

Landlord's consent and planning permission

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The Court of Appeal has held that a landlord could not protect itself against an enfranchisement claim by attempting to block the tenant's application for planning permission to change the use of part of the property to residential. *Hautford Ltd v Rotrust Nominees Ltd* [2018] EWCA Civ 765

The tenant held a long lease of a property in Brewer Street, W1. The building had six floors. The current permitted use for planning purposes was retail for the basement and ground floor, office/ancillary for the first and second floors and residential for the third and fourth. After a failed application to buy the freehold under the enfranchisement provisions of the Leasehold Reform Act, the tenant refurbished all four upper floors for residential use. There were no structural alterations, so the refurbishment did not need landlord's consent. However, the tenant needed planning permission to change the use of the first and second floors to residential. The lease contained a tenant's covenant not to apply for any planning permission without the landlord's prior written consent, which was not to be unreasonably withheld.

The landlord refused consent, on the ground that the change of use might make it possible for the tenant to acquire the freehold by enfranchisement, which would damage the reversion and undermine the landlord's control of the wider Soho Estate. The tenant argued that this was unreasonable and issued proceedings.

The Court of Appeal agreed with the tenant, upholding the first instance decision. It was unreasonable for the landlord to refuse consent to the planning application.

Why?

- The fatal flaw in the landlord's argument was that the user clause in the lease allowed residential use of the whole building. It was not reasonable for the landlord to try to limit this by refusing consent to the residential planning application.
- It was also unfair for the landlord to prevent the tenant making a planning application for change of use, when any third party owner of the property could have done so.

Would the landlord have been in a better position if the refurbishment works had required consent? Maybe, maybe not. The Court of Appeal considered whether it was reasonable for a landlord to refuse consent to alterations linked to a proposed change of use in *Iqbal v Thakrar* [2004] EWCA Civ 592. The purpose of requiring consent to alterations is to protect the landlord from changes that might adversely affect its property interest. It might be reasonable for the landlord to refuse consent, even if the proposed new use is not prohibited by the lease but, as always, each case will be viewed on its merits. Where the proposed new use is expressly permitted by the lease, the landlord may be on rocky ground.

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