Expert determination in rent review clauses (No. 2)

Cine-UK Ltd v Union Square Developments Ltd [2019] CSOH 3.

At the end of last year, I considered the case of *Ashtead Plant Hire v Granton Central Developments* [2018] CSOH 107 and whether an expert determination clause may oust the jurisdiction of the Court of Session. In that case, it was held that on the facts that the relevant clause could not.

However, early in 2019, the Court revisited the same question on almost identical facts in *Cine-UK*. I say "almost" because there was one crucial difference in the wording of the relevant part of the lease which I shall come to. As in *Ashtead*, the dispute arose following a five-yearly rent review where the parties could not agree upon the Open Market Rent and an independent surveyor was appointed to determine that question. In this instance, however, the lease contained a "finality" provision which stated that the determination of the independent surveyor would be "final and binding on the parties hereto both on fact and law."

The tenants disputed the determination reached by the expert surveyor and challenged it in the Court of Session on the basis that it proceeded on an error of law. The landlord contended, among other grounds, that the Court did not have jurisdiction, given the terms of the lease, being the contract between the parties. In that event, even if there was an error of law, it did not matter. It was agreed that following *Ashtead* (which was cited to the Court), the question as to whether the jurisdiction of the Court of Session was ousted was a matter of contractual interpretation and whether the parties had in fact intended to do that based upon the wording used by them. If that was the case, then the decision of the expert would be final and conclusive unless it could be shown that the expert had not performed the task entrusted to her. Putting it more broadly, it was contended that if an expert asks the correct question but answers it incorrectly, that determination will be binding on the parties. On the other hand, if the wrong question is asked, then the determination will be a nullity.

In this case also, the expert required to consider assumptions and disregards under the lease and to make a decision as to open market rent based upon that. She was also informed by expert evidence provided to her in relation to that issue. There was, however no requirement to provide reasons for her determination (although reasons were subsequently provided following a request to do so). This, the Court stated was "wholly consistent with finality being conferred on questions of law as well as on questions of fact" since the purpose of providing reasons is in order to better inform the parties as to whether there might be any grounds to exercise a right of appeal. The

Court also noted that there was no differentiation in the lease as to the type of particular questions (such as construction of the lease) which could be distinguished from other disputes which might arise. The implication of that was that the parties intended that all disputes remitted to the expert should have the benefit of finality. To hold otherwise would be to deprive the words "and law" and the finality provision itself of any content.

Accordingly, the Court found the landlord's jurisdictional challenge to have been well made and concluded that the tenant's action was incompetent. As in *Ashtead*, it was a matter of agreement that the rationale behind the provisions conferring finality on the expert determination clause was to achieve the benefits of speed, certainty and finality in the dealings between the parties. In this case, that was delivered (unlike the outcome in *Ashtead*) by the addition of two words: "and law." This case therefore provides guidance as to the clear wording required to oust the jurisdiction of the ordinary courts which I discussed in my article last month, if that is what parties truly wish to achieve.

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