



"Subject to Licence": Avoiding the Pitfalls

A review of the legal risks inherent in responding to applications for consent by tenants.

In November 2008, the Honourable Mr Justice Sales handed down judgement in the Chancery Division case of *Alchemy Estates Limited v Astor*. His Honour considered in detail the circumstances in which a buyer may rescind a contract for the purchase of a leasehold interest in property under a contract incorporating the Standard Conditions of Sale (Fourth Edition) but he also sounded a warning bell for solicitors and managing agents on a related point: the inadvertent giving of a Landlord's consent.

Where an application for consent is received by a Landlord, its agent or solicitor, whether for permission to assign a lease, underlet premises, carry out works or even for change of use great care must be taken not to prematurely bind the Landlord to the grant of consent. To do so may squander the opportunity to obtain further information about what the tenant proposes and, perhaps more importantly, the Landlord may be unable to attach appropriate conditions to the consent or obtain direct covenants from the tenant, subtenant or assignee.

Consent in principle

In *Alchemy* the sellers of a leasehold property, the Astors, made an application to their Landlord for consent to assign the premises to the purchaser, Alchemy. No formal Licence to Assign was ever completed and the purchaser sought to rescind the contract under the standard conditions citing the lack of consent from the Landlord; the obtaining of consent to the assignment being a condition of the sale. The purchaser was candid in admitting that the motivation for the rescission was the fall in property prices, which caused them to re-assess the bargain they had reached with the seller.

The Court held that the purchaser had lost the right to rescind the contract, primarily because of delay on their part in serving notice. The Court also decided, however, that an e-mail from the Landlord's solicitor confirming consent to the assignment "*in principle*" along with details of the conditions that would be attached to that consent was sufficient consent for the purposes of the sale contract. But even more alarming is that the e-mail went on to state:

"Please note that this correspondence does not constitute the provision of consent by our client. Such consent will only be provided on the completion and delivery of a formal licence executed as a deed. Please also note that our client reserves the right to change the form of the draft licence submitted herewith and to impose new conditions to the grant of their licence in light of any other information received"

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Following Aubergine

There was binding precedent for His Honour to consider in *Alchemy* for the principle that consent can be given even where expressed to be only in principle. In *Aubergine Enterprises Limited v Lakewood International Limited* the Court of Appeal held, by a majority, that correspondence headed "**subject to licence**" which stated that the Landlord "**agreed in principle to grant a licence to assign the lease**" and went on to attach certain conditions to the consent was capable of constituting consent to the assignment for the purposes of a sale contract. The facts were similar to *Alchemy* in that the question arose as a result of a contract for the sale of a leasehold interest conditional upon the assignor obtaining the Landlord's consent.

Doesn't "Subject to Licence" help?

The answer is no. In the 1997 case of *Prudential Assurance Co Limited v Mount Eden Land Limited* the Court of Appeal held that a letter purporting to give consent subject to conditions was not deprived of legal effect by the rubric "**subject to licence**". The Landlord and Tenant were in a pre-existing legal relationship and therefore the rubric would not deprive correspondence of legal effect. It is only in negotiations between parties that are not already contractually bound to each other that a rubric such as "subject to contract" will prevent legal liability arising.

Prudential has been followed on a number of occasions and remains good law yet common practice in the industry still seems to be to rely on "**subject to licence**" to avoid binding Landlord clients. This may not be a problem where the Tenant is equally ill-informed or has no incentive to be opportunistic but in a failing property market problems could arise.

It is not just Landlords and their advisers that need to be careful. Assignors will also need to take care to ensure that they spot when consent has been given by a Landlord and thus when a contractual condition has been satisfied following the *Alchemy/ Aubergine* and principles. A solution is to ensure that the contract is drafted to specifically covers such points. Assignees also need certainty.

There was a dissenting judgement in *Aubergine* and in it Lord Justice Ward stated inter alia:

"I cannot but worry that chaos will reign if a letter, perhaps even the agent's letter, written "subject to licence" giving consent "in principle" but giving conditions agreed to be reasonable nonetheless operates as effective consent to assign even before the formalities are concluded"

Managing agents and solicitors alike must make sure that they take great care when responding to applications from tenants and cannot safely rely on the rubric "**subject to licence**". Responses must be carefully considered and drafted and legal advice sought where necessary. It is up to managing agents and advisers to ensure that if chaos does reign it is not at the expense of their clients.

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