DEALING WITH A MIXED BAG Issues arising with mixed use premises

by

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INTRODUCTION

Mixed use is most certainly in vogue. We constantly read about new gleaming mixed use developments where developers have residential properties usually situated above offices, shops, restaurants or even hotels. In many respects this is nothing new and is a return to the pre Victorian way we lived. There was over the past 150 years a steady separation between commercial and residential areas and thus a division between such developments. But the pressures of population growth and the reluctance to develop in greenfield sites has led to a rapidly changing development world. The centres of our cities are now once again places in which to live.

In this seminar we are going to focus upon some key areas where pitfalls can occur. This is however merely an introduction to the subject and one would need far more time to delve in great depth with all aspects of the subject including the planning and finance issues. We shall be looking at which statutory code applies to the property, forfeiture, rights of first refusal, enfranchisement, the right to manage and service charges.

MIXED BUSINESS AND RESIDENTIAL USER – WHICH STATUTORY CODE?

(Mark Warwick QC)

The Starting Point

1. Section 23(1) of the Landlord and Tenant Act 1954 Part II ("the 1954 Act") states as follows:

> "*Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.*"

2. So if premises are "*occupied for the purposes of a business*" then the 1954 Act applies even if the occupation is for other purposes (e.g. residential). Moreover, if the 1954 Act applies to a tenancy, then the various residential statutes do not apply to that tenancy (e.g. Section 24(3) of the Rent Act 1977 and Schedule 1, Paragraph 4 of the Housing Act 1988).

3. The cases give considerable guidance as to what occupation is "*for the purposes of a business... and other purposes".* In matters of this kind it will, in the end, "*come down to a question of degree, and borderline cases will produce their usual difficulties*" per Geoffrey Lane LJ, Page 1339D, **Cheryl Investments Limited v. Saldanha** [1978] 1 WLR 1329. It is convenient to look at the cases chronologically. They show that it is relatively easy to establish a user that places a tenancy within the 1954 Act. They also reveal a distinction between cases where the tenant himself is the residential occupier, and cases where others are residing in the property and the tenant claims to occupy for the purposes of a business.

The Cases – Considered chronologically

Cheryl Investments Limited v. Saldanha (Supra) and

Royal Life Saving Society v Page

4. In the above cases the Court of Appeal was considering 2 appeals, each involving the tenant himself being in occupation. The facts of the cases lay either side of the line demarcating a business tenancy from a residential tenancy. Both appeals raised a "topsy-turvy" situation (per Lord Denning MR Page 1331G), where the landlord argued for a business tenancy and the tenant argued for a Rent Act tenancy.

5. In **Royal Life Savings Society,** Dr Page was medical advisor to Selfridges, and held clinics there five days a week. He had consulting rooms in Harley Street. He took an assignment of the tenancy of a maisonette in Devonshire Street. Lord Denning explained at page 13314F as follows:

"*After the assignment he moved in and occupied it as his home. He put both addresses (Harley Street and Devonshire Street) in the medical directory. He had separate notepaper for each address and put both telephone numbers on each. This was, of course, so that anyone who wished to telephone him could get him at one or other place. But he did very little professional work at the maisonette. Over the whole period of the tenancy, he had only seen about one patient a year there. The last patient was in distress 18 months ago. He summarised the position in one sentence: "Harley Street is my professional address, and the other is my home.*"

6. Lord Denning's view was that Dr. Pages' occupation of Devonshire Street "*for his profession was not a significant user. It was only incidental to his use of it as his home.*"

7. The appeal involving **Cheryl Investments** concerned a Mr. Saldanha who rented a flat in a former grand house in Beaufort Gardens, which house had been converted into flats. Lord Denning said:

"*Mr. Saldanha is an accountant by profession and a partner in a firm called Best Marine Enterprises. They carry on the business of importing sea foods from India and processing them in Scotland. The firm has no trade premises. The two partners carry on their business from their own homes. The other partner works at his home at Basildon. Mr. Saldanha works at the flat in Beaufort Gardens: and goes from there out to visit clients. When he went into the flat, he had a telephone specially installed for his own use, with the number 589 0232. He put a table in the hall. He had a typewriter there, files and lots of paper: "The usual office equipment" said the manageress. He had frequent visitors carrying brief cases. He had notepaper printed: "Best Marine Enterprises. Importers of Quality Sea Foods. Telephone 589 0232" – that is the number I have just mentioned – "P.O. Box 211, Knightsbridge, London SW3.*"

Lord Denning explained:

> "*On that evidence I should have thought it plain that Mr. Saldanha was occupying the flat, not only as his dwelling, but also for the purposes of a business carried on by him in partnership with another.*"

Groveside Properties v. Westminster Medical School (1984) 47 P&CR 507

8. The above was a case where the tenant did not occupy itself, but its licensees did. The tenant was a medical school, being a company whose objects were , "*To carry on Westminster Medical School for the purposes of education of students of medicine and research.*". The tenant rented a flat comprising four study bedrooms, a sitting room, a kitchen, a bathroom and two WCs. The medical school furnished the flat, and even provided sheets and blankets in the bedrooms, and kitchen utensils. It paid all the rent and other charges under the lease, together with the rates and other outgoings. The Court of Appeal upheld the County Court Judge's decision that the tenancy was within the 1954 Act.

9. Kerr LJ said that he asked himself the question whether the medical school:

> "*Was using the flat for the purposes of its business in the sense of the "activity" carried on by it, that is to say, the education of students of medicine and the provision of the necessary facilities for this purpose, which – as the Judge pointed out – includes the provision of accommodation for them...*"
>
> The Judge answered this question "*Yes*".

10. Stephenson LJ agreed. He referred to the: "*Unchallenged evidence from the secretary of the medical school to support that underlying purpose. It was in order to get better educated students by discussion amongst themselves and by development of the corporate spirit that the school provided accommodation for about one-third of its students, not only in two halls of residence with a resident warden or bursar, but in student houses and flats like this flat.*"

Trustees of the Methodist Secondary School's Trust Deed v. O'Leary (1993) 66 P&CR 364

11. The above is another case where the tenant did not occupy the premises, but its licensee did. The tenant was the trustees of the Methodist School. The trustees rented a dwelling house immediately on the boundary of the school. The dwelling house was occupied by the school's caretaker, under a service occupancy. The County Court Judge applied **Cheryl** in reaching his decision. It was agreed in the Court of Appeal that this approach was wrong. The proper question was whether the residential occupation was in furtherance of the tenant's business activities. Although the Court of Appeal decided the case on other grounds, they were inclined to the view that the Trustees had not established their occupation of the property.

Wright v. Mortimer (1996) 28 HLR 719,

12. In the above case, the tenant himself occupied a maisonette at Northumberland Place London W2. The County Court Judge explained that the tenant was an expert in 17th century painters. Nearly all of the tenant's work was carried out away from his flat. However, he had a large library in the flat, where the books occupied various rooms. There was however no photocopier or fax machine, and only a limited amount of writing was undertaken in the flats. The Judge asked himself whether the tenant's business activities were part of the reason or purpose, aim or object of occupying the premises. He answered no. The Court of Appeal decided the decision was un-appealable and refused permission to appeal.

Broadway Investments Hackney Limited v. Grant (2007) 1 P&CR 18

13. The above case deserves a brief mention because it is comparatively recent, however the case was not a borderline one. It was a decision of HHJ Cotran. He decided that a tenancy of premises comprising a shop with residential upper part was not a business tenancy. The Court of Appeal had no difficulty in disagreeing with him, noting, with regret, that he had commented "*I do not care what the law says*".

FORMER MIXED USE (BUSINESS AND RESIDENTIAL) BUT THE BUSINESS USE ENDS

14. If the user began as mixed, it does not follow that cessation of the business user places the tenancy within a residential statutory code. The leading case is **Tan v Sitkowski** [2007] 1 WLR 1628. Neuberger LJ gave the lead judgment. Since he said that the "*relevant case law..is often unsatisfactory and inconsistent*" it is not helpful to analyse the earlier cases.

15. In 1970 the tenant occupied premises in Battersea Bridge Road. He used the ground floor for his electrical retail business and the first floor as a residence for his family. His original tenancy was in 1970. This was replaced with a tenancy in 1976, which reflected the mixed user. The user remained as mixed until 1989, when all business user ceased, and the ground floor was used as storage ancillary to the residential occupation on the first floor. At paragraph 24 Neuberger LJ said the main question was "*Where premises are let for mixed business and residential use, and the tenant subsequently ceases the business use, can he claim protection under the 1977 Act in relation to the tenancy?".* In order to answer this question Neuberger LJ undertook a chronological review of the pertinent cases. He criticised the reasoning in 3 of these as "*either flawed or incomprehensible*".

16. His conclusion was that, because the premises had been let for mixed business and residential use they were not "let as a separate dwelling" within section 1 of the Act. Thus the tenancy had no statutory protection, and had been properly determined by a common law notice to quit.

17. The above represents the general rule, however Neuberger LJ also considered the exception, which is if the character of the letting had changed. He indicated (paragraph 78) that this will normally only occur if the landlord has "*affirmatively assented to the change of user*". In the next paragraph he explained that "*there has to be something more than mere knowledge of the change of use coupled with acceptance of rent to operate as positive consent to the change*".

FORFEITURE –
WHERE THE PREMISES ARE MIXED RESIDENTIAL AND BUSINESS

18. Even if a tenancy falls within the 1954 Act, if the use is "mixed", with part being residential, it is only possible to forfeit that lease by using legal proceedings. **Patel v. Pirabakaran** (2006) 1 WLR 311 makes this clear, and reversed the generally held view to the contrary.

19. In its essentials, **Patel** involved a typical lease of shop with residential upper part. The tenant's rent fell into arrears and the landlord changed the locks on the shop contending that this amounted to forfeiture of the lease. The tenant continued to live upstairs. The landlord commenced possession proceedings, alleging that the lease had already been forfeited by the changing of the locks. The tenant challenged the validity of the "forfeiture", invoking Section 2 of the Protection from Eviction Act 1977. This states:

"*Where any premises are let as a dwelling on a lease which is subject to a right of re-entry or forfeiture, it shall not be lawful to enforce that right otherwise than by proceedings in the court while any person is lawfully residing in the premises or part of them.*"

20. After a detailed analysis of the statutory origins of Section 2, and many authorities, the Court of Appeal concluded that, "*let as a dwelling*" in Section 2 meant "*let wholly or partly as a dwelling.*". Thus the purported re-entry in **Patel's** case was unlawful and invalid.

THE LANDLORD AND TENANT ACT 1987 PART I – MIXED USE BUILDINGS

Introduction

21. The purpose of the provisions in Part I of the Landlord and Tenant Act 1987 ("the 1987 Act") was: "*To enable tenants of flats to buy their landlord's interest in the building if the landlord proposed to sell it to someone else, and to buy it from the purchaser if the landlord had actually done so.*", per Staughton LJ in **Kaye Green v. Twinsectra Limited** (1996) 1 WLR 1587 at Page 1603B.

22. In its initial form, the 1987 Act proved ineffective and toothless. In its form as from 1st October 2006, (following amendments) the 1987 Act has to be taken seriously by property owners and their advisors; not least because it creates a criminal offence for breach. Where a building has a mixed use questions arise as to:

(i) the premises to which the legislation applies

(ii) which disposals are caught by the legislation.

The Premises to which the 1987 Act relates

23. Section 1(3) provides as follows:

"*This Part does not apply to premises falling within subsection (2) if –*

(a) Any part or parts of the premises is or are occupied or intended to be occupied otherwise than for residential purposes; and

(b) The internal floor area of that party or those parts (taken together) exceeds 50 per cent of the internal floor area of the premises (taken as a whole);

and for the purposes of this subsection, the internal floor area of any common parts shall be disregarded."

24. The above subsection has a number of elements deserving comment:

(i) "*Occupied... other than for residential purposes*"?

If the user of a "*part*" is as a shop or offices then the answer is clear, but what if the part has mixed user (e.g. residential with some business) does the case law relating to the interface between business and residential tenancies (above) apply? As yet there is no decision (although I am inclined to the view that more weight should be given to the residential occupation than in those cases). What if the occupation of the "*part*" is for residential purposes (e.g. students occupying as licensees of their college) but the rental by the college is for business purposes (per **Groveside**)? Probably the fact of residential occupation takes precedence, but the matter is judicially unresolved.

(ii) "*intended to be occupied otherwise than for residential purposes*"? –

How is the intention to be assessed? Is it the tenant's subjective intention, or an objective test, to be gathered from the surrounding circumstances (e.g. from planning user, state of the fit out etc?). It is probably the latter, but the contrary is arguable. Furthermore, since the test is "*intention*" it can presumably change from time to time. e.g. the relevant part of the premises might be empty, but be intended to be used as offices, but later the intention changes to residential purposes.

(iii) "*The internal floor area of any common parts shall be disregarded".* "*Common parts*" are defined by Section 60(1), which states "*in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it.*"

Are disposals of a non residential part of the premises caught by the 1987 Act ?

25. If a mixed use building comprises premises within the 1987 Act, then it is unsafe to assume that a disposition of a non residential part or parts is not a relevant disposal. This is because of the construction given to Section 4 of the act by Warren J in **Dartmouth Court Blackheath Ltd v Berisworth Ltd** [2008] L&TR 187.

26. Section 4(1) provides :

"In this Part references to a relevant disposal affecting any premises to which this Part applies are references to the disposal by the landlord of any estate or interest (whether legal or equitable) in any such premises, including the disposal of any such estate or interest in any common parts of any such premises but excluding –

(a) The grant of any tenancy under which the demised premises consist of a single flat (whether with or without any appurtenant premises); and

(b) Any of the disposals falling within subsection (2)"

27. In **Dartmouth** Warren J, at paragraph 46, said "*The relevant premises are to be ascertained in an objective way disregarding the disposal concerned; many factors may come into play in determining the extent of the relevant premises. The provisions of s 1(2) are then applied to those relevant premises to see whether they are premises to which Pt I applies".*

28. **Dartmouth** involved a block of flats known as Dartmouth Court in London SE1 that comprised two buildings: the main building contained 72 flats on four floors, and a separate garage block contained, inter alia, 20 garages, a caretaker's office and an electricity substation. In April 2003 the freehold owner/landlord transferred 3 garages, plus the equipment room, caretaker's office and electricity substation to Berisworth. In December 2003 the same landlord granted a lease to Berisworth of 4 parcels, namely the airspace above the main building, a lightwell and some basement rooms in the main building, and a small area of garden adjoining the wall at the rear of the main building over a disused coal chute. The Judge decided that the transfer was not caught by the Act, but all the property within the lease was, (subject to the resolution of an issue as to how much of the airspace the tenants' nominated purchaser was entitled to acquire).

29. Particularly because airspace leases are common, **Dartmouth** is a warning that they are likely to be caught by the Act.

MIXED USE AND ENFRANCHISEMENT

(Gary Blaker)

30. The Leasehold Reform Act 1967 originally provided a statutory framework for the residential tenant to purchase the freehold of the house. Under the Leasehold Reform Housing and Urban Development Act 1993 and the Commonhold and Leasehold Reform Act 2002 these rights were extended to long leaseholders.

31. Enfranchisement under the 1967 Act applies where a house is let on a long lease to a tenant who has owned the lease for at least two years. The house can be occupied partly for business purposes within the meaning of Part II of the Landlord and Tenant Act 1954 and still qualify for enfranchisement.

32. The key difficulty however has been how to interpret the meaning of the word house. The statute defines house in section 2(1) and it provides:

33. "*For the 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 not or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes*".

34. The residence and low rent tests were abolished by the 2002 Act. This means that long leaseholders do not have to live at the house so long as they have owned the lease for two years. Similarly the rent or rateable value of the property is no longer relevant in qualifying a tenant to be able to make a claim. This led to many claims being made in respect of properties which at first blush do not appear to conform to the generally held idea of a description of a house.

35. For a tenant of a mixed use property to acquire the freehold of the property under the 1967 Act it is necessary for:

    a. The building the subject of the tenancy to fall within the definition of a "house"; and

    b. The particular tenancy to fall within the definition of a long tenancy for the purposes of the 1967 Act.

36. A long tenancy is a tenancy originally granted for a term certain exceeding 21 years or it must contain a right of non perpetual renewal if shorter with any break clause or forfeiture provision being disregarded.

37. Mixed use tenancies are restricted in that section 1(1ZC) of the 1967 Act provides that a long tenancy does not include a tenancy to which Part II of the 1954 Act applies unless "*it is a tenancy granted for a term of years certain exceeding 35 years*". Further the tenant must be able to satisfy the two year residence test.

38. The result of this is that a tenant of a mixed use property where the lease is for 21 years or more will be able to rely upon the 1967 Act if:

    a. The tenant does not occupy some part of the property for his business; or

    b. If the tenant does occupy the premises for the purposes of his business:

        i. The tenancy is for a period of 35 years or more; and

        ii. The tenant can satisfy the two year residence test.

39. As, for example a shop and the upper parts can be a house for the purposes of the 1967 Act it is important to be able to advise and identify how the courts look at the meaning of the word "house". This is an area which has vexed lawyers considerably over recent years and one which could quite easily be the subject of a long seminar. There is here only time for a brief overview as to the difficult issues presented on this subject.

40. It is necessary to satisfy the court that:

    a. The relevant building was designed or adapted for living in; and

    b. The relevant building is a house "reasonably so called".

41. In *Day v Hosebay Ltd* [2012] UKSC 41 the Supreme Court examined once again the meaning of the word house within the context of the 1967 Act. Hosebay Ltd was the tenant of three Victorian former houses in Kensington which were used as a self catering hotel. Part II of the 1954 Act applied and Hosebay would only be able to acquire the freehold if it met the two year residence test. Clearly as a company it could not do so and thus it sought a way around this difficulty. It granted a sub tenancy to a company in the same ownership as itself and

transferred the business to that company. Once it had divested itself of the business it no longer needed to meet the residence test. This would potentially have the effect of creating a serious extension of the 1967 Act. The issue that was left outstanding however was the question of what is a house.

42. The previous two leading authorities were *Tandon v Trustees of Spurgeons Homes* [1982] AC 755 and *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] UKHL 5. In *Tandon* the property had been designed as a shop with a residence above. The House of Lords considered by a bare majority clear that it was a house "*reasonably so called*". Lord Roskill appears to have been strongly influenced by policy considerations and held that as long as a building of mixed use can reasonably be called a house then it falls within the statutory definition, even though it may reasonably be called something else. He went on to suggest that even if the building is designed or adapted for living in, only in exceptional circumstances would this justify a judge in holding that it could not reasonably be called a house. In that case it was felt that it would be unfair to exclude the tenants of the residential part of the building from the right to enfranchise. Lord Roskill said that even 25% residential use was "*substantial*".

43. *Boss Holdings Ltd* concerned a property in Mayfair. The upper floors had become unusable after a long period of residential use. Lord Neuberger said that the phrase "*designed or adapted for living in*" requires one to look at the original design or subsequent adaptation. As there had been no adaptation away from the original design for living in the property it fell to be considered a house and thus within section 2(1) of the 1967 Act.

44. The courts appear now to have adopted a more restrictive approach perhaps realising that the meaning of house had been given such a wide definition that the 1967 Act was open to abuse.

45. In *Prospect Estates Ltd v Grosvenor Estate Belgravia* [2009] 1 WLR 1313 the premises were a terraced Victorian building. At the date of the claim only the fourth floor was used for residential purposes and the lease prohibited some 88.5% of the property from being used for residential use. The residential part could only be occupied by a person connected with the company occupying the business premises. The Court of Appeal held that the property could not reasonably be called a house. Here the 11.5% residential use was clearly not

considered sufficient for the purposes of the 1967 Act and this should we contrasted with the 25% in Tandon.

46. This case was approved in *Hosebay* where Lord Carnwarth stated that the word "house" needs 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*". Thus in order to be a house the premises has to have both the physical character of a house and also the use as a house.

47. In *Hosebay* the property was being used solely as a self catering hotel. The fact that the buildings might look like houses and might be referred to as houses in certain contexts was not sufficient for the court to displace the fact that their use was entirely commercial. Whilst there is still no definitive test laid down by the Supreme Court it does appear that some common sense has returned to this area of law. It is far more sensible for the test to be based upon use rather than the appearance of the building. There will of course be situations where it is unclear what the settled use is of the premises and it might be sensible for landlords to avoid any part of premises from falling into residential use in order to avoid a potential claim.

48. Lord Carnwarth was careful to distinguish the cases in the appeal before the Supreme Court from previous caselaw arising out of mixed use property. Courts may continue to apply Lord Roskill's test in respect of mixed use property but it does appear that a more holistic approach towards defining what is a house has been advocated.

49. More recent clarification has come in the case of *Henley v Cohen* [2013] EWCA Civ 480. The Claimants purchased a 99 year lease of premises consisting of a shop on the ground floor and an upper floor which had been used for non-residential purposes ever since the grant of the lease. The upper floor was only accessible through a neighbouring property. The Claimants stopped up this access and converted the first floor into a self contained flat. They let this flat on an assured shorthold tenancy and then served notice of a claim under the 1967 Act.

50. It was common ground that the premises had been "*adapted for living in*" and so it was only the second limb section 2(1) that was in dispute. The Court of Appeal

dismissed the claim and held that the property could not reasonably be called a house. The absence of any residential use until just before the claim was made and the lack of connection between the shop and flat were significant factors.

51. The Court of Appeal was not keen on the fact that the conversion of the flat was carried out with the sole intention of making the enfranchisement claim. The works were carried out notwithstanding the landlord's refusal of consent. The court appeared not to want the tenant to benefit from this deliberate act of default.

52. It remains difficult to see a clear consistent thread of reasoning in these cases which clearly makes advising in such matters all the more difficult. It is likely that we shall see further cases testing the meaning of a "house" within the mixed use context.

Long leaseholders of flats

53. Long leaseholders with a lease over 21 years are also able to acquire the freehold of a building or be granted a new lease of their individual flat. As in the case of a house there is no residence requirement for a qualifying tenant to exercise the right to collective enfranchisement.

54. Originally under the 1993 Act where more than 90% of a building was designated for residential use and sufficient owner occupiers had owned their flats for more than two years they could club together and acquire the freehold of the block. The 2002 Act removed the residence requirement and reduced the percentage from 90% to 75%. Thus less than 25% of the total internal floor area excluding common parts must be for non-residential use. This increases the prospect of residential tenants in a mixed use development in acquiring their freehold.

55. In order to make a claim the building should contain at least two flats held by qualifying leaseholders and at least 2/3 of the flats must be leased to qualifying leaseholders. In order to be a qualifying leaseholder the lease must generally be longer than 21 years and it must be a lease of a flat and the leaseholder must not be a commercial leaseholder and must not have a lease of three or more flats.

56. It is thus important for a developer to consider at the outset how it wants to set up the development. So for example it might want to put a structure in place at the outset that anticipates the leaseholders will want to enfranchise. In the event that it concludes it is unlikely that the tenants will decide to act collectively then the developer may well decide to retain the freehold and continue to receive the income from the commercial properties and the residential properties which have not already been sold. This allows the developer to market its interest as a straightforward freehold investment. But if the qualifying tenants do acquire the freehold and the freeholder takes a long leaseback then there could well be management issues between the new commercial long lease and the original commercial lessees. Further, as the building is now being controlled by the residential tenants for insurance and service charge purposes this could have an effect on the developer's financial interest.

57. An alternative is to transfer the freehold to a management company upon the sale of the last residential flat. The residential tenants would be the only shareholders of the property management company. The developer could take a long leasehold interest in the commercial element of the building. In such a case it is less likely that the residential tenants will decide to enfranchise as they already control the freehold at the outset.

58. The collective right to enfranchise only applies to the residential part of the property. The commercial parts of the property do not qualify and those tenants cannot participate. Thus, if the residential tenants decide to enfranchise this will split the residential and commercial elements. Any common areas such as gardens and parking areas which benefit the residential long leaseholders will form part of the residential element.

Lease extensions

59. Each qualifying leaseholder has the right to require the grant of a new lease at a peppercorn rent for a term expiring 90 years after the term date of the current lease. The landlord is entitled to a premium for granting this lease extension. Here the leaseholder can extend even if it owns more than two flats. The leaseholder must have been a qualifying leaseholder for at least two years by the date of the application.

60. The premium payable to the freeholder or intermediate leaseholder is based upon the amount by which the open market value of the freeholder's interest in the flat is reduced by the grant of the lease extension together with the "marriage value" of the interests.

RIGHT TO MANAGE

61. It is not a straightforward issue dealing with the right to manage of a mixed use development. The 2002 Act introduced a no fault right to manage for tenants of residential premises. The right to manage is however only available in relation to "premises" as described in section 72 of the 2002 Act. Section 72(1) defines premises to which the right to manage applies as a self contained building or part of a building with or without appurtenant property. There have to be two or more flats held by qualifying tenants and at least 2/3 of the flats in the premises have to be held by qualifying tenants. Under section 72(2) a building is considered to be self contained if it is structurally detached. Under section 72(3) part of a building is self contained if it is a vertically divided part of a building capable of independent development and independent in terms of services, with or without appurtenant property.

62. The issue of the question of what constitutes "*premises*" has not been clear. In *Albion Residential Ltd v Albion Riverside RTM Co Ltd* [2014] UKUT 6 (LC) the Upper Tribunal dealt with a mixed used development which was described as a "*visually striking and structurally complex modern building located on the south bank of the Thames*" and "*an imposing and modernistic mixed use development*".

63. The right to manage claim related to one of the two principal buildings. This building comprised a ground floor lobby, 185 residential units on seven floors, two further penthouses, car parking spaces a gym and swimming pool. In addition there are office units and a basement car park extending beyond the footprint of the building. This car park also housed the plant rooms and base of the service and lift cores for both buildings.

64. The Upper Tribunal had to determine whether the building was "*structurally detached*" in order to determine whether the right to manage attached to it. The

FTT had held that the underground car park is appurtenant property being a garage and that the main building is a self contained building. This gave the tenants the right to manage the building.

65. The Upper Tribunal held that it is a matter of fact to determine whether the building is self contained.

66. The first step was to define the building. It held that the building does not begin at ground floor level but includes the entirety of each of four reinforced concrete cores which rise from the basement to the tenth floor. It includes the plant and service rooms, structural columns between the first and second floors, part of the ground floor concrete slab and part of the external piazza and part of the concrete raft at basement level.

67. The next step was to determine whether the building is self contained and structurally detached. The issue was whether the building is structurally detached from the car park and any other structure which included concrete structures, the ground and first floor slabs of the building, the car park and piazza. In the circumstances, it was not possible to find that the building is structurally detached. It is therefore of some considerable importance to be aware whether the buildings in a mixed use development are "*structurally detached*".

68. The right to manage may well have a negative effect on the landlord's reversionary interest. Also the commercial tenants may well have a very different view as to how the property should be managed.

SERVICE CHARGES

69. How do the service charge provisions in the Landlord and Tenant Act 1985 apply in the mixed use situation? Section 18 of the 1985 Act refers to a "*service charge*" being an amount payable by a tenant of a dwelling as part of or in addition to rent. Where a mixed use development has separate leases in respect of the residential and commercial parts then it is clear that only service charges payable in respect of the residential leases falls within section 18.

70. The position is more complicated where the commercial and residential part are let under one lease or where there is a head lease of the whole or parts out of which subleases are granted to commercial and residential sub-tenants.

71. In *Oakfern Properties Ltd v Ruddy* [2007] Ch 335 the premises consisted of a building divided into units for commercial and residential use. The upper floors consisting of 24 separate flats were let to a company under a long lease. The individual flats were then sub-let to tenants. The commercial units were held on leases directly from the head landlord. Under the head lease the company was obliged to pay a maintenance charge and then each sub-tenant was obliged to pay 1/24th of that figure as a maintenance charge to the company. Mr Ruddy who was one of the sub-tenants applied to the LVT claiming the maintenance charge was unreasonable.

72. A preliminary issue arose as to whether the maintenance charge under the head lease amounted to a service charge and whether Mr Ruddy had standing to bring the claim. The LVT, Upper Tribunal and Court of Appeal on a second tier appeal all agreed that he could bring the claim and that this was a service charge.

73. The Court of Appeal looked at the legislative history of section 18 but ended up focussing upon the fact that section 18 of the 1985 Act says nothing expressly about any other property of which the person might be a tenant. It did not require occupation of the dwelling. Although a head lessee of mixed use premises comprising more than one flat is not a tenant of a "*building...occupied...as a separate dwelling*", he is a tenant of "*part of a building...occupied...as a separate dwelling*". The fact that the head lessee is also a tenant of commercial premises and common parts and other separate dwellings was considered to be immaterial.

74. This case was not followed by the LVT in *Buckley v Bowerbeck Properties* [2009] 1 EGLR 43. In that case the mixed use consisted of a ground floor with use as medical consulting rooms and a basement residential flat. The two parts were connected internally, had a common doorbell and were connected under the lease in such a way that they could not be occupied separately. The LVT held that the residential part of the building was not separate for the purposes of section 38 of the 1985 Act and thus the tenant was not a tenant of a dwelling and therefore section 18 did not apply.

75. This judgment does not sit easily with *Oakfern*. In the former case the dwelling was considered as part of a wider building and this was not seen as a bar to statutory protection. In *Buckley,* the residential tenant was not afforded protection simply because the property was connected to the commercial part of the premises. Whilst these cases turn upon their own particular facts it is probably safest to err on the side of caution when advising and the likelihood is that a tenant in such circumstances should be consulted in relation to service charge expenditure.

NUISANCE AND COVENANTS

76. There is clearly a need to avoid nuisance to both the resident who is trying to sleep and the office worker who is trying to work (presumably not sleep!). With competing interests it is essential that leases contain sufficiently clear covenants as to what behaviour is permissible and when. So for example, it is important to think through when deliveries can be made as if these are made at unsociable hours this could have a detrimental effect on residents. Such difficulties can be ameliorated through careful design and planning of the development but this will necessitate planners, developers, architects and dare I say lawyers all working together.

CONCLUSION

77. Mixed use developments are increasing and so it appears are the issues that arise. What may appear to be somewhat arcane points have a tendency to lead to the appellate courts. These cases can often have significant implications for developers, landlords, commercial and residential tenants.

78. I started with a little history lesson but now for some futurology. London's population is expected to grow from 8 to 11 million over the next 35 years with the UK's population growing to about 75 million. The days of separate residential living away from commercial use is likely by then to be a distant memory and mixed use living could well be the norm.

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