[2019] EWHC 3414 (Ch)

Claim No: PT-2019-000307

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY, TRUSTS AND PROBATE LIST

CHANCERY DIVISION

Rolls Building

Royal Courts of Justice

Fetter Lane London EC4A 1NL

Date: 9th December 2019

Before:

Deputy Master Bartlett

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Between:

Sara & Hossein Asset Holdings Limited

Claimant

and

Blacks Outdoor Retail Limited

Defendant

- -

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Mr. Richard Fowler (instructed by Pinsent Masons LLP) for the Claimant

Ms. Morayo Fagborun Bennett (instructed by Gateley Plc) for the Defendant

Hearing date: 20th August 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A Para. 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Deputy Master Bartlett:

1. In this claim I have to determine an application made by the Claimant by application notice dated 28th May 2019 for summary judgment on the whole of the claim on the ground that the Defendant has no real prospect of defending it or of succeeding on its counterclaim. The Claimant is the owner of substantial commercial premises at Chicago Buildings, Whitechapel and Stanley Street, Liverpool. The Defendant was until 15th May 2019 the tenant of a large part of those premises, most recently under a lease dated 23rd April 2018 ("the 2018 lease"). The claim as issued was for rent, insurance rent and service charges alleged to be due totalling £413,695.28 together with interest on that sum and costs.

2. The primary facts so far as relevant to the issues before me are fairly simple but they give rise to significant questions of law and construction. I received very helpful skeleton arguments and oral submissions from both counsel.

Factual background

3. By a lease dated 12th December 2005 the Claimant's predecessors in title let the premises in question to The Outdoor Group Limited trading as Blacks ("the 2005 lease"). The premises were to be used for the retail sale of outdoor, sports and leisure clothing and ancillary purposes, "Blacks" being of course a well-known name in that field. From about 2009 onwards The Outdoor Group appears to have been in financial difficulties. In 2010 the then landlord however granted it a new lease ("the 2010 lease"). In 2012 The Outdoor Group went into administration. At some point shortly thereafter the lease was acquired by the present Defendant, presumably as part of a purchase of assets of that group from the administrators. The Defendant is part of a group of companies, its ultimate parent company being JD Sports Fashion Plc.

4. On 13th May 2013 the previous landlord granted the Defendant a new lease of the premises ("the 2013 lease"). That lease was for a term of ten years but contained a right for the tenant to determine it after five years. In about December 2016 the Claimant acquired the reversion to that lease. The Defendant exercised its right to determine the lease in 2018 but requested the Claimant to allow it to continue in occupation of the premises for a further short period. That led to the grant of the 2018 lease, which as I have stated ran until 23rd May 2019. That lease also contained a break clause. The Defendant attempted to exercise that break clause but failed to comply with the preconditions for doing so. The lease therefore continued until its expiry by effluxion of time.

Terms of the leases

5. The 2018 lease provides that it is granted on the same terms as the 2013 lease as varied therein but excluding certain provisions of that lease, in particular the yearly rent and turnover rent reserved by that lease. It provides for what is described as "the Main Rent" of £40,000 per annum payable quarterly in advance. Clause 3.5 provides:

> "Starting on the Term Start Date the Tenant must pay the Continuing Rents as rent at the same time and in the same manner as they were payable under the

Existing Lease credit being given for service charge and insurance rent paid under the Existing Lease for the period from and including the Term Start Date."

The Continuing Rents are defined as rent for the insurance of the premises under Clause 3.3 of the 2013 lease, service charge under Clause 2.3(d) and Schedule 6 of that lease, interest under Clause 3.1(b) and all other sums except the yearly and turnover rents reserved as rent under the 2013 lease.

The only other provision of the 2018 lease to which I need to refer at this stage is Clause 9. This provides that on the expiry of the term howsoever determined the tenant will pay a sum of £200,000 in full and final settlement of all its obligations in respect of dilapidations under both the 2013 and 2018 leases. If the tenant exercised its right to determine the 2018 lease early, it was obliged to make that payment on or before the break date.

6. These provisions clearly direct one back to the 2013 lease for a full statement of the tenant's obligations as regards the various types of payment due under the 2018 lease. The 2013 lease provides for payment by the tenant of a peppercorn rent for the first quarter and thereafter a base rent and a turnover rent. The base rent is £100,000 per annum subject to review after five years. The turnover rent is a sum to be calculated and paid annually in accordance with detailed provisions set out in a schedule. The lease further provides for payment of service charges in accordance with Schedule 6 and as additional rent a fair and proper proportion of the landlord's expenses in insuring the property of which the demised premises form part.

7. Central to this application is Clause 3.1(a) of the 2013 lease by which the tenant covenants:

> "To pay the yearly rent reserved by this lease at the times and in the manner reserved under Clause 2.3 [which sets out the various sums payable as I have explained in Para. 6 above] and not to exercise or seek to exercise any right or claim to withhold rent or any right or claim to legal or equitable set-off or counterclaim (save as required by law)".

Also of importance are the provisions of Schedule 6 as to the service charges. This provides for a calculation of the total reasonable and proper cost to the landlord in

each calendar year of a list of services and expenses and that "the further rent payable by the Tenant" shall be a fair and reasonable proportion of that cost. That proportion is to be calculated in accordance with the proportion which the net internal area of the demised premises bears to the net internal area of all the let areas of the property of which it forms part. Para. 3 of the Schedule provides:

> "The Landlord shall on each occasion furnish to the Tenant as soon as practicable after such total cost and the sum payable by the Tenant shall have been ascertained a certificate as to the amount of the total cost and the sum payable by the Tenant and in the absence of manifest or mathematical error or fraud such certificate shall be conclusive".

The Schedule provides for payments to be made by the tenant quarterly on account and for a balancing payment to be made annually as appropriate after the certificate has been issued.

The claim

8. Subsequent to the issue of this claim it came to light that the Defendant had made a small further payment, reducing the total sum claimed to £406,856.92. That payment had the effect that all rent and insurance rent under both the 2013 and 2018 leases has now been paid, the whole of the outstanding balance being in respect of service charges. Those service charges were the subject of certificates from the landlord's surveyor pursuant to those leases for the period up to 30th September 2018 which were in evidence before me. Subsequent to that date the tenant was invoiced for two further quarterly payments on account prior to the expiry of the 2018 lease totalling just over £60,000. Clearly a certificate will need to be issued in respect of that period and any balancing adjustment made to that liability. However as Mr. Fowler submitted that does not affect the Defendant's present liability for those sums and they are included in the claim. Although the Defence makes no admission there is no evidence of any mathematical error in the figures and Ms. Bennett did not submit that there is any such problem.

9. The Claimant's case on this application rests essentially on two propositions. First, as provided by the 2013 and 2018 leases the certificates issued by the landlord's surveyor are conclusive as to the correctness and recoverability of the service charges.

Secondly, if the Defendant has any counterclaim that claim cannot be set-off against the Claimant's claim by virtue of Clause 3.1(a) of the 2013 lease.

The defence and counterclaim

10. In view of the arguments before me it is necessary to look with some care at the manner in which the Defendant's case is pleaded. The Defence puts in issue as a matter of law and/or construction of the leases the two points which I have identified in Paragraph 9 above. It sets out a number of what are described as challenges to the service charges:

    (a) Some of the works charged for were unnecessary;

    (b) The works were not the subject of competitive tender;

    (c) The cost of the work was increased by past failures on the part of the Claimant to keep the premises in repair;

    (d) Some of the works were not works of repair within the meaning of the relevant repairing covenants.

11. The Defence then sets out what are described as particulars of breach of covenant in respect of which the Defendant is entitled to exercise a right of set-off against the Claimant's claim:

    (a) Failure to progress the works with reasonable speed;

    (b) Failure to remove scaffolding promptly when the works were completed;

    (c) Failure to undertake the works in an economical manner and carrying out unnecessary works;

    (d) Failure to obtain competitive tenders for the works;

    (e) Failure to keep the property in repair historically, leading to increased repair costs.

    (f) Charging the Defendant for works which are not works of repair within the meaning of the relevant repairing covenants.

It is alleged that as a result of these breaches the Defendant suffered distress, inconvenience, loss and damage but no particulars are given. It is however further alleged that by reason of these matters at least £300,000 of the service charges claimed are not due.

12. It will be readily apparent that there is a significant overlap between the matters alleged which I have set out in Paragraphs 10 and 11. This is not necessarily to be criticised, but it may obscure an important distinction which needs to be drawn in this case. Some of the matters alleged are matters which can properly be raised as going to the liability to pay the service charge at all while others are matters which give rise to a counterclaim in damages that can be set off against the Claimant's claim. The former cannot be pursued if a certificate issued by the landlord's surveyor is conclusive on the point in question. The latter are not precluded by any certificate, but the Defendant may be unable to set off any such damages by reason of Clause 3.1(a) of the 2013 lease.

13. The Counterclaim repeats the Defence in its entirety but as Mr. Fowler points out does not actually include any prayer for damages. I regard this as of little significance in itself and the omission can easily be corrected. What is of more significance is the lack of particularity in the Defence and Counterclaim both as regards the matters complained of by the Defendant and as to the financial consequences alleged to result from them.

14. In this connection it is relevant to record that the Claimant objected to the admissibility of part of the evidence of Mr. Bird, the Defendant's solicitor, in opposition to this application. Mr. Fowler objected to Paragraphs 12 and 13 of his witness statement and a letter from surveyors instructed by the Defendant exhibited to that evidence on the basis that they referred to without prejudice discussions between the parties. The relevant passage of Mr. Bird's statement in summary states that in October 2018 the Defendant brought to the attention of the Claimant the matters of which it now claims and that discussions and negotiations between the parties about those matters have been ongoing since then. I see nothing inadmissible in such evidence and it seems to me of some relevance that the Defendant did raise these matters of complaint with the Claimant well before this action was commenced. On the other hand the surveyors' letter is clearly marked "without prejudice" and Ms.

Bennett was not able to point to anything to rebut the normal inference that a letter so marked is inadmissible. I therefore ruled at the hearing that I would admit the witness statement in full but would not admit the letter, which I did not read in any detail.

15. The remaining part of the Counterclaim relates to the dilapidations payment due from the Defendant on the expiry of the lease which I have mentioned above. For reasons which I need not discuss the parties agreed that the amount to be paid in that respect was to be reduced to £161,815.44. When the Defendant attempted to exercise the break clause in the 2018 lease the Claimant submitted an invoice for that sum as due on the intended break date and JD Sports Fashion Plc remitted that sum to it. When it became apparent that the lease was not in fact going to terminate on the break date the Defendant alleges that it became entitled to the return of that sum. It alleges that the Claimant wrongly appropriated that sum towards payment of the alleged arrears of rent and service charges.

16. In the Counterclaim dated 14th May 2019 the Defendant claims the return of that payment and various declarations as to its rights in relation to it. However the 2018 lease expired by effluxion of time on the following day and the payment then became due on any view. The Claimant has now in fact treated the sum in question as payment of the amount due for dilapidations. In those circumstances this part of the counterclaim has become academic save as to the costs of it. The parties have asked me to determine whether the Defendant was properly entitled to issue that counterclaim when it did so and is entitled to its costs of doing so and I shall do so.

Summary judgment

17. The relevant principles when considering an application for summary judgment are well established:

    (a) The crucial question is whether the defence has a realistic as opposed to a fanciful prospect of success. That means that the defence must carry some degree of conviction and be more than merely arguable. The test is not one of probability.

    (b) The court must not conduct a mini-trial. The primary facts in any case are normally to be found by a judge at the end of a full trial following the normal processes of disclosure and exchange of witness statements. However there

will be cases where factual assertions can be seen to be without substance, for instance where they are clearly contradicted by contemporaneous documents.

(c) The court must always consider not only the evidence before it but what further evidence may reasonably be expected to be available at a trial which might affect the outcome of the case. It is not enough for a defendant simply to say that something may turn up which will give substance to a case which is otherwise fanciful.

(d) Short points of law and construction may be suitable for summary determination if the Court is satisfied that it has before it all the evidence necessary for the proper determination of the question since if a point is bad in law the sooner that is determined the better.

(See for instance Easy Air Ltd. v. Opal Television Ltd. [2009] EWHC (Ch) 1339)

Construction

18. The House of Lords and the Supreme Court have given extensive consideration to the principles to be applied to the construction of documents of all kinds over the last twenty years. For present purposes however I think it is sufficient to identify three basic principles:

(a) Interpretation is "the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" (Investors Compensation Scheme Ltd. v. West Bromwich Building Society [1998] 1 W.L.R. 896 per Lord Hoffmann).

(b) Interpretation is "not a literalist exercise focused solely on the parsing of the wording of the particular clause but... the court must consider the contract as a whole and depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning" (Wood v. Capita Insurance Services Ltd. [2017] UKSC 24 per Lord Hodge JSC at Para. 10).

(c) "It is not in my judgment necessary to conclude that, unless the most natural meaning of the words produces a result so extreme as to suggest that it was unintended, the court must give effect to that meaning… If there are two possible

constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other" (Rainy Sky v. Kookmin Bank [2011] UKSC 50 per Lord Clarke JSC at Paras. 20 – 21).

Certificates of service charges – the law

19. Ms. Bennett's submission is that the certificates issued by the Claimant's surveyors are not and indeed cannot be binding on the Defendant on matters of law, particularly as to whether works carried out by the Claimant are properly to be characterised as works of repair to the cost of which the Defendant is liable to contribute. She relied in this respect on the decision of Ungoed-Thomas J. in Re Davstone Ltd.'s Leases [1969] 2 Ch. 378. In that case the service charge payable was to be certified by the landlord's surveyor and his certificate was expressed to be "final and not subject to challenge in any manner whatsoever". Ungoed-Thomas J. first held that as a matter of construction the issue whether particular work was or was not within the landlord's repairing covenants was not a matter for decision by the surveyor. Secondly, he held that in any event if the lease did purport to make the surveyor's decision on that issue conclusive that provision of the lease was void as ousting the jurisdiction of the court on a question of law and therefore contrary to public policy. He took the view that because the relevant provision on that construction made the certificate conclusive on issues of both fact and law without distinguishing between them the result was that it was completely void and of no effect at all. His views on this second point are probably to be regarded as obiter dicta since he introduced them by saying that his conclusion on the question of construction answered the question which he had to decide.

20. The decision in that case can on one view be regarded as turning on the construction of the particular lease in question and therefore not of general application. However the wider views expressed by Ungoed-Thomas J. on the issue of public policy seem to me somewhat surprising and to have potentially far-reaching implications. When the service charge properly payable by a tenant falls to be calculated a number of different questions may arise – is a particular item within what can properly be charged to the tenant under the lease, what sum has actually been spent on an item, has work been carried out properly and at reasonable cost etc. Those questions will commonly

involve mixed issues of construction of the lease, fact and judgment. The effect of the judgment in that case appears to be that a provision making a certificate conclusive will be completely ineffective unless it clearly and expressly excepts any question of law from its operation. If the provision is in that form it is likely in my view to lead to considerable difficulties and disputes in practice as to the matters on which the certificate is and is not conclusive. I have to say that this does not seem to me to be either desirable from a practical point of view or in accordance with the general policy of the modern law as regards the freedom of parties to agree how issues of this kind are to be resolved.

21. In any event I accept Mr. Fowler's submission that the law has developed subsequently in a different way. I agree with him that the correct approach to a clause by which the parties to a contract entrust decision-making authority to an expert is now authoritatively set out in the leading judgment of Thomas L.J. in Barclays Bank Plc v. Nylon Capital LLP [2011] EWCA Civ 826. The contract in that case was a limited liability partnership agreement which provided that any dispute as the allocation of profits due to a member should be referred to an expert accountant whose decision was to be final and binding and expressly empowered him to determine any issue as to his own jurisdiction. An issue arose as to whether the dispute which had arisen between the parties was within the ambit of that provision at all. The Court of Appeal decided that the court had a discretion as to whether that issue should be decided immediately by the court or should be decided initially by the expert, leaving the dissatisfied party to challenge his decision in court thereafter. In the circumstances of that case it decided that the issue should be determined immediately by the court.

22. In the course of his judgment Thomas L.J. reviewed a number of previous authorities. He drew a clear distinction between cases where on the one hand the issue is whether the matter in dispute is within the jurisdiction of the expert or on the other hand the issue is whether the expert has made some error in the course of determining a matter which is within his jurisdiction. The jurisdiction of the expert is a matter of construction of the clause in question to be determined on ordinary principles without any presumption either way. It is ultimately a question for the court, even if as in that

case the expert is expressly given authority to determine his own jurisdiction (see Para. 28).

23. Where the expert has determined an issue within his jurisdiction Thomas L.J. accepted that in general the court will only intervene in narrowly circumscribed circumstances (see Para. 34). There are a number of authorities which express the test as being that the court will intervene only if the expert has made an error which has the result that he has not performed the task assigned to him, such as would be the case if a valuer appointed to determine the open market value of a property determined the value on some other basis (see for example Nikko Hotels Ltd. v. MEPC Plc [1991] 2 E.G.L.R. 103). Thomas L.J. expressly left open in Para. 35 of his judgment the position where an error by an expert "has the consequence that he is not determining the matter in accordance with the mandate given to him". Etherton L.J. simply agreed with that judgment.

24. In his concurring judgment in that case Lord Neuberger M.R. expressed wider reservations about the circumstances in which the court can intervene when the expert has erred on a matter of law within his decision-making authority. In particular at Para. 69 he expresses the view that where an issue of law arises it does not follow from the fact that the resolution of that issue is within the expert's jurisdiction that the court cannot intervene if he decides it wrongly. He does however appear to accept that the reason for the court intervening in such a case is that the decision-maker has gone outside his authority.

25. I do not need for the purposes of this case to pursue further the issues which were left open in that case. It seems to me plain that the judgments there give no support to the existence of some overriding principle of public policy which will invalidate a clause of this kind entirely and despite the intentions of the parties of the kind suggested in Davstone. While Davstone does not appear to have been cited to the Court of Appeal the existence of such a principle is in my view completely inconsistent with the judgments in Barclays Bank v. Nylon Capital.

26. I consider however that there is a fundamental distinction between that line of authority and the present case which makes it of limited relevance when one comes to the essential question of construing the relevant provisions in the 2013 lease.

Although in fact the certificates in this case were prepared by the Claimant's surveyors there is no requirement in the lease that they have to be prepared by an expert at all. There would be nothing to prevent the Claimant from preparing the relevant certificate itself. One is not in this case therefore concerned with determining the extent of the surveyor's decision-making authority at all but with the question on what matters the certificate was intended by the parties to be conclusive.

Service charge certificates – this case

27. Schedule 6 of the 2013 lease provides for the landlord to calculate the reasonable and proper cost to it of the specified services and expenses in each service charge period. It then provides for the tenant to pay a fair and reasonable proportion of that cost based on the proportion of the let area of the property as a whole which is comprised in its lease. It is noteworthy that it provides for any dispute on that issue to be the subject of expert determination by an independent valuer who is required to receive representations from the parties before reaching his decision (see the definition of "expert determination" in Clause 1.1). The landlord is then required once the relevant figure has been ascertained to issue the certificate of what is payable by the tenant. It is entirely a matter for the landlord's choice whether and to what extent he obtains expert assistance in carrying out his obligations under these provisions.

28. It would seem to me surprising if the parties intended that the landlord should in effect be able to decide conclusively significant issues of law or principle which might arise in the course of determining the service charge payable. That would mean that provided he did not act fraudulently or commit any manifest or mathematical error he would be made judge in his own cause. It is true that in many cases of this kind provision is made for the certificate to be issued by a surveyor appointed by the landlord, which gives him a significant degree of control over the process. However in such cases the tenant has the protection that the certificate will be prepared and vouched for by a professionally qualified person who is likely to be subject to professional regulations which require him to bring his own judgment to the matters in question and not simply act in the landlord's interests. The fact that the parties provided specifically for independent determination of the proportion of the landlord's total costs payable by the tenant in the event of dispute seems to me to

strengthen the view that they did not intend other and potentially more important issues to be decided conclusively by the landlord.

29. What is clear is that the parties intended that the certificate should be conclusive on some matters. I regard it as plain that they intended it to be conclusive on what might be described as routine accounting matters. To put that in practical terms by reference to the present case, in the absence of manifest or mathematical error it would not be open to the tenant to challenge the amounts spent by the landlord on ordinary services such as cleaning and security or routine bills such as electricity. It is not necessary for me to attempt a comprehensive definition of the matters on which the certificate was intended to be conclusive. What I have to decide is whether it was intended to be conclusive as to the matters raised which I have set out in Para. 10 above.

30. I have concluded that the parties did not intend to make the landlord's certificate conclusive on the question of whether particular works fell within the Claimant's repairing obligations. I think that this includes both works which are alleged by their nature not to have been within those covenants and works which are alleged to have been unnecessary.

31. The Defendant also relies by way of defence on an allegation that the Claimant did not obtain tenders for very substantial works. This in my view is simply not a defence at all. Assuming it is factually correct it assumes that the Claimant is under some obligation to obtain tenders. There is no such obligation in the leases and there is no basis for implying such an obligation.

32. The remaining allegation by way of defence is that the cost of the work was increased by past failures on the part of the Claimant to carry out its repairing obligations. This is in my view not a matter on which the certificate was intended to be conclusive for a different reason. It does not relate to the process of calculating the service charge payable by the tenant in any given period at all. What the landlord calculates for any such period is the reasonable and proper cost of carrying out the work which he has in fact carried out during that period and that is what the tenant is required to pay. If the landlord has as alleged here failed to perform his repairing obligations in previous periods that will give the tenant a potential claim for damages for that breach of covenant. The measure of damages will by no means necessarily be simply any

resulting increased cost of carrying out the work in a later year, although that will obviously be an important factor in the assessment. In many cases it will be of little if any practical importance whether an issue such as this is characterised as a defence or a counterclaim. In the present case that distinction is relevant and I consider that it is correctly characterised as a counterclaim.

Clause 3(1)(a) of the 2013 lease

33. I have at the outset of this judgment set out briefly the background history of the letting of this property since 2005. I should emphasise that neither counsel relied in argument on that history as being of assistance in construing this clause and I agree with that approach. Similarly neither counsel suggested that further disclosure or evidence is needed in order to decide this issue and again I agree. I consider that the point can and should be determined now.

34. The argument for the Defendant on this issue involves two propositions. The first is that the expression "yearly rent" in the clause when read as required into the 2018 lease means only what is called the main rent of £40,000 per annum and does not include the service charges or any other sums payable. In the 2013 lease it meant only the base rent and nothing else. The second is that it follows that the remainder of the clause excluding any right to withhold rent or right of set-off only applies to that rent and not to any other sum payable by the tenant.

35. The first of these propositions has obvious attractions. There is no definition in the 2013 lease of the expression "yearly rent". As a matter of ordinary language used in the context of a commercial lease one would expect it in my view to refer to the rent payable each year for the premises and not to other payments for service charges and insurance, even if the lease as here makes those sums payable as rent. This impression is reinforced by the way in which the 2013 and 2018 leases use the expressions "yearly rent" and "rent" or "rents" elsewhere in them. Thus in Clause 3(1)(b) of the 2013 lease it provides for interest to be payable in the event of late payment of "the rents and other monies due under this Lease". The proviso for re-entry in Clause 4.1 of the 2013 lease draws a distinction between "yearly rent" and "rents". The 2018 lease contains a definition of the expression "Continuing Rents" as including insurance rent, service charges, interest and "all other sums (save for the yearly rent

and the turnover rent) reserved as rent under the [2013] Lease". Here "yearly rent" must obviously mean only the base rent reserved under that lease. The same applies to Clause 3.2.2 where the 2018 lease itemises provisions of the 2013 lease which are not be carried over into it and specifies the yearly and turnover rents as separate items. It is a familiar principle of construction that expressions are normally to be given the same meaning wherever they appear in a contract unless there is good reason not to do so.

36. Ms. Bennett helpfully took me to the provisions on the same point in the 2005 and 2010 leases. The 2005 lease reserves what is described as a yearly rent and insurance payments and service charges which are described as additional rents. The parallel provision to Clause 3.1(a) is a covenant to pay both the yearly and the additional rents and includes an exclusion of any right to withhold rent or right of set off which clearly applies to all those rents. The 2010 lease reserves an initial peppercorn rent followed by a yearly rent increasing in stages and insurance payments and service charges which are again described as additional rents. The parallel provision to Clause 3.1(a) is a covenant only to pay the yearly rent although it then contains a cross-reference which includes the initial peppercorn rent, followed by an exclusion of the rights to withhold rent and set-off in identical terms to Clause 3.1(a). This comparison and indeed a general review of the leases make plain that the 2010 and 2013 leases were drafted by adapting the then existing lease as thought necessary. The 2018 lease was then drafted by incorporation of the provisions of the 2013 lease with such adaptations as were thought necessary. It also makes it clear that the expression "yearly rent" was almost certainly carried over into the 2013 lease from the previous leases despite the fact that no rent described as yearly rent is reserved by the later lease. The approach adopted by the draftsmen concerned is entirely understandable, but unless carried out with considerable care it risks giving rise inadvertently to difficulties and anomalies in the wording of a later lease. I do not think that one can safely rely upon a comparison of the various leases as an aid to the interpretation of Clause 3.1(a).

37. The second of the two propositions which I have set out in Para. 34 above seems less attractive simply from considering the language of Clause 3(1)(a). The latter part of the clause excludes any right to withhold "rent" and read in isolation is entirely general in its terms. One must however read it in its context and Ms. Bennett submits

that so read it is to be construed as applying only to the yearly rent mentioned in the earlier part of the clause.

38. Mr. Fowler put in the forefront of his argument on this issue the submission that the Defendant's construction gives the clause a meaning which is commercially absurd. No sensible commercial parties could have intended to prohibit any right of set-off against the main rent only and not against any of the other sums payable as rent under the lease. I consider that the description of such a result as absurd puts the matter too high, but I do regard it as a distinctly unlikely result for commercial parties to have intended. I must however bear in mind that the court is only entitled to bring this consideration into play if the clause is as a matter of its language reasonably capable of having more than one meaning.

39. In addressing the language of Clause 3.1(a) Mr. Fowler focusses on the fact that "yearly rent" is not a defined term in either the 2013 or the 2018 lease. He points out that the covenant is to pay the yearly rent "at the times and in the manner required under Clause 2.3" and Clause 2.3 sets out all the different sums payable under the lease, not simply the base rent. I regard this aspect of the lease as ambiguous on the issue which I have to decide and therefore of no assistance. More persuasive is that if Clause 3.1(a) is only a covenant to pay the base rent the lease contains no express positive covenant to pay either the turnover rent or the service charges. No doubt one can infer such an obligation from the fact that they are itemised as reserved in Clause 2, which is the clause granting the lease, but it would be odd and unusual not to find a positive covenant to pay them. On the other hand the lease does contain an express covenant to pay the insurance rent, which tends to my mind to suggest that the drafting of this aspect of the lease has not been thought through properly rather than any clear intention of the parties.

40. I have formed the distinct impression that the point which I am asked to resolve is likely to have arisen as a result of the way in which the 2013 and 2018 leases came to be drafted. It seems to me that all the proposed interpretations of Clause 3(1)(a) are possible but none of them is free from difficulty. The Defendant's construction is in my view significantly less likely to be that which sensible commercial parties would

intend. The Claimant's construction involves either giving the expression "yearly rent" what does not appear to be its natural meaning both as a matter of ordinary language and in the context of the leases or construing the second part of the clause as different from and wider in its ambit than the first part.

41. I have concluded that the words "yearly rent" in Clause 3(1)(a) are used in the limited sense contended for by the Defendant. The natural meaning of the expression together with the way in which it is used elsewhere in the 2013 and 2018 leases to my mind outweigh the indications of a wider meaning. However I have also concluded that it does not follow that the remainder of the clause applies only to that rent. Its language is not so restricted and commercial common sense points clearly against any such restriction being intended. There remains the oddity that one might not expect such a difference between the first and second part of the clauses, but this nevertheless seems to me the least unsatisfactory construction of the clause. It follows that in my judgment the prohibition against set-off applies to payments due from the Defendant in respect of service charges under both the 2013 and 2018 leases.

The dilapidations payment

42. As I have indicated above the parties have asked me to determine whether the Defendant was properly entitled to bring this counterclaim when it was issued although it has now become academic except as to costs. The Defendant gave notice of its intention to terminate the 2018 lease early with effect from 17th January 2019. That meant that in order for that notice to be effective one of the requirements was payment of the dilapidations payment on or before that date. That sum was paid but was not paid in time, with the result that the notice of termination was ineffective. It is important to note that it was paid by JD Sports Fashion rather than the Defendant and that the payment was clearly made specifically in respect of that liability. On 6th February the Claimant's former solicitors wrote to the Defendant's solicitors stating that as the lease had not been effectively terminated the dilapidations payment was not due and the payment "has been applied to the outstanding service charge arrears". On 8th March the Defendant's solicitors replied asserting that the dilapidations payment had in the circumstances not become due and the Claimant was obliged to return it. It was not permitted to apply it to any arrears of any other sums due under the lease. In their response on 22nd March the Claimant's solicitors did not admit that the

Defendant was entitled to reclaim the money and pointed out that the payment would in any event be due when the lease expired.

43. The particulars of claim had no need to and did not refer to the dilapidations payment. There then followed the counterclaim in the form which I have set out above, which is dated the day before the 2018 lease expired. In the evidence served very shortly thereafter in support of this application the Claimant's solicitor stated that it had *now* (my emphasis) allocated the payment made by JD Sports in satisfaction of the dilapidations payment due.

44. In my view the position taken by the Defendant in correspondence prior to these proceedings on this point was clearly right. When the Claimant received the payment it was entitled either to accept it as payment of the dilapidations liability or to reject it on the ground that it was too late to satisfy the requirements of the break clause in the lease. Having decided to reject it and insist the lease was continuing it followed that no dilapidations payment was due. At that point JD Sports had an unanswerable claim to the return of the money, probably on the basis of unjust enrichment or on the ground that the consideration for the payment had wholly failed. There was no right for the Claimant to do what it actually purported to do, namely to appropriate the money to other sums due from the Defendant, because the payment had been expressly and clearly made for the specific purpose of meeting the dilapidations liability. Mr. Fowler sensibly did not argue strenuously that there was any such right.

45. At the time when the Counterclaim was served the Claimant's position had not changed, at least as far as the Defendant was aware. The Defendant had no certainty that when the lease expired the Claimant would not immediately assert that the dilapidations payment had not been made because the previous payment had been appropriated to other liabilities and demand it. A detailed study of the service charge certificates together with the particulars of claim would have revealed that the dilapidations payment had not been deducted from the arrears claimed but the Claimant's position was not in my view made clear until it served its evidence in support of this application. It was therefore in my view entirely reasonable for the Defendant to seek relief in the Counterclaim regarding this payment.

46. Mr. Fowler makes two points in answer to the Defendant's case on this issue. First, by the time the Counterclaim was served the payment was on the point of falling due in any event and it was a pointless waste of time and money to assert any right to repayment of it. Secondly, any cause of action for repayment of the money was vested in JD Sports and not in the Defendant. In my view the second of these arguments is one which would probably require further evidence as to the basis on which JD Sports made the payment if it needed to be decided and I cannot form any concluded view on it.

47. While Mr. Fowler's points have some force they do not take into account the fact that the Counterclaim also claims in general terms declaratory relief as to the Defendant's rights in respect of this payment. In the circumstances which existed at the time when it was served it seems to me entirely reasonable for the Defendant to have asked the court to determine those rights. Even if the Defendant never had any right to claim repayment of the money it was of course the party liable to make the dilapidations payment and therefore had a sufficient interest to claim declaratory relief as to the position. I do not consider that the fact that the further claim for return of the money would inevitably become pointless before it could be decided is sufficient to dissuade me from the overall conclusion that the Counterclaim was properly brought on this issue and the Defendant is entitled to such costs as are properly attributable to it.

Service charges on account

48. Mr. Fowler submitted that even if the Defendant is entitled to dispute the certified service charges it could have no defence in respect of the service charges payable on account for the period between 1st October 2018 and the termination of the lease. There are two features of the service charge provisions which seem to me important on this issue. First, the Claimant is under a positive obligation to issue a certificate of service charges annually fixing the relevant liability. A certificate will therefore have to be issued for the period in question at some point. Secondly, once the certificate has been issued the Claimant is under a duty to apply any payments made on account in satisfaction of the liability determined by it. In this case once the certificate is issued the Defendant will be able to raise the same defences as I have held that it is entitled to raise in respect of the existing certified charges. If this lease were continuing and the Claimant was therefore continuing to provide the services and meet the expenses

for which the service charges are payable that might well not be a good reason for refusing summary judgment now in respect of the charges payable on account. Where as here the lease has come to an end and the final certificate will have to be issued in the near future it seems to me that there is a compelling reason for the liability for all the service charges to be determined at a trial. I am not therefore prepared to give summary judgment separately for the charge payable on account.

Conclusions

49. I now need to draw together the effect of the conclusions at which I have arrived:

(1) The certificates issued by the Claimant as to service charges are not conclusive as to the matters raised in the Defence which I have identified in Para. 30 above.

(2) I have concerns that those matters are pleaded in very general terms and no attempt is made to spell out in any detail the extent to which they would operate to reduce the service charges payable by the Defendant. The evidence does not however suggest to me that these are spurious points raised purely to avoid payment of the sums claimed. I regard it as reasonably clear that at a trial the Defendant may well be able to adduce expert and other evidence in support of its case on these issues. I do not consider that I can properly say at this stage that it has no realistic prospects of success on the facts on these points and I cannot therefore give summary judgment for all or any defined part of the sum claimed. I am not prepared to give summary judgment separately for the service charges payable on account.

(3) The Defendant is not entitled to set off against the Claimant's claim any damages or other sums awarded to it on its Counterclaim. The Claimant is entitled to relief in an appropriate form to reflect that conclusion.

(4) I have already set out in Para. 13 above criticisms of the way in which the Counterclaim is pleaded in relation to the alleged breaches of covenant. However as with the Defence and for the same reasons those defects do not lead me to the conclusion that the Defendant has no realistic prospects of success on the facts on those issues and I am not prepared to dismiss the Counterclaim summarily.

(5) The Defendant is entitled to the costs of the Counterclaim so far as they relate to the dilapidations payment.

Other matters

50. There was brief discussion in the argument before me on whether if the claimant was entitled to a money judgment on the claim now that judgment should be stayed pending the trial of the counterclaim. On the conclusions which I have reached that question does not arise. I will only say that I accept Mr. Fowler's submission that where there is an effective contractual prohibition on set-off it can only be in rare circumstances that such a stay would be granted.

51. Following the circulation of this judgment in draft it has become clear that there are a number of matters which will need to be dealt with at a further hearing. The Claimant may wish to make an application for a payment on account and the Defendant may wish to apply for permission to amend the defence and counterclaim. In addition I will need to finalise the terms of an order giving effect to this judgment and deal with the issue of costs. My provisional view is that any order for costs will reflect the fact that neither party has been wholly successful on this application. The parties should arrange a convenient date and ensure that as far as possible I am able to deal with all the outstanding matters on that occasion.

R. Bartlett

Deputy Master