'House' redefined

The Supreme Court's ruling on the meaning of a 'house' will come as relief to large estate owners, as Natasha Rees explains

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Enfranchisement practitioners have been waiting impatiently for the outcome of two appeals in the Supreme Court known collectively as 'Hosebay'. The appeals, brought by two central London Landed Estates, The Day Estate and the Howard De Walden Estate, were challenging a Court of Appeal decision that a property used for commercial purposes could qualify as a 'house' for the purposes of the Leasehold Reform Act 1967. In a decision given on 10 October 2012, the Supreme Court unanimously allowed both appeals.

It does seem excessive that it has been necessary to ask seven Justices of the Supreme Court to determine the meaning of the word 'house' when it is one of the 200 most frequently used words in the English language. The reason there have been so many appeals relating to this issue is because the house test when it was originally formulated was based on the tenant being resident in the building. The question of whether a building was a 'house' was therefore a relatively straightforward one. Since the removal of the residence condition in 2003, courts have had to consider claims from non-resident tenants where the building itself is being used in a variety of different ways. The various cases over the last ten years culminated in the latest appeal to the Supreme Court, known as *Hosebay*, which practitioners hoped would settle the issue once and for all.

Background

Section 1 of the 1967 Act enables a tenant of a 'house' let under a long lease to serve notice on its landlord seeking to enfranchise. Over the past 35 years the ambit of s1 has been successively extended. The value limitation was raised and then removed and the low rent test has in the majority of cases been removed. The last amendment, effected by s138 of the Commonhold and Leasehold Reform Act 2002, removed the residence condition and replaced it with a two-year test of ownership. Consultation papers that preceded the 2002 Act suggest that Parliament's aim in removing the residence test was to prevent the Act from being too restrictive. By removing the residence condition, tenants with second homes could benefit from the Act and it would also allow company tenants to enfranchise.

The consequence of the removal of the residence condition was that property investors and commercial tenants could seek to enfranchise. Parliament did try to mitigate the consequences of this amendment by introducing a two-year ownership test and a new subsection (1B), which effectively excludes business tenants. In practice, however, tenants can effectively avoid the two-year ownership test by asking the seller to make a claim which is then assigned to them. It is also possible to de-couple the lease from the business use by sub-letting. As a result, the 2002 Act opened up the enfranchisement legislation to a much wider variety of tenant, which, in turn, made the statutory test much harder to apply.

The statutory test

Section 2 of the 1967 Act contains the definition of a 'house'. In order to qualify as a 'house' under s2(1) a property must be 'designed or adapted for living in' and, if it passes that test, it must 'reasonably be called a house'.

The full wording of the section is set out in the box on p4.

The Supreme Court

Following the removal of the residence condition, the ambit of the 1967 Act was extended and tenants who owned leases of buildings that were formerly houses but had been converted into offices or hotels slowly realised that they might be

able to acquire their freehold. Landlords and in particular the Central London Estates in turn began to realise that they stood to lose valuable freeholds to commercial tenants and investors rather than the residential tenants that the Act had originally been enacted to protect. Lord Neuberger who gave the leading judgment when the *Hosebay* case reached the Court of Appeal said that this was a good example of the 'law of unintended consequences'.

It is against this background that the Supreme Court had to consider these two appeals and it is clear from the introduction to their judgment that they decided to consider the Act in the context of its original statutory purpose rather than trying to decide what the legislature would have said, had it known of these consequences. In their view there was no evidence of any ministerial or parliamentary intention to extend the scope of the Act.

In terms of the two-stage test they stated that both parts are complimentary and overlapping but both need to be satisfied at the date that the notice is served. When considering whether a house is designed or adapted for living in it is necessary to look at the function of the building based on its physical characteristics. When deciding whether the building can reasonably be called a house it is necessary to consider whether it is a 'single residence' as opposed to a hostel or block of flats. In each case, it is also necessary to consider the building as a place to live rather than as a piece of architecture or a street scene.

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The facts

The first appeal, *Hosebay*, concerned three buildings situated on the Day Estate in South Kensington. Each building looked like a large town house from the outside but was divided internally into small flat-lets that were let to foreign students and visitors to London. Hosebay had acquired the leases in 1996 and had served its claim in 2007. When the claim was made it was not in business occupation because it had sub-let the buildings to a company called Hindmill thus avoiding the more limited residence condition that applies to business tenancies. At first instance and in the Court of Appeal it had been decided that each building was 'designed and adapted for living in' and 'reasonably called a house'.

The second appeal, known as *Lexgeorge*, concerned a five-storey townhouse in Marylebone which, at the date of the claim was sub-let to a firm of solicitors. When the claim was made the whole building was being used by

the firm as offices although by the date of the trial the top two floors were in residential use. The lease restricted the use to residential use on the top two floors, offices on the first and ground floors and storage in the basement. It was conceded in this case that the building was 'designed or adapted for living in'. The judge at first instance and the Court of Appeal decided that the building was a 'house reasonably so called'.

The judgment

Lord Carnwath, who gave the leading judgment did consider previous well known authorities such as *Lake v Bennett*, *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] and *Grosvenor Estates Ltd v Prospect Estates Ltd* [2008], but derived most help from Lord Denning's judgment in a case from a different statutory context known as *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965], which related to the compulsory acquisition of properties for the purposes of slum-clearance. In this case Lord Denning had defined a 'house' as 'a building which is constructed or adapted or for use as, or for the purposes of, a dwelling'. When applying this test it is necessary to consider the identity or function of a building and if a building is empty this should be done by reference to its physical characteristics.

Applying this to the facts, the Supreme Court concluded that in the case of *Hosebay* the building which was being wholly used as a 'self catering hotel' was not a 'house reasonably so called' within the meaning of the statute. This was contrary to the Court of Appeal's view, which had been based on the external appearance of each building as a town house and the internal conversion into residential units. Lord Carnwath felt, however, that the internal adaptation of the building related to the first part of the test and that even if a building looked like a house and could be referred to as a house this could not displace the fact that the use was entirely commercial. He felt it unnecessary to consider the second part of the test but mentioned that adapted for 'living in' did mean something more settled than 'staying in' and that in the case of Hosebay the use did not qualify as 'living in'. He felt that the value of a two-part definition was that it becomes unnecessary to resolve such narrow factual issues.

Section 2(1)

'For the 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 divided are not separate houses although 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.'

In relation to the case of *Lexgeorge*, he allowed the appeal on similar grounds, namely, that a building used wholly for offices, whatever its original design or current appearance, is not a 'house reasonably so called'.

Conclusion

The judgment, which contains both legal and policy reasons for its conclusion, is clearly aimed at closing the loophole that allowed tenants of buildings wholly in commercial use to seek to acquire their freehold. As a consequence of the judgment, numerous claims will have to be withdrawn, including claims for significant buildings in Mayfair, Harley Street and Chelsea. The central London estates, such as the Grosvenor Estate, Cadogan Estate and Howard De Walden Estate, will be breathing a huge sigh of relief as a different outcome could have lead to a flood of claims, which in turn could have significantly reduced the size of their estates.

Practitioners will now have to consider how best to apply the test going forward. It is clear from the judgment that it will be necessary to consider the internal and external characteristics of the property and its current use at the date that the claim is made. If the 'function' of the building is to be lived in then it will be a 'house' for the purposes of the Act. Whether the building was originally designed as a house or was used as a house when the lease was originally granted will be irrelevant.

The key problem with this is that there are a number of buildings that remain designed or adapted for residential use but are being used as offices or hotels. Since it is the use of the building at the date of service of the notice that must be considered, it appears that a tenant in this situation need only arrange for such a building to be vacated in order to make a claim. It is also difficult to see how the test is applied to building in mixed use or a building that has been completely stripped out so that none of the previous design or adaptation is apparent.

One other issue that may arise is 'what constitutes commercial use'. Houses can be let out in a number of different ways. In *Hosebay*, the Supreme Court decided that short term letting of studio flatlets was a commercial use and on this basis decided that each building could not 'reasonably be called a house'. However, where a property is subdivided into flats that are let for slightly longer periods at what point does the building become a place to 'live in' rather than a business?

Although the judgment is clear that a building wholly in commercial use will not qualify, it is not the final word on 'houses' that everyone had hoped for. There are clearly situations that may arise that have not been contemplated and tenants will still be able to exploit these. Tenants who want to acquire the freehold of their building under the 1967 Act should consider the building and its use carefully before making a claim as there may be steps that can be taken before the service of the notice that will improve their chances of qualifying. ■

Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 1 WLR 1320

Day & anor (appellants) v Hosebay Ltd (respondent); Howard de Walden Estates Ltd (appellant) v Lexgorge Ltd (respondent) [2012] UKSC 41 on appeal from [2010] EWCA Civ 748

Grosvenor Estates Ltd v Prospect Estates Ltd [2008] EWCA Civ 1281

Lake v Bennett, Boss Holdings Ltd v Grosvenor West End Properties Ltd [2008] 1 WLR 289