When is a country house a house?

Lucy Barber looks at a case relating to excluded tenancies under the Leasehold Enfranchisement Act 1967

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'Parliament had not made a mistake in not referring instead to "house and premises" because interpreting "house" in either of the ways contended by the landlord and the tenant, both still resulted in odd situations arising'

There has been much litigation over the last few years as to what is meant by the word 'house' in s2 of the Leasehold Reform Act 1967. The question arose once again in the recent case of *Hertsmere Borough Council v Lovat* [2011] where the Court of Appeal had to decide what was meant by 'house' and 'adjoining land' for the purposes of s1AA(3)(b) of the 1967 Act.

Facts

The case concerned a claim for the freehold of a house and garden, known as Porterlea, Shenley Park, Radlett Lane, Shenley. The house and garden was surrounded by Shenley Park. Shenley Park is an area designated as rural land by the Housing (Right to Acquire or Enfranchise) (Designated Rural Areas in the East) Order 1997. The lease of the house was granted for a term of 125 years on 28 July 1995. The lease contained a rent escalator clause so that it was not a lease with a 'low rent' for the purposes of 1967 Act and did not, when it was granted, give enfranchisement rights to the tenant. The Housing Act 1996 was subsequently introduced, however, which amended the 1967 Act and inserted s1AA.

Section 1AA provides that where tenants do not fulfill the 'low rent' test a tenant can still enfranchise a property provided that it is not an 'excluded tenancy'. The definition of 'excluded tenancy' is set out in s1AA(3) of the 1967 Act and provides that a tenancy will be excluded where:

(a) The house which the tenant occupies under the tenancy is in an area designated for the purposes of this provision as a rural area by Order made by the Secretary of State;

(b) The freehold of that house is owned together with any adjoining land which is not occupied for residential purposes and has been owned together with such land since 1 April 1997; and

(c) The tenancy either was granted on or before that date or was granted after that date but before the coming into force of section 141 of the Common Hold and Lease Reform Act 2002 for a term of years "not exceeding 35 years'.

Decision at first instance

It was not disputed that the tenancy of the house satisfied s1AA(3)(a) and (c) and therefore the only question the court had to decide was whether or not the tenancy satisfied s1AA (3)(b).

The court at first instance found in favour of the tenant who argued that for the purposes of s1AA (3)(b), reference to the 'house' simply meant reference to the building itself, ie just the four walls and the roof.

In addition, the meaning of 'adjoining land' in that subsection referred to land that actually touched the house and not land that simply neighboured it. The 'adjoining land' in this instance was therefore the garden of the house.

Therefore, the house and garden was used for residential purposes; the tenancy was not excluded from the 1967 Act as it satisfied s1AA (b) and the tenant was able to exercise her right to enfranchise.

Court of Appeal

Meaning of 'house': the landlord's arguments

In the Court of Appeal the landlord argued that Parliament had made a mistake in the drafting of subsection (b). They maintained that Parliament meant to refer to 'house and premises' rather than just to 'house'. They said that if 'house' simply meant the house itself, then it would only apply in very rare circumstances because it was unusual to find a house that adjoined non-residential land. They gave an example of such circumstances by reference to a house that shared a party wall with a barn.

They also argued that the tenant's interpretation of what was meant by 'house' was incorrect because it would lead to absurdities. They gave an example of such absurdity by reference to a row of six terraced houses each with gardens at the front and rear, surrounded by non-residential land designated as a rural area by the Secretary of State. Taking the tenant's interpretation of 'house' meant that the tenants on the two end terraces would not be able to enfranchise their properties as they would directly adjoin the rural area whereas the houses in the middle would be able to enfranchise. The landlord contended that Parliament could not have intended such an anomaly.

The tenant was firmly of the view that 'adjoining land' meant land that directly touched the house, whereas the landlord was of the opinion that this meant land that neighboured the house.

Tenant's arguments

The tenant contended that it was inconceivable that Parliament had made a mistake in the manner suggested by the landlord. They said that Parliament did not mean to refer to 'house and premises' instead of just 'house' in s1AA(3)(b) of the 1967 Act. They said that the landlord's contention that 'house' should be interpreted as meaning 'house and premises' would also lead to odd situations arising and would create more problems then

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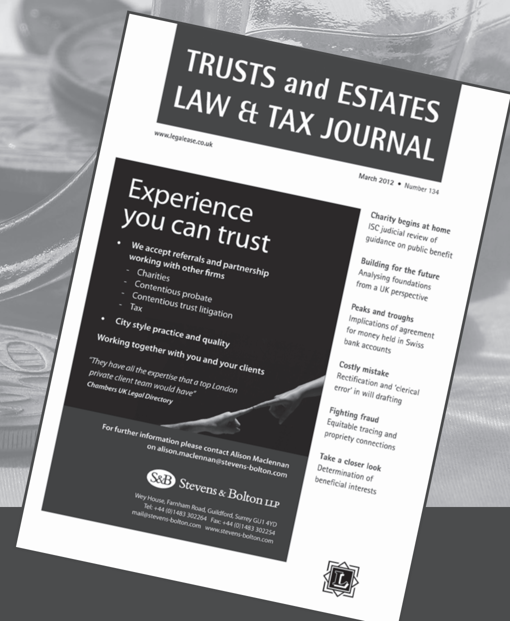

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it solved. To illustrate this point they also gave an interesting example. They asked the court to consider the case of a housing estate containing several houses with gardens at the front and rear. The housing estate is surrounded by a designated rural area. If the landlord's interpretation of 'house' was correct, it would mean that the houses on the edge of the estate whose gardens' abutted the rural area would not be able to enfranchise whereas the tenants of the houses in the middle of the housing estate who did not directly touch the rural area would be able to enfranchise.

The court said that 'the presumption is that Parliament does not intend to enact legislation whose application results in absurdities'.

What is adjoining land?

The next issue in dispute was the interpretation of 'adjoining land' in s1AA(3)(b) of the 1967 Act .

The tenant was firmly of the view that this meant land that directly touched the house, whereas the landlord was of the opinion that 'adjoining land' meant land that neighboured the house. The landlords emphasised again that in most cases (certainly in rural areas) houses would be surrounded by a garden and therefore 'adjoining land' could not be so narrowly interpreted as suggested by the tenant.

In considering the interpretation of 'adjoining land', the court looked at previous decisions, one of which was the Court of Appeal's decision of *Cave v Horsell* [1912] where the interpretation of the word 'adjoining' was considered. The case concerned a row of five shops and number 4 was let to cabinet makers. The landlord had given a covenant in that lease that they would not let any of the 'adjoining shops' that they owned for the purpose of a cabinet makers. The landlord let number 6 to another cabinet maker and when the tenant of number 4 claimed that they were in breach of their lease, the landlord argued that they were not in breach of the covenant because number 6 was not next to number 4. It was held in that case, however, that considering the context in which the word 'adjoining' applied, adjoining meant that the covenant applied to all the shops in the row that the landlord owned. 'Adjoining shops' were therefore all of the shops which the landlord owned in the row.

The Court of Appeal then considered the case of *Cobstone Investments Limited v Maxi* [1985]. In that case the tenants of the second, third and fourth floors of the building complained about noise from a tenant in the ground floor flat. The court had to decide whether the tenants who had issued the claim were 'adjoining occupiers?' The complaining tenants did not own property that directly adjoined the ground floor flat. The court in that case, however, held that the tenants were near enough to the ground floor flat to be affected by that tenant's behaviour and therefore they were 'adjoining occupiers'.

The final outcome

The court agreed with the tenants view of the definition of 'house' in s1AA(3)(b), ie that it did simply mean the building itself. Parliament had not made a mistake in not referring instead to 'house and premises' because interpreting 'house' in either of the ways contended by the landlord and the tenant, both still resulted in odd situations arising.

With regard to adjoining land they held that they could not interpret it as simply meaning land that was 'touching' the house. To do so would lead to absurdities, as had been highlighted by the landlord. They said that 'the presumption is that Parliament does not intend to enact legislation whose application results in absurdities'. They also said that the words had to be interpreted using the context in which they were used and therefore 'adjoining land' for the purposes of s1AA(3) means 'neighbouring land'.

The decision at first instance was thus overturned and the tenants were unable to proceed with their claim for the freehold of their house pursuant to the 1967 Act. It was an excluded tenancy because the house and 'adjoining land' were not occupied for residential purposes as 'adjoining land' in this context included Shenley Park, which adjoined the garden, and which was designated as a rural area.

Conclusion

The decision means that tenants of houses in the country who may have thought they had rights under the 1967 Act to purchase their freehold of their house will be unable to do so where their land and that of their neighbours has been designated a rural area by the Secretary of State.

It should be noted that the exclusion under s1AA(3) applies if the lease of the property is more than 21 years, it is granted before 1 April 1997 and the property is in a rural area and neighbours rural land. It also applies where the lease of the property is more than 21 years but less than 35 years, is granted between 1 April 1997 and 26 July 2002 and is in a rural area and neighbours rural land.

This provision does not therefore apply to leases granted after 2002 and is therefore only going to affect a fairly small number of properties. ■

Cave & anor v Horsell
[1912] 3KB 533

Cobstone Investments Limited v Maxim
[1985] 1 QB 140

Hertsmere Borough Council v Lovat
[2011] EWCA Civ 1185