# Licence to fleece

**Fines** Section 144 of the Law of Property Act 1925 restricts landlords' ability to charge tenants for granting consent but, as Emily Barker says, this can be disapplied

Section 144 of the Law of Property Act 1925 restricts the landlord's ability to charge a fine for the grant of a licence to assign or sublet. Landlords are increasingly attempting to disapply this section in their first draft leases. This article reviews the extent to which fines are permitted within the landlord and tenant relationship.

## Legislative background

Section 144 of the 1925 Act provides that a landlord cannot charge a fine for a licence permitting a disposition, unless the parties agree to the contrary. "Fine" is defined in section 205(xxiii) of the 1925 Act as including "a premium or foregift and any payment, consideration, or benefit in the nature of them".

Section 144 is usually seen as forming part of a progressive march of legislative action by successive governments to strengthen the hand of tenants, particularly occupational tenants, which had a traditionally poor negotiating position, to allow them greater flexibility in dealing with leases without being fleeced by their landlords.

In particular, most land lawyers perceive that a general legislative and equitable presumption exists against allowing the landlord to charge for granting consent. How well-founded is this belief?

As referred to above, the parties to a lease can agree to disapply section 144. Until recently this drafting was unusual, but such clauses are becoming more prevalent. Where the lease contains such a clause, the landlord can withhold consent to dealing unless the tenant pays the fine it demands as consideration for its consent.

In 1985, the Law Commission looked into section 144 as part of its review of restrictions on dispositions, alterations and change of user. It pointed out that the section contains various flaws:

(i) it has no effect where the alienation covenant is absolute;

(ii) there are no anti-avoidance provisions, so the landlord could still demand a fine and an ill-advised tenant might pay up;

(iii) the provision does not convert the qualified covenant (that is, where the tenant can assign but only with the landlord's consent) into a fully qualified one (that is, where the tenant requires the landlord's consent to assign but the landlord could not withhold consent unreasonably). In other words, nothing can stop the landlord from unreasonably withholding consent and agreeing to the transaction only on terms that include the payment of a fine;

(iv) it works only where there is a fully qualified covenant, but this is the situation where it is least useful; and

(v) the section does not apply to a disposition of part only.

Notwithstanding these problems, to modern eyes, the possibility of disapplying this provision sits uncomfortably with the other major legislation governing the payment of fines in the landlord and tenant context, in that there is no requirement for reasonableness on the landlord's behalf.


REX FEATURES

The disapplication of section 144 should be deleted or the basis of the fine should be documented in detail

The Landlord and Tenant Act 1927 imports the concept of reasonableness into three areas of the landlord and tenant relationship: alienation, change of use and alterations. The Landlord and Tenant Act 1988 strengthened the obligation of reasonableness where the tenant cannot deal with the lease without the landlord's consent and that consent cannot be unreasonably withheld.

## 1927 Act

Subsections 1, 2 and 3 of clause 19 of the 1927 Act oblige the landlord not to unreasonably withhold consent to applications to assign, alter or change use.

In each case, it is deemed permissible for the landlord to require the reimbursement of its legal and other costs incurred in granting the licence. These sections are usually interpreted as prohibiting the landlord from charging a fine or premium.

However, it could be argued that if the three sections are compared closely, subsections 1 and 2 allow reasonable fines (including those itemised in the relevant subsection, that is, legal costs in both cases and a sum representing damage to or diminution in value of the premises in respect of alterations). By contrast, subsection 3 (change of use) is worded differently and prevents the landlord from charging any fines unless the works are structural, although it does allow the landlord to charge for legal costs in respect of granting the licence as well as a sum representing damage to or diminution in value of the premises caused by the change of use.

In other words, it can be argued that the first two subsections are permissive and mention the landlord's costs as a non-exclusive example of the sort of charge it might levy, whereas the third subsection rules out any fines other than those itemised.

The 1985 Law Commission report did not make this point but accepted that should a lease contain a fully qualified covenant against dispositions and also a statement disapplying section 144, the landlord might be able to charge a fine.

## Advising tenants

Solicitors acting for tenants in lease negotiations should, where possible, strike out the disapplication of section 144 of the 1925 Act – the imposition of a fine is unduly onerous in the market and may restrict future dealings. If this is unsuccessful, rather than assuming that this would not have any effect in practice, they should ensure that the clause contains details of the basis on which any such fine would be calculated.

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