Rent review clauses – is time of the essence?

AWG Group Limited v HCP II Properties 101 GP Limited [2017] CSIH 9.

In April, I discussed validity of notices given under a contract. This month, I consider the issuing of a particular type of notice generally found in a commercial lease, namely the rent review clause. The important issue that arose in this case was whether the right to a rent review could be taken to have been waived by the landlord.

The long lease over the office blocks in question had a date of entry of 27 February 2004. The rent review clause provided for upwards only reviews every five years. Allied Irish, the previous landlords prior to sale, reviewed the rent in 2009 following notice of review in December 2008 which then became the existing rate. Invoices for rent at the existing rate were issued in November 2013 and January, April and October 2014 which contained a caveat that stated "without prejudice to review on 26/01/14". However, rent invoices issued from January 2015 onwards demanded and obtained rent at the existing rate but contained no such caveat. Moreover, when the property was sold by Irish Life to the present landlords (HCP), the sales particulars indicated that the next upward review of rent would be in February 2019. Despite that, HCP gave written notice on 5 August 2016 that the required rent for a substantial part of the building was to be reviewed as at 27 February 2014.

The tenants therefore raised an action in the commercial court seeking a formal declaration that the landlord was not entitled to seek a rent review as at 27 February 2014. They stated that they had relied upon the pattern of payment from January 2015 onwards as indicating that the right to exercise the rent review had been waived. The essence of waiver is the abandonment of the right or entitlement later relied upon. According to authoritative texts on the subject, abandonment of a right ought not to be readily or easily inferred. This is a different matter to reliance on the actings of the other party by the party seeking to demonstrate waiver, but which is also relevant and an additional requirement to found such an argument.

The Court held that neither the change in the wording of the invoices or the contents of the sales brochure warranted an inference of abandonment, whether considered individually or in relation to their combined effect. The question of reliance therefore did not arise. Another relevant factor was that the lease contained a specific clause to the effect that no demand for or acceptance of rent by the landlord at a rate other than that to which the landlord might be entitled follow a rent review should be deemed to be a waiver of the right of the landlord to require such a review. The Court accepted the principle set out in *Visionhire Ltd v Britelfund Trs* Ltd 1991 SLT 883 that time is not of the essence in relation to instigating rent review provisions within a

commercial lease, unless either party made it so by issuing an ultimatum at or after the review date. A previous case which indicated otherwise was expressly disapproved (*Banks v Mecca Bookmakers* 1982 SC 7).

It can therefore be seen that whilst the usual practice is for there to be notice provided to the tenant in advance of the rent review date (as occurred here in 2008), it is not an essential requirement. Unless the tenant can show that on an objective analysis of the facts, the right to a review has actually been permanently abandoned (rather than mere postponement), the rent review clause may nonetheless be insisted upon. This decision has now firmly clarified that position. The proposition applies even where, as in this case, over a year has passed since the rent review date. The case also demonstrates that it is clearly advisable to include a non-waiver clause in commercial leases to preserve the landlord's right to rent reviews.

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