

# LEGAL ALERT

APRIL 2003

## PROPERTY BULLETIN

### FORCING LANDLORDS' HANDS ON ASSIGNMENTS

Alienation covenants can create problems for both landlords and tenants, and each side must take the necessary precautions.

Landlords who unreasonably refuse consent to an assignment or underletting may be liable in damages. Assignees who take assignments without consent may be forced to vacate.

#### Reasonable Behaviour

A landlord must prove that he was acting reasonably in refusing consent, otherwise he may face a statutory damages claim for any loss.

#### A landlord has a duty to:

1. give consent unless it is reasonable not to do so, and
2. give the tenant written notice of his decision specifying any conditions and, if consent is withheld, provide his reasons.

If giving consent, the landlord must show that he did so within a reasonable time. He also has to demonstrate the reasonableness of any conditions or refusals. Each claim of alleged withholding of consent must be considered on its own merits.

In a recent case the alienation provisions were in standard form namely not to assign or sublet without the landlord's previous written consent which was not to be unreasonably withheld.

The tenant applied for consent to sublet part. Three months later, the landlord having failed to give consent, the tenant started proceedings for a declaration that the landlord was unreasonably withholding consent and for damages.

#### Two important questions were raised:

1. Could a landlord insist on a full copy of the proposed underlease before considering the application?

The answer to this was no. He was only entitled to information which would enable him to understand the transaction and make a sensible decision. It may be reasonable to impose a condition that consent is subject to the approval of the underlease.

2. Could a landlord insist on an undertaking for the discharge of all his costs before dealing with the tenant's request?

The answer to this is no. The landlord's insistence on an undertaking that amounted to an indemnity for all

his costs before dealing with the application was unreasonable. The parties to this case accepted however that it was generally agreed that a landlord who insisted on an undertaking being given for payment of his reasonable costs before progressing an application for consent would not be acting in breach of his statutory duty.

Further case law illustrates that a landlord would be entitled to more detailed information on a sublease (as opposed to an assignment), since he is directly concerned with its terms.

#### Unauthorised Tenants

The tenant may assign or allow a third party into occupation without applying to the landlord. If the tenant becomes insolvent, the purchaser of its business will often be allowed into occupation possibly under a licence, immediately following insolvency. This is not without risk.

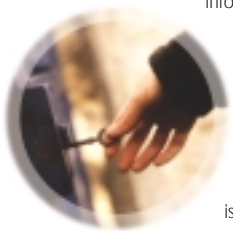
In a recent case, the subtenant went into possession under a sublease that both parties knew constituted a breach of the alienation covenant.

The alienation provisions were heavily in the landlord's favour, providing that the tenant would not assign, underlet, share or part with possession of the premises save as permitted under various provisos. The provisos included a condition precedent requiring a direct covenant with the landlord and prior approval of the underlease.

Following a merger, the premises were no longer needed, but short term occupation was required while the business relocated.

The landlord began possession proceedings, and applied for a mandatory injunction to force the occupier to vacate. The occupier offered to leave on the expiry of its short underlease. The court found that there was no defence despite coming to court only a month or so before the date upon which the occupier's undertaking to vacate would have taken effect. The court ordered possession to be given within three working days. Where there is a clear breach of covenant and a tough landlord, an unauthorised occupier could find its business disrupted.

In summary, there are many issues to be aware of in drafting and negotiating alienations provisions in leases. When in doubt - take legal advice.



2003

# Rollits

SOLICITORS

a h i g h l e v e l o f s u p p o r t

#### IN THIS ISSUE

- FORCING LANDLORDS' HANDS ON ASSIGNMENTS
- PASSING RENT
- \*CON\*... 29DW
- SHARED OWNERSHIP LEASES AND STAMP DUTY

## PASSING RENT

In times when premises are over-rented, tenants often use the ability to sublet as they are able to provide more favourable terms than the head lease. However, most alienation covenants provide for pre-conditions which the tenant must satisfy to be able to proceed, for example, a sublease must reserve a rent not less than the passing rent or open market rent (whichever is the greater). Customarily, tenants have adopted the practice of using collateral agreements with their subtenants to achieve the more favourable terms for them, whilst keeping the sublease in terms required by the head lease.

Following the case of **Homebase Ltd and another v Allied Dunbar Assurance plc** [2002] EWCA Civ 666 there will no longer be an easy way for tenants to achieve such a desired effect. In that case, the Court of Appeal upheld a High Court decision that a sublease and any collateral agreement have to be read together and the effect in that case was that a collateral agreement

giving a rent rebate and reducing the subtenant's repair liability was construed as being in breach of the terms of the head lease.

In considering any application for consent to a proposed subletting, landlords should ensure that the tenant's intentions are fully declared. If the tenant is intending to give a rent rebate to the proposed subtenant pursuant to a collateral agreement, then the landlord has a clear right to object to such a subletting.

Likewise, tenants should bear in mind that unless the lease expressly authorises collateral agreements, they should not rely on being able to use such devices at a future date. Accordingly, a tenant which envisages the need to sublet is advised to ensure at drafting stage that the alienation provisions of the lease are sufficiently flexible so as to permit sublettings in a declining market, because by the time it is decided that such a subletting is required, it may be too late!

## SHARED OWNERSHIP LEASES AND STAMP DUTY

In the "Good Old Days" when freehold (100%) values were 60k or less a simple S97 or S108(LSE) election in the Lease (as appropriate) disposed of the stamp duty issue – it wasn't payable.

Unfortunately, the increase in house values has dragged the luckless 'Low Cost Home Ownership' buyer into Stamp Duty liability which they can ill afford. However, some legitimate avenues of escape or mitigation are available.

There is no Stamp Duty if

1. the Premium is £60K or less AND the rent is less than £600 per annum.

2. if the 100% value is £60k or less with the appropriate S97 or S108 election

3. If 100% of the value is over £60k but less than £150k AND the unit is in a 'Disadvantaged Area' (FA2001). Then you can use a S97 or S108 election and be assessed for duty on the freehold and no duty will be payable. (Without the elections duty would be payable on the rent as the exemption only applies to premiums).

In case where 100% values are over the £60k threshold and no "Disadvantaged Area" relief is available, the level of duty can be somewhat mitigated by reducing the term of the Lease to 99 years from the "standard" 125 years this reduces the rate of duty on the rent from 24% to 12%.

## " CON " ... 29DW

Since water companies adopted the Con29DW format for their drainage reports, they have tried to limit their liability significantly in respect of the same:

i) liability is excluded for failure arising from any defect in any machine, processing system or transformation link, or anything beyond their reasonable control;

ii) if the report is to be used other than in relation individual domestic property transactions, liability is limited to £5,000 (save in cases of death or personal injury arising from negligence).

The Law Society announcement of Con29DW states that water companies will stand by their results in relation to individual domestic properties by connecting such properties to mains drainage and water if a property is purchased in reliance on an incorrect confirmation of connection.

However, if a report is to be obtained for commercial properties or for a commercial development of domestic properties, the water companies' liability will be limited to £5,000. Purchasers should therefore be aware of the limitation of such reports and are advised, particularly where development is envisaged, to carry out a drainage survey and inspection.

## INFORMATION

**If you have any queries on any aspect of Property Law please contact:**

**Martyn Justice at Hull on (01482) 323239  
Carol Bailey at York on (01904) 625790**

This bulletin is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this bulletin useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

**The law is stated as at 1 April 2003.**

**Wilberforce Court, High Street,  
Hull HU1 1YJ**

**Rowntree Wharf, Navigation Road,  
York YO1 9WE**

**www.rollits.com**

