Claim no. F10CL064

IN THE COUNTY COURT AT CENTRAL LONDON

BUSINESS & PROPERTY WORK

BEFORE: HHJ JOHNS QC

ON: 23 NOVEMBER 2020

B E T W E E N : -

ZASH PROPERTIES LIMITED

Claimant

-and-

(1) MAYWORTH LIMITED

(2) LANDAU CONSULTING AND INVESTMENTS LIMITED

Defendants

APPROVED JUDGMENT

HHJ JOHNS QC:

1. The ground floor of 106/106A Greyhound Lane, Streatham SW16 5RW ("the Property") was a shop when demised by the Claimant, Zash Properties Limited ("Zash"), by a long lease dated 30 September 2015 ("the Lease"). It has since been converted into two studio flats without Zash's consent. But is Zash entitled to forfeit the lease by these proceedings? And, if so, should Landau Consulting and Investments Limited ("Landau"), an assignee of the Lease, be given relief against forfeiture? Those are the key questions for decision at trial. If there is to be relief, the terms of such relief also fall to be decided.

2. Before tackling those questions, I will give a little background and identify the principal provisions of the Lease.

3. The Property forms part of a building ("the Building") occupying the corner of Greyhound Lane and Westwell Road, just off Streatham Common in South West London. There is a flat on each of the first and second floors. They are let by Zash on assured shorthold tenancies. As at the date of the Lease, the ground floor comprised shop premises as well as the street entrance for and stairs to the retained flats. It is clear from the plans accompanying the planning application for the conversion that there were, as one would expect, large windows in both elevations forming part of the shop front.

4. Mrs Hanifa Hanid is a director of Zash, a family company formed to own investment property. Zash has in fact only owned one investment property, namely the Building. Mrs Hanid's husband was the other director. He passed away in January 2015. The works which Zash was having carried out to Building to ready it for letting were completed later in 2015. The flats were then let using agents Barnard Marcus and the Property was marketed and sold as a leasehold shop using agents Bells Commercial.

5. The Lease was for a 999 year term at a peppercorn rent for a price of £147,500. The lessee was Mayworth Limited ("Mayworth"). The demise was of the ground floor save for the stairs to and street entrance for the flats.

6. The following provisions of the Lease are relevant to this case:

6.1 There is an absolute covenant by the tenant against alterations in these terms: "Not to make any external or structural alteration or addition to the Property or cut or maim any structural parts of the Building" – see para.8.1 of schedule 4 & clause 5(a).

6.2 And there is a qualified covenant relating to Service Media, being "all media for the supply or removal of heat, smoke, electricity, gas, water, sewage, air-conditioning, energy, telecommunications, television, data and all other services and utilities and all structures, machinery and equipment ancillary to those media" (clause 1.1). The covenant by the tenant is "Not to install, alter the route of, damage or remove any Service Media at the Property without the prior written consent of the Landlord, such consent not to be unreasonably withheld or delayed." – see para.8.2 of schedule 4 & clause 5(a).

6.3 Schedule 4 also contains at para.9.1 a tenant's covenant against alienation; "Not to assign part of this lease or underlet, charge or part with possession of part only of the Property."

6.4 There is a tenant's user covenant "Not to use the Property for any purpose other than for the Permitted Use" – see para.1 of schedule 5 & clause 5(a). "Permitted Use" is defined in this way in clause 1.1: "any use (save for any Prohibited Use) within use class A1 of the Town and Country (Use Classes) Order 1987 as at the date of this Lease or any other use (save for any Prohibited Use) approved in writing by the Landlord (such approval not to be unreasonably withheld or delayed)." The definition of "Prohibited Use" is, by the same clause, "Use as an off licence or betting shop or any use falling within use classes A3, A4 or A5 of the Town and Country (Use Classes) Order 1987 as at the date of this Lease."

6.5 There is a proviso for re-entry for breach of the tenant's covenants in clause 7.

7. Mrs Hanid visited the Building for the first time in around two years on 23 March 2017. There were two for sale boards up outside the Building. On making enquiries with Foxtons, Mrs Hanid discovered that the Property had been converted into two studio flats. The conversion involved bricking up some of the shop front and creating new bathrooms and kitchens. Having found a solicitor to act, Mrs Hanid caused a s.146 notice to be given to Mayworth by Zash on 5 July 2017. The validity of that notice was challenged. A further s.146 notice dated 16 April 2018 was therefore given ("the s.146 notice"). It complained of breach of, among others, the user covenant, the covenant against alterations, and the covenant relating to service media.

8. There was no resolution and these proceedings were issued on 18 January 2019 claiming forfeiture against Mayworth. There then existed, and perhaps still exist, proceedings brought by Mayworth in the High Court seeking relief against forfeiture. They were issued in the Birmingham District Registry on 18 April 2018 with Particulars of Claim which included the following admission at paragraph 21: "the Claimant admits that it undertook the works of alteration permitted by the Planning Consent in breach of the Tenant's Covenant 5(b) Regulation 1". Those proceedings were transferred to the Rolls Building in London. It seems there were inconclusive hearings before a Master and an ICC Judge but the parties before me were unable to say what had become of the proceedings and, apart from noting the admission, I was asked to ignore them.

9. Following the issue of these proceedings there have, unusually, been two assignments of the Lease. First to a company called Mari Holdings Limited on 1 March 2019 for £103,000. And then an assignment on to Landau on 30 April 2019 at a price of £200,000.

10. Landau was joined as Second Defendant by an order of 29 November 2019. It resists forfeiture and counterclaims for relief against forfeiture. Mayworth was debarred from defending the claim as a result of it failing to comply with an unless order made on 10 May 2019.

11. Both Zash and Landau were well represented at trial. Zash by Mr David Peachey. Landau by Alex Shattock. I am grateful to both of them for help they gave me, including by excellent skeleton arguments.

12. I heard evidence from Mrs Hanifa Hanid. A Mr Avigdor Perl gave evidence for Landau. I gave permission for that evidence to be taken by video in circumstances where he was in Israel. He described himself as the agent for Landau, a company owned by his father-in-law, in connection with the Property. He gave evidence of the circumstances in which Landau purchased the Property and the letting of it. Both witnesses were entirely straightforward and did their best to help the Court.

13. The issues on the claim had included breach of covenant and waiver of the right to forfeit. But both issues were, in the end conceded, by Landau. Waiver was dropped as an argument before trial in light of the witness statement of Mrs Hanid. Breach was, realistically, conceded by Mr Shattock in closing submissions. Specifically, he accepted that the conversion involved:

a) An external alteration in breach of the covenant against alterations in paragraph 8.1 of schedule 4 to the Lease.

b) An alteration without prior written consent to the service media at the Property in breach of the covenant concerning service media in paragraph 8.2 of schedule 4 to the Lease.

c) A breach, as at the date of the s.146 notice, of the user covenant in paragraph 1 of schedule 5 to the Lease.

14. But he nevertheless argued that the s.146 notice was invalid with the result that Zash was not entitled to forfeit the Lease by these proceedings. The reason for the invalidity put forward was that s.168 of the Commonhold and Leasehold Reform Act 2002 applied and had not been satisfied.

15. That was therefore the sole issue on forfeiture; Mr Peachey pointing to the other breaches set out in the s.146 notice only as background.

16. S.168 of the 2002 Act provides as follows:

"(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if—

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach, or

(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to [the appropriate tribunal] for a determination that a breach of a covenant or condition in the lease has occurred.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which—

(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(6) For the purposes of subsection (4), "appropriate tribunal" means—

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal."

17. In my judgment, s.168 does not apply in this case. The Lease is not the long lease of a dwelling. It is the long lease of a shop.

18. *Wolfe v Hogan* [1949] 2 KB 194 concerned premises let for use as a shop, though there was no user covenant. But the tenant ended up living at the premises and argued that they were therefore "let as a separate dwelling" with the result that she had the protection of the Rent and Mortgage Interest (Restrictions) Act 1920. The judge and the Court of Appeal rejected that argument. Evershed LJ said this:

""Let as a separate dwelling" must refer to the subject of a contract of letting as a separate dwelling. If it is to be shown that particular premises come within that definition, prima facie, at any rate, as it seems to me, it must be shown that the two parties to the contract have let on the one hand and taken on the other the premises in question as a separate dwelling. That may be shown either by the terms of the bargain or it may be shown, where one party has altered the user with the full knowledge of the other, by that other party accepting the changed position, so that you must again imply a mutual consensus of the two parties to the contract in regard to the use. The vital fact here that I have stated is in my judgment this, that though Miss Hogan has used these premises for some time as a dwelling, the other party to the contract has had no full knowledge of that fact, and for his part has not intended or contemplated any such user."

And later:

"I think, if I may say so, that the matter is more accurately stated by Mr. Megarry in the fourth edition of his book on the Rent Acts, and I quote and adopt as part of my judgment the brief summary of the position which I find on p. 19 of his book : "Where the terms of the tenancy provide for or contemplate the use of the premises for some particular purpose, that purpose is the essential factor, not the nature of the premises or the actual use made of them. Thus, if premises are let for business purposes, the tenant cannot claim that they have been converted into a dwelling-house merely because somebody lives on the premises." … Again I wish to make it quite plain that I am saying nothing which should be taken as indicating that if a tenant does change the user and creates out of what was formerly a shop a dwelling-house, and if that fact is fully known to and accepted by the other party to the contract, whether or not there is a prohibition, the result may not very well be that there will then be inferred a contract to let as a dwelling-house, although it may be a different contract in essentials from the contract which was originally made and expressed."

19. Denning LJ's judgment was to like effect:

"In determining whether a house or part of a house is "let as a dwelling" within the meaning of the Rent Restriction Acts, it is necessary to look at the purpose of the letting. If the lease contains an express provision as to the purpose of the letting, it is not necessary to look further. But, if there is no express provision, it is open to the court to look at the circumstances of the letting. If the house is constructed for use as a dwelling-house, it is reasonable to infer the purpose was to let it as a dwelling. But if, on the other hand, it is constructed for the purpose of being used as a lock-up shop, the reasonable inference is that it was let for business purposes. If the position were neutral, then it would be proper to look at the actual user. It is not a question of implied terms. It is a question of the purpose for which the premises were let."

Having referred to the tenant living at the premises he went on to say:

"What is the effect of that? In my opinion, it does not give the tenant the protection of the Act. A house or a part of a house originally let for business purposes does not become let for dwelling purposes, unless it can be inferred from the acceptance of rent that the landlord has affirmatively consented to the change of user."

20. That decision seems to me to supply the answer in this case. The key is the purpose of the letting. That purpose was plainly for use as a shop. The Property was laid out as a shop, having a shop front, and there was a covenant preventing user other than as a shop in the absence of any other approved user. That purpose did not change by reason of the residential conversion as there was no consent to such a change of use, whether express or to be inferred. On the contrary, on learning of the conversion Zash gave a s.146 notice.

21. Mr Shattock relied in argument on a later judgment of Lord Denning MR in *Cheryl Investments v Saldanha* [1978] 1 WLR 1329 to show that the nature of a letting can change without the consent of the landlord. In that case the landlord claimed the letting of a flat had become a business tenancy and so moved outside the protection of the Rent Acts by reason of business user at the premises. The Court of Appeal agreed. Lord Denning MR said:

“On that evidence I should have thought it plain that Mr. Saldanha was occupying the flat, not only as his dwelling, but also for the purposes of a business carried on by him in partnership with another. When he took the flat it was, no doubt, let to him as a separate dwelling. It was obviously a residential flat with just one large room with twin beds in it. No one can doubt that it was constructed for use as a dwelling and let to him as such within the test in *Wolfe* v. *Hogan* [1949] 2 K.B. 194, 204. But as soon as he equipped it for the purposes of his business of importing sea foods—with telephone, table and printed notepaper—and afterwards used it by receiving business calls there, seeing customers there and issuing business statements from there—it is plain that he was occupying it "for the purposes of a business carried on by him." This was a significant purpose for which he was occupying the flat, as well as a dwelling. It was his only home, and he was carrying on his business from it. It comes within my second illustration….
He did it all surreptitiously. He tried to keep all knowledge of it from the landlord: but that does not alter the fact that, once discovered, his was a "business tenancy" within section 23 of the Landlord and Tenant Act 1954. Some may say: "This is a very strange result. It means that he can alter the nature of his tenancy surreptitiously without the consent of his landlord, and thus get a statutory continuation of it: with all the consequences that this entails for the landlord." That is true: but I see no escape from the words of the Acts.”

22. I do not consider that *Cheryl Investments* undermines the approach in *Wolfe v Hogan* which I have adopted. Indeed, Lord Denning MR refers to *Wolfe v Hogan* in the quoted passage. Any appearance of conflict between the approach in *Cheryl Investments* and that in *Wolfe v Hogan* is removed by a consideration of the four illustrations given by Lord Denning MR earlier in his judgment as pointing to the solution to the cases before the Court of Appeal in *Cheryl Investments*:

“*First,* take the case where a professional man is the tenant of two premises: one his office where he works, the other his flat, conveniently near, where he has his home. He has then a "business tenancy" of his office and a "regulated tenancy" of his home. This remains the situation even though he takes papers home and works on them at evenings or weekends and occasionally sees a client at home. He cannot in such a case be said to be occupying his flat "for the purpose of" his profession. He is occupying it for the purpose of his home, even though he incidentally does some work there: see *Sweet* v. *Parsley* [1970] A.C. 132, 155 *per* Lord Morris of Borth-y-Gest.

Second, take the case where a professional man takes a tenancy of one house for the very purpose of carrying on his profession in one room and of residing in the rest of the house with his family, like the doctor who has a consulting room in his house. He has not then a "regulated tenancy" at all. His tenancy is a "business tenancy" and nothing else. He is clearly occupying part of the house "for the purpose of " his profession, as *one* purpose; and the other part for the purpose of his dwelling as *another* purpose. Each purpose is significant. Neither is merely incidental to the other.
Third, suppose now that the first man decides to give up his office and to do all his work from his home: there being nothing in the tenancy of his home to prevent him doing it. In that case he becomes in the same position as the second man. He ceases to have a "regulated tenancy" of his home. He has only a "business tenancy" of it.
Fourth, suppose now that the second man decides to give up his office at home and to take a tenancy of an office elsewhere so as to carry on his profession elsewhere. He then has a "business tenancy" of his new premises. But he does not get a "regulated tenancy" of his original home, even though he occupies it now only as his home, because it was never let to him as a separate dwelling: unless the landlord agrees to the change."

23. A clear distinction is therefore drawn between cases where business use later begins in premises originally let as a dwelling (the third illustration) and those where business use ceases after the grant of a business tenancy (the fourth illustration).

24. I am concerned in this case with a cessation of business user following the grant of a business tenancy. There is no change in status in such cases unless the landlord agrees. *Cheryl Investments* was concerned with the different case of business use in premises originally let as a dwelling. In those cases, such use can, it seems, change the nature of the tenancy without agreement on the part of the landlord.

25. Mr Shattock also referred to *Patel v Pirabakaran* [2006] EWCA Civ 685. That was a case of mixed use premises which decided that for the purposes of s.2 of the Protection from Eviction Act 1977 "let as a dwelling" meant "let wholly or partly as a dwelling". It is a decision I will return to shortly in connection with an alternative argument advanced for Zash. But I gain some help in dealing with the current argument from the Court of Appeal's treatment of the case of *National Trust v Knipe* [1998] 1 WLR 230. That case had concerned

a letting of premises comprising over 350 acres including farmhouses as an agricultural holding. Wilson LJ analysed that case in *Patel* as follows:
"I believe that the essence of that decision is simple, namely that the premises were not let as a dwelling because they were let as an agricultural holding".

26. There seems to me the same simplicity in this case. The Property was not let as a dwelling because it was let as a shop. Indeed, the simplicity is the greater here as there was no residential use at all. There was, as let, no residential part of the Property.

27. Finally, before dealing with an alternative argument for Zash, I would add that, at least as the case was argued before me, the conclusion I have reached is supported by the principle that a person should not benefit from his own wrong.

28. It was common ground that this was a principle of statutory interpretation as well as of contractual construction. And Mr Shattock accepted that Mayworth, as the tenant carrying out the unlawful conversion, would not have been able to rely on s.168 so as to invalidate the s.146 notice. He argued, however, that Landau could so rely as it was merely an assignee. But the validity of the s.146 notice must be tested when it is given. Here, that is on or around 17 April 2018 (being the pleaded date of the s.146 notice). If s.168 is to be interpreted as then invalidating the s.146 notice I do not see how the s.146 notice can somehow come to life on a later assignment.

29. It follows from what I have said that the s.146 notice is not, in my judgment, invalidated by s.168 of the 2002 Act. That section does not apply because the Lease is of a shop, not a dwelling.

30. Even had I not reached that conclusion, s.168 would not, in my judgment have availed Landau on the facts of this case. That is because I accept the alternative argument for Zash that the fact of multiple residential units in the Property means the Lease cannot be the lease of a dwelling within s.168.

31. Zash's argument finds support in *Horford Investments Ltd v Lambert* [1976] Ch 39. The question in that case was whether leases of two houses gave rise to Rent Act protected tenancies where each house was split up into residential flats or letting rooms. The Court of

Appeal held that there was no protected tenancy of either house because of the plurality of dwellings. In so answering the question, Russell LJ made clear that the same conclusion would flow even were there only two flats:

"…it seems to me immaterial that the houses in question are physically adapted for a great number of units of habitation: the question really is the same as would arise for solution when on the granting of the tenancy of a house it consisted of two separate self-contained flats".

32. His review of the earlier authorities included some which dealt with the situation of two flats:

"In *Langford Property Co. Ltd.* v. *Goldrich* [1949] 1 K.B. 511, in this court, two flats in the same building (which had in fact been previously separately let) were let to a tenant for use by him and his family as one home. The flats were not directly connected and each was a self-contained flat. The whole argument proceeded on the assumption that under the comparable statutory phrase (" a house let as a separate dwelling or a part of a house being a part so let . . .") prima facie would not include a case when the letting comprised more than one unit of habitation. This was, as I understand it, accepted by the court, which decided that on the particular facts of the case it was a letting of one dwelling house only, that is to say, for use as one unit of habitation. …

In *Theis* v. *Muir* [1951] E.G.D. 292 Judge Dale held that leasehold premises comprising *two* self-contained flats and a shop were not at the date of the assignment of the lease (for which a premium was paid) " let as a separate dwelling," presumably on the same basis that the phrase does not include a letting of a plurality of units of habitation".

33. Scarman LJ expressed his conclusion in *Horford* in this way:

"The letting in each case was of a house comprising more dwellings than one. Was it the letting of a house as a dwelling (both parties agree that the word " separate " is of no importance in this connection)? If Mr. Wood is right that the Interpretation Act 1889 requires us to construe the subsection's phrase " a dwelling" so that it includes "dwellings" cadit quaestio: each tenancy is protected. But I agree with the county court judge in thinking that Parliament when it enacted section 1 (1) used the singular deliberately, and in this instance did not intend the singular to include the plural. The policy of the Rent Acts was and is to protect the tenant in his home, whether the threat be to extort a premium for the grant or renewal of his tenancy, to increase his rent, or to evict him. It is not a policy for the protection of an entrepreneur such

as Mr. Lambert whose interest is exclusively commercial, that is to say, to obtain from his tenants a greater rental income than the rent he has contracted to pay his landlord. The Rent Acts have throughout their history constituted an interference with contract and property rights for a specific purpose —the redress of the balance of advantage enjoyed in a world of housing shortage by the landlord over those who have to rent their homes. To extend the protection of the Acts to tenancies such as these in this case would be to interfere with contract and property rights beyond the requirements of that purpose. I, therefore, think that the context requires that the words of the subsection "let as a dwelling" be confined to the singular: they mean what they literally say."

34. But Mr Shattock says the right approach is that seen in *Oakfern v Ruddy* [2006] EWCA Civ 1389. The Court of Appeal there considered whether the tenant of a long lease of three residential floors of a building comprising 24 residential flats was a "tenant of a dwelling" within s.18(1) of the Landlord and Tenant Act 1985 and so able to challenge the reasonableness of service charges levied by the freeholder. It was held that the tenant was the tenant of a dwelling as s.38 of the 1985 Act defines dwelling as "a building or part of a building occupied or intended to be occupied as a separate dwelling …" and the tenant was the tenant of part of a building occupied or intended to be occupied as a separate dwelling, namely a flat. That he was also the tenant of other parts, namely many other flats, did not take him outside the definition because, as the judge highlighted, the Act says "tenant of a dwelling" not "tenant of a dwelling and nothing else".

35. I have decided that the reference in s.168 of the 2002 Act to the "long lease of a dwelling" is to a dwelling in the singular so that the Lease, if it is treated as a lease of residential property at all, is not within s.168 by reason of it comprising two studio flats. My reasons are these.

36. First, the language of s.168 is more akin to that in the Rent Acts considered in *Horford* than to s.18(1) of the 1985 Act, being the provision with which *Oakfern* was concerned. The key phrase in *Horford* was "let as a dwelling"; the question being whether a leasehold house comprising multiple residential units was "let as a dwelling". "Let as a dwelling" is wording very similar to "long lease of a dwelling", being the phrase in s.168. The focus in each is on the nature of the letting. The question is whether the lease is of a dwelling. The key phrase in *Oakfern* is "tenant of a dwelling". The focus is not on the letting

but on the tenant. The question is whether the tenant is the tenant of a dwelling, whether or not he is also the lessee of wider property so that the lease under which he holds may not be the lease of a dwelling. Focussing closely on the language, it might even be said that the conclusion in *Oakfern* supports that in *Horford*. The reasoning in *Oakfern* does not, as I read the decision, depend on the word "dwelling" in s.38 including the plural. Rather, the reasoning proceeds on the basis that the tenant of multiple flats is within s.18(1) because it is the tenant of a dwelling, singular, albeit it is also the tenant of other property.

37. Second, s.168 lies in territory more similar to that occupied by the Rent Acts than that with which s.18(1) of the 1985 Act is concerned. The Court of Appeal in *Oakfern* rejected the suggestion of any real relationship between the legislation dealing with recoverability of service charges and the Rent Acts:

"I also reject the suggestion that there is any significant relationship between the service charge provisions and the Rent Acts. As the judgments in the Horford Investments case [1976] Ch 39 make clear … the decision in that case was materially influenced by the underlying policy of the Rent Acts. The policy underlying the service charge provisions in the 1985 Act and earlier Acts is, however, a different policy in that its emphasis is not so much on protecting the tenant in his home as on providing him with a way of challenging unreasonable charges sought to be levied by his landlord. I can, for my part, see no reason why the policy considerations which led this court in the Horford Investments case to decide that a tenancy of a block of flats is not within the protection of the Rent Acts should lead to the conclusion that a tenant of a flat in a block who happens also to be a tenant of another flat (or flats) in the same block, and/or of the common parts in the building, is not, for that reason, within the protection of the service charge provisions." – Jonathan Parker LJ.

38. But both s.168 and the Rent Acts are concerned with the security of tenure of homes. That seems to me to be borne out by the reference to s.168 in the case of *Patel* already mentioned. Wilson LJ made what he called "sideways reference" to three then recent statutory provisions, one of which was s.168, and said that they had a dual relevance to the issue before him. The second aspect of that relevance was "that each represents yet a further step, beyond those taken by Parliament in providing, ever since the Conveyancing Act 1881, for relief from forfeiture and in enacting what became s.2 of the Act of 1977, towards substantial circumscription, albeit in specified circumstances, of the facility for a tenant to

find himself deprived of his home by forfeiture: the policy of further reining in the exercise of contractual rights of forfeiture is evident."

39. I note that in one of the cases referred to in *Patel*, namely *Wellcome Trust Ltd v Hamad* [1998] QB 638, the Court of Appeal does seem to have treated a lease including multiple residential units as a dwelling. That case considered the construction of s.137(3) of the Rent Act 1977 which refers to "premises" let on a superior tenancy and, drawing on *Maunsell v Olins* [1975] AC 373, the Court approached the word "premises" on the basis that it referred to premises treated as a dwelling house. The argument in that case was that subtenancies of flats could not be protected as against the superior lessor when the superior lease fell in as the superior lease was a business tenancy under Part II of the 1954 Act and so could not constitute a dwelling house. The Court of Appeal rejected that argument, holding that leasehold premises which were a dwelling house were within s.137(3) despite being business tenancies. But neither side, in argument before me, relied on this case on this point. And it is notable that there seems to have been no argument in *Wellcome Trust* that the fact of multiple units meant the premises were not a dwelling house. Having dealt with the different argument, based on application of Part II of the 1954 Act, which was made, Leggatt LJ, giving the judgment of the Court, said simply that "…it is plain that the premises with which each of the three appeals now before the court was concerned constituted a dwelling house".

40. I should add that I have also considered whether the admission by Mayworth in the High Court proceedings meant s.168 of the 2002 Act was satisfied, at least as to the breach of the user covenant, so that the s.146 notice was valid even if, contrary to my conclusions, s.168 applied.

41. S.168(1) operates to invalidate a s.146 notice unless subsection (2) is satisfied. And subsection (2) is satisfied if "(b) the tenant has admitted the breach". Breach of the user covenant is one of the key breaches referred to in the s.146 notice and the admission would have meant, in my judgment, that the notice was valid in respect of that breach had it been preceded by the admission. But it was not. The pleaded date for service of the s.146 notice was "on or around 17 April 2018". The High Court proceedings containing the admission were not issued until 18 April 2018.

42. But it follows from my conclusion that s.168 did not apply that the s.146 notice was valid and, breach of covenant now being conceded, the Lease was therefore forfeit by these proceedings.

43. I turn to consider the discretion to relieve against forfeiture. It arises under s.146(2) of the Law of Property Act 1925.

44. Zash opposes the grant of relief. Mr Peachey pointed to the conduct of Landau (a) in taking a risk when purchasing the lease of the Property, and (b) following purchase, including by not admitting breaches while receiving the rent from the studio flats. As to the suggestion that a refusal of relief would produce a windfall for Zash, he made clear these proceedings were not brought for that purpose but because it was wrong to use the Property other than as a shop. He argued that any relief granted should be on terms that the Property is reinstated as a shop. In that regard, he highlighted that the conversion to, and letting of, two flats involved a breach of the absolute covenants against alterations and parting with possession of part. And that to permit the flats to remain would change, or have the potential to change, the relevant statutory regimes applicable to the Building including in respect of service charges and enfranchisement.

45. Mr Shattock submitted for Landau that it was right to grant relief and that relief should be on terms of a modest financial payment from Landau to Zash. He emphasised the width of the discretion under s.146(2) of the 1925 Act and urged me to take account of the absence of financial damage from the breaches to Zash and that a refusal of relief would give Zash a very significant windfall. He argued that Zash could not reasonably have refused permission for the change of user. As to the terms of any relief, he suggested a payment of £10,000 but made clear that Landau was prepared to do what was necessary to obtain relief, even if that involved reinstating the Property as a shop.

46. Both sides adopted the following passage from *Hill and Redman's Law of Landlord and Tenant* as providing a useful summary of factors relevant to the exercise of the discretion to grant relief against forfeiture.

"A number of factors may be material for the court to consider when exercising the discretion to grant relief:

(1) The nature and gravity of the tenant's breach, together with the tenant's ability and/or willingness to put the breach right are always crucial considerations, precisely because the court's guiding principle is that the landlord should usually be put back into the position he was in, but for the breach of covenant.

(2) As a corollary to the right to forfeit being, in essence, a security for the performance of the tenant's covenants, court must consider the whether the harm caused to the landlord by the breach is proportionate to the advantages of relief being refused. This includes asking whether the breach has caused the landlord lasting damage.

(3) The severity of the breach is important, although the court may grant relief even in such cases, if it is appropriate in all the circumstances to do so.

(4) Where there are wilful breaches of covenant, with no attempt to remedy the breach, the court is unlikely to grant relief: 'The Court should not in, exercising its discretion, encourage a belief that parties to a lease can ignore their obligations and buy their way out of any consequential forfeiture'. Even in a case where the tenant has behaved very badly indeed, the court must nevertheless give proper consideration to the possibility of granting relief.

(5) On the other hand, relief may be more readily forthcoming if the breach was not a deliberate act by the tenant, but something in the nature of an oversight or as a result of a misunderstanding.

(6) The court may refuse relief if the judge finds that he could not accept what the tenant said in evidence, there had been falsehood in the proceedings and points had been taken which could not really be regarded as being put forward in good faith.

(7) The court can, in a proper case, take into account discreditable behaviour by persons connected with the tenant, even if their conduct does not amount to a breach of the lease in and of itself.

(8) The tenant's ability to practically remedy the breach, even if it is legally irremediable, and undo any mischief that the breach has caused to the landlord will be of great significance.

(9) The court may take a very dim view of a tenant who puts it out of his own hands to comply with the terms of his lease, perhaps by granting an underlease on terms inconsistent with either the underlease or the licence to underlet; but, in a proper case, it may still be appropriate to grant relief.

(10) The court will have regard to the tenant's willingness to perform the covenants in future, including the timing and sincerity of any 'open' correspondence in that regard.

(11) Where the breach consists of doing something that required prior consent, the court should consider whether such consent could reasonably have been refused, if it had been sought.
(12) Where the personal qualifications of the tenant were important for the preservation of the value or character of the property, those qualifications were a legitimate consideration for the court to take into account in determining whether to exercise its discretion to grant relief against forfeiture.
(13) The court can and should take into account all breaches of covenant, including breaches in respect of which the landlord cannot forfeit, as no s 146 notice has been served on respect of them.
(14) It is, however, not material to ask whether the covenant is in substance positive or negative: the tenant will obtain relief from forfeiture following breaches of negative covenants just as readily as for non-compliance with positive covenants.
(15) Any delay by the tenant in seeking relief from forfeiture.
(16) Whether third parties have obtained rights over the premises during the period between the forfeiture and the hearing of the application for relief.
(17) Lastly, in considering whether or not to grant relief, the court should always consider the value of the property to be forfeited, and whether a refusal of relief would unduly punish the tenant and/or provide an unjustifiable windfall. The court may mitigate this issue by granting relief, subject to a condition that the tenant either complete a sale and assignment of the lease to an assignee reasonably acceptable to the landlord within a specified period of time or surrender it to the landlord."

47. I have decided that relief should be granted on terms that Landau reinstate the Property as a shop and make a payment representing a share of the rent during the period when the flats have been let in breach of covenant.

48. As the above summary reflects, the right to forfeit is in the nature of security for the performance of the tenant's obligations, and so there is a concern to put the landlord back into the position it would be in but for the breaches of covenant. It is therefore of great significance that Landau can, and is willing to, remedy the breaches here by reinstating the Property as a shop. Not to allow Landau to do that so as to have the Lease restored, i.e. to refuse relief against forfeiture, would produce an unjustifiable windfall for Zash. Zash sold the Property on lease in 2015 for £147,000. A refusal of relief would now give Zash the

chance to sell the Property again just 5 years later. And I accept that is not Zash's object. It is to ensure the tenant is not allowed to ignore its obligations.

49. I do not consider it would be right to grant relief in return for a modest money sum such as £10,000. First, that would be to encourage a belief that Landau can buy its way out of a forfeiture. Second, contrary to Mr Shattock's submission, this is not a case where the breaches are ones where, had consent been sought, that consent could not reasonably have been refused. That is because the conversion could not go ahead without breaching an absolute covenant, being the covenant against external alterations. And no letting of the flats could take place without breaching another absolute covenant, namely the covenant against alienating part. No question of reasonable refusal would therefore arise at all under those covenants. And even considering the case from the point of view of the user covenant, which is a qualified covenant, it has long been established that a consequent breach of another covenant may be a valid reason for refusing consent – see *Ashworth Frazer Ltd v Gloucester City Council* [2001] UKHL 59. Third, it does seem to me there are significant apparent implications for Zash arising from the change to residential use which Zash should be entitled to consider in a negotiation or as part of an application for consent to a change of user, not have foisted upon it by an unremedied breach. If Landau becomes the tenant of a dwelling then the restrictions on recoverability of service charges in the 1985 Act, including as to reasonableness and consultation, will kick in. And Zash will run the risk of a collective enfranchisement if it later decides to sell one of the other flats in the Building on a long lease. Retaining the Property in commercial use should avoid that risk. Fourth, the sum of £10,000 fails to recognise that damages for breach of covenant can extend beyond the traditional measure of diminution in the value of the reversion. There can be negotiating damages in the sum that might reasonably have been demanded for relaxing the covenants so as to permit the wrong. The evidence before me was that the Property was significantly more valuable as flats than as a shop. Accordingly, negotiating damages for the breaches in this case and on the basis (in the scenario where relief is refused) that they are not to be remedied would be likely to be a substantial rather than a modest sum, being likely to be assessed by reference to a share of the gain to the tenant from the breaches.

50. In ordering relief on terms, I do not ignore the conduct of Landau either at the time of purchase or since, including in not admitting the breaches while receiving the rent. As to the time of purchase, the evidence of Mr Perl, which I accept, was that he knew from enquiries

before contract (which he did not see but received advice on from his solicitor) that there was a risk of the residential conversion being a breach of covenant but the nature of his investment strategy was to purchase properties where there were risks of that sort (where parts of the legal pack are missing as he put it) and improve value by regularising the position after purchase. His experience was of paying freeholders to regularise any breach. He told me most freeholders do not pursue breaches of the sort in this case as they are to the landlord's benefit. I have already reflected this conduct in requiring reinstatement rather than a modest payment as a condition of relief. That avoids encouraging a belief that Landau can buy its way out of a forfeiture. I do not consider it right to go further and refuse relief altogether. Yes, Landau took a risk. But even wilful breaches can be relieved against, so risk-taking lessees are certainly not beyond the reach of relief.

51. The concern about receipt of the rent arising from the breaches covenant can be addressed by ordering payment, as a condition of relief, of a sum representing the share of the rent. Such a payment would be akin to negotiating damages for the breach in the limited period of residential use. As to the amount, this can be fixed in a broad brush way as I explored with both counsel in closing submissions. The flats have been let at a total of in excess of £20,000 a year since around August 2018 (so over 2 years), though the tenant (first Mayworth and then Landau) will have incurred some management expenses. A reasonable sum is, in my judgment, £15,000, representing a significant share of the net rent.

52. Overall, Landau's conduct at and after purchase is not such as to warrant a refusal of relief given the other factors I have referred to.

53. Finally on the terms of relief, Mr Shattock asked for 12 months to effect the reinstatement. In circumstances where Mr Peachey regarded that as the minimum period likely to be necessary, including given the presence of assured shorthold tenants at the Property and the difficulties presented by the ongoing pandemic, my order will give a period of 12 months for reinstatement.

54. I repeat my thanks to counsel and invite them to agree the terms of an order reflecting my decision.