

**NUTS & BOLTS:
Consents: an introduction**

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When is consent required?

- A question of the construction of the lease;
- Essentially, a party needs consent when they seek to do something which is governed by a restriction or prohibition in the lease.

Types of covenant



- Three types:
 - **Absolute:** e.g. covenants “only to use as a restaurant”, “not to make structural alterations” or “not to underlet part of the premises”;
 - **Qualified.** Two types:
 - **Partially qualified:** e.g. covenants “not to use premises other than a restaurant without consent”, “not to make structural alterations without consent”, “not to underlet part of the premises without consent”;
 - **Fully qualified:** e.g. covenants “not to use premises other than a restaurant without consent, such consent not to be unreasonably withheld”, “not to make structural alterations without consent, such consent not to be unreasonably withheld”, “not to underlet part of the premises without consent, such consent not to be unreasonably withheld”;

Subject matter of covenants

- The three main areas are:
 - **Alienation covenants:** e.g. covenants against assigning, underletting, charging or parting with possession and whether of the whole of the premises or of any part of them;
 - **Alteration covenants:** e.g. covenants restricting the alteration or improvement of the premises comprised in the tenancy;
 - **User covenants:** e.g. covenants restricting the use of the premises (use only as a restaurant etc.)

At common law



- Absolute covenants:
 - Where an absolute covenant contains a prohibition/restriction (e.g. use only as a restaurant), the landlord can consent to lifting/modifying the prohibition or restriction, but is not obliged to;
 - No obligation to act reasonably;
 - The landlord can extract commercial terms for giving consent and act arbitrarily;
 - Position for absolute covenants has been largely unaffected by statutory interventions.
- Partially qualified covenants:
 - Common law unlikely to imply a term that consent is not to be unreasonably withheld (see, for example, *Pearl Assurance v Shaw* [1985] 1 E.G.L.R. 92 Ch D; *Guardian Assurance Co v Gants Hill Holdings* [1983] 267 E.G. 678)
 - [But contrast position for some restrictive covenants, such as where approval is required for a particular aspect of a transaction, rather than the transaction itself, such as the approval of plans: *Cryer v Scott Bros (Sunbury) Ltd* (1988) 55 P&CR 183]
 - Intervention by statute.

Intervention of statute

- Piecemeal intervention of statute;
- Context specific interventions – important to be clear as to:
 - **type of covenant** (absolute, qualified);
 - **subject matter of covenant** (assignment, user, alteration);
 - **The drafting of the particular covenant.**

Drafting difficulties



- Importance of carefully interpreting the particular covenant illustrated by *Moat v Martin* [1950] 1 KB 175:
 - Covenant provided that the tenant was not to: *“assign underlet or part with possession of the demised premises or any part thereof without the consent in writing of the landlord such consent will not be withheld in the case of a respectable and responsible person”*;
 - Issue arose whether covenant was subject to s19(1) of LTA 1927 so that consent could not be unreasonably withheld in the case of an assignment to a respectable and responsible person;
 - S19(1) provides that *“in all leases...containing a covenant...against assigning...without...consent, such covenant...shall, notwithstanding any express provision to the contrary, be deemed to be subject...to a proviso to the effect that such ...consent is not to be unreasonably withheld.”*
 - Court of Appeal held that on the facts s19(1) did not apply: in the case of an assignment to a respectable and responsible person, consent could not be withheld at all. For such an assignment, there was *“nothing in respect of which s. 19 can come into play.”* (pg 179, 181)

Alienation covenants (I): prohibition on fines

- Alienation covenants subject to significant statutory intervention:
- Qualified alienation covenants (both partially and fully qualified), subject to **s144 Law of Property Act 1925**:
 - Applies where a lease contains a covenant, condition or agreement against assigning, underletting, parting with possession or disposing of the property without licence or consent;
 - such covenant, condition, or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent;
 - Does not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent.
- Reasonable legal and other expenses are recoverable even where the application for consent is refused: *Goldman v Abbot* [1989] 48 E.G. 151

Alienation covenants (II): s19 LTA 1927



- Major statutory intervention through **s19(1) of the Landlord and Tenant Act 1927:**

“(1) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against assigning, underletting, charging or parting with the possession of demised premises or any part thereof without licence or consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject—

(a) to a proviso to the effect that such licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent...”

- Subject to exceptions (s19(1)(b), s19(4));
- Does not apply to absolute covenants;

Alienation covenants (III): s19(1A)

- Section 1 is subject to LTA 1927 s19(1A):
 - 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”*;
 - In such cases, the landlord does not act unreasonably in withholding his consent on the ground (and it is the case) that such circumstances exist;
 - Giving consent subject to the agreed conditions *“shall not be regarded as giving consent subject to unreasonable conditions.”*

Alienation covenants (IV): s19(1A)

- Agreement need not be in lease, and can be made any time before the application for consent: s19(1B);
- s19(1A) is subject to caveat in s19(1C) – where the agreement specifies that its application is dependent on a matter to be determined by the landlord or other person, the agreement must provide that such determination must be exercised reasonably or subject to independent review;
- s19(1E) defines ‘qualifying lease’: any lease which is a new tenancy for the purposes of section 1 of the Landlord and Tenant (Covenants) Act 1995 other than a residential lease, namely a lease by which a building or part of a building is let wholly or mainly as a single private residence

Alienation (V): conditions precedent

- Conditions Precedent - Lease may restrict the tenant'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 the tenant to prove that any such condition precedent has been satisfied: *Allied Dunbar Assurance v Homebase* [2002] 27 EG 144.
- Contrast the position as to burden of proof on reasonableness of refusal of consent to assignment which the LTA 1988 shifts burden to the landlord.

Alienation (VI) – qualified duty to consent

- Other major statutory intervention through Landlord and Tenant Act 1988.
- By s1, applies where:
 - (a) a tenancy includes a covenant not to enter into one or more of (i) assigning, (ii) underletting, (iii) charging, or (iv) parting with the possession of the premises comprised in the tenancy or any part of the premises without the consent of the landlord or some other person, and;
 - (b) the covenant is subject to the qualification that the consent is not to be unreasonably withheld (whether or not it is also subject to any other qualification).
- Effect of s19(1) LTA 1927 is that the 1988 Act applies to all qualified alienation covenants (both partially and fully qualified);
- Where the 1988 Act applies, it creates a ‘qualified duty’ to provide consent to the assigning, underletting etc.

Alienation (VII) qualified duty

Effect of LTA 1988:

- Where there is a written application for consent, imposes a statutory qualified duty to, within a reasonable time:
 - give consent where it would be unreasonable not to do so: s.1(3)(a); and
 - serve a written notice on the tenant specifying whether consent is given and;
 - if it is given subject to conditions, specifying what those conditions are;
 - if consent is refused, the reasons for the refusal (s1(3)(b));
- Any conditions must also be reasonable: s.1(4).
- The qualified duty under s.1 of the LTA 1988 takes effect subject to s.19(1A) so if the landlord withholds consent in those agreed circumstances or imposes agreed conditions it will not be in breach of the qualified duty to give consent where it would otherwise be unreasonable to do so;
- Reverses the burden of proof regarding reasonableness so that it falls on the landlord to justify its refusal as reasonable (contrast common law position): s.1(6). LL must also bear burden of showing its consent was communicated in a reasonable time.
- Ensuring that the landlord can only rely on the reasons it actually gives in its notice for refusing consent (contrast the common law position which is that a landlord can rely on reasons even if not stated provided they actually influenced him at the time that he withheld his consent: *Tollbench Ltd v Plymouth City Council* [1988] 1 EGLR 79; *Footwear Corporation v Amplight Properties* [1999] 1 WLR 551; *Go West v Spigarolo* [2003] 2 WLR 986)

Alienation (VIII): breach of the duty

- The tenant can claim damages for any breach of the statutory duty: s4
- The duty is a personal one imposed on the landlord 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.

Alteration covenants

- LTA 1927 s19(2) makes provision for qualified improvement covenants:

*“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.***”

- Not all alterations will be improvements

User covenants

- LTA 1927 s19(3) makes provision for qualified user covenants:
*“(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.”*
- Prevents demanding a fine, does not upgrade partially qualified covenants to fully qualified covenants (in contrast to s19(1) and 19(2))
- Only applies where change of user does not involve structural alterations of premises.



Right to manage

- Usually any application for consent is made to the landlord;
- But, where an RTM company has been appointed, the position regarding approvals/ consent is governed by s.98 and s.99 of the Commonhold and Leasehold Reform Act 2002;
- Application for consent must be made to RTM Co in relation to premises held by qualifying tenants;
- RTM Co must give written notice to the landlord of the application:
 - in cases relating to assignment, underletting, charging, parting with possession, making of structural alterations or improvements or alterations of use, 30 days' notice is required;
 - in all other cases, 14 days' notice is enough
- If LL does not respond, RTM Co decides application
- An objection to the grant of the approval may not be made by a LL unless he could withhold the approval if the function of granting it were exercisable by him (and not by the RTM company) (s99(2))
- If LL opposes consent, RTM Co must withhold consent unless FTT decides consent should be given. Applications to Tribunal can be made under s99(5).

Right to manage (cont.)

- Where RTM Co does not notify landlord:
 - The RTM Co cannot grant consent (s98(4));
 - It cannot be argued by the tenant that consent has been unreasonably withheld (which would have the effect of lifting the proviso, thereby enabling the tenant to proceed with the transaction). This would impermissibly deprive the landlord of the statutory protections in the Act – *Reiner v Triplark Ltd* [2016] UKUT 524 (LC) (paras 98, 101, 103).

Administration charges

- In case of leases of dwellings, charges permitted under s19 of the LTA 1927 and s144 of the LPA 1925 as part of the application for consent will be “*administration charges*” under Schedule 11 of the CLRA 2002;
- They will only be recoverable so far as reasonable (Sch 11, para. 2);
- The FTT has jurisdiction to decide disputes as to whether such a charge is payable (Sch 11, para 5: see *Holding & Management (Solitaire) Ltd v Norton, Proxima GR Properties Ltd v McGhee [2014] UKUT (LC) and West India Quay (Residential) Ltd v East Tower Apartments Ltd [2016] EWHC 2438 (Ch)*).
- FTT has shown itself willing only to allow modest recovery. LL cannot extract profits or fees unrelated to the costs of routine enquiries or administrative tasks which are appropriate in most cases.
- Onus on LL to prove what it has actually spent and that this is reasonable.
- Any demand for such an administration charge must be accompanied by a summary of the tenant’s rights and obligations as regards such charges and if this is not complied with the T may withhold the charge until it is: Sch 11, para. 4

Applications for consent

- **Formalities:**
 - At common law application does not have to be in writing;
 - BUT, - the qualified duty imposed on the landlord under the LTA 1988 (in relation to alienation) only applies where an application is made in writing;
 - In practice, invariably applications are made in writing. Service must comply with any provisions of the lease: *EON UK v Gilesports* [2013] L & TR 4.
- **Proposal :**
 - LL is entitled to be informed of anything which bears upon the giving of his consent;
 - LL is entitled to be told what is in substance the true nature of the transaction to which he is asked to assent: *Fuller's Theatres and Vaudeville v Rolfe* [1923] AC 435;
- **Insufficient information:**
 - It will be reasonable for the landlord to refuse consent if it has been provided with insufficient information to make an informed decision whether or not to grant consent but the landlord's refusal to grant relief in the absence of specified information must itself be reasonable: see *Kened v Connie Investments* (1995) 70 P & CR 370;

Response to applications

- **Response must be given within a reasonable period**
 - LL must deal with the application within a reasonable time and must make responses clearly and promptly: *Norwich Union Life Insurance Society v Shopmoor* [1999] 1 WLR 531. If LTA 1988 applies, response must be in writing. LL must progress applications expeditiously and not sit on its hands.

- **Practical Points:**
 - Tenants should give full details of the proposed transaction up front. To speed up process T should anticipate any request for further information (such as bank references) and supply them;
 - LLs should identify and request relevant information required promptly to avoid any finding that consent unreasonably withheld or delayed;

- **What constitutes a consent:**
 - a matter of construing the relevant document/ correspondence.
 - NOTE: a letter giving consent marked 'subject to licence' was held to grant consent, albeit subject to execution of the formal licence: *Prudential Assurance Co v Mount Eden Land* (1996) 74 P & CR 377

Reasonableness: an introduction

- Highly fact and context specific;
- Prejudice to LL can be outweighed by prejudice to the T, making it unreasonable to refuse consent: *Footwear Corporation v Amplight Properties* [1999] 1 WLR 551;
- Can rely on professional advice (valuation evidence etc.), but that advice must itself be reasonable: *Blockbuster Entertainment Ltd v Leakcliff Properties* [1997] 1 EGLR 28, *Luminar Leisure Ltd v Apostole* [2001] 3 EGLR 23
- In alienation cases:
 - Approach largely as set out in *International Drilling Fluids v Louisville Investments (Uxbridge)* [1986] Ch 513; NB burden of proof since altered by LTA 1988, placing burden of showing reasonableness on LL;
 - Look out for any agreement under s19(1A) LTA 1927;
 - Be aware of possible implication of the Equality Act 2010 so far as refusal is sought to be justified by reference to a protected characteristic – see Woodfall 11.144, 11.145;

Reasonableness cont.

- In alteration cases:
 - See approach in *Iqbal v Thakrar* [2004] 3 EGLR 21;
 - Burden of showing unreasonableness is on the tenant;
 - Cannot refuse on basis of pecuniary loss alone, in such cases LL should seek a compensatory payment;
- In user cases:
 - Remember, for partially qualified covenants, LL not required to act reasonably in giving consent;
 - If does give consent, cannot charge a premium for it;
 - For fully qualified covenants, broadly speaking the *International Drilling Fluids* test applies. Burden falls on T to show that LL withheld consent unreasonably.

Costs

- LPA 1925 – s144
- LTA 1927 – s19
- LL is entitled to require its reasonable costs of dealing with an application for consent being paid as a condition to such consent. Usual for LL to require such an undertaking at the outset;
- But, it will be unreasonable for LL to require as a condition of its consent a 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 *West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2016] EWHC 2438.
- Costs can be administration charges.

Remedies

- Must have a prior refusal:
 - Cannot escape consequences of a breach of covenant (for example, forfeiture following alterations without seeking consent) by arguing that LL could not have reasonably avoided granting consent: see *Raja v Aviram* [2016] UKUT 102 (LC).
 - LL must have been given reasonable time to consider the application;
 - LL must have been told true nature of the transaction for which consent is sought;
- Whether LL could have refused may be relevant to discretionary relief;
- Where LL has refused and tenant considers LL has withheld consent unreasonably:
 - Can proceed with the change (lifting of proviso – highly risky!)
 - Can obtain a declaration that consent has been unreasonably withheld (slower but much safer)

Remedies cont.

- Section 53 of LTA 1954 authorises proceedings for a declaration to be brought in County Court where a LL has withheld licence or consent:
 - to an assignment of the tenancy or a subletting, charging or parting with the possession of the demised property or any part thereof, or
 - to the making of an improvement on the demised property or any part thereof, or
 - to a change in the use of the demised property or any part thereof, or to the making of a specified use of that property,
- Where LTA 1988 applies, can also be a claim for breach of statutory duty (s4);

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