

Recent cases on consent to assign or sublet

By DAVID HOLLAND

1. The position, at common law, of a tenant who sought consent to assign or sublet was invidious. Assuming that there was no absolute prohibition, when faced with an unreasonable refusal of consent, the tenant could only seek a declaration in advance or proceed with the assignment or subletting and then defend any forfeiture claim. Neither of these courses of action was particularly attractive to most tenants
2. The common law position still applies in relation to applications for consent to carry out alterations and for change of use. For recent judicial discussion of the common law principles, see ASHWORTH FRAZER V GLOUCESTER CC [2001] 1 WLR 2180 and SARGEANT V MACEPARK [2004] 38 EG 164.
3. Market forces these days mean that leases containing an absolute prohibition on assignment or subletting are rare indeed.
4. Further, the common law position in relation to consent to assign or underlet has been ameliorated by statutory intervention on two occasions.
5. Section 19(1) of the Landlord and Tenant Act 1927 makes any term in a lease which prevents a tenant assigning or subletting without his landlord's consent

subject to a proviso that the consent is not to be unreasonably withheld. This has now, of course, to be read subject to the parties rights under the Landlord and Tenant (Covenants) Act 1995, to stipulate in advance situations in which the landlord can refuse consent.

6. More significantly, the Landlord and Tenant Act 1988 makes three fundamental changes to the common law position.
7. Firstly, it imposes a statutory duty on a landlord who receives a written application for licence to assign or sublet to give consent unless it is reasonable grounds not to do so. He must also notify the tenant of his decision and his reasons within a reasonable time. Further, if the consent is subject to any conditions, not only must these be reasonable but they must also be spelt out in the landlords reply.
8. Secondly, the act places on the landlord the burden of showing that any refusal or the imposition of any conditions was reasonable. He need only show that his conclusions were such as might have been reached by a reasonable man in the circumstances, but it is for him and not the tenant to prove this.
9. Finally, the act gives a tenant the right to sue for damages suffered as a result of a landlord's unreasonable refusal.

10. Just how far the pendulum has swung in favour of tenants has been illustrated in a number of recent cases.

11. In GO WEST V SPIGAROLO [2003] QB 1140, the tenant had applied for consent on 13th March 2001. The landlord had written refusing consent on 30th May 2001. However, correspondence continued until the date of issue of proceedings on 10th July 2001. The judge found that, whereas the landlord's refusal of consent on 30th May was unreasonable, as a result of the subsequent correspondence, it was not unreasonable in refusing consent on the day proceedings were issued. He thus dismissed the tenants claim.

12. The Court of appeal overturned his decision. The court emphasised that a landlord cannot rely upon reasons for refusing consent which he has not put forward in writing within a reasonable time. The reasonableness of a landlord's refusal must be judged as at the expiry of the reasonable time. When this period expires, in turn, must depend upon all the circumstances of the case, including, if relevant, events after the tenant's application. If, for example, a tenant applies for consent and the landlord, within a reasonable time, reasonably asks for further information, the time within which the landlord must respond will not expire until after the tenant has given satisfactory replies. Similarly if, following the expiry of what otherwise might be deemed to be a reasonable time, the tenant writes giving the landlord a further deadline within which to respond, then it seems that the landlord's time for responding will not expire until after this deadline has passed.

13. However, once a landlord has responded, the reasonable time automatically expires. Thus, in this case the reasonable time expired on 30th May 2001 and the subsequent correspondence was irrelevant.

14. Perhaps of most significance, the court said this:

“...I find it hard to imagine that a period anything like as long as that which elapsed from 13 March to 10 July 2001--a period of almost four months--could ever be acceptable, save perhaps in the most unusual and complex situations. I repeat, and for my own part would wish to emphasise, Sir Richard Scott V-C's references in the [Norwich Union](#) case [1999] 1 WLR 531 to the landlord dealing with his tenant's application "expeditiously" and "at the earliest sensible moment"“...It may be that a reasonable time....will sometimes have to be measured in weeks rather than days; but even in complicated cases, it should in my view be measured in weeks rather than months.”

15. In BLOCKBUSTER ENTERTAINMENT V BARNSDALE [2003] EWHC 2912, the lease contained a clause compelling the tenant, in the event of a proposed subletting, to provide the landlord with a “certificate” setting out the rent and service charges under the proposed sublease. The tenant wrote asking for consent to underlet on 28th May 2002. Despite the fact that the letter did not contain a certificate, the judge held that the statutory duty on the landlord arose from that date. He held that the landlord had all the necessary information by 19th June 2002

and should have granted consent on or before 26th June. In fact the landlord did not give its consent until 15th July 2002 and was thus in breach. It was held liable in damages when the proposed underletting went off.

16. In MOUNT EDEN V FOLIA [2003] EWHC 1815 Ch, there was some dispute as to whether the tenant's application for consent to sublet had been sent on the 11th or 17th June 2002, however Peter Smith J. accepted that it had been received on 18th June 2002. The judge found that the landlord had considered the application on 20th June 2002 and decided on that day to refuse it on a number of grounds. Thereafter, the landlord had instructed a solicitor and taken advice. Despite a chasing letter from the tenant dated 10th July 2002, the landlord did not respond until 15th July 2002, when it refused consent for the reasons decided on 20th June.

17. In addition to finding that none of the grounds put forward were reasonable, the judge held that the letter of 15th July 2002 was not served within a reasonable time of either 11th or 17th June. Given that the decision had already been made on 20th June, he was of the view that the reasonable time had expired "by a few days after 21st June 2002". Given that the landlord had not given any grounds for refusing consent by that date, it was under a duty to consent.

18. In relation to the subsequent letter from the tenant dated 10th July 2002, which asked for a response "by return", he said:

“...if [the landlord] had responded by return then it would have been difficult for [the tenant] to contend that they had not responded within a reasonable time.”

19. Thus he granted the tenant a declaration and, for good measure, awarded indemnity costs against the landlord. He also added, albeit obiter, that there was no reason why, in an appropriate case, exemplary or punitive damages should not be awarded to the tenant.

20. This was a theme to which the same judge returned in the latest of the cases, DESIGN PROGRESSION V THURLOE PROPERTIES [2004] EWHC 324. In that case the tenant applied on 21st January 2002 for licence to assign the two year residue of the lease. The premises were under-rented and the assignee had offered a premium of £75,000. The judge found that the landlord adopted a deliberate strategy designed to achieve the maximum rental income from the property. It wanted to obtain possession of the premises to re-let at a higher rent. When the tenant refused to surrender for no premium, the landlord set out to frustrate the proposed assignment and “see off” the assignee. The landlord raised a series of requests for further information and for references which the judge styled as “delaying tactics”.

21. The judge however found that the landlord had all the necessary information by 21st March 2002 and that the reasonable time for it to respond expired then. It should have consented on or before that date. Despite this the landlord, for the

next month, made further demands for information which the tenant and the assignee attempted to answer. The landlord never expressly refused or granted consent. The assignee however went elsewhere.

22. The case is most interesting for the following point. Having considered his previous decision and the House of Lords case of KUDDUS V CHIEF CONSTABLE [2002] AC 122, the judge held that he could award exemplary damages. Having awarded well over £100,000 in compensatory damages, he awarded an extra £25,000.

23. Finally, and most recently, there is the decision of the deputy Judge in NCR V RIVERLAND [2004] EWHC 2073 (Ch). In that case, having reviewed the authorities, the judge summarised the principles to be applied. He put forward ten propositions:

“(1) 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 Act.

(2) What will amount to a reasonable time will depend upon all of the circumstances of a particular case....

(3) The assessment of whether a reasonable time has elapsed in which the landlord has to give a decision will be made at the time at which it is claimed that a reasonable time has elapsed, and in the light of the facts at that time.... Amongst the factors that will be borne in mind in assessing

whether a reasonable time has elapsed is that the purpose of the Act is to "enable there to be fair and sensible dealing between landlords and tenants [and] a state of certainty to be achieved at the earliest sensible moment"..

(4) If, within a reasonable time, a landlord gives notice refusing consent, reasons must be given for the refusal: see section 1(3) (b) (ii) of the Act.

(5) The burden is on the landlord to show that it was reasonable, by reference to the reasons given in the notice, to refuse consent. "... [I]t is not now open to a landlord to put forward reasons justifying the withholding of consent if those are reasons which were not put forward in accordance with section 1(3)(b), that is they were not reasons which were put forward in writing within a reasonable time...

(6) Once a notice has been given by a landlord, that landlord cannot subsequently justify a refusal of consent by referring to reasons which are not set out and relied upon in that notice...

(7) An unreasonable refusal of consent renders a landlord liable to pay damages to a tenant for breach of statutory duty. The measure of damages will be the tortious measure: see section 4 of the Act.

(8) A failure to give a decision within a reasonable time will be treated as equivalent to a refusal of consent without reasons. This conclusion

necessarily follows from the fact that it is the landlord's obligation to make a decision within a reasonable time.

(9) It also follows that a failure to communicate a decision on a tenant's application within a reasonable time, will also make a landlord liable to pay damages to a tenant. That liability will not be avoided or mitigated even if a landlord is able subsequently to show that there were reasonable grounds for withholding consent...

(10) A landlord will discharge the burden of proving that a refusal of consent is reasonable if it can show that some landlords, acting reasonably, might have refused consent for the reasons given, even though some other reasonable landlords might have given consent."

24. In that case, the tenant formally asked for consent to underlet on 30th June 2003.

After considerable correspondence and the provision of a considerable amount of information by the tenant about the proposed underlessee, the judge found that the application for consent to underlet was fully "submitted" by 28th July 2003. That was the date by which the tenant had provided to the landlord all the information which could reasonably have been required. That was the date from which the reasonable time for the purposes of section 1 (3) of the act would be measured. Having reviewed all the documents and heard oral evidence, the judge found that the reasonable time expired on 11th August, that is two weeks or 11 working days from the date the application had finally been submitted. Indeed he found that a

period of seven days should have been sufficient. The landlord had not consented by that date and was therefore in breach of its statutory duty.

25. Two factors weighed heavily on the judges mind. The first was the fact that the tenant was applying, not for consent to assign, but for consent to underlet. The tenant would thus still be liable to the landlord under the terms of the lease. In those circumstances, the financial status of the proposed underlessee was of no great or vital significance to the landlord. Secondly, much of the relevant information had been in the hands of the landlord well before 28th July and from as early as 30th June.

26. What lessons can be learned from these cases? I think the following.

27. For landlords:

(1) In negotiating the terms of any new lease, try to specify as many circumstances as possible in which it will be reasonable for consent to be refused-i.e. make use of the provisions of the 1995 Act.

(2) If you do receive a written application for consent to assign or underlet, act quickly. Your time limit will be measured in days or weeks not months. The reasonable time within which a landlord must make his decision may be shorter if the proposed transaction is an underletting rather than an assignment.

(3) Don't stand on technicality. If necessary, give consent in principle but expressly subject to the fulfilment by the tenant of other conditions. Don't seek to rely on minor breaches of covenant.

(4) If you have to ask for further information, do so swiftly. Don't ask for more information than you reasonably require (see below).

(5) If you are going to refuse consent, then draft your letter carefully. Set out each of your reasons and give an explanation. If you are not prepared at present to consent, but would be prepared to consent in other circumstances, then say so and set out the conditions upon which you would be prepared to consent. There's a partner in a well known firm of solicitors who advises his clients to address such letters as if they were written "Dear Judge". That's not as bad a policy to adopt.

(6) Above all, don't have an ulterior motive in refusing consent. Remember, you are not entitled to seek to improve your present position, only to maintain it.

28. For tenants:

(1) Do remember to ask for consent in writing beforehand.

(2) Include as much information as you can in your initial request for consent. What information is relevant and ought to be included will of course depend on the facts of each individual case. However as a rough "rule of thumb", if available you should try to enclose:

- (i) three years audited accounts for the proposed assignee/undertenant together with up to date management accounts;
 - (ii) references from professional advisors and trade references for the payment of the rent and compliance with the lease terms.
- (3) In particular on a proposed assignment, offer extra security (such as a guarantor or a rent deposit) if the proposed assignee's covenant alone is weak.
- (4) In your letter requesting consent, offer to provide any further information which the landlord might reasonably request.
- (4) If, having served your request, you think that the landlord is delaying, then by all means write a chasing letter and give a deadline, but remember to do so expressly without prejudice to any contention you might have that the time limit has already expired.

DAVID HOLLAND

LANDMARK CHAMBERS

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