Neutral Citation Number: [2025] EWCA Civ 799

Case No: CA-2024-002694

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM UPPER TRIBUNAL (TAX AND CHANCERY)**
**Judge Thomas Scott and Judge Ashley Greenbank**
**[2024] UKUT 00307 (TCC)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2025

**Before :**

**LORD JUSTICE LEWISON**
**LORD JUSTICE LEWIS**
and
**LORD JUSTICE HOLGATE**

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**Between :**

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| **AMARJEET AND TAJINDER MUDAN** | **Appellants** |
| **- and -** | |
| **THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS** | **Respondents** |

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**Michael Firth KC** (instructed by **Jonathan Levy, Levy & Levy**) for the **Appellants**
**Michael Ripley** (instructed by **The General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing dates: 19/06/2025

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 27/06/2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## Lord Justice Lewison:

1. The issue on this appeal is whether stamp duty land tax ("SDLT") is to be charged on Mr and Mrs Mudan's purchase of 14 Liskeard Gardens, London SE3 at the rates specified in Table A in section 55 of the Finance Act 2003 (as modified by paragraph 1(2) of Schedule 4ZA of the Finance Act 2003), or Table B in that section. The rates of SDLT payable under Table A are higher than those in Table B. Table A applies "if the relevant land consists entirely of residential property"; and Table B applies if "the relevant land consists of or includes land that is not residential property". The difference between the two rates is of the order of £100,000 on the facts of this case; but we are told that there are other cases which depend on the outcome of this appeal.

2. The distinction between "residential property" and "non-residential property" is contained in section 116 of the 2003 Act which relevantly provides:

> "(1) In this Part *"residential property" means—*
>
> (a) a building that is used or suitable for use as a dwelling, or is in the process of being constructed or adapted for such use, and
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> (b) land that is or forms part of the garden or grounds of a building within paragraph (a) (including any building or structure on such land), or
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> (c) an interest in or right over land that subsists for the benefit of a building within paragraph (a) or of land within paragraph (b);
>
> and *"non-residential property" means* any property that is not residential property."

3. Whether property is or is not residential property is normally determined as at the date of the purchase. The issue, therefore, is whether 14 Liskeard Gardens was residential property when Mr and Mrs Mudan purchased it on 5 August 2019.

4. Both the FTT and the UT held that it was. The decision of the FTT (Judge Baldwin) is at [2023] UKFTT 317 (TC); and the decision of the UT (Judges Scott and Greenbank) is at [2024] UKUT 307 (TCC), [2025] 1 WLR 727.

## The facts

5. Mr Mudan himself gave evidence. The FTT found him a straightforward witness who did not exaggerate the state of the property. I think that we can take it that the FTT accepted his evidence.

6. The FTT summarised part of his evidence at [27]:

> "Mr Mudan agreed that the Property was still residential in nature. It had been someone's house for many years and it was not falling down. Nevertheless, he did not consider that it was safe to live in with a young family. This was so even though there was no structural damage to the Property and no structural

> work was required except to replace the missing roof over the boiler room. Mr Mudan was sure that there was a danger to life because of the state of the electrics."

7. The FTT recorded at [39] that Mr Mudan agreed that the Property was a large, detached house in a residential street. It had previously been used as a dwelling (and the FTT also recorded at [17] that when Mr Mudan visited the property in August 2018 there were people living there). Mr and Mrs Mudan's purchase was financed (at least in part) by loan secured by a mortgage granted to a lender who was willing to lend on that security.

8. The FTT summarised its findings of fact at [32]:

> "I find as facts that, as at the effective date, the Property:
>
> (a) had been used relatively recently as a dwelling; and
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> (b) was structurally sound; but
>
> (c) was not in a state such that a reasonable buyer might be expected to move in straight away. I find that, before a reasonable buyer would consider the Property was "ready to move into", the following works would be needed:
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> (i) the Property would need complete rewiring;
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> (ii) a new boiler, pumps and gas and water pipes would be required in the boiler house, so that the water system operated safely and the boiler house roof would need fixing;
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> (iii) the leaking pipes in the cellar would need to be repaired or replaced;
>
> (iv) the kitchen units and appliances would need to be stripped back to the bare walls and replaced;
>
> (v) broken windows and doors (including locks) would need repairing and the Property made secure;
>
> (vi) a lot of rubbish (inside and outside the house) would need clearing away."

9. The FTT clarified at [34] that its conclusions were based on "a reasonable occupier" rather than an occupier in the particular position of Mr and Mrs Mudan and their young family.

## Mr and Mrs Mudan's case

10. The single ground of appeal is that the FTT and the UT both misinterpreted the requirement in the definition of section 116 that in order to qualify as "residential property" the building in question must be "suitable for use" as a dwelling.

11. Mr Firth KC, on their behalf, argues that the meaning of that expression is clear. A building is not "suitable for use as a dwelling" unless it could *actually* be used as a dwelling at the relevant time. It does not include a building which is simply *capable* of being made suitable for use as a dwelling. That argument is broken down into six sub-arguments:

    i) It is the ordinary meaning of the words;

    ii) If a building which cannot actually be used as a dwelling was nevertheless "suitable for use as a dwelling" that would confuse two separate concepts namely "suitable" and "capable of being made suitable";

    iii) If Parliament had wished to include within the definition of "residential property" buildings "capable of being made suitable" it would have said so;

    iv) Parliament has in fact addressed that question but only in relation to buildings that are "in the process of being constructed or adapted for such use".

    v) Treating something as suitable for use on the basis that it is capable of being made suitable ignores the fact that it might never be made suitable for that use.

    vi) This conclusion is supported by observations in case law concerned with other areas of the law.

**Statutory interpretation**

12. The general principles of statutory interpretation are not in doubt. They were explained by Lord Hodge in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at [29] to [32]. The task of the court is to identify the meaning of the words that Parliament has used. Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. A statement made by a minister is relevant only if the three conditions laid down by *Pepper v Hart* [1993] AC 593 are satisfied. They are (i) that the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity; (ii) that the material must be or include one or more statements by a Minister or other promoter of the Bill; and (iii) the statement must be clear and unequivocal on the point of interpretation which the court is considering.

13. Lord Hodge referred to the purpose of the legislation. This is of prime importance. As Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), explain at para 12.2: "Every enactment to be given a purposive construction." Three examples will suffice. In *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684 at [28] Lord Nicholls of Birkenhead said:

> "the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose."

14. In *Kostal UK Ltd v Dunkley* [2021] UKSC 47, [2022] ICR 434 at [30] Lord Leggatt JSC said:

> "First, as with any question of statutory interpretation, the task of the court is to determine the meaning and legal effect of the words used by Parliament. The modern case law … has emphasised the central importance of identifying the purpose of the legislation and interpreting the relevant language in the light of that purpose."

15. This purposive approach applies to all legislation: *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690 at [10].

16. There is one further point of detail which is relevant to the issue on this appeal; namely the interpretation of defined terms. The most recent authoritative discussion of this point is in the judgment of Lord Sales in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594. He said at [48]:

> "In an appropriate case "the potency of the term defined" may provide some guidance as to the meaning for that term as set out in a statutory definition. As it is put in Bennion, Bailey and Norbury, op cit, section 18.6: "In the case of a statutory definition the defined term may itself colour the meaning of the definition". Lord Hoffmann explained in *MacDonald v Dextra Accessories Ltd* [2005] 4 All ER 107, para 18, "a definition may give the words a meaning different from their ordinary meaning. But that does not mean that the choice of words adopted by Parliament must be wholly ignored. If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean". I agree with Henderson LJ, paras 92–93 (citing *Birmingham City Council v Walker* [2007] 2 AC 262, para 11, per Lord Hoffmann, and *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, para 38, per Lord Hoffmann, and para 82, per Lord Scott of Foscote), that this principle is not confined to cases where there is an ambiguity in the terms of the definition, but means that when the definition is read as a whole the ordinary meaning of the word or phrase being defined forms part of the material which might potentially be used to throw light on the meaning of the definition. Whether and to what extent it does so depends on the circumstances and in particular on the terms of the legislation and the nature of the concept referred to by the word or phrase being defined."

17. The difficulty in the *PACCAR* case was that the defined term, namely "claims management services," had no established meaning. Thus, he said, the weaker the

inherent or established meaning of the defined term, the weaker is its ability to throw light on the express words of the definition.

## Case law on section 116

18. The Tax Tribunals (both the FTT and the UT) have built up a body of case-law on the scope of section 116 to which I should refer.

19. In *PN Bewley Ltd v HMRC* (TC/2018/03175) the property comprised a bungalow and its garden. Its previous owner had obtained planning permission to demolish the bungalow and build a replacement. A demolition survey identified asbestos materials in the bungalow and recommended their urgent removal. The heating system had been removed. The survey had involved breaking through walls and floors. The bungalow was still connected to water, electricity and gas services. The issue for the FTT was whether the property was "suitable for use as a dwelling". The FTT said:

> "[52] We start by approaching this issue by looking only at the words of paragraph 18(1) Schedule 42A FA 2003 – "used or suitable for use as a single dwelling". The "used as" test at a single time is a clear binary issue – either the building was on completion date used as a dwelling or it was not. For buildings that were not so used on the completion date it would be possible to have a yes/no test: eg had its last use been as a dwelling, or if never used was it designed for use as a dwelling? But the test is not like that – it asks the single question: was it "suitable" to be used as a dwelling? There could have been other descriptions used: eg whether it was capable of being used as a dwelling. It seems to us that the legislation contemplates that there must be and is a class of buildings that might not meet the test and the likely class is those which are capable of being a dwelling but which are unsuitable for that purpose. The question then is where is the suitable/not suitable boundary.
>
> [53] No doubt a passing tramp or group of squatters could have lived in the bungalow as it was on the date of purchase. But taking into account the state of the building as shown in the photographs on Mrs Bewley's phone with radiators and pipework removed and with the presence of asbestos preventing any repairs or alterations that would not pose a risk to those carrying them out, we have no hesitation in saying that in this case the bungalow was not suitable for use as a dwelling."

20. In *Fish Homes Ltd v HMRC* [2020] UKFTT 180 (TC), [2020] STI 1344 the property was a flat in a block of flats in Greenwich. Very shortly after the purchase was completed it was discovered that the cladding to the block was of the same type that had been used on Grenfell Tower. That prevented the flat from being let; but it was occupied by Mr and Mrs Fish's daughter under an informal arrangement. Judge Hellier said:

> "[58] In the context of suitable for use I agree with Fish Homes that there is a difference between a building being capable for use as a dwelling and one which is suitable for use as such. But the difference in my view is a slim one and consists mainly in the flavour at which "capable" imports that some adjustment could be made which would render an otherwise unsuitable building fit for use as a dwelling whereas "suitable" indicates in evaluation of its present condition or facilities.
>
> [59] So when do defects in the building mean that it is not a dwelling or not suitable for use as a dwelling? Where a building has all the facilities the dwelling - facilities for rest, sleep, storage, hygiene and the preparation and consumption of food, what can render such a building not suitable for use as a dwelling or cause it not to be a dwelling?
>
> [60] It does not seem to me that the failure of a building to comply with building regulations by itself renders a building incapable of being, or being unsuitable for use as, a dwelling. That is demonstrated by the fact that building regulations change: many people live in houses built under earlier regimes (and at times when there were no relevant regulations at all) which do not comply with current regulations, yet no one would say that a Victorian, a Georgian or a 1930s house was not a dwelling or suitable as such because it did not comply with current regulations."

21. He continued at [62]:

> "But I accept that some defects in what could otherwise be a dwelling or suitable for use as such would mean that it is not so. Defects which make it dangerous to live in fall within that category but such danger must in my view be such that a reasonable person would say "it's too dangerous to live there". Some risks to health and safety may fall into this category: high radioactive pollution, the high probability of walls collapsing, and the kind of hazards which would spur a local authority to issue a prohibition notice restricting the use of the premises."

22. On the facts, he held that the flat did not fall into that category; and it was therefore a dwelling.

23. In *Fiander v HMRC* [2021] UKUT 156 (TCC), [2021] STC 1482 the question was whether a building was "suitable for use as a single dwelling". The property was a house and an annex connected by a short, enclosed corridor. Both the main house and the annex had living, sleeping, bathing and kitchen facilities. There was no door between the house and the annex but there were door jambs in which a door could have been installed. At the date of acquisition, the property was unoccupied and in a state of disrepair. The FTT held that the annex was not suitable for use as a single dwelling; and it was against that conclusion that the taxpayer appealed. Although

much of the appeal concerned the "single dwelling" issue, the UT (Judges Scott and Greenbank) also discussed the meaning of "suitable for use". They said at [48]:

> "(1) The word "suitable" implies that the property must be appropriate or fit for use as a single dwelling. It is not enough if it is capable of being made appropriate or fit for such use by adaptations or alterations. That conclusion follows in our view from the natural meaning of the word "suitable", but also finds contextual support in two respects. First, paragraph 7(2)(b) provides that a dwelling is also a single dwelling if "it is in the process of being constructed or adapted" for use as single dwelling. So, the draftsman has contemplated a situation where a property requires change and has extended the definition (only) to a situation where the process of such construction or adaption has already begun. This strongly implies that a property is not suitable for use within paragraph 7(2)(a) if it merely has the capacity or potential with adaptations to achieve that status. Second, SDLT being a tax on chargeable transactions, the status of a property must be ascertained at the effective date of the transaction, defined in most cases (by section 119 FA 2003) as completion. So, the question of whether the property is suitable for use as a single dwelling falls to be determined by the physical attributes of the property as they exist at the effective date, not as they might or could be. *A caveat to the preceding analysis is that a property may be in a state of disrepair and nevertheless be suitable for use as either a dwelling or a single dwelling if it requires some repair or renovation; that is a question of degree for assessment by the FTT.*
>
> (2) The word "dwelling" describes a place suitable for residential accommodation which can provide the occupant with facilities for basic domestic living needs. Those basic needs include the need to sleep and to attend to personal and hygiene needs. The question of the extent to which they necessarily include the need to prepare food should be dealt with in an appeal where that issue is material.
>
> (3) The word "single" emphasises that the dwelling must comprise a separate self-contained living unit.
>
> (4) The test is objective. The motives or intentions of particular buyers or occupants of the property are not relevant.
>
> (5) Suitability for use as a single dwelling is to be assessed by reference to suitability for occupants generally. It is not sufficient if the property would satisfy the test only for a particular type of occupant such as a relative or squatter.
>
> (6) The test is not "one size fits all": a development of flats in a city centre may raise different issues to an annex of a country

> property. What matters is that the occupant's basic living needs must be capable of being satisfied with a degree of privacy, self-sufficiency and security consistent with the concept of a single dwelling. How that is achieved in terms of bricks and mortar may vary.
>
> (7) The question of whether or not a property satisfies the above criteria is a multi-factorial assessment, which should take into account all the facts and circumstances. Relevant facts and circumstances will obviously include the physical attributes of and access to the property, but there is no exhaustive list which can be reliably laid out of relevant factors. Ultimately, the assessment must be made by the FTT as the fact-finding tribunal, applying the principles set out above." (Emphasis added)

24. The UT applied that approach in *Doe v HMRC* [2022] UKUT 2 (TCC). The main issue again turned on the question whether the property was suitable for use as a *single* dwelling, rather than suitability as such. The UT did, however, say at [48] that the FTT was entitled to take into account the historical use of the building when reaching its decision on suitability for use.

25. In *Henderson Acquisitions Ltd v HMRC* [2023] UKFTT 00739 (TC) the FTT considered a property that was suitable for renovation. At the relevant date the ceiling in the kitchen had collapsed as a result of a water leak and had damaged the joists. It was necessary to put Acrow props in place to support the upper floor. That limited safe access to the kitchen, dining room, and to the bathroom and one bedroom (above the dining room) on the upstairs floor. It was accepted, however, that no load-bearing wall was threatened. The stairs from the ground to first floor remained useable throughout the renovation works despite the damage. There was no limit to access to the remaining two bedrooms and the sitting room throughout. Looking at a floor plan of the house, the damage affected less than half of its floor area. The electrical installations were dangerous and had to be replaced; and the central heating also had to be replaced to comply with building regulations. In consequence the property had to be replastered and redecorated. The FTT also found that the works "were all of a type which might have needed to be undertaken in respect of an occupied house."

26. The FTT considered *Fiander* and said at [20]:

> "It is therefore plain that the question to be determined is suitability for use and not a question of readiness for occupation/immediately habitable."

27. They went on to say:

> "[24] … The question of determining suitability for use of a building as a dwelling (or as relevant a single dwelling) is a question of fact in which all the circumstances will need to be considered. As noted in *Bewley* a dwelling can be expected to have facilities for washing, cooking and sleeping. A property which entirely lacks such facilities is unlikely to suitable for

> use as a dwelling; such a property would not be ratable as a dwelling and, for instances, for the purposes of the VAT rules concerning a dwelling would not represent a dwelling. However, where a property has such facilities which are unserviceable but can be repaired or replaced, the property will continue to be suitable for use as a dwelling.
>
> [25] A building which has the facilities to be a dwelling, but which is so structurally unsound or has some other feature (such as asbestos) which precludes repair/renovation then the building will cease to be suitable for use as a dwelling. In essence, in such cases, the land acquisition is of a plot suitable for development and not the building on it. These situations will, in our view, be relatively unusual (*Bewley* was however, one such example). In our view the majority of renovations will involve making a house which is suitable for use as a dwelling a habitable residence meeting modern building regulations and becoming a comfortable home ready for immediate occupation."

28. In *HMRC v Ridgway* [2024] UKUT 00036 (TCC), the property comprised two separate registered titles. The first was a semi-detached house and gardens. The second was adjoining land and a building with separate access ("the Old Summer House"). The Old Summer House had originally been used as a garage and then as an artist's studio. The taxpayer sought to reduce the SDLT payable on purchase. Two weeks before completion, the vendors, at the taxpayer's instigation, granted a six-month commercial lease of the Old Summer House to a photographic studio. The lease contained a covenant that the Old Summer House should not be used for residential purposes.

29. The UT recorded at [32]:

> "It is common ground that the test for whether a building is suitable for use as a dwelling is an objective test. Any intention the purchaser might have to put the building to a particular use is irrelevant. It is also common ground that in construing section 116(1)(a), we must interpret the statutory provision in the light of its purpose. In the present context, that involves ascertaining the characteristics of the buildings intended to be covered by the phrase "suitable for use as a dwelling", and considering whether the Old Summer House falls within that class of buildings."

30. They went on to say at [36]:

> "Parliament has used simple, straightforward language to distinguish residential property and non-residential property. The focus in section 116(1)(a) is on whether the building in question is actually used as a dwelling at the time of the transaction and if not whether it is suitable for such use. In our view, suitability for use might involve consideration of a wide

> range of factors, including the physical attributes of the building but also any restrictions on use of the building, including legal restrictions. As Mr Birkbeck himself pointed out, there may be a range of legal restrictions on the use of a building. Private law restrictions, environmental law restrictions and planning restrictions. There is nothing in the words of section 116(1)(a) or in the context of FA 2003 as a whole which suggests that Parliament was concerned only with the physical suitability of the building for use as a dwelling. If that was Parliament's intent, it could easily have said so."

31. In my judgment this accumulated case law shows a consistent approach to the question whether property in need of some works does or does not qualify as "residential property".

## Other case-law

32. Mr Firth relied on case-law drawn from other areas considering different statutory provisions. Since the context and legislative purpose in which other cases were decided is of importance to the actual decisions, one must be cautious about reading across isolated words and phrases to different legislation passed in a different context and with a different legislative purpose. As Lord Hoffmann observed in *R (Quintavalle) v Human Fertilisation and Embryology Authority* [2005] UKHL 28, [2005] 2 AC 561 at [33]:

> "The word "suitable" is an empty vessel which is filled with meaning by context and background."

33. The first of the cases to which Mr Firth referred us was *Day v Hosebay Ltd* [2012] UKSC 41, [2012] 1 WLR 2884. That case concerned the right to enfranchise under the Leasehold Reform Act 1967. What the Supreme Court had to consider was whether two particular buildings satisfied the definition of "house" in section 2 (1) of the Act. The relevant part of the definition reads:

> "'house' includes any building designed or adapted for living in and reasonably so called…"

34. At [9] Lord Carnwath said:

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

35. At [20] to [21] Lord Carnwath referred to an earlier decision of this court in *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320. That case concerned the compulsory purchase of two adjoining buildings in the same terrace. Number 17 was said by the Minister to be an unfit house, and number 19 was said to be a building other than a house. Lord Carnwath explained the reasons given for that distinction:

> "The buildings were very similar in appearance; both had been designed as shops with rear living rooms and living quarters above, but neither was in current use for living purposes. No 17, which had undergone no structural alterations, was held by the Minister to have "retained its identity as a dwelling". No 19, by contrast, was held to have "lost its identity as a dwelling", following structural alterations involving the extension of the shop into the rear living area… Lord Denning MR's formula can be seen as his way of expressing the present "identity" (in the inspector's words), or perhaps function, of a building not currently in use, defined by reference to the purpose of its construction or subsequent adaptation."

36. At [30] he referred to the decision of the House of Lords in *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] UKHL 5, [2008] 1 WLR 289. In that case the House of Lords held that a building previously designed for living in remained a house even though it was both disused and in part stripped back to the basic shell. Lord Neuberger said at [17]:

> "The fact that the property had become internally dilapidated and incapable of beneficial occupation (without the installation of floor boards, plastering, rewiring, replumbing and the like) does not detract from the fact that the property was "designed … for living in", when it was first built, and nothing that has happened subsequently has changed that."

37. At [34] Lord Carnwath said:

> "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*." (Emphasis added)

38. Although Lord Carnwath disagreed with some of what had been said in *Boss Holdings*, he did not disagree with the result, which he explained as follows at [36]:

> "The basis of the decision, as I understand it, 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: see para 25. That reasoning cannot be extended to a building in which the residential use has not

> merely ceased, but has been wholly replaced by a new, non-residential use." (Emphasis added)

39. Those observations frame the passage in Lord Carnwath's judgment on which Mr Firth particularly relied. The relevant passage is at [35] in which Lord Carnwath said:

> "Once it is accepted that a "literalist" approach to the definition is inappropriate, I find myself drawn back to a reading which accords more closely to what I have suggested was in Lord Denning MR's mind in *Ashbridge* [1965] 1 WLR 1320, that is a simple way of defining 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. Furthermore, I would not give any special weight in that context to the word "adapted". In ordinary language it means no more than "made suitable". It is true that the word is applied to the building, rather than its contents, so that a mere change of furniture is not enough. However, the word does not imply any particular degree of structural change. 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."

40. There are a number of points to be derived from this. First, in deciding whether a building is a "house" one looks to the present identity or function of a building as a house. That is determined by its current physical "character". The character of a building connotes more than its capacity for immediate occupation. Second, it is in my view clear that when Lord Carnwath referred to adaptation he was referring to the adaptation of a building from a previous use to use as a house. It was in that context that he said that adaptation meant "made suitable".

41. The second case on which Mr Firth particularly relied was the decision of this court in *Aldford House Freehold Ltd v Grosvenor (Mayfair) Estate* [2019] EWCA Civ 1848, [2020] Ch 270. The issue in that case was whether the lessees of a building were entitled to exercise the right of collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993. That, in turn, depended (in part) on how many flats there were in the building. The word "flat" was defined by section 101 of the 1993 Act as follows:

> "flat' means a separate set of premises (whether or not on the same floor)— (a) which forms part of a building, and (b) which is constructed or adapted for use for the purposes of a dwelling, and (c) either the whole or a material part of which lies above or below some other part of the building"

42. At the relevant date the sixth and seventh floors of the building were undergoing substantial works of construction. The trial judge's factual findings ([2018] EWHC 3430 (Ch), [2019] 1 WLR 1489) were set out at [15] of his judgment:

> "Accordingly, on the relevant date, the structural works on the sixth and seventh floor premises had long since been completed and they contained new raised floorboarding and suspended ceilings but no internal walls (other than the dividing wall), pipes, cables or other items of fit out. The two sets of premises on each floor (as identified in the new underleases) were separated from each other by the dividing wall and the locked pairs of access doors, which were designed to be opened to facilitate work to fit out the flats for occupation. Separate access to each of the intended new flats could be gained via the lifts and staircase in the northern or southern core of the Building."

43. On the basis of those findings of fact, he concluded at [34]:

> "Each of the four separate sets of premises in existence on the sixth and seventh floors have been constructed for use for residential purposes, even though their current condition precludes actual use for those purposes."

44. This court disagreed. But it is important to understand why. I summarised the successful argument at [22]:

> "The two areas had never achieved a state of construction sufficient to enable anyone to use them as their home. Put another way, the two areas had not been "constructed" (past tense) for use for the purposes of a dwelling: they were in the course of construction for that purpose."

45. Having considered *Boss Holdings* and *Hosebay*, at [29] I said:

> "Thus, *Boss Holdings* was a case in which a building once had an identity as a house; and had not lost that identity because of subsequent events. By contrast in *Hosebay*, the two buildings, although originally designed for living in, had lost their identity. The identity of each building at the relevant date was to be ascertained by reference to "its current physical character" however that had been produced. I do not consider that the judge was justified in finding support for his conclusion in *Boss Holdings*, in the light of his finding that what had been the flats on the sixth and seventh floors had lost their identity as a consequence of the extensive structural works."

46. The critical point here is that the judge had found that what had been flats had lost their identity as a result of the extensive works in progress. At [30] I went on to say:

> "If a putative flat is in the course of construction, it has not yet been "constructed" for any purpose. Second, whereas a house must be designed "for living in", a flat must be constructed "for use for the purposes of a dwelling". This is more than simply requiring that a flat must be constructed for the purposes of a

> dwelling. It must be constructed for *use* for that purpose. A purpose may be a future purpose. But if a separate set of premises is to be constructed "for use" as a dwelling, it must, in my judgment, be in a state in which it is suitable for use as a dwelling. An interpretation of "for" as meaning "suitable for" is a commonplace in the law of patents. It also coincides with the interpretation that Lord Carnwath JSC put on "adapted" in *Hosebay* ("made suitable"); and would therefore achieve consistency in the definition. Mr Jourdan accepted that in a case of adaptation rather than construction, there had to be some physical work which changed the previous identity of the premises from something that was not suitable for use as a dwelling to something that was. I cannot see any warrant for different tests being applied to the constituent parts of the definition. Accordingly, in my judgment the same meaning should be ascribed to that word in that part of the definition of "flat" which refers to "construction … for use for the purposes of a dwelling".

47. Again, what was important was the use of the past participle ("constructed"). At [32] I said that it was not possible to go back to the original flats, because the judge had found that they had lost their identity. But I went on to say in that paragraph:

> "So we are concerned with premises in the course of construction, which were intended to be used for residential purposes but which, at the relevant date had not in fact been used for that purpose and were incapable of use for that purpose. It is important to stress the narrowness of the issue. Some of the examples given by Mr Jourdan (a flat gutted by fire or stripped out for refurbishment) would still qualify as flats because they had at some stage in the past been constructed for use as a dwelling and had not subsequently lost their identity."

48. What both these cases show is that the court is not restricted to taking a snapshot on a particular date. Accordingly, where the property in question had a previous identity, one highly relevant question is whether on the relevant date it has lost that identity. It is also to be noted that I did not purport to define the concept of suitability; and I envisaged that a flat stripped out for refurbishment would still qualify as a flat if it had not lost its identity.

49. Moreover, in other contexts, for example whether a local housing authority has made an offer of "suitable accommodation" to a homeless applicant:

> "… the suitability of offered accommodation is not to be judged exclusively by reference to the condition of the accommodation at the time of the offer, but that the assessment of its suitability can and should also take into account any adaptations or alterations that are, at that time, proposed to be made." (*Boreh v Ealing LBC* [2008] EWCA Civ 1176, [2009] PTSR 439 at [27] per Rimer LJ)

50. In other words, as Lord Hoffmann said, "suitable" is filled with meaning by context and background.

**The UT's decision in the present case**

51. At [44] the UT agreed with the FTT that it would be surprising if Parliament had intended that a building that does not yet exist, or exists but is not a dwelling, would be residential property if it was in the process of being constructed or adapted, but a building which had actually been used as a dwelling would cease to be residential property simply because it required repair or renovation. They continued at [45]:

> "In our opinion, this suggests that the phrase "suitable for use as a dwelling" is more likely to be focused on the fundamental characteristics and nature of a building which is the subject matter of the transaction than on a snapshot classification by reference to habitability at the effective date. In determining the fundamental characteristics and nature of a building, whether it has in fact been used as a dwelling is clearly relevant."

52. They repeated this in similar terms at [47].

53. At [51] they said that the drafter had used suitability as the relevant threshold and not availability or readiness. Suitability was a test that focussed on the fundamental characteristics and use of a building, which may be informed by its previous use. At [52] they rejected the notion that the building must be ready for immediate use; and also rejected the notion that any repairs must be minor.

54. They summarised their conclusions in a lengthy passage at [58] which deserves quotation in full:

> "In our opinion, the following points should be considered in determining the impact of works needed to a building on its suitability for use as a dwelling:
>
> (1) In assessing the impact of the works needed to a building in the context of determining suitability for use as a dwelling, a helpful starting point is to establish whether the building has previously been used as a dwelling. That is relevant for two reasons. First, as we said in *Fiander* UT [2021] STC 1482, previous use as a single dwelling is relevant in determining whether an alteration needed to a building would be a repair or renovation (because of prior use as a dwelling) or, alternatively, an adaptation or alteration, changing the building's characteristics by making it usable as a single dwelling for the first time. Second, actual use as a dwelling is a very strong indication that the building has possessed the fundamental characteristics of a dwelling, and has previously been suitable for use as a dwelling. An assessment of the repairs and renovations needed can then be made against that backdrop and by reference to the state of the building during its actual use as a dwelling. Previous use is, of course, fact sensitive, and factors

such as the length of time between the previous use as a dwelling and the effective date will be relevant.

The fact of previous use as a dwelling does not mean that a building remains suitable for use as a dwelling regardless of what happens to the building and regardless of the effluxion of time. Equally, to state the obvious, the fact that there has been no previous use as a dwelling does not mean that a building is not suitable for use at the effective date. However, previous use is a highly relevant factor in the evaluation of suitability.

(2) Looking at the building as at the effective date, an assessment must be made of the extent to which it has the fundamental characteristics of a dwelling, including the extent to which it is structurally sound. Is it, for instance, a desirable house which has become dilapidated and requires updating, or is it an empty shell with no main roof? Subject to the points which follow, in principle the former is likely to be suitable for use as a dwelling and the latter is not.

(3) The necessary works should be identified, and their impact on suitability for use should be considered collectively. A distinction must be drawn between works needed to render a building habitable and works to be carried out to make the property "a pleasant place to live", in the words used by the FTT at FTT [30] (such as painting and decorating). The latter do not affect suitability for use as a dwelling.

(4) An assessment should be made of whether the defects in the building which require works are capable of remedy (in colloquial terms, are fixable). That assessment should take into account whether the works would be so dangerous or hazardous as to prejudice their viability (as in *Bewley* [2019] UKFTT 65 (TC)). If they would, then the building is unlikely to be (or remain) suitable for use as a dwelling. It should also take into account whether the works could be carried out without prejudicing the structural integrity of the building (because, for instance, the walls might collapse). If they could not, the building is unlikely to be suitable for use as a dwelling.

(5) If occupation at the effective date would be unsafe or dangerous to some degree (for instance, because the building requires rewiring), then that would be a relevant factor, but would not of itself render the building unsuitable for use as a dwelling.

(6) The question of whether a repair would be a "minor repair" is not irrelevant, but nor is it particularly informative in assessing suitability. While certain repairs were described as "minor" in *Fiander* FTT, that classification was not a reason for the decision in *Fiander* UT. It is too vague and abstract to

> form a principled basis for the overall determination of the impact of the need for repair on suitability. For the same reason, an approach which seeks to establish whether the necessary works are "fundamental" is acceptable if it is effectively shorthand for the approach we describe above, but as a free-standing test it is not particularly informative.
>
> (7) Applying the principles we have set out, the question for determination is then whether the works of repair and renovation needed to the building have the result that the building does not have the characteristics of a dwelling at the effective date, so it is no longer residential property."

55. In the result, the UT held that the approach of the FTT was correct in law, and that it was entitled to make the finding of fact that it did. Mr and Mrs Mudan's appeal was therefore dismissed.

**Discussion**

56. I acknowledge at the outset that the definition is not a masterpiece of drafting. It brings together a number of potentially disparate situations under the umbrella of a common label. Mr Firth submitted that Parliament could have expressed the distinction between "residential property" and "non-residential property" in a number of different ways: for example, by reference to the design of a building, or its last use. But it has chosen to do by reference to use and suitability for use; so that is the test that we must apply.

57. It is seldom helpful to observe that Parliament could have made its meaning clearer. We are faced with the definition in section 116; and our only task is to interpret what it means, having regard to the purpose of the legislation and the context within which the language is used.

58. The first point to make is that the context of the definition is important. The context in which the definition of "residential property" is to be interpreted is the levying of tax on land transactions. Although it is certainly possible for an interest in land to be acquired and subsequently disposed of in short order (for example by way of sub-sale), in very general terms the acquisition of an interest in a building (particularly with a view to occupying the building as one's home) is at least a medium-term enterprise. That context militates against restricting the assessment whether property satisfies the definition to a snapshot on a particular date.

59. Second, the 2003 Act divides property into two mutually exclusive categories: residential property on the one hand and non-residential property on the other. Given that there are only two categories of property, the definitions of each are necessarily broad definitions. That is borne out by the explanatory note to section 116. Paragraph 2 of the note states that clause 116 (1):

> "… provides the broad definition of residential property which is that a building or part of a building which is in use as a dwelling or suitable for use as a dwelling or is in the process of

> being constructed to adapted as a dwelling constitutes residential property."

60. The definition is, in my judgment, concerned with what might be described as land use rather than occupation as such.

61. Third, the phrase "suitable for use as a dwelling" is only part of the overall definition of "residential property". The definition must, in my judgment, be interpreted both as a whole and in such a way as to make it coherent. Parliament is very unlikely to have intended arbitrary or capricious results. As Mr Firth acknowledges, property which is wholly unfit for immediate occupation falls within the definition of "residential property" if it is in the process of being constructed for use as a dwelling. It would be an irrational intention to attribute to Parliament that a higher rate of SDLT should be applied to a potential building which still required the construction of a roof or internal floors and staircases, but not to a building which had all those features but required rewiring and replumbing and the renewal of a kitchen and bathroom. Moreover, as Mr Ripley, for HMRC, pointed out, a property in the process of being constructed would be residential property, but if there were to be a break in the process of construction it would become non-residential property until fitting out was complete. Thus, the same property would oscillate between two rates of charge. In addition, the inclusion within the definition of a building in the process of construction or adaptation for use as a dwelling plainly looks to the future. That is, in itself, an indication that Parliament did not intend to confine the assessment to a snapshot on a particular day.

62. Fourth, property which is in fact used as a dwelling is residential property, no matter how dilapidated or unmodernised it is, and even if any reasonable buyer would carry out the sort of works that Mr and Mrs Mudan did. Suppose, then, that Mr and Mrs Mudan bought the property in the state in which they actually bought it, but the vendor remained in occupation until the day of completion. If Mr Firth is correct, whether the property was or was not "residential property" would depend on the vendor's personal choice and not on any objective characteristics of the property itself.

63. Fifth, the definition (in all its limbs) is concerned with a *building*, rather than its internal fit out. It is the building which must be suitable for use as a dwelling. Some concentration on the structure of the building is therefore appropriate.

64. Sixth, the guidance offered by the UT was concerned only with buildings that had once been used as dwellings. We have seen in other cases the importance that the court attached to the question whether what was once in use as a dwelling (whether a house or a flat) had lost its identity by the relevant date. I consider that that is no different in substance from the test that the UT adopted, namely whether a building had the "fundamental characteristics of a dwelling". Mr Firth placed some reliance on that part of the definition which referred to a building in the process of being "adapted for such use". In my judgment, that reliance was misplaced. The phrase is, as I have said, only part of a composite definition. If one were to tease out the constituent parts of this limb of the definition it would read:

> "… a building that is… in the process of being constructed for use as a dwelling or a building that is in the process of being adapted for use as a dwelling"

65. As I have said, the definition thus expanded, at least in part plainly contemplates the future. It is of some note that the definition refers to a "building" in the process of construction even if, at the relevant date, no one would call the physical manifestations on site (e.g. a few courses of brickwork) a "building". A building that is in the process of being constructed for use as a dwelling plainly refers to something that has not yet been used as a dwelling. That is consistent with what this court held in *Aldford House*, where what had once been flats had lost their identity but had not yet reached the stage of construction sufficient to enable anyone to use them as their home. I consider that that part of the definition which refers to a building in the process of being adapted for use as a dwelling encapsulates the same general idea. That is consistent with what Lord Carnwath said in *Hosebay* where he referred to the use for which a building was *currently* adapted. The whole discussion in that case was concerned with alterations consequent on a change of use.

66. Seventh, Mr Firth's argument requires the phrase "suitable for use" to be interpreted as if it read "suitable for *immediate* use" (subject to the application of the *de minimis* principle). But that, quite simply, is not what the definition says. I agree with the UT which rejected this submission at [53]. Although Mr Firth posited a dichotomy between a building which is currently suitable for a particular use and a building which is capable of being made suitable for that use, the supposed dichotomy depends entirely on the meaning of "suitable for use"; and the extent of the supposed contrast between that and "capable" (a word which is not part of the statutory language). If, as I think, the court is not restricted to taking a snapshot on a particular day but is entitled to consider the past history of a building and whether it retains its identity, then I consider that the supposed dichotomy falls away. The UT in effect decided that where works to property were required, it was a question of fact and degree whether the works were so extensive as to deprive a building of its character as residential property. Reverting to *Boreh* (which I have cited above) Rimer LJ continued after the cited passage:

> "I also agree with the recorder that, if the accommodation as it currently stands is unsuitable, it will be a matter of fact and degree as to whether any such proposed adaptations and alterations will be such as to make it suitable. At one extreme, the proposed adaptations may be simple, and easily and quickly effected: for example, the installation of a ramp for access purposes. At the other extreme they may involve the carrying out of such major works as to make the accommodation uninhabitable in the meantime: in such a case the property might well be regarded as unsuitable despite the proposal to carry out the works."

67. Mr Firth further argued that Parliament has addressed buildings with potential for residential use but has restricted such buildings to those that are in the process of construction or adaptation. But that part of the definition, as I have said, is concerned with structures that have never been used as dwellings (and, indeed, might not be called "buildings" in the ordinary sense of the word). The next argument was that to

treat something as suitable for a particular use on the basis that it could, hypothetically, in the future be made suitable for that use overlooks the possibility that it might never be made suitable for the particular use. In my judgment, this argument proves too much. It would equally apply to a half-completed housing estate where, following the acquisition of the property, the developer runs out of money, so the project is never completed. Yet it is beyond argument that a half-completed housing estate is within the definition of "residential property" at least for so long as the project is on-going.

68. Eighth, there is the potency of the term defined. Unlike "claims management services" (considered in the *PACCAR* case), the concept of residential property does, in my view, have a recognised content, particularly when contrasted with non-residential property. The ordinary speaker of English would, in my view, characterise property as "residential property" if it was the sort of property that people live in. If property previously used as a dwelling was undergoing extensive refurbishment such that it could not be lived in for the time being, but would be once the work was complete, I would be very surprised if the ordinary speaker of English would remove that property from the category of "residential property". As Mr Mudan himself accepted, the property "was still residential in character" at the time of the purchase. If, as a matter of ordinary language, it was not residential property: what was it?

69. In my judgment, the decision of the UT was legally sound. The general principles they laid down are practical, workable, and in my judgment reflect the intention of Parliament. In reaching this conclusion I have not found it necessary to consider the external materials on which HMRC wished to rely. I would dismiss the appeal.

**Lord Justice Lewis:**

70. I agree.

**Lord Justice Holgate:**

71. I also agree.