Sara & Hossein Asset Holdings Limited v Blacks Outdoor Retail Limited [2023] UKSC 2

Abstract

Andrew Francis considers the recent judgment of the Supreme Court in *Sara & Hossein Asset Holdings Limited v Blacks Outdoor Retail Limited* [2023] UKSC 2 (*"Sara & Hossein"*) in which, by a majority, the Court found in favour of the landlord when interpreting a clause in a lease which provided for the landlord's certification of the service charge sum payable by the tenant. The judgment is another example of the application of the modern principles to be applied when construing legal agreements which have been in place for nearly eight years since the judgment of the Supreme Court in *Arnold v Britton* [2015] AC 1619. To that extent the judgment might be thought to be unexceptional. However, its significance rests upon the importance of not only discovering the true meaning and effect of the clause being examined, but also ensuring that any conclusion is consistent with the other terms of the document (in this case two leases) so that they all fit and work together satisfactorily. It is the latter part of the task of interpretation of agreements which can sometimes be overlooked.

Certificate "X". What did it mean?

Sara & Hossein Asset Holdings Limited v Blacks Outdoor Retail Limited [2023] UKSC 2 ("Sara & Hossein").

Introduction

A persistent and difficult question for lawyers to answer when differences arise over the terms of agreements and documents (including statutes and other public documents – but the focus in this article will be on private agreements) is - what do they mean? Such a question cannot be answered by the scornful reply given to Alice in *Alice Through the Looking-Glass* by Humpty Dumpty when considering the meaning of the word "glory" that *"when I use a word it means just what I choose it to mean - neither more nor less."* The correct approach to answering this question is to apply the principles set out by the Supreme Court in its judgments in the past decade, those being notably in *Arnold v Britton* [2015] AC 1619 (*"Arnold"*) and *Wood v Capita Insurance Services Limited* [2017] AC 1173 ("Wood"). These principles were summarised by Lord Hamblen in *Sara & Hossein* when delivering the judgment of the majority, at para. 29, as follows:-

(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.
(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.
(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated

Most of us find no difficulty in remembering to apply these principles. But the hard part comes when applying them in order to produce a reasonably clear answer to the meaning of the terms being interpreted in the agreement. The client will want a clear answer! The starting point is always the words of the relevant part of the document. Whilst the other terms of the document will inevitably be relevant to a greater, or lesser degree in the process of interpretation, the task should not be carried out at the start by treating the application of the principles as if assembling a jigsaw. As the summary states above, the process is an iterative one. This journey does not allow the Court to remake the terms of the agreement. In the absence of a case for the implication of terms into it, or unless rectification is needed, the Court will not insert terms or missing words. In other words, at each stage of the journey of interpretation the Court must follow the route map provided by the agreement. In the absence of a claim based in implication of terms, or rectification, it is not open to the Court to conclude that a different route should be chosen simply because that might be more convenient. It can also be said (ironically) that the shorter the terms of the agreement which lies at the heart of the question of interpretation, the harder it is to produce a convincing answer to its meaning. Here are two examples. In *Chartbrook Ltd. v Persimmon Homes Ltd.* [2009] 1 AC 1101 the provision in question, namely *"23.4% of the price achieved for each residential unit in excess of the minimum guaranteed residential unit value less the costs and incentives"* consisted of 23 words. Although set in a much longer document, and although the process of interpretation is not just applying a dictionary meaning to words, those words divided the

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judges tasked with deciding the meaning of the agreement into two camps. The first comprised three judges, Briggs J. (as he then was) and two members of the Court of Appeal, favouring the Claimant, Chartbrook. The other camp comprised the dissentient member of the Court of Appeal and the five judges in the House of Lords. Thus it was that those 23 words led Defendant, Persimmon, to victory with a large commercial advantage. (A historical footnote of history is that the racehorse bearing that name ran to victory in the 1896 Derby.) In *Arnold* the crucial term obliged the lessee *"To pay to the lessors without any deduction in addition to the said rent a proportionate part of the expenses and outgoings incurred by the lessors in the repair maintenance renewal and the provision of services hereafter set out the yearly sum of £90 and VAT (if any) for the first three years of the term hereby granted increasing thereafter by ten pounds per hundred for every subsequent three year period or part thereof."* (My emphasis). In purely mathematical terms out of the total of 75 words in that clause, the underlined words were the crucial ones, totalling just 16 words. Yet despite the brevity of those key words and their superficial clarity, there was a strongly dissenting judgment of Lord Carnwath in the Supreme Court, who agreed with the conclusion of the trial judge H.H.J. Jarman Q.C. in favour of the Lessees. But the majority in the Supreme Court, together with the Court of Appeal and Morgan J (who allowed the Landlord's appeal from H.H.J. Jarman Q.C.) all favoured the Landlord's interpretation of the key words, notwithstanding the potentially disastrous long-term consequences for the Lessees' liability under the ground rent covenant. Naturally, it is not just a question of numbers of words, or of judges, but so often it is the brevity of the key terms which cause the most difficulty. (For example, does the indefinite article "a" mean the singular, or plural in its context?) It is their meaning which lies at the heart of the dispute and with huge practical, commercial and economic consequences for the parties turning on the outcome, one can see why these cases are hard ones.

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This is the most recent example of the Supreme Court having to decide the meaning and effect of a key provision in a document (in fact two leases) where the terms of that provision were short and concise. They stated that the Landlord should provide a certificate within a specified time *"as to the amount of the total cost and the sum payable by the tenant"* in respect of the service charge calculated under the terms of the lease *"and in the absence of manifest or mathematical error or fraud such certificate shall be conclusive."* The simple mathematical total of these key words is 22, 10 of which fall within the express defence to the conclusiveness of the certificate. The dispute turned on whether the certificate was conclusive in terms of the amount payable (the Landlord's argument) or whether the certificate was conclusive as to the amount of the costs incurred by the Landlord under the service charge provisions, but not as to what the Tenant was liable to pay (the Tenant's argument). The majority judgment of the Supreme Court delivered by Lord Hamblen held that neither party's case on interpretation was satisfactory when applying the principles of interpretation set out above. The tension between the rival interpretations was created by the conflict between the consequence of the Tenant's case which was summarised as "argue now, pay later" and the Landlord's case which was summarised as "pay now, argue never" following the receipt of the certificate. The judgment of the majority was that there was an alternative interpretation which avoided that conflict. Giving effect to the words *"sum payable by the tenant"* protected the Landlord's concern about delays in receipt and cash flow and enabled the Tenant to contest arguable claims after payment. This was held to be consistent with other provisions of the service charge terms which enabled the Tenant to exercise its rights, for example, to inspect the Landlord's vouchers and receipts on which the service charge and the certificate were based. It was also held by the majority that the word "conclusive" did not state *how* the certificate was to be conclusive. The Court held that in the wider context of the lease, the meaning of the key words was directed towards the obligation to make the payment under the certificate without determining any questions which the Tenant might raise as to the ultimate underlying liability for the service charge: i.e. "pay now, argue later".

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What can we learn from Sara & Hossein?

Quite apart from the fact that this is a decision of the Supreme Court which represents the continuation of the line of approach represented by the application of the principles set out in *Arnold* and in the later cases such as *Wood*, and putting aside the point that each case of the interpretation of agreements invariably turns on its own facts, there are three points which can be derived from that decision. Each may be thought to be significant when tackling the task of interpretation in our own cases.

First, the meaning of words should not be taken as "obvious" without close examination and application of the principles of interpretation.

Just as in the conversation between Alice and Humpty Dumpty referred to above, the meaning of words is frequently elastic. It is dangerous to jump to a conclusion based on the examination of the particular word, or term in which it is found without having regard to the relevant facts and evidence at each stage of the journey of interpretation. It follows that the simple mathematical tally of the relevant words in the crucial term of the agreement is no guide either to the task of interpretation, or to the degree of difficulty in carrying it out. As was once said by Mummery L.J. "context is everything". The word "certificate" and the fact that it is said to be "conclusive", unless certain circumstances can be shown, might be thought to produce the simple answer which was contended for by the landlord and with which the Court of Appeal and Lord Briggs in the minority in the Supreme Court agreed. But, along with those who decided the question of interpretation in the Courts below, the Supreme Court asked the question - how was the certificate to be conclusive and conclusive as to what? That question was answered by the Supreme Court in the way described above. It can also be said that in cases such as this one, the temptation to reach conclusions based on a "literal" interpretation of the key words is dangerous and can lead to the wrong answer.

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There are many instances where decisions will be made by party A and notified to party B either by means of a certificate described to be conclusive, or by means of a decision described as conclusive which may, or may not contain reasons for that decision. An example of the latter is often found in the case of qualified covenants where party B seeks approval under that covenant from party A. When it is refused that can lead to a dispute as to whether the decision was properly reached having regard to the "Wednesbury" principles and/or whether it can be upheld as a reasonable decision in cases where reasonableness is an express, or implied term of the covenant. In such cases the same question which arose in *Sara & Hossein* is how is the decision, or certificate to be conclusive and as to what? In other words, the process of interpretation requires a closer examination of the words and terms than might be suggested at first sight. The process might be said to reflect the task of a physician when examining a patient for internal injuries when the exterior of the body appears to show no harm has been caused after an accident.

Secondly, frequently used terms (often in "boilerplate" clauses) may not always lead to the same, or necessarily obvious result as a matter of interpretation as in other cases.

This is a well-known principle. The use of standard form agreements and terms. often in leases can create what A. A. Milne in another context called "Pooh Traps for Heffalumps". The use of conventional expressions such as those relating to "certificates" which are to be treated as "conclusive", save in specified circumstances, in the belief that they have a fixed meaning, is wrong. This is because the governing principles of interpretation set out above will apply to such expressions and in many cases the context in which they are used will be key to their true meaning. Nor will it be permissible to read across any previous decisions on the word, or words in question and treat those decisions as determinative of the answer to the question of interpretation in the present case. *Sara & Hossein* is an example of these principles being applied.

Thirdly, the Court will not remake the parties' agreement simply because that might achieve a more commercial result.

This third point is made against the background of the decision of first, the majority in the Supreme Court on the interpretation of the certification provision which is summarised above and secondly, the dissenting judgment of Lord Briggs. His judgment is founded upon the proposition 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."* On the facts, Lord Briggs considered that the ordinary meaning of the words in the lease pointed to the landlord's construction and that the construction put forward by the tenant found no support from the language of the lease. This meant that the conclusion of the majority of the Court in favour of interpreting the relevant terms as a "pay now, argue later" provision was not a conclusion which Lord Briggs could reach. The writer of this article considers that there is some considerable force in the reasons expressed by Lord Briggs for not being able to agree with the other members of the Court. Whilst the writer does not seek to doubt the reasoning of the majority, this third point is made in order to caution advisers who might be tempted to incline towards an interpretation which satisfies the desire of their clients to achieve an outcome which meets their commercial, or other interests under the agreement. A contrast may also be drawn between the reasoning of the majority JSC in *Arnold* and their conclusion which was a financial disaster for the tenants, and the dissenting judgment of Lord Carnwath which graphically showed why that outcome could and should be avoided.

Conclusion

Generally

It is tempting for lawyers to treat the judgment of the Supreme Court in *Sara & Hossain* as yet another example (albeit of the highest authority) of the application of the well-settled principles set out in *Arnold* and in *Wood* in the last decade. But familiarity with those principles should not lead either to carelessness in their application, or to a sense of exhaustion when undertaking the journey of interpretation. One important element of the decision is the dissenting judgment of Lord Briggs. For as explained above, that brings into focus the danger of departing from the language of the document in order to mend the parties' bargain.

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Latest arrivals

What is certain is that there will always be a steady stream of judgments dealing with tricky questions of interpretation. We have got off to a brisk start in 2023 with three important judgments on interpretation in less than a month from 18th January 2023. The day following the handing down of the judgment in *Sara & Hossein* on 18th January, the Court of Appeal delivered judgment on the interpretation of terms in a Services Agreement. The judgment includes not only an analysis of the post *Arnold* principles, but also examines a related issue concerning implied terms: see *Quantum Advisory Ltd. v Quantum Actuarial LLP* [2023] EWCA Civ 12. Nearly three weeks later, on 8th February 2023, Miles J. delivered judgment in *Cheung v Mackenzie* [2023] EWHC 220 (Ch) (*"Cheung"*). In that case he allowed an appeal from the judgment of Deputy Master Bowles. Miles J. decided the meaning and effect of a power to deal with land without reference to stipulations already imposed on the land and to allow a departure from those stipulations in favour of the party who, but for an agreed draft release with the holder of the power, would have been bound by them. Whilst that case concerned what some might regard as an esoteric area of restrictive covenant law, it demonstrates the application of the post *Arnold* principles clearly. *Cheung* is also an example of the point made above that it is not legitimate to read across previous decisions on the same words when carrying out a process of interpretation. This is because the context of the terms in each case will be a significant factor.

At the risk of overstating the mathematical point made above, difference between the Deputy Master and the Judge (who are both highly experienced in property law cases) arose out of a total of 39 words of which 17 were the crucial ones. This is yet another example where brevity leads neither to simplicity of analysis, nor an easy answer to the question of interpretation. Finally, and also on 8th February, the Supreme Court delivered a unanimous and important judgment in *Aviva Investors Ground Rent GP Ltd v Williams* [2023] UKSC 6, on the meaning of s. 27A Landlord and Tenant Act 1985. The Court considered how far the terms of s. 27A(6) thereof cut down certain forms of provision in leases relating to the determination of the tenant's service charge contribution proportion; eg. the share being x% of the whole "or such part as the Landlord may otherwise reasonably determine". (This is yet another example of the brevity of the key term under review.) The Court held that such provisions did not fall within the anti-avoidance provisions of s. 27A(6) for reasons set out in its judgment. Space does not permit them to be set out here. But the judgment is another example of the principles of interpretation described above being applied to a statutory provision having regard not only to the words used (the crucial words were *"a determination ... of any question"*) the context in which the words are found and the practical consequences of a finding one way, or another. The Court also overruled three earlier Court of Appeal decisions in 2014 and 2017 on the interpretation of s. 27A(6) which conflicted with the Supreme Court's conclusion on that issue.

The moral of the story?

These decisions show that we must always be cautious in the advice we give our clients on the prospects of success in disputes over the interpretation of agreements, as well as other documents such as statutes. This may be a truism, but it can be overlooked in the desire of satisfying our clients' appetite for certainty.

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