Tax Chamber
First-tier Tribunal for Scotland

[2024] FTSTC 6

Ref: FTS/TC/AP/23/0017

Land and Buildings Transaction Tax – whether residential or non-residential – whether used as an office on the effective date – no – whether used as a residential property on the effective date – no – whether suitable for use as residential property – yes – appeal refused

DECISION NOTICE

IN THE CASE OF

Professor Richard Ball and Dr Sigrid Torokoff

Appellants

- and -

Revenue Scotland

Respondent

TRIBUNAL: ANNE SCOTT
CHARLOTTE BARBOUR

The hearing took place in person on Monday 9 September 2024

Supplementary Written Submissions from both parties dated 16 October 2024

David Welsh, Advocate, instructed by Balfour + Manson, LLP – for the Appellants

Ranald Macpherson, Advocate, instructed by Revenue Scotland – for the Respondent

DECISION

Introduction

1. This is an appeal against a decision by Revenue Scotland contained in an Enquiry Closure Notice, dated 9 February 2023, which was upheld on review dated 1 August 2023 (together "the Decision").

2. The Decision was to the effect that the property purchased by the Appellants, Baberton House ("the Property"), was properly to be treated for Land and Buildings Transaction Tax ("LBTT") purposes as a residential property at the effective date, which was 21 April 2020.

3. The consideration was £1,150,000. The Appellants had paid LBTT of £46,000 on the basis that the Property was a non-residential property at the effective date. If it was a residential property, as Revenue Scotland contend, then the LBTT payable would have been £96,350, ie an increase of £50,350.

4. We had a Hearing Bundle extending to 378 pages and an Authorities Bundle extending to 911 pages. Both parties had lodged Skeleton Arguments. The parties had lodged a Statement of Agreed Facts and initially both Counsel indicated that they did not intend to lead evidence.

5. We pointed out that, in previewing the case, we had identified a number of both conflicts and gaps in the evidence in the Bundle. We suggested that, that being the case, it would be appropriate to hear from Professor Ball who had lodged a lengthy witness statement.

6. After an adjournment, we heard evidence from Professor Ball whom we found to be an entirely reliable witness.

7. Following the hearing, on 2 October 2024, the Upper Tribunal issued its decision in *Mudan v HMRC* [2024] UKUT 003707 (TTC) ("Mudan UT") and at the invitation of the Tribunal both parties lodged written Supplementary Submissions.

The Law

8. It is common ground that the issue in this case is whether or not the Property is "residential property" within the meaning of section 59 Land and Buildings Transaction Tax (Scotland) Act 2013 ("LBTTA"). The relevant provisions read:

> "(1) In this Act "residential property" means –
>
> (a) A building that is used or is suitable for use as a dwelling, or is in the process of being constructed or adapted for such use,
>
> …
>
> (2) Accordingly, "non-residential property" means any property that is not residential property."

9. Those provisions are identical to the Stamp Duty Land Tax ("SDLT") provisions at section 116 of the Finance Act 2003.

10. We say that because both parties have relied extensively on the jurisprudence relating to SDLT and, as the Tribunal indicated at paragraph 30 in *Straid Farms Limited v Revenue Scotland* [2017] FTSTC 2:

> "…the Explanatory Notes to RSTPA state:
>
> 'The effect of [the legislation] is that the jurisprudence concerning the proper bounds of the tax authority's role is imported into the devolved tax system. This jurisprudence includes not only case law from the UK jurisdictions but other English-speaking jurisdictions'."

11. We will refer to the jurisprudence in detail under the heading "Discussion".

The Issues

12. Revenue Scotland state that the sole issue is the meaning of "residential property" and the related definition of "non-residential property" under section 59 LBTTA.

13. We prefer and adopt Mr Welsh's articulation of the issues which are:

(i) The proper interpretation and approach to section 59 LBTTA, and

(ii) Whether the purchase of the Property was a non-residential purchase for the purposes of LBTT.

Burden of Proof

14. The burden is on the Appellants to show that they have been overcharged by the Decision and if they fail to do so, the Decision stands good.

15. The standard of proof is the normal civil standard of the balance of probabilities.

The Facts

The Construction and Planning History

16. The Property was built in 1622 by Sir James Murray, who at the time was Master of the King's Works to James VI, for use as his home. It is a building of historical and architectural significance and was Grade A listed by Historic Environment Scotland ("HES") in 1971. That listing designates and provides statutory protection for buildings of special architectural or historic interest as set out in the Planning (List of Buildings and Conservation Areas) (Scotland) Act 1997. That prohibits any unauthorised works to the listed building or curtilage including those resulting in demolition, alteration or extension, which would affect the character as a building of special architectural or historic interest. The boundary walls are also A listed. The bothy and walled garden are C listed and there is also a B listed sundial.

17. The Property had been extended in 1765 and is in two parts being what Professor Ball described as the Main House and the Annex. It is set in approximately 10.8 acres or 4.37 hectares including a walled garden, lawns and established woodland including specimen trees. It is on the south western outskirts of Edinburgh bounded by a 1970's housing development and a golf course.

18. In the mid-1970s the then owners had left it vacant and it fell into disrepair with water ingress and dry rot.

19. However, it still retained (and retains) many of its original internal 17th and 18th century features. In particular, the former withdrawing room contains a ribbed and enriched plaster ceiling comprising narrow ribs with cast relief in each compartment representing the national symbols of Great Britain surrounded by mullets ("the Ceiling"). The significance of the Ceiling is such that it is catalogued in the HES Technical Advice Note 26 "Care and Conservation of 17th Century Plasterwork in Scotland" 2016.

20. Those owners failed to find a residential purchaser and in approximately 1979, the Property was bought by Cruden Investments Limited which is part of the Cruden Group of companies ("Cruden"). They applied for change of use for the Main House and in 1980, that was converted into offices. It was utilised by Cruden as its corporate headquarters.

21. The Annex remained in residential use and was occupied by a caretaker/ groundsman until 1991. On 14 June 1990, Cruden had applied for change of use from a dwelling house and office premises to office premises and that was granted on 18 January 1991 with the Certificate of Completion being granted on 2 July 1991. The caretaker moved into a home in the adjacent housing estate to which there was access via a gate in the boundary wall.

22. The historical planning applications showed that the conversion works for the two parts of the Property to become offices had been substantial, with new walls, corridors and doorways, the installation of fire doors, a new boiler room and chimney, the conversion of the existing kitchen into an office, the installation of a new kitchen, the removal of all existing bathroom fittings which were replaced by male/female WCs in pairs and the installation of extensive telephone and ethernet infrastructure.

23. The Property was marketed by Savills on 15 May 2018. The sales brochure described it as "in office use" but that "Potential uses include a private residence, corporate HQ, hotel or leisure use, subject to obtaining the necessary planning consents".

24. On 20 November 2019, on behalf of Cruden, Savills lodged with Edinburgh City Council an application for change of use from office premises to residential use. That intimated that:

(a) in 2017, Cruden had "…substantially relocated to larger premises" and "The final Cruden employees are scheduled to move out at the end of the year…".

(b) Since May 2018, Savills had actively marketed the property but there had been little serious interest in it with its existing use as offices.

(c) There was interest from potential residential buyers but that would necessitate a formal planning permission to be in place before matters could be progressed to completion.

(d) "No physical works are required to facilitate such a change of use, formally re-establishing the original and long-standing residential use."

25. On 6 March 2020, before missives were concluded and before the effective date, planning permission for change of use was granted. That permission was subject to a condition that there should be two "disabled parking spaces". No explanation for that was offered.

26. In January 2022 the Appellants obtained planning and listed building consent for extensive internal remodelling on the ground floor including a new family kitchen in the Main House. The Appellants had been using the existing kitchen in the intervening period.

The Property

27. The Property was described in the Savill's Brochure and, at all material times from its exposure on the market, it comprised:

1) Entrance hall (accessed by an entryphone).
2) Reception.
3) Conference room.
4) Boardroom.
5) 16 offices, all of which included at least two telephone points and between 4 and 8 ethernet sockets. In total, there were 70 ethernet sockets.
6) Telecommunications room (described as a store).
7) Server room (described as "comms").
8) Photocopier room.
9) Boiler room.
10) 1 small kitchen with facilities for making tea and coffee, and fridge and microwave for lunches (in the Main House).
11) 1 dining kitchen which, in addition to the other equipment also included a hob and an oven (in the Annex).
12) Shower room with WC, sink and electric shower.
13) 6 WCs designated "ladies" and "gentlemen" which were arranged in pairs.
14) 4 stores.
15) Associated wiring infrastructure throughout the building.
16) A wired fire alarm throughout with signage and fire doors.
17) 16 parking spaces (2 of which were designated as being "Disabled" spaces).

The Appellants and their interest in the Property

28. In 2017, the Appellants started to look for a joint home. The first Appellant owned a home in Duddingston and the second Appellant rented a property in Blackford (the rental property). The rental property was leased on a six-month basis on each renewal.

29. They first viewed the Property on 17 May 2018.

30. The Appellants recognised that if they were to purchase the Property then a considerable amount of work would be required in order to reinstate residential use.

31. Savills fixed a closing date for 14 June 2018 but the Appellants were not in a position to, and did not, submit an offer. In July 2018, Savills reverted to the Appellants intimating that the Property had not been sold.

32. The Appellants spoke to a number of architectural firms and obtained a variety of estimates of the cost of conversion back to residential use. Having consulted their bank they put together a financial plan. They were concerned about the potential LBTT payable since that would be a significant part of the overall cost. Their solicitors advised them that LBTT would be payable at the non-residential rate. Before they could arrange a survey Savills reverted stating that there were at least two other potential purchasers.

33. By the end of September none of the potential purchasers had arranged a survey so the Appellants instructed a survey which was performed by J & E Shepherd, Chartered Surveyors, on 2 October 2018.

34. Under the heading "Summary and Recommendations" it stated:

> "The subjects are currently utilised as office accommodation and there will be fairly substantial refurbishment and reconversion works required to turn the subjects back to residential usage".

35. Amongst other things it noted that there was plaster cracking in a number of places. The Appellants then made another visit to the Property accompanied by an architect who specialised in historic buildings. In the course of that visit it was realised that the bowing and cracking in the Ceiling might be a problem because of the historic importance of the Ceiling. It was immediately below the shower room. They were aware that water ingress posed a potential problem as it is the most common cause of damage to plaster ceilings and can lead to collapse of a ceiling by detaching it from the joists supporting the floor above.

36. On 7 November 2018, the Appellants made an offer for the Property which was conditional upon planning consent being granted for residential use and the sale of the Duddingston house. It was lower than the asking price and was predicated upon LBTT being levied at the lower rate, as advised by their solicitors who relied upon and referred to Revenue Scotland's Guidance in their advice to the Appellants.

37. The offer was not accepted as there was another interested purchaser and it was withdrawn on 27 November 2018.

38. On 12 November 2019, Savills contacted the Appellants to state that the property was now back on the market, a previous sale to a commercial purchaser having fallen through.

39. A second offer was lodged on 26 November 2019 by the Appellants and revised on 12 December 2019. However, on 20 December 2019, Cruden intimated that they had accepted another offer. That second offer was withdrawn by the Appellants.

40. However, on 10 January 2020, Cruden intimated that the other offer had fallen through and so on 27 January 2020, a final offer, conditional upon planning permission, was made by the Appellants in the sum of £1,150,000. Before submitting that offer the Appellants again consulted with their solicitors as to a potential liability for Additional Dwelling Supplement LBTT in the event that the Duddingston property was not sold and they were advised that that would not be the case since the Property was classed as non-residential for LBTT.

41. Again, there was reference to Revenue Scotland's Guidance. Professor Ball said that he had carefully checked that Guidance himself and we accept that. Having done so, the offer was predicated on the lower rate of LBTT being levied. Had LBTT been payable at the residential rate the offer would have been adjusted downwards accordingly.

42. The third offer was informally accepted and negotiations proceeded.

43. The Appellants instructed a further survey from Dixon Heaney Kean Kennedy ("DHKK") which was dated 7 February 2020. That recorded that the Property was occupied as an office since 1980 and that some of the rooms were packed full of boxes etc which restricted the scope of inspection. The Property was described as being "a substantial detached dwelling house which is arranged over ground, first and second floors."

44. Under the heading "Fixtures and fittings" it read:

> "There are kitchen and toilet facilities, however, these are of a dated nature and although reasonably adequate, they are designed for office rather than domestic use. In the circumstances, consideration will require to be given to providing better kitchen and sanitary facilities."

45. Under the heading "Electrical wiring" it noted that the wiring had been designed to facilitate office rather than domestic use and therefore rationalisation and adaptation would be necessary.

46. Under the heading "General Remarks" it read "The property is functional as an office but is capable of being occupied as a domestic residence…".

47. Although the survey merely noted that "The ceilings are of plaster construction are (sic) in reasonable condition although general repairs will be required prior to redecoration," the Appellants discussed with DHKK the cracking in the Ceiling and the possibility of doing a more detailed survey. It was not possible to do that since that would have involved the lifting of floorboards. The Appellants understood that closer examination of the Ceiling, and indeed checking whether it was symptomatic of some other underlying structural problems, would have to wait until after the completion of the purchase.

48. The Duddingston property was put on the open market on 8 February 2020 and an acceptable offer was received on 19 February 2020.

49. On 6 February 2020 the Appellants renewed the lease on the rental property for six months from 3 April 2020.

50. On 6 March 2020, Cruden changed the registered address of all of the companies because the Appellants' offer had become unconditional as planning consent had been granted. Missives were concluded on 16 March 2020. The original completion date was 27 March 2020 for both the purchase of the Property and the sale of the Duddingston property.

51. Because of Covid-19 and the closure of the Registers of Scotland a new completion date of 21 April 2020 was agreed. Nevertheless, the Appellants paid the purchase price to their solicitors on 26 March 2020 and signed all the documents including the LBTT return on 2 April 2020.

52. It is not disputed that, in terms of section 63 LBTTA, the effective date of the transaction was the date of completion being 21 April 2020.

53. On 21 April 2020, the Appellants were greeted by the Cruden caretaker, Archie, whom they knew well from previous visits. He showed them around the Property and gave them instructions in relation to the use of alarms etc. The executive chairman of Cruden had left a welcoming letter together with various keys and other items on a table in the Conference room. That table, which looked like a dining room table, with its chairs had been left in the Property although the desks and the armchairs etc in reception had all been removed. The white goods, curtains, light fittings and floor coverings were included in the purchase price.

54. The LBTT return was submitted to Revenue Scotland on 23 April 2020. By virtue of the transaction the Appellants acquired a chargeable interest, namely the real right of ownership in the Property. The purchase price of the Property was £1,150,000 and the return narrated that the transaction was a non-residential transaction. LBTT was accordingly calculated according to the rates and bands applicable to non-residential transactions. LBTT in the sum of £46,000 was paid on 24 April 2020.

55. As at the effective date, the Property was classified by the Lothian Valuation Joint Board ("LVJB") as commercial and water, sewerage and drainage were provided at commercial rates by Castle Water. It was reclassified as residential on 27 May 2020, backdated to 21 April 2020 and, at the request of the Appellants, Council Tax was payable from that date.

56. As at the effective date, all of the other utilities such as telephone, broadband, gas and electricity were provided by commercial suppliers. In the months following the effective date those contracts were cancelled and the Appellants obtained repayments. All supplies were reclassified as being residential in nature.

57. Residential bin and refuse collection only commenced in September 2020; Cruden had used a commercial company.

58. The Appellants are still awaiting a fibre optic line for broadband since the line that is connected to the property is assigned to BT Commercial. Similarly, Scottish Gas declined to service the boiler since it was classed as commercial. It has since been replaced by a pair of domestic boilers.

59. The postal address for the Property was EH14 3HN but the Post Office denied the Appellants use of that on the basis that it was "a unique postcode that belonged to the company Cruden Investments Limited and not the actual postal address".

60. On 26 June 2020, the Post Office allocated the residential postcode EH14 5AB to the Appellants. That had been the postcode prior to 1980 when the address was given as Baberton House, Juniper Green, EH14 5AB.

61. On 26 July 2021, the City of Edinburgh Council allocated a new residential address of 5 Baberton Road, EH14 5AB. Whilst in the ownership of Cruden, the commercial address for the Property was 101 Westburn Avenue, EH14 2TH.

62. At the point at which the Appellants concluded missives they believed that the work required to adapt the Property would take between two and three months. Covid intervened and caused significant delays.

63. The initial work that was done, excluding to the shower room, consisted of removing signage, fire safety signs, door pushes and various other items of office infrastructure. The ceiling strip lighting was systematically replaced with pendant lights and the office blinds removed with the shutters being brought back into use. Some of the fire doors were removed and other cosmetic changes made in order to make the Property a little less like an office.

64. It was recognised in August 2020, when workmen could finally access it, (due to Covid restrictions) that the shower room on the second floor required substantial work, and the lease on the rental property was further extended to run from 1 October 2020 to 3 March 2021.

65. On 9 November 2023, at the request of the Appellants, CSY Architects sent to the Appellants a report which was a retrospective analysis of the works undertaken.

66. In summary, it stated that:–

(a) Following the purchase of the property, the Appellants had sought to commence remedial works in August 2020 "… given both the lack of sanitary facilities available in the dwelling and understandable concern for both safety and the preservation of historic fabric".

(b) Suitable propping to the Ceiling was provided by structural engineers, the flooring and fittings were stripped out and the deafening removed.

(c) It was immediately apparent that approximately 600mm of an oak joist had rotted away and that had occurred at its bearing point within the stone wall where the structural load for the floor is transferred down the external wall. There was a risk of structural failure given that undue stress was placed on the secondary

bearing point within the internal wall some four metres away. Another joist was also displaying signs of decay to approximately half of its depth at its bearing point within the external stone wall.

(d) It was believed that it was likely that water ingress had resulted in decay and that could have originated from a number of sources, including ingress of water through the external stone walls. Although it was possible that the water emanated from the pipework below the bathroom floor, it was observed that the laths appeared to be relatively unaffected. It was concluded that the decay had been caused by historical water ingress and the extent of the decay suggested that that had occurred over a significant time period.

(e) In light of the decision that the joists were unsafe to bear a load, a series of conservation-led remedial works were undertaken using a specialist conservationist architect who designed and specified suitable repairs to the joists.

(f) The bathroom was subsequently fully refurbished and became functional.

(g) The conclusion was that:

> "From the points set out in this report, it can be concluded that the existing defects were serious to the extent that structural failure was imminent and that that (sic) the repairs made were structural, significant, and appropriate to remedy the situation, particularly in relation to historic fabric of significance from a Grade A Listed building.
> …
>
> Opening up works to the floor above the plaster ceiling confirmed our client's concerns, specifically the almost complete loss of bearing onto the external wall as a consequence of decay caused by historic wet rot. This resulted in a series of conservation-led repairs to remedy the situation and therefore allow the structural integrity of the floor to be reinstated both in its ability to bear direct load from above but also to support the weight of the 17th century ornamental ceiling below."

67. Professor Ball explained that the workmen had told him that the shower had never been used and the electric motor had not been connected properly. It was not known when it had been installed.

68. The work was concluded after Christmas 2020 with the bills being paid in January 2021.

69. The oven in the dining kitchen in the Annex, which did not work, was repaired, a dishwasher installed and that kitchen was used by the Appellants for approximately three years.

70. The Appellants moved into the Property in Spring 2021.

The Enquiry

71. On 1 September 2022, Revenue Scotland served a notice of enquiry on the Appellants under section 85 of Revenue Scotland and Tax Powers Act 2014 ("RSTPA").

72. Correspondence then ensued culminating in the issue of the Closure Notice to the Appellants' solicitor on 9 February 2023.

73. The Closure Notice concluded that as at the effective date the Property was suitable for use as a dwelling in terms of section 59 (1)(a) of LBTTA. Revenue Scotland advised the Appellants that the return ought to have been submitted to Revenue Scotland as a residential transaction. Accordingly, the officer had made amendments to the return applying the LBTT residential rates instead of non-residential which resulted in the Appellants having an additional LBTT liability of £54,770 (consisting of £50,350 LBTT, and £4,420 in interest).

74. On 29 March 2023, the Appellants' solicitor advised Revenue Scotland that the Appellants had not received the Closure Notice and requested that a copy be issued directly to the Appellants.

75. On the same date Revenue Scotland sent a copy of the Closure Notice to the Appellants and confirmed that they would accept a late notice of review.

76. On 11 May 2023, the Appellants' solicitor submitted a notice of review on behalf of the Appellants.

77. On 9 June 2023, Revenue Scotland issued its "view of the matter" letter to the Appellants upholding the Closure Notice. On 1 August 2023, Revenue Scotland issued its Review Conclusion notice to the Appellants concluding that the Property was suitable for use as a dwelling as at the effective date.

78. On 17 August 2023 the Notice of Appeal was lodged with the Tribunal.

Discussion

79. As can be seen from paragraph 8 above, section 59 is very concise in its terms. For the Appellants to succeed they must establish that at the effective date the Property was <u>not</u>:

(a) Used as a dwelling;

(b) Suitable for use as a dwelling;

(c) In the process of being constructed; or

(d) In the process of being adapted for such use.

80. Both parties agree that the Property was not in the process of being constructed or adapted as at the effective date. On the basis of the facts found, we agree. Accordingly, only the first two criteria fall to be considered.

Issue one – The proper interpretation and approach to Section 59 LBTTA

81. Both parties referred to the Upper Tribunal in *Fiander & Bower v HMRC* [2021] UKUT 156 (TCC) ("Fiander UT") where the Upper Tribunal, albeit in a case about multiple dwellings relief, set out its view of the meaning of the phrase "suitable for use as a single dwelling". Although we were not referred to that paragraph, we observe that the Upper Tribunal stated at paragraph 44 that, as with any statutory phrase, it must be construed purposively and in the context of the SDLT code as a whole.

82. It is equally relevant to LBTT where the wording is identical to that in the SDLT legislation. In the recent decision of the Upper Tribunal in *Mudan UT* further guidance was issued as to the appropriate approach to the interpretation of the statutory phrase "suitable for use as a dwelling".

83. That is the approach that we have adopted.

84. At paragraph 48 of *Mudan UT,* the Upper Tribunal stated*:-*

> "48. To recap, we have concluded as follows:
>
> (1) This issue raises a question of law.
>
> (2) The relevant wording must be construed by reference to the words used, in context, and taking into account the purpose of the legislation. That purpose is as described in *Ridgway*.
>
> (3) The context, particularly the various classes of buildings treated as suitable for use as a dwelling, suggests a focus on the fundamental characteristics and nature of a building over a period of time, rather than a snapshot of habitability, at the effective date.
>
> (4) Some guidance on the meaning of the phrase can be drawn from *Fiander UT*."

85. At paragraph 36, the Upper Tribunal had quoted from *Ridgway* [2024] UKUT 36 (TCC) and, in summary, the purpose is to tax transactions relating to residential property at a higher rate than non-residential property.

86. At paragraph 41 the Upper Tribunal had stated that:

> "…. the following points can be drawn from *Fiander UT:*
>
> (1) It is not enough to make a building suitable for use "if it is capable of being made appropriate or fit for such use by adaptations or alterations": [48(1)].
>
> (2) Suitability for use falls to be determined by the physical attributes of the property, with the caveat 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": [48(1)].

(3) There is an important distinction between adaptations or alterations and repairs or renovation: that is apparent when one reconciles points (1) and (2) above, and is made explicit in the discussion of the distinction at [68].

(4) Whether a building which does require some repair or renovation is suitable for use is a question of degree for assessment by the FTT: [48(1)].

(5) There are a number of factors relevant to suitability for use, and the question involves a multi-factorial assessment, taking into account all the facts and circumstances: [48(7)].

(6) In considering that distinction, recent use and the history of the property are relevant factors: [67] and [68].

(7) The test is not whether the building was ready for immediate occupation as at completion: *Fiander FTT* at [64], implicitly approved in *Fiander UT* at [65] and [68]."

87. As can be seen, there is a focus on paragraph 48 of *Fiander UT.* In the course of the hearing, which of course was prior to the issue of the decision in *Mudan UT,* Mr Welsh pointed out that in the case of *Ridgway* the Upper Tribunal quoted paragraph 48 of *Fiander UT* and he also relied upon paragraphs 32 and 39 of *Ridgway*. Before turning to those paragraphs, we observe that the Upper Tribunal in *Ridgway* said at paragraphs 27-29 that:

"27. The guidance given in *Fiander* was endorsed by the Upper Tribunal in *Andrew and Tiffany Doe v HM Revenue and Customs* [2022] UKUT 2 (TCC); [2022] STC 287. In the course of summarising the guidance, the Upper Tribunal in Doe stated at [24(1)]:

> (1) "The word 'suitable' implies that the property must be appropriate or fit for use as a single dwelling. The status of a property must be ascertained from its physical attributes at the effective date of the transaction…".

28. The Upper Tribunal went on to say at [48] that although the building in question was not in use as a dwelling at the effective date of the transaction, the FTT was entitled to take into account historic use in determining whether it was suitable for use as a dwelling.

29. It is worth noting that in neither of these cases was there any restriction on use, whether by reference to the freehold or leasehold title or by reference to permitted planning uses. The tribunals in question were concerned solely with the physical attributes of the relevant buildings and the actual or historical use.

88. In his Supplementary Submissions on *Mudan UT,* Mr Welsh relied upon, and addressed at some length, paragraph 58 of *Mudan UT* and therefore we quote it*:*

"58. 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*, 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). 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 freestanding 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."

89. Mr Macpherson had referred to *Henderson Acquisitions Limited v HMRC* [2023] UKFTT 739 (TC) ("Henderson") where Judge Amanda Brown KC and Mr Shearer reviewed *Fiander UT* and the FTT decision in *Mudan v HMRC* [2023] UKFTT 317 (TC) ("Mudan FTT") and P N *Bewley v HMRC* [2019] UKFTT 65 (TC) ("Bewley").

90. In particular he relied upon paragraph 24 of *Henderson* which reads:

*"*We agree with the above analysis [in *Mudan FTT*]. 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 be 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."

91. Mr Welsh argued in his Supplementary Submissions that *Mudan UT* approved paragraphs 50 to 52 of *Mudan FTT* and was authority for the propositions that where a property had not recently been used as a dwelling and had existing defects to the extent that structural failure was imminent, the property could not be suitable for use as a dwelling.

92. However, we observe that paragraphs 45 and 47 of *Mudan UT read:*

"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 the 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.

…

47. So, the focus of the enquiry made necessary by the wording in section 116 is to determine whether the essential characteristics and nature of the chargeable interest that is acquired are those of a dwelling (rather than, say, a plot of land), notwithstanding that it needs repair and renovation."

Issue two – was the purchase of the Property non-residential?

93. At the outset we make it clear that as far as the evidence is concerned:

a) We note Mr Macpherson's argument that, although in large part we should accept Professor Ball's evidence, nevertheless his opinion evidence as to both use and suitability should be disregarded as, being a party to the appeal, his views cannot be objective. Professor Ball was a very clear and straightforward witness but he is a witness of fact only. The opinion evidence of witnesses, unless they are expert witnesses, falls to be disregarded as Mrs Justice Proudman made clear at paragraph 29 in *HMRC v Sunico* [2013] EWHC 942 (CH).

b) We do not accept that the evidence of CSY Architects should be disregarded as it was produced in 2023 for the purposes of this appeal. We found it to be a straightforward narrative of what work was done in the shower room and to the Ceiling and why.

What was the use of the Property?

94. Neither party had been able to identify any case law relating to the sale of a commercial property to a residential purchaser.

95. Mr Macpherson rightly conceded that the question of the use of the Property at the effective date was not an easy question.

96. However, he invited the Tribunal to find that it was in residential use on the basis that the Appellants, having purchased the Property with vacant possession and with planning permission for change of use, could only use it for residential purposes. In summary, even if Cruden's use was non-residential prior to handing over the keys, the use changed at the point of handover and the use in question is that of the Appellants.

97. Mr Welsh argued that:

(1) if there was an active use of the Property at the effective date then that overrides any past or intended future use, and

(2) at the point of the transaction the Appellants had acquired only the right to use the Property but had not begun to exercise that right. He invited the Tribunal to find that the use of the Property on the effective date was non-residential; it was "clearly in use as a commercial office" and Archie the caretaker was carrying out

one of the functions of his employment when showing the Appellants round the Property and completing the handover.

98. Firstly, we do not accept the argument that, because Archie, the caretaker, showed the Appellants around the Property and handed over the keys, that that demonstrated use as an office. An employee of Savills could have fulfilled the same function. That was a matter of courtesy on the part of Cruden.

99. In *Mudan UT,* at paragraph 46, the Upper Tribunal relied on the decision of the Upper Tribunal in *HMRC v Suterwalla* [2024] UKUT 00188 (TCC) at paragraphs 48 and 49 for the proposition that debates about the definition of the effective date in terms of whether it was a particular point in time or the entirety of a day was irrelevant; one has to look at the nature of the chargeable interest at the time of completion.

100. On that basis alone we do not accept either parties' argument.

101. Looked at objectively, the Appellants were certainly not using the Property as a home on the effective date and had not anticipated doing so for at least two or three months. Covid had further impacted on that. In any event, as *Fiander UT* makes explicit, at paragraph 48(4), the fact that the Appellants intended to make the property their home is not relevant.

102. Again, objectively, we do not accept that the Property was being used as an office on the effective date. The employees had all moved elsewhere some months previously. The registered offices for the various group companies had been changed on 6 March 2020. The boxes seen by DHKK had all been removed as had the office furniture. Cruden had been in a position to give vacant possession on 27 March 2020 and only Covid had prevented that. It is not the fact that there was vacant possession on the effective date that leads us to the view that it was not being used as offices but it had not been used as offices for some time.

103. Furthermore, we find that there was no active use. In 1980, after more than 300 years of use as a dwelling house, that use had lapsed because no purchaser could be found who would utilise it as a dwelling house. It was vacated. In 2020, the use as an office had lapsed because no purchaser could be found with that use in mind and it was not suitable for use as offices by Cruden. The sale had only been possible because planning permission for change of use had been granted. It was vacated. The Property was not occupied or in use for any purpose for some time before or indeed on completion.

104. Both parties had advanced arguments on Revenue Scotland's Guidance LBT4010 ("the Guidance"). We found that the Guidance was unhelpful since it did not address the possibility that a property might not be in use at, or have been in use for some time before, the effective date.

The Guidance

105. The relevant paragraph in the Guidance reads:

"**Use at the effective date**

The use, or suitability for use, of the property as a dwelling is to be assessed at the effective date of the transaction. The use at the effective date overrides any past or intended future use for the purpose of establishing whether or not a property is residential."

106. In his Skeleton Argument, Mr Welsh argued that the Guidance, and in particular the second sentence, corresponds with the Appellants' stance in this appeal which is that their primary position was that the Property was used as an office on the effective date and Revenue Scotland "should be held to its guidance upon which the appellant (sic) relied".

107. In that regard he argued that:

(a) Revenue Scotland is under a duty to treat taxpayers fairly and consistently.

(b) "Unfairness in revenue law cases is not unlawful because…it is illogical or immoral for a public authority to act unfairly and thereby abuse its power".

(c) The overriding objective of the Tribunal is to deal with proceedings fairly and justly and that includes the ability to prevent Revenue Scotland from taking advantage of an unfairness which amounts to an abuse of process. In that regard he relied on paragraph 35 of *Foulser v HMRC* [2013] UKUT 038 (TC) ("Foulser").

108. Mr Macpherson's argument is that:

(a) Revenue Scotland does not rely on the future intention of the Appellants.

(b) On the effective date the Property was either in residential use or suitable for such use.

(c) Intention is not irrelevant as a factor when considering suitability.

(d) The appeal is not a judicial review or based on equivalent principles and in that regard, he relied on *Hok Ltd v HMRC* [2012] UKUT 363 (TCC).

(e) The words "or suitability for use" are not repeated in the second sentence of the Guidance. The Guidance does not state, although in theory it could have, that a different use at the effective date overrides "suitability for past or intended future use". For the purposes of the Guidance, use at the effective date is relevant for the determination of suitability for use.

109. At the outset of the hearing, we asked whether the Appellants were running a legitimate expectation argument in relation to the Guidance. Mr Welsh confirmed that they were not and that his argument on the Guidance was predicated upon *Foulser* and abuse of process.

110. Paragraph 35 of *Foulser* should not be read in isolation but what it says is that:-

> "….I consider that for the purpose of determining the jurisdiction of the FTT to deal with arguments as to abuse of process, cases of alleged abuse of process can be divided into two broad categories. The first category is where the alleged abuse directly affects the fairness of the hearing before the FTT. The second category is where, for some reason not directly affecting the fairness of such a hearing, it is unlawful in public law for a party to the proceedings before the FTT to ask the FTT to determine the matter which is otherwise before it. In the first of these categories, the FTT will have power to determine any dispute as to the existence of an abuse of process and can exercise its express powers (and any implied powers) to make orders designed to eliminate any unfairness attributable to the abuse of process. In the second category, the subject matter of the alleged abuse of process is outside the substantive jurisdiction of the FTT. The FTT does not have a judicial review jurisdiction to determine whether a public authority is abusing its powers in public law. It cannot make an order of prohibition against the public authorities."

111. Mr Welsh summarised that as being confirmation that there are two types of unfairness, being unfairness in the course of the hearing and unfairness that is effectively "public law irrationality". He confirmed that he did not rely on the latter but argued that the Tribunal's powers in terms of Rule 2 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 ("the Rules") means that in allowing Revenue Scotland to come to an appeal defending the Guidance is unfair and an abuse of process.

112. Rule 2 reads:

> **2.**—(1) The overriding objective of these Rules is to enable the First-tier Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case in accordance with the overriding objective includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated expenses and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the First-tier Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The First-tier Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
> (b) interprets any rule or practice direction.
>
> (4) Parties must, insofar as reasonably possible—
>
> (a) help the First-tier Tribunal to further the overriding objective; and
> (b) co-operate with the First-tier Tribunal generally.

113. That Rule is in precisely the same terms of the equivalent Rule in the UK Tribunal Rules.

114. We observe that in the following paragraphs of the decision in *Foulser,* Mr Justice Morgan narrated the terms of a number of the Rules including Rule 2. He pointed out that there is a distinction between the two different types of abuse of process and that the questions of jurisdiction and powers are separate and distinct. The Tribunal's powers are restricted to those set out in the procedural rules. He went on to explain that the Tribunal's obligation is to achieve "fairness in its procedures". We have highlighted these two words since Rule 2 is a procedural rule.

115. As Mr Justice Morgan explained, it could be used in conjunction with other procedural rules such as Rule 8 to debar, in that case, HMRC from the appeal. Mr Welsh has only cited Rule 2 to us.

116. We were not referred to the case, but Lord Tyre, in *Ventgrove Ltd v Kuehne-Nagel Ltd* [2022] CSIH 40, considered the status of HMRC's Guidance at paragraph 35 *et seq*. He confirmed that guidance is not law but merely HMRC's interpretation of the law. In particular he approved Lord Leggatt's observation at paragraph 60 in *HMRC v KE Entertainments Ltd* [2020] STC 1402 where he stated:

> "Such guidance … represents only HMRC's view or interpretation of the law and, if a taxpayer disagrees with HMRC's view, it can appeal from a decision or assessment based on that view to a tribunal whose function it is to give authoritative interpretations of the law…".

The Guidance does not have the force of law and, as is the case for HMRC's guidance, it is for the Tribunal to interpret the law.

117. Lord Tyre went on to say that HMRC guidance was capable of generating a legitimate expectation giving rise to enforceable rights in law but there are important limitations. A taxpayer could only rely on a legitimate expectation created by guidance if that expectation was so unfair as to amount to an abuse of power.

118. Of course, in this case Mr Welsh has said clearly that he is advancing no argument on legitimate expectation.

119. Abuse of power can only be considered by the Tribunal in the context of legitimate expectation and then only in limited circumstances.

120. In summary, we entirely agree that this Tribunal must ensure that the provisions in Rule 2 are honoured. There was no unfairness in the course of the hearing. There is no power in Rule 2, or any other of the procedural rules, to force Revenue Scotland to follow the Guidance but, even if we did, their interpretation of the Guidance is not that advanced by the Appellants.

121. We do not accept that the Property was used as a dwelling on the effective date. Accordingly, we find that aspect of section 59(1) LBTTA is not satisfied.

Was the Property suitable for use as a dwelling?

122. Obviously, we must look objectively at a number of factors when considering suitability for use.

123. Our starting point is to consider, in the words of the Upper Tribunal in *Mudan UT* at paragraph 47, whether the essential characteristics and nature of the Property were those of a dwelling, notwithstanding that it needed repair and renovation.

124. There is no doubt that the Ceiling required repair and renovation. The existing shower room was stripped out and entirely replaced but that is unsurprising since a 40 year old electric shower would not have been worth repairing. Many purchasers of homes strip out and replace kitchens and bathrooms and that does not make it a non-residential purchase.

125. Mr Welsh argued that whilst the Property was originally a dwelling, that should be given very little weight, if any at all, given the extensive changes to the Property when it was converted into offices.

126. In his Supplementary Submissions Mr Welsh argued that "very extensive structural alterations" were made to the Property in 1980 and 1990. The implication was that that had to be reversed after the purchase. He stated that "For convenience, the alterations are summarised in an Appendix to these submissions but Professor Ball's evidence is, of course, as was given to the tribunal at the hearing." That Appendix includes a number of items that Professor Ball did not tell the Tribunal and which were not in the documentation. Our Findings in Fact are based on the Professor's straightforward and entirely credible evidence.

127. We have applied the tests set out in *Mudan UT* at paragraph 58. At paragraph 22 of this decision, we have narrated the details of the work that was required for conversion to offices and at paragraph 63 what was done to reverse that when the Appellants took entry to the Property in 2020.The shower room works took a few months but, for example, the kitchen was only replaced some three years later.

128. We agree with Revenue Scotland that at the effective date the primary bar to living in the Property was the concerns about the shower room and the Ceiling.

129. We think that it is relevant that the Property had been a home for in excess of 350 years. The Savills brochure was targeted at a range of potential users including those looking to purchase a home and the Property clearly had a great many of the characteristics of a dwelling. We have narrated the work that had to be completed before the Appellants were able to move in and find that it did not amount to work that changed "the building's characteristics by making it usable as a single dwelling for the first time". The previous use of the Property as a home demonstrates that it had previously been suitable for use as a dwelling. Its period of use as offices was comparatively short. The repairs and renovations to the shower room and the Ceiling and the removal of the office accoutrements were completed in a matter of months, bearing in mind that Covid had delayed matters.

130. Although there was a structurally significant problem with the Ceiling the Property as a whole was structurally sound and habitable.

131. It is entirely understandable that the Appellants were anxious to preserve the listed Ceiling and that did involve expensive and specialised work. However, although the Ceiling was at risk, it had been in that condition for some time and perhaps a very long time. Occupation of the Property as a whole and even of that room alone was not unsafe or dangerous at the effective date.

132. The issue with the shower is unusual. The original concern had been that the shower had leaked causing the bulging in the Ceiling, but it was only when the workmen gained access that it was discovered that the water ingress must have emanated from elsewhere and that it was an historical problem. In fact, the shower had never been used.

133. Had the shower been located anywhere else in the Property, even although this was a Grade A listed building, the replacement of the shower room would have been comparatively straightforward and quick.

134. As can be seen from the description of the Property at paragraph 27, the Property is large and has many rooms. As we understand it, the structural work that was required before the Appellants moved in was in the former withdrawing room with the Ceiling with access also being made from the shower room above. The rest of the Property was habitable although, of course, the Appellants had much that they wished to do to remove all traces of office life and to make it the family home that they wanted. Undoubtedly, it required “updating”.

135. In summary having weighed in the balance all of the factors that have been brought to our attention, we do not consider that the works that were done between the effective date and the Spring of 2021 were such that the Property did not have the characteristics of a dwelling.

136. Therefore, we find that the Property was suitable for use as a dwelling as at the effective date and that aspect of section 59(1) LBTTA is satisfied.

Decision

137. We find that the purchase of the Property was a residential purchase for the purposes of LBTT and therefore the appeal is dismissed.

138. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to Rule 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017. In terms of Regulation 2(1) of the Scottish Tribunals (Time Limits)

Regulations 2016, any such application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

ANNE SCOTT
President

RELEASE DATE: 18 November 2024