Neutral Citation Number: [2018] EWCA Civ 250

Case No: A3/2016/4009

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION
Mr Justice Henderson
CH-2016-000066

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st February 2018

Before :

LORD JUSTICE LEWISON
LORD JUSTICE FLOYD
and
LORD JUSTICE PETER JACKSON

- -

Between :

NO.1 WEST INDIA QUAY (RESIDENTIAL) LIMITED	**Appellant**
- and -	
EAST TOWER APARTMENTS LIMITED	**Respondent**

- -
- -

Mr Martin Hutchings QC & Mr Jonathan Wills (instructed by **Trowers & Hamlins LLP**) for the **Appellant**
Mr Jonathan Seitler QC & Ms Lina Mattsson (instructed by **Penningtons Manches LLP**) for the **Respondent**

Hearing date : 15 February 2018

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Judgment Approved

Lord Justice Lewison:

1. The long lessee of a flat applies to the landlord for consent to assign. The landlord is not entitled unreasonably to refuse consent. The landlord refuses consent on three grounds. Of those three grounds, two are reasonable; the third is unreasonable. Is the refusal of consent valid? That is the question raised on this appeal from Henderson J, whose judgment can be found at [2016] EWHC 2438 (Ch); [2017] 1 P & CR 8.

2. I take the essential facts from the judge's careful judgment. No.1 West India Quay is a 33-storey building comprising a hotel and 158 residential apartments let on long leases by West India Quay. On 17 August 2004, East Tower Apartments Ltd ("ETAL") took 999-year underleases from West India Quay of 42 apartments (together in some cases with car parking spaces), including the Underleases. ETAL is a company registered in the British Virgin Islands, and it does not itself occupy any of the 42 apartments of which it is underlessee. The apartments are managed for it by Premview Properties Ltd, which is a company based in north London. Premview grants short-term assured shorthold tenancies of the apartments, typically of six to 12 months' duration, and there is therefore a regular turnover of tenants in occupation. These sub-lettings do not require the consent of West India Quay.

3. For reasons which do not matter, ETAL decided to sell its 42 apartments. Under the terms of the underlease, West India Quay's consent was required "(such consent not to be unreasonably withheld)". A covenant in this form is usually referred to as a "qualified covenant". West India Quay gave consent for eight sales. The only conditions imposed by West India Quay for these assignments were payment of all service charges demanded (although these were in dispute and are the subject of Tribunal proceedings) and a fee of £1,250 plus VAT. This fee was paid, without apparent objection, by ETAL.

4. In relation to apartment 28.08, ETAL first sought West India Quay's consent by a letter dated 27 March 2015. ETAL's letter confirmed its undertaking to pay West India Quay's costs in connection with the licence to assign in the sum of £1,250 plus VAT, whether or not the matter proceeded to completion. Receipt of the letter was acknowledged by West India Quay on 30 March 2015. ETAL was asked to bring the service charge account up to date. This was duly done, albeit under protest, and on 14 April 2015 ETAL informed West India Quay that completion was due to take place on Friday 17 April 2015, so the licence to assign was urgently required. In response, Emma Catterall for West India Quay said that she would "arrange for signature [of the licence to assign] here too".

5. Despite this, no licence was signed and returned to ETAL. Instead, on 20 April 2015 West India Quay, for the first time, sought to impose conditions of an inspection and an undertaking to pay £350 plus VAT for a surveyor to inspect the property. These conditions were then repeated in letters dated 22 and 28 April 2015. This was challenged in correspondence by ETAL's solicitors, on the grounds that consent to assign had already been given, and the requirement was in any event unreasonable. Eventually, ETAL agreed on 29 April 2015 to pay the sum requested, but only if the inspection took place on the following day and the licence to assign were executed by 4pm on 1 May 2015. This proposal was not acceptable to West India Quay, but after ETAL threatened to bring proceedings, and further correspondence, West India Quay

agreed on this occasion not to insist on the inspection as a condition for granting permission to assign. Their letter added:

> "Going forward, each application must be considered on its own facts."

6. The consent was finally granted on 13 May 2015, 47 days after the original request on 27 March 2015.

7. Less than a week later, on 19 May 2015, West India Quay through its in-house solicitor, Chris Christou, sought to impose the same condition in respect of inspection for apartments 27.02 and 27.09, together with an undertaking to pay £1,600 plus VAT as a fee (i.e. the £1,250 previously charged, plus £350 for the surveyor). What he said was:

> "The fee regarding the Landlord's Licence to Assign is estimated at £1,600.00 plus VAT. This is on the basis that the matter does not become unduly complicated or delayed. Should this be the case, I reserve the right to vary this figure. My client requires the Apartment to be inspected by a surveyor. Arrangements are being made in this respect but I will require your firm's undertaking to pay the proposed fees, such undertaking to apply whether or not the matter proceeds to completion, before the appointment can be finalised."

8. In addition, a requirement of a bank reference was imposed for the first time:

> "My client also requires a current UK bank reference for the prospective assignee, confirming that the prospective assignee is good for the minimum sum of £5,250.00 [or, for apartment 27.09, £6,250.00] per annum."

9. ETAL replied on 19 May agreeing to an inspection in principle, but not to payment of a fee for it. ETAL's solicitors wrote a more formal response on 22 May. They pointed out that whereas in previous cases the application fee was £1,250 the fee now sought was £1,600 which they inferred included £350 for the inspection. They protested about the request for a bank reference. They concluded the substantive part of their letter:

> "We therefore require you to confirm:
>
> a. That the fees payable for the application for the licence to assign will be £1,250 plus VAT for each apartment, and not £1,600 plus VAT
>
> b. That you will consider the applications for licences to assign on receipt of undertakings for the reduced sum, without requiring that inspections have taken place or that the fees of the inspections are paid by our client beforehand, and

> c. That you will not require a current UK bank reference for the assignee.
>
> If you fail to provide confirmation on all three points in writing before Friday 29 May 2016, we are instructed to issue proceedings in which we will seek (i) a declaration that imposing those conditions is unlawful and would amount to unreasonable withholding of consent and (ii) costs."

10. On 26 May 2015 West India Quay wrote refusing to grant consent for the assignments. The letter gave three reasons:

> "My client is not prepared to proceed with the Licences for the following reasons:
>
> 1. **Costs**
>
> Clause 3.10.4 of the underlease clearly entitles my client to recover my client's costs. The amount requested is not unreasonable and it includes the additional fee which you state for the inspection. My client is not prepared to proceed until I receive the undertaking requested…
>
> 2. **Inspection**
>
> My client is entitled to check that there have not been any breaches of the terms of the Underleases. Please therefore provide the undertaking required so that we can progress the matter.
>
> 3. **Reference**
>
> As your client is well aware a Section 21 Notice of Intention has been served on the Lessees and the Residents' Association regarding the utility meters. The costs in this respect are currently estimated at over £1 million. My client is entitled to assess and consider the covenant strength of the prospective assignee. Please therefore let me have the reference requested so that we can progress the matter."

11. On 19 June ETAL's solicitors wrote to the solicitors whom, by that time, West India Quay had instructed. They reiterated their position that the requirement of a bank reference was unreasonable. On the question of fees they said:

> "Our client has not accepted that the sum of £1,250 plus VAT is reasonable…. Our client will pay a reasonable sum relating to the application for consent, but neither £1,250 plus VAT nor £1,600 plus VAT is accepted as reasonable, and your client's attempt to impose a condition requiring payments of the fees for an inspection is absolutely refused."

12. West India Quay's solicitors replied on 22 June that their client's position was as set out in earlier correspondence.

13. Faced with this impasse, ETAL began proceedings, as foreshadowed, for a declaration that West India Quay had unreasonably refused consent to the assignment; or, in the alternative, a declaration that the conditions were unreasonable. The claim form also sought an award of damages. HHJ Walden-Smith declared that all three conditions were unreasonable. As regards the first condition, it was not unreasonable in principle for West India Quay to require its costs to be paid; but it had not established that those costs were any greater than £350. She also declared that West India Quay was in breach of statutory duty under section 3 of the Landlord and Tenant Act 1988. In the interim ETAL had paid the disputed fee and had completed the assignments with West India Quay's consent. HHJ Walden-Smith therefore ordered the disputed fees to be repaid to ETAL.

14. On appeal from that decision, Henderson J approached the question on the following factual basis:

> "[4] In respect of apartments 27.02 and 27.09, West India Quay had refused consent to assign for three reasons set out in its letter of 26 May 2015 to ETAL's solicitors, Penningtons Manches LLP. First, ETAL would not agree to give an undertaking in respect of West India Quay's fees of £1,600 plus VAT, comprising legal fees of £1,250 plus VAT and surveyor's fees of £350 plus VAT. ETAL asserted that the legal fees were unreasonably high, and that no surveyor's fee should be paid because it was unreasonable for West India Quay to require inspection of the apartment by a surveyor. Secondly, following on from this last point, West India Quay wished to carry out an inspection before reaching a conclusion on consent to assign, in order to check whether there had been any breaches of the terms of the Underleases. ETAL challenged the need for any such inspection as a prerequisite of permission to assign, and therefore refused to pay the fee requested. Thirdly, West India Quay had asked to be provided with a bank reference for the prospective assignees, in order to assess and consider their covenant strength. Again, ETAL challenged the reasonable need for such references, and therefore refused to provide them."
>
> "[26] … After further correspondence, on 26 May 2015 West India Quay wrote refusing to grant consent for the assignments in the terms which I have already recorded at [4] above. There was a dispute before the judge whether this letter constituted a refusal of consent, but she decided at [21] of the Judgment that it did, and there is no appeal against her conclusion on that point."

15. The judge decided that, contrary to the view of HHJ Walden-Smith, it was reasonable for West India Quay to require a bank reference; and also reasonable for it to require to have the apartment inspected by a surveyor at a cost of £350. That left the

administration fee. On that issue the judge held that the assessment of £350 for legal costs was an assessment open to HHJ Walden-Smith on the evidence. It followed, therefore, that one of the three reasons given was unreasonable.

16. That led to the question: was West India Quay entitled to rely on its two good reasons? Before the judge it was common ground that the law was encapsulated in Woodfall on Landlord and Tenant (Looseleaf edition) para 11.139:

> "If the 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. However, there may be cases where the real reason for refusal is a bad one, and the good reasons are no more than makeweights, or where the bad reason vitiates the good one. In the absence of such factors, the landlord is entitled to rely on his good reason."

17. The judge referred to the letter of 19 May and also to the opening words of the letter of 26 May; and concluded at [63]:

> "In the light of these letters, it seems clear to me that West India Quay was saying it would not proceed with the licences to assign unless and until it received an undertaking from ETAL's solicitors to pay the estimated fees of £1,600 plus VAT. This figure included the disputed £1,250 plus VAT in respect of West India Quay's own costs. 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. I therefore think [ETAL] is right to submit that in this case the bad reason vitiated the two good ones, with the consequence that West India Quay's success on those two matters is not enough to render the refusal of consent reasonable."

18. At common law where a covenant against assignment without consent is qualified by the proviso that consent is not to be unreasonably withheld, the tenant has no right to damages if consent is in fact unreasonably withheld. Instead, the tenant is released from the obligation to comply with the obligation not to assign without consent, as regards the particular assignment for which consent has been asked. In contending that consent had been unreasonably withheld, the burden of proof was on the tenant. This was regarded as an unsatisfactory state of the law, and following recommendations of the Law Commission made in two reports, it was changed by the Landlord and Tenant Act 1988. The Law Commission recognised a number of defects in the law. First, the burden of proof in establishing that a refusal of consent was unreasonable lay on the tenant. Second, the landlord had no obligation to give reasons for his decision. This left the tenant unable to decide what to do in the face of a refusal. Third, the tenant had no claim in damages against the landlord if consent were unreasonably refused. They also expressed the view that a landlord would unreasonably withhold consent if he purported to give it subject to an unreasonable condition.

19. Section 1 of the Act applies to leases containing a qualified covenant against alienation. It is not confined to long leases for which a premium is paid: nor is it confined to residential property. Section 1 goes on to provide:

> "(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.
>
> (5) For the purposes of this Act it is reasonable for a person not to give consent to a proposed transaction only in a case where, if he withheld consent and the tenant completed the transaction, the tenant would be in breach of a covenant.
>
> (6) It is for the person who owed any duty under subsection (3) above—
>
> (a) if he gave consent and the question arises whether he gave it within a reasonable time, to show that he did,
>
> (b) if he gave consent subject to any condition and the question arises whether the condition was a reasonable condition, to show that it was,
>
> (c) if he did not give consent and the question arises whether it was reasonable for him not to do so, to show that it was reasonable,
>
> and, if the question arises whether he served notice under that subsection within a reasonable time, to show that he did."

20. Section 4 provides:

> "A claim that a person has broken any duty under this Act may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty."

21. It is important to note that what the Act does is to impose a statutory duty actionable in tort. Unlike many landlord and tenant statutes, it does not vary the tenancy by the implication of a term. The second of the Law Commission's reports (Leasehold Conveyancing Law Com No 161) explained that the option of a statutory duty was chosen to avoid an original landlord being liable after he had parted with his reversion; and also emphasised that liability for breach of the duty was a tortious liability. Thus the contract of tenancy remains unaltered; as is also made clear by the test of reasonableness under section 1 (5) which is expressly linked to the question whether completing the proposed transaction would be a breach of covenant. However, that said, it is established that section 1 (6) reverses the burden of proof at common law; and that section 1 (3) (b) precludes a landlord from relying upon reasons for refusing consent which were not communicated to the tenant: *Footwear Corporation Ltd v Amplight Properties Ltd* [1999] 1 WLR 551; *Go West Ltd v Spigarolo* [2003] EWCA Civ 17, [2003] QB 1140.

22. The second important consequence of the imposition of a duty actionable in tort is that in order to recover damages, it must be shown that the breach of duty has caused loss.

23. The proposition in Woodfall to which the judge referred is based on two authorities: *British Bakeries (Midlands) Ltd v Michael Testler & Co Ltd* [1986] 1 EGLR 64 (Peter Gibson J) and *BRS Northern Ltd v Templeheights Ltd* [1998] 2 EGLR 182 (Neuberger J).

24. In *British Bakeries* it was common ground between counsel (who included Mr Neuberger) that:

> "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."

25. The landlord in that case had refused consent to an assignment on two grounds: first, that the assignees' proposed use would be a breach of covenant; and second, that the assignees were not of sufficient financial standing. The judge held that the first reason was bad, but the second reason was good. Having reached that conclusion, the judge said:

> "In my judgment, therefore, the landlord was not acting unreasonably in refusing consent, because of the real doubt that the landlord had about the proposed assignees' financial ability to meet their obligations under the lease. That reason does not seem to me to be vitiated by the bad reason given by the landlord as to user."

26. In *BRS* the landlord refused consent to an assignment on four grounds: first that the proposed assignees' use would be a breach of covenant, second that the landlord's

development interests would be harmed, third that the assignees' interest was intended to frustrate that development and fourth, that the value of the landlord's reversionary interest would be diminished. The judge held that first reason was bad, but the remaining three were good. Having reached that conclusion, he held:

> "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."

27. Neuberger J also held at 193 D-E that the applicable principles had not been changed by the Landlord and Tenant Act 1988. Ironically, as a result of the decision of the House of Lords in *Ashworth Frazer Ltd v Gloucester City Council* [2001] 1 WLR 2180 it may well be that the "bad reason" in both *British Bakeries* and *BRS* was a good one after all.

28. A number of points of interpretation of the Act were discussed in the course of the hearing before us. The duty under section 1 (3) (a) is a duty to give consent "except in a case where it is reasonable not to give consent". The "case" means the particular situation with all its relevant facts. No doubt, as a result of section 1 (3) (b) (ii), the landlord is confined to relying on the reasons that he gives in writing, but section 1 (3) (a) is not itself tied to those reasons. Still less does it require that all those reasons be reasonable. This contrasts with section 1 (4) which provides that giving consent subject to "any condition" that is unreasonable does not comply with the duty under section 1 (3) (a). Section 1 (4) does not say that refusing consent for "any reason" that is unreasonable fails to discharge the duty. In the case of a refusal of consent, the duty to give reasons under section 1 (3) (b) (ii) is a duty to give "the reasons for refusing it". This is not a duty only to give good reasons: it is a duty to give all the landlord's reasons. The burden on the landlord under section 1 (6) (c) in the case of a refusal of consent is a burden to show that it was reasonable for him "not to do so" i.e. that it was reasonable for him not to grant consent. It is not a burden to show that each of his reasons for that refusal was reasonable.

29. Mr Seitler QC, for ETAL, argued that the Act had indeed changed the law radically; and that a landlord was now only permitted to put forward good reasons. If one of his reasons for refusal was bad, then the refusal itself was unreasonable. There were three main strands to this argument. First, the policy of the Act was to strengthen the tenant's hand. In particular the requirement that the landlord had to respond in writing to the tenant's request for consent was designed to enable the tenant to know where he stood. The key to the successful operation of the Act was the accuracy and veracity of the notice given under section 1 (3). There are many cases in the field of landlord and tenant where it is important to get a notice exactly right, and this is one of them. I accept that that was at least one of the policy reasons for the Act. But that policy is

satisfied if the landlord gives his reasons in writing within a reasonable time. The tenant knows where he stands and he can (with legal help if need be) decide what to do next. The notice given by the landlord under section 1 (3) will be accurate and true if it states all the landlord's reasons for the refusal, whether they are good, bad or indifferent. Accordingly, in this context, getting the notice right means complying with the statute; and that in turn means that the landlord must set out in writing all the reasons on which he wishes to rely. The second strand relied on the structure of the Act. Here the argument was that there was no difference between a refusal of consent on the one hand and the grant of consent subject to "any" unreasonable condition. In this context "any" includes one of many. If, therefore, a landlord gives consent subject to, say, three conditions, one of which is unreasonable, he has failed in his duty under section 1 (3) (a). That may or may not be right: I do not decide the point either way. But section 1 (4) addresses only "conditions". It does not address reasons for refusal; or, indeed, reasons for the imposition of conditions. There is nothing that we were shown in the Law Commission's reports that suggested that the Commission considered that a mix of good and bad reasons for a refusal of consent would automatically invalidate the refusal; and certainly nothing of that kind found its way into the Act itself. The third strand was that if a landlord was entitled to put forward a mix of good reasons and bad reasons, he would overload the section 1 (3) notice, secure in the knowledge that he would be permitted to rely on the good reasons. That would run counter to the overall policy of the Act which was to simplify and speed up leasehold conveyancing. There was ample case law on the subject of what was a good reason and what was a bad reason, and a landlord could (with legal help if need be) confine himself to good reasons. I do not think that things are so clear cut. In this very case HHJ Walden-Smith and Henderson J disagreed over whether two of the three reasons were reasonable. It is not difficult to postulate other examples. Suppose, for example, that the tenant of a retail unit wishes to assign to an assignee carrying on a different retail business, which conflicts with the landlord's tenant mix policy. There might be difficult issues of competition law to resolve before it could be known whether the landlord's decision was reasonable. Moreover, if the landlord uses what Mr Seitler QC called a scattergun approach, he runs the risk that a court will consider either that the bad reasons infected the good, or that some of the purported reasons were not in truth operative reasons at all.

30. Finally, for the sake of completeness I should mention the decision of this court in *Berenyi v Watford Borough Council* [1980] 2 EGLR 38. This was an extraordinary case in which a lease contained a covenant not to use the property except for a particular purpose without the landlord's consent, such consent not to be unreasonably withheld. The clause went on to say that the landlord's consent should not be treated as having been unreasonably refused in three defined sets of circumstances. The landlord refused consent to a change of use. It did not attempt to justify the refusal on the ground that it was a reasonable refusal. Rather, it attempted to justify the refusal on the ground that it was covered by one of the three defined sets of circumstance. That was the only issue with which this court was concerned, and Mr Seitler QC, rightly in my judgment, did not rely on it in support of his submission.

31. Thus far, then, I would hold that Neuberger J was right in *BRS*, and that the test he proposed is, broadly speaking, still good.

32. In oral submissions Mr Seitler QC said that on the facts in our case the refusal was not a refusal of consent to assign, but a refusal to entertain the application at all. The requirement of an undertaking to pay the fee demanded of £1,600 was a "gateway" to the application. The two other reasons, which would have been good reasons, never became relevant because West India Quay's refusal to entertain the application at all meant that they never arose. In that sense the bad reason "infected" or "eclipsed" the good reasons, and that was the basis on which the judge said what he did at [63]. Mr Seitler QC accepted, however, that this was not how ETAL's case had been argued either at first instance or on the first appeal. Ironically, it does seem to have been the way in which West India Quay argued its case at first instance, which HHJ Walden-Smith rejected. She said:

> "Insofar as West India Quay have sought to suggest that the letter of 26 May 2015 is not a letter refusing consent to assign, I do not accept that contention."

33. As the judge said, there was no appeal against that conclusion. It is also, in my judgment, inconsistent with the judge's findings at [4] and [26] against which there has also been no appeal. Those findings were that West India Quay had refused consent to the assignment on three grounds. I would not permit this point to be raised on a second appeal. It is too late to attempt to recharacterise the facts on which the case has so far been fought.

34. The judge in our case did not decide (or at least expressly decide) that the demand for the excessive administration fee was "by far the most important reason." Indeed it is difficult to see on what material he could have done so. Nor was such an allegation ever put to the landlord's witnesses (who were not cross-examined). So can it be said that the bad reason infected or vitiated the good reasons?

35. To describe one reason as having "infected" another implies, at the least, some connection between them. If the good reasons are freestanding, and not dependent on the bad reason, it would seem on the face of it that there has been no infection of the good by the bad.

36. This would, I think, be consistent with other areas of the law. If, for example, a contracting party asserts that the other party is in breach; and gives a good reason and a bad reason for that assertion, he is permitted to rely on the good reason. Indeed, in some cases he is allowed to rely on a good reason even if he was unaware of it at the time (although as mentioned that is precluded in a case like this by section 1 (3) (b)). Similarly, in the case of tort if the claimant would have sustained damage anyway, even if the defendant had not been in breach of duty, the breach will have had no relevant causative effect on the loss sustained. Since loss is, in general, a necessary ingredient of a cause of action in tort, that means that no cause of action arises. Likewise, in the case of a notice served under section 146 of the Law of Property Act 1925 alleging multiple breaches of covenant, the fact that some breaches are not proved does not invalidate the notice. So too in the case of a mortgagee's exercise of his power of sale, the exercise will be valid if one of the mortgagee's reasons for the exercise of the power is to recover the secured debt, even if he has other improper reasons.

37. Since the landmark decision of the Supreme Court in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661 we have also learned that the exercise of a contractual discretion is to be judged by the same principles as the exercise of public law discretions. A line of cases in that field has held that where a decision maker gives a good reason and a bad reason for a decision, there are cases in which the good reason is enough to support the decision. Thus in *R v Broadcasting Commission ex p Owen* [1985] QB 1153 the decision maker gave five reasons for a decision, one of which was bad. May LJ said:

> "Where the reasons given by a statutory body for taking or not taking a particular course of action are not mixed and can clearly be disentangled, but where the court is quite satisfied that even though one reason may be bad in law, nevertheless the statutory body would have reached precisely the same decision on the other valid reasons, then this court will not interfere by way of judicial review. In such a case, looked at realistically and with justice, such a decision of such a body ought not to be disturbed."

38. Following the extension of public law principles into the exercise of contractual discretions, much the same approach can be seen in the decision of this court in *JML Direct Ltd v Freesat UK Ltd* [2010] EWCA Civ 34 in which Moore-Bick LJ referred to *Owen* and held that a bad reason for the exercise of a contractual discretion did not invalidate the decision which had a good and independent reason to support it.

39. In *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [2015] Bus LR 1395 the Supreme Court had occasion to consider the "proper purpose rule" as applied to the exercise by directors of a power conferred by the Companies Act 2006. Lord Sumption, with whom Lord Hodge agreed, discussed the question of multiple purposes, some good and some bad, at [17] to [24]. He regarded the question as one of causation. At [21] he said:

> "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. If the answer is that without the improper purpose(s) the decision impugned would never have been made, then it would be irrational to allow it to stand simply because the directors had other, proper considerations in mind as well, to which perhaps they attached greater importance. …Correspondingly, if there were proper reasons for exercising the power and it would still have been exercised for those reasons even in the absence of improper ones, it is difficult to see why justice should require the decision to be set aside."

40. This is, I think, what Neuberger J had in mind when he said in *BRS* that a decision would be bad if the purportedly good reason was no more than a makeweight. If a reason is merely a makeweight then absent that makeweight the decision cannot have been caused by that reason.

41. The theme running through all these cases is that if the decision would have been the same without reliance on the bad reason, then the decision (looked at overall) is good.

In that situation the bad reason will not have vitiated or infected the good one. That approach seems to me to be justified in principle. In addition, I consider that to hold otherwise might lead to considerable practical difficulties. The point can be tested this way. Imagine the case of a rack rented lease of valuable property where the rent is several hundred thousand pounds a year. The tenant asks for consent to assign. The landlord requires the tenant to pay his costs of, say, £1,000 when a reasonable sum would be £750. However, the landlord also objects on well-reasoned and compelling grounds that the proposed assignee will be unable to pay the rent. It seems to me to be a draconian sanction if the landlord is to be saddled with a tenant of precarious financial means all for the sake of having demanded £250 too much as a fee.

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.

43. I would allow the appeal.

Lord Justice Floyd:

44. I agree.

Lord Justice Peter Jackson:

45. I also agree.