

## APPLICATIONS FOR CONSENT TO ASSIGN - THE LANDLORD'S DILEMMA

The landlord's primary objective is to have as tenant a respectable and responsible person of sufficient financial standing to be able to pay the rent and perform the other obligations of the tenant in the lease. The status of the occupying tenant affects the investment value of the landlord's reversionary interest should the landlord want to sell his interest during the term of the lease.

Most modern leases at a market rent contain provisions prohibiting assignment by the tenant without the consent of the landlord such consent not to be unreasonably withheld. A lease entered into since 1st January 1996 will also generally contain a list of circumstances in which it is reasonable for the landlord to refuse consent to assign. The most important of these circumstances is that in the reasonable opinion of the landlord the proposed assignee has insufficient financial standing to enable him to comply with the tenant's covenants in the lease.

When the tenant applies for consent to assign the lease the landlord has a duty to:

1. Respond in writing within a reasonable time giving his decision
2. To include in his written response either any conditions subject to which his consent is given or his reasons for refusing consent.

So the onus is on the landlord to evaluate the applicable alienation provisions in the lease, assess the status of the proposed assignee and notify his decision to the tenant promptly. Not necessarily an easy call where the landlord is under pressure from both the tenant and the proposed assignee who for their own commercial reasons want to complete the transfer of the premises immediately but can only produce limited financial accounts for the proposed assignee's business and the references for the proposed assignee are either qualified or given without responsibility.

Nevertheless a refusal by the landlord to consent allows the tenant to commence court proceedings in which the landlord must show that the reasons given in his response (reasons not set out in his response being inadmissible) refusing consent are reasonable and were given in time. If the landlord fails in this the tenant will have the right to assign and in addition to his legal costs possibly a right to damages.



The court will reach its decision in the particular circumstances of the case but some guidance is available from decisions in previous cases. If the landlord does not respond within a reasonable time this is a deemed refusal of consent without reasons. A reasonable time for the landlord to respond in more complicated cases is two to three weeks from his receiving all the background information requested about the proposed assignee. References that are unsatisfactory are grounds for refusal. The landlord need not give much weight to qualified references. Trading accounts for the business of the proposed assignee should show profits sufficient to pay the rent and perform the other obligations of the tenant in the lease but the court has stated that there is no rule of thumb that a proposed assignee should have profits after tax equal to or greater than three times the rent before he can be regarded as a satisfactory prospective tenant. The nature of the business of the proposed assignee and general economic conditions are also relevant.

Is a landlord safe in refusing consent if the trading accounts for the business of the proposed assignee show a loss? The court has now said in a recent case that it is artificial in the case of a small one man, or two person private company to look solely at the balance sheet and profit & loss account crude figures in deciding whether or not it is financially sound. If one does so restrict oneself then no doubt the answer would have to be that the company was not financially sound, since it made a loss and it had a net deficiency in that its liabilities exceed its assets. But the court went on to find in the particular circumstances of this case that consent was unreasonably withheld because the losses of the business arose from the historic drawings policy of the directors when that policy could, if necessary, immediately be altered and borrowing by the business was guaranteed by the proprietor.

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# HOUSING ACT 2004

The Housing Act 2004, which received Royal Assent on 18 November 2004, seeks to create a better housing market for the most vulnerable in society.

The Act is far reaching and touches on many areas. However, key features of the Act are the introduction of a new housing health and safety rating system (HHSRS) and the licensing of houses in multiple occupation (HMOs) and other residential accommodation. The aims of these features are to regulate the condition of housing and the landlords which own the accommodation.

A new HHSRS scheme has been introduced to replace the old fitness regime set out in the Housing Act 1985. The new fitness test is evidence-based and focuses on a risk assessment of health and safety issues. The separate test for HMOs has also been repealed. It is anticipated that this will allow local authorities more effectively to address problems in their residential properties and to allow them more accurately to determine their suitability for occupation.

The licensing of HMOs which is introduced by the Act, will be compulsory for large higher risk buildings, and discretionary for other types of HMOs where licensing may be necessary to address particular problems. In connection with these issues, a new definition of HMOs has also been introduced by the Act. Local Housing Authorities may also use a licensing scheme for privately rented accommodation provided certain criteria are met. Rent Repayment Orders can be made against Landlords whose premises should have been licensed.

Also under the Act, local authorities have been given the power to tackle low housing demand and anti-social behaviour through a variety of measures,

including the use of management orders, extending the length of introductory tenancies, refusing mutual exchanges and preventing tenants from completing on "Right to Buy" transactions.

The Right to Buy rules have also been changed to extend the initial qualification period for tenants, and the time in which any discount must be repaid. The intention is to reduce profiteering and increase the availability of affordable housing.

In addition, the Act also introduces "Home Information Packs", where sellers are now required to provide the searches and information, including a home condition report, which buyers need to purchase a property. The Government hope that this measure will reduce the time and costs involved in property transactions of this nature. Sceptics remain to be convinced.

Provisions are included to increase the effectiveness of powers to regulate Registered Social Landlords and to enable the Housing Corporation (and the National Assembly for Wales) to pay grants to companies that are not Registered Social Landlords.

As usual nowadays, the Act itself is something of an enabling provision in many respects with the detail to be supplied by secondary legislation from time to time. How the Act actually works in practice is, therefore, likely to be a process of evolution requiring those affected to keep up to date with how the law unfolds and how it will impact on their lives and livelihoods

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## HEDGES

There are many disputes that can arise between neighbours over property rights but one area of concern may be over a high hedge that has been planted on the neighbour's land. This can interfere with the light into your garden and also possibly cause problems with overgrowing branches and roots. Under recently introduced regulations a home owner can now make a complaint to the local authority that the reasonable enjoyment of their property has been affected by the height of a hedge grown on the neighbour's land. The local authority will be able to issue a notice ordering the neighbour to carry out remedial works within a specified period of time and if the neighbour fails to do so the local authority will have powers to carry out the work itself and recover the costs from the neighbour. These regulations apply to hedges of a specified minimum height but they would not apply to a single tall tree.



## COMMONHOLD - A COMMUNITY OF CO-OPERATING FREEHOLD OWNERS

Commonhold is now the alternative to leases for new developments, and whilst it will most often be used in relation to residential developments, developers should also consider its suitability for commercial developments.

The Commonhold and Leasehold Reform Act 2002 and related regulations introduced this new form of landholding from 27 September 2004. Commonhold, which is based on similar systems already in operation around the world, has been introduced alongside the existing leasehold system to combat the inadequacies of that system for dealing with the needs of communal living and working.

The developer retains complete control of the development during the developer's works, but gradually as the flats (or business units) in the development are sold, the common parts of the development (such as stairs and shared gardens) automatically move into the ownership of the commonhold association (a limited company of which the owners of the individual flats are members).

Benefits of Commonhold are:

1. the developer can initially have complete control and then be freed from all involvement in the property once the developer's works have been completed and the flats sold
2. the problem of the value of a flat depreciating as the term of a lease nears its end is avoided as the flat is owned absolutely
3. the control of the common areas is by the owners of the flats themselves rather than by (sometimes!) unsatisfactory landlords

Commonhold therefore provides the residents within a development with a system by which they control their own destiny, whilst allowing developers to be free from involvement in the property once the development has been completed.

This is a relatively new concept and it remains to be seen whether the provisions of the Act will be attractive to developers and their tenants, beyond the scope of the existing law upon residential and business tenancies.

## 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 June 2005**

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