



30 October 2019

PRESS SUMMARY

Sequent Nominees Ltd (formerly Rotrust Nominees Ltd) (Appellant) v Hautford Ltd (a company registered in the British Virgin Islands) (Respondent)

[2019] UKSC 47

On appeal from [2018] EWCA Civ 765

JUSTICES: Lord Wilson, Lord Carnwath, Lord Hodge, Lord Briggs, Lady Arden

BACKGROUND TO THE APPEAL

The Appellant is the landlord of a six-storey terraced building at 51 Brewer Street, Soho, London W1. The Respondent is the current tenant under a lease granted in 1986. Its sub-tenant, Romanys Ltd, runs an ironmongers' shop from the basement and ground floor.

Under clause 3(11) of the lease, the tenant may use any part of the building for (among other things) retail, offices or residential purposes, although the landlord gives no warranty that this usage will comply with planning rules.

Clause 3(19) of the lease says the tenant cannot apply for planning permission without the landlord's consent. It also says this consent must not be "*unreasonably withheld*". This is known as a fully qualified covenant.

Between 2013 and 2015, the sub-tenant converted the first, second, third and fourth floors into self-contained flats. The first and second floors were previously used as storage and office space, and the existing planning permission did not allow residential use. The former landlord (the Appellant's predecessor in title) reserved its position on a planning application until the works were completed. At that point, the tenant sought the former landlord's consent to apply for planning permission to use those two floors residentially.

The former landlord believed a change of use would damage its own financial interests. The majority of the building would become residential which, in turn, would give the tenant the chance to compulsorily acquire the freehold under the Leasehold Reform Act 1967 (a process called enfranchisement.) An increased risk of enfranchisement would devalue the landlord's property. So the landlord refused consent to make a planning application for increased residential use.

The tenant said this was "*unreasonable*" and challenged the landlord's decision in the County Court. HHJ Collender agreed with the tenant, as did the Court of Appeal (Sir Terence Etherton MR, McCombe LJ and Lindblom LJ.) The landlord now appeals to the Supreme Court. The key question is whether the trial judge was right to find the landlord acted unreasonably in withholding consent.

JUDGMENT

The Supreme Court allows the appeal by a majority of three to two. Lord Briggs gives the main judgment with which Lord Carnwath and Lord Hodge agree. Lady Arden and Lord Wilson each give a dissenting judgment.

REASONS FOR THE JUDGMENT

The circumstances in which a landlord may be asked to give consent under a fully qualified covenant are infinitely variable. In every case, the reasonableness of the landlord's decision will be a question of fact and degree. This must be assessed by reference to the facts at the date of the tenant's request, not what the parties contemplated when the lease was granted [27]-[32].

The real issue in this case is whether the courts below were correct in construing the lease in such a way as to prevent the landlord from having regard to an increased risk of enfranchisement from residential use. Three reasons have been advanced in support of that conclusion [33]-[34].

The first reason (adopted by the tenant's counsel before the Supreme Court) is that refusal of consent under clause 3(19) is inconsistent with the landlord's grant of rights under clause 3(11). The majority rejects this argument, holding that the two clauses must be read together. Under clause 3(19) the tenant must act consistently with planning legislation; so clause 3(11) only allows residential use of the building to the extent that it is permitted by the planning regime [34]; [36].

The second reason (adopted by HHJ Collender) is that clause 3(19) serves a limited purpose of protecting the landlord from liability which might arise under new planning conditions. But there is nothing to suggest that there is only one purpose for the existence of clause 3(19). The right approach is to decide whether the landlord's refusal serves a purpose which is sufficiently connected with the landlord and tenant relationship: [37].

The third reason (adopted by the Court of Appeal) is that it makes no sense to allow the landlord to refuse planning permission to avoid the risk of enfranchisement, because a third party could apply for the same planning permission free of any such restraint and with the same adverse consequences to the landlord [18]; [34]. It is true that the landlord was vulnerable to enfranchisement if a third party sought planning permission. But, as a matter of fact, no third party did apply for planning permission. At the time of the tenant's request, the landlord's ability to refuse consent under clause 3(19) gave the landlord a real measure of protection against enfranchisement [38].

So the Court of Appeal made an error of law which requires the Supreme Court to consider the question of reasonableness for itself [39]. The Court considers that, on the undisputed facts, the landlord was acting reasonably in protecting the value of its property [40]-[42].

Dissenting judgments of Lady Arden and Lord Wilson

Lady Arden and Lord Wilson both rely on clause 3(11) which suggests the tenant may use the building for residential purposes. In their judgment, this cannot be cut down by the landlord's power to refuse consent to a planning application [44]; [47]; [55]-[60]. If so, this effectively rewrites clause 3(11) [61]-[62].

Lady Arden reads the authorities as establishing that the court should make an assessment of all the circumstances to determine whether the consent was unreasonably refused. Here, the parties cannot have intended that the landlord should be able to protect itself against the risk of increased enfranchisement by refusing consent to a planning application for increased residential use [48]-[50]. Lord Wilson emphasises that reasonableness is fact-sensitive and considers that the Supreme Court has no reason to depart from the trial judge's determination [63].

References in square brackets are to paragraphs in the judgment.

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<https://supremecourt.uk/decided-cases/index.html>