Neutral Citation Number: 3381

Case No: CH/2015/0258

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: Friday 27th November 2015

Before :

MR JUSTICE HENRY CARR

- -

Between :

WEST END INVESTMENTS (COWELL GROUP) LIMITED	**Appellant**
- and -	
BIRCHLEA LIMITED	**Respondent**

- -
- -

ANTHONY RADEVSKY (instructed by **Wallace LLP**) for the **Appellant/Defendant**
PHILIP RAINEY QC (instructed by **Hogan Lovells International LLP**) for the **Respondent/Claimant**

Hearing dates: 11TH November 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE HENRY CARR

MR JUSTICE HENRY CARR:

Introduction

1. This is an appeal from the Order of His Honour Judge Dight ("the judge at first instance") made on 7 May 2015. The Respondent sought a declaration that it was entitled to acquire the freehold of the house and premises known as 3 Grosvenor Gardens Mews East, London SW1 ("the house") pursuant to Part 1 of the Leasehold Reform Act 1967 ("the Act"). The judge at first instance made this declaration, and permission to appeal was granted by Arnold J by Order dated 15 June 2015.

2. This appeal raises the issue of whether the house is excluded from being a "house" within the meaning of the Act by virtue of s. 2(2). The Appellant, who is the immediate landlord of the house and "reversioner", as defined by paragraph 2 of Schedule 1 to the Act, contends that this is the conclusion that the judge at first instance should have reached. If so, the consequence is that the Respondent is not entitled to enfranchise the house.

3. The judge at first instance heard no evidence in this case because the parties agreed the relevant facts. However, he was able to visit the site on the first morning of the trial and inspect the flank wall of the building, which is of particular relevance to the issues raised by this case.

The agreed facts

4. The Agreed Statement of Facts was set out in full by the judge at first instance at [5]. For the purposes of this appeal, it is only necessary to repeat paragraphs 1 to 4:

> "1. The case concerns a mews house and premises known as 3 Grosvenor Gardens Mews East, London SW1 ("the house")."
>
> 2. The house lies at the back of number 3 Grosvenor Gardens. Adjoining the house to the North [the right as one looks at the house from Grosvenor Gardens Mews East] lies 1/1A Grosvenor Gardens (referred to as 1/1A Grosvenor Gardens). Another mews house adjoins the house to the left [South]. The house is not structurally detached.
>
> 3. The house comprises two storeys. 1/1A Grosvenor Gardens is several storeys higher and considerably taller.
>
> 4. The house and 1/1A Grosvenor Gardens are divided by a single wall. The external flank wall of the Southern elevation of 1/1A Grosvenor Gardens at second floor level and above is a vertical continuation of the same wall which separates the house from 1/1A Grosvenor Gardens at ground and first floor level."

5. The different heights of the house and 1/1A Grosvenor Gardens, and the external flank wall, are shown in two photographs annexed to this Judgment, which were

amongst the photographs referred to at paragraph 5 of the Agreed Statement of Facts. The first photograph numbered [184] shows the external flank wall of 1/1A Grosvenor Gardens which rises above and continues below the roof of the house. This can also be seen in the second photograph numbered [178] which shows the pitch of the roof of the house, with the flank wall of 1/1A Grosvenor Gardens rising above. It is important to note, as acknowledged in paragraph 4 of the Agreed Statement of Facts, that the external flank wall is a single, vertical wall.

6. The judge at first instance quoted various terms of the relevant leases. For my purposes, it is only necessary to record that the leases of the house and 1/1A Grosvenor Gardens each include:

> "one half severed vertically of party walls dividing such building from adjoining premises."

Relevant parts of the Act

7. Section 1 of the Act provides that:

> "(1) This Part of this Act shall have effect to confer on a tenant of a leasehold house … a right to acquire on fair terms the freehold … of the house and premises."

8. Section 2(1)-(2) provide that:

> "(1) For 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; and—
>
> (a) where a building is divided horizontally, the flats or other units into which it is so divided are not separate 'houses', though the building as a whole may be; and
>
> (b) where a building is divided vertically the building as a whole is not a "house" though any of the units into which it is divided may be."
>
> "(2) References in this Part of this Act to a house do not apply to a house which is not structurally detached and of which a material part lies above or below a part of the structure not comprised in the house."

9. Section 2(3) provides that:

> "(3) Subject to the following provisions of this section, where in relation to a house let to a tenant reference is made in this Part of this Act to the house and premises, the reference to premises is to be taken as referring to any garage, outhouse, garden, yard and appurtenances which at the relevant time are let to him with the house."

10. In addition, sections 2(4)-(5) provide that:

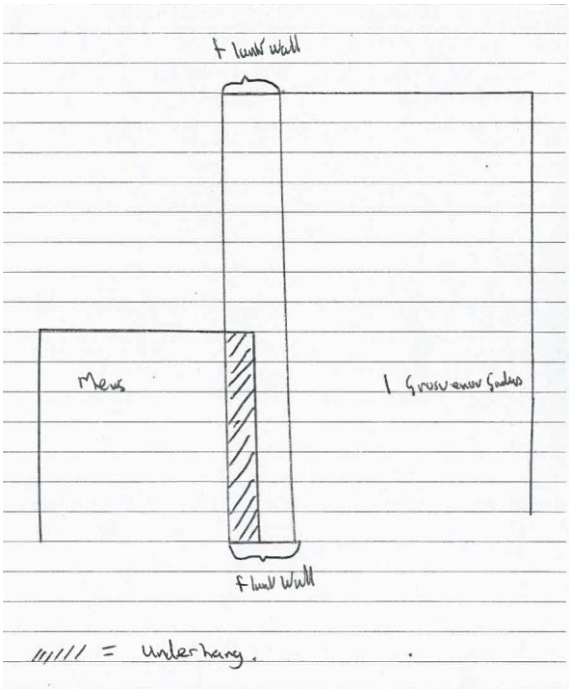
> "(4) In relation to the exercise by a tenant of any right conferred by this Part of this Act there shall be treated as included in the house and premises any other premises let with the house and premises but not at the relevant time [subject to a tenancy vested in him] (whether in consequence of an assignment of the term therein or otherwise) if-
>
> (a) the landlord at the relevant time has an interest in the other premises and, not later than two months after the relevant time, gives to the tenant written notice objecting to the further severance of them from the house and premises; and
>
> (b) either the tenant agrees to their inclusion with the house and premises or the court is satisfied that it would be unreasonable to require the landlord to retain them without the house and premises.
>
> (5) In relation to the exercise by a tenant of any right conferred by this Part of this Act there shall be treated as not included in the house and premises any part of them which lies above or below other premises (not consisting only of underlying mines or minerals), if—
>
> (a) the landlord at the relevant time has an interest in the other premises and, not later than two months after the relevant time, gives to the tenant written notice objecting to the further severance from them of that part of the house and premises; and
>
> (b) either the tenant agrees to the exclusion of that part of the house and premises or the court is satisfied that any hardship or inconvenience likely to result to the tenant from the exclusion, when account is taken of anything that can be done to mitigate its effects and of any undertaking of the landlord to take steps to mitigate them, is outweighed by the difficulties involved in the further severance from the other premises and any hardship or inconvenience likely to result from that severance to persons interested in those premises."

The Appellant's case

11. The Appellant's case is as follows. The exclusion in s.2(2) of the Act applies "to a house which is not structurally detached and of which a material part lies above or below a part of the structure not comprised in the house." Obviously, the house at No. 3 is not structurally detached. The Appellant contends that a material part of the house lies above or below a part of the structure not comprised in the house. It submits as follows:

12. The flank wall of the house, lying below the parapet, is a party wall which divides the house and 1/1A Grosvenor Gardens at ground and first floor levels, and under the terms of the leases, the demise of each of the premises includes one half, severed vertically, of that wall. As 1/1A Grosvenor Gardens is several storeys higher than the house, the flank wall is not a party wall at higher levels. As is now accepted by the Respondent, a wall may be in part of its length and height a party wall and as regards the rest an external wall; Halsbury's Laws 5th edn. Vol. 4 paragraph 365 and the cases cited therein. It is common ground that the party wall only extends to the first floor, (i.e. where the house ends). Above the first floor, a major structural wall, being a material part of the house, lies below a part of the structure not comprised in the house, and thus the exclusion in s.2(2) applies.

13. Mr Radevsky, who presented the Appellant's case with great skill, handed in a sketch prepared by his instructing solicitor, which illustrates this argument.



The hatched portion of the party wall of No.3 is said to be an "underhang", which is said to be a material part of the house. Above this is the remainder of the flank wall, and since this is a part of 1/1A Grosvenor Gardens, and not a party wall, it is not comprised in the house.

The reasoning of the judge at first instance

14. The judge at first instance cited extensive passages from two decisions of the House of Lords in relation to section 2(2) of the Act, namely *Parsons v. Gage* [1974] 1 WLR 435 and *Malekshad v Howard De Walden Estates Limited* [2003] 1 A.C. 1013. At [25] – [34] he summarised, accurately, the competing submissions of Counsel. Two submissions of Mr Rainey QC, who appeared on both occasions on behalf of the Claimant/Respondent were of importance to his conclusions:

> "… that as a matter of common sense there is in fact no deviation from the vertical plane of division between the house and 1/1A (i.e. there is no overhang/underhang); the division between two is a single wall and the considerations of section 2(2) are not engaged and do not arise."
>
> "… that if it is a deviation from the vertical plane of division, then it is de minimis and, again, section 2(2) is not engaged."

15. The judge at first instance accepted these submissions at [35] – [36]:

> "in reaching conclusions on these competing submissions, it seems to me that Mr Radevsky's submissions are, when looked at from a purist and technical perspective, attractive, but turning to the claimant's first submission and the guidance given by Lord Nicholls in paragraph 3 of *Malekshad*, it seems to me that one has to take a common sense approach to resolution of issues such as this. There has to be a point at which the court says that the distinctions being drawn by a landlord in such situations are too fine. There is little guidance as to what physical structure is contemplated by the reference to a vertical division for the purposes of section 2(1)(b) and for the purposes and in the context of section 2(2), but it seems to me that some help can be derived from the speech of Lord Hope in *Malekshad*, where the sort of kink or deviation which he had in mind as causing concern would be a room or a cupboard. In other words something visually apparent and relatively substantial."
>
> "Taken together with the second submission of the claimant, whether the alleged deviation in this case is *de minimis*, it seems to me that the proper and common sense approach leads one to the conclusion that there is no deviation in the vertical division in this case, that a one brick course of the flank wall rising in the air space above the house is not visually apparent, relatively substantial or sufficient to take the house out of the principal provisions of section 2(1)(b). I therefore accept the submission of the claimant that the terrace, if not the other buildings, and the adjoining 1/1A, taken as whole, are capable of being "a building" for the purposes of section 2(1) of the Act; that the flank wall of the house divides the house from the building, and, therefore, prima facie, the house is a house for the purposes of section 1 and 2. The alleged overhang or overlap is de minimis. In my judgment one does not therefore even get into the territory of considering subsection (2) of the Act because I would not come to the conclusion as a matter of fact and law that part of the structure of the building lies above the house."
>
> "It seems to me that for the purposes of the Act, one can properly regard the house, in Mr Radevsky's words, as a cube

> which, taking account of the vertical dividing lines, is self-contained and satisfies the requirements of section 2(1)."

16. So, in summary, the judge at first instance decided that there was no relevant overhang or underhang, or if there was, it was *de minimis*. He went on to decide at [38] that if he was wrong in this conclusion, then the part of the wall which lies within the house was a material part of the house. This finding is challenged by a Respondent's Notice.

History and purpose of the Act

17. This is discussed in chapter 1 of *Hague: Leasehold Enfranchisement* (Sixth Edition, Radevsky and Greenish). From this, I derive the following:

(i) "Leasehold enfranchisement" describes the principle that leaseholders should be enabled to become freeholders by the purchase of the fee simple of their holdings, together with any intervening leasehold interests.

(ii) The White Paper on Leasehold Reform, published in 1966, set out the Government's intention to introduce a bill to enable a long leasehold to acquire compulsorily either the freehold or a 50 year extension of his existing lease. It was based on the principle that the long leasehold system had conferred undue benefits on landlords and had worked unfairly against occupying leaseholders.

(iii) Although the Act was passed primarily to meet the concerns of householders in South Wales, the persons who in fact derived most benefit were wealthy purchasers of short residues of long tenancies of houses in expensive areas of London.

(iv) Only houses, and not individual flats and maisonettes, are affected by Part 1 of the Act.

(v) Enfranchisement was extended in certain respects by the Leasehold Reform, Housing and Urban Development Act 1993.

18. Section 2 of the Act, which is certainly not a masterpiece of drafting, must be interpreted having regard to the policy which underlies it. In *Hosebay Ltd v Day and another* [2012] 1 WLR 2884 (SC) Lord Carnwarth said at [6]:

> "Although the 1967 Act like the 1993 Act is in a sense expropriatory, in that it confers rights on lessees to acquire rights compulsorily from their lessors, this has been held not to give rise to any interpretative presumption in favour of the latter. As Millett LJ said of the 1993 Act: "It would, in my opinion, be wrong to disregard the fact that, while the Act may to some extent be regarded as expropriatory of the landlord's interest, nevertheless it was passed for the benefit of tenants. It is the duty of the court to construe the 1993 Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy." (*Cadogan v McGirk* [1996] 4 All ER 643, 648)

> By the same token, the court should avoid as far as possible an interpretation which has the effect of conferring rights going beyond those which Parliament intended."

Parsons and Malekshad

19. The *Parsons* case concerned the correct construction of the words "not structurally detached" in section 2(2) of the Act. Certain passages in the speech of Lord Wilberforce, who gave the only reasoned judgment, discuss section 2(1) and 2(2) more generally. In particular, at 439D-G Lord Wilberforce said:

> "From section 2(1) it appears, and indeed it is well known, that the Act was intended to provide "enfranchisement" for dwelling houses but not for flats. Flats, as are "strata" in other systems, are units which arise by horizontal division of a building, and by this criterion they are excluded by paragraph (a). On the other hand, the Act evidently intended to allow enfranchisement of terrace houses and dwellings arising by vertical division. This is effected by paragraph (b). If one seeks a reason for this different treatment, it may lie in the difficulty, in relation to units arising by horizontal division, of providing, after they become freehold by enfranchisement, for the enforcement of necessary positive covenants — a difficulty which did not exist while they were leasehold. Possibly there were other reasons for the discrimination: at any rate it was clearly made in section 2(1) of the Act."

> "Then it was necessary to make provision for mixed cases, where units were separated by a broken vertical line, or as it might be expressed, partly vertically and partly horizontally. This I take to be the purpose of subsection (2) and it uses as the discrimen the lying of a material part above or below a part of the structure to which the house is attached. It was necessary to confine the exemption to cases of structural attachment, in order not to include within it cases of mere projection, over or under another structure, without attachment."

20. From this passage, I derive the following:

(i) The Act was intended to provide for the enfranchisement of houses, not flats;

(ii) s. 2(1)(a) therefore excludes the case where a building is divided horizontally into flats or other units which are not separate houses;

(iii) the Act intends to allow enfranchisement of terrace houses. Hence units in a building which are divided vertically may be separate houses. However, s.2(1)(b) provides that where a building is divided vertically, the building as a whole is not a house. This is to avoid the possibility that a whole terrace might be regarded as a house, and therefore liable to be enfranchised as such.

(iv) However, not every division is entirely vertical or entirely horizontal. Accordingly, the purpose of s.2(2) is to provide for "mixed cases" where the separation between units is partly vertical and partly horizontal. The exclusion is confined to cases of structural attachment. It is also confined to cases where a material part of the structure of the house lay above or below a part of the structure not comprised in the house (either an overhang or an underhang).

21. The *Malekshad* case concerned the correct construction of "material part" in section 2(2) of the Act. Lord Nicholls of Birkenhead said at [2] – [6]:

> "2 This appeal raises the question of the proper interpretation of the phrase "material part" in section 2(2) of the Leasehold Reform Act 1967. The context is that the Act confers a right of enfranchisement on the tenants of some, but not all, residential units. Houses may be enfranchised, flats may not. So the statute has to draw a demarcation line between houses and flats. Typically a flat comprises one floor, or part of one floor, of a building. So section 2(1)(a) excludes from the concept of a "house" the flats or other units resulting from the horizontal (side to side) division of a building. Typically also a house may be structurally attached to other property, as with a semi-detached house or a terraced house. So section 2(1)(b) provides that where a building is divided vertically (from top to bottom), the building as a whole is not a house though any of the units into which it is divided may be."

> "3 So far so good. But divisions of a building, either as originally constructed or later adapted, are frequently not wholly along straight lines. A building may be divided from top to bottom, but the dividing line may have a "kink" or a "dog-leg" in it. The division may be along what has been described as a broken vertical line, partly vertical and partly horizontal. Then one unit will, in part, lie over or under the other. Clearly, it would be absurd if every such deviation from a straight vertical line, however trivial or unimportant, were to take a unit outside the scope of section 2(1)(b)."

> "4 Section 2(2) provides how the concept of a "house" is to be applied in such "mixed" cases. The effect of this subsection is that if a *material* part of a (structurally attached) "house", ascertained in accordance with section 2(1), lies above or below a part of the structure not comprised in the house, then the enfranchisement provisions are inapplicable to that house. In this context "material part" must mean material part of the house, namely, of the unit identified as a house by application of section 2(1). This unit is to be excluded from enfranchisement by section 2(2) if, but only if, a material part *of it* lies above or below a part of the structure to which it is attached."

> "5 The criterion by which materiality is to be judged for this purpose must depend upon the purpose which section 2(2) is intended to serve. On this there has been some difference of judicial emphasis. I think the better view is that the purpose of the section is simply to avoid the absurdity mentioned above. The subsection is concerned to ensure that the right of enfranchisement is not lost by reason of the fact that a trivial or unimportant part of the house overhangs or underlies another part of the structure to which it is attached. The subsection achieves this result by excluding from the scope of the Act cases where a material part of the house lies above or below a part of the structure to which it is attached."

> "6 This suggests that in this context materiality calls for a broad assessment of the relative importance or unimportance of the part as a feature of the house. Does this part have the effect that the house as a whole overhangs or underlies the structure to which it is attached to a substantial, or important, extent? If, judged by this standard, the underlying or overhanging part of the house is immaterial, then the landlord's interests, if any, in the adjoining property are protected by section 2(5), not by exclusion of the whole house from enfranchisement."

Similarly, Lord Hope of Craighead said at [25]:

> "…the rule about vertical division was in need of qualification to deal with cases where part of the structure in that plane, such as a room or a cupboard, projected above or below another part of the same structure."

22. This is, of course, consistent with the speech of Lord Wilberforce in *Parsons.* In summary:

(i) s.2(2) is concerned with cases where there is a "kink" or "dog-leg" in the dividing line in units of a building. Potentially, such an overhang or underhang may exclude a house from enfranchisement;

(ii) However, this will not be the case if only a trivial or unimportant part of the house overhangs or underhangs the structure to which it is attached, which would be an absurd consequence;

(iii) if the underlying or overhanging part of the house is immaterial, then the landlord's interests, if any, in the adjoining property are protected by section 2(5), not by exclusion of the whole house from enfranchisement. This is because the landlord may give notice under section 2(5), the effect of which may be to exclude such part from the house and premises which is enfranchised by the tenant.

23. I was referred by Mr Rainey to other parts of the *Malekshad* decision, and in particular paragraphs 11, 25-28, 56-57, 66, 69, 70-75, 89, 91-93 and 96-102. These

passages provide further support for the propositions which I have set out above. I will return to certain of them when considering the Respondent's Notice.

Assessment of the appeal

24. In my judgment, the judge at first instance was correct to reject the Appellant's arguments for the reasons that he gave. My reasons for agreement with his judgment are as follows:

25. First, this is not a case where there is, in reality, a "kink" or "dog-leg" which would engage s. 2(2). On the contrary, there is a single vertical wall a part of which divides the house from 1/1A Grosvenor Gardens. The fact that the dividing part is, in accordance with the leases, a party wall, makes no difference to this physical reality. I agree with the judge at first instance that s.2(2) is concerned with a significant deviation from the vertical, such as room which extends horizontally. In order for s.2(2) to be engaged, there must be a deviation from the division of the building in the vertical plane. In the present case, the wall as a whole creates the dividing feature and there is no deviation from the vertical plane. I do not consider this to be a "mixed case" which s.2(2) is intended to cover.

26. Secondly, I agree with the conclusion of the judge that, even if one regards the thickness of a single brick (if, which is unclear the party wall is in fact two bricks thick) above or below the level of the roof of the house as an overhang or underhang, it is *de minimis*.

27. Thirdly, I do not consider that it would be consistent with the purposes of the Act to allow the legal division of a party wall to disqualify the house from enfranchisement. As Mr Rainey pointed out, the proposition that a single vertical dividing wall may fall within section 2(2) and exclude a house from enfranchisement does not depend upon the height of the vertical wall that extends above the party wall. If it was correct, it would be likely to deprive many leaseholders of the right of enfranchisement which Parliament intended to convey in the Act. For example, if a mansard roof was added to a mews house, the neighbouring mews could be excluded by s.2(2) because this addition extended above a party wall.

The Respondent's Notice

28. At [38] of his judgment, the judge at first instance considered what would have been the position if he had decided that this was a case to which s.2(2) applied. On that hypothesis he considered that the overhang or underhang would have been a "material part" within the meaning of s.2(2). He said:

> "If one then had to go on to consider the materiality of the part lying above or below a part of the structure not comprised in the house, then greater difficulty arises because it seems to me that having regard to the various ways in which their Lordships approached the question in the *Malekshad* case, not all of them suggesting the same criteria for judges in my position to adopt, there is considerable force in Mr. Radevsky's submission that the part of the wall which lies within the house is a material part of the house. Even though that part may not be financially

> important, in accordance with one of the criteria considered by Lord Scott (which I take to mean the sort of overhang or underhang which would provide space which could have an impact on the sale price for the property), nevertheless it is very significant structurally. It is the support for the flank of the house. If one were to take it away, as Mr. Radevsky submits, one would not even have the cube which a house normally consists of. It is one of the four walls. In terms of size, it may not be significant or material, but in terms of support for the house, it is. If I were to reach a conclusion on materiality, having regard to the structure of the house, then in my judgment the flank wall would be a material part."

29. In reaching this conclusion, the judge had in mind [96] of the speech of Lord Scott of Foscote in *Malekshad*, where he considered the phrase "material part" in s.2(2), and said:

> "It is not a reference to a material part of the building of which the house forms part, nor to a material part of the structure to which the house or the part of the house is attached. And since the reference is to a material part of the house to be enfranchised, the materiality must depend, in my opinion, on the relationship between the part in question and the house as a whole. The relative size of the part may be a factor; the price-enhancing quality of the part may be a factor; the extent to which the part derives or provides support or protection from or for other parts of the house may be a factor. No doubt other factors might come into play in a particular case. And, as Lord Wilberforce made clear, the issue will be a largely factual one, an issue, as Stephenson LJ said, "of fact and degree". But the relevant factors will all, in my opinion, relate to the relationship between the part of the house in question and the house as a whole."

30. In reaching his conclusion, the judge at first instance rejected a submission on behalf of the Respondent that the "overlap" created by legal ownership of the party wall was immaterial, and was catered for by s. 2(5) and not section 2(2). He did so on the basis that no notice had been served under s. 2(5) and it was therefore irrelevant.

31. I am conscious that the question of "material part" is a matter of fact and degree on which I would not differ from the judge at first instance, who has considerable experience in this area, without a material error of law or principle. I also bear in mind that in the present case, the facts are agreed, there was no oral evidence, and there has been no suggestion that anything could be learnt from an inspection of the property which cannot be seen from photographs. With great respect to the judge at first instance, I have concluded that he was wrong in law and in principle to conclude that, if the case fell within s.2(2), the relevant part would be "material".

32. In particular, the judge concluded at [36] that the alleged deviation from the vertical was *de minimis*. I agree with this conclusion, and, in my judgment, it also leads to the conclusion that the alleged deviation from the vertical is immaterial. The judge at

first instance, was, in my view, led into error, by focussing on the extent of support provided by the party wall, rather than considering the overall significance of any deviation from the vertical, bearing in mind the purpose of the legislation. He should have approached the question on the basis set out by Lord Nicholls in *Malekshad* at [5]:

> "…the purpose of the section [2(2)] is simply to avoid the absurdity mentioned above. The subsection is concerned to ensure that the right of enfranchisement is not lost by reason of the fact that a trivial or unimportant part of the house overhangs or underlies another part of the structure to which it is attached. The subsection achieves this result by excluding from the scope of the Act cases where a material part of the house lies above or below a part of the structure to which it is attached."

33. In this respect, I have gained assistance from [2.10] of *Hague: Leasehold Enfranchisement* which considers the meaning of material in s.2(2):

> "In Malekshad, the House of Lords found that a proportion of a basement area amounting to just over 2 per cent of the overall floor area of the house which lay beneath the adjoining property was not material and in consequence the tenant succeeded in his claim for that house. In Parsons, the overhang comprised approximately 10 per cent of the overall floor area and included a bathroom, a WC, a substantial part of a dressing room and half of a small bathroom; it was considered that this was clearly a material part on any test and the point was not argued in the House of Lords. As a general rule, it is thought that eaves, drainpipes, cupboards, box-rooms, water tanks, chimney breast and the like would not be material. However, the whole or any substantial part of any living room, bedroom, kitchen or bathroom would constitute a material part. Nevertheless, in each case it will be a question of fact or degree."

34. In the present case, a vertical division of a single party wall does not comprise any of the floor area of the house. It is entirely different from, for example, a substantial part of a living room, bedroom, kitchen or bathroom. In my view, the judge at first instance should have applied his own finding that the alleged deviation was *de minimis* and for that reason, that it was immaterial.

35. Furthermore, I believe that he erred in law in dismissing the relevance of s.2(5) because no notice had been served. The issue concerns the correct interpretation of the Act, rather than an issue of fact.

36. The party wall is a boundary feature which divides the house from 1/1A Grosvenor Gardens. Ss. 2(1) and 2(2) are not concerned with the ownership of boundary features. This appears from the title and structure of section 2 of the Act. The section is entitled "Meaning of "house" and "house and premises" and "adjustment of boundary". Ss. 2(1)-(2) are concerned with the meaning of "house"; s.2(3) is concerned with the meaning of "premises" and ss. 2(4)-(5) are concerned with

adjustment of the boundary on enfranchisement. S. 2(5) entitles a landlord to serve a notice on a tenant who is exercising his right of enfranchisement objecting to severance of certain parts of the landlord's premises. That subsection, in my judgment, is apt to cover the case of a shared party wall. Accordingly, the problem, if any, created by the party wall, is dealt with by s. 2(5), and s. 2(2) is not engaged.

37. Support for this conclusion is to be found in the speech of Lord Nicholls in *Malekshad* at [6], which I have cited above, and in particular:

> "If, judged by this standard, the underlying or overhanging part of the house is immaterial, then the landlord's interests, if any, in the adjoining property are protected by section 2(5), not by exclusion of the whole house from enfranchisement."

38. This is reinforced by Lord Nicholls at [11] and the same conclusion is expressed in the speeches of Lord Millett at [63] and [70]-[72] and Lord Scott at [89].

39. None of this alters the overall conclusion of the judge at first instance. It provides an additional reason for upholding his judgment.

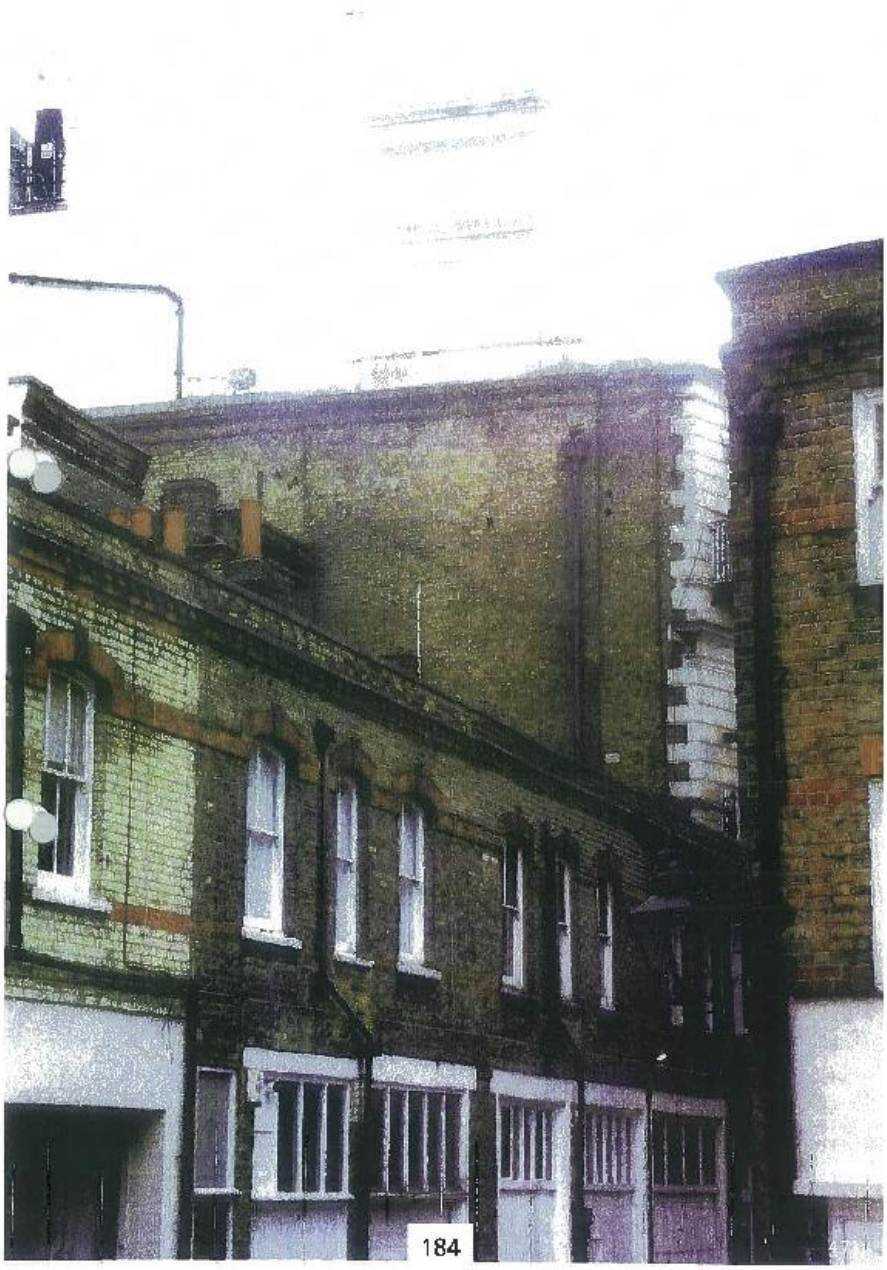
40. I should add that I also heard a submission on behalf of the Respondent about the effect of the Party Walls etc. Act 1996. The judge at first instance concluded at [39] that it did not assist him in deciding whether the criteria of s. 2(2) were made out or not. I respectfully agree with him.

Conclusion

41. For the reasons set out above this appeal is dismissed.

ANNEX

From paragraph 6 above:
[184] - external flank wall of 1/1A Grosvenor Gardens:



[178] - Pitch of the roof of the house, with the flank wall of 1/1A Grosvenor Gardens: