Design for living: 'house' defined by reference to purpose and function

The Supreme Court decision in *Hosebay* closes a major loophole in enfranchisement law, but it is not the final word on what constitutes a 'house', says **Natasha Rees**

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 that is sure to upset tenants the Supreme Court unanimously allowed both appeals (*Day v Hosebay Limited; Howard de Walden Estates Limited v Lexgorge Limited* [2012] UKSC 41).

"There are clearly situations that may arise that have not been contemplated and tenants will still be able to exploit these smaller loopholes"

The plethora of appeals concerning the meaning of the word "house" have come about as a result of the removal of the residence condition on enfranchisement claims in 2003. Before this, the question of whether a building was a "house" was a relatively straightforward one because a tenant had to live in the building in order to make a claim. The change, brought about by the Commonhold and Leasehold Reform Act 2002, recognised the fact that a number of tenants owned their leases through a company which by definition could not "reside". After its removal, provided that the tenant itself was not occupying for the purposes of a business so that the lease was a business lease, the only test was whether the building was a "house".

Valuable freeholds

In order to qualify as a "house" a building must be "designed or adapted for living in" and, "a house reasonably so called". It is when this test is applied to buildings that are not being lived in that difficulties arise. Tenants who owned leases of buildings that were formerly houses but had been converted into offices or hotels suddenly realised that they might be able to compulsorily acquire their freehold. Landlords and in particular the central London estates 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 lead 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 outset of the judgment that they intended 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 necessary to consider the building as a place to live rather than as a piece of architecture or a street scene.

Section 2(1) of the 1967 Act: the house test

Meaning of "house" and "houses and premises", and adjustment of boundary.

(1)For 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 so divided are not separate "houses", though 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.

Source: www.legislation.gov.uk

Identity and function

Lord Carnwath, who gave the lead judgment did consider previous well known authorities such as *Lake v Bennett* [1970] 1 QB 663 and *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] UKHL 5 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] 3 All ER 371 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 both appeals the building did not qualify as a "house". The first case, *Hosebay*, concerned three buildings in Rosary Gardens, 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 itself 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. The Supreme Court justices concluded that although the buildings might look like houses or might be referred to as houses this was not sufficient to displace the fact that the use of the building was entirely commercial.

The conjoined appeal of *Howard de Walden v Lexgeorge* concerned a town house in Marylebone sub-let as offices to a firm of solicitors. It had been conceded in Lexgeorge that the building was "designed or adapted for living in". In previous decisions there was reference to a residential maisonette on the top two floors of the building however the judgment refers to the building as being "wholly used for offices" at the date when the notice was served. In view of the fact that the building was wholly in commercial use they decided that it could not be a "house reasonably so called".

Closing the loophole

The judgment which contains both legal and policy reasons for its conclusion is clearly aimed at closing the loophole which allowed tenants of buildings 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 flat lets 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? It seems that it may be necessary to consider cases concerning what constitutes a business tenancy under the Landlord and Tenant Act 1954 in order to decide this question.

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 smaller loopholes.

Tenants who want to acquire the freehold of their building under the 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.

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