Legal loopholes

The decision in Day v Hosebay *confirms that the right to enfranchise under the Leasehold Reform Act 1967 extends to buildings that are exclusively used for business purposes*

In July of this year, the Court of Appeal handed down its decision in the joined appeals in *(1) Hugo Benjamin Day (2) Lady Hilary Maureen Greenslade Day v Hosebay Ltd; Howard De Walden Estates Ltd v Lexgorge Ltd* (2010) [2010] EWCA Civ 748. The decision confirms that the right to enfranchise under the Leasehold Reform Act 1967 (LRA 1967) extends to buildings that are exclusively used for business purposes despite the fact that it was clearly the intention of parliament that neither LRA 1967 nor the Leasehold Reform Housing and Urban Development Act 1993 were to apply to business tenants.

Business tenancies

As a general rule, tenants under business tenancies within the meaning of Pt II of the Landlord and Tenant Act 1954 (LTA 1954) do not have a right to acquire the freehold under LRA 1967. However, in order for a tenancy to fall within Pt II of LTA 1954, the property comprised in the tenancy must include premises which are occupied by the tenant for the purposes of a business carried on by him. Consequently, if a tenant sublets business premises, he is not occupying them for the purposes of a business and the lease does not fall within Pt II of LTA 1954. This is a useful means by which a business tenant may become entitled to acquire the freehold of a property and what happened in *Hosebay*.

Hosebay

In *Hosebay,* the tenant under the leases of three properties was Hosebay Ltd. Originally, Hosebay occupied the properties for the purposes of a business, "Astons Apartments", which provided short term accommodation for tourists and other visitors to London. Upon legal advice, and for the purposes of making a claim to acquire the freehold of the houses, Hosebay sublet the properties to Hindmill Ltd, an associated company, and thereafter Hindmill Ltd ran "Astons Apartments". Prior to the subletting, Hosebay's leases of the properties would have fallen within Pt II of LTA 1954. However, following the subletting, Hosebay was no longer occupying the properties for the purpose of a business carried on by it, as Hindmill was occupying them and carrying on the business. Consequently, Pt II of LTA 1954 no longer applied to Hosebay's leases and Hosebay was able to make a claim under the Act.

It was held at first instance that the underleases were not shams as they took effect absolutely according to their purported terms and there was no pretence or secrecy about them. Further, while the underleases were artificial transactions in the sense that they were only entered into for a particular artificial purpose, that did not prevent their being effective. The landlords (realistically, in Lord Neuberger's opinion) did not appeal against that finding.

Issues

Consequently, the issue for the Court of Appeal was whether the properties were (1) designed or adapted for living in and (2) houses reasonably so called, it being necessary for the properties to fulfil these criteria in order to come within the definition of a "house" in s 2(1).

In relation to the first issue, Lord Neuberger stated that it was clear that each of the properties was, "designed … for living in". However, he rejected the contention (without deciding the point) that, even if the properties were subsequently adapted away from residential use, that does not matter as they were "designed or adapted" for living in.

Lord Neuberger went on to say that in order to determine whether premises are adapted for living in, one looks at the most recent works of adaptation, and assesses, objectively, whether they resulted in the property being adapted for living in. On this basis he concluded that the works carried out to convert the properties in *Hosebay* were works which "adapted" each of the houses for living in even if that was not their current use.

In relation to the second issue, Lord Neuberger MR held that the question whether a building is a "house … reasonably so called" is to be determined essentially by reference to its external and internal physical character and appearance. On that basis, he found that all the subject properties were houses reasonably so called.

The decision in this latter regard is apparently at odds with the decision of the Court of Appeal in *Grosvenor Estates Ltd v Prospect Estates Ltd* [2009] 1 WLR 1313.

Prospect Estates concerned a building built as a residential house, the essential structure of which remained unchanged. It was held that the terms of the lease (which stipulated that 88.5% of the building was to be used as offices and 11.5%, or one storey, was to be used as a residential flat), the uses of the building and the proportions of the uses at the relevant date meant that it was no longer reasonable to call the building a "house" within the meaning of the Act. In other words, the question whether the building was a "house … reasonably so called" was determined not by reference to its physical character and appearance, but by reference to the user covenant.

Lord Neuberger MR confessed to some difficulty in agreeing with the ratio in *Prospect Estates* and suggested that it should be treated as being limited to a case where residential use is either prohibited entirely or restricted to a very small part of the building, and the actual use accords with that. However, Lord Neuberger MR also confessed to reaching his decision in *Hosebay* "with no particular enthusiasm", this being on the basis that the Act was originally intended to assist residential tenants. A lack of enthusiasm for assisting a business tenant was no doubt a motivating factor behind the Court of Appeal's decision in *Prospect Estates*. However while one may agree with the sentiment, the reasoning, in light of the relevant authorities, is not particularly sound.

The answer, it would seem, is not to strain the meaning of s 2(1) of the Act, but to plug the loophole that exists by defining business tenancies by reference to Pt II of LTA 1954.

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