

***Commercial Leases: Consents to Assignment and Reasonableness of Refusal***

Typical clauses restricting a tenant's ability to renew his interest in a lease in favour of a third party on terms oblige the tenant:

"not without the consent in writing of the Landlord (which shall not be unreasonably withheld) to assign or sublet the whole of the subjects".

Similar clauses constraining letting to subtenants may oblige the tenant

"Not without the consent in writing of the Landlord (which consent shall not be unreasonably withheld or delayed in the case of a substantial and respectable assignee or subtenant) to assign or sublet the [whole of/ any part of] the premises."

We are concerned with assignments rather than subtenancies, though many principles concerned with reasonableness of refusal are common. There is a myriad of variations on the theme, but the *leitmotif* running through them is the content of the landlord's being bound not unreasonably to withhold consent to assignment.

The effect of the breach of such a clause varies according to whether the breach is that of the tenant or the landlord. If the condition requiring the tenant to seek consent is breached, the landlord may seek to irritate the lease. If the landlord unreasonably refuses to consent to the assignment, one consequence is the landlord's liability in damages. For an example of proceedings seeking damages for breach, see the tenant's counterclaim in *Renfrew District Council v AB Leisure (Renfrew) Ltd* 1988 SLT 635. The tenant may be in a position to insist that he be permitted to effect the assignment without the landlord's consent: this on principles of mutuality of obligation.

*Burgerking Ltd v Rachel Charitable Trust* 2006 SLT 224, Lord Drummond Young, is an example of a tenant's failed attempt to obtain declarator to that end.

***What is an unreasonable refusal?***

The first point to note is that the landlord is under no obligation to give reasons: in *Renfrew District Council v AB Leisure (Renfrew) Ltd* 1988 SLT 635 Lord Justice-Clerk Ross at 637 referred to *Young v. Ashley Gardens Properties Ltd.* [1903] 2 Ch. 112 for the proposition that, “although a landlord is not obliged to give any reasons for refusing to grant consent, if he does give reasons the court is entitled to examine and adjudicate upon the validity of these reasons.”

There was formerly a view that the range of matters which a landlord could have in view in judging what was reasonable was narrow. The modern overarching principle, both in Scotland and England is that “the correct approach is to consider what the reasonable landlord would do when asked to consent in the particular circumstances” (*Ashworth Frazer Ltd v Gloucester City Council*, in a passage at [2001] 1 WLR 2180 per Lord Rodger said at 2202, paragraph 66; see below). That is subject to certain specific principles, including the principle that the landlord must not have regard to collateral matters: matters which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease and/or are wholly extraneous to and completely dissociated from the subject matter of the contract. On one view, that is to look at the same thing from a different angle.

The narrow view was typified by *Houlder Brothers & Co. Ltd. v. Gibbs* [1925] Ch. 575 where Warrington L.J. at 586 said; “When you look at the authorities ... this, at any rate, is plain, that in the cases in which an objection to an assignment has been upheld as reasonable it has always had some reference either to the personality of the Tenant, or to his proposed user of the property”. Warrington L.J. also thought that the reason required to affect both parties.

An intermediate position is to be found in dicta of Dunn, L.J. in *Bromley Park Estate v. Moss* [1982] 1 W.L.R. 1019; “*West Layton Ltd. v. Ford* [1979] Q.B. 593 shows that in considering whether the landlords’ refusal of consent is unreasonable, the court should look first at the covenant in the context of the lease and ascertain the purpose of the covenant in that context. If the refusal of the landlord was designed to achieve that purpose then it may not be unreasonable, even in the case of a respectable and responsible assignee; but if the refusal is designed to achieve some collateral purpose wholly unconnected with the terms of the lease ... that would be unreasonable, **even though the purpose was in accordance with good estate management.**” (emphasis added). It appears from House of Lords authority – *Viscount Tredegar v Harwood* (1929) AC 72, approved in *Ashworth Fraser v Gloucester City Council*, [2001] 1 WLR 2180 – that, contrary to what the passage in emphasis suggests, the landlord may consult his interest in good estate management/ sound business principles. This may be simply one aspect of the overarching principle rehearsed above. At any rate, it is something which touches upon one aspect of “the relationship of landlord and tenant in regard to the subject matter of the lease” – and as such it is not (and certainly is not necessarily) collateral.

There are dicta from LJ-C Ross in *Lousada & Co. v. J.E. Lesser Properties Ltd.* 1990 SC 178 at 188 which may suggest that the Scots courts have for some time favoured the broader view that the interests which a prohibition on assignation without consent may secure are wider than (i) personality of the tenant, including his covenant and (ii) proposed user of property – and, perhaps, extend to considerations of estate management. There the Court was faced with a submission for the tenant that “reasonable withholding of consent must be related to the landlords' genuine interest in the lease ... there were only two such interests; (1) the landlords' interest to ensure that the obligations undertaken in the landlords' favour would be performed; (2) the landlords' interest to ensure that the value of the subjects of the lease and any nearby property were not diminished.”

Lord Justice-Clerk Ross considered that where, in the circumstances of that case, rent review was incomplete and long outstanding, it might be reasonable for the landlord to withhold his consent on that basis. As the landlord had not given reasons for withholding consent – and the tenant had no pleadings putting the landlord's reasons in issue – the possibility could not be excluded that such was the basis.

It is now settled that, whatever may have been the position in English law, the common Scots and English position is that reasonableness of refusal of consent to an assignation is to be viewed in a general way. Support for that approach is to be found in *Viscount Tredegar v Harwood* per Viscount Dunedin at 78, doubting *Houlder Bros.* *Viscount Tredegar v Harwood* involved a covenant to insure leased premises with a particular insurance office unless the landlord's consent to some other insurer were

obtained. The appellant, who was the ground landlord of the premises and also of a large number of other houses on the same estate, refused to approve of the Atlas Company on the ground that for purposes of estate management he required that all houses upon his estate should be insured in the same office. The respondent declined to insure in the Law Fire Office, and insisted that under the covenant she had an option to insure either in the Law Fire Office “or in some other responsible office to be approved by the lessor”. The question was whether a term might be implied that such consent should not unreasonably be refused in respect of an office which was responsible. In a test application seeking forfeiture of the tenant’s interest the Judicial Committee held that no such term could be implied. However their Lordships went on to consider the position in the event that such a term could be implied and whether the landlord’s grounds for refusal were reasonable. Lord Dunedin, *ibid*, observed:

“Further, I would like to say, that although it is unnecessary to consider whether [*Houlder Bros.*] was well decided, **I am not inclined to adhere to the pronouncement that reasonableness was only to be referred to something which touched both parties to the lease. I should read reasonableness in the general sense**, and if it was necessary - it is not so in the view already expressed - I would hold here that the appellant's reasons are eminently reasonable.”

Lord Dunedin doubted *Houlder Bros.* to the extent that it required reasonableness to refer to that which touched upon the interests of both parties. Lord Shaw of Dunfermline at 79 was to the same broad effect. Lord Phillimore at 81 to 82 expressly concurred with Viscount Dunedin.

Strictly, these dicta are *obiter*, if House of Lords *obiter*. They have, however, been followed in relation to a clause stipulating for reasonable refusal of consent to assignation by Lord Rodger of Earlsferry, with whom the other members of the Judicial Committee agreed, in *Ashworth Frazer Ltd v Gloucester City Council*, in a passage at [2001] 1 WLR 2180; [2002] 1 All ER 377, para 67. Lord Rodger gained assistance from *Bickel v Duke of Westminster* [1977] QB 517, Denning MR. There the landlord of the head lease refused to consent to an assignment of the tenant's interest to a sub-lessee in possession who, if she remained for five years, would have been entitled - by way of enfranchisement under the Leasehold Reform Act 1967 - to buy the freehold. The landlord refused consent on the ground that he believed that "by so doing this will prevent the purchasers from enfranchising under the provisions of the Leasehold Reform Act 1967." Denning MR said at 524: "I do not think the court can, or should, determine by strict rules the grounds on which a landlord may, or may not, reasonably refuse his consent. He is not limited by the contract to any particular grounds. Nor should the courts limit him. Not even under the guise of construing the words. The landlord has to exercise his judgment in all sorts of circumstances. It is impossible for him, or for the courts, to envisage them all." In 1947 it could not have been foreseen by the landlord that in twenty years time Parliament might grant such a right to buy the freehold. As Lord Rodger said in *Ashworth Frazer Ltd v Gloucester City Council*, at 2202, paragraph 66; "The correct approach is to consider what the reasonable landlord would do when asked to consent in the particular circumstances."

Thus we get to a stage at which what was *obiter* of a Scottish Lord of Appeal in Ordinary becomes English authority. Finally, it was adopted in Scotland (though arguably such was already the position). In *Burgerking Ltd v Rachel Charitable Trust*

2006 SLT 224 Lord Drummond Young followed those dicta. That was a case in which the Pursuers, tenants of high street restaurant premises in Paisley, sought to assign the tenant's interest subject to a substantial reverse premium which meant that the effective rent was much below market value. The Pursuers sought declarator that the Defender landlords had unreasonably withheld their consent to a sublease. The tenants had sought approval for a sublease subsisting for the remainder of the lease, including the payment of a reverse premium of £25,000 per quarter. The rent under the sublease was £112,000 per annum.

The effect of this on the future rent and thus on the value of the landlord's interest was given as one of two reasons for refusal of consent to the assignation. The other reason – which the Court did not uphold – was concerned with the proposed assignee's status. Lord Drummond Young held that the Defender landlords' refusal to consent to the assignation on the first ground was not unreasonable. In doing so at 228 to 229, paragraphs [16] to [19] he provided an authoritative resumé of the principles involved in such cases. The writer shall not attempt to improve upon it – most likely for the worse. The passage is quoted entire as an invaluable point of reference:-

“[16] The legal principles applicable to the present case are well established, and there was no serious dispute between the parties about the relevant law; those principles are clearly set out in a number of cases, notably in the opinions of Balcombe LJ in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd*, at [1986] Ch, pp 519–521, and Lord Hamilton in *Legal and General Assurance Society Ltd v Tesco Stores Ltd* [*Legal and General Assurance Society Ltd v Tesco Stores Ltd*, OH, Lord Hamilton, 18 May 2001, unreported (2001 GWD 18-707) ; cited as [2001] Scot CS 119 on

BAILLII], at paras 30–34. In summary, the law relevant to the present case can be summarised as follows. First, a landlord is not entitled to refuse his consent to an assignation or sublease on grounds that are collateral to the relationship of landlord and tenant under the particular lease in question, in the sense that they have nothing to do with that relationship of landlord and tenant. That may, as Lord Hamilton points out in *Legal and General*, at paras 30–34 at para 31, involve the interpretation of the lease in order to determine whether a matter is truly collateral to the terms of the lease in question and the intention of the parties when it was entered into. A further analogous rule is that, if the landlord's decision is based upon an erroneous interpretation of the lease, that will vitiate the decision. Secondly, the tenant bears the onus of establishing that consent has been unreasonably withheld. Thirdly, the landlord's decision should be upheld if his conclusions might have been reached by a reasonable man in the circumstances of the case; it is not necessary that the court should agree with the decision. Fourthly, as a general rule the landlord need only consider his own interests in deciding whether or not to give consent. Where, however, there is a significant disproportion between the benefits to the landlord and the detriment to the tenant if consent is withheld it will be unreasonable for the landlord to refuse consent. Fifthly, 'the only reasons for refusal which are relevant to the issue of the unreasonable withholding of consent are those which influence the decision-maker at the time when he made the relevant decision. Subsequent considerations, however cogent, are irrelevant': *Legal and General* at para 31. The same is true of the state of knowledge of the landlord, so far as it is material to his decision; that must be determined at the time of refusal:

Scottish Tourist Board v Deanpark Ltd, at 1998 SLT, p 1127C–D per Lord Penrose. Sixthly, subject to the foregoing principles, the question of whether the landlord's consent has been withheld unreasonably is one of fact.

[17] The foregoing principles describe the general approach that must be taken to the issue of whether the withholding of consent is unreasonable. A number of subsidiary issues also arise. First, in cases where more than one reason for refusal is given by the landlord, the landlord's decision should normally be upheld if at least one of the stated reasons is valid: Legal and General at paras 33–34. That rule may be subject to an exception in a case where the reasons are not independent of one another, or where the basis of the landlord's decision is an accumulation of reasons, where eliminating some of the reasons may undermine the fundamental basis for the decision. That is not relevant to the present case, however, where the two reasons advanced on behalf of the landlord are clearly independent of each other. Secondly, in cases where the lease requires that an assignee or subtenant should be 'substantial and respectable' and 'of sound financial standing', the tests enshrined in those words are to be approached in the following way: 'The question whether a person is of sound financial standing appears to relate to the totality of his financial position. If that is correct, the test of "substantial and respectable" in relation to a subtenant must relate to the particular transaction, and to the capacity of the person to carry on the business intended and meet the expense of doing so in a regular way. ... It appears that the issue falls to be determined on an objective basis, without conventional criteria, once and for all at the date consent is sought': Scottish Tourist Board v Deanpark Ltd, at p 1126A–C.

Thus the circumstances of the proposed assignee or subtenant must be

assessed as a whole, and in the light that assessment it must be determined whether the person concerned has the necessary capacity to enter into the particular transaction that is contemplated.

[18] The ultimate criterion against which the landlord's decision must be measured is that of the reasonable landlord. The requirement of reasonableness was considered by Lord Rodger of Earlsferry in *Ashworth Frazer Ltd v Gloucester City Council*, in a passage at [2001] 1 WLR 2180; [2002] 1 All ER 377, para 67 with which the other members of the House of Lords agreed: 'The test of reasonableness is to be found in many areas of a law and the concept has been found useful precisely because it prevents the law becoming unduly rigid. In effect, it allows the law to respond appropriately to different situations as they arise. This has to be remembered when a court is considering whether a landlord has "unreasonably withheld" consent to the assignment of a lease. In this context I would follow Viscount Dunedin's advice in *Viscount Tredegar v Harwood* [1929] AC 72, 78, that one "should read reasonableness in the general sense"'.

Lord Rodger cited with approval a passage from the opinion of Lord Denning MR in *Bickel v Duke of Westminster* at [1977] QB, p 524: 'The words of the contract are perfectly clear English words: "such licence shall not be unreasonably withheld." When those words come to be applied in any particular case, I do not think the court can, or should, determine by strict rules the grounds on which a landlord may, or may not, reasonably refuse his consent. He is not limited by the contract to any particular grounds. Nor should the courts limit him. Not even under the guise of construing the words. The landlord has to exercise his judgment in all sorts of circumstances. It is

impossible for him, or for the courts, to envisage them all.... The utmost that the courts can do is to give guidance to those who have to consider the problem.... But no one decision will be a binding precedent as a strict rule of law.... It is rather like the cases where a statute gives the court a discretion. It has always been held that this discretion is not to be fettered by strict rules: and that all that can be properly done is to indicate the chief considerations which help to arrive at a just conclusion.’

That emphasises that the reasonableness of any decision by a landlord must be considered in the particular circumstances of the case. Later in the same case, at para 72, Lord Rodger pointed out that the landlord's decision cannot be based on a misconstruction of the lease; if the landlord's interpretation is wrong, it would plainly be unreasonable for him to continue to withhold consent on that basis. The same must in my opinion apply to a misconstruction of the tenant's proposals. I should add one further point, which is perhaps obvious but nevertheless important. The test of reasonableness is an objective one, and the landlord's decision must be measured against objective criteria. Nevertheless, as indicated in the third of the principles stated in para 16 above, it is immaterial whether the court actually agrees with the landlord's decision. This I think is the meaning of the fourth of the principles set out by Balcombe LJ in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd*, at p 520C–D.

[19] A further matter that assumes considerable importance in the present case is the construction of the reasons given by the landlord for refusal of consent. The landlord is in my opinion obliged to give reasons; otherwise it is impossible to know whether the requirement that he must act as a reasonable

landlord is satisfied. The need to give reasons is clearly stated in the decision in the sheriff court of Sheriff Wheatley, as he then was, in *Hutchison v Lodge St Michaels*, 5 December 1980, reported in *Paisley and Cusine, Unreported Property Cases from the Sheriff Courts*, p 103. It is also clear, as indicated above, that the reasonableness of the landlord's decision must be determined against the reasons that are given at the time of refusal. I am nevertheless of opinion that the reasons given at the time of refusal should not be construed over strictly. The landlord cannot subsequently pray in aid of his refusal a reason that is not touched upon in the refusal letter. He can, however, rely upon anything that can fairly be said to form part of the reasoning in that letter, or to be a reasonable development of that reasoning.”

In the interests of completeness, it is right to add that the tenant cannot hope to gain assistance from seeking to invoke the Lands Tribunal's jurisdiction to vary land obligations. *Propinvest Paisley LP v Co-operative Group Ltd* 2011 CSIH 41; 2012 SC 51 decided that the Land Tribunal's jurisdiction did not extend to varying a clause excluding assignees without the landlord's consent. At paragraph 16, the Extra Division followed *Fraser (George T) Ltd v Aberdeen Harbour Board* 1985 SC 127; 1985 SLT 384. In *Fraser* Lord President Emslie (p 133) (with whom Lords Stott and Grieve concurred) identified from the scheme and terms of the Conveyancing and Feudal Reform (Scotland) Act 1970, (“the 1970 Act”) by which the jurisdiction of the Lands Tribunal for Scotland to discharge or vary ‘land obligations’ was first conferred, two potential areas of limitation. One was the requirement that a given condition must “relate to the land”. The other was the need for an “obligation” to involve something in the nature of a burden on what could otherwise be regarded as an established right. Support for this latter limitation was found in the statutory

juxtaposition of leasehold conditions with real burdens and servitudes, and on that footing the tribunal was held to have no jurisdiction to interfere with a clause which, by excluding assignees without the landlord's consent, essentially defined the tenant's identity from the outset. There was no true “burden” or “obligation”, just an important delimitation of the initial grant. The parties in *Propinvest* were agreed that, in substance although not precisely in form, the provisions of the Title Conditions (Scotland) Act 2003 concerned with variation of land obligations (particularly ss. 90, 100 and the definition of “title condition” in s 122(1)(a)) derived from those in the 1970 Act which were considered in *Fraser*. The Extra Division concluded, at paragraphs 16 and 17, essentially that the Lands Tribunal had erred in that they had disregarded the court's observations in *Fraser* to the effect that clauses defining or delimiting a grant *ab initio* could not in themselves be discharged or varied. The jurisdiction conferred by the 2003 Act was concerned rather to admit of variation of that which was a burden on what would otherwise be an established right.

### ***Conclusion***

The single most important rule is that enunciated by Lord Rodger in *Ashworth Frazer*: “the correct approach is to consider what the reasonable landlord would do when asked to consent in the particular circumstances”, disregarding collateral matters. What are “collateral matters” has been put in various ways. In *Ashworth Frazer*, at paragraph 3, Lord Bingham of Cornhill treated as collateral matters

“grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease”

The quoted passage is cited from Balcombe LJ in *International Drilling* at p. 520 under reference to Sargant LJ in *Houlder Bros v Gibb*. Lord Bingham observed that

the same principle was earlier expressed by Sargant LJ (ibid) whom he cited to this effect:-

“in a case of this kind the reason must be something affecting the subject matter of the contract which forms the relationship between the landlord and the tenant, and... it must not be something wholly extraneous and completely dissociated from the subject matter of the contract.”

Lord Hamilton in *Legal and General Assurance Society Ltd v Tesco Stores Ltd*, suggested that the reason must not be something “extraneous to the intention of the parties when lease was entered into”.

The distinction between matters to which the reasonable landlord may have regard and those which are collateral is exemplified in the cases considered above. He may look to his interest to have single insurer for a multiplicity of properties (*Tredegar*): he may not take account of his desire for better terms in a new lease (*Renfrew*).

That comparatively simple overarching principle is clouded by the six main and two additional conditions for its application considered by Lord Drummond Young in *Burgerking v Rachel Charitable Trust*.

More than most areas, this is one in which the independent litigator can add value through being involved in advising *before* the points are set – before the irrevocable step of consenting is taken; before the consent to assignation is refused. Doubtless the tests themselves – though involving composite and relatively complex jury questions – are not beyond the grasp of any reasonably competent property lawyer. What is

much more difficult for the property lawyer to provide for himself is the litigator's – indeed any objective third party's – insight into how a court is likely to view a refusal of consent in a given set of circumstances. It is too easy for the decision to consent or refuse consent to be informed by wish fulfilment/ desired outcome.

It pays to involve the litigator in advising upon a course of action with which he and the landlord are happy. And it is so much better than taking a decision to refuse consent and then embarking upon consideration of how to uphold it in court – perhaps with a selection of propositions which, if made, will sit like ashes in counsel's mouth. As a generalisation, if you find yourself casting around for justification for a refusal after the event, the pass has been sold.