

Lease assignments within a group of companies

Negotiate with care!

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Control over assignment

In today's unpredictable market tenants need to retain flexibility with their properties and often need to dispose of leased properties which they no longer require, or restructure where their properties are held within the group. Modern commercial leases will set out the conditions to any assignment, one of which is often "no assignment to a group company".

"Such conditions can...hinder groups of companies being able to run their property portfolio as they want and need to..."

At the time of negotiating the lease many tenant companies think of assignment only to a third party and do not consider the implications such a provision has on any group restructuring/reorganisation. In fact as most leases provide for group sharing, assignment conditions which restrict group disposals are often overlooked. However, when the tenant company asks for consent from the landlord to assign, the bottom line (where such a condition is in the lease) is that the landlord can simply say "no" where the proposed assignee is a group company.

So, is all hope lost?

For over a decade, virtual assignments have been viewed as an efficient method of procuring a lease assignment without having to obtain landlord's consent. In

short, 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". Therefore, where a tenant has concerns about obtaining consent for whatever reason, the alienation covenant can be sidestepped.

The Court of Appeal has recently confirmed the position in *Clarence House Ltd v National Westminster Bank Plc (2009)* which comes as a welcome relief for tenants and landlords alike who are now clear on where virtual assignments lie in legal terms. It was held that a virtual assignment was not a breach of the covenant against parting with or sharing possession and did not breach the covenants against assignment or declaring a trust. In April this year the Supreme Court refused Clarence House Limited leave to appeal the Court of Appeal's decision. For the full judgment see [Clarence House Limited v National Westminster Bank Plc \(2009\)](#).

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Under section 19(1A) Landlord and Tenant Act 1927, the landlord and tenant can agree any circumstances in which the landlord can withhold licence to assign;

and any conditions to which consent can be made subject. Therefore, when negotiating a lease, do not agree to any restrictions which prevent or limit group assignment. Any potential assignee should be judged on its own merit against whether or not it can comply with the covenants in the lease, and any other conditions to assignment agreed at the time of the lease. The fact that it is a group company should not be a bar.

Such conditions on assignment within a lease make the lease potentially

unassignable, and hinder groups of companies being able to run their property portfolio as they want and need to in order to be able to run their business.

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