[1991–92 Gib LR 372]

HILL v. HASSAN, HAMER LIMITED, TAMARIND LIMITED and ELDO HOLDINGS LIMITED

SUPREME COURT (Kneller, C.J.): September 18th, 1992

Landlord and Tenant—assignment of lease—landlord's consent—premium—person with direct financial interest in assignment has locus standi, under Landlord and Tenant Ordinance, s.69(2A), to appeal against premium charged for consent by landlord—premium "charged" includes premium demanded but not yet paid

Landlord and Tenant—assignment of lease—landlord's consent—for purposes of Land Law and Conveyancing Ordinance, s.5, burden of proof of reasonableness of refusal shifts from tenant to landlord if no reasons given—failure to deal expeditiously with request for consent, or refusal intended to force tenant to surrender rather than assign lease is unreasonable refusal—landlord entitled to know true nature of assignment and details of assignee

Landlord and Tenant—assignment of lease—landlord's consent—refusal not justified by assignee's intended future change of user, since will retain right to give or withhold consent to change—if consent unreasonably withheld, tenant may nevertheless validly assign and seek declaration from court

The appellant tenant applied for a declaration that its landlords were not entitled to charge a premium for the assignment of the residue of the lease.

The appellant owned a restaurant business which operated from premises owned by the respondent landlords under a lease containing a covenant against the assignment of the lease without consent. The appellant assigned the lease to C Ltd., and paid the respondents £24,000 as consideration for their consent. With their consent, J. Bank Ltd. extended credit to C Ltd., took a charge over the premises as security, and froze the sum of £50,000 in the appellant's account as a guarantee. C Ltd. defaulted on the bank loan, and the bank appointed a receiver.

The receiver received two offers to purchase the assignment of the lease for £210,000, but was told by the respondents that they would consent only if the rent payable under it were increased by 25%. They also sought a premium of £60,000 (twice the proposed new rent). They then threatened to recover the premises if the receiver did not succeed in

finding a tenant willing to pay the new rent and the premium. Neither of the potential purchasers was willing to do so. If the receiver sold the lease and paid the premium and new rent as well as the rates and rent due from the proceeds, the bank would not be repaid in full and other creditors would receive nothing.

The appellant applied to the court under s.69(2A) of the Landlord and Tenant Ordinance for a declaration that the respondents were not entitled to charge a premium, or, alternatively, a declaration as to what the premium, if payable, should be.

Negotiations between the receiver and the respondents continued. The receiver continued to seek the respondents' consent to an assignment to one of the two potential assignees, offered to pay the reasonable expenses of obtaining that consent, alleged that their unwarranted procrastination had cost the bank £10,000, refused to reveal to them what the consideration for the assignment would be, but reminded them that there might in future be a change of use. They agreed that the future rental value would be determined by an arbitrator.

The appellant submitted that the respondents should not be permitted to demand a premium for the assignment of the residue of the lease, since (a) this was a forced sale; (b) he had already paid them £24,000 for their consent to the earlier assignment; (c) C Ltd. had not paid him the agreed purchase price; and (d) he was in danger of losing the money held by the bank by way of guarantee for the loan on which C Ltd. had defaulted.

Held, making a declaration as to an appropriate premium:

(1) Under s.5 of the Land Law and Conveyancing Ordinance, a covenant against the assignment of a lease without consent was deemed to contain the provisos that consent should not be unreasonably withheld and that no "fine or sum of money in the nature of a fine" should be payable for that consent. Under s.69(2)(b) of the Ordinance, however, the landlord could charge a premium not exceeding two years' rent as at the date of the assignment. Consent could be withheld under s.69(3) if the assignee proposed to change the use of the premises. These provisions had originated in equivalent English legislation, whereas the right of appeal to the Supreme Court, under s.69(2A), against the amount of the premium charged was a local provision. The appellant had *locus standi* under s.69(2A) as a "person aggrieved" by the premium even though he was neither the assignor nor the assignee, since he had guaranteed C Ltd.'s loan from the bank. The word "charged" was properly construed as including "demanded," and the right of appeal was not dependent on the premium having been paid (paras. 24–27; paras. 33–34).

(2) A landlord was not legally obliged to give reasons for refusing consent. However, if no reasons were given, the burden of proof as to reasonableness would shift from the tenant to the landlord. Nor, under the statute, did the landlord have to decide whether to give consent within a specific time, but a failure to deal expeditiously with the tenant's application could amount to unreasonable refusal. Similarly, a refusal

with the intention of forcing the tenant to surrender rather than assign the lease would be unreasonable. The landlord was entitled to be informed of the true nature of the assignment he was being asked to approve. The covenant served the purpose of ensuring that the landlord retained a voice in who was to replace the original tenant as a respectable, solvent person to observe the covenants and other obligations in the lease. A limited company could be such a person, and the assignee's entire conduct could be considered in deciding whether it was a respectable person (paras. 28–31).

(3) In this case, the landlords had been aware for some time that the receiver had planned to assign the lease for a specified consideration to a particular assignee. Since there was to be no immediate change of user, and the landlords would have the right to consent or not to a change in future, s.69(3) did not justify a refusal. The receiver had undertaken to pay arrears of rent and rates before the assignment, and the parties would be bound by the rent to be fixed by the arbitrator and the covenants in the lease. The landlord should process the receiver's application within four days once satisfactory references for the assignee had been supplied, and a failure to do so could be unreasonable. The receiver would then be at liberty to assign the lease without consent and to apply to the court for a declaration and the assignment would be valid (para. 22; para. 32).

(4) The landlords were entitled under s.69 to charge a premium, up to a maximum of £60,000, namely two years' current rent. Their conduct had not deprived them of the right to do so. However, the likely market rental was in the region of £25,000 rather than £30,000, and they had already received £24,000 two years ago upon the last assignment. Accordingly, an appropriate premium would be £36,000, so that they received a total of £60,000. This would probably require the bank to draw upon some of the moneys held by way of the appellant's guarantee, a risk he had run when making the guarantee (paras. 35–38).

Cases cited:

(1) *Bates* v. *Donaldson*, [1896] 2 Q.B. 241; (1896), 65 L.J.Q.B. 578, applied.

(2) *Benzaquen* v. *Sterling Travel Ltd*., Supreme Ct., 1987 B. No. 127, May 2nd, 1989, unreported, referred to.

(3) *City Hotels Group Ltd.* v. *Total Property Invs. Ltd.*, [1985] 1 E.G.L.R. 253, applied.

(4) *Cohen* v. *Popular Restaurants Ltd.*, [1917] 1 K.B. 480; (1916), 86 L.J.K.B. 617, followed.

(5) *Evans* v. *Levy*, [1910] 1 Ch. 452; (1910), 79 L.J. Ch. 383, applied.

(6) *Farrow's Bank Ltd., In re, (No. 00485 of 1920)*, [1921] 2 Ch. 164; (1921), 90 L.J. Ch. 465, followed.

(7) *Fuller's Theatre & Vaudeville Co. Ltd.* v. *Rofe*, [1923] A.C. 435; (1923), 92 L.J.P.C. 116, applied.

(8) *Greater London Properties Ltd.'s Lease, In re*; *Taylor Bros. (Grocers) Ltd.* v. *Covent Garden Properties Co. Ltd.*, [1959] 1 W.L.R. 503; [1959] 1 All E.R. 728, applied.
(9) *Lepla* v. *Rogers*, [1893] 1 Q.B. 31; (1892), 57 J.P. 55, *dicta* of Hawkins, J. applied.
(10) *Lovelock* v. *Margo*, [1963] 2 Q.B. 786; [1963] 2 All E.R. 13, applied.
(11) *Pimms Ltd.* v. *Tallow Chandlers in City of London*, [1964] 2 Q.B. 547; [1964] 2 All E.R. 145, applied.
(12) *Rayburn* v. *Wolf*, [1985] 2 E.G.L.R. 235; (1985), 50 P. & C.R. 463, applied.
(13) *Treloar* v. *Bigge* (1874), L.R. 9 Exch. 151; 43 L.J. Ex. 95, applied.
(14) *William* v. *Earle* (1868), L.R. 3 Q.B. 739; 33 J.P. 86, applied.
(15) *Willmott* v. *Barber* (1880), 15 Ch. D. 96; 49 L.J. Ch. 792; on appeal, (1881), 17 Ch. D. 772, applied.
(16) *Willmott* v. *London Road Car Co. Ltd.*, [1910] 2 Ch. 525; (1910), 80 L.J. Ch. 1, applied.

Legislation construed:
Land Law and Conveyancing Ordinance (1984 Edition), s.5(1): The relevant terms of this sub-section are set out at para. 24.

Landlord and Tenant Ordinance (1984 Edition), s.69(1): The relevant terms of this sub-section are set out at para. 25.
s.69(2), as substituted by the Landlord and Tenant (Amendment) (No. 3) Ordinance 1985, s. 3: The relevant terms of this sub-section are set out at para. 25.
s.69(2A), as added by the Landlord and Tenant (Amendment) Ordinance, 1989, s.6: The relevant terms of this sub-section are set out at para. 25.
s.69(3), as substituted by the Landlord and Tenant (Amendment) (No. 3) Ordinance 1985, s. 3: The relevant terms of this sub-section are set out at para. 25.
s.69(4), as substituted by the Landlord and Tenant (Amendment) (No. 3) Ordinance 1985, s. 3: The relevant terms of this sub-section are set out at para. 25.

C. Finch for the appellant;
Sir Joshua Hassan, Q.C. for the respondents.

1 **KNELLER, C.J.:** Joseph Hill, the appellant, comes to this court under s.69(2A) of the Landlord and Tenant Ordinance for a declaration that in all the circumstances of this case, the landlords are not entitled to charge a premium or, if they are, a declaration as to what a just one should be.

2 The circumstances of the case are these. The appellant was the beneficial owner and a director of Capri Bar Ltd., which occupied the ground floor of 45 Main St. and its business was that of a restaurant and

bar. Its landlords were the trustees of the estate of Mesod Hassan, Hamer Ltd., Tamarind Ltd. and Eldo Holdings Ltd. ("the landlords"), who or which represent 11 individuals. The terms of the lease include a covenant by the appellant—

> "not to assign, transfer, underlet or part with the possession of the demised premises or any part of it without first obtaining the written consent of the landlords, such consent, however, not to be unreasonably withheld in the case of a responsible and respectable person."

3 On May 2nd, 1990 the appellant authorized Jyske Bank (Gibraltar) Ltd. ("the bank") to freeze his account with it to the extent of £50,000 in consideration of the bank's giving Courtlands Ltd. of Gibraltar "time, credit, banking facilities and accommodation to the extent of £200,000." The bank, with the consent of the landlords, took a charge over the premises as security. On May 4th, 1990, Capri Bar Ltd., with the landlords' consent, assigned the premises and goodwill to Courtlands, and in consideration for their consent, the appellant paid the landlords £24,000.

4 Courtlands defaulted in repaying the bank's loan earlier this year and the bank put in a receiver, Mr. Robinson, under the terms of a deed of mortgage and a deed of debenture, both dated May 4th, 1990. On April 14th, this year the receiver approached the landlords' estate agent, Mr. Hassan, about the proposed assignment of the residue of the lease, and the upshot was that the receiver placed advertisements in the *Gibraltar Chronicle* asking for written offers by April 30th. There were three replies, and the offers ranged from £120,000 to £210,000. The receiver provisionally accepted the first of the two offers of £210,000. It was made by Mr. Khubchand, an Indian merchant of Gibraltar and a Justice of the Peace.

5 At this time Mr. Hassan, on behalf of the landlords, told the receiver they wanted the rent raised from £24,000 to £30,000 a year, which was a 25% increase, and he suggested that extensions to the lease would be available. There was no hint that the landlords would ask for a premium. Mr. Khubchand and Mr. Hassan met the receiver in his office. Mr. Khubchand pointed out that in 1989 the rent for the premises had been only £12,000 a year; it had been £24,000 in March 1992; and in June 1992 the market did not warrant a rent of £30,000. He offered £26,400. Mr. Hassan declared that he had to take instructions from the landlords' lawyer, who was on holiday until May 12th. The receiver was minded to offer £10,800 to the landlords as a premium. Mr. Hassan stated that the landlords would want £60,000 as a premium. That is twice the annual rent they had demanded.

6 The receiver told Mr. Khubchand he would offer the lease to the other person who had also answered the advertisement with a bid of £210,000, but that if he too jibbed at a rent of £30,000 a year, he would return to Mr. Khubchand. The receiver asked Mr. Hassan if the amount of the premium was negotiable, and Mr. Hassan advised that it would be difficult to persuade the 11 beneficiaries to accept anything less than £60,000—and certainly not in an open meeting. He could not negotiate the amount of the premium but would bear the receiver's offers back to the landlords' lawyer and then they would try to persuade the others to accept it if it were reasonable. The receiver was vexed and told Mr. Hassan he would make no offer.

7 The receiver declared that Mr. Hassan was preventing him from selling the lease at a realistic price and that that meant Courtlands' asset was removed from his control. He intended to invoke the clause in the lease providing for arbitration if the parties disagreed on the rent at a review date and to ask for legal advice as to making an application under the Ordinance for this court to determine the premium to be paid. Mr. Hassan warned that if the receiver did not succeed in finding a purchaser ready to pay £30,000 a year rent and a premium of £60,000, the landlords would recover the premises in June 1995.

8 The man who made the second offer of £210,000 agreed to pay £30,000 a year rent. He baulked at the premium of £60,000. Mr. Hassan said that the landlords insisted on having it.

9 The receiver's summary of Courtlands' financial position if it sold the lease, and out of the proceeds paid the rates, rents and fees of the receiver, the premium and the new rent is this:

	£	£
SALE PROCEEDS		210,000
Rates due by April 28th, 1992	15,614	
Rent paid February–March	4,000	
Rent paid April–May	5,000	
Legal fees	1,500	
Receiver's fees	5,000	
SUB-TOTAL	31,114	
Add premium	60,000	
TOTAL	91,114	
NET PROCEEDS		118,886

This would leave Courtlands £81,114 short of what it owed the bank, so the appellant's £50,000 could or would be taken by the bank under his guarantee in part satisfaction of Courtlands' debt. All Courtlands' other creditors would be paid nothing.

10 Mr. Hassan warned that if the rent arbitration clause were invoked and the question of the premium came to this court, the landlords would

require the bank to pay the rent and they would procrastinate until they were able to repossess the premises. The second offer of £210,000 was withdrawn. The receiver returned to the negotiations on May 7th and offered £30,000 a year rent from April 1st, 1992 and 10 months' premium at the new rental which would amount to £25,000 if the new lease were one for nine years, beginning on April 1st this year, with rent reviews every three years and all other standard terms, the landlords agreeing to a change of tenant and change of user at the discretion of the new tenant, together with prior payment of all outstanding rents and rates to the date of completion. The receiver pointed out that each week that passed cost him (as Courtlands in receivership) £1,000 in rent, rates and interest.

11 Mr. Hassan promised to set all this out in a paper for the landlords' legal adviser to ponder upon when he returned from his holiday on May 11th.

12 The landlords' estate agent gave notice to the receiver on May 27th that the landlords now demanded £30,000 a year rent for the period beginning April 1st. The appellant's solicitors, by a letter of May 27th, put the landlords, the bank and the receiver on notice that the appellant was aggrieved by the landlords' claim for a £60,000 premium and intended to come to this court for the two declarations I set out earlier in this judgment, so the £50,000 in his account with the bank must not be dissipated or disbursed. The grounds for his grievance are: (a) the sale of the residue of the lease is a forced one; (b) it followed upon the earlier assignment by Capri Bar Ltd. to which the landlords consented; (c) they were paid £24,000 by the appellant and not by Courtlands for that consent; (d) Courtlands has not paid the appellant the agreed purchase price; and (e) the appellant was in danger of losing his £50,000.

13 The appellant's notice of appeal was filed the next day, May 28th. The same day, the receiver rejected the landlords' demand for £30,000 per year rent from Courtlands and asked for the appointment of an independent surveyor to determine the open market rental value. On June 10th he asked for the landlords' written consent to the assignment of the lease. He sent their agent a cheque for £6,000 as payment of rent at the old rate of £2,000 a month for April, May and June 1992, for which the agent issued a receipt the same day.

14 The landlords did not consent to the proposed assignment and added that they did not refuse it. Instead, they asked for (i) the name of the intended assignee, (ii) his references, (iii) what consideration he was paying the receiver, (iv) an assurance that there would be no change of user, and (v) specific performance of all the conditions of the lease prior to assignment, including payment of all rents due, payment of all rates due and the rent from April 1st, to be agreed or determined.

15 The receiver replied on June 17th. He gave an assurance that prior to the assignment the arrears of rents and rates would be paid. The intended assignee would be either Khubchand & Co. Ltd. or Melinda Investments Ltd. They were responsible and respectable entities. References would be provided if the landlords indicated they would in principle agree to the assignment. The premises would probably be used as a bar and restaurant. He pointed out that there was no restriction in the lease as to what use could be made of them. He refused to divulge the sum that Khubchand & Co. Ltd. or Melinda Investments Ltd. would pay for the assignment. It was irrelevant to the landlords' consideration of his request for written consent to the assignment. So was the agreement or determination of the rent.

16 The landlords' agent filed an affidavit dated June 16th in which he deposed to these facts, *inter alia*, that no notice asking for an assignment in writing had been made to him or the landlords. He means "consent in writing." They were asked for it in a letter of June 10th by the receiver which he acknowledged he had read in his letter of June 11th. The rest of the affidavit adumbrates the landlords' stance. They do not give or withhold consent and will consider it on the terms set out in his letter of June 11th.

17 The receiver explained in a letter of June 29th to the landlords' agent that his and the landlords' tactics had cost the bank £10,000. They should have behaved in a more reasonable and commercially-minded manner. He set out the chronology of their negotiations over the assignment and declared that their procrastination was unwarranted. He thought that in those circumstances the landlords should not be offered any premium and they should agree and give their written consent to the assignment at once. He was prepared to cover any reasonable and justifiable administrative expenses that they had in giving their consent.

18 The receiver's solicitors wrote to the landlords' solicitor on June 29th, telling them:

(a) A request for the landlords' consent to assign did not have to be in any particular form.

(b) The consideration for the assignment was irrelevant to the question whether or not to consent.

(c) The landlords had known since early May 1992 that the consideration offered was £210,000.

(d) Material changes to the user of the premises would be made after the assignment. The landlords knew this was so.

19 The landlords' agent, in his second affidavit, which was sworn on August 26th, seizes on this proposed change of user to remind the court

that the landlords can withhold their consent when there is a proposed change of user.

20 The landlords and the receiver have now agreed on an arbitrator to fix the annual rental payable from April 1st this year.

21 There was no *viva voce* evidence because the parties did not wish to call any and it did not seem necessary to the court.

22 That completes the background to the case. I now turn to the relevant law. A short summary of the main principles is this:

1. If the lessee cannot by his covenant assign without written consent, he can ignore it and do so if the lessor's consent is capricious or unreasonable: see *Treloar* v. *Bigge* (13).

2. This covenant touches and concerns the land and therefore runs with it. It is inserted with a view to ensuring that the landlord shall not be deprived of a voice as to who shall be substituted for the original lessee in possession of the premises.

3. So, the lessor can sue the assignor of the lease for breach of the covenant. The assignment is operative despite the covenant being binding on the original lessee not to assign.

4. The measure of damages for it is such a sum as will, as far as money can, put the lessor in the same position as if he had the assignor's liability still instead of the liability of the assignee for breach, past and future, *e.g.* the assignee could not pay the rent, so the land and the lease were less valuable to the lessor because he did not receive rent and had no responsible solvent person to observe the covenants. The damage or loss is deemed to be within the contemplation of the parties when the covenant is made.

5. ". . . [T]he lessor must be taken to intend, and the lessee to know that he intends, to protect himself as far as possible against loss or damage which might result from an objectionable assignee or sub-tenant, or an objectionable use being made of his property . . .": see *William* v. *Earle* (14); and *Lepla* v. *Rogers* (9) ([1893] 1 Q.B. at 35, *per* Hawkins, J.).

6. If the lessor has a legal right to re-enter in default of the lessee assigning without the written consent of the lessor, the court will restrain the lessor from asserting it if he encouraged the assignee to spend money on the property by directly or indirectly refraining from exerting his rights: see *Willmott* v. *Barber* (15) (15 Ch. D. at 105, *per* Fry, J.).

7. An assignment by a liquidator is an act done on behalf of the company, so in a voluntary or compulsory winding up he is bound by the covenant not to assign: see *Cohen* v. *Popular Restaurants Ltd.* (4); and *In re Farrow's Bank Ltd.* (6). The same is so for a receiver who is in an analogous position.

23 Those reported decisions all reflect English landlord and tenant law. The English authorities are persuasive and, in my respectful view, good law for this court to follow. I applied the principles in *Benzaquen* v. *Sterling Travel Ltd.* (2).

24 As for the statute law, we must begin with s.5(1) of the Land Law and Conveyancing Ordinance, which provides that—

> "in all leases whether made before or after the 26th day of September, 1895 containing a covenant . . . against assigning . . . the possession of demised premises without . . . consent . . . such covenant . . . shall be deemed to be subject—
>
> (*a*) to a proviso that such . . . consent is not to be unreasonably withheld . . . [and]
>
> (*b*) to a proviso . . . that no fine or sum of money in the nature of a fine shall be payable for . . . such consent . . ."

The proviso against a fine first appears in Gibraltar's legislation on October 9th, 1912 as s.3 of the Conveyancing Ordinance, 1912 and reflects s.3 of the Conveyancing and Law of Property Act 1892.

25 Then I move to s.69 of the Landlord and Tenant Ordinance, which reads as follows:

> "(1) . . . [I]t shall be a condition of every tenancy to which this Part applies that—
>
> (*a*) the tenant may not assign his interest under the tenancy without the prior written consent of the landlord; and
>
> (*b*) the consent of the landlord to the assignment shall not be unreasonably withheld.
>
> (2) The landlord may as a condition of consenting to an assignment specified in subsection (1), charge a premium not exceeding the equivalent of 2 years' rent at the annual rental payable immediately before the date of the assignment.
>
> (2A) A person aggrieved by the amount of the premium charged by the landlord for a consent to an assignment may appeal to the Supreme Court for a determination of that amount as the Supreme Court may, in all the circumstances of the case, think just.
>
> (3) The landlord may withhold his consent to the assignment of the tenant's interest where the assignee intends to change the user of the holding from that carried on by the assignor of the holding.
>
> (4) It shall not be lawful for an assignee referred to in subsection (3) to materially change the kind of business carried on by him in the holding without the prior written consent of the landlord."

26 It is in s.19 of the Landlord and Tenant Act 1927 that the proviso against unreasonable refusal to consent emerged in England and Wales, and it was 30 years later that it became law here, on July 18th, 1958 to be exact, as s.2 of the Law of Property (Amendment) Ordinance, 1957. And, continuing with this historical excursus, the need for prior written consent of the landlord to an assignment of the tenancy interest is first found in s.69 of the Landlord and Tenant Ordinance, 1983 which became law on July 1st, 1983. It is also the source of the landlord's right to charge a premium.

27 I think s.69(2A), which gives the right of appeal to a person aggrieved by the amount of the premium charged by the landlord for his consent to an assignment, must be the invention of the legal draftsman here. It was inserted by the provisions of s.6 of the Landlord and Tenant (Amendment) Ordinance, 1989 which was passed by the Gibraltar House of Assembly on August 1st, 1989 and assented to on August 10th, 1989. No source is cited for it. Counsel would have provided that and authorities on it, I presume, if it were not a "home made" addition to the Ordinance on which there are no authorities yet.

28 So far, the provisions of the Landlord and Tenant Act 1988 have not been made part of the law of Gibraltar, so the landlord does not have to state in writing his reasons for refusing to consent to an assignment. He has no statutory duty to reach a decision within a reasonable time or to justify his decision.

29 At common law the onus of proof of unreasonableness was on the tenant: see *Pimms Ltd.* v. *Tallow Chandlers of City of London* (11). He is not bound to give reasons for refusing, but if he gives no reason the onus of proof of reasonableness might pass to him: see *Lovelock* v. *Margo* (10). The landlord is entitled to be told the true nature of the transaction which he is asked to approve: see *Fuller's Theatre & Vaudeville Co. Ltd.* v. *Rofe* (7) ([1923] A.C. at 443–444). The tenant is entitled to have his application dealt with expeditiously and a failure to do so will amount to an unreasonable refusal of consent: see *City Hotels Group Ltd.* v. *Total Property Invs. Ltd.* (3).

30 A limited company can be a respectable and responsible person for the purpose of the covenant not to assign. "Respectable" would include the assignee's entire behaviour: see *Willmott* v. *London Road Car Co. Ltd.* (16). "Respectable" means able to pay the rent and perform the other obligations in the lease: see *In re Greater London Properties Ltd.'s Lease*; *Taylor Bros. (Grocers) Ltd.* v. *Covent Garden Properties Ltd.* (8).

31 Refusal has been held to be unreasonable where the landlords' reason was to compel the tenant to surrender and not assign the lease: *Bates* v. *Donaldson* (1).

32 Returning to this case, it seems to me that the landlords knew that the receiver proposed to assign the lease to Khubchand & Co. and that the consideration would be £210,000. There will be no change of user at the outset and the landlords have the power to give or withhold consent to a future change of user as and when it is proposed: see *Rayburn* v. *Wolf* (12). The proposed assignor and assignee will be bound by the new rent fixed by the arbitrator and by all the covenants in the lease. The receiver has undertaken to have arrears of rent and rates paid before the assignment takes place. Once satisfactory references are supplied for Khubchand & Co., the landlords must deal with the receiver's application expeditiously, which, in the circumstances, I would say should be within four clear days of receiving them. A failure to do so might amount to an unreasonable refusal to consent, and then the receiver can assign without consent or apply to the court for a declaration: see *Evans* v. *Levy* (5).

33 There has been no submission that the appellant had no *locus standi* because he is not a person aggrieved for the purposes of s.69(2A) of the Ordinance. If a "person aggrieved" was limited to the assignor or assignee that would have been set out. He is aggrieved because £50,000 in his account with the bank may be utilized under the guarantee he entered into with the bank that Courtlands would service the loan granted to it by the bank.

34 Section 69(2A), however, states that the appeal may be made by a person aggrieved by the amount of premium charged by the landlord and it has been argued that no premium has been charged yet. "Demanded" would be a better word. £60,000 have been demanded by the landlords. "Charged" is used in s.69(2A) because in s.69(2) it provides that the landlord may, as a condition of consenting to an assignment, charge a premium. The right to appeal is not dependent on the premium having been paid. Here, the landlords have, in my view, clearly indicated that the premium they are charging is £60,000.

35 Is that a just one? It is the maximum they can charge under s.69(2) if the annual rental payable immediately before the date of the assignment is £30,000 a year, but it is not known yet what the arbitrator will determine is the annual rentable market value of the premises. Mr. Khubchand was offering £26,400 a year in May of this year. The other possible purchaser was ready to pay £30,000 a year when Mr. Khubchand was by-passed. Those figures may be for a nine-year lease with rent reviews every three years. I doubt if today the annual market value rental could be more than, say, £25,000 a year. Thus, the landlords could charge a premium of up to £50,000, according to s.69(2).

36 Why should it be reduced by the court? The appellant says the landlords' dilatory approach to the question of consent amounts to an unreasonable refusal to consent and they should not have any premium

paid to them. They were paid £24,000 by him in early May 1990 for their consent to his assignment of the lease to Courtlands. That was, I presume, twice the annual rental at that time, which was £12,000 a year. If they are paid £60,000 now, the appellant continues, they will have received not only the rents of £12,000 and then £24,000 and £30,000, but also premiums of £24,000 and £60,000 for the same premises, all within 28 months.

37 The landlords maintain that they are entitled to their premium every time they consent to an assignment. It is not the appellant who will pay for it this time but the receiver, whom the bank has put in to recover for itself and other creditors as much of the facility it gave Courtlands as he can. The appellant took a risk when he agreed to guarantee it to an amount of £50,000, and he must have realized that he might be called upon to honour his guarantee.

38 So I would answer the two issues posed in this appeal in this way. First, the landlords are entitled to charge a premium for this proposed assignment. They have that right under s.69 of the Ordinance. I am not persuaded that their conduct in the matter so far should deprive them of their right to charge a premium for this assignment. The receiver and the landlords' agent have been playing their cards too close to their chests. Secondly, in all the circumstances of the case, I would determine as the just premium, the sum of £36,000, which will give the landlords a total of £60,000 in premiums in the last 28 months but will not, I apprehend, leave the appellant's £50,000 intact. But, as I have said, it was a risk he ran when he guaranteed the bank's loan to Courtlands for that amount. He is not, after all, being charged a premium for the proposed assignment this time.

39 **Order:** There shall be a declaration that landlords are entitled to charge a premium for consenting to the proposed assignment, and a declaration that, in all the circumstances of the case, the just amount to charge for the premium is £36,000. The appeal for the declaration was opposed by the landlords. The appellant succeeded in obtaining the declarations, although the second is of no benefit to him. Costs follow the event. I see no reason here to depart from that rule, and so the costs of appeal are to be paid by the respondents.

Order accordingly.
