

Alienation

A guide to assigning or underletting your lease

This guide is for leaseholders of commercial premises looking to dispose of their business premises whether because they are surplus to their requirements or they are looking to expand into more space. This is often referred to as “Alienation”.

1. What is Alienation?

Alienation is the transfer of ownership of property rights. It includes assignment, underletting, charging of an interest and parting with possession.

Most leases contain restrictions on alienation. This may be an absolute prohibition or may be qualified by the requirement to obtain the landlord's consent.

a. What is an Assignment?

If a lease is assigned the leasehold interest is sold by the existing tenant (Assignor) to a new tenant (Assignee). The Assignor will vacate the property and (subject to certain exceptions noted below in relation to AGAs) will no longer have any direct liability to the landlord. The obligation to comply with the lease covenants is transferred to the Assignee who becomes directly liable to the landlord.

b. What is an Underletting?

Where an underletting takes place, the existing tenant's lease remains in place. That tenant (the Head tenant) grants a sub-interest in the property which fits in under its lease to a new party – the Undertenant. The Undertenant may take an underlease of the whole or part only of the premises occupied by the Head tenant. The Head tenant remains liable to pay the rent and any other sums due under its lease direct to the landlord. Dependent upon whether the Underlease is of whole or part, it will recover the whole or part of these costs from its Undertenant.

2. How do I assign my lease?

a. Check the Lease

- The first thing to check is whether or not your lease allows you to assign and if so, whether this is with or without the consent of the landlord and what, if any, conditions can be attached to that consent. If the lease does not make any reference to prohibiting assignment, or allows assignment without consent, then you are free to assign the benefit of the lease as a whole or in part to the Assignee. i.e you do not need to obtain the landlord's consent:
- Check whether the lease allows assignment of part as well as whole. Most leases allow assignment of whole with the landlord's consent but absolutely prohibit assignment of part.
- Check to see whether the lease contains a covenant by the tenant to pay the landlord's costs for granting its consent to an assignment.
- Check whether there are any conditions attached to the landlord providing its consent to an assignment. The lease may contain a requirement that the tenant enters into an Authorised Guarantee Agreement (AGA). This is an agreement by the Assignor to guarantee the performance of the lease covenants by the Assignee and an indemnity to the landlord if the Assignee fails to do so.
- Check to see whether the consent of any other party is required for example, the landlord's mortgagee. If so, this may impact on the timeframe for obtaining such consent and you may be liable for the landlord's mortgagee's costs as well.

b. Apply to the landlord for Consent

- Once you have established that you can assign the lease subject to consent you should make a formal application to the landlord for its consent to such assignment.
- The notice provisions in the lease itself will set out how such application should be made and it is important to ensure that it is made correctly so that you can challenge any unreasonable refusal by the landlord to consent or any unreasonable delay in providing its consent.
- The landlord is entitled to request details of the Assignee including accounts/references to satisfy itself that the Assignee can comply with the covenants in the lease.

c. What documentation is required?

- The landlord's consent will normally be formally documented in a Licence to Assign. This is prepared by the landlord's solicitor and then circulated to the Assignor's solicitor and the Assignee's solicitor for their approval. The licence may include an Authorised Guarantee Agreement.
- Transfer/Deed of Assignment – The leasehold interest in the lease itself has to be transferred between the Assignor and the Assignee. This will either be by way of Deed of Assignment or a Transfer dependent upon the term of the lease and whether it has been registered at HM Land Registry. The Assignor's solicitor will normally draft this and circulate it to the Assignee's solicitor for approval.
- A contract for the assignment of the lease may also be entered into and again this is drafted by the Assignor's solicitor and circulated to the Assignee's solicitor for approval.
- Following completion of the assignment, a Notice of Assignment has to be served by the Assignee on the landlord/its solicitor and if applicable, the Assignee's solicitor will apply to the Land Registry to record the fact that the tenant (the registered proprietor) has changed.

3. How do I underlet my lease?

a. Check the Lease

- As with assignment, the first thing to consider is whether or not your lease allows you to underlet and whether this is with or without consent. If the lease does not make any reference to prohibiting underletting, or allows underletting without consent, then you are free to underlet the premises demised by the lease as a whole or in part to the undertenant ie you do not need to obtain the landlord's consent.
- Check whether the lease allows underletting of part as well as whole.
- Check to see whether the lease contains a covenant by the tenant to pay the landlord's costs for granting its consent to an underletting.
- Check whether there are any conditions attached to the landlord providing its consent to an underlease. The lease will usually contain a requirement that the landlord approves the form of underlease or will set out the main terms of any underlease.

- Check to see whether the consent of any other party is required for example, the landlord's mortgagee. If so, this may impact on the timeframe for obtaining such consent and you may be liable for the landlord's mortgagee's costs as well.

b. Apply to the landlord for Consent

- Once you have established that you can underlet subject to consent you should make a formal application to the landlord for its consent to such underletting.
- The notice provisions in the lease itself will set out how such application should be made and it is important to ensure that it is made correctly so that you can challenge any unreasonable refusal by the landlord to consent or unreasonable delay in providing its consent.
- Even though the tenant will remain directly liable to the landlord, the landlord is still entitled to request details of the Undertenant including accounts/references to satisfy itself that the undertenant can comply with the covenants in the lease, in case the tenant fails to make these payments.

c. What documentation is required?

- The landlord's consent will normally be formally documented in a Licence to Underlet. This is prepared by the landlord's solicitor and then circulated to the tenant's solicitor and the Undertenant's solicitor for their approval.
- Underlease – The tenant's solicitor will draft this and circulate it to the Undertenant's solicitor for approval. Once agreed a copy will be sent to the landlord's solicitor for approval.
- An agreement for the granting of the Underlease may also be entered into and again this is drafted by the tenant's solicitor and circulated to the Undertenant's solicitor for approval.
- Following completion of the Underlease, a Notice of Underletting has to be served by the tenant on the landlord/its solicitor.
- If applicable, the Undertenant's solicitor will apply to the Land Registry to register the Underlease.

4. Other Options

a. Surrender - It may be that your landlord is willing to negotiate a surrender of your lease rather than consenting to an assignment or underletting.

- A surrender is an agreement between both the landlord and the tenant to end the lease before the contractual expiry date.
- A landlord will not usually be under any obligation to accept a surrender and it will be a question of negotiation between the parties as to whether this can be agreed. This is usually only possible if the landlord has another party interested in taking a lease of the premises or has plans to redevelop the premises itself.
- It is likely that you will have to pay a "premium" to the landlord for the right to end the lease early.
- A surrender may give the tenant a full release from all liability under the Lease; may be without prejudice to the rights of the landlord in respect of any existing breaches e.g. in relation to a dilapidations claim; or may be subject to a payment to the landlord in respect of such dilapidations liability.
- You are also likely to have to pay the landlord's legal costs for drafting the necessary surrender documents.

b. Break Right – A break clause can be included in a fixed term lease allowing either the landlord or the tenant to terminate the lease early.

- The right to break may arise on one or more specified dates or it may be exercisable at any time during the term on a rolling basis, on service of written notice giving at least a specified minimum period before the break date itself.
- Break clauses may specify conditions for the operation of the break, such as a requirement that the tenant must have paid all the rent (or other payments due under the lease); must give vacant possession; and must not be in material breach of its repairing covenants.
- A break clause will usually state that termination of the lease by operation of the break will be without prejudice to the rights of either party in relation to any prior breach of the lease covenants, in particular a landlord can still pursue a dilapidations claim.
- As well as setting out how much notice has to be given to exercise the break, the clause may include mandatory provisions setting out how the break notice must be sent to the other party and when it will be deemed to have been received. In other cases, the general notice provisions in the lease will apply.
- Any conditions attached to the right to break must be strictly complied with and it is therefore important to seek legal advice before considering exercising a break right to ensure that this valuable right is not inadvertently lost.

Moorcrofts' commercial property team provides legal advice to owners and occupiers of commercial property. We specialise in tenant representation and have extensive experience advising corporate occupiers on all aspects of leasehold acquisitions and disposals. If you would like legal assistance with your commercial property needs, please contact our Partner and Head of Commercial Property – Julia Ferguson.



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