

Once a house, always a house?

Damian Greenish explains the phrase “designed or adapted for living in” that was at the heart of the *Boss Holdings* case and how this will affect leasehold enfranchisement

THE LEASEHOLD REFORM ACT 1967 has now been with us for over 40 years. It is not a statute of great substance containing as it does some 41 sections and seven schedules. Over the years it has been the subject of some considerable amendment. It has limited and specialist application and yet it has been the subject of substantial litigation. So what does the Act do?

Right to acquire the freehold

Primarily, it gives to the tenant of the leasehold house, which he holds under a long lease that he has owned for a period of at least two years, the right to acquire the freehold, at a price calculated in accordance with the provisions of s 9. The issue of what constitutes a “house” for this purpose has been considered by the House of Lords on four occasions. Previous cases were *Parsons v Trustees of Henry Smith’s Charity* [1974] 1 WLR 435 HL; *Tandon v Trustees of Spurgeons Homes* [1982] 2 WLR 735 and *Malekshad v Howard de Walden Estates Ltd* [2002] UKHL 49. Now we have *Boss Holdings Limited v Grosvenor West End Properties and others* [2008] UKHL 5.

Section 2 of the Act defines what is a “house”. Subsection (1) is the provision that came before the House of Lords in *Boss*. That says “... ‘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...”.

The issue

The issue in *Boss* was: what is meant by the words “designed or adapted for living in”? Before the implementation of the Commonhold and Leasehold Reform Act 2002 (which broadly abolished the residence test for claims made under the 1967 Act) this particular part of the definition caused little difficulty. The reason is obvious; the tenant



necessarily had to live in the building. In *Tandon v Trustees of Spurgeons Homes* [1982] 2 WLR 735 Lord Roskill said that the words meant “designed or adapted for occupation as a residence”. In *Malekshad v Howard de Walden Estates Limited* [2002] UKHL 49 Lord Millett said that the meaning of the words was “self-explanatory”. However, now that the residence test has been removed as a general qualifying condition, the question as to what is meant by a building “designed or adapted for living in” becomes less obvious.

The building which was the subject of the enfranchisement claim in *Boss* was 21 Upper Grosvenor Street, London W1. The building had been constructed as a single private residence in the middle of the 18th century. It was used as such for over 200 years until 1942 when it was occupied by the Free French Government in Exile. Following the Second World War, the three upper floors were fitted out for residential use and the three lower floors were occupied for a dress-making business. The commercial occupation of the lower three floors ceased in about 1990 since when those floors became vacant.

Occupation of the upper floors ended at least two years before the date that the enfranchisement claim was made (October 2003) and remained vacant. The property was therefore wholly vacant at the time of the claim. Indeed, the top three floors were not only vacant but also by common consent

completely uninhabitable. They had been virtually stripped back to their outer skin.

The dispute arose because the landlord said that the property was not a “house” within the meaning of the Act because it was not “designed or adapted for living in” at the date of the claim. The landlord’s argument was that, in order for a building to be “designed or adapted for living in”, it needed to be physically capable of immediate residential occupation. That argument was supported by both the judge at first instance and also by the Court of Appeal.

What Laws LJ said was that “the true question is whether the premises (or at least a substantial part) viewed as at the moment when the notice is given were designed or adapted for living in. Is residence the purpose of the design or adaptation at the time of the notice? The test is not what the building was originally designed for nor what it might become in the future by adaptation but whether at the date that the notice of claim is given the property demonstrates by design or adaptation that it is capable of being lived in”.

Physical state of the property

Giving the judgment of the court, Lord Neuberger wholly rejected this approach. He did agree that the question of whether or not a property constitutes a “house” must be determined at the date that the notice of claim is given. He also said that, in applying the test “... one is largely concerned with the physical state of the property”; that does not incidentally sit comfortably with the judgement of Lord Hope in *Malekshad v Howard de Walden Estates Limited* [2002] UKHL 49 where he said (at paragraph 21) that this part of the section was addressing user and not structure.

However, Lord Neuberger decided that, as a matter of ordinary language, reinforced by consideration of other provisions of the subsection and supported by the original terms of s 1(1), as well as by considerations of practicality and policy, 21 Upper Grosvenor

Street was “designed or adapted for living in” within the meaning of s 2(1) at the date that the notice was given.

Looking first at the ordinary language, he said that the word “designed” was a past participle. Accordingly, the first question to be asked in applying s 2(1) is: for what purpose was the building originally designed? The second question is whether, in subsequent years, that original design has changed. Has the building been adapted for some other purpose and, if so, what purpose? At each stage you need to ask yourself the question whether the property was designed or is adapted for living in.

The residence test

It is not a requirement that the building must be wholly designed or adapted for living in, because the definition includes the words “... notwithstanding that the building... was or is not solely designed or adapted for living in”. It is unfortunate that Lord Neuberger misquoted these words in his judgment but he did feel that they supported his construction to the extent that the word “was” governs “designed” whereas the word “is” governs “adapted”.

Lord Neuberger noted that s 1(1) as originally enacted required the enfranchising tenant to fulfil a residence test. He did not consider that the definition of “house” would have attached to it a requirement that the property should be capable of being lived in, if there was also a requirement that the house actually was being lived in. Interestingly, this appears to be the opposite of the

thought it inappropriate to allow a tenant compulsorily to acquire the freehold of his property unless the freeholder (or some predecessor in title of his) had either built the property (or permitted a tenant to build it) for living in or he had subsequently allowed the building to be adapted for living in.

In contrast Lord Neuberger could not see what policy considerations would have given rise to a requirement that the property should be fit to live in as a condition for enfranchisement in circumstances where, as originally enacted, the right to enfranchise was conditional upon the tenant living in the property in any event.

On applying the facts of *Boss* to the propositions of law he put forward, Lord Neuberger had no difficulty in coming to the conclusion that 21 Upper Grosvenor Street was a “house” within the meaning of s 2(1). He came to no final conclusion (and it was not necessary to do so) as to whether the property was originally designed for living in or had subsequently been adapted for living in. He was inclined to the view that it was the original design that was relevant on the facts of the case but the point was not pursued in any detail as it made no difference to the outcome.

Adapted for another use

Lord Neuberger went on to ponder the question of whether a property would be a “house” if it had been originally designed for living in but had subsequently been adapted to some other use. He said that, as a matter of literal language, such a property would be a

the legislature had wanted to limit or restrict the right to enfranchisement, it did so, not in the basic definition, but by imposing specific limiting and restrictive conditions.

Originally, these included rateable value or other financial limits on the building, the length of the lease, the level of ground rent and the residence test but in successive Acts these limitations and restrictions have been lessened or removed altogether. Contrary to a suggestion made by Carnwath LJ in the Court of Appeal, the removal of these limiting and restrictive conditions by amendments to other sections, could not affect the construction of s 2(1) where no amendments have been made to that particular section.

Further arguments

It is difficult to see that, as a matter of policy, Parliament intended leasehold enfranchisement to extend to the kind of buildings to which Lord Neuberger has now opened the door. His policy considerations seem to be founded largely on guesswork and do not fit very comfortably in the context of legislation that was originally passed primarily to meet the anxiety of ordinary householders in South Wales. Furthermore, although seeking clarity, in leaving open the question of whether or not a building that was originally designed for living in but has subsequently been adapted for some wholly different use (for example offices) might nevertheless be a “house”, will unquestionably give rise to further argument and no doubt litigation.

Some limitations on enfranchisement under the 1967 Act remain. There are for example conditions to be fulfilled if the tenancy on which the enfranchisement claim is based is a business tenancy within the meaning of the 1954 Act. Furthermore, a building must not only be “designed or adapted for living in” but must also reasonably be called a house. That was not an issue in *Boss* because it was accepted by both parties that, on the application of the tests formulated by Lord Roskill in *Tandon*, 21 Upper Grosvenor Street could reasonably be called a house.

However, whether a building which, at the date of the claim, has no part of it being used or capable of being used as a residence, can nevertheless reasonably be called a house, is one of the issues that will, no doubt, be testing the minds of those involved in this area of the law over the coming months.

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approach taken by Lord Roskill in *Tandon* because his meaning of the words “designed or adapted for living in” was “plain from s 1(1) of the Act of 1967”.

Practicality and policy

In terms of practicality, Lord Neuberger said that to take the test adopted by the courts below could easily lead to argument and uncertainty because each case would depend on an element of subjective opinion as to whether or not a property was capable of being lived in at the date of the claim. Lord Neuberger said that giving the words their natural meaning avoided this uncertainty.

On the issue of policy, Lord Neuberger speculated that Parliament might well have

house because “designed” and “adapted” appeared to be alternative qualifying requirements. He thought that at first blush this might seem a surprising conclusion but an alternative construction required the introduction of an implied term into the definition which was not something that could easily be done.

Again, the requirement of the residence test in s 1(1) as originally enacted, further tempered his surprise at the effect of the literal construction. Tantalisingly, however, he chose not to decide the point, although he gave a very clear indication of what he thought the answer was. Lord Neuberger’s approach was that the definition of “house” in the Act was widely drawn and, insofar as