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Underletting and subletting

The Nature of sub-letting and its constraints 'Sub-letting' (also known as 'under-letting') of a property generally means that a tenant further lets out the property (or part of it) to another 'tenant' (known as 'sub-tenant') by another lease/tenancy agreement (known as the 'sub-lease' or 'underlease'). At law, a sub-lease executed between a tenant and sub-tenant is a separate and independent contract from the lease with the landlord (i.e. 'head-lease'). However, notwithstanding that a tenant and a sub-tenant are generally at liberty to negotiate and agree upon the terms of a sub-lease to be different from the 'head-lease' (e.g. additional restrictive covenants to be imposed), the demised area and the term of a sub-lease are confined by the head lease. This is because the tenant has no right/interest to grant any interest in a sub-lease beyond the interest that he had been granted under the head-lease. For example:- "A owns Flat A and Flat B. A lets Flat A to B for a term of 1 year. However, B entered into a 'sub-lease' of Flat A and Flat B to C for a term of 2 years." In such scenario, B may be regarded to be in breach of the terms of the 'sub-lease' because he had no interest be 'let' to C in respect of Flat B and any flat beyond a 1 year period. Relationship between the tenant and sub-tenant As between the tenant and the sub-tenant, a tenant may incorporate and enforce the terms and covenants of the 'head-lease' by incorporating a covenant under a sub-lease that the sub-tenant shall observe certain covenants under the head-lease. It is generally better practice for the tenant to expressly and specifically set out which covenants are to be complied with and provide a copy of the head-lease to the sub-tenant whenever possible (rather than incorporation by general reference to the 'covenants of the head-lease'). However, since the landlord is not a party to the sub-lease, such covenant may only be binding and contractually enforceable by a tenant against a sub-tenant. Effect of termination of head lease on the sub-lease At law, the right of the tenant to grant a valid estate to a sub-tenant originates from the head lease. This means that, if the head-lease becomes ineffective (e.g. resumption/re-entry by the Government against the landlord or a third party being able to establish that he is the true owner of the land instead of the landlord) or terminated by the landlord for whatever reasons (i.e. non-payment of rent, other kinds of breaches committed by the tenant), the leasehold estate under the sub-lease will also become destroyed. In such case, notwithstanding that the sub-tenant might not be involved in any breach under the sub-lease, the sub-tenant will have no legal right or interest to possess and occupy the property vis-à-vis the landlord (or the Government/third party) and must deliver back the property. The only possible relief of the sub-tenant is to apply for 'relief against forfeiture' from the Court of First Instance under section 58(4) of the Conveyancing and Property Ordinance (Cap. 219) for a 'vesting order' to vest the remaining term (or any less term) of the head-lease to the sub-tenant with conditions that may be imposed by the Court (e.g. to comply with any outstanding breaches committed by the tenant). If such discretionary relief against forfeiture is granted, the sub-tenant may be able to 'stand into the shoes of the tenant' and continue to occupy the property as if he was the tenant until the expiry of the 'vested term'. The inter-relationship between a landlord/tenant/sub-tenant may involve difficult legal concepts and tactical considerations. It is strongly recommended that legal advice should be sought from legal professionals in any of the aforesaid related matters. Prohibition of sub-letting: If I have found that my tenant has sub-let my property to some other person without my consent, then what can I do to protect my interests? To prohibit a tenant from sub-letting, it is necessary for a tenancy document to provide for an express clause that prohibits the tenant from subletting the property (or any part of it) to another party. It is also common practice of landlords to extend the prohibition against any act of licensing or sharing/parting of possession or occupation of the property. If the tenancy document does not contain a clause that restrains a tenant from subletting, then the mere act of subletting of the unit (or part of it) to another person, even without the landlord's consent, may not be illegal per se (subject to whether the tenant's sub-letting has contravened any government regulations as explained above). As a tenancy has the effect of passing the landlord's interests in the property to the tenant during the tenancy period, the tenant may deal with the property in whatever manner as if he owns the property (except for any illegal activities or actions which would amount to a breach of the tenancy agreement), including subletting the property to another party. Based on the same reasoning, the breach of a prohibition clause on subletting may make the tenant liable to the landlord for injunction and/or damages. In certain cases, it may also enable the landlord to forfeit the tenancy agreement upon such breach. In practice, even if a covenant against sub-letting is in force and without any other kinds of restriction, a tenant is still at liberty to cohabit, share occupation or use the property with other parties (who are often claimed to be guests, relatives or friends of the tenant). Prima facie, they do not fall within the ambit of 'sub-letting'. In the absence of any direct evidence that the tenant is engaging in sub-letting activities of the premises (e.g. copies of signed sub-leases, further partitions being made, admissions made by occupants, advertisements/ invitations made by tenant and excessive consumption of utilities), it is often difficult in practice for the landlord to prove and enforce restrictive covenants against sub-letting. We collect and store information about you. Let us explain why we do this. What information do you collect? We collect a range of data about you, including your contact details, legal issues and data on how you use our website. How do you collect information? We collect information over the phone, by email and through our website. What do you do with this information? We store and use your information to deliver you better legal services. This mostly involves communicating with you, marketing to you and occasionally sharing your information with our partners. You can always see what data you've stored with us. Questions, comments or complaints? Reach out on 1300 544 755 or email us at info@legalvision.com.au When renting accommodation many tenants rent directly from a landlord who owns the property. It's also possible to rent from another tenant who has rented the property from the owner. This is called subletting. This page provides more information on subletting and looks at whether tenants are allowed to sublet their home. Before subletting your home: check what it says in your tenancy agreement in most cases you'll need permission, so write to your landlord explaining your situation and ask for their consent be aware that if you don't do things properly it could lead to problems in the long-term. Subletting happens when an existing tenant lets all or part of their home to someone else. That person is known as a subtenant, and they have a tenancy for all or part of the property which is let to them. They also have exclusive use of the accommodation that is let to them. For example, if you decide to sublet your home, you are giving up possession of it. The subtenant would have exclusive use of the property and you could only enter it with their permission. When a property is sublet, the owner is known as the head landlord. The tenant they rent to is called the 'mesne' tenant. Mesne means intermediate and is pronounced as 'mean'. The mesne tenant then rents to the subtenant. A subtenant and a lodger can both rent rooms, although a subtenant can also rent an entire property rather than just part of it. The main difference between a subtenant and a lodger is that a subtenant has exclusive use of their room. Their landlord needs permission before they can enter the subtenant's room. A lodger's landlord can enter the lodger's room without permission and often does so to provide services such as cleaning. In practice, if you share some accommodation with your landlord such as the bathroom or kitchen, then your rights are similar whether you are a subtenant or a lodger. People who share accommodation with their landlord are generally known as excluded occupiers. This is a term used in housing which helps to identify your housing rights. Excluded occupiers have very limited rights. Most tenants need their landlord's permission before they can sublet all or part of their home. Many tenancy agreements contain a term on this, so you should always check your agreement first. If you do need permission, get it in writing. More about the rights of different tenants to sublet their home If you need permission before subletting all or part of your home but don't get it, or if you aren't allowed to sublet but do so anyway, then your landlord may take action against you if they find out. For example, they may take action to evict you for breaking a term in your tenancy agreement. If you're a social housing tenant and you sublet your home unlawfully, you may also be committing a criminal offence. More about what your landlord can do if you sublet your home If you live in a shared ownership property, you could face action from your landlord for breaking the terms of your lease agreement. The worst case scenario would be action to end the lease and recovering possession of the property. This action is known as forfeiture. There is more information about forfeiture on the GOV.UK website. 'Residential long leaseholders - a guide to your rights and responsibilities' - GOV.UK at www.gov.uk Before subletting part of your home there are a number of important things that you need to think about first. More about what you need to think about before subletting your home Next steps 'Alienation' is the right granted in a lease for a tenant to assign, sublet, or share occupation of their property. This is an important factor for tenants when negotiating leases and so this guide will discuss the main alienation provisions in a lease from a tenant's viewpoint. Assignment Assigning (or transferring) a lease is the method by which a tenant disposes of the remainder of their leasehold interest in the property to a purchaser. This will often arise where a lease is no longer suitable for their needs or if the tenant is looking to sell their business. The landlord will exercise close control over the assignment and their formal consent will be needed. The Landlord's consent will be granted via a Licence to Assign and they can also impose conditions on assignment. For example, the outgoing tenant may be required to provide an authorised guarantee agreement ("AGA"), guaranteeing the purchaser's performance of the obligations in the lease. Subletting Subletting allows the tenant to grant a sublease of either the whole or part of the property to a new tenant. The tenant may either stay in occupation (a sublease of part) or will give up occupation of the whole property to the undertenant (sublease of whole). Again, the landlord may impose conditions on the underletting, such as the existing tenant giving a guarantee for the sub-tenant or the sub-tenant providing their own guarantor to the landlord. The sublease must be for a term shorter than the lease (usually a couple of days less) and incorporate all the terms of the head lease. The head lease will set out all the conditions which must be complied with and often prescribes the form the underlease should take. The Tenant should be aware that they will remain liable for terms of their existing lease throughout the term of the underlease. Sharing occupation A lease will typically prohibit sharing of the property except where expressly permitted. One of these permissions is the ability to share occupation with group companies. A group company will usually a subsidiary or parent of the original tenant. Leases will require that there is no landlord and tenant relationship created by the sharing relationship and if one ceases to be a group company then the sharing must end. Key considerations Landlord's consent The Landlord and Tenant Act 1927 restricts provisions in a lease where the landlord requires consent to assign or sub-let. The landlord is bound such that their consent should not be unreasonably withheld. Negotiation As many leases will prevent alienation except in the certain listed circumstances, tenants should consider alienation provisions at the outset of negotiations and ensure their choices for the future are as flexible as possible. The aim being to avoid situations where tenants are unable to dispose of their leasehold interests. If you require further advice regarding assignment, subletting, sharing occupation or any other Real Estate matter, please contact Daniel York in our Real Estate department. You can also email your query to realestate@herrington-carmichael.com, call 01276 686222 or visit . This reflects the law at the date of publication and is written as a general guide. It does not contain definitive legal advice, which should be sought as appropriate in relation to a particular matter. Underletting. The Tenant shall not:Underletting, 22.1 Subletting Unit For the purpose of this clause, "Subletting Unit" means such part of the Premises which is capable of being occupied and used as a separate and self-contained unit with all necessary and proper services. 22.2 Underletting of part The Tenant shall not underlet any part of the Premises other than on the following conditions:- 22.2.1 Each floor of the Premises shall not at any time be in the occupation of more than two (2) persons, the Tenant and any Group Company or Lazard Group Company (if applicable) which is permitted to share occupation under clause 20.2 counting as one; and 22.2.2 the part of the Premises to be underlet shall comprise a Subletting Unit only; 22.2.3 if the Landlord shall reasonably so require, the Tenant shall obtain a reasonably acceptable guarantor for any proposed undertenant and such guarantor shall execute and deliver to the Landlord a deed containing covenants by that guarantor (or, if more than one, joint and several covenants) with the Landlord, as a primary obligation, in the terms contained in Schedule 4 (with any necessary changes); and 22.2.4 the underlease shall incorporate an agreement, authorised beforehand by the Court, excluding sections 24 to 28 of the Landlord and Tenant Act 1954 in relation to such underlease. 22.3 Underletting of the whole 22.3.1 The Tenant shall not underlet the whole of the Premises other than on condition that if the Landlord shall reasonably so require, the Tenant obtains a reasonably acceptable guarantor for any proposed undertenant and such guarantor shall execute and deliver to the Landlord a deed containing covenants by that guarantor (or, if more than one, joint and several covenants) with the Landlord, as a primary obligation, in the terms contained in Schedule 4 (with any necessary changes).

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