Property Litigation column: Give me one good reason: licence to assign

by ***Tim Hammond***, **Barrister, *Tanfield Chambers***

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This article provides a summary of the governing principles that apply if both "good" and "bad" reasons are given by a landlord when refusing consent to assign a lease.

A lease may contain either an absolute or a qualified covenant regarding assignment. If there is an absolute covenant, that will prohibit assignment. If, however, there is a qualified covenant, the tenant will be able to assign in certain circumstances. The qualified covenant may itself state that consent shall not be unreasonably withheld. If not, section of 19(1)(a) of the Landlord and Tenant Act 1927 sets out that this will be implied.

Section 1 of the Landlord and Tenant Act 1988 (LTA 1988) applies to a tenancy which includes a tenant covenant not to assign without consent and where that consent is not to be unreasonably withheld. When a landlord is served with a written application for consent by the tenant, it has a duty under the LTA 1988, if consent is being withheld, to provide the tenant with written notice of its reasons for withholding consent.

What is the effect if the landlord provides multiple reasons for refusal – some objectively "good", some objectively "bad"? Do the "bad" reasons cancel out the "good" ones?

This issue has been addressed on several occasions in the courts: first instance decisions of Gibson J in *British Bakeries (Midlands) Ltd v Michael Testler & Co Ltd [1986] 1 EGLR 64* and Neuberger J in *BRS Northern Ltd v Templeheights Ltd [1998] 2 EGLR 182* provide useful early guidance.

In *British Bakeries* it was said (at paragraph 64) that if a landlord has a good reason and a bad reason for withholding consent, consent may nevertheless have been reasonably withheld if the good reason is a sufficient reason and is not otherwise vitiated by the bad reason.

In *BRS Northern* it was said (at paragraphs 192 to 193) that where a refusal of consent to an assignment is based on a number of reasons, the fact that one of those reasons is bad will not normally render the refusal unreasonable, assuming that the others are good. Ultimately, however, it is a question of considering the covenant and the refusal of consent in each case. For example, it may be clear that the bad reason is by far the most important reason, and that the purportedly good reasons were merely makeweights, or it may be that the existence of the bad reason infects or vitiates what would otherwise, in the absence of the bad reason, be a good reason.

The law was reviewed and applied by the Court of Appeal in *No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2018] EWCA Civ 250*. In that case, Lewison LJ confirmed the relevant principles as follows, at paragraphs 35, 40 and 41:

- To describe one reason as having "infected" another implies some connection between them. If the good reason is freestanding, and not dependent on the bad reason, it would seem on the face of it that there has been no infection of the good by the bad.
- If a reason is merely a makeweight, then absent that makeweight, the decision cannot have been caused by that reason.
- If the decision would have been the same without reliance on the bad reason, then the decision (looked at overall) is good. In that situation, the bad reason will not have vitiated or infected the good one.

The relevant question to ask is: would the landlord still have refused consent on the reasonable grounds, if it had not put forward the unreasonable ground? The issue is whether the decision to refuse consent was reasonable, not whether all the reasons for the decision were reasonable.

The approach to be taken where both "good" and "bad" reasons for refusal have been provided was raised once again recently in the High Court case of *Davies-Gilbert v Goacher [2022] EWHC 969*. The principles above were considered and applied in context.

This was in fact a case that concerned whether a party with the benefit of a freehold restrictive covenant had unreasonably refused consent to another's proposed construction of dwellings on land in East Dean, East Sussex. Two reasons were provided by the covenantee for the refusal:

- The development would have a detrimental impact on the amenity value of the covenantee's entire estate, rather than just the part that benefited from the covenant.
- The development could threaten the future use and commercial value of the covenantee's immediately neighbouring land, which did benefit from the covenant.

It was held that the first reason was a "bad" reason as it related to irrelevant land. It was then argued on behalf of the developers that because the covenantee took into account and considered irrelevant matters when considering the application for consent, it necessarily followed that the reasons read as a whole were unreasonable.

HHJ Claire Jackson stated (at paragraph 152) that it does not follow that simply because a person has taken into account an irrelevant consideration, whether as part of their overall reasoning or their reasoning on a specific issue, that their reasons are "automatically bad". It does not follow that because a reason given is bad that all reasons given are bad. She referred to Lewison LJ's analysis in *No.1 West India Quay* and said (at paragraph 64(h)) that the Court must make an enquiry into whether there is a connection between the reasons or if the reasons are free-standing and whether the good reason, which is more than a makeweight, is not dependent on the bad. When that enquiry was made in *Davies-Gilbert*, it was clear on the evidence that the two reasons were freestanding. The second reason related to different land and, on the evidence, was determined not to be a makeweight reason; rather, it was a reason of substance in its own regard.

It therefore stands to reason that, if a landlord provides both "good" and "bad" reasons for refusal, so long as it has given one objectively "good" reason for refusal and that reason is both freestanding from the other reasons and of substance, that should be sufficient reason to withhold consent.

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