Neutral citation no. [2005] IEHC 120

THE HIGH COURT

1997 No. 12192 P

BETWEEN

DENIS MEAGHER & MIRIAM MEAGHER

PLAINTIFFS

AND

LUKE J. HEALY PHARMACY LIMITED

DEFENDANT

Judgment of Mr. Justice Murphy dated the 15th day of April, 2005.

1. Background

1.1 The plaintiffs are successors in title to the landlord's interest in an indenture of lease dated 14th May, 1971 and made between Marian Neumann of the one part and the defendant of the other part, whereby premises known as No. 1 West Street in the parish of St. Peter, town of Drogheda in the county of Louth (hereinafter called the premises) were demised unto the defendant for a term of 35 years from 1st June, 1971, subject to certain covenants and conditions therein contained.

By the said lease the defendant covenanted, inter alia, to preserve, uphold, support, maintain and keep the demised premises, including the roof and exterior walls and certain fixtures and fittings and all additions to the said premises in good and proper and sufficient order, repair and condition.

The defendant further covenanted not to assign the said premises or any part thereof without the previous consent in writing of the plaintiffs first having been obtained and to use and occupy the premises solely for the purpose of the defendant's trade business as a pharmaceutical chemist and certain ancillary uses.

1.2 Mr. Patrick Hickey acquired the controlling shareholding interest in the defendant in 1995 at a time when there was outstanding a schedule of dilapidations of 1993.

Later in 1995 Messrs. Lisney & Co., on behalf of the plaintiffs, prepared a further schedule of dilapidations which, in turn, was updated in 1999.

It is common case that the defendant did not comply with the first and second schedule of dilapidations notwithstanding its intention to do so when Mr. Hickey became shareholder in 1995. While the premises continued to be used as a pharmacy it was Mr. Hickey's evidence, not controverted by the plaintiffs, that it would be necessary to vacate the premises in order to carry out the extensive repairs necessitated by the schedule of dilapidations. To this end Mr. Hickey acquired a freehold interest in No. 9 West Street and, having eventually obtained the consent of the Health Board to transfer the general medical service permit to that premises, vacated No. 1 and sought to assign the defendant's interest to three prospective assignees. The present proceedings were issued on 17th October, 1997.

2. Proposed Assignment

2.1 The first of these proposed assignees was a Mr. Austin Fitzpatrick in December, 1997 who was prepared to acquire the lessee's interest for the sum of £10,000 and assume the obligation of the repairing covenant. The proposed closing was 30th January, 1998.

The consent of the plaintiff landlords was sought on 9th December, 1997. The landlords were requested to let the lessee/defendant's solicitor know their requirements regarding references.

On 17th December, 1997 the solicitor on behalf of the plaintiffs wrote as follows:

> "Re: Our Client: Denis and Miriam Meagher
>
> Your Client: Luke J. Healy Pharmacy Limited
>
> Premises 1 West Street, Drogheda, Co. Louth
>
> We refer to the above and yours dated the 9th inst. Our clients will not be consenting to the assignment herein nor will they even consider same until such time as works as set out in the schedule of dilapidations have been completed by your clients to our clients' satisfaction as same has been outstanding for a number of years. The High Court proceedings instituted herein are to proceed and we will be serving statement of claim shortly.
>
> Kindly note that your clients are in clear breach of the covenants contained in the original lease on a number of grounds and unless we receive an undertaking by return that the premises will be immediately reopened as a pharmacy and works as set out in the schedule of dilapidations commenced our clients will, inter alia, retake possession of the property forthwith.
>
> Kindly further note that any attempt to assign or sub-let the premises without our clients' permission will be a further breach and in such an event we have immediate instructions to seek injunctive relief and this letter will be produced in court to ground our clients' application for costs of same."

Further correspondence ensued in relation to the compliance with the agreed schedule of dilapidations by the defendant and a suggestion that the building might be modernised to suit a prospective assignee rather than complying with the schedule of dilapidations. The defendant notified the plaintiff that it would be willing to consider a financial settlement with the plaintiff in lieu of those works, enabling the plaintiff landlord to develop the building in whatever way would best suit.

No reply was received to that letter of 19th February, 1998.

2.2 On 20th April, 1998 the defendant requested the landlord's consent to a sub-letting to a Cyril Bellew on a short-term sub-letting while sewerage works were being carried out in Shop Street, Dundalk. Further reminders followed. On 30th April, 1998 the defendant's solicitor referred to the correspondence being ignored and to what was termed "premature proceedings" to have the defendant complete an out of date schedule of dilapidations. The defendant had paid Lisneys for the schedule to be updated but the schedule

was being deliberately withheld from it thus preventing it from complying with the schedule. The plaintiffs were asked if they were refusing to give their solicitor instructions and if they were instructing Lisneys not to make a copy of the schedule of dilapidations available to the defendant and, if so, to confirm the reason. That letter concluded as follows:

> "It appears to us that your client has no agenda in this matter other than to damage our client."

By two letters dated 8th May, 1998 solicitors for the plaintiff served the interim schedule of dilapidations and want of repair notice on the defendant and reserved their right to re-visit and re-inspect the premises when all the fixtures and fittings had been removed.

The second letter stated that:

> "It is ridiculous to suggest that our clients are in any way attempting to damage your client financially or otherwise and we would respectively (*sic*) refer you to correspondence that has passed herein since your clients purchased the leasehold interest in No. 1 West Street, Drogheda, Co. Louth. It is your client's refusal to deal with the schedule of dilapidations over the past number of years that has put them in the position they are, if at all.
>
> …
>
> We understand that your client seeks consent to sub-letting of the premises to one Cyril Bellew and in this regard we await the usual bank and trade references together with a copy of proposed agreement to enable us to obtain out client's further instructions herein."

2.3 A third request for consent was made on 30th June, 1998 together with references from AIB in respect of C.W. Ltd. A further reference from Esat Digiphone on 18th September named the proposed assignee as Cellular World Ltd. with whom Esat Digiphone had entered into a strategic alliance. There were further references from Ericsson and from Sigma Wireless Communications Ltd. The latter had mistakenly stated that Cellular World Ltd., the proposed assignee, had traded with them for ten years.

Solicitors for the plaintiff on 30th June asked why it had taken eight years for the defendant to respond to the schedule of dilapidations originally served and asked whether the defendant had removed all fixtures and fittings as their client wished to inspect the unit with a view to updating the interim schedule of dilapidations.

The defendant replied on 27th July saying that the reason why the respondent had failed to respond to the original schedule of dilapidations was because of a breach of contract by the vendors (the transferor of the shares in the defendant) who was not in funds to carry out the schedule of dilapidations and also because it made no sense for him to carry out the works that the defendant would require and, thirdly, that the defendant had received no notices. Rent was being paid and the plaintiff was suffering no loss.

The plaintiffs replied that non-compliance (of the repairing covenant) was clearly a breach of the lease and that the landlord's investment was a risk by the defendant not attending to the schedule of dilapidations.

On 9th September, 1998 the defendants enclosed copy contract and bank and trade references in relation to Cellular World in which Cellular World intended to trade from the premises and to complete the schedule of dilapidations within one year from closing. The landlord's consent was requested.

2.4 Meanwhile, on 15th September, 1998 the plaintiff requested the filing of the defendant's defence immediately and indicated that they had instructions to serve a motion for judgment. On 21st September, 1998 the plaintiffs wrote expressing their surprise at the letter of 17th September as they had no record of numerous requests and telephone calls being made to their office seeking their client's consent to the assignment to Cellular World Ltd. They said they received the request on the 9th and replied on the 15th stating that they were seeking their clients' instructions. They had then received the instructions and were awaiting advices from counsel. Further correspondence referred to the pleadings, the outstanding defence and the awaiting of counsel's advice.

On 8th October, 1998 the defendant's solicitors replied that the defence would depend on whether or not the plaintiffs were refusing to give consent and thereby frustrate the contract reached between the defendant and the new tenant given that there had been a delay of four weeks.

That letter included the following paragraph:

> "We do not accept your clients' *Bona Fides* in this matter and are satisfied that they are motivated by malice. We enclose a copy letter received from the solicitors for the proposed new tenant who is frantic to get into the premises and to carry out the schedule of dilapidations which your clients allegedly want to have completed. (Their solicitors), John Griffin & Company, have indicated that they will give us a further period of time up to tomorrow, October 9th, before withdrawing from the contract. Our clients shall be holding your clients responsible for every loss, expenditure and cost should the contract be frustrated."

Formal notice was given by their solicitors of their intention to withdraw from the contract at the end of a further two-week period up to 20th October, 1998. The proposed tenant withdrew on 21st October, 1998 there being no consent.

2.5 A further tenant wished to take a sub-letting of the premises. A request was made on 3rd December, 1998 to the plaintiffs to take an "opportunity to mitigate their loss in the related litigation" in which the defendants had, by then, counterclaimed. (See 3 and 4 below)

A notice of trial was served on 8th December by the defendant.

On 6th January, 1999 the plaintiffs informed the defendant's solicitor that Lisneys had been instructed to carry out an up-to-date schedule of dilapidations. A forfeiture notice was served by the plaintiffs' solicitor on 15th January, 1999. Later that year the defendant carried out repairs which were completed by September, 1999.

2.6 On 1st September, 1999 the solicitor for the defendant sought consent to the proposed assignment to Sean and Louise O'Sheehan of Hallmark Cards. Correspondence relating to the proceedings continued. There appeared to have been no reply. On 3rd November, 1999, the defendant's solicitor pointed out the failure of the plaintiffs to deal with the consent to the assignment of the lease to Sean and Louise O'Sheehan. In the same letter of 3rd November, 1999 the defendant's requested the plaintiff landlord's consent for an agreement to Esat Digiphone Ltd.

On 8th November the plaintiffs said that they had advised Lisneys of the request of that assignment and that they had no objection to the defendant writing directly to Lisneys. On 11th November bank references were sent to the plaintiffs. On 18th November, 1999 the plaintiffs' solicitor wrote "strictly without prejudice" regarding the proposed assignment to Sean and Louise O'Sheehan awaiting copies of a conditional contract. In principle their clients had no objections to the assignment in favour of Esat.

2.7 On 2nd February, 2000 the defendant complained that Lisneys had failed to furnish them with confirmation that the plaintiffs were satisfied that the schedule of dilapidations was completed and that this was frustrating yet another agreement with a proposed assignee.

It is clear at this stage that the defendant had substantially complied with the schedule of dilapidations during the autumn of 1999. Their consulting engineer, Joseph P. Osbourne, B.E., had inspected the property on 21st December, 1999 and confirmed that the building works had been carried out in accordance with the schedule of dilapidations and in accordance with good building practice.

On 15th February, 2000 the defendant complained that the tone of the correspondence reflected the reality of the relationship between the defendant and the plaintiffs in failing to confirm that the plaintiffs were satisfied. The following day, 18th February, 2000, the plaintiff's solicitors stated:

> "We now hereby confirm that our clients in relying on Joseph P. Osbourne, dated the 17th inst. confirm that in their opinion the works specified in the interim schedule of dilapidation has been complied with."

That letter further noted that the defendant had been trying to assign the lease for about two years but stated that difficulties encountered by the defendants in that regard were entirely of their own making.

By 6th July, 2000 the plaintiffs' solicitors pointed out that the proposed assignee's accounts furnished showed considerable losses and borrowings and required the comfort of a parent guarantee or rent on deposit. On 28th July one year's rent by way of deposit was required.

By letter dated 31st August, 2000 the plaintiffs' solicitors confirmed that the client's consent to the assignment was subject to legal formalities being completed. By letter dated 11th October, 2000 the defendants asked for confirmation of what legal formalities were now being claimed.

Further correspondence ensued relating to the progress of the proceedings.

3. Particulars of Counterclaim
3.1 By particulars of counterclaim dated 21st July, 2004 the defendants counterclaimed as follows:

1.	Building contractor	£91,045.72
2.	Building preservation	1,462.50
3.	Security systems	616.50
4.	Gunne Auctioneers	9,229.82
5.	Rent paid between 15th September, 1998 and 18th November, 2000	93,186.30
6.	Security	205.70
7.	Rates	4,220.08
8.	Water charges	150.00
9.	Repairs to shop front	358.04
10.	Consulting engineer	4,694.80
11.	Lisney Auctioneers	2,199.29
Total:		£207,468.75
Less sum received on assignment of lease:		70,000.00
Total claim to date:		£137,448.75
Being Euro:		**€174,749.31**

3.2 An arbitrator's award in respect of rent review published on 6th September, 2000 determined the rent as IR£43,000 per annum for a seven-year period commencing 1st June, 1999.

4. Defence and counterclaim of 28th October, 1998.
There was a preliminary objection that besides the plaintiffs being guilty of laches, that the proceedings were actuated by mala fides. It was pleaded that it was an implied term that consent would not be unreasonably withheld to an assignment or sub-letting and admitted that repeated requests had been made on behalf of the plaintiffs that the defendant should comply with the terms of the lease but that throughout the same period of time the plaintiffs themselves failed to comply with the express or implied terms of the covenants. It was denied that the defendant had failed or refused to comply or would continue to contravene and/or breach the terms of the lease. The plaintiffs had not suffered loss or damage or inconvenience and were not entitled to the relief sought.

By way of counterclaim the defendant had a legitimate expectation that they would be free to assign the leasehold provided the proposed assignee was good for the rent and for the covenants in the lease and was desirous of assigning the interest to a suitable assignee; that it would be more appropriate for the proposed assignee to carry out any schedule of dilapidations and that a suitable covenant to do so would be incorporated into any assignment.

The response of the plaintiffs was to issue the present proceedings.

On 9th December, 1997 the schedule of dilapidations was agreed and it was proposed by the defendant that the works be carried out within one year of the assignment to the first proposed assignee. No consent was given despite the special condition in the proposed assignment.

On 19th February, 1998 the defendants offered to enter into negotiations for a financial settlement to enable the landlord to carry

out the schedule of dilapidations but such offer was ignored by the plaintiffs.

In the same month the defendant retained a quantity surveyor to attempt to agree an updated amendment of the schedule of dilapidations and paid the landlord's agents but the said schedule was withheld from them for a period of about two months, thus preventing the defendant from negotiating sub-lettings or assignments. On 8th May, 1998 the amended schedule of dilapidations was finally furnished and agreed to.

On 30th June, 1998 the defendant sought the consent of the plaintiffs to an assignment of the leasehold to Cellular World and forwarded appropriate bank references. On 9th September, 1998 a copy of the executed contract in relation to that assignment was forwarded but the plaintiffs refused to furnish their consent notwithstanding notice that if such consent were not forthcoming by 20th October, 1998 Cellular World would withdraw from the proposed assignment.

The plaintiffs' failure was unreasonable and arbitrary and, by reason of their breach, the defendant suffered and continues to suffer loss, damage, inconvenience and expense and sought a declaration and damages.

The plaintiff replied and defended the counterclaim joining issue with the defendant.

5. Evidence to the Court
5.1 Mr. Patrick Hickey, controlling shareholder of the defendant who had changed its name by a special resolution dated 5th March, 1998 to Hickeys Pharmacy (Drogheda) Ltd., gave evidence of his acquisition of the shares in 1995 and of the various requests for consent to assignment and of the circumstances of his acquisition of No. 9 West Street and the transfer of the business to that address initially pending the repairs and subsequently pending the outcome of negotiations for assignment subject to consent of the plaintiffs.

He also gave evidence relating to the enquiries by the plaintiff into the general medical service permit issued to the defendant and its transfer to No. 9 West Street and to his negotiations with Lisney, agents on behalf of the plaintiffs.

He believed that the attitudes of the defendants, who were competitors within the pharmacy business, were motivated by factors outside the relationship of landlord and tenant in that the transfer of the business to No. 9 was closer to the pharmaceutical business of the plaintiffs.

5.2 Mr. Hugh Markey, FRICS, of Lisneys, gave evidence on behalf of the plaintiff in relation to his negotiation and advices not to consent to an assignment as the schedule of outstanding dilapidations.

5.2.1 The only case in which a schedule was passed on was where there was not a full FRI lease, the landlord being responsible for walls and additional structures.

He believed that pharmacies paid higher rentals and, in shopping centres, would be put to tender getting twice the rent of fashion shops. The asset was a pharmacy of long standing and there was a restrictive covenant. He advised that it was better to retain a pharmacy tenant.

On re-examination he agreed that the entitlement of a landlord was to the covenants in the lease. When he had advised not to give a consent he agreed that there was not a refusal in relation to Cellular World. He relied on the principles of good estate management and he would have given the same opinion if it were an AAA company or an impecunious one. He agreed that the remedy was forfeiture in the event of non-compliance with the leasehold covenance. He believed that the defendant company could afford to carry out the necessary repairs on the basis of his calculation of the turnover from the premium paid in 1995. He did not believe that the time between 21st September, 1998 and 21st October, 1998 was sufficient to enable him to advise the plaintiff landlord as to the suitability of Cellular World Ltd. (the approach of 30th June, 1998 specified CW Ltd). He advised that the work should be done before consent was given and that Cellular World was not a good covenantee – its financial reliability was irrelevant, he was concerned about the references to ten years trading when it had only traded for two years.

He would have given his advice by telephone and not in writing.

He did no financial searches against the first proposed assignee, Mr. Fitzpatrick, in September, 1997. On 17th December, 1997 he advised that consent be refused.

He agreed that he did not follow this advice with Cellular World and that the delay was to enable the landlord to consider their position while they awaited counsel's advice.

5.2.2 In relation to the schedule of dilapidations he believed that there was no onus on the landlord to release such schedule to the tenant. In any event he was not instructed to release the schedule of dilapidations to the defendant. The schedule of dilapidations is the property of the landlord, even though the tenant pays for it. He agreed that it took two months for it to be given to the defendant. The work was completed in September, 1999. However, there was no onus on the landlord to indicate that the work was done satisfactorily.

Mr. Markey was referred to the letter of the plaintiffs' solicitors dated 17th December, 1997 which specifically referred to completion to the plaintiff's satisfaction:

> "Our clients will not be consenting to the assignment herein nor will they ever consider same until such time as works as set out in the schedule of dilapidations have been completed by your clients to our clients' satisfaction as same have been outstanding for a number of years."

He said that he was specifically instructed not to confirm the schedule of dilapidations, notwithstanding the terms of that letter.

The reason that consent was withheld from September, 1999 was that Esat was not suitable without a deposit or guarantee. He said that the delay was because of the impending takeover of Esat by British Telecom.

In re-examination Mr. Markey had referred to a letter of advice of 17th September, 1998 whereby he had advised that there should be no consent before the completion of the schedule of dilapidations. (It appeared that this letter was not on the discovery file)

He said that there was no proposal by the tenant that work should be done by any assignee proposed before the assignment was

made.

5.3 Evidence was also given by Kevin Maguire BSc. as to incidents of schedules of dilapidation being complied with by suitable assignees after assignment and of such schedules being complied with before such assignments were completed.

Mr. Maguire outlined the basis for the items of expenditure. He agreed, in cross-examination, that the costs incurred at any event pursuant to the schedule of dilapidations, including fees, would have been almost half of the total. The additional costs incurred by the failure of the plaintiff was the extra rent payable between 15th September, 1998 and 18th November, 2000, together with the auctioneering costs of £9,229.00. The earlier date of the account of costs was the date of the binding contract with Cellular World and the latter date was the assumption of rent by that assignee.

6. Defendant/counterclaimant's submissions
Mr. Dwyer SC, on behalf of the defendant, submitted the schedule of dilapidations having been completed, the remaining issue was the counterclaim. He agreed that there had been a breach in an obligation of the tenant to comply with the three schedules of dilapidations in 1993, 1995 and 1998. However, he said that the tenant did not avoid dealing with this particularly from 1995 onwards. The issue before the court was the reasonableness of the attitude of the plaintiff/landlords with regard to the holding of their consent.

The landlords, who were also pharmacists, were not entitled to rely on a commercial advantage outside the relationship of landlord and tenant. He referred, in particular, to the plaintiffs' enquiry to the North Eastern Health Board regarding the defendant's general medical service permit and the insistence on discovery of that contract in the proceedings.

Mr. Dwyer submitted that there was an obligation to consider an application by the landlord within a reasonable time and to require clarification if necessary. The application in relation to Fitzpatrick of November, 1997 was met with a blank refusal. That was per se unreasonable. He referred to *Wylie* 15.34 with regard to the obligation of the repairing covenant.

In relation to the application for consent for Cellular World in June, 1998 where a formal application was made on 8th September, 1998, this was "being considered" by the plaintiff but it dragged on unreasonably. Cellular World had issued a 28-day notice and the landlords were aware of this.

The defendant, as tenant, took the decision to carry out repairs and had those done by September, 1999. Yet there was a deliberate policy to refuse to confirm compliance for a further six months without any explanation being given for that delay. This was, *prima facie, mala fides* in the absence of a reason for the total inactivity – no reason was given for the failure of the plaintiffs to consent to the assignment.

Reasons given to the court must have been reasons known to the landlord at the time as was clear from *Wright v. Dublin Corporation*. Mr. Dwyer referred to the black deal at p. 180 that the landlord could not withhold consent unless he would be prejudiced. Reference was made to *Kelly v. Cussen* [1954] 88 ILTR 97 with regard to the unreasonable withholding of consent causing delay which would entitle the tenant to damages. Here the tenant had suffered damages by reason of the delay. The Cellular World deal was pivotal and there should have been no obligation on the tenant after the closing date of that proposed contract.

Mr. Dwyer submitted that, on the basis of an analysis of the case law the following propositions emerged:

> 1. The landlord has a statutory duty to the tenant within a reasonable time, to give consent except in a case where it is reasonable not to give consent.
>
> 2. In judging whether it is reasonable or not to give consent, the position must be tested by reference to the state of affairs at the expiry of the reasonable time.
>
> 3. If, at that time, the landlord has raised no point and there is no point outstanding which would constitute a reasonable ground for refusing of consent, then the landlord's duty is positively to give consent.
>
> 4. The question whether the case is one "where it is reasonable not to give consent" ought to be tested by reference to the point at which the reasonable time for dealing with the application has expired (same as 2).
>
> 5. If at that point it cannot be shown that it is reasonable for the landlord not to give consent, then the statutory duty of the landlord is to give consent and the court can so declare.
>
> 6. It is not open to the landlord to seek to justify a refusal of consent by reference to matters not raised with the tenant prior to the expiry of the reasonable period.
>
> 7. A landlord who has given reasons in writing for refusing his consent cannot, when subsequently seeking to justify his refusal of consent, rely on reasons which he has not given.

He submitted that, in relation to damages for breach by the landlord the Irish position is that of *Kelly v. Cussen* [1954] 88 ILTR 97, where Judge Barra Ó Bríain stated:

> "As a matter of principle, where there is a breach of a statutory duty, damages can be recovered from injury resulting therefrom."

It was submitted that *Rice v. Dublin Corporation* [1947] I.R. 435 was not an authority for the proposition that an initial refusal by a landlord to give reasons for a withholding of consent was not necessarily unreasonable provided that the landlord gave good reasons later. This did not accord with the very mischief which s. 66 of the Landlord and Tenant (Amendment) Act, 1980 was designed to prevent.

7. Plaintiffs' submissions
Mr. Rawlson SC for the plaintiff/defendant to the counterclaim stated that the fact there was no formal response to Cellular World could not be treated as a refusal. There were reasonable grounds of requiring repairs to be done before any assignment was consented to and, moreover, there were grave doubts as to the financial viability of Cellular World.

The delay in respect of Esat was related to the takeover by BT of Esat.

Section 66 (the unreasonable withholding of consent) required the obligation of the tenants to be complied with. The section did not impose a covenant nor allow damages for breach.

There was no positive covenant to give consent.

The English cases were not relevant given the radical change in the 1988 English legislation.

Moreover, *Wylie* at 37.646 distinguishes *Kelly v. Cussen* [1954] 88 ILTR 97 re damages because no loss was suffered. The judgment, accordingly, could not be taken as establishing a principle that a tenant may recover damages as a result of the withholding of consent. In any event, consent in principle was given to ESAT on 18th November, 1999.

8. Decision of the Court
8.1 The court has to be cautious in relation to English cases prior to the radical change in the legislation in 1988.

The import of the Irish legislation, particularly ss. 66 and 67, does however, to a lesser extent, occasion a radical change insofar as the rights of lessees are concerned to assign or sub-assign their interests. The rights of a landlord are necessarily restricted to those covenants contained in the lease, including the implied covenants imposed by the Landlord and Tenant (Amendment) Act, 1980. That is to say so long as the conditions covenanted in the lease, especially with regard to rent and repairs, are complied with then the remedy of forfeiture is not available to the lessor.

It is common case that the defendant, as lessee, was in breach of the covenant to repair. Proceedings had issued on 17th October, 1997. A notice of forfeiture had issued on 15th January, 1999. The context of the issuing of proceedings and the service of the forfeiture notice is, however, significant in relation to the dispute between the parties.

It is of some significance that, at the time that the second schedule of dilapidations was served, the shareholding of the defendant had changed. The evidence of Mr. Hickey was that at that time the company could not have complied with the schedule given its run-down state. Indeed, the evidence of Mr. Markey as to the viability of the company, at that stage, is based entirely on his understanding of the premium paid for the shares. In this regard the court must prefer the evidence of Mr. Hickey. Indeed, it is clear that Mr. Hickey proposed, at that stage, to carry out the schedule of dilapidations and negotiated with the plaintiff in that regard. Mr. Hickey traded out of the premises and I accept his evidence that, in order to carry out the schedule of dilapidations, he would need to move. This he did by acquiring the freehold interest in No. 9 West Street, after some opposition regarding the transfer of his permit as was then required by the Health Board. Some time after that move it seems that Mr. Hickey changed his mind with regard to carrying out the repairs and, having vacated the premises, sought to assign his leasehold interest.

The first attempt was met with a blank refusal as evidenced by the letter of 17th December, 1997:

> "Our clients will not be consenting to the assignment herein nor will they ever consider same until such time as works as set out in the schedule of dilapidations have been completed by your clients to our clients' satisfaction as the same have been outstanding for a number of years."

Moreover, High Court proceedings had been instituted some two months beforehand on 17th October, 1997.

That letter had also referred to a breach of the covenant regarding the premises being used as a pharmacy.

It seems to the court that the blank refusal to grant consent, without consideration of the proposed assignee does not accord with the provisions of s. 66 of the Landlord and Tenant Act.

That section provides, *inter alia*, that:

> "A covenant prohibiting or restricting the alienation, either generally or in any particular manner, of the tenement without the licence or consent of the lessor, the covenant shall, notwithstanding any express provision to the contrary, be subject –
>
> > (c) to a proviso that the licence or consent shall not be unreasonably withheld, but this proviso shall not preclude the lessor from requiring payment of a reasonable sum in respect of legal or other expenses incurred by him in connection with the lease or consent."

Section 68 is also relevant with regard to the change of user.

8.2 As that stage the schedule of dilapidations of 1993 had been outstanding for a period of four years and what was being offered by the defendant was a condition in the assignment that the proposed assignee would take over the obligation under that schedule.

Wylie, Irish Landlord and Tenant Law, at 15.34 referred to the practice of landlords serving schedules of dilapidations when notified of a proposed assignment seeking not alone repairs but improvements to the premises. This practice was often prompted by the premium received by the assignor.

Mr. Maguire's evidence was that it was not unusual for assignees to take over a schedule of dilapidations but Mr. Markey, with greater experience could not recall schedules of dilapidations being passed on except in one particular case where the lease was not a full FRI lease.

Notwithstanding, it seems to me to be reasonable for a landlord to consider proposals regarding repairs and considering having those repairs done to a more appropriate standard to suit an incoming assignee.

8.3 In relation to the change of user the court should take into account that the premises is a free-standing one and that there is no good estate management reason why it should be maintained as a pharmacy as if it were in a shopping centre. If the rent, as reviewed, is payable, and the other covenants assured, by an assignee of the pharmacy tenant there seems to be no reason why consent should be withheld from the application for change in user. The rent reserved is a function of comparable rents. The evidence of Mr. Markey with regard to the rent of pharmacies in shopping centres would seem to have no application to the present case.

Further applications for consent were delayed. The delay in relation to Cellular World, in particular, was unreasonable and not in conformity with the 1980 Act.

The application for consent in relation to Cellular World included references and, furthermore, included the completion notice served on the defendant. In this case, in contradistinction to the original application of 9th December which was rejected on 17th December, the plaintiff purported to consider the assignment but delayed beyond the completion notice. To my mind this was unreasonable and prejudicial to the tenant.

Finally, in respect of the application for Esat, which had a strategic alliance with Cellular World, and taking into account the explanation given by Mr. Markey that the delay was occasioned by the takeover of Esat by BT, the court is of the opinion that, notwithstanding any delay that may have been so occasioned by the proposed assignee, it was inappropriate for the plaintiffs as landlords to delay.

The court has considered the counterclaimant's allegations regarding the *mala fides* of the plaintiff as competitors motivated by considerations beyond the terms of the lease. The dismissive attitude in respect of the first requests for consent; the delays; the enquiries regarding the Health Board permit; the refusal to allow Lisneys to give the defendant a copy of the schedule of dilapidations for almost two months; the initial refusal to certify compliance with the schedule, notwithstanding their letter of 17th December, 1997 that they would not give consent until they were satisfied with compliance, and the plaintiff being in competition with the defendant, are instances relied upon by the defendant to support a lack of good faith.

Having considered the evidence in relation to these incidences, the court finds that, on the balance of probabilities, that the plaintiff acted unreasonably and was motivated by considerations beyond the terms of the lease.

Do they constitute *mala fides* or bad faith?

The relationship between the parties is strictly contractual and not fiduciary. No obligation of good faith arises. Yet the instances referred to do, in the view of the court, go beyond the duties and obligations of the plaintiff landlord.

The seven principles enunciated by Mr. Dwyer, S.C. are implied in the relationship of landlord and tenant. I would add that reasons outside that relationship are unreasonable but that no duty of good faith arises.

8.4 The issue of damages must be considered from the point of view of the relationship between landlord and tenant. That relationship is a commercial relationship with rights and duties emanating therefrom. The payment of rent, as reviewed from time to time, the maintenance and repair and insurance of the premises all involve financial obligation. There would seem to be no reason, in principle, why unreasonable delay in giving consent, on implied covenant under s. 66, should not be treated in a similar manner.

Kelly v. Cussen (88 ILTR 97) suggested that where a tenant proves that he has suffered loss by the unreasonable withholding of consent by a landlord, there is no reason in principle why the tenant should not be entitled to damages.

However, no loss was established in that case. In the instant case the court finds the plaintiff/landlord to have acted unreasonably and to have been motivated by reasons outside the terms of the lease. In the circumstances the plaintiff acted wrongfully as a result of which the defendant suffered loss and damage.

The remedies available to the landlord include damages for breach of covenant. For the landlord to act unreasonably is, similarly, a breach of the implied statutory covenant of s. 66 and s. 67. Where the landlord is motivated by considerations outside the least it would seem to follow that the tenant is entitled to damages for any loss ensuing.

I will, accordingly, make a declaration that the plaintiffs have unreasonably and wrongfully withheld their consent to the sale and assignment of the premises to Cellular World Limited.

In relation to the first applications for assignment, it seems to me that the defendant/counterclaimant did not have a concluded contract nor references. However, in relation to the Cellular World application for consent, those documents were submitted to the plaintiffs on 8th September, 1998. The 28-day completion notice was furnished to the plaintiffs which expired on 20th October, 1998. It seems to me that no reasonable objection had been taken by the plaintiffs with regard to the suitability of that tenant who was ready, willing and able to close the assignment on 20th October, 1998. The damages, accordingly, must be assessed from the date of the assumption of the assignee of liability for rent and repairs which was 20th October, 1998.

The measure of damage is, accordingly, the rent and rates paid by the defendant from 20th October, 1998 to the assumption by Esat of the tenant's interest together with the selling agent's fees in respect of that assignment.