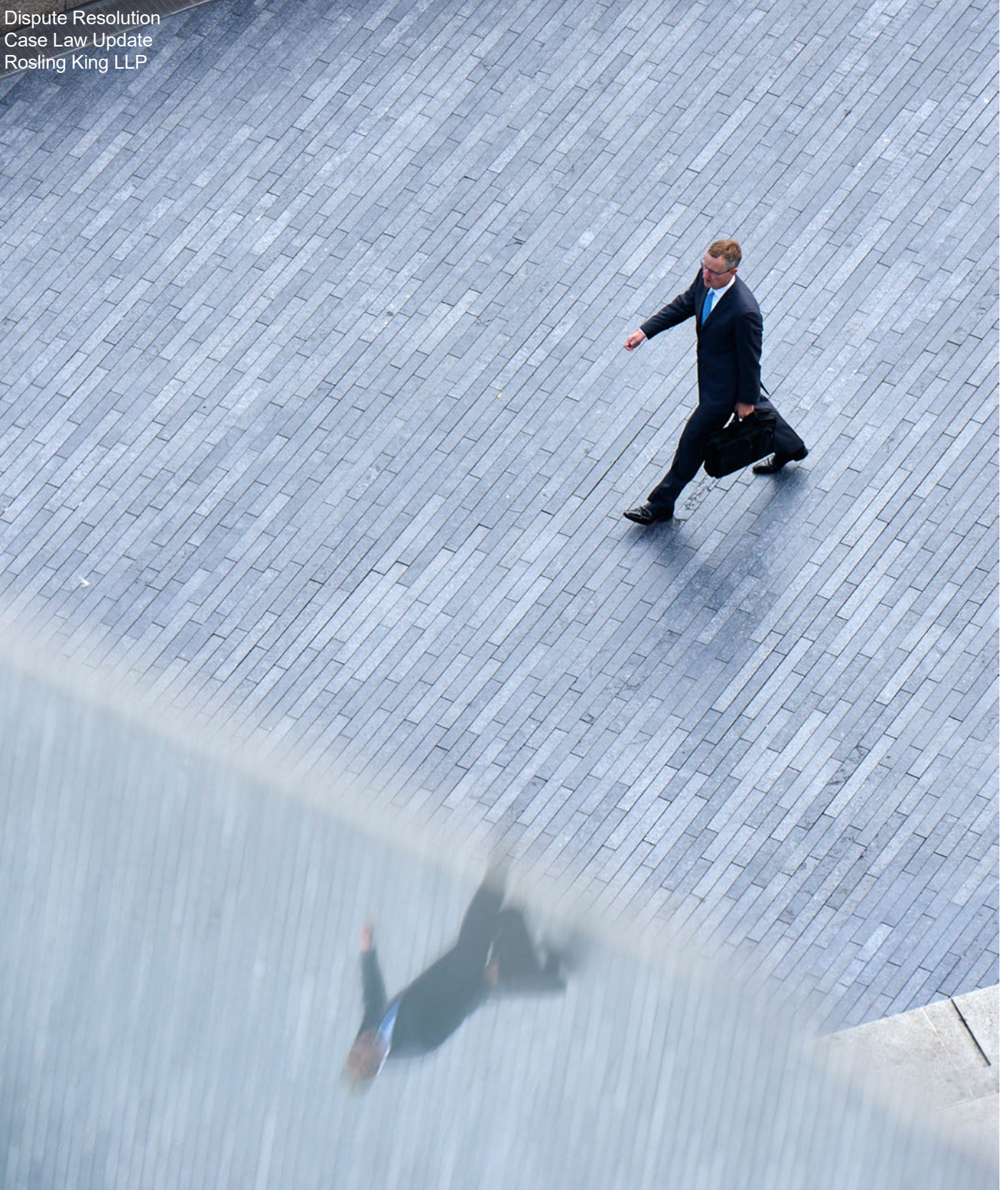


Dispute Resolution  
Case Law Update  
Rosling King LLP



### Background

In order to consider the recent Supreme Court decision in *Sequent Nominees Ltd (formerly Rotrust Nominees Ltd) v Hautford Ltd*, it is useful to first understand the difference between a qualified covenant and a fully qualified covenant. A “qualified covenant” is a promise on behalf of the tenant not to do something without the landlord’s consent. A “fully qualified covenant” is a promise on behalf of the tenant not to do something without the landlord’s consent, not to be unreasonably withheld. In essence, a fully qualified covenant adds a condition of reasonableness.

The case relates to a fully qualified covenant contained within a lease over the entirety of a six-floor building in Soho. At the time of the dispute, the ground and basement floors of the premises were used for retail, the first and second floors for offices/ancillary retail and the third and fourth for residential. In planning terms this mirrored the permitted use of the building at the time.

As long as the residential parts of the building were confined to the top two floors, the proportion of the building in residential use did not amount to a sufficient proportion of the whole building to be considered at risk of enfranchisement. The Tenant, however, wanted to convert the first and second floors into self-contained residential units.

The Tenant proceeded to request Landlord’s consent under the lease on the basis of two clauses which were:

- 1 Clause 3(11) – A general user covenant which permitted the tenant to use the whole of the premises for a number of purposes, including residential, provided that the tenant complied with all town planning laws and regulations.
- 2 Clause 3(19) – A fully qualified covenant not to apply for planning permission without the prior written consent of the landlord, such consent not to be unreasonably withheld.

The Tenant applied for permission from the Landlord under clause 3(19) to apply for a change in use of the first and second floors of the premises to residential, on the basis that residential use was already permitted under clause 3(11). The Landlord withheld consent from the Tenant referring to the increased risk of a successful claim of enfranchisement under the Leasehold Reform Act 1967.

The Tenant was successful both at trial and in the Court of Appeal arguing that consent to the planning application had been unreasonably withheld by the Landlord. The case was then referred to the Supreme Court on appeal.

### The Decision

Lord Briggs gave the leading judgement in the Supreme court in a decision that was a 3/2 split in favour of granting the Landlord’s appeal. Briggs LJ explained that the Courts had been incorrect in their application of the law at first and second instance and focused his judgment instead on the test of reasonableness in the context of a fully qualified covenant.

The trial judge and Court of Appeal both based their decisions on the purpose and intention of clause 3(11) and clause 3(19). It was decided that it could not have been the intention of clause 3(19) for it to be used to refuse consent to a planning application for a use that was already permitted by clause 3(11). The Courts viewed a refusal as an attempt to impose a restriction that was not negotiated or included in the lease.

In the opinion of Briggs LJ, the earlier decisions had been incorrect in discussing the limited purpose behind clause 3(19). The only contentious principle for Briggs LJ was whether a landlord may reasonably refuse consent under a fully qualified covenant when he was aware of the enfranchisement position in the 1967 Act and had not included any other protection against it in the lease.

Briggs LJ applied the three overriding principles of reasonableness from the case of *Ashworth Frazer Ltd v Gloucester City Council* which had previously been used to decide cases when there had been a refusal to an assignment of a lease:

- 1 The landlord is not entitled to refuse his consent on grounds outside of the relationship of landlord and tenant in regard to the subject matter of the lease;
- 2 The decision has to be made on the facts of each particular case, only using prior decisions for illustrative effect; and
- 3 The landlord is under an obligation to show that his conduct was reasonable in the common sense meaning of the word i.e. would the conclusion be reached by a reasonable man in the circumstances.

The Court should therefore not be applying any rigid or strict rules and should not be solely referencing the original purposes of clause 3(19). This decision of the Supreme Court sets out that every case on reasonableness in this context will be decided as a question of fact and on the date upon which the consent was sought by the tenant, not the date when the lease was agreed.

Briggs LJ applied the first principle to find that the landlord's refusal to consent to an application for planning permission, which prevented damage to the reversion through enfranchisement, was part of the landlord and tenant relationship created by the lease. Applying the second principle, Briggs LJ employed a factual analysis of the economic consequences of enfranchisement for the landlord that would result from the giving of consent, which suggested that refusal was reasonable. Finally applying the third principle, the landlord did not need to show that a refusal was right or justifiable, only that it was reasonable, and in the opinion of Briggs LJ it was.

### Commentary

The Supreme Court's decision to apply a strict test of reasonableness in cases relating to fully qualified covenants opens up opportunities for landlords to refuse to grant consent as required by such covenants. Naturally, the decision will not be welcomed by tenants, especially those who have relied on wider permitted user clauses when negotiating their lease or when making the decision acquire a particular leasehold property.

Despite clearly affording greater protection for landlords, both sides should be aware that every decision on reasonableness will be taken on a case by case basis and will turn on the specific facts and circumstances of the dispute. It would be prudent for any landlord that wishes to reduce the risk of enfranchisement and for any tenant that is looking to embark on a new residential development to make clear provisions in the lease, or obtain other contractual commitments, to ensure they are adequately protected.

Tenants especially should now pay even greater attention to fully qualified covenants, whether they be found in long-standing leases or form part of new lease negotiations. In light of this decision, these covenants might now impose a higher degree of restriction on tenants than what would be typically anticipated.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.