

Interpretation
of Consent
to Alienate
Revisited

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INTERPRETATION OF CONSENT TO ALIENATE REVISITED

Introduction

This article¹ proposes to review the judgment of the recent Supreme Court case of *Denis Meagher and Miriam Meagher v Luke J.Healy Pharmacy Limited* (the “Supreme Court case”). The Supreme Court case was an appeal made by the plaintiffs/appellants against a High Court decision in the case of *Denis Meagher and Miriam Meagher v Luke J. Healy Pharmacy Limited*² (the “High Court case”) where it was held that a tenant was entitled to damages when a landlord unreasonably withheld its consent to a tenant to alienate and change of user. The outcome of the Supreme Court case reverses that decision and serves to interpret the meaning of s.66 of the Landlord and Tenant (Amendment) Act,1980 (the “1980 Act”). This article outlines the implications of the Supreme Court case for landlords, tenants and their solicitors.

Background

Denis Meagher and Miriam Meagher (“plaintiffs/appellants”) were the landlords and Luke J.Healy Pharmacy Limited (“the defendant”) was the tenant of a lease dated May 14, 1971, for a term of 35 years from June 1, 1971 (the “lease”) in respect of the premises known as 1 West Street, Drogheda, County Louth (the “premises”). The lease contained standard covenants including:

“During the continuance of this demise to preserve, uphold, support, maintain and keep the demised premises including the roof and exterior walls, the glass in windows, all locks, sash cords, electric, gas and other fittings, mains, pipes and water taps and all sanitary fixtures and fittings therein and all additions made to the said premises in good and proper and sufficient order, repair and condition and at the end of the term hereby granted or the sooner determination of this demise to so leave and yield up the same onto the lessor”

“Not to assign the said premises or any part thereof without the previous consent in writing of the Lessor first had and obtained”

“To use and occupy the premises solely for the purposes of the Lessee’s trade or business as a pharmaceutical chemist to include cosmetics, chiropody and photographic goods and services and not to use any part thereof for residential

¹ This article is an update to the article “Alienation of a Leasehold Interest: Landlord and Tenant Perspectives” contained in the *Conveyancing and Property Law Journal* (2009) Vol. 14 No. 2.

² [2005] IEHC 210.

purposes or for any other trade or business whatsoever without the previous consent in writing of the Lessor first had and obtained.”

Three schedules of dilapidations were served on the defendant, the first in 1993, the second in 1995 and the third in 1999. Mr Patrick Hickey acquired the controlling shareholding interest in the defendant in 1995 and the premises continued to be used as a pharmacy. Mr Hickey confirmed in evidence (which was not contested by the plaintiffs/appellants) that it would be necessary to vacate the premises in order to carry out the repairs. Mr Hickey confirmed that he acquired the freehold interest in No. 9 West Street and having eventually obtained the consent of the Health Board (“HB”) to transfer the general medical service permit to that premises vacated the premises and sought to assign the defendant’s interest.

High Court Case

On October 17, 1997, the plaintiffs/appellants instituted proceedings against the defendant in respect of repairs that were not carried out pursuant to a schedule of dilapidations and sought injunctive relief requiring the defendant to comply with the repairing covenant in the lease. The defendant delivered a defence and counterclaim on October 28, 1998, primarily objecting on the basis that the proceedings were being motivated by *mala fides*. The defendant pleaded that it was an implied term in the lease that consent could not be unreasonably withheld by the plaintiffs/appellants to an assignment or sub-letting and confirmed that numerous applications had been made to the plaintiffs/appellants to alienate. It also pleaded that non-compliance with the carrying out of the repairs did not entitle the plaintiffs/appellants to withhold consent as they were obliged to comply with the express and/or implied covenants in the lease.

The defendant made application to the plaintiffs/appellants for the assignment of the premises to Mr Austin Fitzpatrick in December 1997, and change of user. The schedule of dilapidations was agreed on December 9, 1997, and it was proposed by the defendant that the repairs would be carried out within one year of the assignment to the first proposed assignee, however, no consent was given. Further correspondence ensued and on February 19, 1998 the defendant offered to enter into negotiations with the plaintiffs/appellants for the payment of an agreed sum to enable the plaintiffs/appellants to carry out the repairs but no response was given. On April 20, 1998, the defendant requested the plaintiffs’/appellants’ consent to a sub-let to Cyril Bellew by way of a short-term letting. This was not responded to. Furthermore, the defendant endeavoured to agree an updated schedule of dilapidations as the previous schedule was out of date. Despite having paid the plaintiffs’/appellants’ agents for an updated schedule, the said schedule was withheld from the defendant for a period of

approximately two months preventing the defendant from negotiating further possible sub-lettings or assignments.

In May 1998, the amended schedule of dilapidations was finally furnished and agreed. On June 30, 1998, the defendant made application to the plaintiffs/appellants for an assignment of the leasehold interest to Cellular World Limited ("CWL"). On September 9, 1998, the defendant furnished a copy of the contract and the bank and trade references to the plaintiffs/appellants and confirmed that it was intended that the repairs would be carried out and completed within one year from the date of completion of the transaction. The plaintiffs/appellants were advised that in the event that the consent was not forthcoming by October 20, 1998 ("Long Stop Date") that CWL would withdraw from the proposed assignment. The consent was not granted by this date and CWL withdrew from the proposed assignment. A further application for consent was made for a proposed sub-letting on December 3, 1998. The defendant proceeded to carry out the repairs which were completed in September 1999, however, despite repeatedly requesting the plaintiffs/appellants to confirm their approval of the repairs, the plaintiffs/appellants did not confirm their approval until February 18, 2000. On September 1, 1999, application was made for consent to assign the premises to Sean and Louise O'Sheehan of Hallmark Cards to which the defendant received no response. On November 3, 1999, the defendant's solicitor outlined the failure of the plaintiffs/appellants to deal with the consent of the assignment of the lease to Sean and Louise O'Sheehan and in the same letter requested that the plaintiffs'/appellants' consent for an assignment to Esat Digifone Limited ("ESAT"). The plaintiffs'/appellants' solicitor responded on November 18, 1999, by way of letter headed "strictly without prejudice" consenting in principle to the proposed assignment to both Sean and Louise O'Sheehan and ESAT subject to the obvious legal requirements being met. The consent to ESAT assignment was not granted until February 18, 2000.

Evidence

Mr Patrick Hickey gave evidence to the court disclosing the enquiries raised by the plaintiffs/appellants which included clarification of the general medical service permit issued to the defendant and its transfer to No. 9 West Street and of the negotiations with the plaintiffs'/appellants' agents. Mr Patrick Hickey felt that the plaintiffs/appellants were motivated by reasons outside of the relationship of landlord and tenant on account of the transfer of the defendant's business which was a competitor of the plaintiffs'/appellants' business. Mr Dwyer SC for the defendant stated that the issue before the court was the reasonableness of the attitude of the plaintiffs/appellants with regard to the withholding of

their consent. Counsel relied on the case of *Kelly v Cussen and Cussen*³ which concerned a statutory tenancy under the Rent Restrictions Act 1946 (the “1946 Act”). Section 40(4) provides as follows:

It shall be deemed to be a condition of a statutory tenancy in any controlled premises—
(b) that the tenant will not assign the premises or any part thereof without the consent in writing of the landlord, which consent may be withheld only if greater hardship would, owing to the special circumstances of the case be caused by granting the consent than by withholding it.

Kelly v Cussen and Cussen was a decision of the Circuit Court where it was held that a covenant arising in the s.40(4)(b) of the 1946 Act, would entitle a statutory tenant to damages where consent to assign was not properly withheld. In this case, consent to assign was withheld and the Circuit Court judge held that the greater hardship resulted from the withholding of the consent than the granting of consent. The statutory tenants also sought damages for the unreasonable and wrongful withholding of consent and the Circuit Court judge Barra O’Brian dealt with the issue of damages as follows:

“As a matter of principle where there is a breach of statutory duty, damages can be recovered for injury resulting therefrom and if the plaintiff in this case prove a loss, I see no reason that he should not be entitled to damages.”

No damages were awarded in this case as the statutory tenant failed to establish loss.

Mr Ralston SC for the plaintiffs/appellants stated that s.66 of the 1980 Act required tenants to comply with the obligation but that this section did not impose a covenant on a landlord nor did it allow damages for breach and that there was no positive covenant on the landlord to give consent. He also stated that *Kelly v Cussen and Cussen* could not be relied upon in respect of damages because no loss was suffered in that case and that the judgment could not be taken as establishing a principle that a tenant could recover damages as a result of the withholding of consent.

High Court Decision

The High Court considered the defendant’s counterclaim allegations in respect of *mala fides* regarding the plaintiffs/appellants as business competitors of the defendant and that the plaintiffs/appellants were motivated by considerations beyond the terms of the lease and

³ [1954] 88 I.L.T.R. 97.

outside the relationship of landlord and tenant. Given also the refusal to respond, the delays and the enquiries in respect of the HB permit, the refusal to allow its agent to provide the defendant with a copy of the updated schedule of dilapidations for almost two months and the initial refusal to certify compliance with the repairs, the court found on the balance of probabilities that the plaintiffs/appellants acted unreasonably and were motivated by considerations beyond the terms of the lease resulting in the defendant suffering loss and damages.

The decision of *Kelly v Cussen and Cussen* was upheld stating that there was no reason in principle why a tenant should not be entitled to damages when he had suffered loss due to the unreasonable withholding of consent by a landlord. A declaration was made that the plaintiffs/appellants unreasonably and wrongfully withheld their consent for the sale and assignment of the premises to CWL. The reason that the declaration related to the application for consent to CWL was due to the fact that the defendant had provided all necessary references and documentation to the plaintiffs/appellants (this did not appear to be the case with the previous applications). Damages were awarded from the Long Stop Date and the damages payable were the rent and rates paid by the defendant from October 20, 1998 to the assumption by ESAT of the tenant's interest in the lease together with the selling agent's fee in respect of the said assignment.

Supreme Court Case

The plaintiffs/appellants appealed the High Court decision and counsel for the plaintiffs relied on the case of *Rendell v Robert and Stacey Limited*,⁴ a decision of the Queens Bench division in England and Wales. This case related to a lease which contained the following covenant by the tenant:

“[T]he Lessee will not assign, transfer, under-let or part with the possession of the said premises or any part thereof without the previous consent in writing of the Lessors and of the Superior Lessors but so that such consent shall not be unreasonably withheld to an assignment of the whole of the demised premises to a respectable and responsible person or limited company to the reasonable approval of the Lessors who shall in the case of an assignment enter into a direct covenant with the Lessors to pay the rent and perform the covenants and conditions and obligations therein contained.”

In this case, the defendant/landlord refused consent to assign and it was held that the refusal of consent was unreasonable. The issue at the hearing was whether or not the

⁴ 175F.G.265 [1960] E.G.D. 161.

refusal to grant consent amounted to a breach of covenant on the defendant's/landlord's part which would make it liable for damages. The plaintiff/tenant contended that the covenant was a covenant by the tenant not to assign without consent but that it amounted also to a positive covenant by the defendant/landlord that it could not withhold consent unreasonably. The plaintiff/tenant claimed that as the defendant/landlord was in breach of the covenant, the plaintiff/tenant was entitled to damages. The defendant/landlord claimed that the covenant was a covenant on the plaintiff/tenant not to assign without consent, qualified on the basis that the consent should not be unreasonably withheld. It was submitted that the effect of the covenant was that if the consent could be withheld unreasonably, the plaintiff/tenant would be entitled to assign without consent but that the covenant did not entitle the plaintiff/tenant to damages. The trial judge in that case referred to the case *Ideal Film Renting Company Limited v Nielsen*.⁵ It was noted in that case that there was an express covenant by the landlord not to unreasonably withhold consent in the case of a respectable and responsible assignee. Passing judgment in that case, Eve J. stated:

“It is established beyond controversy that if the covenant on the part of the lessee not to assign without consent is merely qualified by a proviso that the consent of the lessor is not to be unreasonably withheld there is no implied covenant by the lessor that he will not unreasonably withhold his consent and in the absence of an express covenant to that effect no action will lie against him for unreasonably withholding it”.

Passing judgment in *Rendell v Roberts and Stacey Limited*, Salmon J. having quoted the above stated:

“Eve J. was stating what had been clear law since the case of *Treloar v. Bigge* L.R. 9 EXCH151. *Treloar v. Bigge* had never been doubted up to the date of Eve J's judgement in 1921 and it has not been questioned since”.

In the case of *Treloar v Bigge*⁶ the covenant in issue was as follows:

“[A]nd the said Thomas Treloar doth covenant with the said T.E. Bigge that he shall not or will assign this present lease, or letting etc or otherwise part of the premises hereby demised, or any part thereof without the consent in writing of the said T.E. Bigge such consent not being arbitrarily withheld.”

⁵ [1921] I.C.H. 575.

⁶ [1874] L.R. 9 EXCH 151.

In this case Kelly C.B. held as follows:

“... Now the rule of law, no doubt, is that any words in a deed which impose an obligation upon another amount to a covenant by him; but the words must be so used as to show an intention that there should be an agreement between the covenantor and the covenantee to do or not do a particular thing. I cannot find any such intention here. Words taken grammatically do not seem to me to amount an undertaking by the lessor but are part of the same sentence as that containing the lessee's covenant and qualifying its generality.”

Supreme Court Decision

It was held that the case of *Kelly v Cussen and Cussen* related to the 1946 Act which was concerned with an implied covenant which differed significantly from the covenant in the lease as affected by s.66 of 1980 Act, which states that an application can be made to the court for a declaration where consent has been unreasonably withheld in which case the tenant is entitled to assign without consent. The court also held that it was satisfied that if *Treloar v Bigge* represented the law in Ireland, the effect of s.66(1) of the 1980 Act was not to impose a statutory duty but rather to regulate the construction of covenants freely entered into between a landlord and a tenant. It also held that it was satisfied that if the Oireachtas intended to confer upon a tenant a cause of action that it would have done so in clear and unambiguous terms and that s.66 of the 1980 Act did not alter the common law by providing an action for damages where none had previously existed. It was held that the defendant had no right of action for damages. A tenant would only have a right to damages where there was an express covenant by the landlord in the lease in this regard. The judgment of the High Court was set aside and accordingly it was unnecessary to consider whether the plaintiffs/appellants in refusing consent to the assignment of the lease to CWL had acted unreasonably.

Conclusion

It is apparent that the only course of action that a tenant has when a landlord unreasonably withholds consent is to seek a court declaration to this effect in order that the tenant may alienate the premises without the consent of the landlord. Alternatively a tenant may choose to assign without consent which may be considered risky, particularly if the landlord makes an application to the court seeking an injunction to prevent the assignment or for damages for breach of covenant in the lease and the court holds that the withholding of consent is

reasonable. Also in such circumstances the landlord may seek to forfeit the lease. However, relief against forfeiture may be obtained by the tenant under s.35(1) of the Landlord and Tenant (Ground Rent) Act 1967. In respect of leases that are currently in place, a greater onus now rests with landlords to act reasonably rather than unnecessarily withholding and delaying applications for consent resulting in financial hardship for tenants who are now dependent upon the goodwill of landlords in granting such consent. Given the harsh economic climate coupled with rents that are now deemed overinflated there has and will be an even greater need for tenants to alienate particularly those who are struggling to pay the rents. Delays by a landlord in granting consent may result in a proposed assignee/sub-tenant withdrawing from the proposed transaction which could lead to the tenant becoming bankrupt or going into examinership/receivership which is not in the interest of the landlord or the tenant, nor is it for the common good of society which is enduring increasing unemployment rates. When negotiating leases, it is now crucial for a tenant to ensure that the landlord agrees to an express covenant being provided in the lease to the effect that he shall not unreasonably withhold or delay his consent to an application by the tenant to alienate the premises. Given the similarity of ss.67 and 68 of the 1980 Act which relate to change of user and the carrying out of alterations, it stands to reason that the landlord also agrees to an express covenant not to withhold or delay his consent in relation to an application made by the tenant to a change of user and to the carrying out of alterations.

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