Consents to assign – one wrong invalidates two rights

DENTONS

October 20, 2016

The High Court decision in *No.1 West India Quay (Residential) Ltd v. East Tower Apartments Ltd* [2016] EWHC 2438 (Ch) is a stark reminder to both landlords and tenants of the need to be aware of and to comply with the provisions of the Landlord and Tenant Act 1988 (1988 Act) when dealing with applications to assign where landlord's consent is not to be unreasonably withheld.

Background

East Tower Apartments Ltd (Tenant) held 42 long leases of flats in a residential tower block at West India Quay. In 2015 the Tenant made a number of applications to its landlord, No. 1 West India Quay (Residential) Ltd (Landlord) for consent to assign some of its leases.

The leases were all drafted on substantially the same terms. Those terms included a requirement for landlord's consent to assignments. As the leases stipulated that the landlord's consent could not be unreasonably withheld the provisions of section 1 of the 1988 Act applied.

Section 1 of the 1988 Act applies (with some exceptions) to both commercial and residential property where landlord's consent is required to an assignment, underletting, charging or parting with possession of premises and that consent cannot be unreasonably withheld. It requires, among other things, that a landlord must, within a reasonable time, grant consent to the application unless it is reasonable not to and further that, where consent is granted subject to conditions, those conditions must be reasonable.

Unfortunately three of the Tenant's applications did not go according to plan and litigation ensued. In respect of two of the disputed applications the Tenant sought declarations that the Landlord had unreasonably refused consent. In relation to the third disputed application the Tenant sought a declaration that the Landlord had failed to grant consent within a reasonable time. The matter reached the High Court on appeal.

Unreasonable refusal of consent

The three grounds the Landlord gave for not consenting to the first two disputed applications were that the Tenant had refused to:

1. provide a bank reference for the proposed assignee;
2. allow the Landlord to inspect the premises at the Tenant's cost prior to determining the application; and
3. provide an undertaking to cover the Landlord's fees for dealing with the application.

On the facts it was decided that the first two grounds were both reasonable. In relation to the bank reference it was difficult to see how such a "requirement could be stigmatised as unreasonable even if many landlords might have

dispensed with it". The request to inspect was also reasonable given "that serious and unremedied breaches of repairing covenants may justify a refusal of consent to assign" and certain once-and-for-all breaches, such as unlawful alterations, would not be enforceable against an assignee. The costs of such inspection were reasonable "in the context of an assignment of a long lease of prime residential property in London".

Unfortunately for the Landlord, the third ground for refusal, namely the request for an undertaking, was held to be unreasonable because of the amount sought.

Once the court had determined that only two out of the three reasons for withholding consent were good the question was whether the third, bad, reason vitiated the two good ones. The court held it did. Looking at the correspondence it was clear that the Landlord's position was that it would not proceed to grant the consent unless and until it received the undertaking for costs, irrespective of whether or not the Tenant complied with the other conditions in the meantime.

Failure to grant consent within a reasonable time

Unlike the other two disputed applications, the Landlord did grant consent to the third disputed application. The problem was that the Tenant alleged that the Landlord had not granted that consent within a reasonable time as required by the 1988 Act.

A landlord must respond to a tenant's application for consent within a reasonable time. The trigger for that "reasonable" time to start running is service of the tenant's written application for consent. Section 5(2) of the 1988 Act provides that an application is to be treated as served if it is served in any manner provided by the tenancy. Here the leases provided for notices to be served by being "left or sent through the first-class post by pre-paid letter addressed to the Lessor at its registered office".

In 2014 the Landlord had sent the Tenant a "sales pack" advising that any application for consent to assign should be sent to a specified address, not being the Landlord's registered office. When the Tenant came to make its third disputed application it duly sent the same to the address specified in the sales pack (Initial Application) rather than to the Landlord's registered office. The question was whether the Initial Application was sufficient to start time running under the 1988 Act.

The court decided the Initial Application did not start time running; time only began running for the purposes of the 1988 Act when the Tenant served a further application on the Landlord at its registered office, some 33 days after the Initial Application. On the facts the "sales pack" did not amount to an offer by the Landlord to waive the formal requirements for service set out in the lease. Consequently the Initial Application had not been served as required by the 1988 Act.

The Landlord was held not to have failed to grant consent within a reasonable time as such consent had been granted 14 days after service of the application on the Landlord's registered office.

Conclusion

While it is important to emphasise that each case will turn on its own particular facts, this decision highlights two important points for those dealing with leasehold applications for consent falling within the provisions of the 1988 Act:

- Tenants must ensure that their application for consent is correctly served in order to trigger the landlord's obligations under the 1988 Act. This will involve reviewing the requirements of both the 1988 Act and the lease. As the judgment leaves open the possibility that it may be possible for a clear statement to waive the service

requirements in the lease, tenants should also check any subsequent correspondence from the landlord. If in doubt it may be safest to serve the application by more than one method to more than one address.

- Landlords should note that one unreasonable ground for refusal can spoil the reasonableness of the other grounds for refusal. Where, as here, it is felt that the good grounds for refusal only masked a bad ground for refusal, the latter will prevail and the decision not to grant consent will be held to be unreasonable. As such landlords should consider how they present their reasons for refusing consent.

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