

# Be mindful of the distinctions

Mark Reading and Harriet Holmes consider applications for consent in real property contracts: when to respond, how to do so and what to say

There is a great volume of case law dealing with how a court will go about assessing the reasonableness of a party's refusal of consent in the world of landlord and tenant. There is far less in relation to other types of commonly encountered property transactions, such as requests for consent in the context of restrictive covenants, option agreements or overage arrangements.

But *Minerva (Wandsworth) Ltd v Greenland Ram (London) Ltd* [2017] EWHC 1457 (Ch); [2017] PLSCS 139 is a reminder that such questions do arise in the realm of real property. While many of the principles in the lease disposition and alterations case law are directly relevant to these other types of property transactions, there are important distinctions between these situations that could well influence a receiving party's strategy in responding to a request for consent.

Two of the key distinctions are: 1) the burden of proof in making out the reasonableness (or unreasonableness) of the refusal; and 2) the requirement to give reasons when refusing consent to a request (as well as the point in time at which those reasons are to be communicated to the party making the request).

## Burden of proof

In applications for consent to dispose of a lease, section 1(6) of the Landlord and Tenant Act 1988 (the 1988 Act) puts the onus on a landlord, rather than a tenant, to show that any refusal of consent (or the attachment of conditions to the granting of consent) was reasonable. A landlord only has to show that its conduct in refusing consent was reasonable and not that it was right or justifiable. The genuineness and reasonableness of its reasons for doing so will be a question of fact that will need to be determined by a court, should



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the matter ever be disputed.

In contrast, in most other property scenarios where a request for consent is made, the burden of proving unreasonableness will be on the party alleging it. This is best demonstrated by an example: a landowner has a plot of land that is burdened by a restrictive covenant, the meaning of which requires him to obtain his neighbour's consent before carrying out any external alterations. If he requests his neighbour's consent, and that consent is refused, the burden will be on the landowner to demonstrate that the decision made by the neighbour was one that no reasonable person in his neighbour's position would have reached in the particular circumstances existing at that time.

## Requirement to give reasons/ timing

Again, in the landlord and tenant context of consents to dispose, section 1(3) of the 1988 Act requires that a landlord must give a tenant written notice of its decision in relation to an application to make a disposition of a lease within a reasonable time. If consent is:

1. given subject to conditions, then these must be specified in the written notice; or
2. refused, then the landlord must specify its reasons for refusal in the written notice (and if a reason is not specified in this notice, then it is doubtful that it can be relied on at a later stage).

The position at common law (and thus non-landlord and

tenant transactions) differs from this in two important respects:

1. in the absence of any express contractual requirement, there is no obligation on a receiving party to give its consent within a reasonable time; and
2. in the absence of an express contractual requirement, there is no obligation, at common law, for a receiving party to set out its reasons for refusal in writing.

The second of these differences was recently considered by the High Court in the context of overage provisions.

Here, the court confirmed that a party refusing consent can, as a matter of principle, rely on reasons that genuinely and reasonably influenced its mind at the time of refusal, even though those reasons were not communicated to the other party at that time.

A point to note in practice, however, is that if a party chooses not to communicate its reasons at the time of refusal, and a dispute subsequently ensues as to the reasonableness of its decision, it will, at that stage, be imperative for the party to then relay the full extent of its reasons for refusal. A failure to do so could result in that party not being able to rely on reasons for refusal not communicated or properly pleaded at any trial of the matter.

## Reasons for refusal

Irrespective of the substance or nature of a request for consent, any receiving party should give

careful consideration to their reasons for refusal and the manner in which these are communicated. Although there is an outstanding appeal in this matter, the outcome in *No 1 West India Quay Residential Ltd v East Tower Apartments Ltd* [2016] EWHC 2438; [2016] EGLR 3 acts as a stark example as to why that is so.

In that case, a landlord's reasonable reasons for refusing consent (requiring a bank reference for the proposed assignee and instructing a surveyor to inspect the premises) were held to be vitiated by a sole bad reason (an insistence on an undertaking for costs, in an unreasonable sum). The net effect of this was that the landlord was held to have unreasonably withheld its consent to the application for consent.

While the High Court's finding was very much on its own facts, it is a useful reminder that the reasons for refusal must be genuine and reasonable; and a receiving party should think carefully before "throwing in the kitchen sink" in an attempt to make its reasons for refusal stick.

## Final thoughts

Applications for consent, in any context, are to be approached on their own facts, having regard to the particular circumstances at hand. There are, however, practical and legal distinctions in dealing with applications for consent to dispose of a lease on the one hand, and applications for consent in most other property transactions on the other. Being mindful of these distinctions should assist in ensuring that any tactical advantage (whether acting for the party receiving a request or not) is exploited to its fullest potential.

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