Case No: B2/2011/3147

Neutral Citation Number: [2012] EWCA Civ 594
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON CIVIL JUSTICE CENTRE
HER HONOUR JUDGE MARSHALL QC
ICL10040

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/05/2012

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE LONGMORE
and
LORD JUSTICE LEWISON

- -

Between:

MAGNOHARD LIMITED — **Appellant**

- and –

(1) THE RIGHT HONOURABLE CHARLES GERALD JOHN EARL CADOGAN
(2) CADOGAN ESTATES LIMITED — **Respondents**

- -

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

- -

Mr Stephen Jourdan QC (instructed by **Payne Hicks Beach**) for the **Appellant**
Mr Philip Rainey QC (instructed by **Pemberton Greenish LLP**) for the **Respondents**

Hearing date: 2nd May 2012

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Judgment

Lord Justice Lewison:

1. The word "house" is one of the 200 most frequently used words in the English language, and one of the 20 most frequently used nouns. The sole issue in this case is whether the building comprised in a lease of 1 Sloane Gardens and 2, 4 and 6 and 6B Holbein Place is a house for the purposes of section 2 (1) of the Leasehold Reform Act 1967 ("the Act"). HH Judge Marshall QC decided that it was not, but gave permission to appeal. It is regrettable that an issue of this kind involves analysis of many decisions of this court and of the House of Lords; and in the present case has also involved an extensive historical investigation into the initial construction and subsequent use of the building.

2. Section 2 (1) of the Act provides:

> "(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. It is common ground that the building in the present case was designed or adapted for living in. It is also common ground that it is divided horizontally into flats or maisonettes (although it includes shops as well). Thus the issue can be narrowed further: is the building "reasonably called" a house?

4. The building itself occupies a corner site opposite Sloane Square Underground station. The site on which it is built is a quadrant (i.e. a quarter circle). It was built in 1888 and demised by a lease of that year. The overall square footage of the building is some 20,000 square feet. It consists of a basement, ground and five upper floors. As built it consisted of six residential suites, one on each floor; one housekeeper's flat, and three small shops. The housekeeper's flat has since been converted into another flat. All the flats are served by a communal entrance hall, although the former housekeeper's flat had its own separate street entrance. There have also been alterations to the internal layout of the building which have resulted in the creation of an additional flat; so that there are now eight flats in all. The shops each have a separate entrance from Holbein Place. The retail component of the building is just under 7 per cent of its total area. The building was constructed of red brick with stone facings (although these are now painted white). The judge described it as having been built in "the fairly elaborate Victorian style that is commonplace, and might reasonably be considered to be the vernacular in this locality of buildings that were being built in the late 1880s and 1890s." Having heard evidence the judge decided that the building could be adapted (at no little cost) into a single dwelling, although that had not in fact been done.

5. The lease under which the tenant claims to be entitled to acquire the freehold was granted in 1986. The parcels clause (repeating words that had been used in the original lease of 1888) described the property as a "piece or parcel of land and the messuage tenement and premises thereon". The lease contained a covenant that the residential parts of the building were not to be used "otherwise than ... each self-contained flat and maisonette to be used as a single residence in one occupation only". No 1 Sloane Gardens was to be used as six self-contained flats and two self-contained maisonettes. There were also restricted uses specified for each of the three shops.

6. The judge was taken through a large number of authorities that have discussed the meaning of the word "house" in section 2 (1) of the Act. As she pointed out the point is in the end, a short one. She said that her task was to arrive at a conclusion about the character of the building. She said that if a building could equally reasonably be called "a house", but could equally reasonably be called something else, then it fell within section 2 (1). But if you could only call it "a house" by straining the concept or straining the use of language, then it would not be reasonable to call it a house. In that event it would be outside the definition. Equally, she said, if there was an appellation which is so much more apposite than "house" that one does not feel comfortable using that word about a building, then it would not be reasonable to call the building "a house". In paragraph 116 of her judgment she said:

> "When I ask myself what this building is, my immediate reaction is: "it's a block of flats". It's a block of flats with three shop units, but – it's a block of flats. It is not a house divided into flats. It is constructed and it is used as a block of flats. As I know (and I do) what the features of the building are, if I were to ask someone "what would you call that building" and they were to respond "a house" my eyebrows would naturally rise and I would think this odd. I would not call this building a house naturally, but only possibly if I were pressed into [doing] so by argument that it was surely "possible". In those circumstances, it is, in my judgment, not reasonable to call this building a "house" at all, let alone in ordinary parlance."

7. Was the judge wrong?

8. We have been referred to eight cases in the Court of Appeal on the meaning of the word "house" in section 2 (1), and three cases in the House of Lords. The last of the cases in the Court of Appeal is itself on the way to the Supreme Court, where the appeal is due to be heard in a few weeks' time.

9. It is clear from all the authorities that the word "reasonably so called" are intended to be words of limitation: *Lake v Bennett* [1970] 1 QB 663, 670 (Lord Denning MR), 672 (Salmon LJ); *Tandon v Trustees of Spurgeon Homes* [1982] AC 755, 764 (Lord Roskill); *Malekshad v Howard de Walden Estates Ltd* [2002] UKHL 49 [2003] 1 AC 1013, 1028 (Lord Millett); *Prospect Estates Ltd v Grosvenor Estate Belgravia* [2008] EWCA Civ 1281 [2009] 1 WLR 1313, 1317 (Mummery LJ). Their purpose is to exclude buildings that would otherwise come within the other parts of the definition. The mere fact that a building might be called something other than "a house" is not sufficient to trigger the exclusion: *Tandon v Trustees of Spurgeon Homes*, 765 (Lord Roskill). As long as a building can reasonably called "a house" it is within the

definition, even though it may also reasonably be called something else: *Tandon v Trustees of Spurgeon Homes*, 767 (Lord Roskill). Whether a building can reasonably be called "a house" or can only reasonably be called something else is a question of appellation: *Malekshad v Howard de Walden Estates Ltd* 1030 (Lord Millett). I agree with the judge that the question is not whether it is *possible* to call a building "a house"; the question is whether it is *reasonable* to do so. In the present case the structure and use of the building have hardly changed since it was first erected. That being so the extensive historical research that the parties undertook, although of great interest, is in my judgment largely irrelevant. In the case of a building predominantly used for residential purposes, whether it can reasonably be called "a house" will depend primarily on its external and internal physical character and appearance: *Hosebay Ltd v Day* [2010] EWCA Civ 748 [2010] 1 WLR 2317, 2330 (Lord Neuberger of Abbotsbury MR).

10. Many judges have given illustrations of what they thought the words of limitation would exclude. I give some examples:

    i) A tower block of flats: *Lake v Bennett* 671 (Lord Denning MR);

    ii) The Ritz Hotel, Rowton House and a large purpose built block of flats, or a block of flats: *Lake v Bennett* 672 (Salmon LJ);

    iii) A block of flats or an office building with a residential penthouse suite: *Malekshad v Howard de Walden Estates Ltd* 1028 (Lord Millett);

    iv) A purpose-built hotel or block of flats: *Malekshad v Howard de Walden Estates Ltd* 1036 (Lord Scott of Foscote);

    v) A purpose built hotel, a hostel, a purpose built block of flats, a factory with caretaker's accommodation or an office block with a penthouse suite: *Prospect Estates Ltd v Grosvenor Estate Belgravia* 1318 (Mummery LJ).

11. The clear consensus of judicial opinion is that a purpose built block of flats cannot reasonably be called "a house". It is true that some judges have referred to tower blocks and others to *large* purpose built blocks, but in my judgment the underlying principle is clear. It is also true that none of these observations is binding ratio, but such is the strength and consistency of the consensus that it would in my judgment be wrong for us to depart from it. As Lord Roskill himself said in *Tandon v Trustees of Spurgeon Homes* (at 766-7) it is imperative that there should be not only uniformity of principle in the approach of the courts but also a broad consistency in the conclusions reached. In the present case there is the added feature that the building is not a wholly residential building but also includes the three shops.

12. In my judgment the judge made no error of law in her approach to the question. She was amply justified in the conclusion that she reached. I would dismiss the appeal.

The Master of the Rolls:

13. The premises in this case consist of a substantial and imposing building, some 20,000 square feet in area, constructed in 1888 so as to consist of a substantial self-contained flat on each of the five upper floors (served by a lift and staircase), and three shops

and two flats on the ground floor. Although there have been alterations to the premises over the past 114 years, they remain substantially as constructed.

14. The question which the Judge had to determine was not whether the premises could reasonably be called something other than a house: that would be to put the question too generously to the landlord, as the cases show. Nor was the question whether the premises could conceivably be called a house by someone: that would be to put the question too generously to the tenant. The question was whether the premises could reasonably be called a house.

15. Unless there is binding authority to the contrary, it appears to me that, simply as a matter of ordinary language, such premises cannot 'reasonably [be] called' a 'house', as at September 2010, when the appellant served a notice to acquire the freehold, which is the date as at which the issue falls to be considered. A building constructed, laid out and used as a block of substantial self-contained flats throughout its 120 years of existence cannot reasonably be called a house – at least in the absence of very unusual factors.

16. In that connection, I draw comfort from the judicial observations helpfully identified by Lewison LJ at para 10 above.

17. Mr Jourdan QC, in his clear and attractive submissions for the appellant primarily relied on four points to support a different conclusion.

18. His first point is that in *Tandon v Trustees of Spurgeon Homes* [1982] AC 755, 767C, Lord Roskill said*:*

> '[I]f 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 a house.'

In my view, that sentence does not assist the appellant, as the reference to 'occupation as a residence' does not extend to occupation as more than one residence. I draw this conclusion from three factors: (i) the natural meaning of 'a residence' is a single residence, and the Interpretation Act 1971 (which provides that, at least *prima facie*, the singular includes the plural) does not apply to judgments; (ii) in that passage, Lord Roskill was drawing a conclusion from *Lake v Bennett* [1970] 1 QB 663, which was concerned with a building including a single unit of residential accommodation (and a ground floor shop); (iii) given the reference in that case to 'a tower block of flats' and 'a large purpose built block of flats, or a block of flats', it is very unlikely that Lord Roskill would have found it 'hard to envisage' circumstances where a building was outside the 1967 Act, if he was referring to one 'designed or adapted for occupation as' more than one residence, as opposed to a single residence.

19. Secondly, Mr Jourdan relied on what Lord Roskill said immediately after the passage I have just quoted, namely that in order for a building not to be within the 1967 Act, the circumstances 'would have to be such that nobody could reasonably call the building a house'. I do not think that that takes the point which I have summarised in para 14 above, and which Lewison LJ makes in para 9 above, any further.

20. Thirdly, Mr Jourdan said that it would be strange if the premises in this case could not reasonably called a house, given that the effect of the recent decision in this court of *Hosebay Ltd v Day* [2010] EWCA Civ 748, [2010] 1 WLR 2317 would be that the premises could be reasonably so called if they had been constructed in 1888 as a house for single occupation, but had been subsequently internally refurbished to convert them precisely to their present physical state. I do not accept that. The buildings the subject of the cases considered in that decision had been initially constructed as houses for single occupation, and none of them had been converted into a block of flats. I do not therefore consider that there is any inconsistency between that decision and Judge Marshall QC's decision in this case. In any event, whatever the meaning of 'a house … reasonably so called', there will be (i) cases close to the dividing line, where, however clear the meaning of the expression, reasonable people will differ in their views, and (ii) cases where a small differences in the facts could produce a different outcome.

21. Fourthly, Mr Jourdan relied on the description of the premises in the lease granted in 1888. The parcels clause, which describes the premises demised by the lease, refers to them as a 'messuage or tenement and premises'. Although 'messuage' may have been used by conveyancers in 1888 to refer to a house, I do not think that that helps to establish that, in 2010, the premises could 'reasonably [be] called' a 'house'. The use of an arcane technical word to describe the premises in a lease in 1888 is scarcely likely to be a helpful guide as to the reasonableness of describing the premises as a 'house', a very common word in use by everyone, in 2010. In any event, in the 1887 edition of *Williams on The Principles of the Law of Real Property,* cited by Mr Jourdan, it was said that 'messuage was formerly considered as of more extensive import than the word house', and conveyancers, as now, often used archaic language. Further, although the author suggested that 'such a distinction is no longer relied on', it is clear that, even in his view, the meaning of the word was unclear, as it may not include a garden.

22. In these circumstances, for the reasons given by Lewison LJ, I would dismiss this appeal.

23. The parties were informed of our decision at the end of the argument, and Mr Jourdan asked for permission to appeal to the Supreme Court, which Mr Rainey QC, for the respondents, resisted. Having given the unsuccessful landlords permission to appeal in the two cases decided in *Hosebay* [2010] 1 WLR 2317, the Supreme Court is due to hear the appeals, we were told, in around ten weeks time. In those circumstances, I consider that (i) we should refuse the appellant permission to appeal to the Supreme Court, but, if the appellant applies to the Supreme Court for permission, (ii) we should respectfully suggest that the Supreme Court should consider the application with despatch, in order to decide whether (a) to grant permission to appeal and expedite the appeal to be heard together with the *Hosebay* appeal, (b) to adjourn the application to await the outcome of the *Hosebay* appeal, or (c) to grant or refuse permission to appeal without more.

Lord Justice Longmore:

24. I agree with both judgments.