Case No: B2/2014/1362

Neutral Citation Number: [2015] EWCA Civ 1111
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
HH JUDGE DIGHT
3CL10384

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 October 2015

Before :

LORD JUSTICE PATTEN
LORD JUSTICE TOMLINSON
and
LORD JUSTICE VOS

- -

Between :

JEWELCRAFT LIMITED	**Appellant/ Claimant**
- and -	
(1) PAUL PRESSLAND **(2) JUSTIN PRESSLAND**	**Respondents/ Defendants**

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Mr Stephen Jourdan QC and **Mr Tom Jefferies** (instructed by **Maxwell Winward LLP**) for the **Appellant**
Mr Anthony Radevsky (instructed by **Bishop & Sewell LLP**) for the **Respondents**

Hearing date : 8 October 2015

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Judgment

Lord Justice Patten :

1. This is the judgment of the Court.

2. The issue on this appeal is whether some premises at 373 Upper Richmond Road, London SW15 ("the Premises") qualify as a "house" within the meaning of s.2(1) of the Leasehold Reform Act 1967 ("the 1967 Act"). That defines a "house" in these terms:

> "(1) 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 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
>
> (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."

3. The Premises consist of a ground floor purpose-built shop with residential accommodation on the floor above. They form part of a parade of shops of similar external appearance and design constructed in the 1920's. As originally built, the ground floor shop was not self-contained and could be accessed via an internal staircase leading to the first floor or from a kitchen and scullery located at the rear of the ground floor which, in turn, provided access to a small yard at the rear of the Premises. The accommodation on the first floor comprised a sitting room, two bedrooms, a bathroom and W.C. with access to the ground floor kitchen and scullery via the internal staircase.

4. In about 1970 the internal layout of the Premises was changed. The kitchen and scullery on the ground floor were removed and the space incorporated into the shop. At the same time the internal staircase disappeared and access to what then became a self-contained first floor flat was provided by a new external staircase located in the back yard. The rear bedroom of the flat has been converted into a kitchen but otherwise the accommodation is largely arranged as before but with the absence of the internal staircase. The floor space occupied by the ground floor shop and the first floor flat is approximately equal.

5. The Premises were let on a 99 year lease granted on 12 January 1923 for a term commencing on 25 March 1921. The lease still subsists. It contains no covenants which restrict the user of the Premises and the evidence was that the Premises were used for the business of a tobacconist and post office at least until 1942. On 10 October 1978 a sub-lease of the whole of the Premises was granted to Martin Newsagents Limited on terms which restricted the use of the upstairs flat to that by an employee of the tenant. A new sub-lease has been granted in March 2011 on less

restrictive terms but this post-dates the service of the notice to enfranchise in June 2010 which is the relevant date for determining the issue on this appeal.

6. On these facts HH Judge Dight held that the Premises did not constitute a house within the statutory definition contained in s.2(1) of the 1967 Act so that the claimant company was not entitled to enfranchise. The claimant now appeals with the permission of Gloster LJ on the ground that the judge's findings amount to an error of law and that he failed properly to apply the s.2(1) definition to the subject Premises as interpreted and explained by the decisions of the House of Lords in *Tandon v Trustees of Spurgeon Homes* [1982] AC 755 ("*Tandon*") and, more recently, by a unanimous Supreme Court in *Hosebay Ltd v Day and Lexgorge v Howard de Walden Estate* [2012] 1 WLR 2884 ("*Hosebay*").

7. The 1967 Act was passed in order to confer on the tenants of houses held on a long lease the right to acquire the freehold or an extended lease. As originally enacted, a condition of the right to enfranchise under s.1 of the 1967 Act was that the tenant should be occupying the house as his residence but s.1(2) qualified this requirement to the extent that occupation included occupation of only part of the house and, consistently with this, the statutory definition of a house in s.2(1) includes buildings which are or were not solely designed or adapted for living in. It is therefore common ground that the use of part of the building in question as a shop or for other commercial purposes is not a bar in itself to the property being a "house" within the meaning of s.2(1) nor to the satisfaction of the residence requirement under s.1(1).

8. The 1967 Act was amended by the Commonhold and Leasehold Reform Act 2002 so as to remove the residence requirement contained in s.1(1). This has had the consequence of extending the right to enfranchise to the lessees of buildings which qualify as houses even though not resided in by the tenant and therefore potentially at least to houses so defined used exclusively for commercial purposes. The conjoined appeals in *Hosebay* which we shall come to shortly both concerned premises of this kind.

9. The residence requirement in the 1967 Act was replaced with a new requirement in what is now s.1(1)(b)(i) that:

> "at the relevant time (that is to say, at the time when he gives notice in accordance with this Act of his desire to have the freehold or to have an extended lease, as the case may be) he has-
>
> (i) in the case of a right to acquire the freehold, been tenant of the house under a long tenancy for the last two years;"

10. There are also restrictions in s.1(1B) on claims to enfranchise by tenants of houses who are entitled to the protection of Part 2 of the Landlord and Tenant Act 1954. In such cases there is no right to enfranchise:

> "….. unless, at the relevant time, the tenant has been occupying the house, or any part of it, as his only or main residence (whether or not he has been using it for other purposes) —

(a) for the last two years; or

(b) for periods amounting to two years in the last ten years."

11. There was some discussion during the course of the appeal as to whether the leasehold premises had to qualify as a house within the meaning of s.2(1) for the whole of the two year period specified in s.1(1)(b) and s.1(1B) or only at the date of the notice. This is a question of statutory construction which is not germane to the outcome of the appeal and, in the absence of full argument on the point, we do not propose to express a view which would be no more than *obiter dicta* in any event. What is, however, clear is that, consistently with s.1 of the 1967 Act in its original form, the changes now made to the conditions for enfranchisement have left untouched the statutory acceptance that occupation of part of the property and the use of the remaining part for business purposes does not *ipso facto* take the property outside the statutory definition of a house.

12. Against this background, we can turn to consider the authorities on what constitutes a house for the purposes of the 1967 Act. "House" is an ordinary English word meaning a building of one or more floors which, as s.2(1) says, is either designed or adapted for living in. In physical terms, the word can denote a property which is either detached, semi-detached or part of a terrace but, as a matter of common parlance, a house would not ordinarily include a property unless at least part of the building occupied the ground on which it was built. That understanding is reflected in s.2(2) which excludes from the definition of a house premises of which a material part lie above or below part of the structure not comprised in the house.

13. The most obvious contrast in terms of residential accommodation is between a house and a flat or maisonette and the 1967 Act has also recognised this distinction by making express provision for houses divided horizontally into flats. In such cases the building itself may still qualify as a "house" provided that it is a house "reasonably so called".

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. A block of flats is a building designed for living in and divided horizontally into flats. But should it qualify for enfranchisement under s.2? The removal of the residence requirement brings into consideration properties such as those in *Hosebay* which were constructed as houses and both externally and perhaps even internally retain the appearance of a house but in fact are used solely for commercial purposes. Does the use to which they are put determine their character as a house or does external (or internal) appearance remain the

defining element? Finally there are buildings such as the one under consideration on this appeal which were designed or have been adapted to provide living accommodation but also include a commercial element; most commonly a shop. The structural definition of a house in s.2(2) means that there is no right to enfranchise properties of this sort unless the whole building including the ground floor shop element can reasonably be called a house.

16. The width of the extended definition in s.2(1) created by the proviso beginning with the words "notwithstanding that the building" means that the more difficult cases of the types we have just described fall to be determined by the words "reasonably so called". As a matter of construction, that phrase qualifies and has to be satisfied in relation to any property in respect of which a claim to enfranchise is made even if its potential inclusion as a house depends upon the application of the terms of the proviso. The interpretation and application of the reasonably so-called condition will therefore often be the critical limiting factor in determining whether the 1967 Act applies to the property in question.

17. In *Hosebay* Lord Carnwath (who delivered the only judgment) said this about the opening part of the s.2(1) definition:

> "9. The two parts of the definition are in a sense "belt and braces": complementary and overlapping, but both needing to be satisfied. The first looks to the identity or function of the building based on its physical characteristics. The second ties the definition to the primary meaning of "house" as a single residence, as opposed to say a hostel or a block of flats; but that in turn is qualified by the specific provision relating to houses divided horizontally. Both parts need to be read in the context of a statute which is about houses as places to live in, not about houses as pieces of architecture, or features in a street scene, or names in an address book."

18. The reference to the words "reasonably so called" imposing the requirement that the building should be a single residence comes from a distillation of the authorities rather than the express language of the statutory definition or any other part of the 1967 Act. The Court's task in all the decided cases has been to set limits to the right to enfranchise in a way which recognises and gives effect to the policy of the Act. This is most evident in the decision of the majority of the House of Lords in *Tandon* and was recognised by Lord Carnwath in *Hosebay* at [27]-[28]. But the limits of the statutory right to enfranchise, although dictated by policy, fall to be established through a mechanism ("reasonably so called") which requires some kind of objective evaluation by the Court and the central part of the debate has concerned the identification of the criteria on which this exercise should be based. Physical appearance, use and the terms of the lease have all featured as relevant factors but the weight to be attached to them and even their relevance have been the subject of widely differing views. If one takes the cases concerning buildings with a ground floor shop and accommodation above which is this case, claims to enfranchise were upheld by this Court in *Lake v Bennett* [1970] 1 QB 663 and by the House of Lords in *Tandon* but rejected by this Court in *Henley v Cohen* [2013] L.& T.R. 28. Judge Dight rejected the claim to enfranchise in the present case because, as he put it:

> "The question that I have to address is not whether it is possible but whether it is reasonable to call the building in this case, a house. I have had regard to the history of the property, the physical appearance of it, the layout, the terms of the lease, and the user of the premises over the years. The starting point, as far as I am concerned, is that the building does not look like a house. It is part of a parade of shops with living accommodation over it. It was not, in my judgment, built as a house. It was built as a shop with living accommodation over it. The two elements are not as they were in *Tandon*. It was not built as a house. Nor is it now a physically mixed unit. The two units have been separate for the last 40 years."

19. He is in fact wrong about the position in *Tandon* because in that case, as in this, the premises as constructed consisted of a purpose built shop with living accommodation above linked by an internal staircase. Unlike in *Lake v Bennett*, the property had never been a house with no shop. If the present case is distinguishable on its facts from *Tandon* it can only be because of the removal in 1970 of the internal staircase and the creation of two self-contained units in the form of the ground floor shop and the first floor flat.

20. We can start our analysis of the authorities with a few general observations. 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.

21. The second point (which follows from the first) is that, in relation to a statutory right to enfranchise, one might assume that Parliament intended to include (or not) certain recognisable types of property. Consistently with this, it seems surprising that the grant of a right to enfranchise to the lessees of property within such categories should depend on particular physical characteristics such as whether the various parts of the premises were linked internally or externally. One would expect the policy of the 1967 Act to be fashioned by broader questions of entitlement.

22. The third point is that if the correct interpretation of s.2(1) to particular types of property is driven by policy considerations then it ought to be possible (and it is certainly desirable) that the application of the policy of the Act should promote consistency of treatment. One of Mr Jourdan QC's criticisms of the judgment in the present case is that it is essentially an *ad hoc* assessment based on the judge's view of how to describe the physical appearance of the Premises rather than a principled application of the law as laid down in *Tandon* and *Hosebay*.

23. For the purposes of this appeal we can begin the authorities with *Lake v Bennett*. The case concerned a house in Hampstead, part of the ground floor of which was subsequently converted into and used as a shop. At the time the owner made her claim to enfranchise the shop was sub-let to a commercial tenant. The County Court judge (HH Judge Leslie) dismissed the claim to enfranchise because, as he put it, the building would not, as a matter of ordinary speech, be called a house as opposed to a shop with living accommodation above. His decision was reversed by the Court of

Appeal. Lord Denning MR, having reviewed earlier cases in which the word "house" was used in various different statutory contexts, said (at page 671):

> "I do not think that a tower block of flats would reasonably be called a "house." But I think a four-storied building like the present one is reasonably called a "house." Take it in stages. First, if the tenant occupied the building entirely by himself, using the ground floor for his shop premises, that would plainly be a "house" reasonably so called. Second, if the tenant, instead of using the ground floor himself for business purposes, sublets it, that does not alter the character of the building. It is still a "house" reasonably so called. And that is this case."

24. Salmon LJ (at page 672) stressed that the construction of the word "house" had to give effect to the policy behind the 1967 Act:

> "In my judgment there was no evidence on which it could be possible to uphold a finding that this building could not reasonably be called a house with its ground floor converted into a shop. I am encouraged in coming to this conclusion by the reflection that this appellant, living in a house of this kind in these circumstances, is obviously the sort of person to whom the legislature intended to give security of tenure. It is, I think, well recognised that in construing a word in a statute one is entitled to look at the general purpose of the Act."

25. The decision in *Lake v Bennett* was approved by the House of Lords in *Tandon*. The premises in that case also consisted of a ground floor shop with accommodation above but the building had been constructed in this way as part of a purpose-built parade of shops. In the Court of Appeal the claim to enfranchise failed. *Lake v Bennett* was distinguished on the basis that the premises in that case were, in terms of appearance, different in character. The conversion of the ground floor into a shop had not deprived the building of the appearance of a house whereas in *Tandon* the building had never been a house and could not reasonably be described as one. It was a shop with accommodation above: see Griffiths LJ [1982] QB at page 45. But by a majority the House of Lords allowed the tenant's appeal.

26. The speeches in *Tandon* reveal a fundamental difference between the majority and the minority as to the test to be applied in order to satisfy the "reasonably so called" condition in s.2(1). Lord Fraser of Tullybelton (at page 762) took much the same approach as Griffiths LJ had done in the Court of Appeal and Judge Leslie had taken at first instance in *Lake v Bennett*:

> "Section 2(1) evidently recognises that not every building which is partly designed or adapted for living in is a house; if every such building were a house, then a large factory or office building with living accommodation in a caretaker's flat might qualify. That result is avoided by the provision which limits the meaning of house by adding the qualification that the building must be reasonably so called. The limitation directs attention to the character of the building and the main element in the

> character of a building is its appearance. The fact that a building, originally designed solely as a house, has been partly adapted or converted into a shop is, in my view, not relevant per se. Partial conversion is relevant only in so far as it affects the present appearance of the building, as it usually does. In *Lake v. Bennett* [1970] 1 Q.B. 663 both Salmon L.J. and Cross L.J. referred to the building having had its ground floor "converted into" or "made into" a shop, but I think they were only explaining the reason for the appearance of the building at the relevant date. If they meant to imply that the fact of conversion was relevant in itself, I would respectfully disagree. Some buildings which were designed and originally used solely as houses, but have had their ground floors converted into shops, retain most of their original character as houses. Others do not. The character of each building has to be considered separately, as a question of fact. *Lake v. Bennett* did not, in my opinion, decide as a matter of law that all buildings with shops on the ground floor and living accommodation above are "houses" in the sense of the Act. If Parliament had intended that to be the law it could easily have said so, but it did not."

27. Lord Wilberforce (at page 760) also considered that whether a particular building constituted a house was a fact-specific question to be decided on a case-to-case basis having regard to the user and appearance of the building:

> "I do not think that it is contended that *all* mixed units are houses reasonably so called: if it were I should reject the contention: there is no warrant for it in the Act. Nor can I agree that there is any presumption that mixed premises are to be regarded as a house. The Act extends to dwellings: it does not extend to shops: there is no warrant for forcing one category into the other. Nor do I think it our task to prescribe a simple formula which will solve the judges' problem for them. Certainty can always be purchased for the price of injustice, and I know of no rule which prevents different cases from being differently decided. To suppose that judges, if left without firm guide-lines, will give anomalous decisions seems to me to underrate their common sense. The judge has to decide each case using his knowledge and applying the Act, and unless he applies a wrong test the decision is decisive."

28. The views of the majority are contained in the speech of Lord Roskill with which Lord Scarman and Lord Bridge agreed. As Lord Carnwath observed in *Hosebay*, the speech is not without its difficulties in terms of analysis because Lord Roskill begins by accepting (at page 766A) that the character of the premises at the time of the notice to enfranchise will be determined in part by reference to its history, layout and physical appearance but concludes that the question whether the premises constitute a "house" is essentially one of law to be determined by reference to the policy of the 1967 Act rather than the appearance or construction of the building:

> "Small corner shops and terrace shops combined with living accommodation are to be found in almost every town and village in England and Wales. Parliament plainly intended that a tenant who occupied such premises as his residence should have the benefit of the Act if the building could reasonably be called a "house." It is imperative, if the law is to be evenly and justly administered, that there should be not only uniformity of principle in the approach of the courts to the question but also a broad consistency in the conclusions reached. The question must not, save within narrow limits, be treated by the courts as a question of fact: for the variations of judicial response could well be such as to give rise to unacceptable, indeed unjust, differences between one case and another. This could lead to the statute being applied to two practically identical buildings one way by one judge and another by another - an echo of equity and the length of the Chancellor's foot. For this reason, the Court of Appeal's decision in *Lake v. Bennett* [1970] 1 Q.B. 663 was welcome as stating a principle and confirming the question of fact to a narrow area. I deduce from it the following propositions of law: (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 hard to envisage, would justify a judge in 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."

29. This is a confirmation, contrary to the view expressed by Lord Wilberforce, that, as a matter of law, it is reasonable to call a shop with accommodation above a "house" for the purposes of s.2(1) absent some highly unusual or exceptional circumstances. As the facts of *Tandon* illustrate, those circumstances must be something more than mere physical differences in the layout of the premises or their appearance. The premises in *Tandon* were held to be a house even though they were purpose-built as a shop with ancillary accommodation and looked very different from the converted house in *Lake v Bennett*.

30. In *Hosebay* Lord Carnwath (at [24]-[29]) conducted a detailed analysis of Lord Roskill's three propositions of law which he regarded as directed to cases like *Tandon* involving mixed use premises. The second and third propositions were intended to carry into effect the policy of the 1967 Act which was not to exclude mixed units of that kind from the right to enfranchise. The properties under consideration in *Hosebay* were not buildings in mixed use such as shops with accommodation above but buildings constructed as houses and used exclusively for commercial purposes. In their case the application of the "reasonably so called" condition required one to decide whether the physical appearance of the premises as a house was sufficient to

satisfy the condition even though their use was entirely commercial. In the Court of Appeal in *Hosebay* ([2010] 1 WLR 2317) the claims to enfranchise were upheld on the basis that the premises had been designed and constructed as houses and that, both internally and externally, they retained the character and appearance of a house. Lord Neuberger of Abbotsbury MR at [43]-[46] doubted whether the user of the premises permitted under the lease was the decisive factor as opposed to external and internal appearance. Referring to the decision of the Court of Appeal in *Prospect Estates Ltd v Grosvenor Estates Ltd* [2009] 1 WLR 1313 (which concerned a house on the Grosvenor Estate used as offices) and to the judgment of Goldring LJ who considered it highly material that only 11% of the building could lawfully be used for residential purposes, Lord Neuberger said:

> "[46] While the observation is tolerably clear, I am not sure that I would agree with it. It appears to place decisive weight on the user covenant in a lease, whereas it seems to me that the thrust of the judgments in *Lake*'s case and the opinion of Lord Roskill in *Tandon*'s case (as opposed to the dissenting opinion of Lord Fraser in that case) is that the question whether a building is a 'house… reasonably so called' is to be determined essentially by reference to its external and internal physical character and appearance."

31. Lord Neuberger's approach was endorsed by Lewison LJ at [9] in *Earl Cadogan v Magnohard Ltd* [2013] 1 WLR 24 in a case concerning a 7 storey building consisting of 6 residential units and 3 small shops, which both the County Court judge and the Court of Appeal decided it was not at all reasonable to call a house.

32. Lord Neuberger's reading of Lord Roskill's speech in *Tandon* has now been rejected by the Supreme Court in *Hosebay*. Having referred to [46] of Lord Neuberger's judgment, Lord Carnwath said:

> "[41] As will be apparent from my earlier analysis of *Tandon*, I cannot agree that Lord Roskill regarded "external and internal physical character and appearance" as the determining factors. I agree with the Master of the Rolls that the terms of the lease as such should not have been treated as the major factor. However, in so far as Mummery LJ treated the use of the building, rather than its physical appearance, as determinative, his approach was in my view entirely consistent with the reasoning of the majority in *Tandon* as I have explained it. I consider that *Prospect Estates* [2009] 1 WLR 1313 was rightly decided, and that the ratio need not be limited in the way the Master of the Rolls proposed."

33. The other case which we need to mention and which has formed a central plank of Mr Radevsky's argument on behalf of the landlords is the subsequent decision of this Court in *Henley v Cohen* [2013] L.&T.R. 28. This was another case involving a purpose-built shop with a flat on the upper floor. It differed factually from both *Lake v Bennett* and from *Tandon* in that until 2008 the upper floor had been used as a storeroom in connection with adjoining shop premises and the lease of the building which had been granted in 1935 contained a covenant prohibiting the tenant from

making any alterations to the premises without the landlord's consent. The tenant applied for consent to convert the first floor into a self-contained flat with access via a metal staircase located in a rear service area but the landlord refused consent and was subsequently held to have done so reasonably. Notwithstanding this, the tenant proceeded to carry out the works without consent and, once completed, applied to enfranchise the lease.

34. HH Judge Cowell rejected the claim on the basis that the building was not a house reasonably so called and that the tenants were disentitled from seeking to enfranchise by their breach of the user covenant. He was particularly influenced by the fact that the building had not been constructed for mixed use and that the first floor had never been used for residential purposes until shortly before the claim to enfranchise was made:

> "47 . . . First of all, not only has there in the past been no residential use since even before the grant of the lease, but there is no design in the property at 252 for residential use (or there was not at any rate until 2009) or for mixed use or for residential use to be combined with commercial use. In short no shopkeeper ever lived above or was intended by the design to do so at the time of the grant of the lease or since. At the time of the grant the shop was a shop, it had no access to the first floor, while the first floor could only be accessed and used from number 250 next door or, after 1997, by going against rather than along the fire escape route and opening the fire escape door from the outside. Mixing and words connoting combination of uses are particularly inappropriate in this case; the two uses have always been and still are completely independent, and they are independent by reason of the design of the building, that is the physical characteristics of the building."

35. Apart from use, the judge also took into account the physical state and appearance of the building directing himself in accordance with the passage in Lord Neuberger's judgment in *Hosebay* quoted in [30] above. By the time that the case reached the Court of Appeal the decision of the Supreme Court in *Hosebay* had been given which, as Mummery LJ observed in [25] of his judgment, had established two points of general application in relation to the decision of the House of Lords in *Tandon*:

> "… first, the external and internal physical character and appearance of the building and the lease descriptions of it are not determining factors in deciding whether the building is a house reasonably so-called; and secondly, the *use* of a building at the relevant date, rather than its physical appearance, may be treated as determinative."

36. Notwithstanding this direction, the Court of Appeal went on to affirm the decision of Judge Cowell that the building could not reasonably be called a house. Mummery LJ said:

> "55. The Premises were neither adapted for residential use at the date when the Lease began nor were they ever used as such until the recent adaptation for living in, which was completed shortly before the claimants gave notice under the 1967 Act. The upper floor was a subsidiary part of the building, being smaller and previously used for non–residential purposes in connection with an adjoining building. The case is distinguishable from *Tandon* where the living accommodation above was physically connected with the shop unit below. In that case there was a bathroom at the rear of the shop, as well as a connecting staircase at the rear to the first floor. In this case there was no connecting access from the commercial unit on the ground floor to the flat on the first floor. On the contrary, the only means of access to the flat involved traipsing to the back of the building, climbing an outside metal staircase and then walking along a passageway. In my view, the judge was entitled to place the use of the upper floor relied on as at the date of the notice, upon which the claimants place such emphasis, into the proper setting of the use of it under the Lease during the preceding 70 plus years."

37. Mr Radevsky relies on the decision in *Henley v Cohen* to support the exclusion of two types of building from the s.2(1) definition of a house. These are buildings looking like a house but which are used for non-residential purposes such as the buildings under consideration in *Hosebay* and *Prospect Estates*; and buildings with some residential use but which do not look like a house. This second category includes blocks of flats and mixed use premises like those in *Henley v Cohen* where the commercial and residential parts of the building are completely separate and self-contained. On this basis, a distinction can be made, he says, between the premises under consideration in *Tandon* and mixed units like the one in the present case where there is no internal link or sharing of accommodation between the two parts of the building.

38. Our view is that this distinction is precluded as a matter of authority. We do not accept that the removal of the internal staircase and the construction of an external means of access to the first floor flat had the effect of taking the building outside the scope of what can reasonably be called a house for the purposes of s.2(1). There is no doubt that until the alterations to the building in 1970 the Premises, although obviously not identical in appearance to those considered in *Tandon*, were in substance the same in terms of layout and use. In our view, that did not change merely because the shop space was increased and the means of access to the upstairs flat was changed. If a purpose-built shop with ancillary accommodation falls within the definition of a house for the policy reasons identified in *Tandon*, we do not see how that position can be materially changed by the works to the staircase. The flat remains accessible by means of a staircase situated within the demise.

39. *Henley v Cohen* was on any view an exceptional case because until shortly before the service of the notice to enfranchise there was no residential use of the building and the upper floor was linked and used in conjunction with the next door premises. But, by the date of the notice to enfranchise, the upper floor had been adapted for living in

and if the date of the notice is the relevant date for satisfying the statutory test then it is difficult to see why the user of the premises on that date rather than over the previous 70 years should not be what counts. As explained earlier, cases like *Henley v Cohen* would not previously have qualified for enfranchisement because of the residence requirement in s.1(1). But, following its abolition, there is no warrant for re-imposing it by some kind of revised version of the reasonably so called test. The definition of what constitutes a house has remained the same and the Courts must apply it in accordance with the guidance in *Tandon* and *Hosebay*. We therefore doubt whether *Henley v Cohen* was rightly decided, particularly in the light of Judge Cowell's misdirection to himself about the weight to be attached to the physical appearance of the building. But if the user of the building over the duration of the lease was the central factor relied on then the case is obviously distinguishable from the present appeal.

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. County Court judges will doubtless be adept at dismissing cases where the conversion of part to residential user is not genuine or substantial or where the premises are not of the type which, as a matter of policy, Parliament intended to fall within the 1967 Act. A block of offices with a caretaker's flat would be such a case. But, these cases apart, there ought to be no warrant from now on for distinguishing between similar types of building solely on the basis of their external appearance or their internal layout.

41. Since that is what the judge did in the present case, we propose to allow this appeal.