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Virtual Assignments – “Strange new beasts in the forest”

The recent case of *Clarence House Limited -v- National Westminster Bank Plc [2009]* has highlighted the need to be aware of this relatively new concept (Ward LJ describing ‘virtual assignments’ in his judgment as “...strange new beasts in the forest...”). The facts of the case were as follows:

A 25 year lease had been granted by Clarence House to NatWest and contained a tenant covenant against alienation by assigning, underletting, sharing or parting with possession of the premises. NatWest, as tenant, subsequently underlet the premises, with the consent of the landlord, to a third party. As part of a wider commercial arrangement, NatWest had entered into a ‘virtual’ assignment of its interest in this and several other properties to another party (New Liberty). The ‘virtual’ assignment **did not** assign the term of the lease or grant a right of occupation to New Liberty but gave them all the financial burdens and benefits of the lease and the underlease. Therefore, a ‘traditional’ assignment of the lease did not take place.

Clarence House, as landlord, subsequently discovered that the ‘virtual’ assignment had taken place and being concerned they may lose the valuable, original Nat West covenant, alleged breach of covenant by the tenant.

Initially, the judge found for the landlord, having decided that the receipt by the assignee of the underlease rents placed the assignee in ‘possession’ of the premises and that, by requiring the assignee to deal with the premises as tenant, NatWest had parted with, or was sharing possession of, the premises. However, NatWest took the case to the Court of Appeal, where the nature of the ‘virtual’ assignment was considered, along with the meaning of the term ‘possession’.

The Court of Appeal subsequently found in favour of NatWest, concluding that they were in fact **not** in breach of the alienation covenants contained in the lease, giving the following reasons:

- The term ‘possession’ should be given its ordinary meaning, being the right to enter and occupy the premises to the exclusion of all others.
- The ‘virtual assignor’ (New Liberty) had never actually been in possession of the premises, as they were not the actual occupier and therefore, could neither part with, nor share possession of, the premises.
- A leasehold covenant against parting with, or sharing possession of, the premises is concerned with the question of whether the tenant has allowed another party into physical occupation of the premises with the intention of relinquishing his own exclusive possession to that other.
- In collecting rents due under the underlease the ‘virtual assignee’ was expressly acting on behalf of the ‘virtual assignor’ and not on its own account. In addition, an assignment of the right to receive rents should not be regarded as an assignment of the reversionary leasehold title.

- The prohibition on assignment in the lease only related to a 'legal' assignment and that the 'virtual' assignment did not amount to an equitable assignment of the lease, nor did it amount to an underlease of the premises.

Conclusion

The effect of the Court of Appeal's decision in this case is that if a landlord wishes to prevent a tenant from entering into a 'virtual' assignment of premises, then the landlord should include in the lease an express prohibition on 'virtual' assignments.

Therefore, as at December 2009, subject to the specific facts of individual transactions, 'virtual' assignments may be regarded as being effective.

This articles offer general guidance and reflects the law as at [March 2010](#). The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.