Case No: B2/2012/0572

Neutral Citation Number: [2013] EWCA Civ 480
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON CIVIL JUSTICE CENTRE
HHJ COWELL
Claim No. 0CL10314

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/05/2013

Before :

LORD JUSTICE MUMMERY
LADY JUSTICE HALLETT
and
LORD JUSTICE LEVESON

- -

Between :

STUART HENLEY & ANR	**Appellant**
- and -	
EMMANUEL COHEN	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

MR PHILIP RAINEY QC and MR STAN GALLAGHER (instructed by WGS Solicitors) for the Appellants
MR ADAM ROSENTHAL (instructed by Peter Brown & Co) for the Respondent

Hearing date: 26th February 2013

- -

Judgment

Lord Justice Mummery:

Introductory summary

1. This dispute is about the right to enfranchise under the Leasehold Reform Act 1967 (the 1967 Act). The right is exercisable in specified circumstances where a "building" is subject to a long lease. So, as the very learned County Court Judge observed, "Diogenes in his barrel does not qualify." He delivered his ex tempore judgment on 28 September 2011.

2. The "building" also has to fit the statutory description of a "house." Can the mixed unit building here in Palmers Green (a ground floor shop with a first floor that has been adapted as a flat for living in) reasonably be called a house?

3. Section 2(1) of the 1967 Act provides that:-

> "For the purposes of this Part of this Act, 'house' includes any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes…"

4. That rather short, tolerably clear, inclusive description of a "house" in ordinary English has for 30 years generated enough legal analysis and judicial guidance to verify one of the satirical laws promulgated by C Northcote Parkinson in 1957. The latest weighty decision of our newest highest court was handed down (on 10 October 2012), : *Hosebay Ltd v. Day* [2012] UKSC 41; [2012] 1 WLR 2884 (*Hosebay*). The unanimous decision in *Hosebay* explained the earlier 3-2 decision of the House of Lords upon which the trial judge in this case had had to rely: *Tandon v. Trustees of Spurgeons Homes* [1982] AC 755 (*Tandon).*This court has received written and oral submissions from each side about the impact of *Hosebay* on *Tandon*. For obvious reasons the trial judge did not have the benefit of the latest learning in *Hosebay*.

5. This case falls into two parts. The first part is whether a two-storey, long lease building in Palmers Green, which has a greetings card shop on the ground floor with a recently converted flat above, is "a house reasonably so called" within the meaning of s.2(1). If it is not, that is the end of this affair. But if it is, the second part of the case is whether the unlawful conduct of the present lessees of the building (the claimants/appellants), who, with a view to enfranchisement, deliberately acted in breach of covenant by carrying out works to adapt the upper floor for living in, disqualifies them from acquiring the freehold that belongs to the present lessor/freeholder (the defendant /respondent), he having refused, when asked, to give his consent to the claimants' proposed conversion works.

6. The issue on this appeal is whether the order of HHJ Cowell dated 28 September 2011 was wrong in declaring that the claimants, Mr Henley and Mr Maunder Taylor, are not entitled to acquire the freehold of the premises at 252 Green Lanes, London N13, formerly called No 3 The Triangle (the Premises) pursuant to Part 1 of the 1967 Act. The judge also declared that alterations by the claimants to the first floor of the Premises were made in breach of clause 5 of the lease of the Premises dated 9 August 1935 (the Lease).

7. The original grounds of appeal advanced were that the agreed facts and those found by the judge ought to have led to the conclusion that the Premises were a house "reasonably so called" within the meaning of the 1967 Act; that the judge erred in law in holding that the respondent's consent was required for the works undertaken by the claimants to convert the first floor of the Premises into a flat; that the judge erred in holding that the respondent's consent was reasonably withheld; that the judge erred in concluding that the claimants were not entitled to rely on the conversion works, which were found to be unauthorised, in order to claim the right of enfranchisement; and that the judge erred in law in failing to give adequate reasons to explain and support the conclusions that the respondent unreasonably withheld his consent to the conversion works.

8. On 3 May 2012 Lewison LJ granted permission to appeal, save for ground 4 (consent to works not reasonably withheld by the respondent).

Background

9. The claimants began these proceedings claiming various declarations after they had given notice in writing to the respondent on 3 August 2009 of their intention to acquire the freehold of the Premises under the 1967 Act and the respondent had denied the entitlement asserted by them in a counter-notice dated 28 September 2009.

The Lease

10. The term was for 99 years from 24 June 1935. The claimants were registered as proprietors of the Lease on 13 February 2004. The Lease contains a number of references to the Premises as being a "messuage" and/or a "dwelling house", as, for example, in clause 5, which is a covenant against alterations to the Premises in the following terms:

> "… the Lessee will not alter the plan or elevation or architectural design of the said messuage shop dwellinghouse and premises or of the boundary walls or fences or make any additions to the said premises without the previous consent in writing of the Lessor or the Lessor's Surveyor and that plans showing elevations and sections shall be submitted in duplicate to the Lessor or the Lessor's Surveyor when applying for any consent and the reasonable fees of such Surveyors shall be paid whether such consent be granted or not."

11. The judge noted that there were other references in the Lease to "dwellinghouse", as in clause 8.

The physical condition and use of the Premises

12. The Premises are located in a parade of two storey buildings dating from the 1920s. There are ground floor shops. In the Premises both floors are sub-let. The ground floor shop is called "Hallmark." It is occupied under a sub-lease granted by the claimants on 16 November 2004. The claimants have carried out works to adapt the first floor for living in as a flat. The judge visited the Premises in the company of counsel, but was unable to see the inside of either floor. He observed the area as a whole and described it in his judgment.

13. The access arrangements to the Premises are that the entrance to the ground floor is from the street at the front, but access to the first floor can only be gained via a service area and passageway at the rear. A metal staircase runs from the ground up to the flat roof of the shop and then along a route of about 50 feet across the flat roof of the shop to what was a fire door designed to open outwards to be an escape from the fire within. To the left of the fire exit is the first floor of No 252, which includes the fire exit.

14. As for the use of the first floor, ever since the grant of the Lease it had been used for non-residential purposes in conjunction with the occupation of No 250 next door. There was no internal access to the first floor except from No 250. In 2008 the opening between No 250 and the Premises was bricked up leaving the only access to the first floor via the door in the rear elevation. That was reached from the iron staircase at the rear and along the route across the flat roof of the back of the ground floor shop.

15. As appears from photographs in evidence and from the descriptions in the judgment the overall appearance of the Premises is that of a shop located in a parade of shops rather than of a house residing in a row of houses.

16. The claimants, one of whom is a surveyor, applied to the respondent on 9 October 2008 for consent to convert the first floor into a flat by carrying out works, which were described as follows:-

> " …providing services to the first floor (there are none at present) and forming some non-load bearing partitions to provide for appropriate accommodation layout. There would be no change to the front elevation of the property and there would be only minor changes to the rear elevation."

17. The application included a copy of the plan prepared to show the proposed layout and noted that the Lease required the lessor's consent for a change in plan. The plan set out precisely where the living-room and the open-plan kitchen, the bathroom and the three bedrooms, one of them with an en-suite, would be placed.

18. The respondent refused consent. The refusal is in a series of letters dating from 7 November 2008. He relied on a number of grounds for his refusal. They included his wish to avoid the application of the Leasehold Reform, Housing and Urban Development Act 1993 giving a right to acquire an extended lease. The respondent wished to avoid the application of the 1993 Act and the 1967 Act. The judge held that the grounds for refusing consent were reasonable.

19. Despite the refusal the claimants proceeded with the proposed works to convert the first floor of the Premises from a storeroom, which was previously used in connection with the adjoining shop at No 250, into a self contained residential flat. The works were completed by the beginning of August 2009. On 1 August 2009 the claimants granted an assured shorthold tenancy of the flat so that, as at the date of the notice under the 1967 Act, the first floor of the Premises had been adapted for living in and was in fact lived in.

20. On 3 August 2009 the claimants served their notice of claim to the freehold under the 1967 Act. The respondent served a counter notice disputing the claim. The respondent alleged breach of covenant by the claimants and also relied on that as a ground for disentitling them from purchasing the freehold of the Premises, even if the court concluded against him that the Premises are a house reasonably so called.

The authorities on "house"

21. Until last year the leading case on the position of mixed use units under the 1967 Act was *Tandon*. By a majority of 3-2 the House of Lords restored the decision of the trial judge, which had been overturned by the Court of Appeal. The decision of the majority was that whether it was reasonable to call a building a house was a question of law; that a purpose-built shop with a flat above forming part of a parade of similar buildings was "a house…reasonably so called", even though it might reasonably be called something else; and that, if a building was designed or adapted for living in, only exceptional circumstances, such that nobody could reasonably call it a "house", would justify holding that it could not be reasonably so called.

22. Lord Wilberforce, who, with Lord Fraser, was in the minority, made a shrewd general observation on the role of appellate courts in this context:-

> "…Nor do I think it our task to prescribe a simple formula which will solve the judges' problem for them. Certainty can always be purchased for the price of injustice, and I know of no rule which prevents different cases from being decided differently. To suppose that judges, if left without firm guide-lines, will give anomalous decisions seems to me to underrate their common sense. The judge has to decide each case using his knowledge and applying the Act, and unless he applies a wrong test the decision is decisive."

23. I would add a comment based on 20 years of sitting in appellate courts and tribunals which exist to correct error. I would respectfully suggest that it is wrong to assume that appellate courts and tribunals always have the same depth or range of accumulated experience about the way the law works in practice as trial courts and tribunals have. Appellate courts do not always have the same grasp of the facts of particular cases as the trial courts acquire from having to listen to the evidence and to decide the contested facts. In consequence of those handicaps appellate bodies can themselves fall into errors of their own making by framing an overambitious legal formula for the future or by putting out judicial guidance in overconfident terms that may turn out to be misguided.

24. Other appellate decisions followed from the majority ruling in *Tandon*: *Boss Holdings Ltd v. Grosvenor West End Properties Ltd* [2008] 1 WLR 289; *Prospect Estates Ltd v. Grosvenor Estate Belgravia* [2009] 1 WLR 1313 (described by the judge as a "difficult case", a polite way of saying that he thought that the decision might be wrong, but it was later approved in *Hosebay);* and *Earl Cadogan v. Magnohard* [2013] 1 WLR 24. They were all cited to the Supreme Court in *Hosebay* in which the claims of enfranchisement failed as neither building in question was, on the relevant date, a "house" within the meaning of s.2 of the 1967 Act.

25. *Hosebay* was not, however, a mixed unit case like *Tandon*. That difference has formed an important part of the submissions made by Mr Philip Rainey QC on behalf of the claimants. Although the buildings in *Hosebay* had been built, designed and originally occupied as houses, and were later let on long leases, they were adapted and used solely for commercial purposes, in one case used as a self-catering hotel and in the other used wholly for offices. Their use was wholly commercial. It was held that they were not houses reasonably so called. The significance of *Hosebay* for the present case is in its explanation in [41] of the scope of *Tandon* affecting two points of general application: first, the external and internal physical character and appearance of the building and the lease descriptions of it are not determining factors in deciding whether the building is a house reasonably so-called; and secondly, the *use* of a building at the relevant date, rather than its physical appearance, may be treated as determinative.

Judgment

26. Following his careful consideration of the detailed evidence and of the law in a comprehensive judgment, the judge concluded that this is one of those cases in which the property, though adapted for living in, was not reasonably called a house, "particularly because of the complete isolation of the first floor from the ground floor …"[52]; that the respondent's consent was required to the works carried out by the claimants to the first floor [55]; that the respondent had not acted unreasonably in withholding his consent [57]; and that there was a breach of covenant in the Lease, which founded the very entitlement of the claimants to enfranchisement and that "it is not for the claimants to take advantage of their own wrong" [58], so that the respondent succeeded, even if the judge was wrong on the "house " point [59].

The house point

27. In his consideration of the authorities the judge noted that the property in *Tandon* was a shop with a dwelling above and that it was constructed as a mixed unit. He was even shown photographs of the *Tandon* property, as we were, though I wonder whether that kind of case-law archaeology is to be encouraged. He cited passages from the speeches in *Tandon* that refer to the physical appearance of the particular building, the setting in which it was placed, the proportion of residential use to the non-residential use, the history of the property, the character of the premises at the date of the lessee's notice under the 1967 Act and the terms of the lease. He commented that those matters may vary in importance depending on the facts of the particular case.

28. The judge identified and considered four areas of the evidence.

29. First, the history and character of the Premises. He found that their character at the date of the notice was totally different from their history down to that date. Neither floor of the Premises had been used as a residence until shortly before the notice was given. Even now the upper floor was not used as anything to do with the shop on the ground floor. There were two separate, uncombined uses throughout the history of the Premises until the year 2009. The judge cited a passage from the speech of Lord Roskill in *Tandon* at 766G discussing instances of tenants living over the shop and how they should not be denied the right conferred by the 1967 Act. In that particular passage the focus was on small corner shops and terrace shops "combined with" living accommodation to be found in almost every town and village.

30. HHJ Cowell summarised the matters which he considered important as follows:-

> "47. …First of all, not only has there in the past been no residential use since even before the grant of the lease, but there is no design in the property at 252 for residential use (or there was not at any rate until 2009) or for mixed use or for residential use to be combined with commercial use. In short no shopkeeper ever lived above or was intended by the design to do so at the time of the grant of the lease or since. At the time of the grant the shop was a shop, it had no access to the first floor, while the first floor could only be accessed and used from number 250 next door or, after 1997, by going against rather than along the fire escape route and opening the fire escape door from the outside. Mixing and words connoting combination of uses are particularly inappropriate in this case; the two uses have always been and still are completely independent, and they are independent by reason of the design of the building, that is the physical characteristics of the building."

31. Secondly, he turned to the terms of the Lease. He mentioned that in the Lease the Premises are described as "shop and premises" and said that there were what he described as errors in the references in the covenants to "dwellinghouse" indicating, perhaps, that it was contemplated that there might be a dwelling in the Premises at some stage.

32. Thirdly, the proportions were discussed. The judge did not think that the proportions advanced either parties' case particularly. The proportions were much less in the case of the first floor (1/3rd) than of the ground floor (2/3rd)

33. The fourth topic was the physical appearance of the Premises. The judge commented, by reference to the authorities, in particular the judgment of Lord Neuberger in the Court of Appeal in *Hosebay* that the "emphasis is now on the physical state of the premises rather than the actual use…" [45]. He regarded this as "very subjective" saying that the general impression from the photographs and the view was of a parade of 10 commercial premises, a commercial or shopping parade and that it could not reasonably be called a parade of houses. The Premises were built in the 1920s in the centre of a commercial or retail area. Further, there was no access to the first floor at the front, as there was in *Tandon,* and there was a "complete divorcing of the uses of the upper floor and the shop floor" which meant that the word "house" seemed wholly inappropriate as a description.

34. At the end of his detailed discussion the judge concluded that the Premises were not a house reasonably so called within s.2(1), emphasising that the ground floor shop and the first floor flat were independent units, without internal communication, with entrances sited at different parts of the premises, at the rear in the case of the flat and at the front in the case of the shop; that there was no history of occupation for the first floor in conjunction with the ground floor shop; and that, in fact, there was no history of residential occupation at all until shortly before the giving of notice of the claim after the completion of the unauthorised works.

The breach point

35. The judge held that the claimants were in breach of clause 5, as the alterations fell within the scope of the covenant and consent had been reasonably refused by the respondent. He concluded that "plan" in clause 5 simply meant what it normally meant: the horizontal layout, whereas the elevation meant the vertical layout. The claimants had altered one large empty room into a detailed series of rooms with the usual domestic services provided. That involved making a new layout, which was a breach of covenant unless consent was unreasonably withheld by the respondent. On that point the judge concluded that the respondent lessor was entitled to refuse consent to a particular alteration of the plan of the property which enabled the claimants to obtain something that was never thought of at the grant of the Lease, namely the right to enfranchise.

The disentitlement point

36. The judge held that the breach of clause 5 of the Lease precluded the claimants from relying on the unauthorised works to demonstrate that the Premises were within the 1967 Act. The Lease founded the entitlement to enfranchise. By relying on their breach of the Lease the claimants were seeking to take advantage of their own wrong.

Claimants' submissions

37. The claimants' general point is that, as illustrated by *Tandon*, the policy of enfranchisement under the 1967 Act extends to mixed unit premises, such as where what started as a house was partly converted into a shop, or where the premises are in a building that was purpose built, designed or adapted for someone to live over a shop, even if that person is not actually involved in the running of the shop. On the wording of the legislation a building that consists of a shop as well as a flat can be a house. The sub-letting of the shop and the flat above to different persons does not take the Premises outside the scope of the 1967 Act.

The house point

38. Mr Rainey QC submitted that the leading case was and remains *Tandon* and that the reasoning of Lord Roskill in the leading speech applies, since, like the instant case and unlike *Hosebay*, this case concerns a shop with living accommodation above as at the date of the notice to enfranchise. The facts are, it is submitted by the claimants, "very,very similar to those in the present case." The error of the judge was to ignore the decision and reasoning in that case and in not applying it to the facts of this case as at the date of the claimants' notice. In the result almost all of the judge's reasoning was erroneous.

39. For example, it did not matter, as the judge thought it did, that the first floor was not originally built or used as a dwelling; or that no-one had ever resided there before the date of the notice; or that the first floor had previously been used in connection with the premises next door at No 250. Nor did it matter that it was impossible to gain access internally from the shop to the first floor. What mattered was that, at the date of the notice, the first floor was a flat for living in and it was an integral part of the building comprising the Premises. It was no longer connected to the next door property. On a more general plane it was important in the interests of justice that there was consistency and certainty in judicial decisions on this point.

40. *Hosebay* did not, Mr Rainey argued, affect the decision in *Tandon.* The sort of buildings considered in *Hosebay* were different from the mixed unit, a shop with a residence above type of building involved in *Tandon* and in this case. *Hosebay* did not throw any doubt on the correctness of the result in *Tandon*. The Premises are substantially residential, which is a permitted use of the whole building. The judge wrongly thought that the "isolation" of the flat from the ground floor shop and the separate rear access to the flat distinguished the Premises from *Tandon.* It did not. A mixed use building could reasonably be called "a house." The judge also paid too much attention to the history of the Premises, in particular the lack of residential use until just before the service of the notice, and to the look of the building. In the interests of consistency the judge should have followed the guidance in *Tandon* and he did not: his decision was wrong

The breach point

41. Mr Rainey QC submitted that the judge also fell into error in holding that consent for the works carried out by the claimants to the flat was required. This was a 99 year lease. No changes were being made to the elevation or the architectural appearance of the building. The covenant is concerned with external matters only. The alteration in the horizontal internal layout was not an alteration in the "plan" of the Premises, as that term was used in the particular covenant in clause 5.

42. The Lease did not contain any conventionally drafted covenant against structural alteration. On the judge's construction of clause 5 internal non-structural alterations without consent were prohibited. That was unlikely to have been intended and was not commercial in the context of a 99 year lease of a mixed unit that included a ground floor shop.

The disentitlement point

43. On this point the judgment was criticised as wrong and the reasoning as "exiguous."

44. This was not a case involving any covert or concealed criminal conduct. If, which was disputed, there was a breach of covenant, that was no answer to the claim under the 1967 Act, which did not make observance of the covenants in the Lease as a pre-condition of the existence or exercise of the statutory right to enfranchise. Other remedies, such as an injunction to restrain breach of covenant or forfeiture of the Lease, were available in the case of breaches of covenant.

45. The judge ignored the distinction between cases like this arising under contract and cases arising in the context of statutory rights, like the case of *Welwyn* which involved dishonesty, deception or concealment, all of which were absent from this case. The claimants were open about their plans. The *Welwyn* principle had no application to the 1967 Act, which was a full code. It is inherent in that code that a claim may be made by a tenant who is in breach of covenant and who is protected against forfeiture.

Respondent's submissions

46. In a skeleton argument and an oral submission, which I would commend for their clarity and succinctness, Mr Rosenthal for the respondent stated the arguments for dismissing this appeal on all three grounds.

The house point

47. This point was addressed on the premise that the alterations to the upper storey were lawful and that the claimants are not precluded from relying on them. The overall submission is that, on a proper reading of the authorities, the judge made no error of law in his decision that the Premises are not a "house reasonably so called." This case differs from *Tandon* on which the claimants heavily rely. In particular, according to the layout in that case, the living accommodation above was physically connected with the retail unit below thereby producing a degree of mixed use and physical integration between the residential and commercial parts that is absent in the case of the Premises.

48. He submitted that the judge's conclusion was justified by a number of points: the appearance of the Premises and their setting in a shopping parade, which bore no indication of residential use; the impression gained by the judge on his site visit, which has not been replicated at this hearing; the layout of the Premises, in particular the absence of access arrangements between the two storeys; the fact that the Premises were not originally constructed for residential use, but have been adapted subsequently after a very long history of non-residential use; and the smaller proportion and subsidiary nature of the space occupied by the residential accommodation.

The breach point

49. The short point is made that the judge did not err in his conclusion that the unauthorised works converting the first floor into a flat were in breach of covenant. He correctly held that the work involved amounted to an alteration to the "plan" of the Premises, using the term "plan" in its ordinary and natural meaning, which would include the internal layout of the Premises and would not be limited to the external footprint of the Premises.

The disentitlement point

50. Finally, it is sought to uphold the judge's decision on the alternative ground that the claimants are precluded from relying on the unauthorised works of conversion to the first floor in order to contend that the Premises are adapted for living in within the meaning of s.2(1). That provision should only apply if the Premises have been lawfully adapted for that purpose. It cannot have been within the legislative contemplation or purpose of the 1967 Act to allow a lessee, who has committed a wrong as against the freeholder by adapting the Premises in breach of covenant, to base his claim on that wrong and to take the benefit of it. In a case such as this there was a direct and necessary connection between the unlawful alterations for residential use and the statutory rights invoked by the claimants.

51. Reliance was also placed on the application in cases of statutory interpretation of the wider principle of justice that a person should not be permitted to take advantage of his own wrong, as illustrated in the recent case of *Welwyn Hatfield BC v. Secretary of State for Communities and Local Government* [2011] 2 AC 304.

Discussion and conclusions

52. It was common ground that, if the conversion of the upper floor is taken into account, the building was, at the relevant date, "adapted for living in": the key issue was whether it was "a house reasonably so called." A building may be designed or adapted for living in, yet not, in all the relevant circumstances, be a house reasonably so called.

The house point

53. The question for decision at trial was a precise statutory one: are the Premises "a house reasonably so called" within the scope of s.2(1) of the 1967 Act? That is not the same as a more direct non-statutory inquiry as to whether the Premises are a house. Answering the specific statutory question involves a full exploration of the Premises from a number of different aspects and angles followed by an overall assessment of the entire situation. The various matters must be considered in the round before deciding whether it is reasonable to call the Premises a house. In my judgment, that is what HHJ Cowell took care to do before reaching his conclusion that the Premises were not "a house reasonably so called."

54. Obviously that conclusion does not meet with the approval of the claimants. They have made an investment in the Premises. They bought the residue of the Lease and have spent money on the first floor conversion. So they think that the judge gave the wrong answer to the question. I do not share their view. The judge did not apply the wrong legal test or reach the wrong result. What something can reasonably be called is a relative question. There is no cut and dried answer to it in the sense that everyone who knows about these things would always agree upon the same answer. What matters for the purposes of this appeal is that the answer given by the judge was in fact amply supported by the evidence and was in law reasonably justified by the arguments relied on.

55. The Premises were neither adapted for residential use at the date when the Lease began nor were they ever used as such until the recent adaptation for living in, which was completed shortly before the claimants gave notice under the 1967 Act. The upper floor was a subsidiary part of the building, being smaller and previously used for non–residential purposes in connection with an adjoining building. The case is distinguishable from *Tandon* where the living accommodation above was physically connected with the shop unit below. In that case there was a bathroom at the rear of the shop, as well as a connecting staircase at the rear to the first floor. In this case there was no connecting access from the commercial unit on the ground floor to the flat on the first floor. On the contrary, the only means of access to the flat involved traipsing to the back of the building, climbing an outside metal staircase and then walking along a passageway. In my view, the judge was entitled to place the use of the upper floor relied on as at the date of the notice, upon which the claimants place such emphasis, into the proper setting of the use of it under the Lease during the preceding 70 plus years.

The breach point

56. The judge was not wrong to find that the covenant was broken by the carrying out of the works of conversion without his consent. He was entitled to find that the work amounted to an alteration to the "plan" of the Premises, which included within it the internal layout of the Premises.

The disentitlement point

57. The failure of the appeal on the "house" point means that a decision on the disentitlement point is unnecessary. However, the judge, who found all the relevant facts and heard full argument on the point, made a ruling on it and its correctness is challenged in this court. It may even be challenged in a higher court, or in another case and involves a matter of some general interest. I would therefore depart from my usual cautious approach to unnecessary legal points and express a view, even though the point does not have to be decided in order to dispose of this appeal.

58. Having found that the conversion of the upper storey of the building was a breach of clause 5, the judge was, in my view, justified in concluding that the claimants were not entitled to rely on those unauthorised conversion works to assert that that part of the Premises had been "adapted for living in."

59. In my judgment, it would, as a general rule, be unacceptable, if a person were entitled to enforce a right to acquire property compulsorily by deliberately doing something that was necessary to found the claim, which act was wrongful as between him and the person against whom he seeks to enforce that right. When a right of that kind is based on a statute the question will be whether the language of the relevant provision, construed in the context of the purpose and scheme of the legislation, and applied to the circumstances of the particular case, made that right available to the person seeking to enforce it.

60. The judge found that the claimants deliberately committed breaches of the covenant in clause 5 by carrying out unauthorised works to the Premises and that they did so in order to qualify for the right to acquire the freehold. Their action involved committing, as against the freeholder, a wrong in order to qualify for invoking a procedure to acquire compulsorily from him a right. There is accordingly a direct and close connection between the unlawful alterations to the first floor of the Premises, on which the claimants base their claim to enfranchise, and the statutory rights which they seek to enforce. Without those conversion works adapting the first floor for living in the 1967 Act would not apply at all.

61. In my judgment, no case has been made out for holding that the benefit of the enfranchisement provisions of the1967 Act is available to a long leaseholder in such circumstances. As a matter of statutory construction it cannot have been intended by Parliament to give the lessee the right to enfranchise by making, in breach of covenant, the very adaptation of the building for living in that is necessary for him to exercise the right. The claimants seek to enforce a right acquired by committing a wrong. In general, the law should not and does not allow that.

Result

62. I would dismiss the appeal.

63. The claimants have failed to show that the judge was wrong in fact or in law in holding (a) that the Premises were not, at the relevant date, a house reasonably so called; or (b) that, even if they were, the claimants are not entitled to enfranchise the Premises, having regard to their conduct in deliberately breaching clause 5 in order to carry out works adapting the first storey for living in and thus bringing about the very

state of affairs necessary for exercising a right to enfranchise the Premises under the 1967 Act.

Lady Justice Hallett:

64. I agree.

Lord Justice Leveson:

65. I also agree.