



Don't give consent until you mean it

A worrying trend of cases suggests that any correspondence from a landlord indicating in principle consent to a tenant's request to carry out alterations, underlet or assign can constitute actual consent – even if you say the contrary.

The scenario - your tenant contacts you requesting consent to carry out alterations

This is not an unusual request; you enjoy good relations with the tenant and you are minded to consent. You respond by e-mail to the tenant saying that in principle, that is fine but you will contact your lawyers and they will be in touch with documentation. You even stipulate that your consent is subject to licence, or to certain conditions.

Until recently this was a perfectly sensible approach but it could now mean you will have given a legally binding consent.

Recent case-law

In the recent case of *Alchemy Estates Ltd v Astor and Another* [2008] EWHC following a Court of Appeal case (*Aubergine Enterprises v Lakewood International* [2002] EWCA) it was decided that the landlord's in principle consent provided by e-mail from his solicitor constituted actual consent to the tenant's request to assign even though that e-mail contained the following wording:

"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...and to impose new conditions to the grant of their licence in light of any

further information received ..."

The implications of this ruling will have an impact whenever your tenant asks for your consent. You will need to think carefully before you respond and ensure that you do not give consent before you mean to do so.

"You may tell your tenant you are considering their request and will get back to them.

Do not give any initial indication that you are planning to consent."

Before *Alchemy* we would have taken comfort from the following safeguards:

- in response to the tenant's request, you would have caveated your reply in the same apparently prudent manner as the landlord in *Alchemy*;
- we would have issued a licence with a covering letter stating that no consent is given until the completion of that licence;
- your lease may say that consent may only be provided in writing and by deed.

According to *Alchemy*, all this may now be irrelevant if you have at any stage in correspondence (or possibly even in

conversation) intimated that you are inclined to grant consent.

Practical steps

What is to be done? You want to indicate to your tenant that they may go ahead with the alterations, assignment or underletting but you do not want to inadvertently waive the ability to make any requirements or impose any conditions on your consent.

We suggest that as soon as possible after receiving a request for consent from your tenant you forward it to Travers Smith. You may let your tenant know that you are considering their request and will revert to them as soon as you have been in touch with your lawyers.

You may wish to ask for accounts or to see plans and whilst we think that should be safe, you should not at this stage indicate that you are planning to consent.

It is very important that you pass the tenant's request to us as soon as possible (ideally within a week of receipt) so there is no suggestion that you are unreasonably delaying consent. We will then, following your instructions, request further details of the proposal or issue a draft licence containing all the conditions upon which your consent is to be granted.

We will continue to state to tenants' solicitors that no consent is granted until the licence is executed. Whether this is effective in the light of the *Alchemy* case is uncertain. The important thing is that by making the issue of a draft licence the first substantive communication the tenant receives on the subject, any consent that may be deemed as issued will contain the belt and braces protection you, as landlord, require.

TRAVERS SMITH

Travers Smith – Real Estate

The Real Estate department advises on all aspects of real estate: buying, selling and leasing property, development schemes, joint ventures, investment structures, financing, estate management, licensing and dispute resolution. We advise on the establishment and operation of property investment funds, structured finance schemes, and tax planning.

We have specialist groups within the firm who advise on construction, environmental and planning matters and our clients' climate change responses.

Our clients are diverse – they include UK and overseas private investors, developers, pension funds, government and statutory agencies, unit trusts, retailers, service operators, manufacturers, charities, hospital trusts, hotel, pub and leisure operators, financial institutions and professional enterprises.

We are experienced lawyers with a full understanding of the property industry in which our clients operate and apply our advice accordingly. We have close links with leading UK surveyors and many of those in the forefront of the property market.

The team are described in the legal press as “extremely effective and professional closers” with “experience of highly structured and complex deals often turning deals around in a short time scale”.

For further information please contact **Julian Bass**, Head of Real Estate, or your usual contact:



julian.bass@traverssmith.com

Travers Smith LLP

10 Snow Hill
London
EC1A 2AL

T: +44 (0)20 7295 3000

F: +44 (0)20 7295 3500

www.traverssmith.com

December 2008

Clients

Atis Real
Bankhaus Wölbern
Bank of Ireland
Bank of Scotland
Benson Elliott
Carpetright
Criterion Capital
Diageo/Guinness
Fenn Wright Manson
Fimalac
Garbe Group
Guinness
Jaguar Capital
John Lewis
KBC Asset Management
Lothbury Property Trust
Macquarie
McAleer & Rushe
McCarthy & Stone
Montague Goldsmith
Moto
Mountgrange
National Grid UK Pension Scheme
New Star
Northridge Capital
Patron Capital
Peel Holdings
Pinewood Shepperton
Rotch
Royal Bank of Scotland
STA Travel
Transport for London
Ulster Bank
University of Surrey
Waitrose

Please note that the contents of this memorandum do not constitute legal advice and should not be relied upon as such. Specific advice should be sought on particular situations.

Travers Smith LLP is a limited liability partnership registered in England and Wales under number OC 336962 and is regulated by the Solicitors Regulation Authority. The word "partner" is used to refer to a member of Travers Smith LLP. A list of the members of Travers Smith LLP is open to inspection at our registered office and principal place of business: 10 Snow Hill, London, EC1A 2AL. We are not authorised under the Financial Services and Markets Act 2000 but we are able, in certain circumstances, to offer a limited range of investment services because we are members of the Law Society of England and Wales and regulated by the Solicitors Regulation Authority. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide. The information in this document is intended to be of a general nature and is not a substitute for detailed legal advice.