

First Supplement to Memorandum 88-44

Subject: Study H-111 - Commercial Lease Law (Assignment and Sublease--
additional information)

Standards for Determining Reasonableness

Draft section 1995.050 (transfer restriction requiring landlord's consent), which appears in Exhibit 1 to Memorandum 88-44, codifies the rule in Kendall that a lease clause requiring the landlord's consent to an assignment or sublease is construed to include an implied standard that the landlord's consent may not be unreasonably withheld. The statute does not attempt to prescribe specific grounds for withholding consent, noting that this is a question of fact, based on commercial reasonableness. The Comment states that:

Under subdivision (a), some of the factors that the trier of fact may properly consider are financial responsibility of the proposed transferee, suitability of the use for the particular property, legality of the proposed use, need for alteration of the premises, and nature of the occupancy. Denial of consent solely on the basis of personal taste, convenience, or sensibility is not commercially reasonable, nor is denial in order that the landlord may charge a higher rent than originally contracted for. 40 Cal. 3d at 501.

We have received from Professor William A. Reppy, Jr., a copy of an article published in a British real property law journal concerning the assignment and sublease problem. See Kodilinye, "Refusal of Consent to Assign: The Unreasonable Landlord," *The Conveyancer* 45 (January-February 1988). The article notes that under Section 19(1)(a) of the Landlord and Tenant Act of 1927, if a lease clause precludes the tenant's assignment or sublease without the landlord's consent, the consent shall not be unreasonably withheld. The article observes that little is clear in the law on this point, and the cases provide no consistent pattern for deciding whether a refusal of consent by a landlord is reasonable in a particular case. The author summarizes the various lines of case law authority that have developed as follows:

It is now clear that the courts have developed three different tests for determining the question of reasonableness. They are to the effect that a refusal is reasonable if: (i) it is based upon the personality of the proposed assignee or upon the proposed use or occupation of the premises; or (ii) it is based on the contract between lessor and lessee and it safeguards the interests granted or reserved to the lessor by the lease, or (iii) it is reasonable in a general sense, taking into account the surrounding circumstances, the commercial realities of the market-place and the economic impact of an assignment on the landlord.

The author indicates that in a 1986 report, the Law Commission (the British equivalent of the California Law Revision Commission) "perhaps surprisingly" considered the existing law to be satisfactory. The author disagrees with this decision, finding the existing case law inadequate and stating "there is a need for clear principles establishing the circumstances in which refusal of consent would or would not be reasonable." The author advocates a test that would strike a balance between the rights of landlords and tenants. "Such a policy requires that the power of landlords to withhold consent to an assignment or subletting be limited to (i) ensuring the observance of covenants in the lease; (ii) recovering possession of the premises at the end of the lease; and (iii) any other circumstances expressly agreed in the lease."

Limiting the Retroactivity of Kendall

Draft section 1995.050, while codifying the rule in Kendall, limits its application to leases executed on and after the date of the Kendall case. The Note expresses some concern about the possible constitutional implications of attempting to restrict the case, although the Comment cites Kreisher v. Mobil Oil Corporation, 198 Cal. App. 3d 389 (1988) in support of this approach. The Kreisher case holds that Kendall may not be applied retroactively where the lease was executed, the landlord refused to consent to an assignment, and the tenant sued the landlord (but the court had not yet entered judgment), all before the Kendall case was decided.

The tenant sought review of the Kreisher holding in the Supreme Court, and the Supreme Court has now denied review. This appears to allow room for the Commission room to act on the retroactivity issue.

Respectfully submitted,

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