Case No: B 01 CL 455

IN THE MAYOR'S AND CITY OF LONDON COURT

Guildhall Buildings
Basinghall Street
London EC2V 5AR

Date: Thursday, 11th August 2016

Before:

HIS HONOUR JUDGE COLLENDER QC

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Between:

HAUTFORD LIMITED	**Claimant**
- and -	
ROTRUST NOMINEES LIMITED	**Defendant**

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Miss Tiffany Scott (instructed by **Thomson Snell & Passmore LLP**) for the **Claimant**.
Mr. Philip Rainey QC (instructed by **Trowers & Hamlins LLP**) for the **Defendant**.

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APPROVED JUDGMENT

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His Honour Judge Collender QC :

INTRODUCTION

1. The Claimants, Hautford Limited ("Hautford"), are the lessees from the Defendant, Rotrust Nominees Limited ("Rotrust"), of a terraced building at 51, Brewer Street, London W1 ("the Property").

2. This is the trial of a claim by Hautford for a declaration that Rotrust are unreasonably refusing to consent to the making of a planning application by Hautford for change of use of a part of the demised premises.

3. As a matter of history, I note that, for corporate restructuring reasons unconnected with this claim, the freehold of a contiguous estate of properties in Soho, including the Property, has been transferred from the original Defendant to these proceedings, Tuesday One, an unlimited company, to Rotrust and, by consent, Rotrust have, pursuant to CPR 19, been substituted as the Defendant. Rotrust is adopting Tuesday One's management, so the merits of the action are unaffected.

THE FACTUAL BACKGROUND

4. I will set out the facts that are undisputed or that, on the evidence that I have heard, I conclude cannot sensibly be disputed. At the heart of this case is a dispute as to the proper application of the law to the facts of the case rather than any real dispute as to the facts.

5. Since 1998, Hautford has been the tenant of the Property pursuant to a lease, dated 4th April 1986 (which is for a term of 100 years from 25th December 1985), at a peppercorn rent. It follows that the lease expires in a little under 70 years.

Hautford's lease is a long tenancy as defined in the leasehold Reform Act 1967 ("the 1967 Act").

6. Relevant covenants of the lease are as follows. Clause 2(11):

> "Not to use the Demised Premises otherwise than for one or more of the following purposes(a) retail shop (b) offices (c) residential purposes (d) storage (e) studio PROVIDED however that nothing herein contained shall imply or be deemed to be a warranty that the Demised Premises may in accordance with all Town Planning Law and Regulations now or from time to time in force be used for the purposes above mentioned."

Clause 3(19):

> "To perform and observe all the provisions and requirements of all statutes and regulations relating to Town and Country Planning and not to apply for any planning permission without the prior written consent of the Landlord such consent not to be unreasonably withheld and to obtain any development or other consent which may be requisite by reason of any permitted development of or on the Demised Premises by the lessee and to indemnify the lessor from and against any loss or expense suffered by the lessor by reason of the lessee's failure to obtain any necessary development or other consent as aforesaid ..."

7. The Property, including a basement, extends over six floors and comprises a retail unit on the ground floor with four storeys above. The ground floor and basement are, in area, much greater than any of the upper floors.

8. At present, for planning purposes the uses permitted for the property are as follows: for the ground/floor, retail; the top two floors, residential; the first and second floors, office/ancillary. Romanys Limited ("Romanys") cannot, therefore, lawfully sub-underlet floors 1 and 2 to residential occupiers without planning consent.

9. It is agreed between the parties that, at present, the proportion of gross internal area which is residential is roughly 25% of the whole property. If floors 1 and

2 were to be used for residential purposes, the proportion would rise to roughly 52%.

10. Hautford sub-let the Property to Cusdens (Victoria) Limited, by an underlease commencing on 1st October 1998, at a rent of £85,000 per annum, subject to review. That underlease was assigned to Romanys in 2008. There is a connection between Hautford and Romanys and, indeed, Hautford's principal factual witness, Mr Pindolia, is a director of Romanys, not Hautfords. Romanys, not Hautford, are entitled to any letting income from the upper floors.

11. The underlease was renewed on 22nd June 2012 by a further underlease, which incorporates all the terms of the first underlease, for a term ending on 30th September 2023, also at a rent of £85,000 per annum, subject to review. That underlease is a business tenancy.

12. Romanys trade as ironmongers from the basement and ground floors. The first and second floors were, until fairly recently, used by Romanys for storage and as a staff room. The third and fourth floors have been used from time to time for residential purposes since the commencement of the lease, although, for substantial periods since 1998, they have been vacant.

13. By clause 3(15)(c) of the lease, a prohibition on keeping animals on the Property is stated not to apply to the "existing residential sub-tenants of the upper floors of the premises". That clause is ambiguous as to whether it refers to some, or all, of the upper floors. I am inclined to the view that it should be read as referring to all the upper floors.

14. It is convenient for me to mention at this point a matter raised in evidence in the course of the hearing, namely whether or not, in the past, floors 1 and 2 have been used for residential purposes. I can deal with that matter shortly. The evidence of past residential use of those floors is exiguous, and it is conceded by Hautford that any such use could not sensibly be used to support a case that those floors have in the past been regularly used as a residence.

15. By clause 3.16 of the underlease, no consent is required to the subletting by Romanys of the residential accommodation on floors 3 and 4 on assured shorthold tenancies. From 1978 to 1990, floors 3 and 4 were rated as residential flats; and likewise, from April 1993, when the council tax was introduced to September 2002, they were recorded by the council as being in residential use.

16. On 4th October 2012, Hautford served on Tuesday One a Notice of Tenant's Claim to acquire the freehold of the Property, pursuant to the 1967 Act. On 28th November 2012, Tuesday One served on Hautford a Notice in Reply to the Tenant's Claim which did not admit the tenant's right to acquire the freehold. By a solicitor's letter, they contended that the Property was not a "house, reasonably so called" within the meaning of section 2(1) of the 1967 Act.

17. Hautford's solicitors responded, by a letter dated 11th January 2013, by withdrawing the Notice of Tenant's Claim, thereby effectively conceding that the Property, as it then stood, could not be enfranchised.

18. On 22nd March 2013, the Defendant served an interim schedule of dilapidations on the Claimant.

19. Romanys then decided to refurbish the four upper floors at the Property. This was done between 2013 and 2015. Listed Building Consent was obtained for the proposed works, and a building regulation certificate has been issued and all four floors have now been fitted out for residential use. This work was done with the knowledge of the lessor and without demur save, at a fairly late stage in the work, a refusal to permit a rear extension because, according to evidence before me, the lessor did not want to change the appearance of the back of the building.

20. On 9th June 2014, the lessor offered to buy out the head lease for £1 million, but that offer was rejected by Hautford on 18th June 2014.

21. Romanys have, since 6th March 2015, sublet floors 3 and 4 on an assured shorthold tenancy for a term of two years, at an annual rent of £49,400. As a consequence of an agreement, rather than on a rent review, Romanys have agreed to pay an increased rent of £120,000 under the underlease, with effect from 25th March 2015. All four floors are now zoned for payment of council tax, whereas previously only floors 1 and 2 were zoned for business rates.

22. On 17th April 2015, Hautford applied to the lessor for their consent, under clause 3(19) of the lease, to make the necessary application to the planning authority for change of use. By a letter dated 30th April 2015, that request was refused. It was contended that to give consent might facilitate a claim by Hautford to acquire the freehold of the Property pursuant to their potential enfranchisement rights under the 1967 Act. An enfranchisement would damage the reversion. Further, it was contended that the lessor wanted to retain control of the Property

for estate management purposes, being, as it is, part of a block of properties then in their freehold ownership.

23. In their Reply in these proceedings, Hautford accept that improvement of their enfranchisement prospects is one motive for the application. I quote from their Reply:

> "It is admitted that one purpose of the application is to improve the prospects of making a future claim to acquire the freehold, although a consequence of the Defendant refusing the Application is to deny Romanys Ltd the ability to rent out the upper floors on assured shorthold tenancies and thereby increase their income from the property."

24. By this action, Hautford seeks declarations that Rotrust has unreasonably refused consent to the making of a planning application in the terms as sought by Hautford in their letter of 17th April 2015 and that Hautford is entitled, notwithstanding such refusal, to make the planning application in respect of which the lessor's consent is sought.

25. I should note at this point the following facts and matters. When this lease was granted in 1986, there was no risk of a successful enfranchisement claim being made by the original lessee or Hautford, because they are both limited companies and, as such, could not satisfy the residence test and so any such claim would have been bound to fail. However, amendments made by the Commonhold and Leasehold Reform Act 2002 removed the residence test, except where the tenant is a business tenant.

26. For so long as the Romanys sub-lease is in existence, the lease is not a business tenancy to which Part II of the Landlord and Tenant Act 1954 applies. The effect of that, in turn, is that section1(1ZC) of the 1967 Act, which continues to

impose a residence test on business tenants, if they are to have the right to enfranchise the freehold, does not apply to Hautford or an assignee of the lease who is not a business tenant.

THE EVIDENCE

27. I heard evidence from witnesses as follows. For Hautford, I heard oral evidence from Mr Copeman, a surveyor who had prepared a report on the Property and history of its occupation. I heard from Mr Pindolia, who is a director of Romanys and who has been concerned with the Property for many years and the lease under which it is held. He was concerned and involved with the works carried out to renovate the property and to convert floors 1 and 2 at the property.

28. I also heard from Mr Kerstein, a senior property manager at Brecker Grossmith, managing agents and surveyors employed by Rotrust and their predecessors in the management of the Property. He only started with Brecker Grossmith in February 2014. He was the author of the letter of 9th June 2014, proposing to Hautford that they surrender the lease for a payment of £1 million. I found his memory of his dealings with the property was somewhat sparse, in part, it seemed to me, because he had not familiarised himself recently with the contents of the file that must exist but not all of which appears to have been disclosed in these proceedings.

29. Finally, for the Defendant, I heard from Mr McGirl, a director and senior surveyor at Andrews & Boyd Consultants. He had some involvement for Tuesday One and/or Rotrust with the performance of the renovation and conversion works at the Property performed by Romanys. He inspected the premises and prepared the interim schedule of dilapidations. He had some

involvement in negotiations in respect of the granting of a licence by Rotrust for conversion works and, in particular, the lessor's refusal to permit a rear extension at the premises, because it would alter the appearance of the rear elevation of the building.

30. Whilst helping me to understand the context of this claim, and without any criticism of the witnesses, in my judgment, all of the evidence was peripheral to the heart of the dispute in this claim. What I can say is that, collectively, the evidence of those witnesses demonstrated to me that the personalities controlling both parties to this litigation are successful business people, who are motivated to maximise their assets and to profit from their investments. I stress that that motivation, and their conduct as revealed to me in the evidence, did not disclose anything other than proper and legitimate business dealings.

31. I should say a little about matters that might arise in the future, which in the circumstances of this case, inevitably, I have to consider. The parties and I can only speculate as to (a) whether, if made, a planning application for permission for residential use of floors 1 and 2 would be successful, and (b) whether, if such an application was successful, an application for enfranchisement supported by that increased residential floor area would be successful on the basis that the Property was a "a house reasonably so-called" and (c) what the financial benefit to the Claimant and financial detriment to the Defendant would be if positive answers were given to both questions (a) and (b).

32. What is clear to me, and I think is generally if not formally agreed by the parties, is that the answer to (a) is that a planning application for change of use to residential would probably be successful. As to (b), the prospects of success in

an enfranchisement application would be substantially enhanced by the proposed increase in residential floor area and, as to (c), whilst no figures are available, the relative changes in value of the parties' assets related to this lease upon a marriage of the leasehold and freehold interests, bearing in mind the fact that there is a period of less than 80 years left to run on this lease, can fairly be characterised as sums of some real worth.

THE RELEVANT LAW

33. As a preliminary matter, I would note that the onus of proof lies on the lessee seeking a declaration that a lessor has acted unreasonably.

34. I will, firstly, consider the principles of law to be applied to the question of whether or not a landlord's refusal of consent under a term of a lease is unreasonable or not. The test of reasonableness is an objective one: see *Woodfall* para.11.141:

> 'Cozens-Hardy M.R. has defined unreasonableness in these terms: "It was not enough to show that other lessors might have accepted the proposed assignees; the lessors were not to be held to have withheld the licence unreasonably if in the action they took they acted as a reasonable man might have done in the circumstances." So if a reasonable man in the landlord's position might regard the proposed transaction as damaging to his property interests, so that the landlord's view cannot be said to be unfounded though some persons might take a different view, he is not acting unreasonably in withholding his consent …'

35. The general principles are conveniently set out in the authority of Iqbal v Thakrar [2004] 2 EGLR 21 (CA). In particular, at paragraph 26, Peter Gibson LJ said:

> "Before I go through those various points raised by the parties respectively, let me set out what I believe to be the relevant

considerations to be taken into account by the court when considering the question of whether a landlord's refusal of consent to proposed structural alterations or additions is unreasonable. I should make it clear that no case has been drawn to our attention that deals with that type of consent. But the principles laid down in other cases, such as cases relating to consent by the landlord to an assignment of the tenant's lease, including International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd [1986] Ch 513, can be applied, with necessary changes.

(1) The purpose of the covenant is to protect the landlord from the tenant effecting alterations and additions that could damage the property interests of the landlord.

(2) A landlord is not entitled to refuse consent on grounds that have nothing to do with its property interests.

(3) It is for the tenants to show that the landlord has unreasonably withheld its consent to the proposals that the tenant has put forward. Implicit in that is the necessity for the tenants to make sufficiently clear what its proposals are, so that the landlord knows whether it should refuse or give consent to the alterations or additions.

(4) It is not necessary for the landlord to prove that the conclusions that led it to refuse consent were justified, if they were conclusions that might have been reached by a reasonable landlord in the particular circumstances.

(5) It might be reasonable for the landlord to refuse consent to an alteration or addition to be made for the purpose of converting the premises for a proposed use even if not forbidden by the lease. But whether such refusal would be reasonable or unreasonable will depend upon all the circumstances. For example, it might be unreasonable if the proposed use was a permitted use and the intention of the tenant in acquiring the premises to use them for that purpose was known to the freeholder when the freeholder acquired the freehold.

(6) Although a landlord will usually need to consider only its own interests, there might be cases where it would be disproportionate for a landlord to refuse consent, having regard to the effects upon it and upon the tenant respectively.

(7) Consent cannot be refused on grounds of pecuniary loss along. The proper course for the landlord to adopt in such circumstances is to ask for a compensatory payment.

> (8) In each case it will be a question of fact, dependent upon all the circumstances, as to whether the landlord, having regard to the actual reasons that impelled it to refuse consent, has acted unreasonably.'

36. There is authority, in the context of covenants against assignment or sub-letting, that supports the proposition that it is reasonable to withhold consent to the proposed alienation if the proposed assignee or sub-lessee would be able to qualify for enfranchisement, but the assignor/sub-lessor could not: see Norfolk Capital v Kitway [1977] 1 QB 506 (CA) and Bickel v Duke of Westminster [1977] 1 QB 517 (CA). These cases are an application of the general principle that it is reasonable for a landlord to refuse consent to such an alienation under a lease if it is reasonable to contemplate that there would be damage to the reversion as a result.

37. Since 1976, the provisions of the 1967 Act have been substantially amended, and numerous other statutes permitting enfranchisement by residential lessees have become part of the law. In Mount Eden Land Ltd v Bolsover Investments Ltd [2014] EWHC 3523 (Ch), the general principles were considered by Mr Stuart Isaacs QC, sitting in the High Court, in respect of the issue of whether or not a landlord refusing a required consent was acting unreasonably or not.

38. The lease in Mount Eden had some 900 years unexpired and the premises were used as serviced offices. The tenant wished to redevelop them to provide residential flats, which required the landlord's consent to the making of alterations. The landlord refused consent, on the basis that there was a possibility of the lessees of the proposed residential units applying for collective enfranchisement, which would lead to the landlord losing control of the building.

39. Understandably, in the circumstances of a 900 year long lease, the judge found that the possibility of enfranchisement was "wholly speculative" (paragraph 16). He determined that the 1976 cases were "not authority for the proposition that a landlord is not acting unreasonably in seeking to preserve its property interests and to avoid the possibility of those interests becoming susceptible to compulsory acquisition" (paragraph 17). He distinguished the 1976 cases which addressed the 1967 Act as originally enacted and which did not "unlike under the current regime" permit the landlord to obtain fair compensation for the enfranchisement (paragraph 17). He concluded (at paragraphs 18-19):

> "In contrast … in the present case Mount Eden's expressed concern it not that it would suffer substantial financial detriment but that it would lose control of the building, which control is said to be necessary for the protection of its wider estate … In my judgment, the Judge [at first instance] was entitled to conclude that this consideration, weighed together with all the other circumstances of the case, did not make a refusal of consent reasonable."

40. There does not appear to be any authority specifically dealing with the principles applicable when determining the meaning of reasonableness in respect of a covenant restricting the making of planning applications.

41. General principle requires that it is necessary, firstly, to consider what was in the reasonable contemplation of the parties to the lease and to look, first of all, at the covenant to see what its purpose was when the parties entered into it and to determine what they must be taken to have understood when they acquired their respective interests: see Bromley Park Garden Estates Ltd v Moss [1982] 1 WLR 1019. At 1033A, Dunn LJ said that the landlord is not entitled to refuse consent:

> "… in order to acquire a commercial benefit for himself by putting into effect proposals outside the contemplation of the lease under consideration, and to replace the contractual relations created by the lease by some alternative arrangements more advantageous to the landlord, even though this would have been in accordance with good estate management."

42. It follows from this that a lessor can only withhold consent to a planning application in order to protect the benefit it obtains under a covenant of the lease relating to planning, and not in order to obtain an uncovenanted or collateral advantage: see: e.g. Anglia Building Society v Sheffield City Council [1983] 1 EGLR 57. In that case, the council was held by the Court of Appeal to have unreasonably refused consent to a change of use from one service use to another service use, on the ground that it wished the premises to be used for retail purposes rather than a service use. That would be an attempt to secure, as Slade LJ said at p.60:

> "A collateral advantage for themselves quite dissociated from the bargain made between the original parties to the lease."

43. A lessor may not, under the guise of considering an application for consent to obtaining planning permission, in fact attempt to vary the lease by prohibiting residential use: see, by analogy, Berenyi v Watford BC [1980] 2 EGLR 38. In that case, a landlord purporting to consider and object to an application for change of use, was, in reality, objecting to a sub-letting, but had no reasonable grounds for doing so.

THE 1967 ACT

44. I turn to the law relevant to the issues in this case, in respect of enfranchisement under the 1967 Act. The 1967 Act confers the right to acquire the freehold of a "house reasonably so-called". Mixed use buildings such as a shop with flats

above "may" be a "house", because to qualify a building does not have to be wholly designed or adapted for living in.

45. By section 10(4) of the 1967 Act, restrictive covenants can be included in the transfer of the freehold which "materially enhance" the value of the landlord's property – a phrase which has been construed to include covenants which maintain the value of other property which might otherwise deteriorate: see *Hague on leasehold Enfranchisement* 6th Ed at para 6-32 and Le Mesurier v Pitt (1972) 23 P&CR 389 (Lands Tribunal).

46. The circumstances in which mixed use buildings may qualify is not at all clear, as demonstrated by the inconsistent decisions concerning very similar buildings in Henley v Cohen [2013] 2 P&CR 10 (CA) and Jewelcraft v Pressland [2016] 1 P&CR 9 (CA). The Supreme Court in Hosebay v Day [2012] 1 WLR 2884 (SC) did not explain the qualifying criteria. It is clear, from Hosebay and Prospect Estates v Grosvenor [2009] 1 WLR 1313 (CA), that the lawful use of areas of the building and the proportions of residential to non-residential use are very important factors to be considered.

THE RELATIVE CONTENTIONS OF THE PARTIES.

47. Hautford contends that Rotrust cannot use the power under clause 3(19) to defeat their wish to obtain planning permission for residential use of floors 1 and 2. That would run counter to the user clause that does not restrict the permitted users to any particular floors but encompasses the whole building. The purpose of the covenant at clause 3(19) of the lease is to protect the lessor from the possible effect of an application for planning permission, because, as the owner of the land, it could be subject to enforcement action if there were a

breach of a planning obligation (under ss.172(2) and 336(1) of the Town and Country Planning Act 1990.

48. To prevent residential use of floors 1 and 2 of the Property would devalue Hautford's leasehold estate in the land, effectively amounting to a derogation from grant. What Rotrust is seeking to do is to achieve a variation of the lease which would have the effect of excluding Hautford's rights under the 1967 Act, although an agreement to that effect would have been void under section 23(1) of the Act.

49. It is not reasonable for Rotrust so to prevent income from residential use in that way. Further, although it is admitted that part of the motive of Hautford in making the application is to increase the chance of an application for enfranchisement being successful, Rotrust are not acting reasonably in trying by this refusal to reduce the chances of such an application being successful; the right to apply for enfranchisement is one granted by law. At the time when this lease was granted, the enfranchisement provisions were in place. Whilst, at that time, Hautford or their predecessors in title could not have sought enfranchisement, being a Limited Company, an assignee could have done so. Residential use is permitted under the lease. The threat of an application under the 1967 Act has been present since the outset and, in order to succeed in a claim to enfranchise, the Claimant will still have to overcome the hurdle of demonstrating that the Property is a "house reasonably so called" under section 2(1) of the 1967 Act. If the lessor had wanted to prevent the residential occupancy of the building being increased so as to make the argument that the

building was "a house reasonably so called" successful, an appropriate restrictive covenant could have been included in the lease.

50. Miss Scott argues that the case law on which Rotrust relies to establish a "settled" principle that consent will be withheld reasonably if it is to prevent enfranchisement can be distinguished on the ground that the leases in those cases were entered into before the 1967 Act was passed. She submits that, in the circumstances, the judges found it difficult to see why a landlord who had not contemplated that Parliament would one day enact legislation that allowed tenants to expropriate their property should not be acting reasonably in refusing consent to actions by the tenant which might improve the prospects of a successful claim under the Act. In this case, the lease was executed in 1986 and the parties to it must have had the Act in mind at that time. In leasing a whole building, all of which could be used for residential purposes under the terms of the lease, there was a real prospect that a successful claim to enfranchise could be made at some future time by a qualifying tenant.

51. In Norfolk (supra) and in Bickel (supra), although the landlord was considered to be acting reasonably in resisting a potential claim under the 1967 Act, an important factor in both decisions was that the valuation of the freehold would have taken place under section 9(1) of the 1967 Act, as originally enacted, which was particularly favourable to tenants. It provided for valuation on enfranchisement on the assumed principle that the land on which a house was built belonged in equity to the landlord who had granted a long lease but the house itself belonged in equity to the tenant. A tenant enfranchising was not required to pay the full market value for the property.

52. In the present case, by contrast, the valuation would take place under section 9(1C) of the 1967 Act, which is far more favourable to the landlord, who is paid the market value of the house as well as the land, and marriage value if the unexpired term is less than 80 years. Miss Scott contends that the Mount Eden case demonstrates that apprehensions relating to enfranchisement do not of themselves justify a refusal of consent.

53. I turn to the arguments advanced by Mr Rainey QC, on behalf of Rotrust. It is contended that, in refusing to consent to Hautford making a planning application in respect of residential use of floors 1 and 2, the lessor is not being unreasonable because the use of those floors for residential purposes would increase the chances of an application by Hautford for enfranchisement of the property being successful. Amounting as it does to the complete loss of the reversion, enfranchisement is the paradigm example of a case where it cannot be said that it is unreasonable to withhold consent under the lease to a specified course if in so doing that risk of enfranchisement is averted.

54. A statutory enfranchisement price does not alter the fact that Rotrust would have lost its reversion, its rights of control of the block of which the Property is a part and the statutory price is calculated so that the value of the marriage of leasehold and freehold interests is split between the parties; it does not all go to the freeholder.

55. The authorities of Norfolk (supra) and Bickel (supra) are not limited to alienation covenants, as is supported by the authority of Henley v Cohen (supra).

56. Further, it is said that, in this case, the loss of the reversion would also impact upon the wider Soho Estate as it would fragment the single freehold block. The

Soho Estate is actively and closely managed by Rotrust, who are, it is said, particular about the look and character of the Estate and the lease has, as a result, onerous covenants for a 100 year lease. Rotrust's ability to control the Property will be lost if an enfranchisement claim succeeds.

57. Mr. Rainey QC notes that Section 10 covenants would not answer Rotrust's point that the damage to the reversion goes beyond the Property; the reversion includes the entire block and enfranchisement would mean that the Claimant's contiguous freehold interest in the block containing the Property would cease. It is asserted that attempts by landlords to impose restrictive covenants in freehold transfers are also quite often hotly contested at tribunal level.

58. It is contended that the purpose of clause 3(19) is to protect the lessor from the possible adverse effect of a planning application, including the adverse effect of such an application if granted. Improving the lessee's prospects of making an enfranchisement claim to acquire compulsorily the lessor's reversion is such an effect and refusal of consent is reasonable in those circumstances. The effect of the user clause at 3(11) is simply that use of any part of the Property (including the retail unit and basement) for residential purposes would not, of itself, be a breach of the lease. It does not mean that the lessor is obliged to consent to other applications under other clauses or other changes necessary to facilitate a change of use to residential use.

CONCLUSIONS

59. I have set out the respective arguments of the parties at some length to demonstrate the quality, variety, and strength, of the arguments made to me. However, the question posed for me by this case is ultimately one that can be

stated simply. In refusing to consent to the proposed application by their lessee, have Tuesday One/Rotrust been unreasonable? Of course, that question must be answered in the light of the provisions of the lease, authority and the relevant circumstances, accepting that what circumstances are relevant goes to the answer as well as the question.

60. Having considered all the arguments so skilfully placed before me, the authorities and the circumstances that are properly relevant to the question, I am satisfied that Hautford have proved that Rotrust have acted unreasonably in refusing consent to Hautford, to apply for planning permission, for residential use, in respect of floors 1 and 2, at the Property.

61. The matters that lead me to that conclusion, in particular, are these. I accept that the purpose of the covenant at clause 3(19) of the lease is to protect the lessor from the possible effect of an application for planning permission, because as the owner of the land, it could be subject to enforcement action if there were a breach of a planning obligation. I accept the argument that it is not to enable the lessor to restrict or limit the permitted use under clause 3(11). In my judgment, the lessor's refusal of consent under clause 3(19) is unreasonable because thereby they are seeking to achieve a collateral purpose, i.e. the imposition of a restriction on use that was not negotiated and is not included within clause 3(11).

62. Preventing the use sought is inconsistent with Hautford's right to enjoy the Property for the term granted, which right includes the right to use it for residential purposes, so long as planning permission for such use is obtained and was a right that Tuesday One, as assignee, legitimately expected to obtain when

it purchased the leasehold interest. The original lessee paid a premium for the grant of this lease in 1986, as did Hautford in 1998 for the assignment. Those premiums will have been negotiated in light of the use to which the tenant would be entitled to put the property.

63. I accept Miss Scott's argument that the case law on which Rotrust relies to establish a settled principle that consent will be withheld reasonably if it is to prevent enfranchisement is properly explained by the fact that the leases in those cases were entered into before the 1967 Act was passed. This lease was different. In leasing the property without a restriction on any part of the buildings' use for residential purposes, the lessor must have known that there was a real prospect that a successful claim to enfranchise could be made by a qualifying tenant. If the lessor really had preventing enfranchisement in contemplation when including clause 3(19) in the lease, then the lessor should have imposed a restriction on assignment.

64. I accept that, in seeking to retain in the provisions of the lease some control over the making of a planning application, the lessor was not intending to use that power to frustrate a lessee who wished to use any part of the building for residential purposes, even if that use were to improve the lessee's prospects for a successful application for enfranchisement. Attempts to control use now, by objecting to a planning application, are attempts to enhance the benefits already obtained under the lease.

65. At the time of the grant of the lease, the lessee, as a limited company, could not have applied for enfranchisement, but the lessee could have assigned the lease to a qualifying tenant, who could unarguably have successfully applied for

enfranchisement if they had, in reliance upon clause 2(11), converted the whole property to a residence, subject only to planning permission, and of course the consent to such an application by the lessor. I agree with Miss Scott's submission that the fact that the lessor did not consider it necessary to insert such a clause is good evidence that the lessor, and lessee, when negotiating the lease, did not contemplate that the lessor would use the lease terms to object to attempts to enfranchise. It cannot now rely on the lease to object to attempts to improve the position on enfranchisement if it was not contemplated by the parties to the lease that it could do so. The user clause in the lease is unrestricted; it could easily have been limited in one way or another so as to prevent the whole building being used for residential purposes, had the lessor been concerned to guard against enfranchisement.

66. In so far as the lessee has interests in respect of their contiguous holdings, I accept that, on an enfranchisement, those interests should be capable of being sufficiently preserved under section 10 of the 1967 Act.

67. In the course of the argument in this case, there has been discussion as to the relevance of the parties' motives behind this dispute. The motivation of Hautford is clearly set out in the Reply, and has not been challenged. The landlord may or may not have a collateral motive or be seeking a collateral advantage by refusing consent. I accept that the motives of the parties to this case are, or largely are, irrelevant to the question I have to determine in this case. The lessee is seeking consent to a step, namely an application for planning permission that he is, but for the lack of that consent, entitled, under the lease and in law, to take as a step needed to legitimise use of the floor 1 and 2 for

residential purposes. Those floors have been converted into residential accommodation with the knowledge and acquiescence of the lessor.

68. In my judgment, for the reasons given, I consider the lessor's consent has been unreasonably withheld. I will grant the declarations sought.

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