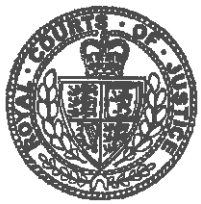

Neutral Citation Number: [2018] EWCA Civ 427

Case No: A3/2017/0192 & 0192(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Richard Millett QC (sitting as a Deputy Judge of the High Court)
HC-2016-000654

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 March 2018

Before :

LORD JUSTICE PATTEN
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE MOYLAN

- -

Between :

WARBOROUGH INVESTMENTS LIMITED	**Appellant/ Defendant**
- and -	
LUNAR OFFICE S.A.R.L.	**Respondent/ Claimant**

- -
- -

Mr Edwin Johnson QC (instructed by **Rex Cowell Solicitors**) for the Appellant
Mr David Holland QC (instructed by **Hamlins LLP**) for the Respondent

Hearing date : 6 February 2018

- -

Approved Judgment

Lord Justice Patten :

1. The appellant, Warborough Investments Limited ("Warborough"), is the freehold owner and registered proprietor of some premises at 12-20 Denmark Street, Wokingham, Berkshire ("the Premises"). It acquired the Premises in October 2007 subject to a lease ("the Head Lease") dated 16 April 1980 for a term of 99 years from 25 March 1980 which was granted by its predecessor in title, Wokingham District Council, to a company called Power Investments Limited. The respondent company, Lunar Office S.A.R.L ("Lunar"), is the current lessee by assignment and was registered as the owner of the lease on 4 April 2014.

2. The Premises comprise a row of four self-contained shops with offices above which front on to Denmark Street. Behind this is a courtyard containing two office blocks (Seymour House and Resource House) together with a car park.

3. The Head Lease appears from its terms (see clause 2) to have been a building lease but there are no other relevant extant documents which cast any light on the factors which dictated its terms or are admissible as an aid to their construction. As one would expect in a lease of this kind, the rent reserved for the first five years of the term is the greater of £12,500 per annum; a sum equivalent to 20% of the rack rental value (calculated as the aggregate of the net rental income from any underleases of parts of the Premises and whatever would have been the market rental value of the unlet parts at the date of the lease); and the rent of £12,500 per annum plus half of the amount by which the rack rental value of the Premises exceeds the annual sum of £75,000. There are then five yearly rent reviews by reference to the formula set out in the Second Schedule which I will come to later in this judgment.

4. Clause 4 of the Head Lease contains the tenant's covenants. This is a full repairing and insuring lease (see clause 4(6)-(12)). In clause 4(14) the tenant also covenants not to make any structural alterations or to erect any new building without the landlord's consent and in clause 4(18) not to use the Premises or any part thereof other than as shops, offices, car park, pedestrian way and landscaped areas. Clause 4(21) contains various covenants by the tenant not to assign or underlet the Premises except upon certain terms and conditions and it is these provisions which are in issue on this appeal. Set out in full, they provide as follows:

> "(21)
>
> (a) Not at any time during the term hereby granted to assign part only of the demised premises and not at any time during the said term to assign this Lease without the previous consent in writing of the Lessor which consent shall not be unreasonably withheld
>
> (b) Not at any time during the term hereby granted to underlet or part with possession of the whole or any part of the demised premises other than by written underlease which shall not be in respect of less than complete floors or shop units for terms of not less than 10 years and at such rent or rents and upon such terms generally (including provision for the periodic review of rent at five

> yearly intervals) as shall accord with the principles of good estate management and with the duty (which is hereby imposed specifically upon the Lessee) of managing the demised premises to the best commercial advantage of the parties hereto
>
> (c) Not at any time during the said term without the consent in writing of the Lessor first obtained such consent not to be unreasonably withheld to grant an Underlease or Undertenancy of any part of the demised premises except at a rent which shall represent the best rent reasonably obtainable for the premises concerned as between a willing lessor and a willing lessee
>
> (d) Not at any time during the said term on the granting of any such Underlease or Undertenancy take a fine or premium."

5. On 9 August 2011 Oak Business Limited ("OBL"), which was then the tenant of the Premises under the Head Lease, granted an underlease ("the Underlease") of part of Resource House for a term of 10 years commencing on (and including) 1 December 2008 and expiring on 30 November 2018. The premises demised by the Underlease are described in Schedule 1 as:

> "Part of that suite of offices shown edged red on the Plan together with the ground floor lobby and staircase from ground to first floor and the appurtenances thereto belonging and situate on the first floor and being part of the building ("Building") known as Resource House, The Courtyard, Denmark Street, Wokingham, Berkshire….."

6. It is common ground between the parties that the premises demised by the Underlease do not comprise a complete floor of Resource House nor was the Underlease granted for a term of not less than 10 years so that at least two of the conditions referred to in clause 4(21)(b) of the Head Lease were not complied with. On 5 February 2016 Warborough served a notice on Lunar pursuant to s.146 of the Law of Property Act 1925 specifying a breach of the covenant against underletting contained in clause 4(21)(b). Lunar responded by bringing a claim in which it sought declaratory relief that, on the true construction of the Head Lease, the grant of the Underlease did not amount to a breach of covenant or alternatively that Warborough had waived either its right to rely on clause 4(21)(b) or its right to forfeit by reason of a breach of that covenant.

7. We are not concerned on this appeal with any issue of waiver. On 10 May 2016 an order was made by consent for the trial of a preliminary issue in the action as to whether the grant of the Underlease constituted a breach of clause 4(21)(b). Although framed in terms of the pleadings, the central issue is whether clauses 4(21)(b) and (c) take effect as separate covenants in the sense that even if an underletting is not of a whole floor or shop unit and is for a term of less than 10 years, it will still be lawful if the conditions in clause 4(21)(c) are met; or whether they are what has been described as cumulative in their effect so that a breach by the tenant of sub-clause (b) is a breach

of covenant regardless of whether the tenant is or is not also in breach of sub-clause (c).

8. The descriptions of the two covenants as "separate" or "cumulative" which are the words used in the pleadings are not wholly accurate. Mr Johnson QC for Warborough accepts that the covenants are separate in the sense that they each impose a separate obligation on the tenant not to underlet the Premises or part of the Premises other than in compliance with the covenant. His use of the word "cumulative" means no more than that each of the covenants contained in clause 4(21) has to be observed during the term of the Head Lease so that a tenant who, as in this case, decides to underlet part of the Premises must ensure not only that the lease is of at least a complete floor or a shop unit and for a term of not less than 10 years (clause 4(21)(b)) but also that it is granted with the landlord's consent and at the best rent reasonably obtainable (clause 4(21)(c)). The two sub-clauses are cumulative in the sense that they are not alternatives. Mr Holland QC for Lunar contends that the two sub-clauses are separate in the sense that they are self-contained, alternative routes to the grant of a lawful sub-tenancy so that a tenant who grants an underlease of less than a complete floor or for a term shorter than 10 years is not subject to and therefore in breach of the covenant in clause 4(21)(b). The underlease will have been lawfully granted if consent is obtained in accordance with clause 4(21)(c) and the underlease is granted at the best rent reasonably obtainable.

9. The Deputy High Court Judge (Mr Richard Millett QC) accepted Mr Holland's submissions on the construction of clause 4(21): see [2017] EWHC 19 (Ch). There is a subsidiary issue between the parties as to whether the landlord's consent was in any event required under clause 4(21)(c) of the Underlease which turns on whether "lessor" in s.19(1)(b) of the Landlord and Tenant Act 1927 means only the original lessor (a local authority) or includes the lessor from time to time. But the judge was not required to decide that question as part of the preliminary issue and it does not arise as part of this appeal.

10. Despite describing the landlord's argument as, up to a point, compelling, the judge in the end came down firmly in favour of the tenant. He noted that there are no words in clause 4(21) which expressly link sub-paragraph (c) to sub-paragraph (b) such as a cross-reference or proviso. Instead the two sub-clauses contain separate negative covenants against sub-letting each with its own separate conditions or exceptions. This was not, he said, fatal to the landlord's construction of the clause but what was important if not essential to the landlord's argument was that the reference in both sub-clauses to "any part of the demised premises" should be construed as applicable to the part of the Premises comprised in the Underlease. Although the judge acknowledged that the natural instinct, as he put it, was to read them as meaning the same thing, that was the wrong approach:

> "41. In my judgment it is wrong to read them that way. Under paragraph (b), the object of a permitted underletting, by way of exception to the absolute prohibition on underletting, is *"any part of the demised premises"* which is *"not less than a complete floor or shop unit"* (since that is the first condition), on the further terms that follow. Under paragraph (c), on the other hand, the same expression is not so limited: it can be more or less than a complete floor or shop unit. In each

paragraph the word "part" is informed by its immediate context. Under paragraph (b), *"any part of the demised premises"* available for underletting by way of exception to the total ban cannot be for less than a complete floor or shop unit, whereas under paragraph (c) it can. The point is that the exceptions to the negative covenant on partial underletting contained in each of paragraph (b) and paragraph (c) do not have the same subject-matter, in terms of what premises may be underlet by dint of the exceptions within them. Paragraph (b) prohibits all underletting unless in respect of a complete floor or shop unit, and imposes additional conditions for such a sub-letting. Paragraph (c) prohibits all underletting whether or not in respect of a complete floor or shop unit, and imposes different exceptions and conditions.

42. By treating the word "part" in paragraph (c) as having the same application as in sub-paragraph (b) the Defendant's construction amounts to a total prohibition on any underletting save in respect of a complete floor or shop unit, such that the Lessee, for the entire 99 years of the Lease, cannot underlet any part of the Premises which does not comprise a complete floor or shop unit. In addition, any underletting of that complete floor or shop unit must satisfy the five other conditions in paragraph (b) and also the conditions in paragraph (c). I will return later to the commercial impact of such a construction and the objective likelihood that the parties intended it.

43. In my judgment, although the negative covenants under each of paragraph (b) and (c) are the same (no underletting of *"any part"* of the demised premises), the ambit and object of the exceptions to each negative covenant is different. If the proposed underletting, by way of exception, is a complete floor or shop unit, then provided that the other five conditions contained in paragraph (b) are met, there is no need to seek the Lessor's consent or satisfy the condition as to best market rent as required under paragraph (c). As Mr Holland put it orally, paragraph (b) is "an island of consent in a sea of prohibition". The metaphor is ungainly but apt. For underletting parts of the demised premises which comprise complete floors or shops, paragraph (b) is a self-contained set of pre-conditions, which if satisfied permit the Lessee to underlet without exposure to what Mr Johnson called the "vagaries" of reasonableness of the Lessor's withholding of consent.

44. If, on the other hand, the proposed underletting is for a part of the demised premises which is more or less than a complete floor or shop unit, or for a complete shop floor then the exception to the negative covenant in paragraph (b) cannot apply at all. However, paragraph (c) provides a separate set of exceptions to the same negative covenant, albeit one which is

> repeated at the start of paragraph (c). If that set of exceptions is satisfied then the Lessee may underlet.
>
> 45. It is true that on this reading the Lessee might seek to underlet a complete floor or shop unit but fail any of the other five remaining conditions, and can still rely on paragraph (c) to escape the prohibition on underletting. However, that does not detract from the primacy of the importance of the proposed underletting as a complete floor. If, as Mr Johnson put it, paragraph (b) was an *"anti-patchwork covenant"*, then it would not undermine its efficacy to permit the Lessee to underlet a complete floor but (say) for a term of less than 10 years provided it had the Lessor's consent and it was for the best available rent under paragraph (c). It would enable the Lessor to ensure that there was no patchwork and otherwise to police the terms of the underletting.
>
> 46. Accordingly, in my judgment the right way of reading these two paragraphs together is that they contain the same negative covenant against underletting any part of the demised premises (the fact that paragraph (b) also applies to the whole is not relevant for present purposes), but that each provides different sets of exceptions to the negative covenant depending on the nature of the part proposed to be underlet and the terms of the proposed underletting. That explains why they are contained in two separate paragraphs within the Covenant, namely to indicate that there are two separate sets of available exceptions to a single (but repeated) negative covenant."

11. The judge supported this construction of clause 4(21) by a number of considerations which Mr Holland has relied upon in argument on this appeal. First, as a matter of drafting, some reliance, as I have already mentioned, is placed on the absence of any express link between sub-clauses (b) and (c) such as to indicate that they are to be read as cumulative in the sense I have described. The judge considered that the landlord's construction required one to insert the word "such" before the words "part of the premises" in sub-clause (c) which would, as he put it, re-write the parties' bargain. The use of the word "such" in sub-clause (d) shows, he said, that they could use it when it was appropriate. Secondly, he thought that it was significant that the parties to the Head Lease had separated the contents of (b) and (c) into two different covenants. Had it been their intention to require the tenant to satisfy eight conditions before being able to underlet part of the premises this could have been done by a single clause with a single set of conditions or exceptions.

12. The third matter the judge relied on was the alleged lack of commerciality in requiring the tenant to underlet only complete floors or shop units for the duration of a 99 year lease. The Head Lease contemplates the possibility of alterations or even redevelopment of the Premises during the currency of the term (see clause 4(14)) which points, Mr Holland says, away from a construction of clause 4(21) that would require any sub-letting throughout the term to be for a minimum portion of a building or buildings that might no longer exist in precisely that form. The judge said that the

imposition of such a condition in a long commercial lease would have had to be spelled out in clear terms.

13. The judge also accepted Mr Holland's submission that the requirement in sub-clause (b) for the terms of an underlease to accord with the principles of good estate management might conflict with the need under (c) for it to be at the best rent. Examples were suggested in argument before us of the need (in the interests of estate management) to secure an important anchor tenant even if that might involve agreement to a rent-free period. Conversely there might be a tenant that would be willing to pay a very high rent in order to get into a development but whose inclusion might create problems in terms of tenant mix. The judge did not accept that the potential for conflict was removed by the use of the words "reasonably obtainable" in sub-clause (c). The provisions of that sub-clause were unqualified by any reference to the interests of good management under sub-clause (b).

14. Mr Holland's next point was that if sub-clauses (b) and (c) had both to be complied with then there could be no further underlease of the Premises or part of it during the last ten years of the term. This would expose the tenant to the risk of unrented voids within the Premises in that period which could not be filled by new underlettings. The tenant would, however, remain liable to pay rent under the Head Lease calculated by reference to the rack rental value of the Premises. If the tenant is right, this problem could be avoided by the tenant being able to re-let the vacant parts.

15. The next point relied on by the judge concerns the rent review provisions contained in clause 3 and the Second Schedule of the Head Lease. The rent is reviewable every 5 years to what at the review date would amount to 20% of the rack rental value of the Premises. This is defined in paragraph 1(b) of the Second Schedule as:

> "the yearly rack rent of the Unit in question and at rent review date the aggregate of the yearly rack rents of the whole of the lettable accommodation comprised in the demised premises assuming such yearly rack rents are established in the open market by a willing Landlord letting to willing Tenants for a term of years and with rent reviews appropriate to the market conditions prevailing at the appropriate review date so far as practicable in all other respects identical with the terms of the lease or leases effecting the occupational underlettings in force on the first rent review date or the relevant rent review date as the case may be".

16. Mr Holland relies on the fact that under this formula there is on the landlord's construction a mismatch between the type of underleases which are permitted under clause 4(21) and the assumption which is made to determine the rack rental value of the Premises at the review date. The tenant is prevented from subletting for a term of less than 10 years even if under the market conditions then prevailing most commercial leases would be for a much shorter term. This is likely to lead to a difference between the rent achievable by the tenant in compliance with clause 4(21) and the notional market rent based on a shorter term. Even though the judge had no evidence about the terms of a typical commercial lease granted in the 1980s and declined to take judicial notice of what was then the position, the parties, says Mr Holland, must be taken to have foreseen that not only the buildings within the

Premises but also market conditions governing lettings would change over a period of 99 years and can be expected to have provided the flexibility in the Head Lease to deal with it.

17. On the tenant's construction of clause 4(21) the judge had to consider the landlord's argument that without the combined effect of sub-clauses (b) and (c) it would be left having to rely exclusively on being able to show that its refusal of consent to a subletting was reasonable. The judge thought that the requirement to obtain landlord's consent to any subletting of part under (c) made it difficult to understand why the parties should have agreed to set out the conditions in (b) if the two sub-clauses were both to apply in every case. This would be likely, he said, to lead to uncertainty and dispute. Mr Holland submits that in most cases the provision for withholding consent is the landlord's main protection against unsuitable subletting and that the authorities give the landlord a considerable measure of control by allowing him to give priority to his own commercial interests in determining whether a refusal of consent is unreasonable: see *NCR Limited v Riverland Portfolio (No 1) Ltd (No 2)* [2005] L&TR 25: But as the judge seems to have recognised (although it is not clear to me what weight he attached to this) the Court of Appeal has recognised in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513 that there may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if consent is withheld as to make it unreasonable for the landlord to refuse consent: see Balcombe LJ at page 521C-D.

18. The judge summarised his conclusions in these terms:

> "59. Standing back, it is to my mind commercially highly unlikely that the parties would have sought to impose on the Lessee such a heavily circumscribed and inflexible set of conditions on underletting that accumulation of paragraphs (b) and (c) produces when underletting was the very commercial purpose of the Lease from the Lessee's point of view. In particular, there is no good commercial rationale I can see to explain why the Lessee should be forbidden from underletting at all in the last 10 years. That prohibition produces such a serious commercial disadvantage to the Lessee, particularly where during that period the Lessee would involve a rent review based on the market rack rental rates even if there were voids, that the parties cannot have intended it. It could only be solved by the Lessor granting consent under paragraph (c), and in such circumstances the Lessor would have an uphill struggle proving that withholding consent was reasonable.
>
> 60. The commercial purpose of paragraphs (b) and (c) as separate sets of exceptions to the covenants against underletting was to seek to achieve a balance between, on the one hand, giving long term flexibility to the Lessee to underlet parts of the Premises, and on the other, to provide long term protection to the Lessor from being faced with an unruly patchwork of underleases of parts of the Premises either during or at the end of the term. Reading them as separate sets of exceptions achieves that balance, whereas reading them as cumulative tilts

> the playing field disproportionately and unjustifiably in favour of the Lessor."

19. The starting point has to be the words used. As Lord Neuberger observed in *Arnold v Britton* [2015] AC 1619, the Court's primary task is to arrive at the proper construction of the lease by reference to what the reasonable and informed person with all the available and relevant background knowledge would have understood the parties to have meant by the words they used. This involves a consideration of the language in its context and by reference to its subject matter and to the other terms of the lease. But it is normally safe to assume that the parties intended to give the words they chose their natural meaning. In particular, there is a danger in approaching the construction of the document with pre-conceived ideas about what the parties, acting commercially, are likely to have intended and to allow those ideas to subvert the clear language of the document:

> "17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision.
>
> 18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.
>
> .....
>
> 20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose

> of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

20. The judge quoted this passage from Lord Neuberger's judgment but did not apply it. Having recognised that there is no evidence in this case of any relevant background circumstances beyond what is apparent from the Head Lease itself and having declined to take judicial notice of what the assumptions, practices and expectations of those letting commercial property in the 1980s may have been, the judge has, I think, allowed his own views of what would have been a sensible commercial regime to control subletting to prevail over what the parties have actually said and agreed.

21. Clause 4(21) contains an example of the kind of torrential drafting which is not uncommon in commercial leases of this kind. It is comprised of four sub-clauses none of which, as the judge observed, contain any express link to the others save for sub-clause (d) which refers to "such underlease" in the context of prohibiting the taking of a fine or premium. The first and perhaps most obvious point to make in terms of the structure of this clause is that what it contains are four separate or individual covenants by the tenant not to assign or underlet except upon certain terms and conditions. Both sub-clauses (a) and (b) contain absolute covenants (respectively) against the assignment of part of the Premises or the underletting of the whole or part of the Premises except upon certain terms. It is not suggested that there is anything unclear about the internal language used in sub-clause (b) and it is equally clear that the Underlease as granted was a breach of that covenant by Lunar's predecessor in title if one reads sub-clause (b) in isolation. Had clause 4(21) stopped at sub-clause (b) there could be no dispute about this.

22. The tenant's case depends upon reading sub-clause (c) as qualifying sub-clause (b) even though, as Mr Holland has emphasised, there is no express link between them whether by way of proviso or otherwise. The absence of such a link seems to me to point away from the tenant's construction rather than in favour of it. If the sub-clauses are to be read as separate, independent covenants by the tenant then each must be complied with in relation to any subletting by the tenant to which they apply. The same goes for every other tenant's covenant in the Head Lease. Mr Holland's case for Lunar is that if the tenant chooses to sub-let on terms other than those specified in the provisions of sub-clause (b) then the covenant in sub-clause (b) has no application to the sub-letting in question and instead the legality of what he has done is to be judged by reference to his covenant in sub-clause (c). This, I think, has the consequence that the tenant could avoid the restraints of sub-clause (b) by choosing not to comply with it and, subject to granting the underlease at the best rent, be able to respond to any refusal of consent by the landlord by contending that it was unreasonable. The landlord must therefore be taken to have agreed to substitute for the protection of an absolute covenant against underletting save on specific terms the qualified protection

of sub-clause (c) which would require him to justify his insistence on the sub-clause (b) conditions. This construction of clause 4(21) would render the covenant against underletting in sub-clause (b) a dead letter.

23. In my view this is an impossible construction of the lease. It proceeds, I think, from a wrong approach to clause 4(21) which is to treat each of the sub-clauses as if they were some kind of conditional permission for the grant of an underlease so that the tenant is free to choose between them as to which condition he is prepared to comply with. The proper approach is to recognise that these are a series of negative covenants by the tenant which, like any other covenant, require to be complied with according to their terms. The tenant would therefore only be relieved of complying with the covenant in sub-clause (b) if his covenant was qualified by a suitable proviso indicating that these are alternative routes to a lawful subletting. That would, I think, be a rather odd provision given the obvious scheme of drafting in the Head Lease but the short answer is that there is no such qualification as Mr Holland was at pains to emphasise.

24. The judge separated out the application of sub-clauses (b) and (c) by giving a different meaning to the phrase "part of the demised premises" where it appears in sub-clause (c). As explained earlier, he treated the meaning of that phrase as dependent upon the terms of the conditions which follow so that in sub-clause (b) it means a part which is not less than a complete floor or shop unit whereas in (c) it is entirely general and can mean any part of the Premises. But again, with respect to the judge, that misreads sub-clause (b). The tenant's covenant under (b) is in terms not to underlet part of the demised premises save on certain terms including that the underlease should be of a whole floor. That means that the tenant is not to underlet any part of the Premises unless that part comprises at least a whole floor. It is not a covenant by the tenant not to let a whole floor of the Premises except for a term of 10 years and upon the other terms specified in the sub-clause. The judge's construction completely re-writes sub-clause (b) and there is no warrant for it in the language used.

25. Mr Holland is, of course, right that if the intention was to require the tenant to comply with each of the covenants in clause 4(21) so far as material, the Head Lease could have been differently drafted using some kind of composite sub-clause to deal with subletting. But that is a point which can always be made and, in my view, it carries the matter no further. The Court has to give effect to the Head Lease as drafted and agreed by the parties. The fact that the same effect could have been achieved by some other form of clause does not assist.

26. Of more relevance are the consequences for the tenant which flow from the landlord's construction of the Head Lease. These are (i) the possibility of some conflict between the requirement in sub-clause (b) that the underlease should be on such terms as accord with good estate management and the provision in sub-clause (c) requiring the underlease to be granted at the best rent reasonably obtainable; (ii) the inconsistency between the requirement under sub-clause (b) to let whole floors or units and the possibility of re-development; (iii) the inability of the tenant to sub-let vacant parts of the Premises during the last 10 years of the term; and (iv) the potential for a mismatch between the rent payable by the tenant under the Head Lease and the rent available from authorised sub-lettings.

27. The difficulty envisaged in the first of these points is, I think, unlikely. The question of what terms the underlease should contain in order to satisfy the requirements of good management is something which will require to be assessed by the tenant having regard to the circumstances prevailing at the date when the underlease comes to be granted. For the same reason, the requirement to obtain the best rent reasonably obtainable will involve the tenant letting the relevant premises on the open market on the terms provided for under sub-clause (b). The rent referred to in sub-clause (c) is not a hypothetical rent but a rent for the premises on terms which comply with the tenant's covenant under (b). If good estate management justifies the grant of a lease with a rent-free period, for example, then the requirement to charge the best rent reasonably obtainable must take account of and accommodate that.

28. The Head Lease clearly did contemplate future development on the site. The definition of "demised premises" in clause 1(3) includes a reference to "buildings erected thereon and hereafter erected thereon". But the landlord is given a measure of control over any new building under clause 4(14) and there is no reason to assume that the parties contemplated that the Premises would change significantly over the term of the Head lease. This is confirmed by clause 4(18) which contains an absolute covenant prohibiting use of the Premises for any purpose other than as shops and offices with a car park and landscaped areas. There is nothing in this material to justify the reading of clause 4(21) on which the tenant relies.

29. It is correct that on the landlord's construction of clause 4(21) the tenant will be unable to sub-let a part of the Premises which becomes vacant during the last 10 years unless the landlord is prepared to waive compliance with the covenant in sub-clause (b). The judge (see [59] quoted above) attached particular importance to this and could see no good commercial rationale for excluding sub-letting during the last 10 years particularly given that the purpose of the Head Lease was to enable the tenant to recoup the expenses of constructing the Premises out of future rental income. The difficulty, however, about the judge's approach is that, as he himself found, there is no evidence to indicate that a building lease granted on these terms was outside the commercial norm in the 1980s or that the landlord had no good commercial reason for restraining sub-lettings close to the end of the term when he would have been concerned to avoid fragmentation of the lettable parts of the Premises. More important still, on the judge's preferred construction of clause 4(21), the ability of the tenant to sub-let (with consent) at any time during the term for periods of less than 10 years requires one to assume that the landlord was agreeable to there being no requirement for a minimum term of an underlease **at any time** during the 99 year term: not simply during the last 10 years. Given that the requirement for a 10 year term was thought important enough to be made a condition of an underlease covered by sub-clause (b) "at any time during the term", this seems to me to be implausible.

30. The existence of a mismatch between the basis of calculation of the rent under the Head Lease and the level of rent achievable on sub-lettings which are compliant with sub-clause (b) is also a possibility. But it needs to be borne in mind that the tenant under the Head Lease is only required to pay 20% of the rack rental value of the Premises as defined subject to a minimum of £12,500. The actual effect of any possible mismatch is not therefore likely to be significant in overall terms and depends in large part on market conditions a long time in the future which are difficult

to predict. Again, I do not regard this as a persuasive factor in favour of the tenant's construction of clause 4(21).

31. For these reasons, I consider that there is nothing in these wider considerations which can justify a departure from what in my view is the plain language of clause 4(21). The judge's construction of the phrase "any part of the demised premises" involves, as I have explained, a misreading of clause 4(21)(b) and requires one to give different meanings to identical words in successive sub-clauses of the Head Lease when there is nothing in the terms of the Head Lease itself or the surrounding circumstances to justify that. I would therefore allow the appeal.

Lord Justice David Richards :

32. I agree.

Lord Justice Moylan :

33. I agree also.