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JULIAN v. CHRISTOPHER: NEW STANDARDS FOR LANDLORDS' CONSENT TO ASSIGNMENT AND SUBLEASE

I. INTRODUCTION

In Julian v. Christopher, the Maryland Court of Appeals held that when a lease requires a tenant to obtain the landlord's consent to an assignment or sublease, consent may not be unreasonably withheld unless the lease explicitly gives the landlord the right to withhold consent arbitrarily. The court opted, however, to apply its holding prospectively only, except with regard to the parties before it.

Julian reverses a common-law rule established in Maryland nearly thirty years ago in Jacobs v. Klawans. Klawans held that a "silent consent" clause would be interpreted to permit a landlord arbitrarily to refuse consent. With Julian, Maryland joins a growing minority of jurisdictions that have rejected the rule represented by Klawans, by reading a reasonableness requirement into "silent consent" clauses.

1. 320 Md. 1, 575 A.2d 735 (1990).
2. Id. at 11, 575 A.2d at 740.
3. Id. at 11-12, 575 A.2d at 740. The decision will apply only to leases entered into after July 30, 1990, the date the mandate of this case was issued. See Md. R. 8-606(b) 1990 (mandate to be issued 30 days from the filing of the opinion). For a discussion of the court's decision to apply its holding prospectively, see infra notes 38-47 and accompanying text.
5. Julian, 320 Md. at 8, 575 A.2d at 738 ("silent consent" clause requires the landlord's consent to assign or sublease, but does not provide a standard for the landlord's decision) (quotations in original). The fact that the clause in question was silent on the standard for consent leads the court in Julian to refer repeatedly to such a clause as a "silent consent" clause. This could be misconstrued to imply that "silent" describes the character of the consent, when it really describes only the fact that the clause provides no standard. Describing it as an unqualified consent clause, omitting the word "silent" and the quotation marks, might have avoided this confusion.
II. The Case

Douglas Julian and William J. Gilleland, III, leased business premises, including an upstairs apartment, and purchased a tavern and restaurant business on those premises, from landlord Guy D. Christopher. The lease provided that the premises could not be assigned or sublet "without the prior written consent of the landlord." After they took occupancy, the tenants asked the landlord for permission to sublease the upstairs apartment. The landlord responded that he would grant permission only if Julian and Gilleland agreed to pay $150 in additional monthly rent. The tenants permitted the sublessee to move in, whereupon the landlord filed an action requesting repossessing the building, charging that the tenants violated the lease by subletting the premises without permission. The District Court for Baltimore City, and, on appeal, the Circuit Court for Baltimore City, found in favor of the landlord, relying on the Klawans rule. The Court of Appeals granted certiorari to consider whether Klawans "should be modified in light of the changes that have occurred since that decision."

III. The Decision

In deciding to overrule Klawans and adopt the "minority rule," the court initially noted that Klawans' foundations have been "substantially eroded." It then offered two public policy reasons...
for changing the law: first, the policy against restraints on alienation of property, and second, the implied covenant of good faith and fair dealing applicable to all contracts.

A. The Erosion of Klawans

When *Klawans* was decided in 1961, the weight of authority overwhelmingly supported the majority rule. Subsequently, both case law and commentators have made a pronounced shift toward the minority position. Perhaps most significant, the American Law Institute endorsed the minority view in the second *Restatement of Property*, published in 1976. In light of the "burgeoning minority position," the court considered whether public policy would support overruling *Klawans*.

B. Restraints on Alienation Not Favored

At common law, restraints on alienation of property are disfavored. Thus, "absent some specific restriction in the lease, a lessee has the right to freely alienate the leasehold interest by assignment or sublease without obtaining the permission of the les-

17. Id. at 8, 575 A.2d at 738.
18. Id.
20. See, e.g., R. Powell & P. Rohan, *Powell on Real Property* § 248[1] (1988), stating that [withholding consent arbitrarily] was allowed because it was believed that the objectives served by allowing the restraints outweighed the social evils implicit in them, inasmuch as the restraints gave the landlord control over choosing the person who was to be entrusted with the landlord's property and was obligated to perform the lease covenants.

It is doubtful that this reasoning retains full validity today. Relationships between landlord and tenant have become more impersonal and housing space (and in many areas, commercial space as well) has become more scarce. These changes have had an impact on courts and legislatures in varying degrees. Modern courts almost universally adopt the view that restrictions on the tenant's right to transfer are to be strictly construed.

21. *Restatement (Second) of Property* § 15.2(2) (1976). The *Restatement* now provides that [a] restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.

23. Julian, 320 Md. at 7, 575 A.2d at 738.
24. See id.
Further, because public policy opposes restraints on alienation, when present, these restraints "are looked upon with disfavor and are strictly construed." 26

If a lease’s clause is open to two interpretations, public policy favors the interpretation that least restricts alienation. 27 Applying that premise here, the court concluded that "[i]nterpreting a 'silent consent' clause so that it only prohibits subleases or assignments when a landlord's refusal to consent is reasonable, would be the interpretation imposing the least restraint on alienation and most in accord with public policy." 28

Interestingly, Klawans also stated that restraints on alienation are to be strictly construed. 29 In Klawans, however, the court observed that restraints on alienation have been justified when "the objectives behind the imposition outweigh the social evils which flow from the enforcement of the restraint." 30 Klawans concluded that "the right of the lessor to select a lessee of his own choosing to occupy and use his property offsets, if it does not outweigh, any evils flowing from the enforcement of the restriction on alienation." 31 In reversing Klawans, Julian does not change its analysis, but reconsiders the relative values of the tenant’s right to sublease and the landlord’s ownership interest. Julian implicitly found the tenant’s right to sublease outweighed the landlord’s ownership interest, 32 although it did not explain why the "evil" of the restriction is greater today than it was when Klawans was decided.

25. Id. (citing R. Schoshinski, American Law of Landlord and Tenant § 5:6 (1980); 1 American Law of Property § 3.56 (A. Casner ed. 1952)).
26. Id. at 9, 575 A.2d at 738-39 (citing Powell on Real Property ¶ 248[1] (1988)).
27. Id., 575 A.2d at 739.
28. Id. Other courts have used the policy against restraints on alienation to read a reasonableness requirement into a consent clause. See, e.g., Funk v. Funk, 102 Idaho 521, 524, 633 P.2d 586, 589 (1981) (imposing upon lessors of farmland an obligation to act reasonably in considering the lessees' request to sublease). The Funk court reasoned that

[i]f the lessor is allowed to arbitrarily refuse consent to a sublease for what is in effect no reason at all, such would virtually nullify the right of a lessee to sublet. The imposition of a reasonableness standard also gives greater credence to the doctrine that restraints on alienation of leased property are looked upon with disfavor and are strictly construed against the lessor.

30. Id.
31. Id. at 152, 169 A.2d at 679.
32. See 320 Md. at 7, 575 A.2d at 738 (the court quoted from a discussion of Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d (Ala. 1977), found in Johnson, supra note 20, at 761-63).
C. Implied Covenant of Good Faith and Fair Dealing

In addition to being a conveyance of property, a lease is a contract in which "there exists an implied covenant that each of the parties thereto will act in good faith and deal fairly with the others."\(^3\) If a contract grants discretion to a party, it must be exercised in accord with principles of good faith and fair dealing. In the court's view, the implied covenant of good faith and fair dealing imposes a standard of reasonableness on withholding consent, unless the consent clause permits a landlord to exercise arbitrary or subjective discretion.\(^4\)

The application of contract principles to assignment and sublease clauses in leases can be traced to the first decision in favor of the minority rule, *Gamble v. New Orleans Housing Mart.*\(^5\) The *Gamble* court acknowledged a landlord's right to prohibit subleasing, but determined that the mere presence of a clause requiring the lessor's written consent implied a tenant's right to sublease.\(^6\) It concluded that at the time the lease was entered into, the lessee had every reason to believe that he could sublet upon producing a proper subtenant, and therefore, "the lessor cannot unreasonably, arbitrarily, or capriciously withhold his consent."\(^7\)

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33. *Id.* at 9, 575 A.2d at 739 (quoting *Food Fair v. Blumberg*, 234 Md. 521, 534, 200 A.2d 166, 174 (1964)).
34. *See id.*
35. 154 So. 2d 625 (La. Ct. App. 1963). *In Gamble,* a landlord rejected a sublessee not because the sublessee was unacceptable to the landlord, but instead to enable the landlord to lease other unleased space in the property to the sublessee and thereby acquire a new tenant while retaining the plaintiff as a tenant. The lease provided only that subleasing was prohibited without the landlord's consent. *Gamble* addressed the question of "whether the . . . lease provision gives the lessor the arbitrary and absolute right, without any reason and in bad faith, to refuse to give the permission required by the provision." *Id.* at 626.
36. *Id.* at 627.
37. *Id.* *The Gamble* court traced the origin of this proposition to Louisiana's French jurisprudential history, noting that

[un]der French jurisprudence, the lessor who wished to reserve for himself such an arbitrary right must have expressly so stated. When the provision, as here, was simply a reservation for the consent of the lessor he did not have the right arbitrarily to refuse the sublease tendered to him when such person was solvent, honorable, and fulfilled the same conditions as the original lessee. *Id.* (citing 2 M. PLANIOL, TREATISE ON THE CIVIL LAW, No. 1752, n.42 (La. Law Inst. trans. 1959)). Though based in large part on French civil law, a number of common-law jurisdictions have followed *Gamble*'s reasoning. *See supra* note 7.
IV. APPLICATION OF THE JULIAN RULE

A. Prospective Effect

The tenants asked the Julian court to overrule Klawans retroactively, and read a reasonableness requirement into all existing leases with "silent consent" clauses. The court refused. "In the absence of evidence to the contrary," the court stated, "we should assume that parties executing leases when Klawans governed the interpretation of 'silent consent' clauses were aware of Klawans and the implications drawn from the words they used. We should not, and do not, rewrite these contracts." The new rule is to be applied prospectively only. Although Julian continues a national trend by reversing the Klawans rule, Maryland is the first state to apply the new rule prospectively only.

Prospective overruling is sometimes appropriate when retroactively applying the new rule would unfairly penalize those who relied on the old law. And it is in the area of property and contract law that reliance on precedent is often heaviest. By overruling Klawans prospectively, the Julian court assumes that reliance on Klawans was widespread. Even prior to Julian, however, a well-advised landlord might have been aware of the possibility that Klawans could be overruled. Thus, the court resorted to the uncommon remedy of prospective application without clearly demonstrating that the situation demands it.

B. Effect on Julian Litigants

Even when a decision is to be applied prospectively only, courts ordinarily allow the new rule to apply to the litigants as well, in order to provide an incentive to challenge infirm doctrine or seek re-

38. 320 Md. at 10, 575 A.2d at 739.
39. Id.
40. See id.
41. Compare cases cited supra note 7.
42. See Traynor, Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility, 28 Hastings L.J. 533, 542 (1977) (tracing the development of prospective overruling doctrine); Lewis v. State, 285 Md. 705, 713, 404 A.2d 1073, 1079 (1979) (holding that accessories to crimes could be tried before principals were sentenced or tried, but refusing to apply the rule retroactively because to do so could "impinge upon basic fairness"); Deems v. Western Md. Ry., 247 Md. 95, 115, 231 A.2d 514, 525 (1967) (claims for loss of consortium can only be asserted in a joint action, but the new rule applied prospectively as "it would be unfair if the holding attempted to affect rights of defendants which have . . . accrued.
43. Traynor, supra note 42, at 542-43.
versal of unsound precedent. Convinced that the new rule should apply to the present litigants, but concerned about fairness to the landlord, the court remanded the case for a new trial, at which the landlord would have the burden of proving that it would be unfair to bind him to the new rule. The court conceded that this procedure would give Julian and Gilliland a benefit unavailable to other similarly situated tenants, but in the court’s view, this was an “insignificant cost for adherence to sound principles of decision making.”

V. IMPLICATIONS OF THE DECISION

Julian presents two options to a landlord who seeks to limit the tenant’s ability to sublease or assign the leased premises. The landlord may either negotiate the right to withhold consent arbitrarily, or subject its consent to a standard of reasonableness.

A. Option One: Arbitrary Refusal

Julian explicitly provides that the landlord may retain the right to act arbitrarily. The court even suggests appropriate language to include in the lease: “For example, ... ‘consent may be withheld in the sole and absolute subjective discretion of the lessor.’”

44. See Julian, 320 Md. at 12, 575 A.2d at 740. The court quoted at length from Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 28, 163 N.E.2d 89, 97 (1959). In Molitor, the Illinois Supreme Court noted that (1) to announce a rule and not apply it to the controversy before the court would render it mere dictum, and (2) to refuse to apply the rule in the instant case would “deprive appellant of any benefit from his effort and expense in challenging the old rule .... Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it.” Id. See Williams v. State, 292 Md. 201, 217, 438 A.2d 1301, 1309 (1981) (prospectively changing the common law to enable counsel to waive a defendant’s right to be present at every stage of his criminal trial, and giving the defendant in question the benefit of the new rule by ordering a new trial). For a criticism of the “reward” theory of partial retroactivity, see Traynor, supra note 42, at 546.

45. Julian, 320 Md. at 12-13, 575 A.2d at 740-41. The court stated that on remand the landlord could prove unfairness by establishing his reliance upon the Klawans interpretation at the time he executed the lease. Id. at 13, 575 A.2d at 741.

46. A “similarly situated” tenant is one who signed the lease before the Julian decision. Under the prospective ruling, such tenants would not receive the benefit of the Julian rule.

47. Id. (quoting Stovall v. Denno, 388 U.S. 293, 301 (1967)).

48. Id. at 11, 575 A.2d at 740 (“If the parties intend to limit the right to assign or sublease by giving the landlord the arbitrary right to refuse to consent, they may do so by a freely negotiated provision in the lease clearly spelling out this intent.”).

49. Id. at 11-12, 575 A.2d 740. This dictum makes it easy for parties who wish to give arbitrary power to the landlord to so do without fear that the language they choose will later be found ambiguous by the courts. Compare Kendall v. Ernest Pestana, Inc., 40
Viewed in this way, the court's ruling simply guarantees full disclosure. Only when the meaning of the lease term is ambiguous is the arbitrary exercise of the consent power objectionable. As the court explained:

Because most people act reasonably most of the time, tenants might expect that a landlord's consent to a sublease or assignment would be governed by a standard of reasonableness. Most tenants probably would not understand that a clause stating "this lease may not be assigned or sublet without the landlord's written consent" means the same thing as a clause stating "the tenant shall have no right to assign or sublease." 50

A narrow reading of Julian could lead one to conclude that it simply provides a clear rule of draftsmanship. But this analysis does not go far enough. Leases are negotiated documents in which parties expect to exchange concessions. Since Julian effectively requires leases to give full disclosure of the landlord's right to be arbitrary by explicitly asserting this right in the document, the standard for evaluating the landlord's consent will be squarely on the negotiating table. In that event, landlords may need to give away more than they have previously in exchange for the undisputed right to act arbitrarily. 51

The Julian rule is thus more than a guide to better draftsmanship: it also imposes upon the landlord an economic cost.

B. Option Two: A Reasonableness Standard

After Julian, "silent consent" clauses will be interpreted to pro-
hibit a landlord’s unreasonable refusal to consent to an assignment or sublease. Although the court declined to address in any detail what constitutes a reasonable refusal to consent, its limited comments are helpful. Reasonable objections could include “the financial irresponsibility or instability of the transferee, or the unsuitability or incompatibility of the intended use of the property by the transferee.” Unreasonable refusal could include situations in which “the reasons for withholding consent have nothing to do with the intended transferee or the transferee’s use of the property” or when “the refusal to consent was solely for the purpose of securing a rent increase . . . unless the new subtenant would require additional expenditures by, or increased economic risk to, the landlord.”

The Maryland Court of Special Appeals in Maxima Corp. v. Cystic Fibrosis Foundation recently considered the meaning of reasonableness with regard to withholding consent to a sublease. In Maxima, the lease explicitly provided that “consent shall not be unreasonably withheld or delayed.” The Maxima court concluded that a landlord may refuse a request to sublease only on objective grounds. “[A] landlord is normally expected to act pursuant to reasonable commercial standards, without regard to subjective attitudes personal to the landlord.” The Maxima court supplied specific guidance as to what would constitute a reasonable basis for refusal. Bases for good faith reasonable refusal to consent include (1) the sublessee’s inability to fulfill the terms of the lease, (2) the proposed sublessee’s financial irresponsibility or instability, (3) the suitability of the premises for the use intended by the new tenant, or (4) an intended unlawful or undesirable use of the premises.

52. See Julian, 320 Md. at 11, 575 A.2d at 740.
53. Id. at 9-10, 575 A.2d at 739.
54. Id. at 10, 575 A.2d at 739.
55. Id.
57. Maxima apparently was the first time a Maryland appellate court considered this question. Id. at 612, 568 A.2d at 1175. In Maxima, the landlord refused to consent to the tenant’s proposed sublessee, who was subleasing another space in the building and was described by all as an “excellent tenant.” Id. at 615, 568 A.2d at 1177. The court held that this was a subjective decision that was not commercially reasonable, and that there were no objective problems with the proposed sublease “in and of itself.” Id. at 615, 568 A.2d at 1177.
58. Id. at 612, 568 A.2d at 1175.
59. Id. at 613, 568 A.2d at 1176. The court found no objective grounds for the landlord to refuse consent. Id. at 615, 568 A.2d at 1176.
60. Id. at 613, 568 A.2d at 1176.
61. Id. (citing Kendall v. Ernest Pestana, Inc., 40 Cal. 3d 488, 501, 709 P.2d 837,
also cited with approval a District of Columbia decision which con-
cluded that the "'landlord has no reasonable basis for withholding
consent if the landlord remains assured of all the benefits bargained
for in the prime lease.'"

Both of Maryland's appellate courts have now provided a few
standards for evaluating whether a landlord acted reasonably in
withholding consent to a sublease or assignment. Clearly, for exam-
ple, a landlord cannot refuse to consent solely for the purpose of
extracting a rent increase unless the subtenant's presence would
mean new costs or risks for the landlord. Also, a landlord who
seeks to withhold consent simply to share in the increased value of
the leasehold will be considered to act unreasonably.

It remains uncertain, though, how the court would resolve
other specific situations. A good example is the commercial lease
that contains a percentage rent clause. Is it reasonable for the
landlord to refuse consent when a tenant who is meeting sales pro-
jections desires to sublease to a subtenant who may not meet the
same sales figures? Can the landlord's decision be affected by the
fact that the current tenant plans to move to a competing project
across the street? How do we calculate the benefit of the landlord's
bargain in the original lease if the percentage rental clause makes
rent projection nearly impossible?

By recognizing the parties' "freedom to contract" for arbitrary
refusal of consent by the landlord, there is an implicit suggestion
that parties should address this issue, and other potential areas of

845, 220 Cal. Rptr. 818, 826 (1985)). Maxima also cited the following factors, which
were considered by a Florida court: "(a) Financial responsibility of the proposed sub-
tenant; (b) the 'identity' or 'business character' of the subtenant, i.e., suitability for the
particular building; (c) the need for alteration of the premises; (d) the legality of the
proposed use; and (e) the nature of the occupancy, i.e., office, factory, clinic, etc." Id.
(citing Fernandez v. Vasquez, 397 So. 2d 1171, 1174 (Fla. Dist. Ct. App. 1981)).

62. Id. (quoting 1010 Potomac Assocs. v. Grocery Mfrs. of America, 485 A.2d 199,
210 (D.C. 1984)).

63. In Julian, the landlord indicated that he would consent to the sublease if the
tenants paid an additional $150 per month. 320 Md. at 4, 575 A.2d at 736. The court
called this "unreasonable." Id. at 10, 575 A.2d at 739.

64. Because Maxima adopts the position that the court seeks to protect only the ben-
efits originally bargained for by the landlord, a tenant could charge the subtenant signifi-
cantly more rent than the tenant is obligated to pay, and the original landlord cannot
reasonably refuse to consent to such a sublease in an effort to share in some market-
driven increase in his reversionary interest. See Maxima, 81 Md. App. at 613, 568 A.2d at
1176.

65. A percentage rent clause typically requires the tenant to pay the landlord a set
percentage of tenant's gross sales, or a percentage over a certain base amount of sales,
in addition to, or instead of a fixed rent. M. Friedman, Friedman on Leases § 6.1, at
188 (1990).
dispute, in the contract negotiations. Parties should include in the lease specific bases for which a landlord may refuse to consent to a sublease. Such provisions would give the parties clear guidelines to resolve a potential dispute, perhaps without judicial intervention. If litigation ensues, the same provision will guide the court with specific standards that these parties have agreed are reasonable, and enable it to rule on that basis.

VI. CONCLUSION

Julian v. Christopher changes Maryland law by ruling that a landlord may no longer unreasonably refuse consent to an assignment or sublease, without express authority in the contract. The Julian court cannot, however, be condemned for changing the rules of contract interpretation after the fact. It avoids this criticism by applying its rule prospectively only, except for the parties before it.

The Julian decision does more than establish a rule of draftsmanship: Julian shifts negotiating leverage from landlord to tenant. It does so by guaranteeing full discussion and negotiation of a lease term that has until now gone unconsidered by many tenants—occasionally to their later dismay—as in this case.

Perhaps more important, Julian reaffirms the parties' right to contract. While the court sends a clear message that public policy does not permit a landlord to refuse consent arbitrarily without an express reservation of the right to do so, it makes equally clear that public policy does not preclude landlord and tenant from negotiating such a provision and contracting to it. This may provide an answer for landlords, in particular, who have some trepidation about what a court will deem a reasonable basis for refusal. They may wish to include in the lease an extensive, though perhaps nonexclusive, list of bases for refusal to consent. This list would help the parties avoid litigation over this issue, but in the event of litigation, the list would give the court a clear understanding of how the parties themselves intended to define reasonableness.

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66. See Julian, 320 Md. at 11, 575 A.2d at 740.
67. See id. at 11-12, 575 A.2d at 740.