Court of Appeal confirms refusal of consent to application for change of planning use was unreasonable – Tiffany Scott QC acts for successful respondent in *Rotrust Nominees Ltd v Hautford Ltd*

This case confirms that there is no general proposition that a landlord will be entitled to refuse consent to assign, or alter, or change the planning use of the demised premises on grounds of feared enfranchisement and the consequent loss of the landlord's interest under the Leasehold Reform Act 1967 (**LRA 1967**).

Two decisions of the Court of Appeal from 1976 which are often cited in support of such a general proposition are simply decisions on their own facts and they are distinguishable on the grounds that the leases in those cases pre-dated the enactment or even contemplation of the LRA 1967. General observations in textbooks such as *Woodfall: Landlord and Tenant* and *Hague on Leasehold Enfranchisement* that a landlord will normally be entitled to refuse consent on enfranchisement grounds are therefore of no real assistance.

This is also the first decided case concerning the inter-relationship between a covenant expressly authorising residential use and a covenant against applying for planning permission without the landlord's consent. A user clause is not to be construed as being subject to a planning consent clause – that would amount to rewriting the lease.

The facts

The case concerned a 100 year lease of a whole building in Soho executed in 1986. The lease permitted residential use but also required the tenant (**Hautford**) to obtain permission of the landlord (**Rotrust**) before making any application for planning permission (such consent not to be unreasonably withheld). Hautford wished to make a planning application to change the use of two floors of the building from office to residential use. Rotrust refused consent on the grounds that giving consent would increase the prospect of a successful claim by Hautford to enfranchise i.e. to acquire the freehold of the building under the LRA 1967. Rotrust also stated that it wanted to retain control of the building for estate management purposes as it forms part of a block of adjacent and contiguous properties in Rotrust's freehold ownership.

Rotrust alleged that the purpose of the requirement to obtain consent to the making of a planning application is simply to protect the landlord from damage to the reversion. Hence refusal of consent was said to be reasonable because Rotrust was protecting its property interests in the face of a potential claim under the 1967 Act which would deprived it entirely of its freehold interest in the building and would also have an adverse impact on the value of its investment in the wider adjacent estate.

The decision on appeal

The Court of Appeal disagreed with that reasoning and upheld the first instance judgment. The purpose of the covenant as intended by the original parties to the lease was not to preclude residential use of two floors in frustration of the user covenant, which expressly authorised residential use of the entire building. There was no proviso that residential use was subject to landlord's consent. Rotrust's argument that the user clause must be read together with and subject to the planning consent clause was "*no more and no less than a re-writing*" of the user clause to make it subject to a proviso that landlord's consent must be obtained. In withholding consent to a planning application the landlord was seeking to obtain a collateral advantage.

If Rotrust's argument were right, Hautford would be precluded from applying for planning permission to enable residential use for the 70 or so years remaining of the lease term – even though any third party (including an intended assignee – there being no restriction on assignment) could at any time make a planning application for change of use. That could not have been the intention of the original parties.

The lease was granted against the legislative background of the LRA 1967. The Court of Appeal cases of *Norfolk Capital Group Ltd v Kitway Ltd* and *Bickel v Duke of Westminster*, both decided in 1976, where the landlords' refusal of consent to assignment on grounds of feared enfranchisement was held to be reasonable, could be distinguished on the facts - and in particular on the basis that the leases in those cases were entered into before the LRA 1967 was enacted or foreseen.

The Court of Appeal also agreed with the Judge that estate management considerations were sufficiently met by the provisions in section 10(4) of the LRA 1967 for the insertion of restrictive covenants in the transfer of the freehold. Parliament had laid down a legislative regime balancing the rights of the tenant and of the landlord in such a situation and that scheme would not so seriously fail to protect the landlord's wider interests in the surrounding estate as to justify the refusal of consent.

Postscript

Practitioners should note that the Court of Appeal remarked in a postscript that the case of *Mount Eden Land Ltd v Bolsover Investments Ltd* [2014] EWHC 3523 (Ch) (a decision given on an application for permission to appeal) did not satisfy the requirements of the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 and should not have been referred to at the trial. *Mount Eden* is referred to in textbooks including *Hague* and *Hill & Redman*, and had been cited in *Hautford* to support the argument that the 1976 cases are not general authority for the proposition that a landlord is not acting unreasonably in seeking to avoid the possibility of its property interests becoming susceptible to compulsory acquisition.

The Court of Appeal has refused Rotrust permission to appeal to the Supreme Court.

Tiffany Scott QC was instructed by Thomson Snell & Passmore. She also acted for Hautford at first instance. See her article from February 2017 here [link]