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IF neither the claimant's nor the defendant's construction of a contract accords with commercial common sense, can a court adopt a "third" approach when interpreting that contract? In *Sara & Hossein Asset Holdings Ltd.* ("S&H") *v Blacks Outdoor Retail Ltd.* ("Blacks") [2023] UKSC 2, [2023] 1 W.L.R. 575, a majority of the Supreme Court answered this question in the affirmative. In doing so, they held that a clause in a commercial lease should be interpreted to embody a "pay now, argue later" regime, rejecting both the landlord's "pay now, argue never" and the tenant's "argue now, pay later" interpretations of the certification provisions.

A dispute arose between the landlord (S&H) and the tenant (Blacks) when Blacks paid the main rent and certain other charges due under leases for commercial premises, but did not pay the service charge for the years 2017–18 and 2018–19. S&H certified that a total of £462,000 was payable, and issued proceedings claiming the outstanding charge. Blacks served a defence and counterclaim, averring that the certified sums were not properly due on the basis that certain works either did not fall within the scope of the S&H repair covenant, or were unnecessary at the time of their commission. This raised the question of whether S&H's certificate was conclusive as to the sum payable by Blacks, or whether it was conclusive only as to the amount of total costs incurred by S&H.

Paragraph 3 of Schedule 6 provided that Blacks should be furnished with a certificate as to the "amount of the total cost and the sum payable" and that "in the absence of manifest or mathematical error or fraud such certificate shall be conclusive". Blacks argued that the effect of this provision was that the certificate was conclusive *only* as to the amount of money spent by S&H on services and expenses, but not as to Blacks' liability. There were two main justifications for this interpretation. The first was that the service charge calculation required various steps to be taken, and each step of the determination of the sum payable by Blacks could give rise to arguable disputes and a need for investigation. These disputes were unlikely to fall within the narrow scope of the permitted defences in paragraph 3 itself, such that S&H's interpretation would render the landlord a "judge in its own cause". The second justification for Blacks' non-literal interpretation was that S&H's case was inconsistent with both the detailed dispute mechanism, and Blacks' inspection rights in relation to receipts, invoices and other evidence relating to the service charge. This interpretation, envisaging an "argue now, pay later" regime, was accepted by both the Deputy Master ([2019] EWHC 3414 (Ch)) and the High Court ([2020] EWHC 1263 (Ch)).

In contrast, S&H began from the premise that the purpose of the lease was to impose an obligation on the tenant to pay a particular sum by way of service charge, in circumstances where the landlord would have *already* incurred the costs of providing the services pursuant to its own obligations under the lease. In light of this purpose, any limits on Blacks' right to dispute its liability to pay the certified service charge were understandable, since S&H would otherwise be compelled to litigate for prolonged periods of time to recover incurred costs. S&H's case was also based on a literal reading of paragraph 3, suggesting that Blacks' interpretation would render the phrase "and the sum payable by the tenant" redundant and would undermine the conclusive nature of the provision. The Court of Appeal ([2020] EWCA Civ 1521) unanimously accepted this "pay now, argue never" regime.

On appeal to the Supreme Court, Lord Hamblen J.S.C., on behalf of the majority, accepted neither of these interpretations. Instead, the court favoured an interpretation whereby the landlord's certificate was indeed conclusive as to what was required to be paid under the Schedule 6 regime, with no set-off permitted against that sum so certified. However, payment of the sum did not preclude the tenant from thereafter disputing liability for that payment, with the burden on the tenant to establish any such claims. The Court of Appeal was therefore right to enter summary judgment for S&H, but that did not preclude Blacks from pursuing its counterclaim. In other words, the majority adopted an iterative interpretation of paragraph 3 to construe it as a form of "pay now, argue later" provision.

Lord Hamblen J.S.C. sought to justify this conclusion on both literal and commercial grounds. The literal justification was that although the language of the lease stated that the certificate shall be "conclusive", it did not state *how* it was to be conclusive. In the majority's view, given that the purpose of Schedule 6 was to establish what service charge sum should be paid on a particular date, the conclusivity was simply directed towards this "pay now" mechanism. The commercial justification was that this interpretation protected S&H's immediate cashflow needs, since Blacks could not simply withhold payment whenever charges were disputed, but would rather have to take steps to initiate and establish a claim first. In the majority's view, this conclusion was not undermined by the presence of a no-set-off provision in Clause 3 of the lease: that provision was not extinctive of Blacks' rights, and was directed only to counterclaims which seek to hold up the payment due under Schedule 6 by the assertion of disputed claims.

Caught between the rock of S&H's literal approach, and the hard place of Blacks' wider interpretation, the majority's decision appears to provide an attractive and creative solution. However, the judicial creativity which underpinned this approach is somewhat reminiscent of the approach in

Rainy Sky S.A. v Kookmin Bank [2011] UKSC 50, 1 W.L.R 2900. Lord Briggs J.S.C. rightly identified that "the uncommerciality of the prima facie meaning of contractual words only yields to a more commercial alternative if there is some basis in the language of the contract as a peg upon which that alternative can properly be hung" (at [61]). In the present case, the assumption underlying the majority's interpretation was that the certification provisions were all simply mechanisms to preserve S&H's interim cashflow, and that once this was recognised, their alternative construction was properly hung on that cashflow peg. However, this assumption does not find its basis in the language of Schedule 6 itself which draws no such distinction between a liability to pay *now*, and a liability to *ultimately* pay the service charge.

In these circumstances, the interpretation favoured by the majority can only amount to re-writing the parties' bargain in the name of commercial common sense, an exercise effectively prohibited by the Supreme Court in *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619, at [77]. Although this prohibition ordinarily limits the ability of a court to prefer one party's interpretation over another, it must also prevent the court from granting themselves a carte blanche to re-write the entire bargain. This is especially so where the majority themselves accepted that S&H's interpretation gives "full force" to the "ordinary and natural meaning" of the provision, and also "accords with commercial logic" (at [44]).

The approach of Lord Briggs J.S.C. in dissent – who upheld the Court of Appeal conclusion favouring S&H's interpretation – is preferable. His Lordship noted that it was understandable for the parties to include expert determination provisions regarding the proportion adjustment, given that this could affect a number of service charge years. Lord Briggs J.S.C. also explained that the inspection provisions did not point away from S&H's interpretation, since it was hard to see how Blacks could have a prospect of relying on the "manifest or mathematical error" exception without access to the relevant documents. Finally, the fact that numerous items likely to give rise to a dispute were included within the service charge formula, but were outside the availability of the permitted defences, did not of itself justify a departure from the ordinary and natural meaning of the words. Indeed, it was quite understandable that a landlord such as S&H should wish to limit litigation.

The majority's approach, which envisages a "third way" approach to contractual interpretation, may neatly avoid both the Scylla and the Charybdis of the parties' alternative constructions. However, it has not only reignited the battle between textualism and contextualism which has pervaded the law of contract since *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1997] UKHL 28, [1998] 1 W.L.R 896, but has also arguably opened an uncertain new frontier. It remains to be seen whether the courts will take the opportunity to reject parties'

rival interpretations in favour of their own view of what accords with commercial common sense.

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