

CONSENTS TO ASSIGNMENT AND SUBLETTING

by

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for the Property Litigation Association Annual Conference

**Keble College, Oxford
Friday, 27th March 2009**

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The following case study (pages 1-4) was used as a vehicle for discussion during Gary's session, and a separate paper of comments (pages 5-10) was issued at the end of the session.

Worsley v Malford Properties Ltd

Ginny Worsley runs a grocery store in Hogwash High Street, Hogwash Organic Green Grocers, through her company Hogg Limited. However, two years ago Tescos opened a big store with a car park about 800 metres down the road. They are open 24 hours a day and what with that and the general downturn in the economy Ginny can no longer cope with the competition. She took the lease a number of years ago when the market was stronger and the rent is now crippling her. She has decided to pack it all in and assign the lease. The lease of the shop was granted in 1997 and is for a term of 15 years, thus expiring in 2012. The lease contains the following relevant terms.

1. The "basic rent" is defined as £20,000 per year or such other sum as may be determined at the rent reviews. The rent is currently £25,000 per year.
2. There is an express covenant not to assign the lease without the consent of the landlord not to be unreasonably withheld but under that clause "the Landlord may withhold consent to an assignment in any of the following circumstances which are specified for the purposes of s19(1A) of the Landlord and Tenant Act 1927". One of the specified circumstances is that "at the date of the application for consent to assign the Tenant is in breach of any of its obligations under the Lease".
3. There is also a clause in the Lease stating that any licence to consent "shall be in the form attached to this Lease at Appendix 1", which is in the form of a Deed. The clause also states that "consent shall not be deemed to have been granted" until the licence to assign "has been executed in the form of a Deed and delivered to the Tenant".
4. There is a covenant "not to underlet the demised premises at a rent less than the basic rent for the time being payable under the lease unless the Landlord shall otherwise agree".
5. There is a covenant restricting user of the shop to that of a grocery shop unless the Landlord gives prior written consent to some other trade or business, such consent not to be unreasonably withheld.

Ginny employed agents to market the lease and they spent a long time trying to get rid of it. However, the rent is too high and it is very difficult to find anybody.

Eventually they did manage to find a limited liability company selling mobile telephones that will agree to take the lease. Shortly after coming to an agreement with the mobile company Ginny received a pack of documentation from the proposed assignees solicitors. That documentation included a letter (a copy of which they asked her to sign and return) stating that the solicitors for the mobile telephone company would make the application to the landlord for consent. She signed the copy and sent it back to the solicitors. Those solicitors then wrote to the landlord identifying themselves as solicitors for the proposed assignee and seeking consent to assign. They enclosed a copy of the letter that Ginny had signed. They also sent the landlord a banker's reference, two trade references and three years of accounts, all of which seemed to show that the company will be good for the rent. One of the directors was also willing to provide a personal guarantee although no evidence was provided of his personal financial situation.

Within a week the mobile phone company's solicitors received a letter from the landlord's solicitors stating that "our clients are in principle prepared to grant consent to enable the Lease to be assigned to your client upon condition that your clients pay our clients reasonable costs and that the Licence to Assign is in the form set out in standard form that is attached to the Lease".

However, another week passes and in that time the landlord discovers that the mobile telephone company has a history of not paying rent on some of its other properties. The landlord has also just discovered (on a recent inspection) that Ginny has a sign on the outside of the shop, which was erected without first asking consent and is thus there in breach of the lease.

The landlord therefore instructs its solicitors to write to the solicitors for the mobile phone company stating that it is not now willing to grant consent. The mobile phone company is not happy and argues that consent has already been granted by the earlier letter from the landlord's solicitors in which it was stated that the landlord agreed in principle to the assignment. What are your views on the following questions:

1. Was a valid application for consent ever made?
2. Has consent been granted?

3. Is the unauthorised installation by the tenant a valid justification for not granting consent?
4. Would an undertaking to remove the sign make good the breach and render the refusal unreasonable?

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You will not be surprised to discover that the proposed assignment to the mobile phone company does not proceed. Ginny has decided to give up trying to assign the property. The rent is just too high. She decides instead to sublet the property at a rent below the “basic rent” (currently £25,000 per year).

A few months later she finds someone who is willing to take a sub-lease. The rent is to be £15,000 per year. This will be a continuing burden to her but at least she will now be able to limit her losses. She is advised that £15,000 represents the market rent. She doesn't think that there will be any problem with the landlord this time as the new tenant wants to use the premises as a grocery shop, so it will not even be necessary to ask the landlord for permission to change use. Imagine her surprise therefore when the landlord objects to the sub-lease. He says she can't sublet at below the basic rent. He is also still going on about the sign on the outside of the property that has not yet been taken down.

What can Ginny do? What should Ginny do?

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March 2009

With thanks to Duncan Freeman for his assistance in the preparation of this session.

CONSENTS TO ASSIGNMENT AND SUBLETTING

Worsley v Malford

Suggested Answers

Was a valid application for consent ever made?

1. An application for consent must be made by the tenant, not the proposed assignee. It is one thing if the proposed assignee or its solicitors are clearly acting as agent on behalf of the tenant but is it absolutely clear that this is what is happening here? The letter that Ginny has signed might be construed as an actual or ostensible authority to apply for the consent on her behalf. We would have to see the complete letter to form any definite view. The lesson however is that if a solicitor for a proposed assignee wishes to act as agent on behalf of the tenant in obtaining consent this should be done without any ambiguity.

Has consent been granted?

2. As a matter of general principle consent can of course be granted by an ordinary letter or email. It does not have to be given in a formal deed. Consent can even be effectively given where the letter is marked "subject to licence" (*Prudential Assurance Co v Mount Eden Land* [1997] 1 E.G.L.R. 37, CA and *Aubergine Enterprises Ltd v Lakewood International Ltd* [2002] EWCA Civ 177). The concept of "subject to contract" is not appropriate to a unilateral act such as the granting of consent. Auld LJ in the *Aubergine* case at para 43:

"The landlord's solicitors' heading of a number of their letters 'subject to licence', coupled with a statement of conditions, did not qualify the plain indication of consent in the body of the letters so as to make it equivocal or uncertain. This follows from the reasoning in [*Mount Eden v Prudential*]... In that case ... Morritt LJ .. said ...

'I do not accept that it is legitimate to extend the principle .. from the field of bilateral negotiations to that of a unilateral act ... In cases requiring a unilateral act **the only question is whether the act occurred**. In truth the heading 'subject to licence' added little to the condition expressed in the body of the letter and could not qualify the unambiguous expression of consent it contained.' " (My emphasis)

3. More recently in *Alchemy Estates Limited v Astor* [2008] EWHC 2675 (Ch) the parties entered into a contract for sale and purchase of a leasehold property. The lease of the property required the landlord's "previous consent in writing" for an assignment of the lease, which was not to be unreasonably withheld. The contract contained provision for either party to rescind the contract if the landlord's consent was not given. The parties initially failed to seek landlord's consent to assign the lease, each expecting the other to make the application. When landlord's consent was eventually sought, the landlord's solicitor confirmed by e-mail that the landlord is:

"... ***in principle*** prepared to grant its consent to enable the Lease ... to be assigned to [the buyer] ... The conditions attaching to the grant of such Licence are (a) the payment of our client's reasonable costs ... and (b) such Licence is documented within the form of the attached draft Licence to Assign ...". (My emphasis).

The email also went on to state:

"Please note that this correspondence ***does not constitute the provision of consent by our client***. Such consent will only be provided on the completion and delivery of a formal Licence executed as a Deed. Please also note that our client reserves the right to change the form of the draft Licence submitted herewith and to impose new conditions to the grant of their licence in light of any further information received". (My emphasis)

4. In an action between the seller and buyer (proposed assignor and proposed assignee) the latter wanted to get out of the contract by arguing (amongst other things) that the landlord's consent to the assignment had not been obtained in time. The main point in the case was that the buyer had lost the right to rescind because it acted too late. However, the judge also held that the landlord's email consenting in principle subject only reasonable conditions was an unequivocal consent. Sales J at para 66:

"Although the consent was expressed to be in principle and to be conditional upon payment of reasonable costs and execution and delivery of a formal Licence to Assign in the form of a deed, it is clear from the terms of standard condition 8.3.3(b) that a consent given subject to certain conditions may be sufficient to prevent the right to rescission under the standard condition from arising or continuing. This was the basis for the decision of the Court of Appeal on a similar issue which arose in *Aubergine Enterprises*: In my view, the expression in Olswang's e-mail of the landlord's consent in principle, subject to certain conditions, satisfied the relevant test for landlord's consent laid down by the Court of

Appeal in that case, which applies to what is now standard condition 8.3. It was consent which was expressed to be subject only to reasonable conditions, and was unequivocal. "

5. The case highlights the difficulty that a landlord's solicitor faces when confirming consent to assign or sublet "in principle". Here, the landlord's solicitor could hardly have spelt out more clearly that consent was not intended to be granted by the e-mail, but the court nonetheless held that consent had in fact been granted. The lesson: Never agree in principle.
6. In our case the lease requires the consent to be in the form of a deed. Does that change the position? Does that mean that consent will only be deemed to have been granted when the deed is executed? My personal view based on the above decisions is "no". Whatever, the lease may say if the court finds on the facts that consent has been given it will be too late to argue that it has not. Whether I am right or not
7. Consider also the landlord's request for costs as a condition to the grant of consent. Such a condition might ordinarily be reasonable. However the terms of the undertaking can themselves amount to an unreasonable condition (see *Dong Bang Minerva (UK) Limited v Davina Limited*)

Is the presence of the sign a valid justification for not granting consent?

8. Section 19(1A) of the Landlord and Tenant Act 1927 (as amended by the Landlord and Tenant (Covenants) Act 1995) is in the following terms:

(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 such licence or consent subject to any such conditions, shall not be regarded as giving it subject to unreasonable conditions;

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

9. Our lease was entered into after these provisions came into force on 1 January 1996. They therefore apply. They are strict. They relate to "any circumstances" specified in the lease. There is no "reasonableness requirement". Our lease refers to any breach, no matter how trivial. The existence of the sign, erected in breach of the lease, is therefore a circumstance specified in the lease as entitling the landlord to refuse consent. Contrast this with a situation where the lease requires substantive performance of the tenant covenants, in which case the erection of a sign might be considered trivial.

10. (Compare s19(1C) where any circumstances or conditions specified in the lease are framed by reference to any matter falling to be determined by the landlord or some other person in which case that person's power must be exercised reasonably or the matter must be determined by an independent person.)

11. Note the following:

11.1. The words "specifying for the purposes of this subsection" would seem to suggest that the lease must contain a reference to s19(1A). (although Master Moncaster thinks not, see *Old English Inns plc v Brightside Limited* unreported 18 May 2004 Ch.D for further commentary see also: *Leases Covenants & Consents*, 2nd edition by Crabb and Seidler QC.)

11.2. The provision only applies to assignments – not sublettings. Thus, the landlord was not entitled to object to it in relation to the sub-letting.

Subletting at below the basic rent

12. The tenant cannot sublet at below the basic rent. Sometimes a tenant might try to get round provisions of this sort by entering into a sublease which complies with lease but also by entering into a secret side agreement with the sub-tenant, for example, agreeing to take only part of the rent specified in the sub-lease.
13. In *Allied Dunbar Assurance plc v Homebase Ltd* [2002] L&TR 27 an attempt to get round the condition that the rent on a sublease should not fall below the basic rent stated in the headlease, by means of a side agreement, failed. The proposed sublease complied with the terms of the head lease but in a side agreement the tenant was to indemnify the sub-tenant against the difference in rent. However, the CA said that the two agreements needed to be read together and as such constituted a breach of the condition.
14. As to the use of reverse premiums to get round the problem of not being able to underlet below a specified rent see *NCR Ltd v Riverland Portfolio No 1 Ltd* [2004] EWHC 921 but note the particular words of the headlease in that case: "Not to underlet .. unless (i) the underlease is granted at the best rent obtainable in the open market without **the grantor** taking any premium or other capital consideration or, if greater, the rent then payable thereunder". The judge noted that "the clause does not make any reference to the granting of a reverse premium and it is not expressly excluded".

And another recent case on another topic – "virtual assignments"

15. In *Clarence House Limited v National Westminster Bank plc* [2009] EWHC 77 (Ch) it was held that where a lease restricts a tenant's ability to dispose of his leasehold interest, a "virtual assignment" is likely to breach a restriction on parting with possession. What is a virtual assignment? HH Jg Hodge QC:

"A 'virtual assignment' is an arrangement under which all the economic benefits and burdens of the relevant lease (including any management responsibilities) are transferred to a third party, but without any actual assignment of the leasehold interest or any change in the actual occupancy of the premises in question. It is typically employed where the relevant lease contains covenants against assigning or parting with the

possession of the demised property without the consent of the landlord, and there are concerns either that the landlord may be unwilling to consent to a legal assignment of the lease because of perceived concerns about the financial standing of the assignee, or that the landlord's consent may not be available in advance of the scheduled date for completion of the transaction."

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March 2009

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