What is a house?

By Alex Johnson
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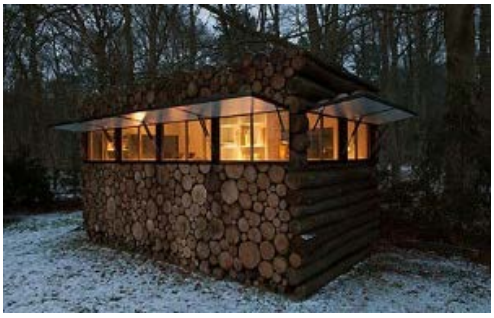

A line of legal cases which allowed leaseholders of commercial premises the right to force their landlords to sell them the freeholds of their buildings, for a reduced price, has been considered and rejected this week, *writes Paul Greatholder, partner in the contentious property department of Russell-Cooke LLP.*

The Supreme Court is the highest domestic Court in England and Wales. In a judgment given on 10 October 2012 in a case called Hosebay the Supreme Court gave its view on a question which many people would have been surprised to learn remained unanswered, namely, 'what is a house'?

The question had arisen because of a change in the law. In 1967 Parliament passed an Act called the Leasehold Reform Act which gave long leaseholders of houses the right to buy (or 'enfranchise') their freeholds if certain criteria were met. The price was fixed by a formula under the Act which was below open market value. The 1967 Act was seen as confiscatory by some landlords on its introduction, including one of the most famous landlords of all, the Duke of Westminster, who owns much of Mayfair. He sought to challenge the 1967 Act as a breach of his human rights (his right to property) but lost in the European Court of Human Rights.

The 1967 Act included a definition of a house as "…any building designed or adapted for living in and reasonably so called…". It was also a requirement under the Act as originally drafted that the leaseholder had to live in the house – the 'residence test'. With that test only human beings (and not companies or corporations) could therefore enfranchise a house.

In 2002 another Act was passed, the Commonhold and Leasehold Reform Act. The 2002 Act (amongst many other things) abolished the 'residence test'. The apparent intention behind this was to allow non-resident leaseholders – perhaps those who were subletting their houses – to enfranchise too. But quickly some people, and a number of lawyers, noticed some unintended consequences. If there was no residence test then companies could enfranchise houses too. More controversially, if there was no need for the leaseholder to live in the house, what might be the position where what had once been an inhabited house (and perhaps still looked like a house) had now been converted partially, or perhaps completely, into something else (offices say, or a hotel)?

A House of Lords (the predecessor to the Supreme Court) case in the 1970s, usually called "Tandon", had produced a judgment which gave a clue about the problem. In Tandon the leasehold owner of a shop with a flat above it tried to enfranchise. The House of Lords said he could. Considering the definition of a 'house', it held that part at least of the building had been designed for living in, and even though it might be reasonable to call the building something else (eg 'a shop'), it was not just because of that unreasonable to call it a 'house'. Tandon therefore allowed a wider range of buildings to be defined as a house than many people would have expected.

With the abolition of the residence test, leaseholders have been taking the wide definition of a house from Tandon, and testing it, in some cases to breaking point.

In Boss Holdings in 2008, a leaseholder argued that just because the house was stripped back to its basic structural shell (i.e. was uninhabitable), did not stop it being a house. The House of Lords agreed.

In Prospect Estates in 2009, a building which was 88.5% used for commercial purposes was held not to be a house, although some might have said (and did say) that the actual use of the property as of limited if any help in considering the definition of a house as '"...any building designed or adapted for living in and reasonably so called...". There was a very strong view expressed by an influential judge that, provided the building had at one time been designed or adapted for living in, it did not matter if at a later date it was adapted to something else.

In Hosebay the Supreme Court in fact considered two buildings: a series of houses which had been converted into a self-catering hotel for short term visitors to London, and separately an eighteenth century five storey house in Marylebone, London which had been a house until around 1888, but used for commercial purposes after that.

The Supreme Court moved well away from the recent practice of a detailed analysis of what 'designed or adapted' might mean, and went straight for the question of 'reasonably so called'. Without too much trouble it decided that neither a self catering hotel nor a commercial building could reasonably be called a house. Commercial speculators who were waiting to buy leases of commercial buildings, with the intention of buying the freehold later at a discounted price, have therefore to a large extent been frustrated.

Why the case of Hosebay is important is both because it looks like a return to normality in an important area of law, but also of the message which the Supreme Court has given about its approach. As Lord Carnwarth observed, the relevant law is "about houses as places to live in, not about houses as pieces of architecture, or features in a street scene, or names in an address book". Some people would be surprised that the law in this area had ever been about anything else.

This is a guest post by Paul Greatholder, a partner in the contentious property department of Russell-Cooke LLP

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