

DOUG STEVENS SEMINAR

22nd August 2016

► SUBJECT

1. *Assigning a lease*
2. *Underletting a lease*
3. *Open Questions*
4. *NEXT SEMINAR - 19th September - CBRE 'C' Bar at 08;00hrs*

PREVIOUS SEMINARS - Notes posted www.douglasstevens.co.uk Seminars

*SEMINAR BY DOUG STEVENS TO 1st & 2nd YEAR GRADUATES
DELIVERED AS A POWERPOINT PRESENTATION*

ASSIGNING / UNDERLETTING A LEASE

- ▶ WE WILL FIRST LOOK AT WHAT IS MEANT BY ASSIGNING OR UNDERLETTING A LEASE (GENERALLY REFERRED TO AS ALIENATION)
- ▶ IN WHAT PROPERTY ROLES IS IT RELEVANT - ASSET MANAGEMENT - AGENCY - INVESTMENT AGENCY
- ▶ THEN WE WILL LOOK AT 2 SCENARIOS
 - AGENCY ROLE - SELLING / ASSIGNING A LEASE
 - ASSET MANAGEMENT ROLE - DEALING WITH AN APPLICATION TO ASSIGN EITHER AS A LANDLORD OR MANAGING AGENT
- ▶ IF WE HAVE TIME WE WILL LOOK AT THE SAME 2 SCENARIOS FOR UNDERLETTING
- ▶ ALIENATION PROVISIONS VARY LEASE BY LEASE (EVEN IN A SHOPPING CENTRE WHERE STANDARDISATION IS PREFERABLE)
- ▶ IN ADDITION TO THE QUALIFICATIONS AND CONDITIONS IN A LEASE RELATING TO ALIENATION THERE IS ALSO THE IMPACT OF PROPERTY LEGISLATION

ALIENATION

- ▶ A GENERAL TERM COVERING **ASSIGNMENT - UNDERLETTING** - PARTING WITH POSSESSION
- ▶ WHY AND WHERE IS IT RELEVANT ?
- ▶ **ASSET MANAGEMENT** - AN UNDERSTANDING OF THE ALIENATION PROVISIONS IN EXISTING LEASES IS FUNDAMENTAL TO EFFECTIVE MANAGEMENT / CONTROL OF PROPERTY AS A LANDLORD AND/OR MANAGING AGENT
- ▶ **AGENCY** - DISPOSING OF OR ACQUIRING LEASES BY ASSIGNMENT OR UNDERLETTING IS DETERMINED / INFLUENCED BY ALIENATION PROVISIONS - SO AN UNDERSTANDING IS CRITICAL
- ▶ **INVESTMENT AGENCY** - DISPOSING OF OR ACQUIRING LONG LEASEHOLDS BY ASSIGNMENT DETERMINED/ INFLUENCED BY ALIENATION PROVISIONS - SO AN UNDERSTANDING IS CRITICAL
- ▶ EVERY LEASE MAY CONTAIN DIFFERENT CLAUSES - BUT THESE STATUTES ALSO APPLY
- ▶ **LANDLORD & TENANT ACT 1927 S.19**
- ▶ **LANDLORD & TENANT ACT 1988 S.1**
- ▶ **LANDLORD & TENANT COVENANTS ACT 1995**

SCENARIO 1 - AGENT SELLING/ASSIGNING A LEASE

- ▶ **YOU ARE INSTRUCTED BY A RETAILER TO SELL THEIR LEASE - WHAT DO YOU NEED TO KNOW?**
 - ASK FOR COPY OF LEASE AND ANY OTHER DOCUMENTS i.e. Licence for Alterations, Deeds of Variation
 - HAS THE LEASE LENGTH OR USER BEEN VARIED. HAVE ANY TENANTS IMPROVEMENTS BEEN CARRIED OUT
 - WHAT IS THE CURRENT RENT? ESTABLISH IF IT IS UNDER-RENTED OR OVER-RENTED
 - DOES THE LEASE PERMIT THE ASSIGNMENT OF THE LEASE?
 - IS THERE A GOOD ESTATE MANAGEMENT / TENANT MIX PROVISIO
 - IS THERE A PRE-EMPTION ENABLING LANDLORD TO MATCH ANY ASSIGNEES OFFER
- ▶ INSPECT AND MEASURE THE PROPERTY
- ▶ OBTAIN A COPY OF THE EPC (ENERGY PERFORMANCE CERTIFICATE)
- ▶ **ESTABLISH IF THE TERMS OF THE LEASE WILL PERMIT YOU TO ASSIGN THE LEASE TO THE ASSIGNEE**
 - IS THE PROPOSED USE PERMITTED?
 - IS THE COVENANT EQUIVALENT OR BETTER?
 - IF NOT, WILL A RENT DEPOSIT OR GUARANTEE BE OFFERED?
 - OBTAIN PHOTOS, REFERENCES, ACCOUNTS, LIST OF BRANCHES
- ▶ **DID YOU CONSIDER A SURRENDER TO THE LANDLORD - REMOVES AGA AND DILAPIDATION PROBLEMS**

ALIENATION

- ▶ **ASSIGNMENT** THE DISPOSAL OF A LEASE.
- ▶ LEASE MAY -;
- ▶ PROHIBIT ASSIGNMENT ABSOLUTELY - L/L maintains full control - negative effect on value ?
- ▶ PROHIBIT ASSIGNMENT FOR A SPECIFIED PERIOD - ie, for an anchor store in a centre
- ▶ PERMIT ASSIGNMENT OF WHOLE - (but not part) subject to various conditions
- ▶ PERMIT ASSIGNMENT BUT SUBJECT TO L/L PRE-EMPTION - allows L/L to take the lease back matching any premium offer
- ▶ STANDARD LEASE PROVISIONS WILL PERMIT ASSIGNMENT OF WHOLE SUBJECT TO CONDITIONS
- ▶ good estate management/tenant mix - covenant - AGA - guarantor - rent deposit
- ▶ **LANDLORDS CONSENT NOT TO BE UNREASONABLY WITHHELD (or delayed) LCNTBUW**
- ▶ S.19 Landlord & Tenant Act 1927 - L/L deemed not to act unreasonably
- ▶ LANDLORD & TENANT ACT 1988 S.1 Consent not to be unreasonably withheld - BUT - this will not over-ride specified qualifications/conditions

SCENARIO 2 - LANDLORD/MANAGING AGENT RECEIVING TENANT APPLICATION FOR LICENCE TO ASSIGN

- ▶ **YOU ARE INSTRUCTED BY A RETAILER TO SELL THEIR LEASE - WHAT DO YOU NEED TO KNOW?**
 - ASK FOR COPY OF LEASE AND ANY OTHER DOCUMENTS i.e. Licence for Alterations, Deeds of Variation
 - HAS THE LEASE LENGTH OR USER BEEN VARIED. HAVE ANY TENANTS IMPROVEMENTS BEEN CARRIED OUT
 - WHAT IS THE CURRENT RENT? ESTABLISH IF IT IS UNDER-RENTED OR OVER-RENTED
 - DOES THE LEASE PERMIT THE ASSIGNMENT OF THE LEASE?
 - IS THERE A GOOD ESTATE MANAGEMENT / TENANT MIX PROVISIO
 - IS THERE A PRE-EMPTION ENABLING LANDLORD TO MATCH ANY ASSIGNEES OFFER
- ▶ INSPECT AND MEASURE THE PROPERTY
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 - IS THE PROPOSED USE PERMITTED?
 - IS THE COVENANT EQUIVALENT OR BETTER?
 - IF NOT, WILL A RENT DEPOSIT OR GUARANTEE BE OFFERED?
 - OBTAIN PHOTOS, REFERENCES, ACCOUNTS, LIST OF BRANCHES
- ▶ **DID YOU CONSIDER A SURRENDER TO THE LANDLORD - REMOVES AGA AND DILAPIDATION PROBLEMS**

ALIENATION Continued

- ▶ **ASSIGNMENT** - TENANT SEEKS LANDLORDS CONSENT/ LICENCE TO ASSIGN
- ▶ LANDLORD CHECKS LEASE TO CHECK ANY SPECIAL CONDITIONS
- ▶ LANDLORD MUST ACT REASONABLY - L& T ACT 1988 S.1
- ▶ NO DELAYS - OBJECTION ON LEGITIMATE GROUND ONLY - see case law
- ▶ SUPERIOR LANDLORDS CONSENT OR DISCHARGE OF CHARGE ?
- ▶ LANDLORD GRANTS LICENCE TO ASSIGN
- ▶ TENANT SIGNS AN AGA
- ▶ **CASE LAW** GO WEST V SPIGAROLO [2003] QB 1140
- ▶ DESIGN PROGRESSION V THURLOE PROPERTIES [2004] EWHC 324
- ▶ **PRE-EMPTION** - On receiving an application for assignment
- ▶ L/L reserves right to exercise a pre-emption to take the lease back (a surrender) at same premium as offered to T in market
- ▶ Does the existence of the pre-emption depress the rental value ? No.

AUTHORISED GUARANTEE AGREEMENTS (AGAs)

- ▶ Authorised guarantee agreements (AGAs) were created by the Landlord and Tenant (Covenants) Act 1995. Applies to all leases granted from 1 January 1996. It sought to strike a balance between the uncertainty of liability of a tenant who assigns a lease and the protection of the landlord if the tenant assigns to a party who is not particularly acceptable to the landlord.
- ▶ Previously privity of contract applied. If the former tenant was the original tenant of an old lease, it will remain liable for all liabilities due under the lease until the end of the term, even though the lease may have been assigned many times and many years ago.
- ▶ Now tenants and their guarantors are automatically released from liability to the landlord when a lease is lawfully assigned to a third party. Landlords can, however, require outgoing tenants to enter into AGAs guaranteeing the liabilities of the new tenant under a lease.
- ▶ **There is no set form for an AGA, although the 1995 Act does set out what certain characteristics which an AGA must have and also certain characteristics which it cannot have. Therefore you will be liable for whatever the AGA expressly provides for, unless your liability is limited by statute**

AGAs continued

- ▶ CASE LAW ON AGAs
- ▶ **Good Harvest Partnership LLP v Centaur Services Limited** held that a guarantee of an assignee given by the outgoing tenant's guarantor was void.
- ▶ It was followed by **K/S Victoria Street and House of Fraser (Store Management) Ltd.**
- ▶ A guarantor can be liable for the new tenants liabilities under the terms of an AGA but only the terms of the AGA not all the lease terms.
- ▶ S.24(2) of the Act states that where a tenant is released from its covenants, a guarantor is also released "to the same extent as" the tenant. Where the tenant is only released from its obligations under the lease in so far as he is required to re-assume them under an AGA, equally the assignor's guarantor may be released from its obligations only to the same extent and may, accordingly, be required to guarantee the assignor's liability under the AGA

UNDERLETTING

- ▶ **UNDERLETTING** THE DISPOSAL OF A LEASE BY GRANTING AN UNDERLEASE.
- ▶ LEASE MAY:-
- ▶ PROHIBIT UNDERLETTING ABSOLUTELY - L/L maintains full control - negative effect on value?
- ▶ PROHIBIT UNDERLETTING FOR A SPECIFIED PERIOD - ie, for an anchor store in a centre - or close to lease end
- ▶ PERMIT UNDERLETTING OF WHOLE - subject to various condition
- ▶ PROHIBIT OR PERMIT UNDERLETTING OF PART OR PARTS ONLY
- ▶ STANDARD LEASE PROVISIONS WILL PERMIT UNDERLETTING OF WHOLE ONLY BUT SUBJECT TO CONDITIONS
- ▶ good estate management/tenant mix - covenant - guarantor - rent deposit
- ▶ reserving a market rent - same rent review pattern permitted part(s)
- ▶ Contracted out of S.24-28 L & T Act 1954
- ▶ **LANDLORDS CONSENT NOT TO BE UNREASONABLY WITHHELD (or delayed)**
- ▶ S.19 Landlord & Tenant Act 1927 - L/L deemed not to act unreasonably
- ▶ LANDLORD & TENANT ACT 1988 S.1 L/L to act reasonably Consent not to be unreasonably withheld - BUT - this will not over-ride specified qualifications/conditions

UNDERLETTING continued

- ▶ TENANT APPLIES FOR LANDLORDS CONSENT & LICENCE TO UNDERLET
- ▶ LANDLORD CHECKS LEASE FOR SPECIAL CONDITIONS
- ▶ LANDLORD MUST ACT REASONABLY - L& T ACT 1988 S.1
- ▶ NO DELAYS - OBJECTION ON LEGITIMATE GROUND ONLY - see case law
- ▶ SUPERIOR LANDLORDS CONSENT OR DISCHARGE OF CHARGE ?
- ▶ LANDLORD GRANTS LICENCE TO UNDERLET

- ▶ MOST MODERN LEASES PROVIDE THAT UNDERLETTING IS AT MARKET RENT
- ▶ CASE LAW - ;
- ▶ BLOCKBUSTER ENTERTAINMENT V BARNSDALE [2003] EWHC 2912
- ▶ MOUNT EDEN V FOLIA [2003] EWHC 1815 Ch
- ▶ NCR V RIVERLAND [2004] EWHC 2073 (Ch).Sets out 10 principles

INDIVIDUAL VOLUNTARY ARRANGEMENTS (IVA's)

- ▶ **Individual Voluntary Arrangement (IVA)**
- ▶ A sole trader or self-employed trader who is insolvent can appoint an insolvency practitioner who works out what you can afford to repay and how long the IVA lasts. You'll have to give details about your financial situation, eg your assets, debts, income and creditors.
- ▶ Your insolvency practitioner will contact your creditors. The IVA will start if the creditors holding 75% of your debts agree to it. It will apply to all your creditors, including any who disagreed to it.

COMPANY VOLUNTARY ARRANGEMENT (CVA)

- ▶ If your limited company is insolvent, it can use a Company Voluntary Arrangement (CVA) to pay creditors over a fixed period. If creditors agree, your limited company can continue trading.
 - ▶ A company or limited liability partnership (LLP) can apply if **all** the directors or members agree.
 - ▶ You can only get a CVA through an insolvency practitioner They will charge you to apply for the CVA and also to administer it.
1. The insolvency practitioner will work out an 'arrangement' covering the amount of debt you can pay and a payment schedule. They must do this within a month of being appointed.
 2. They'll write to creditors about the arrangement and invite them to a meeting to vote on it.
 3. To get a CVA, it must be approved by creditors who are owed at least 75% of the debt.

CVA Continued

- ▶ The business will now be solvent and can start trading again. You make the scheduled payments to creditors through the insolvency practitioner until these are paid off. If you don't get the 75% vote from the creditors, your company could face voluntary liquidation
- ▶ You can choose to liquidate your limited company (also called 'winding up' a company).
- ▶ The company will stop doing business and employing people. The company won't exist once it's been removed ('struck off') from the companies register at Companies House.
- ▶ When you liquidate a company, its assets are used to pay off its debts. Any money left goes to shareholders.
- ▶ If that money hasn't been shared between the shareholders by the time the company is removed from the register, it will go to the state.
- ▶ **If you don't meet the agreed payment schedule, any of your creditors can apply to wind up your business**
- ▶ *Goldacre (Offices) Ltd –v- Nortel Networks UK Ltd [2011] and Leisure (Norwich) II Ltd –v- Luminar Lava Ignite Ltd [2013].*
- ▶ **Jervis –v- Pillar Denton re: Games Station – rent as an Administration expense**
- ▶ For landlords, irrespective of the date the tenant company enters Administration, the landlord should be paid in full for the period the Administrator uses the demised property for the benefit of the Administration.

PRE-PACK ADMINISTRATION

- ▶ **Pre-pack Administration is an insolvency process which allows a viable but insolvent business to be sold in order that it can continue trading under a new name without the burden of its debts.**
- ▶ The Pre-pack protects the limited company from action by creditors. The old company can then be sold to either a third party or a phoenix company.
- ▶ Pre-pack is the pre-packaged sale of the companies assets and trade.
- ▶ A new company is formed and the old company is transferred to the new company. The old company is then put into administration.
- ▶ SIP 16 was introduced in January 2009 to assist Insolvency Practitioners in pre-pack cases. It was designed to make the process more transparent for creditors and to ensure that fair value was obtained for the assets. A 2011 survey of SIP 16 reports revealed that -;
 - **79%** of pre-pack sales were to parties connected with the insolvent company
 - Administrators undertook some marketing in **51%**
 - An element of the sale consideration was deferred in **63%** of cases

`PHOENIX` COMPANY

- ▶ A 'phoenix' company is a company that has been set up by the existing directors of the insolvent business before it goes into administration. It purchases the assets from the insolvent business pre- administration and continues trading.
- ▶ The `phoenix` company retains the viable part of the business – with the non-viable part and debts left in the old company which then is put into administration.
- ▶ The Directors of the original business and the Phoenix company are the often the same. The process also saves staff their jobs and is relatively quick and easy to arrange. The `phoenix` company is required to pay a fair price for the business and its assets – but the criticism is that that no other party gets the same opportunity.

ADMINISTRATION

- ▶ Company administration under the Insolvency Act 1986.
- Administration requires a Court Order – filed by the creditors or directors of the company (or by CVA) or a party (bank or other lender) which has a floating charge
- ▶ An insolvent company can enter administration **which** allows the reorganisation of the company's affairs or the realisation of its assets for the benefit of creditors. An insolvency practitioner takes over the control of the company's affairs from its directors.
- ▶ The key aim is to rescue the company (not the business that the company carries on) so that it can continue trading as a going concern.
- ▶ If the rescue of the company is not possible, the administrator must aim to achieve a better result for the company's creditors as a whole than would be likely if the company were put into **liquidation**
- ▶ If the administrator cannot achieve a better result for creditors as a whole, the purpose of the administration is to realise the company's property to make a distribution to the company's secured or preferential creditors ie, the bank.
- ▶ The administration ends after 1 x year, unless the creditors or the court agree an extension but normally many companies remain in administration for years.
- ▶ No liability for rates – therefore L/L leaves property in administration until ready to take it back

LIQUIDATION

- ▶ Insolvency Act 1986
- ▶ Also known as winding up.
- ▶ An insolvency procedure under which the assets of a company are realised and distributed to creditors by the **liquidator**
- ▶ **Compulsory liquidation** following a court order
- ▶ **Voluntary liquidation** instigated voluntarily by the members or creditors of the company.
- ▶ Unlike **administration** and **administrative receivership**, liquidation always results in the dissolution of the company.