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Cite as: [2002] UKHL 49, [2002] 3 WLR 1881, [2003] 1 All ER 193, [2002] 50 EGCS 114, [2003] 1 EGLR 151, [2002] NPC 160, [2003] 1 AC 1013, [2003] HLR 31, [2003] 1 P & CR DG18, [2003] L & TR 13

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## Judgments - Malekshad (Respondent) v. Howard De Walden Estates Limited (Appellants)

### HOUSE OF LORDS

Lord Nicholls of Birkenhead Lord Hope of Craighead Lord Hobhouse of Woodborough Lord Millett  
Lord Scott of Foscote [\[2001\] EWCA Civ 761](#)

### OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

#### IN THE CAUSE

*MALEKSHAD*

*(RESPONDENT)*

v.

*HOWARD DE WALDEN ESTATES LIMITED*

*(APPELLANTS)*

**ON 5 DECEMBER 2002**

**[2002] UKHL 49**

### LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead and Lord Scott of Foscote. I have reached the same conclusion as them, although in one respect I am inclined to differ in my reasoning. I too would allow this appeal.

#### *The question of interpretation*

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.

7. In *Parsons v Trustees of Henry Smith's Charity* [1973] 1 WLR 845, 854, Stephenson LJ said that material "must mean material to the tenant or to his enjoyment of the house." This formulation seems to link materiality to the use made of the part by the tenant. I do not think this can be correct. Whether a part is material cannot vary according to the use made of the part by the particular tenant or, indeed, according to the potential use of the part. A very small area is often capable of valuable use. But this ought not to make 'material' a part of the house which otherwise would not be such. It ought not to exclude the house from enfranchisement. Section 2 (1)(b) uses the physical state of the building as the criterion ('divided vertically'). Section 2(2) is concerned to ease the rigour of the 'vertical division' criterion.

8. When the *Parsons* case reached your Lordships' House Lord Wilberforce left open the exact meaning of this phrase in this context: see [1974] 1WLR 435, 439-440. He did note that whether a part is material is an issue which must be largely factual and one of common sense. This suggests a simple, non-technical approach. The question I have posed conforms with this approach.

9. It follows from what I have said that on this question of interpretation I respectfully differ from the view expressed by Nourse LJ in *Duke of Westminster v Birrane* [1995] QB 262, 270-271. He identified the primary purpose of section 2(2) as follows:

"The primary purpose of section 2(2) must have been to exclude from the operation of the Act houses in respect of which the inability of one freehold owner to enforce positive obligations against successors in title of the other would be likely to prejudice the enjoyment of the house or another part of the structure."

10. He then stated the test to be applied when deciding whether a part is material:

"if the part of the house which lies above or below a part of the structure not comprised in it is of sufficient substance or significance to make it likely that enfranchisement will prejudice the enjoyment of the house or another part of the structure, whether by reason of the inability of one freehold owner to enforce positive obligations against successors in title of the other or otherwise, then it is a material part of the house within section 2(2)."

11. I recognise that difficulties of enforcement of positive obligations against successors in title, and other difficulties of this nature, may well have led, or contributed, to the policy decision to exclude flats from the scope of the Act. But I am not persuaded that section 2(2) is aimed directly at these difficulties. Rather, section 2(2) is aimed more generally at elucidating, and giving effect to, the broad distinction drawn by the Act between houses, which may be enfranchised, and flats, which cannot. If, having given effect to this distinction, the unit in question is not excluded from enfranchisement by section 2(2), and there are potential difficulties arising from the fact that an (immaterial) part of the house underlies or overhangs structurally attached property of the landlord, the provisions of section 2(5) are apt to produce an adequate, balanced solution. Therein lies the landlord's protection against the risk of possible prejudice in the respects identified by Nourse LJ. The test enunciated in *Birrane*, on the other hand, would go far to emasculate what must have been the intended operation of section 2(5).

*This case*

12. In the Court of Appeal Robert Walker LJ was of the view that the whole of the built structure, or building, comprising 76 Harley Street and 27 Weymouth Mews can reasonably be called a 'house'. I have some sympathy with this view. The fact that for some years 27 Weymouth Mews was occupied and used as a separate residential unit has only a limited bearing on the question whether the whole of this single structure can reasonably be called a 'house'. 76 Harley Street is itself divided into several separate residential units. Despite this the whole of 76 Harley Street can reasonably be called a 'house', as the Act itself envisages: see section 2(1), and the observations of Dillon LJ in *Malpas v St Ermin's Property Ltd* [1992] 1 EGLR 109, 110.

13. Where I part company with the Court of Appeal is that, even if the whole structure can reasonably be called a 'house', I do not think that is the end of the matter. The scope of the opening words of section 2(1) ('"house" includes any building designed or adapted for living in and reasonably so called') is cut down, when the circumstances require, by section 2(1)(b) ('where a building is divided vertically the building as a whole is not a house'). That is this case. The structure comprising 76 Harley Street and 27 Weymouth Mews is divided vertically at the point where the eastern end of the extended ground floor and basement of 76 Harley Street meets 27 Weymouth Mews. The division is vertical (from top to bottom), even though part of the basement of 76 Harley Street lies under 27 Weymouth Mews.

14. Accordingly there can be no question of Mr Malekshad being entitled to enfranchise 27 Weymouth Mews as well as 76 Harley Street. Each of these two units comprises a house for the purposes of the Act. Of these two houses, Mr Malekshad was, it seems, occupying the third floor flat in 76 Harley Street as his residence. His claim to enfranchise 27 Weymouth Mews must fail.

15. Thus far I have applied the provisions of section 2(1) to the particular facts of this case. The next step is to apply section 2(2), given that at the point of division between 76 Harley Street and 27 Weymouth Mews part of the basement of 76 Harley Street lies below 27 Weymouth Mews. The basement of 76 Harley Street extends back to a wall which divides the front part of the basement from the rear part of the basement under 27 Weymouth Mews.

16. In applying section 2(2) Judge Ryland was bound to follow the test enunciated by the Court of Appeal in *Duke of Westminster v Birrane* [1995] QB 262, 270-271. If that test is put aside in favour of the approach outlined above, the application of section 2(2) is straightforward and admits of no doubt: the portion of 76 Harley Street underlying 27 Weymouth Mews is not a material part of 76 Harley Street. It does not have the effect that 76 Harley Street as a whole underlies 27 Weymouth Mews to a substantial or important extent. In terms of figures, it represents an insubstantial part, just over two percent, of the overall floor area of 76 Harley Street and about seven percent of the overall basement area of 76 Harley Street.

17. Accordingly, section 2(2) does not operate to exclude 76 Harley Street from the scope of the enfranchisement provisions in the Act. I would so hold. The matter should be remitted to the County

Court on this footing. This court is the appropriate venue for deciding any issues arising from any necessary amendments of Mr Malekshad's notices and application.

## **LORD HOPE OF CRAIGHEAD**

My Lords,

18. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Scott of Foscote. I agree with it, and I also agree on all points that matter with the speech of my noble and learned friend Lord Nicholls of Birkenhead. I would allow the appeal for the reasons which they have given, declare that the respondent is entitled to enfranchise 76 Harley Street alone, and remit the case to the County Court to decide, in the light of any counternotice which the freeholder may serve, whether the part of 76 Harley Street which lies under 27 Weymouth Mews should be included or excluded from the property to be enfranchised. I should like however to add some observations of my own, in recognition of the fact that we are differing from a unanimous decision of the Court of Appeal on the two issues which arise for consideration in this case. I gratefully adopt Lord Scott's explanation of the facts and his discussion of the authorities.

### *The first issue*

19. Part I of the Leasehold Reform Act 1967 enables a tenant to acquire the freehold of a leasehold house which he occupies as his residence. The tenant's ability to obtain enfranchisement had to be confined to the purpose for which it was intended, so it was necessary for the draftsman to provide a definition of the word "house". There were two distinct issues that had to be addressed. The first was what may best be described as an issue of structure. Buildings in which people live come in a variety of shapes and forms, especially in urban areas. Many people live in semi-detached or terraced houses or in smaller units such as flats or maisonettes. The buildings in which dwellings of that kind are found are often much larger than the individual units within it which the tenants occupy as their residence. The draftsman had to describe the way in which buildings might be divided up in order to identify the units within them which were available for enfranchisement. The second issue may best be described as an issue of user. Buildings in which people live may be designed or adapted for a variety of uses. These may include to a greater or a lesser degree their use as a residence. So the draftsman had to indicate how those buildings which were appropriate for enfranchisement were to be distinguished from those which were not.

20. The issue which I have described as the issue of structure was capable of being solved more precisely than the issue of user. All that was needed to resolve the issue of structure was a definition which identified the way in which buildings were to be divided up. The definition had to identify the individual units within a building which were to be available for enfranchisement. It was necessary to address two features which are common to almost every building which comprises more than one residence. These are the features by which a building may be divided up into separate units both vertically and horizontally. All that was needed was to set out the rules by which the individual units within buildings with divisions of that kind could be identified. But the issue of user was not capable of the same precise treatment. The best that could be done was identify a test by which a building which was appropriate for enfranchisement as a house occupied by the tenant as his residence could reasonably be distinguished from one which was not.

21. Section 2 of the 1967 Act is not easy to analyse, as it deals with the issues of structure and use in the same subsection. Subsection (1) deals with both use and structure, so it is necessary to pay careful attention to the words used. They must be construed and then applied to the facts precisely in the order in which they are set out. The first part of the subsection addresses the issue of user. It does so by saying that "house" includes any building "designed or adapted for living in and reasonably so called." This instruction is then qualified by the words "notwithstanding that the building is not structurally detached, or was or is not wholly designed or adapted for living in, or is divided horizontally into flats or maisonettes." This is a list of things which are to be disregarded when the issue of user is being addressed. It does not deal with the issue of structure. That issue is dealt with in the second part of the subsection. This part is divided into two separate paragraphs. Paragraph (a) deals with cases where the building is divided horizontally. Paragraph (b) deals with cases where the building is divided vertically. Different rules are set out in each of these two paragraphs. But they have this point in common, that they are both self-contained. There is no instruction that the result of giving effect to these rules must be

subjected to a further test which asks whether the building is nevertheless a house "reasonably so called."

22. The houses at 76 Harley Street and 27 Weymouth Mews are designed, adapted and used for living in, and they are used by their respective occupiers as a residence. So the user test in this case is easily satisfied. The question whether we are dealing here with a building which is a "house" reasonably so called admits of only one answer, as there is no element of mixed use. The problem to which the agreed facts give rise is a different one. It is an issue of structure. The question whether the building is a house reasonably so called is not relevant to that issue. It must be answered by applying, and by applying only, the rules which are set out in the second part of section 2(1).

23. In my opinion the Court of Appeal were wrong to apply the guidance which this House gave in *Tandon v Trustees of Spurgeons Homes* [1982] AC 755, and in particular that given by Lord Roskill at pp 766-767, to the facts of this case. The question of law which Lord Roskill identified in that case, namely whether it is reasonable to call the building a "house", does not need to be answered. There is no question here of any part of the building having been designed or adapted for use for any other purpose other than for living in as a residence. The judge made it clear in his judgment that his decision that there were here not one but two houses was based on his examination of the structure. The second part of section 2(1) does not admit of the possibility that a building which on an application of these rules requires to be divided up into two or more units is nevertheless to be regarded as a whole as a house. That is precisely what the rule which is set out in paragraph (b) says cannot be done.

24. I think therefore, with great respect, that Robert Walker LJ was wrong to criticise the judge for asking himself the question "is this one house or two?" He said that the judge set off on the right track, but that he then strayed off it: [\[2001\] EWCA Civ 761](#); [\[2001\] 3 WLR 824](#), 838C, para 37. In my opinion the Court of Appeal strayed on to the wrong track when they asked themselves whether the building, which on the judge's findings was divided vertically into two units at the point where the extended ground floor and basement of 76 Harley Street adjoin the back wall of 27 Weymouth Mews, could nevertheless be called a "house". This is because section 2(1)(b) states that 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.

#### *The second issue*

25. This too, in my opinion, raises an issue of structure. The answer to it is to be found upon a proper construction of the words used in section 2(2) of the 1967 Act. The draftsman had to recognise that rules which are designed to deal with this issue in section 2(1) might have to be applied to cases where the vertical or horizontal division, as the case may be, was not in a straight and unbroken line from side to side of the building or from top to bottom. The rule about horizontal division did not need to be qualified to deal with cases where, for example, the horizontal line dividing the building into flats was broken by a staircase or a lift shaft. This was because all divisions of the building in this plane were to be disregarded for the purpose of dividing the building into separate houses. But the rule about vertical division was in need of qualification to deal with cases where part of the structure in that plane, such a room or a cupboard, projected above or below another part of the same structure.

26. The legislative purpose of the rule that divisions of the building horizontally were to be disregarded was described by Lord Wilberforce in *Parsons v Trustees of Henry Smith's Charity* [1974] 1 WLR 435, 439. As he explained, the reason for the different treatment of divisions horizontally from divisions vertically may well have been the difficulty, in relation to units arising by horizontal division, of providing for the enforcement of necessary positive covenants after they became freehold by enfranchisement. Whatever the reason for it, however, the rule which section 2(1)(a) lays down does not depend on an analysis of the need for such covenants or of any difficulty which may arise in their enforcement in each case. The rule does not admit of any exceptions which might result from such an analysis. It applies to every case where a building is divided horizontally. What then is one to make of section 2(2)?

27. Section 2(2) provides that references in Part I of the 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. The problem with which it is designed to deal arises only after one has identified a "house" by applying the rules set out in section 2(1). It includes units which have been

found to be a house where a building is divided vertically by applying the rule set out in section 2(1)(b). Section 2(2) contains a phrase which is of critical importance on the facts of this case. This is the phrase "of which" which immediately precedes the words "material part". The part which lies above or below a part of the structure which is not comprised in the house must be "a material part". But one cannot begin to address the question whether the part is material until one has construed the preceding phrase. Are we dealing here with a part which is a material part of the house, as the judge thought? Or are we dealing here, as the Court of Appeal thought, with a material part which, although it is not material to the use or enjoyment of the house, is material to the use or enjoyment of another part of the same structure?

28. In my opinion the answer to this problem is to be found by reading the words of the subsection in the way which their ordinary meaning indicates. The words "of which" refer back to the words "a house" which are to be found at the beginning of the subsection. They cannot reasonably be read as referring to the words which follow, which direct attention to a part of the structure not comprised in the house. So the word "material" must be understood in this context as applying to the house itself only, and not to the structure as a whole or to any other part of it which is not comprised in the house.

29. The Court of Appeal applied to the word "material" the meaning which Nourse LJ gave to it in *Duke of Westminster v Birrane* [1995] QB 262, 271. Applying to it what he took to be the primary purpose of the subsection, Nourse LJ said that the issue to which it was directed was prejudice to the enjoyment of the house or another part of the structure which would be caused by enfranchisement. In my opinion however this approach is open to criticism on two grounds. The first is that it overlooks the fact that the subsection directs attention to a part which is material to the house itself, not to a part which is material to the part of the structure not comprised in the house. The second relates to Nourse LJ's reference to "the enjoyment" of the house.

30. As I said earlier, the issue which section 2(2) raises is an issue about structure. It is the structure of the house that matters, not the way it is or is capable of being used or enjoyed for the time being. Use and enjoyment may vary from tenant to tenant, whereas the test for materiality relates to the house itself. It does not depend on the tenant's use or enjoyment of it. That is indicated both by the wording of the subsection and by its context. For the same reason I am unable to agree with the approach which was described by Stephenson LJ in *Parsons v Trustees of Henry Smith's Charity* [1973] 1 WLR 845, 854D-E, where he said:

"Assuming that 'material' does not simply point the contrast with 'trivial' or 'insignificant,' I think that it must mean material to the tenant or to his enjoyment of the house, and that if it is material in that sense it will be of such significance as to alter the house into a flat, and so take it outside the Act."

31. I do not read Lord Wilberforce's comments on the meaning of section 2(2) and its relationship with section 2(5) in the same case at [1974] 1 WLR 435, 439E-440B as expressing a view either way or the other on the soundness of the meaning which Stephenson LJ had given to the word in the Court of Appeal. After describing the reason why section 2(1) discriminated between divisions which were vertical and those which were horizontal, Lord Wilberforce said at p 439F-G:

"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."

The point which he was making in this passage was that the question of materiality has to be addressed only in cases where, along the broken line, there is an attachment to another part of the structure. He did not comment on the meaning of the word "material".

32. Although Lord Wilberforce did not say that the word was to be given a different meaning from that which was given to it by Stephenson LJ, I think that the meaning which Stephenson LJ gave to it should now be disapproved. I agree with Lord Scott, Lord Nicholls and Lord Millett on this point, and I agree with them that the meaning which Nourse LJ gave to it in *Duke of Westminster v Birrane* should also be disapproved. As to the decision in this case, it is clear, on the agreed facts, that the area of the

overhang to which this part of the argument is directed was not material to the structure of the house at 76 Harley Street.

33. The discussion of this issue in the Court of Appeal was much influenced by the fact that the court permitted counsel for the applicant to amend his notice of appeal to take enable him to present an argument under reference to articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. I think that it should be mentioned, in fairness to the Court of Appeal, that the respondent did not seek to take that point in your Lordships' House. This has made it easier for your Lordships to concentrate on the essential question, which is the meaning which is to be given to the word "material" in the context in which it is used in section 2(2).

## **LORD HOBHOUSE OF WOODBOROUGH**

My Lords,

34. The present appeal raises two questions concerning the meaning of s.2 of the Leasehold Reform Act 1967. On the first question, that relating to the meaning of subsection (1), I entirely agree with the analysis and reasoning of my noble and learned friend Lord Hope of Craighead and do not wish to add anything. On the second question, the meaning of subsection (2), I have the misfortune to disagree with your Lordships and will shortly explain why I prefer the reasoning and decision of Nourse LJ and the Court of Appeal in *Duke of Westminster v Birrane* [1995] QB 262.

35. Subsection (2) is a qualification of subsection (1). It further limits the category of parts of a structure which can be treated as a house. It applies to a part of a structure which is not structurally detached from another part but which is divided vertically, that is to say from top to bottom, from another part of the structure. If the part is neither structurally detached nor divided vertically, it will not be a house under subsection (1). The added feature is that, for subsection (2) to apply, a "material" part of the house must lie above or below another part of the structure which is not comprised in the house. I am at one with my noble and learned friend in accepting that the words "of which" relate to the house identified by applying subsection (1). But that still leaves the question what the element of materiality has to be.

36. Subsections (3) to (5) only become relevant once the house has been shown to comply with the criteria in subsections (1) and (2). Subsection (5) only applies as between landlord and tenant; it is not dependent upon structural attachment; it applies to the premises of a house as well as the house itself. It applies criteria of hardship and convenience. I find no assistance here in answering the question of materiality under subsection (2).

37. The word "material" in subsection (2) requires the application of some criterion which the structural feature is material to. To put it another way, what is the materiality of the fact that part of the house lies above or below another part of the undetached structure? The first indication was given by Lord Wilberforce in *Parsons v Gage* [1974] 1 WLR 435 at 439. He referred to the exclusion by subsection (1)(b) of 'strata' separated by horizontal division possibly deriving from the (perceived) difficulty of providing for the enforcement of necessary positive covenants. He then seems to follow the same logic through into subsection (2) where the horizontal division is only partial. He does not refer to nor adopt what Lord Denning MR and Stephenson LJ had said in the Court of Appeal. The point of materiality had ceased to be in contention.

38. The point was specifically considered by the Court of Appeal in *Duke of Westminster v Birrane* [1995] QB 262 in which the only judgment was that of Nourse LJ, agreed to by Mann and Saville LJJ. He said that it did not mean simply 'not trivial, not insignificant': "In ordinary legal parlance 'material', used adjectivally, is not found in a vacuum. It imports a reference to something else. The thing to which it is applied must be material to some inquiry or for some purpose. It must be of sufficient substance or significance to have an effect of some kind." (p.270) He then went on to ask himself what was the test that Parliament could reasonably be supposed to have intended and answered that question in the same way as had Lord Wilberforce - the inability to enforce positive covenants against successors in title. (p.271) This was a considered and unanimous decision of the Court of Appeal directly in point and binding on the judge and the Court of Appeal in the present case. I consider that it should be followed.

39. To apply the test to the facts of this case, the agreed facts are:

"That part of 76 Harley Street which undercuts 27 Weymouth Mews provides support to the rear flank wall of 27 Weymouth Mews and, if the basement walls were to fall into disrepair so as to remove that support, the rear flank wall of 27 Weymouth Mews at ground floor and first floor level would fall down."

It is clear from this that the two parts of the undetached structure are mutually dependent upon each other in the same way as horizontally divided strata and that the rationale of subsection (1)(a) applies. Loyalty to the scheme of subsections (1) and (2) and to the statutory intent disclosed in subsection 1(a) shows that, where there is such a structural interrelation and interdependence, subsection (2) should be given effect to.

40. What is the alternative? It is argued that it is to be found in the judgment of Stephenson LJ in *Parsons* [1973] 1 WLR 845 at pp.853-4. Lord Denning had equated material with "important" and treated this assessment as simply a question of fact and impression. (p.849) Stephenson LJ rejected this. But then continued:

"Whatever meaning be given to 'material' in this context, whether I consider its size or its rateable value or its history or the use to which it is now put, I find it impossible to say that this part of the tenant's house was not material. .... It has value and importance to the tenant .... It must be worth taking over. .... Assuming that 'material' does not simply point the contrast with 'trivial' or 'insignificant', I think that it must mean material to the tenant or to his enjoyment of the house, and that if it is material in that sense it will be of such significance as to alter the house into a flat, and so take it outside the Act. " (p.854)

The concluding words recognise the relationship to subsection (1)(a) but if the relevant residential unit is correctly to be viewed as a flat it will not come within either (1) or (2) anyway. The guidance he gives earlier - size, rateable value, history, current use - scarcely seem to assist unless one is adopting a simple criterion of relative importance. If the test is "does the tenant think it is important to his wish to acquire the freehold of the whole house?", it either becomes assimilated to the test in subsection (5) or it becomes simply an election by the tenant whether he would prefer to get nothing if he cannot get the whole which, it can be commented, has nothing to do with the purpose of subsection (2).

41. What the application of the Stephenson approach comes down to in the present case is a comparison between the size and character of 76 Harley Street as a whole and 76 Harley Street without the undercutting end of the basement which had formerly contained two basement rooms. The answer would be that the owner of No.76 would say that the inclusion of those two additional rooms would add virtually nothing to the amenity of No.76. (Indeed, he would probably add that he would be better off without the undercutting end and the structural responsibility for the habitability of No.27 and legal the complications it entailed.) It follows from applying the Stephenson approach that, if the undercutting part was part of a residential unit which consisted, say, of only four rooms in all, the answer would be different although the structure of the building would be no different and the rationale of subsections (1) and (2) would not have been affected. Stripped of its embellishments, the language of Stephenson LJ really amounts to a criterion of the relative importance of the part in question to the tenant, the test adopted by Lord Denning and earlier rightly rejected by Stephenson LJ.

42. In my judgment the Stephenson test is unsatisfactory and does not give effect to the scheme and intention of subsections (1) and (2). The correct criterion is materiality of the tenant's part to the undetached structure. I would therefore answer both the questions in favour of the appellant and allow the appeal and restore the judge's judgment.

## **LORD MILLETT**

My Lords,

43. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Scott of Foscote. I gratefully adopt his account of the facts and description of the properties with which this appeal is concerned.

44. The Respondent Mr. Malekshad is the leasehold owner of two properties No. 76 Harley Street and No. 27 Weymouth Mews, both in Marylebone, London W1. The properties are held under a single lease.

The Appellant Howard de Walden Estates Ltd. is the freeholder. Mr. Malekshad claims to be entitled to enfranchise the two properties pursuant to Part I of the Leasehold Reform Act 1967 ("the Act"). If he cannot enfranchise both of them, then he claims to be entitled to enfranchise No. 76 Harley Street on its own. Both Mr. Malekshad's claims failed before the Judge (HH Judge Ryland), but his claim to enfranchise both properties succeeded in the Court of Appeal.

*The statutory definition of "house"*

45. Section 1 of the Act gives the tenant of "a leasehold house" who is occupying the house or part of it as his residence a right to acquire the freehold or an extended lease of "the house and premises," provided that certain qualifying conditions are satisfied. Mr. Malekshad occupies No. 76 Harley Street as his residence. He does not occupy No. 27 Weymouth Mews as his residence, but that would not prevent him from enfranchising it if it is part of the same "house". The critical question, therefore, is whether the two properties together or alternatively No. 76 Harley Street on its own is a "house" within the meaning of the Act.

46. "House" is defined in section 2 of the Act. The definition has several elements. Taking them in the order in which they appear in the section, a "house" is (strictly speaking includes)

- (i) any building which
- (ii) is designed or adapted for living in and
- (iii) which may reasonably be called a house
- (iv) 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 (subsection (1); but so that
- (v) (a) where the building is divided horizontally, the flats or other units into which it is divided are not separate houses, though the building as a whole may be; and
- (vi) (b) where it is divided vertically the building as a whole is not a house though any of the units into which it is divided may be; but so that
- (vii) it does not include 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 (subsection (2)).

With the exception of (ii) and (iii), all these elements are concerned with the structure of the building. I will take them in turn.

47. "*Any building*". A "building" is merely a built structure. For the purposes of section 2 of the Act, it need not be structurally detached and may be subdivided into self-contained units. So it may form part of a larger whole, and at the same time may itself be a composite whole formed by separate units. The word is, therefore, not used with any degree of precision. The necessary precision is obtained by other elements of the definition of "house". For the purposes of section 2, the same structure may be regarded as a single building or as several buildings. Thus a terrace of houses may constitute a single building even though each house in the terrace also constitutes a building in itself.

48. Given the degree of imprecision in the concept of a "building", I think that the primary purpose of the requirement that the house should form the whole or part of a building is to exclude other forms of residential accommodation such as caravans or houseboats. No doubt it goes further than this, for I do not see how two separate detached buildings can constitute a single building. But subject to this, I do not think that the question calls for the kind of historical, sociological and architectural investigation which was conducted by the Courts below in the present case. In my opinion No. 76 Harley Street is a building; and so are No. 76 Harley Street and No. 27 Weymouth Mews taken together.

49. "*Designed or adapted for living in*". This requirement is self-explanatory. It is satisfied in relation to both properties, and I need say nothing more about it.

50. "*Which may reasonably be called a house.*" An authoritative explanation of these words was

given by Lord Roskill in *Tandon v Trustees of Spurgeons Homes* [1982] AC 755 at p. 767. He made two particular points of general application which greatly influenced the Court of Appeal in the present case: (1) as long as a building of mixed use can reasonably be called a house, it is within the statutory definition of "house", even though it may also reasonably be called something else; and (2) it is a question of law whether it is reasonable to call a building a house.

51. Earlier in his speech, however, at p.764, Lord Roskill made an equally important point of which the Court of Appeal seem to me to have taken rather less notice. This is that the words "which may reasonably be called a house" are words of limitation. They serve to exclude from the statutory definition of a "house" premises which would otherwise fall within it but which could not reasonably be called a house. They do not operate so as to bring within the statutory definition premises which are outside it merely because they are capable of reasonably being called a house.

52. The point is important because the statutory definition of "house" does not end with this requirement. It continues, not only to bring in premises which might otherwise have been excluded ("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") but also to exclude other premises which might otherwise have been included (the individual flats or other units into which a building is divided horizontally and an entire building which is divided vertically). Where these further provisions extend the definition of a "house", the premises must also satisfy the requirement that they should be capable of being reasonably called a house. Where they limit it, however, the premises are not a "house" within the meaning of the Act, and they do not become one even if they could reasonably be so called.

53. *Where the building is divided horizontally.* In such a case the flats or other units into which it is divided are not separate "houses", though the building as a whole may be. "May be" not "is", because the building may not be reasonably capable of being called a house. A block of flats cannot reasonably be called a house, nor can an office block with a residential penthouse suite.

54. *Where the building is divided vertically.* In such a case the building as a whole is not a "house", though any of the units into which it is divided may be. Even if, as I think, the whole Harley Street terrace of which No. 76 forms part is a building, it is not a "house" because it is divided vertically into separate units. On the other hand, any of the units may be a "house". "May be" not "is", because a particular unit may fall outside the definition of "house" for any number of reasons. It may, for example, be a doctor's surgery with no living accommodation, and so not designed or adapted for living in. Or a material part of it may lie above or below another part of the structure. But a building which is divided vertically is not a "house", even though it may reasonably be called a house.

55. *"Of which a material part lies above or below a part of the structure not comprised in the house."* These words create a difficulty to which I shall return. For the moment it is sufficient to observe that references to "house" do not apply to such premises even though they may be reasonably called a house.

56. I have already expressed the view that No. 76 Harley Street and No. 27 Weymouth Mews taken together can be regarded as a single building. But Mr. Malekshad's claim to enfranchise both properties depends critically on its not being a building which is "divided vertically", in contradistinction to one which is "divided horizontally". The thinking behind the different treatment of the two cases is tolerably clear. The enfranchisement of part of a building has the effect of separating the freehold titles to different parts of a single structure. This is productive of considerable legal and other difficulties where the properties in different ownership lie one above the other; but not where they lie side by side. So-called "flying freeholds" are a relatively modern innovation and bring with them many problems which need to be resolved. These include but are not confined to problems of support. Who is to bear responsibility for the repair of the roof is another example. Terraces of freehold houses, by contrast, date back at least to the 18th century.

57. There is, however, no need to require the line of separation to be precisely horizontal or vertical, ie. at precisely 90 degrees to the vertical or horizontal as the case may be. Nor is there any need to insist that the line of separation should be an unbroken line, that is to say that it should lie in a single plane. It is not the geometric characteristics of the line of separation which matter but the structural relationship of the units into which the building is divided. In my opinion a building is divided horizontally if it is divided from side to side and vertically if it is divided from top to bottom. A building may, of course, be

divided both vertically and horizontally. A building which contained two flats on the ground floor and two on the first floor would fall into this category.

*Is Mr. Malekshad entitled to enfranchise both properties?*

58. In my opinion the answer is plainly "no". Even if No. 76 Harley Street and No. 27 Weymouth Mews are taken to be a single building, as I think they are, that building is not a "house" because it is divided vertically from roof to basement: the two properties into which it is divided stand side by side. The line of division does not lie in a single plane, so that part of No. 76 Harley Street lies below a part of No. 27 Weymouth Mews, but as Lord Wilberforce explained in *Parsons v Trustees of Henry Smith's Charity* [1974] 1 WLR 435 at pp. 439-40 this situation is dealt with by section 2(2). If the division of the building results in a material part of the house lying above or below another part of the same structure, then it is taken out of the definition of a "house". But it follows that if the part in question is not material, then it remains within the definition of a "house"; and this shows that the vertical division need not be in the same plane.

59. In considering whether No. 76 Harley Street and No. 27 Weymouth Mews together constituted a "house", the Judge asked himself whether the two properties "constitute one house or two houses". He (correctly as I have explained) found that they were two houses. He then went on to consider what he called a secondary question, whether the two houses were nevertheless a single house "reasonably so-called."

60. In the Court of Appeal Robert Walker LJ criticised the Judge for having asked himself wrong question (though in fairness to the Judge these may have been the terms of the preliminary question on which he was being asked to rule). It was said to be the wrong question because it was based "on the assumption that the building or buildings could not simultaneously be one house or two houses." This assumption, it was said, failed to take account of the decision in *Tandon v Spurgeons Homes*, which laid it down that a building of mixed use can reasonably be called a house even though it may also reasonably be called something else. Like the Judge, the Court of Appeal considered whether No. 76 Harley Street and No. 27 Weymouth Mews could reasonably be called a house. They agreed with him that they could reasonably be called two houses, but unlike him they considered that they could also reasonably be called a house.

61. I am bound to say that I find this conclusion a startling one. Whether a building can reasonably be called a house or can only reasonably be called something else is a question of appellation. The present question is not one of appellation but of number. I do not see how the same building can at one and the same time reasonably be called one house and two houses.

62. But there is no need to decide this. In my opinion the Judge asked himself the right question. The "secondary question" whether the two properties were reasonably capable of being called a house did not arise for decision if they were not a "house" at all; and because they comprised a building divided vertically they were not. The Judge was, of course, right to ask himself the "secondary question" in case he was wrong on the first. In my respectful opinion, however, the Court of Appeal fell into error by treating their answer to the secondary question as determinative of the issue in favour of Mr. Malekshad in circumstances when it was conclusively determined against him by the nature of the structural division of the building.

*Is Mr. Malekshad entitled to enfranchise No. 76 Harley Street on its own?*

63. This depends on whether No. 76 Harley Street is "a house ... of which a material part lies above or below a part of the structure not comprised in the house." Grammatically the words "of which" refer back to the words "a house" and not forwards to "a part of the structure not comprised in the house". So the question is whether the part of the basement of No. 76 Harley Street which lies under No. 27 Weymouth Mews is a "material part" of No. 76 Harley Street. If so, then the whole of No. 76 Harley street is excluded from the operation of the Act. If not, then subsection (5) comes into play, and Mr. Malekshad is entitled to enfranchise No. 76 Harley Street but may have to submit to the exclusion of the part in question.

64. Mr. Malekshad argued that, since the part in question must be a material part of the house which the tenant is claiming to enfranchise and not of anything else, it must be material in relation to the house

and not to any other part of the structure of which it forms part but which is not included in the house.

65. With all respect to those who think otherwise, I cannot agree that the proper grammatical analysis of the sentence is conclusive of the question. "A material part of a house" merely means "a part of the house which is material". So the words "of which a material part lies above....." merely mean "of which a part which is material.....lies above.....". They serve to identify the house and the relevant part, and tell us that the part must be "material". But they tell us nothing of the meaning of the word "material" or of the identity of the whole by reference to which the materiality of the part must be assessed.

66. The word "material" means "significant", and like that word its meaning is inherently ambiguous. It may mean "substantial" but it may equally well mean "relevant". In *Parsons v Trustees of Henry Smith's Charity* [1973] 1 WLR 845 the Court of Appeal adopted the former meaning and said that materiality must be judged exclusively by reference to the house which the tenant is seeking to enfranchise. Lord Denning said that "a material part" of the house meant "an important part" of the house. Stephenson LJ explained that it meant "material to the tenant or to his enjoyment of the house"; and that if it was material in that sense then it would be "of such significance as to alter the house into a flat". In *Duke of Westminster v Birrane* [1995] QB 262 by contrast the Court of Appeal adopted the latter meaning and said that materiality must be judged by reference to the structure of which the house forms part. Nourse LJ said, at p 271:

"I would therefore hold that if the part of the house which lies above or below a part of the structure not comprised in it is of sufficient substance or significance to make it likely that enfranchisement will prejudice the enjoyment of the house or another part of the structure.....then it is a material part of the house within section 2(2). In practice it may be found that that test will exclude from the operation of the Act houses of which little more than a trivial or insignificant part lies above or below a part of the structure not comprised in it...."

67. I do not find either approach satisfactory. The former has exclusive regard to the house which the tenant is seeking to enfranchise and takes into account the relative importance of the relevant part to the rest of the house with particular regard to the use to which the tenant is putting the part in question. This could have unfortunate consequences. If the relevant part of the house is relatively small but serves an important function, for example as the location of the central heating boiler, it seems that the house is taken out of the operation of the Act altogether, even though the part in question neither provides any significant degree of support to nor receives any significant degree of support from the rest of the structure. And even if the relevant part of the house does provide a significant degree of support to or receive a significant degree of support from the rest of the structure, it is difficult to discern any good reason why the whole house rather than the relevant part of it should be excluded from the operation of the Act. Lord Wilberforce did not comment on the approach of the Court of Appeal to this question when the case reached the House (beyond saying that the meaning of the word "material" was "open to discussion"), but this should not be taken as tacit approval. The point was no longer a live one, and Lord Wilberforce was characteristically reserving the question for the future.

68. The latter approach is equally unsatisfactory and for much the same reason. As Nourse LJ recognised, it must have the effect of excluding altogether from the operation of the Act a large number of properties in respect of which there can be no discernible reason for excluding the whole house rather than the relevant part from the operation of the Act.

69. In my opinion the key to the meaning of the word "material" in section 2(2) is provided by the context. The subsection forms part of a section which is concerned almost exclusively with structural matters and follows immediately upon provisions which are concerned with buildings which are vertically or horizontally divided. As Lord Wilberforce remarked in *Parsons*, section 2(2) deals with the case where the division is in a "broken line", that is to say where it is not in a single plane. Like the immediately preceding part of the section, therefore, it is also concerned with the layout of the building and the geographical relationship to one another of the units into which it is divided. It has nothing to do with the use which the tenant happens to make of the relevant part of the house when he serves his notice, or with the importance or value of the relevant part of the house relative to the whole. I do not think that Parliament can have intended that the larger or more valuable the house the greater or more valuable is the area of the relevant part required to preclude enfranchisement. This would give rise to all kinds of anomalies. In my opinion, the word "material" has an absolute and not a relative meaning. I would construe section 2(2) as referring to the case where part of the house lies above or below the rest

of the structure to a material degree.

70. This brings one to the question: what is meant by "to a material degree"? I think that in the context of section 2 as a whole, and having regard in particular to the presence of subsection (5), the word "material" must mean "substantial" rather than "relevant". There is no reason to ascribe to Parliament an intention to take the house out of the operation of the Act altogether if any prejudice to other parts of the structure can be dealt with under section 2(5). It follows that I cannot accept Nourse LJ's approach in *Duke of Westminster v Birrane*. I would construe section 2(5) as referring to the case where part of the house lies above or below the rest of the structure to a substantial extent.

71. This is a question of fact and degree and is primarily a matter for the trial judge. But in approaching the question he should bear in mind (i) that "substantial" does not mean "other than trivial" and (ii) that evidence that the relevant part of the house is structurally significant in that it provides a substantial degree of support to or receives a substantial degree of support from the rest of the structure is relevant but not decisive, since this problem falls to be dealt with under subsection (5). With due respect to Stephenson LJ, I do not think that the relevant part of the house must be so extensive that the house can be regarded as a flat. Section 2(2) is not needed to deal with such a case; it is excluded by section 2(1)(a). As Lord Wilberforce recognised, section 2(2) deals with the intermediate case where the building is divided vertically but in such a way that there is a substantial degree of overlay.

72. In the present case the part of No. 76 Harley Street which lies below No. 27 Weymouth Mews is not extensive. Excluding it from the operation of the Act while allowing Mr. Malekshad to enfranchise the rest of No. 76 Harley Street would not affect the character of his house. On the other hand it is structurally significant since it cannot be severed from the rest of the structure without giving rise to problems of support. The case is pre-eminently suited to the application of section 2(5).

73. Loyally applying *Duke of Westminster v Birrane*, as he was bound to do, the trial judge thought that the last-mentioned feature meant that the relevant part of the house was material. In my opinion this was an error of principle which entitles us to examine the question for ourselves. Like the majority of your Lordships I would place the case on the other side of the line. I do not consider that the part of No 76 Harley Street which lies under No. 27 Weymouth Mews does so to any substantial extent. It follows that section 2(2) does not have the effect of taking No.76 Harley Street out of the operation of the Act altogether. On the other hand the evidence showed that that part of No. 76 Harley Street provides a significant degree of support to the rear of No. 27 Weymouth Mews; so that the freeholder may well have a case for excluding that part from the operation of the Act.

### Conclusion

74. For these reasons, which are substantially the same as those of my noble and learned friend Lord Nicholls of Birkenhead, I too would allow the freeholder's appeal in relation to the two properties; set aside the declaration of the Court of Appeal that Mr. Malekshad is entitled to enfranchise both properties; and substitute a declaration that he is entitled to enfranchise No. 76 Harley Street alone. I agree that the case should be remitted to the County Court to decide, in the light of any counter-notice which the freeholder may serve, whether the part of No. 76 Harley Street which lies under No. 27 Weymouth Mews should be included in or excluded from the property to be enfranchised.

### **LORD SCOTT OF FOSCOTE**

My Lords,

The Issue

75. On 2 April 1997 Mr Nasser Malekshad, the leaseholder of 76 Harley Street and 27 Weymouth Mews, London W1, served on the freeholder, Howard de Walden Estates Limited, a notice under Part 1 of the Leasehold Reform Act 1967 of his desire to acquire the freehold of the demised premises. He served another similar notice on 4 April 1997. Nothing turns on the differences between the two notices or on the reasons why the second notice was served.

76. Mr Malekshad is the respondent on this appeal. Howard de Walden Estates Limited, the freeholder, is the appellant. The issues between them relate to the extent of the premises, if any, that Mr Malekshad is entitled to enfranchise under the provisions of the 1967 Act.

77. He claims to be entitled to enfranchise the whole of the premises comprised in his lease, that is to say, both 76 Harley Street and 27 Weymouth Mews. Alternatively, he claims to be entitled to enfranchise 76 Harley Street alone. The appellant, on the other hand, contends that 76 Harley Street and 27 Weymouth Mews, taken together, do not constitute a "house" as defined in section 2 of the 1967 Act. They accept that 76 Harley Street, taken alone, would ordinarily be a "house" but it is excluded from enfranchisement, they contend, by subsection (2) because it is not structurally detached from 27 Weymouth Mews and "a material part lies above or below a part of the structure not comprised in the house". So the issues are first, whether Mr Malekshad is entitled to enfranchise the whole of the premises demised by his lease and, second, if he is not, whether 76 Harley Street is barred from enfranchisement by section 2(2) of the 1967 Act.

### The buildings

78. At some time in the 18th century a block of land fronting on to Harley Street was developed by the erection of a terrace of several dwelling houses. Each dwelling house was built on a plot some 131 feet deep bordered on the west by Harley Street and on the east by what is now Weymouth Mews. At the Mews end of each plot a building, consisting of a coach house and stables with residential accommodation above, was erected. This Mews building was intended to be enjoyed in conjunction with the main dwelling house on whose plot it stood. It would accommodate the owner's horses and at least some of his servants. 76 Harley Street is one of the dwelling houses in the terrace. It is flanked to the north and to the south by other dwelling houses in the terrace. It has a basement, a ground floor and four upper floors. The basement underlies Harley Street by a few feet and then extends all the way to Weymouth Mews. The Mews building, now 27 Weymouth Mews, was built in part above the eastern end of the basement. But, as originally built with a ground floor and an upper floor, there was no access from the Mews building to the basement. The only access to the basement was from 76 Harley Street.

79. Over the years both 76 Harley Street and the Mews building were further developed. 76 Harley Street now consists of a flat and storage rooms in the basement, a ground and first floor maisonette, and a flat on each of the second, third and fourth floors. 27 Weymouth Mews is a separate residential unit consisting of two basement storage rooms, two garages at ground floor level and first floor accommodation. It will be apparent from these details that part of the original basement of 76 Harley Street has been incorporated into 27 Weymouth Mews. This building alteration was carried out in 1960. The two storage rooms that are now part of 27 Weymouth Mews were blocked off from the rest of the basement by bricking up the existing doorways. An access to them from the ground floor of 27 Weymouth Mews was constructed. There had originally been access to 76 Harley Street from the Mews building via a connecting door at ground floor level leading to an open yard at the back of 76 Harley Street. But at some time between 1935, when the Mews building was converted into a self-contained residential unit, and 1949, when conversion works to 76 Harley Street were carried out, the connecting door was bricked-up. There was then no means of access between 76 Harley Street and what had become 27 Weymouth Mews.

80. At some stage, probably in the middle of the 19th century, the south side of the ground floor of 76 Harley Street was extended along the southern boundary to meet the western flank wall of the Mews building. The extension reduced the area of the yard at the back of 76 Harley Street.

81. By a lease of 25 February 1949, under which the respondent is now the leaseholder, 76 Harley Street and 27 Weymouth Mews were demised for a term expiring on 6 April 1997 at a rent of £300 a year. The lessee was given power "to convert the buildings ... into high class residential flats or maisonettes . . .". The demised property was described as:

" . . . the messuage or dwelling house garage building and all other erections thereupon built . . . and being on the east side of and numbered 76 in Harley Street and on the west side of and numbered 27 in Weymouth Mews . . ."

It is apparent from this description, as well as from the plan attached to the lease, that in 1949 the occupation of 27 Weymouth Mews as a dwelling separate from 76 Harley Street had not yet commenced. The only significant development that had already taken place was that the coach house and stables had become garages and the southern ground floor extension of 76 Harley Street had been built. The conversion of 76 Harley Street into a maisonette and flats and of 27 Weymouth Mews into a separate, self-contained residential unit took place after the grant of the 1949 lease.

82. On 3 March 1960 the then leaseholder under the 1949 lease granted an underlease of 27 Weymouth Mews, including the two basement storage rooms, to a Dr McKenzie for a term expiring on 1 April 1997. Dr McKenzie was at the time the occupant of the ground and first floor maisonette in 76 Harley Street, where he had his consulting rooms. The 27 Weymouth Mews underlease gave him a personal permission to construct a doorway at ground floor level in the boundary wall of the Mews building in order to obtain access from 76 Harley Street to the 27 Weymouth Mews garages. Dr McKenzie covenanted, in the underlease, that on giving up his occupation of the 76 Harley Street maisonette he would close the doorway and restore the boundary wall to its previous condition.

83. Dr McKenzie gave up occupation of the Harley Street maisonette in about 1970 but he did not close the doorway or reinstate the boundary wall. In November 1974 a Dr Gomez acquired the underlease of 27 Weymouth Mews and remained in occupation until shortly before the underlease expired. Her evidence at trial was that during her occupation of 27 Weymouth Mews the doorway that Dr McKenzie had constructed remained locked and was never opened. On the Mews side, she said, the door had no door handle.

84. Mr Malekshad, as well as being the leaseholder under the 1949 lease, occupied the third floor flat in 76 Harley Street as his residence from November 1987 up to, and including, the dates on which his 1967 Act notices were served. He did not, during that period, occupy any other part of the 76 Harley Street or any part of 27 Weymouth Mews.

### The 1967 Act

85. Section 1 of the 1967 Act gives "a tenant of a leasehold house, occupying the house as his residence, a right to acquire on fair terms the freehold or an extended lease of the house and premises" provided certain qualifying conditions set out in the section are met. It has not been suggested to your Lordships that Mr Malekshad has not met these qualifying conditions. Section 1(2) provides that "references to a person occupying a house shall apply where he occupies it in part only." So the fact that Mr Malekshad's qualifying occupation relates only to the third floor flat in Harley Street does not disqualify him from claiming to acquire the freehold in the whole "house".

86. Section 2 of the 1967 Act defines "house":

"2(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.

(3) Subject to the following provisions of this section, where in relation to a house let to and occupied by 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 and are occupied with and used for the purposes of the house or any part of it by him or by another occupant."

It is convenient to set out also subsection (5):

"(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."

Before seeking to apply these statutory provisions to the facts of this case, it is convenient to make some observations about their meaning and effect. First, the definition in subsection (1), before one comes to the paragraph (a) and paragraph (b) qualifications, is expressed as an inclusive definition— ". . . includes any building . . ." etc. It is not expressed to be a comprehensive one. But I think it should be treated as comprehensive. If a building is not designed or adapted for living in or if it cannot reasonably be called a "house", the building cannot, in my opinion, be a "house" for 1967 Act purposes. Nor can a dwelling which is not a building at all be a "house", for example, a caravan (c/f *Ex parte Allen* [1985] EGLR 153) or a houseboat (c/f *Chelsea Yacht and Boat Co Ltd v Pope* [2000] 22 EG 147).

87. Second, the requirement that the building be reasonably called a house serves to exclude buildings such as purpose-built hotels or blocks of flats, none of which could reasonably be called a house. By contrast, a building which was originally designed as a house but was subsequently divided into self-contained units could often, perhaps usually, continue to be reasonably called a "house". This possibility is expressly left open by paragraph (a). Where a building designed for residential accommodation is divided horizontally into several units, none of the units can be a "house" for 1967 Act purposes, but the building as a whole may be. Paragraph (b) is the converse. Where a building designed or adapted for living in is divided into vertical units, the building as a whole cannot be a "house" although the individual units may be. As my noble and learned friend Lord Hope of Craighead pointed out in the course of the hearing, the whole Harley Street terrace block, of which 76 forms part, may be described as a building designed for living in. But although each of the vertically divided units may be a house, a combination of them cannot be.

88. The provisions of section 2(1) to which I have been referring do not satisfactorily cater for the case where the division of the building is a mix of the horizontal and the vertical. This must often happen when large houses are sub-divided into separate residential units. The division may have been made broadly on vertical lines but with some degree of horizontal division or it may have been made broadly on horizontal lines but with some degree of vertical division. In relation to such a building, how is section 2 to be applied? The section seeks to give the answer in subsection (2). Where the "house", the unit sought to be enfranchised, is not structurally detached, as it would not be in any case of vertical or horizontal division of a building, and where a "material part" of the house lies above or below some part of the structure of the building not comprised in the house, the enfranchisement rights conferred by the Act are not available. The house is not a "house" for the purposes of the Act. Subsection (2) raises an issue, fundamental in the present case, as to what criteria should be applied in order to decide whether the overhanging or underlying part of the house is a "material part", I must return to this.

89. If it is concluded that the overhanging or underlying part of the house is not a "material part" of the house and if the premises underneath the overhanging part, or above the underlying part, belong to the landlord of the house, then subsection (5) comes into play. The subsection allows the landlord to serve a counter notice on the tenant objecting to the severance that the enfranchisement would bring about. Then, unless the tenant agrees to the exclusion of the overhanging part, or the underlying part, from the premises to be enfranchised the court must decide whether the part should be excluded. And it will decide that question by comparing any hardship or inconvenience that would be caused to the tenant by the exclusion with the hardship or inconvenience that would be caused to the landlord by the severance.

90. There is a certain amount of authority as to the correct approach to subsections (1) and (2). In *Tandon v Trustees of Spurgeons Homes* [1982] AC 755 the issue was whether the premises of which enfranchisement was sought could reasonably be called a house. The premises consisted of living accommodation on the first floor of the building and a shop on the ground floor. The character of the premises was, therefore, a mix of residential and shop. Lord Roskill, with whose speech Lord Scarman and Lord Bridge of Harwich expressed agreement, accepted as correct three propositions that had been advanced by counsel, namely:

"First, the question whether the particular premises were a 'house' within the definition was a mixed question of fact and law . . . Secondly, if the premises might also be called something other than a 'house' within the definition, that fact alone did not prevent those premises from being a 'house . . . reasonably so called.' Thirdly, it was implicit from such previous decisions as there have been upon this question that premises used for non-residential as well as for residential purposes could in law be a 'house' within the definition and that it depended upon the character of the premises in question whether by reason of their mixed user they fell within or without the definition." (p. 765)

Although Lord Wilberforce and Lord Fraser of Tullybelton delivered dissenting speeches they, as well as the majority, approved the Court of Appeal decision in *Lake v Bennett* [1970] 1 QB 663 which had established that provided a building of mixed use could reasonably be called a "house", it fell within the section 2 definition even though it might also reasonably be called something else eg. a shop. (see pp. 760, 761 and 767).

91. As to subsection (2) there are two authorities to which I should refer. In *Parsons v Trustees of Henry Smith's Charity* [1973] 1 WLR 845 (in the Court of Appeal) and [1974] 1 WLR 435 (in your Lordships' House) the litigation arose out of the conversion of a building into two dwelling houses. A claim to enfranchise under the 1967 Act was made in respect of one of the dwelling houses. But two rooms and a bathroom overhung the garage of the other dwelling house. In the Court of Appeal attention was given to whether the overhanging part was a "material part" of the house of which enfranchisement was sought. Lord Denning MR said that it was. He said that a "material part" meant any "important part" (p. 849H). Stephenson LJ adopted a slightly more complex approach. He said:

"Assuming that 'material' does not simply point the contrast with 'trivial' or 'insignificant', I think that it must mean material to the tenant or to his enjoyment of the house, and that if it is material in that sense it will be of such significance as to alter the house into a flat, and so take it outside the Act. Whether it was material in that sense is a question of fact and degree . . ." (p. 854 D-E)"

Stephenson LJ also remarked on what he took to be some degree of conflict between section 2(2) and section 2(5). Under section 2(2) an overhanging or underlying part of the "house" would, if it were a material part, exclude the whole house from enfranchisement. But the material part in question would, he said, be excluded from the rest of the house by section 2(5), thus allowing the rest of the house to be enfranchised. But Stephenson LJ had no difficulty in agreeing with Lord Denning that, on the facts, the overhanging part of the house in question was a material part. So the case fell within section 2(2) and enfranchisement was precluded.

92. The tenant's appeal to this House was dismissed. The only substantive speech was that of Lord Wilberforce. His speech contains a valuable discussion of the function of section 2(2). After referring to subsection (1), to the exclusion from enfranchisement of units arising by horizontal division of a building and to the different treatment given to units arising by vertical division, Lord Wilberforce continued:

"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.

Undoubtedly some difficulty exists in reconciling subsection (2), so interpreted, with subsection (5) of section 2. That provides for the exclusion from the 'house and premises' of any part of them

which lies above or below other premises if the landlord gives notice of objection and either the tenant agrees to the exclusion of that part, or the court is satisfied that any hardship or inconvenience to the tenant is outweighed by the difficulties involved in severance. But it seems that subsection (5) is dealing with a different case from that covered by subsection (2): it omits any reference to 'not structurally detached' or to 'material part' and it adds a reference to 'premises' (see subsection (3)). So I understand the result to be that if a case falls within subsection (2) the whole 'house' is excluded from the operation of Part I of the Act. If, on the other hand, the different requirements of subsection (5) are satisfied, the part only may be excluded. I do not find anything in subsection (5) which is inconsistent with the meaning I would place on 'not structurally detached' in subsection (2).

In my opinion, section 2(2) interpreted as I would suggest, both gives the natural meaning to the words 'structurally detached', and fits in with section 2(1) . . . If this is the meaning of 'structurally detached', there is no doubt that Mr Parsons' property comes within the first part of subsection (2) and it must then be considered whether what lies over the garage is a material part of the house. The exact meaning of 'material' in this context is perhaps open to discussion. Whether, in any case, the part is material is a matter for the judge . . . I am reluctant, in relation to an issue which must be largely factual and one of common sense, to attempt a closer definition, all the more so as in this House the materiality of the overhang was not disputed . . ." (pp. 439 - 440).

Two points of relevance to the present case seem to me to emerge from the above cited passage.

93. First, Lord Wilberforce expressed no criticism of, and said nothing inconsistent with, Stephenson LJ's conclusion that 'material' must mean material to the tenant or to his enjoyment of the house. Second, whatever difficulty there may previously have been in reconciling subsection (2) with subsection (5) seems to me to have been resolved by Lord Wilberforce's remarks. Subsection (2), if it applies, takes the case out of the Act. Enfranchisement is not available. Subsection (5) is not relevant because, as Lord Wilberforce observed, it is dealing with a different case. It is dealing with a case where the house to be enfranchised does have an overhanging, or underlying, part but the premises below or above, as the case may be, are either not structurally attached or, if they are structurally attached, are not a material part of the house to be enfranchised. The cases to which subsection (5) applies are, therefore, cases where the tenant's right to enfranchise the "house" is established notwithstanding that some part may be above or below "other premises" belonging to the landlord. The "other premises" may be part of a building to which the house is structurally attached but not a material part of the house, or may be a building to which the house is not structurally attached or may simply be land. The common feature of all these cases is that they will necessarily for one reason or another, fall outside subsection (2).

94. The other subsection (2) authority to which I should refer is *Duke of Westminster v Birrane* [1995] QB 262. That case, like the present, arose out of a long lease which demised a main house together with mews premises. Conversion works later led to the mews premises becoming a separate dwelling house incorporating a basement area a part of which lay below the main house. The question arose whether the mews house was a "house" for 1967 Act purposes. The landlord contended that it was not because it came within section 2(2): it was not structurally detached from the main house and a material part of it, namely the basement, lay below the main house. The trial judge held that the basement area below the main house was not a "material part" of the mews house. The Court of Appeal allowed the appeal. Nourse LJ, with whose judgment the other members of the court agreed, did not accept as satisfactory the tests proposed by Lord Denning MR and Stephenson LJ in *Parsons*. As to Lord Denning's test, Nourse LJ said:

"'Important' is sometimes synonymous with 'material', but at other times it is not. The problems inherent in treating them as equivalents are demonstrated by the judgment of Judge Rich QC. He thought the basement area important because it would add considerably to the price of the house in the market. But he held nevertheless that it was not a material part of the house. So Lord Denning MR's test has not been helpful in this case."

He went on:

"My objection to Stephenson LJ's [test] is that although it is related, correctly as I believe, to the enjoyment of the house, it is one-sided. Why should 'material' mean material to the tenant or his enjoyment of the house, but not to the landlord?"

Stephenson LJ assumed that in section 2(2) 'material' did not, as it sometimes does, simply point the contrast with 'trivial' or 'insignificant'. As a matter of language I agree with him. In ordinary legal parlance 'material', used adjectivally, is not found in a vacuum. It imports a reference to something else. The thing to which it is applied must be material to some inquiry or for some purpose. It must be of sufficient substance or significance to have an effect of some kind. So Parliament must have intended that the part of the house, in order to be material, would be of sufficient substance or significance to have an effect of some kind. What might that effect be? Bearing in mind the primary purpose of section 2(2), I think it must be prejudice to the enjoyment of the house or another part of the structure caused by enfranchisement, in particular by reason of the inability of one freehold owner to enforce positive obligations against successors in title of the other.

I would therefore hold that if the part of the house which lies above or below a part of the structure not comprised in it is of sufficient substance or significance to make it likely that enfranchisement will prejudice the enjoyment of the house or another part of the structure, whether by reason of the inability of one freehold owner to enforce positive obligations against successors in title of the other or otherwise, then it is a material part of the house within section 2 (2). In practice it may be found that that test will exclude from the operation of the Act houses of which little more than a trivial or insignificant part lies above or below a part of the structure not comprised in it. But that is not a reason for rejecting the only test that Parliament can reasonably be supposed to have intended."

95. The last paragraph of this passage was cited and applied by Robert Walker LJ in the Court of Appeal in the present case (see para 27).

96. My Lords, I find myself unable to agree that Nourse LJ was right in adopting a test of what was a "material part" that depended upon the relationship between the part in question and the premises that lay above or below the part. In the context of section 2(2) the reference to "material part" is to a material part of the house to be enfranchised—"...of which a material part ...." etc. 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. A part of a "house" does not, in my opinion, become a "material part" for section 2(2) purposes on account of its importance or significance or materiality to premises which do not form part of the "house". Nor, in my opinion, in disagreement in this respect with what Stephenson LJ said in *Parsons* (p 854), would a part of a house become a "material" part on account of some special use to which a particular occupant might put, or propose to put, the part.

97. If, judged on this approach, the overhanging or underlying part of a "house" is a material part, the tenant cannot enfranchise. If it is not, he can enfranchise. An approach which judges the materiality of the overhanging or underlying part by reference to its relationship with the parts of the building or structure not comprised in the house, is not only inconsistent with the language of the subsection but would have the result that, for example, a trivial store cupboard or 18 ins of basement space of no conceivable importance or significance or value to the house to be enfranchised might result in disqualifying the "house" from enfranchisement. In disagreement with Nourse LJ I cannot believe that Parliament intended such a result. The problems about positive covenants to which Nourse LJ referred do not seem to me to be substantial. If the premises that lie above or beneath the part of the house in question do not belong to the landlord, the problems of severance, of flying freeholds, will have already arisen and the enfranchisement of the house, including the part, will make no difference. If the premises, on the other hand, belong to the landlord, the severance difficulties can be addressed under subsection (5). The landlord can serve a subsection (5) notice objecting to the severance. In a case where the "house" is not structurally detached and the tenant is contending that the overhanging or underlying part is not a material part of the house, the tenant's opposition to the landlord's objection to severance on grounds of "hardship or inconvenience ... to the tenant" could hardly be expected to succeed. (see ss. 5 (b)).

98. In my opinion, for the reasons I have given, the approach to subsection (2) for which *Duke of Westminster v Birrane* is authority ought not to be followed.

99. The approach to subsection (2) that I have suggested would have the consequence that where the division of a building has been mainly on horizontal lines, none of the several units could qualify as a house. It would be inevitable that the overhanging or underlying part of each unit would be a material part of the unit. But where the building has been divided mainly on vertical lines, with only a minor degree of horizontal division, the approach would make it possible for the vertical units, or at least some of them, to qualify.

100. Moreover, this approach dovetails, it seems to me with Chapter II of the Leasehold Reform, Housing and Urban Development Act 1993. The purpose of Chapter II was to enable a qualifying tenant of a flat, who would necessarily be unable to enfranchise under the 1967 Act, to obtain a new long lease on payment of a discounted premium (see Sch 13). 'Flat' is defined in section 101(1) as:

".... a separate set of premises (whether or not on the same floor)—

(a) which forms part of a building, and

(b) which is constructed or adapted for use for the purposes of a dwelling, and

(c) either the whole or a material part of which lies above or below some other part of the building."

101. It was clearly the intention of Parliament to bring about a state of affairs in which a dwelling which formed part of a building would either be a "house" under section 2(1) and (2) of the 1967 Act or, if it was not, would be a "flat" as defined in section 101(1) of the 1993 Act. Into which category would 76 Harley Street fall? It seems to me natural to regard it as a "house" rather than a "flat". A natural reading of paragraph (c) of the section 101(1) definition would require the "material part" to be a part material to the flat. If it is not material to the flat, then the dwelling cannot be a "flat" as defined.

102. It is, of course, not permissible to construe section 2(1) of the 1967 Act by reference to a later enactment. But the terms of section 101(1) of the later Act can at least serve to confirm the Parliamentary intention in enacting section 2(2) of the 1967 Act.

103. I must now turn to the two issues in the case.

Are 76 Harley Street and 27 Weymouth Mews a "house" for 1967 Act purposes?

104. The judge, Judge Ryland, held that they were not. He asked himself whether "the two structures form a house or two houses?" (para 18). In the Court of Appeal Robert Walker LJ commented that this question was based on "the unspoken assumption that the building or buildings could not simultaneously be one house and two houses". This assumption, the Lord Justice thought, failed to take account of the guidance given by this House in *Tandon v Trustees of Spurgeons Homes* (supra). *Tandon's* case was a mixed use case. The issue was whether a property, part of which was used as a residence and part of which was used as a shop, could reasonably be called a "house". This House held that mixed use was not necessarily a sufficient reason why a property could not reasonably be called a "house". The present case does not, however, involve mixed use. The purposes for which 76 Harley Street and 27 Weymouth Mews were being used when Mr Malekshad's notices were served was, bar the use of a small part of 76 Harley Street as a doctor's consulting rooms, wholly residential. The issue is whether premises which appear to be two separate houses can, for section 2 purposes, be a "house". This issue, unlike the issue in *Lake v Bennett* [1970] 1 QB 663 and in *Tandon*, is not an issue of appellation.

105. Judge Ryland took the view that the Act was envisaging one house, not two, as being the "house .... reasonably so called". He said that each of 76 Harley Street and 27 Weymouth Mews could reasonably be called a house, but that the two together could not (para 23). Robert Walker LJ thought that the judge had misdirected himself in concluding that two houses, each reasonably so called, could not together be a "house .... reasonably so called" for section 2 purposes. For my part I would prefer to leave the point open. I find it difficult to envisage how two apparently separate houses could together constitute a "house .... reasonably so called" but would not wish to exclude completely the possibility. I

prefer to concentrate on whether these two houses, 27 Weymouth Mews and 76 Harley Street could together reasonably be called a "house". The judge plainly thought they could not and I do not think his supposed misdirection, if that is what it was, drove him to a conclusion he would not otherwise have reached. But Robert Walker LJ came to a different conclusion. He said:

"From 1775 the entirety of the site between Harley Street and Weymouth Mews was occupied by a built structure .... and until some date in the 1930s (at the earliest) it would have been reasonable and natural to call the whole of that structure a house."

He then referred to the various conversion works that had taken place and continued:

"But the physical shape of the entire structure remained essentially the same, despite these internal rearrangements, from the middle of the nineteenth century until 1997 .... In my view it remained a single house, for the purposes of the 1967 Act, at the time when the notices were given." (para 38)

106. The first of these two passages contains, in my respectful opinion, a false premise which invalidates the conclusion. I do not think it would ever have been reasonable or natural to call the whole of the 76 Harley Street/27 Weymouth Mews structure a "house". 76 Harley Street was the house. The Mews building, comprising a coachhouse and stables, later garages, with accommodation above, was not part of the house. If anyone had asked the coachman or groom, or chauffeur, who occupied the residential first floor of the Mews building, whether he lived in his employer's house, he would answer that he did not and that he lived above the stables/garages. The housemaids and domestics who lived in the upper floors, or perhaps basement, of 76 Harley Street lived in the house. The occupants of the Mews building did not.

107. The Mews building would, in the days when it was still used for the domestic purposes of the owner of 76 Harley Street, have passed, whether or not expressly mentioned and unless expressly excluded, on a conveyance of 76 Harley Street (s. 62(1) of the Law of Property Act 1925). Subsection (3) of section 2 of the 1967 Act underlines the point. The enfranchisement right conferred by section 1 is a right to acquire "... the house and premises", and subsection (3) says that:

".... 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 .... with the house and are occupied with and used for the purposes of the house ...."

So the "premises" of 76 Harley Street would have included the coachhouse, stables, garages, and the residential accommodation, all of which were occupied and used for the purposes of the house.

108. In my opinion, it would never have been reasonable or natural to call the whole of the 76 Harley Street/27 Weymouth Mews structure a "house". The Mews buildings, 27 Weymouth Mews, was at one time part of the "premises" that would have been subject to enfranchisement with 76 Harley Street, the "house". Once 27 Weymouth Mews had become occupied separately from and otherwise than for the purposes of 76 Harley Street it would, of course, no longer have been part of the "premises" of 76 Harley Street.

109. In my opinion, in agreement with the judge and disagreement with the Court of Appeal, 76 Harley Street and 27 Weymouth Mews were not together a "house .... reasonably so called".

110. There is another reason why, in my opinion, the combined property cannot be a "house". If the building comprising both 76 Harley Street and 27 Weymouth Mews is considered as a whole, the division of the building into 76 Harley Street on the one hand and 27 Weymouth Mews on the other hand is a vertical division. As originally built, there was a horizontal division at basement level. But once a part of the basement had been incorporated into 27 Weymouth Mews, there was a vertical division of the building at basement level, as well as a reduced horizontal division. At ground floor level there was originally open space between 76 Harley Street and 27 Weymouth Mews but once the southern ground floor extension of 76 Harley Street had been built, there was a further vertical division of the composite building at the point where the extension met the Mews building. Accordingly, in my opinion, subsection (1)(b) prevents the composite building from being a "house" for 1967 Act purposes.

111. For these reasons I would allow the appeal against the Court of Appeal's decision that Mr

Malekshad was entitled to enfranchise the whole of the premises comprised in the 1949 lease.

Is enfranchisement of 76 Harley Street alone barred by section 2(2)?

112. There is no doubt that 76 Harley Street is a "house .... reasonably so called". The issue is whether it is disqualified from enfranchisement by section 2(2) on the ground that "a material part lies above or below a part of the structure not comprised in the house". The part in question is the part of the basement that lies beneath 27 Weymouth Mews. It comprises an area of about 27.3 square metres. Both Judge Ryland and Robert Walker LJ applied, as they were bound to do, the test of materiality prescribed by Nourse LJ in the *Birrane* case. They held that because part of the ground floor and first floor of 27 Weymouth Mews lie above and are supported by the 27.3 square metres of basement the freeholder's enjoyment of 27 Weymouth Mews would be prejudiced by the severance of the freehold of 76 Harley Street from that of 27 Weymouth Mews. In my opinion, however, for the reasons I have explained, Nourse LJ prescribed the wrong test. Judged by its relationship to 76 Harley Street as a whole the 27.3 square metres is of no materiality whatever. It is not a "material part" of 76 Harley Street, the house to be enfranchised. If it is important for the freeholder of 27 Weymouth Mews to retain ownership and control of the 27.3 square metres, and it may well be, the freeholder's remedy is to serve a subsection (5) notice in order to bring about the exclusion of the 27.3 metres from the premises to be enfranchised. Your Lordships have been given to understand that Mr Malekshad would agree to that exclusion. Even if he did not I can see no possible ground on which a court could fail to be satisfied that any hardship or inconvenience likely to be caused to the tenant by the exclusion would be out-weighed by the difficulties likely to result from severance of the 27.3 square metres from the premises lying above them.

113. Both the two 1967 Act notices served by Mr Malekshad seek the enfranchisement of 76 Harley Street and 27 Weymouth Mews together. There is, at present, no notice that seeks enfranchisement of 76 Harley Street alone. If one or other of the notices is proposed to be amended so as to exclude reference to 27 Weymouth Mews, the amendment should not, in my opinion, be permitted otherwise than on terms that allow the freeholders a reasonable period, not exceeding two months, within which to serve a subsection (5) notice relating to the 27.3 square metres.

## Conclusion

114. For the reasons expressed I would allow the freeholder's appeal against the Court of Appeal's decision that 76 Harley Street and 27 Weymouth Mews together constituted a "house" for the purposes of the 1967 Act. I would set aside the declaration by the Court of Appeal to that effect.

115. Mr Malekshad's originating application which came before Judge Ryland sought an order that he was entitled to acquire the freehold of both 76 Harley Street and 27 Weymouth Mews. Just as his 1967 Act notices were never amended so as to restrict his enfranchisement claim to 76 Harley Street alone, so his originating application has never been amended. Nonetheless before Judge Ryland, before the Court of Appeal and before your Lordships' House Mr Malekshad has contended, in the alternative, for the right to acquire 76 Harley Street alone. In my opinion, in disagreement with Judge Ryland and the Court of Appeal, he succeeds on that issue. I agree, therefore, that the case should be remitted to the County Court as my noble and learned friend Lord Nicholls of Birkenhead has suggested.