

12-1-1991

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Shalom Lerner

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Recommended Citation

Shalom Lerner, *A Lessor's Objection to Assignment of the Lease By the Lessee: Israeli Law in the Light of the Common Law*, 17 Brook. J. Int'l L. 293 (1991).

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A LESSOR'S OBJECTION TO ASSIGNMENT OF THE LEASE BY THE LESSEE: ISRAELI LAW IN THE LIGHT OF THE COMMON LAW

*Shalom Lerner**

I. INTRODUCTION

In principle, a lessee may enter into various transactions with the right to lease, such as an assignment or a sublease.¹ This Article examines whether, and under what conditions, the lessee is permitted to effect these transactions.

On this issue, contradictory considerations come into play. On the one hand, the lessee should be allowed to enter into various transactions concerning the leased property since he holds the right of possession and of use during the period of the lease. On the other hand, the lessor — the actual owner of the property — may be affected by the assignment of rights to another. The lessor who originally enters into an agreement with an acceptable lessee, may be left with a different contractual partner or possessor of the property after such an assignment.

The lessee's power to assign rights does not stem from the general approach of the legal system to the nature of a lease. Indeed, a property-oriented approach advocates the potential assignment of the lessee's rights, but this conclusion is the handmaiden of the law and not its master. First, the ruling is made

* Associate Professor, Faculty of Law, Bar Ilan University, Israel.

1. The distinction between sublease and assignment of the lease is recognized in the Common law. See H. LESAR, *LANDLORD AND TENANT* 297-300 (1957) [hereinafter H. LESAR]. In an assignment the transferee comes into privity of estate with the lessor so that both are liable to the other on covenants running with the land. Furthermore, the lessee is not the landlord of the transferee. However, in a sublease, the original lessee becomes the landlord of the transferee. Moreover, they may not, under the common law sue each other directly upon covenants in the lease. *Id.* See also R. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* 555-59 (1980) [hereinafter R. SCHOSHINSKI]. Israeli law distinguishes, in addition, between assignment of the entire rental agreement and assignment of the rights of the lessee. In the case of assignment of the agreement, the lessee is completely released from his obligations, and the assignee replaces him in all that concerns the contract. See *Hacker v. Barash*, C.A. 208/51, 8 P.D. 566-70. Common law does not recognize anything similar, and even after the assignment, the original lessee has privity of contract with the lessor.

In this Article, the term "assignment of lease" includes the three transactions (sublease, assignment of the entire rental agreement, and assignment of the rights of the lessee), unless otherwise implied by the context.

concerning the assignment of the lease, and later, in view, *inter alia*, of this ruling, the classification of a lease is made in that legal system.

There are various options for balancing the opposing interests regarding the assignment of rights in a lease. Detailed legislation which sets forth precise rules and standards for distinguishing between permissible and nonpermissible assignments is one option. Such legislation should take into account the distinction between long-term and short-term leases,² between leases of furnished rather than nonfurnished property,³ and between an assignment and a sublease. In a long-term lease, for example, the personal element is relatively marginal since the lessor is aware of the possibility that the lessee may not remain on the property for the duration of the period. In contrast, the lessor has a greater interest in the particular person who leases a furnished apartment as that lessee will use the lessor's furniture. With respect to an assignment of the lease, the assignee is the only obligee of the lessor with respect to the rent,⁴ and financial dependability is therefore of utmost importance. In a sublease, however, the original lessee remains the lessor's contractual partner. Therefore the sublessee's financial standing is not of equal importance. Similarly, it is possible to distinguish between a regular lease and a "percentage" lease in which the rent changes to reflect the lessee's business cycle. In this situation, there is a tendency to accept the lessor's objections to assigning the management of the business to a party other than the original lessee.⁵

II. HIRE AND LOAN LAW, 1971⁶

The Israeli legislature refrained from being overly detailed in the formulation of the Hire and Loan Law, 1971 (Hire Law).

2. For a similar distinction in Scotland, see G. PATON & J. CAMERON, 4 THE LAW OF LANDLORD AND TENANT IN SCOTLAND 65-73 (Aberdeen 1967).

3. See In Swedish Law, 2 AN INTRODUCTION TO SWEDISH 389 (S. Stromholm, ed. 1981).

4. This is so in the case of assignment of the entire contract. See *supra* note 1.

5. See H. LESAR, *supra* note 1, at 295-96. In American common law there is no right to transfer the lease when the lessor's compensation relies on the skill and competence of the lessee. This would be the case in the common percentage lease. This is grounded in the notion that such a lease is based on a relation of trust and confidence between the lessor and the original lessee. *Id.*

6. Hire and Loan Law, chapter A, section E., S.H. 180 (1971) [hereinafter Hire Law].

One criterion was laid down for the different forms of hire or lease. Because of the importance of the provisions of section 22 of the Hire Law, the entire section is reprinted below:

The lessee shall not without consent of the lessor transfer his right to possess and use the thing hired to another or sublet such thing. Provided that if the lessor does not consent to the transaction on unreasonable grounds, or attaches unreasonable conditions to his consent, then —

- (1) in the case of immovable property — the lessee may effect the transaction without the consent of the lessor;
- (2) in the case of any hire — the Court may authorise the transaction on such conditions as it may see fit; in the case of a hire of immovable property, the Court may do so notwithstanding anything provided in the contract of hire.

In this section, there are two points of intersection: between immovable and movable property, and between a contract restricting assignability and one which contains no such restriction. Accordingly, when the lessor objects unreasonably to assignment, there is a double distinction between movable and immovable property. First, when the rental agreement does not limit assignability, the lessee is entitled to assign the leased immovable property without the prior consent of the court. In the case of movable property, the lessee may act only after the court has given its consent. Second, when the rental agreement prohibits the lessee from assigning his right, the prohibition is absolute as regards movable property, but the court may still allow the assignment of immovable property.

This section of the Hire Law places clear restraints on the lessee's power to assign a lease. The submission of a potential lease assignment to the court results in delays that may preclude the lessee from assigning rights in the leased property to certain assignees. In addition, the court is authorized to impose "conditions as it may see fit" on the implementation of the transaction including compensation for the lessor.⁷

Section 22 of the Hire Law changes the legal posture that existed in Israel during the period of the *Mejelle*,⁸ both with re-

7. Cf. Tenant Protection Law (Consolidated Version) § 37(b) (1972).

8. The Ottoman civil law was embodied in the "*Mejelle*," a code containing 1,851 articles written in Turkish. The substantive part of the *Mejelle* is arranged in 16 books concerning specific subjects such as sales, hire, guarantee, transfer of debts, pledges, trusts, agency, and evidence among others. The *Mejelle* was repealed in Turkey more

spect to the assignment of the lease and with respect to the sublease. In the absence of an agreement to the contrary, section 587 of the *Mejelle* stipulated that the lessee could sublet the property, but the court was not authorized to allow such a sublease if it was contrary to the provisions of the original lease.⁹ On the other hand, a lessee was not permitted to assign a lease¹⁰ unless the agreement with the lessor specifically allowed such a transaction.

The following section examines two central questions that arise from a reading of the Hire Law: (1) what is the criterion for testing the "reasonableness" of the lessor's objection to the assignment, and (2) why did the legislature intervene in the freedom of contract by permitting assignment contrary to the provisions of the original agreement between the lessor and the lessee? Before discussing these questions, it is important to note that the starting point in section 22 of the Hire Law is that a lease should not be assigned without the lessor's consent. From this conclusion stems the opinion that the lessee must first approach the lessor and seek consent to a sublease, even if the lessee believes that the lessor has no good reason for opposing the assignment.¹¹ The request must include various details about the proposed assignee, and the lessor must be given a reasonable period of time in which to formulate a position.¹² The burden of proof falls on the lessee who must prove that any of the lessor's objections to the assignment are grounded on unreasonable considerations.¹³

than 60 years ago. In Israel, portions of the *Mejelle* continued in force until 1984 when the code was repealed.

9. This is the rule, in general, in the Common law. See R. SCHOSHINSKI, *supra* note 1, at 553. On the tendency in the United States toward the criterion of reasonableness, see RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) § 15.2 n.7 (1977) [hereinafter RESTATEMENT (SECOND)]; Johnson, *Correctly Interpreting Long-term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 VA. L. REV. 751 (1988) [hereinafter Johnson]. In England, if it has been stipulated in the contract that the lessee will not be permitted to effect transactions without the consent of the lessor, the lessor will not be permitted to withhold his consent unreasonably. See HILL & REDMAN, LANDLORD AND TENANT para. A 2600, n.1 (18th ed. 1987) [hereinafter HILL & REDMAN].

10. See *Hacker v. Barash*, C.A. 208/51, 8 P.D. 566.

11. For a discussion on the interpretation of a term in a contract stipulating that the consent of the lessor will not be withheld unreasonably, see F.H. 20/62 *Meiri v. Morri*, 17(2) P.D. 1236, 1241.

12. W. COOPER, SOUTH AFRICAN LAW OF LANDLORD AND TENANT 227 (1973).

13. See *Hakhsharat Hayishuv Leyisrael Co. v. State of Israel*, C.A. 335/67, 22(2) P.D. 365, 367.

III. TESTING WHETHER THE LESSOR'S OBJECTION IS REASONABLE

Section 22 of the Hire Law, reprinted above, sets forth the general principle that the lessor should not be allowed to object to the assignment unreasonably. The legislature left the details to be fleshed out by the courts. The following section examines the various options left open to the courts. In principle, this Article posits that the required degree of reasonableness enabling the lessor to reject a particular assignment by the lessee must be defined as precisely as possible to help the lessee assess the lessor's motives. As discussed above, where a rental agreement does not limit assignments, the lessee does not need judicial consent and is permitted to rent out the immovable property despite the lessor's objection, if the lessee believes such objections are unreasonable. It follows that the discretion given to the lessee must be accompanied by the creation of clear tools to help formulate the decision to sublease.

In testing the reasonableness of the grounds of objection, a number of approaches may be adopted. According to a narrow approach, a lessor's refusal to consent to a sublease will be deemed reasonable only if it is related to the proposed assignee's personality, financial credibility or planned use of the property.¹⁴ This approach is "objective" because it does not take into account the personality of the lessor. Under this approach, a lessor will be entitled to object to an assignee whose previous conduct as a tenant has been fraught with problems, who has few financial means or who is known as someone who does not fulfil obligations. In this framework, the objection to the assignment of a rented apartment may be considered reasonable if the family of the assignee is larger than that of the original lessee,¹⁵ or if the planned use by the assignee of commercial property might depress its value. In contrast, an objection will not be deemed reasonable if it is unrelated to the person of the assignee but rather stems from the lessor's desire to exploit the assignment for personal gain, such as raising the rent, or imposing additional restrictions on the use of the property.¹⁶

14. Cf. Note, *Effect of Leasehold Provisions Requiring the Lessor's Consent to Assignment*, 21 HASTINGS L.J. 516 (1970).

15. This example and its predecessors are to be found in Model Residential Landlord-Tenant Code § 2-403 (1969).

16. Cf. Johnson, *supra* note 9, at 758-60. According to this opinion, the lessor will not be permitted to object to the proposed assignee because of the latter's occupation constituting competition with his own. For a discussion, see R. SCHOSHINSKI, *supra* note

Based on this approach, a lessor would not be entitled to object to the assignee for reasons of the latter's religion or ideology. Such objection would be "subjective," stemming from the views of the particular lessor. This issue arose in the United States when a lessor with certain religious views from the Yeshiva University in New York objected to a particular assignee because the latter was involved in family planning.¹⁷ The court ruled that such an objection was unreasonable, since it was neither related to the conduct of the assignee as a lessee nor with the proposed use of the property.¹⁸ However, it is doubtful whether an Israeli court would arrive at the same conclusion. In Israel, the court is not authorized to force a person who wishes to rent property, to rent it to an ideological opponent.¹⁹ An owner may choose to rent or not rent property to whomever he wishes. It therefore makes no sense that by means of an assignment, the owner could be subjected to a transaction that could not be achieved directly through the original lease.

Under another, more flexible approach, a lessor is entitled to object to assignment as long as the reasons are "fair, genuine and reasonable."²⁰ Accordingly, grounds for objection should not be limited in advance, and the court should be left with wide discretion. In reaching a decision, the court should be allowed to take into account all the circumstances of the lease, not just the personality of the assignee.

One Israeli court rejected the narrow approach and adopted the more flexible framework.²¹ In the course of its decision, the court ruled that an objection will not be considered reasonable if the lessor takes refuge in an unclear reason, or if the true purpose of the objection to the assignment is to terminate the principle lease. In light of this ruling, it is clear that the gap between the two approaches is not wide, and in most cases, an objection will be deemed reasonable and fair only if it is related to the

1, at 581-82.

17. *American Book Co. v. Yeshiva University Dev. Found.*, 297 N.Y.S.2d 156 (N.Y. Sup. Ct. 1969).

18. *Id.* at 161.

19. In the United States, the courts tend to fight against discrimination already at the stage of the original lease. See *American Book Co.*, 297 N.Y.S.2d at 161. See generally RESTATEMENT (SECOND), *supra* note 9, at § 3.1.

20. See RESTATEMENT (SECOND), *supra* note 9, at loc. cit. See also CHESHIRE AND BURN'S MODERN LAW OF REAL PROPERTY (13th ed. 1982).

21. *Hakhsharat Hayishuv Leyisrael Co. v. State of Israel*, C.A. 335/67, 22(2) P.D. 365.

personality of the assignee and the proposed use of the property.²² It should also be noted that the court's decision preceded the Hire Law, and dealt with a contract that stipulated that the lessor would not object unreasonably to an assignment. The Hire Law currently lays down a similar policy, and as discussed above, clear and unequivocal criteria should be adopted in addition to according discretion to the lessee. An approach that accords discretion to the lessee, and sets forth clear and unequivocal criteria should be adopted.

The cases post-dating the enactment of the Hire Law have only dealt with the question of reasonable grounds for objection — in connection with the long-term lease of immovable property owned by the Israel Lands Administration.²³ In these agreements, which are of great importance in the Israeli context, the lessee undertakes to pay the Israel Lands Administration upon assignment of the lease, one-third of the increased value of the land. In other words, the payment equals one-third of the difference between the value of the land at the time the lease agreement was made and its value at the time of the assignment.²⁴

An express agreement to make such payments, called "consent fees," does not give rise to many problems.²⁵ The Israeli court, however, has ruled that if the contract prohibits the lessee from assigning rights without the lessor's consent, and if the lessor is allowed under the agreement to object on reasonable grounds to the assignment, then the lessor is entitled to a reasonable proportion of the profits stemming from the appreciation in value of the property.²⁶ In other words, the right to "con-

22. On the issue of what is reasonable, many questions have still to be decided. For example, is it possible to take into account the damage that will be caused to the lessee as a result of the withholding of consent? See *Keren Kayemet Leyisrael v. Savizki*, C.A. 840/75, 30(3) *P.D.* 540. For a recent decision in England on this subject, see *International Drilling Fluids, Ltd. v. Louisville Invs. (Uxbridge) Ltd.*, 1 All E.R. 321 (1986).

23. In Israel, most of the land is owned by the State, and is leased to the people through a body known as the Israel Lands Administration, by means of 90 year leases. See *Hacker v. Barash*, C.A. 208/51, 8 *P.D.* 566-70.

24. The decisions of the Israel Lands Administration Council on this matter appeared in the Official Gazette no. 2844 of 26.8.82. In lease agreements relating to land leased, for the first time, after 1975, "consent fees" are capitalized in advance and are paid to the Israel Lands Administration at the time that the first agreement is made.

25. The main question which occupied the courts in recent years is whether, in calculating the rise in value of the land, inflationary price rises must be taken into consideration. For a discussion of the different approaches here, see *Amar v. Israel Lands Admin.*, C.A. 118/83, 39(1) *P.D.* 693; *Bobilski v. Israel Lands Admin.*, C.A. 605/82, 39(3) *P.D.* 130.

26. *Weirauch v. Israel Lands Admin.*, C.A. 585/68, 23(1) *P.D.* 491. This decision was

sent fees" exists in this instance even if there was no express agreement to this effect in the lease agreement. In this context, the court decided that the lessor's demand to receive one third of the rise in value of the land was reasonable and fair. If the Israel Lands Administration were to demand exaggerated sums, however, the court would intervene under the authority granted by section 22 of the Hire Law.²⁷ This position finds expression in the unequivocal language of Judge Witkon:

Regarding a rented or leased property which, because of the rise in value of the land, has been sold at a profit — both law and equity require that not only should the lessee enjoy such profit, but the owner as well. The latter, too, has a legitimate interest in being a partner to the appreciation of his property.²⁸

The court deems participation in the profits of the lessee at the time the rented property is assigned to be just and fair. This conclusion is somewhat surprising. In actual fact, the rise in value of the leased property does not occur *because* of the assignment but merely finds expression at that time. Nevertheless, the lessor would not be entitled to share in the appreciation of the land if the lessee did not assign the lease since the contract did not provide for such an apportionment. In other words, the lessor exploits the fact that his consent is required for assignment to obtain advantages not directly connected to the assignment. This result expresses — though perhaps inadvertently — a trend in the case law allowing long-term contracts to adapt to changing circumstances. It is difficult for parties to foresee future circumstances when they enter into a contract. Therefore, this approach permits one of the parties to take advantage of an opportunity that arises — such as assignment of the lease — to adapt the contract to the new circumstances. This view, however, is unacceptable because it is possible for the parties to a contract to include various mechanisms for making future adaptations such as renegotiating the rent from time to time. A contract provision addressing future modifications is preferable to exploiting unforeseen events that arise unexpectedly.

issued prior to the passage of the Hire Law, and at that time, if the contract prohibited assignment, the lessor was permitted to withhold his consent, even if his reasons were arbitrary, and he could make his consent contingent upon the payment of substantial sums. In particular, see the opinion of Judge Landau.

27. *Keren Kayemet Leyisrael v. Savizki*, C.A. 840/75, 30(3) P.D. 540.

28. *Weirauch*, C.A. 585/68, 23(1) P.D. at 493.

As discussed above, this Article supports the narrow view which advocates setting forth clear criteria for testing the reasonableness of the lessor's objections to assignment. Just as the lessor is not permitted to add new restrictions on the use of the property, or to raise the rent at the time of assignment (even if such actions would be reasonable under current conditions), the lessor should not be entitled to benefit from the rise in value of the land. The lessor who does not secure this right in the contract with the lessee must suffer the consequences for the omission. For this reason, an obligation to pay "consent fees" which is not anchored in a lease agreement constitutes a tax,²⁹ which a public authority may be authorized to impose but which has absolutely nothing to do with the rights of the Israel Lands Administration as a lessor.

IV. LIMITATIONS ON ASSIGNABILITY AND THE FREEDOM OF CONTRACT

As discussed above, section 22 of the Hire Law permits a court to allow the lessee to assign a lease of immovable property, contrary to the provisions of the contract if the lessor objects on unreasonable grounds. The following discussion examines why the Israeli legislature chose to intervene in the freedom of contract and took an unfavorable view on limitations on the assignment of a lease. The express reference to these limitations is especially apparent considering the legislature's silence on the whole issue of limitations on assignability of property.³⁰

A negative attitude to limitations on assignability need not manifest itself in legislative intervention in the freedom of contract. Rather, it is possible to restrict the scope of limitations by means of judicial interpretation. This is the only way open to courts that have not been authorized to directly invalidate limitations, such as the courts in Israel at the time of the *Mejelle*, or under Common law.³¹ Limitations on assignability of leases have been interpreted narrowly, in favor of lessees, to prevent a forfeiture of the lease because of a breach.³² Thus courts have de-

29. For a discussion on viewing "consent fees" as a tax, see *id.* at 494.

30. See generally J. WEISMAN, LAND LAW 1969: TRENDS AND ACHIEVEMENTS 49 (1969).

31. But see *supra* note 9.

32. See *Bollos v. Mayor of Nazareth*, C.A. 420/63, 18(1) P.D. 443. A similar approach was adopted with respect to unprotected tenancy. See *Tobis v. Rabelski*, C.A. 60/53, 9(1) P.D. 681. For a discussion of narrow interpretation against the lessor, see R.

cided that a limitation on assignment does not apply to a sublease,³³ or to assignment by virtue of the law;³⁴ that a prohibition on assignment and sublease does not prevent another person from merely using the property,³⁵ and that a prohibition on "transferring the use of property to another" does not apply to a license to use the property when no transfer of possession is involved.³⁶ These decisions have led, *inter alia*, to increased licensing as the court has ruled on several occasions that a prohibition on subleasing does not preclude the grant of a license.³⁷ The court has also ruled that a prohibition on assignment is not violated by assigning from a registered partnership to one of the partners,³⁸ or by transferring the ownership of the shares of the lessee company.³⁹ However, the court's power of interpretation is not infinite, and experienced lessors have managed to overcome these interpretative devices. Various contracts have laid down broad limitations which barely allow the lessee to put up relatives — even temporarily — on the property.⁴⁰ As already stated, section 22 adopted a different approach and authorized the court to ignore a limitation if the objection of the lessor cannot stand the test of reasonableness.

In the last century, the importance of the principle of freedom of contract has waned.⁴¹ It appears, however, that this principle must still be adhered to, unless intervention in the contractual relationship serves important social purposes or legal principles. The following discussion attempts to discover the aims of the legislature: why decisive weight was attributed to the

SCHOSHINSKI, *supra* note 1, at 583-84.

33. An agreement to limit the assignability of a leasehold is a restraint on alienation. As such it is subject to the doctrine of strict construction. Therefore a covenant not to assign does not prevent the lessee from subleasing the leasehold. H. LESAR, *supra* note 1, at 301.

34. See HILL & REDMAN, *supra* note 9, at A 2563.

35. See Tissauer v. Melman, C.A. 645/78, 34(1) P.D. 375.

36. See Tobis, C.A. 60/53, 9(1) P.D. 681.

37. See Weisman, *On the Distinction Between Lease of Land and License*, 20 HAPRAKLIT 40, 43 (1964).

38. See Humpert v. Konigshoffer, C.A. 148/63, 18(1) P.D. 73. Of course, the parties may expressly prohibit such an assignment. See, e.g., Hanaovich v. Levinholz, C.A. 220/54, 9(3) P.D. 1901.

39. See R. SCHOSHINSKI, *supra* note 1, at 586. However, assignment from a lessee to a company he controls is deemed to be assignment to another because of the separate legal identity of the company. See Tissauer, C.A. 645/78, 34(1) P.D. 375.

40. See, e.g., Nagar v. Marcus, C.A. 802/75, 30(3) P.D. 29.

41. See generally Shalev, *What Remains of the Freedom of Contract*, 17 MISHPATIM 465 (1988).

reasonableness of the objection to an assignment, and why the lessor is not allowed to object for arbitrary reasons to the assignment even if the right to do so is secured in the contract. This Article analyzes briefly three possible justifications: consumer protection, the principle of good faith, and the public interest in efficient use of property.

In general, the lessor has the upper hand in the contract, and can dictate various conditions to the lessee. In such instances, the lessee's agreement to limit assignability is not obtained from equal bargaining power, and therefore the court may subject the lease to the test of reasonableness.

However, a careful analysis of section 22 reveals that the statute is not concerned with consumerism. The protection afforded by the section extends to all lessees, not just those who rent property for personal or domestic use.⁴² A provision which is truly consumer oriented would not apply to all property, but only to property which is important from the consumer's perspective, such as an apartment or a car. The conclusion that the statute is not concerned primarily with consumer affairs also arises from the placement of the section within the Hire Law. The Israeli legislature enacts special laws for consumer affairs and does not insert consumer-related provisions into general laws. For example, the problems created by the imbalance between the supplier and the customer are dealt with in the Standard Contracts Law, 1982 and in the Consumer Protection Law, 1981. On the other hand, the general laws, such as the Sale Law and the Hire and Loan Law, assume parity between the parties to a contract.⁴³ Thus it is clear that legislative intervention in limitations on assignability of a lease does not reflect a trend of consumer protectionism.

Another possible explanation for the legislature's decision to intervene in the freedom of contract is that arbitrary and capricious refusal on the part of the lessor to the assignment of the lease is not compatible with the obligation to fulfill the contractual commitments in good faith.⁴⁴ In other words, the provisions of section 22 of the Hire Law are derived from the general obligation to act in good faith, and as a meta-principle, good faith

42. For the definition of "consumer," see Consumer Protection Law, § 1, 1981.

43. For a discussion on sale, see *generally* E. ZAMIR, SALE LAW 1968 65-66 (1987).

44. See N. COHEN, CAUSING THE VIOLATION OF A CONTRACT (THE LAW OF TORTS — THE VARIOUS CIVIL WRONGS) 218, n.39 (G. Tedeschi ed., Harry Sacher Institute for Legislative Research and Comparative Law, 1986); Johnson, *supra* note 9, at 767.

prevails over the principle of freedom of contract.

At first glance, this explanation seems satisfactory, but in the opinion of this author, it is not in keeping with section 22 of the Hire Law. In fact, the issue is more general: whether an obstinate and capricious insistence on the fulfillment of a contract negates the obligation to act in good faith. The legislature has not expressed an opinion on this question elsewhere, nor has the case law adopted an unequivocal position on the issue.⁴⁵ In this light, the claim that legislative opinion is clear and unequivocal precisely in this context of assignment of lease, is far from unassailable.

The conclusion that the policy reflected in section 22 is not engendered by the obligation to act in good faith becomes even firmer in the light of a comparison with another provision in the Hire Law. The Hire Law does not authorize the court to permit use of the property by the lessee when such use is prohibited by the contract, even if no damage is caused to the lessor and the objection is unreasonable.⁴⁶ If arbitrary insistence on the fulfillment of the contract is contrary to the obligation to act in good faith, the result must be identical in both instances. Neither is the obligation to act in good faith compatible with the fact that, in relation to movable property, the limitation is totally valid.

Examining the distinction in the Hire Law between movable and immovable property is of assistance in understanding the policy behind the provision. Land is a special type of property, "the quantity of this product on the market is limited, and taking it out of circulation must therefore be prevented, insofar as possible."⁴⁷ According to this view, the good of the public requires that limitations on the assignability of land not be accorded validity, since these limitations lead to nonexploitation of the property. As discussed above, the public has an interest in exploiting land which is limited in quantity. The legislature therefore allows the lessee who is not interested in using the rented land to be released from the lease obligation, and to as-

45. See, e.g., *Pizanti v. Bezek Co.*, C.A. 147/85, 41(3) *P.D.* 74, 78; *Ludait Ltd. v. Shirliv Invs. Ltd.*, C.A. 795/86, 41(3) *P.D.* 645, 649.

46. See Hire Law, *supra* note 6, at § 16. The position of the legislator in relation to protected tenancy is different. See Tenant Protection Law (Consolidated Version) 1972, § 37(a)(1).

47. Weisman, *Long-Term Leases Viewed Through a Mortgage Transaction*, 7 *MISHPATIM* 84, 96 (1976). The author provides another reason, according to which "in the lease of land, the personality of the lessee is not as important a factor as it is liable to be with respect to other property." *Id.*

sign the land to another who almost certainly will use the property efficiently.

In principle, there is no doubt that the freedom of contract may take second place to the public good. However, the assumption that validating a limitation on assignability leads to a lack of exploitation of land is not unassailable. In actual fact, the lessee who does not wish to, or cannot, utilize the land has four options:

- (1) to assign the lease to another;
- (2) to come to an agreement with the lessor concerning termination of the lease;
- (3) to leave the property unutilized and to continue paying rent;
- (4) to breach the obligation to pay rent and to abandon the property.

Assuming that the contract bars the lessee from assigning his rights and that the restriction is totally valid, the lessee is left with only three options. It is reasonable to assume that a lessee who cannot assign the lease will first suggest to the lessor to take back the property, thereby agreeing to terminate the lease. In a rising market, where the lessor can get a higher rent from a new lessee, there is no good reason for the lessor to reject the proposal. However, even if the lessee did not propose a mutual cancellation of the agreement, or the lessor refused such a proposal, it is still better, from the lessee's point of view, to violate the agreement unilaterally, cease paying rent, and abandon the property. In a legal system such as Israel's, which imposes an obligation on the lessor to mitigate the damage caused by the lessee,⁴⁸ this option is preferable to a continuation in payment of the rent, despite the nonutilization of the property. With the abandonment of the property, the lessee will be exempt from payment of the balance of the rent, or a part thereof, to the extent that the lessor could have mitigated his damage by finding another lessee. As discussed above, the initial assumption was that a new lessee could be found, but the lessee would be unable to assign the lease because of a limitation stipulated in the con-

48. Under section 23 of the Hire Law, all the provisions of the Contracts (Remedies for Breach of Contract) Law, 1970, apply to a rental agreement, including the rule of mitigating the damage (sec. 14 of that Law). For a discussion of this issue in the Common law and on the recent developments in that system, see Weissenberger, *The Landlord's Duty to Mitigate Damages on the Tenant Abandonment: A Survey of Old Law and New Trends*, 53 TEMP. L. E L.Q. 1 (1980).

tract. In order to prevent losses, a reasonable lessor will lease the land to another party, leaving no cause for concern that the land will not be utilized. Indeed, one of the reasons for applying the doctrine of mitigating damages with respect to the lease of land is raising the productivity of the property.

In other words, the limitation or nonlimitation of assignability has no effect on the utilization of the land. Because of the rule concerning mitigation of damages, there is no danger that the land will remain unutilized, and that it will not be rented out to someone else.⁴⁹ The only result of the limitation of assignability is that the lessor, rather than the lessee, will select the new lessee. There is no apparent reason to intervene in such an agreement and to deprive the lessor of this advantage.

In fact, in only rare cases will the objection of the lessor be truly capricious and irrational. In most cases, the purpose of the objection is to obtain economic advantage. When there has been a drop in rent in the market, the lessor will be interested in a continuation of the rental bond, either with the original lessee or with the assignee, and will not have an interest in regaining possession of the land. When the market price for rentals is higher than the rent being paid under the contract, the lessor will be interested in enforcing the restriction on assignability to take advantage of this increase and not to allow the lessee to pocket all the profits. It is interesting to note that according to the approach manifested in Israeli case law, as described above, the lessor may be awarded a significant proportion of the price increase, even if the court intervenes in the agreement and allows the lessor to object to assignment on reasonable grounds only. In other words, if the limitation on assignability is accorded full validity, the lessor will get the benefit of the full rise in the value of the rented property. In contrast, the policy expressed in section 22 of the Hire Law will accord the lessor only partial advantage from the price increase.

V. SUMMARY AND CONCLUSIONS

According to the Hire Law, a lease of land may not be assigned, nor may the land be sublet, without the consent of the lessor, but if the lessor objects to the transaction on grounds which are not reasonable, the transaction may be effected, albeit

49. For a discussion on the connection between mitigation of damages and sublease, see 1 Milton R. FRIEDMAN, *LEASES* 226-27, 258 (2d ed. 1983).

contrary to the stipulations of the agreement of lease.

This Article discussed two major difficulties, the first theoretical and the second practical, posed by this system. In our view, intervention in the freedom of contract does not serve a clear interest, and is therefore unjustified. The practical difficulty is that the law allows the lessor to object to the transaction on "reasonable grounds," an unwieldy term that cannot be defined easily.

It appears that there was nothing to stop the legislature from choosing another path. It would have been possible to legislate that in the absence of a limitation in the rental agreement, the lessee would be permitted to assign the lease or to sublet without the consent of the lessor and that any contractual limitation would be totally valid. This position is compatible with the proprietary nature of the lease, while taking into consideration the principle of freedom of contract as long as public order is maintained. This is the prevailing Common law position, and was the law pertaining to subleases in Israel at the time of the *Mejelle*. This approach also constitutes the law pertaining to the making of a mortgage or an easement by the lessee.⁵⁰ In conclusion, such a framework is not alien even to the current legislature.

Israeli law takes the position that the lessor who demands of the lessee who vacates the premises the balance of the rent due, must mitigate damages and search for an alternative lessee. Such a system leaves no concern that the property will remain unutilized economically, and particularly not as a result of according full force to a limitation on assignability. The concern that lessors will insist on similar limitations as a matter of course and that the lessee will hold none of the bargaining power should be dealt with in special consumer protection laws, as enacted legislatively with respect to other transactions, rather than by a sweeping provision in the Hire Law.

Apparently, according to this author's proposal, the law affords unjustifiable protection to the lessor's arbitrary objection to assignment. It must not be forgotten, however, that on the other side stands the principle of the freedom of contract, and the limitation is the fruit of voluntary negotiations and agreement between equal parties. Does arbitrary insistence on fulfillment of the contract contradict the obligation to act in good

50. Land Law, sec. 81.

faith? This view has not yet taken root in the general law of contracts. There is no justification for adopting an unbending position on the issue of the assignability of a lease.