

housing update

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When business premises can qualify for enfranchisement

A property designed and built as a house but used as an office can still be classed as a house for enfranchisement purposes.

That was the ruling of the Court of Appeal in the case of Day and Day v Hosebay Ltd and Howard de Walden Estates Ltd v Lexgorge Ltd (2010).

The case involved three commercial tenants who leased offices in properties which had originally been built as town houses. The tenants argued that the buildings were still essentially houses and sought to exercise their right to enfranchisement under the Leasehold Reform Act 1967.

The landlords objected saying the Act did not apply in this case because the buildings were used exclusively for business purposes. Giving the lead judgment in the Court of Appeal, Lord Neuberger said the question of whether a building was a house for purposes of the Act should be determined "at least in the main" by the nature of its character and physical appearance.

He said: "One could, it seems to me, quite naturally describe a building built as a town house, which had subsequently been internally converted into offices, as a 'house used as offices': hence it would 'reasonably be called' a house, even though it was not used for residential purposes, and even if it was not permitted to be so used. If most people were asked whether a building could reasonably be called a house, I am not convinced it would occur to them to ask about the permitted use under any lease, or that they would be influenced if told what the permitted use was. The 1967 Act was originally

Ruling could lead to more enfranchisement claims



Are they in a house or an office?

intended to assist residential tenants occupying their houses as their only or main residence to acquire their freeholds. Partly to extend its reach, and partly to defeat the device of company lettings, the legislature ditched the residence requirement, as a result of which the extension of the Act may well have gone further than the legislature intended or anticipated.

"If I am right on these appeals, it can extend to buildings exclusively used for business purposes."

Lord Neuberger dismissed the appeals by the landlords but said he reached his conclusion with "no particular enthusiasm".

It's thought the ruling could lead to several enfranchisement claims from commercial tenants who will see it as an opportunity to buy the freehold of their offices on favourable terms. London could be among the areas most affected as it contains so many offices situated in properties originally built as houses.

Foster child not entitled to succession of secure tenancy

A foster child was not entitled to the succession of a secure tenancy following the death of his foster mother because he was not a member of her family for the purposes of the Housing Act.

The exclusion was compatible with his rights under the European Convention on Human Rights 1950. Those were the findings of the Court of Appeal in the case of Sheffield City Council v Wall & Ors.

Steven Wall was the foster son of June Wall who had been granted a secure tenancy by the local authority in 1986. Mr Wall had a very close relationship with his foster mother after being placed with her in 1967 but he had never been

formally adopted. When she died in 2003, the authority successfully sought a possession order against Mr Wall and the property was relet to new tenants.

Mr Wall took the case all the way to the Court of Appeal but that has now ruled against him.

It held that in defining members of a family, the Housing Act placed a heavy emphasis on blood relationship. It meant the meaning of "child" could include a step-child and an illegitimate child but significantly for this case, it did not include foster child.

Parliament had expressly extended the meaning of child to cover various relationships but had not included

foster child. Mr Wall's case was further weakened by the fact that there had been no formal adoption.

Giving the lead judgment, Lord Justice Ward said: "We have great sympathy for Mr Wall who was to all intents and purposes Mrs Wall's son but he was short of that vital piece of paper – the adoption order – and without it he falls outside the definition in section 113 unless that has to be read and given effect in a way which is compatible with his Convention rights."

However, Lord Justice Ward added that the exclusion of foster children from the Act could be objectively justified and was compatible with the European Convention on Human Rights 1950.

Possession orders based on violence – when the victim has already left

The Court of Appeal has ruled that a possession order can be granted on the grounds of domestic violence even if the people involved are not living together at the time.

The case of Metropolitan Housing Trust v Djilali Hadjazi centred on the Housing Act 1988, Sch.2, ground 14A.

This gives a discretionary ground for possession against an assured tenant on the basis that the “the dwelling house was occupied... by a married couple... and ... one partner has left the dwelling house because of violence or threats of violence by the other towards that partner or a member of the family... and the partner who has left is unlikely to return”.

The issue was whether this could apply if the couple were no longer living together at the property.

Mr Hadjazi lived with his wife and children in a four-bedroom house owned by the trust.

He was an assured tenant. He had a history

of domestic violence towards his family.

In July 2006, he separated from his wife and left the property.

However, his violence towards her continued after the separation. In November 2007, his wife and children left the house and he moved in the following month. In January 2008, the trust served him with notice that it was seeking possession based on ground 14A.

The judge declined to grant the order and held that ground 14A only applied if a couple were living together at the property immediately before the victim felt compelled to leave.

However, he added that if his interpretation was wrong, he would not have considered it unreasonable to make an outright possession order.

The judge’s decision has now been overturned by the Court of Appeal. It held that it was not

necessary for a couple to be living together at the time of the violence for ground 14A to apply.

The court said there was nothing ambiguous about the wording of the Act and the fact that ground 14A used the past tense did not support the interpretation adopted by the judge – an interpretation that defied common sense.

The couple did not have to be living together at the date of the causative violence or at the date of the triggering event.

The wife and children had left the property as a result of the continuing violence and threats. There was no reason why the timing of that departure should make any difference to whether or not the landlord had grounds for possession.

Those grounds were therefore established. The question of whether it was reasonable to make a possession order in this particular case was remitted to the county court.



Former secure tenant can pass on the right to revive secure tenancy

A former secure tenant who has had a possession order made against him can pass on to his relatives the right to revive his secure tenancy following his death.

That was the ruling by the Supreme Court in the case of Austin v Southwark.

Barry Austin brought the case following the death of his brother Alan. Alan had been a secure tenant of a local authority house but had fallen into arrears. An order for possession was made against him in February 1987.

The order was not to be enforced as long as he paid the arrears by 4th March 1987. He failed to pay so the order became enforceable. However, he stayed in the property paying rent plus contributions towards the arrears.

In 2003, he fell ill so his brother Barry moved into the house to look after him. Alan died in 2005 but Barry continued living in the property. In 2006, the authority served notice on him to quit and issued possession proceedings.

The case went all the way to the Supreme Court. The main issue related to the Housing Act 1985 and the rights



of a former secure tenant to apply to postpone the date of possession and so revive the secure tenancy.

Did these rights survive his death and pass to his estate? The Supreme Court has ruled that they do.

Giving her judgment Lady Hale described the phrase “tolerated trespasser” as an oxymoron.

“A trespasser is someone who should not be there. But tolerated trespassers were allowed to be there. Indeed, in some cases the local authority had no right to evict them.

“These were not people whom the local authority were reluctant to have there and were waiting for the machinery of eviction to take its course. These were people whom the authority wanted to

have there, provided that they could be persuaded to pay most, if not all, of their rent.”

Lady Hale added that the Housing and Regeneration Act 2008 “abolished the problem” of tolerated trespassers by granting them new tenancies.

However, as this case illustrated, there remained the issue of what happened when a tolerated trespasser died before an application could be made to postpone possession and revive the secure tenancy.

Lord Hope, who gave the lead judgment, said that if Parliament had intended that courts should not have powers they could exercise in favour of others on the tenant’s death then it “would have been easy to say so”.

The death of the tenant did not prevent the court exercising its power under the Housing Act to postpone the date of possession. It followed that, after the tenant’s death, it was open to his representative to apply for the date of possession to be postponed and to revive the secure tenancy.

Law is clear when defining ‘premises’ for purposes of enfranchisement

The High Court has held that the law is quite clear in defining “premises” in relation to enfranchisement provisions.

The issue arose in the case of *Craft Rule Ltd v 41-60 Albert Palace Mansions (Freehold) Ltd*, which involved tenants who wanted to exercise their right to collective enfranchisement.

The point of contention was the meaning of the phrase “a self-contained part of a building” in the Leasehold Reform, Housing and Urban Development Act 1993 (The Act). The property involved was divided into two sets of 10 flats. The nominee purchaser comprised of three tenants from one set and seven tenants from the other. Together they had the necessary majority for enfranchisement under the Act.



the tenants only had a majority in the set where seven of them wanted to exercise their right to enfranchisement. The landlord contended that the right to collective enfranchisement only applied to a part of a building which did not comprise of two or more self-contained parts.

The High Court, however, dismissed this view. It held that the Act was framed in clear language with no ambiguity. If Parliament had wanted to oblige tenants to claim the smallest section of a building that satisfied the requirements of the Act it would have said so. An enfranchisement notice could relate to a self-contained part

of a building that could itself be further sub-divided.

However, when the tenants served notice, the landlord disputed that they had a majority over the whole property. It submitted that, as the premises were split into two equal sets,

Majority ruled was part of the system and Parliament must have intended that the wishes of individual tenants could be over-ridden for the sake of enabling enfranchisements to work.

Anti-social behaviour - housing trust fails to stop tenant's liability claim

The High Court has ruled that a tenant can proceed with a claim that a housing trust failed to deal adequately with incidents of anti-social behaviour.

The case involved Octavia Hill Housing Trust and Terri Brumby who owns a flat on the lower ground floor of a large block. Ms Brumby claimed that the trust had failed to prevent anti-social behaviour on its land, in and around the block, by people visiting another flat.

She said she had endured the anti-social behaviour for four years and although she had complained to the trust, it had failed to take reasonable steps to deal with the problem.

The trust submitted that the liability claim should be struck out because it failed to disclose reasonable grounds. The trust applied for summary judgment on the basis that the claim had no real prospect of success.

liability claim

The application was dismissed so the trust appealed.

It submitted that for a liability claim to succeed, there had to be more than just the existence of anti-social behaviour on the trust's land. It also argued that a mere failure to stop the nuisance would not be sufficient.

However, the High Court has also rejected the application to strike out the claim. It held that the case involved fact-sensitive issues and would depend on how a judge would view the evidence. There was therefore no reason to prevent the claim proceeding.



Collective enfranchisement thwarts sale agreement

A company has lost out on a share of the proceeds of the sale of a flat because of unforeseen circumstances created by a collective enfranchisement.

The case of *Hildron Finance Ltd v Sunley Holdings Ltd* involved a disagreement that arose more than 20 years after the sale of a block of flats.

When Sunley sold the freehold of the block to Hildron in 1986, there was a porter in residence in one of the flats. The other flats were let on long leases which required the landlord to provide accommodation for a porter.

The sale agreement between Sunley and Hildron contained terms relating to the porter's flat. If there came a time when it was no longer needed as a porter's flat, a new long lease for it

was to be sold on the open market with vacant possession. The proceeds were then to be shared with Sunley.

In 2004, the tenants in the block exercised their right to collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993.

It meant Hildron could no longer comply with the original terms agreed in 1986 to sell the porter's flat on the open market. The Lands Tribunal said the sum attributable to the porter's flat was £200,000.

Hildron and Sunley were unable to agree whether the overage provisions in their original agreement had been triggered. In 2006, Hildron granted an assured shorthold tenancy on the porter's flat. A recorder found that the

unforeseen circumstances of the collective enfranchisement removed the contractual obligation to share the proceeds from a sale.

Sunley appealed saying the court should uphold the underlying purpose of the original agreement. The High Court, however, has found in favour of Hildron. It said that Sunley was asking the court to go too far in reconstructing the agreement which had been based on the assumption that the porter's flat might one day be sold on the open market.

Neither party at the time had contemplated the sale of the flat as part of a disposal of the entire block. The fact that such a sale was brought about by the collective enfranchisement further weakened Sunley's case.

Occupancy agreement didn't meet legal requirements

The Court of Appeal has ruled that an agreement between a landlord and tenant could not be enforced if it failed to meet the conditions required of a properly drawn up lease.

In the case of *Berrisford v Mexfield Housing Co-operative Ltd*, the tenant appealed against a decision that her landlord was entitled to end her tenancy. The landlord was a fully mutual housing association. Its status meant it could not create an assured or secure tenancy. Its tenants, therefore, had no protection against eviction except under the Protection from Eviction Act 1977.

The tenant and landlord had drawn up a month to month occupancy agreement. Clause 6 stated that the landlord could not end the agreement unless the tenant fell into arrears or otherwise breached the agreement. However, the landlord later served the tenant with a month's notice to quit even though she was



not in arrears and had observed all the necessary conditions. It submitted that the agreement was void because there was no fixed term to the lease as required by law.

The tenant accepted that under common law this rendered her tenancy void, but she submitted that equity, which in some cases can be used to mitigate against the full rigour of the law, prevented the landlord from seeking possession because that would breach the occupancy agreement between them. The Court of Appeal held that it is a well established legal principle that

Time for Parliament to reconsider rules on leases?

the commencement of a lease and its maximum duration had to be certain before it could take effect. The month by month nature of the occupancy agreement in this case did not meet that requirement. That legal requirement could not be removed, as the tenant had suggested, by the concept of equity.

However, the court said it did not reach its conclusion with enthusiasm as it was clear that the two sides had intended to create a contract when they drew up the occupancy agreement.

The Appeal judges suggested that it was perhaps time that the rule about certainty of term in leases was re-examined by Parliament.

When only one joint tenant serves notice to quit ...

A situation in which one joint tenant can serve notice to quit and so effectively end the other tenant's legal interest in the property is not incompatible with the Human Rights Act 1998. That was the ruling of the High Court in the case of *Lana Wilson v London Borough of Harrow*.

Mrs Wilson and her husband had been joint secure tenants of a local authority flat. The relationship broke down after she had started suffering from a mental illness. He left the property and rent arrears began to mount up because Mrs Wilson didn't apply for housing benefit.

The authority told Mr Wilson that if he remained as a tenant he would be liable for the arrears. It added that he could end the tenancy by serving notice to quit but that would also have the effect of ending his wife's rights to the tenancy.

The authority did not tell Mr Wilson that it might be possible for him and his wife to assign the tenancy to Mrs Wilson alone. He was advised to seek legal advice on the issue. Mr Wilson did not seek legal advice but went ahead and

served notice to quit. The authority then began possession proceedings against Mrs Wilson but said that it was prepared to offer her a one-bedroom property nearby. In the county court, Mrs Wilson submitted that the rule in *Hammersmith v Monk* – which means one joint tenant can end the other's legal interest in a tenancy by unilaterally serving notice to quit – was incompatible with the Human Rights Act 1998. She also submitted that it was irrational and disproportionate for the authority to begin possession proceedings.

HHJ Million rejected both points. He said a notice to quit was only incompatible with the Human Rights Act if it had been "induced" by the landlord. There was no evidence of such inducement in this case.

He also held that it was not irrational for the authority to seek possession because any hardship to Mrs Wilson would be outweighed by the need to re-allocate her flat to a larger family.

Those rulings have now been upheld by the High Court.



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