BREACH OF COVENANT – A REVIEW OF THE PRINCIPLES AS ILLUSTRATED IN RECENT CASELAW AND DEVELOPMENTS

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1. Introduction

"Whilst not referring to Alice in Wonderland, both counsel seem to be agreed that in the same lease, indeed in the same clause of the lease, the word "premises" may have one meaning at one time and another at another time. In our judgment it is clear that "premises" is a chameleon-like word which takes its meaning from its context. Since it can mean almost anything the task of the court is to give the word the meaning which it most naturally bears in its context and as reasonably understood by the commercial men who entered into the agreement."

See ***Spring House (Freehold) Ltd. v. Mount Cook Land Limited [2002] 2 All ER CA***.

The construction of words is a feature of legal practice generally, but perhaps especially within the context of property and landlord & tenant law. Issues concerning breach of covenant often turn upon the proper construction of a particular phrase or word and, as illustrated above, it is often the position that the word will change in its meaning depending upon its context and commercial good sense. Whilst this makes the task of giving clear and definitive advice to clients challenging, it is to be hoped that a flavour of the approach of the courts in the particular context of

breach of covenant disputes can be obtained from the reviews of the most significant decisions during approximately the past 12 months which appears below – and perhaps from some discussion engendered by these cases.

2. Authorities

Ambrose v. Kaye [2002] 1 EGLR 49

This case involved a tenancy protected under Part 2 of the Landlord & Tenant Act 1954. The landlord had served a section 25 notice terminating the tenancy on the contractual term date. The landlord opposed the grant of a new tenancy on the ground that he intended to occupy the premises for the purposes of a business to be carried on by him (section 30(1)(g)). Section 30(3) of the Act provides that where a person has a controlling interest in a company (for example more than one half of the equity share capital) any business carried on by that company shall be treated as being carried on by that person.

The tenant served a counter-notice indicating that he was not willing to give up possession and made an application for a new tenancy. There was a preliminary issue as to whether or not the landlord could substantiate his ground of opposition. At the hearing the landlord gave evidence about his family business and the fact that it had been incorporated as a limited liability company. In his closing submissions at the end of the hearing, the solicitor/advocate acting for the tenant took the point, for the first time, that there was no evidence that the landlord had a controlling interest in the family

company and as a result he could not rely upon section 30(3) in order to establish the ground of opposition.

This “bombshell” preceded the short adjournment for lunch. During the course of that adjournment the landlord took the opportunity to get his wife to transfer to him a sufficient number of shares to enable him to satisfy the requirements of section 30(3) – which until then he would not have been able to do. The parties came back after the adjournment and the judge allowed the landlord a further adjournment to establish by way of documentary evidence that the statutory requirements were satisfied.

When the hearing resumed on the subsequent occasion, the judge accepted the landlord’s evidence and made the appropriate orders. The tenant, aggrieved, appealed and argued that the judge should never have allowed the first hearing to be adjourned, thereby enabling the landlord to produce further evidence. It was common ground that the judge, in considering the ground of opposition, had to have regard to the position as at the date when he made his order.

The Court of Appeal dismissed the tenant’s appeal. It held that the judge had properly exercised his power to adjourn the first hearing and that it simply wasn’t possible to reconcile the contentions of the tenant (to the effect that his legal advisers were perfectly entitled to hold back the point under Section 30(3) until it was too late in the proceedings for the landlord to remedy the position), with the overriding objective now contained in the CPR. The overriding objective required issues to be raised so that the justice of this

dispute be properly determined. The point should have been raised at an earlier stage and the tenant had no grounds for complaint.

It was said by the Court of Appeal (Chadwick L.J) that: ***"… the tenant's solicitor might have taken the deliberate decision not to draw the point to the attention of the landlord's solicitor in the hope that the landlord's solicitor would not see the point in time to meet it before the hearing. The latter course could have no sensible purpose, unless the court would be obliged, or could be relied upon, to refuse the landlord an adjournment in the course of the hearing. It was submitted on behalf of the tenant that, whatever may have been the actual state of knowledge of the tenant's solicitor before the hearing, it was entitled – indeed it is said, required, in the interests of its client – to adopt the latter course. It was entitled to decide not to draw the point to the attention of the landlord's solicitor, with the object of taking it at the hearing in circumstances in which it was too late for the landlord to meet it by a transfer of shares. Further, it is said that the court should have recognised that, by refusing an adjournment. To grant an adjournment, it is said, was to deprive the tenant of the advantage to which he was entitled.***

I would be sorry it that was the position under the Civil Procedure Rules. If it were, the Court could, I think, be criticised for treating civil litigation as though it were indeed a game of skill and chance. The courts would be criticised for losing sight of the overriding objective, which is to deal with cases justly. I find it impossible to reconcile the course that, on the basis of the tenant's contentions, it is said the court should have adopted in this case

with the overriding objective. It is said that the court should have told the landlord on 16th February 2001 that, although it recognised that the point was one that could easily have been met by share transfer from his wife – and, indeed, had been met by the execution of such a transfer during the luncheon adjournment on that day – the law required the judge to hold that it was too late for that to be done; indeed that the law required him to refuse to take into account what had, in fact, been done; the landlord must look to his solicitor for a remedy. Had the court taken that course, I cannot believe that the landlord would have left the court with the feeling that his case had been dealt with justly. Nor do I think that anyone else in the court would have thought that his case had been dealt with justly. It is obvious that that would not have been the just result in this case. Nor would it have been a result that is compatible with the overriding objective to which I have referred."

3. Hazel v. Akhtar [2002] 1 EGLR 45

In this case the landlord opposed the tenant's application for a new lease under the 1954 Act, relying both on breach of repairing covenants and breach of the covenant to pay rent. It was the issue concerning the breach of covenant to pay rent which took the matter on appeal from Judge Simpson in the Mayor's & City of London County Court to the Court of Appeal. An interest in the reversion of the relevant lease was acquired by the First Respondent landlord in 1997 and the Second Respondent landlord in 1999. They both served Section 25 Notices on the tenant opposing the grant of a new tenancy on grounds (a) and (b) of Section 30(1). The tenant served the appropriate

counter-notice. At the trial it was contended that there had been persistent delays in the paying of rent and that the tenant's application for a new tenancy should be dismissed. The Court found that rent had consistently been paid late throughout the period from 1997 to 2000 and that there had been no good explanation or apology or even expression of regret. Frequently, payment had been made by cheque, thereby incurring additional delay while waiting for the cheques to clear. The tenant appealed the judge's decision, characterising it as "perverse". At the appeal hearing, the Court of Appeal found that the trial judge had left out of account the fact that the tenant's conduct, in respect of late payment of rent, had always been treated in an acceptable fashion by the previous landlord and agent, notwithstanding the fact that it involved repeated minor breaches of the obligations under the lease. This practice of the previous landlord meant that the present landlords, as the assignees, were both in legal and equitable terms, estopped from insisting that the tenant should revert to strict compliance with the lease, unless they gave him reasonable notice to that effect. No such notice had been given insisting on strict compliance and once it was recognised that this form of rent payment, both in terms of payment by cheque and the slightly late presentation of rent had been acceptable to the landlords until they appointed new agents in 1999, there were two clear legal consequences. The first was that there was an estoppel which operated until clear notice was given demanding strict compliance with the lease. The second was that it was possible for the landlord to contend for "persistent" delay within the meaning of the Act from the time that any such notice was given (but not before). (As to the repairs, those had been carried out sufficiently by the date of the hearing).

4. Southwark London Borough Council v. McIntosh [2002] 1 EGLR 25

One of the most frequent applications of breach of covenant experienced by property practitioners is breach of the covenant to repair. In this case the tenant had taken a residential tenancy of a flat in Peckham on 30th October 1992. By the latter part of 1993 she had become aware that the premises were afflicted with dampness throughout. There was a smell of damp, and evidence of it in the form of mould which became progressively worse and required her to move from one room to another in order to avoid the unpleasantness. Although she reported the condition to her landlord, nothing was done until late 1999 and as a result she claimed damages for breach of the landlord's covenant to repair pursuant to the provisions of the implied term under Section 11 of the Landlord & Tenant Act 1985. She was awarded £7,850 in damages and the council landlord appealed, raising several grounds of appeal, namely (i) it was contended that they owed no duty to the tenant to advise her not to use a particular cupboard containing hot pipes for drying clothes because the resultant condensation emanating from those clothes caused damp in the cupboard and condensation elsewhere and (ii) principally, the damp in the premises was not caused by breach of covenant by the landlord; (iii) whether the leak of water in her kitchen was caused by any breach by them and (iv) the level and quantum of damages. The main point in the case was the issue as to whether or not the undoubted damp was properly occasioned by breach on behalf of the landlord. It is important to bear in mind the nature of the implied repairing obligation under Section 11 of the Landlord & Tenant Act 1985 which is:

"(a)   to keep in repair the structure and exterior of the dwellinghouse (including drains, gutters and external pipes)

(b)   to keep in repair and proper working order the installations in the dwelling house for the supply of water, gas and electricity and for sanitation …"

There is long established authority ***(Quick v. Taff-Ely Borough Council [1986] QB 809)*** that "disrepair" is established for the purposes of Section 11 if, and only if, there is established to be physical damage to the structure or exterior of the premises that does not arise by reason of the tenant's default. Landlords are not liable under the implied covenant simply because there is serious damp in the premises demised. The obligation is upon the tenant to establish either that the damp arises from a breach of the covenant (that is to say physical damage to the structure or exterior of the premises) or that the damp has itself caused damage to the structure or exterior and that this damage, in turn, has caused the damp of which complaint is made.

In the event, the judge by whom the appeal was heard (Lightman J.) found that the Particulars of Claim contained no allegation of any physical damage to the structure or exterior of the property nor that such damage had caused the damp of which the complaint was made and in respect of which damages were sought. He held that all that had been pleaded and particularised was that there was damp, as if complaint to that effect was sufficient. The result of this was that the tenant's expert also proceeded upon the basis that it was only necessary to establish the damp. He did not point to any damage to the

structure or exterior of the premises. He didn't address the question of causation. None of this was sufficient in law to establish the necessary breach of covenant. The landlord's appeal was therefore allowed and the action was dismissed.

5. Blunden v. Frogmore Investments Ltd [2002] 2 EGLR 29

This case does not strictly involve a breach of covenant, but it is an important case on the service of notices – which can tangentially be of relevance if one party or the other is to be entitled to rely upon a breach of covenant. In this particular case there were commercial premises let pursuant to a lease containing two particular terms. The first of these, clause 6.4, entitled the landlord, on giving 6 months notice in writing, to terminate the lease following damage that rendered the premises unfit for use. In addition, clause 6.9 expressly provided:

"In addition to any prescribed mode of service any notices requiring to be served hereunder shall be validly served if served in accordance with section 197 **(this was a typo for 196)** ***of the Law of Property Act 1925 as amended by the Recorded Delivery Act 1962 or in the case of the tenant if letters addressed to it or if there shall be more than one, to any of them, on the demised premises, was sent to him or any of them by post or left at the last known address or addresses of him or any of them in Great Britain."*** The reference to Section 197 in the lease was an obvious slip for section 196.

On 15th June 1996 an IRA bomb extensively damaged the premises which were in the Arndale Centre in Manchester. The landlord in fact did serve a

notice under clause 6.4 (together with a further notice under section 25 of the 1954 Act) by sending copies by recorded delivery to two addresses believed to be those of the tenant, and by fixing a notice on the demised premises.

The tenant challenged the validity of the service of the notice and gave evidence that he had been away from home at the time, that on his return he had found a communication from the Post Office that it held a recorded delivery item. By the time he had become aware of this, the recorded delivery item had been returned to the landlord's solicitor as undelivered. The tenant also argued that he hadn't seen the notice on the premises because he was forbidden to go near them as a result of the dangerous nature of the buildings. The judge dismissed these contentions and held that there had been good service of the notice but the tenant appealed.

The judge at first instance referred to various past authorities (including ***Galinski v. McHugh (1988) 57 P&CR 354***) and said that it was well established that compliance with a prescribed form of service was valid service, even if the notice did not in fact come to the knowledge of the intended recipient. Although he felt that it was "hard, very hard indeed", he felt that it had to be held that the landlord had established service by each of the three routes:

(1) Under Section 196(3) of the 1925 Act by fixing the notice to the door of the premises.

(2) Under clause 6.9 in the lease by fixing the notice to the door.

(3) Again by virtue of clause 6.9 by sending the notice by post to the last known address of the tenant.

The Court of Appeal held that notice is not the same as knowledge. Although the evident purpose of requiring notice to be given to a particular person is that the contents of the notice should be communicated to him and become known to them, nevertheless there is no doubt that both by statute and contract, provisions may lead to a position in which a valid notice has been given, even though the intended recipient does not know of the notice and is not even at fault for not knowing about it. In the Galinski case for example, it was said that the object of similar provisions was:

"… not to protect the person upon whom the right to receive the notice is conferred by other statutory provisions. On the contrary, section 23(1) is intended to assist the person who is obliged to serve the notice, by offering him choices of mode of service which will be deemed to be valid service, even if in the event, the intended recipient does not in fact receive it."

A striking illustration of these principles can be found in ***Kinch v. Bullard [1999] 1 WLR 423*** which was not in fact a landlord & tenant case, but a case about severance of a joint tenancy between a husband and wife. The facts were described by the judge as "sad" but the Court of Appeal in this case referring to the judge's decision also felt that it might be said that it had some "element of grim irony". The husband and wife were living together but the wife (who was terminally ill) was considering seeking a divorce and was advised by her solicitor to give notice severing the beneficial joint tenancy of their home, in order that the husband should not come into the whole interest

on her death. Accordingly her solicitor on her instructions, posted a notice to her husband at the house where they were both living. On 3rd August 1994 which was a Thursday, the solicitor posted the letter. On 5th or 6th August, the husband suffered a serious heart attack and was taken into hospital on Monday 7th August. Either on the Saturday or the Monday itself, the notice came through the letter box at home. The wife picked it up and threw it away because at that stage she thought that her husband was likely to predecease her anyway, ill though she was, and it would be better that the notice be not served, so that she could inherit all. In the event the husband died a week later and the wife died 5 days after him. The Judge (Neuberger J) held that the joint tenancy had effectively been severed, applying Section 196(3) of the 1925 Act and that the notice, once served, could not be recalled. The husband's executors wanted to establish that the notice had been validly served (so that the wife could not suggest that she should inherit all) and they succeeded. Another striking example was ***Lord Newborough v. Jones [1975] Ch 90*** in which an agricultural tenant had refused to accept a notice to quit send by recorded delivery. Accordingly the landlord went with a witness to the tenant's house, knocked on the door and got no answer and then slipped a notice under the back door. It was the door that the tenant normally used but it had no letter box. According to the tenant and his wife, the letter slipped under the linoleum inside the back door and was not found for months. The County Court Judge did not believe their evidence, but the Court of Appeal approached the matter on a different footing and on the basis that it might be true.

6. Russell L.J. said that:

"I have formed the view that the subject matter being a notice, it is implicit in the provisions of Section 92 that, if served by leaving at the proper address of the person to be served, it must be left there in a proper way; that is to say, in a manner which a reasonable person, minded to bring the document to the attention to the person to whom the notice is addressed, would adopt. This is to my mind, the only qualification (or gloss if you please) proper to be placed on the express language of the statutory provision. In the present case it is quite impossible to say that the action of the landlord in putting the notice under the door was other than leaving it at the proper address in a manner which a reasonable person, minded to bring the document to the attention of the tenant, would adopt."

7. Yeoman's Rowe Management Ltd. v. Bodentien-Meyrick [2002] 2 EGLR 39

In this case the landlord owned a flat which had been let under a statutory tenancy. There was a covenant in the agreement on the part of the tenant to repair and maintain the interior and to allow the landlord entry "to execute any repairs or work to the inside or the outside of the flat". The landlord served a notice indicating a desire to enter the flat in order to carry out work, to recover possession for a temporary period for that purpose and if these works constituted improvements, to seek an increase in the rent under the Rent Act 1977. The County Court Judge held that the right of entry provided for in the covenant in the lease was simply to go into to do remedial works of repair which the tenant would otherwise have been obliged to do. The landlord appealed but the appeal was dismissed on the basis that, again, the covenant

did not entitle the landlord to go into to do improvements. There was no requirement upon the tenant to submit to works of improvement or be dispossessed while work was carried out. It was not an express part of the bargain between the parties that the landlord should be entitled to make any improvements she chose.

8. *Goldmile Properties Ltd v. Speiro Lechouritis [2003] EWCA Civ 49, January 29th 2003*

This case involved a claim by a tenant against his landlord for breach of covenant for quiet enjoyment leading to a claim for loss of profit. The tenant failed in front of the District Judge, but succeeded in front of the Circuit Judge and the landlord took the matter to the Court of Appeal. The Claimant had a restaurant business in the premises in respect of which he enjoyed this business tenancy. The lease contained the usual covenant for quiet enjoyment and also contained a covenant by the landlord to repair those parts of the building which were not the responsibility of the tenant. The tenant's covenant for quiet enjoyment was qualified by the words "except as herein provided". Complying with his repairing covenant, the landlord contracted for certain works to be done involving the exterior of the premises and which required the erection of scaffolding and sheeting to the premises. The work involved the cleaning of the external walls and windows of the building and the repairing of the seals between the frames and the wall. This work took approximately 6 months to complete and during this time the tenant's restaurant business was seriously disrupted. Accordingly, he claimed against the landlord for breach of the implied term as to quiet enjoyment. The basis

of the District Judge's finding in favour of the landlord was that the landlord was simply necessarily carrying out his repairing obligation under the lease and he was satisfied that the landlord had taken all reasonable steps to minimise the potential risks so that there was no breach of the covenant for quiet enjoyment. The Circuit Judge was not satisfied that that was the appropriate test and held that to avoid being in breach of the covenant of quiet enjoyment, the landlord had to take all possible precautions and in this respect the Judge was not satisfied that such precautions had indeed been taken.

The Court of Appeal held that "neither covenant trumped the other" and that effect had to be given to both the covenant for quiet enjoyment and the repairing covenant. The Court of Appeal held that the test adopted by the District Judge was the correct test and that the appropriate threshold for disturbance by repairs was represented by the question of whether or not all reasonable precautions rather than all possible precautions had been taken. It pointed out that the covenant for quiet enjoyment was qualified by the phrase "except as herein provided" and that the result of this was that the ways in which the tenant's quiet enjoyment could be disturbed included the execution of structural repairs and maintenance. Sedley L.J, giving the main judgment of the court posed the following hypothetical question:

"And then what would be the outcome if the test preferred by the County Court Judge were adopted? Take the present case. Assuming for the sake of argument that the restaurant was closed on Mondays, it would have been possible, however unrealistic, to erect the scaffolding and sheeting each Monday morning, to work on the building for the day and to strike the

scaffolding in the evening, repeating the process for perhaps 18 months or 2 years. As Mr. Berkley accepted, such a course though possible, would not be reasonable, not least because it would greatly inflate the cost to be borne ultimately not only by the claimant but – with no additional benefit to themselves, by the other tenants of the building."

He also added at the end of his judgment:

"This lease, like many leases, makes limited provision to compensate the tenant for interruption of the enjoyment of the demise. It is perfectly possible, at least in principle, to make provision in a lease to cover the kind of disruption which has occurred here. In its absence, while there is no obligation or necessity to reflect the disturbance of quiet enjoyment by remitting rental service charges, an offer to do so may well help in establishing the overall reasonableness of the lessor's intervention."

9. Spring House (Freehold) Ltd. v. Mount Cookland Limited [2002] 2 All ER 822

There had been a lease by predecessors of the present landlords of a property on the corner of two streets in Central London. There was a covenant in the lease by the tenant to the effect that "no goods shall at any time be or remain placed outside the said premises". The property was originally a school but later became an office block and shop. The basement areas which had originally been open had since been completely covered by sky lights at the same level as the pavement and railings had been removed so there was no obvious boundary between the property and the pavement. The result was that

it had become possible to park a motor car on the covered areas and for many years the occupiers had parked one or more motor cars on the sky light. The present lessor's solicitors pointed out the above covenant and relied on this as being a prohibition for parking these cars. Ultimately a Section 146 notice was served and the matter came before the County Court for a declaration as to who was right. Essentially the judge was required to determine whether motor cars were "goods" within the meaning of the covenant. There was also an issue as to what were the "premises" for the purposes of the construction of the clause. In the event the judge at first instance held that although he was with the landlord on the question of the "premises" he was for the tenant in concluding that cars were not "goods" for the purposes of the lease. The Court of Appeal referred to the dictionary definition of "goods" which was capable of incorporating "property or possessions" or "tangible moveable property viewed as an item or items of commerce". There was also some earlier authority to support the proposition that "goods" could well mean motor cars. The Court of Appeal did in fact conclude that the word should be given its natural and ordinary meaning and that it covers a wide range of property or possessions and would not be restricted to merchandise or wares or goods offered for sale and that accordingly the landlord's arguments prevailed.

<u>10. Go West Limited v. Spigarolo [2003] 07 EG 136 (CS)</u>

Breaches of covenant in respect of assignment and corresponding allegations of breach of covenant or duty on the part of the landlord to give consent, continue to occupy the courts. This case, and the next case, constitute recent examples. In this case the tenant held two leases of business premises both

containing clauses prohibiting assignment without the landlord's written consent, such consent not to be unreasonably withheld or delayed. Section 1(3) of the Landlord & Tenant Act 1988 provides that where a tenant in these circumstances makes a written application for consent, the landlord has a duty to give that consent within a reasonable time, unless it is not reasonable to do so, and in that event he has to serve a written notice of the decision specifying the reason for withholding consent. In this case the tenant sought the landlord's consent in March 2001. In May the landlord refused consent and gave its reasons. After this however there was more correspondence but ultimately the tenant brought proceedings seeking a declaration that the consent had been unreasonably withheld. At first instance, the finding was in favour of the landlords on the basis that although the refusal of consent in May was unreasonable, the subsequent correspondence showed that the parties treated that as having no real effect and proceeded on the basis that the tenant's request for consent was continuing. The trial judge concluded that there was no breach of duty as at July 2001.

Both parties appealed. The tenant argued that the response in the letter of May 2001 constituted the end of the period of reasonable time allowed to the landlords by the statute, and the tenant disputed the existence of any continued or renewed application after this. The landlord argued that refusal of consent only occurred after a reasonable time had elapsed so that there was no real breach as at May 2001. The Court of Appeal held for the tenant and against the landlord. It held that section 1(3) of the Act gave the landlords a reasonable time to do that which was required of them, but that once that had

happened by the serving of the written notice with reasons, there was nothing more for them to do. By sending that letter they had necessarily brought the reasonable time to an end and could not subsequently claim that it was open to them to reconsider the tenant's application during the remainder of what might otherwise have been a reasonable period. Also the Court of Appeal held that the scheme of the Act was predicated upon a single date upon which the tenant's application would be made and from which the reasonable time would run. There was no concept of a "continuing application". On the facts of the case, the continuing correspondence did not amount to a renewal of the application for permission and the landlords had not withdrawn their previous refusal. The Court focussed on the landlord's letter of May 2001 and found that it was unreasonable and declared accordingly.

11. Mount Eden Land Ltd v. Towerstone Ltd [2003] L&TR 4

This case also involved an alleged breach of the assignment covenant in the lease and also of the statutory duty under the Landlord & Tenant Act 1988. It featured retail and shop premises in Oxford Street London. The lease contained a tenant's covenant not to assign the term except to a person who had entered into direct covenants with the landlord, and if the proposed assignee was a limited company, the landlord was entitled to request two or more of its directors or other persons to stand as surety for the company. The tenant gave notice to the landlord indicating that it was running down its business and that it wished to assign its lease. The landlord asked for further documents and confirmed that it wished to have the directors of the proposed assignees stand as sureties for the company. References for M, the director of

the tenant were given but the landlord insisted that the tenant request the referees to confirm that their references would remain unchanged in respect of the total of M's contingent liabilities under all of his guarantees (which totalled £1.6 million) rather than his contingent liability in respect of the lease which amounted to some £370,000. The tenant refused to do this, contending that the landlord's request was unreasonable. The landlord then requested two other guarantors and the tenant put forward B, although B had inadequate references. Ultimately, the landlord refused to give consent but nonetheless the assignment went ahead, as a result of which the landlord commenced forfeiture proceedings. The new tenant defended on the ground that the landlord has unreasonably withheld its consent to the assignment, contrary to section 1 of the 1988 Act and counterclaimed for relief from forfeiture. The Court of Appeal held that there was an implied term of the lease that any request for guarantors should be genuinely for the purpose of improving the landlord's financial security. It could not, in circumstances where there was ample security, request a large number of guarantees, with the object of making it impossible for the tenant to comply, thereby precluding the assignment. However, there was nothing further to be implied. The lease gave the landlord a discretion to require such security as it thought appropriate and it was not necessary to imply a requirement of reasonableness in order to make the lease work. Applying the "officious bystander test" any landlord would have rejected that kind of suggestion at the time the lease was entered into. On the facts, the landlord had in fact acted reasonably. It was not unreasonable for the landlord to have required references which confirmed the proposed guarantor's ability to meet all of his contingent liabilities and not just

those that might arise under the lease. The tenant's claim for relief from forfeiture was dismissed.

12. Williams v. Kiley (t/a C.K. Supermarkets Ltd) [2003] 06 EG 147

The Respondents to this appeal carried on business as a newsagent and confectioner and tobacconist in a shop in a parade of shops in Swansea. The lease contained a covenant restricting its use to those trades. The Defendant (who appealed) carried on a supermarket business in the shop next door which was held pursuant to two leases both containing covenants restricting the use of the premises. In particular, in his lease, the covenants excluded the use of the premises for "newsagents, sugar confectioners, tobacconists" and other trades. The Defendant sold products including tobacco and cigarettes, confectionary and stationary items. All the leases in the parade had been granted for 99 years. At first instance, the Judge held that the parties' leases formed part of a "letting scheme" which entitled the Claimant to enforce the covenants directly against the Defendant and that there had been a breach by the Defendant of the restrictive covenants. The Defendant who had the supermarket business was unhappy and he appealed, but his appeal was dismissed. The Court of Appeal held that a letting scheme did exist and that the leases created "reciprocity of obligation". The covenants were in identical form and carefully constructed to dovetail with the other leases in the group of five shops. They were not directed simply to protect the interests of the landlords and were intended to create rights enforceable by the lessees themselves. It was reasonable to infer that the intention to create such reciprocity would have been known to the first lessee in the parade and the

plan attached to the first lease defined the area of the letting scheme. What the Defendant was doing breached the covenant and he was doing so to an extent that the Court found for the Claimant, as had the judge at first instance. The case is especially interesting because it deals with the principles of law governing a "lettings scheme" and the fact that the Claimant in this case was able to enforce the restrictions in its own lease as against another lessee who was also part of the same "letting scheme" without having to rely upon the intervention of the landlord – in this case the council. The position would appear to be that where such a scheme is held to exist, restrictive covenants of this kind may be enforceable as part of a "local law" by the owners or lessees of individual plots or buildings without the need to rely upon the original grantor. The position is dealt with in Megarry & Wade on Real Property in the appropriate detail.

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