Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd [2023] UKSC 2

A tenant was required to “pay [the service charge] now and argue later” by the Supreme Court when interpreting wording commonly found in commercial lease service charge provisions.

Background: Blacks occupied premises at Whitechapel and Liverpool owned by S&H. For the years 2017 – 2018 S&H certified service charges at around £400,000.

Blacks were unhappy with the sum sought – it was almost 8 times higher than the previous year – and decided to challenge the amount claimed under S&H’s certificate, refusing to pay the service charge until the issue had been resolved. S&H sued Blacks for the outstanding service charge balance.

The dispute centred around the meaning of the term in the leases which said S&H was to issue a certificate for service charges “as to the amount of the total cost and sum payable by the Tenant” and that certificate would be “conclusive” in the absence of “manifest or mathematical error or fraud”.

References to the landlord providing the tenant with a certified service charge statement are commonplace in commercial leases and many also state that the landlord’s certificate will be conclusive as to the sums sought, which is why this case is particularly interesting.

What did the Court decide? When interpreting a clause in a contract, the court will look to give it its natural and ordinary meaning. On the face of it, the wording in Blacks’ leases points against any right for Blacks to challenge the sums sought, without there being any manifest or mathematical error or fraud.

The High Court originally decided this wording meant the landlord’s certificate was conclusive as to the costs of providing the services but it was not conclusive as to the question of whether the landlord was entitled to charge for those services to begin with, agreeing with Blacks.

S&H appealed. The Court of Appeal overturned the High Court’s decision, agreeing with S&H, and said that the landlord’s certificate was conclusive as to all elements which made up the “total cost” of the tenant’s bill, saying the services and expenses properly falling within the service charge could not be separated from the total costs incurred. Any other interpretation would require either express words to that effect or for words to be implied. There were no express words in the leases and the Court of Appeal found there were no grounds for implying terms either.

Blacks then appealed to the Supreme Court.

The Supreme Court agreed with S&H’s argument that Blacks’ challenge to the payment of a service charge undermines the commercial purpose of that clause in the lease – it would be highly disadvantageous for a landlord to incur substantial costs in providing services and then be required to litigate for months, or even years, in order to receive payment. But the Supreme Court also agreed with Blacks that if S&H were entitled to determine conclusively the amount of service charge payable without question or recourse, this would effectively make S&H “the judge in his own cause”.

S&H’s case was pithily described as “pay now, argue never” with Blacks’ described as “argue now, pay later”.

Neither was considered to be satisfactory, so the Supreme Court offered an alternative interpretation of “pay now and argue later”. This way, S&H could not complain there would be a delay in receiving the service charge payment but any service charge payments made by Blacks could be the subject of a counterclaim.

This decision was a little surprising because the court had imposed its own view of what was fair in the circumstances and had effectively re-written that part of the lease – this is something the courts are extremely reluctant to do, especially where it is accepted that both parties are “sophisticated commercial entities”, as they both were here.

What can we take away from this? Moving forwards, tenants are going to (and should) be wary about agreeing wording which provides that the landlord’s service charge certificate is conclusive and are potentially going to be looking to soften the relevant service charge provisions, perhaps by expressly including a right for the tenant to challenge the sums sought by referring the matter to an expert under the lease disputes clause. From a landlord’s perspective, so long as the tenant is still required to “pay now and argue later”, this seems to be a sensible way of balancing the competing interests of the parties.

It will also be very interesting to see how this decision will affect future court cases involving the interpretation of contractual terms more widely, as the court in this instance appears to have opted for fairness over certainty. Where will the line be drawn on rescuing a contract where two sophisticated parties with the benefit of legal advice have simply contract into a “bad bargain”?