

Protocol for Applications for Consent to Assign or Sublet (the Alienation Protocol)

1. Preliminary

1.1 This Protocol applies where a tenant wishes to assign or sublet part or all of its premises, but its lease prohibits such transactions without the landlord's consent.

1.2 References in this Protocol to "the third party" are shorthand for the proposed assignee or sub-tenant, as the case may be.

1.3 The drafting below assumes that the proposed transaction is in accordance with any specific terms going beyond a standard qualified prohibition on assignment or subletting without landlord's consent. Before any application is made, however, the tenant should satisfy itself that this is the case.

2. The Application

2.1 The application for consent to assign or sublet should be in writing, and should:

- Specify whether the tenant proposes (a) to assign or (b) to sublet (c) the whole or (d) part (and if so which part) of the premises;
- Identify the third party, and any guarantor;
- Provide sufficient information about the third party (and any proposed guarantor) to enable the landlord to consider the application, including, unless obviously irrelevant or disproportionate:
 - a description of the trade or business of the third party;
 - where the third party is a company, its registered number and office;
 - where the third party is an individual, character references or contact details for referees, current or former landlord references and (if possible, unqualified) bank and/or accountants' references; and
 - in the case of a proposed assignment, information (such as the last three years' accounts or, if unavailable, a business plan with profit forecasts) sufficient to demonstrate the ability of the assignee and any guarantor to comply with the obligations in

the lease.

- Provide details of the proposed use of the premises by the third party;
- In the case of a proposed sublease, provide a draft sublease or sufficiently detailed information about its proposed terms, having particular regard to any requirements in the lease as to the terms on which a subletting may be permitted;
- Offer to meet the landlord's reasonable and proper legal and other costs in connection with the application and the grant of consent in accordance with paragraph 3 below;
- Provide an explanation as to any circumstances which make the tenant's application especially urgent; and
- Provide any other information which might be pertinent to the application and to the landlord's decision.

This is a non-exhaustive list and the tenant should have regard when making its application to all legal and commercial circumstances when considering what further information the landlord might reasonably require.

2.2 The tenant should aim to provide such information in a single package so that the landlord is able to consider all materials supporting the application as a whole.

2.3 The application should be served on the landlord by the tenant (rather than by the third party) in accordance with the terms of the lease. If the tenant is aware that the landlord has retained agents or lawyers, it should also send a copy of the application to them.

3. Costs

3.1 A landlord will usually be entitled to its reasonable and proper legal and other costs in connection with the application and the grant of consent.

3.2 When making its application for consent a tenant should therefore offer to provide an enforceable undertaking (preferably from a solicitor) to meet such reasonable and proper legal and other costs.

3.3 If either party wishes instead to specify an amount for the undertaking, or, in the absence of such an undertaking, to specify an

amount to be paid on account, that amount should reflect, as appropriate, the complexity of the proposed transaction (including the number of leases, the volume of documents for review, the number of parties involved, and the number of documents to be drafted); the value of the property in question; any requirement to seek the consent of any other party (such as a lender or superior landlord); any need for external professional advice; any conditions requiring compliance; and any extraordinary feature of the proposed transaction.

3.4 If the tenant offers an undertaking which the landlord considers is insufficiently secured, or offers an undertaking to pay costs up to a specified amount or makes a payment on account, and the landlord considers that amount to be insufficient, and the landlord is not willing to complete its consideration of the application unless and until a sufficient undertaking is given or payment made, the landlord should promptly give its reasons to the tenant.

3.6 If subsequently the landlord considers that its costs will exceed the tenant's undertaking or payment on account, it should notify the tenant, with reasons, of any further sum required.

3.7 The landlord should not use costs as an excuse to defer dealing with the tenant's application. Doing so may amount to an unreasonable delay or refusal of consent. In particular, the landlord should not delay its consideration of the tenant's application on the basis only that the parties are seeking to agree an increased amount to which the tenant's undertaking for, or payment on account of, costs should be limited. The landlord should process the application by doing work up to the limit of the tenant's undertaking or payment on account.

4. Acknowledgement and requests for further information

4.1 Within 5 working days of receiving the tenant's application, the landlord should respond to the tenant to confirm receipt of the application. If the landlord either (a) believes that the tenant's application does not include enough information for a decision; or (b) requires time to ascertain what further information it might require in order to deal properly and reasonably with the application, the landlord should so notify the tenant at the same time.

4.2 Where the landlord is itself a tenant, and the terms of its lease require it to seek its own landlord's consent to any such proposed transaction, the landlord should consider its obligations in the lease and under statute to pass applications onto its own landlord. Without prejudice to that, the landlord should aim to serve on its own landlord copies of the application and supporting documents

within 5 working days of receiving them from its tenant. This should be done even if the landlord has not yet consented to the application (although it should not be taken to imply that such consent will be given). Any such superior landlord should follow this protocol, communicating with its tenant (i.e. the landlord to whom the application was made).

5. Further information

5.1 Where the landlord has reasonably requested further information from the tenant in support of the tenant's application, the tenant shall provide that further information as soon as is reasonably possible and in any event before the information already provided in support of the application becomes out of date. The landlord should aim to request and the tenant should aim to provide any further information as a single package.

6. The Landlord's Decision

6.1 The landlord should deal with the application expeditiously and communicate its decision and reasons to the tenant in writing within a reasonable time of receiving the application and any further information reasonably requested.

6.2 The landlord should aim to communicate its decision in this way within 21 days of receiving the tenant's application, but what constitutes a reasonable time in every case is a question of fact having regard to the circumstances of the transaction, including:

- The type and amount of information provided to, and requested by, the landlord;
- The speed with which the tenant responds to requests for information;
- Any particular urgency or time limit constraining the tenant, which has been notified to the landlord;
- The complexity of the transaction, corporate structure and any guarantee arrangements, and the complexity of any unusual legal and estate management issues to be dealt with by the landlord when making its decision; and
- Whether the tenant is likely to suffer loss as a result of a delay.

6.3 The landlord must have regard to these and all other pertinent factors when deciding how quickly to act on the tenant's application.

The tenant must have regard to these and all other pertinent factors when considering whether its landlord is acting with sufficient expedition. As a general rule, the landlord should not assume that a new 21 day period begins when the tenant provides additional information.

6.4 If the landlord believes that it will not be able to communicate its decision to the tenant in writing either within an express time limit requested by the tenant, or within a period of 21 days (whichever is shorter) the landlord should notify this to the tenant as soon as possible, and give reasons.

7. Dispute Resolution

7.1 If the tenant believes that its landlord has unreasonably withheld or delayed its consent, the parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation and, if so, endeavour to agree which form to adopt. Both the landlord and tenant may be required by the Court in subsequent proceedings to provide evidence that alternative means of resolving their dispute were considered.

7.2 The options for resolving disputes without litigation include:

- Arbitration by a suitably qualified and experienced lawyer agreed upon by the parties or appointed in default of agreement from the Property Panel of the Chartered Institute of Arbitrators by the President of that Institute;
- Expert determination by an independent third party (for example, a barrister, solicitor or surveyor experienced in the relevant field);
or
- Mediation - a form of facilitated negotiation assisted by an independent neutral party.

7.3 If the parties cannot reach agreement after complying with the protocol then the final step will be for the dispute to be referred to the Court.

Written by:

Guy Fetherstonhaugh QC
Jonathan Karas QC
Nicholas Cheffings
Mathew Ditchburn

Date:

February 2015

[Print Page](#)