

APPLICATIONS TO ASSIGN OR SUBLET - LANDLORDS BEWARE

Three recent cases in relation to applications by tenants to either assign or sublet their Leases have highlighted what a minefield this area is for landlords and their advisers. Since the Landlord and Tenant Act 1988, landlords have a duty to deal expeditiously with such applications and can be held liable in damages if they delay or unreasonably refuse consent.

*In The Royal Bank of Scotland
v Victoria Street (No.3) Limited
(28 October 2008)*

The Bank applied to assign its Lease to a newly formed company and the Landlord almost immediately refused consent on the basis that the application did not meet the criteria in the Lease that any assignee had to be respectable and responsible. The Landlord appears to have wrongly thought that it could simply rely on this criteria not being met and that it did not have to show that it had also acted reasonably. In this case, the Lease pre-dated the Landlord and Tenant (Covenants) Act 1995 and, therefore, was subject to Section 19(1) of the Landlord and Tenant Act 1927 which requires a landlord to act reasonably and precludes it from dictating what is reasonable and what is not. Fortunately for the Landlord, the Court decided it was reasonable to refuse consent because of the lack of substance of the proposed assignee.

*In Lombard North Central Plc
v Remax Herbarne Limited
(28 November 2008)*

The Tenant succeeded in its claim that the Landlord had unreasonably refused consent to sublet. In this case, the Landlord did not give consent as it objected to the rent that was to be payable under the proposed sublease but the Court was satisfied that this was a market rent and that the Landlord could not prevent a subletting at below the passing rent. The Landlord's fallback position was to argue that it had no duty under the 1988 Act as the Tenant had not complied with the requirement in the Lease to forward a draft Underlease for its approval. The Court also gave this argument short shrift as it noted that the Landlord was fully aware of the principal terms proposed for the sublease and held that the Landlord did have a duty to deal with the application on its merits and any requirement as to the form of the Underlease could be dealt with after consent had been given. As a result of the Landlord's unreasonable refusal to grant consent, the subletting did not proceed and the property remains empty and it is understood that the Landlord is facing a very substantial claim for damages.

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From Chambers UK - A Client's Guide to the Legal Profession 2008

*In Landlord Protect Limited
v St. Anselm Development
Company Limited*
(20 February 2009)

The Court made it clear that a Landlord cannot use an application for consent to assign or sublet to seek to enhance its position. In this case, the Tenant wanted to sell its interest in the property to a newly formed company and the Landlord quite reasonably required that the obligations of the proposed assignee should be guaranteed by a third party. However, the Landlord went further and required that the guarantor should not be released on any subsequent assignment of the Lease unless reasonable alternative security was provided. The Court held that such a requirement was unreasonable because the Landlord was entitled in any event to refuse consent to any further assignment if it was not satisfied with the covenant of the proposed new tenant and it would simply be improving its position if an assignee was acceptable but it was able to keep the guarantor on the hook as well or obtain alternative security in place of his guarantee. As a result of the Landlord's refusal of consent, the proposed assignment of the lease for a premium of some £1million did not proceed and, accordingly, the Tenant may now have a claim for damages as a result of the loss of such sale.

All of the cases above serve to illustrate that there is often a lack of understanding as to

- the extent of a Landlord's rights when dealing with any application to assign or sublet and
- the proper process to be followed by a Landlord or its agents in order to seek to ensure that any decision is reasonable and made within a reasonable time in accordance with the requirements of the Landlord and Tenant Act 1988.

It is particularly important for Landlords to appreciate that, particularly in a falling or difficult market, such applications have to be given priority and decisions made within weeks rather than months. It is also important for Landlords to understand that, if they are minded to refuse consent, it is absolutely essential that they not only make their decision within a reasonable time but they set out their full reasons in writing for refusing consent as they cannot subsequently seek to justify their decision by relying on any reason that was not communicated to the Tenant at the time that the decision was made.

It is clearly prudent for Landlords and their advisers to have systems in place to deal with such applications properly and promptly. Not only do Landlords need to guard themselves against being held liable for damages when they should have given consent but they also need to protect themselves from being held liable in circumstances where they could have reasonably refused consent if they had acted more promptly or given more considered or detailed reasons.

This article offers general guidance, it reflects the law as at June 2009. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.

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