

On the house

S.2(1) of the Leasehold Reform Act 1967 after *Hosebay* and *Magnohard*

Introduction

1. The definition of “house” in s.2(1) of the Leasehold Reform Act 1967 has given rise to considerable difficulties in the 45 years since it was enacted. This year, there have been two further appellate decisions on the definition - *Hosebay v Day* [2012] 1 WLR 2884 in the Supreme Court (where Lord Carnwath gave the only judgment) and *Magnohard Ltd v Cadogan* [2012] L. & T.R. 32 in the Court of Appeal (where both Lewison LJ and Lord Neuberger gave judgments). Where do those decisions leave the law?

The two parts of the definition

2. S.2(1) defines “house” as follows:

(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. There are two parts of the definition. First, the building must be “designed or adapted for living in” – this “looks to the identity or function of the building based on its physical characteristics”: *Hosebay* [9].
4. Second, the building must be “reasonably so called” i.e. reasonably called a “house”. This part is intended to limit the definition, ensuring that not all buildings which are designed or adapted for living in qualify: *Magnohard* [9]. This part “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”: *Hosebay* [9].
5. The two parts are “... in a sense “belt and braces”: complementary and overlapping, but both needing to be satisfied... 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”. *Hosebay* [9].

***Hosebay and Magnohard* – a 2 minute summary**

6. In *Hosebay*, the SC were concerned with two appeals. The first, *Hosebay v Day*, concerned three properties in Kensington originally built as separate terraced houses, but converted into individual rooms for letting out, and used as a self-catering hotel, with the reception and office in a room in the middle building. The second, *Lexgorge v Howard de Walden*, concerned a property in Marylebone, built as a terraced house but used as offices. The SC held that none of the properties fell within the definition, because they were not houses “reasonably so called” due to their commercial use.
7. *Magnohard* concerned a 20,000 sq ft mansion block in Chelsea, comprising 8 flats and 3 small shops which made up about 7% of the total area. The Court of Appeal held that it was not a house “reasonably so called” because there was a clear consensus of judicial opinion that a purpose built block of flats cannot reasonably be called “a house”.

A summary of the principles after *Hosebay* and *Magnohard*

- (1) **“For living in” means “for living in with a reasonable degree of permanency”**
8. *Hosebay* [44] “I agree with the appellants (and the judge) that “living in” means something more settled than “staying in”; and that the present use does not qualify as such.”
9. In *Hosebay* at first instance, HHJ Marshall QC at [76] said: “I find that the words “living in” do bear the meaning which Mr Johnson urges upon me, i.e. they connote occupation for living in with some degree of permanence, and not merely as a transient occupier. In effect, they mean using the property as some kind of a “home”, as contrasted with merely a convenient place to meet an immediate human need for shelter and sleep.”
10. In *Hosebay*, the reservations in evidence were between 1 and 11 nights, with most being 3-5 nights: HHJ Marshall QC at [18]. That was not settled enough to count as “living in”.
11. Thus earlier statements by judges that purpose built hotels are “designed or adapted for living in” and are only excluded because they are not houses reasonably so called are wrong: see *Lake v Bennett* [1970] 1 QB 663 at 670F and 672C, *Malekshad v Howard de Walden* [2003] 1 AC 1013 at 1036E-F and *Prospect Estates Ltd v Grosvenor Estate Belgravia* [2009] 1 WLR 1313, at [14].

- (2) **To decide what a building is “designed or adapted” for requires one to look at the building at the date of the notice**
12. The question is whether, at the date of the notice of claim, whether as a result of the original design or as a result of subsequent adaptations, is it a building “for living in”. The phrase “designed or adapted for living in” defines the “present identity or function of a building as a house, by reference to its current physical character, whether derived from its original design or from subsequent adaptation”: Lord Carnwath at [35].
13. The suggestion in *Boss Holdings v Grosvenor West End Properties* [2008] 1 WLR 298 at [26] that it may be sufficient if the building was originally designed for living in, regardless of whatever happened since, is wrong. *Hosebay* [34]: “Context and common sense argue strongly against a definition turning principally on historic design, if that has long since been superseded by adaptation to some other use”.
- (3) **A building is “adapted for living in” if it has been made suitable for living in**
14. “Adapted” means no more than “made suitable”. It does not imply any particular degree of structural change. The adaptation must be to the building, so that a mere change of furniture is not enough. But, “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”: *Hosebay* [35].
- (4) **A building suitable for living in does not cease to be “designed or adapted for living in” if it becomes dilapidated and uninhabitable, provided it is not put to any other use**
15. That was the decision in *Boss Holdings*, which Lord Carnwath said he was not calling into question. He said that the basis for the decision in *Boss Holdings* was that “... the upper floors, which had been designed or last adapted for residential purposes, and had not been put to any other use, had not lost their identity as such, merely because at the material time they were disused and dilapidated. It was enough that the building was partially “adapted for living in”, and it was unnecessary to look beyond that,”: *Hosebay* [36].
- (5) **It is not reasonable to call a building a “house” if it is being used exclusively or predominantly for business purposes**
16. It is clear from *Hosebay* that a property used exclusively as offices, or as a hotel, where people stay for short periods of 1-11 days, is not a “house”.

17. It is also clear from *Prospect Estates Ltd v Grosvenor Estate Belgravia* [2009] 1 WLR 1313 as interpreted in *Hosebay*, that use predominantly for business purposes disqualifies a property from being a “house”.
 18. In *Prospect*, there was a building designed and built as a house, but since 1958, 88.5% of it had been used for office purposes, and the top floor, comprising 11.5%, was used as residential accommodation. Under the lease, the top floor could only be used as 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 top floor was not separated by a door either at the top or bottom of the staircase.
 19. The Court of Appeal held that it was not reasonable to call the building a “house” partly because it was predominantly used as offices and partly because, under the lease, it could only lawfully be used as offices with an ancillary flat. In *Hosebay*, Lord Carnwath agreed with that decision, except that he thought that “the terms of the lease as such should not have been treated as the major factor.” However, in so far as the Court of Appeal treated the use of the building, rather than its physical appearance, as determinative, its approach was correct.
- (6) It is reasonable to call a building a “house” if it was built as a single residence, and the ground floor has been converted into a shop with the rest of the property used as a single residence**
20. That was the decision of the Court of Appeal in *Lake v Bennett* [1970] 1 QB 663 which was approved by the House of Lords in *Tandon v Trustees of Spurgeon Homes* [1982] AC 755, and treated as good law in *Hosebay*.
- (7) It is reasonable to call a building a “house” if it was built and used as a combined single residence and shop, provided the residential element is substantial**
21. That was the decision of the majority of the House of Lords in *Tandon v Trustees of Spurgeon Homes* [1982] AC 755. The minority thought it unreasonable to call something which looked like a shop in a parade of shops a “house”. But the majority thought that “tenants who live over the shop are not to be denied the right conferred by the Act, whether they themselves trade from the shop or not, merely because the building in which they work and live accommodates the two uses,” see per Lord Roskill at p.766.
 22. In *Hosebay*, the decision in *Tandon* was treated as turning principally on the fact that the proportion of residential use, even if only 25%, was “substantial” and that a tenant occupying such a building as his residence was within what was perceived to be the scope of the protection intended by Parliament.

23. In *Tandon*, Lord Roskill, with whom Lords Scarman and Bridge agreed, set out, near the end of his speech, what he described as three propositions of law. The third was: "... 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 a house. They would have to be such that nobody could reasonably call the building a house".
24. In *Magnohard* [18], Lord Neuberger said that he thought this proposition was only applicable in the case of a building designed or adapted as a single residence, not where there was more than one residence, so it did not apply to a purpose built block of flats.
25. In *Hosebay*, Lord Carnwath said at [25] that this (and the other two propositions) did not "offer much assistance as such, at least beyond the facts of the case". Later, Lord Carnwath said (at [27]): "Rather than a free-standing proposition of law, deduced from *Lake v Bennett*, this proposition seems more an expression of Lord Roskill's own view as to the correct policy approach to a building of the kind before him, which was adapted at least in part for occupation as a residence". Accordingly, it seems that Lord Roskill's propositions are unlikely to be of much relevance in the future.

(8) It is not reasonable to call a purpose built block of flats a house

26. That was the decision of the Court of Appeal in *Magnohard*. Even where a building is used wholly or substantially for residential purposes, its physical character may be such that it cannot reasonably be called a "house".
27. *Magnohard* concerned the physical character issue. Lewison LJ at [10] summarised the views expressed in a number of previous cases on buildings which could not reasonably be called a "house".

"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).*

(9) It is reasonable to call a building purpose built as two maisonettes, which externally looks very like a single residence, a “house”

28. That was the decision in *Malpas v St Ermin's Property Ltd* [1992] 1 EGLR 109. There, the Court of Appeal held that a building purpose built as two maisonettes, with separate doors, was a “house”. Externally, the building looked very much like a terraced house, albeit that it had two front doors. This shows that there can be buildings purpose built as flats which it is reasonable to call a “house”.

Some remaining questions

29. There are a number of questions left open by the above decisions. They include the following.

(1) Is a building constructed as a single residence and later divided into bed-sits a “house”?

30. It is unclear whether small bed-sits or flatlets such as most of the rooms in the *Hosebay* case will be treated as “designed or adapted for living in”. HHJ Marshall QC held that they were, and the Court of Appeal agreed. However, in the Supreme Court, Lord Carnwath refrained from deciding the point: [44] “I find it unnecessary to reach a concluded view on the application of the first part of the definition in this appeal. I agree with the appellants (and the judge) that “living in” means something more settled than “staying in”; and that the present use does not qualify as such. There is more room for debate, however, whether the premises are to be taken as “adapted” solely for such use, to the exclusion of longer term occupation.” So the position is unclear.

31. However, there is much to be said for the view of HHJ Marshall QC and the Court of Appeal. Although Supreme Court Justices do not live in single rooms, and may find it hard to treat them as designed for living in, a lot of people do have to live in that sort of accommodation. *Uratemp Ventures Ltd v Collins* [2002] 1 AC 301 is an example. There, Mr Collins resided in a single room in a hotel with 58 rooms, 15 of which were occupied by long-term residents: see per Lord Millett at [23]. The standard of accommodation was very modest. The room was 72 square feet, and contained a bed and had a separate lavatory and a shower and wash basin. It had no cooking facilities at all. The House of Lords held that it was Mr Collins’ “dwelling”.

(2) How long do people have to stay in a building before they are using it for “living in”?

32. It is unclear how long a person has to remain in one place for that to amount to “living” rather than “staying”. It is clear from *Hosebay* that stays of 1-11 days

will not suffice. 6 months would easily be long enough. 1-5 months might well be long enough.

(3) *Can a building used or rented out for holidays be a “house”?*

33. If there is a building constructed or adapted as a single residence, which is rented out for 1 or 2 weeks at a time for holidays, is it reasonable to call it a “house”? E.g. a cottage in Wales or the Lake District rented out by a company which provides holiday accommodation.
34. Such a property is not used for “living in” i.e. occupation with a reasonable degree of permanence. Under the Rent Acts, it was held that a tenant does not occupy a holiday house which he visits occasionally as his residence: *Walker v Ogilvy* (1974) 28 P & CR 288.
35. But query if that is enough to take it out of s.2(1) - would it be treated as being used for business purposes, like the *Hosebay* properties, so as to prevent it from being a “house”? It seems somewhat unsatisfactory that such a property would be disqualified from being a “house” just because it is rented out for short term occupation. Lord Carnwath did not explain the basis for his view that the use of the three buildings in the *Hosebay* case was “entirely commercial”, when the tourists and visitors staying in the rooms were not themselves using the rooms for business purposes. It may have been because the three buildings were being operated together, with the reception and office in the middle building, so that they had overall the character of a hotel rather than of three houses.

(4) *When will it be reasonable to call a building purpose built as flats a “house”?*

36. It seems reasonably clear that a building originally constructed as a single residence and later converted into flats will normally still be a “house”, reasonably so called. S.2(1) says that a building may be a house “notwithstanding that the building ... 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”.
37. *Harris v Swick Securities Ltd* [1969] 1 WLR 1604 is an example of this. Mrs Harris held the long lease of a house in Fulham, which had been divided into 4 flats. She lived in the basement flat and sublet the other three flats. The landlord did not, in fact, argue that the building was not a “house”; it argued that her claim should be rejected because she did not occupy the whole house, and argument that failed. However, it seems clear that the building was a “house” under s.2(1).
38. In *Malekshad v Howard de Walden* [2003] 1 AC 1013 at [87], Lord Scott distinguished between a building built as a house and then divided into flats,

- and one purpose built as flats: “... the requirement that the building be reasonably called a house serves to exclude buildings such as purpose-built hotels or blocks of flats, none of which could reasonably be called a house. By contrast, a building which was originally designed as a house but was subsequently divided into self-contained units could often, perhaps usually, continue to be reasonably called a 'house'. This possibility is expressly left open by para (a). Where a building designed for residential accommodation is divided horizontally into several units, none of the units can be a 'house' for 1967 Act purposes, but the building as a whole may be.”
39. What about buildings purpose built as flats? *Malpas* shows that such a building can be a “house”; *Magnohard* shows that it will not always be a “house”, but the Court of Appeal did not lay down a test for distinguishing between the *Malpas* situation and the *Magnohard* situation. Although *Malpas* was cited to the Court of Appeal in *Magnohard*, it was not referred to in the judgments in that Court.
 40. At first instance, in *Magnohard*, HHJ Marshall QC said at [70] of *Malpas*: “... the “character” test is very often assisted by looking at the general impression of the property as conveyed by photographs. In that particular case, bearing in mind the specific recognition in the Act that a building which looks like a “house” may be divided horizontally into maisonettes or flats, it is not difficult to see why the court should have quickly come to the conclusion that it did.”
 41. That suggests that the test may be whether a building currently divided into flats gives the general impression of being one which could originally have been a single residence, even if in fact it was not.
 - (5) *In a mixed use building, what proportion of residential use is sufficient?*
 42. In *Tandon*, the property comprised a purpose built shop and flat above, a yard to the rear, and stables behind the yard. The yard had been covered over with a roof and was used as part of the shop. It was unclear what was the “house” and what was the “premises” for the purposes of the Act. If the “house” was just the original building, the flat comprised 50% of the space. If the “house” was the original building plus the covered yard, the flat comprised 25% of the space. Lord Roskill said that even if it was only 25%, that was still “substantial”.
 43. In *Prospect Estates*, 11.5% of the building was used as a residence. The Court of Appeal clearly thought that was insufficiently substantial; Smith LJ also referred, at [29], to the fact that “the living accommodation is ancillary to the office use.”
 44. So where there is mixed use, for both residential and business purposes, the residential use must be “substantial” and it appears that if 25% of the floor space is devoted to residential use that is sufficient, while if it is only 11.5% that

is insufficient, certainly if the residential use is ancillary to the business use. It is unclear at what point residential use will be treated as becoming sufficiently substantial to make it reasonable to call the building a “house”.

(6) *What happens if a house being used for offices is vacated?*

45. It is clear that a building designed or adapted as a single residence ceases to be a “house” when it is used exclusively or predominantly for business use. It no longer has a residential character.
46. But what if the tenant stops trading and vacates the building, and makes any structural adaptations necessary to ensure that it is entirely suitable for use as a single residence? Can a notice be served at that point, or must the tenant ensure that someone actually lives in it – with a reasonable degree of permanence – before it re-acquires the character of a “house”? Is planning relevant in this situation – does it matter if planning permission has, or has not, been granted for a change of use to residential? In *Hosebay* [18], Lord Carnwath did refer to the planning position in relation to the Marylebone property: “At the time of the notice the office use of all floors had become “established”, and therefore lawful for planning purposes, although in breach of the lease as respects the upper floors.”

Questions, not answers

47. These questions are, for the most part, easier to ask than to answer. The fact that there are so many live questions after *Hosebay* is troubling and, at the risk of sounding like a sore loser, might suggest a flaw in the essential reasoning of the decision.
48. HHJ Marshall QC and the Court of Appeal thought that s.2(1) was identifying a “house” by reference to its physical character, but the Supreme Court disagreed, and held that it must have the character of a house both physically and by reference to its use. A user based test inevitably gives rise to greater uncertainty than a physical test, especially as no real guidance was given on the application of the user test. No doubt the Courts will give us the answers to the questions that *Hosebay* gives rise to in the years to come.