

B2/2004/0039
B2/2004/0039(A)

Neutral Citation Number:- [2004] EWCA Civ 592
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CANTERBURY COUNTY COURT
(MISS RECORDER PLUMPTRE)

Royal Courts of Justice
Strand
London, WC2

Wednesday, 28th April 2004

B E F O R E:

LORD JUSTICE PETER GIBSON
LORD JUSTICE LONGMORE

(1) MOHAMMED IQBAL
(2) OMAR FAROOK KHAN
(3) MOHAMMED SULEMAN KHAN
(4) MOHAMMED ABDUL KORIEEM KHAN

Claimants/Respondents

-v-

(1) RISHI THAKRAR
(2) RUPA THAKRAR

Defendants/Appellants

(Computer-Aided Transcript of the Palantype Notes of
Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

MR ANDREW BUTLER (instructed by Messrs Marsh Brown & co, Lewisham SE13 5AF)
appeared on behalf of the Appellants
MR PAUL CLARKE (instructed by Messrs Russell-Cooke Solicitors, London WC1R 4BX)
appeared on behalf of the Respondents

J U D G M E N T
(As approved by the Court)

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1. LORD JUSTICE PETER GIBSON: The appellants, the defendants, Mr Rishi Thakrar and his sister Ms Rupa Thakrar, appeal with the permission of this court (Clarke LJ) from the order made by Mrs Recorder Plumptre in the Canterbury County Court on 12th December 2003. By that order the Recorder granted certain declarations relating to structural alterations and additions which the respondents, the claimants, Mohammed Iqbal, Omar Farook Khan, Mohammed Suleman Khan, Mohammed Abdul Koriem Khan, as tenants under a long lease of ground floor premises at 4 Risborough Lane, Cheriton, Folkestone, were proposing to make and for which they had sought the consent of the appellants.
2. The appellants are the holders of the freehold of 4 Risborough Lane ("the Property") subject to that lease. Under the terms of the lease the appellants cannot refuse consent unreasonably. The appellants did refuse consent to the alterations proposed by the respondents. The primary question on this appeal, as it was before the Recorder, is whether the Recorder was right to declare that the appellants unreasonably withheld consent and that the respondents were entitled to proceed with the proposed alterations and additions in accordance with their plans.
3. I summarise the relevant facts in this way. Prior to March 1998 the property had been occupied for several decades by a branch of the British Legion. The freehold of the Property was, in 1998, vested in Southern Breweries Ltd. On 20th May 1998 the respondents purchased from the freeholder a 999-year lease of premises which were defined in the lease as "the Demised Premises". They were defined in this way:

"ALL THAT ground floor shop premises forming part of the Building known as 4 Risborough Lane Cheriton Folkestone Kent ALL OF which premises are shown for the purpose of identification only edged red on the plan attached hereto and are hereinafter called 'the Demised Premises' and for the purpose of obligation as well as grant include:

(a) ...

(b) any of the walls or partitions lying within the Premises which are not loadbearing or which do not form part of the main structure of the Building.

...

(e) the windows and window frames and doors and door frames in the walls bounding the Premises or otherwise in the Premises.

(f) the shop front of the Premises but not including

(i) ...

(ii) the foundations exterior main walls party walls and roof or any of the main timbers and joists of the Building or any of the load bearing walls or any of the partitions therein (whether internal or external) except such as are expressly included in this demise ..."

4. Clause 3 of the lease contains the tenant's covenant with the landlord and included:

"(h) Not to make any structural alterations or additions to the Demised Premises either internally or externally without the approval in

writing of the landlord (such approval not to be unreasonably withheld) to the plans and specifications."

5. The lease surprisingly contained no covenant restrictive of user.
6. The purchase by the respondents had been effected pursuant to an advertisement by the freeholder advertising, for sale by auction, the premises as comprising "a ground-floor lock-up shop unit having A3 takeaway use". A3 use is the planning category for the sale of hot food on or off the premises.
7. The appellants, at the time the respondents purchased their long lease, were the tenants of the upper storeys of the property. They purchased the freehold, including the reversion to the respondents' lease, on 4th June 2001 for a sum of under £300. They have been developing the upper storeys of the property into what they call ten luxury flats.
8. Even before the appellants purchased the freehold, they had become aware that the respondents wanted to convert the ground floor into an Indian restaurant. Thus on 11th May 2001 the appellants' father, Mr Subhash Kanji Thakrar, who is a chartered accountant and has throughout acted on behalf of his son and daughter, wrote to the first respondent to say that he was aware that the respondents had applied to the District Council for the conversion of the ground floor premises. Mr Thakrar said:

"There are load bearing walls, which you wish to take off and this could have an impact on the flats above."

9. The respondents' architect, Mr Rahman, wrote to Mr Thakrar on 10th June 2001 to say that the respondents proposed to have a restaurant with a new entrance door and window, and said that planning and building regulation approval had been obtained. That provoked a strong protest from Mr Thakrar, who said that the appellants would oppose the conversion. He added:

"You may have A3 permission, but that does not entitle you to do works, which are not acceptable to the freeholder."

10. On 3rd May 2002 solicitors for the respondents wrote on their behalf to the appellants. They referred to clause 3(h) of the lease and enclosed a copy of their architect's proposed restaurant plan dated April 2001, approved by the District Council on 8th May. They thereby applied to the appellants for approval to the structural alterations and additions shown on the plan.
11. The plan shows the existing front elevation and the proposed front elevation. The most material change is that in place of a wide window below which is part of the exterior wall, it was proposed that a narrower window would be installed and that a little to the side of the new window a new door would be inserted. It is apparent that the new door would be built where part of the existing window stands and that this would also involve cutting into the exterior wall below the window to remove the bricks (or whatever material was there constituting the front wall).
12. In the centre of the plan is what is called "existing ground floor plan". That shows the existing layout of the ground floor. In the middle of that plan one finds this legend:

"Existing partition and load bearing wall to be checked on site before work commence".

That legend is also to be found again in certain notes which are included on the plan. It is

plain that these notes are directions intended to be read by the contractor who is to do the building work.

13. Also on the plan is what is called "proposed restaurant plan". Comparing the existing ground floor plan with the proposed restaurant plan, one sees the door leading to the street that is to be newly constructed in place of part of the existing window. One sees that an internal partition, referred to at the trial as partition E, is to be removed, as is a brick pier which at the trial was referred to as pier D and lies at the end of partition E. Also one notes that opposite pier D, another pier, called pier F, has been reduced in size on the proposed restaurant plan.
14. There are no directions as to what is to be happen when the contractor checks the existing partition and load bearing wall. It is not stated that if the contractor finds that the wall is load bearing, he is to stop work. Nor is it stated in any other way what is then to happen. The architect's plan was the only the document supplied to the appellants. No specification, such as may have been contemplated by the lease in clause 3(h), was provided.
15. Mr Thakrar responded to that request for consent. He expressed himself in strong language over four typed pages, in a somewhat idiosyncratic style. The general tone was extremely hostile to what was proposed. The most relevant part of the letter was in these terms:

"There is also a structure problem that will arise from the rearranging of any walls to make changes that are structural or load bearing, and your client has misrepresented that situation to the Local Council. There are no other door openings, as shown on your new plans and our clients' will not give access or any permission for your client to formulate or have new openings or put doors. This will result in a loss of parking spaces as well as it will create difficulties with the Health, Safety and stable structure of the building. The clients' building works have been completed to the upper part and flats of the property and our clients', as freeholder are now entitled to reject your clients' application, because they did not see fit to consult them nor take their permission in good time or at all until now. They were put on notice about consulting Solicitors or somebody like Architects. Your letter of 3 May 2002 is too late, and furthermore, our clients' are entitled to withhold any approval of the works, where impinge upon their amenities and/or the fabric of the building, the amenities of the ten flats, because it is now a substantial residential property and planning permission has not been previously properly sought for 'the Restaurant', as you also call it a shop."

16. After further correspondence, proceedings were commenced on 20th January 2003 by the respondents against the appellants. The respondents claimed that by the letter of 13th May 2002 the appellants unreasonably refused to give their consent to the proposed alterations and sought the declarations which the judge was to grant.
17. The appellants by their defence in paragraph 3 pleaded that the external front wall of the property was not demised to the respondents and they averred in paragraph 12 that their refusal of consent was justified. The pleader has then set out in some detail the matters alleged to justify the refusal of consent.
18. By their reply the respondents pleaded that the external front wall was expressly included within the Demised Premises because of the reference in the definition to the shop front, and the respondents further denied the alleged justification of the refusal of consent. Among the matters relied on was, as they averred, that the intended alterations did not involve the removal of a load-bearing wall. That was a point repeated by solicitors for the respondents in

correspondence. However, as I will describe, the respondents changed their case somewhat by the time of the trial, in consequence of the report which they had received from their expert engineer, Mr Huband, in which he accepted that the plan showed removal of or alterations to certain load-bearing structural features.

19. The action was heard by the Recorder on 11th and 12th December 2003, the Recorder then giving an extempore judgment at the end of the hearing. In her judgment she referred to the submissions made by Mr Paul Clarke for the appellants as to the relevant legal principles. She said that she was satisfied that had Mr Thakrar sought legal advice, the letter of 13th May 2002 would not have been written. She said that she should concentrate on that letter as containing the reasons for the refusal of consent in the appellants' minds. She noted that it was common ground that it was for the tenants to show that the reasons given for refusal of consent were unreasonable. She then considered what were the operative reasons. She indicated that she had little difficulty in finding that the appellants did not specify reasonable grounds in the letter of 13th May.
20. She went through the objections which she had extracted from that letter. First, was the structural problem over the removal of load-bearing walls. She found as a fact that pier D was load bearing. She made no finding in respect of pier F. She referred to Mr Huband's evidence as to partition E as being a partition which might be load bearing, but which in any event needed additional structural support if the partition was removed. She accepted Mr Huband's evidence that no responsible builder or architect would have proceeded to remove pier D, as it was so clearly load bearing.
21. The Recorder secondly dealt with the question of the door. She referred to the refusal of the appellants to permit another door to be constructed. She found that the objection raised by the appellants was not reasonable because they had themselves blocked up the original entrance to the Demised Premises.
22. Third, the Recorder dismissed an objection based on loss of parking. She did so on two grounds. First, that there was no evidence of a prescriptive right to park and, secondly, any loss was capable of being compensated in money terms.
23. Fourth, she dealt with the loss of amenity which she found to be an objection to the use of the Demised Premises as a restaurant. She said that Mr Thakrar's real motive was to ensure that there was no Indian restaurant there because it would result in a diminution of rental value of the flats and possibly a quicker turnover of tenants. The Recorder rejected that objection as unreasonable because the Demised Premises had been sold with A3 use confirmed by the District Council.
24. Finally, the Recorder rejected the argument that the appellants had an unrestricted right to refuse consent in relation to that part of the alteration consisting of the change to the front exterior wall. She accepted the argument of the respondents that the demised premises included the shop front, which in turn included the exterior wall.
25. On this appeal Mr Andrew Butler, for the appellants, advances no less than nine grounds of appeal. Mr Clarke advanced two further grounds on which the respondents seek to uphold the judgment of the Recorder.
26. 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 whether a landlord's refusal of consent to proposed structural alterations or additions is unreasonable. I should make clear that no case has been drawn to

our attention which 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, such as International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd [1986] Ch 513, can be applied with necessary changes.

- (1) The purpose of the consent is to protect the landlord from the tenant effecting alterations and additions which damage the property interests of the landlord.
 - (2) A landlord is not entitled to refuse consent on grounds which have nothing to do with his property interests.
 - (3) It is for the tenant to show that the landlord has unreasonably withheld his consent to the proposals which the tenant has put forward. Implicit in that is the necessity for the tenant to make sufficiently clear what his proposals are, so that the landlord knows whether he should refuse or give consent to the alterations or additions.
 - (4) It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable landlord in the particular circumstances.
 - (5) It may 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 is reasonable or unreasonable depends on all the circumstances. For example, it may 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) While a landlord need usually only consider his own interests, there may be cases where it would be disproportionate for a landlord to refuse consent having regard to the effects on himself and on the tenant respectively.
 - (7) Consent cannot be refused on grounds of pecuniary loss alone. The proper course for the landlord to adopt in such circumstances is to ask for a compensatory payment.
 - (8) In each case it is a question of fact depending on all the circumstances whether the landlord, having regard to the actual reasons which impelled him to refuse consent, acted unreasonably.
27. It is also clear from the authorities and in particular from the judgment of May LJ in Tollbench Ltd v Plymouth City Council [1988] 1 EGLR 79, 81F, that the court considers two questions. First, what was the actual reason for refusing consent which, May LJ pointed out, is a subjective enquiry to find out what was in the mind of the landlord at the time of the refusal of consent. The second question is an objective enquiry whether the reason in the landlord's mind was reasonable or unreasonable.
28. I now turn to Mr Butler's nine grounds. First, he says that in so far as the Recorder limited herself to consideration of certain propositions of law which Mr Clarke had advanced in his

skeleton argument and to which she expressly referred, she was wrong because other propositions of law were relevant. In particular, Mr Butler stresses that the test of reasonableness is whether a reasonable man in the position of the landlord might regard the alterations or additions as detrimental to his property interests.

29. Mr Butler accepted that it is not necessary for a judge to set out all the relevant propositions of law which should guide him or her, provided that the judge in reaching his or her conclusion has the relevant propositions in mind. In essence, this ground of appeal is best considered in relation to specific points taken by Mr Butler where he says the Recorder erred.
30. The second ground is that in so far as the Recorder sought to glean the appellants' reasons for refusal from the general conduct of Mr Thakrar rather than from the letter of 13th May 2002, the Recorder was wrong. However, to my mind the Recorder makes plain that she accepts that the letter does contain the relevant reasons. There is some infelicity, if I might say so, in the Recorder's judgment, in that at one stage she appears to identify a single reason for the refusal in that she states, under the heading of "loss of amenity to the flats", that the real motive of Mr Thakrar in refusing consent was to ensure that there was no Indian restaurant at the Property because of the resulting diminution in rental value of the flats and a possible quicker turnover of tenants. But in my judgment, the Recorder was there making a comment in relation to one particular reason as to loss of amenity. There is therefore nothing in this ground to justify allowing the appeal.
31. Third, however, is this ground. Mr Butler says that the Recorder was wrong to hold that the respondents' concerns about the effect of the proposed alterations on the structural integrity of the building did not amount to a good reason for withholding consent. With this ground can be considered the fourth ground, that the Recorder's finding was undermined by her failure to deal with pier F in her judgment. It can also be considered with the two additional points which are taken by Mr Clarke in the respondent's notice. Mr Clarke submits that it cannot have been reasonable for the appellants unequivocally to refuse consent to the alterations merely on the grounds that there may theoretically be structural problems. The appellants should, he says, have granted consent conditional on ensuring that the alterations were carried out without causing structural problems. Further or alternatively he submits, concern for the structure of the building was not a factor influencing the appellants in refusing consent but was a makeweight, the real reason being that the appellants wished to prevent the premises being used as an Indian restaurant and that reason should therefore be considered irrelevant to the present issue.
32. If I may deal with Mr Clarke's points first, whilst I admire his footwork in changing the ground on which the respondents attacked the refusal by the appellants of consent to the proposed alterations, I do not accept that a landlord can be found to have unreasonably refused consent to a proposed alteration on the basis that a conditional consent should have been given by the landlord. It is for the tenant to put forward the proposals for the alterations or additions, consent to which is sought from the landlord. It is of course possible, as in the present case, that it can be envisaged that problems may arise when work is actually done. In this case it is apparent from the plan which was put to the appellants that the contractor was to check the "existing partition and load bearing wall". What was to happen if it was found that the partition or wall was load bearing was not specified, and it was for the respondents to indicate what alterations or additions they proposed in that event. Unhappily for them they did not so specify, and all that the appellants had was the plan to tell them what were the alterations and additions which were proposed and for which their unconditional consent was sought.

33. Nor can I accept Mr Clarke's further or alternative submission that this was not a matter of real concern to the appellants but was a makeweight, the true reason being the opposition to the user as an Indian restaurant. That was not the approach of the Recorder in her judgment read as a whole, and in my judgment it is plain that the letter of 13th May 2002 should be taken to contain the material reasons why the appellants refused consent. The concern about the alterations affecting the structure of the building was voiced as early as 11th May 2001.
34. The Recorder's approach to the structural problem was to accept what Mr Huband had said. But what he said indicated that the appellants were entirely right to be concerned on structural grounds about the proposed alterations. Mr Huband in his written report acknowledged that pier D was shown on the plan submitted to the appellants as to be removed. He also says that he understood from the first respondent that the pier was in fact to remain; but that was not known to the appellants. As for pier F, even Mr Huband, an expert engineer, was not able to determine the bearing of the beam which was carried by pier F, and he said that it might be that removal of part of the pier would result in an inadequate bearing. He added that if the bearing was inadequate, then relatively substantial remedial works would be necessary. The architect's plan contained no indication of such works.
35. Given that the direction contained in the plan to check the existing partition and load bearing wall was intended not for an engineer but for the builder, it would be astonishing if a landlord was not able to justify a refusal of consent to the alterations proposed. Furthermore, in relation to partition E Mr Huband said that because of creep effects, it was now likely to be carrying load from the first floor and that removal of the partition might cause additional deflection in the first floor. For that reason, he considered that it would be prudent to provide additional structural support to replace the partition. However, that was not indicated on the architect's plan.
36. Thus, on three grounds the proposed alterations either would or could, on the respondents' expert's own evidence, give rise to structural problems. The Recorder dismissed that as being a good ground for withholding consent by saying that plans are normally drawn up because parties so often do not actually have access to the property and cannot expose the full extent of the load bearing walls or beams, and that the structural problem could be cured by proper means to ensure that pier D remained load bearing. She accepted Mr Huband's evidence that any competent builder or architect would not have let these works go ahead with the removal of the load-bearing pier, and she found as a matter of common sense that it was in nobody's interest that the building should collapse. No doubt it was in nobody's interest, but how were the appellants to know precisely what alterations not shown on the architect's plan were to be effected.
37. In my judgment the suggestion that parties might not have access to the property does not assist. There is no evidence that the respondents could not have had whatever access they wanted to the demised premises. The Recorder also took into account the wording on the plan that the existing partition and load bearing wall was to be checked before works commenced, and that Mr Huband had said that this was a common phrase that he himself had used. But that does not go to show that the landlord in this case was acting unreasonably in withholding consent. That language in the note simply is not good enough to tell the landlord what it was that the tenants proposed. Indeed, Mr Huband said that he might have wished that something stronger had been stated in the architect's plan in relation to the load bearing features. I am therefore not able to agree with the Recorder when she concludes that, for the reasons she gave, the appellants were acting unreasonably in refusing consent to the alterations shown on the plan.

38. The Recorder does not deal expressly with pier F in the same way that she did with pier D, but there is no doubt that she would have applied the same reasoning in respect of pier F. The problem arising from the alterations to pier F simply reinforces the point which can be taken on pier D, as indeed does the proposed removal of partition E.
39. A further point which was taken by Mr Clarke is that the reason given in the letter of 13th May for refusing consent was not really directed at the structural point at all, but was directed, rather, at the alleged fact that the respondents had misled the District Council. We were told by Mr Butler that this was not a point put to the appellants' witnesses, and in any event in my judgment it is not correct, as it seems to me plain that the respondents were being told that there was a structural problem arising from the rearranging of the walls. Accordingly, on this ground I conclude that Mr Butler is correct and the Recorder's decision cannot stand.
40. Ground five of Mr Butler's grounds was that it was wrong for the Recorder to hold that there was no evidence of a prescriptive right to park on the forecourt area in front of the building. With that can be taken ground six, that she was wrong to hold that the loss of such a prescriptive right was solely pecuniary.
41. I can deal with that relatively shortly. Whilst there was some evidence that the British Legion had for a long time used the area in front of the Property for the purpose of parking a single car, there is no evidence that a prescriptive right had been acquired. An attempt was made by the appellants to obtain title to that area, on the footing that with the British Legion's occupation they were able to claim such title. But, as was pointed out by the Land Registry, possession was not shown to have been taken for the requisite continuous period, there being a gap between the British Legion occupying the site and the appellants claiming to succeed to that right. The appellants, I am afraid, failed to obtain the requisite evidence that during the interval that area had been so possessed. In my judgment, the Recorder was entitled to take the view which she did, even though she might have gone a little too far in saying that there was no evidence at all. However, I do not agree with the Recorder's second ground on which she held that it was unreasonable for the appellants to rely on a loss of any parking right, viz. that the appellants could be compensated for it in monetary terms. In my judgment, no case goes so far as to say that a property owner who enjoys an amenity in connection with his property can be required, in effect, to sell the right to it by being compensated in money for it when it is an amenity which that person wishes to continue to enjoy.
42. Ground seven is that the Recorder, having accepted that the proposed use of the Demised Premises would depress rents or quicken the turnover of tenants, was wrong to find the appellants' objection on this ground unreasonable. Again, I can deal with that point shortly. Whilst I accept that the fact that the proposed use as an Indian restaurant was a use which is not prohibited by the terms of the lease does not preclude a landlord refusing consent reasonably to alterations made for the purpose of that use. However, I see no answer to the point which is taken by the Recorder in paragraph 34 of her judgment, that it was unreasonable of the appellants to object on that ground, the demised premises having been sold with class A3 use and that use having been confirmed by the District Council, when that is coupled with the fact that the appellants appear to have been aware at all times that that was the proposed use which the respondents intended. The respondents paid some £29,000 for the long lease. In my judgment, it was unreasonable for the appellants to refuse consent on that ground.
43. Finally, I come to grounds eight and nine, relating to the proposed alteration to the exterior wall of the demised premises so as to construct a new door in place of part of that exterior wall and part of the existing window. Mr Butler submits that the Recorder was wrong to find that the demise, including as it did the shopfront, extended to the bricks and mortar of the

front wall as opposed to the facade of the premises alone, and that accordingly she was wrong to subject the proposed creation of a new entrance through that wall to the test of reasonableness. He went on in ground nine to submit that the Recorder was in any event wrong to be influenced by the fact that the appellants had blocked the previous entrance into the demised premises.

44. On the latter point he has told us that there was evidence from the appellants that that was done because of a break-in into the demised premises, and that the blockage was carried out with the consent of the respondents. He has also told us, however, that the respondents do not agree that the blocking of the entrance was with their consent.
45. The Recorder certainly took that action by the appellants to be a relevant matter. I have to say it does not seem to me to be relevant to a question of construction of the lease. Further, that which is blocked can easily be unblocked, and if the respondents believe that there is a right to have the entrance unblocked, they can seek to enforce that right. It does not to my mind go to the question which was before the Recorder, and in any event she did not make material findings of fact on the point.
46. The question is one of construction: did the parties to the lease intend the reference to the shop front of the premises to include the front exterior main wall of the Property? Mr Clarke submitted that that shopfront should include the main wall. He says that this is the only way to make sense of clause 1(f). He relies in particular on the coda to the clause excepting, as it does, those parts of the premises which are expressly included in the demise. He submits that his construction gives meaning to those concluding words. Mr Butler submits that that is not the correct construction, that the shop front means only the facade of the premises and that the landlord would naturally have wished to retain complete control over the exterior main wall at the front of the Property.
47. I agree with Mr Butler. It seems to me that the parties to the lease apportioned between them those parts of the Property which were to be the responsibility of the tenants and to be included within the demise to them, and those parts which were to be retained by the landlord as his responsibility. The landlord has the right to refuse, even unreasonably, any alteration or addition which trespasses on what is retained by him. The landlord was in my judgment not to demise, and so there was not to be excluded from the covenant in clause 3(h), what might be called the basic structure of the building: exterior main walls, main timbers, joists and load bearing walls. The tenant was to have responsibility for the maintenance of the Demised Premises, and this was to include the shop front in the sense that what appeared on the facade would be the responsibility of the tenant. These are somewhat unusual premises for a restaurant. The building appears from the photographs to be an ordinary residential house. But plainly at the time the parties came on the scene the ground floor was intended for a commercial user, hence the A3 planning use.
48. In the context of this lease and having regard to the exclusion from the Demised Premises of the basic structure of the building, I would construe "shop front" as not including the front exterior main wall but as limited to the facade. On that footing, the question whether consent was unreasonably refused to an alteration involving the construction of a new front door in the exterior main wall simply does not arise.
49. I would add that it was drawn to our attention that a similar argument could have been mounted by the appellants that the load bearing walls which are excluded from the Demised Premises would include piers D and F, so that again the appellants could, if this argument were right, refuse to grant permission to an alteration to those piers, even if the refusal was unreasonable. However, that was not a point which was pleaded, and it is subject to a

possible argument that the reference to load bearing walls does not include a brick pier. It is unnecessary to say more on that point. On this ground too, therefore, I would respectfully disagree with the conclusion reached by the Recorder.

50. Accordingly the appeal, if my Lord agrees with my conclusion, must be allowed and the declarations must be discharged.

51. I feel bound to add that it seems to me highly unfortunate that this matter has reached the expensive impasse which it appears to have done. It is of course open to tenants who unsuccessfully seek the consent of a landlord to alterations to apply again with other proposals. That might still happen in the present case, subject to the problem of the new door. But it is a matter for negotiation between the parties as to what agreement can be reached between them. What is plain is that it is an unfortunate waste of a property asset for the respondents to have premises which are not being used. I do not doubt that access could be obtained into those premises by the unblocking of the previous door. It would be more convenient of course for the respondents if the proposed alteration could proceed with necessary modifications, but agreement on that is a matter for them and the appellants.

52. For these reasons, I would allow this appeal.

53. LORD JUSTICE LONGMORE: I agree with the judgment given by Lord Justice Peter Gibson in respect of his disposition of all the grounds of appeal. I add a few words on the question whether the landlords reasonably refused their consent to the proposed alterations, since we are differing from the Recorder on this point.

54. The Recorder thought that since no reasonable tenant and no reasonable local authority would allow load-bearing walls to be removed without proper replacements, it was unreasonable for the landlords to refuse their consent to the proposed alterations, as per the April 2001 proposed restaurant plan passed for approval by Shepway District Council on 8th May 2001. The plan does not indicate what walls or piers are load-bearing walls or piers, but it does say in two places:

"Existing partition and load bearing wall to be checked on site before work commence."

55. These words no doubt constitute instructions to any builder or contractor doing the alterations. Mr Huband, the expert whose evidence the Recorder accepted, said that this was a common notation on this sort of plan and that he had himself written it on many occasions himself. No doubt that is correct.

56. The learned Recorder then went on to say this in paragraph 29 of her judgment:

"I am quite satisfied that the reason for refusal is not a reasonable one, and that there are proper measures that could and would be taken, both by the claimants, and more importantly by Shepway Council to ensure that the proposed alterations complied with building regulations and adequate support would be one of the foremost things in a Shepway planning officer's mind."

57. The matter cannot however be dealt with so simply. Mr Clarke submitted (1) that the implication of the plan as a whole was that piers or walls would not be removed if they were found to be load bearing; and (2) that if it was found after checking that work needed to be done to give support that would otherwise be taken away, that work would be done. What Mr Clarke appears not to appreciate is that these are two entirely different ways of solving problems due to the presence of load-bearing walls or piers. In my view, the landlord is

entitled to know what solution the tenant proposes, if there is a proposal to remove structural items which are in fact load bearing. In this case the landlords were left in ignorance whether the tenants planned not to remove items which were load bearing, or proposed to make further alterations to compensate for the removal of load-bearing items. In these circumstances, it was in my judgment not unreasonable for the landlords to have refused their consent to the alterations, for the simple reason that they did not know how the tenants would proceed in relation to load-bearing parts of the premises.

58. I agree therefore that this appeal should be allowed. That does not prevent the tenants from making a further application for consent which deals with the problem of the load-bearing parts of the premises. If that course is taken, however, our decision on clause 1(f)(ii) in relation to the proposed new door will of course be binding on the parties and on any court which further considers the matter.

ORDER: Appeal allowed; the respondents to pay the appellants their costs, including the costs below, up to 15th March; the respondents to pay 75% of the appellants costs after 15th March; the respondents to pay the appellants an interim payment of costs in the sum of £7,500.

(Order not part of approved judgment)
