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ALIENATION, ALTERATIONS AND USER COVENANTS: THE PROBLEMS AND SOLUTIONS

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By Richard Snape

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LANDLORD'S CONSENT TO ASSIGNMENT

Prudential Assurance Co Ltd v Mount Eden Land Ltd [1997] 14 EG 130, CA

The tenant asked consent for an alteration to the premises. The landlord agreed 'subject to licence'. Subsequently, it was argued, by the purchasers of the reversion, that the consent had not been obtained, and a **S.146** notice was served.

Held: the agreement 'subject to licence' clearly stated the consent which had been obtained. The interpretation of words such as 'subject to contract' could not be used with respect to unilateral acts such as the present one. There was a binding agreement. Many agents will bind the landlord to an alteration or assignment prior to the solicitor ever becoming involved.

Note: If the lease makes clear that a licence must be by deed and drawn up by a solicitor, the problem does not arise.

Next Plc v National Farmers Union Mutual Insurance [1997] EGCS 181

A confirmation of the above. A surveyor's letter to the effect that solicitors would be requested to draft a licence to assign constituted a consent to assign.

Rose v Stavrou [1999] Ch.D 23

A similar case, in relation to user covenants. The fact that the change of user rendered the landlord in breach vis-a-vis other tenants was irrelevant.

This point resurfaced in ***Aubergine Enterprises Ltd v Lakewood International Ltd [2002] PLSCS50***. Here there was a contract to assign using the Standard Conditions of Sale whereby the tenant would use his best endeavours to obtain the landlord's consent at least three working days before completion, otherwise the proposed assignee would have a right to rescind. The landlord agreed in principle, subject to licence but his solicitors required an undertaking as to costs which the tenant thought inappropriate given that the landlord was holding a large rent deposit. Due to the dispute, no formal licence materialised and the purchaser rescinded the contract.

The Court of Appeal held that written consent to the assignment, as required by the lease did not mean consent by deed, or drawn up by a solicitor. Nor did it mean that consent could not be given "in principle" or made conditional. The landlord had given his licence to assign and the purchaser was therefore in breach of contract and forfeited his deposit.

There are various lessons to be learnt here, not least of which is that landlords' agents should not give consent until they are quite happy with the terms of the assignment. Moreover, once

agreement subject to licence is given it may well be too late to start introducing new terms at a later stage. The licence must be made conditional e.g. on undertakings as to costs.

To solve the problem solicitors should be involved in the giving of consent from the very beginning. For new leases, alienation should perhaps be made "subject to a formal licence by deed drawn up by a solicitor", to ensure the solicitor retains a role in the process otherwise, to quote from the dissenting judgment of Ward L. J. "I cannot but worry but chaos will reign".

Alchemy Estates Limited v Astor [2008] EWHC 26759

The parties exchanged contracts under the Standard Conditions of Sale without having obtained a Licence to Assign. The purchaser then wished not to be bound by the contract, arguing that under Condition 8.3.3 no formal licence had been obtained three days before completion. The Court held that an email from the Landlord's solicitor agreeing in principle to the assignment constituted the licence: see ***Aubergine v Lakewood [2002] EWCA 177***. This was in spite of the fact that the email stated that nothing in the correspondence constituted the provision of consent, and that such consent would only be provided on the completion and delivery of a formal licence executed as a deed. Under the Standard Commercial Property Condition if there is no formal licence three days before completion then completion will be delayed for up to four months but the problem still exists.

Moreover, if a purchaser wishes to rescind a contract they must do so by the day of completion or perhaps one or two days later. Otherwise they must use the Notice to Complete procedure.

Note: The only solution to this startling decision may be to ensure that the lease requires assignment, alteration and change of use to be subject to licence by deed and not merely in writing. If this is not the case a *minded* to letter may suffice.

ALIENATION COVENANTS AND REASONABLENESS OF REFUSAL OF CONSENT

An absolute covenant against alienation is always possible, but would have a massively detrimental effect on rental. A qualified covenant is therefore more likely. If an absolute ban is required, e.g. in relation to subletting part, the subletting provision should be made separate and there should be included an absolute covenant against such subletting but a qualified covenant against subletting of the whole.

Reasonableness

Any refusal of consent to assign or sublet in relation to a qualified covenant must be exercised reasonably: see **S.19** LTA 1927.

The landlord can only refuse consent in relation to the identity of the tenants or the proposed mode of occupation.

An alternative is a deed of re-imbursement but these have never been tested in the courts. A better solution might be to absolutely bar subletting.

An instructive Court of Appeal decision is ***International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd [1986] CH 513*** where the detriment to the tenant is not allowing the assignment was extreme and disproportionate to the detriment to the landlord in consenting. The landlord objected that the assignee's use of the premises as serviced offices would decrease the value of the reversion and cause parking problems. The court held that consent was unreasonably withheld.

Balcombe LJ went on to lay down various criteria deduced from previous authorities, for determining the question of reasonableness.

(1) The purposes of the covenant was to prevent the landlord having his premises used or occupied in an undesirable way or by an undesirable tenant; this is a most important criterion in assessing to the validity of a refusal.

(2) The landlord could not, therefore, withhold consent on grounds outside the landlord and tenant relationship.

(3) The landlord had only to show that a reasonable person would have refused consent.

(4) It is possible to refuse consent on the grounds of proposed user even though such user was not forbidden by the lease. For instance, in ***Moss Bros v CSC (1999)*** consent was refused to an assignee who wished to use the premises for the purpose of selling computer games.

Even though creditworthy, this did not fit with the landlord's estate management plan whereby this part of a large shopping centre should be used for the purpose of men's clothing.

Note: In relation to consent to make a planning application the Supreme Court have decided, in the case of ***Sequent Nominees v Hautford (2019)***, the landlord can take into account their own business needs even if the tenant is unduly prejudiced. The Supreme Court also stated that the guidance in **International Drilling Fluids** was correct (see later).

Note: Under ***Chapter 1 of the Competition Act 1998*** a user covenant which prevents, distorts or restricts competition may be void unless they give rise to benefits to consumers which outweigh any restrictions on competition.

(5) The landlord could usually consider his own interests in deciding whether or not to refuse consent, but if there was a great disproportion between the benefit to the landlord and the detriment to the tenant, the landlord could not so refuse consent.

(6) Subject to the above, the question was one of intent, depending on all the circumstances of the case.

Note: In ***Re Gibbs and Houlder Brothers [1925] Ch 575*** consent was refused as the assignee would vacate one of the landlord's existing premises. This was unreasonable.

Note also: Extensive dilapidations may be good reasons for refusing consent. See ***Orlando Investments v Grosvenor Estates [1989] 4WLUK 188***. Here the tenant had refused to repair and the assignee had refused to agree undertakings to repair as a condition of the licence to assign. However, in ***Beale v Worth*** **[1993] E.G. 135** where there were minor and disputed dilapidations consent was unreasonably refused.

Roux Restaurants Ltd v Jaison Properties Ltd [1996] EGCS 118, CA

The Court of Appeal confirmed ***International Drilling Fluids v Louisville Investments [1986] Ch 513*** and that consent cannot be reasonably withheld for reasons unconnected with the subject matter of the lease. The landlord could not use the assignment as an opportunity to negotiate a variation of the lease and make the tenant responsible for the cost of all repairs.

In ***Straudley Investments Ltd v Mount Eden Land Ltd [1996] EGCS 153*** the Court of Appeal added two further guidelines to the above, i.e.:

(1) it will be reasonable to refuse consent if necessary to prevent the tenant acting to the prejudice of the landlord's existing rights; and

(2) it will normally be unreasonable to withhold consent for the purpose of imposing a condition which increases the landlord's control over the premises.

See also:

Clarence House Limited v National Westminster Bank Plc [2009] EWCA Civ 1131

The Court of Appeal has held that a virtual assignment of the lease, where the assignee allows the assignor to remain in occupation, is not a breach of an alienation covenant unless the lease makes this perfectly clear.

CONDITIONS AS TO ASSIGNMENT

Post 1 January 1996 and S.22 Landlord and Tenant (Covenants) Act 1995

By S.19 (1A) LTA 1927 if a landlord and tenant have entered into an agreement under a qualifying lease (i.e. a new tenancy under the Act which is not a residential tenancy) and this agreement specifies any circumstances under which a landlord may withhold consent to an assignment, or any conditions subject to which consent may be so granted, the landlord will not be deemed to have unreasonably withheld consent if such circumstances exist or if the landlord imposes such conditions. Note – the provisions only apply to assignment and not subletting.

By **S.19 (1B)** this provision applies whether any agreement is contained in the lease or not, or whether it is made at the time of the lease or not.

By **S.19 (1C)** a landlord cannot frame conditions by reference to matters solely to be determined by himself unless his determination must be exercised reasonably or a third-party arbitrator had an absolute right to determine any dispute.

By **S.19 (1D) – S.19 (1)(b)** in relation to building leases will cease to apply for new leases.

Note: the Act does not apply to sublettings, where no absolute conditions may be included. A better course of action may be to ban subletting.

Note: the Landlord of a lease which is renewed under LTA 1954 Part II may be faced with a dilemma.

The most obvious clause to include is an authorised guarantee agreement.

In ***Wallis v General Accident [2000] EGCS 45***: the court stated that the original leasehold terms should not be varied substantially on a renewal.

Here, the judge declined to include an authorised guarantee agreement as an absolute condition of assignment, but made it subject to a reasonableness test. This is the first reported decision on the effect of the 1995 Act on the LTA 1954. It suggests that the standard presumption that the new leases will be on the same terms as the existing leases will be followed. see ***O'May v City of London Real Property [1983] 2 AC 726.***

See also ***Cairnplace v CBL Ltd [1984] 1 WLR696***. The new lease cannot include a clause requiring the tenant to pay costs of assignment if the old one had no such clause.

THE LANDLORD AND TENANT ACT 1988

The ***Landlord and Tenant Act 1927*** gave rise to a practical problem, i.e that landlords when asked to give consent to an assignment would not reply to any written request either at all, or within a reasonable period of time. The tenant was, therefore, unsure whether consent was being withheld or not.

To meet this difficulty, the ***Landlord and Tenant Act 1988*** was passed. By **S.1**, when a landlord is asked in writing for consent pursuant to a qualified covenant against assignment, sub-letting or parting with possession, he is required:

(1) to give consent (unless it is reasonable not to) within a reasonable time, and to give written notice to the tenant of his decision, also within a reasonable time, specifying any conditions attached to consent; or

(2) if consent is refused, the reasons for refusal (within a reasonable time).

These provisions effectively shift the burden on to the landlord either to give a reasonably swift, unequivocal consent, or to give precise reasons for withholding consent, which the tenant can either challenge, if he considers them unreasonable, or accept. If the landlord fails to comply with **S.1** the tenant may sue for damages in tort: **S.1** should not be forgotten and should always be discussed in conjunction with **S.19** above.

It seems that the parties cannot contract out of **S.1**, but it is possible that the landlord could require an indemnity, e.g. against a guarantor against potential liability.

In the few cases which discuss the subject, a reasonable time for the purpose of replying to a request for assignment or sub-letting is enough time to allow the landlord to check the creditworthiness and suitability of the proposed assignee. Thus, in ***Midland Bank v Chart Enterprises [1990] 44 EG 8,*** the landlord was successfully sued on not replying to the tenant's request after three months. In ***Kened Ltd v Connie Investments Ltd [1997] 04 EG 141*** assignment was subject to a satisfactory replacement surety being found. The Court of Appeal found for the tenant. The landlord was not entitled to particulars of the assignment but was only concerned with the character and identity of the assignee. Moreover, an objectively suitable surety should have been accepted by the landlord.

Finally, the fact that the landlord had not notified the tenant of a reason for refusal suggested that it was not in his mind at the time of refusal. There was consequently a breach of **S.1** by the landlord.

Dong Bang Minerva Ltd v Davina Ltd [1996] 31 EG 87, CA

The Court of Appeal have confirmed that the landlord could not withhold consent to assignment by requiring an undertaking as to costs which were estimated as being unreasonably high.

The question of whether consent to an assignment can be refused prior to any undertaking as to costs being given was left open, as was the question as to when time began to run for the purpose of **S.1**, i.e. whether or not before a reasonable undertaking as to costs had been requested.

In ***Norwich Union Life Insurance Society v Shopmoor Ltd [1998] 3 AllER 681***, the court made it clear that the landlord must decide any information required to make his decision and then put the questions clearly and precisely to the tenant. Where the landlord had not asked the tenant about the financial standing of the proposed assignee, he could not subsequently use the lack of information as a reason for refusing consent.

This has been taken further in ***Footwear Corporation Ltd v Amplight Properties Ltd [1998] 25 EG 171***. The landlord could not refuse consent to a sub-letting for reasons he had intimated to the tenant in a telephone conversation but were not given in writing. The Court said that the policy behind the 1988 Act is that a landlord who has not given his reasons for refusing consent in writing within a reasonable time cannot afterwards justify his refusal by putting reasons forward which he had in his mind but had not sufficiently notified the tenant of.

Note: That the case also said that there was no blanket rate that if profits were not 3 times rental, consent to a sub-letting could be refused. In relation to an assignment, post Landlord and Tenant (Covenants) Act 1995, there could be an absolute condition here.

In ***NCR v Riverland Properties (2004)*** the court said that lack of creditworthiness of a sub-tenant was a good reason for refusal of consent as if the head lease were disclaimed the sub-tenant would become the immediate tenant.

In ***Proxima GR Properties v Dr T D McGhee [2014] UKUT 0059 (LC)*** the Tribunal held that under **S.1** of the Landlord and Tenant Act 1988 the landlord had to show that the charge for a notice of assignment was reasonable. Moreover the response must be given in a reasonable time. If a landlord tried to charge an unreasonable amount for a notice of assignment then the tenant would not have to pay anything as the landlord would be deemed to have given their consent. In this case £90 was held to be reasonable.

In ***No 1 West India Quay (Residential) Ltd v East Tower Apartments [2018] EWCA Civ 250*** this case involved the sale of a portfolio of 42 long leasehold flats. The landlord had responded to a request for an assignment within a reasonable time as originally the tenants had sent the request to the wrong address. He was also acting reasonably in the circumstances in requiring guarantors and also a surveyor to inspect the premises. However, requiring an undertaking as to costs of £1,250 + VAT amounted to an unreasonable refusal of consent which allowed the tenant to assign without consent. In spite of this the landlord was entitled to £350 contractual costs. In February 2018 the Court of Appeal heard this case and decided that the fact that the cost of the licence to assign was unreasonable, did not affect the other conditions as to assignment relating to the need for a survey and guarantors.

In ***Singh v Dhanji [2014] AllER(D)131*** the landlord refused consent to an assignment of a 15 year lease unless alleged breaches arising out of refurbishment work were remedied. It was held that

breaches were not proven but even if they were they would be minor and would not be a good reason for refusing consent. Damages were assessed at £183,000 plus £31,000 in interest.

In the case of ***Design Progression Ltd v Thurlough Properties Ltd [2004] EWHC 324*** exemplary damages were available to punish the landlord's behaviour.

PERSONAL BREAK CLAUSES AND ASSIGNMENT

Brown and Root Technology Ltd v Sun Alliance [1997] 1 EGLR 39

Here, there had been an assignment of the lease with the landlord's consent but the assignee had never been registered with the Land Registry. The original tenant still therefore held the legal estate and was able to exercise a personal break clause.

Quaere: the effect of this on leasehold terms generally where, presumably, the original tenant remains bound.

Should tenant and landlord police the actions of the assignee and check on registration? Presumably so on the basis of this decision.

In future leases should contain a provision which clearly defines the moment of assignment. This becomes even more important if substantive registration applies to leases of more than three years duration.

ALTERATION COVENANTS

The landlord may consider placing an absolute bar on alterations where the lease is for a short term only. Even where the lease is for a longer term, the landlord may wish to prohibit external or structural alterations.

However, an absolute prohibition does not necessarily mean that the tenant will be unable to carry out any alterations, since:

- the landlord may be prepared to give his consent despite the prohibition;
- the works may not amount to "alterations";
- some statutes permit the tenant to vary an absolute prohibition on alterations and make it subject to a reasonableness test, for example, in relation to disability access;
- if the works amount to "improvements" part I of the Landlord and Tenant Act 1927 provides a mechanism whereby the tenant may obtain permission even in the face of an absolute prohibition.

Qualified Restrictions

Where the covenant is qualified, to the extent that the works constitute "improvements", ***Section 19 (2) Landlord and Tenant Act 1927*** implies a proviso that the landlord's consent is not to be unreasonably withheld.

Whilst a landlord will still be able to unreasonably withhold his consent to alterations which are not improvements, there will be very few occasions when the landlord will be able to show that he is being reasonable in withholding his consent. This is because reasons relating to the financial impact of the "improvements" upon the value of the landlord's reversion do not constitute reasonable grounds for withholding consent. The correct approach for the landlord in such circumstances is to require payment of reasonable compensation to cover the fall in value (as is provided for in **S.19 (2**)). See ***Lambert v F W Woolworth & Co Ltd [1938] 2 All ER 664***.

The landlord may reserve the right to impose certain conditions on giving consent. Where the landlord's conditions are unreasonable conditions, and the alteration amounts to an improvement (within the meaning of **S.19 (2)**), the landlord will be unreasonably withholding his consent. However, if the intended alteration is not an "improvement", it seems that the landlord's wishes will prevail.

Fully Qualified Restrictions

To avoid any argument that the tenant's works are not improvements (and thus outside S19(2), most tenants normally insist upon a fully qualified covenant (at least to the extent of internal alterations).

There is no implied obligation by the landlord not to delay. Although delay might, in some circumstances, be such as to be tantamount to "unreasonably withholding consent", it is prudent for a tenant to expressly provide that the consent is not to be unreasonably withheld or delayed. The tenant should further consider whether the landlord should have to give reasons for refusal of consent, since no requirement would be implied by law.

Often the landlord will impose an obligation to reinstate altered premises at the end of the term. The tenant will often try to resist this, or at least qualify the obligation so that the tenant only has to reinstate where he is quitting the premises. However, an obligation to reinstate may, in some circumstances, be viewed as an onerous obligation which has a detrimental effect on rental value at review.

USER COVENANTS

User Covenants and Consent to Planning Applications

Sequent Nominees v Hautford [2019] UKSC 47 Here consent to a change of use could not be unreasonably withheld and there was also provision the tenant would not apply for planning permission without the prior written consent of the landlord, such consent not to be unreasonably withheld. The premises consisted of a six-storey building with 70 years remaining on the lease. The tenant ran an ironmonger's business from the basement. He wished to obtain planning permission to let out the upper storeys as residential units. The landlord objected as if a tenant is not in occupation for business purposes, they may be a qualifying tenant for the purpose of the Leasehold Reform Act 1967 and could apply for enfranchisement of the premises. In ***Bickel v Duke of Westminster [1977] 1QB 517*** it was held that the landlord's fear of enfranchisement was a reasonable ground for refusal of consent to assignment. The Supreme Court have now reversed the Court of Appeal decision. It was held that although residential use was not a breach of user covenants the requirement for consent to a planning application must be read together with the user covenants. It was reasonable to refuse consent because of the possibility of enfranchisement. The Supreme Court expressly accepted the guidance in ***International Drilling Fluids*****.**

THE TOWN AND COUNTRY PLANNING (AMENDMENT) (ENGLAND) ORDER 2020

These provisions apply to England only. In 2018 the Welsh Government announced a review of planning use, but we have heard nothing since.

Part of these came to force on 1 August 2020. Purpose built blocks of flats will be able to build two additional storeys of no more than 7 metres in extent and the new building must be no more than 30 metres. This is subject to prior approval which can be refused because of flooding, external appearance, natural light, traffic and highway impact or defence assets.

From 1 September 2020 Class A1, shops, A2 financial and professional services, A3 restaurants and cafes and B1 business will all be subsumed in a new Class E. Class E will include the following:

1. the display or retail sale of goods, other than hot food, principally to visiting members of the public,

2. the sale of food and drink principally to visiting members of the public where consumption of that food and drink is mostly undertaken on the premises,

3. the provision of the following kinds of services principally to visiting members of the public

    a. financial services,

    b. professional services (other than health or medical services), or

4. any other services which it is appropriate to provide in a commercial, business or service locality,the provision of medical or health services, principally to visiting members of the public,

except the use of premises attached to the residence of the consultant or practitioner, a creche, day nursery or day centre, not including a residential use, principally to visiting members of the public,

5. for:

    a. an office to carry out any operational or administrative functions,

    b. research and development of products or processes, or

    c. any industrial process.

IN ADDITION:

Drinking establishments, takeaways (the old use classes A4 and A5) are now added to the list of sui generis uses along with cinemas and live performance venues. A change of use involving those uses still requires planning permission.

There is a new Class F1 use class applies to residential and non-residential institutions; and

A new Class F2 use class applies to community uses.

Note: These regulations underwent judicial review. On 18 November 2020 the High Court threw out the claim.

Note: On 31 March 2021 the Government made the Town and Country Planning General Permitted Development (Amendment) (England) Order 2021 in front of Parliament. It comes into force on 1 August 2021 and introduces a new Class MA. This will allow Class E to be converted into Class C3 dwellings subject to prior approval. It will only apply to buildings with a floor area of 1500 sq metres or less. They will have to have commercial use for at least two years and have been vacant for at least three months.

Change of Use

Absolute Restrictions

With an absolute covenant, the tenant will be at the mercy of his landlord should he seek a change of use. Thus, the tenant should be confident that the permitted user at the outset is wide enough for his (and any assignee's) immediate and foreseeable needs.

From the landlord's point of view, may demand a consideration (or lease variation) should he be prepared to permit a change of use.

Qualified Restrictions

With simple qualified covenants, there is no statutorily implied proviso that the landlord's consent is not to be unreasonably withheld. The tenant is, therefore, in no better position than if the covenant were absolute.

The only positive benefit of this kind of restriction is that, if the landlord is prepared to grant consent, he cannot, as a general rule, require a fine or an increased rent in return for giving that consent (**S.19 (3)** Landlord and Tenant Act 1927).

Fully Qualified Restrictions

In view of the limited effect of the Landlord and Tenant Act 1927, the tenant should ensure that the lease contains an express proviso that the landlord's consent to a change of use shall not be unreasonably withheld.

However, there is no positive statutory duty on the landlord to give consent, and nor is there a duty to act without unreasonable delay. Therefore, from the tenant's point of view, the restriction should refer to the landlord's consent not being unreasonably withheld or *delayed*.

Whilst this sort of clause gives the tenant a considerable degree of freedom, the tenant should look out for other lease clauses (e.g. alterations, applications for planning permission) which might have the effect of blocking what might otherwise be a reasonable change of use.

89 Holland Park (Management) Ltd v Hicks [2020] EWCA 758 – HPML was the freeholder of a large Victorian building which was divided into five flats all of which were held under long leases. The leases were subject to the freeholder giving consent development which was not to be unreasonably withheld.

The Court of Appeal held that the freeholder was entitled to take into account the interest of the leaseholders as well as its own interests. The freeholder could also raise valid objections on aesthetic grounds even though this would not affect the value of the reversion.

Effect on Rental Values

The parties should be aware of the potential effect of the permitted use upon rental value at review. It is firmly established that a court cannot assume that consent may be given under a qualified covenant where there is no proviso for the landlord to act reasonably, and the landlord cannot unilaterally vary the user covenant; (see ***Plinth Property Investments Ltd v Mott, Hay & Anderson (1978) 249 EG 1167*** and ***C & A Pension Trustees v British Vita Investments Ltd (1984) 272 EG 63***).

The landlord may seek to provide a narrow actual user clause but provide that for the purposes of rent review the permitted user is, for example, any retail [or office] use except those likely to reduce market rents. This is clearly unfair to the tenant, and may be an onerous covenant and therefore adverse to the landlord on review.