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On the House – 1967 Act Case Law (Non-Valuation)

Alero Orimoloye
Leasehold Advisory Service
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What you will learn

- Recent case law about the following;
  - Meaning of House
  - Notice of Tenant's Claim
  - Restrictive Covenants

Basic Qualification Requirements

- Section 1 Leasehold Reform Act 1967 grants a qualifying tenant the right to acquire the freehold of a house and premises
  - Tenant must have a long lease
  - Must be a tenant of the whole house
  - Must have been a tenant for 2 years/more

Meaning of House

- S2(1) 1967 Act
  - Meaning of "house" and "houses and premises", and adjustment of boundary
  - (1)For purposes of this Part of this Act, "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; and -
  - (a)where a building is divided horizontally, the flats or other units into which it is so divided are not separate "houses", though the building as a whole may be; and
  - (b)where a building is divided vertically the building as a whole is not a "house" though any of the units into which it is divided may be.

Meaning of House

- Definition:
  - Building
  - Designed/adapted for living in
  - Reasonably called a house
  - Flats/maisonettes are not separate houses
  - May be divided horizontally into flats/non-residential units

Building

- *Malekshad v Howard de Walden Estates Ltd [2002] UKHL 49*
  - Building denotes a built structure of some degree of permanence
  - Terrace of houses may constitute a single building even if each house in the terrace is a building in itself
  - However "building" does not include the plural so two separate buildings are not within the definition

Malekshad / the facts

- Lessee of 76 Harley Street and 27 Weymouth Mews served notice to acquire the freehold of demised premises
- 76 Harley street comprised basement, ground and upper floors
  - Basement extended all the way to mews behind
- Mews building at No.27 built on two floors partly over the basement

The Facts

- Mews converted into self-contained residential unit
- Means of access blocked up
- Part of the basement under the mews incorporated into the mews building
- Freeholder argued that house and mews not a house for the purpose of 1967 Act

The Outcome

- House of Lords agreed that the combined property could not be a house by virtue of S2(1)(b) because the building was divided vertically
  - Irrelevant that part of the basement at No.76 lay under No.27
- Each of the two units comprises a house for the purpose of the Act
- S2(1)(b) provides that where building is divided vertically the building as a whole is not a house, though any of the units it is divided into may be.

Designed/Adapted for living in

- *Boss Holdings Ltd V Grosvenor West End Properties & Ors [2008] UKHL 5*

Boss Holdings/ the facts

- Property comprised basement, ground and four upper floors in a grand terrace of buildings
  - Built as a single private residence and used as such for over 200 years until 1942
  - In 1946, the three upper floors were fitted out for residential use
  - Three lower floors occupied for a dress making business

The facts

- Commercial use of three lower floors continued until 1990
- Residential use of upper floors ended about 1995
- Floor plans showed the internal layout of the property
  - Top three floors stripped back to their outer skin
  - Staircases, internal walls floor joists had not been removed
  - Ceilings, floor boards, light fittings and carpet remained in some rooms

The Issues

- Freeholder argued that as at Oct 2003, the property was not “designed or adapted for living in” because not physically fit for immediate residential occupation
- H/L disagreed with C/A and stated that the fact that the property had become internally dilapidated and incapable of beneficial occupation does not detract from the fact that it was designed for living in

The tests

- Lord Neuberger delivering the lead judgment stated the true test is to consider the property as it was initially built
  - For what purpose was it originally designed?
  - Has work been subsequently done so the original "design" has been changed?
    - Has it been adapted for another purpose?
    - Was the purpose for living in?
- The most important consideration being the most recent adaptation

The test

- Words to be given their natural meaning to avoid myriad of uncertainties
- Property designed for living in when first built in the 1730's
- Upper three floors used until fairly recently as such
- Although property now significantly dilapidated, upper three floors structurally laid out as they were when property was in single residential occupation

The test

- *"the original design of the property is what matters in this case. Its original internal layout as a single residence appears to have survived substantially unchanged throughout, the three upper floors have always been envisaged for living in…the external appearance has not been altered since well before the property ceased being used as a residence in single occupation "* per Lord Neuberger

The outcome

- Appeal allowed
- 21 Upper Grosvenor Street, London, W1 was “designed or adapted for living in” within the meaning of S2(1) 1967 Act

Reasonably Called a House

- *Day and Day Ltd V Hosebay Ltd [2010] EWCA Civ 748*
- *Howard de Walden Estates Ltd V Lexgorge Ltd [2010] EWCA Civ 748*
- Co-joined appeals
- H/L considered the position where a building is constructed as residential property and subsequently becomes adapted for use as offices
- Lord Carnwath delivered lead judgment

The Main Question

- The questions can be phrased thus;
- Is the building one designed/adapted for living in?
- Is it a house reasonably so called?
- Two parts of the definition “belt and braces” , complementary and overlapping
  - What is the identity/function of the building?
  - Is the house a single residence?

Hosebay/ the facts

- Three properties at 29, 31 and 39 Rosary Gardens, South Kensington, London, SW7 originally built as separate houses as part of a late Victorian terrace forming the west side of Rosary Gardens
- Leases of Nos.29 & 39 granted in 1966 for use as “16 high class self-contained private residential flatlets”
- Lease of No.31 granted in 1971 for use as a “single family residence”

The facts

- Current use of properties contrary to user covenants
- Hosebay Ltd served notice on landlord on 23/04/07 to acquire freeholds of all three properties
- County Court and Court of Appeal concluded that the three properties were physically “adapted for living in”
  - Each room was a self-contained unit of accommodation
    - Basic small shower room/WC and basic cooking facilities

Lexgorge/ the facts

- Property at 48 Queen Anne Street, Marylebone, London, W1
- Comprised five floors including basement in a terrace of houses
- Occupied as a house until 1888 when it was used for commercial purposes

The facts

- Planning permission granted in Dec 1949 for conversion of second and third floors into a self-contained maisonette
- From 1961, all four upper floors used as offices up to notice date of 4 March 2005
- In October 2009, upper two floors in residential use and lower floors in office use

The facts

- Office use of all floors in breach of lease covenants had become established by the date of notice
- Freeholder conceded that at the material date the premises, although used as offices, were still in part "designed or adapted for living in"

What did the C/A decide?

- "*…bearing in mind its external character and appearance (a classic town house in London's West end), its internal character and appearance at least on the upper two floors (substantially as constructed), the description of the property in the lease as 'messuage or residential or professional premises', and to the extent that it is relevant, the terms of the lease (restricting the use of the upper two floors to residential). I find it hard to see why the fact that the upper two floors had been used (even for many years) as offices (in contravention of the terms of the lease) should wreak such a change that the property could no longer reasonably be called a house*"

House of Lords discussed relevant authorities

- *Lake V Bennett [1970] QB 663*
  - Three story house comprising ground floor shop
  - Building was in part adapted for living in
  - C/A held that notwithstanding the commercial element, the building as a whole was a house "reasonably so called" for the purpose of 1967 Act

Another relevant authority

- *Tandon V Trustees of Spurgeons Homes [1982] AC 755*
- Lord Roskill giving lead judgment in H/L stated the following propositions of law
  - "…*(1) as long as a building of mixed use can reasonably be called a house, it is within the statutory definition of 'house' even though it may 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 living in by which is meant designed or adapted for occupation as a residence, only exceptional circumstances would justify a judge in holding that it could not reasonably be called a house…"*

The *Tandon* case

- Lord Carnwath's position on the Tandon case was that it was to be read within its factual context and did not offer much assistance save beyond its particular factual matrix

Another relevant authority

- *Prospect Estates Ltd V Grosvenor Estate Belgravia [2008] EWCA Civ 1281*
  - C/A held that a building which had been designed and built as a house, but which for many years used almost wholly as offices, was not a house within the definition

The outcome

- Appeal allowed in Hosebay on the ground that a building which is wholly used as a "self catering hotel" is not a "house reasonably so called" within LRA 1967
- H/L disagreed with C/A's assessment about the external appearance of (1) each property as a town house and (2) the internal conversion to self-contained units with cooking and toilet facilities

The Outcome

- "…*The fact that the buildings might look like houses, and might be referred to as houses for some purposes, is not in my view sufficient to displace the fact that their use was entirely commercial"* per Lord Carnwarth
- *"Living in" means something more than "staying in" and the present use does not qualify as such"* per Lord Carnwath

The Outcome

- Appeal allowed in *Lexgorge* case as well on similar grounds
- " 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 in architectural histories is beside the point" per Lord Carnwath
- Neither building in both cases was on the relevant date a "house" within the meaning of S2 LRA 1967

The Outcome

- Emphasis of the *Hosebay* and *Lexgorge* decisions lay with the "reasonably so called" definition of a house and use of the house rather than the physical state or external appearance of the property
- In each case it was clear that there was 100% commercial use at the date of the claim
- Unnecessary to decide whether the *Hosebay* buildings were designed/adapted for living in

Mixed Use Buildings

- *Henley & anor V Cohen [2013] EWCA Civ 480*
- *Magnohard Ltd V Cadogan [2012] EWCA Civ 594*
- *Jewelcraft Ltd V Pressland [2015] EWCA Civ 1111*

Henley/ question on appeal

- Can a mixed unit building (ground floor shop with a first floor adapted as a flat for living in) reasonably be called a house?

Henley/the facts

- Premises located in a parade of two storey buildings
- Ground floor shops sublet with first floor adapted to flat living
- Overall appearance of the premises is of a shop located in a parade of shops rather than a house residing in a row of houses
- Lessee applied for consent to convert the first floor into a flat
- Landlord refused on the ground that he wanted to avoid enfranchisement rights under LRA 1967

The facts

- Lessee carried out conversion works regardless so that by date of notice, the first floor premises had been adapted for living in and was lived in
- Lessee served notice of claim under LRA 1967
- Landlord disputed the claim
  - Not a house reasonably so called
  - Breach of covenant

What did the county court decide?

- LJ Mummery in delivering the lead judgment considered the trial judge's decision
  - That the property, though adapted for living in, was not reasonably called a house particularly because of the complete isolation of the first floor from the ground floor
  - Respondent's consent was required to works carried out by the lessee to the first floor
    - Respondent had not acted unreasonably in witholding consent
    - Breach of covenant
      - Lessee cannot take advantage of their own wrong

What did the C/A decide?

- Approved county court's decision
- The premises were neither adapted for residential use at the date when the lease began nor were they ever used as such until the recent adaptation for living in
- Case distinguishable from the *Tandon* where living accommodation above was physically connected with shop unit below
  - No connecting access from commercial unit on ground floor to flat on first floor

What did the C/A decide?

- Judge entitled to place the use of the upper floor into the proper setting of the use of it under the lease during the preceding 70 plus years
- Judge was correct about the breach point
  - Lessee not entitled to rely on unauthorised conversion works to assert that part of the premises had been adapted for living in
- Appeal dismissed
- Premises not a house reasonably so called for the purpose of LRA 1967

Magnohard Ltd/ the question on appeal

- LJ Lewison delivered lead judgment in C/A
- Whether the building comprised in a lease of 1 Sloane Gardens and 2,4,6 and 6B Holbein place is a house for the purpose of S2(1) LRA 1967?
- HHJ Marshall QC decided it was not and gave leave to appeal

Magnohard Ltd/the facts

- Building consists of basement, ground and five upper floors
- Six residential suites; one on each floor; one housekeeper's flat and three small shops
  - Housekeeper's flat converted into another flat
  - Currently eight flats in all
- Retail part of premises consisted in just under 7% of total area
- Lease was granted in 1986

The outcome

- C/A concluded that a purpose built block of flats cannot reasonably be called a house
- A building constructed, laid out and used as a block of substantial self contained flats throughout its 120 years of existence cannot reasonably be called a house in the absence of very unusual factors
- Permission to appeal to the Supreme court refused

Jewelcraft Ltd/question on appeal

- Whether premises at 373 Upper Richmond Road, London, SW15 qualify as a house for the purpose of S2(1)?

Jewelcraft Ltd/the facts

- Premises consist of a ground floor purpose-built shop with residential accommodation on the floor above.
  - Part of a parade of shops of similar construction and appearance constructed in the 1920's
  - Ground floor shop could be accessed via an internal staircase

Jewelcraft Ltd/the facts

- First floor comprised a sitting room, two bedrooms, bathroom and WC with access to the ground floor kitchen through the internal staircase
- Alterations to the internal layout undertaken in 1970 to remove ground floor kitchen and scullery. Internal staircase removed as well
- First floor flat became self contained with external staircase in the backyard

Jewelcraft Ltd/the facts

- Premises initially let on a 99 year lease
- Sublease granted in Oct 1978 restricting the use of the upstairs flat to employee of the tenant

What did the county court decide?

- Held the premises were not a house for the purpose of S2(1)
  - "*The question that I have to address is not whether it is possible to call the building in this case, a house. I have had regard to the history of the property, the physical appearance of it, the layout, the terms of the lease and the user of the premises over the years. The starting point as far as I am concerned is that the building does not look like a house. It is part of a parade of shops with living accommodation over it…it was not built as a house. Nor is it now a physically mixed unit. The two units have been separate for the last 40 years.*" *per HHJ Dight*

What did the C/A decide?

- Considered the following;
- It is a question of law and not a purely factual issue whether a particular property is a house within S2(1)
- Parliament's intention is to include certain recogniseable types of property
  - Right should not depend on particular physical characteristics
    - Eg whether various parts of the premises were linked internally/externally
- Correct interpretation of S2(1) should promote consistency of treatment if driven by considerations of policy

What did the C/A decide?

- Did not accept that the removal of the internal staircase and construction of external means of access to the first floor flat had the effect of taking the building outside the scope of S2(1)
- Doubted whether Henley V Cohen was rightly decided in light of weight attached to physical appearance
  - Distinguished Henley V Cohen on particular facts

The Outcome

- Endorsed H/L decision in the *Tandon* case that shops with accommodation above are, as a matter of law, reasonably to be described as houses for the purpose of S2(1) provided that a material part of the building is designed/adapted for and used for residential purposes on the relevant date
- Appeal allowed

Flats/Maisonettes excluded

- Building may be a house even if divided into flats/other commercial units
- Definition of Building expressly precludes flat/maisonette from being a house in its own right
- Vertically divided properties such as terraces/semi detached properties is not a house even though each of the units may be

Exclusion of overlapping premises

- *Malekshad V Howard de Walden Estates Ltd [2002] UKHL 49*
- *Parsons V The Trustees of Henry Smith's Charity [1974] 1WLR 435*
- *West End Investments (Cowell Group)Ltd V Birchlea Ltd [2015] EWHC 33819 (Ch)*

Exclusion of overlapping premises

- S2(2)1967 Act
- References in this part of this Act to a house do not apply to a house which is not structurally detached and of which a material part lies above or below a part of the structure not comprised in the house

Malekshad/the test

- H/L confirmed the test of materiality depended on the relationship between the part in question and the house as a whole.
- Materiality not linked to any special use of the part by tenant
  - Material as being physically substantial

The outcome

- H/L decided that the portion of 76 Harley street underlying 27 Weymouth Mews was not a material part of 6 Harley street
  - It did not have the effect that 76 Harley street as a whole underlies 27 Weymouth Mews to a substantial extent
    - It represented an insubstantial part at just over 2% of the overall floor area of 76 Harley street and about 7% of the total basement area of 76 Harley street
  - Effect of this was to enable enfranchisement of 76 Harley Street

In conclusion

- Consider the following factors in relation to the house;
  - Relative size of the part
  - Price enhancing quality of the part
  - Extent to which the part derives/provides support or protection from or for other parts of the house
- Whether a part is material or not is a question for the trial judge
  - A question of fact and degree

Parsons V The Trustees of Henry Smith's Charity

- The overhang was 10% of the total floor area
  - It included a bathroom, WC, substantial part of a dressing room and half of a small bathroom
- H/L determined this was material
- No right to enfranchise under 1967 Act

West End Investments (Cowell Group)Ltd/ the facts

- Premises known as 3 Grosvenor Gardens Mews East, London SW1
- Lessee obtained a declaration that it was entitled to acquire the freehold interest
- Landlord appealed on the ground that premises not a house by virtue of S2(2) of 1967 Act

The facts

- The house was at the back of No.3 Grosvenor Gardens
- Adjoining the house to the North was 1/1A Grosvenor Gardens
- The house and 1/1A Grosvenor Gardens are divided by a single wall (designated a party wall)
- Nos.1/1A was several storeys higher than the house and at the higher levels was an overhang of a width of one brick between the premises not comprised in the house

What did the county court decide?

- The judge at first instance decided there was no relevant overhang/underhang
- Even if there was, it was de minimis.

What did the High court decide?

- Landlord's appeal dismissed
  - S2(2) 1967 Act was not engaged because this was not a case where there was in reality a "kink" or "dog-leg".
    - S2(2) is concerned with a significant deviation from the vertical such as a room(s) extending horizontally
    - To engage S2(2) there must be a significant deviation from the division of the building in the vertical plane

What did the High court decide?

- Part of the single vertical wall divided the house from 1/1A Grosvenor Gardens
  - This did not comprise any of the floor area of the house
    - Position different if it comprised a substantial part of the living room, bedroom, kitchen or bathroom
- The thickness of a single brick above/below the level of the roof as an overhang/underhand was de minimis
- Inconsistent with the purpose of 1967 Act to allow the legal division of a party wall to disqualify the house from enfranchisement
  - Landlord's interest protected by S2(5) of 1967 Act (where applicable)

Notice of Tenant's Claim

- *Speedwell Estates Ltd(1) Covent Garden Group Ltd (2) V Jane Rush Dalziel & Ors [2001] EWCA Civ 1277*

Notice of Tenant's Claim

- S5 of 1967 Act provides the means by which right to enfranchise is exercised
- Service of notice of claim creates rights and obligations as would arise under a contract for sale between landlord and tenant
- Enforcement of obligations similar to a normal contract for sale
- Notice of tenant's claim in a prescribed form/form substantially to the same effect

Speedwell Estates Ltd(1) Covent Garden Group Ltd (2)/the facts

- Tenants of houses holding under a long lease at a low rent
- Served notices of their desire to enfranchise freeholds of their houses
- Landlords challenged validity of notices on the basis that they failed in material respects to satisfy the statutory requirements for such notices

The facts

- Various leases dated 30/11/1900, 01/10/1901 and 18/10/1901 for 99 year terms in respect of Nos.4,12 and 24 Carlisle Terrace, West Allotment, Newcastle upon Tyne
- Tenant of No.12 served notice on the landlord on 24 July 1998
- Solicitors used form 1 prescribed by Regulation 3(1) of the Leasehold Reform (Notices) Regulations 1997
- Schedule to form 1 contained 9 boxes

The facts

- Boxes 1,2 and 5 were correctly completed
- Deficiencies in the particulars of boxes 3,4,6,7 & 8
- Box 9 did not apply
- If tenants' notices are declared invalid, right to enfranchise freehold is lost
- Landlords argued that the tenants' errors cannot be identified as mere inaccuracies

Landlord's position

- Advanced the following arguments;
  - Particulars in their notices failed to identify the instruments creating their tenancies
  - Failed to provide any information as to the rateable values of the houses on the appropriate day sufficient to show rent was a low rent
  - Failed to provide particulars as to the tenants' occupation of the houses
  - Failed to provide information in boxes 7 and 8

Tenant's position

- Wished to invoke the operation of the reasonable recipient test set out in the case Mannai Investment Co. Ltd V Eagle Star Life Ass. Co. Ltd. [1997] A.C. 749
- C/A stated that the better approach is to look at the particular statutory provisions pursuant to which the notice is given and identify the requirements
- Does the notice adequately comply with those requirements?

What did the county court decide?

- Judge agreed with the landlords and declared tenants not entitled to acquire the freeholds
- Tenants accepted imperfections in their notices buy judge erred by holding them to be invalid

What did the C/A decide?

- Rejected the application of the "*Mannai*" principle on the particular facts of the case
- The particulars required to be provided by the prescribed form of notice should be assessed by reference to the extent of the landlord's actual knowledge of the facts
- Schedule 3 provides for notice in a prescribed form with the following particulars
  - Requirements are mandatory
  - Tenant must comply with them to ensure valid notice

What did the C/A decide?

- "*Purpose behind provision of particulars which prescribed form requires is to inform the landlord of the nature and basis of the tenant's claim and as to the basis on which any price is to be assessed*" per LJ May
- C/A considered the correct approach in determining whether/not notices were invalid would be to consider the manner in which tenants' responded to each box in Form 1, and then form an overall view, as to whether notices can be regarded as satisfying mandatory requirements of Schedule 3

What did the C/A decide?

Concluded that the material omissions in the information provided in response to boxes 6,7 and 8 sufficed to invalidate the notices, and were not mere inaccuracies.

None of the notices were in substantially the correct form and none satisfied the mandatory requirements of Sch.3

Appeal dismissed

Restrictive Covenants

- Conveyance may be made subject to any existing restrictive covenant affecting the landlord's interest
- Landlord entitled to indemnity against a breach of covenant
- Landlord cannot require the continuance of any of the covenants imposed by the lease
  - Unless such covenant benefits other property
    - The covenant is enforceable by one/more persons other than the landlord OR
    - Even if only enforceable by landlord, is such as to materially enhance the value of the other property

Restrictive Covenants

- *Ackerman & anor V Mooney&Ors [2009] PLSCS 266*
- *Moreau V Howard de Walden Estates Ltd. LRA 2/2000*

Ackerman & anor./ the facts

- Properties comprised two-storey brick-built house with loft conversion
  - Divided into three residential units
- And a larger four-storey Edwardian property
  - Part of a family estate
- Enfranchisement claim accepted by landlord but dispute over terms of transfer

The facts

- Landlord sought inclusion in transfer of absolute covenants against redevelopment of the properties unless waived by them
- Tenant contended that absolute covenants against redevelopment would not benefit their retained properties or materially enhance their value as per S10(4) of the 1967 Act

What did the Lands Chamber decide?

- Determined that a “material” enhancement for the purpose of 1967 Act was one that was significant and more than minimal/nominal
- Enhancing the value of landlord’s other property encompassed maintaining a value that would otherwise deteriorate
- Landlord had to show that the covenant in question would benefit and materially enhance the value of their particular property

What did the Lands Chamber decide?

- Land to be benefitted, should be clearly identified and set out in the transfer document
- The “other property” must be sufficiently close to tenant’s property to be affected by the covenant
- Lands Chamber agreed with landlord that absolute covenants were justified to ensure the continued protection of retained land

Moreau/the facts

- Planning control does not achieve the same result as restrictive covenants against alterations and user and does not make such covenants unnecessary

Questions?

The Leasehold Advisory Service
020 7832 2500
info@lease-advice.org
www.lease-advice.org
Fleetbank House, 2-6 Salisbury Square
London EC4Y 8JX

Next webinar: 17 March 2016

- The lost landlord – cures for a common problem
  - What practical steps you can take to locate the landlord
  - The relevant court and tribunal procedure
  - What to do if there are multiple landlords and one or more is missing
  - What to do if the landlord re-appears