**OUTER HOUSE, COURT OF SESSION**

**[2015] CSOH 49**

**CA210/14**

OPINION OF LORD TYRE

In the cause

HOMEBASE LIMITED

Pursuer;

against

GRANTCHESTER DEVELOPMENTS (FALKIRK) LIMITED

Defender:

**Pursuer:  Lindsay, QC;  DWF LLP**

**Defender:  Dunlop QC;  Brodies LLP**

30 April 2015

**Introduction**

[1]        The pursuer is the tenant, and the defender the landlord, of retail premises in Central Retail Park, Grahams Road, Falkirk.  I shall refer to the parties as “the tenant” and “the landlord” respectively.  The lease in favour of the tenant was granted by a predecessor of the landlord for a period of 25 years from 10 November 1995.  The tenant wishes to assign its interest in the lease to a company called CDS (Superstores International) Limited (“CDS”).  The landlord has not consented to the assignation.  The issue in the case is whether the landlord’s consent has been unreasonably withheld.  The material facts are not in dispute and parties were agreed that the case could be decided on the basis of legal argument.

**The terms of the lease**

[2]        Clause 5 of the lease contains the tenant’s obligations.  These include:

“5.9.1.  Permitted Use

 Not to use the Premises other than:

5.9.1.1  as a non-food retail unit or units for the retail sale of do-it-yourself products or materials, home maintenance, home adornment and home improvement products, kitchen and bathroom fitments and equipment, tools and machines, plants and garden furniture, garden produce and supplies, including as ancillary to the foregoing the sale of confectionary or the sale for consumption on the Premises of hot and cold non-alcoholic beverages and light refreshments; or

5.9.1.2    for such other non-food retail purpose within Class 1 of the Schedule to the Town and Country Planning (Use Classes) (Scotland} Order 1989 (for which all requisite consents have been obtained from the feudal superiors) as the Landlord may first approve in writing, such approval not to be unreasonably withheld, in the case of some other retail trade or retail business which in the reasonable opinion of the Landlord does not conflict with the principles of good estate management;…

...

5.11.2   Assignation etc. of Whole

Not to assign, charge or otherwise dispose of or in any way deal with the Tenant’s interest in the whole of the Premises without the prior written consent of the Landlord which consent shall not be unreasonably withheld (in the case of an assignation) in the case of an assignee of sound financial standing demonstrably capable of fulfilling the Tenant’s obligations in terms of this Lease…

…

5.11.4   Sub-Letting – Test

 Not to sub-let:

5.11.4.1 the whole of the Premises; or

5.11.4.2            part only of the Premises other than a Permitted Part,

 in either case without obtaining the prior written consent of the Landlord, which consent shall not be unreasonably withheld…

5.11.5   Conditions of Sub-Letting

 Notwithstanding the foregoing provisions of this clause 5.11 not to grant a  sub-lease of the Premises unless:

5.11.5.1  the rent reserved by that sub-lease shall be at a rent which at the date of the grant of that sub-lease… in the case of a sub-lease of the whole of the Premises is equal to or greater than the open market rent for the Premises;

5.11.5.2  that sub-lease is granted on or subject to terms which do not require the payment of any fine or premium to the Tenant (other than by way of payment for tenant’s or trade fixtures and fittings) or the giving of any unreasonable incentive or the granting by the Tenant of any unreasonable rent free period…”

**Landlord’s reason for withholding consent**

[3]        The tenant has agreed in principle with CDS to assign its interest under the lease, subject to obtaining the landlord’s consent to the assignation and also to a proposed change of use which would allow the retail sale of goods not falling within the current permitted use.  In response to a letter from the tenant’s solicitors seeking those consents, the landlord’s solicitors, in a letter dated 11 June 2014, stated inter alia as follows:

“We are advised by our client that the terms of the contractual arrangements between your client and CDS involve payments being made by your client to CDS in consideration for the assignation.  Prior to our client being in a position to properly consider your client’s application for consent, our client requires to have further details of the proposed transaction between your client and CDS for the purposes of assessing any impact which that transaction may have on our client’s legitimate interest in terms of the Lease.  We should therefore be grateful if you would provide to us the terms of the agreement between your client and CDS insofar as they regulate any premium or deal in any with, or in any way relate to, the payment of sums which fall due to be paid to our client in terms of the Lease.”

[4]        The tenant refused to provide the information requested.  Its reasons for refusal were set out in a letter dated 24 June 2014 from the tenant’s solicitors as follows:

“The fact that any payment may or may not be passing between our clients and CDS is irrelevant in respect of your clients considering this consent application.  In that regard we would refer you to the assignation provisions contained at Clause 5.11.2 of the Lease.  Your clients should only be concerned with the identity and character of the proposed assignee and their ability to comply with the tenant’s obligations under the Lease.”

[5]        Correspondence continued between the parties’ solicitors.  The tenant maintained its position that the landlord was not entitled to the information requested, and accordingly no consent to the assignation or change of use was given by the landlord.  In the course of correspondence, the tenant did disclose to the landlord the information requested on a confidential basis.  According to the tenant’s note of argument, however, this was done “in order to maintain a good commercial relationship with the [landlord] and as a gesture of goodwill”.  The tenant did not ask the landlord to make its decision on consent in the light of the information provided.  It maintained, and continues to maintain, its position that the landlord is not entitled to the information and accordingly is unreasonably withholding consent by demanding it prior to making a decision.

[6]        It is accepted by the landlord that CDS is of sound financial standing and demonstrably capable of fulfilling the tenant’s obligations in terms of the lease.  That being so, the only issue is whether the information sought by the landlord is a relevant and material consideration for the purposes of its decisions under clauses 5.11.2 and 5.9.1.2 to consent or withhold consent to the proposed assignation and change of use application.

**Argument for the tenant**

[7]        On behalf of the tenant it was submitted that the terms of clause 5.11.2 were clear, and prescribed the relevant considerations that might be taken into account by the landlord.  Those were limited to the proposed assignee being of sound financial standing and demonstrably capable of fulfilling the tenant’s obligations in terms of the lease.  If the proposed assignee satisfied those requirements, it was unreasonable for the landlord to withhold consent.  The issue of whether a rent subsidy or reverse premium was to be payable by the tenant to the proposed assignee was a collateral matter falling outside the considerations specified as relevant by clause 5.11.2.  Failure to provide information relating to such matters could not therefore be a ground upon which consent could reasonably be withheld.

[8]        In International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd [[1986] Ch 513](http://www.bailii.org/ew/cases/EWCA/Civ/1985/3.html), Balcombe LJ set out at p 519-20 a number of legal propositions, applied inter alia  by Lord Drummond Young in Burgerking Ltd v Rachel Charitable Trust 2006 SLT 224 at paragraph 16.  The second of these was that

“…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”.

In Norwich Union Life Insurance Society v Shopmoor Ltd [[1999] 1 WLR 531](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWHC/Ch/1997/368.html), this proposition was held to apply to a refusal of consent to subletting of a unit in a shopping centre at a rent below market rates, on the ground that this could have a detrimental effect on the level of rents obtainable for other shops in the centre.  The present case was analogous.  It must have been in the contemplation of the parties to a 25-year lease that there would be assignations and sub-lettings from time to time.  In contrast to the position under clause 5.11.5 regarding sub-letting, the lease itself contained no provision prohibiting rent subsidy on assignation.  This was not an oversight and indicated that the parties had agreed that there was to be no control exercisable by the landlord over such a matter.  The element of judgment implicit in the “reasonableness” of withholding consent referred to the landlord’s assessment of whether the criteria specified by 5.11.2 were fulfilled by a proposed assignee.  The court might disagree with the landlord’s assessment yet nevertheless find it not to have been unreasonable.  Here, however, it was admitted that CDS fulfilled the criteria, and so consent could not reasonably be withheld.

**Argument for the landlord**

[9]        On behalf of the landlord it was submitted that clause 5.11.2 specified a two-stage test.  The first stage was to determine whether the proposed assignee’s covenant was good, i.e. whether it was of sound financial standing and demonstrably capable of fulfilling the tenant’s obligations.  If and only if that test was satisfied, one passed to the second stage, which was to determine whether there were reasonable grounds for a refusal of consent by the landlord.  The two-stage approach had been explained by AL Smith LJ in Bates v Donaldson [1896] 2 QB 241 at 246-7 as follows:

“It will be seen that it is only when a respectable and responsible person is proposed as assignee or undertenant that this clause (as to the permission not being unreasonably withheld) comes into play.  If the person proposed be not a respectable and responsible person, the lessor has an absolute right to refuse permission; if, however, the person proposed be respectable and responsible, then the lessor cannot unreasonably withhold his permission.”

The same approach had been taken in Burgerking Ltd v Rachel Charitable Trust (above), in which it was held that consent to sub-letting had been reasonably refused albeit that the proposed sub-tenant was held to meet the criteria of being substantial and respectable and of sound financial standing.  It had also been adopted in Burgerking Ltd v Castlebrook Holdings Ltd [2014] CSOH 36, a decision of mine.  It had been implicitly adopted by the House of Lords in Ashworth Frazer v Gloucester City Council [[2001] 1 WLR 2180](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/2001/59.html), which could not have been decided as it was if the grounds upon which consent could reasonably have been withheld were restricted to the respectability and responsibility of the proposed assignee.  Moreover, the question whether a prospective tenant was of sound financial standing fell to be determined on an objective basis: it did not admit any exercise of reasonable judgment.  The tenant’s construction failed to give any substance to the word “reasonably” in clause 5.11.2.

[10]      As regards the reasonableness of the withholding of consent, the court should not determine by strict rules the grounds on which a landlord might reasonably or unreasonably refuse consent: Ashworth Frazer Ltd v Gloucester City Council (above), Lord Rodger of Earlsferry at para 67, applying a dictum of Lord Denning MR in Bickel v Duke of Westminster [1977] QB 517 at 524.  In the circumstances of the present case, payment of a rent subsidy or reverse premium was highly material to the landlord as it might adversely affect the rent receivable after the next review date, thereby impacting upon the investment value of the property.  It was therefore reasonable for the landlord to seek that information before making a decision whether or not to consent to the assignation.  Reference was made to Norwich Union Life Insurance Society v Shopmoor Ltd (above), Sir Richard Scott V-C at 547; NCR Ltd v Riverland Portfolio (No 1) Ltd (No 2) [2005] L&TR 503, Carnwath LJ at para 30; Burgerking Ltd v Rachel Charitable Trust (above), Lord Drummond Young at paras 26-30.

**Decision**

[11]      In my opinion the submissions on behalf of the landlord are to be preferred.  I accept, firstly, that a two-stage approach along the lines described by AL Smith LJ in Bates v Donaldson (above) must be adopted.  The first stage is to determine whether the proposed assignee meets the financial test specified in the lease, the test in this case being whether the assignee is of sound financial standing demonstrably capable of fulfilling the tenant’s obligations.   That determination must be made on an objective basis (Scottish Tourist Board v Deanpark Ltd 1998 SLT 1121, Lord Penrose at 1126) and admits of an affirmative or negative answer without opening up the possibility of any exercise of reasonableness by the landlord.  As AL Smith LJ observed, if the proposed assignee fails to meet this test, the landlord has an absolute right to refuse consent.  On the other hand, where, as here, the proposed assignee meets the financial test, one passes to the second stage, and the landlord’s consent can be withheld only if withholding is reasonable.  In my opinion this construction of the clause accords with commercial common sense.  There may be good reasons, unconnected with the financial standing of the proposed assignee, why a landlord might wish to withhold consent, although he will not be entitled to do so if the reasons have nothing to do with the relationship of landlord and tenant in regard to the subjects leased.  The terms of clause 5.11.2, which are not at all unusual, protect the landlord from having his premises used or occupied in an undesirable way (cf Balcombe LJ’s first proposition of law in International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd (above) at page 519).

[12]      The question in the present case is whether the landlord has reasonably withheld consent on the ground of the tenant’s refusal to provide information as to whether it has agreed with the proposed assignee to make any payment by way of rent subsidy or reverse premium.  In my opinion the landlord’s request for this information is reasonable, entitling it to withhold consent unless and until the information is supplied.  There are ample judicial dicta recognising that the payment of a rent subsidy or reverse premium may affect the rental value of the property.  Perhaps the clearest is the observation of Sir Richard Scott V-C in the Norwich Union v Shopmoor case at page 547 that

“…there can be no question but that the landlord can reasonably refuse consent if the assignment will result in a diminution in the value of the rental value of the property itself.”

The court went on in that case to hold that in the case of a subletting of premises comprised in a 150 year lease, there could be no suggestion of any such diminution.  The principle was, however, regarded as well established.  Similarly, in Burgerking Ltd v Rachel Charitable Trust (above), Lord Drummond Young held (para 30) that payment of a very substantial reverse premium was likely to have an effect on the rent determined at the time of the next letting of the premises, and that that was sufficient to render the defenders’ decision to withhold consent one that a reasonable landlord might make.  It is clear that where the landlord’s concern relates to the effect of a rent subsidy or reverse premium on the level of rental likely to be obtainable in future for the same property, as opposed to, for example, other retail units within the same shopping centre (as in Norwich Union v Shopmoor), this is not a collateral matter falling within Balcombe LJ’s second proposition.  I do not accept the submission on behalf of the tenant that because any lease of the premises in five years’ time would be a different lease with, perhaps, a new tenant, the landlord’s concern was properly characterised as collateral.  Such a contention is inconsistent with the authorities to which I have referred and attributes too wide a scope to Balcombe LJ’s proposition, which refers to grounds that have “nothing whatever” to do with the relationship of landlord and tenant of the premises in question.  That cannot, in my opinion, be said of a matter which is said to be capable of having a significant and adverse effect on the future rental value of those premises.

[13]      If, as I have held, the payment of a rent subsidy or reverse premium is a matter which might – and I need put it no higher than that – reasonably affect the landlord’s decision whether or not to consent to the proposed assignation to CDS, then it follows that it is reasonable for the landlord to require the supply of that information before making its decision.  It further follows that the landlord is not acting unreasonably in withholding consent either to the assignation or to the change of use on the ground that the tenant is refusing to supply the information.

**Disposal**

[14]      The tenant has not established that it is entitled to any of the declarators which it seeks.  I shall accordingly repel the pursuer’s pleas in law, sustain the defender’s first plea in law (a general relevancy plea) and dismiss the action, reserving questions of expenses.