Day v Hosebay Limited

Howard de Walden Estates Limited v Lexgorge Ltd

[2010] EWCA Civ 748

Leasehold Enfranchisement – Leasehold Reform Act 1967 – s. 2 (1) – "house . . . reasonably so called"

Introduction

In these conjoined appeals to the Court of Appeal Lord Neuberger MR revisits two of the most lively issues under the 1967 Act namely: (1) when is a house "designed or adapted for living in" and (2) what is a "house . . . reasonably so called". These two clauses of s. 2 (1) of the Act have engendered considerable controversy in recent years largely as a result of the removal of the residence requirement by the Commonhold and Leasehold Reform Act 2002. The issue at stake is whether large numbers of buildings which were unquestionably built as houses qualify under the 1967 Act notwithstanding that (sometimes substantial) parts are no longer used for residential purposes.

Let me remind you of the recent developments in this area. In the landmark decision of the House of Lords in *Boss Holdings v Grosvenor West End Properties Limited* [2008] Lord Neuberger suggested that buildings which were originally designed to be lived in may satisfy the "designed or adapted for living in" test notwithstanding that they have subsequently been adapted for non-residential purposes. However, the effect of that decision was trammelled by the decision of the Court of Appeal in *Prospect Estates Ltd v Grosvenor Estates Belgravia* [2009] 1WLR 1313, to the effect that a building cannot be a house reasonably so called if under the terms of the lease only 11.5% of the floor area could be used for residential purposes.

In this important decision Lord Neuberger admits to having had heretical leanings in his own judgment in *Boss* and severely curtails the effect of the decision in *Prospect*.
As this is a long report I will give my comments after each main issue rather than at the end.

"Designed or adapted for living in"

In the *Hosebay* case concerned three properties in South Kensington which were each originally constructed, and first occupied as large houses. Each property was described in the lease as "messuage or dwellinghouse". "Messuage" is an archaic term for a house. The lease stipulated that each property be used only as a number of residential "flatlets". It was assumed that therefore that each house had been converted from a house in single occupation into a house suitable for occupation by several households. At the time that the notice claiming the right to enfranchise was served each house was divided into rooms with self-catering facilities used as short term holiday accommodation.

Anthony Radevsky was for the tenants. He deployed three arguments:

(i) First, given that the three properties were originally designed for living in it is unnecessary to consider the issue of adaptation (i.e. picking up the argument suggested by Lord Neuberger in *Boss*.).

(ii) Secondly if that is wrong then the most recent works to the three properties were insufficient to have "adapted" them so the original "design" stands.

(iii) Thirdly if that is wrong then the works adapted each of the three properties "for living in".

Lord Neuberger rejected the first argument saying this:

"It is clear that each of the three properties was "designed . . . for living in", as each of them was constructed as a house for single occupation . . . Picking up on the point which was left open in *Boss Holdings* . . . the contention is that, even if the three properties were subsequently adapted away from residential use, that does not matter as they were "designed or adapted for living in – i.e. that satisfaction of either alternative suffices even if the other alternative is not satisfied.

The point has now been fully argued and . . . I would reject it. It would seem somewhat illogical that one could "adapt into" residential use, but that one could not "adapt out of" such use. Further, although . . . the literalist meaning of "designed or adapted" is that either alternative will do, that is not by any means what the words naturally convey . . . I must confess to having started . . . what I now think is a hare by suggesting an over-literalist approach to the language used by the legislature".

As to the second argument that the recent works converting the units in the property from “flatlets” to units suitable for short-term holiday accommodation did not amount to “adaptation” Lord Neuberger preferred not to decide the point as there was no evidence as to precise nature of the works carried out.

For the purposes of the third argument Lord Neuberger assumed that the works carried out at the properties were works which “adapted” each of the properties but concluded that the works adapted the properties for living in. It was necessary to look “at the most recent works of adaptation, and assess objectively, whether they resulted in the property being adapted for living in”.

Lord Neuberger stressed that it was necessary to reach an objective assessment of the physical changes to the building. Furnishings and furniture are irrelevant. The subjective intention of the person responsible for the works will rarely be relevant in judging whether the property has been adapted for living in: “one is concerned with how the building was adapted, not why it was adapted”. The actual or intended use immediately after the works could only be relevant to the limited extent that if the building was used for living in immediately after the works were carried out it *might* help to undermine an argument that the works did not result in the property being adapted for living in.

The actual use of the property at the date of the notice was likely to be irrelevant. This point was neatly illustrated by the facts of the case. The landlord argued that the use of the units within the property as short term holiday accommodation meant that it was not being used for “living in”. Lord Neuberger assumed that was true without deciding the point but pointed out that was irrelevant to the question of whether the works adapted the property for living in. As Moore-Bick LJ pointed out in argument the rooms were laid out in a way “entirely appropriate for letting to students on three year degree courses”. The landlord conceded that if they had been the property would have been used for living in.

Comment

In view of the decision as to what is a "house . . . reasonably so called" (see below) the landlord's best argument in every case where a house is being used for non-residential purposes is likely to be that objectively assessed the works of adaptation have resulted in the premises no longer being adapted for living in. The actual use at the time may not be a good guide to whether the premises have been so adapted. This case illustrates that point. It is not hard to think of similar cases e.g. a house which still has a flat including a kitchen and bathroom on the top floor but is otherwise used as offices. In many cases there will be a grey area and it seems certain that there will be future cases which will turn on the facts of the particular case.

"house . . . reasonably so called"

In *Tandon v Trustees of Spurgeon Homes* [1982] AC 775 Lord Roskill said:

"As long as a building of mixed use can reasonably be called a house, it is within the statutory meaning of "house" even though it may reasonably be called something else . . . [I]f the building is designed or adapted for living in , . . . only exceptional circumstances . . . would justify a judge holding that it could not reasonably be called a house. They would have to be such that nobody could reasonably call the building a house"

Lord Neuberger pointed out that, in view of his decision in *Hosebay* and the concession in *Lexgore*, that the premises concerned *were* designed or adapted for living in, the landlords had a "high hurdle" to cross in arguing that the premises were not reasonably called a house in view of the dicta of Lord Roskill.

In *Hosebay* Edwin Johnson QC for the landlord deployed two arguments:

(i) The dicta of Lord Roskill ought not to be regarded as sound in view of the fact that it was made at a time when *ex hypothesi*, any building to which it referred would have been occupied, at least in part, by the tenant i.e. that it was no longer reliable in view of the removal of the residence requirement.

(ii) In considering whether premises were reasonably called a house, the decision in *Prospect Estates* indicated that it was permissible to look

> at the actual use to which the premises were put and that the actual use was inconsistent with the premises being called a house.

In *Lexgore* Katherine Holland QC essentially raised the same argument relying on the fact at the date of the notice a substantial part of the premises were used as offices.

As to the point that Lord Roskill's dicta no longer applied Lord Neuberger pointed out that the dicta related to section 2 (1) of the 1967 Act and that the meaning of those provisions of that subsection cannot have changed as a result of the amendments of other parts of the Act.

The second argument raised in *Hosebay* was that the decision in *Prospect Estates* indicated that it was permissible to look at the actual use to which the premises were put and that the actual use was inconsistent with the premises being called a house. Lord Neuberger was doubtful whether that was in fact the ratio of *Prospect Estates.* He said of the decision:

> "Although it is, in principle, binding on us so far as its ratio is concerned, I must confess to some difficulty in identifying and agreeing with that ratio. Goldring LJ appeared to consider that the crucial point was the fact that only about 11% of the building concerned could lawfully be used for residential purposes under the lease in question. That is tolerably clear in its general effect: one concentrates on the permitted use, and, if it forbids residential use, or allows it only to a relatively exiguous extent, the building cannot be a "house … reasonably so called".

He then went on to say why he disagreed with the decision. There were essentially two reasons. First it put decisive weight on the user covenant while the House of Lords in *Tandon* emphasized that the question whether building is a house . . . reasonably so called" is to be determined essentially by reference to its external and internal physical character and appearance. to his mind the ratio was that it the permitted use under the lease which was important. Secondly the fact that the main use was as an office was not inconsistent with the building being described as a house:

"One could . . . quite naturally describe a building built as a town house, which had subsequently been internally converted into offices, as a "house used as offices": hence it would "reasonably [be] called" a house, even though it was not used for residential purposes, and even if it was not permitted to be so used. If most people were asked whether a building could reasonably be called a house, I am not convinced it would occur to them to ask about the permitted use under any lease".

In short having professed to be bound by the decision in *Prospect Estates* Lord Neuberger substantially demolished that decision and suggested that it should be confined to cases where "residential use is either prohibited entirely, or restricted to a very small part of the building, and the actual use accords with that".

Accordingly the premises in the *Hosebay* case which all had the appearance of houses and were described as such in the lease were reasonably called houses despite the use as short term holiday lets. As the landlord in *Lexgorge* had also relied on the decision in *Prospect Estates* and the case concerned a town house the tenant also triumphed in that case.

Comment

In the view of this commentator Lord Neuberger's criticisms of the decision in *Prospect Estates* are spot on. I have to admit to a smug satisfaction in reading this decision as I made virtually identical criticisms when I wrote the case report on *Prospect Estates.* I said:

> "It is clear that the primary requirement of whether a building is a house reasonably so called is one of shape and form.
> The judge below was surely right to conclude that the "overwhelmingly significant factor" was that the building was designed for living in and still had the form and shape of a private house. The Court of Appeal in overturning that decision had to find that "nobody could reasonably call the building a house". It based that decision on the assertion that nobody could call a building a house if the lease said no-one can lawfully live in virtually 90% of it. That would seem to be wrong. Surely most people are quite comfortable with describing a building as a house (if it looks like one) regardless of what the terms of the lease state."

In confining the decision in *Prospect Estates* as he did, this judgment ensures that many properties built as town houses, but now used as something else will be

considered “houses . . . reasonably so called”. The main line of defence for landlords will be an argument on the first limb of s. 2 (1) discussed above i.e. that the premises are not “adapted for living in”.