

# SALES SUBJECT TO LANDLORD'S CONSENT

By Christopher Cant

1. The object of this paper is to consider the obligations and remedies that arise from a contract for the sale and purchase of a leasehold interest requiring the obtaining of a landlord's consent. The trigger for the paper was a case in which I was brought in for the vendor not at the end of the conveyancing stage but a few months after exchange when it became apparent that the purchaser had decided early on that he did not want to complete. It was first necessary to obtain the landlord's consent so as to secure the damages claim before commencing the real proceedings. It brought home to me how difficult the conveyancing aspects can be with such contracts particularly when the other party is seeking to block the transaction.

2. Open contracts – it would be a great rarity nowadays to find an open contract for the sale and purchase of a leasehold interest although not unknown (see *Pips (Leisure Productions) Ltd. v Walton* (1980) 260 EG 601). However, there is a value to be gained from considering the position with such contracts under the general law. It is the foundation and context for the obligations and rights created in respect of such a contract which is then developed by the conditions included in the particular contract. When the express provisions are not comprehensive the obligations under the general law can apply.

2.1 Title – the contract will come into force in the normal way and will not be subject to a condition precedent. The Vendor will be under an obligation to show a good title and in the event that the Vendor fails to do so could be at risk of a general damages claim (*Day v Singleton* [1899] 2 Ch 320). An important element in this process will be establishing that the Vendor has the ability to assign the lease without there being a risk of forfeiture by the Landlord. Usually this will mean that by the completion date the Landlord's consent will have been obtained. There is no obligation that the consent must be available prior to completion. However, the production of the landlord's consent is not the only set of circumstances which will discharge this aspect of the Vendor's obligation to show good title.

The general rule is that a Vendor cannot force completion on a Purchaser if the Landlord refuses consent even if the Vendor believes the refusal to be unreasonable (*Re Marshall & Salt's Contract* [1900] 2 Ch. 202 – landlord refused to consent to assignment of public house to brewer because did not want it to be tied) but there are circumstances in which a contract will be enforced even though the Landlord's consent has not been obtained. For a Vendor wishing to enforce completion of such a contract the possibilities are:-

2.1.1 prove Landlord's consent obtained;

2.1.2 obtain a Court declaration that the Landlord's consent has been unreasonably refused (*Young v Ashley Gardens Limited* [1903] 2 Ch.112). This contrasts with a contract that expressly provides for the need to obtain the landlord's contract this option may as a matter of

construction not be available because the consent is a prerequisite to completion and a court declaration will not satisfy it; or

- 2.1.3 from the circumstances show that the consent has been unreasonably refused and there is not a “reasonably decent probability of litigation” (Alderson B in *Cattell v Corrall* (1840) 4 Y & C Ex 228 at 237). For the reason given in 2.1.2 this course may not be available if there is an express provision.

Equally these courses of action are open to a Purchaser. For example, in *Curtis Moffat Limited v Wheeler* [1929] 2 Ch. 224 a Purchaser was able to compel the assignment of a lease to a specified nominee of the Purchaser when the Landlord was not prepared to consent to an assignment to the Purchaser. No consent had actually been given because the Vendor had not applied for consent in relation to an assignment to the nominee. The Purchaser was required to give an undertaking to guarantee the nominee’s performance of the lessee’s covenants. It indicates the extent to which the Court is prepared to go to carry through specific performance.

2.2 Vendor’s obligation – it will be the obligation of the Vendor to obtain the Landlord’s consent. This is not an absolute obligation but an obligation to use reasonable endeavours.

This obligation cannot compel the Vendor

- 2.2.1 to commence proceedings against the Landlord (*Fischer v Toumazos* [1991] 2 EGLR 204 and *Lehmann v McArthur* (1986) LR 3 Ch. App. 496));
- 2.2.2 to seek to change the Landlord’s mind after a categorical refusal even if the Landlord is acting unreasonably (*Bickel v Courtenay Investments (Nominees) Ltd.* [1984] 1 WLR 79). All that has to be established by the Vendor is that there has been a definite refusal by the landlord;
- 2.2.3 to give the Purchaser the opportunity to approach the Landlord in order to ascertain why there has been a refusal and to seek to change the Landlord’s mind (*Lipmans Wallpaper Ltd v Mason and Hodghton Ltd* [1969] 1 Ch. 20 confirmed by Dillon LJ in *29 Equities Ltd v Bank Leumi (UK) Ltd* [1986] 1 WLR 1490 at page 148 E/G).

2.3 Purchaser’s obligation – the Purchaser is under a duty to co-operate with the Vendor and not to seek to prevent the Landlord giving consent. In *Jebco Properties Limited v Mastforce Limited* (20<sup>th</sup> Feb. 1992) Harman J. accepted that in a contract which had the National Conditions of Sale (20<sup>th</sup> Ed) incorporated it was still possible to imply a term that the Purchaser will not carry out an act “which would – and that must mean would inevitably – cause the freeholder to withhold a licence”. The Purchaser was not to be allowed to act in a manner which seeks to frustrate the contract. In that case he held that the purchaser had broken the terms by entering the property and carrying out site clearance which were breaches of the lessee’s

covenants. It is often formulated as an obligation to co-operate with the Vendor in obtaining the Landlord's consent.

2.3.1 References – the view of Harman LJ in *Scheggia v Gradwell* [1963] 1 WLR 1049 was that the Purchaser was obliged to use best endeavours to provide reasonably satisfactory references if requested by the landlord and if the purchaser could not or would not provide them then the Purchaser would be liable in damages.

However, the Purchaser's obligation is not an absolute obligation to provide references and information which will satisfy the landlord but merely to do best (*Shires v Brock* (1977) 247 EG 127 – concerned with contract incorporating NCS (18<sup>th</sup> Ed). Scarman LJ stated that Purchaser to provide full honest and truthful information and proper credible references about true state of financial position. If this is not sufficient for the landlord then the Purchaser is not in breach and not liable. Confirmed by Buckley LJ (p.157 E/F) that the Purchaser cannot be allowed to frustrate contract by failure to do best in way of supplying information and references. "But he cannot be expected to do more than his best."

2.3.2 Interview – the obligation does not mean that the Purchaser can be compelled to attend an interview with the Landlord if required by the Landlord (*Elfer v Benyon-Lewis* (1972) 222 EG 1955 concerned with NCS 10(5)).

2.3.3 Deposit monies – the purchaser cannot be compelled to deposit monies (*Davies v Fagarazzi* (1970) 21 P& CR 328).

2.4 Time – if no date is specified for completion then a reasonable time will be allowed (*Re Longlands Farm* (1968) 20 PCR 25).

3. Standard Conditions – almost without exception any modern contract will have specific conditions incorporated either special conditions or standard conditions or both. Standard condition 8 of Standard Conditions of Sale (5<sup>th</sup> Ed) ("sc8" and "SCS") or standard condition 10 of Standard Commercial Property Conditions of Sale (2<sup>nd</sup> Ed) ("sc10" and "SCCS"). The approach of these standard conditions is to spell out in greater detail the obligations that arise under the general law and to confirm the allocation of responsibilities between the Vendor and the Purchaser as regards obtaining the Landlord's consent. Sc10 is more effective than sc8 and from the vendor's perspective imposes more obligations on the purchaser.

It is important that consideration is given in each case as to whether the standard provisions are appropriate and which set of standard conditions and whether they need to be modified and if they do how the special conditions will relate to the standard conditions. A number of points arise:-

3.1 Standard condition 8 SCS – this adds little to the general law in that it

3.1.1 is formulated in such a manner that it is not a condition precedent but part of the overall obligation to show good title;

3.1.2 requires the Landlord's consent to be in a form which satisfies the requirements of the lease (8.3.1(b));

3.1.3 confirms that it is the Vendor's responsibility to obtain consent by using all reasonable efforts and at the Vendor's expense (8.3.2(a));

3.1.4 requires the Purchaser to "provide all information and references reasonably required" (8.3.2(b)) which really adds nothing to the general law;

3.1.5 confers on each party a right to rescind the contract if the Landlord's consent is not obtained (8.3.3 – see section 7 below).

3.2 Standard Condition 10 SCCS – this standard condition is a little fuller.

3.2.1 the points in 3.1.1, 3.1.2 and 3.1.3 apply equally to this condition;

3.2.2 in the event that the Landlord's consent is obtained notice must be given forthwith by the Vendor to the Purchaser;

3.2.3 the Vendor must enter into an authorised guarantee agreement ("aga") (10.3.3(b)). The Vendor is only obliged to enter an aga if the Landlord has reasonably required it as the condition refers to an aga being lawfully requested by the landlord. This is the position as between the Landlord and the Vendor in accordance with section 16 Landlord and Tenant (Covenants) Act 1995 and equates to what is possible when determining the terms of a new business lease on a renewal..

3.2.4 the Purchaser must comply with "all reasonable requirements including requirements for the provision of information and references." (10.3.2(b)). This is wider in scope than in standard condition 8 particularly taking into account the points in 3.2.5 below. However, the extension is in general terms which inevitably gives scope for disputes. In each case it would be sensible to consider what is likely to be required by the landlord and to cover such matters specifically.

3.2.5 a number of significant specific obligations are imposed on the Purchaser requiring that the Purchaser:-

3.2.5.1 covenant directly with the Landlord (10.3.3.(a)(i));

3.2.5.2 use reasonable endeavours to provide guarantees (10.3.3(a)(ii)) In addition to this general obligation it may be appropriate to specific person who are to give guarantees. The inclusion of this requirement is a major difference from sc 8 SCS and from the Vendor's point of view an important provision;

3.2.5.3 execute the Landlord's licence (10.3.3(a)(iii)).

3.2.6 no objection may be taken by a Vendor or Purchaser to any condition attached to a Landlord's consent (10.3.4) if it is

3.2.6.1 not regarded as unreasonable under section 19A Landlord and Tenant Act 1927; or

3.2.6.2 lawfully required under the terms of the lease.

3.2.7 the completion date is subject to change so that it is the earlier of five days working days after the Vendor has given written notice to the Purchaser that the Landlord's consent has been obtained or four months from the original agreed completion date (10.3.5). The inclusion of this standard condition has an important effect and extends the period in which the Vendor can seek to obtain the Landlord's consent. It is not to be found in SCS. It is important that consideration is given in each case as to whether this condition should be included, deleted or modified. Although it is suggested that the four month period may be too long with some landlords such as some local authorities it can be too short.

When the landlord's consent is given ahead of the formal licence by, say, letter there may be a practical problem that the Licence is not executed by the completion date which is five working days after notification.

3.2.8 confers a right of rescission (subject to 3.2.9 below) on each party if at any time after the expiry of the period of four months from original completion date neither the Landlord's consent has been obtained nor a Court declaration that consent has been unreasonably withheld (10.3.6). This means that it will no longer be sufficient to show from the circumstances that the consent has been unreasonably refused and there is no chance of litigation. If it is likely that reliance is to be placed on a Court declaration then longer than four months will be required. In the case I mentioned the period was extended to fifteen months in the event that proceedings were commenced against the Landlord.

3.2.9 the right to rescind cannot be exercised by a party in breach of the obligations in conditions 10.3.2 and 10.3.3 "for so long as its breach is a cause of the consent's being withheld". In the event that special conditions are included in the contract as well as incorporating these standard conditions then it will be necessary to consider modifying this condition to ensure that breaches of the special condition are within this condition and that its operation is not limited to breaches of the two specified standard condition. Such modification may arise impliedly as a matter of construction as in the Alchemy Estates case. The right to rescind is not suspended if there is a breach but it is not a cause of the Landlord's consent being withheld (see section 7.4 below).

4. Special conditions - Each contract will require separate consideration as to whether the standard condition is sufficient in itself or whether special conditions will be required in addition. If the latter course is adopted then that in turn will require consideration of the relationship between the special and standard conditions (see section 5 below) and whether the standard conditions will require modification.

When deciding whether to include special conditions the following are some of the matters which will need to be considered:-

4.1 References – should the number and types of references by the Purchaser be specified?

4.2 Accounts – should accounts be required from the prospective assignee?

4.3 Landlord's requirements – purchaser to comply at its expense with all

reasonable requirements of the landlord and any superior landlord. Is it known whether the landlord has specific requirements which can be covered by a special condition;

4.4 Guarantees – name persons who are to give guarantees;

4.5 Aga – should the vendor be obliged to execute an aga and if so should it only be if the landlord can reasonably request it;

4.6 Purchaser to covenant directly with landlord;

4.7 Correspondence - Purchaser to deal with it diligently;

4.8 Approval of Licence within specified time limit;

4.9 Execution of Licence within specified time limit.

4.10 Conditions attached to landlord's consent – specific conditions which shall be regarded as reasonable.

5. Combination of Special and standard conditions – one issue which will arise when there are special conditions as well as standard is whether the special replace the standard. It is a point which was argued in *Alchemy Estates Limited v Astor* [2008] 3 EGLR 143. The contract in that case incorporated SCS (and in particular sc 8.3.2 – see 3.1. above) and a special condition, clause 16, requiring the Purchaser “to comply with all requirements of the Lease in relation to its assignment to him... and the Seller shall not be required to take any action in respect thereof...the responsibility of compliance resting with the Buyer”. The Vendor claimed that the standard conditions did not apply as they had been wholly replaced by clause 16 so that the right to rescind in sc 8.3.3 did not apply. This argument was rejected by Sales J. who held that the standard and special conditions should be interpreted together as “a coherent contractual scheme” if

5.1 a contract includes both standard and special conditions;

5.2 there is no indication that the standard conditions are to be displaced in some respect by the special; and

5.3 there is no necessary inconsistency between the two sets of conditions.

The judge accepted that if there was a conflict between the two sets then the special conditions would take precedence. In this case clause 16 qualified the balance of responsibilities between the parties so as to impose a heavier burden on the Purchaser in seeking to obtain the Landlord's consent but it had not removed the basic obligation upon the Vendor to make the original application to the Landlord for consent.

Such an argument as failed in the *Alchemy Estates* case is not necessarily a forlorn hope. In *Elfer v Beynon-Lewis* supra it was held that the purchaser's general duty to co-operate was excluded by the wording of condition 10(5) of NCS (20<sup>th</sup> Ed) which focused on references and information.

The argument can arise if specific provisions are included requiring guarantees

to be given by named persons for the assignee. If sc. 10 SCCS had also been incorporated in the contract will the special provision exclude sc 10.3.3(a)(iii)? The issue becomes material if the guarantees from the named persons are reasonably rejected by the landlord.

6. What constitutes consent? – one of the vexed issues in the context of sales and landlord’s consent is what is it that actually satisfies the requirement. This is not just important in order to discharge the Vendor’s obligation to show good title but may also be important in determining the completion date and whether or not it was possible to rescind on the ground that there was no Landlord’s consent. The issue raises two separate but inter-related points. First does it have to be in a particular form? Second what is consent for these purposes?

6.1 Form – both sets of standard conditions apply if a consent is “required to complete the contract” and then provides that it means “consent in a form which satisfies the requirement to obtain it”. It has been argued that this only requires consent in substance and does not require compliance with the terms of the lease. The argument was accepted at first instance but rejected by the Court of Appeal in *Aubergine Enterprises Limited v Lakewood International Limited* [2002] 1 WLR 2149. It was held that

6.1.1 the requirements of the lease need to be satisfied because that is what is needed in order to provide a good title. In that case the requirement was prior written consent (Auld LJ p.2161D);

6.1.2 an unconditional consent is not needed as the consent may reasonably be subject to conditions (Auld LJ p. 2161E/F);

6.1.3 a deed is not required – it may be that the Landlord will require a Licence to be executed as a deed but consent for these purposes can be given prior to that stage unless the Lease imposes the need for a formal licence (Auld LJ p.2161F). This may give rise to a practical problem because the giving of the consent may accelerate the completion date.

6.1.4 The consent may require deeds such as an authorized guarantee agreement and a covenant by the purchaser but these do not need to be executed before there can be a consent (Auld LJ p.2161G).

6.1.5 The conditions relating to a consent by the Landlord did not require that the conditions were fulfilled prior to contractual completion date (Auld LJ p. 2162 B/E).

6.2 Consent – the execution of a formal licence is the clearest and most unequivocal form of consent on the part of the Landlord. The difficulty is that it is often delayed whilst the landlord waits for various steps to be taken. The danger is that the formal Licence may not have been fully executed and delivered by the time at which the right to rescind will take effect if no Landlord’s consent has been obtained. Usually in cases in which the battle centres on whether the right to rescind is exercisable the issue will be whether a consent expressed to be “subject to licence” is sufficient to constitute a consent for the purposes of the contract. The strong trend in the authorities is to treat such a statement by or on behalf of the landlord as sufficient.

6.2.1 In *Aubergine Enterprises supra* the contract was for the sale of a lease for

£4.6 million. The contract incorporated SCS. The lease required a written consent and permitted the Landlord to withhold consent unless the assignee covenanted with the landlord and any guarantees reasonably required were provided. The agreed completion date was 30<sup>th</sup> September 1999. By letter dated 21<sup>st</sup> September and headed “subject to licence” the Landlord’s solicitor wrote to the Vendor’s solicitor confirming that the landlord had agreed “in principle” but made four requests “of an administrative nature” (Auld LJ p.2154 F/G) which were:

- (i) Engrossed licence supplied to be executed;
- (ii) Amendments to rent deposit deed to be agreed;
- (iii) Engrossed copy of aga as amended requested;
- (iv) Confirmation that execution clause effective in BVI where both parties to sale contract incorporated

The engrossment of the licence was sent by the Landlord’s solicitors on 27<sup>th</sup> September. The Buyers purported to rescind pursuant to sc 8.3.4 on 30<sup>th</sup> September on the ground that no consent had been obtained from the Landlord and this was not through the fault of the Purchaser. The evidence also indicated that the Purchaser had funding problems.

At first instance the judge had held that the “subject to licence” qualification to the letter prevented it being a consent. The Court of Appeal rejected this. Auld LJ stated (p.2163 A/C) that to draw a consent from correspondence construed in the light of the surrounding correspondence it must

6.2.1.1 record consent as required by the contract which in turn means by the lease;

6.2.1.2 be unconditional or subject only to reasonable conditions;

6.2.1.3 be unequivocal.

The “subject to licence” qualification together with the list of conditions did not cause the “plain indication of consent in the body of the letters” to be equivocal or uncertain (Auld LJ p.2166 F). There was no requirement in the lease that consent be given by deed.

6.2.2 Alchemy Estates - This decision was applied by Sales J. in the Alchemy Estates case (para. 66). He held that a solicitor’s e-mail expressed to be “in principle” and specifying conditions which included the payment of reasonable costs and the execution and delivery of a formal licence to assign. The e-mail was held to have satisfied the test laid down by the Court of Appeal in the Aubergine Enterprise case. It was unequivocal and subject only to reasonable conditions.

6.2.3 Mount Eden Limited v Prudential Assurance Co. Ltd (1996) 74 P&CR 377 – The court in the Aubergine Enterprises case applied this Court of Appeal decision which concerned the issue whether a letter headed “subject to licence” coupled with a condition that the landlord should give a formal licence constituted a consent to a tenant to make structural alterations. It was held that it did. The subject to licence qualification in a unilateral transaction did not equate to a “subject to contract” qualification in a bilateral transaction and did not have the same “magic”. The rationale behind the “subject to contract”

qualification is to prevent one party seeking to prematurely conclude a contract with the other. The only question was whether consent had been given and not whether two parties have agreed to the creation of a relationship. In the lease there was no requirement that a formal deed had to be executed merely previous written consent given.

6.2.4 Venetian Glass Gallery Ltd. v Next Properties Ltd [1989] 2 EGLR 42 is a warning. In that case Harman J. refused to accept as the landlord's consent a letter from the landlord's solicitor headed "Subject to Licence" stating that the landlord was "prepared in principle to consent to the proposed assignment.....but on the following conditions" including a formal licence. He read the letter in the context of the correspondence before and after that letter and gave the impression that a letter would not be a suitable means of giving such a consent. However, he went on to hold that the landlords had executed a formal licence and delivered it in escrow so that a successor landlord could not go back on the consent contained in that deed.

6.2.5 In Next plc v NFU Mutual Insurance Co. Ltd (12<sup>th</sup> December 1997) Morland J considered both the Prudential Assurance case and the Venetian Glass case when construing a course of correspondence and holding that the landlord's consent had been given once it was stated that the financial references were satisfactory. He rejected the submission that issuing a draft licence was merely getting the groundwork out of the way and that no consent was given until the licence was executed.

6.2.6 Bader Properties v Linley Property investments (1967) 19 P & CR 620 concerned consent to an underletting. Roskill J. held that a letter from the landlord's solicitor stating that the landlord was quite willing to consent to the underletting and that they would "prepare the necessary documents..". This is in line with the more recent decisions.

6.2.7 It cannot definitely be said that Harman J's decision would necessarily be regarded as wrong now but in the light of the recent decisions a judge is much less likely now to reach such a decision and is more likely to find consent in correspondence notwithstanding the use of words such as "in principle" and "subject to licence". This is on the basis that

(i) neither the terms of the lease nor the contract require the landlord's consent to be given in a deed; and

(ii) there are no ongoing negotiations of substance regarding the conditions to be set out in the formal licence as opposed to the form of that licence.

6.3 Given – the Landlord's consent is given "when the landlord's decision in principle is communicated to the tenant by the landlord himself, or by the landlord's solicitors or other agents" (Robert Walker LJ p.2181 E).

7. Right to rescind – this is an important right as it provides an exit at no cost and without there being a breach from contracts which are proving unexpectedly difficult to complete. Surprising the right gives rise to unexpected complications and care has to be taken not to fall into traps. It has to be remembered that there are material differences between sc 8 and sc 10 with regard to the right to rescind and if care is not taken it is possible to be caught out.

7.1 Accrual – with sc 8 the right arises if the Landlord’s consent has not been obtained by the date which is three working days before the completion date or a later date on which the parties have agreed to complete the contract. In contrast with sc 10 it is any time after the expiry of four months from the original completion date. Sc 8 is focused on a particular day whereas sc 10 runs after the expiry of the four month period. In neither case is it now relevant to ask at that date whether it will be possible to obtain the licence. This is in contrast to the position as it use to be under sc 11(5) NSC (20<sup>th</sup> Ed.)(29 Equities Ltd v Bank Leumi (UK) Ltd. [1986] 1 WLR 1490).

7.2 Timing of exercise – the right to rescind arising under sc 8 must be exercised promptly and will not run indefinitely (Sales J. in *Alchemy Estates Limited v Astor* supra at page 151 B/D).The right has to be exercised by the completion date or “perhaps a day or two thereafter”. If it is not then the parties must be taken to have decided to continue with the contract. The justification for this is that under the contract time is not of the essence normally and so a reasonable period is usually given in which to remedy any outstanding defects. Sc 8.3.3 is unusual and has a specific object which is to allow the parties to take stock in the event that the Landlord’s consent has not been obtained by that time and decide whether to continue. Due to the uncertainty of how the third party will act it permits either party to achieve certainty at that particular defined juncture in the contract. The judge did not consider that the right would continue indefinitely allowing a party to cancel the contract without warning notwithstanding that the other party has expended effort and costs on seeking to obtain the necessary consent.

Once that right is lost then the Purchaser will have to give notice requiring that good title be shown which will allow the Vendor time in which to achieve that objective.

In contrast sc 10 states that it is exercisable “at any time” after the expiry of the four month period which suggests that the right continues but if so it will be subject to all the objections raised by Sales J. in the *Alchemy Estates* case.

7.3 Landlord’s consent granted after arising of right to rescind – at first instance in the *Aubergine Enterprises Ltd* case supra it was held that once a right to rescind arose it could then be exercised even if between accrual of the right and exercise the Landlord granted consent. In that case the right arose on 24<sup>th</sup> September 1999, the agreed completion date was 30<sup>th</sup> September and there was a letter dated 27<sup>th</sup> September from the Landlord’s solicitor which was relied on as a consent. Auld LJ (at page 2169 C/F) held that if there had not been an earlier consent then the letter dated 27<sup>th</sup> September would have been too late to prevent the right of rescission from being exercised effectively.

7.4 Breach – it is common to both standard conditions that the right to rescind cannot be exercised by a party who is in breach of the obligations to seek to obtain the landlord’s consent and the breach has caused the consent to be withheld. The practical point in respect of this aspect is establishing a causal link between the breach and the withholding of the landlord’s consent. In *Aubergine Enterprises Ltd* the breach relied on to defeat the claimed exercise of the right to rescind occurred after the accrual date of 24<sup>th</sup> September and so could not be a cause of the withholding. Similarly in the *Alchemy* case the argument based on breach failed. In that case due to the failure of the Vendor to apply for the Landlord’s consent until a late stage the Landlords requirements were not notified until 6<sup>th</sup> March 2008. The agreed completion date was 13<sup>th</sup> March 2008 and the right to rescind was said to accrue on 11<sup>th</sup> March. The failure to comply with the Landlord’s demands shortly

after the notification was held not to be a breach as the Purchaser had a reasonable time in which to comply with the request and such a period had not expired.

Sales J. made clear that in determining this issue attention was focused on the position at the date the rescission notice is served rather than the date of the accrual of the right. In doing so account must be taken not just of continuing breaches but also past breaches which were still having “significant continuing effects tending to impede the obtaining of the Landlord’s consent at the date of the notice” (p.150 D/E).

Failure by a Vendor to diligently pursue the application for consent will deprive the Vendor of the ability to exercise the right of rescission (*Ganton House Investments v Corbin* [1988] 2 EGLR 69 at 73 A/B which concerned a contract into which had been incorporated NCS (20<sup>th</sup> Ed)).

7.5 Waiver/estoppel – in both the *Aubergine Enterprises Ltd* case and the *Alchemy Estates Ltd* case it was argued that the right to rescind had been lost because of waiver or estoppel. Reliance was placed on the continuing steps taken to obtain the consent after the accrual of the right to rescind and to complete the contract. In the *Aubergine Enterprises* case the conduct was not considered to be a representation that the right to rescind would not be exercised (Auld LJ p.2175 A/D). In contrast in the *Alchemy Estates Ltd.* case Sales J. considered that the actions of the Purchaser had given a “clear and unequivocal indication after the contractual completion date that it regarded the contract as on foot” and was seeking to rely on it. In that case the Purchaser had written through its solicitors after the agreed completion date requesting the Vendor to present an amended notice of claim under the enfranchisement procedure. It took a step which was more than just acts in performance of the sale contract. This result indicates that acts after the contractual completion date are more likely to be regarded as an affirmation of the contract.

A purchaser by going into occupation of the premises and even paying the purchase monies before completion does not waive the right to rescind if the landlord’s consent is not given (*Butler v Croft* (1974) 27 P&CR 1).

This defence to a claim to have rescinded the contract will be more important in the context of sc10 if it is correct that such right of rescission runs indefinitely.

8. Waiver of requirement – it is not possible for a purchaser to waive the requirement to obtain the landlord’s consent (*Ganton House Investments Ltd v Corbin* [1988] 2 EGLR 69). It is not exclusively for the benefit of the purchaser.

9. Prior occupation by purchaser – in many cases involving leasehold business premises the purchaser may go into occupation ahead of completion and indemnify the Vendor against rent and outgoings. In the event that the Landlord’s consent is not given the occupation may not have been lawful and thus the indemnity may not be effective (*Cantor Air Service v Kenneth Bieber Photography Ltd.* [1969] 1 WLR 1226).

10 Damages – these will be calculated on the normal basis for a contract to sell land (*York Glass v Jubb* (1926) 134 LT 36). In the case mentioned at the start there was a twist in that the vendor found a guarantor satisfactory to the Landlord because the persons named in the contracts to provide guarantees were not satisfactory to the Landlord. The issue was raised by the Briggs J. whether this affected the measure of damages but he accepted that

it did not. Before the 1995 Act a vendor of a leasehold interest who was the original lessee would have continued to be liable to the landlord and this continuing liability had never affected the amount of damages awarded. The position in this case was analogous to that.

#### 11. Points to consider

11.1 There is a need to consider whether one or other of the sets of standard condition are adequate for particular contract and if relying on one whether it need to be modified;

11.2 Sc 10 SCCS is preferable to sc8 SCS;

11.3 If sc8 SCS or sc10 SCCS is used then consideration should be given to deleting the Vendor's right to rescind if the purchaser is in a chain of transactions.

11.4 Consideration should be given to including special conditions to cover the topics such as those within section 4 above and if included consideration should be given to their relationship with the standard conditions.

11.5 If the Vendor is to be obliged to execute an aga consideration should be given to modifying the obligation so that it is only if the landlord reasonably requires it.

11.6 Completion date – should it be capable of being deferred as in sc 10.3.5 and if it is to be what will be the appropriate periods?

11.7 Care needs to be taken on behalf of the vendor to ensure that any time limits are complied with regarding the provision of the draft Licence and the engrossed Licence so that a notice to complete can be properly served.

11.8 Right to rescind – on behalf of the purchaser consideration will have to be given to the timing of any exercise and care taken not to waive the right by leading the Vendor not to believe that the contract is continuing.

12. The answer in an ideal world is to obtain the landlord's consent before exchange takes place.

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