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"...CONSENT NOT TO BE UNREASONABLY WITHHELD OR DELAYED"

A leaseholder of a flat wants to carry out some alterations, or sublet, or sell the flat and the lease requires the landlord's prior consent. Builders, a subtenant, or a purchaser are pressing to get on, and the landlord and/or the managing agent are frustratingly difficult or slow. What to do?

In *Avon v Garnier (2016) UK UT 4777(LC)*, Garnier carried out his alterations and only when he wanted to exchange contracts for a sale did he ask for retrospective consent. He had already therefore breached the lease which required prior consent. Avon asked for some fees plus £5,000. That £5,000 is an "administration charge" within the meaning of Paragraph 1(1) of Schedule 11 to the 2002 Act and thus payable only to the extent that the amount of the charge is reasonable. However, Garnier was held to have agreed the amount (payment of itself is not taken as agreement – Paragraph 5(4) of Schedule 11 to the 2002 Act). He could have paid without expressing agreement or he could have paid under protest. He didn't. His agreement to pay was therefore final.

When a managing agent investigates a prior or retrospective application for consent to alter, step one is to get a written agreement as to the fees for a stated amount of money, for an adequately described job. No one wants an unnecessary F-tT case: an agreement recorded in writing protects both parties (even if it is one person writing to record what was verbally agreed on the phone or at face-to-face discussion). Step two: there needs to be attention to what is being altered: only the demise, or some common or retained parts? Is there any risk of a trespass which might need a Deed of Variation and not just a consent to alter?

What then flows in the nature of a consent (e.g. letter or formal licence), Health and Safety compliance, methodology (of working practice) statement, local authority issues, final certification etc. can then be addressed.

In *Drewett –v- Bold* (Upper Tribunal LRX/90/2005) the tenants had carried out an unauthorised alteration, the landlord's solicitors, in a without prejudice letter, had proposed a retrospective licence subject to payment of past and future costs to which the tenant objected. Found that the Tribunal can rule on existing demands, but not on total liability. Until an approval is signed, the tenant has no liability to pay and hence no way to challenge any proposed fee for the approval. After the approval is signed, the tenant will have, as part of the approval, agreed the sum paid. That agreement takes away the jurisdiction of the Tribunal. More reason why managing agents should tread very carefully when asked for a retrospective licence or consent.

In *No 1 West India Quay v East Tower Apartments (2016) EWHC 2438 Ch*, East Tower wanted to assign some of its forty-two apartments but needed consent. The landlord refused consent on three grounds, two of which were found to be reasonable (references required and a reasonable inspection fee to check on lease compliance/possible breaches) but the third ground was unreasonable (£1,600 plus VAT for costs) as the landlord's consent "*may not be used as a source of profit for landlords or their managing agents*". The landlord lost its case.
In *Reiner and Wismayer v Triplark (2016) UKUT 0524 (LC)*, Reiner had sold her flat lease to Wismayer without the required landlord's prior consent (not to be unreasonably withheld); at that time a matter for the RTM Company (S.98 and 99 of the 2002 Act) of which Wismayer was, at that time, the sole director. The RTM Company was under a statutory obligation to notify the landlord (Triplark) of the request for consent. Prior to the sale of the lease being registered at the Land Registry, Triplark lodged an objection which prevented Wismayer being registered as the proprietor. Triplark applied to the F-tT for a determination of breach of lease (S.168 (4) of the 2002 Act) which determined that Reiner had parted with possession of her flat without prior consent. Reiner and Wismayer appealed to the Upper Tribunal.

The lengthy decision discusses in detail what constitutes "parting with possession": not as straightforward a matter as many managing agents might think (see Paragraphs 79, 80 and 82/83 of this UT decision).

The reasons for Reiner and Wismayer proceeding with the sale without notifying Triplark are summarised in Paragraph 98: anticipated unwelcome delay upsetting their plans which required some urgency. (Last minute urgency problem: a common one for managing agents.)

A contrived way of avoiding the delays caused by the statutory obligation is considered in Paragraph 98, rejected and a warning given as to the possibility of a claim for damages (that warning repeated in Paragraph 102). Managing agents and RTM company directors beware!!

Why all this fuss and what will be the consequences?

The block of flats had fallen into a state of disrepair. The lessees could have pursued the landlord, applied for the appointment of a Manager, exercised their RTM or done nothing. A majority exercised their RTM which brings with it a burden of the responsibility (not often recognised). A contract for a £2m-£3m heating renewal programme was started which went wrong and two factions emerged from within the lessees (1: finish the job. 2: start again and sue). Wismayer was brought in by Faction 2 but a majority of RTM members elected a new board of directors who applied for a Manger to be appointed by Order of the F-tT (S.24 L & T Act 1987) and the contract is due to be substantially completed by Spring 2017, albeit at a substantial cost overrun.

If Reiner and Wismayer do not successfully appeal this UT decision, they risk forfeiture action although Triplark stated (Paragraph 28) that it would consent to relief against forfeiture on terms that the flat is not retained by Wismayer or any party connected with him.

BRMT
20 January 2017