INTERNATIONAL DRILLING FLUIDS LTD V LOUISVILLE INVESTMENTS (UXBRIDGE) LTD, [1986] CH 513

Between:

INTERNATIONAL DRILLING FLUIDS LTD
V
LOUISVILLE INVESTMENTS (UXBRIDGE) LTD

Kim Lewison (instructed by Helder Roberts & Co, of Epsom) appeared on behalf of the appellant; Paul Morgan (instructed by Nabarro Nathanson) represented the respondent tenant.

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1. Giving the first judgment at the invitation of Fox LJ, BALCOMBE LJ said: This is an appeal from an order dated June 18 1985 of Mr Edward Nugee QC, sitting as a deputy High Court judge, whereby he declared that the refusal of the appellant landlord to grant to the respondent ('the tenant') a licence to assign a lease to Euro Business Services Ltd ('Euro') was unreasonable. The lease was made on January 31 1972 between the landlord and Bovis New Homes Southern Ltd ('Bovis'). The property comprised in the lease is a two-storey office building known as Colne House, Highbridge Industrial Estate, Uxbridge. Highbridge Industrial Estate is owned by the landlord.

2. The term of the lease is for 30 years from December 25 1971, so it now has some 16 years to run. The initial rent was £ 12,500 per annum, but there is a rent review clause, exercisable only upwards at five-yearly intervals, and the current rent is £ 46,000 per annum. The user clause in the lease prohibits the use of the property 'for any purpose other than as offices within the meaning of Class II of the Town and Country Planning (Use

Classes) Order 1963 with ancillary showrooms . . .'. The relevant part of the lessee's covenant against assignment is in the following terms:

. . . not at any time during the term hereby granted to assign the whole of the demised premises without the licence in writing of the lessor being previously obtained such licence not to be unreasonably withheld.

3. The lease was assigned by Bovis to the tenant by an assignment dated March 1 1978. By a deed dated February 28 1978 the landlord granted Bovis licence to assign the lease to the tenant, and the tenant entered into a direct covenant with the landlord for payment of the rent reserved by the lease. So the landlord now has the benefit of two direct covenants for payment of the rent - that of Bovis and that of the tenant. The tenant is a subsidiary of a well-known public company, and its accounts for the year ended September 30 1983 showed an annual profit (after tax) of £ 470,000 on a turnover of almost £ 15m, with fixed assets of £ 2.16m and net current assets of £ 963,000.

4. The tenant occupied Colne House as a single office block for its own use. In July 1983 the tenant instructed Leslie Lintott & Associates ('Lintott'), surveyors and valuers, to try to find someone who would take an assignment of the lease of Colne House, without any premium, since the tenant wished to move to new premises. The learned judge said he was satisfied that Lintotts had taken the appropriate steps to market the property, but nevertheless, until shortly before the trial of the action, only one serious inquiry had been received. That was from a Mr Brodie and a Mr Gluck, who wished to use the building for the provision of serviced office accommodation. This is a form of business which has developed in recent years to meet the demand for office facilities which can be used on a short-term basis. There are a growing number of businesses which do not wish to take permanent office accommodation but want to have the temporary use of offices which are fully furnished and which provide the services of are a receptionist, telephonist and typist, and such facilities as word-processing, photocopying and telex and telephone equipment.

5. It was common ground that, if the lease were assigned to Mr Brodie and Mr Gluck, or to a company formed by them, the proposed use of the property would not be in breach of any of the

provisions of the lease. Although the landlord's witnesses were not optimistic about the viability of the proposed business, the learned judge held that Mr Brodie had carried out sufficient research into this field of business to entitle him to form the view that it could be successful at Colne House.

6. Mr Brodie and Mr Gluck first expressed interest in December 1983. An initial application by the tenant for a licence to assign the lease to a particular company owned by them was abandoned, but on August 2 1984 the tenant applied to the landlord for licence to assign the lease to Euro, a company owned by Mr Brodie and Mr Gluck, and for whose obligations they were prepared to stand as guarantors. In the meantime, in May 1984, the tenant had vacated Colne House which, at the date of trial, remained empty. Of course the tenant remained, and remains, liable on all its obligations under the lease.

7. On August 28 1984 the landlord's solicitors wrote saying that their clients were not prepared to grant a licence to assign 'on the grounds that the investment value of our clients' interest in the property would be detrimentally affected by the proposed use'. These grounds were supplemented by further grounds in a letter from the landlord's solicitors, dated October 26 1984, but the ground of diminution in the value of the reversion remained, and remains, the principal ground of the landlord's refusal to consent to a licence to the tenant to assign the lease to Euro. Of the other grounds mentioned in the letter of October 26 1984, two are still relied on by the landlord in its notice of appeal: (i) the viability of the proposed business, and (ii) the effect that the proposed user of Colne House might have on the car-parking facilities on the Highbridge Industrial Estate.

8. On the principal ground of objection, the learned judge heard evidence from a number of expert witnesses. His relevant findings of fact can be summarised as follows:

   (1) By the end of the term of the lease, the site value of the property would be as great as, or greater than, the building value. There was no possibility that the use of the building for serviced offices might have a depreciating effect on the letting value of the property at the end of the lease.
   (2) In view of the tenant's financial position, there was no significant danger that the rent would not be paid throughout the term.

(3) The rent obtainable on future rent reviews would not be prejudiced by the use of the premises as serviced offices.
(4) There was no prospect of Colne House being placed on the market or mortgaged to the fullest extent possible. Although this finding was attacked by Mr Lewison, who appeared for the landlord before us (as he did below), I am satisfied that it was justified by the evidence of Mr Dibley (a director of the landlord) which the learned judge fully rehearsed in his judgment - if one understands 'prospect' in its dictionary meaning of 'expectation'.
(5) That reasonable professional men might take the view that, if Colne House were placed on the market, it could fetch less with Euro in occupation of the property carrying on the business of providing serviced offices than with the property having remained vacant for more than a year. The learned judge said that if it were relevant, he would not himself be satisfied that that would be the case, and I can understand his reluctance to reach such a conclusion, since it does seem surprising that the reversion to an empty property, which no one wishes to occupy as a single unit, should be worth more than one occupied by a company providing (with guarantors) a third source from which payment of the rent, and performance of the obligations under the lease, could be secured.

9. The learned judge then rehearsed the arguments and the authorities with great care, and his finding on the principal ground was expressed in the following terms:

   I accept that the valuation evidence shows that reasonable professional men might take the view that, if Colne House were placed on the market, it could fetch less with Euro in occupation of the property carrying on the business of providing serviced offices than with the property having remained vacant for more than a year . . . but in the circumstances of this case, in which, so far as the evidence shows, there is no prospect of Colne House being placed on the market or mortgaged to the fullest extent possible, that does not in my judgment constitute a ground for reasonable apprehension of damage to the (landlord's) property interest.

10. He then dealt quite shortly with the car-parking problem as a ground for the landlord refusing consent to the assignment to Euro, commenting that even the landlord's own witnesses considered it a minor point, and said that he was not satisfied that the problem was likely to be substantially greater than if the

property were assigned to a company which could use it as its own offices. He concluded that he did not consider that the possibility of a small increase in parking problems was enough, either on its own or in conjunction with the alleged diminution in the value of the reversion, to justify the landlord's refusal to consent to the proposed assignment, or that a reasonable man might consider it enough.

11. The judge, however, did not accept an argument by Mr Morgan, counsel for the tenant both here and below, that since the proposed use of the property was not forbidden by the lease, the landlord, by refusing consent to the proposed assignment, was trying to secure a collateral advantage in the form of preventing a use which was originally permitted when the lease was granted. This argument has been revived before us by a respondent's notice.

12. During the course of argument many cases were cited to us, as they were to the learned judge. I do not propose to set them out in detail here; many of the older cases were considered in the full judgment of the Court of Appeal in *Pimms Ltd* v *Tallow Chandlers Co* [1964] 2 QB 547. From the authorities I deduce the following propositions of law:

(1) The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the lessor from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee - per A L Smith LJ in *Bates* v *Donaldson* [1896] 2 QB 241, at p 247, approved by all the members of the Court of Appeal in *Houlder Bros & Co Ltd* v *Gibbs* [1925] Ch 575.
(2) As a corollary to the first proposition, a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject-matter of the lease (see *Houlder Bros & Co Ltd* v *Gibbs* (*supra*), a decision which (despite some criticism) is binding on this court; *Bickel* v *Duke of Westminster* [1977] QB 517).
A recent example of a case where the landlord's consent was unreasonably withheld because the refusal was designed to achieve a collateral purpose unconnected with the terms of the lease is *Bromley Park Garden Estates Ltd* v *Moss* [1982] 1 WLR 1019.

(3) The onus of proving that consent has been unreasonably withheld is on the tenant - see *Shanly* v *Ward* (1913) 29 TLR 714 and *Pimms* v *Tallow Chandlers* (*supra*) at p 564.
(4) It is not necessary for the landlord to prove that the conclusions which led him to consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances - *Pimms* v *Tallow Chandlers* (*supra*) at p 564.
(5) It may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease -
see *Bates* v *Donaldson* (*supra*) at p 244.
(6) There is a divergence of authority on the question, in considering whether the landlord's refusal of consent is reasonable, whether it is permissible to have regard to the consequences to the tenant if consent to the proposed assignment is withheld. In an early case at first
instance, *Sheppard* v *Hongkong & Shanghai Banking Corporation* (1872) 20 WR 459, at p 460, Malins V-C said that by withholding their consent the lessors threw a very heavy burden on the lessees, and they therefore ought to show good grounds for refusing it. In *Houlder Bros & Co Ltd* v *Gibbs* (*supra*), Warrington LJ said (at p 584):
An act must be regarded as reasonable or unreasonable in reference to the circumstances under which it is committed, and when the question arises on the construction of a contract, the outstanding circumstances to be considered are the nature of the contract to be construed and the relations between the parties resulting from it.

13. In a recent decision of this court - *Leeward Securities Ltd* v *Lilyheath Properties Ltd* (1983) 271 EG 279, [1984] 2 EGLR 54 - a case concerning a subletting which would attract the protection of the Rent Act - both Oliver and O'Connor LJJ made it clear in their judgments that they could envisage circumstances in which it might be unreasonable to refuse consent to an underletting, if the result would be that there was no way in which the tenant (the sublandlord) could reasonably exploit the premises except by creating a tenancy to which the Rent Act protection would apply, and which inevitably would affect the value of the landlord's reversion. O'Connor LJ said (at p 283):

It must not be thought that, because the introduction of a Rent Act tenant inevitably has an adverse effect upon the value of the

reversion, that that is a sufficient ground for the landlords to say that they can withhold consent and that the court will hold that that is reasonable.

14. To the opposite effect are the dicta, *obiter* but nevertheless weighty, of Viscount Dunedin and Lord Phillimore in *Viscount Tredegar* v *Harwood* [1929] AC 72 at pp 78 and 82. There are numerous other dicta to the effect that a landlord need consider only his own interests - see eg *West Layton Ltd* v *Ford* [1979] QB 593 at p 605; *Bromley Park Garden Estates Ltd* v *Moss* (*supra*) at p 1027E. Those dicta must be qualified, since a landlord's interests, collateral to the purposes of the lease, are in any event ineligible for consideration - see para (2) above.

15. But in my judgment a proper reconciliation of those two streams of authority can be achieved by saying that while a landlord need usually consider only his own relevant interests, there may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent to an assignment, that it is unreasonable for the landlord to refuse consent.

(7) Subject to the propositions set out above, it is, in each case, a question of fact, depending upon all the circumstances, whether the landlord's consent to an assignment is being unreasonably withheld - see *Bickel* v *Duke of Westminster* (*supra*) at p 524; *West Layton Ltd* v *Ford* (*supra*) at pp 604H and 606-7.

16. In the present case, the learned judge, having made the findings of specific fact set out above, carefully considered the relevant authorities. He then reached the conclusion that the views of the landlord's expert witnesses about the effect of the proposed assignment on the value of the reversion, although views which could be held by reasonable professional men, did not in the circumstances of this case, where there was no prospect of the landlord's wishing to realise the reversion, constitute a ground for reasonable apprehension of damage to its interests. That was a decision on the facts to which the learned judge was entitled to come. He made no error of law in reaching his decision; he took into account nothing which he ought not to have considered, and he omitted nothing which he ought to have considered. In my judgment, this court ought not to interfere.

17. But in any event, in my judgment, the learned judge reached the right decision. Although he did not expressly mention the disproportionate harm to the tenant if the landlord were entitled to refuse consent to the assignment, compared with the minimum disadvantage which he clearly considered the landlord would suffer by a diminution in the paper value of the reversion - 'paper value' because he was satisfied there was no prospect of the landlord's wishing to realise the reversion - he clearly recognised the curious results to which the landlord's arguments, based solely upon a consideration of his own interests, could lead.

18. As he said (at p 19C of the transcript)*:

> It seems to me that, if Mr Lewison is right, the more substantial the lessee, the more easily the landlord would be able to justify a refusal of consent to an assignment, since unless the proposed assignee's covenant was as strong as the assignor's, a reasonable man might form the view that the market would consider the reversion less attractive if the lease were vested in the proposed assignee than if it were vested in the proposed assignor. To take the matter to extremes, if a lease was made in favour of a government department, it would be unassignable except to another government department; for, as Mr Matthews (one of the expert witnesses) accepted in cross-examination, the market would prefer to have the government as the lessee, whether the premises were being used as serviced offices or not, even if they were standing empty, rather than a company, however strong its covenant.
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> * [1985] 2 EGLR 74 at p 79; (1985) 275 EG 802 at p 809.

19. In my judgment the gross unfairness to the tenant of the example postulated by the learned judge strengthens the arguments in favour, in an appropriate case - of which the instant case is one - of it being unreasonable for the landlord not to consider the detriment to the tenant if consent is refused, where the detriment is extreme and disproportionate to the benefit to the landlord.

20. I am also satisfied that the learned judge could, and should, have had regard to the fact that the proposed service office user was within the only form of user permitted by the lease. I have already stated the proposition of law, derived from the cases, that it may be reasonable for the landlord to refuse his consent to an assignment on the grounds of the proposed user, even though

that proposed user is permitted by the lease. But it does not follow from that that, in all circumstances, it will be reasonable for the landlord to object to a proposed user which is permitted by the lease. In most of the cases cited to us in which it was held reasonable to object to the proposed user, even though not forbidden by the lease, the user clause was, in general terms, merely prohibiting the carrying on of any noxious or offensive trade or business (see eg *Governors of Bridewell Hospital* v *Fawkner* (1892) 8 TLR 637; *Re Spark's Lease* (1905) 1 Ch 456). An exception is the case of *Premier Confectionery (London) Co Ltd* v *London Commercial Sale Rooms Ltd* [1933] Ch 904. This was a decision at first instance which is not binding on us. The facts are that there were two separate tenancies of a shop and a kiosk in the same office building, granted consecutively by the same landlord to the same tenant. Each contained a covenant by the tenant to use the demised premises as a tobacconist's shop only. The tenancies were assigned together to a company which went into creditor's voluntary liquidation. The liquidator applied for consent to assign the tenancy of the kiosk alone to an assignee who wished to carry on the trade of tobacconist in it. The landlord refused consent to the assignment on the grounds that it would prejudice the chances of finding anyone prepared to take an assignment of the tenancy of the shop. Bennett J held that the landlord's consent was not unreasonably withheld.

21. It may be that the decision can be justified on the particular facts of that case, in that the two tenancies were originally granted to the same person, and that there was no certainty (as there is here) that the landlord had security for the rent of the shop for the residue of the term (see the judgment at p 911); but I find it difficult to reconcile this decision with the second proposition of law set out above, and if it be suggested that it is authority for the proposition that in all circumstances it is reasonable for a landlord to refuse his consent to an assignment on the grounds of the proposed user, even though the proposed user is the only user permitted by the lease, then I am not prepared to follow it. There is all the difference in the world between the case where the user clause prohibits only certain types of use, so that the tenant is free to use the property in any other way, and the case where (as here) only one specific type of use is permitted. In my judgment, in that type of case it is not reasonable for the landlord to refuse consent to an assignment on the grounds of the proposed user (being within the only specific type of use), where

the result will be that the property is left vacant and where (as here) the landlord is fully secured for payment of the rent.

22. I can deal shortly with the remaining grounds of appeal. Mr Lewison did not seriously seek to contend that the learned judge was wrong in his conclusion that the possibility of a small increase in parking problems was enough, or that a reasonable man might consider it enough, to justify the landlord's refusal in the present case. In my judgment that was a conclusion to which the learned judge was entitled to come on the evidence before him, and is unassailable.

23. Mr Lewison devoted slightly more time to his ground of appeal based on the viability of the proposed business and in particular to certain answers given by Mr Brodie in cross-examination. Euro had submitted to the landlord the draft of a licence which it proposed to grant to the licensees of the serviced offices. This draft provided that among the services which Euro would provide to the licensee for the basic licence fee, there should be included dictating equipment for the use of the licensee, who might use this 'to dictate up to four A4-size sheets per day. The Licensor will also provide secretarial staff to transcribe the same on stationery provided by the Licensee'.

24. Under cross-examination, Mr Brodie admitted that this provision was a nonsense. Doubtless this would very soon have been realised by Euro - probably well before any licences were actually issued. Certainly there is no reason to suppose that once the defects of this provision (or indeed any other defects in the form of the draft licence) had been appreciated, they would have been allowed to continue without remedy, or to affect the viability of the business. In my judgment, there is nothing in this point.

25. Accordingly, I would dismiss this appeal.

26. FOX and MUSTILL LJJ agreed and did not add anything.

The appeal was dismissed with costs and leave to appeal to the House of Lords was refused.