

# Property Nuts and Bolts: Consents

## User and Alterations/Improvements

**Ben Fullbrook**  
**Landmark Chambers**

# User Covenants s19(3) LTA 1927



(3) In all leases whether made before or after the commencement of this Act **containing a covenant condition or agreement against the alteration of the user of the demised premises, without licence or consent**, such covenant condition or agreement shall, if the alteration does not involve any structural alteration of the premises, be deemed, notwithstanding any express provision to the contrary, to **be subject to a proviso that no fine or sum of money in the nature of a fine, whether by way of increase of rent or otherwise, shall be payable for or in respect of such licence or consent**; but this proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to him and of any legal or other expenses incurred in connection with such licence or consent.

# When does s19(3) apply?



- Effectively applies to covenants relating to the user of the demised premises
- Only applies to fully or partially qualified covenants
- Eg: *“Not to use the demised premises except as a licensed public house without consent”*
- Must not require any structural alteration of premises (Barclays Bank v Daejan Investments (Grove Hall) Ltd [1995] 1 EGLR 68)
- Note exceptions in s19(4)

# What is the effect of s19(3)?



- Note that it does not imply any proviso that consent will not be unreasonably withheld.
- Instead, implies proviso that no fine or sum of money in the nature of a fine is to be paid for the consent.
- The landlord may only require:
  - *a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to him; and*
  - *any reasonable legal or other expenses incurred in connection with such licence or consent.*

# What is a 'fine'?



# What is a 'fine'?



- Would seem to be anything other than the 'reasonable sums' allowed under s19(3).

- The following have been held to be 'fines':



- Demand for a break clause (Barclays Bank v Daejan Investments (Grove Hall) Ltd [1995] 1 EGLR 68 )

- Increased rent (Jenkins v Price [1907] 1 Ch 229)



- Condition that a public house becomes 'tied' (Gardner and Co. v Cone [1928] Ch. 955)



## Remedies available under s19(3)



- If there is a disagreement relating to a sum demanded by a landlord then either party may apply to the court to determine what is a 'reasonable sum'
- The court can determine this sum and compel the landlord to grant consent on payment of the sum
- Note that the landlord still has absolute right to refuse consent to the change, provided that he does not ask for anything.

# Fully qualified user covenants



- Eg. *Not to use the demised premises except as a licensed public house without consent which is not to be unreasonably withheld*
- Reasonableness determined in accordance with in International Drilling Fluids
- But note that the LTA 1988 does not apply, meaning:
  - Burden of establishing unreasonableness falls on the tenant
  - Landlord can rely on reasons not specified in the refusal of consent provided that they were operative reasons at the time of refusal



# Fully qualified user covenants: remedies $\frac{L}{C}$

- Tenant may proceed with change of use without consent (risky)
- Tenant or landlord may apply to court for a declaration as to the reasonableness of withholding consent
- Tenant not entitled to damages for unreasonable refusal

## Alterations and Improvements under s19(2)



(2) In all leases whether made before or after the commencement of this Act **containing a covenant condition or agreement against the making of improvements without a licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld**; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed.

# When does s19(2) apply?



- Lease does not need to specify 'improvement'
- Will only apply to qualified covenants
- Note also 'hybrid covenants' eg. *Not to make any structural alterations. Not to make any other alterations without consent.*
- Note exceptions in s19(4)

# What is an 'improvement'?



FW Woolworth & Co v Lambert (no. 2) [1938] Ch 883



## FW Woolworth & Co v Lambert (no. 2) [1938] Ch 883



- Section 19(2) will apply to any alteration or addition which can be deemed to be an 'improvement'
- Improvement assessed from point of view of the tenant
- Immaterial whether 'improvement' causes damage or diminution in value from point of view of the landlord

# Examples of 'improvements'



- Making an opening between the demised premises and other premises (Lilley & Skinner v Crump (1923) 73 SJ 366)



- Conversion of roofspace into habitable accommodation (Davies v Yadegar [1990] 1 EGLR 71)



- Installation of hot water heating system (Tideway Investment v Wellwood [1952] Ch 791).



- Demolition and replacement of buildings??? (National Electric Theatres v Hudgell [1939] Ch. 553)



## Improvements must be to the 'demised premises'



- See Iqbal v Thakrar [2004] 3 EGLR 21





## The 'reasonableness' test for s19(3): Iqbal v Thakrar [2004] 3 EGLR 21



- (1) The purpose of the consent is to protect the landlord from the tenant effecting alterations and additions which damage the property interests of the landlord.
- (2) A landlord is not entitled to refuse consent on grounds which have nothing to do with his property interests.
- (3) It is for the tenant to show that the landlord has unreasonably withheld his consent to the proposals which the tenant has put forward. Implicit in that is the necessity for the tenant to make sufficiently clear what his proposals are, so that the landlord knows whether he should refuse or give consent to the alterations or additions.
- (4) It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable landlord in the particular circumstances.
- (5) It may be reasonable for the landlord to refuse consent to an alteration or addition to be made for the purpose of converting the premises for a proposed use even if not forbidden by the lease. But whether such refusal is reasonable or unreasonable depends on all the circumstances. For example, it may be unreasonable if the proposed use was a permitted use and the intention of the tenant in acquiring the premises to use them for that purpose was known to the freeholder when the freeholder acquired the freehold.
- (6) While a landlord need usually only consider his own interests, there may be cases where it would be disproportionate for a landlord to refuse consent having regard to the effects on himself and on the tenant respectively.
- (7) Consent cannot be refused on grounds of pecuniary loss alone. The proper course for the landlord to adopt in such circumstances is to ask for a compensatory payment.
- (8) In each case it is a question of fact depending on all the circumstances whether the landlord, having regard to the actual reasons which impelled him to refuse consent, acted unreasonably.

# Application of the 'reasonableness' test



What may be a reasonable ground of objection?

- Aesthetic, artistic, historical or sentimental grounds (FW Woolworth & Co v Lambert (no. 2) [1938] Ch 883)



- Concern about the structural effect of the proposed works (Iqbal v Thakrar [2004] 3 EGLR 21)



- Competition with landlord's adjoining business (Sargeant v Macepark (Whittlebury) Limited [2004] 4 All ER 662)



## Application of the 'reasonableness' test



What may not be a reasonable ground of objection?

- Pecuniary loss only FW Woolworth & Co v Lambert (no. 2) [1938] Ch 883
- Reliance on a collateral purpose Redevco Properties v Mount Cook [2002] NPC 158
- Tenant's right to enfranchise the lease: Bickel v Duke of Westminster [1977] 1 QB 517 (CA) **cf** Mount Eden Land Ltd v Bolsover Investments Ltd [2014] EWHC 3523 (Ch) & Hautford Ltd v Rotrust Nominees [2016] Unreported



# Procedure and Remedies



- Note that the LTA 1988 does not apply which means:
  - Burden of establishing unreasonableness falls on the tenant;
  - Landlord can rely on reasons not specified in the refusal of consent provided that they were operative reasons at the time of refusal
- Claimant should bring claim in County Court (although High Court also has jurisdiction)
- Tenant not entitled to damages for unreasonable refusal. Only remedy to proceed with the change of use (risky) without consent or seek a declaration that they should be permitted to do so.
- Declaration should be that the landlords have unreasonably withheld their licence or consent. A second declaration that in the events which may have happened the tenants are entitled to make the improvements without any further application for licence or consent is usually added.
- The court cannot be asked to declare what is a proper sum to be paid as compensation of s19(3)

# Questions?

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