Landmark CHAMBERS

Consent to Assignment and Sub-letting

Introduction

1. The purpose of this paper is to examine briefly the three most common questions which I am asked assist on in relation to consent to assignment or sub-letting:
   (1) How long have we got?
   (2) What is a reasonable basis for refusal?
   (3) What is my remedy?

2. In the short time available to me I do not intend to undertake a comprehensive review of the complex topic of leasehold consents, but I hope at least to draw attention to a few points which are sometimes overlooked, and which may assist when you are faced with the same questions.

The basics

3. I begin with a very brief summary of the basic law. As you all know, express covenants restricting the right of a tenant to do something may be absolute, or partially qualified (not to assign etc. without the landlord's consent) or fully qualified (not to assign without the landlord's consent, which is not to be unreasonably withheld). In the case of prohibitions upon assignment, underletting, charging and parting with possession, a partially qualified covenants are converted to fully qualified covenants by virtue of s. 19(1)(a) of the Landlord & Tenant Act 1927[1].

[1] "19(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 part thereof without licence or consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed subject:-

4. As well as converting partially qualified covenants into fully qualified ones, S. 19(1)(a) also effectively prevents the imposition of unreasonable conditions upon consent, and prevented qualified covenants being limited in some way by specifying in advance what may or not amount to 'reasonable' refusal of consent[2]. However:

(1) the provision has no effect upon absolute covenants;

(2) the provision does not allow the landlord to prevent assignment just because it is reasonable to do so if the alienation provision would otherwise entitle the tenant to assign, or require the landlord to consent[3];

(3) the provision does not exclude the inclusion within the lease of genuine free-standing pre-conditions, such as a requirement that prior to any sub-letting the subtenant must execute a direct covenant with the landlord.

5. As to the last of these points, it is useful to compare the cases of Re Smith's Lease[4] and Adler v. Upper Grosvenor Street Properties[5]. In the first case a provision, deeming it reasonable for the landlord to refuse consent when offering a surrender which the tenant was then required to accept, was held to be overridden by the operation of s. 19(1)(a). In the second case, the lease provided that that the tenant could not assign without landlord's consent, and further provided that, should the tenant desire to assign, it must first offer a surrender to the landlord in writing. The Court of Appeal held that the second provision was a valid proviso to the power of the tenant to assign, which was therefore unaffected by s. 19(1)(a).

(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…."

[2] Re Smith's Lease [1951] 1 All ER 346 (provision overridden by s. 19(1)(a), which provided that consent was deemed reasonable where the lessor had offered to accept a surrender); Creery v. Summersell & Flowerdew & Co Ltd [1949] 1 Ch 741 (reservation of right not to consent where, in the opinion of the landlord for any reason, the underlessee is undesirable, overridden by s. 19(1)(a)); RBS v. Victoria Street (No. 2) Ltd [2008] EWHC 579 Ch (provision that consent not to be unreasonably withheld "in the case of a respectable and proper person" overridden).

[3] Moat v. Martin [1945] 1 KB 175

[4] [1951] 1 All ER 346

[5] [1957] 1 WLR 227

6. In addition to the possibility that the lease will contain free-standing provisos to a valid assignment or sub-letting, as all will be aware s. 19(1A), which was inserted by s. 22 of the Landlord & Tenant (Covenants) Act 1995 and which applies to leases granted on or after 1 January 1996, now permits the parties to agree in advance[6] circumstances in which the landlord may withhold consent, and conditions to which any such consent may be made subject, and which are not to be regarded as unreasonable if relied upon by the landlord. S. 19(1A) is itself subject to the limitation that, where these agreed circumstances include some power of a party to determine something (eg a potential basis for refusing consent 'where the landlord considers that…' some situation exists) in order to fall within s. 19(1A) the lease must require that such power be exercised reasonably, or make it subject to independent review.

7. At common law, the consequences for a landlord in unreasonably failing to give consent were very limited. However, by virtue of the Landlord & Tenant Act 1988, persons who may consent to assignment[7], underletting, charging or parting with possession[8] area placed under a statutory duty to consent within a reasonable time unless it is reasonable not to do so, and to serve on the tenant a notice of their decision giving reasons for any refusal, and specifying any conditions to which the consent is subject[9]. Giving a consent which is subject to an <u>unreasonable</u> condition does not satisfy the duty[10].

8. The 1988 Act places the burden upon the party with the power to consent to prove (if the issue arises):

(i) that he gave the notice of his decision;

(ii) that he gave any consent within a reasonable time;

[6] Although usually contained in the lease, the agreement need not be in the lease and may be made subsequent to the date of the lease.
[7] Note also the qualified duty to approve consent by head landlords of sub-tenant transactions, within s. 3
[8] See ss. 1(1)-(2) for the application of the duty.
[9] S. 1(3)
[10] S. 1(4)

(iii) that any condition he imposed was reasonable;

(iv) that any refusal by him was reasonable.

9. Once a notice has been given by a landlord that he refuses consent, or grants consent conditionally, that landlord cannot subsequently justify that refusal of consent or those conditions by referring to reasons which are not set out and relied upon in the notice[11]. A failure to give a decision within a reasonable time will be treated as equivalent to a refusal of consent without reasons. Crucially, a refusal of consent for bad reasons (and thus also without giving reasons) is a breach of statutory duty which is actionable by the tenant.

10. For a useful summary of the relevant principles of the operation of the 1988 Act, see NCR Ltd v. Riverland Portfolio (No. 1) Limited (No.2) [2004] EWHC 2073 per Peter Leaver QC at para 17[12].

Timing

11. To answer the first question I am repeatedly asked - 'how long have I got?' - one must first consider when the relevant period starts. The duty to respond within a reasonable time arises *"where there is **served** upon the person who may consent to a proposed transaction*[13] *a **written** application by the tenant…."* [14]. An application is "served" when it is served in accordance with the requirements of the tenancy, or in any of the ways provided by s. 23 of the 1927 Act[15]. So, a request made other than in accordance with a mandatory requirement of the lease as to service will not start time

[11] Per Pill LJ in Go West Ltd v. Spigarolo [2003] EWCA Civ 17 at 1158F
[12] The decision was overturned upon appeal, but this summary was not disputed.
[13] Note also the duty to pass on applications contained in s. 2
[14] S. 1(3)
[15] In very rough summary, that is: personal service; leaving at last place of abode; registered post to last place of abode or the principal office of a company, in each case properly addressed.

running[16]. It may also be important to distinguish between informal communications and a formal request[17].

12. Do not make the mistake of assuming that some failure to provide information with the request means that the duty is not yet triggered, and time is not ticking. Although a failure to provide relevant information may provide a reasonable basis for refusal of consent, or the basis of a request for further information which may have the effect of increasing the reasonable period of decision-making (as to which see below), it will not generally mean that a valid request has not been made, and so a failure to respond to the request within a reasonable time will still be fatal:

- Failure to state the rent under a sublease did not render request for consent invalid, even though the lease contained a valid precondition that no sublease should be granted below the passing rent[18].

- Failure to provide a copy of the draft sub-lease did not prevent time running, despite precondition that sublease should contain requisite provisions[19].

13. It might be reasonable to decline to consider any application further if an undertaking to pay the costs of considering it is sought and refused. However:

(i) The point was left open in Dong Bang Minerva (UK) Ltd v. Davina Ltd[20];

(ii) A request for anything beyond the payment of 'reasonable' costs (eg "our full" costs or a request for an "indemnity") will itself be unreasonable;

(iii) The burden would be on the landlord to justify any figure or estimate put forward.

[16] E.ON UK v. Gilesport [2012] 3 EGLR 23 (service by email not permitted by the lease, so email request did not trigger duty under the 1988 Act).
[17] As for example in NCR Ltd v. Riverland Portfolio No.1 Ltd (No. 2) [2005] EWCA CIv 312.
[18] Norwich Union Linked Life Assurance v. Mercantile Credit Co Ltd [2003] EWHC 3064
[19] Lombard North Central v. Remax Herbane [2008] EWHC 316
[20] At first instance ([1995] 1 ELGR 41) Hazel Marshall QC (sitting as a deputy) considered the point difficult, but decided that since the request for "full" costs and the figure subsequently requested were both unreasonable, she didn't have to decide it. Her decision was upheld in the Court of Appeal.

14. As to the end of the period, although the point at which this occurs may seem obvious, ~~there are a few points~~ to note:

(i) If the decision has *in fact* been taken internally, it may be impossible to justify a delay of more than a couple of days in communicating the decision to the tenant[21]. So, an apparently reasonable period of response, examined only from the *inter partes* correspondence, may prove to be unreasonable once internal documents are examined at the disclosure stage.

(ii) If the landlord refuses consent prematurely, he does not get the remainder of what would have been an objectively reasonable period in order to change his mind and avoid a breach of duty. By serving notice the landlord shortens what might otherwise be a reasonable time[22].

15. As to what amounts to a reasonable period, this is a question of fact which will depend on all of the circumstances of any particular case[23] and may vary as the situation unfolds. The assessment of whether a reasonable time has elapsed is therefore necessarily made at a time at which it is claimed that a reasonable period has elapsed, and in the light of the facts at that time[24]. Amongst the factors relevant in assessing whether a reasonable time elapsed is the overall purpose of the 1988 Act, which has been described as being to "enable there to be fair and sensible dealing between landlords and tenants [and] a state of certainty to be achieved at the **earliest possible moment**"[25].

16. Although the issue of 'reasonable time' has been considered many times, perhaps the most informative and well quoted passage is the remark of Munby J in Go West Ltd v. Spigarolo[26] at [73]:

[21] As was the decision of Peter Smith J in Mount Eden Ltd v. Folia Ltd [2003] EWHC 1815.
[22] Go Est Ltd v. Spigarolo [2003] EWCA Clv 17
[23] Go West Ltd v. Spigarolo [2003] EWCA Civ 17
[24] Per Sir Richard Scott VC in Norwich Union Life Insurance Society v. Shopmoor Ltd [1999] 1 WLR 531 and per Munby J in Go West (ibid)
[25] Per Sir Richard Scott VC in Norwich Union v. Shopmoor (ibid)
[26] [2003] EWCA Civ 17

> *"I repeat, and for my own part would wish to emphasize, Sir Richard Scott V-C's references in the Norwich Union case [1999] 1 WLR 531 to the landlord dealing with his tenant's application "expeditiously" and "at the earliest sensible moment". It may be that the reasonable time referred to in section 1(3) will sometimes have to be measured in weeks rather than days; but even in complicated cases, it should in my view be measured in weeks rather than months"*

17. Everything depends on the particular facts, but some particular points are still worth noting:

(1) If the information provided is inadequate, the reasonable period in which a decision must be made may consequently be extended **but only** when the information has been requested and is awaited, and only when the request is reasonable. If, when it comes to cross-examination, the decision maker cannot properly justify their inability to reach a decision without the information they requested, the court may be quick to infer that such requests are merely attempts to create obstacles[27].

(2) If the tenant sets a deadline, it would be difficult for a court to conclude that a response within that deadline was unreasonable[28].

(3) Where the application raises issues of complexity, the need to take advice may extend the reasonable period of decision. In NCR Ltd v. Riverland Portfolio No. 1 Ltd (No.2)[29] the Court of Appeal concluded that a period of 3 weeks was not *"inherently unreasonable"* to consider an application which was in a form which required the relevant party to consider the serious financial and legal implications of refusal with his advisors and, if necessary, report to the board. Complex evidence was eventually called as to the effect of the proposed transaction upon the value of the landlord's reversion.

18. So how can you help your client landlord in relation to the reasonable period?

[27] As was the conclusion of Peter Smith J in Design Progression Ltd v. Thurloe Properties Ltd [2004] EWHC 324
[28] Per Peter Smith J in Mount Eden Land Ltd v. Folia Ltd [2003] EWHC 1815
[29] [2005] EWCA Civ 312

(1) Of course you must emphasize the urgency to the client.

(2) As soon as correspondence is running, take care to clarify whether what is being discussed is an actual application, or merely a potential future application. Ask for confirmation if you are in any doubt. With a bit of luck the request for this confirmation may re-set the clock in the eyes of the court.

(3) Test with the client the genuine need for any further information, or advice. If it is needed, spell out to the tenant in correspondence why you say that it is needed.

(4) If there are matters outstanding which will have to be dealt with before assignment, but it is already clear that (if they provided) consent will be given, consider giving conditional consent. Where possible **do not** delay making a decision because of such issues[30].

(5) If you need more time, consider explaining carefully to the tenant why you need more time. Silence is generally bad news.

(6) Warn the landlord as strongly as possible against 'trumped up' reasons and get it to focus on any potential prejudice to its property interests (as to which more below).

19. So how can you help your client tenant?

(1) Consider any preconditions to the grant of consent, and deal with them in the application for consent.

(2) Check carefully how the lease requires a request for consent to be served, and make sure any request complies.

(3) Make sure supporting documentation is sent with the application sufficient to deal with the obvious points (such as covenant strength of the assignee);

[30] WARNING: note the difficulties with expressing consent in terms such as "subject to licence". See Prudential Assurance Co Ltd v. Mount Eden Land Ltd [1997] 1 ELGR 37 (CA)

(4) Ask the landlord to confirm receipt of the request, and ask it to say immediately if it requires any further information.

(5) If further information is requested by the landlord, apply pressure by asking why it is needed. If you consider it is a delaying tactic, say so. However, (unless there is a serious issue) provide any information anyway, without prejudice to your assertion that it is unnecessary.

(6) Express and explain any urgency, and chase the landlord to force it to explain and justify any apparent delay. It is generally easier for a landlord to explain delay retrospectively than to do so as it goes along.

Reasonableness of refusal/conditions

20. Should the court ever come to consider the issue of reasonableness, it will be faced with two issues:

(1) What were the landlord's actual reasons for the refusal?

(2) Could a reasonable landlord, basing himself on those reasons, reach the conclusion that consent should be withheld?[31]

21. As to the first point, bear in mind that the reasons expressed in the decision are the only reasons which can form the basis of the landlord's justification of the refusal of consent[32]. A landlord is entitled to elaborate upon a reason stated over-concisely in his letter, but not to add to the reasons stated. The court will exclude any reasons which it concludes, as a matter of fact, did not actually affect the decision to refuse consent. However, the fact that one reason fails will not affect other reasons unless the reasons are, by their nature, inextricably linked.

[31] As expressed by Morgan J in RBS Plc v. Victoria Street (no. 3) Ltd [2008] EWHC 3052 at [29]
[32] Footwear Corporation Ltd v. Amplight Properties Ltd [1999] 1 WLR 551 (per Neuberger J) approved in Go Wset v. Spigarolo [2003] QB 1140

22. Any consideration of what is or is not "reasonable" must start with the landmark decision of *International Drilling Fluids Ltd. v. Louisville Investments Ltd.*[33] The leading judgment of the Court of Appeal was given by Balcombe LJ[34], who set out a test for deciding whether or not consent has been unreasonably withheld, in that case to an assignment[35]. This test can be summarised as follows:[36]

22.1 The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the landlord from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee.[37]

22.2 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, as defined by the subject matter of the lease.[38]

22.3 It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances.[39]

33. [1986] Ch. 513 (CA).

34. At page 519H-521E. Mustill and Fox LJJ agreed.

35 The lease provided that the property was not to be used "for any purpose other than as offices" and, there were to be no assignments without consent, such consent not to be unreasonably withheld. The tenants sought the landlords' consent to assign the lease. The landlords refused, *inter alia*, because the assignee's proposed use of the premises, as serviced offices, would be detrimental to the investment value of the reversion and create a parking problem. The trial judge held that the evidence did not justify refusal of consent on either ground and, accordingly, he made a declaration that the refusal of consent was unreasonable. The Court of Appeal agreed.

36. NB the statement of principle has be to read carefully in cases of assignments and sub-lettings, where the 1988 Act applies, as it has changed some aspects.

37. See A.L. Smith LJ in Bates v. Donaldson [1896] 2 QB 241, 247 (CA), approved by all the members of the Court of Appeal in Houlder Brothers & Co. Ltd. v. Gibbs [1925] Ch 575 (preferring AL Smith LJ's formulation to that of Kay LJ).

38. See Houlder Brothers & Co. Ltd. v. Gibbs(ibid); Bickel v. Duke of Westminster [1977] QB 517 (CA); and Bromley Park Garden Estates Ltd. v. Moss [1982] 1 WLR 1019 (CA), in which the landlord's consent was unreasonably withheld, because the refusal was designed to achieve a collateral purpose (namely, obtaining a surrender) which was unconnected with the terms of the lease.

39. See Pimms Ltd. v. Tallow Chandlers Company [1964] 2 QB 547, 564 (CA). See now the Landlord and Tenant Act 1988, section 1(6); see also Midland Bank plc v. Chart Enterprises SA [1990] 2 EGLR 59 (Popplewell J); *Air India v. Belabel* [1993] 2 EGLR 66 (CA).

22.4 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.[40] It may be more easily be shown to be reasonable for the landlord to refuse consent where he reasonably anticipates that the new tenant or subtenant's proposed use will be a breach of covenant. However, there is no rule of law to that effect: it is always a question of fact as to whether the landlord's refusal is reasonable.[41]

22.5 While a landlord need usually only consider his own relevant interests, there *may* be cases where there is such an *extreme* 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.

22.6 Subject to the propositions set out above, it is in each case a question of fact, depending upon all the circumstances, whether the landlord's consent to an assignment is being unreasonably withheld.[42]

23. It is unreasonable for the landlord to refuse to consent to a transaction where his reason for doing so is to obtain a collateral, uncovenanted for, advantage[43]. So, even if the landlord's reasons relate to the relationship of landlord and tenant, if the real reason for the refusal or condition is to put pressure on the tenant to give up something or agree something which the landlord would not otherwise obtain, the refusal or condition will be unreasonable. An interesting example of an uncovenanted advantage arose in Allied Dunbar Assurance Plc v. Homebase[44] where the court held[45] that the real reason for objecting to an underletting was to prevent the creation of

40. See Bates v. Donaldson [1896] 2 QB 241, 244, per A.L. Smith LJ (CA).
41. *ibid*
42. Bickel v. Duke of Westminster [1977] QB 517, 524 (CA), and West Layton Ltd. v. Ford [1979] QB 593..
43 Bromley Park Garden Estates Ltd. v. Moss [1982] 1 WLR 1019 (see footnote 38)
44 [2002] EWCA Civ 666
45 And the Court of Appeal agreed.

what would have been disadvantageous comparable evidence for future rent reviews, which was an unreasonable collateral advantage.

24. Since the issue of reasonableness is one of fact, the lawyer's role in assisting the client is necessarily somewhat limited. Obviously it is possible to provide guidance in relation to well-trodden situations, such as where the landlord has a reasonable concern about an assignee's ability to meet the leasehold obligations. However, it must ultimately be for the landlord, perhaps with the assistance of his financial advisers, to reach the necessary judgment once he understands that he may not base his judgment upon the gaining of uncovenanted advantages. In my experience clients are often keen for their lawyers either to advise in the abstract as to whether or not a refusal is reasonable, or to dream up reasons which the landlord may rely upon. The best assistance that can probably be given is to identify and test the reasoning of the landlord, and make sure that no collateral advantage is being sought.

25. Having said all that, it may be of some use at least to identify a few areas which frequently arise.

Future occupant's use

26. As already mentioned, the landlord may reasonably refuse consent to an assignee who he reasonably anticipates will breach the user covenant, even though the landlord will (of course) have the protection of that covenant:

> *"It is one thing to have a tenant who complies with the user covenant in the lease and against whom there is no need to take steps to enforce the covenant. It is quite another to have a new tenant who does not comply with, or who challenges the interpretation of, the user covenant and against whom the landlord might need to take steps to enforce it…"*[46]

Equally, a landlord may be reasonable in withholding consent to an assignment or subletting if he reasonably objects to the use which the proposed assignee intends to make of the premises, even though such use is neither illegal nor forbidden by the

[46] ®Ashworth Frazer v. Gloucester CC [2001]

lease as, for example, where the proposed use would distort the tenant mix of the landlord's estate[47]. However, clearly a knee-jerk decision which does not genuinely consider the importance of this issue to the landlord in the circumstances, still less justify the decision in the decision letter, may be held to be unreasonable.

Tenant default

27. Clients often (perhaps reasonably) suppose that where the landlord's reason for refusing consent is the existence of a breach of a term of the lease on the part of the tenant, the landlord cannot be seeking any collateral advantage. It is, indeed, correct that if the landlord can show that a refusal of consent, or the imposition of a condition, is necessary to prevent his contractual rights under the lease from being significantly prejudiced that may amount to a reasonable basis for refusing consent. For example, where a "good covenant" in default of a repairing obligation is seeking to assign to a much weaker covenant who is less likely to be able to meet the obligations at the end of the lease. However, if the covenant of the assignee is just as good, or if the relevant breach is trivial or as easily remedied by the assignee, the landlord may have difficulty in justifying a refusal based upon the existence of the breach. Again, I stress that everything depends on the particular facts.

Assignment plus guarantee

28. A not infrequent question asked is whether the landlord can refuse consent to an assignment of a weaker covenant when the original tenant will remain liable (under an old lease, or through the imposition an Authorised Guarantee Agreement). If the landlord has a genuine and properly-based concern about the performance and observance of covenants the landlord may still arguably be reasonable in objecting. As Morgan J accepted in RBS PLC v. Victoria St (No. 3) Ltd[48]:

[47] Bros Group v. CSC Properties [1999] EGCS 47; F W Woolworth plc v. Charlwood Alliance Properties Ltd. [1987] 1 EGLR 53 (HH Judge Finlay QC, sitting as a judge of the High Court).

[48] [2008] EWHC 3052

"Holding the original tenant to account for damage caused by a breach of covenant is much less good than having performance and observance in the first place."[49]

29. That is as much as I consider I can usefully say about reasonableness in the time available. If you manage to make your client understand the distinction between collateral advantage and protecting his genuine interests as landlord, you will be off to a good start.

Remedy

30. The third of my three questions was 'what is my remedy?'

31. For the landlord, the need for a remedy arises where the tenant has assigned, underlet or parted with possession in breach of covenant. In such circumstances, the landlord will probably be aware of his potential right to forfeit the lease. Although he would have a claim for breach of covenant if he suffers damage, it seems unlikely that it would be of much use to him in most cases.

32. Perhaps less frequently kept in mind is the possibility of compelling a re-assignment back to the original tenant, or a surrender of an unlawful underletting, on the basis that the new tenant or undertenant is guilty of the tort of inducing a breach of contract. If the landlord can establish that the new tenant or undertenant induced the other party to act in a way which he knew was a breach of the lease, or in relation to which he deliberately turned a blind eye, he will be guilty of this tort and the landlord will be "entitled" (subject to any available equitable defence) to an injunction compelling the original tenant and the assignee or undertenant to execute the necessary surrender or conveyance to reverse it[50]. The landlord faces the obvious difficulty of establishing the requisite level of knowledge on the part of the new tenant or subtenant (being either actual knowledge of the breach that would arise, or "blind

[49] at [31] and [33]
[50] Tesco v. Crestfort Ltd [2005] EWHC 2480

eye" knowledge of that breach). However, where the parties are reasonably sophisticated the court may be skeptical of suggestions by the new subtenant that it did not know it was inducing a breach of contract[51].

33. For the tenant, the right to a remedy arises by virtue of a breach of the statutory duty (which is a tort) which has occurred where the landlord has unreasonably failed to give consent. The burden is on the tenant to prove its loss but, for example, where a proposed subletting goes off, the losses may include loss of rental income from the proposed sub-tenant, and liability for rates and service charges which would have been met by the sub-tenant[52]. Such claims are strictly 'loss of chance' claims, because the future letting or assignment was only ever a hypothetical possibility, dependent on the actions of a third party which never eventuated. However, in a particular case on particular facts that chance may be assessed at 100%. Claims are, of course, also subject to the tenant's obligation to mitigate its losses.

34. A word of warning: issues of causation can sometimes be harder than one might expect. For example, in Clinton Cards (Essex) Ltd v. Sun Alliance & London Assurance Co Ltd[53] the tenant established an unreasonable refusal to consent to an underletting of their shop to Orange, who took the shop next door as a result. However, the landlord had also unreasonably refused to consent to a change of use. Since there was nothing to suggest that, on the hypothesis that the landlord had not breached its statutory duty, it would have changed its position in relation to change of use. Since that unreasonable refusal did not give rise to a breach of duty, and since there was no evidence that *Orange* would have entered into the underlease if the landlord had maintained its unreasonable objection to the change of use, Clinton Cards failed on causation.

[51] Per Morgan J in Brimex Ltd v. Begum [2009] L &TR 21, in which the landlord's claim failed because the suggestion that the tenant knew had not been put to the witnesses.
[52] As in Blockbuster Entertainment v. Barnsdale Properties [2004] L&TR 13
[53] [2005] 1 WLR 1

35. Finally, a word of warning to those representing landlords (if more warning were necessary). In Design Progression Ltd v. Thurloe Properties Ltd[54] Peter Smith J held that the landlord had adopted a deliberate tactical approach to "see off" a proposed assignee. The judge awarded £100,000 as the lost premium and rent which would otherwise have been paid. However, the judge also awarded a further £25,000 as exemplary damages.

Conclusion

36. Although this talk was not intended to be anything approaching a comprehensive review of an extremely large topic, I hope at least that it will provide you with a head start in considering the three questions which at least I am most frequently asked.

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[54] [2005] 1 WLR 1

[55] I am grateful to Nicholas Taggart, whose previous thoughts on many of these topics were the seeds for this talk.