

# The saga continues

*New case commentary by Natasha Rees on the question of what constitutes a 'house' under the Leasehold Reform Act 1967*



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**'The judge in *Lexgorge* stated that he was bound by *Prospect*. He accepted the landlord's argument that actual user was a relevant factor in determining whether a building is a house reasonably so called. However, he also accepted the tenant's argument that the determining factor in *Prospect* was the lawfulness of the user.'**

Over the past few years there have been a number of decisions in the County Court, the Court of Appeal and the House of Lords on the issue of what constitutes a 'house' under the Leasehold Reform Act 1967. These cases have arisen as a result of the removal of the residence condition, which followed the introduction of the Commonhold and Leasehold Reform Act 2002. Before this Act came into force any tenant making a claim for the freehold under the 1967 Act had to be residing in the property. This meant that the question of whether the building qualified as a house was fairly straightforward. Since the 2002 Act came into force judges have had to consider whether a building constitutes a house in a range of different circumstances, and issues such as lawful use and planning appear to have become relevant.

The latest in this long line of cases is the County Court decision in *Lexgorge Ltd v Howard de Walden Estates Ltd* [2010], given by HHJ Dight on 15 February 2010. It considers the second limb of the house test, namely, what is a house 'reasonably so called' within the meaning of s2(1) of the 1967 Act. It contains a useful analysis of the recent decisions in this area of the law. In particular, it examines the *ratio* of the decision of the Court of Appeal in *Prospect Estates Ltd v Grosvenor Estate Belgravia* [2008], which overturned a previous decision of the same judge on the same issue.

## Background

*Lexgorge* concerned a building on the Howard de Walden Estate, which was constructed in the 18th century as a single private residence. The use of the building changed to commercial in about 1888. From then onwards there were a variety of commercial occupiers

until 1949, when planning consent was granted to convert the top two floors into a residential maisonette. Not long after this, a lease was granted allowing residential use on the top two floors.

From 1977 the building was sublet to a firm of solicitors which used the basement for storage and filing and the ground and first floors as offices. The actual use of the top two floors was slightly less clear. There was evidence to suggest that the top two floors had been left unused and derelict for a time in the early 1980s. They were later used as offices by a firm of surveyors. At the date of the claim, 4 March 2005, the head-lease of the property was owned by a property investment company, and the building itself was still sublet to the same firm of solicitors. The head lessee (*Lexgorge*) claimed that the maisonette was sublet to a member of the firm of solicitors, although there was no formal tenancy agreement. The judge, following his inspection, thought that the return of the maisonette to residential use was probably quite recent. The only access to the maisonette was through the front door of the building and up a common staircase. Since it was necessary to pass through the reception area used by the firm of solicitors to access the flat, the landlord contended that the residential maisonette could not be separately let.

On 4 March 2005 the tenant served notice on the Howard de Walden Estate, seeking the freehold of the house pursuant to the 1967 Act. The estate disputed the validity of the notice on various grounds. As a result, it was necessary for the tenant to issue a County Court claim seeking a declaration that it was entitled to acquire the freehold. In its defence to the claim the landlord stated that the demised premises did not constitute

a 'house' because the two limbs of the test under s2(1) were not satisfied. First, they were not 'a building designed or adapted for living in' and second they were not 'a house reasonably so called'. By the time that the case came to be heard it was accepted that the first limb of the test, as explained by Lord Neuberger in *Boss Holdings Ltd v Grosvenor West End Properties & ors* [2008], was satisfied since there had been no structural alterations since the property had been built, and it retained its original features.

### A house 'reasonably so called'

The judge felt that although he was considering the second limb of the test it was necessary to remember that the words are words of exclusion, as set out in *Malekshad v Howard de Walden Estates Ltd* [2002]. He also referred to *Tandon v Trustees of Spurgeons Homes* [1982], in which it was held that a shop with a flat above was reasonably called a house. In that decision Lord Roskill set out three propositions of law which he derived from the earlier authority of *Lake v Bennett* [1970] with a view to avoiding inconsistencies in judgments. The test was as follows:

1. As long as a building of mixed use can reasonably be called a house, it is within the statutory meaning of a 'house', even though it may reasonably be called something else;
2. It is a question of law whether it is reasonable to call a building a 'house';
3. If the building is designed or adapted for living in, by which is meant designed or adapted for occupation as a residence, only exceptional circumstances would justify a judge holding that it could not reasonably be called a house.

The judge in *Lexgorge* stated that he was bound by *Prospect*. He accepted the landlord's argument that actual user was a relevant factor in determining whether a building is a house reasonably so called. However, he also accepted the tenant's argument that the determining factor in *Prospect* was the lawfulness of the user. The fact that the prescribed use of 90% of the building was commercial was an 'exceptional circumstance' that took it within the third limb of Lord Roskill's test.

Having considered the recent decisions on this issue, the judge formulated a test which he felt should be followed to determine whether a building is a house:

1. Consider whether a building was designed or adapted for living in at the date of construction.
2. Consider whether it has been excluded from the definition of a house because it could not be a house reasonably so called bearing in mind that the words are words of exclusion rather than inclusion.
3. Look at all of the relevant information to determine whether there are exceptional circumstances which should lead one to conclude whether the building could not reasonably be called a house.
4. Consider among the relevant circumstances 'the prescribed and predominant use' (Mummery LJ), 'the lawfulness of the user' (Goldring LG), the actual, lawful and predominant user and whether the living accommodation is ancillary to the office (Smith LJ). These were all references to the judgments given in *Prospect*.

He then applied this test to the facts of the case. At the date of the claim the appearance of the building was that of a house. There was no actual residential user, and the judge concluded that there had not been for some time, although there only needed to be a change of furniture on the second and third floors to enable residential use to be resumed. The relevant planning consent and the user covenants in the lease meant that residential use on the second and third floors was lawful, and there was no requirement under the lease that the residential use was not ancillary to the office use.

The judge decided that it was more appropriate to determine the relevant proportions of residential to commercial use by considering the number of floors

than by measuring internal floor areas, especially where the floors were of a similar size. On this basis he concluded that the residential use required by planning and under the lease was substantial and the office use was not predominant. Although there had obviously been some office use of the top two floors, he felt that since this was

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unlawful it could not be an 'exceptional circumstance' that excluded the building from the definition of a house.

### Conclusion

It is clear that, as the law currently stands, it is necessary to consider a number of factors to determine whether a building qualifies as a house under s2(1) of the 1967 Act. Not only will the history and physical appearance of the building be relevant but also its use, as prescribed by the lease and the relevant planning authority. It is not clear how the test should be applied where a tenant has a lease which allows mixed residential and commercial use throughout the building and where the building is unoccupied at the date of the notice of claim. Practitioners will just have to apply the test to the building and the facts as best they can to decide whether there are 'exceptional circumstances' that justify a conclusion that the building can no longer reasonably be called a house. At the time of writing *Lexgorge* is the subject of an appeal. ■

*Boss Holdings Ltd v Grosvenor West End Properties & ors* [2008] UKHL 5

*Lake v Bennett* [1970] 1 QB 663

*Lexgorge Ltd v Howard de Walden Estates Ltd* (Unreported, County Court, HHJ Dight, 15 February 2010)

*Malekshad v Howard de Walden Estates Ltd* [2002] UKHL 49

*Prospect Estates Ltd v Grosvenor Estate Belgravia* [2008] EWCA Civ 1281

*Tandon v Trustees of Spurgeons Homes* [1982] AC 755