DISTINCTLY FOCUSED
ON REAL ESTATE

DAVITT
JONES
BOULD

REAL ESTATE LAW SPECIALISTS

ALIENATION, ALTERATION AND USER COVENANTS: THE PROBLEMS AND SOLUTIONS

DJB SEMINARS: THE LEGAL SERIES
28TH JULY 2020

ABOUT DJB

FOR SURVEYORS & PROPERTY PROFESSIONALS

Davitt Jones Bould "DJB" is the largest niche real estate law firm in the UK.

We are renowned for our high-quality legal work and service. We only recruit experienced solicitors and, as a result, our legal team of 45 solicitors has an average post-qualification experience that exceeds 20 years. Most have joined us from other City firms, in-house departments and/or senior roles.

Our solicitors have advised some of the UK's most significant land owners including The Royal Parks, The Cabinet Office, the Department for Environment Food & Rural Affairs (Defra), DSTL and a number of local authorities and private-sector clients.

All of our clients are provided with a dedicated client care professional at no extra charge, to ensure they receive the highest standard of service at all times.

DJB is regularly selected to advise on high-profile projects such as the hosting of the London 2012 Olympic Games by The Royal Parks and the first Sukuk Bond to be entered into by a Western Government on behalf of HM Treasury.

The firm enjoys top-tier rankings in all of the main directories, including Chambers and the Legal 500. We were recently commended for Commercial Property in The Times Best Law Firms 2020 list, are shortlisted for Real Estate Team of the Year 2020 at the Legal Business Awards and were Finalists for National Firm of the Year at The Lawyer Awards 2019.

"The service we receive from DJB is first class. Their lawyers are excellent, with detailed knowledge of their areas of expertise… Put simply, DJB are my first choice when I need to instruct external solicitors."

Peter Bryant, Head of Democratic and Legal Services at Woking Borough Council

FOR SOLICITORS

Senior solicitors are drawn to DJB because of the innovative structure we have developed over a number of years.

We separate client care from legal advice. This means our core solicitors can focus entirely on their legal work, unfettered from the competing demands of business development, client liaison and matter administration. Everything is taken care of for them from case opening to case completion and beyond. This approach allows our solicitors to be just that – solicitors.

In addition to protecting our clients' interests and delivering expert advice, our goal is to ensure we find work for our solicitors at the right level to give them the lifestyle they want. As such, our solicitors are in complete control of their capacity and have the option to work remotely at home or hot-desk at one of our offices in London, Manchester, Birmingham or Taunton. All DJB core solicitors receive a percentage of the fees they bill, so their workload and lifestyle can work hand in hand.

All of this is possible whilst still having access to complex work for prestigious clients both in the private and public sector. The success of this model is exemplified by our 50-50 gender split at partner level and our exemplary lawyer retention rate.

"After too many years in the legal rat-race, life at DJB is a great comfort. Fantastic work, great clients, flexible working routine, the ability to work from home, 100% support from the firm. It's a great all in one package for any lawyer seeking autonomy with a top firm and top work"

A DJB Lawyer

OUTCOME FOCUSED TRAINING INFORMATION

Lecture is aimed at: Property professionals and fee earners involved in both contentious and non-contentious property work

Learning Outcome: To give an increased knowledge of the subject matter. To update on current issues, case law and statutory provisions and to be able to apply the knowledge gained in the better provision of service to the client.

Satisfying Competency Statement Section: B – Technical Legal Practice

For further information please see http://www.sra.org.uk/competence

CONTENTS

LANDLORD'S CONSENT TO ASSIGNMENT

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

This is a very important decision. 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] Times 23 June

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.

Quaere whether this is reasonable. 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.

However, see ***Homebase Ltd v Allied Dunbar Assurance plc [2002] EG***

It is established however that where the lease contains a condition to alienation e.g. the rent must be at least the passing rent as a condition of subletting, this will be an absolute requirement. Moreover, a tenant will be in breach of such condition if he sublets subject to a reverse rental payment.

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 man 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 (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 (1935)*** 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 (1999***). 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 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.

See also ***Plinth Properties v Mott, Hay and Anderson [1978] 249 EG 1167***, where a highly restrictive covenant reduced rent by 30% on review.

Consider also the fact that there is no more privity of contract for post 1996 leases. As AGAs are however the norm this will have little effect on rental in shorter leases. However, in relation to

assignment of a reversion by the landlord see the recent case of ***Avonridge Property Co. Ltd v Mashru [2005]***. The House of Lords have reversed the Court of Appeal decision. Sections 6 to 8 of the Landlord and Tenant (Covenants) Act 1995 allow landlords to ask the tenant to be released from their liability in contract on an assignment of the reversion. If the tenant refuses the request, then the court can determine if a release is reasonable.

Many leases circumvent this by including a term in the lease that release occurs automatically on assignment. The House of Lords have stated that this does not fall foul of the anti-avoidance provisions in the legislation.

They also suggest that advisers should make their clients aware that if a landlord assigns the reversion to a "man of straw" then the tenant may in reality lose the ability to sue anyone. It is unfortunate that the tenant cannot select the reversioner as the landlord can select the assignee.

Liability of Guarantors

Good Harvest Partnership v Centaur [2010] UKHC 330 - Section 24 of the Landlord and Tenant (Covenants) Act 1995 states that, on the original tenants ceasing to be liable, anyone whose liability is dependent on the original tenant will also cease to be liable for breaches. Section 25 of the Act states that the provisions of the Act cannot be avoided. Here the guarantor was required as a condition of assignment to enter into an authorised guarantee agreement (AGA) which would guarantee the assignee's debts. The Judge held that such an absolute condition would be a breach of Section 25 and seemed also to suggest that such a requirement, even though not a condition of the lease would also be a breach. Furthermore, the Judge refused to accept as established law that an original guarantor could be made liable to guarantee a tenant under an AGA.

Tindall Cobham v Adda Hotels [2014] EWCA 1215. Here the clause that required the guarantor to enter into an authorised guarantee agreement with the assignee as a condition of assignment was void. However, it could be severed from the rest of the lease and acted as a provision whereby a guarantor could be required if reasonable.

The Court of Appeal in ***KS Victoria v House of Fraser [2011] EWCA 904*** confirmed that a guarantor cannot be directly required in the lease to guarantee an authorised guarantee agreement as it would render **S.24** of the Act redundant Moreover, a guarantor cannot be required to guarantee an assignee. However, if reasonable to do so, the guarantor may be required to guarantee the tenant's AGA, and if the lease allows it, the guarantor may be required to guarantee the tenant's AGA.

In ***EMI v O&H Q1 Ltd [2016] EWHC 529 (Ch***) the High Court decided that a tenant could not assign a lease to their guarantor as this would fall foul of the anti-avoidance provisions in **S.25** Landlord & Tenant (Covenants) Act 1995. The case was meant to be heard by the Court of Appeal in May 2017 but has now been settled.

Co-operative General v A and A Shah (2019) EWHC 941. Here, a licence to assign repeated the obligations of the assignor and guarantor in the licence. This was held to be a direct guarantee and was void. However, a sub guarantee whereby the guarantor guaranteed the assignee was still valid.

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.

OTHER PROBLEMS IN RELATION TO ALIENATION: PARTING WITH AND SHARING POSSESSION

Akici v L R Butlin [2005]

The sole trader tenant had set up a company which was actually running the business of a pizza parlour. The landlord, presumably with ulterior motives, served a Section 146 notice effecting forfeiture and specifying the breach as being that of parting with possession. The Court of Appeal held that the tenant for whom they appeared to have the utmost sympathy had not parted with but had shared possession with the Company. The Section 146 notice was therefore invalid as specifying the wrong breach. This issue is significant in its own right, placing a procedure problem in the way of the landlord who wishes to commence forfeiture proceedings. They went on to say that the breach was one which could be remedied (and the subletting without consent: ***see Scala House v Forbes [1974])*** and that as the tenant was trying to obtain control of the company, they would be entitled to relief. This in itself seems to involve some judicious interpretation of the nature of a company, being a separate entity from the person in control.

The real bombshell dropped by the Court involved the implication for the less contentious work. They overruled the decision of ***Tulapem v De Almeida*** and said that sharing possession is not the same as sharing occupation and is not one and the same. This part of the decision is esoteric in the extreme and on the facts the Court found that the tenant was sharing possession. However, possession suggests some degree of control which is not required for occupation. Occupation is, therefore, subsumed in possession but not vice versa. Standard alienation covenants which prevent parting with or sharing possession will not operate to prevent the tenant sharing occupation. Alienation covenants need to be adapted accordingly. PLC have an alienation covenant which incorporates the implication of this decision.

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.

SUBLETTING AT LESS THAN THE PASSING RENT

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.

Blockbuster Entertainment Ltd v Leakcliffe Properties Ltd [1997] 09 EG 139

The tenant was subject to a fully qualified covenant against subletting. The rent for the premises was £115,000 p.a. The tenant applied to sublet at £75,000 p.a. The landlord objected as he argued that the subletting at such a rent would affect the value of the reversion and did not amount to a reasonable market rent. The tenant obtained a declaration allowing the subletting. It would be unreasonable to expect the tenant to wait until rents increased before subletting. Moreover, the tenant had sufficiently marketed the property and £75,000 p.a. must therefore be deemed to be the market rent.

The landlord could have refused consent on the wording of the alienation clause if he did not believe the rent to be the market rent. However, the landlord had not relied on this ground at the time of refusal and, in any case, such belief was unreasonable.

Most leases might include provision that the rent is the higher of the passing rent and market rent.

Quaere whether this is reasonable. 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.

However, see ***Homebase Ltd v Allied Dunbar Assurance plc [2002] EG***

It is established however that where the lease contains a condition to alienation e.g. the rent must be at least the passing rent as a condition of subletting, this will be an absolute requirement. Moreover, a tenant will be in breach of such condition if he sublets subject to a reverse rental payment.

Note: The Code for Leasing Business Premises provides that the sublease rent should be the market rent at the time of the subletting.

SUBLETTING AND TERMINATION OF THE HEAD LEASE

In ***Pennell v Payne [1995] QB 192***, it was accepted that on termination of the head lease by notice, the sublease will also end. The House of Lords in ***Barrett v Morgan [2000] 1 All ER 1***, followed this decision even though the head tenant and landlord had colluded in giving notice so as to terminate an undesirable subletting. The head tenant may be faced with a claim for non derogation from grant, however. In relation to a business lease within the Landlord and Tenant Act 1954, termination of any head lease will merely accelerate a statutory continuation.

In ***PW and Co Ltd v Milton Gate (2004***), termination of the head lease by means of a break clause was expressed to be subject to the continuation of any subsisting subleases (these being outside the 1954 Act). Nevertheless, the subleases came to an end and the tenant was successfully sued for not breaking the lease with a certain amount of floor space let.

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.

Keep Open Clauses

With user covenants the Courts are willing to award damages for breach against a tenant who ceases to carry on his trade (see, for example, ***Transworld Land Co Ltd v J Sainsbury plc [1990] 2 EGLR 255***). However, the Courts are not prepared to grant mandatory injunctions forcing the tenant to stay open for business. (See ***Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1997] 23 EG 141***). Consider the use of the ***Contracts (Rights of Third Parties) Act 1999*** to increase a tenant's exposure to damages (e.g. by requiring the tenant to covenant not just with his landlord but also with the other tenants in the centre).

SHB v Cribbs Mall April 17th 2019

SHB are in liquidation and are successors to BHS. They occupied a prime site at Cribbs Causeway in Bristol and held a 125-year lease. The landlord wanted to effect forfeiture for breach of a keep open clause. The tenant argued that they should be entitled to release as the loss involved would be so great and they should be given a substantial time in which to be given the opportunity to assign the lease. The Court decided that three months delay in order to attempt an assignment should be sufficient.

Note: **S.82** of the ***Coronavirus Act 2020*** - There is a moratorium on forfeiture for non-payment of rent until 30 September 2020. This may be extended further but it does not apply to breaches other than non-payment of rent. Forfeiture will still be available after the moratorium period is over and rent will still be owed. Landlords wishing to go down this route must be careful not to waive any breach and must be careful of business rates liability on empty properties.

Note: Planning law has been relaxed temporarily whereby pubs, restaurants and cafes can now operate as takeaways. Check the user covenants as there can still be a breach.

If the covenant is positive:

- The tenant should try to qualify the obligation to allow closure for normal business reasons, for example, for repair, or refurbishment and perhaps an assignment.
- Consideration needs to be given to what amount to the normal business hours of the shopping parade

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.

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.

QUIET ENJOYMENT

This is implied if not expressed. It requires the landlord to ensure that the tenant is free from interference by himself and, in so far as is reasonable, from other tenants.

In ***Century Projects v Almacantar (Centre Point) Ltd [2014] 394 (Ch)*** the landlord had reserved the right to carry out external works on the building. It was held that the works could still be done but only in a reasonable fashion so as to cause minimal interference to the tenant.

In ***Timothy Taylor v Mayfair House Corporation [2016] EWHC 1075 (Ch)*** the tenant occupied the basement and ground floor premises. The lease allowed the landlords to carry out work on the upper floors. It was held that any work must be carried out in a reasonable fashion. As the scaffolding was placed in an area detrimental to the tenant's business and as the landlord had not adequately discussed how to conduct the works, then the tenant could claim damages. Moreover, the landlord had not adequately included rights of access to the tenant's property and this was also actionable.

Published June 2020

DISCLAIMER

This oral presentation including answers given in any question and answer session ("the presentation") and this accompanying paper are intended for general purposes only and should not be viewed as a comprehensive summary of the subject matters covered. Nothing said in this presentation or contained in this paper constitutes legal or other professional advice and no warranty is given nor liability accepted for the contents of the presentation or the accompanying paper. Richard Snape and Davitt Jones Bould will not accept responsibility for any loss suffered in consequence of reliance on information contained in the presentation or paper.

OUR CREDENTIALS

LEGAL 500

- London: Real Estate: Corporate Occupiers; Investors; Property Litigation; Local Government
- North West: Commercial Property
- South West: Real Estate: Commercial Property, Planning, Property Litigation, Local Government

"Excellent niche property and planning firm"

LEGAL 500 2019

CHAMBERS UK

- London: Real Estate
- South West: Real Estate, Planning, Property Litigation

"Immense depth and knowledge enabling them to deal with anything that is thrown at them"

CHAMBERS 2019

INDUSTRY AWARDS

- Times Best Law Firm List 2020 – Commended for Commercial Real Estate
- 2019 Lawyer Awards – Finalists – National Firm of the Year
- 2018 British Legal Awards – Winner – Boutique Firm of the Year
- 2018 Estates Gazette Awards – Finalists – Legal Team of the Year 2018
- 2017 Estates Gazette Awards – Finalists – Real Estate Law Firm of the Year
- 2016 Amercian Lawyer Legal Awards - Global Finance Deal of the Year – Honoree
- 2013 Lawyer Awards – Boutique Firm –
- National – Winner
- 2013 Lawyer Awards – Real Estate Team – 2nd

"Extremely client focused and solutions driven"

LEGAL 500 2019

"'They're approachable and helpful". "

CHAMBERS 2019

www.djblaw.co.uk
0344 880 8000

CONTACTS

Madeleine F Davitt, Senior Partner
Central Government and Property Companies
T: +44 203 026 8295
M:+44 7904 677 739
E: madeleine.davitt@djblaw.co.uk

Peter Allinson, Chief Executive
Real Estate Support for Other Law Firms
T: +44 203 026 8290
M: +44 7904 677 773
E: peter.allinson@djblaw.co.uk

Sue McCormick, Account Director
Local Authorities
T: +44 1823 328 084
M: +44 7535 655 060
E: sue.mccormick@djblaw.co.uk

Yvonne Hills, Client Director
Property Companies
T: +44 20 3026 3467
M: +44 7921 925 761
E: yvonne.hills@djblaw.co.uk

OFFICES

LONDON - CITY
Level 24 The Shard,
32 London Bridge Street,
London SE1 9SG

LONDON - WEST END
48 Dover St,
Mayfair,
London W1S 4NX

BIRMINGHAM
2 Snow Hill,
Birmingham BG4 6GA

MANCHESTER
Floor 2, 3 Hardman Square,
Manchester M3 3EB

TAUNTON
12-14 The Crescent, Taunton,
Somerset TA1 4EB

DAVITT JONES BOULD
REAL ESTATE LAW SPECIALISTS