

The Landlord and Tenant Act 1988 served to refine section 19 (1) of the Landlord and Tenant Act 1927, which governs covenants not to assign without license or consent. The original text of the Landlord and Tenant Act 1927 Section 19 (1) stated a proviso in all leases signed prior or following the commencement of the act requesting the Landlord not to withhold consent to assign or sublet a lease at the request of a tenant, even in cases where assignment or subletting was prohibited by the terms of the lease, unless it was reasonable to withhold that consent. It is not unreasonable to see there may be instances where a tenant may need to shed themselves of the remainder of a 40 year lease, and the most reasonable way for them to do so is to assign or sublet until the end of the lease. Of course, the Landlord may wish to confound the interest of the tenant in their attempt to assign or sublet due to their own interests, something which the 1927 Act prior to amendment doesn't do much to prevent.

The Landlord and Tenant Act 1988 was created to plug the gaps in Section 1 of the 1927 Act. The foremost authority on the intended purpose of the act is cited in *Go West Limited v Spigarolo* [2003] EWCA Civ 17¹, as Sir Richard Scott V-C, who stated the following about the 1988 Act in *Norwich Union Life Insurance Society v Shopmoor Ltd* [1999] 1 WLR 531², P544F:

"The Act was intended to remedy the state of affairs in which a landlord, by his dilatory failure to respond to an application for consent to an assignment or to subletting, could cause substantial financial damage to the tenant without the tenant having any remedy for that damage. A tenant might lose a valuable property transaction because of the landlord's failure to deal expeditiously with the application for consent. It is clear that it was an intention of the Act to remedy that state of affairs. The Act creates a statutory duty requiring landlords to attend promptly to applications for consent to assignments, or underletting or parting with possession of premises comprised in a tenancy where there is a covenant not to do those things without consent."

This phrase from *Go West* was subsequently cited in *Design Progression Limited v Thurlow Properties* [2003] EWHC 324 (Ch)³, and *NCR Limited v Riverland Portfolio (No 1) Limited* [2005] EWCA Civ 312⁴ as an explanation of the 1988 Act's intent.

The Landlord and Tenant Act 1988's power stems from imposing a statutory duty on Landlords to respond to any application to assign or underlet from a tenant in reasonable time⁵, in writing⁶, stating any conditions attached to the consent to assign or underlet, or, if consent is refused, the reasons for refusing that consent⁷. If the Landlord fails to respond either in a reasonable timescale or at all, they are found to be in breach of statutory duty. In addition the Landlord, should they be questioned, must be able to prove the reasonableness of their response time and any conditions assigned to their consent, or if consent was not granted, the reasonableness of their refusal. The Landlord and Tenants Act (Covenants) 1995 inserts a provision into the Landlord and Tenant Act 1927

¹ *Go West Limited v Spigarolo* [2003] EWCA Civ 17, P24

² *Norwich Union Life Insurance Society v Shopmoor Ltd* [1999] 1 WLR 531, P544F

³ *Design Progression Limited v Thurlow Properties* [2003] EWHC 324 (Ch), P12

⁴ *NCR Limited v Riverland Portfolio (No 1) Limited* [2005] EWCA Civ 312, P11

⁵ The Landlord and Tenant Act 1988, Section 1 (3)

⁶ The Landlord and Tenant Act 1988, Section 3 (2b)

⁷ The Landlord and Tenant Act 1988, Section 1 (3b)

Section 19 (1A) stating the Landlord and Tenant Act 1988 "...shall have effect subject to the provisions of this subsection".

Reasonableness, as in most English law, is key in interpreting the statute. What is meant by a reasonable time, and reasonable refusal of consent? In *Go West Limited v Spigarolo* [2003] EWCA Civ 17, it was determined that the amount of "reasonable time referred to in section 1(3) will sometimes have to be measured in weeks rather days; but, even in complicated cases, it should in my view be measured in weeks rather than months."⁸ As outlined by Mr. Justice Mundy, the reasonable amount of time can be extended by virtue of further information within reason being requested by the Landlord, or agreement between the two parties;

"...what is a reasonable time cannot necessarily be determined when the tenant makes his application: one has to assess the question of what was a reasonable time as at the end of the period starting with the tenant's application".⁹

Justice Mundy also notes this reasonable time period serves as a buffer for the Landlord, so they may seek advice should they wish to refuse consent.¹⁰ When the Landlord issues notice to the tenant of their decision, in writing, the reasonable time is said to have elapsed. The application at this point is either accepted, with conditions attached to it, or rejected. Justice Mundy noted the Section 1 (3) of the Act states "a" notice from the Landlord.¹¹ Following the expiry of the reasonable period, any further correspondence is irrelevant to the application. This means the expiry of the reasonable amount of time is determined in part by the point at which the Landlord informs the tenant of their decision. Both parties in *Go West Limited v Spigarolo* [2003] EWCA Civ 17 ignored the initial notice served on 30th May. Mr. Dutton, on the behalf of the defendant, sought to use *Ideal Film Renting Co Ltd v Nielsen (1921)*¹² due to the reference of a continuing application. Justice Mundy refuted this, stating

"Whatever may have been the position at common law, the 1988 Act simply does not contemplate a "continuing application" in the sense in which Eve J was speaking when he referred to a "continuing" request".¹³

The purpose of this, alongside the requirement to serve written notice of the Tenants application and the Landlord's decision, is to ensure all parties are clear on the status of the application.

In the case of *Design Progression Limited v Thurlow Properties* [2003] EWHC 324, the landlord was found to have unreasonably withheld consent due to not issuing notice to the Tenant in a reasonable time. To quote Justice Peter Smith;

⁸ *Go West Limited v Spigarolo* [2003] EWCA Civ 17, P12

⁹ *Go West Limited v Spigarolo* [2003] EWCA Civ 17, P34-36

¹⁰ *Go West Limited v Spigarolo* [2003] EWCA Civ 17, P40

¹¹ *Go West Limited v Spigarolo* [2003] EWCA Civ 17, P45

¹² *Go West Limited v Spigarolo* [2003] EWCA Civ 17, P44

¹³ *Go West Limited v Spigarolo* [2003] EWCA Civ 17, P45

"...the Defendant by the 21st March 2002 had all the relevant information in its possession for the purpose of enabling it to make a decision whether or not to give license to assign. Accordingly, I determine that was the latest date when a reasonable time had been given it to consider the position"¹⁴

The Landlord's representatives were found to have purposefully made repeated, unreasonable requests for information, delaying the application far beyond the reasonable amount of time. Justice Peter Smith notes the reasoning in *Go West Limited v Spigarolo* [2003] EWCA Civ 17 regarding information supplied beyond the point at which the reasonable time had expired being irrelevant to the decision making process¹⁵.

The difference in this case is that although the reasonable time was deemed to expire on 21st March, this was not due to notice being served by the Landlord prematurely as in the case of *Go West Limited v Spigarolo* [2003] EWCA Civ 17, rather Thurlow Properties lack of response given the quantity and quality of information¹⁶, which ought to have been sufficient for them to decide whether to consent. This highlights how subjective this reasonable timescale is, and serves to clarify circumstances which play in to determining what is reasonable; namely the amount of time reasonably needed for the Landlord to assess the merits of the tenant's application and any relevant information they may need to do so in an objective manner. As a result the tenant was unable to complete the assignment of their lease to a prospective tenant, incurring several losses, notably a £75,000 premium. The judge found that the Landlord had purposefully delayed sending any notification in an attempt to reclaim the property and re-lease it to the potential sub tenant or another at a higher rental value.¹⁷ It is exactly this type of behavior the Act is intended to prevent, and the outcome of *Design Progression Limited v Thurlow Properties* [2003] EWHC 324 falls in line with the cases referred to as authorities on the matter in *Go West Limited v Spigarolo* [2003] EWCA Civ 17, Sir Richard V-C in *Norwich Union Life Insurance Society v Shopmoor Ltd* [1999] 1 WLR 531¹⁸ and Neuberger J in *Footwear Corporation Ltd v Amplight Properties Ltd* (1999)¹⁹.

In the cases examined so far, there has been an implicit assumption from the Tenants perspective that consent could not be reasonably withheld. Certainly in *Go West Limited v Spigarolo* [2003] EWCA Civ 17 and *Design Progression Limited v Thurlow Properties* [2003] EWHC 324 the tenants complied with Landlord requests for information, yet the Landlord was ultimately at fault for not responding in a reasonable timescale or notifying the tenant in writing. *NCR Limited v Riverland Portfolio No 1 Limited* [2005] EWCA Civ 312 outlines circumstances in which it may be reasonable for the landlord to refuse consent. NCR Ltd sought to sublet the premises to Telco Ltd. Riverland refused on the basis of a reverse premium to be paid as part of the deal not conforming to the lease, and the covenant strength of Telco being insufficient. In the High Court case, the refusal of the landlord to allow subletting was deemed unreasonable due to the lack of contractual relationship between Telco and Riverland, NCR remaining liable for the rent therefore guaranteeing Riverland continued income

¹⁴ *Design Progression Limited v Thurlow Properties* [2003] EWHC 324, P98

¹⁵ *Design Progression Limited v Thurlow Properties* [2003] EWHC 324, P101

¹⁶ *Design Progression Limited v Thurlow Properties* [2003] EWHC 324, P90

¹⁷ *Design Progression Limited v Thurlow Properties* [2003] EWHC 324, P124

¹⁸ *Norwich Union Life Insurance Society v Shopmoor Ltd* [1999] 1 WLR 531, P545E

¹⁹ *Footwear Corporation Ltd v Amplight Properties Ltd* (1999)P559G

regardless of whether Telco defaulted on payment, and the financial status and covenant strength of Telco being deemed irrelevant to the decision and therefore not significant enough to withhold consent. High Court judgement in favor of NCR was overturned by the Court of Appeal on the basis of the 3rd point being refuted.

Lord Justice Carnwarth considered three issues in *NCR Limited v Riverland Portfolio No 1 Limited* [2005] EWCA Civ 312; whether the decision to refuse consent was granted in a reasonable time, whether consent was unreasonably refused and whether the application for consent was invalidated by a proposed change in terms of the transaction²⁰. The Lord Justice found that the Landlord had acted within a reasonable period of time, and that the proposed change in terms did not result in a material change in the application, and therefore did not invalidate NCR's initial application. Further consideration had to be given to the second point, the issue of refusal. Citing the most recent House of Lords authority on the subject, Lord Bingham in *Ashworth Frazer Limited v. Gloucester City Council* [2001] 1 WLR 2180²¹, who determined three principles which ought serve as a test when considering a point of contention in the reasonableness of a landlords refusal to consent. The first, citing *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513, 520, is 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 ..."

Should the matter be relevant to the relationship between the landlord and tenant in terms of the lease, further consideration should be made on the basis of the facts of the case. Finally, the Landlord's objective is to prove they were reasonable in their decision to refuse consent; they do not have to justify their refusal, only give the reason, which must be reasonable.

A person would not be deemed unreasonable to refuse an agreement should they be putting themselves at risk. There stands no good reason why in the instance of *NCR Limited v Riverland Portfolio No 1 Limited* [2005] EWCA Civ 312 the landlord should not refuse consent on the grounds of poor covenant strength of the proposed sub-tenant²², their perceived potential to default on payments, which would result in the property having to be re-let at the lower market rate; resulting in a loss to the Landlord. In closing, Lord Justice Carnwarth states;

"One further point should be mentioned for completeness. Following the approach of Balcombe LJ in *International Drilling*, it might have been argued that Mr. Shapiro's estimate was no more than of a difference in "paper value", and that it was outweighed by the loss to NCR of its liability for an empty building. I did not understand Mr. Wood to put his case in this way, and in my view he was right not to do so. As I have explained the approach taken in that case was exceptional, and dependent on the strong findings made by the judge. By contrast, in the present case, the estimated difference in present value was related to a future possibility which was real, albeit uncertain. On the other side,

²⁰ *NCR Limited v Riverland Portfolio No 1 Limited* [2005] EWCA Civ 312, P18

²¹ *Ashworth Frazer Limited v. Gloucester City Council* [2001] 1 WLR 2180, 2182E-2183D

²² *NCR Limited v Riverland Portfolio No 1 Limited* [2005] EWCA Civ 312, P40

there was no examination of the consequences for NCR, or the alternatives that might have been available.”²³

Therefore *NCR Limited v Riverland Portfolio No 1 Limited* [2005] EWCA Civ 312 highlights an instance in which the Landlord and Tenant Act 1988 is actually used to protect a Landlord from potentially putting themselves at risk, by entering into an agreement which could cause them to lose rental value in the future.

The cases examined have all built on each other to develop an understanding of the 1988 Act in terms of what is reasonably expected on behalf of the Landlord and Tenant. Provided the tenant or potential tenant would not be in breach of covenant should the Landlord assign the lease to them, or allow the subletting, and provided their covenant strength is sufficient, there is no good reason for the Landlord to withhold consent. *NCR Limited* and *Design Progression Limited v Thurlow Properties* [2003] EWHC 324 built on the work of Sir Richard Scott V-C in *Go West*, further clarifying the concept of reasonableness and the importance of written notice. The 1988 Act was intended not only to afford rights to Tenants in terms of reducing their liability when seeking assignment or underletting as per Sir Richard Scott V-C's comment in *Go West Limited v Spigarolo* [2003] EWCA Civ 17, but also to normalize relations between the Landlord and Tenant. In requiring notices to be served in writing, all parties are aware of the current status of negotiation. As Justice Mundy concluded in *Go West Limited v Spigarolo* [2003] EWCA Civ 17, notices are legally binding documents, and once issued, whether premature in negotiations, signal the Landlords intent. By introducing the concept of a reasonable timescale, tenant's liability for transactions with potential sub tenants or assignees is reduced as in *Design Progression Limited v Thurlow Properties* [2003] EWHC 324, and the Landlord is given a buffer in which to consider the application and seek expert advice should they require as in *NCR Limited v Riverland Portfolio No 1 Limited* [2005] EWCA Civ 312.

²³ *NCR Limited v Riverland Portfolio No 1 Limited* [2005] EWCA Civ 312, P51

Bibliography

Statutes

The Landlord and Tenant Act 1988

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The Landlord and Tenant Act (Covenants) Act 1995

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