Neutral Citation Number: [2008] EWCA Civ 1281

Case No: B2/2008/0715

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HHJ DIGHT
CHY07534

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2008

Before :

LORD JUSTICE MUMMERY
LADY JUSTICE SMITH
and
LORD JUSTICE GOLDRING

- -

Between :

GROSVENOR ESTATES LIMITED	**Appellant**
- and -	
PROSPECT ESTATES LIMITED	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

- -

MR ANTHONY RADEVSKY (instructed by Messrs Boodle Hatfield) for the Appellant
MR STAN GALLAGHER (instructed by Radcliffes) for the Respondent

Hearing date : 8th October 2008

- -

Judgment

Lord Justice Mummery :

The issue

1. This appeal is about the statutory right of a tenant of a long lease to acquire the freehold. The tenant succeeded in the Central London County Court. The issue in this court is whether the judge was wrong in holding that the property known as 132 Ebury Street, London SW1 (the Building) was, at the relevant date (3 January 2007), a house "reasonably so called" within the meaning of section 2(1) of the Leasehold Reform Act 1967, as amended (the 1967 Act). If his decision was wrong, the tenant, Prospect Estates Limited (Prospect), in which is vested an unexpired term under a 42 year lease granted by the landlord on 29 December 1972 (the Lease) and expiring on 29 September 2013, is not entitled to acquire the freehold of the Building by virtue of Part I of the 1967 Act. The judge granted the landlord permission to appeal against his ruling in favour of leasehold enfranchisement.

2. Section 2(1) (meaning of "house") provides that

> "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 wholly designed or adapted for living in, or is divided horizontally into flats or maisonettes …"

3. The judge referred to the relevant statutory provisions and cited the leading authorities on their interpretation: **Lake v. Bennett** [1970] 1 QB 663 at 760H; **Tandon v. Trustees of Spurgeon Homes** [1982] AC 755 at 764G and 766H-767D; **Malekshad v. Howard de Walden Estates Ltd** [2003] 1 AC 1013 at paragraph 51; **Boss Holdings Ltd v. Grosvenor West End Properties Ltd** [2008] 1 WLR 289 at paragraph 26.

4. The undisputed written evidence about the design, construction, history and use of the Building and the terms of the Lease is carefully summarised by the judge in his excellent judgment. There was no oral evidence. The Building was originally designed as a house for living in when it was built in about 1850. Apart from the addition of a third and fourth floor no major structural works to the Building have been carried out since it was built. It still looks like a house. The essential dispute is whether, as at the date when Prospect served notice of its claim to the freehold of the Building on 3 January 2007 and when 88.5% of the Building was used as offices, it was still a house in the statutory sense of a "building designed or adapted for living in and reasonably so called."

5. In consequence of amendments to the 1967 Act there is no longer a requirement on the facts of this case for the tenant to be occupying the Building as a sole or main residence. The residence test in section 1(1) of the 1967 Act was abolished by section 138 of the Commonhold and Leasehold Reform Act 2002, subject to certain exceptions inapplicable to this case. The abolition of the residence test marks, to a significant extent, a change in the legislative policy and the scope of the enfranchisement legislation. The construction of section 2(1) is, however, unaffected by subsequent amendments to other provisions of the 1967 Act, as no amendments

were made to the definition of a house: **Boss Holdings** at paragraph 23 per Lord Neuberger.

Background and judgment below

6. The Building is a flat fronted terraced early Victorian building. It consisted of a basement and two upper storeys, to which third and fourth storeys were later added, together with other additions and extensions. Since 1965 the fourth storey (11.5% of the Building's floor space) has been used as residential accommodation. It is not separated by a door either at the top or bottom of the staircase. Since about 1958 the remainder of the Building has been used as office space (88.5% of the Building's floor space) by a number of different sub-tenants under short term commercial sub-leases. The Building has retained the majority of the main internal walls and many, if not all, of the original basic and decorative features.

7. The terms of the Lease (clause 2(x)) limit the use of the fourth floor to a self contained private residential flat in the occupation of a director, partner, officer, or senior employee of the company, organisation or firm of the person in occupation of the remainder of the demised premises. The remaining floors can only be used as business or professional offices. Clause 2(xi) prohibits any indication of the use of the Building and provides that the windows shall be furnished like those of a private dwelling house. To a passer-by the Building still looks like a house.

8. The judge had the advantage of a view of both the outside and the inside of the Building. He concluded that

> "9. Viewed from the outside, the Building appears to be of the same type as the houses in the remainder of the terrace. Viewed from the inside the overwhelming impression that I was left with was that this was a house in its essential character.
>
> ……..
>
> 27. In my judgment the overwhelmingly significant factor in determining whether or not the Building is "a house …reasonably so called"….is that the Building was designed for living in and that its structure and appearance have (largely) remained unchanged. ….The terms of the current lease require the tenant to maintain the appearance of a private dwelling house while limiting the residential user to the top floor of the Building. I bear those terms in mind, but in my judgment they do not alter the fact that the Building itself resembles a house even though the majority of it may not be used as such. The use of one out of 5 floors of the Building, albeit 11.5% of the floor space, is, in any event, a substantial proportion in my judgment. Further I accept the evidence of Ms Scanlon as to her use of the top floor flat and I find that there was, at the date of the tenant's notice, substantial residential user of the Building. Taking those various factors together I am of the view that, notwithstanding the office user of the majority of the Building, its essential character is that of a house. I accept that some people might say that the Building could reasonably be called an office block, but that is not the test. As

> Lord Roskill said [**Tandon** at 766H -767G cited below] the circumstances would have to be such "*nobody could reasonably call the building a house"* for a judge to hold that it was not a house. In my judgment the Building could reasonably be called a "house" within the meaning of section 2(1) of the 1967 Act and the circumstances are not such that nobody could reasonably call the Building a house."

Landlord's submissions

9. Mr Radevsky for the landlord contended that the judge erred in law in holding that the Building was a house "reasonably so called." He accepted the judge's finding that there were insufficient works of adaptation to the Building to conclude that it had ceased to be designed for living as at 3 January 2007 when Prospect served its tenant's notice. But, he submitted, the Building could not be "a house reasonably so called" at that critical date, as the only living accommodation was on the 4th floor and even the occupation of that was linked to the occupation of remainder of the Building, which, in compliance with the covenants in the Lease, was and could only be used for offices. Under the terms of the Lease only 11.5 % of the Building could be lawfully used for living in.

10. As for the decided cases Mr Radevsky distinguished **Lake v. Bennett,** a case of a building constructed in 1869 as a house on three floors with a basement. The ground floor was later used as a shoe repairing shop and then as a betting shop with living accommodation still used for dwelling purposes in the rest of the building. The Court of Appeal reversed the decision of the county court judge and held that the building was "a house reasonably so called" within section 2(1). The living accommodation appears, on one view, to have been 75% of the floor area of the building. Only one floor was occupied as a shop. The dominant use of the building was for living in. It was still a house. It was within the original policy of the legislation, even though part of it was used for shop purposes.

11. Mr Radevsky distinguished **Tandon**, a case of a shop built as such in a shopping parade with living accommodation above (50% of the floor space, or 25% on one view). The House of Lords held by a majority that the building was "a house reasonably so called." In his speech, with which Lords Scarman and Bridge concurred, Lord Roskill approved **Lake v. Bennett.** He stressed the importance of uniformity of principle in the approach to this question and the need for broad consistency in the conclusions reached. I shall consider **Tandon** in greater detail later.

12. On Mr Radevsky's analysis the judge in this case went wrong in the passage quoted in paragraph 8 above. It is clear, he submitted, that the judge was unduly swayed by the original design of the Building and by the fact that it had remained unchanged. The judge erred in treating this as "the overwhelmingly significant factor." He gave little or no weight to the fact that, at the relevant date, the greater part of the Building was no longer used, and could not be lawfully used, for residential purposes. Mr Radevsky argued that it was no longer reasonable to call the Building a house. The result was that Prospect was not entitled to acquire the freehold compulsorily under the 1967 Act.

Discussion and conclusion

13. The House of Lords held in **Tandon** that the question whether a building is a house "reasonably so called" is one of law. In another part of his opinion (page 765E-F), Lord Roskill appears to have accepted the submission of the parties that it was a mixed question of law and fact, but I do not think that anything turns on this point. More important is the ruling that the expression "a house reasonably so called" is a limitation or qualification. Its purpose was to exclude certain buildings, which were regarded as a house under other legislation (e.g. the Rent Acts), from being a house within the 1967 Act.

14. When is it reasonable to call a building a house under the 1967 Act? On the one hand, it is clear there are buildings which could not, as a matter of law, be a house reasonably so called: a purpose built hotel, a hostel, a purpose built block of flats, a factory with a caretaker's accommodation, or an office block with a residential penthouse suite. Under other legislation such buildings may have been treated as a house. On the other hand, it is clear that a building designed for living in does not, as a matter of law, cease to be a house reasonably so called, simply because a part of it is no longer used for living in. In between these two kinds of building there is the grey area of varying degrees of mixed use. Depending on the particular circumstances of the case such buildings may, or may not, as a matter of law, be a house reasonably so called.

15. The authoritative interpretation of section 2(1) is in the opinions of the majority in **Tandon.** The extent of judicial disagreement on the question of law is an indication of the challenge to achieving the consistency of outcomes to which the law aspires. The judge at first instance in **Tandon** decided that the purpose built shop with living accommodation above was reasonably a house so called. He was reversed by a majority in the Court of Appeal, which was in turn reversed by a majority of 3 to 2 in the House of Lords. 5 judges took one view. 4 judges (including Lord Wilberforce) took the opposite view.

16. In **Tandon** Lord Roskill derived three propositions of law from **Lake v. Bennett,** which he said was welcome as stating a principle of which he approved. Lord Scarman and Lord Bridge agreed with him: see pages 763C-D, 767B-C and F-G.

> "… (1) 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 also 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, as is plain from section 1(1) of the Act of 1967, is meant designed or adapted for occupation as a residence, only exceptional circumstances, which I find it hard to envisage, would justify a judge in holding that it could not reasonably be called the house. They would have to be such that nobody could reasonably call the building a house."

17. Mr Gallagher, who appeared for Prospect, relied heavily on Lord Roskill's proposition (3), as did the judge. He contended that it clearly covered the case: the Building was originally designed for living in; the original design had not been

changed or adapted; it was still reasonable to called it a house; and the fact that only part of it was still occupied as a residence did not mean that it was no longer reasonable to call it a house. The change from sole use as a residence to mixed residential and office use was not an "exceptional circumstance" which would justify the judge in holding that it could not reasonably be called a house. This was one of the intermediate mixed use cases of the kind identified by Salmon LJ in **Lake v. Bennett** at p. 672E and Cross LJ at p. 673A-B. The Building could "equally reasonably" be called a house with the lower floors used as offices *or* offices with living accommodation above. In an intermediate case the Building could still reasonably be called a house applying Lord Roskill's proposition (3). The judge had the benefit of a view of the outside and inside of the Building. This clearly influenced his conclusion. It was impossible to say that nobody could reasonably call the Building a house.

18. I appreciate that it is a strong thing to say, using Lord Roskill's words, that *nobody* (least of all this judge, who had given the matter the most careful judicial consideration) could reasonably call this Building a house. The concept of a house "reasonably so called" has a degree of flexibility. Within the limits of reasonableness, different minds can reach different conclusions which are not obviously wrong. It would, however, be wrong to take this approach too far. In every case it is necessary to take account of all the relevant circumstances in order to decide whether a building is a house reasonably so called.

19. In my judgment, the judge applied Lord Roskill's propositions without taking full account of all the relevant circumstances. The propositions are not a statutory text and were never intended to be understood or applied as such. The judge paid insufficient attention to the peculiar, even exceptional (to echo Lord Roskill's language), circumstance of prescribed and predominant office use in compliance with the Lease. That circumstance is, in my view, the overwhelming and decisive feature of this case.

20. The original design and the unchanged external and internal appearance of the Building featured too prominently in the judge's reasons. If he had given due weight to the prescriptive terms of the Lease, the actual uses of the Building and the relative proportions of the mixed use at the relevant date, he could only have come to one conclusion: that it was no longer reasonable to call the Building a house within the 1967 Act.

21. I should add that the effect of the residence requirement in the 1967 Act, as originally enacted, was that the Building would not have fallen within it or its policy of enabling a tenant of a long lease of residential property compulsorily to acquire the freehold. I do not, however, think that that policy has continuing relevance to this case. The non-exhaustive definition of a house has remained the same, but other amendments, particularly the abolition of the residence test, have enlarged the scope of the 1967 Act and significantly changed the direction of its original policy.

Result

22. I would allow the appeal. The judge's decision that the Building was a house reasonably so called has been shown to be wrong. The Building was designed for living in, but, by reason of its prescribed and preponderant office use, it is impossible to say that, at the relevant date, the Building could reasonably be called a house.

Lord Justice Goldring:

23. I agree. I would only add this. As Mr Gallagher accepted in argument, his submission can be encapsulated in the following proposition. This building can reasonably be called a house although no-one can lawfully live in virtually 90% of it. As it seems to me, that cannot be right.

Lady Justice Smith:

24. I agree with the judgment of Mummery LJ. I add a few words of my own only because we are differing from the judge who wrote a careful and lucid judgment. He also had the advantage of a view, which we have not.

25. The question of whether a building is a house reasonably so called must be considered in the light of all the available information. Various factors will have to be taken into consideration and, as here, some factors point towards the building being a house; some point towards it being an office building and not a house or a house reasonably so called.

26. The question here is whether the judge was correct in his analysis of the various factors at his paragraph 27, quoted at paragraph 8 above. The judge considered that the overwhelmingly significant factor was that the house was originally designed for living in and that its structure and appearance had remained largely unchanged. He was of the view that the removal of the kitchen and bathroom(s) did not amount to significant adaptation away from use for living in. I am not sure that I would have so found but I am content to adopt the judge's holding on that point.

27. When the judge came to consider the terms of the lease, the point that he stressed was that the terms required the tenant to keep the building looking like a private house. The judge seemed to think that this was a pointer to the building actually being a house or a house reasonably so called. I do not agree that it is. It seems to me highly likely that the requirement to maintain the appearance of the building was related to the requirements of the planning authorities in a conservation area. The landlord who was itself required to keep the building looking like a house (even though it was being used as offices) would pass that obligation on to the tenant. I do not think that that factor points to the building being a house reasonably so called.

28. Although the judge mentioned that the terms of the lease limited the residential user to the upper floor and that this amounted to only 11.5% of the total floor area, the emphasis in the judge's reasoning was that the flat was used regularly and that this amounted to significant residential user. The judge did not appear to consider it important that a very large proportion of the building was used and could only be used for office purposes and that the residential flat was ancillary to the office use. It could only be occupied by a director or employee of one of the office tenants.

29. In my view, it is an important factor that this building has been predominantly used as offices since the 1950s and certainly throughout the current long lease. At the material date, it was predominantly so used. In my view, the terms of the lease are also of considerable importance. 88.5% of the floor area cannot lawfully be used as living accommodation. The living accommodation is ancillary to the office use.

30. I think that the judge underestimated the importance of those factors and, as a result, he mistakenly concluded that the building was a house or a house reasonably so called when, had he given proper weight to those factors, he would have been driven to the conclusion that this building is in fact an office building and cannot reasonably be called a house.