

# LANDLORDS' CONSENT

## - *Alienation, alterations and use*

by

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## INTRODUCTION

1. Absent a covenant restricting alienation, use or alterations, the lease will be freely alienable, the tenant can carry out alterations (providing, in doing so, the tenant does not commit waste or breach other covenants such as the repairing covenant) or change the use of the premises (providing the use remains lawful).
2. Covenants restricting these activities fall into two categories: absolute and qualified. An absolute covenant precludes the tenant from a particular activity without scope for the tenant to require the landlord to consent. Even with an absolute covenant, it is open to the parties to agree to relax it and in that sense, the landlord's agreement is a form of consent, but analytically, this sort of consent will be formalised by a waiver or variation of the absolute covenant.
3. A qualified covenant, on the other hand, precludes the tenant from undertaking a particular activity, except with the consent of the landlord. The category of qualified covenants is, itself, sub-divided into those covenants which are subject to the landlord's consent, but which do not purport to fetter the landlord's decision-making process as to whether to give or withhold consent and prohibitions which are subject to the landlord's consent, which expressly provide that consent is not to be unreasonably withheld (or similar). Sometimes, these are called partly qualified and wholly qualified covenants. In *Footwear Corporation Ltd v Amplight Properties Ltd* [1999] 1 WLR 552, Neuberger J. described the first sub-category as a qualified covenant and the second as "doubly qualified".
4. In relation to alienation covenants and covenants against alterations (in certain circumstances), there is a statutorily implied proviso that consent cannot be unreasonably withheld. Where that proviso is implied, there is little distinction between the two sub-categories of qualified covenant (see per Neuberger J. in *Footwear v Amplight*, above).
5. In practice, therefore, it is only qualified covenants against changing the use of the premises which do not contain the express proviso that consent is not to be unreasonably withheld, that potentially enable the landlord to exercise an expressly conferred decision-making power arbitrarily or capriciously (in contrast to an absolute covenant which confers no express power to give or withhold consent). In

other contexts, this itself might be subject to an implied proviso that consent is not to be unreasonably withheld (or, at least, not arbitrarily withheld): see e.g. *Rickman v Brudenell Bruce* (Ch.D, 27 June 2005, unreported). Nevertheless, in *Guardian Assurance Co v Gants Hill Holdings Ltd* [1983] 2 EGLR 36, it was held that no such proviso should be implied in a user covenant in a lease because (a) the lease contained numerous other qualified covenants, some of which were subject to such a proviso and some weren't and (b) the covenant was made against the statutory background of s.19(1), (2) and (3). Given this statutory background, it would be difficult to argue that such a proviso should be implied in a qualified user covenant, although in a simplistic lease which does not contain any great scheme of qualified covenants, there might be more scope for the implication of a limited proviso than in *Guardian Assurance v Gants Hill Holdings*.

## FORM OF CONSENT

6. Where the covenant does not stipulate that consent is required to be given in writing, in theory, oral consent will suffice. However, if the consent is later disputed, the absence of writing will present obvious evidential difficulties. Also, under the Landlord and Tenant Act 1988, in relation to alienation covenants, the grant or refusal of consent must be given in writing.
7. If consent is given in writing, but expressed to be "subject to licence", the landlord intending to negotiate and complete a formal licence before his consent is actually given, the terms of the written document, when construed objectively, might nevertheless indicate that consent has been given, notwithstanding the words "subject to licence". It is not a term of art like the phrase "subject to contract" and it does not have the same automatic effect: *Prudential Assurance Co Ltd v Mount Eden Land Ltd* (1996) 74 P & CR 377, *Venetian Glass Gallery v Next Properties Ltd* [1989] 2 EGLR 42.

## ALIENATION

8. Alienation is the transfer or grant of an interest in land, and so the relevant leasehold covenants are those addressing the tenant's rights to assign, sub-let, part with or share possession of all or part of the property demised under a lease.

9. There is nothing objectionable about an absolute bar against alienation as the parties are free to strike their bargain as they choose and there is no statutory control in this regard. Of course, from the landlord's perspective an absolute covenant gives control, but the reality is that most leases, particularly long leases, will contain a qualified covenant. Absent a specific prohibition, whether absolute or qualified, the tenant will generally have a common law right to sub-let or assign and the landlord will have no right to object at all: *Sweet & Maxwell v Universal News Services* [1964] 2 QB 699.
10. In the case of an absolute covenant against alienation, the landlord is under no obligation to consent to any request by the tenant, and cannot be compelled to do so even if he is acting unreasonably. Matters are more complicated where the covenant is qualified.
11. A common form of qualified covenant is as follows:

*"The tenant covenants that it will not...assign, sub-let, or part with possession without the consent of the landlord, such consent not to be unreasonably withheld."*

In this example the parties have included an express common law obligation on the landlord that he is not to withhold consent unreasonably. However if the covenant were to provide simply that the tenant is not to assign etc "*without the consent of the landlord*", then a statutory limitation on the landlord's freedom to withhold consent is imposed. By section 19(1)(a) of the Landlord and Tenant Act 1927 ("the 1927 Act") all leases containing a covenant against alienation without licence or consent are deemed to be subject:

*"...to a proviso to the effect that such licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent.."<sup>1</sup>*

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<sup>1</sup> Such a sum may be claimed where it is reasonable to do so even where the lease makes no provision for it: *Holding & Management (Solitaire) v Norton* [2012] L&TR 241 (UT).

12. Section 19(1)(a) attaches only to qualified covenants to assign; it does not control or limit absolute covenants.<sup>2</sup> With regard to the manner of its application, it has been held that parties cannot side-step the oversight it gives the court by drafting controls into the covenant. For example, in *Creery v Summer sell and Flower dew & Co* [1949] Ch 751 the covenant ran “*not to underlet without the consent (not to be unreasonably withheld) of the lessor had and obtained save that the lessor reserves the right not to give his consent if in his opinion the proposed ... sublessee is for any reason in his discretion undesirable as an occupant ... or underlessee...*”. The court ruled that the wording “*save that the lessor etc*” was invalid.
13. On the other hand, there is nothing to stop the landlord accepting an even more restricted discretion than s.19(1)(a) would allow. So an agreement that a landlord would not “*withhold consent in the case of a respectable and responsible*” proposed assignee (*Moat v Martin* [1950] 1 KB 175) meant that the landlord could not object on otherwise reasonable grounds, as long as the proposed assignee was in fact “respectable and responsible”.
14. However, although the parties cannot oust the court’s oversight of reasonableness, so a clause cannot contain, for instance, deeming provisions as to reasonableness, a covenant can properly include agreed pre-conditions which must be complied with before the tenant can seek consent. A landlord might, for instance, wish to impose a condition that, “*the landlord may require the assignee to provide separate references from a bank with which it has held an account for a minimum of five years and from a chartered accountant both confirming that it has a minimum cash balance as at the date of request of £1,000,000*”, or “*provided that the tenant pay the landlord a premium of £10,000*”.
15. Notably, also, s.19(1A) of the 1927 Act provides that, in the case of a lease entered into after the coming into force of the Landlord and Tenant (Covenants) Act 1995:

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<sup>2</sup> Note also the important exception that in a *building* lease for more than 40 years, where the lessor is not a government department or local or public authority, or a statutory or public utility company, no licence is required for an assignment, underletting, charging or parting with possession effected more than seven years before the end of the term, if notice in writing is given to the lessor within six months after the transaction is effected: s.19(1).

(1A) *Where the landlord and the tenant under a qualifying lease have entered into an agreement specifying for the purposes of this subsection—*

- (a) *any circumstances in which the landlord may withhold his licence or consent to an assignment of the demised premises or any part of them, or*
- (b) *any conditions subject to which any such licence or consent may be granted,*

*then the landlord—*

- (i) *shall not be regarded as unreasonably withholding his licence or consent to any such assignment if he withholds it on the ground (and it is the case) that any such circumstances exist, and*
- (ii) *if he gives any such licence or consent subject to any such conditions, shall not be regarded as giving it subject to unreasonable conditions;*

*and section 1 of the Landlord and Tenant Act 1988 (qualified duty to consent to assignment etc) shall have effect subject to the provisions of this subsection.*

16. Clearly a request for consent must be made before the landlord's duty not to withhold consent unreasonably can arise. If he does unreasonably refuse consent, then both at common law and for the purposes of s.19(1)(a) the tenant's remedy is to assign without consent, or, as would be more prudent, to seek a declaration from the court that consent has been unreasonably withheld (see below, paras 37-38).

17. There is a separate statutory right to seek damages which arises under the Landlord and Tenant Act 1988 ("the 1988 Act").

18. Although it appears that the purpose of the 1988 Act is not to alter the test of reasonableness *per se* its effect is far-reaching and places a significant burden on landlords. In the case of a qualified covenant against assigning, underletting, charging or parting with possession which is subject to the qualification that consent not be unreasonably withheld (expressly or by statute) then under section 1 the following duties arise:

- (3) *Where there is served on the person who may consent to a proposed transaction a written application by the tenant for consent to the transaction, he owes a duty to the tenant within a reasonable time*



- (a) *to give consent, except in a case where it is reasonable not to give consent,*
- (b) *to serve on the tenant written notice of his decision whether or not to give consent specifying in addition—*
  - (i) *if the consent is given subject to conditions, the conditions,*
  - (ii) *if the consent is withheld, the reasons for withholding it.*
- (4) *Giving consent subject to any condition that is not a reasonable condition does not satisfy the duty under subsection (3)(a) above.*
- (5) *For the purposes of this Act it is reasonable for a person not to give consent to a proposed transaction only in a case where, if he withheld consent and the tenant completed the transaction, the tenant would be in breach of a covenant.*
- (6) *It is for the person who owed any duty under subsection (3) above—*
  - (a) *if he gave consent and the question arises whether he gave it within a reasonable time, to show that he did,*
  - (b) *if he gave consent subject to any condition and the question arises whether the condition was a reasonable condition, to show that it was,*
  - (c) *if he did not give consent and the question arises whether it was reasonable for him not to do so, to show that it was reasonable,*

*and, if the question arises whether he served notice under that subsection within a reasonable time, to show that he did.*

19. Most obviously this places an obligation on the landlord to respond (a) in writing, (b) within a “reasonable time”, either (c) giving consent with or without conditions, or (d) refusing consent and the reasons for such a refusal. Furthermore, the landlord bears the burden of proving whether he gave consent within a reasonable period of time, whether any conditions were reasonable, and whether any refusal of consent is reasonable.

20. *No 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2016] EWHC 2438 (Ch) is recent example where the court found that it was reasonable for the landlord to impose conditions on consent requiring the tenant to produce bank references and insist on instructing a surveyor to check for compliance with



repairing covenants. Notably, it was also found that the landlord's claimed legal fees of £1,250 were unreasonably high, since the task involved in granting consent was merely administrative.<sup>3</sup>

21. A "reasonable period" of time is often of primary importance, because even if a landlord intends to give permission, or is moving towards giving permission, he must nevertheless do so within a reasonable period of time, and if he takes too long the tenant can go ahead and assign regardless. Time runs from the date of service of the tenant's application for consent, and there is no definition of how long a period is reasonable. It can therefore vary on a case by case basis, depending on the context. The guidance of the Court of Appeal, per Munby J (as he then was) is that "*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*" - *Go West v Spigarolo* [2003] EWCA Civ 17 at para.73.

22. Furthermore, and also as held in *Go West v Spigarolo*, under the 1988 Act the landlord will be limited in his objections to the grounds he put forward in writing within a reasonable time. This marks a departure from the position under the bare common law duty, where the landlord was not obliged to give reasons for his refusal and could set them out or add to them after his refusal, albeit that they must have influenced his decision at the time of the refusal (see below, para.41).

23. If consent is refused and reasons are given within a reasonable period of time, the spotlight will then shift to those reasons and whether they are reasonable. It will come as no surprise that yet again, context and individual factors are very important, but nevertheless a general outline of the relevant principles can be drawn from the authorities. The touchstone cases, commonly referred to, are the previously

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<sup>3</sup> On this latter point, note also *Proxima GR Properties Ltd v McGhee* [2014] UKUT 59, where the Upper Tribunal found that a fee of £95 was reasonable *only* because the matter involved some complexity. The Deputy President suggested that, if the fee charged was unreasonable in any given situation, the whole obligation to seek consent fell away, so that the correct process was not for the FTT to substitute an appropriate, lower fee, but simply to find that the sum demanded was unreasonable. The Tribunal generally denigrated the practice of charging a 'standard fee' for consents. NB the Tribunal's jurisdiction is restricted to determining "administration charges" which arise under leases of dwellings under the Commonhold and Leasehold Reform Act 2002.

mentioned *Go West v Spigarolo*, *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch. 513 (see below) and a decision of the House of Lords in *Ashworth Frazer Ltd v Gloucester CC* [2001] UKHL 59.

24. In *Ashworth Frazer* it was considered that the “overriding principles” were (a) that a landlord is not entitled to refuse consent on a ground that has nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease; (b) that the landlord only needs to show that they were conclusions which might be reached by a reasonable man in the circumstances but not necessarily that they were justified in fact; and (c) that it is a question of fact depending on all the circumstances in each case.

25. It should also be noted that section 4 of the 1988 Act gives a tenant the right to sue in tort, in the case of a breach by the landlord, for breach of statutory duty. This adds a claim for damages to the remedies available to the tenant. The tenant will bear the burden of proving loss, but the landlord will bear the burden of proving reasonableness.

## ALTERATIONS

25. In a 21<sup>st</sup> century lease, it would be rare for a tenant merely to covenant against making “alterations to the premises”<sup>4</sup>. Even a more straightforward commercial lease will distinguish between structural and non-structural alterations and it might well go further and have specific provision relating to adding to the premises / “cutting and maiming” / altering the external appearance and so on. Some of these restrictions might be absolute (e.g. structural alterations) and some might be qualified.

26. Where the tenant covenants not to make alterations without the landlord’s consent, s.19(2) of the LTA 1927 implies a proviso that consent is not to be unreasonably withheld where the proposed alterations amount to “improvements”. S.19(2) provides, expressly, that this proviso does not prohibit the landlord from requiring as

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<sup>4</sup> Such a covenant featured in *Bickmore v Dimmer* [1903] 1 Ch. 158, where it held that, without more, “alterations to the premises” were limited to alterations which affected the form or structure of the building.

a condition for granting licence or consent payment of a reasonable sum in respect of damage to or diminution in value of the premises or any neighbouring premises belonging to the landlord. It also provides that the landlord is entitled to make his consent conditional on the tenant undertaking to reinstate the premises, where the improvement does not add to the letting value of the holding.

27. An alteration amounts to an “improvement” for this purpose where it improves the demised premises from the point of view of the tenant<sup>5</sup>. It is difficult, therefore, to conceive of a tenant seeking consent to make an alteration which does not amount to an “improvement” within the meaning of s.19(2).

28. Where a landlord’s withholding of consent is challenged as being unreasonable, the principles which are applied are the same as those applied to alienation covenants (as formulated in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch. 513), with modifications to apply them to the case of a request for consent to make alterations to the premises: *Iqbal v Thakrar* [2004] 3 EGLR 21. In outline:

- (1) The purpose of the covenant is to protect the landlord from the tenant making alterations etc. which damage the property interests of the landlord.
- (2) The landlord is not entitled to refuse consent on grounds which have nothing to do with his property interests.
- (3) The burden of proving that the landlord has withheld consent unreasonably rests with the tenant.
- (4) The landlord need only prove that his decision was a reasonable one, not that it was justified. In other words, if the decision was one which a reasonable landlord could reach, that is sufficient.
- (5) Consent may be refused if the purpose of the alterations is to convert the premises to a particular use even if that use is not prohibited by the lease, but whether such refusal is reasonable will depend on all the circumstances.
- (6) While a landlord usually need only consider his own interests, there may be cases where it is disproportionate for a landlord to refuse consent having regard to the effects on the landlord and the tenant respectively.

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<sup>5</sup> *Lambert v Woolworth & Co Ltd* [1938] Ch. 883.

- (7) Consent cannot be refused on pecuniary grounds alone. In such circumstances, the landlord should seek a monetary payment.
- (8) In each case, the question whether the landlord acted unreasonably is a question of fact.

## USE

29. In contrast with alienation covenants and covenants against alterations, there is no statutorily implied proviso that consent to a change of use cannot be unreasonably withheld. Whilst ss.19(1) and (2) of the LTA 1927, dealing with alienation and alterations, respectively, restrict the landlord to withholding consent on reasonable grounds only, s.19(3), which is intended to provide protection for tenants where consent is sought to a change of use, is considerably more limited.
30. As with ss.19(1) and (2), s.19(3) applies only to qualified covenants against user. It has no application where there is an absolute covenant (although absolute covenants are rare, partly because of the negative impact they have on rent reviews).
31. The proviso which is implied by s.19(3) is *“that no fine or sum of money in the nature of a fine, whether by way of increase of rent or otherwise, shall be payable for or in respect of such licence or consent...”*. This does not, however, preclude the landlord from requiring payment of *“a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord”*.
32. Apart from not requiring payment of a sum of money in the nature of a fine, or increasing the rent, the landlord is not precluded, by statute, from withholding consent unreasonably. In addition, this proviso will apply only if the change of use *“does not involve any structural alteration of the premises”*. So, if the tenant requires to make structural alterations to facilitate an alternative use, the landlord can require a premium to be paid for the change of use.
33. The potential interaction between s.19(3) and a covenant against alterations is important. Where a tenant requires consent to make alterations, assuming the

alteration is an improvement to the premises, s.19(2) implies that consent cannot be unreasonably withheld to the alterations. However, the landlord can act as arbitrarily as he wishes in refusing consent to the change of use for which the alterations are intended. Moreover, the fact that the change of use involves making alterations for which consent cannot be unreasonably withheld entitles the landlord to demand a fine for the change of use<sup>6</sup>.

34. A cunning tenant might seek consent to change the use of the premises, with a view to later undertaking alterations in connection with the proposed change of use. If the tenant is able to use the premises for the changed use without making the alterations, but merely desires to make those alterations to enhance this new use, the tenant might take this course. It would not work, though, if the tenant needed to make the alterations before being able to change the use. In *Barclays Bank v Daejan (Grove Hall) Ltd* (above), it was held that a change of use “involves” structural alterations not just where those alterations are necessary for the change of use, but where they are included in or are part of the proposal to change the use. If the landlord believed that the tenant was merely delaying applying for consent for structural alterations (or, if consent were not required, making those alterations) to invoke s.19(3) and avoid a fine, it might nevertheless be possible to prove that the tenant’s proposed change of use “involves” the structural alterations notwithstanding the time gap between the two.

35. Where the covenant is subject to an express proviso that consent to a change of use cannot be unreasonably withheld, any attempt to charge a premium for the change of use, even where the change will involve structural alterations (and so the proviso that no fine may be sought by the landlord will not be implied), will most likely amount to an unreasonable withholding of consent. As with covenants against alterations, but unlike alienation covenants, the burden is on the tenant to establish that the landlord has acted unreasonably (rather than under the LTA 1988, in

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<sup>6</sup> It was suggested, by HH Judge Rich QC, sitting as a High Court Judge, in *Barclays Bank v Daejan Investments (Grove Hall Ltd* [1995] 1 EGLR 68, that the reason for excluding the protection against a landlord demanding a fine where structural alterations are made was that under Part I of the 1927 Act, any improvement appropriate to the change of use can be imposed on the landlord (subject to payment of compensation) even where there is an absolute covenant against alterations.

relation to alienation covenants, where the landlord must prove the reasonableness of his refusal).

36. It is considered that the *International Drilling Fluids* principles, which have been applied, also, to covenants against alterations<sup>7</sup>, apply to the question of whether a landlord has unreasonably withheld consent to a change of use by the tenant: see *Tollbench Ltd v Plymouth City Council* (1988) 56 P & CR 194.

### **CHALLENGING UNREASONABLE REFUSAL OF CONSENT**

37. If a landlord's consent is sought pursuant to a qualified covenant and refused, the tenant has two options. One is to proceed with the alienation / alterations / change of use. The effect of the proviso that consent is not to be unreasonably withheld is to afford the landlord the opportunity of giving consent or reasonably withholding it, but if it is refused unreasonably, the covenant ceases to operate in relation to the tenant's proposed alienation / alterations / change of use: *Treloar v Bigge* (1874) L.R. 9 Ex. 151.

38. The alternative is to apply to the Court for a declaration that consent has been unreasonably withheld. This is potentially cumbersome and time-consuming, but has the advantage of security. Unless the landlord's refusal is so blatantly unreasonable that the landlord would be certain to lose any claim to enforce the covenant against the tenant, proceeding with the act which is prohibited without the landlord's consent without a declaration from the Court carries a risk of enforcement action by the landlord.

39. A standard proviso that consent is not to be unreasonably withheld does not create a contractual obligation on the part of the landlord to give consent unless it is reasonable to withhold it: see *Treloar v Bigge* (above). So, contractually, there is no cause of action for damages against a landlord who unreasonably withholds or delays giving consent to alterations or a change of use<sup>8</sup>. However, a landlord who

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<sup>7</sup> See above, para. 28.

<sup>8</sup> Contrast, however, *Ideal Film Renting Company Ltd v Nielson* [1921] 1 Ch. 575, which contained an express covenant by the landlord to give consent unless it was reasonable to refuse it.

unreasonably withholds or delays consent to a proposed alienation may be liable in damages under the Landlord and Tenant Act 1988.<sup>9</sup>

40. Under the LTA 1988, the landlord must state his reasons in writing within a reasonable time and once that reasonable time has elapsed, consent is taken to have been unreasonably withheld if it has not been granted or reasonably refused: see above, para. 19. If the reasonableness of the landlord's decision is later challenged by the tenant, the landlord is confined to the reason stated in writing in compliance with this statutory duty even if the landlord's decision was, in fact, influenced by other reasons.

41. The position is different, however, in relation to reasons for withholding consent to alterations or change of use. If the tenant proceeds to alter / change the use without consent (based on the principle in *Treloar v Bigge*, above), the landlord is confined to the reasons stated to the tenant before the assignment took place. However, where the tenant applies for a declaration that consent has been unreasonably withheld, the landlord is entitled to supplement the reasons previously stated to the tenant at any time down to the hearing of the application<sup>10</sup> (but not on appeal<sup>11</sup>). But, the landlord must satisfy the Court that previously unstated reasons did actually influence his mind at the time of the refusal and are not mere afterthoughts: *Bromley Park Garden Estates Ltd v Moss* (above), *Blockbuster Entertainment v Leakcliff Properties Ltd* [1997] 1 EGLR 28.

42. Where the landlord's reasons include good reasons and bad reasons for withholding consent, unless the good reason is vitiated by the bad reason, consent will nevertheless have been reasonably withheld on the basis of the good reason: *British Bakery (Midlands) Ltd v Michael Testier & Co Ltd* [1986] 1 EGLR 64, *BRS Northern v Templeheights Ltd* [1998] 2 EGLR 182.

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<sup>9</sup> See above, para. 25.

<sup>10</sup> *Sonnenthal v Newton* (1965) 109 Sol Jo 333, *Bromley Park Garden Estates Ltd v Moss* [1982] 1 WLR 1019.

<sup>11</sup> *Lovelock v Margo* [1963] 2 QB 786.



## Case-Studies

### SCENARIO 1

A four-storey building in Wimpole Street is subject to a 99-year lease, granted in 1938. When the lease was granted, the building had just been converted from a house into offices and the original tenant used it for that purpose. The lease contains no user covenant. There is a tenant's covenant "*not to make alterations without the landlord's consent*".

A recent assignee of the lease wishes to convert the building back into a house. The works will fall within the scope of the alterations covenant. The lessee requests the landlord's consent. The landlord refuses consent on the ground that if the building is converted, the lessee will acquire rights of enfranchisement under the Leasehold Reform Act 1967.

The tenant threatens to challenge this refusal of consent by applying to the Court for a declaration.

You are asked to advise the landlord.

Would it make any difference if the building were significantly larger and the proposed alterations were intended to convert it into flats?

Would it make any difference if the lease was granted for a term of 999 years rather than 99 years?

#### Issues to consider

- (1) Although the alterations covenant is not expressed to be subject to the proviso that consent cannot be unreasonably withheld, under s.19(2) of the LTA 1927, this proviso is implied in relation to "improvements". The test is whether the alterations amount to improvements from the perspective of the tenant. That will almost certainly be met. So, consent cannot be unreasonably withheld.
- (2) Was the landlord's reason for withholding consent a valid one? The test is not whether the court thinks the reason is a reasonable one. Rather, the court must consider whether the decision is one which a reasonable landlord could have reached. If it is, the tenant's claim must fail (see *Iqbal v Thakrar* [2004] 3 EGLR 21, *Dulwich Estate v Baptiste* [2007] EWHC 410 (Ch)).
- (3) In a series of cases decided shortly after the Leasehold Reform Act 1967 was enacted, the court held that a landlord who withheld consent to a proposed assignment to an assignee who would be entitled to enfranchise under that Act was acting reasonably: see *Bickel v Duke of Westminster* [1977] QB 577, *Norfolk Capital Group v Kitway* [1977] QB 506, *Welch v Birrane* (1974) 29 P & CR 102. This reason was accepted by the court as being a reasonable basis for withholding consent to alterations, in *Henley v Cohen* (not appealed on this point; CA decision reported at [2013] 2 P & CR 10).
- (4) However, this line of authority was distinguished in *Mount Eden Land Ltd v Bolsover Investments Ltd* [2014] EWHC 3523 (Ch). There, the lease was a 999-year lease (granted in the early part of the 20<sup>th</sup> century). The building was in Central London and the landlord withheld consent to the proposed alterations on

a number of grounds, all of which were held to be unreasonable at trial. The landlord appealed, relying only on the ground that if the building was converted into flats, those flats might be sold off on long leases, the lessees might then combine to collectively enfranchise and buy the freehold. The trial judge held that the decision of the landlord on this issue was an unreasonable one in the circumstances of the case since (a) the landlord's reversion was postponed for 900 years, (b) a majority of the lessees would be required to combine to enfranchise and (c) under the Leasehold Reform, Housing and Urban Development Act 1993 a landlord was intended to be fully compensated for having to cede his reversion all made. On appeal, it was held that the trial judge was entitled to reach this decision, distinguishing the earlier decisions on the ground that (a) the price payable (at the time of those decisions) under the 1967 Act did not fully compensate the landlord for the loss of the reversion and (b) those cases were concerned with the fag-end of a long lease rather than a reversion which was postponed for several hundred years.

**The landlord, in its Defence, advances, as a reasonable reason for withholding consent (a) the point previously raised relating to enfranchisement rights and (b) a new point about the letting value of adjoining buildings held by the landlord.**

- If the request related to alienation and the LTA 1988 Act applied, the landlord would be restricted to reasons notified to the tenant in writing within a "reasonable time" of the request. However, in relation to other forms of qualified covenant, including alterations, the landlord is not so restricted. In principle, therefore, it might be said that the landlord can conjure up new reasons, down to trial, if those reasons provide a justification for withholding consent (see e.g. *Sonenthal v Newton* (1965) 169 Sol Jo 333). However, it is now reasonably well established that if the landlord wishes to introduce a new reason, he must also show that it was a reason which affected his decision at the time consent was refused: *Bromley Park Garden Estates Ltd v Moss* [1982] 1 WLR 1019, *Blockbuster Entertainment v Leakcliff Properties Ltd* [1997] 1 EGLR 28.

**The tenant ultimately succeeds at trial. It has taken 18 months since the landlord's refusal of consent to get a declaration from the court (the High Court having transferred the case to the Central London County Court of its own motion and the CLCC having expedited the trial, only for the trial to be relisted because of a shortage of judges). By then, the tenant has lost its potential j.v. partner for the development of the building with losses estimated at £0.5 million.**

- The tenant has no redress against the landlord. There is no equivalent in relation to an alterations covenant to the statutory duty under s.1 of the LTA 1988 to give consent within a reasonable time unless it is reasonable to withhold it. Even where the covenant contains an express proviso not to unreasonably withhold consent, that does not operate as a covenant to give consent unless it is reasonable to withhold it (although such covenants have been known to exist: see *Ideal Film Renting CO Ltd v Nielson* [1921] 1 Ch 575).

- The only option for the tenant is to proceed with the alterations, putting the onus onto the landlord to apply for an injunction to restrain the work from progressing. This, of course, presents risks and the more substantial the programme of work, the less convenient it will be to take those risks. Alternatively, the tenant can seek to have a trial expedited. Aside from administrative errors at the CLCC, the court ought to be reasonably sympathetic (and the urgency might justify retaining the case in the High Court where it is usually straightforward to achieve expedition, as to which see *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2009] EWHC 3204 (Ch)).

## **SCENARIO 2**

**The same building in Wimpole Street continues to be subject to a 99-year lease, granted in 1938. The tenant has spent all its money on litigation and can no longer afford to carry out the proposed alterations, and therefore decides to assign the lease to a new tenant instead.**

**The lease contains a qualified covenant against assignment which goes on to state, “...such consent not to be unreasonably withheld PROVIDED ALWAYS that any refusal by the lessor to consent to any particular assignment shall not be deemed to be unreasonable where the lessor at the time of refusing consent offers to accept a surrender of the tenancy and in the event of any such offer being made by the lessor the lessee ... shall either ... withdraw its application for the lessor's consent to assign ... the said premises or shall surrender to the lessor the tenancy hereby created.”**

**The tenant doesn't wish to surrender the lease, which is valuable. You are asked to advise the tenant as to whether or not he must offer to surrender.**

- Note that this lease is an old lease, so the amendments to section 19 of the Landlord and Tenant Act 1927 – and in particular the insertion of section 19(1A) – don't apply.
- In *Bocardo v S&M Hotels* [1980] 1 WLR 17, Megaw LJ said (at 22), “...as a result of section 19 (1) the parties cannot by the terms of their contract abrogate the right and duty of the court, in the event of a dispute as to the reasonableness of the withholding of consent where consent is required by the terms of the lease, to decide by all objective standard whether or not the refusal is reasonable. Thus, if the parties by their contract purport to say that in such and such circumstances the landlord may withhold his consent, that term of the contract is invalid and is to be disregarded. The court itself decides whether in the circumstances which actually exist the refusal of consent is reasonable.”
- The form of covenant here is based on the one considered in *Re Smith's Lease, Smith v Richards* [1951] 1 All ER 346. Unsurprisingly, the Court found that this clause represented an attempt by the parties to decide what was or wasn't to be deemed reasonable and thus fetter the court's discretion. By seeking to determine that question, the clause falls foul of section 19(1) of the LTA 1927.

**Would it make any difference if the proviso read, “PROVIDED that should the tenant wish to assign he must before doing so offer in writing to surrender the lease for no consideration, the landlord being deemed to have rejected that offer if not accepted within 21 days.”**

- This variation demonstrates that, even without the benefit of section 19(1A), careful drafting can achieve the same result as was attempted in *Smith*. This version is based on the clause in *Adler v Upper Grosvenor Street Investment* [1957] 1 WLR 227 per Hilbury J. It was expressly distinguished from the provision in *Smith* because it constituted a condition precedent to the coming into operation of the covenant allowing assignment with consent, and therefore was found not to offend section 19(1). Obviously the distinction is rather narrow, but it was approved in *Bocardo*.
- Note that if the lease had been a new lease (as defined by the Landlord and Tenant (Covenants) Act 1995), the landlord and tenant would be entitled to specify, for the purposes of section 19(1A), specific circumstances in which the landlord is entitled to withhold consent, and conditions subject to which consent may be granted without either being considered unreasonable, which makes this sort of distinction nugatory.
- Importantly, though, the modified version of section 19(1) only applies to assignments properly so-called. If the proposed alienation were an underletting, it would not assist (see the wording of section 19(1A)(a)). In addition, by section 19(1E), an agreement specifying such conditions cannot be made in relation to a residential lease – a ‘qualifying lease’ is a new lease which is not residential. Care must therefore be taken in considering whether or not such provisos are effective.

**The tenant makes the offer to surrender, but the landlord refuses. The tenant therefore writes to the landlord seeking consent for the assignment. The landlord replies demanding financial references for the proposed assignee and a copy of the proposed assignment before he will make a decision. The tenant refuses to supply a copy, and three months pass. What should the tenant do?**

- Although the lease is an old lease, we have been told that these events are taking place ‘recently’, and therefore the Landlord and Tenant Act 1988 does apply and the landlord is subject to the duties in it.
- The landlord is entitled to ask for further information, as long as he seeks it clearly and promptly. Thus, in *Norwich Union Life Assurance Society v Shopmoor* [1999] 1 WLR 531, the landlord was precluded from relying on its concerns about the financial standing of a proposed assignee where it had not sought information about that matter within ‘a reasonable time’ as the statute requires. So whether or not the request for financial information here is legitimate will depend on when it was raised.
- Interestingly, though, the landlord is not entitled to see a copy of a proposed assignment, and of any premium or reverse premium paid for it, even though any such payments might impact upon the financial standing of the assignee: see

*Kened v Connie Investments* (1995) 70 P&CR 370, CA. This is in contrast to the position where the proposed alienation is a sub-letting, where the landlord is entitled to see a copy of the sub-lease: see *Fullers Theatres and Vaudeville v Rofe* [1923] AC 435 at 440ff per Lord Atkinson.

- The tenant can simply assign now, or seek the usual declaration and damages, if appropriate.

### **SCENARIO 3**

A lease contains an absolute covenant against assignment and a covenant not to underlet without consent. The tenant seeks the consent of the landlord to an underletting of the premises. The landlord's solicitors respond, in the following terms:

**Subject to Licence**

***Our clients are prepared to consent to the proposed underletting subject to your client and the proposed sub-tenant entering into a formal licence. Our conveyancing department will send a draft licence for your approval.***

***Yours faithfully***

A draft licence was supplied to the tenant's solicitors a few days later. The tenant did not acknowledge it and went ahead and completed the underletting. The landlord threatens to forfeit the lease.

- The tenant is probably not in breach of covenant because the landlord's solicitors letter consented to the underletting. The words "subject to licence" do not have the same effect as "subject to contract" where parties are negotiating a bilateral agreement. It is not possible to give consent subject to entering into a licence. Either the landlord consents to the underletting or he doesn't: *Mount Eden Land Limited v Prudential Assurance Company Limited* (1997) 74 P & CR 377.

What if the landlord's solicitors responded to the request for consent in the following terms:

***"Our client has no objections to the underletting. We enclose a copy of our client's standard-form licence for underletting which we would ask your client to execute. In the meantime and pending completion of that document, nothing in this letter is intended to or does amount to our client's consent to your client's proposed underletting."***

- The more emphatic statement that the landlord is not giving consent to the underletting without entering into a licence might distinguish this form of letter from the more loosely drafted letter which relies on the term "subject to licence" but otherwise makes it clear that consent is given. The answer, in every case, will depend on the context.

**After the underletting is completed, the landlord learns that the director and sole shareholder of the proposed undertenant had recently been convicted of health and safety and food hygiene offences in connection with nearby restaurant premises which he ran and which had been forced to close. The landlord is**



**particularly concerned because the undertenant intends to run a café from the demised premises which are in the landlord's shopping centre. The landlord seeks advice as to whether he can revoke his consent on the ground that a material piece of information about the sub-tenant was withheld. The landlord has approached his tenant who says that he knew nothing of the undertenant's convictions.**

- The likely answer is that the consent cannot be revoked. Once consent is given, it is irrevocable. Similar facts arose in *Mitten v Fagg* [1978] 2 EGLR 40 and it was held that the consent is not nullified and cannot be revoked if material information is not provided, at least where that information is not known to the tenant seeking consent.
- Would it make any difference if the tenant knew of the undertenant's convictions but remained silent? This is, perhaps, more of a moot point. On the one hand, a tenant is not obliged to proffer information to the landlord. The landlord can request information and the tenant is obliged to provide such information, truthfully, to the best of his ability.
- In *Sanctuary Housing Association v Baker* (1998) 30 HLR 809, the housing association's consent to an assignment of a secure tenancy was nullified on the ground that it was unravelled by the fraudulent conduct of the tenant who had deliberately misinformed the landlord in order to procure the landlord's consent. Where a tenant remains silent about characteristics of a proposed undertenant which the tenant knows will be material to the landlord's decision-making process, does that entitle the landlord to set aside or revoke his consent? If the landlord has not requested information about the undertenant (or assignee) which might include the withheld information, the landlord's position is difficult. In general, a landlord cannot complain about relevant information not being provided if it has not been sought.
- However, if the tenant deliberately withholds information which is requested or deliberately provides false information, consent given in reliance on that false information will be capable of being set aside or revoked. If, as in *Sanctuary Housing v Baker*, the underletting or assignment has been completed, that transaction is not avoided by the revocation of the landlord's consent, but the landlord will have good grounds for forfeiting the lease or for seeking injunctive relief against the tenant and undertenant on the ground that the consent is nullified on the ground of the fraudulent answer to the landlord's question. Query, however, whether the consent would be capable of being withdrawn if the tenant has acted on it by granting an underlease to the undertenant who is unconnected with the tenant's fraud.
- It is not clear what the position would be if the tenant, in response to a question from the landlord, provided false information believing it to be true. This would not amount to fraud (because of the absence of an intention to deceive). If a material misrepresentation is made, negligently, which induces a party to enter into a contract, the contract is liable to be set aside for misrepresentation. In

principle, this ought to apply, also, to a unilateral act, such as consent to an underletting etc. However, if the consent cannot be set aside (e.g. because it has been acted upon by the tenant by granting the underletting), the landlord might have a claim for damages for negligent misrepresentation if the landlord has been caused loss (e.g. as owner of the shopping centre).

#### **SCENARIO 4**

**Another property in Wimpole Street is let on a lease granted in 2005 for 12 years. That building consists of a high-class restaurant serving quality French food on the ground floor, with offices on the upper floors. The lease expressly incorporates the provisions of section 196 of the Law of Property Act 1925. It contains no express user covenant. The alienation covenant is in the usual qualified form.**

**The tenant wishes to assign the lease to a fashion retailer, which is currently occupying a different, much smaller, property nearby, under a lease granted by the same landlord. The landlord is also a fashion retailer operating from a further shop in the close vicinity, and the proposed fashion retail tenant is a close rival.**

**The tenant emails the landlord setting out a formal request for consent to the proposed assignment.**

**Four weeks later, the landlord replies in writing, citing the following grounds for refusing consent:**

- a) The landlord objects to the assignee's proposed user as a fashion retailer;**
- b) There are breaches of the repairing covenants in the upper parts of the building – in particular the roof is leaking; and**
- c) The lease is due to be renewed soon, and although the assignee can probably afford the current rent, the rent is likely to rise dramatically and it probably won't be able to afford the increased rent.**

**The Tenant immediately telephones the landlord to object. The landlord says that it considers its decision to be reasonable, particularly because:**

- a) The proposed assignee is a competitor and the landlord doesn't want its business operating so near to its own;**
- b) The landlord doesn't wish to lose the assignee as its tenant of the smaller building, which will be hard to re-let; and**
- c) The landlord is concerned that the proposed assignment will reduce the value of his reversion, because the restaurant business is very popular.**

**The tenant issues proceedings seeking a declaration that consent has been unreasonably withheld. In its defence, the landlord cites all six reasons given above, pointing out that they were not only the reasons operating on its mind at the time, but also that they were all communicated to the tenant within a reasonable time. The tenant seeks your advice as to its prospects of success in the claim.**



- The landlord has responded to the tenant's request in writing, as the 1988 Act requires, and four weeks is probably just about on time, particularly if the tenant hasn't indicated that there's any great urgency. So the main question here is as to the substance of the matters raised by the landlord.
- The usual principles apply, as set out in *International Drilling* etc – see the handout. So among other matters, the reasons must relate to the relationship of landlord and tenant, and be matters on which a reasonable person might rely.
- As to the proposed user, it is possible for circumstances to exist where a landlord can reasonably refuse consent to a use which does not breach the user covenant: *Bates v Donaldson* [1896] 2 QB 241 at 244 per Kay LJ. In *Rossi v Hestdrive Ltd* [1985] 1 EGLR 50, the Court found that a user covenant limited to a 'high class restaurant or retail shop' did not necessarily preclude the proposed user as a restaurant with some take-away, but that it was potentially reasonable for the landlord to rely on that concern (though in that case other concerns weighed more heavily). That would be much harder to justify here, where the proposed user is more in keeping with the area.
- As to the disrepair, whether or not a refusal on this basis is reasonable depends on the seriousness of the breach and whether or not the assignment will prejudice the landlord. A continuing breach of a disrepair covenant (so that consenting to assignment will not entail that the right to forfeit is waived and permanently lost) which is minor will not be a proper basis for a refusal: *Straudley Investments Ltd v Mount Eden Land* [1997] E.G.C.S. 175. But longstanding serious breaches can be a good basis, unless the landlord can be satisfied that the incoming tenant will remedy them: see eg *Crestfort v Tesco Stores* [2005] 37 EG 148.
- Obviously, whether or not the assignee can pay the rent and comply with the lease covenants is central to the question of consent. But it is only the rent under the current lease, which is to be assigned, which matters, so this is not a proper ground for refusing consent: *Design Progression Limited v Thurloe Properties Limited* [2004] EWHC 324 (Ch).
- It has been held to be reasonable for the landlord to refuse consent to an assignment to a business competitor: *Whitminster Estates v Hodges Menswear* (1974) 232 E.G. 715 and *Sportoffer v Erewash Borough Council* [1999] E.G.C.S. 37. *In the context of a shopping centre, he may also be entitled to refuse consent to an assignee who will compete with other tenants. Query, though, how the Competition Act might interact with those decisions.*
- The landlord is entitled to take into account matters affecting his general property interests in considering whether or not to grant consent: see *Re Town Investments Limited Underlease* [1954] Ch 301. Thus an assignment whose effect was to make another property in the neighbourhood harder to let might be the subject of a reasonable objection. However, refusing consent because of the difficulty of re-letting a separate property is relevant neither to the relationship of landlord and tenant in the subject premises nor to the personality of the proposed assignee, and has therefore been found not to be a proper ground for a refusal of consent: see *Re Gibbs and Houlder Bros & Co. Limited's Lease* [1925] Ch 575. The distinction

appears to be that it is not the assignment which is causing the problem – the other property is hard to re-let anyway.

- Whether or not the feared diminution in value of the reversion is relevant depends on the landlord's plans for it. If it is merely a paper loss, because the landlord intends to retain the property, it will not be a proper basis for a refusal of consent: see *International Drilling Fluids v Louisville Investments (Uxbridge) [1986] Ch. 513*, but note the very strong findings of fact in that case which have been said subsequently to have informed that outcome (*NCR v Riverland Portfolios No 1 (No 2) [2005] 22 E.G. 134 (CA)*). Where the landlord intends to sell his reversion soon, or has a proper basis for fearing that the proposed assignment will reduce rents in this or nearby properties and so his income, that is probably a good reason to refuse consent: *Ponderosa International Development v Pengap Securities (Bristol) [1986] 1 E.G.L.R. 66* and *FW Woolworth v Charlwood Alliance Properties [1987] 1 E.G.L.R. 53*.
- In any event, the landlord cannot rely on the three additional reasons, even though they were given orally at the relevant time. The reasons must be given in writing: see *Go West v Spigarolo [2003] EWCA Civ 17* citing with approval dicta of Sir Richard Scott V-C in *Norwich Union Life Insurance Society v Shopmoor Ltd [1999] 1 WLR 531, 545* and Neuberger J in *Footwear Corp'n Ltd v Amplight Properties Ltd [1999] 1 WLR 551, 559-560*.
- There is a further issue here, however. The tenant's initial request was sent by email, rather than in writing. Accordingly, it probably failed to satisfy the requirements of section 196 of the Law of Property Act 1925, which requires physical delivery, directly or in the post. That entails that it may never have made a valid request, and the entire process is a nullity, imposing no obligation whatever on the landlord: see per Arnold J in *E.ON UK Plc v Gilesports Ltd [2012] EWHC 2172 (Ch)*. In that case, the tenant attempted to establish that lengthy negotiations had established an estoppel by convention, but the Court found on the facts that there was no estoppel entailing that the 1988 Act was engaged, and that consequently none of the duties under that statute arose at all.

**The Court finds here that the landlord has been unreasonable. The tenant claims damages under section 4 of the 1988 Act because the arrangement with the assignee has collapsed and the transaction can no longer proceed. The assignee has suffered significant losses, having assumed that the transaction would go ahead, in instructing architects and builders to consider how it might re-model the new premises for its own purposes, which sums have been wasted as a result of the landlord's breach of his duty under the 1988 Act. Should the assignee be joined to the proceedings to claim those sums?**

- The duties under the 1988 Act are owed to 'the tenant', and therefore the remedy in damages under section 4 is not available to the assignee.

## **SCENARIO 5**

**A 99-year lease contains a covenant preventing the tenant from using the premises otherwise than for retail or office purposes on ground floor and**

**basement levels and as a self-contained flat on the first and second floors or such other use to which the landlord provides his consent in writing. There is no covenant against alterations.**

**The tenant wishes to extend the building, by adding two further storeys and to create a small boutique hotel. This will require the landlord's consent to change the use. The landlord has indicated that he will give his consent but only if the tenant pays him £500,000.**

- The tenant has very little leverage. Although the covenant is qualified, it is not subject to the proviso that consent cannot be unreasonably withheld. There is no basis for implying such a proviso: see *Guardian Assurance Co Ltd v Gants Hill Holdings Ltd* [1983] 2 EGLR 36.
- Under s.19(3) of the Landlord and Tenant Act 1927, the landlord is precluded from requiring payment of a “fine” and the sum of £500,000 would fall foul of that prohibition. However, that only arises if the change of use does not involve making structural alterations to the building.

**Would it make a difference if the tenant were able to reconfigure the interior of the premises without carrying out the extension or making any other structural alterations in order to convert them to hotel use?**

- Even if it weren't for the structural alterations, the fact that the landlord is not restricted to reasonable grounds for withholding consent means that the landlord can, in effect, refuse to grant consent to the change of use without a payment, so s.19(3) serves little purpose if the user covenant is not subject to an implied proviso that consent cannot be unreasonably withheld.
- If the tenant's intention is to undertake the structural alterations after the use has been changed with the landlord's consent, the question arises whether the request for consent to the change of use engages s.19(3) on the ground that it nevertheless “involves” structural alterations.
- The causal connection between the change of use and structural alterations was considered in *Barclays Bank v Daejan (Grove Hall) Ltd* [1995] 1 EGLR 68, where it was held that the test is wider than necessity. The fact that structural alterations are not a necessary consequence of the change of use does not, itself, bring the request for change of use within s.19(3). Rather, the question is whether the structural alterations are either included in or are part of the tenant's actual proposal to change the use. So, even where there is to be delay between the implementation of the proposed change of use and carrying out structural alterations, the change of use might still be said to “involve” structural alterations if, in reality, they are part of the same project.

**What if the user covenant contained a proviso that consent was not to be unreasonably withheld?**

- Irrespective of s.19(3), in these circumstances, it would, almost certainly, be difficult for the landlord to justify claiming a premium for the change of use. When



exercising the power to give or withhold consent, the landlord must act reasonably, in accordance with the principles in *International Drilling Fluids v Louisville Investments (Uxbridge) Ltd* [1986] Ch. 513.