

Sara & Hossein Asset Holdings Ltd (a company incorporated in the British Virgin Islands) (Respondent) v Blacks Outdoor Retail Ltd (Appellant)

Date: 18 January 2023

Justices

Lord Hodge (Deputy President), Lord Briggs, Lord Kitchin, Lord Sales, Lord Hamblen

Background to the Appeal

Blacks Outdoor Retail Ltd ("Blacks") rented commercial retail premises from Sara & Hossein Asset Holdings Ltd ("S&H") under two successive leases dated 2013 and 2018 (the "leases"). The leases stated that S&H as landlord should provide a certificate each year setting out the service charge sum payable by Blacks as tenant. The relevant clause stated that the landlord should provide a certificate "as to the amount of the total cost and the sum payable by the tenant" and that this was to be "conclusive" in the absence of "manifest or mathematical error or fraud" (the "certification provision"). Blacks refused to pay the service charge for the years 2017-18 and 2018-19, which amounted to £407,842.77, claiming that the service charge was excessive and included unnecessary items and expenses that were not properly due under the terms of the leases. S&H issued proceedings and sought summary judgment for the outstanding service charge, arguing that under the certification provision S&H's certificate as to the sum payable was conclusive subject only to the defences that there had been a manifest error, a mathematical error or fraud (the "permitted defences"). Blacks argued that the true meaning of the certification provision was that S&H's certificate was conclusive as to the amount of costs incurred by the landlord, but not as to Blacks' liability for service charge. S&H's application for summary judgment was dismissed by a Deputy Master in the High Court. A Deputy Judge of the High Court dismissed S&H's first appeal. The Court of Appeal allowed S&H's second appeal and entered summary judgment in S&H's favour, remitting to the High Court the question of what, if any, counterclaims Blacks could pursue.

Judgment

By a majority the Supreme Court dismisses Blacks' appeal against the grant of summary judgment but holds that this does not preclude Blacks from pursuing a counterclaim in the High Court in relation to its underlying liability for the disputed service charge payments. Lord Hamblen gives the lead judgment, with which Lord Hodge, Lord Kitchin and Lord Sales agree. Lord Briggs gives a dissenting judgment.

Reasons for the Judgment

The majority of the Supreme Court holds that neither party's proposed interpretation of the certification provision is satisfactory.

S&H's case is that its certificate is conclusive as to Blacks' service charge liability, subject only to the permitted defences. Whilst that fits well with the wording of the certification provision, it is inconsistent with other provisions of the leases [44, 46]. Under the leases, the amount of service charge payable depends partly on the proportion of the overall premises that the tenant rents under the agreement. The leases contain a detailed dispute mechanism in relation to the assessment of that proportion, which may alter the amount payable by the tenant (the "proportion adjustment"). The certificate cannot, therefore, be entirely conclusive as to the sum payable by Blacks [40, 48, 54]. S&H's interpretation also does not fit well with Blacks' rights to inspect S&H's receipts, invoices and other evidence relating to the service charge for up to 12 months after the certificate is provided. If S&H's interpretation were correct, the only purpose of these detailed inspection rights would be to identify the rare case of fraud, since identifying the other permitted

defences of manifest or mathematical error would be possible without extensive investigation. Any arguable issue identified on inspection could not be pursued by Blacks, meaning the lengthy and detailed inspection rights would be largely superfluous [33, 40, 48].

There are, moreover, many potentially arguable issues which may arise as to liability for service charge under the leases. The permitted defences are narrow and do not include an arguable error, however well founded the allegation of error may ultimately prove to be [30-34]. It would be surprising for the parties to agree that arguable issues as to liability could be determined conclusively by the landlord, as judge in his own cause, without any opportunity for the tenant to challenge the determination or even to make representations [37-39, 48]. It is a 'pay now, argue never' regime. It is well established that in interpreting a contract one starts with the presumption that neither party intends to abandon any remedies which arise by operation of law and that clear words are necessary to do so [48].

Blacks' case is that the certificate is conclusive only as to the landlord's costs and not as to the sum payable by the tenant. However, this interpretation contradicts the natural and ordinary meaning of the certification provision that the certificate is conclusive both as to the "amount of the total cost" and "the sum payable by the tenant" [49]. There is also force in S&H's submission that allowing Blacks to challenge payment of the service charge undermines the commercial purpose of enabling the landlord to recover costs and expenses with minimal delay and dispute [43, 47]. It is an 'argue now, pay later' regime.

The majority finds that there is an alternative interpretation that avoids these difficulties. That interpretation is that S&H's certificate is conclusive as to what is required to be paid by Blacks following certification, subject only to the permitted defences. S&H is thereby assured of payment of the service charge without protracted delay or dispute, meaning its cashflow position is protected [51]. However, payment of the certified sum does not preclude Blacks from later disputing liability for that payment. This gives full effect to Blacks' inspection rights and entitles Blacks to pursue arguable claims as to service charge liability [52]. It is a 'pay now, argue later' regime, a contractual arrangement which is commonly found. Adopting an iterative approach, this interpretation is consistent with the contractual wording, it enables all the provisions of the leases to fit and work together satisfactorily and it avoids surprising implications and uncommercial consequences [57].

The majority therefore dismisses the appeal but holds that this does not preclude Blacks from pursuing its counterclaim [58].

Lord Briggs dissents. In his view, the structure of the service charge regime in the leases and the ordinary meaning of the words used are irreconcilable with the majority's judgment [62]. There is no reason why the provision for a dispute mechanism in relation to proportion adjustment should mean that the landlord's certificate is not conclusive as to all other aspects of the tenant's service charge liability [67]. Blacks' inspection rights provide it with reasonable access to relevant documents in order to identify manifest errors, mathematical errors or fraud. The existence of those rights does not indicate that S&H's certificate is not conclusive as to service charge liability [68]. Service charge disputes commonly result in complex and costly litigation. It is not uncommercial that S&H should have insisted on limiting the available grounds for litigation to the permitted defences [69]. Lord Briggs would therefore have accepted S&H's proposed interpretation of the certification provision, meaning the certificate would be conclusive as to Blacks' service charge liability [70].

References in square brackets are to paragraphs in the judgment

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available online. [Decided cases](#)