



Neutral Citation Number: [2020] EWHC 1521 (Ch)

Case No: PT-2019-000787

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

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: 12/06/2020

Before :

THE HON. MR. JUSTICE FANCOURT

Between :

MONSOLAR IQ LIMITED

Claimant

- and -

WODEN PARK LIMITED

Defendant

Toby Watkin and Luke Wilcox (instructed by **Osborne Clarke LLP**) for the **Claimant**
Timothy Dutton QC (instructed by **Geldards LLP**) for the **Defendant**

Hearing dates: WRITTEN SUBMISSIONS ONLY

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.

.....

THE HON. MR JUSTICE FANCOURT

Fancourt J :

1. This supplementary judgment addresses a further argument raised by the Defendant and the consequential issues arising from my judgment at [2020] EWHC 1407 (Ch).

Further Argument

2. After handing down judgment and giving directions for consequential matters to be addressed in writing, I received an application from the Defendant’s solicitors’ for permission to address further argument on a substantive issue arising from my judgment. It was in these terms:

“The outcome of the case as set out in the draft judgment is based on an interpretation of the lease (“the Interpretation”) advanced by neither party. Neither party has had the opportunity to make submissions either on the Interpretation or on the effect of the Interpretation on the second limb of the Chartbrooke [sic] test.

It is permissible in these circumstances to request the opportunity to make further submissions on these points alone ...”

3. The Claimant’s solicitors also requested permission to make submissions. Accordingly, I permitted both parties to send further written submissions on the Interpretation and its effect.
4. The point identified related to whether it could be said to be clear what mistake had been made in the language of the Lease and therefore what “correction” was required. In fact, as I pointed out in my judgment, the Defendant had addressed no argument in its submissions to that question, preferring instead to concentrate on seeking to persuade me that it was not clear that any mistake had been made. Before I prepared my judgment, neither party had requested the opportunity to address any argument in the other’s submissions.
5. I received further submissions from Mr Timothy Dutton QC, newly instructed on behalf of the Defendant. However, the submissions sought to argue for the first time, apparently without telling the Claimant’s solicitors in advance that it was intending to do so, that there was a further possible meaning of Schedule 6 that no none had previously raised, and that for that reason it was not clear what mistake was made, and accordingly that my decision on the claim should be reversed.
6. Mr Watkin and Mr Wilcox on behalf of the Claimant had already sent further submissions seeking to show that, by reason of the way that the RPI operates, my conclusion on the mistake made by the parties in fact had exactly the same financial consequences as the correction for which the Claimant had contended. It seems that in the light of the solicitors’ earlier correspondence they were anticipating a different argument from the Defendant.

7. Once the Claimant's solicitors had seen the Defendant's further submissions, they requested the opportunity to respond. Having considered the argument that Mr Dutton QC had raised, I invited them to respond.
8. The Defendant's new argument is that the parties might have meant to provide, by Schedule 6, that the rent should increase in line with the RPI but should not decrease on any Review Date. In other words, an "upwards only" or "ratchet effect" review clause. Not only had the Defendant not previously sought to argue that it was unclear what mistake was made in Schedule 6, but its argument on the question of whether there was a mistake at all laid much emphasis on the fact that deflation during the term of the Lease was a real possibility and that the rent could therefore go down as well as up.
9. The argument that an upwards only review clause was intended is therefore not only new, but a volte face in the Defendant's case, and opportunistic. Neither was it the point that the Defendant had sought permission to address. It was a new argument about the meaning of Schedule 6 that was not the Interpretation that I had reached. The reality is that the Defendant was seeking to argue, after seeing my judgment, a point that it had not previously taken.
10. Be that as it may, the Defendant now argues that it cannot have been clear that the mistake was the one that I identified because there was another possible meaning that the parties might have intended Schedule 6 to have. But the relevant question is not whether, divorced from the context and the other terms of the Lease, it is possible that parties in the position of the Claimant and the Defendant might have agreed an upwards only review clause. Of course they might have done so. The question is whether it is unclear what mistake these parties made because, objectively, they could have meant that the rent should increase but not decrease in line with the RPI.
11. Mr Dutton relies in this regard on the terms of paragraph 4.2 of Schedule 6, which states that if the RPI ceased to be published a new arrangement for indexation should be agreed, so that the rent to be calculated "shall reflect increases in the cost of living on a similar basis...". I do not consider that this is anywhere near sufficient to suggest that the parties' mistake could well have been in failing to provide for upwards only RPI reviews. The necessary correction must reflect the nature of the mistake. The mistake was to specify the wrong Base Index Figure, which had the unintended result of repeating each annual RPI adjustment to the rent on every succeeding rent review during the term. A failure to state that each rent review should have upwards only effect would be a further mistake, different in kind from the mistake that I held was clearly made. There is no suggestion that, by omission, the parties made that mistake too. The use of a cost of living index such as the RPI suggests the opposite.
12. Contrary to the original submissions of the Defendant, which stressed the potentially upwards and downwards effect of Schedule 6, the expectation of the parties was, no doubt, that the rent would increase annually during the term of the Lease. There had only been one recent year in which, overall, the RPI had reduced. That was 2009, in the immediate aftermath of what would, in 2013, have been regarded (mistakenly) as a once in a lifetime economic crisis. The reference in paragraph 4.2 to "increases in the cost of living" simply reflects the parties' knowledge that, invariably, the RPI increases each year. There was, in truth, little need for the parties to specify upwards

only rental adjustments, but if that was their intention they would have included separate and specific words to that effect. There is no support for the argument that, by mistake, they omitted those words as well as mistakenly specifying the wrong base index figure.

13. Mr Dutton submitted that his argument makes this case indistinguishable from the Trillium case that I addressed in detail in my judgment. I do not agree. The decision in that case turned on its own particular facts, namely the commercial deal that had been struck in 2005 to restructure the lease arrangements, reduce the rent passing under the old lease and fix the initial rent under the new lease. If the new lease in that case did not mean what it said, there was – in the light of that commercial deal – “more than one possible solution to the alleged drafting error”, to use the words of Lewison LJ in that case, each of which produced a different financial outcome. It was not possible for the reasonable observer to say which one the parties clearly meant. If, as I held, the terms of Schedule 6 were mistaken, it is clear what the mistake was and what the parties must have meant in place of the mistaken words.
14. There is therefore no reason to alter the decision that I reached.

Costs

15. I consider that, for the reasons given by the Claimant in its further submissions, it has succeeded on the claim. It is the successful party and the Defendant is the unsuccessful party. The Defendant submits that no order for costs should be made or only a proportion of the Claimant’s overall costs ordered. The only reason given is that the witness statements of Ms Meyer on behalf of the Claimant contain inadmissible material. I consider that submission as made to be unrealistic. The only question is whether some part or all of the costs of one or other (or both) of Ms Meyer’s witness statements should be disallowed. Although her second witness statement contained much inadmissible material, this was largely there to respond to the inadmissible material in the Defendant’s own witness evidence. The Claimant had accepted that this was only admissible in the event that the Defendant’s challenged evidence was held to be admissible.
16. It is nevertheless true that significant parts of the Claimant’s witness statements contained argument, speculation and inadmissible opinion evidence. It is important that the proper limits of factual evidence are respected, even on a Part 8 claim, and the court will increasingly seek to mark non-compliance with the rules and practice direction. Overall, justice is done in this case by directing that one-third of the costs of preparing both witness statements of Ms Meyer is disallowed. Subject to that, the Defendant must pay the Claimant its costs of the claim, to be assessed on the standard basis if not agreed.
17. The Claimant seeks a payment on account of its costs of £100,000. Its amended schedule of costs contains a grand total of £218,887.67. Like the Defendant, whose own costs are said to be half the amount of the Claimant’s costs, I find the total in the costs schedule remarkable for a Part 8 claim raising one issue of the true interpretation of a lease. There may however be a partial explanation in the criticisms of the Claimant as to the way that the Defendant has conducted the litigation and increased costs. There was also a mediation. Nevertheless it is hard to see how reasonable costs on the standard basis could exceed about £100,000. Allowing some margin for

the incidence of assessment and the order I have made disallowing some costs, I shall order a payment under CPR Part 44.2(8) of £65,000.

18. The Defendant asks for 60 days in which to pay, on the grounds of Covid-related difficulty and the need for the Defendant to sell assets. No evidence in support of the latter has been adduced. I therefore disregard that suggestion. I accept that time lines are generally more stretched at the current time and therefore will allow 28 days rather than the usual 14 days for payment of the payment on account of costs.

Permission to appeal

19. The Defendant seeks permission to appeal on the basis that I was wrong to conclude that it was clear that a mistake had been made in the drafting of Schedule 6, and also on the basis that I was wrong to decide that it was clear what mistake was made and what “correction” was therefore required.
20. Although the issue that I decided is one of the true interpretation of a contract, on which subject it is notorious that the true meaning can strike different judges differently, I do not consider that the arguments raised by Mr Dutton in his application for permission to appeal have real prospects of success. In particular, on the first ground, there is no explanation of how the draftsman could be taken rationally to have intended that the rent should increase exponentially in the way that the formula would operate, all the more so if, as the Defendant now contends, the rent was not intended to be capable of falling with the RPI. On the second ground, the different version of the appropriate “correction” which the Defendant says is a real possibility is not a version whose difference addresses the clear mistake in the Lease but a version that additionally deals with another alleged mistake that has not been established.
21. Permission to appeal is therefore refused.