



Pay now, argue later: UK Supreme Court rules that tenant should pay landlord service charges upfront and dispute liability later

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In a recent judgment the Supreme Court of the United Kingdom ruled that a tenant contesting a certified service charge from their landlord had to pay the charge upfront, and that any defences (other than the defence of fraud or manifest error) had to be raised at a later stage.

We often see provisions in Guernsey and Jersey leases that say that the landlord's or landlord's surveyor's service charge certificate is conclusive, but what does this mean in practice? This was considered in the UK case, Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd.

The dispute arose when Blacks fell into arrears with their service charge, claiming the charge was excessive and that it included unnecessary items and expenses which fell outside the terms of the lease.

The landlord, S&H, issued proceedings to recover the service charge. The courts had to consider how conclusive the landlord's certification of the tenant's service charge was by interpreting a clause in the lease that said:

“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.” (emphasis added)

Blacks argued that the certificate was conclusive as to the costs incurred by the landlord only but not the sum payable by the tenant, and a battle ensued on the interpretation of this clause. This was the heart of the matter.

S&H's interpretation led to a “pay now, argue never” regime, subject only to the permitted defences (manifest or mathematical error, or fraud). The Supreme Court felt such interpretation was inconsistent with other provisions in the lease such as the right of inspection of records and

dispute resolution mechanism in respect of the service charge.

On the other hand Blacks' view led to an “argue now, pay later” regime which, according to the court, undermined the landlord’s need for reimbursement of costs and expenses incurred with minimal delay and dispute, and ignored the ordinary meaning of the words in the clause: “and the sum payable by the tenant”.

The Supreme Court did **not** agree with either of the parties' interpretations of the clause and concluded that

1. the landlord's certificate was conclusive both as to the costs incurred and the sum payable by the tenant (subject to the permitted defences) but
2. payment of the certified sum did not preclude the tenant from disputing liability afterwards

The court said that solution protected the landlord's cashflow position but at the same time gave the tenant the possibility of bringing "a claim seeking repayment of a cost which it contended had been improperly charged. It is a form of 'pay now, argue later' provision."

Although decisions of the UK Supreme Court are not binding upon Guernsey and Jersey courts, it is likely that the courts in these jurisdictions would take a similar approach to that taken by the Supreme Court. Of course, every matter would be considered on its own facts and the precise wording of the relevant provision in the lease would be crucial.

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