

***No.1 West India Quay v East Tower – Lessons
for landlords and tenants***

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“Oh, East is East, and West is West, and never the twain shall meet...”

Outline of this talk



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2. Key statutory provisions
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4. ***West India Quay*** – the judgments
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West India Quay – the background



- 42 flats in block in Canary Wharf – No. 1 West India Quay is landlord
- 42 long (residential) leases all owned by East Tower
- Leases required consent to assign
- L refused consent in respect of two flats for three reasons:
 - (i) L required £1,250 plus VAT in legal fees;
 - (ii) L required an inspection by surveyor (at cost of £350 plus VAT); and
 - (iii) L required a bank reference.
- T sought declaration consent unreasonably refused (part 8 claim)

Key statutory provisions



- S. 1 Landlord and Tenant Act 1988

(applies to fully qualified assignment and sub-letting covenants in tenancy agreements):

“(3) Where there is served on the person who may consent to a proposed transaction a written application by the tenant for consent to the transaction, he owes a duty to the tenant within a reasonable time –

(a) to give consent, except in a case where it is reasonable not to give consent,

(b) to serve on the tenant written notice of his decision whether or not to give consent specifying in addition –

(i) if the consent is given subject to conditions, the conditions,

(ii) if the consent is withheld, the reasons for withholding it

(4) Giving consent subject to any condition that is not a reasonable condition does not satisfy the duty under subsection 3(a) above”

S. 1(6) places burden on L to prove that refusal was reasonable.



Previous case law (1): pre-1988 Act

British Bakeries (Midlands) Ltd v Michael Testler & Co Ltd [1986] 1 EGLR 64 (Peter Gibson J)

"If a landlord has a good and a bad reason for withholding consent, consent may nevertheless have been reasonably withheld if the good reason is a sufficient reason and is not otherwise vitiated by the bad reason."

Berenyi v Watford Borough Council [1980] 2 EGLR 38:

- Only previous Court of Appeal authority considering 'good' and 'bad' reasons.
- Held that the bad reason did vitiate the good.
- sd

Previous case law (2): post-1988 Act

***BRS Northern Ltd v Templeheights Ltd* [1998] 2 EGLR 182**

Comprehensive review and analysis of the authorities by Neuberger J.

Conclusion:

"In my judgment, where, as here, a refusal of consent to an assignment is based on a number of reasons, the fact that one of those reasons is bad will not normally render the refusal unreasonable, assuming that the other reasons are good. As the observation in *Berenyi* and *British Bakeries* suggests, it seems to me that, ultimately, it is a question of considering the covenant and the refusal of consent in each case. Thus, it may be clear that the bad reason is by far the most important reason, and that the purportedly good reasons were merely makeweights; or it may be that the existence of the bad reason infects or vitiates what would otherwise, in the absence of the bad reason, be a good reason."

Principles not altered by 1988 Act on this point.

Judgments – (i) County Court



HHJ Walden-Smith held:

- £1,250 plus VAT legal fee was **unreasonable**. (£350 plus VAT was all that was justified on the evidence.)
- Requirement for a surveyor to inspect (and hence for T to pay for that) was **unreasonable**.
- Requirement for a bank reference was **unreasonable**.

Judgments – (ii) High Court on appeal

Henderson J held:

- The Judge had not erred in finding the £1,250 plus VAT legal fee **unreasonable** on the evidence.

Her “robust and sceptical approach” to the reasonableness of the legal fees had been “amply justified”.

- Requirement for a surveyor to inspect (and hence for T to pay for that) was **reasonable**.
- Requirement for a bank reference was **reasonable**.



Judgments – (ii) High Court on appeal (contd)

- There were therefore two ‘good’ reasons and one ‘bad’ reason operating on L’s mind.
- Was the refusal reasonable or not?
- L argued that one good reason would be sufficient
- T argued that the bad vitiated the good
- Henderson J accepted the general rule derived from ***British Bakeries*** and ***BRS***.

Judgments – (ii) High Court on appeal (contd)

- However, he held that the bad reason vitiated the good reasons.
- The legal fees were required as a pre-requisite to a licence, and
“There is no indication that West India Quay would have modified its position in this respect, even if ETAL had agreed to provide bank references and to pay for inspection by a surveyor.”
- → Refusal was bad
- This appears to be a ‘but for’ analysis:
‘would L have changed its decision if T had satisfied the good reasons?’ = ‘would L have refused consent but for the good reason?’
Answer to this will surely always be ‘no’...

Judgments – (iii) Court of Appeal

Lewison LJ (with whom Floyd and Peter Jackson LJJ agreed):

- The s. 1(3)(a) duty is to give consent except in a “case” where it is reasonable not to. It is the decision that must be reasonable, and not every reason given [28];
- S. 1(4) applies to conditional grant of consent, and not to refusals [28], [29];
- Expressly did not decide that one unreasonable condition on a grant would constitute a breach of s. 1 duty [29];
- Policy of the Act of letting T know where he stands is satisfied if L complies with the statute and gives all of his reasons for refusal.
- Not always obvious to L which reasons will be held to be good;
- A “scattergun approach” risks adverse findings of fact as to true reasons.
- *Berenyi* was an extraordinary case (lease allowed potentially unreasonable reasons for refusal).

Judgments – (iii) Court of Appeal (contd)

- Test in **BRS** is broadly speaking still good law [31]
- T was not permitted to argue that the requirement for the fee meant that the application was never considered at all (this was a second appeal and that issue had been determined at first instance) [32] – [33]
- For a reason to “infect”, there must be some connection [35]
- Support also comes from law on s. 146 notices (not all breaches must be proven for notice to be good)

Judgments – (iii) Court of Appeal (contd)

Support also comes from other areas of law altogether:

- ***Braganza v BP Shipping Ltd* [2015] UKSC 17**

Exercises of contractual discretion essentially judged by same principles as public law discretions.

- ***R v Broadcasting Commission ex p Owen* [1985] QB 1153**

If statutory body would have reached same decision in absence of the bad reason, then decision will not be quashed.

- ***Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71**

"One has to focus on the improper purpose and ask whether the decision would have been made if the directors had not been moved by it."

Judgments – (iii) Court of Appeal (contd)



Lewison LJ's ultimate conclusion:

“42 In short, in my respectful opinion, the judge asked himself the wrong question. The question was not: would the landlord have maintained the unreasonable reason if the reasonable conditions had been complied with? Rather it is: would the landlord still have refused consent on the reasonable grounds, if it had not put forward the unreasonable ground? To put the point another way: the question is whether the decision to refuse consent was reasonable; not whether all the reasons for the decision were reasonable. Where, as here, the reasons were free-standing reasons each of which had causative effect, and two of them were reasonable, I consider that the decision itself was reasonable.”

So, a new ‘but for’ test.



Lessons for Landlords

Legal fees: safest to seek 'reasonable' fees rather than specify. Not safe to assume the court will find more than £350 plus VAT reasonable

Bank references: probably reasonable to require in majority of cases

Inspections: Very fact-sensitive. Only require if really needed.

Reasons in refusal notices: Don't assume a scattergun approach will be tolerated, as it may influence court's findings of fact. Consider whether an issue should be a condition or reason for refusal.

Dealing with requests: treat anything as a potential request. Don't refuse to deal with a request until a particular sum is agreed.

Evidence: burden of proof on L so ensure everything is proven

Part 8 vs part 7: L should be very wary of part 8 given it has burden of proof

Lessons for Tenants



Legal fees: don't blindly agree to an undertaking for a particular sum, even if it seems commercially realistic.

Bank references: don't refuse to give this unless there is a very good reason. In cases of sub-letting it *may* not be reasonably required however.

Inspections: Very fact-sensitive. Seek to argue that it is not necessary, but hard to say it's automatically unreasonable. If lease has no indemnity for application costs, argue that T should not pay.

Reasons in refusal notices: If multiple reasons are given, consider arguing that the reasons were not true reasons. Don't seek to argue that one true reason vitiates another unless there is some link between them.

Making requests: Ensure application is made to address required in the lease, even if that is not L's registered address. If in doubt, serve on all addresses that are plausible.

Evidence: burden of proof on L. Include any evidence that seeks to undermine L's case as to what were true/operative reasons.

Part 8 vs part 7: consider part 8 to prevent L from discharging burden.