



Consent formalities

The Message:

Pre-conditions to completion under an agreement must be clearly stated.

The Case:

British Telecommunications Limited v Rail Safety and Standards Board Limited [27 July 2011] determined what was entailed in a condition requiring the obtaining of superior landlord's consent. Did that requirement extend to having a formal licence executed by all parties, or was it merely the obtaining of the superior landlord's consent even if not provided in a formal way?

BT was the landlord of property in Holborn. Its landlord (the "superior landlord") was Prudential Assurance Company Limited. BT and Rail Safety and Standards Board Limited ("RSSB") entered into an agreement by which BT would let part of the property to RSSB. Under the agreement, BT was obliged to use reasonable endeavours to obtain Prudential's consent as soon as reasonably practicable and RSSB agreed to provide reasonable assistance and join in the licences.

The agreement stated that if the "superior landlord's consent" was not obtained by 5 October 2007, either BT or RSSB could end the agreement any time afterwards by serving written notice on the other, provided that consent had not been granted in the meantime. Of critical importance was the agreement's definition of "superior landlord's consent", stated to be "the consent of the Superior Landlord to the grant of the Leases by way of the Licence to Underlet and to the Tenant's Works by way of the Licence for Alterations". Forms of the respective licences were included in the agreement.

On 20 November 2007, RSSB served what purported to be a notice under the agreement to end it immediately. In response, BT served a notice requiring RSSB to complete and, when RSSB failed to do so, BT treated the agreement as at an end.

The key point was whether BT or RSSB was liable for the agreement not completing (with the consequential impact on possible contractual rights). Was RSSB justified in serving its notice to terminate the agreement on the basis that superior landlord's consent had not been obtained by the requisite date? At the point RSSB purported to terminate, BT, RSSB and Prudential had executed the licence to underlet. The licence for alterations had been executed by BT and Prudential and, while not signed by RSSB, had been approved by them. RSSB's signing of the licence was all that was required to complete.

BT argued that by "superior landlord's consent" the parties did not mean completion of the licences. The unilateral act of consent in principle from Prudential was sufficient, and to argue otherwise would allow RSSB or BT to reconsider their position and choose to walk away, even where Prudential had consented.

In response, RSSB contended that the phrase did mean completion of the licences. The provision of consent "by way of" the licences created a certainty that Prudential had consented.

The High Court decided in BT's favour. Construing the words of the agreement, superior landlord's consent referred to Prudential's consent and not the completion of the licences.

The parties' intentions were focused on providing for Prudential's agreement and not on providing themselves with the opportunity to change their minds about the transaction. That opportunity would be provided if Prudential's consent was treated as synonymous with completion of licences by BT and RSSB as well.

While the words "by way of" show the way in which the consent will ultimately exist, that is not inconsistent with the scheme of the agreement being that consent is given even though the licences may still to be completed.

This decision reiterates earlier case authority that consent can be provided by a landlord, even though the formal licence has yet to be completed. For that reason, when reacting to a tenant's application for a licence to assign, underlet or alter, landlords and their advisers should be very careful not to unwittingly provide consent to the application. Landlords will usually want completion of a formal licence and should ensure that consent is not provided before then.