

NUTS AND BOLTS: Consents

A step-by-step guide to Alienation Covenants

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Introduction



- Covenants against assigning, underletting, charging or parting with possession with either the whole or part of a premises.
- Often contentious in commercial context. T may wish to assign quickly to escape liabilities. LL may be concerned over proposed assignee/subtenant or wish to ensure that historic breaches are remedied.
- Time pressure on both sides. Unreasonable delay by LL may give rise to lost chance to assign, giving rise to significant damages.
- Made difficult by fact sensitive nature of reasonableness assessment – hence need for LL to identify concerns early and to reconsider as necessary.

Questions to address

1. Does Tenant need to make a request at all?
2. Are there preconditions?
3. If so, is the request adequate/properly served?
4. Has the Landlord unreasonably delayed in responding?
5. What are reasonable grounds for refusal/ What can LL ask for?

(1) Does T need to make a request?

- (i) Look at the lease: does it contain a restriction on the proposed assignment, underletting, charging or parting with possession?
 - Any fully or partially qualified covenant (i.e. any reference to LL's consent) will be subject to the statutory intervention of s.19(1) LTA 1927 and treated as subject to a proviso that consent shall not be unreasonably withheld ("CNUW").
- (ii) Check the restriction against proposed action, is it caught?
- (iii) If so, request must be in writing to engage LTA 1988.

(2) Are there preconditions?

- Again, a matter of construing the clause. The lease may restrict T's right to apply for a licence to assign etc., so that no application for consent can be made until defined conditions are met. This does not fall of the anti-avoidance provisions in s.19: see *Bocardo v S&M Hotels* [1980] 1 WLR 17.
- The burden is on T to prove that any such condition precedent has been satisfied: *Allied Dunbar Assurance v Homebase* [2002] 27 EG 144.
- Query whether a court will be as ready to interpret as a precondition given post-1996 power to specify circumstances where refusal will not be unreasonable: s.19(1A) LTA 1927.

(3) Is request adequate and validly served?

- Tenant's written request gives rise to landlord's duty under s.1(3) of the LTA 1988.
- Request should be clear, unequivocal and specific and in writing.
- S. 5(2) contains a deeming provision for service:
 - Either in accordance with provisions in lease (which normally refer to s.196 LPA 1925, requiring leaving at or sending by registered post to LL's last known address.); or
 - If no provision for service then service is under s.23 of LTA 1927 at last known place of business or to secretary at registered address.
 - Email unlikely to be sufficient for s.196.

Normal contents of a request

- Address of assignee/subtenant
 - Directors and owners if a company
 - Bank reference
 - Previous LL's reference
 - 3 years audited management accounts
 - Solicitor/accountant's reference
 - Evidence of assets/current account.
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- LL entitled to ask for more information, but will be at risk if T refuses to provide.

(4) Has LL unreasonably delayed?

- Duty to respond within a reasonable time: s.1(3) LTA 1988.
- Burden falls on LL: s.1(6) LTA 1988
- Period begins to run at date where LL receives completed application – and may therefore be extended by a valid request for further information.
- The more factually and legally complex the longer the period:
NCR Ltd v Riverland Portfolio No 1 Ltd [2005] 2 EGLR 42

Delay (cont.)

- Reasonable period may be measured in weeks rather than days where circumstances demand it, but even in most complicated cases should be in weeks rather than months: **Go West Ltd v Spigarolo** [2003] 1 EGLR 133.
- Failure to give decision within a reasonable time will be treated as a refusal without reasons
- In such circumstances the tenant will be entitled to assign or sublet anyway.

(5) What are reasonable grounds for refusal?



- Burden of proof regarding reasonableness is reversed so that it falls on the landlord to justify its refusal as reasonable (contrast common law position): s.1(6) LTA 1988.
- Landlord can only rely on the reasons given in notice refusing consent: contrast to the common law position where landlord can rely on reasons even if not stated provided they actually influenced him at the time he withheld his consent: ***Tollbench Ltd v Plymouth City Council*** [1988] 1 EGLR 79): see ***Footwear Corporation v Amplight Properties*** [1999] 1 WLR 551.

Landlord may rely on prescribed circumstances: s19(1A) LTA 1927



- Applies where the landlord and tenant of a qualifying lease have entered into an agreement specifying, for the purposes of the ss19(1), *“any circumstances in which the landlord may withhold his licence or consent”* to assignment or *“any conditions subject to which any such licence or consent may be granted”*;
- A qualifying lease is a “new tenancy” – see Landlord and Tenant (Covenants) Act 1995 which applies to leases granted from 1.1.96 (save where agreement or order made before that date)
- Only applies to assignment, not underletting.

s.19(1A) (cont.)

- In such cases, the landlord does not act unreasonably in withholding its consent as a result of circumstances specified in the lease, provided that
 - LL identifies that this is the reason for refusal and
 - LL can establish that such circumstances exist.
- Agreement must predate request but does not have to be contained in the lease.

Assessing reasonableness (i)

- Each case will turn on its own facts, but a number of principles have been established.
- Core principle is that a LL can withhold consent or impose conditions in order to protect the benefits it obtains under the lease; but not to obtain an uncovenanted advantage:
Ashworth Frazer Ltd v Gloucester City Council [2001] 1 WLR 2180
- Corollary, LL not entitled to refuse reasons which have nothing to do with L&T relationship.

Assessing reasonableness (ii)

- Onus is on LL (under 1988 Act); but it is a standard of reasonableness – LL has to show that conclusions which led to refusal might have been reached by reasonable man.
- It is a question of fact and degree, depending on all the circumstances.
- LL should avoid having rigid policies: ***Footwear Corp***
- Be aware of implications of Equality Act 2010.

Assessing reasonableness (iii)

- Potentially adequate reasons might include:
 - Genuine concern about proposed subtenant/ assignee's future use, even if not prohibited by user covenant: ***Ashworth Frazer***
 - Desire to keep a good tenant mix: ***Moss Bros Group plc v CSC Properties Ltd [1999] EGCS 47***
 - Concern that new tenant might acquire statutory protection unavailable to assigning tenant: ***Cristina v Seear [1985] 2 EGLR 128***. cf enfranchisement cases.
 - Concern about financial strength of assignee or subtenant: ***Venetian Glass Gallery [1989] 2 EGLR 42*** and ***Re Town Investments Underlease [1954] Ch 301***

- Pitfalls for Landlord include:
 - Requiring payment by way of costs in excess of what is reasonable: ***Dong Bang Minerva (UK) Ltd v Davina Ltd (1996) 73 P & CR*** and see ***No 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2016] EWHC 2438***
 - Refusing consent in order to lever the departing tenant into remedying breaches if they would be easily remediable by incoming tenant: ***Singh v Dhanji [2014] EWCA Civ 414.***

Remedy



- T can claim damages for any breach of the statutory duty: s4.
- The duty is a personal one imposed on LL whose consent is required and so the original landlord, if a predecessor, will not be liable. Duty is owed only to the T, not any proposed assignee or ST.
- If consent is withheld unreasonably, T can assign but risky to do so. Safer, but slower, route is to apply for a declaration which can be sought in county court – s.53(1) LTA 1954. Damages can be sought at same time.

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