

SIMMONS & SIMMONS

FALCON CHAMBERS LECTURE

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**CONSENT TO ASSIGN OR SUBLET:
REASONABLENESS REVISITED¹**

**Jonathan Brock QC FCI Arb
Falcon Chambers
Falcon Court
London EC4Y 1AA**

1. INTRODUCTION

Many of you will not remember the Dark Ages. Memories in the property market are notoriously short. In boom times no one remembers the last recession and in the pit of recession no one ever believes there will be a boom again. However, there may be some among you who were in practice before the coming into force of the Landlord and Tenant Act 1988 ("the 1988 Act"). Like me, you will remember the days when landlords could with impunity stifle the assignment or subletting of commercial leases if they so wished. It was well settled, albeit in somewhat obscurely reported cases², that the proviso to a qualified covenant against alienation that the landlord would not

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² Rendall v. Roberts & Stacey (1960) 175 EG 265; Rose v. Gossman (1967) 201 EG 767.

unreasonably withheld consent, whether or not expressed in the lease or implied by section 19(1) of the Landlord and Tenant Act 1927, did not give rise to a cause of action in damages against a landlord who was unreasonably refusing or withholding consent.

2. The tenant's only remedy against a recalcitrant landlord was to sue for a declaration that the landlord was unreasonably withholding or refusing consent and that the tenant could assign or sublet without it. The tenant's only sanction was in the costs of the proceedings which, if vigorously pursued, would invariably be settled in any event. In practice most potential assignees would not await the outcome of contested proceedings and landlords could hold tenants to ransom. Accordingly, the 1988 Act was enacted to impose upon a landlord statutory duties, enforceable in damages, to give consent within a reasonable time, except where it is reasonable not to do so, and to serve written notice of its decision whether or not to give consent specifying any conditions for consent or the reasons for withholding it. The Act then provided expressly that the common law in respect of reasonableness was preserved subject to the reversal of the burden of proof, it being provided that henceforth it would be for landlords to prove that they had acted reasonably and not the reverse.

3. At a stroke the legislature had given tenants teeth. In this lecture, seventeen years since the passing of the Act, I shall consider how sharp the teeth have become, the extent to which they have wounded landlords and whether they have bitten off more than they can chew. In reviewing the authorities I shall consider cases concerning user and alterations as well as alienation.

4. **FIRST PRINCIPLES**

Most conveniently, shortly before the passing of the 1988 Act, the Court of Appeal set out the principles governing the reasonableness of consent in the now leading case of International Drilling Fluids v. Louisville Investments [1986] Ch. 513. Lord Justice Balcombe summarised the principles as follows:

- (1) the purpose of a qualified covenant against alienation is to protect the landlord from having his premises used or occupied in an undesirable way or by an undesirable occupier;
- (2) the landlord is not entitled to refuse consent on collateral grounds having nothing to do with the relationship of landlord and tenant in regard to the premises;
- (3) the burden of proving that consent has been reasonably withheld is on the landlord³;
- (4) the landlord need only prove that his conclusions were such as might be reached by a reasonable man in the circumstances;
- (5) it may be reasonable for the landlord to refuse consent on the ground that the assignee intends to use the premises for an unacceptable purpose, even though that purpose may be permitted by the lease;
- (6) the landlord need usually only consider his own rather than the tenant's interests;⁴

³ This principle is as stated following the reversal of the burden of proof by section 1(6) of the 1988 Act.

⁴ The only reported case in which this principle has been applied is International Drilling Fluids itself. It was expressly not applied in Sportoffer v. Erewash BC [1999] 3 EGLR 136.

- (7) subject to the above propositions, it is in each case a question of fact in all the circumstances of each case whether consent has been unreasonably withheld;
- (8) it would normally be reasonable to refuse consent if such refusal is necessary to prevent the tenant from acting to the prejudice of the landlord's existing rights;
- (9) it would normally be unreasonable to impose a condition which would increase or enhance the control which the landlord was entitled to exercise under the terms of the lease⁵.

5. **THE PRESENT CLIMATE**

Much has changed since the mid-1980s. We have been through the longest and deepest commercial property recession in living memory, the legislature, particularly in the form of the Landlord and Tenant (Covenants) Act 1995, has been active in the field and the tension between the respective interests of landlord and tenant concerning alienation, change of use and alterations remains high. Taking 1985 as a random starting point in the run-up to the 1988 Act there have been 45 reported and a number of unreported cases concerned with landlord's consent, almost all relating to alienation. Many of the problems which the 1988 Act sought to address remain unresolved and the law is, from a lawyer's point of view, in as agreeable a state of flux as ever.

6. With that introduction I will attempt to categorise and comment on those aspects of the disputes concerning consent and in particular the working of the 1988

⁵ The last two principles were added by the Court of Appeal in Straudley Investments v Mount Eden Land (No.1) (1997) 74 P&CR 306.

Act which have troubled the Courts over the last twenty years. I make no excuse for analysing the authorities rather than embarking on a consideration of theoretical questions because it must be obvious that the volume of authority reflects the problems with which landlords and tenants actually grapple.

7. **THE COMMON LAW AND THE 1988 ACT**

Since the passing of the Act there has been judicial doubt as to the extent to which the common law has been varied or subsumed by the Act. In some respects the Act is clear. Section 1(5) expressly provides that the question of reasonableness will be determined on existing common law principles and the then existing authorities. Section 1(6) expressly reverses the burden of proof as to reasonableness. At an early stage in the debate⁶ the Court of Appeal held that the Act did not change the law by requiring reasons to be proved on the balance of probability but only required a landlord in accordance with Lord Justice Balcombe's principles to satisfy the Court that his views were views which a reasonable landlord could hold. So far so good. However, doubts remained as to the interplay between the common law and the Act until the decision of Mr. Justice Neuberger in Footwear Corporation v. Amplight Properties [1998] 3 AER 52 in which he analysed the relevant authorities⁷ and said this:

".... I consider it is right to proceed on the basis that the 1988 Act does, as it were, interlink with, and does not provide an entirely separate code from, the contractual covenant as between landlord and tenant."

⁶ Air India v. Balabel [1993] 2 EGLR 66.

⁷ Including the decision of the Vice-Chancellor in Norwich Union Life Insurance Society v. Shopmoor [1998] 3 AER 32.

If this view is accepted and built upon by the judiciary it will go a long way to avoiding highly technical and unnecessary arguments as to the relationship between the common law and the Act.

8. **WHEN DOES THE DUTY ARISE?**

In Allied Dunbar Assurance v Homebase [2002] 2 EGLR 23 the lease in question contained a covenant not to underlet the whole or part of the premises without consent provided that any underlease contained covenants in the same form as the covenants in the lease. At the material date the premises were over-rented. The tenant reached an agreement with a proposed undertenant for the grant of an underlease purportedly on the terms of the lease but subject to the parties entering into a collateral deed reducing the rent and repairing obligations as between the parties to the underletting. This was a well known scheme for avoiding provisions of this kind. Somewhat to the surprise of the professions the Court of Appeal held that the scheme did not comply with the terms of the lease because the proposed underlease and the collateral deed were interdependent and were to be read together as one transaction. Accordingly, the statutory duty under section 1 of the 1988 Act never arose because the proposed underletting was not in accordance with the terms of the lease.

9. Similarly, it has been held that an unqualified covenant not to underlet at a fine or premium or at a rent less than the rack rental value of the premises from time to time is not a covenant giving rise to a statutory duty under section 1⁸. Equally the statutory duty will not arise in respect of a new lease for the purpose of the Landlord and Tenant

⁸ Clinton Cards v Sun Alliance & London Assurance [2002] 3 EGLR 19.

(Covenants) Act 1995 where the relevant covenant is not a tenant covenant for the purposes of that Act⁹. A proviso to an alienation covenant declaring that where an intended assignee was a private company the landlord could insist upon guarantees being given in a particular form gives the landlord a contractual entitlement to insist upon its terms which is not subject to any statutory requirement of reasonableness¹⁰. More importantly, section 19(1A) of the Landlord and Tenant Act 1927¹¹ expressly provides that where a qualifying lease expresses circumstances in which the landlord may withhold consent to an assignment or imposes conditions subject to which licence may be granted the landlord shall not be regarded as unreasonably withholding consent on those grounds. It is expressly provided that in those circumstances section 1 of the 1988 Act shall not impose a statutory duty. It follows that in respect of new leases for the purposes of the 1995 Act a landlord can by careful drafting exercise substantial control over alienation.

10. **WHAT IS CONSENT?**

Bearing in mind the statutory duty imposed on landlords to give consent where it is reasonable to do so questions have arisen as to whether and when consent has been given. Just before the passing of the Act Mr. Justice Harman¹² held that a consent given "subject to licence" was not a binding and complete consent on which a tenant could rely. That decision was distinguished and effectively disapproved in three later cases, by the Court of Appeal in Mount Eden Land v. Prudential Assurance (1996) 74 P&CR 377 and at first instance in Next v. National Farmers Union Mutual Insurance

⁹ First Penthouse v Channel Hotels & Properties [2004] 1 EGLR 16.

¹⁰ Vaux Group v Lilley [1999] 1 EGLR 60.

¹¹ Added by the Landlord and Tenant (Covenants) Act 1995.

¹² In Venetian Glass Gallery v. Next Properties [1989] 2 EGLR 42.

Company [1997] EGCS 181 and Aubergine Enterprises v Lakewood International [2001] 3 EGLR 71, where the words "subject to licence" and "subject to contract" were held insufficient to qualify a landlord's consent and render it ineffective. This is one example of the discernible trend of the Courts to put the onus on landlords to make up their minds not only within a reasonable time but with reasonable precision and to prevent landlords from prevaricating or imposing unreasonable or unnecessary conditions on their consent. In future, one should assume that unless the particular covenant in the lease requires a formal licence by deed for the particular act for which the tenant requires consent a letter purporting to give consent will not cease to be a consent because it contains the words "subject to licence" or the equivalent.

11. WHAT IF THE LANDLORD REFUSES TO COMMIT HIMSELF?

First, it is clear that a landlord can only rely on reasons which were present in his mind at the relevant time when he was considering the application for consent and not on reasons of which he could not be aware¹³ or which were not in the landlord's mind at the material time¹⁴. But until recently there was uncertainty as to the degree to which a landlord can rely on reasons not fully expressed to the tenant or only expressed orally. The Court of Appeal on at least two occasions¹⁵ declined to decide whether the landlord may rely on reasons unexpressed, orally expressed or inadequately expressed. Not so Mr. Justice Neuberger. In the Footwear case already mentioned he held that the landlord can only object to an assignment or underletting for the purposes of the Act for reasons expressed in writing. This decision prevents a previously fertile source of dispute as to whether and if so to what extent the landlord has behaved reasonably. It is arguable that the decision may give rise to unfairness. The landlord has to communicate his decision as to whether to give consent, with conditions or reasons for refusal where appropriate, within the statutory "reasonable time". If the reasonable time is short because the transaction is a relatively straightforward one it is possible that the landlord might be unable to communicate conclusively in writing but might be able to speak to the tenant. No doubt for good policy reasons that will not now be good enough. Each landlord must put pen to paper before the reasonable time expires. This

¹³ See CIN v. Gill (No.1) [1993] 2 EGLR 97 where the landlord was very dubious about the proposed assignee's financial standing when considering consent. By the time of the trial the proposed assignee had gone into liquidation. The landlord could not use the subsequent liquidation as a reason for refusal at trial because at the relevant time when the application for consent was being considered it had not happened.

¹⁴ Air India v. Balabel (above).

¹⁵ Tollbench v. Plymouth City Council [1988] 1 EGLR 79; Kened v. Connie Investments [1997] 1 EGLR 21.

is one of the reasons that the Court of Appeal expressed in considering the length of the reasonable time in NCR v Riverland Portfolio [2005] 13 EG 135 (CS) considered below.

12. **WHAT IS A REASONABLE TIME?**

This is probably the most difficult question thrown up in every case where the Act applies. It is obvious that the reasonable time for considering the application for consent to a proposed assignment or sub-letting will vary from case to case. In one case it was suggested that the reasonable time may not begin to run until the tenant has offered an undertaking to pay the landlord's reasonable costs¹⁶. In most cases the reasonable time begins when the application for consent is communicated to the landlord. In a relatively straightforward case 28 days may be a reasonable benchmark for the period of the reasonable time¹⁷. Nevertheless, in more complex cases and in cases where the tenant fails to reply to reasonable enquiries by the landlord the time may be extended. That it is obviously a question of fact to be decided in each particular case does not make advice to clients any easier to give. More importantly, if the landlord fails to elucidate his requests for information or makes repeated unreasonable requests the time may expire even if he professes himself unable to make a decision. Where the landlord makes unreasonable repeated demands for financial information there will come a time, which is often hard to pin down, when the

¹⁶ Dong Bang v. Davina [1996] 2 EGLR 31.

¹⁷ Dong Bang v. Davina [1995] 1 EGLR 41 per Miss Hazel Williamson QC sitting as a Judge of the Chancery Division. This part of her judgment was not considered or disapproved by the Court of Appeal at [1996] 2 EGLR 31.

reasonable time has plainly expired¹⁸. The lesson for landlords must be to respond to the application for consent in writing as soon and as fully as possible. Pro-forma applications for references, accounts and other financial information will not do. Very often the tenant will have sent relevant material with the application for consent. Any landlord who fails to respond with detailed and comprehensible requests for further information must expect in future to be given short shrift by the Courts.

13. The meaning of a reasonable time has now been considered by the Court of Appeal in Go West v Spigarolo [2003] 1 EGLR 133¹⁹. In that case it was held that the reasonable time begins with the service of the request for consent. The length of the reasonable time will depend upon the circumstances of the case but it is the time reasonably required by the landlord to do the things that the 1988 Act requires of him. Once the landlord has replied substantively to the application the reasonable time is at an end. Accordingly, subsequent correspondence between the parties whereby the tenant seeks to persuade the landlord to change its mind before resorting to litigation does not re-open the reasonable time. More recently the Court of Appeal has considered the question again in NCR v Riverland Portfolio [2005] 13 EG 135 (CS). In that case the tenant imposed a two-week deadline for the landlord's decision after providing financial information requested by the landlord. The trial judge held that the landlord should have abided by this deadline and that it was in breach of statutory duty

¹⁸ See, for instance, Design Progression v Thurloe Properties [2005] 1 WLR 1 and City Hotels Group v. Total Property Investments [1985] 1 EGLR 253 as approved by the Vice-Chancellor in Norwich Union v. Shopmoor (above). See also Midland Bank v. Chart Enterprises [1990] 2 EGLR 59 and CIN Properties v. Gill (No.2) (1994) 67 P&CR 288.

¹⁹ Other examples of cases where the landlord has been held not to have made a decision within a reasonable time are Design Progression v Thurloe Properties [2005] 1 WLR 1 and Blockbuster Entertainment v Barnsdale Properties [2004] PLSCS 11.]

for failing to do so. The Court of Appeal allowed the appeal, holding that the landlord had been entitled to take adequate time following receipt of the completed application for consent in order to consider with its advisers the serious financial and legal implications of a refusal and, if necessary, to report to the relevant board. In the absence of special circumstances a period of less than three weeks could not be categorised as being inherently unreasonable for that process. It was in neither party's interest for the decision to be rushed, particularly bearing in mind that the landlord was entitled to take the view that the tenant would probably assert its rights under the Act if the landlord made a hasty decision. In any event in that case no harm had been caused by the delay.

14. A landlord can protect himself from criticism by responding conditionally to the application. In a typical case the tenant will apply in writing for consent accompanying the application with references and accounts for the assignee. The landlord can consider that information and reply seeking further information. The tenant may then provide the further information. If it is unsatisfactory or incomplete the landlord should then protect himself by writing back to the tenant seeking further clarification and indicating in terms that he is aware of his obligations under the Act, that he appreciates that he is required to communicate his decision, with reasons where appropriate, within a reasonable time but that he is unable to do so at present. The landlord should then indicate that if the tenant fails to give further sufficient information the landlord will be forced to communicate his decision in any event but that the decision may be influenced by the degree to which the tenant has co-operated in giving information. This strategy in my experience puts real pressure on the tenant. The landlord has told the tenant in terms that he will respond in writing within a

reasonable time but that unless the tenant gives further information the result may be adverse to the tenant and justified by the inadequacy of the information.

15. In the end in every case the landlord must diarise a point when he will write a compendious response setting out his full position. At that point he may have no option but to refuse consent but in giving his reasons may be entitled to say "had I had further information which satisfied me on the questions over which I am most concerned my answer might have been different but I am bound to come to a reasonable conclusion and the conclusion is that I must refuse consent for the reasons given".

16. **CONDITIONS FOR CONSENT**

What conditions can the landlord impose before making a decision? First and most importantly, he is entitled to require an undertaking from the tenant for payment of his reasonable costs. However, the word "reasonable" must appear in the request for the undertaking. It is fatal to any such request to ask for or give the impression that you are requiring an indemnity as to whatever costs you incur²⁰. In an appropriate case the landlord may legitimately seek guarantors²¹. But he is normally not entitled to particulars of the financial arrangements in respect of any proposed assignment and the premium payable²². It will often be unreasonable, and in effect an attempt to obtain a collateral advantage proscribed by Lord Justice Balcombe's second principle, to link

²⁰ Dong Bang v. Davina (above).

²¹ See for example London and Argyll Developments v Mount Cook Land [2002] 50 EG 111 (CS) and Storehouse Properties v. Ocobase Times 3rd April 1998, Rimer J.

²² Kened v. Connie Investments (above).

consent to a proposed variation of the lease²³ or the resolution of an outstanding rent review²⁴. In cases of financial uncertainty it may be unreasonable to seek a deposit against rent from the proposed sub-tenant or assignee²⁵.

17. But can the landlord refuse to consider the application where the tenant is allegedly in breach of covenant? I shall consider existing breaches of covenant as a ground for refusal later in this lecture. But it has been argued that where a landlord has served a section 146 notice preparatory to forfeiture proceedings he simply does not have to continue to consider the application for consent until the dispute concerning the breaches has been resolved. In Yorkshire Metropolitan Properties v. Co-operative Retail Services [1997] EGCS 57 Mr. Justice Neuberger suggested that this was indeed the law because to continue to consider the application for consent to assign in those circumstances might give rise to a waiver of forfeiture. This suggestion, which raised the alarming possibility of landlords serving unjustified section 146 notices in order to stultify applications for consent, was rejected by Judge Bromley QC sitting as a Judge of the Chancery Division in the later case of Straudley Investments v. Mount Eden Land (No.2) [1997] EGCS 175. He held that the service of a section 146 notice, which on the facts he held in that case to have been unjustified, could not in any event have operated, even if it had been justified, to suspend the landlord's duty to consider the application for consent to assign or to suspend the reasonable time for considering the

²³ Jaison Property Development v. Roux Restaurants (1997) 74 P&CR 357.

²⁴ Dong Bang Minerva v. Davina (above).

²⁵ Mount Eden Land v. Straudley Investments (No.1) (1997) 74 P&CR 306.

application. This must be right. An unjustified section 146 notice should not be a ground for refusal to consider the application or for refusal of consent.

18. **REASONS FOR REFUSAL**

So much for the procedural problems arising under the Act. What do the authorities tell us about the reasons justifying landlords' refusal of consent? Although Lord Justice Balcombe imposed no set of categories in International Drilling Fluids the authorities over the last twenty years show an interesting pattern of reasons falling relatively neatly into a number of categories.

19. **(1) Proposed user**

The largest category of reported cases concerns landlords refusing consent on the grounds that the proposed user of the premises by the assignee or sub-lessee will cause damage or the perception of damage to the reversion²⁶. Until recently the Courts had to relate the landlord's fears to the principles in the then leading case of Killick v. Second Covent Garden Property Company [1973] 1 WLR 658 in which the Court of Appeal held that it is not enough for the landlord to fear the consequences of a change of use, unless the change of use is plainly contrary to the terms of an absolute user covenant, if the proposed user would not necessarily result in a breach of covenant after the assignment or sub-letting. The House of Lords overruled Killick in Ashworth

²⁶ Rossi v. Hestdrive [1985] 1 EGLR 50; Rayburn v. Wolf [1985] 1 EGLR 235; British Bakeries v. Michael Testler [1986] 1 EGLR 64; Woolworth v. Charlworth Alliance Properties [1987] 1 EGLR 53; Warren v. Marketing Exchange for Africa [1988] 2 EGLR 247; Crown Estate Commissioners v. Signet Group [1996] 2 EGLR 200; BRS Northern v. Templeheights [1998] 2 EGLR 182.

Frazer v Gloucester City Council [2001] 1 WLR 2180 holding that the question whether the landlord's conduct in refusing consent is reasonable or unreasonable depends in each case on its own particular facts. Where a landlord reasonably considers that a proposed assignment would or might lead to a breach of the user covenant in the lease it would be unusual for his refusal of consent to be found to be unreasonable. The previous cases must now be viewed in this light. Although in most cases the landlord will retain his right to forfeit for breach of covenant that may not be sufficient protection against damage to his reversion. A good example is Woolworth v. Charlworth Alliance Properties [1987] 1 EGLR 53 where it was plain that the proposed assignee could not give any assurance that it would comply with the covenant to keep the retail premises the subject matter of the lease open for business.

20. Landlords often seek to justify their stand by reference to the principles of "good estate management". It is not always easy to tell what that phrase really means. One suspects that it often depends on the calibre of the landlord and the quality of evidence he can produce as to his management policy. The Crown Estate Commissioners succeeded in justifying refusal to an assignment with a proposed change of use from retail to non-retail use on the Regent Street Estate by adducing weighty and comprehensive evidence of the management scheme on the Estate²⁷. The Court arrived at a similar result in respect of a policy as to good estate management whereby a landlord refused to countenance tenants operating a particular user in part of a shopping centre.²⁸ Similarly, a local authority was held not to have unreasonably

²⁷ Crown Estate Commissioners v. Signet Group (above).

²⁸ Moss Bros Group v. CSC Properties, unreported, Chancery Division 19th March 1999.

withheld consent to a change of use (as to which the principles in International Drilling Fluids were held to apply) where it had reason to fear the threat of competition from the tenant to its operations on neighbouring premises²⁹.

21. However, it is essential for landlords to produce cogent evidence of any good estate management policy. Mr. Justice Neuberger held a landlord to be unreasonable in refusing consent to an assignment involving change of retail use to a pet shop business not least because the premises had been empty for some time. The Judge made it clear that convincing evidence of a real perception of damage to the reversion would be required in such a case for refusal to be justified³⁰. The need for cogent evidence must survive the decision of the House of Lords in Ashworth.

22. **(2) Financial strength**

The most obvious and reasonable ground for refusal in an appropriate case is the inability of the proposed assignee or sub-tenant to pay the rent and comply with the covenants. This ground has given rise to numerous decisions³¹ and is often combined with others. The authorities indicate that the landlord is always entitled to sufficient information to judge the worth and quality of the proposed tenant. If the landlord asks cogent and comprehensible questions and does not receive satisfactory answers he will generally be entitled to refuse consent outright. However, it has to be said that the

²⁹ Sportoffer v. Erewash BC (above).

³⁰ Footwear Corporation v. Amplight Properties (above).

³¹ British Bakeries v. Michael Testler (above); Ponderosa International Development v. Pengap Securities [1986] 1 EGLR 66; Warren v. Marketing Exchange for Africa [1988] 2 EGLR 247; Footwear Corporation v. Amplight Properties (above); Kened v. Connie Investments (above); CIN Properties v. Gill (No.2) (above).

attitude of the Courts to the analysis of financial information has not been particularly consistent. References have received much criticism and may be said to be of little if any real value even in the smaller cases because they are so often qualified³². By contrast there have been cases where detailed enquiries as to referees and their qualifications to give references were held to be reasonable and the tenant's failure to comply with such enquiries fatal to its case³³. Where accounts and other financial information have been furnished it is difficult to see why one Court held the landlord to be reasonable in refusing consent and another held the opposite³⁴. In the end it is not surprising that the decisions are difficult to reconcile because in respect of financial worth every case must turn on its own facts. The lesson for both parties is to ask for and give as much detailed information as possible at the earliest possible stage. Failure to ask the appropriate questions will prejudice the landlord's position³⁵ as much as the tenant's failure to answer the questions adequately.

23. One relatively easy rule of thumb which was in currency for some years may have had its day. What was described by Mr. Justice Peter Gibson, as he then was, in British Bakeries v. Michael Testler [1986] 1 EGLR 64 as "a generally accepted test of the financial standing of many proposed assignees" by way of accounts showing a pre-

³² See as examples the judicial criticisms of references in Ponderosa International Developments v. Pengap Securities (above) and Warren v. Marketing Exchange for Africa (above).

³³ Mount Eden Land v Towerstone [2002] 31 EG 79 (CS).

³⁴ By way of example compare the analysis of the Court of Appeal in Kened v. Connie Investments (above) and Footwear Corporation v. Amplight Properties (above).

³⁵ See Norwich Union v. Shopmoor (above).

tax profit of not less than three times the rent has been disapproved by Mr. Justice Neuberger in Footwear Corporation v. Amplight Properties (above). Accordingly, landlords can no longer use that test.

24. **(3) Breaches of covenant**

Another legitimate reason for refusal of consent is of course existing breaches of covenant which the proposed assignee does not satisfactorily undertake to remedy. The most obvious example is dilapidations. Again, there have been numerous cases on this point³⁶. However, it is noteworthy that in only one case in the last twenty years³⁷ have dilapidations been sufficiently serious and long-standing to justify refusal of consent to assign. The Courts have made it clear that the degree to which breaches can be justified will be rigorously tested in proceedings under the 1988 Act and that landlords assert breaches of covenant as justification for refusal of consent at their peril³⁸. Minor breaches will never justify refusal to consider the application or refusal of consent³⁹.

25. **(4) Damage to the reversion generally**

³⁶ Orlando Investments v. Grosvenor Estate Belgravia [1989] 2 EGLR 74; Sood v. Barker [1991] 1 EGLR 87; Beale v. Worth [1993] EGCS 135; Straudley Investments v. Mount Eden Land (No.2) (above) and Yorkshire Metropolitan Properties v. Co-operative Retail Services (above).

³⁷ Orlando Investments v. Grosvenor Estate Belgravia (above).

³⁸ See in particular Straudley Investments v. Mount Eden Land (No.2) (above) where the alleged breaches, upon analysis, proved to be of minimal significance and could not possibly justify refusal of consent or refusal to consider the application.

³⁹ Mount Eden Land v Folia [2003] PLSCS 188.

A landlord may have other reasons for alleging damage to the reversion justifying refusal of consent. A clear example arose where the proposed assignment back to the original lessee would have entitled the original lessee to operate a break clause which the existing assignee could not⁴⁰ or where the assignment would result in statutory protection for the assignee not available to the assignor⁴¹.

26. But a landlord's contention that as a matter of valuation the proposed assignment or underletting would reduce the value of the reversion in financial terms is less likely to find favour today than it did twenty years ago. In 1985 Mr. Justice Warner⁴² accepted a landlord's valuer's evidence that the market perceives the reversion to have been damaged where the assignee in possession is a covenant of lesser value than the covenant of the original lessee even where the original lessee is still liable in privity of contract. This conclusion was questioned a year later by Lord Justice Balcombe⁴³ where there was no evidence that the landlord intended to sell the reversion. It has been again doubted recently by Mr. Justice Neuberger⁴⁴. He said this:

"So far as diminution in value of the reversion is concerned, that is a point which should in my judgment always be approached with a certain degree of caution by the court"

⁴⁰ Olympia & York Canary Wharf v. Oil Property Investments [1994] 2 EGLR 48.

⁴¹ Deverall v. Wyndham [1989] 1 EGLR 57 following Norfolk v. Kitway [1976] QB 506.

⁴² In Ponderosa International Developments v. Pengap Securities (above).

⁴³ In International Drilling Fluids v. Louisville Investments (above).

⁴⁴ In Blockbuster Entertainment v. Leakcliff Properties [1997] 1 EGLR 28 and Footwear Corporation v. Amplight Properties (above).

In the case of old leases where the original lessee and possibly intermediate assignees remain liable in privity of contract I suggest that the Court will look with increasing scepticism at landlord's arguments based on diminution of the reversion by reference to the character of the proposed assignee. For instance, the landlord was held to have unreasonably refused consent to change of use and underletting in Luminar Leisure v Apostole [2001] 3 EGLR 23 where the landlord relied on flawed valuation evidence that it would suffer £300,000 loss of reversionary value if the premises were used as a fitness centre rather than a nightclub. The Judge held that the valuer's approach was ill-informed, wrong-headed and unreasonable and it followed that the landlord was unreasonable to rely on it. The position may be different in respect of new leases following the Landlord and Tenant (Covenants) Act 1995 where recourse against predecessors of the tenant may be more difficult.

27. The landlord is entitled to consider the likely position at the end of the relevant lease. Where the landlord had reasonable grounds for concern that a proposed underletting might result in the grant of a new tenancy under the Landlord and Tenant Act 1954 of part only of the demised premises giving rise to the fragmentation of the premises that was held to be a reasonable ground for refusal of consent. It was sufficient, on the authorities⁴⁵ for it to be shown that a reasonable landlord could take that view.

28. There remains one apparent anomaly. Normally a landlord cannot refuse consent on grounds which, on analysis, really amount to a desire to achieve a surrender

⁴⁵ NCR v Riverland Portfolio [2005] 13 EG 135 (CS), applying Ashworth Frazer and International Drilling Fluids.

of the lease⁴⁶. However, in the exceptional circumstances of a case called Pimms v. The Tallow Chandlers Company [1964] 2 QB 547 it was held that the landlord was reasonable in refusing consent when the proposed assignee did not intend to occupy the demised premises but to negotiate with the landlord for a surrender of the lease where the landlord was seeking to assemble a development site including the demised premises. The transaction was described by the Court of Appeal in that case as "not a normal assignment and ... pregnant with future probabilities". That decision can perhaps be justified by the fact that the proposed assignee was not intending to occupy the premises at all. However, the Pimms case was followed by Mr. Justice Neuberger in a case⁴⁷ where the proposed assignee Safeway certainly intended to occupy the demised premises but where the landlord sought to develop an adjoining site for occupation by its rival Sainsbury. With all due respect to the learned Judge it is a little difficult to see how that decision can be justified bearing in mind that the effect of the landlord's refusal of consent to assign was to prevent the tenant from selling its interest to a bona fide occupier. I do not expect this line of authorities to survive unscathed in the foreseeable future.

29. **DAMAGES FOR BREACH OF STATUTORY DUTY**

Section 4 of the 1988 Act entitles the tenant to claim damages for breach of statutory duty in respect of any breach by the landlord of its duties under the Act. This is a tortious and not a contractual remedy. The significance of this is that a person will not be liable for the defaults of a successor in title as might otherwise be the case if the

⁴⁶ Bromley Park Garden Estates v. Moss [1982] 1 WLR 1019.

⁴⁷ BRS Northern v. Templeheights (ante).

remedy had been framed in contract. Subject to the normal rules as to damages such as the tests of remoteness, causation and mitigation, damages may be very significant in a case where the landlord's default has resulted in the loss of a potential assignee or subtenant, particularly in a falling market. In any case there should be a significant claim to abortive or increased costs and fees. In an extreme case a landlord may even be liable for exemplary damages if it can be shown that he entered on a deliberate course of conduct designed for profit.

30. In Design Progression v Thurloe Properties [2005] 1 WLR 1 the evidence showed that the landlord did make a conscious decision to refuse consent with a view to forcing the tenant to surrender the lease rather than obtain a premium on assignment. In that case, in addition to compensatory damages for loss of premium, extra rent incurred, loss of goodwill and costs the tenant also obtained £25,000 by way of exemplary damages to punish the landlord for its deliberate breach of statutory duty. This was obviously an extreme case but is a salutary warning to landlords.

31. By contrast, in Clinton Cards v Sun Alliance & London Assurance [2002] 3 EGLR 19 the judge held that the landlord was in breach of statutory duty by unreasonably refusing consent to an underletting on the basis that it was a rent which was less than the full rack rental value of the premises declined to award damages where the tenant had been unable to show causation of damage on the evidence. The problem was compounded by the fact that the tenant was applying for consent to change of use as well as underletting and there was no evidence to show that the outcome of the facts would have been different if the landlord had been faced with a challenge to the refusal of consent to change of user alone.

32. **CONCLUSION**

What conclusions can be drawn from these considerations? First, there are uncertainties inherent in the 1988 Act. The length of the reasonable time in each case will continue to vex practitioners and clients. Secondly, I cannot believe that the debate over the meaning of damage to the landlord's reversion is by any means over. Thirdly, the teeth provided by the 1988 Act are agreeably sharp from the tenant's point of view. There is no doubt that the Act has worked in its primary purpose of providing tenants with a remedy for landlord's unreasonable behaviour. Fourthly, it will be apparent from my analysis of the authorities that I detect a continuing judicial movement in favour of tenants.

JONATHAN BROCK QC

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