

'Respectable and responsible' tenants

Charlotte Ross examines a recent Scottish case regarding the refusal of consent to a proposed subletting, and looks at how the English courts would have decided the issues



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'It was held that evidence of "respectability" and "responsibility" should relate to the proposed sub-tenant itself. It was not sufficient to show that group companies, or the company's owners, were respectable and responsible.'

In the recent decision of *Burgerking Ltd v Castlebrook Holdings Ltd* [2014], the Scottish Court of Session ruled on the meaning of 'a respectable and responsible' tenant. The case concerned a landlord's refusal to consent to a proposed subletting, and the judgment provides guidance on what a tenant will need to provide in order to establish that a proposed sub-tenant or assignee is 'respectable and responsible', particularly where the proposed sub-tenant in question is a new company.

The case will be of general interest to landlords and tenants, in particular those with property in Scotland. It is worth noting, however, that the approach applied to similar issues by the English courts would be rather different. The case serves as a reminder of the overriding requirements of s19(1) Landlord and Tenant Act 1927 on qualified alienation covenants, and of the approach which landlords under leases governed by English law are required to take when considering a tenant's application to assign or sublet.

The facts of *Burgerking*

The action related to a fast food restaurant and car park at Queens Drive Leisure Park, Kilmarnock. The restaurant was let to Burgerking who wished to

sublet the whole of the premises to Caspian Food Retailers Ltd, a company incorporated in England. Burgerking was required to obtain its landlord's consent to the proposed underletting, as the schedule to Burgerking's lease contained the following covenants on the part of the tenant:

16.1 Not to assign charge (by way of fixed charge) sub-let or in any way for any purpose deal with the tenant's interest in this lease in whole or in part or share or part with possession of the premises in whole or in part except as herein permitted...

[...]

16.3 Notwithstanding the foregoing generality, not to sub-let the whole of the premises without the prior written consent of the landlord whose consent shall not be unreasonably withheld or a decision thereon unreasonably delayed to a sub-tenant who is respectable and responsible.

On 9 August 2012, solicitors acting for Burgerking wrote to the landlord, Castlebrook Holdings Ltd, formally requesting consent to the proposed subletting of the premises to Caspian. Their letter enclosed a note prepared by Caspian in support of the application, which set out details of the business and group structure

of the proposed undertenant company.

The note explained that Caspian had acquired the operations of 26 Burger King restaurants in Scotland. In addition, it had been granted the exclusive right for future store openings in Scotland, and intended to open 50 new restaurants in the United Kingdom over the next five years. Caspian's estimated turnover for that year was £25m.

The note also stated that Caspian was owned by Mr Taji Zadeh. Mr Zadeh was the owner of a separate company which was part of the same group of companies as Caspian and which had owned and operated Burger King restaurants since 1993. The information provided showed that Mr Zadeh's company had a very impressive track record. It had carried out a series of new restaurant openings and acquisitions and, as a result, by 2004 it had 12 stores operating around the M25 area. These included high-profile outlets at Thurrock, Brent Cross and Woking. In December 2004, the company had also acquired Gowrings plc, which was the oldest Burger King franchisee in the United Kingdom. As a result, the company had become the owner and operator of a further 41 Burger King restaurants. In the 2011 financial year, the company was running a total of 54 Burger King restaurants with a combined turnover of £44m. The application enclosed details of the landlords for each of the 54 restaurants leased by the company. Furthermore, the note confirmed that in 2008 the company had appeared in the *The Sunday Times* Fast Track 100 listing, and Mr Zadeh himself had been awarded a brand leadership award by Burgerking in recognition of his contribution to the brand.

The application was considered by the landlord and, on 14 August 2012, Castlebrook's agents replied requesting Caspian's last three years' accounts and references from at least two of Caspian's current landlords. Castlebrook's agents explained that this information was necessary to allow Castlebrook to consider the matter properly. Burgerking's response stated that Caspian was

a new company that had been formed in February 2011, and had been dormant until recently. It said that, as a result, it had no trading history and so neither accounts nor references from landlords were available.

Further correspondence between the parties followed, in which Burgerking tried to persuade Castlebrook that there were no reasonable grounds on which to refuse consent.

company was capable of being 'a respectable and responsible person' in the context of an assignment or subletting, and confirmed that this description is not limited to natural persons only.

Wilmott also confirmed that 'respectability' refers to the manner in which the company in question conducts its business and reputation. It relates to the behaviour of that entity, primarily in carrying on its business, but

A company can have its own distinct reputation which is not the reputation of the individual directors, but the reputation of the company.

Castlebrook gave its final response to the application by email in November 2012, and refused to consent to the subletting. In view of the lack of a track record, it said it had no idea whether Caspian was respectable and responsible, and noted that no evidence to that effect had been produced. However, Castlebrook did indicate that consent would be granted if either Mr Zadeh or the main company in the group agreed to provide a guarantee or take the sub-lease in their own right. Burgerking did not arrange for the provision of any such guarantee and, instead, brought an action against Castlebrook, claiming that it had unreasonably refused consent.

'Respectable and responsible'

The case was heard by Lord Tyre in the Scottish Court of Session. He commented that the expression 'respectable and responsible' is commonly used in commercial leases and has a long history. His opinion summarised previous authorities on the meaning of those words, when used to describe a tenant.

Wilmott v London Road Car Co Ltd [1910] established that a limited

probably also in the whole of its external relations. A company can have its own distinct reputation which is not the reputation of the individual directors, but the reputation of the company.

On the other hand, 'responsibility' in this context refers to the entity in question's financial capacity. By using the word 'responsible', the parties agreed that the landlord would be entitled to the financial solidity of any proposed sub-tenant.

The decision

The court considered that the proper construction of clause 16.3 of the schedule to Burgerking's lease required it to adopt a two-stage approach. The first stage was to consider whether the proposed sub-tenant was respectable and responsible. If it was so established, then the second stage was to consider whether the landlord's consent had been unreasonably withheld or whether the decision-making in respect of the application had been unreasonably delayed.

It followed that, if the first stage was not passed, and the proposed sub-tenant was found to be either not respectable or not responsible, then the landlord would be entitled to refuse consent

without the need to justify that refusal by reference to any other reason. The court commented that this analysis was consistent with the judgment of AL Smith LJ in *Bates v Donaldson* [1896].

Adopting this approach, the first issue the court considered was whether, at the time at which Castlebrook had refused consent, Burgerking had provided sufficient material to establish that Caspian was respectable and responsible.

The court commented that when the parties entered the

is not something that a company acquires automatically with its certificate of incorporation, although it may not be long until its mode of carrying on business establishes that it is respectable.

The judgment cited the English case of *Royal Bank of Scotland plc v Victoria Street (No 3) Ltd* [2008], which considered similar issues. The lease contained a tenant's covenant:

... not to assign the demised premises... without the written

to act in a respectable way may in some cases affect the return obtainable by the landlord on a future letting, by behaving in a way which, whether directly or indirectly, has an adverse impact upon the value of the premises.

The court concluded by finding that Burgerking had not provided any positive evidence to show Caspian was respectable and responsible and, as a result, Castlebrook was entitled to refuse consent. Burgerking's claim was rejected.

The judge commented that if Burgerking had demonstrated a successful first few months of trading by Caspian, and had been in a position to provide landlord's references relating to that initial period, it would have been harder for Castlebrook to refuse consent. Burgerking had not been well served by choosing to approach the matter as one of principle.

A landlord has an indirect interest in the financial soundness of a sub-tenant. A sub-tenant's capabilities may impact upon the ability of the tenant to meet its obligations to the landlord.

lease, they must have been aware of the meanings given by the courts to the words 'respectable' and 'responsible'. Burgerking would have been aware that 'respectability' related to the manner in which the proposed sub-tenant conducted its business, and that 'responsibility' related to the proposed sub-tenant's financial capacity.

It was held that evidence of 'respectability' and 'responsibility' should relate to the proposed sub-tenant itself. It was not sufficient to show that group companies, or the company's owners, were respectable and responsible. The point was made that, by using the word 'responsible' in clause 16.3, the parties agreed that the landlord would be entitled to be satisfied as to the financial solidity of any proposed sub-tenant. Furthermore, it is not improbable for a company to suffer insolvency while the owner of that company and any group companies remain solvent and continue to trade successfully. In so far as respectability was concerned, the court commented that this

consent of the landlord such consent however not to be unreasonably withheld in the case of a respectable and responsible assignee...

The tenant proposed an assignment to a newly incorporated company, and the question of how the covenant should be incorporated fell to be considered. The judgment given in *Royal Bank of Scotland* supported the Scottish Court's view that there must be a positive indication that the sub-tenant meets the criteria, by reference to its track record. A passive absence of such a positive indication, ie there being nothing to suggest that the sub-tenant lacks respectability or responsibility, is not sufficient.

The judge recognised that *Royal Bank of Scotland* related to a proposed assignment, not a proposed subletting, but did not consider that this should affect the analysis. A landlord has an indirect interest in the financial soundness of a sub-tenant. A sub-tenant's capabilities may impact upon the ability of the tenant to meet its obligations to the landlord. In addition, the failure of a sub-tenant

The differences between Scottish and English law

When considering the impact of this decision, it is essential to bear in mind that this was a case relating to property in Scotland, decided by the Scottish Court of Session.

If this case had been decided under English law, the covenants in the lease would have been construed subject to the provision contained in s19(1)(a) Landlord and Tenant Act 1927, which states:

- (1) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against assigning, underletting, charging or parting with the possession of demised premises or any part thereof without licence or consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject –
 - (a) to a proviso to the effect that such licence or consent is not to be unreasonably withheld, but this proviso

does not preclude the right of the landlord to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent...

Section 19(1)(a) attaches to all leases containing a covenant against assigning or underletting without consent, and provides that such a covenant will be deemed to be subject to a provision to the effect that consent is not to be unreasonably withheld. This will be the case even if the lease contains an express provision to the contrary.

The impact of s19(1)(a) was considered by Lewison LJ (at that point sitting as a judge in the Chancery division) in *Royal Bank of Scotland* (as mentioned above). The lease in question on that occasion contained a covenant similar to that in *Burgerking*, as follows:

Not to assign the demised premises or underlet or part with the possession of the demised premises or any part thereof or of this lease without the written consent of the landlord such consent however not to be unreasonably withheld in the case of a respectable and responsible assignee or subtenant...

Judge Lewison held that s19(1)(a) imported into this clause a statutory proviso so that, where the lease referred to a landlord's consent, it was qualified by the words 'such consent not to be unreasonably withheld'. He explained that the attempt to restrict the circumstances in which a landlord's consent must not be unreasonably withheld by the inclusion of the words 'in the case of a respectable and responsible assignee or sub-tenant' amounted to an express provision which was contrary to the earlier wording. The effect of s19(1)(a) was to override these words. Accordingly, the landlord was not entitled to base its decision solely on a

consideration of whether the proposed tenant is respectable and responsible, and instead must have considered whether it is reasonable to withhold consent to the application as a whole as presented by the tenant.

As a result of s19(1)(a), the position in English law is fundamentally different to that in Scottish law. Had *Burgerking* been decided by reference to English law, the approach, if

of the application as presented by the tenant. There is no requirement to ask questions of the tenant, to obtain additional supplementary information, or to solicit further proposals from the tenant, which may be of greater interest. That said, a landlord will be held to the reasons set out in their letter of refusal. As a result, they must set out the reasons for the refusal in full, since they will be confined to those reasons, although those reasons may be amplified at a

Had Burgerking been decided by reference to English law, the approach, if not the decision, would have been very different.

not the decision, would have been very different. The two-stage approach used would not have applied. In particular, despite the fact that it was not established that Caspian was 'respectable and responsible', it would not have followed automatically that the landlord had complete freedom to refuse consent. The court would have gone on to consider whether it was reasonable for Castlebrook to have refused consent, taking into account all of the circumstances.

Whether or not it is reasonable to refuse consent will depend on the facts of each individual case, and there is a vast amount of case law surrounding this. Previous decisions (*Taylor Bros (Grocers) Ltd v Covent Garden Properties Co Ltd* [1959]) have established that an application must be approached in a practical and realistic manner, and not as a theoretical exercise without any regard to probable facts. Whether or not the proposed sub-tenant is respectable and responsible will no doubt inform a landlord's decision, but the landlord is required to consider the application as a whole.

A landlord can take comfort from the fact that it is only required to make its decision on the basis

later date (*Ashworth Frazer Ltd v Gloucester City Council* [2001]).

From a tenant's point of view, the decision of *Burgerking* provides useful guidance to both Scottish and English tenants as to the type of information which should be provided to a landlord when applying for consent to assign or sublet to a newly incorporated company. It will depend on the wording of the covenant but, in many cases, a tenant will be better served by providing whatever limited material is available regarding the proposed new tenant than it will be by providing none at all. ■

Ashworth Frazer Ltd v Gloucester City Council [2001] UKHL 59

Bates v Donaldson [1896] 2 QB 241

Burgerking Ltd v Castlebrook Holdings Ltd [2014] CSOH 36

Royal Bank of Scotland plc v Victoria Street (No 3) Ltd [2008] EWHC 579 (Ch)

Taylor Bros (Grocers) Ltd v Covent Garden Properties Co Ltd [1959] 1 WLR 503

Wilmott v London Road Car Co Ltd [1910] 2 Ch 525