SUPREME COURT HANDS DOWN IMPORTANT LEASEHOLD ENFRANCHISEMENT DECISION

By Paul Skinner

On 10 October 2011 the Supreme Court handed down judgment in the cases of Day v Hosebay *and* Howard de Walden Estates Limited v Lexgorge Ltd *[2012] UKSC 41 holding that properties originally designed for living in but which now have an entirely commercial user are not "houses" within the meaning of the Leasehold Reform Act 1967 and the tenant accordingly has no right to the freehold.*

BACKGROUND

The Leasehold Reform Act 1967 was designed to remedy a potential injustice to tenants of long residential leases terminating at the end of their term. This was particularly pressing because of the large swathes of South Wales which had been developed under the building lease system in the late 18th century, the leases of which were coming to an end. While some landlords and tenants had managed to negotiate extensions to the terms at affordable rents, many landlords took a strictly commercial approach and sought to evict tenants from their homes.

The Act unsurprisingly proved controversial among landlords and in particular those, such as the Duke of Westminster and the Earl of Cadogan who own large amounts of residential property in central London and Chelsea respectively and who stood to lose the freehold title to much of that property by virtue of the Act. Indeed, large landlords were so put out by the Act that they took their challenge to the European Court of Human Rights arguing that the Act brought about a disproportionate (and therefore unlawful) deprivation of their property rights. They lost on the basis that the Act pursued a legitimate social policy and fell within the UK's margin of appreciation under the Convention: *James v UK* (1986) 8 EHRR 123.

At the time of enactment the Ministry of Land and Natural Resources thought that 'different considerations of equity apply and there would be many practical difficulties in providing for

enfranchisement of flats' (Cmnd 2916, 1966 at para 8). While subsequent legislation was subsequently enacted in respect of flats, the Act accordingly only applies to houses.

WHAT IS A HOUSE?

This seemingly straightforward question has proved difficult to answer in practice and has generated a significant amount of case law at the highest levels. Section 2 of the 1967 Act provides that the definition of a house "includes any building designed or adapted for living in and reasonably so called". So caravans and houseboats are excluded because they are not buildings: *R v Rent Officer of Nottinghamshire Registration Area, ex parte Allen* [1985] 2 EGLR 153; *Chelsea Yacht & Boat Co v Pope* [2000] 1 WLR 1941. But what of property that is used for a business? In *Tandon v Trustees of Spurgeon's Homes* [1982] AC 755, the House of Lords confirmed that a property can be a house 'properly so called' even if it could also properly be called something else, such as a shop. Likewise, where a property that was designed or adapted for living in was now disused and stripped out to the basic structural shell, the House of Lords held that this was still within the statutory definition: *Bas Holdings Ltd v Grosvenor West End Properties Ltd* [2008] UKHL 5.

> *"Context and common sense argue strongly against a definition turning principally on historic design, if that has long since been superseded by adaptation to some other use." The expression designed or adapted for living in "can only be taken as directed to the present state of the building"*

Importantly, in the *Bass Holdings* case, Lord Neuberger considered that the phrase "designed or adapted for living in" was disjunctive. That is, a property is capable of being a house *either* if it was designed for living in (regardless of whether it is or can now be lived in) *or* has been adapted for living in (presumably because it was not designed for living in). This would mean that a house which has been converted into offices would still be within the scope of the Act and the business tenants would be able to claim ownership of the freehold. Whether Lord Neuberger was correct to say this was the issue in the present case.

THE FACTS

In *Day v Hosebay*, Hosebay was the freehold owner of three properties at 29, 31 and 39 Rosary Gardens, South Kensington, London SW7. They were originally built as separate houses as part of a late Victorian terrace. The current leases of Nos 29 and 39 were granted in 1966 for terms expiring in December 2020 to be used as 16 high class self-contained private residential flatlets. The lease over

No 31 was granted in 1971 for a term expiring in 2030 with use restricted to a single family residence or a high class furnished property for accommodating not more than 20 persons. The current use of the properties was not in accordance with those restrictive covenants, the properties being used as a self-catering hotel.

Howard de Walden Estates v Lexgorge related to a property at 48 Queen Anne Street, Marylebone, London W1. It was built as a 5-storey house in a terrace of substantial houses in the early 18th century. In so far as is relevant, it has been in entirely commercial use since 1888. The current lease was granted in 1951 for a term of 110 years and restricted its use to self-contained flats or maisonettes on the upper two floors, professional offices on the first and ground floors and storage in the basement. It is a listed building. English Heritage's records describe it as a "Terraced House".

ARE THESE PROPERTIES HOUSES?

If Lord Neuberger's observations in *Bass Holdings* were correct, it would be enough that the properties in these cases were originally designed as houses for them to fall within the scope of the Act. In the Court of Appeal in these cases, Lord Neuberger MR considered however that he had been wrong and had adopted an over-literalist approach to the interpretation of s.2 of the 1967 Act. Lord Carnwath, giving the judgment of the Supreme Court, agreed: "Context and common sense argue strongly against a definition turning principally on historic design, if that has long since been superseded by adaptation to some other use." The expression designed or adapted for living in "can only be taken as directed to the present state of the building".

Accordingly the properties in the *Hosebay* case, were not houses "properly so called". The fact that the buildings might look like houses and might be referred to as houses for some purposes is not sufficient to displace the fact that their use was entirely commercial. Likewise in *Lexgorge*, a building wholly used for offices, whatever its original design or current appearance is not a house reasonably so called. The fact that it was designed as a house and is still described as a house for many purposes, including architectural histories, is beside the point.

COMMENT

This case will provide a much awaited sigh of relief for landlords who have lost property of a very large value indeed and who had sought to avoid the provisions of the 1967 Act by converting the houses into commercial assets. The Supreme Court's interpretation of the meaning of "house" is also clearly in accordance with the underlying purpose of the Act, namely to prevent people losing their

homes, not to provide a windfall to commercial entities at the expense of another. Indeed, the justification which the European Court of Human Rights found proper in *James v UK* is entirely lacking in the commercial context.

There is one difficulty however with interpreting the Act in this way – it is not what the Act says. A property which is "designed *or* adapted for living in" on its face does include those properties which were designed for living in but which have now been adapted for commercial (or other) purposes. Arguably therefore the Court should have held that these were houses and left it to Parliament to remedy any inconsistency between the intention and the effect of the enactment. From a practical point of view however, while the Supreme Court has stretched the natural meaning of the words used, the result has avoided the need for political wrangling and the bringing of statutory amendments.

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