What is a flat?

The Court of Appeal judgment in *Jafton Properties Limited* held that sub-let flats used as service apartments were commercial properties. **Natasha Rees** reports on the effects for tenants

The decision of the Supreme Court last year in the appeals collectively known as *Hosebay* made it clear that commercial tenants of 'houses' should not enjoy the benefits of the statutory enfranchisement regime. Although the *Hosebay* decision concerned the definition of houses under the Leasehold Reform Act 1967 it has had a far reaching effect. Most recently, it has been relied upon by a freeholder to prevent a collective enfranchisement claim of flats let as serviced apartments. In a judgment given in April this year known as *Smith and Dennis v Jafton Properties Limited* (2013), the central London county court decided that due to the transient nature of the occupation the apartments were not "flats" as defined by the Leasehold Reform Housing and Urban Development Act 1993.

This decision will obviously have a significant impact on the enfranchisement rights of tenants who sub-let their flats. It does not sit easily with the cases such as *Howard De Walden Estates v Aggio* (2008) where, as a matter of policy, it was held that following the removal of the residence test, commercial head tenants were entitled to extended leases of flats held under a head lease. It seems to follow a trend of the courts, who have become more restrictive in their approach to claims, particularly where tenants are using the premises for commercial purposes.

The case concerned a warehouse-style building close to Smithfield Market that in a previous life had probably been used for meat storage. The lease of the building was acquired at auction by City Apartments Limited in 2004. The building, which at that time was in a state of disrepair, was then converted into four loft-style apartments. Following its conversion, the lease was assigned in part to Mr Smith and in part to Mr Dennis so that they acquired two flats each, together with a share of the common parts. At the date of the notice of claim, the apartments were being sub-let to City Apartments Limited who, in turn, let them out as serviced apartments.

Following service of the notice of claim, the freeholder served a counter-notice challenging the claim on three grounds. The first of these was that the tenants were not "qualifying tenants" under the 1993 Act because they were joint tenants of all four flats and therefore qualifying tenants of none of them. This ground was decided in favour of the tenants by the court of Appeal in a decision given in 2011. The case then went back to the county court who had to decide the remaining grounds, namely, whether the apartments were flats as defined by section 101 of the 1993 Act and if so, whether the flats were occupied for non-residential purposes which would have excluded the building from the 1993 Act under section 4 of that Act. If the flats were considered to be residential, there was then a further issue regarding the basement and other areas of the building and whether these areas comprised residential or commercial space since this had an impact on whether the building was excluded.

On the issue of whether the apartments

were flats the landlord argued that the case was about use. They relied heavily on the *Hosebay* decision throughout and said that the use that the flats were being put to had been characterised by the Supreme Court in *Hosebay* as commercial use. They claimed that the 1967 Act and the 1993 Act were interconnected as they had a common purpose and that legislation operated in favour of residential use. They stressed the transient nature of the occupiers which was evidenced by the fact that the average length of stay was 18 days. They also claimed the assured shorthold tenancy agreements that had to be signed by the tenants at the commencement of each stay were of no legal effect.

The tenants submitted that the test should be a physical test rather than a test of use. The definition of a flat in section 101 of the 1993 Act defines a flat as "a separate set of premises which is constructed or adapted for use for purposes as a dwelling". They argued that the words "constructed or adapted" were more akin to the first limb of the "house" test which requires that a building is "designed or adapted for living in". The Supreme Court had made it clear in the case of *Boss Holdings* that the first limb of the test was largely a physical test. The tenants also argued that there was no need to imply any test of use into the word "dwelling" because when the 1993 Act was first enacted, there was a residence test in place already. It was only following the removal of the residence test that anomalies had begun to arise.

The judge said that his decision was finely balanced. On the question of whether the apartments were flats he considered that *Hosebay* decision was not determinative but was persuasive and that a multi-factorial approach was required. He stated that the definition of a flat as a set of premises designed or adapted for living in required some consideration, not only of the physical characteristics but also their current and subsequent use. Although the flats were capable of occupation on a long term basis, the manner of the bookings and the general pattern of occupancy more closely resembled hotel use. As a result of the transient nature of the occupancy, he felt that he could not say that the apartments were constructed or adapted for use for the purposes of a dwelling and so held that they were not flats for the purposes of the 1993 Act.

The judge also held, for much the same reason, that the apartments were not occupied for residential purposes. He considered that on this issue it was necessary to look further than the "snapshot" at the date of the hearing. It was necessary to consider the use from the date of the notice to the date of the hearing. He felt that although there might be some tenants who stayed for longer periods, the balance was tipped in favour of short term occupancy. The company was providing short term places to stay that were similar to rooms and flats provided by hotels and aparthotels, and he felt that this sort of occupation was not "residential". To be residential, he decided that occupation need not be as some kind of home, but must amount to more than simply staying for a short time.

Since it had been decided that the four apartments were not flats and were not residential, it was not strictly necessary to decide whether the building as a whole was more than 25 per cent non-residential. For the sake of completeness, however, the judge considered the use of the storage areas in the basement and the access to these areas. He decided that the storage areas were used and enjoyed by the tenants of the flats which meant they were residential. He also decided that the access to these areas constituted common parts. Common parts are excluded from the calculation when deciding the relative areas of commercial to residential. As a result of this, had the judge found in favour of the tenants on the first two grounds, the claim would have succeeded because the commercial areas would have constituted less than 25 per cent of the building.

The test in this case was different from *Hosebay* since it concerned a different Act but it has moved, very much in line with *Hosebay*, towards a test of use. There are, however, obvious problems with this.

Firstly, it is not clear whether the test of use is confined to the date of the notice. The decision seems to suggest that evidence, both past and present, can be relied upon to determine whether the premises are constructed or adapted for the purposes of a dwelling.

It also suggests that even though it is "current use" that is relevant to the question of whether the flat is in residential or commercial use – this need not be a "snapshot" at the date of the hearing but can include the period from the date of the notice to the date of the hearing. If the use of the premises is changed shortly before the notice is served, or if the apartment is empty at the date of the claim, how far back can the court look at the use of the premises to determine whether it is a flat?

It is also difficult to see what level of permanence is required. If on a collective claim a number of flats are being sub-let at the date of the claim, the landlord may be able to challenge the claim and seek evidence of how the flats are being used. Tenants will have to be ready to provide evidence such as tenancy agreements and council tax invoices. Even then, it is difficult to see how a landlord will be able to decide whether there is a sufficient degree of permanence for the flat to constitute a dwelling since it is not clear where any cut off in terms of the length of any tenancy will be. It also appears that they way tenants are 'booked' will have an impact. If the tenancy was arranged by a commercial letting agency rather than the actual tenant will this be considered to be commercial use? Although the residence test was removed in 2003, it appears clear that the courts are trying to limit the unintended consequences of its removal.

This is obviously a decision that will raise more questions than it answers and which will have wide ramifications for any individuals or companies that own flats which are sub-let and who are considering enfranchisement. At the date of writing it is not yet know whether the decision will be appealed.

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