

Number 12

Granting Licences – A Trap for the Unwary

PROPERTY DISPUTE

Readers will be familiar with correspondence relating to the grant of Licences to Assign (or Alterations) which are marked Subject to Licence and Without Prejudice. Many will feel that this gives them the protection necessary to ensure that consent is not given until the formal licence documentation is completed. However, a recent Court of Appeal decision¹ has highlighted that this may not always be the case.

The Facts

The sale of long leasehold premises required the landlords prior written consent to assign, such consent not to be unreasonably withheld and (under the terms of the lease) there were certain conditions to be satisfied.

When consent was requested, the landlord's agent responded marking the letter subject to contract and without prejudice and stating that the landlord "will be prepared in principle to grant a licence for the assignment of the lease". The reply went on to refer to the landlord's solicitors dealing with the formalities of the licence.

The purchaser subsequently had difficulty in obtaining the necessary funds to complete. By the contractual completion date, both the landlord's agents and the landlord's solicitors had indicated that the landlord would grant consent "in principle" and "subject to licence".

In view of its financial difficulties, the purchaser sought to rescind the contract pursuant to Standard Condition 8.3.4 and requested return of the deposit pursuant to Condition 7.2(a). The purchaser contended that the landlord's consent had not been obtained.

At first instance the Judge held that Standard Condition 8.3 did not require the landlord's consent to be in writing. That was rejected by the Court of Appeal who confirmed that the consent required by the lease must be a prior written consent, however, the Court held that the appropriate consent had been given here by virtue of the letter from the landlord's solicitors enclosing an engrossment of the licence for execution by the purchaser and indicating that consent was agreed "in principle". The Court held that the qualification "in principle" did not mean that the landlord was seeking to rely on any reasonable grounds for refusing consent.

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¹ Aubergine Investments Limited –v- Lakewood International Limited [2002] EWCA CIV 177

Consequences for Commercial Property Practice

Clearly it is no longer safe to refer to consent being granted “in principle” unless it is unequivocally intended to constitute the necessary consent. If it is not, a different form of words will have to be used and it should be spelt out expressly that consent is not to be given until all formalities have been complied with. Indeed, it would be sensible to spell out precisely what is required in terms of documentation, etc (including any specific requirements for consent under the lease) in order for consent to be treated as granted. All correspondence should be headed “subject to completion of formal licence” and a disclaimer inserted in any initial letter making it plain that agents or other advisers do not have authority to grant consent.

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PROPERTY DISPUTE

Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing. For further information on property disputes or litigation please contact:

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