

## Expert determination in rent review clauses

*Ashtead Plant Hire v Granton Central Developments* [2018] CSOH 107.

Following my discussion in April of the case of *Pentland Investments v Aitken Turnbull Architects* which considered adjudication, another case has recently arisen in relation to alternative dispute resolution in the context of commercial disputes. This time, the issue was whether an expert determination clause effectively ousted, or at least suspended, the jurisdiction of the courts in relation to a rent review.

The parties entered into a commercial lease in 1998. It was subsequently varied to increase its duration and to insert a rent review clause. The clause provided that the rent was to be reviewed at five-yearly intervals and would be the greater of the previous year's rent or the Open Market Rent ("OMR"). In the event that the parties could not agree what the OMR should be, that matter was to be determined by an expert appointed by the parties or, failing agreement, by the Chairman of the RICS in Scotland. The parties were unable to agree OMR in respect of the rent review for the five-year period from 28 May 2017, but the matter had not yet been referred to a chartered surveyor for expert determination.

However, the tenants then sought a formal declaration from the Court of Session as to what the basis of OMR should be. In particular, that it should be on the basis of a lease for the ground let only, and which disregards the presence of any buildings on the lease subjects and any improvements carried out by the tenant. The extent of the leased subjects was therefore in dispute and an interpretation of the assumptions and disregards as stated within the lease definition was required. The landlord defending the action contended that the Court had no jurisdiction because of the terms of the Expert Determination clause and that therefore the action should be dismissed.

The landlord pointed out that expert determination was generally intended to provide advantages in terms of cost, speed and finality in relation to matters of dispute. The terms of the lease included an agreement between the parties to confer sole jurisdiction to determine the issue at hand on the expert. The Tenant submitted that, when the terms of the lease were viewed in context, the expert's sole jurisdiction was in relation to the question of valuation of the OMR alone and not the legal question of the extent of the leased subjects.

The Court agreed with the Tenant's submission. It would have been competent to have conferred jurisdiction on the expert to determine the extent of the leased subjects, but on a proper construction, the relevant term of the lease did not in fact do so. The Court observed, however, that it would be very surprising if the parties had

agreed that a surveyor should have exclusive jurisdiction to decide the correct legal interpretation of a such an important provision. The lease permits the expert to carry out his or her valuation functions on the basis of the correct interpretation of the lease's provisions, including a sound construction of the assumptions and disregards referred to there. If the expert failed to do that, he or she would fail to comply with their terms of reference. For that reason, the lease did not confer exclusive jurisdiction on an expert to determine all matters and the court had the jurisdiction to consider the action for declarator.

An interesting aspect of the Expert Determination clause was that it contained a provision which entitled the parties to submit written valuations, statements and other evidence in relation to OMR to the expert. The expert, if requested by either party, was required to hold a hearing at which both parties may be heard and potentially cross-examined. So, in many respects the expert would have been acting in a quasi-judicial capacity. As accepted by the parties, it would have been competent for the expert to consider the extent of the leased subjects. Given those general powers and that concession, perhaps that outcome would not have been so surprising after all, although not ultimately accepted here. The reluctance of the court to interpret the jurisdiction provision of the clause more widely suggests that if it is desired by the parties to oust the jurisdiction of the courts completely, then the clearest possible wording is required to achieve that.

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