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What is a house?

Despite being a piece of 'residential' legislation, the Leasehold Reform Act 1967 appears now to give a wide variety of leaseholders the right to buy their freeholds even where none of their building is in residential use. Ed Cracknell questions Paul Greatholder about the implications for property owners.

What is the Leasehold Reform Act 1967 about?

In short, the 1967 Act gives leaseholders the right, in certain circumstances, to buy their freeholds where the building in question was 'designed or adapted for living in' (which I'll call the design test) and is 'a house...reasonably so called'.

Why has the Leasehold Reform Act 1967 been in the news so much recently?

It's because a change in the law in 2002 has been exploited by tenants who are now able to take advantage of the 1967 Act in a way that was not previously possible.

Recent cases have strongly suggested that the right to buy under the Act can now be exercised even where there is no residential occupation of the building.

That can't be right! What has changed?

The 1967 Act as originally drafted included a provision that the right to buy was available where (amongst other things) the leaseholder was "...occupying the house as his residence...". These words were repealed by the Commonhold and Leasehold Reform Act 2002. There is, therefore, now no 'residence' qualification in order for a leaseholder to fall within the requirements of the 1967 Act. What this means is that companies, and in fact anyone even if they do not live at a property, can consider whether they have rights under the Act. The definition of what is a house under the 1967 Act has not been changed since the legislation was passed in 1967 and so some surprising results are emerging.

Isn't it obvious what a house is?

You would think so, but even before the 2002 Act the issue has been the subject of a number of court cases. The leading case was the House of Lords decision in *Tandon v Trustees of Spurgeon Homes (1982).* In the judgment of Lord Roskill in that case, the word 'house' could be given a wide meaning: specifically, a building used for both business and residential purposes could still be a 'house' under the 1967 Act (subject to passing the design test mentioned above). The property in question in *Tandon* was a building with shops

at ground floor level, and flats above: many people might have concluded that it was not obviously 'a house'. However, Lord Roskill went as far as to say that there would need to be 'exceptional circumstances' where a building which passed the design test, and was a house reasonably so called, would not be a house under the Act. Subsequent commentators have questioned whether the scope of a house considered by Lord Roskill was too wide, but for many years *Tandon* remained the only House of Lords decision of the issue.

Wasn't there another House of Lords decision on the question more recently?

That's right. In 2008 the House of Lords heard *Boss Holdings v Grosvenor West End Properties Ltd.* That case related to a property which had originally been built as a house, then was largely but not exclusively used for commercial purposes, but which had for a number of years been derelict. The landlord, Grosvenor, therefore argued that because it was not 'habitable' at the time a claim was made under the 1967 Act, it was not at that point 'designed...for living in...' and fell outside the Act.

Lord Neuberger, giving the leading judgment, decided that the important date for deciding whether a property is or was 'designed or adapted for living in' is when the property was constructed or subsequently altered not the time of making the claim under the Act.

So, *Boss* decided that if a property was derelict, that did not by itself stop it from being a house which could be acquired under the 1967 Act. Is there more?

Much more. Shortly after *Boss* the Court of Appeal heard *Prospect Estates Ltd v Grosvenor Estates Belgravia* in 2009. In that case, a property had been built as a house, but had subsequently been partly adapted for commercial use. At the time of the leaseholder's claim the relevant lease under which it held an interest restricted the residential use at the property to merely the top floor, which amounted to only 11.5% of the floor area of the building. The question was, what weight was to be given to the amount of permissible residential use when considering the definition of a house? Was that the most important issue, or was it outweighed by the actual use of the property, or its structure, or appearance?

The Court of Appeal in *Prospect* held that they were entitled to look at all the facets of the 'house', but decided that they would give most weight to the terms of the lease. Given the predominant permitted business use, the building was therefore not a 'house reasonably so called'. The parties in *Prospect* settled the case at that stage and therefore the question did not come before the House of Lords (now the Supreme Court).

It seems to make sense that if most of a building is not permitted to be used for residential purposes, it is probably not a house. The issue is settled then isn't it?

Not quite. Although *Boss* and *Prospect* have answered important questions, there are still grey areas. In particular, what would be the situation where a property had been used exclusively for business purposes, even though the lease under which it was held was a residential lease (a not uncommon situation in some parts of Central London)? And what about houses that were being used for multiple occupation such as bedsits?

The Court of Appeal looked at these questions in June 2010 in the conjoined appeals of *Day v Hose bay Ltd* and *Howard de Walden Estates Ltd v Lexgorge Ltd.* Coincidentally, the leading judgment was given by Lord Neuberger MR, who, after *Boss,* as Master of the Rolls had returned to the Court of Appeal.

In *Day,* the relevant properties, although built as large houses, had subsequently been converted to, and used as, multiple residential units (described as bedsits or 'flatlets'). They were used for occupation by short-term visitors to London. In *Lexgorge,* a five storey Georgian house was occupied under a lease which permitted residential occupation of only the top two storeys, although on the evidence it appears that even those floors had been used for business or commercial purposes until around the time of service of the leaseholder's claim.

In giving judgment, Lord Neuberger clarified his earlier comments in *Boss Holdings.* He confirmed that even if a building was originally designed as a house, it could, at a later date, be "adapted out of" such a description, i.e. the original design did not fix a building as 'a house' for all purposes and for all time. He confessed to having 'started a hare' by suggesting an 'over-literalist' approach to reading the Act.

He then went on to decide that changing the use of the *Day* properties into 'flatlets' was not inconsistent with the buildings having been designed or adapted 'for living in', and that Lord Roskill's generous interpretation of 'a house reasonably so called' in *Tandon* was still good law (and thereby caught the relevant properties). His Lordship, having regard to the *Prospect* decision, decided that the restriction (or obligation) on the use of a property under the terms of its lease was simply one of a number of factors which should be taken into account in considering what was a 'house'. In his view the physical characteristics of the building, such as external appearance and internal layout, were probably more important. The internal furnishings were of little relevance to the 'house' test.

Lord Neuberger similarly found for the leaseholders of the five storey property in *Lexgorge.* He held that even if the actual use of the premises was wholly for commercial purposes at the time the leaseholders' claim was first brought, this did not outweigh the other factors in considering the nature of a house such as appearance and original design. Lord Neuberger distinguished *Lexgorge* from *Prospect* by noting that in the latter case the lease allowed only a very limited use (11.5%) of the building for residential purposes, whereas in Lexgorge 2 of 5 floors should have been used residentially (even if that was not, in breach of the terms of the lease, the case).

So if I understand the position, a general restriction on the use of a building, or the vast majority of a building, for residential purposes, will probably stop it being 'a house'. However, provided that the building still looks like a house, and the relevant lease allows some unspecified amount of residential use, it will not matter that the building has in fact been used for a business, or for several occupiers, or even if it is not fit for occupation at all. This could be a real problem for landlords, couldn't it?

Lord Neuberger admitted that he reached his decision in *Day* and *Lexgorge* '*with no particular enthusiasm',* and that he suspected that the draftsman who abolished the residence test in the CLRA 2002 did not foresee the effect of the change. There is a restriction in the LRA 1967 upon business occupiers being able to claim the benefit of the Act, but in practice this restriction is easily avoided. The current state of the law is therefore something which both landlords and tenants need to be aware of.

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