

LANDLORD'S CONSENT THE POTTED GUIDE



CRACKING THE BASICS

Jonathan Seitler QC starts the first of his new monthly series, aimed at guiding practitioners through the basics of core areas of practice, with a checklist on a tenant's application to assign or sublet

LANDLORD AND TENANT CHECKLIST

- ▶ **Is there a restriction on alienation (assigning or sub-letting)?**
- ▶ **What is the effect of section 19(1) of the Landlord and Tenant Act 1927?**
- ▶ **Does the tenant need to make a written request?**
- ▶ **If so, is the one it has made adequate?**
- ▶ **Has the tenant validly served its request?**
- ▶ **What is a reasonable time within which to respond?**
- ▶ **What happens if the landlord responds too slowly?**
- ▶ **What are reasonable grounds for refusing consent?**
- ▶ **What if the landlord refuses consent or delays unreasonably?**
- ▶ **What are the landlord's remedies for alienation without consent?**

Is there a restriction on alienation (assigning or subletting)?

Without any restriction in the lease, the tenant has a basic freedom to dispose of the term or grant a sublease ("alienate") without any control by the landlord. The default position is total freedom for the tenant. It is only express covenants in the lease that can be the source of restrictions.

What is the effect of section 19(1) of the Landlord and Tenant Act 1927?

An absolute covenant prohibits alienation absolutely. A qualified covenant prohibits save with the landlord's consent. A fully qualified covenant (the most common) says that what is prohibited may only take place with the landlord's consent, which must not be unreasonably withheld. In the case of most types of alienation covenant there are effectively only absolute or fully qualified covenants, because section 19(1)(a) of the 1927 Act turns qualified covenants into fully qualified covenants, notwithstanding any provisions in the lease to the contrary.

Does the tenant need to make a written request?

A landlord will not have any remedy

against a tenant if the act of alienation is not, in fact, in breach of the alienation covenant. An agreement to assign a lease (as opposed to the assignment itself), for instance, will not amount to a breach of a clause prohibiting assignment, nor will a disposition of the equitable interest alone, nor a parting with possession that on the facts is not complete: see *Ansa Logistics Ltd v Towerbeg* [2012] EWHC 3651 (Ch); [2013] 2 EG 67 (CS).

Similarly, a covenant against subletting the whole will not be regarded as having been breached by a parting with possession that involves the grant only of a licence to occupy or a sublet of part: see, as an example, *Cook v Shoemith* [1951] 1 KB 752. To prohibit a sublet of part, the alienation clause must expressly prohibit it, as in *Field v Barkworth* [1986] 1 EGLR 46. A sharing of possession, to the extent conceptually possible, is a question of fact: see *Akici v LR Butlin Ltd* [2005] EWCA Civ 1296; [2006] 1 EGLR 34.

If the tenant needs to make a request, is the one it has used adequate?

The tenant's request should be clear, unequivocal and specific and also in writing if, as is common, the lease requires it. The landlord should expect to see, and

the tenant needs to supply, most, if not all of the following: the address of the assignee, the directors and owners; a bank reference; a previous landlord's reference; three years previous audited/management accounts which show, roughly, pre-tax profits net of salaries and drawings, three times the anticipated outgoings that the proposed assignee would have a liability for, or a satisfactory position as regards net assets; a solicitor's or accountant's reference, especially where the assignee is taking on a rental liability at a level higher than any it previously managed; a trading reference; and, if necessary, valuations of other properties held by the proposed assignee with proof of the level of borrowings against those properties (see *Ponderosa International Development Inc v Pengap Securities (Bristol) Ltd* [1986] 1 EGLR 66).

Has the tenant validly served its request?

The application must be served on the landlord's address as stated in the lease (usually by reference to section 196 of the Law of Property Act 1925); by leaving it at, or sending it by registered post to, the landlord's last known business address; or, if the lease is silent as to the service of notices, in accordance with section 23 of the 1927 Act, at the landlord's last known place of business or to its secretary at its registered address. A request for consent by e-mail is not likely to be good service under section 196. Service on a landlord's solicitor is probably insufficient for the purposes of section 5(2) of the Landlord and Tenant Act 1988: see *Norwich Union Linked Life Assurance Ltd v Mercantile Credit Co Ltd* [2004] EWHC 3064 (Ch); [2004] 04 EG 109 (CS).

What is a reasonable time within which to respond to a valid tenant's request?

A landlord owes a duty to a tenant to give a decision on an application for consent within a reasonable time: section 1(3) of the 1988 Act. The reasonable period of time begins to run when the landlord



receives the complete application from the tenant. It ends when the landlord makes a decision and notifies the tenant of that decision. Once a decision has been communicated, a landlord is not entitled to more time to consider further issues, even if such consideration would have led the landlord to conclude that there are reasonable grounds for refusing consent.

The reasonable period may be measured in weeks rather than days where the circumstances justify it, but even in the most complicated cases, it should be measured in weeks rather than months: see *Go West Ltd v Spigarolo* [2003] EWCA Civ 17; [2003] 1 EGLR 133. On the other hand, in *E.ON UK plc v Gilesports* [2012] EWHC 2172 (Ch); [2012] 3 EGLR 23, 11 days was held to be less than a reasonable period. Generally, the more factually or legally complicated the circumstances and the more there is at stake, the longer will be the reasonable period for dealing with the application: see *NCR Ltd v Riverland Portfolio No 1 Ltd (No 2)* [2005] EWCA Civ 312; [2005] 2 EGLR 42.

What happens if the landlord responds too slowly?

A failure to give a decision within a reasonable time will be treated as equivalent to a refusal of consent without reasons. It will also render a landlord liable to pay damages to a tenant. That liability will not be avoided even if a landlord is able subsequently to show that there were reasonable grounds for withholding consent: *Footwear Corporation Ltd v Amplight Properties Ltd* [1998] 2 EGLR 38.

If the landlord refuses or delays giving consent and the tenant calculates that the refusal is unreasonable or unreasonably

delayed, the tenant can assign or sublet anyway and the legal interest in the lease will pass as intended: see *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales & Hire Ltd (No 2)* (1979) 252 EG 1103. If the tenant's assessment of the reasonableness of the landlord's refusal turns out to be misjudged, the landlord will be able to seek damages, claim an injunction or even seek to forfeit the lease.

What are reasonable grounds for refusing consent?

The landlord can withhold consent or impose conditions in order to protect the benefits it obtains under the lease but not to obtain an uncovenanted advantage. Reasons for refusal must be given under the 1988 Act.

A landlord is fully entitled to look critically at any matter relating to the proposed assignee as to whether or not it would reduce the value of his interest: see *Royal Bank of Scotland plc v Victoria Street (No 3) Ltd* [2008] EWHC 3052 (Ch); [2008] PLSCS 294.

It is not reasonable to refuse consent in order to lever the departing tenant into remedying breaches, especially where they are easily remediable by the incoming assignee: see *Singh v Dhanji* [2014] EWCA Civ 414.

It would be reasonable for a landlord to refuse consent on the grounds of the proposed assignees or subtenant's use or likely use if there was a genuine basis for this. This is especially so if such use is prohibited under the lease: see *Ashworth Frazer Ltd v Gloucester City Council (No 2)* [2001] UKHL 59; [2002] 1 EGLR 15.

It would probably be reasonable for a landlord to refuse consent on the basis that

the assignee or subtenant would, or might, assume a statutory protection unavailable to the assigning tenant: see *Cristina v Seear* [1985] 2 EGLR 128.

Although a landlord is entitled to take into account the demands of good estate management, it is unlikely to be justified in refusing consent to prevent the establishment of comparable transactions: see *Norwich Union Life Insurance Society v Shopmoor* [1998] 2 EGLR 167. The landlord can refuse consent to keep a good tenant mix: see *Moss Bros Group plc v CSC Properties Ltd* [1999] EGCS 47.

There is no distinction to be made between proposed assignments and proposed sublettings. A reasonable landlord would be concerned with a proposed subtenant's ability to meet the obligations under the lease as they fall due.

What if the landlord refuses consent or delays unreasonably?

An unreasonable refusal of or delay in giving consent makes a landlord liable to pay damages to a tenant for breach of statutory duty. The measure of damages will be the reasonably foreseeable losses suffered by the tenant as a result of the landlord's breach. Exemplary damages are also available, reflecting the landlord's gain.

What are the landlord's remedies for alienation without consent?

Forfeiture, damages or, if it has not happened already, an injunction against the assignment or sublet proceeding without consent.

Jonathan Seidler QC is a barrister at Wilberforce Chambers

USEFUL RESOURCES

Woodfall: Landlord and Tenant, 11.113-11.177 (Sweet & Maxwell)

Hill & Redman's Law of Landlord & Tenant, chapter 5 (Lexis Nexis)

Crabbe, L and Seidler, J: *Leases: Covenants & Consents* (Sweet & Maxwell, 2008)

Kidd, D and Higgins, G: *Landlords' Consents: A Practical Guide* (RICS, 2009)

LEADING AUTHORITIES AND STATUTORY PROVISIONS

International Drilling Fluids v Louisville Investments (Uxbridge) Ltd [1985] 2 EGLR 74
Ashworth Frazer v Gloucester City Council (No 2) [2001] UKHL 59; [2002] 1 EGLR 15
Go West v Spigarolo [2003] EWCA Civ 17; [2003] 1 EGLR 133
NCR Ltd v Riverland Portfolio No 1 Ltd (No 2) [2005] EWCA Civ 312; [2005] 2 EGLR 42
Singh v Dhanji [2014] EWCA Civ 414

Landlord and Tenant Act 1988

Section 19 of the Landlord and Tenant Act 1927

SEITLER'S LEADING PRACTITIONERS

Katie Bradford, Linklaters
 Rob Bridgman, Wragge Lawrence Graham
 Ian Brierley, DLA Piper

Joanna Lampert, Berwin Leighton Paisner
 Simon Serota, Wallace LLP
 Andrew Todd, Gordons LLP