WHEN IT’S REASONABLE TO SAY NO

Leases

Andrew Ross and Sarah Quy explain the duty on landlords contained in section 19(1) of the Landlord and Tenant Act 1927 not to withhold consent unreasonably to a tenant’s request to assign, underlet, charge or part with possession of premises.

If a lease is silent about tenant dealings or simply permits them, then tenants can assign or sublet without the landlord’s permission. However, most commercial leases prevent the tenant from dealing with the lease without obtaining the landlord’s consent. Section 19(1) of the Landlord and Tenant Act 1927 (“LTA 1927”) applies to many such clauses.

Section 19(1) has three component parts. First, where a tenant covenants in a lease not to assign, underlet, charge or part with possession of the premises without the landlord’s consent, section 19(1) qualifies this covenant with the proviso that such consent must not be unreasonably withheld. If the tenant is permitted to deal with its interest in the property then this section is intended to stop the landlord blocking the tenant’s transaction without reasonable cause.

Secondly, the landlord can require payment of a reasonable sum to cover the legal or other expenses incurred in connection with providing such a consent, even if the lease does not expressly say so.

Thirdly, for building leases granted with a term of more than 40 years under which the tenant covenants to build or substantially improve buildings, the tenant need not obtain the landlord’s consent to assignment, underletting, charging or parting with possession. The tenant must, however, notify the landlord in writing about the transaction within six months of its completion. This provision does not apply to leases where the tenants are government departments, public authorities, or statutory or public utility companies.

Does section 19(1) apply to all alienation covenants?

Section 19(1) does not apply to:

- residential leases, mining leases and agricultural and farm business tenancies;
- any covenants relating to assignments, underlettings, charging or other forms of parting with possession, including agreements which are referred to as “section 19(1A) agreements”;
- alienation covenants which prevent the landlord from dealing with the lease or any part thereof, such as clauses for the landlord to unreasonably withhold consent or in refusing consent or in imposing any of the agreed conditions if any of the agreed circumstances exist at the time of the request for consent.

Further reading

Woodfall: Landlord and Tenant, chapter 11 (Sweet & Maxwell)
Ross: Commercial Leases, chapter H11 (Butterworths Law)
Fancourt, Enforceability of Landlord and Tenant Covenants, chapter 24 (Sweet & Maxwell)

What does section 19(1A) say?

The Landlord and Tenant (Covenants) Act 1995 (“the 1995 Act”) inserted into section 19 a new subsection (1A) which provides that in new tenancies the parties can set out in the lease or elsewhere:

- circumstances in which the parties agree would constitute reasonable grounds for the landlord to withhold its consent to an application for consent to assign; and
- the conditions subject to which any such consent may be granted.

An agreement in these terms is sometimes referred to as a “section 19(1A) agreement” and applies only to assignments – not underlettings, charges or other forms of parting with possession. When such an agreement has been reached, the landlord will not be regarded as behaving unreasonably in refusing consent or in imposing any of the agreed conditions if any of the agreed circumstances exist at the time of the request for consent.

Interaction with common law and other statutory provisions

Section 19(1) needs to be understood in the context of the statutory and common law provisions regulating this area, including:

Section 144 of the Law of Property Act 1925

This applies where a lease contains an alienation covenant which prevents the tenant dealing with the lease without the landlord’s consent. It provides that the landlord cannot charge a fine or sum of money for granting consent to a dealing but can require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to such licence or consent.

Sections 1 and 2 of the Landlord and Tenant Act 1988 (“LTA 1988”)

These sections impose certain duties in relation to the grant of consent to assign, underlet, charge or part with possession:

- a duty to give written notice of the decision within a reasonable time; and
- a duty to pass on applications for consent to others whose consent is also needed (such as freeholders or lenders) within a reasonable period of time.

They also give the tenant a claim in damages for breach of that duty. The LTA 1988 applies to leases which include a covenant by the tenant not to assign, underlet, charge or part with possession without the consent of the landlord or another person, and that covenant is
subject to a qualification that the consent is not to be unreasonably withheld.

**Accidental granting of consent**

Much careful drafting can be undone if consent is given by means of conduct or casual discussion. There have been a number of high-profile cases (such as AuberGINE ENTERPRISES LTD v ASTOR AND ANOTHER [2001] 3 EGLR 2675 (Ch); [2008] 3 EGLR 143) in which the courts have held that correspondence between the parties and their agents have been deemed to constitute consent despite a "subject to licence" rubric.

**Typical contents of a section 19(1A) agreement:**

- Grounds for refusal of consent:
  - an outstanding material breach of any of the tenant's covenants;
  - the occurrence of an insolvency-related event in relation to the proposed assignee or guarantor;
  - the proposed assignee or guarantor having diplomatic immunity or being registered or resident in a jurisdiction in which judgments obtained in England and Wales are not enforceable;
  - the proposed assignee being a group company of the tenant;
  - the proposed assignee being a current guarantor;
  - the proposed assignee having weaker covenant strength than the outgoing tenant or financial standing insufficient to enable it to comply with the tenant's covenants in the lease; and/or
  - any other circumstances in which it is reasonable for the landlord to withhold consent.

- Conditions that might be imposed on consent:
  - the assigning tenant must provide the landlord with an authorised guarantee agreement ("AGA");
  - the proposed assignee must covenant with the landlord to observe the tenant covenants in the lease;
  - any guarantor of the assigning tenant must give the landlord a guarantee that the assigning tenant will comply with the terms of the AGA;
  - the provision of a surety and/or a rent deposit as security for the assignee's performance of the tenant's covenants in the lease with a charge over the deposit; and/or
  - any other reasonable condition.

Such an agreement can be in the lease itself or in a separate document, provided that it is entered into before the tenant makes the relevant application for consent.

**Anti-avoidance provisions**

Landlords understandably want to introduce some flexibility into the terms of section 19(1A) agreements to deal with the unpredictability introduced by setting out circumstances in advance.

Subsection (1C) provides, however, that such agreements will only be valid if either (i) the landlord's discretion in determining whether the relevant circumstances exist is required to be exercised reasonably; or (ii) the tenant can refer any such determination to an independent third party for review.

The general anti-avoidance provision contained in section 25 of the 1995 Act will also apply to section 19(1C) agreements, and will render void any provision that works to exclude, modify or otherwise frustrate any provision of the 1995 Act.

When considering conditions on assignment it is important to remember three cases – Good Harvest Partnership LLP v CENTAUR SERVICES LTD [2010] EWCH 330 (Ch); [2010] 1 EGLR 29; K/S Victoria Street v House of Fraser (Stores Management) Ltd and others [2011] EWCH 3179 (Ch); [2011] PLSCS 281; and UK LEASING BRIGHTON LTD and others v TOPLAND NEPTUNE LTD and another; ZINC COHAIN 1 LTD and others v ADDA HOTELS (AN UNLIMITED COMPANY) and others [2015] EWCH 53 (Ch); [2015] EGLR 20) – all of which were based on the potential impact on standard alienation provisions in leases of the anti-avoidance provisions contained in section 25 of the 1995 Act.

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