

Review

Property @ction



Consent “in principle”: risks for landlords and their advisors

A recent case has highlighted the danger faced by landlords in consenting inadvertently to an assignment or subletting. The case of *Alchemy Estates Limited v Astor (2008)* provides a timely reminder of the Court of Appeal’s earlier decision in the case of *Aubergine Enterprises Limited v Lakewood International Limited (2002)*.

BACKGROUND

Where a tenant wishes to assign or sublet his interest in a lease, it is usual for the lease to provide that the tenant must seek landlord’s consent before the assignment or subletting goes through. This is to allow the landlord an opportunity to consider the identity of the proposed assignee or subtenant and to decide whether or not there are reasons why consent should be withheld.

Where the lease specifies that landlord’s consent is needed, statutory provisions require landlords not to delay in making a decision and not to withhold consent unreasonably. Landlords therefore need to be seen to be progressing applications for consents expeditiously.

It is not uncommon, therefore, for landlords or their advisors to indicate in correspondence with the tenant that consent is likely to be given subject to clarification on various points. However, the danger of that approach was highlighted in the *Aubergine* case and a further reminder of this danger emerges from the decision in *Alchemy*.

GRANTING CONSENT “SUBJECT TO LICENCE”

In *Aubergine*, a landlord’s solicitor gave consent in principle to an assignment subject to conditions relating to payment of costs, the provision of a foreign lawyer’s opinion and completion of a licence to assign, authorised guarantee agreement and rent deposit deed. The letter was headed “subject to licence”. The Court of Appeal held that consent by letter was sufficient for the purposes of the lease and the phrase “subject to licence” did not negate the consent given in the letter. Generally, it said, any consent drawn from correspondence should, when construed in the light of the surrounding circumstances:

- record consent as required by the contract.
- be unconditional or subject only to reasonable conditions.
- be unequivocal.

THE ALCHEMY CASE

The wider facts of the *Alchemy* case related to the ability of a buyer to rescind a sale contract. However, an important side issue upon which the Court commented, was whether or not a landlord’s solicitor had granted consent to an assignment in an e-mail. The e-mail stated:

“Our client in principle is prepared to grant its consent to enable the Lease to be assigned to Alchemy...”

The conditions attached to the grant of such Licence are:

- *the payment of our client’s reasonable costs incurred in connection therewith.*

A recent case has highlighted the danger faced by landlords in consenting inadvertently to an assignment or subletting.

-
- *such Licence to be documented in the form of the attached draft Licence to Assign, which is sent for your completion and approval.*
 - *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 further information received in relation to this matter...*

The Court observed that although consent was expressed to be “in principle” and subject to practical conditions, it satisfied the relevant test for landlord’s consent laid down in the *Aubergine* case. It was consent which was expressed to be subject only to reasonable conditions and was unequivocal. Importantly, the caveat in the e-mail that consent would only be provided on the completion of a licence deed was of no effect: the reason being that the lease itself contained no such requirement.

CONCLUSIONS

Whilst landlords, surveyors and solicitors will wish to be seen to be acting promptly and reasonably in relation to their response to applications to assign or sublet, *Alchemy* is a reminder that giving consent “in principle” or subject to conditions, will not necessarily keep a landlord’s options open. In both the *Aubergine* and *Alchemy* cases, the conditions stipulated dealt primarily with administrative matters, which did not leave room for the landlord to argue later that consent would not be given.

To avoid falling into this trap, landlords and their advisors should:

- ensure that any initial correspondence in response to an application for consent should give no indication as to whether or not consent will be given until the landlord (or its solicitors) are in a position to provide a formal considered response.
- avoid use of the phrase “in principle” in the context of granting consent.
- check whether the lease expressly provides for the form in which consent should be given. Where consent (under the terms of the lease) can only be given by way of a formal licence document, the dangers of inadvertent consent may be minimised.

FURTHER INFORMATION

For more information relating to this article, please contact:

Will Lawrence

Partner
T: +44 (0)20 7655 1551
E: will.lawrence@hammonds.com

Helen Hoath

Senior Associate
T: +44 (0)161 830 5068
E: helen.hoath@hammonds.com

Caroline Wort

Senior Associate
T: +44 (0)121 222 3405
E: caroline.wort@hammonds.com

Patrick Walker

Director for Advocacy
T: +44 (0)113 284 7566
E: patrick.walker@hammonds.com

WWW.HAMMONDS.COM

If you do not wish to receive further legal updates or information about our products and services, please write to: Richard Green, Hammonds LLP, Freepost, 2 Park Lane, Leeds, LS3 2YY or email richard.green@hammonds.com.

These brief articles and summaries should not be applied to any particular set of facts without seeking legal advice. © Hammonds LLP 2009.

Hammonds LLP is a limited liability partnership registered in England and Wales with registered number OC 335584 and is regulated by the Solicitors Regulation Authority of England and Wales. A list of the members of Hammonds LLP and their professional qualifications is open to inspection at the registered office of Hammonds LLP, 7 Devonshire Square, London EC2M 4YH. Use of the word “Partner” by Hammonds LLP refers to a member of Hammonds LLP or an employee or consultant with equivalent standing and qualification.