

Chapter 13: The running of covenants in a lease

Assessment question

In 1994 Lisa leased (by deed) a house to Tommy for four years. The lease includes the following covenants:

1. the tenant should pay £2,000 per year rent;
2. the tenant should not use the house for any purpose other than as a private dwelling;
3. the tenant should not assign, sub-let, or part with possession except with the landlord's consent.

The lease does not contain a forfeiture clause.

Lisa believes that Tommy intends to assign or sub-let to Percy. She is alarmed at that prospect, as Percy uses a number of houses in the area as branches of his very extensive accountancy practice.

Advise Lisa:

- as to the possible legal consequences if she withheld her consent to an assignment or sub-letting to Percy; and
- as to her position if she gave her consent to an assignment or sub-letting, but subsequently wishes to enforce covenants (1) or (2).

Specimen answer

The lease omits a forfeiture clause, thus limiting the remedies Lisa can seek for breach of covenant. She can sue for damages, and also an injunction to restrain non-residential user, but she will be unable to reclaim possession, even if the breach is extremely serious.

A second preliminary point is that if Tommy assigned or sublet to Percy without even asking for Lisa's consent, that would be a breach of covenant. Lisa could claim damages, but the transaction would be valid (*Peabody v Higgins*). If Percy was a man of excellent character to whom no reasonable objection could have been taken, the damages might be nominal. Assuming that Tommy asks (in writing) for consent to assign or sub-let to Percy, then the Landlord and Tenant Acts 1927 and 1988 apply to covenant (c), a 'qualified covenant' against assignment etc. The 1927 Act (section 19) implies into covenant (c) a proviso that Lisa must not unreasonably withhold her consent.

The 1988 Act is even more significant, placing on Landlords (like Lisa) a series of duties if they receive from a tenant, with respect to a qualified covenant, a written request for consent to an assignment or sub-letting. Firstly, Lisa must give an answer within a 'reasonable time'. Secondly, she must give consent, unless there are reasonable grounds for refusing. Thirdly, if she says 'no' then she must give written reasons. Moreover, if she breaches any of these duties, Tommy can sue for damages. The 1988 Act also establishes that in any dispute over a landlord's actions where there is a qualified covenant, the onus of proof will be on the landlord to show that (s)he is being reasonable.

Thus Lisa is advised to say 'yes' to any written request from Tommy, unless she has good grounds for objecting which she can prove to the satisfaction of the court. Case-law (particularly the *Louisville Investments* case) indicates that purely personal objections (e.g. 'I cannot stand accountants') will not suffice. The landlord's objections must relate to the character of the assignee or sub-tenant or his proposed use for the premises. If Percy were of proven bad character, for example, a convicted criminal, that could be justifiable grounds for objection.

More importantly, if Lisa could prove that Percy intended to use the premises for inappropriate purposes, for example that he was definitely going to use the house as an office, that would be good grounds for saying 'no'.

It follows from this discussion that the answer to part (i) largely depends on whether Lisa is confident that she has reasonable grounds of objection proveable in court. If this is so, then she will succeed any litigation commenced by Tommy. She might even consider herself seeking an injunction to restrain the proposed sub-letting/assignment.

If, in response to Tommy, she advances inadequate reasons, she may be fortunate. Tommy may not want to risk litigation, and abandon his proposed transaction. Lisa will have bluffed her way out. But Tommy may well call Lisa's bluff, and when told 'no' go ahead and assign or sub-let without consent. Proceedings then commenced by Lisa would fail.

Tommy might alternatively claim a declaration that Lisa is withholding her consent unreasonably and/or claim damages under the 1988 Act. Tommy would succeed. Moreover, if because of delay caused by litigation Percy lost interest in the premises, the damages could be substantial.

With respect to part (ii) of the question, if Lisa wishes to enforce covenants (a) or (b) against Tommy, then the position is the same, whether Tommy has sub-let or assigned. Tommy, being the original tenant, is liable for the duration of the lease. He contracted for forty years, so he (or his personal representatives after his death) remains liable for that period. This will be so, whether the breach about which Lisa is complaining is actually committed by Tommy, Percy, or an assignee from Percy.

With respect to enforcement against Percy, it matters whether the transaction is an assignment or sub-lease. If an assignment, then Lisa and Percy will come into a relationship known as 'Privity of Estate'. Such privity exists where two parties are in a direct landlord and tenant relationship. Where parties are in Privity of Estate, then covenants which 'touch and concern the land' are enforceable between them. Covenants to pay rent and relating to user of the premises touch and concern the land. Thus if rent arrears build up, Lisa will have the choice of suing Tommy (contract) or Percy (privity of estate). She can only recover one lot of damages. She should sue whoever has the most money.

If the house is used for other than a private dwelling, she can again sue either Tommy or Percy, though if she wants an injunction preventing the user she should sue Percy.

If the transaction is a subletting, then there is no Privity of Estate between Lisa and Percy, as there is no direct relationship of landlord and tenant. (Tommy, as it were, stands between them.) Thus the covenant to pay rent would only be enforceable against Tommy.

Covenant (c) is special. It is a restrictive covenant, which can be enforced by a landlord (Lisa) against a subtenant (Percy), not by invoking landlord and tenant law, but by invoking restrictive covenants law. If the lease is registered title, then the covenant automatically binds a sub-tenant (Land Registration Act 2002, section 29(2)(b)). If the lease is unregistered, then Percy is only bound if he has notice of the covenant. Lisa can ensure this by consenting to the sub-letting on condition that Tommy tells Percy about the covenant. (Case law and the 1988 Act allow consent on conditions, providing they are reasonable. Clearly this condition is reasonable.)