Case No. CHANF 95/1231/B

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
(His Honour Judge Rich)

Royal Courts of Justice
Strand
London WC2

Date: Tuesday, 12th November, 1996

B e f o r e:

LORD JUSTICE BELDAM
LORD JUSTICE MORRITT
SIR JOHN BALCOMBE

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	MOUNT EDEN LAND LTD	Appellant
	-v-	
	(PRUDENTIAL ASSURANCE CO LTD	Respondent

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(Computer Aided Transcript of the Palantype Notes of
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Official Shorthand Writers to the Court)

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MR K LEWISON QC (Instructed by Herbert Smith EC2A 2HS) appeared on behalf of the Applicant

MR D WOOD QC (Instructed by Lovell White Durrant EC1A 2DY) appeared on behalf of the Respondent

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J U D G M E N T (As approved by the Court)

LORD JUSTICE MORRITT: This is an appeal of Mount Eden Ltd, the landlord, from the order of His Honour Judge Rich, sitting as additional judge of the Chancery Division, made on 14th July 1995. By that order he declared in answer to a preliminary issue that the appellant's predecessor in title to the reversion, Grovewood (LE) Ltd, had granted consent to the tenants, The Prudential Assurance Co Ltd, for the execution of works to properties in Oxford Street and Wells Street London, which in the absence of such consent would have constituted breaches of covenants contained in the relevant leases.

The leases in question are four in number, three were dated 17th January 1917 and the fourth 24th June 1924. They were leases of 134/140 Oxford Street and 80/83 Wells Street for terms which amounted in total, that is to say under each lease, to the equivalent of 999 years from 6th April 1915. The four leases were so far as relevant in the same terms. The term which is relevant is the expression "previous written consent" contained in Cl.II(9) and II(8) in these terms:

> "That (without the previous written consent which may be temporary or permanent revocable or irrevocable or otherwise howsoever framed or qualified of the Lessor)"

The other material provision is the covenant in question, which is against the making of alterations. That is contained in Cl.II(11) and II(10) in the respective leases. That provides: "That without such previous written consent as aforesaid and except in accordance with plans previously approved by the Lessor and to his satisfaction no building or erection shall at any time be built or placed on the said demised premises and no addition or alteration affecting the elevation external structure or stability of the said premises or any parts thereof shall at any time be made to any building or erection for the time being on the said demised premises and that no machinery shall at any time be erected upon or affixed to the said demised premises except under the supervision and to the satisfaction of the Lessor and that the said Lessees will pay to the Lessor on demand and indemnify the Lessor against all reasonable Surveyors Fees and other charges and expenses which the Lessor may incur in connection with any matter or thing under this present sub-clause."

By October 1992 Grovewood (LE) Ltd, then in administrative receivership, held the reversions to each of the four leases, the terms were vested in The Prudential Assurance. The Prudential had ascertained that outer cladding of the building needed to be replaced and that that would give rise to an alteration of the appearance of the outside. On 5th October 1992 The Prudential wrote to the agents for the Landlords notifying them of their proposals to carry out such works.

On 5th January 1993 The Prudential sent to the agents for the Landlords, "the latest plans being considered by the Planners." On the 1st March 1993 The Prudential wrote to the agents of the Landlord seeking, "written confirmation of your client's agreement" for the works due to commence in April of that year. On the 24th March 1993 the agents for the landlord wrote to The Prudential in these terms:

> "Please note that I have not yet received confirmation from my clients that consent will be given for these works.
>
> I will endeavour to keep you fully informed of any progress in this matter."

On 29th March 1993 The Prudential expressed concern at the delay in obtaining an answer, and on 1st April 1993 the agents for the Landlord again replied that they had still not received:

> "authority to grant consent for your alteration to the elevations."

On the planning front, on 6th April 1993 the City of Westminster, as the planning authority, gave consent, but subject to certain specified conditions, to the proposed works of recladding. Then, on 18th May 1993 the agents for the Landlord wrote the crucial letter. It is in these terms:

> " <u>Subject to License</u>
>
> Dear Mr Pritchard,
>
> WELLS HOUSE, 134/140 OXFORD STREET, LONDON W1
>
> I refer to your request to consent to alter the external appearance of the above building during the course of maintenance to the defective cladding.
>
> I can confirm that the Freeholder, Grovewood (LE) Limited (In Administrative Receivership), gives consent for the works subject to the following conditions:
>
> 1. A formal licence is entered into by your client, The Prudential Assurance Company Ltd.
>
> 2. The Prudential will pay my client's costs in this matter, including any

additional insurance premium levied as a result of the works.

3. The Prudential are to obtain necessary consents and statutory approvals.

If you can confirm acceptance of the above terms, I will arrange for my client's solicitor to prepare the necessary licence. When replying, I should be grateful if you would confirm the name of the solicitor who will be representing your client and the appropriate drawing numbers to be incorporated in the licence."

On 30th June and then again on 5th August 1993 the City of Westminster, as the planning authority, approved the reserved matters.

On 7th September 1993 The Prudential wrote confirming their agreement to the conditions set out in the letter of 18th May 1993. That letter reads as follows:

"*Reference your letter dated 18th May. I confirm my client's agreement to items 1-3 inclusive.*

I have forwarded drawings and details of the licence to my client's solicitors:- [the name and address of Lovell White Durrant is there set out]

I should be grateful if you would inform your client's solicitors of the position."

Subsequently, on 6th September 1994 s.146 notices were served on The Prudential, by the then Landlord, claiming amongst other things that the replacement of the cladding had been carried out without the Landlord's consent. This prompted The Prudential to issue an Originating Summons on 23rd November 1995 claiming, amongst other things, that previous written consent had been given by the then landlord's predecessor in title.

In March 1995 Master Dyson ordered that that issue be tried as a preliminary issue. Then, on 14th July 1995 the matter came before His Honour Judge Rich.

The Judge concluded that the letter of 18th May 1993 did constitute such consent as the leases required. After referring to the facts and the terms of the letter he posed the issue for his decision in these terms:

"The issue therefore, it appears to me, between the parties is whether or not the expression 'subject to licence' has a similar magic to the expression 'subject to contract' such that it may contradict the effect which would otherwise arise from the words of the letter.

I put it that way, conscious that the letter has got to be construed as a whole and of course, even if those words lack magic, they may so reinforce the implications of other words in the letter as to contradict the expression 'I can confirm that the freeholder gives consent', if that expression may, within the body of the letter, be said to give with one hand what is

withdrawn with another.

I think that Mr Neuberger has wished, at the same time as he relies upon the magic of 'subject to licence', also to put the totality of the effect of the letter as being other than the granting of a licence because of, in effect, the withdrawal of what is said in 'I give consent' by the conditions and requirements identified subsequently in the letter."

The Judge then considered the four reported cases to which he was referred. The fourth was the decision of Harman J in Venetian Glass Gallery v Next Properties Ltd (1989) 2 EGLR 42. At page 12 of his judgment Judge Rich continued:

> "If the importation of the words 'subject to licence' in any letter automatically had the effect that no consent is to be granted until the execution of a formal licence, then of course the letter upon which the plaintiffs here rely would be nullified in its effect, but Mr Justice Harman at page 44H, in my judgment completely destroys Mr Neuberger's concept that those words are of themselves magic words. He referred to the three cases to which I have also referred and he said:
>
> > 'All three go to show that there is a distinction recognised by the law between relationships such as those between landlord and tenant, where there is a existing set of legal obligations between the parties and there is sought within those obligations a consent, and relations between strangers in law as between prospective purchaser and prospective vendor where there is no present tie and the parties are in mere negotiation. I accept that there is such a distinction and I agree that one does not regard the need for a formal licence, probably under seal, as being the essential step without which there can be no effective licence.'
>
> He contrasted to that the situation in relation to vendor and purchaser transactions where there is no pre-existing relationship between the parties.
>
> In other words, Mr Justice Harman accepted, as I think it is necessary to accept in the light of many decisions to which I do not need to refer, that the words 'subject to contract' do have what Mr Neuberger I think very reasonably describes as a magic, but that magic arises from the particular incantation in the particular context of particular transaction. Because the words 'subject to contract' create magic it does not mean that similar magic is created by different words in different contexts.
>
> Mr Justice Harman has rejected that concept. I entirely agree with him in rejecting it. Without magic, this letter granted consent. There is no magic. It is a consent and I so declare."

From that decision the Landlords now appeal.

They contend that the judge was wrong. Their case is that the heading 'Subject to License' prevented the letter having any legal consequence. They submit that there is a general principle that:

> "where parties contemplate completion of a formal document in due course their negotiations are subject to the completion of that document and preclude any legal consequences from anything that precedes the execution of that document."

It is submitted that such a proposition is a general application and makes for certainty in a transaction such as this.

In support of that proposition we have been referred to cases dealing with phrases such as 'subject to lease' and 'subject to details' in the field of carriage of goods by sea. In those cases the same effect was given to those phrases as to the familiar phrase 'subject to contract' in the field of sales of land. Thus in Longman v Chelsea [1989] 58 P&CR 189 Nourse LJ said at page 193/4:

> "Wherever parties intend to enter into the relationship of landlord and tenant without a preliminary contract for the grant and acceptance of a lease, and their negotiations are expressed to be 'subject to the completion of a lease,' 'subject to lease,' 'subject to contract' or the like, then, so long as the qualification remains in force, the relationship does not become binding on them unless and until there is an exchange of lease and counterpart, before which either party can withdraw. The parties intend to be bound at one ascertainable point of time, conventionally at a completion meeting where, if there is to be a mortgage, the mortgagee will also be represented and where all necessary formalities and exchanges will take place. With advances in modern technology it may increasingly be possible to dispense with a physical encounter between the parties. But in the absence of evidence to the contrary it is not possible to dispense with the common intention that the parties shall become bound at one ascertainable point in time."

The judgment of Nourse LJ was quoted and adopted by Dillon LJ in Akiens v Saloman [1993] 65 P&CR 364. At page 369 he said:

> "The parties were negotiating throughout on the basis that neither would be bound until the terms of lease had been embodied in formal lease and counterpart and these had been exchanged in the usual way. They had been negotiating on a basis that accepted, as each of the solicitors must have known, that either could withdraw from the negotiations at any point before the exchange had taken place."

In The CPC Gallia [1994] 1 Ll L R, 68 Potter J adopted a similar approach to the phrase 'subject to details' when used in negotiations for the carriage of goods by sea. At page 73 he quoted with approval the dictum of Steyn J in Junior K [1988] 2 Lloyd's Rep, 574 where he said:

> "I would respectfully suggest that it is in the interests of the chartering business that the Courts should recognise the efficacy of the maritime variant of the well-known 'subject to contract'. The expression 'subject to details' enables owners and charterers to know where they are in negotiations and regulate their business accordingly. It is a device which tends to avoid disputes and the assumption of those in the shipping trade that it is effective to make clear that there is no binding agreement at that stage ought to be respected."

I do not accept that it is legitimate to extend the principle illustrated by those cases from the field of bilateral negotiations to that of a unilateral act. There can be no doubt that the distinction drawn by Harman J in the Venetian Glass case, to which the judge referred is a valid one. The purpose of the

suspensory condition 'subject to contract' in the context of negotiations is to avoid the other side seeking prematurely to conclude a contract by the acceptance of an offer so as to give rise to unintended legal consequences. In cases requiring a unilateral act the only question is whether that act has occurred. So in this case the only question is whether the letter of 18th May 1993 was a consent as required by the leases. That is a question of the construction of the letter in the light of all the surrounding circumstances.

So regarded I have no doubt that the letter does express the consent required by the leases. It will be remembered that such consent may be temporary or revocable or qualified. This letter expresses consent in the clearest terms. The consent was qualified by the stipulation for a formal licence as stated in the body of the letter. For that document it would be necessary to have the drawing numbers referred to in the concluding passage. In truth the heading 'subject to licence' added little to the condition expressed in the body of the letter and could not qualify the unambiguous expression of consent it contained. If it be necessary to attribute some meaning to the heading then it might serve to emphasise the degree of formality required so that the express condition for a formal licence should not be satisfied in correspondence or by some less formal method than a licence strictly so-called. But no such document was required by the terms of the leases. In my view it was right for the reasons he gave and I would dismiss this appeal.

SIR JOHN BALCOMBE: I agree.

LORD JUSTICE BELDAM: I also agree.

ORDER: Appeal dismissed with costs.

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