

## Assignments & Underlettings

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### How does a Landlord control alienation?

- ▶ If lease is silent Tenant can assign/sublet/part with possession as it likes BUT this is rare
- ▶ Most leases have express covenants controlling alienation:
  1. Absolute prohibition - Tenant cannot assign/sublet. Rare.
  2. Qualified Covenant - Tenant cannot assign/sublet without the Landlord's prior written consent.
  3. Fully Qualified Covenant - Tenant cannot assign/sublet without the Landlord's prior written consent not to be unreasonably withheld.
- ▶ Most leases = Qualified Covenant or Fully Qualified Covenant.



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### Legislation

#### Section 19(1A) Landlord and Tenant Act 1927

▶ In the case of prohibitions on assignment, underletting, charging and parting with possession a partially qualified covenant is converted into a fully qualified covenant i.e. not to assign/sublet without landlord's consent becomes a covenant not to assign/sublet without landlord's consent such consent not to be unreasonably withheld



#### Landlord and Tenant (Covenants) Act 1995

- ▶ Privity of contract abolished
- ▶ Pre-conditions/circumstances can be stipulated in "new" leases
- ▶ If not satisfied Landlord can refuse consent

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## Landlord and Tenant Act 1998



Landlord's statutory duties when written application received:

1. To **give consent** except where it is not reasonable to do so
2. To give the tenant written notice of the decision within a **reasonable time** and
  - if consent is given subject to conditions, the conditions
  - if consent is withheld, the reasons for withholding it
3. To **pass on any application** to any other person who he believes is a person whose consent is required.

**Non-compliance = risk damages claim or Tenant assigning/subletting without consent**

The 1988 Act places the burden upon the landlord to prove:

- i. That he gave notice of his decision
- ii. That he gave consent within a reasonable time
- iii. That any condition imposed was reasonable
- iv. That any refusal by him was reasonable



Note: cannot subsequently rely on reasons that were not initially given as grounds for refusal

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## What is a reasonable time?



### ➤ Section 1(3) Landlord and Tenant Act 1988

"where there is **served** upon the person who may consent to a proposed transaction a **written** application by the tenant"

An application is served when it is served in accordance with the requirements of the tenancy.



See *E.ON UK v Gilespost* [2012] 3 EGLR 23

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## What is a reasonable time?



- What is reasonable is a question of fact and depends on all the circumstances  
*Go West Ltd v Spigarolo* [2003] EWCA Civ 17  
*"I repeat and for my own part would wish to emphasise Sir Richard Scott V-C's reference in the Norwich Union case to the landlord dealing with the tenant's application expeditiously and at the earliest sensible moment. It may be that the reasonable time referred to in section 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"*  
See *NCR Ltd v Riverland Portfolio No.1 Ltd (No.2)* [2005] EWCA Civ 312
  - **BUT** time does not start running until **complete application** has been made
    - informal exchanges vs formal application
    - all necessary information provided
    - undertaking for Landlord's reasonable costs provided (see *Dong Bang Minerva (UK) Ltd v Davina*) Ltd [1995] 1 ELGR 41
  - Reasonable time ends once Landlord communicates decision
- CAUTION: failure to communicate decision within reasonable time will be treated as an unreasonable refusal even if legitimate reasons for refusing**

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## Reasonable Time – Practical Tips



- Pass application to solicitor ASAP – privilege protection
- Diarise** key dates – acknowledgement/formal response
- Be careful not to inadvertently give consent. Mark correspondence "**subject to licence**"
- Don't "**jump the gun**" and give decision too soon – cannot add to the reasons originally given
- OK to **request additional information** BUT must be (1) reasonably necessary and (2) done promptly
- ➡ **3 week target time** unless particularly complex

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## General Principles of Reasonableness



- Reasons expressed in landlord's decision are the only reasons that he can subsequently rely on
- Not all of the landlord's grounds for refusal must be found to be reasonable (*No 1 West India Quay (residential) Ltd v East Tower Apartments Ltd [2018]*)
- Collateral Advantage** – Landlord cannot withhold consent where the reason for doing so is to obtain an uncontracted advantage e.g. insisting that a rent review memorandum be completed

*International Drilling Fluids v Louisville Investments*[1986]

- Consent can be refused, or conditions imposed, where this **protects the landlord's rights** under the lease – the purpose of the covenant is to protect the landlord from having his premises used or occupied in an undesirable way.
- Not entitled to refuse consent on grounds unconnected with relationship of landlord and tenant
- Landlord not required to prove that its decision to refuse consent is justified as long as they are conclusions that would have been reached by a **reasonable person** in the circumstances
- Reasonableness is to be decided as a **question of fact** in all the circumstances
- If withholding consent results in a **disproportionate benefit to the landlord and detriment to the tenant** then it may be unreasonable for the landlord to withhold consent.

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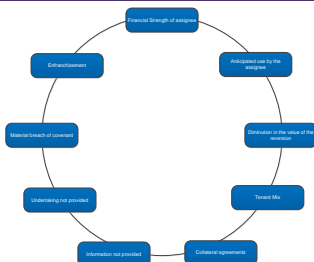
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## Specific Examples of Reasonableness



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## Financial Strength of Assignee



### "Can the assignee pay the rent?"

- ▶ Usual practice to ask for 3 years worth of accounts
- ▶ Do accounts show pre-tax profits 3x rent BUT only guideline. This approach has been criticised by the courts e.g. a tenant with pre tax profits of 10 times the rent may have a hundred other rented properties and high expenses – if no other reasons for refusing consent = likely to be unreasonable
- ▶ References – from persons of good standing with sufficient knowledge of the assignee"
- ▶ Newco – taken over prior business/ phoenix company?
- ▶ Guarantor - landlord must look at the overall picture thus guarantor may make refusal unreasonable. However, if assignee's covenant strength very poor, still reasonable to refuse consent: "a totally insubstantial company even though backed by a guarantee is quite a different thing from an assignment to a satisfactory and responsible tenant".
- ▶ "Old Lease" means original tenant and guarantor still liable but may still not be reasonable to refuse consent depending on covenant strength of assignee.



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## Existing Serious Breach of Covenant



- ▶ Refusal reasonable where sufficiently **serious** breach
- ▶ **Materiality** – question of fact in each case. If the breaches are minor, or are unlikely to continue and are remediable: unlikely to be reasonable to refuse consent (Apply But For test).
- ▶ **Disrepair** – generally not sufficient: depends on the seriousness of the disrepair and ability and willingness of assignee to remedy the disrepair (are the breaches extensive and long standing?)
- ▶ **Once and for all breaches** – unlikely to be reasonable to refuse consent in order to preserve a right to forfeit (consider granting consent without prejudice to right to forfeit)



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## Anticipated use by assignee



- ▶ Landlord can reasonably object to the assignment/subletting where reason to believe assignee will breach user covenant even though landlord will be able to enforce a breach of the covenant (*Ashworth Frazer v Gloucester City Council* [2001])
- ▶ The landlord also entitled to refuse consent to if he reasonable objects to the proposed use even if that use is neither illegal nor forbidden by the lease.
- ▶ **Tenant Mix** may be a good reason **BUT**:
  - ▶ policy should ideally be formulated, rational and known as in:  
**Crown Estate v Signet Group [1996]**
  - ▶ Jewellers → Ticket office/bureau de change (Regent Street)
  - ▶ Court agreed with L - legitimate and formulated policy to attract shops with "eye appeal". Ticket office inappropriate use and would detract from the specific shopping experience trying to be created  
**Moss Bros v CSC Properties [1999]**
  - ▶ Fashion → Games Stores (Metro Centre, Gateshead)
  - ▶ Court agreed with L – no written policy but evidence there was a policy and L applied this on new lettings to maintain and improve that part of the Centre for fashion retailers

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## Landlord Remedies



Where Tenant assigns/sublets without Landlord's consent:

- 1 Claim an **injunction** to undo the transaction (*Crestford and others v Tesco Stores Limited* [2002])
- 2 Claim **damages**
- 3 **Forfeit** the lease (beware waiver)



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## Tenant Remedies



- ▶ Breach of the statutory duty where landlord has unreasonably failed to give consent.
- ▶ Claim for damages. The burden is on the tenant to show loss e.g.
  - could include loss of rent from proposed subtenant
  - liability for rates and service charges which would have been paid by subtenant

The above claims would be a "loss of chance" claim so may only recover a proportion of the loss depending on how likely the assignment/subletting was.

See *Design Progression Ltd v Thurloe Properties Ltd* in which landlord had adopted a deliberate tactical approach to "see off" the assignee.

- ▶ L deliberately set out a delay consent in the hope that assignee would walk away – L wanted to re-let at market rent for comparable purposes
- ▶ Drip fed through requests for information and assignee lost patience

The Judge ordered the landlord to pay £100,000 in relation to the lost premium and rent that would have been paid and a further £25,000 as exemplary damages.

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## Questions



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