

Rent reviews in commercial leases

Trustees of RM Prow (Motors) Ltd v Argyll & Bute Council [2013] CSIH 23.

Readers may recall that in the January issue of this publication, I discussed break clauses in commercial leases. This case may also be of interest because it sets out some indicative requirements that ought to be fulfilled prior to the exercise of a rent review clause. Rent review clauses are commonly encountered provisions but they are obviously very important and may have costly consequences for landlords if they are not exercised correctly.

Premises were let by the landlords to the Council as tenants on a 20 year lease. Clause 25(a) of the lease provided for a rent review on the ‘relevant terms’ of 1 October in 2005, 2010 and 2015 on giving three months’ notice and by proposing a fair market rent. The tenants had a right to negotiate the suggested fair market rent by serving a counter-notice within three months of the date of receipt of the notice. Clause 25(c) permitted the landlords to require a rent review on the 28th day of any month following the relevant term if no notice had been issued in terms of Clause 25(a). By letter dated 19 July 2010, agents for the landlords purported to exercise their right to require a rent review in terms of Clause 25(a). However, that letter contained three errors, namely that the landlords were not correctly designated, less than three months notice was given and the fair market rent was stated as being as at 1 November, rather than 1 October. Realising their error, but while not expressly acknowledging it in precise terms, agents for the landlords then sent another rent review notice on 24 July 2010 proposing a fair market value as at 28 November 2010. The tenants failed to send a counter-notice within the three month period set out in the lease.

The single judge who first heard the case held that time was of the essence in relation to the counter-notice and that therefore the new rent suggested by the landlords stood. He also held that whereas the first notice was invalid and did not satisfy the “reasonable recipient” test, the second notice cleared up any ambiguities and therefore met the test, even although the tenants were left with two different notices with three month periods running from different overlapping dates. The reasonable recipient test derives from the case of *Mannai Investment Co Ltd v Eagle Star Assurance* [1997] AC 749 which requires it to be plain that the recipient was not misled by the notice and that he was “in no doubt whatever” as to its meaning. The tenants appealed to the Inner House of the Court of Session.

In upholding the first judge’s decision the Inner House agreed that he had set out the six fundamental requirements that require to be met for a valid rent review notice in terms of Clause 25: (i) it required to be in writing; (ii) given by the landlord; (iii) to be

received by the tenants; (iv) at least three months prior to the relevant period; (v) specifying the new rent proposed; and (vi) specifying the relevant term at which the rent was to be assessed. All of those conditions had been met by the second notice and therefore the three month counter-notice period ran from the date of receipt of it. The reasonable recipient would have been aware that the first notice was invalid applying his common sense. It also distinguished the situation which occurred in the case of *Ethel Austin Properties v D&A Factors* (unreported sheriff court decision of 21 June 2005) in which two notices in identical terms were received by the tenant leading to an ambiguity as to a deadline for payment. In this case, the terms of the notices were different as a consequence of the distinct purposes of those clauses, notably to invoke a 'timeous' rent review at the relevant term and to invoke a 'late' rent review on the twenty eighth day of any subsequent month respectively. They were not competing notices.

It was fortunate for the landlords that the lease did indeed contain a 'late' rent review clause. In the absence of that, they would have lost out on an increased rent for a five year period as a result of the errors contained in the first rent review notice. Better still to get it right first time, however.

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