[9] On the question of ouster clauses (such as the finality clause here) which seek to render a decision final and such as to preclude the court's jurisdiction to review a decision in

an action by a dissatisfied party, it is competent for contracting parties to confer upon an expert, appointed to resolve some question or dispute between the parties, exclusive jurisdiction to determine issues of both fact and law. In all cases it is a question of contractual construction whether or not the parties have in fact done so: *Ashtead Plant Hire Company Limited* v *Granton Central Developments Limited* [2018] CSOH 107, paragraph [15], *per* Lord Doherty.

The jurisdictional challenge

[10] The defenders' jurisdictional challenge is the most fundamental challenge and, if successful, would result in dismissal of this action as incompetent. It is logical, therefore, to begin with parties' submissions on this issue.

Submissions on behalf of the defenders

The Lease

[11] Mr Thomson QC noted that the Lease concerned a multiplex cinema and, further, that by definition the Independent Surveyor to be appointed was "experienced assessing rental levels of property similar to the Property in city centre locations in the United Kingdom". The effect of the finality provision was to render the Surveyor's Determination final and binding on the parties on matters of fact and law. Accordingly, what had been remitted to the Surveyor had, on the terms of this Lease, included questions of law such as the proper interpretation of the rent review provisions.

The Determination

[12] Mr Thomson QC noted the Surveyor's observations at the beginning of paragraph 5.2 of the Appendix to the Determination, to the effect that there was "no consensus nor methodology" on how to analyse landlords' capital contribution (which is nowhere defined). He also noted her observation that she had "carefully considered" the parties' arguments and where, again, she expressed an awareness of differing views in arbitration awards on this matter. These comments militated against a prescriptive reading of certain parts of the rent review provisions in part 4. In relation to the last sentence of paragraph 5.2, the precise content of this sentence was unclear but, in his submission, that was problematic for the pursuers but not the defenders.

The jurisdictional challenge

[13] Applying the legal propositions identified above, Mr Thomson QC's submission was that there was no rule of law preventing parties agreeing that the decision of an expert shall have binding effect on issues of both fact and law. In such circumstances, the decision was final and conclusive, and not subject to the court's review (even if there were an error of law), unless it could be shown that the expert had not performed the task assigned to him. As it was put by Knox J in *Nikko Hotels (UK) Ltd* v *MEPC plc* [1991] 2 EGLR 103, 108: "If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity". These propositions were well vouched by the authorities: see *Jones and others* v *Sherwood Computer Services plc* [1992] 1 WLR 277, 287 *per* Dillon LJ; *Barclays Bank plc* v *Nylon Capital LLP* [2011] EWCA Civ 826; and *West of England Shipowners Mutual Insurance Association* v *Cristal Ltd* [1996] CLC 240, 247-248 *per* Neill LJ; *cf National Grid Company plc* v *M25 Group Ltd* [1999] 1 EGLR 65.

[14] Mr Thomson QC stressed that the finality of the decision and the ouster of the court's jurisdiction could extend even to questions of law, if this is what the parties had agreed. The case of *West of England Shipowners Mutual Insurance Association, cit supra,* identified an example of this. (I note that the example did not arise on the facts of that case; rather the Court of Appeal in that case identified an example provided in the case of *Jones*. The example the Court of Appeal held out (from *Jones*) was that the determination made by accountants was binding even though it had involved a legal question (considering as a matter of construction what transactions were included in the term "sales")). For this reason, too, cases founded upon by the pursuers could readily be distinguished. The provisions under consideration in those cases were not in the same terms. So, for example, even in the most recent case decided by Lord Doherty (of *Ashtead Plant Hire Company Ltd* v *Granton Central Developments Limited*) the wording under consideration did not purport to render the decision final on matters of law.

[15] Mr Thomson QC submitted that if the parties have agreed that the decision of an expert will be "final and binding" (or words to a similar effect) then that decision will indeed be incapable of challenge, even if, for example, the decision in question required the expert to reach a view on a matter of contractual construction. That, he submitted, was precisely the circumstance of the present case. In short, it simply will not avail the pursuers to argue (as they do) that the Surveyor erred in law because the parties have agreed that the Surveyor's "decision shall be final and binding on the parties hereto both on fact and law". The case of *National Grid Company*, on which the pursuers relied, could readily be distinguished. In that case, Mummery LJ expressly observed that "the terms of the lease do not confer on the valuer, either expressly or by implication, the sole and exclusive power to

construe the lease". In the instant case, by contrast, the parties have conferred "the sole and exclusive power to construe the lease" upon the Surveyor. The language of the Lease could not be clearer in this respect.

Submissions on behalf of the pursuers

[16] Mr Bowen QC invited me to reject the defenders' challenges and to allow a proof before answer including on the pursuers' averments about the commercial practice of landlords granting certain inducements in order to secure an inflated or headline rent.

[17] Mr Bowen QC indicated that he did not dispute Mr Thomson QC's submissions about the clauses in the Lease or the terms of remit. He did not accept, however, that finality on matters of "fact and law" gave the Surveyor a free hand in relation to all matters set out in paragraph 2 of part 4 or that she was entitled to make mistakes in any of these contractual directions.

[18] In his concise submission, the only commercially sensible interpretation of part 4 was that these constituted detailed and individual "contractual directions" to the Surveyor and which she was obliged to follow. Furthermore, departure from these constituted an error of law of the kind it was open for this court to correct. A determination vitiated in this way could not be final and binding.

[19] In other words, what the Surveyor had done had constituted an error in law by misdirecting herself on the interpretation of clause 2.2.6 and which amounted to her answering the wrong question. For these reasons, the pursuers' case was competent.

Discussion and determination of the defenders' jurisdiction challenge

Interpretation of the finality provision

[20] I have no hesitation in preferring the submissions on behalf of the defenders on this issue. In my view, there is no ambiguity in the finality provision. It could not be clearer in its terms. Mr Bowen QC did not argue to the contrary. He also accepted that, as recognised by the cases, the rationale underlying provisions conferring finality on decisions of experts to whom disputes are remitted included the benefits of speed, certainty and finality.

[21] In my view, the parties' intention for finality in questions of fact and law is reinforced by two features of the Lease not yet noted. First, the fact that there is no requirement of the Independent Surveyor to provide reasons for his or her determination - a point noted by the Surveyor (as she noted at para 6 of her Determination), is in my view significant. One important function of the provision of reasons is to enable parties to consider whether there has been an error of law in order better to inform their exercise of any right of appeal. This rationale for giving reasons largely falls away if parties agree that there is to be no appeal to the courts against a determination. The absence of a requirement to give reasons is not, of course, determinative but it is wholly consistent with finality being conferred on questions of law as well as on questions of fact. Secondly, it is also significant that the finality provision is not defined by reference to the subject matter of the kind of disputes which may be referred to the Independent Surveyor. In other words, had parties wished to retain the ability to challenge a determination on the basis of an error of law in certain sorts of disputes or where legal questions could arise (eg in the construction of clauses of the Lease), they could have distinguished those forms of disputes from others in which finality in fact and law was desired. They did not do so. Instead, the finality provision is inherent in the very definition of an "Independent Surveyor". In other words,

the parties' intention was that *all* disputes remitted to an Independent Surveyor were to have the benefit of finality on both matters of fact and law.

Did the Surveyor ask the wrong question?

[22] As the debate developed, the dispute between the parties narrowed to a question as to what had been remitted to the Surveyor. Putting it another way, the argument became whether the Surveyor had answered the wrong question (as the pursuers contend) or answered the right question (as the defenders contend).

[23] What, then, was remitted to the Surveyor?

[24] As noted above, there was no letter of remit to the Surveyor because, in the absence of parties' agreement, she was appointed by the President of her professional body. The issue she had to determine, after considering the expert reports provided to her by the parties, was the revised rent. In particular, she had to determine the "Open Market Rent" for the Property from the agreed review date determined in accordance with part 4 (especially clause 2) of the schedule to the Lease.

[25] Mr Thomson QC contended that the question referred was the question of ascertaining the new open market rent. He argued that, so long as the Surveyor addressed herself to that question (of the revised open market rent at the agreed review date), and did not answer another question, her decision was final regardless of whether she had erred in law in, say, her interpretation of parts of clause 2.2.6 (which he did not concede). For his part, Mr Bowen QC argued that the question referred was more particular. Each part of clause 2 in part 4 constituted a contractual direction.

[26] Ably argued though it was, I do not accept Mr Bowen QC's submission that the individual provisions of clause 2 (especially the disregard in clause 2.2.6) of part 4

constituted a "contractual direction" (ie as comprising part of the question posed) such that, if she erred in her interpretation of that provision, it meant that she had addressed herself to the wrong question. If she erred in her interpretation of this disregard, so the argument ran, that was an error of law and one which involved the Surveyor departing from the question posed.

[27] On this approach, any error of law in the interpretation of a particular contractual provision (such as the scope of the disregard in clause 2.2.6 of part 4), even if done within the bounds of the relevant exercise (here, ascertaining the open market rent) is nonetheless to be characterised as asking the wrong question (eg because of departing from the "contractual direction"). In my opinion, however, the effect of that approach is to conflate the two very questions the cases have articulated ("*Did the Surveyor answer the wrong question?"* with "*Did the Surveyor answer the right question, albeit in the wrong way?"*) to define the boundaries of the court's limited jurisdiction to review. Furthermore, in my view, this approach is not consistent with the clear words the parties used. It would deprive the words "and law" in the finality provision of any content. If Mr Bowen QC's approach were correct, it was hard to identify what kinds of errors of law could survive (ie could permissibly be made within the jurisdiction of the Surveyor). When asked for examples of this or for some content to be attributed to the words "and law", Mr Bowen QC was unable to provide any convincing answer.

[28] For these reasons I find that the defenders' jurisdictional challenge is well-made and the pursuers' action is incompetent.

Is there any discernible error of law disclosed in the Appendix to the Determination?

[29] The foregoing discussion proceeds on the basis that there is an error of law discernible in the Surveyor's Determination. As I understood it, the pursuers' criticism is based on the final sentence of paragraph 5.2 of the Appendix to the Determination, quoted above (at para [6]). In particular, it is suggested that the Surveyor's use of the words "Landlord's capital contribution" necessarily meant that she disregarded more than she should have, given that the disregard in clause 2.2.6 was confined to the value of any rent-free period or other concession or consideration attributable to a notional fitting out period (ie the *Bishopgate's* anomaly).

[30] I am not persuaded that it can be inferred from this short passage that the Surveyor did anything other than to apply the disregard in clause 2.2.6. The phrase "capital contribution" does not appear to be a defined term in the Lease. Certainly, parties did not suggest this phrase had any specific or agreed content, or that on the material available to the Surveyor, "capital contribution" was comprised of several elements of which notional fitting out costs was only one. In any event, I am not persuaded that this passage necessarily means that the Surveyor approached matters in the way the pursuers contend, ie that not only did she disregard notional fitting out costs but that she disregarded some other, additional, but unknown, "capital contribution". I am not persuaded that there is any colourable ground to argue that the Surveyor erred in law in her interpretation of clause 2.2.6 of part 4. Demonstrating an error of law on the face of the reasons is a necessary precondition to any case for contending that the Surveyor had erred and that that error had led her to address the wrong question. For this reason, too, the pursuers' argument on the jurisdictional issue fails.

The relevancy challenge

[31] In view of the conclusion I have reached on the jurisdictional challenge, the pursuers' case falls to be dismissed as incompetent. It is, therefore, not strictly necessary to address the relevancy challenge. In deference to the careful oral and written submissions I have had, I should indicate briefly how I would have determined this issue. As noted above, there was no dispute between the parties as to the principles to be applied in the construction of contracts; it was also accepted that there was no specialty in their application to commercial leases or rent review clauses.

[32] Mr Thomson QC did not offer an interpretation of what these provisions meant as it sufficed for his purposes to contend that the pursuers' proposed interpretation was not an available one. I turn to consider the pursuers' interpretation.

[33] The pursuers' case that the Surveyor erred in law in her interpretation of clause 2 of part 4 is premised on the court being persuaded that the pursuers' interpretation is the correct and, indeed the only correct, interpretation of these clauses. The pursuers' interpretation amounts to a contention that, inherent in the contractual provision in clause 2.2.6 to *disregard* the value of notional fitting out costs, there is a positive obligation necessarily to be applied not to disregard (ie the surveyor must *positively have regard* to) other landlords' inducements (here equiparated with "capital contribution"), whatever it may be. I accept Mr Thomson QC's submission that this is not an available interpretation of this provision of the Lease. As I have not had the benefit of full submissions on this point, I do not propose to provide a view as to the correct interpretation of this provision. It suffices for present purposes to note that, in my view, clause 2.2.6 of part 4 did no more than expressly require the Surveyor to disregard the value of notional fitting out costs. I do not accept that the clause positively required her to have regard to other factors, particularly

where there are no defined terms clearly identifying what would be within the scope of this implied positive obligation. It may well be that, as this was not expressly provided for in these provisions, an expert surveyor had a discretion as to what matters to have regard to, so long as this was not inconsistent with the express terms of the rent review provisions.

[34] Accordingly, even had I found the pursuers' action competent, I would have dismissed it as irrelevant.

The pleadings case

[35] Finally, the pleadings case amounted to no more than an attempt to articulate in a declarator the pursuers' preferred interpretation. As I have not accepted that interpretation, there is little utility in discussing the terms of the declarators sought in either their amended or prospectively further amended form.

Decision

[36] I shall grant the defenders' motions and dismiss the action as incompetent. I shall reserve the question of expenses meantime.