

Number 9

Assignments and Sub-Lettings – Points to Watch

PROPERTY

Several recently reported cases point to potential pitfalls for landlords and tenants.

Under the Landlord and Tenant Act 1988 landlords must respond within a reasonable time to a tenant's request to assign a lease or underlet where the lease requires the landlord to act reasonably¹. In a recent case² the tenant's solicitors made a written request in March for a licence to assign and after some correspondence the landlord's solicitors responded in May refusing consent on the basis of inadequate sureties. Further correspondence ensued between solicitors during which the landlord's solicitors raised as a new point the tenant's allegedly unauthorised alterations. The tenant issued proceedings alleging an unreasonable withholding of consent. The Court of Appeal decided that the landlord was bound by its May decision letter. That brought to an end the reasonable time under the 1988 Act. In addition nothing in the subsequent correspondence constituted a waiver variation or release of the May decision letter which in any case the Court would not be ready to infer.

Landlords should therefore note the following:

- Having chosen to serve a notice withholding consent, a landlord cannot then argue that it was entitled to more time and that the notice is ineffective.
- It cannot rely on reasons not stated in its notice.
- It is therefore essential that landlords and their advisers act quickly and closely with each other so that an informed decision is sent promptly.
- Further negotiations will not affect the tenant's rights arising from the original unlawful refusal.
- A reasonable time will depend upon the circumstances but should be measured in weeks not months.

When subletting tenants have frequently used the device of side agreements with subtenants to side step the requirements of a lease relating to rent payable and other subtenant covenants.

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¹ Section 1(3) Landlord and Tenant Act 1988

² Go West Ltd. v. Spigarolo

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The Court of Appeal has now held³ that a side letter and the sublease must be read together and that even if the former is expressed to be personal to the tenant and subtenant it does not affect the issue. Such an arrangement could prejudice the landlord in relation to comparability of rents or enforcement of covenants against the party in occupation or the position of the subtenant of a protected tenancy on renewal at the expiry of the term of the lease.

Points to note:

- Landlords should require full disclosure on an application to sublet.
- A tenant will then be obliged to disclose any side arrangement.
- Possible alternatives for tenants involving paying a reverse premium or entering into an arrangement with another group company are not without problems.
- When negotiating a new lease tenants must seek to avoid a requirement that the rent on a subletting must reflect the passing rent under the lease. The alternative is to seek a tenant's break notice.

One other point highlighted by this case was that the reasonableness test under the Landlord and Tenant Act 1988 did not arise because the provisions in the lease regarding subletting were pre-conditions that had to be satisfied before an application to sublet could be made. In a further case⁴ the lease provided that on assignment the landlord could require two or more guarantors of suitable standing. The right was a pre-condition to the tenant's right to assign and so long as the landlord in exercising the right genuinely intended to secure financial security the exercise of the right was not subject to any test of reasonableness. So a further point for tenants is:

- To ensure so far as possible that the landlord is obliged to act reasonably in relation to any pre-condition relating to assignment or sub-letting.

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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³ Allied Dunbar v. Homebase

⁴ Mount Eden v. Towerstone

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