ENFRANCHISEMENT OF MIXED USE PREMISES

WHICH MIXED USE BUILDINGS ARE HOUSES

Is the Property a house?

1. For the purposes of the 1967 Act a house is defined by s2 as follows, so far as relevant

> "(1) For the 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
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> (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."

2. The relevant time for assessing whether the building is a "house" is at the date on which statutory notice of the claim is given to the landlord.

3. The definition raises two separate but overlapping questions: (i) is the building one "designed or adapted for living in"? (ii) is it a "house … reasonably so called"? See *Hosebay Ltd v Day* [2012] 1 W.L.R. 2884 at [9].

Is the Property designed or adapted for living in?

4. It is clear from the words "notwithstanding that the building ..was or is not solely designed or adapted for living in" that a "house" can include a building in mixed residential and commercial use. It is also clear from section 2(1)(a) that a building divided horizontally into flats or other units can be a house. That is not to say that any element of residential accommodation, however small, is sufficient.

What proportion of residential is sufficient?

5. The leading case of *Tandon v Trustees of Spurgeons Homes* [1982] AC 775 concerned whether a shop and upper parts was a "house". On the issue of what proportion of residential accommodation was sufficient, Lord Roskill, giving the majority view, held that

> "On the view most favourable to the respondents, the figures were 75 per cent. shop, 25 per cent. residential, but if the yard and stable be excluded as part of the premises the two figures would be approximately equal. On any view both users were substantial".

6. The Supreme Court in *Hosebay v Day* [2012] 1 WLR 2885 noted that one of the two determinative factors behind this conclusion was that "the proportion of residential use, even if only 25%, was 'substantial' (p 776)" [29].

7. In *Prospect Estates Ltd v Grosvenor Estates Ltd* [2009] 1 WLR 1313 a house on the Grosvenor Estate 89% of which was used as offices was held not to be a house.

8. In *Boss Holdings v Grosvenor West End Properties* [2008] 1 WLR 293 ("*Boss*"), a building constructed as a house over six floors had been adapted for commercial use on the three lower floors, so that the residential part comprised three out of the six floors. That was held sufficient for it to be a house reasonably so called. See paragraph [15].

9. In *Grosvenor (Mayfair) Estate v Merix International Ventures Limited [2017] EWCA Civ 190 ("Merix")*, the court was concerned with a property in Mayfair which was built as a house and mews, and also converted after the Second World War to mainly commercial use. The most recent use of most of the house was as offices, and only the upper two storeys and the mews were in residential use. Only 33% of the whole was in residential use. That was held to be sufficient.

Is the Property a house reasonably so-called?

10. In *Tandon v Trustees of Spurgeons Homes* [1982] AC 775 the majority of the House of Lords held that a shop and upper parts was a "house" reasonably so called. There

have recently been a number of criticisms of the reasoning of the majority in that case, but it remains good law. The most recent cases on mixed use properties are *Jewelcraft v Pressland* [2015] EWCA Civ 1111 and *Merix*.

11. In *Jewelcraft* the building was a purpose built shop and upper parts. It was formerly occupied by the shopkeeper who was able to use an internal staircase. In the 1960s that staircase was removed to make the shop bigger, and replaced by an external staircase accessed from the rear. The landlord argued that it was not a house reasonably so-called, and that *Tandon* was either now no longer good law, or was distinguishable.

12. The Court of Appeal held that it was a house as a matter of law, that *Tandon* should be followed, and that judges should not base their decisions on their own perceptions of what a house was. Patten LJ explained as follows:

> "14 The first point, however, to be made about the s.2 definition of a "house" is that, although it represents in many ways what might be described as the common understanding of what is meant by a house in ordinary parlance, it operates and was clearly intended to operate as a purpose-made and therefore extended definition of that term designed to carry into effect the policy of the 1967 Act. It was therefore not Parliament's intention to exclude the right of enfranchisement in the case of buildings which were designed or adapted in part ("not solely") for non-residential use or which (if wholly residential in character) were internally sub-divided into flats.
>
> 15 The use of this extended definition has the potential to bring within the scope of the Act various types of premises which do not obviously conform to the every-day description and understanding of a house…."
>
> 21….The first is that the question whether a particular property is a house within the meaning of s.2 has been authoritatively recognised to be a question of law and not a purely factual issue for the judge. There is therefore only one correct answer to the question. These are not cases where this Court is concerned to decide whether the decision was one reasonably open to the judge on the evidence he was presented with."

13. The landlord had argued that a building was not a house if it:
    a. looked like a house but was used for non-residential purposes such as the buildings under consideration in *Hosebay* and *Prospect Estates*;
    b. had some residential use but did not look like a house, or where the commercial and residential parts of the building are completely separate and self-contained.

14. This distinction was rejected for the following reasons

> *"* 40 In our view the endorsement and explanation of the decision in *Tandon* by the Supreme Court in *Hosebay* as one turning on user means that claims to enfranchise buildings comprising shops with accommodation above should not be dismissed for non-compliance with the reasonably so called condition in s.2(1) either because the building is, as a matter of ordinary speech, best described as a shop or because the accommodation is not linked internally to the remainder of the building. *Tandon* establishes that shops with accommodation above are, as a matter of law, reasonably to be described as houses for the purpose of s.2(1) provided that a material part of the building is designed or adapted for and used for residential purposes on the relevant date."

15. In *Merix*, the court was concerned with a property in Mayfair which was built as a house and mews, and also converted after the Second World War to mainly commercial use. The most recent use of most of the house was as offices, and only the upper two storeys and the mews were in residential use. Only 33% of the whole was in residential use. Grosvenor argued that it was not a house reasonably so-called, but a disused office building with some ancillary residential accommodation. The judge held that the property was a house reasonably so-called, following the decision in *Boss Holding Ltd v Grosvenor West End Properties Limited* [2008] 1 WLR 289 which he held to be indistinguishable.

16. In *Boss*, the property was built as a house, but from 1948 the top three floors were to be used as flats, and the lower three floors were used for dress making. The commercial use stopped before the notice was served. The upper floors had been

stripped back to the joists and bare walls. Lord Neuberger (then in the Court of Appeal) held, at [15], that "the judge was plainly correct to conclude that the property could reasonably be called a house". This finding was not challenged in the House of Lords. The Supreme Court in *Hosebay v Day* held that *Boss* was correctly decided.

17. The Court of Appeal in *Merix* noted and agreed with the comment in *Jewelcraft* that the extended definition of house meant that it included buildings which might not, in ordinary parlance, be regarded as a house. However, McCombe LJ appeared to seek to limit the ratio of *Hosebay*:

> "69. I also think that it is difficult to take the ratio of *Hosebay* much beyond the final two sentences of paragraph [35] in that case, i.e. as dealing with buildings with an active and settled use, such as the properties in both appeals actually had.
> 71 What the court has to do is to decide the building's "present identity or function by reference to its physical character, whether derived from its original design or from its subsequent adaptation" at the relevant date (Lord Carnwath at [35] in *Hosebay*). Past adaptation may have changed that identity or function, but I do not consider that the last user can be the only relevant consideration."

18. McCombe LJ also qualified the proposition of Patten LJ in *Jewelcraft* that the categorisation of a building was, in every case, a matter of law. He held as follows:

> "78 In formulating his propositions of law in *Tandon* Lord Roskill was desirous of achieving "broad consistency in the conclusions reached" and said that the question must not, "save within narrow limits" be treated as a question of fact. Patten LJ in *Jewelcraft* said that the question was not "purely" a factual issue. Where the trial court is faced with a property of a type not exactly similar to one previously characterised by the higher courts, it must surely do its best to apply the law to the facts as found and decide whether the property in question is or is not a house, with the benefit of its own evaluation.

> 79. Once one reaches that position, it seems to me that it would be misplaced to disturb the judge's conclusion that the Property here had essentially the same identity and function as the building in issue in *Boss*. *Boss* was the closest example for the purpose of trying to place the case within a defined legal category. Beyond that, one comes to a stage where, having paid due regard to the various formulations of legal principle in past cases, it becomes hard to fault or to better the final assessment made overall by a trial judge. However much one tries to squeeze particular types of property into watertight legal compartments, e.g. as in *Tandon*, the fact remains that buildings are infinitely variable in character and function, affected in part by historic user. The Supreme Court in *Hosebay* was clearly troubled by the rigidity imposed by the *Tandon* decision and said that the propositions formulated "do not…offer much assistance as such, at least beyond the facts of the case". Various types of building must, it seems to me, be amenable to varying characterisation by trial judges, doing their best to apply the principles emerging from decided cases. Any other solution is simply a recipe for an endless chain of appeals to the higher courts in an attempt to achieve a formal legal characterisation of individual properties to no advantage at all to the litigants involved."

19. The Court of Appeal upheld the decision of the judge that the building was a house on the basis that it was similar to that in *Boss*.

20. What conclusions can we draw from these decisions? First, it now seems clear that a shop and upper parts is a house, whether purpose built or converted, and whether it has any internal connection or not. Second, buildings constructed as houses and adapted for office use are likely to be houses if at least 25% is in residential use or adapted for residential use at the date of the notice. Third, the courts will try to ensure consistency of decision making, and previous decisions on similar cases are likely to be followed if they are consistent with higher authority.

FLATS IN MIXED USE

21. The definition of "flat" in s101 of the 1993 Act does not in terms refer to or contemplate mixed use:

> "flat" means a separate set of premises (whether or not on the same floor)—
> (a) which forms part of a building, and
> (b) which is constructed or adapted for use for the purposes of a dwelling, and
> (c) either the whole or a material part of which lies above or below some other part of the building"

22. In *Smith v Jafton Properties Ltd* [2013] 2 EGLR 104, the County Court was concerned with a collective enfranchisement claim relating to a block of flats used as serviced apartments. In a long and difficult judgment HHJ Hand QC held that the units did not meet the definition of flat because although they had the physical characteristics of flats, the adaptation did not create premises for use for the purposes of occupation with a sufficient degree of permanence to say that the occupier was either "living in" the flat or using it as a "dwelling" (see paras 131-133, 142-149 of judgment). He also held that the units were not "occupied or intended to be occupied for residential purposes" within the meaning of section 4.

23. The latter issue also fell to be considered by the High Court (Mann J.) in *Westbrook Dolphin Square Ltd v Friends Life Ltd* [2015] 1 W.L.R. 1713, which concerned flats used as serviced apartments. Counsel for the landlord did not even seek to argue that the flats were not "flats", and did not seek to defend the reasoning of the judge in *Smith v Jafton* as to whether there were occupied for residential purposes. Mann J found the decision in *Smith v Jafton* to be of no assistance. He concluded that "residential purposes" did not require the units to be occupied as dwellings or import any requirement of permanence: they simply had to be used for lodging sleeping or overnight accommodation, a test which was satisfied.

MIXED USE PREMISES IN COLLECTIVE ENFRANCHISEMENT?

Which premises qualify?

24. This question requires a consideration of the exclusion of premises by section 4 of the 1993 Act which provided as follows:

> 4.— Premises excluded from right.
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> (1) This Chapter does not apply to premises falling within section 3(1) if—
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> (a) any part or parts of the premises is or are neither—
>
> (i) occupied, or intended to be occupied, for residential purposes, nor
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> (ii) comprised in any common parts of the premises; and
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> (b) the internal floor area of that part or of those parts (taken together) exceeds 25 per cent. of the internal floor area of the premises (taken as a whole).
>
> (2) Where in the case of any such premises any part of the premises (such as, for example, a garage, parking space or storage area) is used, or intended for use, in conjunction with a particular dwelling contained in the premises (and accordingly is not comprised in any common parts of the premises), it shall be taken to be occupied, or intended to be occupied, for residential purposes.
>
> (3) For the purpose of determining the internal floor area of a building or of any part of a building, the floor or floors of the building or part shall be taken to extend (without interruption) throughout the whole of the interior of the building or part, except that the area of any common parts of the building or part shall be disregarded.

25. In ascertaining whether this exception applies, it is therefore necessary to ascertain: (1) the internal floor area of the premises as a whole and (2) the internal floor area of all those parts of the premises, which are not occupied for residential purposes and not intended to be so occupied. If area (2) amounts to more than 25% of area (1), the premises are excluded.

26. In making this assessment, the common parts are excluded from both sides of the equation (i.e. are not included in either the total internal floor area, or the non-residential floor area).[1] Section 101(1) of the Act provides that: *"common parts", in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it".*

27. The most recent and comprehensive guidance on the application of this exclusion is to be found in the recent decision of Mann J in *Westbrook Dolphin Square Ltd v Friends Life Ltd (No 2)* [2015] 1 W.L.R. 1713:

    a. The section 101(1) definition is non-exhaustive (paragraph 197);
    b. The definition of "common parts" assumed an ordinary meaning of those words (paragraph 198). The non-exhaustive definition suggested by Roth J in the *Panagopoulos case* [2011] Ch 177 was approved, namely that:

    "…it is intended to include those parts of the building that either may be used by or serve the benefit of the residents in common (using that expression in a non-technical sense), as opposed to those parts of the building that are for the exclusive benefit of only one or a limited number of the residents or for none at all."

    c. Other general points that were said to be extracted from the authorities included (paragraph 200):
        i. It is not necessary that the part be devoted to purposes as a matter of obligation in the leases[2];
        ii. It is not necessary for residents to have access to a part of the building for it to be a "common part". A caretaker's flat, for example, is capable

[1] Section 4(3). See too *Indiana Investments Ltd v Taylor* [2004] EGLR 63 and *Marine Court (St Leonards on Sea) Freeholders Ltd v Rother District Investments Ltd* [2008] 1 EGLR 39.
[2] This principle was applied to a caretakers flat in *Merie Bin Mahfouz Company (UK) Ltd v Barrie House (Freehold) Ltd* [2014] UKUT 0390 (LC); [2015] L & TR 21 at [114] to [117]: "The essential attribute is some shared use or benefit".

of being a common part even though the residents do not have access to it.[3]

iii. A part of the premises used by several occupants can be a "common part" even if the only users are commercial users and not residential users. An example would be a corridor which leads to commercial units and is used by the commercial tenants only.

28. In ascertaining the internal floor area which is neither occupied, or intended to be occupied, for residential purposes, regard should be had to s4(2) which clarifies that areas *"intended for use, in conjunction with a particular dwelling contained in the premises"* are to be treated as residential areas, the example given being garages, parking spaces and storage areas.

29. In relation to the calculation of areas occupied, or intended to be occupied, for residential purposes, Mann J held that:

    a. The Act does not define either "non-residential" or "residential" purposes, and the court did not propose to formulate a test (paragraph 179);
    b. However, the court did confirm that it is possible for premises to be used for residential purposes without being anyone's home in the sense of sole home, or principal home (paragraph 181);
    c. The term "residence" indicated living, as opposed to office, accommodation, and could encompass lodgings (paragraphs 178-179, 181-195).

How can the commercial elements be dealt with in a collective claim?

30. The possible options for a freeholder are
    a. To let the tenants acquire the commercial parts as well, if they can afford them;
    b. Claim a leaseback;
    c. Grant a lease to a third (or connected) party.

[3] For a helpful discussion of the authorities on caretakers flats, see Hague paragraph 21-08.

Leasebacks

31. Under section 36 and schedule 9, the freeholder can ask for leasebacks of a "unit" in the specified premises owned by the freeholder if it is not let to a qualifying tenant.

32. A "unit" is defined by s38(1) as "(a) a flat; (b) any other separate set of premises which is constructed or adapted for use for the purposes of a dwelling; or (c) a separate set of premises let, or intended for letting, on a business lease".

33. In *Merie Bin Mahfouz Company (UK) Ltd v Barrie House (Freehold) Ltd* [2014] UKUT 0390 (LC); [2015] L & TR 21, the Upper Tribunal considered claims to leasebacks of certain areas of a block. It held, among other things, that
    a. A unit which includes an area which was a common part at the relevant date cannot be the subject of a valid claim for a leaseback.
    b. A flat used as a caretaker's flat is a common part even if there is no obligation to provide a resident caretaker. This decides a point which was only discussed obiter in Panagopoulos.
    c. The landlord was entitled to leasebacks of two units let to mobile phone providers. O2 and Orange each had demised to them an area of the roof in order to erect an aerial and a basement room to store equipment. Even though the two areas where physically separated, together they were a separate set of premises let on a business lease. Although the roof areas had originally been common parts, once they were let to the telecoms companies, those areas ceased to be part of the common parts, and so a leaseback was not precluded on that ground.

34. The Upper Tribunal granted the landlord permission to appeal, and the decision of the Court of Appeal is awaited.

35. Any leaseback must be claimed in the counter-notice. Schedule 9 of the 1993 Act specifies the detailed terms of the leaseback. There is no need to specify the terms of any proposed leaseback: *Buckley v Tibber* [2015] EWCA Civ 1294.

Granting a lease

36. Whether or not the freeholder claims a leaseback, there is nothing to prevent the grant of a lease which would not be liable to acquisition. See *Queensbridge Investment Ltd v 61 Queens Gate Freehold Ltd* [2014] UKUT 0437 in which the landlord had claimed leasebacks of three flats not let on long leases, but did not like the terms and the price determined by the LVT, and appealed. Before the appeal was heard, the landlord granted leases of each of the three flats to linked companies on the terms which it had proposed to the LVT. It successfully contended before the Upper Tribunal that it was not obliged to enter into the leasebacks. Were those new leases effective? The Upper Tribunal held that they were. There is nothing in the 1993 Act, in particular in s.19 which prevents certain actions taking place during a claim, which stops a landlord from granting individual leases of flats not already let on long leases.

37. Thus the freeholder could simply grant leases to a third party of the shops, storerooms, and telecoms leases of parts of the roof. It could do the same with the workshop although the tenants might contend that it is common parts, in which case the lease would be void under s19.

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