OUTER HOUSE, COURT OF SESSION

[2018] CSOH 107

CA40/18

OPINION OF LORD DOHERTY

In the cause

ASHTEAD PLANT HIRE COMPANY LIMITED

Pursuer

against

GRANTON CENTRAL DEVELOPMENTS LIMITED

Defender

Pursuer: MacColl QC; Anderson Strathern
Defender: Garrity; Turcan Connell

21 November 2018

Introduction

[1] The pursuer is the tenant and the defender is the landlord (and proprietor) of commercial subjects at West Harbour Road, Granton, Edinburgh. The lease was entered into on 2 and 25 February 1988 between predecessors in title of the parties. The term initially granted was from Candlemas (2 February) 1988 until Whitsunday (15 May) 2012. The lease was varied in certain respects by Minutes of Agreement in 1988 and 1989. By Minute of Variation of Lease dated 7 and 14 March 1997 it was further varied. The 1989 variation added sub-clause (4) at the end of clause Third(c)(ii). The 1997 variations included the extension of the period of the lease to 28 May 2096; making provision for rent review every

5 years; and providing that the tenant should occupy and use the leased subjects for the purpose of the storage, hire and sale of equipment mainly for use by the construction and civil engineering industry.

[2] The lease as varied provides that as from 28 May 2002 and at every 5 years thereafter the annual rent for the time being payable under the lease in respect of the leased subjects shall be the greater of (1) the rent payable in the year immediately before the review date in question and (2) a sum as shall represent the Open Market Rent at the review date in question. It further provides:

> "FIRST (a) The [landlord] in consideration of the rent aftermentioned and on the conditions following, hereby lets to the Tenants...ALL and WHOLE that land extending to one acre and thirty four decimal or one hundredth parts of an acre or thereby with buildings and structures thereon at West Harbour Road, Granton, Edinburgh (hereinafter called 'the leased subjects') all as delineated and outlined in red on the plan annexed and executed as relative thereto...
> ...
> THIRD...
> ...
> (c)...
> (ii) 'Open Market Rent' shall mean the best yearly rent for which the leased subjects if vacant might be expected to let, without fine or premium, as one entity by a willing landlord to a willing tenant on the open market at and from the review date in question for a period, running from the review date in question, equal in length to the original duration of this Lease on terms similar in all respects to those contained or referred to in this Lease (save as to the amount of rent but including provision for a rent review cycle or pattern being a continuation of that herein contained) and on the assumption (if not a fact) that the Tenants have complied in all respects with all of the obligations imposed on them under this Lease and, in the event of the leased subjects or any part thereof having been destroyed or damaged and not having been fully restored at the review date in question, on the further assumption that the destruction or damage had not occurred, there being disregarded however (1) any goodwill attached to the leased subjects by reason of the carrying on thereat of the business of the Tenants, (2) any work carried out in or to the leased subjects which has diminished the rental value of the same and (3) the effect on rent of all improvements carried out, with the prior approval of the [landlord], by the Tenants at their own cost after the date of entry hereunder provided such improvements are not in pursuance of an obligation to the [landlord] on the part of the Tenants, and (4) The (*sic*) effect on any rent of the value of any buildings or other constructions erected on and any improvements carried out to the subjects of lease.

> (iii) If the [landlord] and the Tenants have not agreed the amount of the Open Market Rent by the review date in question then and in any such event the determination of the Open Market Rent at the review date in question shall at any time thereafter be referred to the decision of some competent person to be agreed upon to act as an expert and not as an arbiter in such determination, and in default of agreement as to the person to be appointed either the [landlord] or the Tenants may request the Chairman (or senior office holder) for the time being of the Scottish Branch of the Royal Institution Chartered Surveyors ... to appoint a competent person (to be a Chartered Surveyor, with not less than five years continuous experience preceding the date of his appointment in the valuation of premises comparable to the leased subjects) to act as an expert and not as an arbiter in such determination and the decision of such person shall be final and binding on the parties to this Lease. Within one month of the date upon which such person is agreed upon or appointed as aforesaid, the [landlord] and the Tenants shall each be entitled to submit to such person written valuations, statements and other evidence relating to or supporting their assessment of the Open Market Rent in which event they shall, at the same time, deliver to the other party a copy of all such valuations and others submitted as aforesaid. Such person shall, if so requested by written notice from one party... hold a hearing at which both parties may be heard and, if present, cross-examined...
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> ... The fees and costs of any such person appointed as aforesaid in connection with the determination of the Open Market Rent shall be borne by the [landlord] and the Tenants in such shares as such person shall direct and, failing any such direction, they shall be borne equally: Notwithstanding the foregoing, either the [landlord] or the Tenants may in the first instance pay any such fees and costs to such person if they so wish subject to recovery, or demand, from the other party of such, if any, part of such costs as are the other party's responsibility.
>
> ..."

[3] The parties have been unable to agree the Open Market Rent for the 5 year period from the 28 May 2017 review date. The determination of the Open Market Rent has not yet been referred to an expert. However, during the course of their discussions it has become apparent that the parties disagree as to the proper construction of the lease, and, in particular, what "the leased subjects" are and how certain of the assumptions and disregards should be interpreted. The pursuer maintains that the expert requires to determine the rent for the ground let, with no value being attributed to any of the buildings, other constructions or tenant's improvements. On the other hand the defender maintains that the leased subjects include certain buildings and other constructions and that the rental

values of some of those buildings and constructions are to be taken into account when calculating the Open Market Rent.

[4] In this commercial action the pursuer seeks declarator that the Open Market Rent is to be calculated on the basis of a hypothetical lease of the subjects which disregards the presence of any buildings or other constructions or tenant's improvements. The defender pleads that the court has no jurisdiction to determine that dispute. It maintains that the effect of clause THIRD (c)(iii) is that the dispute falls within the exclusive jurisdiction of the expert.

[5] The defender has not pled, and did not seek to argue, that the action is incompetent (as raising a hypothetical, future or academic issue) or premature (because there is as yet no determination by the expert) (*cf. Mercury Communications Limited* v *Director General of Communications* [1994] CLC 1125 (CA), per Hoffmann LJ (as he then was) at pp1140-1143).

[6] I heard a debate which was restricted to the issue of jurisdiction. Parties prepared written notes of argument. After the debate, in response to my invitation, each party tendered supplementary written submissions which made reference to further authorities. I am grateful to counsel for the assistance provided by their oral and written submissions.

Counsel for the defender's submissions

[7] Mr Garrity submitted that the parties to the lease had agreed that in the event of disagreement as to the Open Market Rent at a review date the matter should be referred to an expert for determination. Part of the expert's task was to determine the proper construction of the relevant parts of the lease. That was a necessary part of the process of arriving at the Open Market Rent. Surveyors were routinely called upon to carry out such tasks as an ordinary part of fixing the rent at a rent review. Reference to an expert was

generally intended to provide advantages of cost, speed and finality. Since on a proper construction of the lease it had been agreed that in the absence of agreement exclusive jurisdiction to determine the Open Market Rent was conferred upon the expert, the court had no jurisdiction to pronounce the declarator sought. Reference was made to *Campbell* v *Edwards* [1976] 1 WLR 403, per Lord Denning MR at p407F-G; *Channel Tunnel Group Ltd* v *Balfour Beatty Construction Ltd* [1993] AC 334, per Lord Mustill at p353A-C; and *Franborough Ltd* v *Scottish Enterprise,* unreported, Lord Penrose, 14 June 1996 at p15 (noted at [1996] GWD 27-1619); *Pontsarn Investments Ltd* v *Kansallis-Osake-Pankki* [1992] 1 EGLR 148, per Judge Paul Baker QC at p151F-H; *Norwich Union Life Assurance Society* v *P&O Property Holdings Ltd and Ors* [1993] 1 EGLR 164, per Dillon LJ at p169A-C, F; *Premier Telecommunications Group Ltd* v *Webb* [2016] BCC 439, [2014] EWCA Civ 994. Mr Garrity recognised that other authorities were "less supportive" of his argument: *National Grid Company Plc* v *M25 Group Ltd (No. 1)* [1999] 1 EGLR 65; *Level Properties Ltd* v *Balls Brothers Ltd* [2008] 1 P&CR 1, [2007] EWHC 744 (Ch); *Homepace Ltd* v *Sita South East Ltd* [2008] P&CR 24, [2008] EWCA Civ 1; *Aviva Life & Pensions Limited* v *Kestrel Properties Limited* [2011] EWHC 3934 (Ch); *Thorne* v *Courtier* [2011] EWCA Civ 460; and *Barclays Bank* v *Nylon Capital LLP* [2012] Bus LR 542, [2011] EWCA Civ 826. However, he suggested that *Norwich Union Life Assurance Society* v *P&O Property Holdings Ltd and Ors* and the most recent Court of Appeal decision, *Premier Telecommunications Group Ltd* v *Webb,* assisted his position.

[8] If the court did not have jurisdiction to entertain the action it should be dismissed. It would not be appropriate to sist it pending the expert carrying out his determination. In the event that once the determination was made the court had jurisdiction to consider a challenge to it, appropriate proceedings could then be commenced.

Counsel for the pursuer's submissions

[9] Mr MacColl submitted that the correct approach was to consider what the parties to the lease meant by the language that they used, read in the context of the lease as a whole and against the background knowledge available to the parties at the time that the lease was entered into. Thus, the ambit of the expert's exclusive remit was to be ascertained in light of: (a) the natural and ordinary meaning of the words used; (b) any other relevant provisions of the lease; (c) the overall purpose of the provisions and the lease; (d) the facts and circumstances known or assumed by the parties to the lease at the time it was executed; and (e) commercial common sense (*Rainy Sky SA* v *Kookmin Bank Co Limited* [2011] 1 WLR 2900, per Lord Clark of Stone-cum-Ebony JSC at para 14; *Arnold* v *Britton* [2015] AC 1619, per Lord Neuberger of Abbotsbury PSC at para 15; *Wood* v *Capita Insurance Services Limited* [2017] AC 1173, per Lord Hodge JSC at paras 8-15*).*

[10] Mr MacColl emphasised that the pursuer was not asking the court to determine the Open Market Rent. That was a valuation issue which, in the absence of agreement between the parties, only the expert had jurisdiction to determine. However, he argued that on a proper construction of the lease the landlord and tenant had not agreed that the expert should have exclusive jurisdiction to determine disputed questions of law such as those at issue here. It would be very odd if they had. The expert was to be a valuer, not a lawyer. The determination of legal issues would be beyond his expertise. It was noteworthy that the lease made no provision for the expert to obtain legal advice or assistance.

[11] The parties had agreed that an expert should carry out his functions on the basis of the correct interpretation of the lease's provisions (*Mercury Communications Limited* v *Director General of Communications* [1994] CLC 1125 (CA), per Hoffmann LJ at pp1139-1142, and (on appeal) [1996] 1 WLR 48 (HL), per Lord Slynn of Hadley at pp58C-59H; *Barclays Bank plc* v

Nylon Capital LLP, supra). The expert was authorised to value the "leased subjects". The proper interpretation of that term, and of the assumptions and disregards in clause THIRD (c)(ii), set limits on the expert's power to determine the rent. There had been no such limits on the decision-maker's power in *Norwich Union Life Assurance Society* v *P&O Property Holdings Ltd and Ors.* The court retained jurisdiction to determine the proper construction of the lease's provisions (*National Grid Company plc* v *M25 Group Limited (No. 1),* supra, per Mummery LJ at pp 67-68).

[12] If the defender was right the consequence would be that the pursuer might never be able to obtain a ruling from the court on the disputed questions of construction. At each rent review the matter would fall to be decided by a surveyor as an incident of determining the Open Market Rent. That would be a very unsatisfactory state of affairs indeed, and the court should be very slow to hold that it represented the objective intention of the parties to the lease. It was more in accord with commercial common sense that the parties should have intended that the court should retain jurisdiction to construe the relevant provisions. The true - and more satisfactory - position was that the exclusive jurisdiction which was conferred upon the expert related only to questions of valuation.

[13] It was highly desirable that the parties and the expert should have the court's guidance on the correct construction of the lease so as to avoid the risk of them proceeding on the wrong basis (*Mercury Communications Limited* v *Director General of Communications,* supra, per Lord Slynn of Hadley at p59C-F; *Barclays Bank plc* v *Nylon Capital LLP*, supra, per Thomas LJ at para 42; *National Grid Company Ltd* v *M25 Group Ltd (No. 2)* [1999] 1 L&TR 206, per Chadwick LJ at p210).

[14] Even if the court did not have jurisdiction to pronounce the declarator sought at this stage, before the expert had provided his determination, the appropriate course would be to

sist the action. The sist could then be recalled if the expert did in fact materially depart from his reference. Reference was made to *Hamlyn & Co.* v *Talisker Distillery* (1894) 21R (HL) 21, per Lord Watson at p.27.

Decision and reasons

[15] The key question is whether or not in terms of the lease the landlord and tenant agreed that the expert would have exclusive jurisdiction to determine certain legal questions, *viz*. what "the leased subjects" are; and the correct interpretation of the assumptions and disregards in clause THIRD (c)(ii) (in particular disregards (3) and (4)). It is common ground that it would have been competent to confer such jurisdiction upon the expert. It is also common ground that whether or not that jurisdiction has been conferred falls to be determined on a proper construction of the lease. In my view those propositions are well founded. They are amply supported by the authorities.

[16] In *Mercury Communication Limited* v *Director General of Communications* [1994] CLC 1125 (CA) at pp1139-1140 Hoffman LJ explained, using examples, how the limits of an expert's authority may be ascertained:

> "The parties agree that a firm of accountants shall determine the value of a parcel of shares. They do not prescribe any particular principle of valuation, such as allowing a discount for a minority interest. In such a case, the court will not intervene to decide how the valuation should be done. Neither in advance of the valuation nor afterwards. The parties have agreed to accept the accountants' valuation and in the absence of fraud or collusion they are bound by whatever he decides. The same is true of other decisions entrusted to experts. This is a rule of substantive law: *Jones v Sherwood Computer Services plc [1992] 1 WLR 277*.
>
> Assume, however, that the parties have in addition agreed certain of the principles upon which the accountants should value the shares. For example, that the goodwill of the company's business shall be valued at three times the net profits over the past three years. If it can be shown that the accountants have valued the goodwill on a different basis ... the court will set aside the valuation. It is not a valuation to which the parties have agreed.

> On the other hand, even in cases in which the parties have agreed principles of valuation, their application may involve questions of judgment which they have left to the decision of the accountants. In the last example, the question of what counts as 'net profits' may be something on which different accountants could hold different views. Here again, as a matter of substantive law, the court will not interfere. As a matter of contract, the parties have agreed that 'net profits' are to be whatever the accountants honestly consider them to be.
>
> So in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision. This is because the court's views about the right answer to the question are irrelevant. On the other hand, the court will intervene if the decision-maker has gone outside the limits of his decision-making authority.
>
> One must be careful about what is meant by 'the decision-making authority'. By 'decision-making authority' I mean the power to make the wrong decision, in the sense of a decision different from that which the court would have made. Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to 'decide' what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority."

While these views were expressed in the course of a dissenting judgment, it seems clear that they were accepted on appeal. Lord Slynn of Hadley (with whom all of their Lordships agreed) observed ([1996] 1 WLR 48 (HL) at pp58G-59B)):

> "What has to be done in the present case under condition 13, as incorporated in clause 29 of the agreement, depends upon the proper interpretation of the words "fully allocated costs" which the defendants agree raises a question of construction and therefore of law, and 'relevant overheads' which may raise analogous questions. If the Director misinterprets these phrases and makes a determination on the basis of an incorrect interpretation, he does not do what he was asked to do. If he interprets the words correctly then the application of those words to the facts may in the absence of fraud be beyond challenge. In my view when the parties agreed in clause 29.5 that the Director's determination should be limited to such matters as the Director would have power to determine under condition 13 of the B.T. licence and that the principles to be applied by him should be "those set out in those conditions" they intended him to deal with such matters and such principles as correctly interpreted. They did not intend him simply to apply such meaning as he himself thought they should bear. His interpretation could therefore be reviewed by the

> court. There is no provision expressly or impliedly that these matters were remitted exclusively to the Director, even though in order to carry out his task he must be obliged to interpret them in the first place for himself. Nor is there any provision excluding altogether the intervention of the court. On the contrary clause 29.5 contemplates that the determination shall be implemented 'not being the subject of any appeal or proceedings.' In my opinion, subject to the other points raised, the issues of construction are ones which are not removed from the court's jurisdiction by the agreement of the parties."

A similar approach was taken in *National Grid Company Plc* v *M25 Group Ltd* (*No. 1*), supra; *Level Properties Ltd* v *Balls Brothers Ltd,* supra*; Homepace Ltd* v *Sita South East Ltd,* supra; *Aviva Life & Pensions Limited* v *Kestrel Properties Limited,* supra; *Thorne* v *Courtier,* supra; and *Barclays Bank* v *Nylon Capital LLP,* supra. The relevant principles and the case law are discussed in *Woodfall's Law of Landlord and Tenant*, para 8.054; *Hill and Redman's Law of Landlord and Tenant*, paras A[826] and A[2263]; and Lewison, *The Interpretation of Contracts* (6th ed.), paras 14.03, 14.07, 14.08 and 18.06.

[17] *Norwich Union Life Assurance Society* v *P&O Property Holdings Ltd and Ors,* supra, was distinguished in *Mercury* (see [1994] CLC 1125 per Hoffmann LJ at pp1141-1142, and [1996] 1 WLR 48 per Lord Slynn of Hadley at pp58C-59B). Whereas in *Norwich Union* on a proper construction of the contract (a funding agreement) the interpretation of the provisions in issue had been entrusted to the decision-maker, the interpretation of the relevant provisions in *Mercury, National Grid* (*No. 1*) (see Mummery LJ at pp 67-68), *Homepace* (per Lloyd LJ at para 52), and *Barclays Bank* v *Nylon Capital LLP* (per Lord Neuberger of Abbotsbury MR at paras 67-69; *cf.* Thomas LJ at para 35) had not been so entrusted.

[18] In my opinion the reasoning in *Mercury* and in the cases which followed it is not undermined by *Premier Telecommunications Group Ltd* v *Webb.* In that case the Court of Appeal referred to and accepted the principles outlined in *Mercury* and applied in subsequent cases (see Moore-Bick LJ at paras 8 - 9). It held that on a proper construction of

the (share valuation) agreement the parties had agreed that the expert had been entrusted to decide some matters involving questions of law (per Moore-Bick LJ at paras 11-18). However, although it was unnecessary to decide the point because the court concluded that the expert had decided the particular matter correctly, it inclined to the view that the interpretation of one of the instructions given to the expert was so central to the valuation and to the heart of the valuer's task that it had not been entrusted by the parties to his exclusive jurisdiction (per Moore-Bick LJ at paras 19-22).

[19] I turn then to the present lease. Clause THIRD (c)(iii) provides that the expert appointed shall be a "competent person", and it defines a competent person as "a Chartered Surveyor, with not less than 5 years continuous experience preceding the date of his appointment in the valuation of premises comparable to the leased subjects". The objective intention is that a chartered surveyor should be appointed.

[20] In my view Mr MacColl went too far when he suggested that there were no circumstances in which the expert would be empowered to obtain legal advice. Clause THIRD (c)(iii) makes provision for him recovering both fees and costs. Costs which are reasonably required to carry out the reference ought to be recoverable. In my opinion there may be circumstances where the obtaining of appropriate legal advice may be reasonable, for example if the expert is presented with contentious legal submissions on a material matter (*cf. Barclays Bank* v *Nylon Capital LLP*, supra, per Lord Neuberger of Abbotsbury MR at para 70; *Kendall on Expert Determination* (5th ed), para 6.11-4: *Hill and Redman's Law of Landlord and Tenant*, para A[2250]-[2260]).

[21] However, the critical issue is whether on a proper construction of the lease the contracting parties expressly or impliedly agreed that the legal interpretation of "the leased subjects" and of the assumptions and disregards were remitted exclusively to the expert. I

am not persuaded that they agreed that those issues of construction were removed from the court's jurisdiction. Even on the basis that the expert could obtain legal advice, it would be very surprising if the parties had agreed that a surveyor should have exclusive jurisdiction to decide the correct legal construction of such important provisions. A surveyor would not have the necessary skill and competence to make the required adjudication. He could only obtain and rely upon legal advice. In those circumstances I think that the lease would have to have made it very clear indeed (whether expressly or by implication) that exclusive jurisdiction was being conferred. As Lord Neuberger of Abbotsbury MR observed in *Barclays Bank plc* v *Nylon Capital LLP*, supra, at para 70:

> "70 I appreciate that, in cases of this sort, the advantage of leaving all points of law to the final determination of the expert is that it results in a relatively quick and cheap process for the parties. However, it must be questionable whether the parties would have intended an accountant, surveyor or other professional with no legal qualification, to determine a point of law, without any recourse to the courts, even if it has a very substantial effect on their rights and obligations. It would, I suggest, be surprising if that were the effect of an expert determination agreement, when the Arbitration Act 1996 gives a right (albeit a limited and prescribed right) to the parties to refer points of law to the court. That Act applies where the parties have entered into an arbitration agreement, which gives them a much greater ability, in law and in practice, to make representations and to involve lawyers in connection with the arbitration, than parties enjoy in connection with the great majority of contractual expert determinations."

While the Arbitration Act 1996 does not apply to Scotland, the Arbitration (Scotland) Act 2010 makes similar provision for referring a question of Scots law to the court (Schedule 1, Scottish Arbitration Rules, rules 41 and 42).

[22] I am not satisfied that the lease provides that the suggested exclusive jurisdiction is to be conferred on the expert here. On the contrary, in my opinion the more natural and common sense reading of the lease is that the expert is to carry out his functions on the basis of the correct interpretation of the lease's provisions, including the sound construction of "the leased subjects" and of the assumptions and disregards. If he fails to do that he will

have departed from his instructions in a material respect and will have failed to comply with the terms of his reference. He will not merely have given the wrong answer to the right question.

[23] On a proper construction of the lease the parties to it did not confer exclusive jurisdiction upon the expert to decide as a matter of law what "the leased subjects" are; nor in my view did they confer exclusive jurisdiction upon him to decide the legal effect of the assumptions and disregards. The circumstances of the present case are readily distinguishable from the circumstances in *Norwich Union.* They are also materially different from the circumstances in *Premier Telecommunications Group Ltd* v *Webb.* In my opinion the court has jurisdiction to entertain the present action of declarator.

[24] In light of my decision the question of sisting the action does not arise.

Disposal

[25] I shall sustain the pursuer's plea to the relevancy in so far as directed to the defender's averments of no jurisdiction, and I shall repel the defender's plea of no jurisdiction. I will put the case out by order (i) to consider any issue as to expenses which may arise; and (ii) to discuss further procedure.