

Gabb

v

Farrokhzad

2022] EWHC 212 (Ch)

This is an excellent primer on the law of granting/unreasonably withholding consent. Oh my, did the landlord go to town on the withholding here.

The judgment is beautifully structured: on page 1, Simon Gleeson, sitting as a judge of the High Court, lists 10 issues.

I have followed that structure, save that I have flipped 6 and 7 so as to create a flow between liability and consequence under the Landlord and Tenant Act 1988.

1. The lease
2. The facts
3. The applicable law
4. The validity of the various communications
5. Whether the landlord's conduct was unreasonable
6. The consequences of the unreasonable behaviour at common law
7. Liability under the Landlord & Tenant Act 1988
8. The consequences of the unreasonable behaviour under the 1988 Act
9. Exemplary damages
10. Whether to grant an injunction.



(1) The lease

Mr Gabb wanted to sell – aka assign – his lease, which required him:

- “Not to agree to assign or to assign” the lease without obtaining the landlord’s prior written consent, and
- “On the occasion of each and every such intended assignment [to] first procure” direct covenants between the incoming leaseholder and the landlord to the effect that the new leaseholder would pay the rents and abide by the covenants in the lease.

(2) The facts

It’s safe to say that the sale did not progress well from Mr Gabb’s perspective.

He accepted an offer from a Mr Green.

Mr Farrokhzad made a planning application for permission to convert the ground floor shop into a licensed sushi bar.

Mr Green withdrew.

On 18 January 2021, Mr Farrokhzad issued a (rather hopeless) application in the FTT against Mr Gabb for a determination that Mr Gabb was in breach of covenant.

Mr Gabb accepted an offer from a Mr Holz, and they agreed that the sale would be put on ice until the outcome of the FTT application was known.

On 30 April 2021, the FTT determined that there was no breach of covenant.

On 09 June 2021, Mr Holz withdrew.

Mr Gabb issued a claim in the High Court for a declaration that Mr Farrokhzad had unreasonably withheld consent to the assignment.

Meanwhile, a third purchaser, a Mr Oppenheimer, entered the fray. Mr Gabb accepted his offer of £3.2m, which was some £50,000 lower than Mr Holz’s.

The purchase was however beset by problems. Mr Gabb amended his claim to allege that Mr Farrokhzad had unreasonably withheld consent to an assignment to Mr Oppenheimer too.

(3) The applicable law

The proceedings took place in the context of a covenant not to assign which was

[54] ... in this lease, in a form generally referred to as a "fully qualified" covenant. This means a covenant where the covenantor undertakes not to do something without the consent of the covenantee, and where that consent is not to be unreasonably withheld.

Judge Gleeson identified two applicable streams of law:

[52] One is the common law right which arises under the lease. This is the right to assign without consent if the landlord unreasonably refuses that consent.

The other is the right granted by the 1988 Act to sue the landlord for damages in respect of his failure to grant consent to assign within a reasonable time, unless he has reasons for refusing the consent which are

- (a) reasonable and
- (b) notified in good time to the tenant.

The 1988 Act does not change the common law position but supplements it.

In both cases, if the landlord unreasonably withholds consent, the tenant is free to assign without consent and may seek a declaration to that effect.

A reasonable time

What is reasonable depends on the circumstances of the case, although it has been observed that, even in complex cases, the measurement should be in weeks rather than months.

The reasonableness of a refusal

In *Ashworth Frazer Ltd v Gloucester City Council* [2001] 1 WLR 2180, the House of Lords listed three main principles for establishing whether a refusal to grant consent was reasonable:

- 1) A refusal must arise from the relationship of landlord and tenant in regard to the subject matter of the lease;
- 2) Thereafter it is a question of fact;
- 3) "Reasonable" has a broad common sense meaning.

The judge observed that in *Sequent Nominees Ltd v Hautford Ltd* [\[2019\] UKSC 47](#), at [21]-[25], the Supreme Court had treated the principles as settled law, but he identified two further factors.

First, in the residential context,

“[66] while a landlord need usually only consider his own relevant interests, there may be ... such a disproportion between the benefit to the landlord and the detriment to the tenants [if consent to assignment is withheld] that it is unreasonable for the landlord to refuse consent.

“That proposition is likely to carry most force in the context of residential leases, where the lease represents a valuable and tradeable capital asset, and is an interest which far exceeds, in value and importance, the very limited reversion of the landlord.

Secondly,

[67] “The mere fact that there are or may be breaches of covenant on the part of the lessee at the time of the assignment is not per se sufficient to justify a landlord's refusal to consent to an assignment. It depends on the seriousness of the breaches and the potential impact of the assignment on the landlord's position - *Straudley Investments Ltd v Mount Eden Land Ltd* [1997] Lexis Citation 4483”.

Mr Farrokhzad ran a wide field of defences to Mr Gabb's claim, ranging across:

- Challenges to the validity of Mr Gabb's requests for consent,
- Denials of unreasonable behaviour, thereby withholding consent through delay,
- Assurances that there was no need for an injunction because he was content for an assignment to take place.

(4) The validity of the various communications

Together, two elements make up the communications at common law:

- 1) Intentional communication, and
- 2) Knowing receipt.



Is email a written request?

The 1988 Act requires the tenant commit to a “written” request that is “served”.

An email can be a “written” request.

Serving the notice

At [75] the judge observed that:

“[where] a communication that is not subject to any degree of formality under a contract, that communication can be said to have been “served” where it has been caused to be received”.

In this case, the lease did not set out how the written request was to be given.

The 1988 Act does not require the request to be communicated in any particular manner, although section 5(2) of the 1988 Act permits the request to be served in a manner provided for by the Landlord & Tenant Act 1927.

(Ed: the judgment refers to an Act of 1923, but I cannot find one. Section 23 of the 1927 governs service of notices. I've added 2+2 and come up with section 23 of the 1927 Act.)

Were the words used sufficiently clear?

In context, Mr Gabb’s request to know Mr Farrokhzad’s “requirements in relation to the licence” was clearly “intended by its communicator, and understood by its recipient, to be a request for consent to assign”.

The ultimatum

At one stage, Mr Gabb’s solicitors intimated that if consent was not granted within 7 days, proceedings for the unreasonable withholding of consent would follow.

The judge held that such intimations did not invalidate the request for consent, nor did they affect Mr Farrokhzad’s duty to respond within a reasonable period under the common law and the 1988 Act.

The sequence of events required by the lease

A quick reminder: the lease required the leaseholder:

- “not to agree to assign or to assign” the lease without obtaining the landlord’s prior written consent, and
- “on the occasion of each and every such intended assignment [to] first procure” direct covenants between the incoming leaseholder and the landlord to the effect that the new leaseholder would pay the rents and abide by the covenants in the lease.

Those provisions meant that:

- The current tenant must obtain consent before entering a *legally binding* agreement to assign (my emphasis) rather than entering a “subject to contract” agreement, and
- “intended assignment” was a description of the particular assignment that the outgoing tenant was proposing to make. It was otherwise an “apparently absurd” clause that required the outgoing tenant to obtain consent to enter into covenants from the new tenant before forming the intention to assign the lease to that tenant.

And so Judge Gleeson turned to whether Mr Farrokhzad had unreasonably withheld consent.

There was plenty of material to consider.

(5) Whether the landlord’s conduct was unreasonable

The failed sale to Mr Holz

Mr Farrokhzad knew that Mr Holz agreed to purchase the lease in February 2021.

He waited 11 working days after the FTT published its decision in the breach of covenant proceedings before writing to Mr Gabb about his request for consent.

That was too long: Mr Farrokhzad had known about the sale since February.

Not only was it too long: Mr Farrokhzad’s position was far from clear at the end of those 11 days.

First, on 27 May and 07 June, he refused consent (twice) on the grounds that he intended to appeal the FTT’s decision.

On 10 June, he then intimated that he might grant consent if Mr Gabb:

- Agreed that the FTT's decision was wrong;
- Dropped his claim for his legal costs to be paid by Mr Farrokhzad under rule 13 of the FTT rules, and instead
- Paid Mr Farrokhzad's legal costs of the FTT action.

Mr Oppenheimer's purchase

Having seen off Mr Holz, on the appearance of Mr Oppenheimer as a potential purchaser, Mr Farrokhzad appeared to have

“[101] ... embarked on an extended campaign of delay”.

He appointed managing agents, and expressly instructed them to delay their response times to Mr Gabb.

Unfortunately for him however, the agents were diligent and proactive. Despite Mr Farrokhzad's lack of cooperation, they turned around the LPE1 leasehold information form in one month.

Next, Mr Farrokhzad instructed a surveyor, who drew up plans for a refurbishment of the whole building, including areas demised to Mr Gabb, who was in any event only required to pay towards repairs, not refurbishments.

Judge Gleeson observed that the work:

“[106] ... seems to be completely unrelated to any potential liability of the incoming tenant”.

Finally, Mr Farrokhzad instructed a solicitor to deal with the licence to assign, but formed:

“[101] the sudden desire to require financial references from a man recognised by all involved to be a billionaire”.

The Oppenheimer family office had already confirmed that Mr Oppenheimer:

“[108] ... had access to sufficient family wealth to comfortably complete on any residential property transaction”.

That confirmation did not appear to satisfy Mr Farrokhzad that Mr Oppenheimer might be able to pay his contribution to refurbishment works for which he would bear no liability anyway.

Seven weeks elapsed between the first relevant request for consent to assign to Mr Oppenheimer on 26 October 2021 and Mr Gabb's court claim of 15 December 2021.

That delay was unreasonable.

Mr Farrokhzad argued that there had been a "perfect storm" of misfortunes caused by delays and miscommunications between himself and his agents. That, said the judge, was irrelevant:

"[109] ... where I have an obligation to a third party, and I fail to perform that obligation because of the failure of my intermediary, my liability is no different from what it would have been if there had been no such intermediary".

(6) The consequences of unreasonable behaviour at common law

Mr Gabb had sought a declaration that he was entitled to assign the lease to any person he wishes without Mr Farrokhzad's consent.

Under the common law, that declaration was granted.

(7) Liability under the 1988 Act

Under the 1988 Act, a landlord must respond in writing to a request for consent to assign:

- For Mr Holz's sale, not only did Mr Farrokhzad's notice not contain reasons: his delay in responding caused Mr Holz to withdraw.
- Mr Farrokhzad provided no notice at all for the proposed sale to Mr Oppenheimer.

Accordingly, Mr Farrokhzad had unreasonably withheld consent under the 1988 Act and was liable to Mr Gabb.

(8) The consequences of unreasonably withholding consent under the 1988 Act

Mr Holz had offered £3.25m for the lease. Mr Oppenheimer's offer was £3.2m. Mr Farrokhzad's financial liability was:

- The difference between the two offers, plus the council tax and mortgage interest for which he would have had no liability, had the sale to Mr Holz completed;
- The money spent by Mr Gabb in pursuing the lost sale to Mr Holz, and
- A costs undertaking to Mr Farrokhzad's (disinstructed) solicitors.

If the sale to Mr Oppenheimer failed by reason of Mr Farrokhzad's conduct, he risked further liability. Judge Gleeson observed that to be:

"[117] ... an appropriate result for two reasons. One if that it ensures that any long term devaluation of the property resulting from Mr Farrokhzad's actions will come out of his own pocket. The other is that he is now very powerfully incentivised to ensure that the existing transaction completes as quickly as possible".

(9) Exemplary damages

Citing *Design Progression Ltd v Thurloe Properties Ltd* [2004] EWHC 324, Judge Gleeson gave a handy overview:

"[118] Exemplary damages are appropriate where a landlord pursues a deliberately obstructive policy designed to prevent the tenant assigning their lease for their own gain, regardless of whether that policy succeeds".

Despite Mr Farrokhzad's behaviour however, the judge declined to award exemplary damages to Mr Gabb.

He did not accept that Mr Farrokhzad had such a "preconceived strategy", saying:

"[121] Even in commercial contracts between sophisticated parties, it is by no means unknown for the human trait of being difficult for the sake of it to emerge... The repeated exercise of [the power to obstruct others] may be motivated by nothing more than an inchoate idea that eventually someone will offer something of value to make it stop. I am strongly of the view that that is the case here".

(10) Whether to grant an injunction

The judge also refused to grant an injunction ordering Mr Farrokhzad to comply with his duty to respond reasonably to requests for consent to assign.

"[124] Given the form of the declaration which I propose to make, Mr Farrokhzad's involvement in any future sale will be restricted to hoping, for the sake of his own pocket, that it completes at or above the price of the Holz sale. I regard that as sufficient to dispose of this matter."