

Property / Landlord & tenant

Becoming a yes man

Rajeev Nayyar finds the recession leaves landlords with fewer choices

IN BRIEF

- If a tenant applies for consent to assign its lease and the lease contains a qualified covenant against assignment, statute requires its landlord to convey its written decision on the application to the tenant within reasonable time.
- If the landlord is minded to refuse consent, it must ensure that its grounds relate to the identity and character of the incoming tenant rather than to any other reason and that the written notification contains all its reasons for refusal.

Failure to follow these requirements may leave the landlord vulnerable to a claim for breach of statutory duty that could result in a court declaration that consent has been unreasonably withheld and damages. Further, where consent has been unreasonably withheld the landlord is not entitled to remove the assignee if it occupies without licence. The key factor that the landlord must consider is whether no reasonable landlord would withhold consent to the requested assignment, having regard to the identity and character of the assignee.

Landlords may be on the receiving end of calls from tenants on the brink of insolvency requesting consent to assign, possibly to a newly incorporated company with no trading history or past accounts. When the market was buoyant they may have been reluctant to grant consent to the assignment but in the current market landlords are struggling with increased tenant defaults and falling capital values. These drops in capital value are magnified when a property becomes vacant. In many cases landlords feel they have little choice but to consent to the assignment to prevent the property from falling vacant with the associated risks of lengthy rent-free periods and reduced rents being demanded to secure a new letting. If the premises become vacant, there is also the risk for the landlord of incurring a full rating liability. Whether or not the landlord is minded

to grant consent it is essential that the correct procedure is followed and that any conditions imposed are legitimate.

This article examines the grounds on which a landlord can refuse consent to an assignment and the conditions which can attach to the granting of consent. It also examines some of the key points of practice in relation to such qualified covenants when a request for consent to assignment is received by a landlord.

Qualified covenants

A covenant by a tenant not to assign without its landlord's consent is known as a qualified covenant. This is subject to a condition of reasonableness pursuant to s 19(1)(a) of the Landlord and Tenant Act 1927. The Landlord and Tenant Act 1988 (LTA 88) sets out a landlord's obligations in relation to such qualified covenants and these are:

- to notify the tenant as to whether consent is granted or refused;
- if the application is to be refused to provide the reasons in writing for the refusal to the tenant and if challenged to show that the reasons were not unreasonable; and
- if consent is granted subject to conditions to notify the tenant of those conditions in writing and if challenged to show that the conditions were not unreasonable.

As a condition of granting consent a landlord may not seek to improve its

position under the lease or to obtain an advantage unrelated to the landlord/tenant relationship that it is to enter into with the assignee.

Each of these notifications must be given to the tenant within a "reasonable time". What is reasonable depends on the facts and complexity of each application. The court's approach is shown by Munby J's comments in *Go West Limited v Spigarolo* [2003] EWCA Civ 17, [2003] 2 All ER 141 that: "It may be that the reasonable time referred to in s 1(3) 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."

The provisions of LTA 88, s 19 apply irrespective of contractual provisions to the contrary. The burden of evidence falls upon the landlord who must show that it has reasonable reasons for withholding consent.

International Drilling Fluids

International Drilling Fluids Limited v Louisville Investments (Uxbridge) Limited [1986] 1 All ER 321 set down some general precepts for landlords considering requests to assign:

- a fully qualified covenant not to assign a lease without the landlord's consent is intended to protect the landlord from the tenant causing damage to his property interests;
- refusal to an assignment can only be reasonably given on grounds which are connected with the landlord's property interests;
- in making its application, a tenant must make its proposals sufficiently clear to allow the landlord to know whether consent should be granted or refused;
- a landlord is constrained by the standard of a reasonable landlord, ie would a reasonable landlord permit the assignment?;
- refusal based on the proposed assignee's use of the property may

be reasonable depending upon the circumstances;

- (vi) if the detriment to the tenant in not granting consent is disproportionately large when compared to the benefit to a landlord, it may be unreasonable for the landlord to refuse consent to the assignment; and
- (vii) in each case it is a question of fact as to whether the landlord has unreasonably withheld consent.

Oral responses to applications for consent are not adequate for the purposes of the LTA 1988 s 1(3)(b). The landlord's final response, whether conditional or absolute must be in writing. Conveying a decision to a tenant on the telephone or at a meeting will not prevent a landlord from being in breach of its statutory duty.

RBS v Victoria Street

In the recent case *The Royal Bank of Scotland v Victoria Street (No. 3) Limited* [2008] EWHC 3052 (Ch), [2008] All ER (D) 280 (Oct), concerning an old lease, the court reaffirmed the view expressed in *International Drilling Fluids* that a landlord can object to an assignee's

covenant strength if the landlord has a real concern about the assignee's ability to pay the rent and to comply with the other lease covenants, irrespective of the assignor's very good covenant strength. The key issue is whether the assignee would itself be able to observe and perform the lease covenants as they fall due having regard to any additional security offered by the assignee, such as the provision of a guarantor (but excluding any AGA).

Collateral arrangements

Surprisingly, given the Court of Appeal decision in *Allied Dunbar Assurance plc v Homebase Limited* [2002] 2 EGLR 23 in the context of underletting it has been held that a tenant does not have to inform its landlord of collateral arrangements (such as a premium or reverse premium) or provide the landlord with a copy of the assignment when applying for consent. This does not detract from the requirement that a landlord must be told of anything which would affect the granting or withholding of consent but as the terms of the lease to be taken by the assignee are fixed and cannot be

varied, eg as to quantum of rent, without the landlord's consent, the issue of side arrangements need not be disclosed to the landlord.

When considering whether to grant or withhold consent to an assignment the landlord should not compare the covenant strength of the current tenant with the covenant strength of the proposed assignee. Instead, the landlord should consider the covenant strength of the proposed assignee on its own merits.

In addition, a landlord must turn its own mind to the covenant strength of the proposed assignee and, if seeking external advice on this point, it must consider whether that advice is reasonable.

As a final point of warning, the recent case of *Alchemy Estates v Astor* [2008] All ER (D) 35 (Nov) has reminded us that if landlords grant in principle consent to an assignment but do not stipulate the conditions of this, they may be held to have given consent without conditions. The words "in principle" do not prevent consent from being deemed to have been given. **NLU**

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