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CASE STUDY

A tenant law firm occupies a four storey Georgian property in Mayfair for the purposes of its business. The property was originally built as a house, and was used as such for around 150 years until, shortly after WWII, it was let for a 99 year term as offices. The lease forbids the use of the premises for residential use, except in relation to a small attic ‘flat’ which is only to be used by an employee of the tenant occupier. The flat has, in reality, been used for storage for a number of years.

The lease also obliges the commercial tenant to maintain the property so as to give the outward appearance of residential occupation, and forbids the tenant from making any structural alterations (in fact no major amendments have been made to structural items since the granting of the lease).

Can the tenant law firm enfranchise the freehold interest in the premises?

DISCUSSION

Introduction

1. In recent years landlord and tenant law has generated only a handful of decisions by the House of Lords. However, their Lordships have shown remarkable enthusiasm for cases concerned with leasehold enfranchisement and, specifically, the meaning of “house” for the purposes of the governing statute, the Leasehold Reform Act 1967. The issue has been before them four times: (i) *Parsons v Viscount Gage* [1974] 1 WLR 435; (ii) *Tandon v Trustees of Spurgeons Homes* [1982] AC 755; (iii) *Malekshad v Howard de Walden Estates Limited (No.1)* [2003] 1 AC 1013; (iv) most recently, *Boss Holdings Limited v Grosvenor West End Properties* [2008] 1 WLR 289.

The 1967 Act

2. Section 2(1) of the 1967 Act provides:

“‘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 ...”

3. The 1967 Act has been amended on numerous occasions, perhaps most significantly by the removal (under the Commonhold and Leasehold Reform Act 2002) of the original residence requirement imposed by section 1; residency is no longer a precondition to eligibility to enfranchise. Section 2(1) has, however, remained unscathed, so it is all the more surprising that its meaning and effect has warranted judicial consideration at the highest level so often.

“Designed or adapted for living in”

4. *Boss Holdings* concerned a property (consisting of a basement, ground and four upper floors) which was built in the 1730s as a single private residence. It remained used as such for over 200 years. However, from the 1940s the lower floors were used as commercial premises. The residential use of the upper floors continued but this too eventually lapsed. By the time of the tenant’s notice of claim under the 1967 Act, the upper floors had been stripped out to the basic structural shell and the property was generally dilapidated with the result that it was no longer physically fit for immediate residential occupation.
5. At first instance and in the Court of Appeal it was held that the premises were not “designed or adapted for living in” for the purposes of section 2(1). However, the House of Lords disagreed. Lord Neuberger, with whom the other law lords agreed, held that the statute, requiring consideration of whether a property is “designed ... for living in”, looks to the past – this being most clearly signified by the use of the past participle “designed” – and focuses on the physical state of the property as initially built: for what purpose was it originally

designed? One then goes on to consider whether any subsequent work has been undertaken so that the original “design” has changed and has been adapted for another, and if so what, purpose. Either way, the issue is whether the purpose for which the property was designed or later adapted was “for living in”.

6. In Lord Neuberger’s judgment, section 2(1) – defining “house” – is not concerned with whether a property can be physically lived in, especially bearing in mind the original, albeit now displaced, section 1 residence requirement. The fact that a property is not fit for immediate residential occupation is no bar as such to qualification as a “house”. No such condition is imposed by section 2(1).
7. The House of Lords held that the property in *Boss Holdings* was designed for living in when it was first built. Nothing that had happened in the intervening years (including the stripping out of the upper floors and the general dilapidated state of the property) detracted from that. The upper floors remained “designed” to be lived in and the lower floors were still structurally laid out substantially as they were originally when in single residential occupation; there had been no significant change in internal layout. Further, the external appearance of the building had not materially been altered. Consequently, the property was a “house” and the tenant was entitled to enfranchise.
8. Here the physical characteristics of the Georgian Mayfair property remain essentially as designed and constructed 150 years ago, namely as a house. The property has not undergone any radical transformation. (Indeed, even a property designed for living in but subsequently adapted to another use may well remain a ‘house’, although Lord Neuberger left this point open.) Applying *Boss Holdings* and focussing on physical state, the fact that the property’s overall use has not been residential in recent years seemingly does not matter. *Boss Holdings* is strongly suggestive of an affirmative answer to the question.

“Reasonably so called”

9. However, *Boss Holdings* was concerned only with the issue as to whether the premises were “designed or adapted for living in”. This is a necessary, but not a sufficient, precondition for premises to constitute a “house” for the purposes of the 1967 Act. Section 2(1) imposes a further hurdle, namely that the property must be a house “reasonably so called”. These “words of limitation” mean that premises are not to be treated as a house merely because they are a building designed or adapted for living in unless they can also in ordinary parlance be reasonably described as a “house”: *Tandon*, per Lord Roskill.
10. For many years it was thought that it was not difficult to satisfy the “reasonably so called” test. Dicta of Lord Roskill in *Tandon* were interpreted as suggesting that the further requirement added little in practice. In that case the House of Lords was concerned with a purpose-built shop with flat above in a parade of similar buildings. The majority of their Lordships (3:2) held that such a property – to be found up and down the country – could reasonably be called a “house”. In reaching this conclusion, Lord Roskill laid down three propositions of law:

“(1) as long as a building of mixed use can reasonably be called a house, it is within the statutory meaning of ‘house,’ even though it may also reasonably be called something else;
(2) it is a question of law whether it is reasonable to call a building a ‘house’;
(3) *if the building is designed or adapted for occupation as a residence, only exceptional circumstances, which I find hard to envisage, would justify a judge in holding that it could not reasonably be a house. They would have to be such that nobody could reasonably call the building a house.*”

The belief was readily understandable in the light of the third proposition.

11. However, Lord Roskill was speaking in different times. In 1982 the residence requirement was alive and well. His conclusion that it would

be an extreme case in which premises (necessarily occupied by the claimant tenant as a main residence) were, despite being designed or adapted for living in, somehow not to be regarded as a “house” must be seen in that context. The removal of the residence test requires the courts to grapple with cases which that test previously filtered out and which involve properties that are only marginally residential.

12. A recent example is *Prospect Estates Limited v Grosvenor Estates Limited* [2008] EWCA Civ 1281. The property was a flat-fronted, terraced, early Victorian building. Apart from the addition of a couple of floors, no major structural works had been carried out to it since its construction. It still looked like a house to any passer-by. Against that background, and in the light of *Boss Holdings*, it was accepted that the property was “designed ... for living in”. However, the challenge to the tenant’s enfranchisement claim was put on a different basis. The landlord contended that the building was not a house “reasonably so called” at the date of the notice of claim because at that date 88.5% of the building was used as offices, with only the top floor being used as residential accommodation. It also relied on the terms of the tenant’s lease, restricting the use of the lower floors to offices and the top floor as a flat in the occupation of someone associated with the business occupier. The tenant for its part placed emphasis on Lord Roskill’s third proposition (cited above).

13. Reversing the first instance judge, the Court of Appeal held that the building was not a house “reasonably so called”. Although Lord Roskill’s propositions were said to be part of “the authoritative interpretation of section 2(1)”, they “are not a statutory text and were never intended to be understood or applied as such”. It is necessary to take account of all the relevant circumstances in reaching a decision as to whether a property is a house “reasonably so called” (a concept said to have a degree of flexibility).

14. What weighed with the Court of Appeal was the circumstance of prescribed and predominant office use in compliance with the lease. The combination – the prescriptive terms of the lease, the actual uses of the building and the relative proportions of the mixed use (i.e. the preponderant office use) at the relevant date – was viewed as the overwhelming and decisive feature, sufficient to render the case peculiar or even “exceptional” (to echo Lord Roskill). Weighing all the factors, the property – a building in almost 90% of which no-one could lawfully live – was an office building and not a house “reasonably so called”.

15. Following *Prospect Estates* the notion that the abolition of the residence requirement, coupled with the tenant-friendly decision in *Boss Holdings*, means that enfranchisement of essentially totally commercial buildings is on the cards no longer holds good. Exclusive concentration on the physical condition and appearance of a building is inappropriate. Consideration must also be given to the actual and permitted use of the property. This accords with what Lord Roskill had said in *Tandon @ 766*:

“The character of the premises ... will usually though not perhaps invariably reflect its history. Accordingly the history will be relevant though certainly not conclusive. The terms of the lease will also be relevant as will be the proportion of the premises respectively used for residential and non-residential purposes, and also the physical appearance of the premises.”

16. The result is that, although there may be some relatively clear-cut cases (e.g. hotels, hostels, purpose-built blocks of flats, factories with caretaker’s accommodation and office blocks with a residential unit: see *Prospect Estates*, per Mummery LJ & *Tandon*, per Lord Fraser (dissenting)), the dividing line between what is and what is not a house “reasonably so called” may often be rather hazy. When is a case sufficiently “exceptional”? Each case will turn on its own facts and there will be questions of degree. It is instructive to compare and contrast: (i) *Tandon* – minimum of 25% of the property used

residentially (held to be “substantial”); (ii) *Boss Holdings* – premises unoccupied, but formerly half in commercial use and half in residential use in accordance with the terms of the lease (the issue as to whether the property could reasonably be called a house not being before the House of Lords, although Lord Neuberger expressed the view that the judge had been plainly correct to hold that it could); (iii) *Prospect Estates* – only 11.5% of the property lawfully in residential use and that only in conjunction with the required office use of the remainder.

17. Returning to the question, this case has obvious parallels with *Prospect Estates*. Although the property was originally built as a house and can still properly be regarded as designed as such, this is not decisive. Regard must be paid to the terms of the lease and the nature of the actual use of the property. Since the grant of the lease soon after WWII the overwhelming bulk of the property has been, and may lawfully be, used only for non-residential purposes. Further, the permitted residential use is: (i) merely ancillary to the predominant business user; (ii) not in fact present on the ground. To this may be added that the stipulation in the lease that the tenant keep the building looking like a private house goes to appearance alone and is not a factor that points to the building being a house “reasonably so called”: see *Prospect Estates* in which a similar covenant was regarded as of no consequence.

Conclusion

18. Taking account of all the circumstances, the tenant law firm cannot enfranchise the freehold in the premises.

Postscript

19. In *Tandon* Lord Roskill stated that it is imperative, if the law is to be evenly and justly administered, that there should be not only uniformity

of principle in the approach of the courts to the question but also a broad consistency in the conclusions reached. However, in *Prospect Estates* Mummery LJ observed that the extent of judicial disagreement in *Tandon* indicated the challenge to achieving the consistency of outcomes to which the law aspires. Whether the position which has now been reached is satisfactory and in line with what Lord Roskill had in mind is doubtful, not least because it seems that exceptional cases may well become more common in the light of *Prospect Estates*. On any view, both *Boss Holdings* and *Prospect Estates* leave interlocking matters up for future argument, such as whether a building initially designed for living in but later converted to a commercial unit constitutes a house “reasonably so called”, especially where the lease permits both residential and business use.

Happy litigating!

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