

# House rules

The removal of the residence condition for the purposes of leasehold enfranchisement has given judges more to take into account when considering the definition of a house, says **Natasha Rees**

**UNDER THE LEASEHOLD** Reform Act 1967, a leaseholder of a house can acquire the freehold if certain conditions are met at the date of claim. Since the introduction of the Commonhold and Leasehold Reform Act 2002, a tenant no longer needs to satisfy a residence condition except in limited circumstances. The tenant only has to satisfy a two-year ownership condition.

One consequence of this is that commercial tenants who previously could not satisfy the residence test may now qualify. Since there still remains a residence test where the tenancy is a 'business tenancy', a commercial tenant will only qualify if it does not occupy the property for the purpose of its business and can establish that the property is a 'house'.

As a consequence of this change in the law, judges have had to consider whether a building falls within the definition of a 'house' in a range of different circumstances that would not previously have arisen. Recently, HHJ Hazel Marshall QC gave judgment in the case *Hosebay Limited v Hugo Day and Lady Hillary Day*, which concerned a building that was being let as serviced apartments. This case provides a useful summary of recent decisions in this area and highlights the problems caused by the removal of the residence condition.

The case concerned three properties on the Day Estate in South Kensington. Hosebay acquired leases of each property in 1996. At the date of the claim, each property had been converted into 'serviced apartments', although the judge said they were better described as "rooms with self-catering facilities" and that the use of each property was as a "self-catering hotel".

Prior to the claim, the owners of Hosebay set up a company, Hindmill Limited, that took under leases of the properties, in order to create a situation where Hosebay was not occupying for the purposes of its business and not, therefore, subject to a residence test. Hosebay then served notice on the Day Estate to acquire the freeholds. The Day Estate disputed the validity of the notices on two grounds. First, they denied that the property was a 'house' within section 2(1) of the Act – the 'house' issue. Second, they

claimed that the lease in each case was subject to the 1954 Act, which in principle excludes a lease from falling under the 1967 Act – the 'business tenancy' issue.



## The 'house' issue

To qualify as a 'house' under section 2(1) of the 1967 Act, a property must be *designed or adapted for living in* and, if it passes that test, it must *reasonably be called a house*. Before the residence condition was abolished, the definition of 'house' did not cause too many problems because the tenant had to live in the building. It was therefore likely to be "designed or adapted for living in" and the words "reasonably so called" were treated as words of limitation. Since its removal, the definition has caused much judicial debate. The first limb of the test was considered by the House of Lords in *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] UKHL 5. The second limb of the test was considered more recently by the Court of Appeal in *Prospect Holdings Limited v Grosvenor Estate Belgravia*.

## The 'business tenancy' issue

The issues that had to be considered were whether the grant of the under leases by Hosebay to Hindmill and the transfer of the business to Hindmill were effective so that Hosebay was no longer in occupation for the purpose of its business when the claim was made and not, therefore, subject to a residence test.

The judge concluded that each property was a 'house' as defined by the Act. She stated that *Boss Holdings* and *Prospect* were clearly the two authorities that presently define the state of the law in this area.

In relation to the first limb of the test, she said she was not bound by *Boss Holdings* to accept that it was a simple alternative test. She considered whether the adaptation works had altered the physical structure such that it was no longer "designed or adapted for living in" and concluded that they had not.

In relation to the second limb of the test, she did not accept that *Prospect* introduced a test of user. She said that there would have to be "exceptional circumstances" for her to conclude that each property was not a "house reasonably so called" and that there were no such circumstances in this case.

In relation to the business tenancy issue, she was satisfied that, on the evidence, the transactions were not a "sham". As a result, she declared that Hosebay was, at the time of its notices, entitled to acquire the freeholds.

## Unusual circumstances

As a postscript, the judge added that she had reached her conclusion with reluctance but was at least satisfied that it arose from an unusual combination of circumstances. Although the circumstances were unusual, it is clear that tenants are becoming more ingenious in successfully de-coupling their business use and occupation from the relevant tenancy. There are also a number of commercial head lessees who are currently considering whether to make a claim where their building is already completely sub-let and no ingenious solution would be required.

Although the judge considered that the effects of the decision are likely to be confined to its peculiar facts, there are plenty of commercial tenants who will be pleased to see that steps can be taken to avoid the residence condition and that buildings in commercial use can, in certain circumstances, qualify for enfranchisement.

Natasha Rees is a partner at Forsters