APPROVED **[2024] IEHC 61**

THE HIGH COURT
CIRCUIT APPEAL

2023 6 CAT

BETWEEN

CAMBERVALE LTD

PLAINTIFF

AND

WESTSIDE SHOPPING CENTRE LTD

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 February 2024

INTRODUCTION

1. This judgment is delivered in respect of a landlord and tenant dispute. The demised premises comprise a unit in a multi-unit shopping centre. The tenant holds the demised premises under a 500 year lease. The tenant proposes to assign its interest under the lease to a third party. The landlord is withholding its consent to the proposed assignment on the grounds of good estate management. In particular, it is said that the use which the assignee wishes to

make of the demised premises, namely, use as a community centre, represents dead frontage and, as such, is unsuitable for a shopping centre.

2. The tenant instituted the within proceedings seeking a declaration that the landlord is acting unreasonably in withholding its consent to the assignment of the demised premises. The tenant contends that the withholding of consent is informed by an ulterior motive, namely, to facilitate the landlord in obtaining possession of the demised premises by way of a surrender at an undervalue.

FACTUAL BACKGROUND

Demised premises

3. These proceedings relate to a unit in a multi-unit shopping centre ("*the demised premises*"). The demised premises are located within Westside Shopping Centre ("*the shopping centre*"). The shopping centre is situate approximately 1 km northwest of Galway City Centre. The shopping centre is said to have been constructed in the late 1970s.

4. The shopping centre comprises a single level trading mall together with a surface car park. The majority of the retail units front on to the car park, with a canopy running along the front of the parade. The anchor tenant is Dunnes Stores. There are an additional fourteen retail units within the shopping centre. These include an electrical store, health food store, barber shop, pharmacy, butcher and a McDonalds drive-thru restaurant. One unit is used for the purposes of a driving test centre.

5. There are approximately 320 to 330 parking spaces provided within the shopping centre. Most of the customer parking is located at the front of the shopping centre, with some additional customer parking and staff parking located to the rear. Car parking is provided for free, subject to a maximum stay

of three hours. This time-limit is enforced by clamping vehicles which stay beyond three hours.

6. Vehicular access to the shopping centre is provided via Bóthar le Chéile (to the west of the shopping centre). Service access is via the rear of the shopping centre. The demised premises is located close to the main vehicular access to the shopping centre. The demised premises has significant frontage to Bóthar le Chéile.

7. The demised premises consists of a two-storey building of approximately 6,185 square feet. The demised premises is currently in a dilapidated condition, both inside and out. It is apparent from the photographs which have been adduced in evidence that the demised premises, in its current state of disrepair, is an eyesore and detracts from the presentation of the shopping centre when viewed from the vehicular access.

Lease

8. The demised premises are the subject of a 500 year lease created on 17 January 1984 ("*the Lease*"). The plaintiff herein, Cambervale Ltd, has held the tenant's interest under the Lease since 20 November 1990 ("*the Tenant*"). The landlord's interest has, since 7 February 2020, been held by Westside Shopping Centre Ltd ("*the Landlord*"). The Landlord has since acquired the freehold reversion from Galway City Council.

9. It should be explained that it has been accepted for the purpose of these proceedings that the landlord company is a wholly owned subsidiary of a company known as Elkstone Capital Partners Ltd. This connection is relevant to the principal argument advanced on behalf of the Tenant, i.e. that the withholding of consent to the assignment of the demised premises is informed

by an ulterior motive, namely, to facilitate Elkstone Capital Partners in acquiring the demised premises at an undervalue by way of the surrender of the lease to its subsidiary company. Given the concession made on behalf of the defendant, it is not necessary, for the purpose of this judgment, to consider further whether the legal test for piercing the corporate veil has been met.

10. The permitted user under the Lease is as a licensed premises, i.e. a public house. This is provided for as follows at Clause 12 of the Lease:

> "[…] Without prejudice the foregoing or to the generalite (*sic*) thereof not to use or offer to be used the said premises or any part thereof for any purpose other than that of Licensed Premises which expression shall mean (the sale to consumers of beer, wine and spirits but shall in any event exclude the sale of (goods and services provided by all those traders listed in the Fourth Schedule hereto) and any wholesale trade and not to use or permit to be used the premises hereby demised for a Bank […]"

11. The Fourth Schedule of the Lease (referenced above) reads as follows:

> "Pharmacist, Shoe Shop, Sports Goods shop, Ladies Fashions and Children's wear, Menswear, Dry Cleaning and Launderette, Newsagency, Electrical goods, Television, Radio and Associated goods, Restaurant, Bread & Cakes shop, Hairdressing, D.I.Y. Shop, Betting Office and Bank."

12. Clause 13 of the Lease provides, in brief, that the Tenant is required to keep the demised premises open for the carrying on of the trade of business permitted by Clause 12 unless prevented from doing so by circumstances outside the control of the Tenant.

13. Clause 15 of the Lease provides as follows:

> "Not to assign charge or underlet or share or part with the possession of the premises or any part thereof or otherwise alienate same without the previous written consent of the Lessor such consent not to be unreasonably withheld."

Events leading to proposed assignment

14. The Tenant had, during the period 1990 to 2018, let out the demised premises by way of subtenancy. The first subtenant appears to have successfully operated the demised premises as a public house for a period of approximately twenty years. It appears from the evidence that the subsequent subtenants were less successful. The Tenant served a notice of forfeiture in respect of one of the subtenancies in April 2018.

15. The demised premises has not been operated as a public house since 2018. It has been suggested by the Tenant in evidence that the demised premises does not represent a suitable location for a public house. In particular, the Tenant called evidence from a member of An Garda Síochána, Sergeant Gerard Dunne. This witness gave evidence in relation to incidents pertaining to the public house which are recorded on An Garda Síochána's database, i.e. the PULSE system. Whereas the headline figure of 169 incidents over twenty-one years is dramatic, the breakdown of the statistics indicates that the vast majority of the incidents did not involve what might be described as public order offences. Some 65 of the recorded incidents related to compliance with the liquor licensing legislation: there are 2 convictions recorded against the licence holder. Another 62 of the recorded incidents are what are described as "*attention and complaint*", a non-crime category under the PULSE system. This category would include incidents where, for example, an alarm was sounding but when members of An Garda Síochána attended, there was no one there to make a report.

16. This evidence does not establish that, if properly managed, the demised premises is incapable of being successfully operated as a public house. Importantly, this issue has been overtaken by events in that the Landlord does

not seek to hold the Tenant to the user expressly prescribed under the Lease, i.e. use as a licensed premises (public house). Rather, the Landlord has indicated that it is, in principle, prepared to consent to any commercial use which is complementary to the shopping centre use.

17. The Tenant has sought, for a number of years now, to sell its interest in the Lease. In May 2019, a prospective purchaser of the leasehold interest made an application for planning permission with the approval of the Tenant (Reg. Ref. 19/145). This proposed development would have comprised a change of use to tourist accommodation and restaurant. The application was subsequently deemed to have been withdrawn by the planning authority in August 2020.

18. The Tenant entered into a contract for the sale of its interest in the demised premises to a company known as the Western Islamic Cultural Centre Ltd ("*the proposed assignee*") on 27 August 2020. As explained below, the intention of the proposed assignee is to use the premises as a community centre. One of the special conditions of the contract for sale provides that same is contingent on the Landlord providing its consent to the sale.

APPLICATION FOR CONSENT TO ASSIGNMENT

19. On 29 January 2020, the Tenant first notified the then landlord of its intention to assign the Lease. The then landlord's agents replied on 5 February 2020 drawing attention to the user clause at Clause 12 of the Lease. The (new) Landlord's agents subsequently furnished a questionnaire on 10 March 2020. This questionnaire sought, *inter alia*, details of the exact use intended for the demised premises. The Landlord's solicitors wrote on 12 March 2020

expressing concern that the demised premises were published on the daft.ie website as having gone from "*for sale*" to "*sale agreed*". The solicitors indicated that unless confirmation was provided that no contract for sale would be executed until such time as the application for consent to assignment had been concluded, their instructions were to apply for an injunction restraining the Tenant from assigning the Lease without the Landlord's consent. The Tenant ultimately undertook, by letter dated 20 March 2020, that it would only enter into a contract regarding the demised premises conditional on consent to assignment.

20. In the event, the questionnaire was not completed and returned until 22 October 2020. The completed questionnaire indicated, incorrectly, that the intended use by the proposed assignee was "*as in lease*", i.e. as a public house, and that there would be no requirement for planning permission. When this was queried by the Landlord's solicitors, the correct position was stated as follows in a letter from the proposed assignee's solicitors:

> "In completing the purchase, our clients will preserve the premises as a Public House with a seven-day licence attaching thereto.
>
> Our clients will ultimately revert to the Landlords seeking the consent to Change of Use from its existing use as a Public House to a Community Centre. Apart from the Landlord's consent, this will also require a full planning application for Change of Use within the meaning of the Local Government and Planning Development Acts, 1963 as amended.
>
> In the event that the consent from the Head Landlord is refused and or the consent from the Planning Office is refused for Change of Use, then our clients will put the premises as a Public House with a seven day licence attaching thereto on the market.
>
> By converting the premises to a Community Centre which would be an active centre, it is anticipated that it would

> increase significantly, the footfall in the vicinity which would be expected to have the knock-on effect of increasing footfall in the adjoining shopping centre of our clients' patrons visiting the Community Centre."

21. The above letter was furnished to the Landlord's solicitors by the Tenant's solicitors under cover of letter dated 24 November 2020. The Tenant's solicitor sent two further letters, on 8 December and 17 December 2020, respectively. In the latter letter, a response to the request for consent was sought by 7 January 2021: the letter indicated that, in the event of default, proceedings would be issued without further notice. The Tenant's solicitor wrote again on 8 January 2021, indicating that they were now asking counsel to draft proceedings, and querying whether the solicitors had authority to accept service. In the event, the within proceedings were issued out of the Circuit Court Office on 22 January 2021.

22. Counsel on behalf of the Tenant has sought to make much of the supposed failure on the part of the Landlord to make a timely response to the correspondence from late November and December 2020. With respect, any complaint in this regard is unfounded. The fact of the matter is that it is the Tenant, not the Landlord, who has been guilty of culpable delay. The Tenant delayed in returning the questionnaire, which had been sent to it in March 2020, for some seven months. Even then, the questionnaire did not fully disclose the intended change of use which the proposed assignee sought to make. This was not done until 24 November 2020. The Tenant indicated in early January 2021, i.e. some six or seven weeks later, that proceedings were being instituted. This was an unreasonably short period of time to allow the Landlord to respond, especially having regard to the very significant change in circumstances of the proposed user of the demised premises. The Landlord

should have been afforded sufficient time to take legal advice on the issues presenting, with allowance being made for the Christmas and New Year holiday period. The legal advice received would attract litigation privilege: as appears from the *inter partes* correspondence, the threat of litigation arising out of the proposed assignment had been raised as early as March 2020.

23. The Landlord delivered a defence to the proceedings on 14 May 2021. The following plea is made at paragraph 20:

> "By way of special reply to Paragraph 12 of the Landlord and Tenant Civil Bill, the Defendant pleads that the course of action being proposed by the Plaintiff and the Western Islamic Cultural Centre in general, and/or the assignment been proposed by the Plaintiff in particular, runs contrary to the good estate management of the Shopping Centre in general, and/or the Property in particular."

24. The Tenant neither raised particulars nor sought discovery in the proceedings.

25. The proceedings were heard before the Circuit Court (His Honour Judge O'Callaghan) on 28 February 2023. The Circuit Court made an order dispensing with the Landlord's consent. Thereafter, the Landlord filed an appeal to the High Court against this order. The appeal was heard before me over three days: 12 December and 13 December 2023 and 16 January 2024. Judgment was reserved until today's date.

LEGAL FRAMEWORK

26. The restriction on alienation under Clause 15 of the Lease is subject to the stipulation that the Landlord's consent is not to be unreasonably withheld. Even without this stipulation, an unreasonable withholding of consent would have been amenable to challenge: the Tenant would have been entitled to rely on Section 66 of the Landlord and Tenant (Amendment) Act 1980. This

provides, relevantly, that a covenant in a lease which purports to restrict alienation shall have effect as if it were a covenant restricting such alienation without the licence or consent of the lessor, subject to the proviso that the licence or consent shall not be unreasonably withheld.

27. The restriction on a change of the use of the demised premises under Clause 12 of the Lease appears to be unqualified. The terms of the Lease are, however, mitigated by Section 67 of the Landlord and Tenant (Amendment) Act 1980. This section states, relevantly, that a covenant in a lease (whether made before or after the commencement of the Act) absolutely prohibiting the alteration of the user of the tenement shall have effect as if it were a covenant prohibiting such alteration without the licence or consent of the lessor, subject to a proviso to the effect that the licence or consent shall not be unreasonably withheld.

28. The principal relief sought by the Tenant is a declaration to the effect that the Landlord is acting unreasonably in withholding its consent to the proposed assignment. The parties are in broad agreement as to the legal principles governing the assessment of the reasonableness of withholding consent. The areas in respect of which there is disagreement are addressed at paragraphs 34 to 42 below.

29. Both parties relied upon the following statement of principles from the judgment of the High Court (Haughton J.) in *Perfect Pies Ltd v. Chupn Ltd* [2015] IEHC 692 (at paragraphs 11 to 13):

> "Although the law in the UK has changed since 1988 and must be approached with some caution, the parties did not disagree that the general principles to be applied in determining unreasonableness are laid down in the current edition of Woodfall's *Law of Landlord and Tenant*, para. 11.140, which states as follows:-

- The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the landlord from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee;
- As a corollary to the first proposition, a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease;
- The onus of proving that consent has been unreasonably withheld is on the tenant;
- It is not necessary for the landlord to prove that the conclusions which led him to refuse to consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances;
- It may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose to which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease;
- While a landlord need usually only consider his own interests there may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent to an assignment, that it is unreasonable for the landlord to refuse consent;
- Subject to the proposition set out above, it is, in each case, a question of fact, depending on the circumstances, whether the landlord's consent to an assignment is being unreasonably withheld.

In addition, the landlord may state the grounds for refusal to the Court even if no reasons had previously been given: *Rice v. Dublin Corporation* [1947] I.R. 425, a further authority for this proposition is *Irish Glass Bottle Co. Ltd. v. Dublin Port Co.* [2005] IEHC 89. Further, if a landlord gives an invalid reason for refusing, he can subsequently amend his hand by giving a valid reason: *Boland v. Dublin Corporation* [1946] I.R. 88, at 103-104. The essence of the test is that the onus is on the tenant to show that no reasonable landlord would have refused consent in the circumstances as the landlord apprehended them to be. A landlord does not need to justify the conclusions that led it to refuse consent. Moreover, the landlord is entitled to rely upon the advice of appropriate qualified professional/experts provided that the advice given is reasonable: *Blockbuster Entertainment Ltd. v. Leakcliff Properties Ltd.* [1997] 1 EGLR 28.

> There was no disagreement between counsel that the date on which the reasonableness or otherwise of the landlord's withholding consent falls to be considered is the date/time at which these proceedings were initiated, namely 18th November, 2014. It is on the basis of the proposals, information and documentation furnished at that point in time that the Court should make its determination. As will be seen, this is of particular significance in this case as there were subsequent developments and correspondence between the parties' respective solicitors after the commencement of the proceedings, including a letter sent on the evening of the day that proceedings issued."
>
> *Footnotes omitted

30. The High Court also emphasised (at paragraph 111) that a landlord, who has been found to have withheld consent for improper motives, cannot invoke a good reason *retrospectively*.

31. The High Court (Clarke J.) in *Dunnes Stores (Ilac Centre) Ltd v. Irish Life Assurance plc* [2008] IEHC 114, [2010] 4 I.R. 1 emphasised that a landlord is obliged to act reasonably in respect of an application for a change of use or assignment: the landlord is not entitled to use such an application to obtain leverage in a strategy to regain possession of the demised premises.

32. In *O.H.S. Ltd v. Green Property Company Ltd* [1986] I.R. 39 (at page 43), the High Court (Lynch J.) rejected an argument that the court should balance the tenant's position as against the landlord's position, and that if the court should find that the tenant's need is greater than the landlord's, then the court should find it is unreasonable of the landlord to withhold its consent. The correct legal position was stated as follows:

> "However, I do not think that a balancing of the positions of the landlord and tenant is quite the test although the special circumstances of the tenant must be taken into account to some extent. The real question is whether the landlord is unreasonably withholding its consent contrary to

> the term implied in the covenant restricting user by s. 67 of the Landlord and Tenant (Amendment) Act, 1980.
>
> The onus is on the tenant to establish that the landlord is unreasonably withholding its consent. Some of the cases would suggest, that in order to do this, the tenant would have to show that the landlord is acting capriciously or arbitrarily but each case must depend upon its own facts."

33. The High Court in *O.H.S. Ltd v. Green Property Company Ltd* accepted that it is desirable for a shopping centre to have as many and varied retail outlets as possible in order to attract the maximum number of customers. This was because the more customers that are attracted to the shopping centre, the better it is for every trader and the more valuable become the various units in the shopping centre thus attracting a higher rent for the owner of the shopping centre. The High Court held, on the facts, that it was consistent with good estate management to seek to avoid an excessive number of dead frontages in a shopping centre.

34. The parties are in disagreement as to the significance, if any, of the length of the term of the lease. It was submitted on behalf of the Tenant that a leasehold interest of five hundred years is akin to a freehold interest, and that a person with a freehold title is entitled, under Section 50 of the Land and Conveyancing Law Reform Act 2009, to apply to have a freehold covenant discharged. The Tenant sought to characterise the Lease as "*conferring an extensive intergenerational multiple century title for a nominal unreviewable rent*". It was submitted that the court should be "*sceptical*" in applying case law which is concerned with leasehold interests of shorter duration. There was also some suggestion that the Tenant in this case might be entitled to benefit from the leasehold enfranchisement legislation, i.e. the Landlord and Tenant (Ground Rents) (No. 2) Act 1978.

35. With respect, none of these submissions are well founded. The High Court (Murphy J.) has previously rejected a submission along similar lines in *Wanze Properties (Ireland) Ltd v. Mastertron Ltd* [1992] I.L.R.M. 746 (at 753/54). The High Court held that the extent of neither the landlord's equity nor financial interest in a demised premises is relevant to the evaluation of the reasonableness or otherwise of the withholding of consent to an assignment:

> "It is true, as the recited facts indicate, that the headlessor has not what is usually described as 'the equity' in either the site or the buildings erected thereon. The buildings were erected by the intermediate lessor in pursuance of a covenant in that behalf contained in the 1988 lease and the fine paid on foot of that lease presumably represented the full value of the lessor's interest in the lands. The rent of £1.00 per annum is not even a ground rent. It is effectively a peppercorn rent reserved to preserve the relationship of landlord and tenant. However, the whole purpose of creating that structure rather than completing an outright sale is to enable the headlessor to create, maintain and control a relationship between himself and the tenants which will ensure the effective operation of the shopping centre. That being the manifest purpose of the arrangement it seems to me that the reasonableness or unreasonableness of the conduct of the headlessor must be evaluated by reference to that consideration and not on the basis of his financial stake or interest in the premises."

36. The High Court also rejected the notion that a court, hearing an application to dispense with a landlord's consent, could legitimately consider the question of leasehold enfranchisement (at page 755 of the reported judgment). The tenant there had argued that it would be entitled to acquire the fee simple interest, and that in this way the clause restrictive of user of the premises would cease to operate.

> "Whilst I would prefer to resolve all matters and issues between the parties I think that it would be impossible in the present case in proceedings which are brought for the specific purpose of deciding whether the landlord is unreasonably withholding his consent to conclude in effect that his consent is not necessary. If that issue was to be

> determined it should in my view be determined in proceedings brought for that purpose. Moreover, I do not think that it could be said that a landlord would be acting unreasonably to rely on a covenant which on the face of it had full force and effect and which of necessity the plaintiff had herself invoked in seeking the appropriate consent. It would not be unreasonable to rely on such a covenant even though it might subsequently be established that as a matter of law it had become inoperative. In these circumstances it seems to me that what might be described as the special argument of the plaintiffs fails."

37. I respectfully adopt these passages as a correct statement of the law. It is entirely legitimate for the owner of a shopping centre to create the relationship of landlord and tenant in order to ensure a level of control over the use and occupation of the individual units. The position of a tenant is protected by the statutory stipulation that where consent of the landlord is required for an assignment, same shall not be unreasonably withheld.

38. A second area of disagreement between the parties relates to the *sequencing* of the assignment and intended change of use. The Tenant submits that the only application made to the Landlord had been for consent to the proposed assignment. It is submitted that the question of the change of use to a community centre will be the subject of a *separate* application for consent to be made after the assignment has been completed. On this analysis, the Landlord is confined to considering the suitability of the proposed assignee, by reference to matters such as, for example, the solvency of the proposed assignee. It is submitted that it would be premature to consider the appropriateness of the intended change in use.

39. With respect, these submissions are not well founded. The principal question for determination by the court is whether consent to the assignment has been unreasonably withheld. In assessing reasonableness, it would be artificial to

exclude from consideration the known facts. Here, the Landlord has been put on notice of the fact that the proposed assignee intends to use the demised premises as a community centre. The proposed assignee intends to apply both for consent under the lease and for planning permission in respect of this intended change in use. The proposed assignee has further indicated that it will put the demised premises up for sale in the event that either consent under the lease or planning permission is refused.

40. These are all factors which a reasonable landlord would take into consideration in deciding whether or not to consent to the proposed assignment. The precise purpose of a covenant against assignment is to protect a landlord from having their premises used in an unsuitable way. A landlord is, therefore, entitled to have regard to the use to which the proposed assignee intends to put the demised premises. It is artificial and contrived to suggest that a landlord must exclude from consideration the fact that the proposed assignee's sole objective in acquiring the demised premises is to use same for a purpose which the landlord, on justified grounds of good estate management, regards as unsuitable. It is no answer to this to say that the proposed assignee will be bound by the user covenant and that the landlord can enforce same in the event of a breach. Here, the proposed assignee has frankly admitted that it will seek to sell on the demised premises in the event that the intended change in use is frustrated, whether by the refusal of consent under the lease or the refusal of planning permission. The landlord is entitled to have regard to this fact in deciding whether to consent to the assignment. It is, in principle, reasonable for a landlord to withhold consent to an assignment in circumstances where there would be reasonable grounds for withholding consent to the change in

use which the proposed assignee intends to make. A landlord is not necessarily required to go through the formalistic step of having to grant consent to an assignment when it is indisputable that the landlord would, thereafter, be lawfully entitled to refuse consent to the intended change in use. Such a rigmarole would simply delay the inevitable and would prejudice the position of the landlord in the interim. On the facts of the present case, for example, such staggered decision-making would prolong unnecessarily the period of time during which the demised premises would remain unoccupied and dilapidated: this would be to the detriment of the shopping centre as a whole.

41. Here, there is no benefit to any of the parties in deferring consideration of the question of whether the withholding of consent by reference to the intended change in use was unreasonable. Such a deferral would have the practical effect that the parties would, almost inevitably, be exposed to further legal proceedings, with all of the inherent costs and delay. The issue of the intended change in use has been extensively argued over three days before this court and should now be determined.

42. For completeness, it should be observed that the above approach to this question, i.e. the entitlement of a landlord to consider an intended change in use in the context of an application for consent to an assignment, is consistent with that adopted in the neighbouring jurisdiction. Counsel for the landlord helpfully referred me to the decision of the House of Lords in *Ashworth Frazer Ltd v. Gloucester City Council* [2001] UKHL 59, [2002] 1 All ER 377 (at 398/99). The House of Lords rejected an argument that it would be unreasonable for a landlord to withhold consent, on the grounds of an apprehended change of use, because the assignment would not change the legal

relationship between the landlord and the tenant. The House of Lords considered that, depending on the particular facts, it might well be reasonable for a landlord to withhold consent to an assignment on the grounds of an apprehended change of use, notwithstanding that, technically, his legal position and his legal remedies would remain the same following the assignment.

DETAILED DISCUSSION

(1). ALLEGED ULTERIOR MOTIVE

Overview

43. The gravamen of the Tenant's case is that the decision to withhold consent to the proposed assignment has been informed by an improper or ulterior motive. It is alleged that the Landlord's objective is to acquire possession of the demised premises at an undervalue. More specifically, it is alleged that the Landlord, by withholding consent, seeks to frustrate the contract for sale which has been entered into between the Tenant and the Western Islamic Cultural Centre. It is said that this has been done in the hope that the Landlord (or another company within the Elkstone group) will then be able to secure a surrender of the Lease for the payment of an amount less than market value. Much emphasis was laid on the fact that the Landlord, as of September 2020, had valued the demised premises at approximately €500,000, whereas the purchase price under the contract for sale is €790,000.

44. These arguments are all predicated on events which occurred in December 2019 and September 2020. The evidence in respect of these events is summarised below.

Evidence

45. Mr. Terry Leyden gave evidence on behalf of the Tenant. Mr. Leyden stated that he has been a director of Cambervale Ltd for approximately twelve years. The company is part of a group of companies which have proprietary interests in a number of public houses and restaurants in Galway and Dublin.

46. Mr. Leyden gave evidence in relation to a discussion which he had with Mr. Joe Bergin. Mr. Leyden explained that he had known Mr. Bergin from the latter's time in Ulster Bank. Mr. Leyden said that he received a telephone call from Mr. Bergin in September 2020. Mr. Bergin is said to have introduced himself as working for Elkstone and as saying that the company was interested in purchasing the demised premises which, at that time, had been publicly advertised for sale. Mr. Leyden described the telephone conversation as a "*general casual conversation*". Mr. Leyden requested Mr. Bergin to put any proposal in writing.

47. An email of 28 September 2020 has been put into evidence. Mr. Leyden recalls the email as having been received on either the day of, or the day following, his telephone conversation with Mr. Bergin. The email is from Mr. Bergin and reads as follows:

> "Subject: Pub – Westside Galway
>
> Terry,
> Good to talk earlier. Understand you have contracts signed on the above at €850K but if that wasn't to materialise we would be interested in discussing a potential purchase of the premises. Just to outline we have funds in place and would be in a position to close quickly if a reasonable price can be agreed upon.
>
> We will keep the option open our end for a few more weeks after that if we hear nothing we will redirect the funds to another opportunity."

48. As appears, the email refers to a purchase price of €850,000 having been agreed. In fact, the purchase price under the contract for sale between Cambervale Ltd (the Tenant) and the Western Islamic Cultural Centre is €790,000. Mr. Leyden stated in cross-examination that he had told Mr. Bergin that the purchase price was €850,000. Mr. Leyden explained that he had misstated the purchase price in an attempt to "*get a better price*" from Mr. Bergin. Mr. Leyden recalls that, in the telephone conversation, Mr. Bergin described €850,000 as a "*bit too strong*".

49. Mr. Leyden was unable to provide a satisfactory explanation as to how his company could lawfully offer the premises for sale in circumstances where it had already entered into a contract for sale with the Western Islamic Cultural Centre. Mr. Leyden simply said, in cross-examination, that he "*was open to a conversation*" with Elkstone Capital Partners notwithstanding the subsisting contract for sale. Mr. Leyden stated that nothing further occurred in this regard and that there was no further discussion between the parties. No reply was ever made by him to the email of 28 September 2020.

50. The other participant in these events, Mr. Bergin, gave evidence as follows. As of September 2020, Mr. Bergin occupied the role of director of business development with Elkstone Private. Mr. Bergin explained that he had been asked in September 2020 to reach out to Mr. Leyden in circumstances where he had known Mr. Leyden previously, from when he (Mr. Bergin) had been employed by Ulster Bank. This request was made by Mr. Ciaran McIntyre who is a director of Elkstone Capital Partners.

51. When asked by counsel for the Tenant as to what his "*riding instructions*" were, Mr. Bergin explained that he had not been briefed in advance with the

details of the proposed assignment of the leasehold interest to the Western Islamic Cultural Centre. Nor had he been briefed as to any valuation of the demised premises. Mr. Bergin explained that he had not been involved in the "*real estate side*" of Elkstone Capital Partners.

52. Mr. Bergin stated that it was Mr. Leyden who informed him of the existence of a contract for sale between Cambervale Ltd (the Tenant) and the Western Islamic Cultural Centre. Mr. Leyden had informed him (falsely) that the purchase price under the contract was €850,000. Mr. Bergin stated that he subsequently relayed this information internally to those on the "*real estate side*" of Elkstone Capital Partners. Mr. McIntyre instructed him to send an email in the terms of the email sent on 28 September 2020.

53. Mr. Bergin stated that his "*clear understanding*" was that the company wanted to see if there was an option to purchase the demised premises but this was "*not core*", and that the company did not pursue it thereafter.

54. These events were also addressed by a second witness on behalf of the Landlord, namely, Mr. Padraig Owens. Mr. Owens described his role as director of asset management with Elkstone Capital Partners. He explained that his primary role relates to company properties that are operating and generating an income. Mr. Owens explained that the primary objective of the company, having purchased the shopping centre, was to generate income for its investors and to obtain a grant of planning permission for student accommodation on part of the site. Mr. Owens explained that these were the primary objectives in the company's business plan. (An Bord Pleanála ultimately granted planning permission on 1 November 2022).

55. Mr. Owens described the possibility of purchasing the demised premises as "*purely incidental*". The approach to Mr. Leyden was made to ascertain the "*type of price*" which was being sought. (It will be recalled that the demised premises had been publicly advertised for sale). The witness stated that the company, as a property company, regularly has discussions with third parties in relation to potential property acquisitions. The witness further stated that the company would have been "*happy*" to pay market value for the demised premises and that the company considered that the market value was approximately €500,000. Mr. Owens had not been directly involved in obtaining a valuation. Mr. Owens thought that his colleague, Mr. McIntyre, may have taken advice on valuation from an auctioneer, but the witness did not know the precise details of this.

56. Mr. Owens emphasised that the approach made in September 2020 came to nothing and that the company did not now want to acquire the demised premises. Mr. Owens emphatically denied that the company had any ulterior motive in withholding consent to the proposed assignment.

57. Mr. Owens explained that there had, in fact, been an earlier approach made to Mr. Leyden by Mr. McIntyre in or about December 2019. This approach was not referred to by Mr. Leyden in his evidence.

Decision on alleged ulterior motive

58. It is well established in the case law that consent will be regarded as having been unreasonably withheld where it has been refused for an improper or ulterior motive. This will be the position where, for example, a landlord seeks to use the occasion of an application for consent as leverage to secure the surrender of the demised premises. Importantly, however, the case law also

establishes that a landlord is not necessarily precluded, during the pendency of an application for consent, from entering into any negotiations with the tenant. The position is summarised as follows by the High Court (Clarke J.) in *Dunnes Stores (Ilac Centre) Ltd v. Irish Life Assurance plc* [2008] IEHC 114, [2010] 4 I.R. 1 (at paragraph 43 of the reported judgment):

> "The important point to make is that the terms of a lease bind both landlord and tenant contractually to a series of terms. Among the obligations on the part of the landlord, by covenant, will normally be an obligation not to unreasonably withhold consent to assignment (or, as in this case, to change of use). Such an obligation governs the landlord's freedom of action. He is obliged to act reasonably in respect of an application for a change of use or assignment. He is not entitled to use such an application to obtain leverage in a strategy to regain possession of the property, even though he would be perfectly entitled to pursue any legitimate negotiation strategy to seek to achieve the same end. The reason why he cannot do this is that he is already bound by covenant only to refuse consent where it is reasonable so to do. The reason for his refusal must be reasonable, independent of his strategy to regain the property."

59. On the facts of the present case, the Tenant had publicly advertised the demised premises for sale. Both parties to these proceedings are commercial entities and each are part of a group of companies which have extensive property holdings. In such circumstances, there can be no principled objection to the Landlord having approached the Tenant to inquire as to the purchase price. It might well have been possible for the parties to reach a mutually satisfactory arrangement in relation to the surrender of the demised premises. Of course, it would not be permissible for the Landlord to threaten—directly or indirectly—to refuse consent to an assignment to a third party as "*leverage*" to acquire the property at an undervalue. Nor would it be permissible for the Landlord to refuse consent in an attempt to acquire the property at an undervalue.

60. It is necessary, therefore, to consider whether the evidence before the court discloses, on the balance of probabilities, that the Landlord had such an ulterior motive. The following facts are not in controversy. There were two approaches made to Mr. Leyden as representative of the Tenant. The first approach was in December 2019. Relevantly, this was at a time prior to the Landlord having acquired its interest in the shopping centre. The Landlord only acquired its interest in February 2020. The second approach was in September 2020. Both sides accept that the conversation between Mr. Leyden and Mr. Bergin (on behalf of Elkstone Capital Partners) is accurately recorded in the subsequent email of 28 September 2020. Mr. Leyden informed Mr. Bergin of the existence of a contract for sale and misstated the purchase price as €850,000 when, in truth, the purchase price was €790,000. This deliberate misstatement was made in an attempt to "*get a better price*" from Mr. Bergin.

61. The only direct evidence in relation to motivation is the oral testimony of Mr. Owens on behalf of the Landlord. This evidence has been summarised earlier. Crucially, Mr. Owens emphatically denied that Elkstone Capital Partners had any ulterior motive in withholding consent to the proposed assignment. Mr. Owens emphasised that the approach made in September 2020 came to nothing and that the company did not now want to acquire the demised premises. The Tenant has not put forward any evidence—whether oral or documentary—which directly contradicts this oral testimony. In contrast to the tenants in the case law upon which it seeks to rely, the Tenant failed to seek the discovery of documents in these proceedings. The Tenant is thus unable to gainsay Mr. Owen's assertion that the purchase of the demised

premises is not identified as an objective in the Landlord's business plan for the shopping centre. The Tenant is unable to point to any document which indicates that the Landlord has an objective to obtain possession of the demised premises, still less one which identifies any purpose for which the Landlord might require possession of the demised premises.

62. It is also a fact that the Landlord did not pursue the matter of a potential purchase of the demised premises beyond the events of September 2020. This is inconsistent with the Tenant's theory of the case: if the Landlord had an ongoing objective to secure a surrender of the demised premises, then one would have expected it to attempt to negotiate further with the Tenant.

63. It is also relevant that the Landlord has adopted a generous approach in indicating that it is, in principle, prepared to consent to any commercial use which is complementary to the shopping centre use. The Landlord has not, as it would in principle have been entitled to do, sought to hold the Tenant to the use expressly prescribed under the Lease, i.e. use as a licensed premises (public house). If, as is now alleged by the Tenant, the objective of the Landlord had been to secure possession of the demised premises by way of a surrender at an undervalue, then one would have expected that the Landlord would have sought to confine the user to a public house, with a view to limiting the range of rival bidders. The fact that it has not done so and has instead indicated a willingness to consider any commercial use undermines the Tenant's theory of the case.

64. In assessing the credibility of the oral testimony, it is appropriate to have some regard to the nature of the grounds relied upon for withholding consent to the assignment. Of course, a finding of an improper or ulterior motive can be

made notwithstanding that the grounds ostensibly relied upon for withholding consent might appear convincing. Nevertheless, the *strength* of the grounds may be of some relevance in a case, such as the present, where the court is being invited to make a finding of ulterior motive by inference. If the grounds ostensibly relied upon are, objectively, weak, then there may be justification for drawing the inference that the true reason for withholding consent involves an undisclosed ulterior motive. Here, the grounds relied upon, namely, good estate management, are very convincing: see the discussion at paragraphs 87 to 99 below. This militates against the making of a finding, by inference, of an undisclosed ulterior motive.

65. It is relevant to consider the timing of the approach in September 2020 relative to the chronology of the application for consent to the proposed assignment. The application for consent was first mooted in January 2020. As of September 2020, the Tenant had yet to complete the questionnaire which it had been asked to complete in March 2020. Importantly, the Tenant had yet to disclose that the proposed assignee did not intend to continue the permitted user as a public house, but wished, instead, to use the demised premises as a community centre. This change would necessitate both consent under the lease and a grant of planning permission. This intention was not properly disclosed to the Landlord until 24 November 2020. Thus, by the time the Landlord came to make its decision on whether to grant consent, there had been a significant change in circumstances from those prevailing at the time of the brief discussion in September 2020. This change in circumstances had a direct bearing on the assessment of good estate management. It is more likely that the decision to withhold consent was informed by this change in circumstances

than by a short-lived expression of a potential interest in acquiring the demised premises by surrender.

66. In assessing the credibility of the Landlord's explanation, it is appropriate to give some weight to the Tenant's reaction to the events of December 2019 and September 2020. It is telling that there is no plea in the Civil Bill to the effect that there was an ulterior motive for the withholding of consent. This suggests that the Tenant, until a very late stage in the proceedings, did not regard these events as significant. Even more tellingly, Mr. Leyden did not make any reference, in his oral evidence, to the approach made to him by Mr. McIntyre in December 2019. No explanation has been provided for this startling omission from his evidence. Nor has any explanation been provided for why no response of any sort was made to the email of 28 September 2020. All of this tends to suggest that the Tenant did not regard the brief discussion in September 2020 as involving a serious proposal to acquire the demised premises, still less that it was indicative of a strategy to withhold consent as leverage.

67. For completeness, it should be noted that the suggestion that the Landlord's valuation of the premises at €500,000 is a significant undervalue is not corroborated. It appears from the Tenant's own accounts that it has valued the demised premises in the sum of €481,279.

68. In conclusion, none of the factors relied upon on behalf of the Tenant, whether individually or cumulatively, impeach the credibility of the oral evidence adduced on behalf of the Landlord. Having had the opportunity to observe the demeanour of both Mr. Owens and Mr. Bergin in the witness box, I am satisfied that both were truthful witnesses. In particular, the explanation given

by Mr. Owens as to the objectives of Elkstone Capital Partners is plausible, is consistent with such limited documentary evidence as has been put before the court, and was in no way undermined in cross-examination. I am satisfied, on the balance of probabilities, that the withholding of consent is not informed by an ulterior motive.

69. For completeness, any suggestion that the court should draw an adverse inference from the omission on the part of the Landlord to call evidence from Mr. McIntyre is misplaced. In particular, the suggestion that the omission to call him as a witness is tantamount to the "*suppression*" or "*spoilation*" of evidence, such as to trigger the maxim *omnia praesumuntur contra spoliatorem*, is unjustified. There is no question of evidence having been improperly destroyed or otherwise suppressed. If and insofar as the Tenant had wished to call evidence from Mr. McIntyre, it would have been entitled to serve him with a *subpoena*. It should be recalled that this matter comes before the High Court by way of appeal from the Circuit Court. The Tenant was, therefore, fully on notice of the line of defence being pursued by the Landlord. If the Tenant considered that Mr. McIntyre would be able to give evidence which was relevant to the question of the Landlord's motivation, it could have called him as a witness.

70. The reality is that the allegation of ulterior motive appears to have been very much an afterthought. It does not feature as part of the pleaded case and no discovery of documents was ever sought from the Landlord's side. As the narrative in the judgments in *Dunnes Stores (Ilac Centre) Ltd v. Irish Life Assurance plc* and *Perfect Pies Ltd v. Chupn Ltd* illustrates, there are ample

procedural mechanisms open to a party who wishes to pursue a claim of ulterior motive.

(2). GOOD ESTATE MANAGEMENT

Evidence

71. The only evidence in relation to good estate management proffered on behalf of the Tenant was that of Mr. Niall Browne. Mr. Browne is an estate agent and a partner in O'Donnellan & Joyce. As discussed at paragraphs 103 to 107 below, an issue arose during the course of cross-examination as to whether Mr. Browne fulfils the requirement for independence which is expected of an expert witness.

72. Mr. Browne is the estate agent with carriage of the proposed assignment of the demised premises. Mr. Browne stated that he is principally involved in residential sales and lettings. Mr. Browne described himself as having some experience in the sale of public houses and restaurants, but has no specific experience in the sale, letting or management of multi-unit shopping centres.

73. In the event, Mr. Browne's oral testimony was directed principally to his involvement in the process leading up to the contract for sale with the Western Islamic Cultural Centre. The witness described his firm having been instructed in the sale in the last quarter of 2019; the preparation of a sales brochure; the advertisement of the sale by way of signage at the property and online on the daft.ie website; the limited viewings; and a sale having been agreed.

74. On the issue of good estate management, Mr. Browne's evidence was as follows. The witness stated that "*there are several other business types that would flourish*" at this location, i.e. businesses other than a public house. The

witness went on to say that "*anything outside of a bar in this particular area would work well*".

75. Mr. Browne stated that he had carried out research and had identified two cultural centres in shopping centres as follows. The first is the Ahlul Bayt Islamic centre in Cork; the second, the Masjib Islamic Cultural Centre in Carlow. In cross-examination, Mr. Browne accepted that the first example is located in an industrial estate not a shopping centre. Mr. Browne also conceded that he had not consulted the Property Registration Authority's website in respect of the premises in Cork. The witness was thus aware neither of the small scale of the premises (1,500 square feet) nor the fact that it was held under a short-term letting.

76. Counsel on behalf of the Landlord put a number of passages from their side's expert's report to Mr. Browne (at pages 7 and onwards). Mr. Browne agreed with the propositions advanced in these passages. Relevantly, Mr. Browne agreed with the proposition that there appears to be no reason that the demised premises should not be able to trade successfully based on a commercial use, and that the continued vacancy may, therefore, be due to other factors such as price or rent expectations or the condition of the premises.

77. Mr. Browne also agreed with the proposition that it is unlikely that patrons of the proposed community centre would frequent the commercial outlets to the same extent as other visitors to the shopping centre, and that there is the inherent potential for conflict between busy times in the community centre and busy times in the shopping centre.

78. In response to a direct question from the court, Mr. Browne confirmed that he agreed, to a degree, with the proposition that it was reasonable to refuse

consent for a use which would involve dead frontage in the context of a multi-unit shopping centre. Mr. Browne emphasised the importance of having a well presented unit at a location which overlooks the entrance to the shopping centre. Mr. Browne stated that he was not in a position to give evidence on the footfall likely to be generated by the community centre.

79. The Landlord adduced expert evidence from Mr. David Potter. Mr. Potter is a director of Savills Commercial (Ireland) Ltd ("*Savills*"). Mr. Potter outlined to the court his extensive experience in landlord and tenant disputes, in particular, in relation to shopping centres. Mr. Potter explained that, in his early years of practice, he had been involved in the initial leasing of a number of shopping centres outside Dublin, including centres in Mullingar, Monaghan and Carlow. In more recent years, he has been involved in advising in relation to the Dundrum Town Centre, Liffey Valley, Jervis, Ilac and Pavilion shopping centres. Mr. Potter has also advised Dunnes Stores in relation to its anchor unit in Eyre Square shopping centre in Galway and advised Lifestyle Sports in relation to its unit at Headford Road.

80. Mr. Potter explained that shopping centres, by their very nature, depend on a broad mix of complementary uses to drive commercial footfall and to contribute to the overall success of the centre as a primarily retail destination. This is especially so in respect of a relatively small shopping centre, such as Westside Shopping Centre. The removal of a unit from commercial use would be detrimental to the overall shopping centre.

81. Mr. Potter did not consider that the proposed use as a community centre would be an appropriate use in the context of a small shopping centre. This is because the patrons attending a non-commercial outlet will have different goals and

different dwell times than those attending for the purpose of shopping. There would also be a significant risk of conflict in terms of car parking demand between the patrons of the community centre and customers of the shopping centre. The nature of the current retail mix is such that there is a high turnover of customers, with shoppers going in and out quickly.

82. Mr. Potter stated that he was unaware of any instance where a landlord had considered use as a community centre as part of a shopping centre mix strategy. Landlords are very reluctant to allow dead frontage and non-commercial uses into a shopping centre.

83. Mr. Potter stated that the use of the demised premises as envisaged under the lease, i.e. use as a public house, would be compatible with the shopping centre. The witness emphasised the changing nature of licenced premises over recent years, with many now providing a high quality food offering. The witness further stated that enhanced food and beverage facilities have become a more integral part of a shopping centre experience. The witness also suggested that the trading difficulties experienced by the previous subtenant may have been as a result of his failure to provide a more modern food and beverage offering.

84. More generally, the witness noted that the shopping centre trades successfully and that there has been little vacancy apart from the demised premises. A number of the tenants have been in occupation for some considerable time and existing tenants often renew leases when they come to an end.

85. Mr. Potter explained that the two examples of community centres cited by the Tenant were distinguishable. The first is located in an industrial estate, not a shopping centre. The second is a much smaller unit (approximately 1,500 square feet) and confined to the first floor of the relevant building. The

premises are held under a short lease which expressly excludes any statutory right to renewal.

86. In cross-examination, Mr. Potter rejected the suggestion that the proposed student accommodation was inconsistent with the shopping centre use.

Discussion and decision on good estate management

87. Counsel on behalf of the Tenant raised an issue concerning the timing and communication of a decision to withhold consent. Counsel appears to envisage that a landlord must have formulated, in full, the grounds for withholding consent *prior* to the institution of any legal proceedings on behalf of a tenant. It is then argued that, in the absence of any direct evidence to the effect that the landlord in the present case had the benefit of expert evidence in relation to good estate management prior to the institution of these proceedings in January 2021, the report of the expert, Mr. Potter, cannot be relied upon. Put otherwise, the Tenant appears to regard the existence of an expert report as a "*fact*" which must be subsisting as of the date of the institution of the proceedings.

88. With respect, this contention appears to be predicated on a misunderstanding of the judgment in *Perfect Pies Ltd v. Chupn Ltd* [2015] IEHC 692. As appears from paragraph 13 of that judgment, the High Court explained that the date, upon which the reasonableness or otherwise of the landlord's withholding of consent falls to be considered, is the date of the institution of proceedings. It is on the basis of the proposals, information and documentation furnished by the tenant at that point in time that the court should make its determination.

89. The reasonableness of any grounds relied upon in support of the withholding of consent must be assessed against the factual circumstances pertaining at the time of the institution of proceedings. These factual circumstances relate to

matters such as, for example, the solvency of the proposed assignee. If, at the time of the institution of the proceedings, the proposed assignee was solvent, the landlord could not, opportunistically, rely on the assignee having *subsequently* become insolvent as a ground for having refused or withheld consent. Put otherwise, it is the relevant factual circumstances that are frozen as of the date of the institution of proceedings. The judgment in *Perfect Pies Ltd v. Chupn Ltd* makes it clear that a landlord is entitled to introduce new reasons. It follows *a fortiori* that a landlord must be entitled to elaborate upon previously stated reasons. Therefore, there can be no principled objection to a landlord, who has relied upon good estate management as a ground for withholding consent, introducing expert evidence at the hearing of the proceedings to substantiate that ground. The court has to assess the reasonableness of the withholding of consent by reference to an objective landlord, and the expert evidence is relevant to this issue.

90. The case law establishes that it will be reasonable to withhold consent to an assignment and change in use where this is done for reasons of good estate management. It has also been expressly recognised that, in the context of a multi-unit shopping centre, it is good estate management to ensure a mix of retail uses and to avoid dead frontage. Thus, for example, a landlord was held to be justified in refusing consent to a proposed change which would involve the introduction of yet another financial services unit to a shopping centre (*O.H.S. Ltd v. Green Property Company Ltd*).

91. In the event, there was very little disagreement between the witnesses called in respect of good estate management. The witness called on behalf of the Tenant expressly agreed with a number of propositions from the report furnished by

the Landlord's expert. Any difference between the two witnesses was more one of emphasis. The Tenant's witness was of the opinion that *any* use which was visually attractive would be better than the current eyesore which the dilapidated public house represents. This seems to have been the basis upon which the witness considered that a non-commercial or non-retail use, such as that inherent in the community centre, would be acceptable. Crucially, however, the witness accepted that, in principle, the proposed community centre had the potential to conflict with the retail use of the shopping centre, especially in terms of demand for car parking. The witness also, very fairly, conceded that he was not in a position to give evidence in relation to the footfall likely to be generated by the community centre.

92. If and insofar as there is a difference of opinion between the witnesses, and it seems to be more one of emphasis, I prefer the evidence of Mr. Potter on behalf of the Landlord. Mr. Potter has extensive experience in relation to the letting of shopping centres. His experience far exceeds that of Mr. Browne. Indeed, it must be doubtful as to whether Mr. Browne is competent to provide expert evidence in relation to the letting of shopping centres at all. It appears that his expertise is principally in the area of residential sales and lettings, with some limited experience in relation to public houses.

93. I am satisfied, on the balance of probabilities, that the expert evidence establishes that it is important that there be a good mix of retail uses in a multi-unit shopping centre and that dead frontage is to be avoided. I am also satisfied that, on the basis of the limited information which had been provided to the Landlord by the Tenant, the proposed community centre use is properly regarded as dead frontage.

94. It was suggested on behalf of the Tenant that the refusal of consent would give rise to hardship. This is not borne out by the evidence. The Tenant's own witness confirmed that there are a number of commercial uses which would "*flourish*" in the demised premises. Thus, even allowing that there *might* be difficulties in securing a subtenant who would be prepared to let the demised premises for the purposes of a public house, there is no evidence to suggest that there would be difficulty in obtaining a subtenant for a retail or commercial use. Indeed, the evidence confirms that the shopping centre trades successfully and that there has been little vacancy apart from the demised premises. Given that the Landlord has indicated that it is, in principle, prepared to consent to any commercial use which is complementary to the shopping centre use, there is nothing in the evidence which supports the suggestion that the only viable use for the demised premises is as a community centre.

95. Separately, there was some emphasis placed by counsel for the Tenant on a supposed inconsistency between the Landlord's invocation of good estate management and its conduct in having sought and obtained planning permission for student accommodation within part of the shopping centre site. It was submitted that Elkstone Capital Partners has an "*agenda*" as the developer of residential property which is far more dominant than any concerns as to good estate management of the shopping centre. With respect, no evidential basis has been laid for these submissions. There was no expert evidence before the court to the effect that there is a conflict between the proposed student accommodation and the operation of the shopping centre.

96. Counsel on behalf of the Tenant is critical of what he characterises as a failure on the part of the Landlord to interrogate or investigate further the potential

impacts of the proposed use as a community centre. More specifically, the Landlord is criticised for having made no attempt to carry out any assessment or "*reality test*" of what effects, positive or negative, the community centre might bring to the shopping centre.

97. With respect, these criticisms are unfounded. There is an obligation upon a tenant, who seeks consent to a proposed assignment, to provide a minimum level of information to the landlord as part of the request for consent. In particular, the tenant must indicate, at least in general terms, the nature of the use to which the proposed assignee intends to put the demised premises. Here, the information initially provided by the Tenant was inaccurate. It was stated, incorrectly, that the intended use by the proposed assignee was "*as in lease*", i.e. as a public house, and that there would be no requirement for planning permission. The true position was only disclosed on 24 November 2020. Even then, the nature of the intended use was stated in the vaguest of terms. No information was provided, for example, in relation to the proposed hours of operation. Against this procedural history, there was no obligation upon the Landlord to pursue the Tenant for basic information which the latter should have provided in response to the questionnaire furnished in March 2020.

98. More generally, it is the Tenant who bears the onus of proof of demonstrating that consent is being unreasonably withheld. It is only if the Tenant had put forward evidence which indicated that the proposed use as a community centre would be complementary to the shopping centre use that the evidential burden might shift to the Landlord to put forward some countervailing evidence. The striking feature of the present case is that the Tenant has failed, at any point, to provide any detail as to what might be involved in the community centre use,

still less to adduce evidence as to relevant factors such as operating hours, footfall, dwell times and car parking demand.

99. Here, the Landlord took the view that the proposed use was unsuitable for a multi-unit shopping centre. The expert evidence supports this view, and no contrary expert evidence was put forward by the Tenant. In the circumstances, there is no substance to the criticism that the Landlord should have called for further information from the Tenant before concluding that the proposed use was unsuitable for a multi-unit shopping centre.

CONFLICT OF INTEREST / PECUNIARY INTEREST

100. For the reasons explained under the previous heading, there is no material disagreement between the evidence of the respective parties in relation to good estate management. If and insofar as there is a difference of emphasis, I prefer the evidence of the Landlord's more highly qualified witness. Given these findings, it may not, strictly speaking, be necessary to address the question of whether the Tenant's witness, Mr. Browne, fulfils the criteria of independence which is a prerequisite for an expert witness. For completeness, however, I propose to make some brief observations on this issue.

101. The principles governing the approach to be taken to expert evidence have recently been restated by the Court of Appeal in *Duffy v. McGee* [2022] IECA 254. The following points are germane to the present proceedings. First, an expert witness is there to assist the court, not to decide the case, and the court has no obligation to accept the evidence of any particular expert, even where it is uncontradicted. Secondly, the duty of an expert witness to assist the court overrides any obligation to any party paying

the fee of the expert. Thirdly, an expert witness should state the facts or assumptions upon which his or her opinion is based and should not omit to consider material facts which could detract from their concluded opinion. Finally, an expert witness is not entitled simply to accept without question the instructions of his or her client and thereby proceed to offer what must necessarily be a blinkered opinion. The court is entitled to expect that experts will apply their critical faculties and their expertise to the case being made by their clients.

102. The Supreme Court, in *O'Leary v. Mercy University Hospital Cork Ltd* [2019] IESC 48, [2019] 2 I.R. 478 (at paragraph 23), has emphasised that it is desirable that an expert should have no actual or apparent interest in the outcome of proceedings in which he gives evidence. The Supreme Court cited with approval certain observations in *R. (Factortame Ltd and Others) v. Secretary of State for Transport, Local Government and the Regions (No. 8)* [2003] Q.B. 381. The relevant passage of which reads as follows:

> "Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management."

103. On the facts of the present case, the witness tendered as an expert on behalf of the Tenant was the estate agent who has carriage of the proposed sale of the demised premises. It emerged during the course of cross-examination that the firm of estate agents has a direct pecuniary interest in the outcome of the

proceedings in that the payment of the fee for the marketing of the demised premises is contingent on a successful conclusion of the sale, which, in turn, depends on a successful outcome to these legal proceedings. The witness confirmed that the commission is in the order of one per cent of the purchase price, and that this approximates to a fee of €7,900. The existence of this pecuniary interest is, at the very least, a factor which goes to the *weight* which the court can attach to his evidence.

104. This potential conflict of interest could have been avoided by the simple expedient of the Tenant discharging the fees in relation to the sale in advance of the hearing of these proceedings. Put otherwise, the Tenant could have removed any qualification that the fees were only payable on the successful conclusion of the contract for sale.

105. There was some discussion at the hearing as to whether the existence of this pecuniary interest had been adequately identified as part of the expert report. Counsel on behalf of the Tenant submitted that it was implicit in the disclosure by the witness that he had carriage of the sale that he must have had a contingent fee. This fact was not, however, stated in express terms and the quantum of the fee was not indicated.

106. The observations below are subject to the following caveat: there is no suggestion that there was any deliberate attempt to conceal the existence of the pecuniary interest from the court and there is no criticism made of either the witness or the legal representatives.

107. In future cases, it would be preferable that where a party wishes to tender, as an expert witness, an individual who has a pecuniary interest in the outcome of the proceedings, this should be stated in express terms. Where, as in the present

case, it is possible to quantify the pecuniary interest, that should be done. It should not be left to the court to infer the existence of a pecuniary interest. The court can then hear submissions from the parties as to the implications which the existence of the pecuniary interest may have for the very *admissibility* of expert evidence by that witness, and, if ruled admissible, the *weight* to be attached thereto.

CONCLUSION AND PROPOSED FORM OF ORDER

108. The question of whether or not the withholding of consent to an assignment is unreasonable is fact specific and the answer will depend on the particular circumstances of the individual case. As a statement of general principle, however, it can be said that it will, in certain instances, be reasonable for a landlord to withhold consent to an *assignment* in circumstances where there would be reasonable grounds for withholding consent to the *change in use* which the proposed assignee intends to make. Here, the proposed assignee has frankly admitted that it will seek to sell on the demised premises in the event that the intended change in use is frustrated, whether by the refusal of consent under the lease or the refusal of planning permission. The landlord is entitled to have regard to this fact in deciding whether to consent to the assignment.

109. Here, the landlord was not required to go through the formalistic step of having to grant consent to an assignment when it is indisputable that the landlord would, thereafter, be lawfully entitled to refuse consent to the intended change in use. Such a rigmarole would simply delay the inevitable and would prejudice the position of the landlord in the interim. Such staggered decision-making would prolong unnecessarily the period of time during which the

demised premises would remain unoccupied and dilapidated: this would be to the detriment of the shopping centre as a whole.

110. The case law establishes that it will be reasonable to withhold consent to an assignment and change in use where this is done for reasons of good estate management. It has also been expressly recognised that, in the context of a multi-unit shopping centre, it is good estate management to ensure a mix of retail uses and to avoid dead frontage. (*O.H.S. Ltd v. Green Property Company Ltd*). On the facts of the present case, the landlord took the view that the proposed use as a community centre represented dead frontage and, as such, was an unsuitable use in the context of a small scale multi-unit shopping centre. The expert evidence supports this view, and no contrary expert evidence was put forward by the tenant.

111. The tenant has failed to substantiate its allegation that the refusal of consent was informed by an ulterior motive, namely, to facilitate the landlord in obtaining possession of the demised premises by way of a surrender at an undervalue. (See, in particular, paragraphs 58 to 70 above).

112. In summary, the tenant has failed to discharge the onus upon it to establish that the landlord acted unreasonably in withholding its consent to the proposed assignment. Accordingly, an order will be made allowing the appeal and setting aside the order of the Circuit Court of 28 February 2023. The proceedings will be dismissed.

113. As to costs, my *provisional* view is that the defendant/landlord, having been entirely successful in resisting the proceedings, is entitled to its costs above and below, i.e. the costs before both the Circuit Court and the High Court on appeal. This would represent the default position under Section 169 of the

Legal Services Regulation Act 2015. The proposed costs order would include the costs of the various written legal submissions, all reserved costs, and the costs of two counsel before the High Court.

114. If the plaintiff/tenant wishes to contend for a different form of costs order than that provisionally proposed, it should file short written submissions within twenty-one days. The defendant/landlord will have twenty-one days thereafter to file written submissions in reply. In the event that no written submissions are filed by the plaintiff/tenant by 6 March 2024, the order will be drawn up along the lines provisionally proposed.

Appearances

Michael O'Connor SC and Alan Ledwith for the plaintiff instructed by Benen Fahy Associates
Jacqueline M. O'Brien SC and Brian McGuckian for the defendant instructed by Ahern Rudden Quigley Solicitors

Approved