Landmark Chambers

What is a “flat”?

Leasehold Enfranchisement- current issues

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The topics

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- What was decided in the Aldford House case?
- Adaptation cases
- AirBnb uses
- Live/work units
- What improvement can be disregarded in creating the flat?

The starting point: s.101 1993 Act

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- "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 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"

- "dwelling" means:

  "any building or part of a building occupied or intended to be occupied as a separate dwelling"

Aldford House Freehold Ltd v (1) Grosvenor (2) K Group Holding Inc [2018] EWHC 3430

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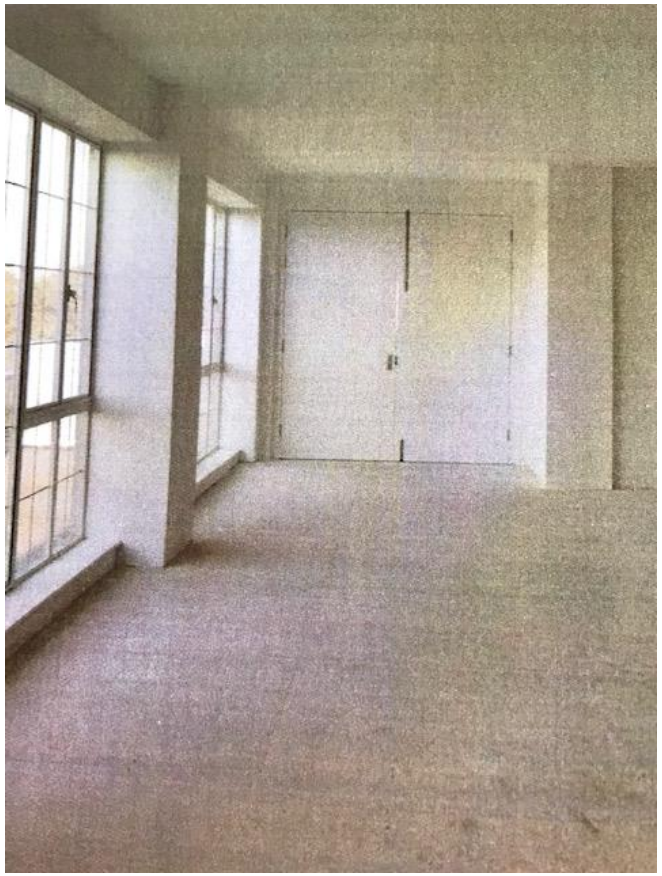

Aldford House (1)

- First issue was whether there were two or no “flats” on the 6th and 7th floors

- Prior to 2008 there was a single flat on each of the 6th and 7th floors

- At the relevant date:
  - The existing underleases of the 2 flats had been surrendered
  - 4 new underleases had been granted with plans showing the extent of the demise and a covenant not to use other than as a single private residence
  - The lawful planning use was as four separate flats
  - Structural works were completed, not fitted out and not habitable
  - Separated by dividing wall with locked pair of large double access doors

Aldford House (2)

- Held that there were 4 flats
  - Each flat was a separate set of premises: separate identity as enclosed by external walls and diving wall and functional identity by underleases
  - All 4 flats had been constructed for use for residential purposes and were intended to be occupied as dwellings:

    "the test is not whether the separate set of premises has reached such an extent of fitting out, or remains in such good condition, that it can actually be used for living, eating and sleeping purposes on the relevant date"

  - Relevant factors: the underleases, planning permissions and the works

- Permission to appeal granted

Adaptation Cases

- How much adaptation is necessary?

- In an office with a toilet, sink and small kitchen, would putting a bed in be enough to make it "*adapted for the purposes of a dwelling*"?

- Day v Hosebay [2012] UKSC 41:

> "It is true that the word is applied to the building, rather than its contents, so that a mere change of furniture is not enough. However, the word does not imply any particular degree of structural change. Where a building is in active and settled use for a particular purpose, the likelihood is that it has undergone at least some physical adaptation to make it suitable for that purpose. That in most cases can be taken as the use for which it is currently "adapted", and in most cases it will be unnecessary to look further"

- Mere user is not adaptation: Smith v Jafton Properties [2013] 2 EGLR 104

AirBnb uses (1)

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Smith v Jafton Properties [2013] 2 EGLR 104

- Were serviced apartments operated via a centralised booking system flats?
- Current user not determinative (contrast Day v Hosebay [2012] UKSC 41)
- Doesn't need to be a '*main or only residence*' or '*some kind of home*' but more than simply staying for a time
- Physical characteristics and intended (actual) use must be capable of accommodating more than simply a transient population

AirBnb uses (2)

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- Finely balanced decision not a flat because:

  i) centralised booking system which allowed for preference but no guarantee of specific choice and

  ii) lack of tenancy agreements made it more akin to a hotel

- Difficult judgment, largely open question whether premises used for transient population but capable and intended for more permanent use are a “flat”

- May depend upon whether AirBnb use is combined with tenancies and the mechanics of the booking system?

Live/Work units

- The Bishopsgate Foundation v Curtis [2004] 3 EGLR 57 (CLCC)
  - User clause was live and/or work so purely residential use not a breach
  - No use in fact required - failure to carry on a business not a breach
  - Principle that a T cannot rely on his own wrong did not apply to 1993 Act

- Interesting issues arise where covenant does require both live and work

- 1967 Act expressly contemplates mixed use s.2(1) the 1993 Act does not

- Principle that T cannot rely on his own wrong does apply to the 1967 Act: Henley v Cohen [2013] EWCA Civ 840:

Disregard for improvements in creating the flat (1)

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- Para 3(c) of Schedule 6 of 1993 Act (see para 3(c) Sch.13 for new lease):

  "On the assumption that any increase in the value of any flat held by a participating T which is attributable to an improvement carried out at his own expense by the T or by any predecessor in title is to be disregarded"

- Rosen v Trustees of Camden Charities [2002] Ch 69
  - Improvement has to be to "the house and premises"
  - Construction of a new house on bare site not enough
  - Building lease is an alternative to a premium not works at T's own expense

Disregard for improvements in creating the flat (2)

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- Shalson v John Lyon [2004] 1 A.C 802
  - Purpose of disregard is to prevent tenant paying twice

- Portman Estate v Jamieson [2018] UKUT 0027
  - Former mews house demolished and replaced by a new mews house, claim under the 1967 Act was the construction of the new house an improvement which could be disregarded?
  - The works do not have to be to a house
  - Rosen limited to a new house on bare site
  - Demolition of old building and construction of new house capable of being an improvement to be disregarded

Thank you for listening

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