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**DOES NO MEAN NO?
COMMERCIAL LEASES
AND CONSENTS**

**Wednesday
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**PROPERTY LAW
GROUP**



7 Lincoln's Inn Fields London WC2A 3BP

T 020 7404 7000 F 020 7831 4606

DX 90 Chancery Lane E clerks@thomasmore.co.uk

www.thomasmore.co.uk

I: SOME PRACTICAL EXAMPLES (PART ONE)

(1) *Jenkins v Price* [1908] 1 Ch. 10

By a lease of an hotel the lessee covenanted (1.) not to assign without the previous consent of the lessor, unless such consent should be unreasonably withheld; (2.) at all times during the term to reside at the hotel and personally carry on the business of a licensed public house. The lessee asked permission to assign to a limited company which carried on a brewery business. The lessor, being of the opinion that an assignment to brewers would depreciate the goodwill, gave an unconditional consent to the assignment to a private person, but required as a condition of giving his consent to an assignment to a brewery firm that the rent should be increased and the term of the lease extended. The lessee brought an action for a declaration that the lessor was not entitled to impose such terms as a condition of giving his consent.

(2) *Sargeant v Macepark (Whittlebury) Ltd* [2004] 4 All E.R. 662

The claimant (S), a landlord, applied for a ruling that a clause restricting the use of a proposed extension to hotel premises on land leased by the defendant tenant (M) was reasonable and could be inserted into the lease so as to vary it. S owned a large country park and ran a number of businesses within it, including a golf club, bars and restaurants. The majority of the turnover of S's businesses came from hosting functions, particularly weddings. S had granted a lease to M to construct and build a hotel within the park. The larger part of M's turnover came from hosting management training and conference events such as product launches. The lease contained clauses restricting future development and construction works at the hotel to those for which S had given consent, such consent not to be unreasonably withheld. M wished to build an extension to the hotel but S was prepared to consent to the works only if M agreed not to use the proposed extension for functions other than those directly connected to the management training conferences. S considered that the proposed extension could be damaging to its business interests. After prolonged negotiations, S granted M a licence to commence the building works. The licence contained a term allowing for a clause restricting use of the extension to be inserted in the lease subject to the court's decision that such a condition was reasonable.

(3) *Anglia Building Society v Sheffield City Council* [1982] 266 E.G. 311

A lease of business premises restricted their user to that of a travel and employment bureau and a theatre ticket agency, and further provided that the user could be changed with the consent of L, such consent not to be unreasonably withheld. T, an employment agency, wished to assign the premises to AB for use as a building society office, but L refused consent on the ground that the rental value of neighbouring shops would be higher if the premises were used as a class I retail outlet. It was acknowledged that the proposed service user would indeed depress the rental value of neighbouring shops, but it was further acknowledged that the existing service user had already had that effect.

(4) *Iqbal v Thakrar* [2004] 3 E.G.L.R. 21

T, the landlord, appealed against a decision that he had unreasonably withheld consent to I's proposed alterations to the leasehold premises. The premises consisted of the ground floor of a building of which T owned the top floor as well as the reversion to I's lease. The designated planning category of the premises was for the sale of hot food for consumption on or off the premises. The lease contained a covenant requiring T's consent before structural alterations or additions could be made, such consent not to be unreasonably withheld. The tenant wanted to convert the premises to a restaurant and submitted architect's plans to T identifying various structural features and load-bearing walls which required checking before work commenced but the plans submitted did not set out what would be done with any such walls that were found. T refused to give consent, and I applied for a declaration that consent had been unreasonably refused. On appeal, T argued that the judge had taken the wrong approach to the test of reasonableness and had failed to give adequate weight to the issue of the building's structural integrity.

(5) *Oriel Property Trust v Kidd* 154 E.G. 500

Landlords withheld their consent to the assignment of a tenancy because they had a waiting list of prospective tenants and it was their policy not to allow tenants to choose their successors.

(6) *The Governors of Bridewell Hospital v Fawkner & Rogers* [1892] 8 TLR 637

The Plaintiff sought an injunction to restrain the Defendants, the assignees of a lease of premises in New Bridge Street, Blackfriars, from assigning the premises to any persons except in such manner and with such license as expressed in the lease. The original lessee covenanted not to assign or underlet the premises without the license or consent in writing of the officers of the hospital, such license or consent not to be arbitrarily or without good and sufficient reasons withheld. In March “General” Booth applied for an assignment of the premises to him for the purposes of the Salvation Army. On the original lessee’s applying to the Plaintiff for leave to assign the premises to “General” Booth, the Plaintiff refused the license on the ground that the use of the premises for the purposes of the Salvation Army might deteriorate the other property held by the Plaintiff and served affidavits, by persons competent to judge, confirming that position. “General” Booth stated in evidence that he required the premises for offices only and not for meetings or band playing.

II: ASSIGNMENT AND SUBLETTING

INTRODUCTION

Essential legislation

- S.19(1) Landlord and Tenant Act 1927
- Landlord and Tenant Act 1988

General points

- In the absence of any form of covenant against assignment or subletting in the lease, the tenant is free to assign or sublet his interest without seeking consent from the landlord.
- An absolute covenant against assignment or subletting is not subject to any implied condition of reasonableness.
- Where there is a qualified covenant providing that the tenant may not assign or sublet without the landlord's licence or consent, s.19(1) LTA 1927 implies that consent is not to be unreasonably withheld, and LTA 1988 imposes further duties on the landlord in relation to the giving of consent.
- Although the drafting of s.1(5) LTA 1988 is rather opaque, it is considered that LTA 1988 was not intended to change the test of reasonableness at common law: Woodfall: Landlord and Tenant at paragraphs 11.129 and 11.130, and footnote 13 to those paragraphs.
- LTA 1988 interlinks with the contractual covenant as between landlord and tenant and does not provide an entirely separate statutory code: **Footwear Corporation Ltd v Amplight Properties Ltd** [1998] EWHC 313 (Ch).

- It is essential that consent is sought prior to the assignment or subletting.
- Subject to the express terms of the covenant, the consent or licence need not be given in any particular form.

S.19(1) LANDLORD AND TENANT ACT 1927

- S.19(1)(a) Landlord and Tenant Act 1927: implied proviso that consent is not to be unreasonably withheld where covenant is not to assign without licence or consent. This 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.
- S.19(1)(b) LTA 1927: if lease is for more than 40 years, in limited circumstances no consent or licence is required where the assignment etc. is effected more than seven years before the end of the term and notice is given to the landlord.
- S.19(1) LTA 1927 does not apply to an absolute covenant against assignment.
- Provisions which seek to limit the court's ability to decide what is reasonable (e.g. by saying that in certain circumstances it will be reasonable for the landlord to withhold consent) are of no effect. However the same effect can be achieved by careful drafting of conditions precedent to the granting of consent: **Level Properties Ltd v Balls Brothers Ltd & anor** [2007] EWHC 744 (Ch).
- S.19(1) applies in a modified form to new tenancies as defined by the Landlord and Tenant (Covenants) Act 1995 (generally those granted after the Act came into force on 1st January 1996): see s.19(1A) LTA 1927. The duties under LTA 1988 take effect subject to s.19(1A).
- The historic difficulty with s.19(1) is that a breach by the landlord did not give rise to a cause of action in damages. If the landlord delayed, most potential assignees would

not wait for the outcome of contested proceedings for a declaration. This led to the passing of the Landlord and Tenant Act 1988.

LANDLORD AND TENANT ACT 1988

When LTA 1988 applies

- LTA 1988 applies where a tenancy:
 - (i) includes a covenant on the part of a tenant not to assign, sublet, charge or part with possession of the whole or part of the premises without the consent of the landlord (s.1(1)(a)), and
 - (ii) the covenant is subject to a qualification that the consent is not to be unreasonably withheld (s.1(1)(b)).
- The Act is not retrospective and applies only to an application for consent or approval served after it came into force on 29th September 1988.
- The Act does not apply to covenants against other activities without consent e.g. change of use.
- If the tenant must comply with conditions precedent before applying for consent, no duty is imposed on the landlord unless the conditions precedent have been fulfilled: **Level Properties** (cited above, and see the earlier decisions considered in **Level Properties**).

Landlord's response to request for consent

- Where a request for consent is served, the landlord (or other person who may consent) must:

- (i) Give consent within a reasonable time, except where it is reasonable not to give consent (s.1(3)(a)).
 - (ii) Serve a written notice of decision on the tenant within a reasonable time specifying any conditions on which consent is given or the reasons for withholding consent (s.1(3)(b)).
- Giving consent subject to a condition which is not reasonable does not satisfy the duty to give consent within a reasonable time pursuant to s.1(3)(a): s.1(4).
 - It is reasonable for the landlord to decline to consider the tenant's application for licence to assign unless the tenant undertakes to pay the landlord's reasonable costs: ***Dong Bang Minerva (U.K.) v Davina*** [1995] 1 EGLR 41.

Duty to pass on applications

- If a landlord or other person with the power to consent receives an application for consent and believes that another person may consent to the transaction, he owes a duty to the tenant to take reasonable steps to secure the receipt within a reasonable time by the other person of a copy of the application (s.2).

Sub-tenants

- S.3 LTA 1988 contains provisions broadly equivalent to those in s.1 save that they cover the position where a tenant is not to give consent to a subtenant assigning, subletting etc. without the approval of the landlord, such approval not to be unreasonably withheld. Again the landlord must, within a reasonable time:
 - (i) Give approval except where it is reasonable not to give approval (s.3(2)(a)).

- (ii) Serve written notice of decision on the tenant and subtenant specifying any conditions for approval or any reasons for withholding approval (s.3(2)(b)).

Burden of proof

- It is for the person who owes a duty to give consent under s.1(3) or approval under s.3(2) to show, pursuant to s.1(6) or s.3(5):
 - (i) If he gave consent or approval, that it was given within a reasonable time.
 - (ii) If he gave consent or approval subject to conditions, that they were reasonable.
 - (iii) If he did not give consent or approval, that it was reasonable.
 - (iv) That notice under s.1(3) or s.3(2) was served within a reasonable time.

Reasonableness under LTA 1988: legal framework

- Guidance has been given by the House of Lords and by the Court of Appeal, most importantly in ***Ashworth Frazer Ltd v Gloucester City Council*** [2001] UKHL 59 and ***International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd*** [1986] Ch 513 CA; both recently considered in ***NCR Ltd v Riverland Portfolio No.1 Ltd*** [2005] EWCA Civ 312.
- In ***Ashworth Frazer***, Lord Bingham (with whom the remainder of their Lordships agreed on this issue) set out what he described as “*three overriding principles*”:

- (i) A landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease.
 - (ii) Where the requirements of the first principle are met, the question whether the landlord's conduct was reasonable or unreasonable will be one of fact to be decided by the tribunal of fact. There are many reported cases which are of illustrative value, but care must be taken not to elevate a decision made on the facts of a particular case into a principle of law.
 - (iii) The landlord's obligation is to show that his conduct was reasonable, not that it was right or justifiable.
- Lord Bingham added that one should read “*reasonableness*” in the general sense:

“There are few expressions more routinely used by British lawyers than ‘reasonable’, and the expression should be given a broad, commonsense meaning in this context as in others.”
 - The principles drawn from ***International Drilling Fluids*** (some of which were adopted in ***Ashworth Frazer***) are as follows (as modified by statute):
 - (i) The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee.
 - (ii) As a corollary to the first proposition, a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease (this is the first of the ***Ashworth Frazer*** principles).

- (iii) The onus of proving that consent has been unreasonably withheld is on the landlord (ss.1(6) and 3(5) LTA 1988).
 - (iv) The landlord need only prove that his conclusions were such as might be reached by a reasonable man in the circumstances (this is similar to the third of the **Ashworth Frazer** principles).
 - (v) It may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease.
 - (vi) While a landlord need usually only consider his own relevant interests, there may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent to an assignment, that it is unreasonable for the landlord to refuse consent.
 - (vii) In each case it is a question of fact in all the circumstances whether the landlord's consent to an assignment is being unreasonably withheld (this is effectively the second of the **Ashworth Frazer** principles).
- Two additional principles are set out in ***Straudley Investments v Mount Eden Land (No. 1)*** [1997] 74 P&CR 306:
 - (i) It will normally be reasonable for a landlord to refuse consent or impose a condition if this is necessary to prevent his contractual rights under the lease from being prejudiced by the proposed assignment or sublease.

- (ii) It will not normally be reasonable for a landlord to seek to impose a condition which is designed to increase or enhance the rights that he enjoys under the lease.

Reasonableness under LTA 1988: what is a reasonable time?

- What constitutes a reasonable time will obviously vary from case to case.
- A number of propositions as to what constitutes a reasonable time were set out in **Go West Ltd v Spigarolo** [2003] EWCA Civ 17:
 - (i) Time starts running with the service of the request for consent.
 - (ii) The reasonable time may sometimes have to be measured in weeks rather than days, but even in complicated cases it should be measured in weeks rather than months. It was hard to imagine that a period of as much as four months could ever be acceptable, save in the most unusual and complex situations.
 - (iii) The question of a reasonable time cannot be determined when the tenant makes his application, but must be assessed at the end of the period.
 - (iv) Once the landlord serves the written notice required under LTA 1988 he necessarily brings the reasonable time to an end. Subsequent correspondence where the tenants seeks to persuade the landlord to change his mind does not re-open the reasonable time.
 - (v) If on receiving a request for consent, the landlord reasonably seeks further information, the amount of time which is reasonable may be extended, for example if the tenant delays in replying or supplies a large volume of material which needs to be considered.

- The more recent decision of *NCR Ltd v Riverland Portfolio No.1 Ltd* [2005] EWCA Civ 312 provides some useful material for landlords seeking to argue that more time is required.
- Where the landlord is seeking further information he should send a clear request promptly on receiving the request for consent. Where the tenant's response is incomplete a further letter should explain that the landlord is well aware of his obligations under LTA 1988 but requires clarification before he can make a decision. In this situation, whether or not further information is received from the tenant, the landlord should diarise a date by which he will send a full response.

Reasonableness under LTA 1988: typical grounds for refusal

Damage to the value of the reversion

- Concern that the proposed user will cause damage to the value of the reversion is the main issue in a substantial number of the reported cases. This can be a legitimate basis for refusing consent even if the proposed use is not prohibited by the lease.
- If there is no foreseeable prospect of the landlord wishing to sell or mortgage his reversion, a diminution in the value of the reversion which is shown as a paper loss will not necessarily justify refusal of consent.

Financial strength

- The landlord is entitled to be concerned about the ability of the proposed assignee to pay the rent and other sums due under the lease. If financial information or references cast doubt on the proposed assignee's inability to pay the rent, the landlord will normally be entitled to withhold consent.
- Where the proposed assignee offers guarantors, the landlord must have regard to the financial position of the guarantors as well as that of the assignee.

- The landlord may be reasonable in insisting on a suitable guarantee even where the property itself provides good security for the rent (e.g. where there are subleases under a head-lease which would pay the rent due under the head-lease): **Landlord Protect Ltd v Dolman & ors** [2007] 18 EG 154 (Central London County Court).
- The rule of thumb used in the past, that a proposed tenant should have profits after tax equal to three times the rent before it would be regarded as a satisfactory prospective tenant, was disapproved by Neuberger J in **Footwear Corporation Ltd v Amplight Properties Ltd** [1998] EWHC 313 (Ch).

Character of the proposed assignee

- A company is capable of being a respectable and responsible person, where the lease requires that consent will not be given save in respect of a respectable and responsible assignee.
- Plainly, consent may not be refused on discriminatory grounds of race, sex, religion or disability.

Existing breaches of covenant

- Existing breaches of covenant may sometimes justify refusal, but generally only where they are serious and the proposed assignee does not undertake to remedy them (for example serious disrepair).

Competitive trade

- Where the landlord is a trader it may be reasonable for him to refuse consent to an assignment to a business rival.
- It may be reasonable to refuse consent to an assignee who would be in competition with other tenants.

Good estate management

- The landlord is entitled to consider not only the property comprised in the lease but may take into account the effect of the transaction on his property interests as a whole.

Terms of the transaction

- This is more likely to arise in relation to subletting, particularly where the subletting is at a substantial premium and a low rent.

Conditions

- The landlord's concerns can often be resolved by the imposition of suitable conditions, for example the provision of suitable guarantors.
- Any conditions imposed must be reasonable: s.1(4) LTA 1988.
- The landlord is not entitled to require that the tenant pays a sum of money in the nature of a fine for the licence or consent: s.144 Law of Property Act 1925. This does not prevent the landlord from requiring payment of his reasonable costs and expenses incurred in relation to the licence or consent.
- S.144 does state that the lease can contain an express provision to the contrary (which would allow for the taking of a fine) but this is rare in practice.

TENANT'S REMEDIES

Claim for breach of statutory duty

- Unlike s.19(1) LTA 1927, breach of the duties in LTA 1988 gives rise to a claim in tort for breach of statutory duty, expressly provided for by s.4.

- A claim may be for damages or an injunction.
- The burden is on the tenant to show that the breach of statutory duty has caused him a loss: **Clinton Cards v Sun Alliance & London Assurance** [2003] L&TR 2.
- The measure of damages is that which would put the claimant in the position it would have been in but for the defendant's breach of duty. Substantial damages including exemplary damages of £25,000 were awarded in **Design Progression Ltd v Thurloe Properties Ltd** [2004] EWHC 324 (Ch).

Declaration

- An unreasonable refusal of consent in breach of a contractual proviso or of s.19(1) LTA 1927 does not confer on the tenant any right to claim damages.
- The tenant's remedy is simply to assign without consent, or to apply to the court for a declaration that the refusal is unreasonable.
- If the tenant seeks a declaration, it should be to the effect that (i) the landlord's refusal of consent is unreasonable; and (ii) that the tenant is entitled notwithstanding the refusal of consent to make the proposed assignment or subletting.
- The county court will normally be the appropriate venue: s.53(1) Landlord and Tenant Act 1954.

III: CHANGE OF USER

General points

- In the absence of a covenant to the contrary the tenant is entitled to use the premises for any lawful purpose.
- Where there is an absolute restriction on change of use, there is no implied term, by statute or otherwise, to the effect that consent will not be unreasonably withheld.
- Consider whether it can be argued that the proposed user is in fact within the scope of the user covenant: ***Mount Cook Land Ltd v Joint London Holdings Ltd & Market Place Investments Ltd*** [2005] EWCA Civ 1171.

Unreasonable withholding of consent

- Unlike s.19(1), s.19(3) does not stipulate that the landlord's consent cannot be unreasonably withheld.
- The statutory right to damages under LTA 1988 does not apply to an unreasonable refusal of a consent to a change of use.
- If the tenant makes a combined application for consent to assign and for a change of use, the landlord is entitled to consider them together.
- If the lease itself contains a proviso that consent will not unreasonably be withheld, the principles concerning reasonableness are broadly similar to those for assignment or subletting (considered above).
- A claim that a refusal to consent to a change of use has been unreasonable can be brought in the High Court or the county court: s.53 LTA 1954.

- Contrary to the position relating to assignment and subletting, where a landlord refuses consent to a change of use the burden of establishing unreasonableness remains on the tenant.

Payment of reasonable sum under s.19(3) LTA 1927

- The demand of a fine as a condition of consent is in general prohibited by s.19(3) Landlord and Tenant Act 1927. Where there is a qualified covenant for change of user with consent, the landlord is entitled to 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 him, and of any legal or other expenses incurred in connection with the licence or consent.
- If a dispute arises as to what sum is reasonable, once it has been decided by the court, the landlord is bound to grant the licence or consent on payment of the sum so determined.
- Check that the county court has jurisdiction. A simple dispute about the amount payable is not expressly covered by s.53 Landlord and Tenant Act 1954, so the jurisdiction of the county court on this issue appears to be its general jurisdiction to make declarations affecting land, which is restricted by rateable value.

IV: ALTERATIONS AND IMPROVEMENTS

General points

- In the absence of an express covenant prohibiting alterations, a tenant can only be prevented from altering the demised premises if the alterations amount to waste or would be in breach of an express repairing covenant.
- It is common to find hybrid covenants, where some alterations are absolutely prohibited and some are only permitted if the landlord consents.
- An “alteration to the premises” is generally something which affects the form or structure of the building.

Improvements: s.19(2) LTA 1927

- S.19(2) LTA 1927 provides that where there is a covenant against the making of improvements without consent it is subject to the proviso that consent is not to be unreasonably withheld.
- As in the case of change of user (cf s.19(3) LTA 1927), this does not prevent the landlord from requiring payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or neighbouring premises belonging to the landlord, and any other legal or other expenses incurred in connection with the licence or consent.
- Where the improvement does not add to the letting value of the holding, the tenant may, if this is reasonable, be required to give an undertaking to reinstate the premises as a condition of consent.
- S.19(2) does not apply to absolute covenants against improvements.

What is an improvement?

- Where a covenant refers to “alterations or additions” rather than improvements, s.19(2) will nevertheless apply if the proposed alterations would in fact effect an improvement.
- There is no definition of “improvements” in LTA 1927. An alteration or addition is an improvement within the meaning of s.19(2) if it is an improvement from the point of view of the tenant.
- If the alteration is an improvement from the tenant’s point of view it is immaterial that the alteration may produce damage or diminution in value from the point of view of the landlord.

Reasonableness

- The issue of reasonableness has centred on the reasonableness of the sum required by the landlord as compensation for damage to or diminution in the value of premises or neighbouring premises. There is little other authority on this issue though it is clearly open to the landlord to put forward other grounds for refusing consent.
- The considerations relating to reasonableness are likely to be similar to those taken into account in relation to assignments and subletting (as to which see above).
- A landlord was reasonable in refusing consent where he was concerned about the structural effect of the proposed works: *Iqbal v Thakrar* [2004] 3 EGLR 21 CA.
- An objection based purely on pecuniary loss is unlikely to be sustainable.
- A landlord may object on aesthetic, artistic, historic or sentimental grounds: *Lambert v Woolworth & Co* [1938] Ch 883.

Remedy

- If the landlord unreasonably refuses consent, the tenant can either proceed with the improvement without consent or seek a declaration that consent has been unreasonably withheld.
- As with change of user, the statutory right to damages under LTA 1988 does not apply to refusals of consent relating to improvements.
- The county court has concurrent jurisdiction with the High Court pursuant to s.53(1) LTA 1954.

V: SOME PRACTICAL EXAMPLES: PART TWO

- See answers on separate sheet.

Laura Collignon

Faisal Saifee

Property Law Group

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RELEVANT LEGISLATION

Landlord and Tenant Act 1927

19 Provisions as to covenants not to assign, etc, without licence or consent

(1) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against assigning, under-letting, charging or parting with the possession of demised premises or any part thereof without licence or consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject—

(a) 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; and

(b) (if the lease is for more than forty years, and is made in consideration wholly or partially of the erection, or the substantial improvement, addition or alteration of buildings, and the lessor is not a Government department or local or public authority, or a statutory or public utility company) to a proviso to the effect that in the case of any assignment, under-letting, charging or parting with the possession (whether by the holders of the lease or any under-tenant whether immediate or not) effected more than seven years before the end of the term no consent or licence shall be required, if notice in writing of the transaction is given to the lessor within six months after the transaction is effected.

(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.

(1B) Subsection (1A) of this section applies to such an agreement as is mentioned in that subsection—

(a) whether it is contained in the lease or not, and

(b) whether it is made at the time when the lease is granted or at any other time falling before the application for the landlord's licence or consent is made.

(IC) Subsection (IA) shall not, however, apply to any such agreement to the extent that any circumstances or conditions specified in it are framed by reference to any matter falling to be determined by the landlord or by any other person for the purposes of the agreement, unless under the terms of the agreement—

(a) that person's power to determine that matter is required to be exercised reasonably, or

(b) the tenant is given an unrestricted right to have any such determination reviewed by a person independent of both landlord and tenant whose identity is ascertainable by reference to the agreement,

and in the latter case the agreement provides for the determination made by any such independent person on the review to be conclusive as to the matter in question.

(ID) In its application to a qualifying lease, subsection (I)(b) of this section shall not have effect in relation to any assignment of the lease.

(IE) In subsections (IA) and (ID) of this section—

(a) “qualifying lease” means any lease which is a new tenancy for the purposes of [section 1](#) of the Landlord and Tenant (Covenants) Act 1995 other than a residential lease, namely a lease by which a building or part of a building is let wholly or mainly as a single private residence; and

(b) references to assignment include parting with possession on assignment.

(2) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the making of improvements without licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the 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, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed.

(3) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the alteration of the user of the demised premises, without licence or consent, such covenant condition or agreement shall, if the alteration does not involve any structural alteration of the premises, be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso 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; but this proviso does not preclude the right of the landlord to require 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 him and of any legal or other expenses incurred in connection with such licence or consent.

Where a dispute as to the reasonableness of any such sum has been determined by a court of competent jurisdiction, the landlord shall be bound to grant the licence or consent on payment of the sum so determined to be reasonable.

(4) This section shall not apply to leases of agricultural holdings within the meaning of the [Agricultural Holdings Act 1986](#) which are leases in relation to which that Act applies, or to farm business tenancies within the meaning of the [Agricultural Tenancies Act 1995](#), and paragraph (b) of subsection (1), subsection (2) and subsection (3) of this section shall not apply to mining leases.

Landlord and Tenant Act 1988

I Qualified duty to consent to assigning, underletting etc of premises

(1) This section applies in any case where—

(a) a tenancy includes a covenant on the part of the tenant not to enter into one or more of the following transactions, that is—

- (i) assigning,
- (ii) underletting,
- (iii) charging, or
- (iv) parting with the possession of,

the premises comprised in the tenancy or any part of the premises without the consent of the landlord or some other person, but

(b) the covenant is subject to the qualification that the consent is not to be unreasonably withheld (whether or not it is also subject to any other qualification).

(2) In this section and section 2 of this Act—

(a) references to a proposed transaction are to any assignment, underletting, charging or parting with possession to which the covenant relates, and

(b) references to the person who may consent to such a transaction are to the person who under the covenant may consent to the tenant entering into the proposed transaction.

(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.

2 Duty to pass on applications

(1) If, in a case where section 1 of this Act applies, any person receives a written application by the tenant for consent to a proposed transaction and that person—

- (a) is a person who may consent to the transaction or (though not such a person) is the landlord, and
- (b) believes that another person, other than a person who he believes has received the application or a copy of it, is a person who may consent to the transaction,

he owes a duty to the tenant (whether or not he owes him any duty under section 1 of this Act) to take such steps as are reasonable to secure the receipt within a reasonable time by the other person of a copy of the application.

(2) The reference in section 1(3) of this Act to the service of an application on a person who may consent to a proposed transaction includes a reference to the receipt by him of an application or a copy of an application (whether it is for his consent or that of another).

3 Qualified duty to approve consent by another

(1) This section applies in any case where—

(a) a tenancy includes a covenant on the part of the tenant not without the approval of the landlord to consent to the sub-tenant—

- (i) assigning,
- (ii) underletting,
- (iii) charging, or
- (iv) parting with the possession of,

the premises comprised in the sub-tenancy or any part of the premises, but

(b) the covenant is subject to the qualification that the approval is not to be unreasonably withheld (whether or not it is also subject to any other qualification).

(2) Where there is served on the landlord a written application by the tenant for approval or a copy of a written application to the tenant by the sub-tenant for consent to a transaction to which the covenant relates the landlord owes a duty to the sub-tenant within a reasonable time—

- (a) to give approval, except in a case where it is reasonable not to give approval,
- (b) to serve on the tenant and the sub-tenant written notice of his decision whether or not to give approval specifying in addition—
 - (i) if approval is given subject to conditions, the conditions,
 - (ii) if approval is withheld, the reasons for withholding it.

(3) Giving approval subject to any condition that is not a reasonable condition does not satisfy the duty under subsection (2)(a) above.

(4) For the purposes of this section it is reasonable for the landlord not to give approval only in a case where, if he withheld approval and the tenant gave his consent, the tenant would be in breach of covenant.

(5) It is for a landlord who owed any duty under subsection (2) above—

- (a) if he gave approval and the question arises whether he gave it within a reasonable time, to show that he did,
- (b) if he gave approval 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 approval 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.

4 Breach of duty

A claim that a person has broken any duty under this Act may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty.

5 Interpretation

(1) In this Act—

“covenant” includes condition and agreement,

“consent” includes licence,

“landlord” includes any superior landlord from whom the tenant's immediate landlord directly or indirectly holds,

“tenancy”, subject to subsection (3) below, means any lease or other tenancy (whether made before or after the coming into force of this Act) and includes—

- (a) a sub-tenancy, and
- (b) an agreement for a tenancy

and references in this Act to the landlord and to the tenant are to be interpreted accordingly, and

“tenant”, where the tenancy is affected by a mortgage (within the meaning of the [Law of Property Act 1925](#)) and the mortgagee proposes to exercise his statutory or express power of sale, includes the mortgagee.

(2) An application or notice is to be treated as served for the purposes of this Act if—

- (a) served in any manner provided in the tenancy, and
- (b) in respect of any matter for which the tenancy makes no provision, served in any manner provided by [section 23](#) of the Landlord and Tenant Act 1927.

(3) This Act does not apply to a secure tenancy (defined in [section 79](#) of the Housing Act 1985) or to an introductory tenancy (within the meaning of Chapter I of [Part V](#) of the Housing Act 1996).

(4) This Act applies only to applications for consent or approval served after its coming into force.

6 Application to Crown

This Act binds the Crown; but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the [Crown Proceedings Act 1947](#).

7 Short title, commencement and extent

(1) This Act may be cited as the [Landlord and Tenant Act 1988](#).

- (2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.
- (3) This Act extends to England and Wales only.

DOES NO MEAN NO? COMMERCIAL LEASES AND CONSENTS

SOME PRACTICAL EXAMPLES (PART TWO): ANSWERS

(1) *Jenkins v Price* [1908] 1 Ch. 10

Held, that, having regard to the covenant as to personal residence, the lease could not be assigned to a limited company.

(2) *Sargeant v Macepark (Whittlebury) Ltd* [2004] 4 All E.R. 662

A landlord was not precluded in principle from relying on perceived damage to his trading interests which affected his property interests in adjoining or neighbouring land as a ground of refusal of consent to proposed building alterations. However, the proposed clause went further than was reasonable to protect S's legitimate concerns as it precluded M from pursuing activities which formed a part of its existing business.

(3) *Anglia Building Society v Sheffield City Council* [1982] 266 E.G. 311

Held that consent had been unreasonably withheld. Ls had sought by their refusal to procure the use of the premises as a retail shop, which was an advantage collateral to the terms of the lease, and was not open to them in law.

(4) *Iqbal v Thakrar* [2004] 3 E.G.L.R. 21

Held that consent had been reasonably withheld in the circumstances. T was entitled to seek to protect the structural integrity of the building, and it was for L to show that refusal of consent was unreasonable. It was necessary to establish T's real reason for refusing consent before determining, on an objective basis, whether the reason was unreasonable or not. Alterations to a load-bearing wall could have a detrimental affect on the property but the plans submitted did not set out what would be done with any such walls that were found. Therefore T had not been given a full picture on which to decide whether consent should be given. It was therefore reasonable for T to doubt the viability of the planned alterations.

(5) *Oriel Property Trust v Kidd* 154 E.G. 500

Devlin, J., held that the policy of not allowing tenants to choose their successors did not constitute a good reason for withholding consent.

(6) *The Governors of Bridewell Hospital v Fawkner & Rogers* [1892] 8 TLR 637

The Plaintiff was advised by persons competent to judge that it was not desirable to let this particular property to Mr Booth and affidavits to that effect were filed. It might turn out that that advice was wrong, and that the result of letting the premises to Mr Booth would be to the benefit of the neighbourhood. But Kekewich J thought the Plaintiff had shown a good and sufficient reason for withholding consent. The Defendant had urged an issue of sentiment upon the Court, but Kekewich J ruled that the issue was one of law not sentiment.