OUTER HOUSE, COURT OF SESSION

[2020] CSOH 59

CA68/19

OPINION OF LORD DOHERTY

in the cause

TOSCAIG LIMITED

Pursuer

against

POUNDLAND LIMITED

Defender

Pursuer: Sandison QC, Brodies LLP
Defender: Lindsay QC; Shoosmiths LLP

10 June 2020

Introduction

[1] The pursuer is the landlord of a commercial building ("the Building") at 187-189 Argyle Street (odd numbers), 169-185 Jamaica Street (odd numbers), and 10 and 11 Adam Court Lane, Glasgow. The Building comprises several different letting units, certain "Common Parts", and some areas which are not capable of being let. The defender is the tenant of a ground and basement shop unit (Unit 9) ("the Premises") which is let to it for the period of ten years from 18 October 2010 until 17 October 2020. At the time the lease was

entered into the landlord was Redevco UK 2 BV. Toscaig Properties Limited ("TPL") succeeded to the landlord's interest. Thereafter, the pursuer succeeded to that interest.

[2] The parties are in dispute as to the proper construction of the service charge provisions in the lease. In this commercial action the pursuer seeks (i) declarator that certain costs which it and TPL have incurred constitute valid service charges in terms of the lease; and (ii) payment of those sums. The matter called before me to debate the defender's preliminary plea to the relevancy of the pursuer's averments.

The lease

[3] In terms of clause 7.3 of the lease the landlord obliged itself to carry out and perform the services specified in Part 6 of the Schedule to the lease. Part 6 of the Schedule contains *inter alia* the following terms:

> "1. To pay all running and operating costs associated with and keep in good and substantial repair and in a neat and tidy condition and, where necessary to rebuild, reinstate and replace the Common Parts … and for such purpose to carry out such tests and employ such consultants as the Landlords (acting reasonably) may consider desirable.
>
> 2. If and when the Landlords (acting reasonably) consider it desirable to do so, instead of carrying out renewal, reinstatement or replacement of any of the Common Parts, to upgrade and improve the same but so that the costs of so doing (to the extent that they exceed the costs which in the reasonable opinion of the Landlords would have been incurred in carrying out renewal, reinstatement or replacement) shall not form part of the costs falling to be taken into account for the purposes of paragraph 2 of Part 7 of the Schedule.
>
> …
>
> 11. To provide such other services as the Landlords (acting reasonably and having due and proper regard to the principles of good estate management) may from time to time consider necessary in connection with the Building and the Common Parts."

[4] In terms of Clause 6.2 of the lease, the defender obliged itself:

> "To pay to the Landlords without any retention or deduction:

6.2.1 quarterly in advance on written demand in accordance with the estimates therein provided for the service charge specified in Part 7 of the Schedule; and

6.2.2 on written demand annually in arrears the amount if any by which the said advance payments of service charge fall short of the actual costs due by the Tenants also in accordance with Part 7 of the Schedule."

[5] Part 7 of the Schedule to the lease contains *inter alia* the following terms:

"2. The costs properly and reasonably incurred (which expression, for the purpose of calculating the advance payments specified in the subsequent paragraphs of this part of the Schedule shall comprehend costs likely to be properly and reasonably incurred) by the Landlords during each Charging Year in observing and performing their obligations under Part 6 of the Schedule shall be payable by and recoverable from the tenants of the Building by means of the service charge aftermentioned.

…

4. The service charge herein referred to shall be a fair and reasonable proportion of the costs referred to in paragraph 2 of this part of the Schedule having due and proper regard to the principles of good estate management and primarily on the basis which the proportion which the Gross Internal Area of the Premises bears to the aggregate Gross Internal Area of all units let or intended for letting as a separate entity (including the Premises) within the Building

PROVIDED ALWAYS THAT notwithstanding the foregoing, the following shall not form part of the service charge:-

…

4.2 the cost of any refurbishment works to the extent that the same comprise the cost of any addition, alteration or amendment to the Building (other than in the context of repair and maintenance) and to a standard beyond the equivalent thereof as at the Date of Entry but excluding the cost of any repairs, renewals, replacements and maintenance of the Common Parts or minor improvements to the Common Parts or parts thereof;

…

4.7 the cost of renewal or replacement of any item except where such renewal or replacement is necessary because such item is beyond economic repair;

…

4.9 any costs associated with the implementation of any planning permission affecting the Building save to the extent that implementation of any planning

> permission is required in order that the Landlords can fulfil their obligations in Part 6 of the Schedule.
>
> …
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> 5. The said service charge shall initially be estimated by the Landlords and a copy thereof provided to the Tenants and shall be paid quarterly in advance on the Quarter Days in accordance with such estimate."

The pleadings

[6] The pursuer seeks to recover service charges from the defender in respect of its share of the cost of works to the Common Parts, *viz*. façade works, the replacement and repair of windows, and the removal of asbestos.

[7] The façade has mosaic tiles on concrete panels. The pursuer avers (art 6) that it was not in good and substantial repair; that most of it showed signs of structural distress through bossing and no longer fully adhered to the supporting structure, affecting approximately 95% of the tiles; that there were large areas of slight to moderate cracking, with very severe cracking in some areas; that the cracking was allowing water ingress and resulted in significant corrosion to the supporting rebar underneath, which led in turn to spalling and further degradation of the façade support system; that carbonation of the concrete panels occurred, and that they could no longer provide a protective environment for reinforcement; that some of the fixings retaining the panels in place had broken or otherwise failed; that failure of further fixings without warning was likely, rendering any and all of the panels susceptible to sudden fall; that the service life of the existing façade had been exceeded; and that, because of the risk of elements falling off and endangering the safety of the public, mesh netting has required to be installed.

[8] The pursuer avers that in order to meet the landlord's obligations in terms of clause 7.3 and Part 6 of the Schedule it was necessary to replace the existing façade system with a new one. It avers that that work does not represent an upgrading or improvement of the existing façade, but that it was and is the only reasonable and responsible way of rendering the façade in good and substantial repair. It avers that the repairs to the façade which the defender suggests would not have put it into good and substantial repair, because unrepaired sections would have continued to permit water ingress and corrosion to the supporting rebar underneath; that piecemeal repair would have resulted in a situation where effectively continual patching works to the façade and its support system would have to be done, with lesser efficacy and at greater ultimate cost than one-off complete replacement; and that the solution adopted is the most economical replacement system likely to be acceptable in planning terms to the local planning authority, given the prominence of the site within the Glasgow Central Conservation Area.

[9] The pursuer avers (art 7) that the steel windows in the areas of the Common Parts where cladding replacement is taking place are not in good and substantial repair and that the only reasonable and responsible way of putting them into good and substantial repair is to replace them. It avers that in other areas of the Common Parts steel windows are also not in good and substantial repair, and that where reasonably possible those windows will be repaired; but that where such attempts to repair are unsuccessful the windows will require to be replaced.

[10] The pursuer avers (art 8) that asbestos requires to be removed from a fifth floor plant room and from other areas of the Common Parts on the third and fourth floors of the Building in order to put the Common Parts into good and substantial repair.

[11] The pursuer avers (art 9) that the costs of the works carried out and to be carried out have been apportioned among the tenants of the Building in accordance with paragraphs 2 and 4 of Part 7 of the Schedule. It avers that there has been ascribed to the defender:

> "...responsibility for the proportion of those costs which the Gross Internal Area of the premises let to the defender bears to the aggregate Gross Internal Area of all units let or intended for letting as a separate entity within the Building. It excluded from the said aggregate Gross Internal Area areas of the Building which were as at the date the Lease was entered into, and which remain, inaccessible and not either let or intended (then or now) for letting."

In art 10 the pursuer gives a breakdown (by reference to each of the charging years 2017, 2018, 2019 and 2020) of the service charges which the pursuer seeks to recover from the defender. It avers that all of the works are due for completion within the charging year 2020. It estimates that total charges amounting to £1,496,754.10 remain to be paid by it in respect of the works in the charging year 2020.

Counsel for the defender's submissions

[12] Mr Lindsay submitted that the action should be dismissed. He maintained that the pursuer's averments about work required to put the Common Parts in good and substantial repair are irrelevant; and that its averments anent apportionment of service charges are also irrelevant. They are not a correct reflection of the terms of the lease and the relevant legal principles which require to be applied.

[13] Mr Lindsay suggested that when assessing the work required to put the Common Parts in good and substantial repair (paragraph 1 of Part 6 of the Schedule) regard has to be had to the duration of the lease, and to the fact that it will expire on 17 October 2020. The assessment of what is necessary is not undertaken in the abstract having regard to what may or may not be in the pursuer's long term interests as landlords. The pursuer's averments as to what is necessary to keep the Common Parts in good and substantial repair are irrelevant

because the pursuer does not aver (i) that the costs are reasonable in view of the short unexpired portion of the lease; and (ii) that there was a pressing need to commence the works prior to the expiry of the lease (*Scottish Mutual Assurance Plc* v *Jardine Public Relations Ltd* [1999] EG 43 (CS), [1999] EWHC 276 (TCC); *Crane Road Properties Ltd* v *Hundalani & Others* [2006] EWHC 2066 (Ch); *Fluor Daniel Properties & Others* v *Shortlands Investments Ltd* [2001] All ER (dig) 36 (Jan), [2001] 2 E.G.L.R. 103 | [2001] 4 E.G. 145 (C.S.)). Taking the pursuer's averments *pro veritate*, it is clear (a) that replacement of the façade and the windows, and the removal of asbestos, go significantly beyond what is required for the performance of the pursuer's obligations to the defender during the currency of the lease; and (b) that the purpose of those works is to satisfy the interests of prospective new tenants after the expiry of the lease rather than to keep the Common Parts in good and substantial repair.

[14] Mr Lindsay further submitted that the proposed apportionment of the costs does not comply with the requirements of paragraphs 2 and 4 of Part 7 of the Schedule. In apportioning costs to the defender regard must be had to the length of the lease, to its expiry on 17 October 2020, and to the defender's limited interest in the long-term refurbishment of the Building. Recovery from the defender of costs which go beyond or otherwise exceed what is required to keep the Common Parts in good and substantial repair until the expiry of the lease on 17 October 2020 would not be recovery of a fair and reasonable proportion of the costs. The pursuer's averments make clear that when considering the reasonableness of the apportionment of the service charge it has not had regard to any of these considerations. It has simply apportioned the costs according to Gross Internal Area ("GIA").

[15] Mr Lindsay submitted that these issues are all points of law capable of determination at debate. They involve the interpretation of the relevant provisions of the lease under

reference to the applicable authorities. It is unnecessary to have a proof before answer so that the facts can be ascertained.

Counsel for the pursuer's submissions

[16] Mr Sandison submitted that the authorities cited by the defender do not support the proposition that the apportionment of service charges in the present case can be determined as a matter of legal abstraction. There is no rule of law that the unexpired portion of a lease requires to be taken into account when assessing the fair and reasonable proportion of a global service charge payable by a tenant. Even if the unexpired portion may be taken into account, there is no rule of law that that factor will necessarily affect the determination of what is fair and reasonable in any particular case. In each case it is a question of construing the terms of the lease.

[17] The lease obliges the landlord to perform the services described in Part 6 of the Schedule. Whether a landlord's repair or renewal is necessary involves questions of fact and degree: *Post Office* v *Aquarius Properties Ltd* [1987] 1 All ER 1055; *Ravenseft Properties Ltd* v *Davstone (Holdings) Ltd* [1980] QB 12. Where reasonable remedial works are proposed by a landlord in order to fulfil its repairing obligations under a lease, the tenant is not entitled to insist upon more limited or cheaper works being carried out: *Plough Investments Ltd* v *Manchester City Council* [1989] 1 EGLR 244.

[18] Nothing in the present case permits the court to hold as a matter of law at this stage that the pursuer would be bound to fail to establish that the works in fact carried out by it and its predecessor, and the further works intended to be carried out, are not works for which the tenantable interests in the Building are liable to pay by way of service charge.

[19] Where a lease does nothing more than provide for a "fair and reasonable" apportionment amongst the tenantable interests in a building of costs incurred by the landlord in fulfilling his repairing obligations, it may be (depending on the wording of the lease in question) that factors which it might be appropriate to take into account include (a) the length of the lease which any particular tenant has enjoyed; (b) the unexpired period of that lease, and whether a renewal or extension of its term appears likely; (c) the nature and extent of work already carried out by the landlord and recharged to a tenant during the currency of a lease, and the continuing efficacy of such work; (d) the urgent (or non-urgent) nature of the need for the repairs in question; (e) the legal position of other tenants of the landlord in the building to which works are carried out; and (f) the actual motivation of the landlord in carrying out the works in question. That is the only proposition vouched by the authorities upon which the defender relies. The pursuer does not accept that those authorities (which were all at first instance) advance any other distinct proposition of law. If they do, the pursuer does not accept the correctness of any such proposition. In each case the apportionment exercise depends on the facts and on the terms of the particular lease. The lease here makes it clear (Schedule Part 7, paras 2 and 4) that apportionment of allowable costs amongst the tenantable interests in the Building (which interests are, together, to contribute the whole of the allowable costs incurred - para 2), is to be carried out "primarily" by reference to the proportions of GIA therein described, and only secondarily by paying "due and proper regard" to the principles of good estate management (the content of which may themselves be a matter of factual dispute). That is the context in which there is to be a "fair and reasonable" apportionment (para 4).

[20] Determining the costs which the landlord may recharge to the tenantable interests by way of service charge involves consideration of questions of fact and degree. Many factors

may inform a fair and reasonable apportionment of the costs incurred amongst those interests, but the primary route to arriving at a "fair and reasonable apportionment" is signposted by the lease. The degree to which it may or may not be appropriate to deviate from that route cannot be determined solely on the pleadings and the terms of the lease. The pursuer is entitled to claim an apportionment by the route primarily envisioned, leaving it to the defender, if so advised, to aver and in due course prove features of the case which might ultimately make it appropriate to take a different route. It cannot be said at this stage that the pursuer's approach to apportionment will not prove after inquiry to be one which it is entitled to take.

Decision and reasons

[21] I am grateful to counsel for their submissions which have been of considerable assistance to me. However, since in the result I have no real difficulty in concluding that a proof before answer is the correct disposal, I do not think it appropriate to embark upon a lengthy discussion of the arguments which I have heard.

[22] An action may not be dismissed as irrelevant unless a pursuer is bound to fail even if he proves all of his averments (*Jamieson* v *Jamieson* 1952 SC (HL) 44, Lord Normand at p 50, Lord Reid at p 63). I am not persuaded that that test is satisfied here.

[23] It is not clear to me that the defender's suggested construction of paragraph 1 of Schedule 6 is correct. It is not the ordinary and natural reading of that provision. However, in my opinion it is unnecessary to reach a concluded view on the matter at this stage, and I think it is undesirable to seek to do so without inquiry into the facts (which may include evidence of relevant surrounding circumstances at the time of contracting). For present

purposes it suffices to say that I am not satisfied that the pursuer's interpretation is plainly wrong.

[24] Moreover, I agree with Mr Sandison that whether the landlord was/is obliged in terms of paragraph 1 of Part 6 of the Schedule to do all of the works which it has carried out/proposes to carry out will require consideration of questions of fact and degree. In my view those questions are not capable of determination on the pleadings.

[25] In my opinion both parties recognised that paragraphs 2 and 4 of Part 7 of the Schedule are more open-textured than paragraph 1 of Part 6. Both acknowledged that a range of factors might arguably be relevant considerations when it came to allocation of the defender's share of the landlord's costs. Nevertheless, I am not persuaded that it is appropriate at this stage, without inquiry into the facts, to determine (i) the factors which are relevant to the allocation of costs to the defender; or (ii) the relative weight (if any) which ought to be given to each of those factors. The pursuer's averred position is that the allocation here ought to be made on the primary basis identified in paragraph 4 (ie taking the GIA of the Premises as a proportion of the total GIA of the properties in the Building which are let or are intended for letting). In my opinion it cannot be said that the pursuer's averments in that regard are plainly irrelevant. While on the basis of the incomplete information presently available to the court I might incline to the view that in the circumstances allocation on that primary basis would be a surprising outcome, I do not think that the court can properly conclude at this stage that it is not a possible outcome.

Disposal

[26] I shall allow a proof before answer with all pleas standing. I reserve meantime all questions of expenses. I shall put the case out by order to discuss arrangements for the proof.