Neutral Citation Number: [2017] EWCA Civ 190

Case No: B2/2016/0091

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
His Honour Judge Gerald
A10CL318

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/03/2017

Before:

LORD JUSTICE McFARLANE
LORD JUSTICE McCOMBE
and
LORD JUSTICE FLAUX

- -

Between:

(1) GROSVENOR (MAYFAIR) ESTATE **(2) GROSVENOR WEST END PROPERTIES**	**Appellants**
- and -	
MERIX INTERNATIONAL VENTURES LIMITED	**Respondent**

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- -

Jonathan Gaunt QC and Anthony Radevsky (instructed by Boodle Hatfield) for the Appellants
Edwin Johnson QC (instructed by VMA Solicitors) for the Respondent

Hearing dates: 7-8 March 2017

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Approved Judgment

Lord Justice McCombe:

(A) Introduction

1. This is an appeal by Grosvenor (Mayfair) Estate and Grosvenor West End Properties (which I will call together "Grosvenor", save where the difference matters), brought with permission granted by David Richards LJ by order of 30 March 2016, from an order of 18 December 2015 of HH Judge Gerald made in the County Court at Central London. By his order Judge Gerald declared that the property known as 41 Upper Grosvenor Street ("41 UGS") and 41 Reeves Mews, London W1 ("the Mews") (together "the Property") comprised a house and premises within the meaning of s.2 of the Leasehold Reform Act 1967 and that the respondent, Merix International Ventures Limited ("Merix") was entitled to acquire the freehold and reversionary interests pursuant to a notice served on 23 December 2013 ("the relevant date") under Part 1 of the 1967 Act.

2. This is yet another case raising the question whether a particular building is or is not "a house" within the partial definition of that term in s.2 of the 1967 Act. If the Property was a house at the relevant date Merix is entitled to enfranchise, if not, not.

3. It will be necessary to set out a rather more detailed factual summary below. However, in short, this case involves a large London townhouse (here with an annexed mews building) which, following residential use until shortly after the Second World War, was used at times partially for office purposes with residential accommodation on an upper floor or upper floors and in the Mews. The unusual feature, compared with other cases of this genre, is that the Property here was left totally unused for 13 years prior to the relevant date. Merix says that on that date the building was a house, admittedly with traces of former office user, but nonetheless a house. Grosvenor says that the building was a disused office building with some ancillary residential accommodation and, therefore, not a house. The judge decided it was a house; Grosvenor argues that he was wrong to do so.

4. I think it is safe to say that none of the very experienced counsel who appeared before us, deploying their highly impressive arguments, could say that the present conundrum is precisely resolved by any of the many previously decided cases, concerning the definition of "a house" in s.2(1) of the Act, in the House of Lords/ Supreme Court or in this court.

(B) Background Facts

5. In the court below and before us there were some small differences between the parties as to the factual background to the case but, to my mind, the points of dispute made little difference to the merits of the important arguments on either side. The helpful agreed chronology used before Judge Gerald and on the appeal, with a few additions, together with the judge's findings, gives a sufficient overview of the history.

6. The chronology recites the construction of the Property between 1912 and 1914 and the grant of the first lease of it by Grosvenor for a term of 90 years from 1912. It summarises the residential occupation up to 1946, including residential occupation in the very last years of the War by the Envoy and Minister Plenipotentiary and by the

Ambassadors of Yugoslavia and, finally and briefly, by the deposed King Peter II of that country. The chronology then continues as follows:

"1946-1948 -	Property unoccupied.
1948-1961 -	Use of the lower floors of 41 Upper Grosvenor Street as offices by miscellaneous companies. Use of 41 Reeves Mews as a residential flat over a garage. The Claimant's case is that the third and fourth floors of 41 Upper Grosvenor Street were used as flats/maisonette during this period. This use of the third and fourth floors during this period is not admitted by the Defendants.
25th March 1958-	The 1914 Lease assigned to Covent Garden Properties Limited.
1962-1963 -	Property unoccupied.
1963-1969 -	Use of 41 Upper Grosvenor Street as offices. Part office and part residential use of 41 Reeves Mews, with garage.
8th June 1964 -	1914 Lease surrendered. Lease of the Property granted by Grosvenor to Covent Garden Properties Company Limited for a term of 44 years from 1958 ("the 1964 Lease").
1969-1987 -	Property unoccupied.
1981-1982 -	Refurbishment of the Property. Two flats created on the third and fourth floors of 41 Upper Grosvenor Street. Three flats created in 41 Reeves Mews, together with a garage.
21st October 1987 -	Grant of underlease of the Property to J. Henry Schroder

	Wagg & Co. ("the Underlease")
1987-1995 -	Office use of lower four floors of 41 Upper Grosvenor Street. Residential use of 41 Reeves Mews. The Claimant's case is that there was residential use of the third and fourth floors of 41 Upper Grosvenor Street during this period. This use of the third and fourth floors during this period is not admitted by the Defendants..
1996-2000 -	Office use of lower five floors of 41 Upper Grosvenor Street. Part residential use and part staff use of fourth floor of 41 Upper Grosvenor Street. Residential use of 41 Reeves Mews.
1st August 1996 -	Lease of the Property granted by Grosvenor (Mayfair) Estate to European Prime Properties SA for a term of 125 years from 24th June 1996 ("the Lease"). The 1964 Lease is assumed to have been surrendered.
28th January 1999 -	Deed of variation of the Lease.
27th December 2000 -	Surrender of the Underlease.
27th December 2000 -	The occupier of the Property, Schroder Asseily and Company, vacates the Property.
December 2000-present day -	Property unoccupied."

7. Mr Gaunt QC for Grosvenor was anxious to bring to our attention the agreed features of description of the Property from the historical experts, which can be found principally in paragraph 1.33 of their joint statement as follows:

"1.33 From our respective inspections of the building, we are agreed that it has the following characteristics and appearance:

1.33.1 The external appearance of the property has been little altered and externally it has retained the character and appearance of an Edwardian town house with its coachhouse or motor house and stabling at the rear.

1.33.2 Internally, the basic plan form on the principal floors (ground and first) has been retained, but the basement and second to fourth floors have been subdivided with modern partitions. The ornate main staircase and secondary staircase remain, although part of the balustrading of the main staircase has apparently been replaced following its theft in c1975.

1.33.3 The basement, which extends beneath 41 Reeves Mews, has retained some historic features, but there are also modern fire doors with vision panels, partitions, suspended ceilings, and modern sanitary fittings and a server room from its use as offices.

1.33.4 The ground floor has retained its original proportions, plan form and most of its ornate decoration apart from the chimneypieces which have been stolen. There is a reception desk in the main entrance hall and other indicative features of office use include fire doors set within original architraves, some modern lighting, alterations to some walls and the floors to run services, cabling and sockets, and modern sanitary fittings.

1.33.5 The first floor has likewise retained its original proportions and plan form including one particularly grand room stretching from front to rear. Most of the original decoration has likewise survived, although damaged in places, and minus some chimneypieces. As on the ground floor, there have been alterations for office use including fire doors in original architraves, sockets, suspended and emergency lighting, alterations to the floors for cable runs, and modern sanitary fittings which appear suited to office use. In addition, there are some partitions, which, however, stop short of the ceiling and do not interfere with its decorative features.

1.33.6 The second floor has for the most part retained its original proportions and plan form and some decorative features. There have been alterations for office use, including the insertion of some partitions, fire doors, sockets, and lighting, alterations to the

> floors for cable runs, and modern toilets in the closet wing.
>
> 1.33.7 The third floor also retains its original proportions and some original features, although its plan form has been altered to create a residential flat. There are some indications of office use in the form of cable runs and floor sockets and partitions, as well as wc's suited to office use.
>
> 1.33.8 The fourth floor has been altered to create a residential flat, although certain fixtures and fittings such as lighting, partitions and viewing panels in doors appear more suited to office accommodation.
>
> 1.33.9 The interior of 41 reeves Mews, above basement level, has been altered to create a modern garage and three flats."

8. It is to be noted that it is the lease of 1 August 1996, of which in 2007 Merix became the registered proprietor, which gives such right as there may be in Merix to enfranchise and to acquire the superior interest(s).

9. To the bare bones of the chronology, Mr Gaunt added in argument certain additional factual features which were, so far as they went, largely uncontentious.

10. The 1996 Lease contained a covenant by the tenant (a) to use 41 UGS only as business or professional offices on the basement, ground, first and second floors and as to the third and fourth floors as not more than two flats; (b) to use the Mews only as not more than three flats with private garage accommodation on the ground floor; and (c) not to use the flats within the premises otherwise than as residential accommodation for directors or senior employees of the company or companies occupying that part of 41 UGS used as offices. The requirement that the residential space be used by directors and senior employees of the office users was subsequently removed in 1999 and 2006.

11. The 1987 underlease in favour of J. Schroder Wagg & Co. Limited ("Schroders"), expiring in March 2002, required the undertenant to use the basement, ground, first and second floors of 41 UGS for business or professional use and the third and fourth floors as a single private flat held under a service occupancy licence.

12. The Deed of Variation of 1999, mentioned in the chronology, consented to the assignment of the term under the 1996 Lease and varied the user clause to permit the third floor to be used as offices.

13. Mr Gaunt referred us to a description of the Property in the following terms:

> "*41 Upper Grosvenor Street comprises an office building of 954.74 square metres (10,277 square feet) arranged on lower ground, ground and four upper floors. 41 Reeves Mews*

> *provides three self-contained flats, on ground and first floors, and parking spaces for 2/3 cars*."

The description appears in a document prepared by agents, Healey & Baker, in early 1998, who are said (in Grosvenor's Defence in the proceedings) to have been acting for the tenant: sed quaere, as the initial draft before us (AB2/39/395 et seq.) appears to have been prepared for Grosvenor Estate Holdings (Loc. Cit. pp. 393-4). However, nothing seems to turn on this discrepancy.

14. Mr Gaunt also invited us to note that the description of the third floor, in the same document, described the third floor as offices. One of the peripheral factual disputes, to which I have referred above, has been as to the extent to which that floor was used as offices and at what date or dates. Subject to this debate, for my part, I propose to take as sufficiently accurate the judge's, no doubt "broad brush", assessment that the upper two storeys and the Mews, amounting to 33% of the whole (and 22% if the third floor were to be excluded), were adapted or partially adapted for living accommodation. This ignores the even more peripheral issue of the effect of excluding from those floor area estimates certain elements of "communal" space. Counsel were agreed that "playing the numbers game" in these respects did not advance the arguments significantly further.

(C) The Judge's Findings of Fact

15. Having looked at the history of the building and its description in outline, it is necessary to record the judge's findings of fact as to the occupation and user of the Property in the years following the Second World War. What follows is a summary of the findings to be found at paragraphs 9 to 23 of the judgment. (Before proceeding further, I would wish to pay tribute to the judge's extremely careful judgment, which addressed fully the material issues of fact and law in a most helpful way.)

16. The judge found that following a period of two years' disuse, works were carried out to enable occupation of the basement, ground, first and second floors as offices and the occupation of the upper two floors as a maisonette. He found the first floor of the Mews was adapted to enable residential user. He also found that the parts so adapted were occupied for office and residential use and were used accordingly until 1961. There was then a period of 2 years when the building was unoccupied. Between 1961 and 1963 the whole of 41 UGS was used as offices. From 1969, the Property once more fell vacant and remained so until 1987. In 1964, the 1914 lease was surrendered and a new 44 year lease was granted which required 41 UGS to be used as offices until 1973 and then as a single private dwelling, with the Mews to be occupied as offices with a garage, and with a flat at the front of the first floor.

17. The judge's findings continued by recording some refurbishment in 1980/81 to provide office accommodation on the basement, ground, first and second floors of 41 UGS, part of the Mews basement with two (originally four) flats on the third and fourth floors of 41 UGS and three flats in the Mews. This was permitted by a planning permission in 1978 and by deed of variation to the 1964 lease, which required the residential parts to be occupied by directors or senior employees of the office occupant of 41 UGS.

18. Passing over a dispute between the parties as to the planning position in this period, recorded by the judge in paragraphs 13 and 14 of the judgment, which he found unnecessary to resolve, the judge found that the Property remained unoccupied until the grant of the underlease to Schroders in 1987. Schroders took up occupation in October 1987 and remained there until their surrender of the underlease and vacation of the Property on 23 December 2000.

19. The underlease to Schroders required the basement, ground, first and second floors of 41 UGS to be used for business and professional offices and the third and fourth floors to be used as a single private flat, with the Mews to be used as three self-contained flats. It was, said the judge, common ground that from 1987 to 2000 Schroders occupied the basement, ground, first and second floors of 41 UGS and part of the Mews as offices and the rest of the Mews as three flats with garage. Again it was common ground that from 1996 to 2000 the third floor was occupied as offices and the fourth floor was partly residential and partly for staff use.

20. There was a dispute before the judge as to whether the third floor was "designed or adapted for living in" and whether the third and fourth floors were occupied residentially between 1987 and 1995. The only oral evidence on the subject was from the experts who sought to draw inferences about the user in this period from various documents and plans.

21. The judge noted that the main documentary evidence on this issue was a series of floor plans, dated at around the time that Schroders took up occupation, these contained typed descriptions of rooms' actual or intended user, but with manuscript amendments. A problem arose because five of the nine plans (relating to ground, first and second floors), in Grosvenor's records, were annexed to a letter of 4 March 1988 referring to the plans as "showing tenants' alterations, but understand that these are minor and insignificant…". The other four plans were plans of the basement, third and fourth floors were filed separately with a letter of 6 February 1997.

22. The judge's conclusion on this dispute (paragraph 19 of the judgment) was this:

> "19. It is very difficult to draw any firm conclusions from the 1987 plans (which bear different handwriting) or the related documentation to which the experts were taken in cross-examination. On balance, however, I take the view, and hold, that the only alterations carried out by March 1988 were to the ground, first and second floors and consisted of essentially minor works such as provision of a hospitality cupboard on the ground floor and partitioning one room on the first and two on the second floors. It was not until some time later that the third and fourth floors had any adjustments for office user as shown by the partitioning of some of those rooms and the conversion of the basement staff room into a communications room as shown by the 1987 plans filed with the 1997 Alphameric letter, from which I infer and find those handwritten annotations and marking were added shortly before the date of the letter."

Referring to other documents, the judge found in the next paragraph that it was difficult to tell when the third and fourth floors started to be used differently, but went on to find this:

> "21. I therefore find that residential occupation of the third and fourth floors (which had been converted into self-contained flats in 1980/81) continued until sometime in 1996/97 when some of the rooms on the third and fourth floors were partitioned but that the kitchen remained in the third floor until removed sometime later. …
>
> … The inference is that from 1997 or thereabouts onwards, the fourth floor was mixed user but predominantly associated with office user of the main part of the building save that it could readily be used as a self-contained flat by closing off various doors."

23. For my part, notwithstanding Mr Gaunt's challenge to the judge's findings as to the user of the third floor between 1987 and 1997 before us, I find it to be quite impossible to disturb this finding of fact by the judge.

24. I follow Mr Gaunt's argument derived from the nine plans, which he submitted had been separated by misfiling in his clients' records. However, there was no evidence of any such misfiling and the judge had a far fuller opportunity to analyse the various documents, of which these plans were only a part. He also heard the evidence of the experts as to the inferences that they drew from the documentation as a whole, some of which we were not shown at all during the hearing of the appeal. The submissions advanced do not, I think, justify us in departing from the judge's findings of fact in this area, based as they were on a series of documentary materials, of which we have seen only snapshots, and on oral evidence which we have neither heard nor seen transcribed.

25. The judge recorded that it was common ground that at the relevant date the Property had been unoccupied for 13 years and that nothing had been done to it during that period. Its physical state, on the relevant date and on the date of the judge's site visit during the trial, remained essentially the same as when Schroders vacated in December 2000, with no doubt some continuing dilapidation.

26. The judge proceeded to describe, carefully and in detail, the physical characteristics of the Property, in its various parts, as he found it to be on the date of the site visit: see paragraphs 25 to 33 of the judgment.

27. I do not think that much can be added to that description for present purposes that is not supplied by his conclusion (in paragraph 65 of the judgment) as to the impression that the Property created on him. Whatever the correctness, or otherwise, of his conclusion for the purposes of the statutory definition, the judge's impression of the Property was this:

> "65. I should say that I found Mr Johnson's submission that the building was and remains a Mayfair townhouse now accommodating a set of flats with traces of prior office use

> attractive. What was striking during the site visit was just how evident the residential character, identity and functionality of the building remained externally and internally. There really was no doubt that internally the whole building was on the Relevant Date designed and laid out for living, with grand rooms on the ground, first and second floors and sleeping and wider living accommodation on the third and fourth floors and in the mews, readily accessible internally at basement and ground floor levels and housing the plant room which served the main part and also the garage. The only thing which might have altered that conclusion was the presence of some old office light fittings, cabling, sockets, discrete toilets, partitioning and such like. But all of that was essentially superficial, pretty ancient and, as Mr Johnson submitted, amounted to no more than mere evidence of past office user which did not detract from the quite overwhelming residential character, identity and functionality of a still grand Mayfair townhouse."

As I have said, the judge found the Property to be "a house" for the purposes of s.2(1) of the Act.

(D) The Law

28. Section 1 of the 1967 Act confers upon a tenant of "a leasehold house", in certain circumstances, the right to acquire on fair terms the freehold or an extended lease of the house and premises. Section 2(1) of the Act then provides as follows:

> "(1) For purposes of this Part of this Act, "house" includes any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes; and –
>
> > (a) where a building is divided horizontally, the flats or other units into which it is so divided are not separate "houses", though the buildings as a whole may be; and
> >
> > (b) where a building is divided vertically the building as a whole is not a "house" though any of the units into which it is divided may be."

29. As a matter of language, that definition is only *inclusive* of properties so described and leaves open the possibility of other types of property falling within the description. However, Mr Radevsky, junior counsel for Grosvenor, pointed us to the following passage in the speech of Lord Scott of Foscote in the House of Lords in *Malekshad v Howard de Walden Estates Ltd.* [2003] 1 AC 1013 at 1036D-E:

> "Before seeking to apply these statutory provisions to the facts of this case, it is convenient to make some observations about their meaning and effect. First, the definition in subsection (1),

> before one comes to the paragraph (a) and paragraph (b) qualifications, is expressed as an inclusive definition—"includes any building" etc. It is not expressed to be a comprehensive one. But I think it should be treated as comprehensive. If a building is not designed or adapted for living in or if it cannot reasonably be called a "house", the building cannot, in my opinion, be a "house" for 1967 Act purposes. Nor can a dwelling which is not a building at all be a "house", for example, a caravan (cf *R v Rent Officer of Nottinghamshire Registration Area, Ex p Allen* [1985] 2 EGLR 153) or a houseboat (cf *Chelsea Yacht and Boat Co Ltd v Pope* [2000] 1 WLR 1941)."

30. Before considering the authorities on this deceptively simple statutory definition, it is helpful to have in mind the substance of the parties' respective cases to see what one is looking for in the previous decisions.

31. As the judge records, at paragraph 38 of the judgment, it was common ground before him that the Property comprised a "building" which was "designed or adapted for living in" in whole or in part at the relevant date although precisely what part or parts were so designed or adapted was in issue. That common ground remained solid for the purposes of the appeal. The thrust of the appeal, therefore, centred upon whether the Property is "a house…reasonably so called".

32. Merix's case is that at the relevant date the whole Property was designed for living in and could reasonably be called a house. Alternatively, this was a house of mixed adaptation, but remained partly adapted for living in and a house reasonably so called.

33. For Grosvenor, it is argued that the design or adaptation for living in was confined to the fourth floor or as the judge found (and, as I have said, I would not reverse) the third and fourth floors (and the Mews) and was ancillary to the rest of the Property, which was designed or adapted for office use and had been so used. As there was no active and settled use at the relevant day, it was argued for Grosvenor that the last use of the Property was determinative of whether this was a house reasonably so called. As the judge said, "…Mr Gaunt submitted that the clock had to be turned back to 23rd December 2000". Mr Gaunt argued that on 24 December 2000 this building was a disused office building, with some ancillary residential accommodation and, absent an established change of use, it remained as such at the relevant date thirteen years later.

34. It seems to me that we can focus attention in this case on four previous decisions: *Tandon v Trustees of Spurgeons Homes* [1982] AC 755 ("*Tandon"*); *Boss Holdings Ltd. v Grosvenor West End Properties Limited* [2008] 1 WLR 289 ("*Boss*"); *Prospect Estates Ltd. v Grosvenor Estate Belgravia* [2009] 1 WLR 1313 ("*Prospect*") and *Hosebay Ltd. v Day (& a linked case)* [2012] 1 WLR 2884 ("*Hosebay*").

35. In *Tandon* the House of Lords was concerned with premises consisting of a shop with living accommodation above. They were one of a row of four similar premises forming a shopping parade. Judge Coplestone-Boughey, in the Wandsworth County Court, found that the premises were a "house" within the definition. By a majority, this court reversed him. The House, also by a majority, reversed that decision and restored the judge's order.

36. In the minority, Lord Wilberforce said this:

> "There must be many thousands of mixed units in the country, varying greatly in character. Many of them may have started life as an ordinary house on several floors, and later the basement and/or ground floor has been made into a shop. Some may be at a corner, though for myself I do not appreciate the relevance of this category; others may form one part of a terrace. Others may have originated as a shop, and later some portion may have been made into living accommodation. Others, again, may have been built as mixed units, of which part has been designed and constructed for use as a shop, part as living accommodation. It is the user at the date of the application to enfranchise that matters, but the nature of the building, and to some extent its history, must be relevant to a determination of its character.
>
> I do not think that it is contended that *all* mixed units are houses reasonably so called: if it were I should reject the contention: there is no warrant for it in the Act. Nor can I agree that there is any presumption that mixed premises are to be regarded as a house. The Act extends to dwellings: it does not extend to shops: there is no warrant for forcing one category into the other. Nor do I think it our task to prescribe a simple formula which will solve the judges' problem for them. Certainty can always be purchased for the price of injustice, and I know of no rule which prevents different cases from being differently decided. To suppose that judges, if left without firm guide-lines, will give anomalous decisions seems to me to underrate their common sense. The judge has to decide each case using his knowledge and applying the Act, and unless he applies a wrong test the decision is decisive."

His Lordship considered that, if the judge had not found himself to be bound to hold that these premises were a house following the decision in *Lake v Bennett* [1970] 1 QB 663, he could only have come to one conclusion which was,

> "[W]hether one accepts the proportion of 75-25 per cent. or that of 50-50 per cent.-namely, that it is a mixed unit consisting in part of shop and in part of a dwelling. That is not a house within the Act; it is not the policy of the Act that the tenant should be able compulsorily to acquire it."

37. Lord Fraser of Tullybelton agreed with Lord Wilberforce and concluded as follows:

> "The building in question here was built and has all along been let and used as a shop on the ground floor and as living accommodation on the first floor. The fact that the bathroom and w.c. for the living accommodation are on the ground floor means that the shop and the living accommodation can only be conveniently occupied by the same family-the family of the

> shopkeeper who lives above the shop. Such a building is not likely to be reasonably called a house, and the photograph of it that we have seen shows a shop in a row of shops."

38. Lords Scarman, Roskill and Bridge of Harwich disagreed. The only full speech for the majority was given by Lord Roskill.

39. Lord Roskill agreed with three propositions which were common ground between counsel: first, the question of whether a property was a house or not was a mixed question of fact and law; secondly, if the premises might be called something other than a "house" that fact did not prevent them from being a "house…reasonably so called"; and thirdly, premises used for mixed residential/non-residential purposes could be a "house" depending upon the character of the premises.

40. Lord Roskill proceeded, after discussing *Lake v Bennett* (supra) to this conclusion:

> "The purpose of these words in the definition is clear. Tenants who live over the shop are not to be denied the right conferred by the Act, whether they themselves trade from the shop or not, merely because the building in which they work and live accommodates the two uses. Such a tenant occupies the house as his residence, even though it is also used for another purpose.
>
> Small corner shops and terrace shops combined with living accommodation are to be found in almost every town and village in England and Wales. Parliament plainly intended that a tenant who occupied such premises as his residence should have the benefit of the Act if the building could reasonably be called a "house." It is imperative, if the law is to be evenly and justly administered, that there should be not only uniformity of principle in the approach of the courts to the question but also a broad consistency in the conclusions reached. The question must not, save within narrow limits, be treated by the courts as a question of fact: for the variations of judicial response could well be such as to give rise to unacceptable, indeed unjust, differences between one case and another. This could lead to the statute being applied to two practically identical buildings one way by one judge and another by another—an echo of equity and the length of the Chancellor's foot. For this reason, the Court of Appeal's decision in *Lake v. Bennett* [1970] 1 Q.B. 663 was welcome as stating a principle and confirming the question of fact to a narrow area. I deduce from it the following propositions of law: (1) as long as a building of mixed use can reasonably be called a house, it is within the statutory meaning of "house," even though it may also reasonably be called something else; (2) it is a question of law whether it is reasonable to call a building a "house"; (3) if the building is designed or adapted for living in, by which, as is plain from section 1 (1) of the Act of 1967, is meant designed or adapted

> for occupation as a residence, only exceptional circumstances, which I find hard to envisage, would justify a judge in holding that it could not reasonably be called a house. They would have to be such that nobody could reasonably call the building a house."

41. Clearly, the Property in this case is far removed in "character" from the premises in issue in *Tandon*. However, if the wide propositions stated by Lord Roskill were of universal application, it seems to me that this Property would have to be a "house" and would have to be so as matter of law, even though Lord Roskill had accepted from counsel the agreed proposition that the question was one of mixed law and fact.

42. In *Boss*, the House of Lords was concerned with 21 Upper Grosvenor Street, in the same street as the Property in our case. It was an older building. Lord Neuberger of Abbotsbury, giving the only speech, described the history of the premises as follows:

> "12. The property was built in the fourth decade of the 18th century. The judge described it as "a fine looking house" consisting of a basement, ground and four upper floors "in a grand terrace of buildings…with an Edwardian façade added about 100 years ago". It was built as a single private residence, and was continuously used as such for over 200 years until 1942, when it was occupied by the Free French Government in Exile. From about 1946 the three upper floors were fitted out for residential use, and the three lower floors were occupied for a dress making business. Under the lease granted in 1948, (a) the second and third floors were to be used as self-contained flat, with the fourth floor for the occupation of servants, and (b) the lower three floors could be used in connection with dress-making, subject to a prohibition against any show of business being visible from the exterior.
>
> 13. The commercial use of the lower three floors continued until about 1990, since when those floors have been vacant. The residential use of the upper floors continued a little longer but ended well before October 2003, and quite possibly by 1995, save that a caretaker may have occupied the top floor until about 2001. Although there was evidence as to the planning history of the property, it quite rightly played no part in the parties' arguments, particularly as there is no question of any of these uses being or having been unlawful."

43. In that case, the difficulty was that the rooms on the upper three upper floors, the residential part, had been stripped back to the basic structure; most of the plaster had been hacked off to the bricks; ceilings had been removed to reveal the joists and in some rooms the floor boards had been removed. In contrast, some rooms had been rather less devastated. The former commercial premises were not stripped out: doors, carpets, wiring and light fittings seem to have been retained, at least on the ground floor.

44. The relevant date for the purposes of the Act was 14 October 2003. At [15], Lord Neuberger said this:

> "15. The judge concluded the property was not a house within the meaning of section 2 (1), because it was not, as at October 2003, "designed or adapted for living in". Had he not reached that conclusion, he said he would have accepted that it could "reasonably [be] called" a house. The Court of Appeal agreed. Before turning to the question of whether the property was designed or adapted for living in, it is right to record that, in the light of the reasoning of this House in *Tandon v Trustees of Spurgeons Homes* [1982] AC 755, the judge was plainly correct to conclude that the property could reasonably be called a house."

The case for Grosvenor there was that the property was not at the relevant date "designed or adapted for living in" because it was not physically fit for immediate residential occupation: see [16]. Lord Neuberger rejected that argument. His conclusion was (at [17]):

> "17. While I accept that for present purposes one is largely concerned with the physical state of the property, I disagree with these conclusions. It seems to me that, as a matter of ordinary language, reinforced by considering other provisions of the subsection, and supported by the original terms of section 1(1), as well as by considerations of practicality and policy, the property was, as at October 2003, "designed or adapted for living in" within section 2(1). 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. While internal structural works will no doubt have been carried out to the property from time to time over the past 275 years, it seems very likely from the floor plans that its layout, in terms of internal walls, partitions and staircases, has not changed much since the property was built. In any event, the upper three floors have always been laid out for residential use."

45. I will not repeat in detail what Lord Neuberger said as to the grammatical construction of section 2 of the Act because in this court in *Hosebay* [2010] 1 WLR 2317, at [31] (as Lord Neuberger MR) his Lordship had "second thoughts" about that construction of the section which he considered offered an "over-literalist" approach to the language of the section. In the Supreme Court in that case (at [34]) Lord Carnwath, speaking for all members of the Court, said that he had no doubt that Lord Neuberger's "second thoughts" were correct. However, Lord Carnwath also said that his own interpretation of the section did not call into question the actual decision in *Boss* of which he said this (at [36]):

> "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."

Both the properties in issue in the *Hosebay* cases had active and subsisting non-residential user.

46. The learned judge below, in the present case, considered that the Property fell "four square within *Boss*" (see paragraph 59 of the judgment). Mr Gaunt submits that he was wrong to do so.

47. I would note, however, the conclusion of Lord Neuberger in *Boss* that the judge (upheld by the Court of Appeal) had been "plainly correct" to hold that the property could reasonably be called a house, a matter that was not apparently challenged in the House of Lords. Further, Lord Carnwath did not question the decision that the property had not lost its identity as being designed and last adapted for residential purposes. "It was enough that the building was partially "adapted for living in", and it was unnecessary to look beyond that (see again per Lord Carnwath at [36]). In saying this Lord Carnwath referred expressly to Lord Neuberger's speech in *Boss* at [25]] which included the following passage:

> "25. [I]t is clear from section 2(1) that, in order to be a "house", the property need not be "solely" adapted for living in, so it would make no difference to the outcome of this appeal if that were the correct analysis. The issue was, unsurprisingly, not much debated, but I incline to the view that the original design of the property is what matters in this case. Its original internal layout as a single residence appears to have survived substantially unchanged throughout, the three upper floors have always been envisaged as being for "living in", and (perhaps less importantly) the internal fitting out of the lower three floors has a residential character, and the external appearance has not been altered since well before the property ceased being used as residence in single occupation."

48. I think that it is also worth quoting what Lord Neuberger had said at [24] in *Boss* as follows:

> "24. Indeed, the layout of all six floors of the property does not appear to have been substantially altered from its original construction as a house in single residential occupation. It is true that it has not been occupied for a number of years, that it has become very dilapidated, and that three residential floors have been stripped out to the basic structural shell (albeit that

> the internal walls, windows, staircases, and joists are in place). However, none of that detracts from the point that at least the upper three floors were and remain "designed" to be lived in, and that the lower three floors appear to be structurally laid out substantially as they were when the property was in single residential occupation, and, as pointed out by my noble and learned friend, Lord Rodger of Earlsferry in argument, they are (or, at least the ground floor is) still internally fitted out in a way which gives a residential appearance.."

49. That property in Upper Grosvenor Street was also in a disused state at the relevant date. The House of Lords regarded it as "plainly correct" that it could reasonably be called a house and they decided that it was partially adapted for living in. The Supreme Court in *Hosebay* said that that was a correct decision, notwithstanding their view that Lord Neuberger had been correct in the Court of Appeal to have second thoughts about his "literalist" construction of s.2.

50. Mr Gaunt was at pains to point out that in *Boss* half of the property had not been put to use other than for residential purposes, whereas in our present case over half the Property had been adapted to office use and (when used at all) had been used for nothing else since 1946. In comparing this case with *Boss*, said Mr Gaunt, the judge "overlooked the settled use of the office floors", the absence of separate access to the flats and the unlikelihood of use of the residential parts by persons unrelated to the business elsewhere in the building. He submitted that the *Boss* case was not about the concept of "house…reasonably so called".

51. *Prospect* concerned a building dating from 1850, originally built as a house for residential use. It originally had a basement and two upper storeys, to which third and fourth storeys had been added. From 1958 onwards, the vast majority of the building (88.5%) had been used as offices by a number of sub-tenants on short commercial leases. The fourth storey had been used for residential purposes from 1965. The use of the fourth storey was confined (as was that of the flats here under the 1996 Lease, until varied in 1999) to occupation by a director, partner, officer or senior employee of a company, firm or person in occupation of the remainder of the demised premises. The remaining floors could only be used as offices. The user of the building in this manner in its respective parts continued at the relevant date. The judge held that the building was a house reasonably so called; this court disagreed.

52. In allowing the landlord's appeal in *Prospect* this court held that while the concept of a house "reasonably so called" had an element of flexibility to it, the judge had paid insufficient attention to the non-residential user of the building, in compliance with the lease, and that the design and unchanged appearance had played too large an element in the judge's decision. Mummery LJ said, with reference to Lord Roskill's speech in *Tandon*:

> "19. In my judgment, the judge applied Lord Roskill's propositions without taking full account of all the relevant circumstances. The propositions are not a statutory text and were never intended to be understood or applied as such. The judge paid insufficient attention to the peculiar, even

> exceptional (to echo Lord Roskill's language), circumstance of prescribed and predominant office use in compliance with the Lease. That circumstance is, in my view, the overwhelming and decisive feature of this case.
>
> 20. The original design and the unchanged external and internal appearance of the Building featured too prominently in the judge's reasons. If he had given due weight to the prescriptive terms of the Lease, the actual uses of the Building and the relative proportions of the mixed use at the relevant date, he could only have come to one conclusion: that it was no longer reasonable to call the Building a house within the 1967 Act."

Goldring LJ added pithily that the submission of counsel for the tenant could be encapsulated as follows:

> "The building can reasonably be called a house although no one can lawfully live in virtually 90% of it."

The learned Lord Justice said, "As it seems to me, that cannot be right." That case, of course, was dealing with a property in continuing commercial use, as to almost 90% of its area, on the relevant date.

53. Turning now to *Hosebay*, there were two conjoined cases before the Supreme Court in which appeals from different judges had been heard together in this court.

54. In the first case (that of Hosebay Ltd.) the properties in issue were three in number held on long leases. The three properties were in a terrace and had been initially constructed and occupied as large houses, described in the leases as dwelling houses, but which had been used commercially to provide individual rooms for hire with self-catering facilities. The trial judge, Judge Marshall QC, described the premises as "a self-catering hotel".

55. The second case (involving a company called Lexgorge Limited) concerned the long lease of a property originally built as a house in a terrace of substantial houses; it had been used for many years as a house and retained listed building status as a "terraced house" of special architectural interest. The tenant used the whole building as offices.

56. In Hosebay's case the landlord contended that the properties were neither "designed or adapted for living in" nor were they houses "reasonably so called". In Lexgorge's case, the landlord said that the building was not a house "reasonably so called". In Hosebay's case, the judge decided both issues in favour of the tenant, and in Lexgorge's case, Judge Dight also decided the one issue in the tenant's favour. Their decisions were upheld in this court. The Supreme Court disagreed and allowed the landlord's appeals in each case.

57. Lord Carnwath began his judgment (with whom all the other Justices agreed) by saying,

> "The Leasehold Reform Act is on its face about houses not commercial buildings."

Having summarised the important changes to the legislation since 1967, in particular the restrictive elements of residence and the exclusion of second homes which had been removed, Lord Carnwath said that there was no evidence of any ministerial or parliamentary intention to extend the Act more generally,

> "…or in particular to confer statutory rights on lessees of buildings used for purely non-residential purposes."

58. At [9], Lord Carnwath added this:

> "9. 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."

59. Lord Carnwath said of the reasoning of the single majority speech of Lord Roskill in *Tandon* that it was "not without difficulty" and that the case had to be read in its factual context. Of the three propositions stated by Lord Roskill at the end of his speech, Lord Carnwath said that they did not offer much assistance as such, at least beyond the facts of the *Tandon* case itself. It is perhaps necessary only to quote what Lord Carnwath said of the first proposition which was this:

> "25. The first proposition was in terms directed to a building in mixed residential and commercial use. Such a building could plausibly be described either as a house with a shop below, or as a shop with a dwelling above. That was enough to show that it could "reasonably" be called a house. That proposition cannot in my view be applied more generally. The mere fact that a building may be described as a "house" for other purposes (for example, in the English Heritage list) is not enough to bring it within this part of the definition.."

60. As for the second proposition, Lord Carnwath noted the conflict between the acceptance by Lord Roskill of counsels' agreed position in *Tandon*, that the question in issue was one of mixed fact and law, and his statement in the second proposition that the matter was one of law only. With regard to the third proposition, Lord Carnwath regarded it as being simply Lord Roskill's view as to the correct policy approach to a building of the kind before him: see [26] and [27]. Indeed, in general, Lord Carnwath regarded the decision in *Tandon* as reflecting simply a difference between the majority and the minority of their Lordships as to the policy considerations involved in the facts of that case: see [28].

61. Lord Carnwath did, however, note the relative lack of weight afforded by the majority in *Tandon* to the appearance of the building in deciding whether it was a house

"reasonably so called". He noted that Lord Roskill accepted that the appearance and history could be relevant in determining the character of a building, but that such factors seemed to play no detectable part in the final decision in the case. Lord Carnwath said that:

> "29. The determinative points were that the proportion of residential use, even if only 25%, was "substantial" (p 766), and that a tenant occupying such a building as his residence was within what was perceived to be the scope of the protection intended by Parliament (p 766)."

62. Lord Carnwath then turned to the decision in *Boss* and I have already summarised his conclusions on the case. As for the construction of s.2 of the Act, it is perhaps the statement at [35], over which we pored longest in the course of the helpful arguments, to the extent that at one stage I ventured to suggest we were in danger of trying to construe the paragraph as a statute. Lord Carnwath said this:

> "35. 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'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."

63. It was debated in argument whether this paragraph was dealing with the first part of the definition in s.2 ("designed or adapted for living in") or with that part and also the second part (house "reasonably so called"). I think both counsel inclined to the view that it was dealing with both, having regard to what Lord Carnwath had said at [9], quoted above.

64. Having dealt with *Boss*, Lord Carnwath considered *Prospect*. In the Court of Appeal in *Hosebay*, Lord Neuberger had suggested that the ratio of *Prospect* should be treated as being "limited to a case where the residential use is either prohibited entirely, or restricted to a very small part of the building, and the actual use accords with that". Lord Carnwath's comment in *Hosebay* (at [41] was this:

> "41. As will be apparent from my earlier analysis of *Tandon*, I cannot agree that Lord Roskill regarded "external and internal

> physical character and appearance" as the determining factors. I agree with the Master of the Rolls that the terms of the lease as such should not have been treated as the major factor. However, in so far as Mummery LJ treated the use of the building, rather than its physical appearance, as determinative, his approach was in my view entirely consistent with the reasoning of the majority in *Tandon* as I have explained it. I consider that *Prospect Estates* [2009] 1 WLR 1313 was rightly decided, and that the ratio need not be limited in the way the Master of the Rolls proposed."

65. Lord Carnwath proceeded to the decisions in the two cases.

66. For the Hosebay appeal, the decision appears at [43] in these terms:

> "43. I would allow the appeal in *Hosebay* on the grounds that a building which is wholly used as a "self-catering hotel" is not "a house reasonably so called" within the meaning of this statute. As appears from para 38 of their judgment (quoted above), the contrary view of the Court of Appeal turned on two main points: (i) the external appearance of each property as a town house; (ii) the internal conversion to self-contained units, with cooking and toilet facilities. I find it difficult with respect to see the relevance of the second point to this part of the definition, which only arises in relation to a building which is in some sense adapted for living in under the first part. It is not suggested that the building is divided in a way which comes within the proviso. The first point, for the reasons given in my analysis of *Tandon*, should not have been given determinative weight. The fact that the buildings might look like houses, and might be referred to as houses for some purposes, is not in my view sufficient to displace the fact that their use was entirely commercial."

67. In the Lexgorge appeal, the decision (at [45]) was this:

> "45. In *Lexgorge* I would also allow the appeal on similar grounds. A building wholly used for offices, whatever its original design or current appearance, is not a house reasonably so called. The fact that it was designed as a house, and is still described as a house for many purposes, including in architectural histories, is beside the point. In this case no issue arises under the first part of the definition. It is unnecessary to consider whether the concession in that respect was rightly made, although it is possible that it was based on a wider interpretation of *Boss Holdings* [2008] 1 WLR 289 than my own analysis would have supported."

(E) Discussion and Conclusion

68. In endeavouring to apply the decided cases to this appeal, I think that it is useful, as Mr Johnson QC for Merix did, to begin by putting to one side the types of property which are clearly *not* houses within the statutory definition, although possibly designed or adapted for living in: e.g major hotels, hostels, purpose-built blocks of flats, self-catering hotels (the Hosebay facts), premises with an active and settled use for entirely commercial purposes (the Lexgorge facts). Equally, this case is not like *Prospect* where the continuing use of the building, in conformity with the lease, was, as to nearly 90%, as offices. None of the cases, apart from *Boss*, has concerned a building without any present use at all at the relevant date and a history of mixed use in the past.

69. I also think that it is difficult to take the ratio of *Hosebay* much beyond the final two sentences of paragraph [35] in that case, i.e. as dealing with buildings *with* an active and settled use, such as the properties in both appeals actually had.

70. The fact that Lord Carnwath speaks expressly of "active and settled use" must imply that other considerations may come in where there is no such use, as in our present case. If there is no such use as here, it seems to me that one must "look further" because the building is not within the category of "most cases" to which Lord Carnwath was referring, even if one does not shut past user from the mind.

71. I find myself unable to accept Mr Gaunt's submission that the last user, or at least the last adaptation for use, must be determinative of the character and identity of the subject building for the purposes of the definition. The statute requires the matter to be assessed at the relevant date. To turn the clock back in the way proposed is, in my judgment, to negate rather than to apply the statute. What the court has to do is to decide the building's "present identity or function by reference to its physical character, whether derived from its original design or from its subsequent adaptation" at the relevant date (Lord Carnwath at [35] in *Hosebay*). Past adaptation may have changed that identity or function, but I do not consider that the last user can be the only relevant consideration.

72. Mr Gaunt supplemented this part of his submissions by saying that one should look at the position at (say) 24 December 2000, just after Schroders moved out, having removed their office equipment and furniture and having left the same traces of immediately past office user behind. In that case, he argued, the Property would clearly not have been a "house" and the situation has not changed since.

73. I do not accept the premise of that submission. It seems to me that the same conclusion, that it was a house, might well have been reached even at that date, essentially for the same reasons as given by the judge, both with reference to *Boss* and his own overall assessment in paragraph 65 of the judgment.

74. In this context, Mr Johnson invited us to consider the common case of a suburban house, used partly as a residence and partly as surgery rooms for doctors or dentists. If the medical/dental use was discontinued, the house would (he submitted) be likely still to be considered a "house" for present purposes, even if it bore traces of the past user.

75. I think the analogy was useful for this reason. In the 21st century, we remain accustomed to looking at such a hypothetical suburban property used for mixed purposes of residence and medical/dental practice and still regarding them in common parlance as "houses". Once the doctor/dentist leaves, the place still looks and "feels" like the house it has been customarily seen to be, even if traces of the past user may be present. On the other hand, the large London townhouse is less frequently seen today as a single private residence and, therefore, less clearly as a "house" in modern eyes. Many such properties will have been used wholly or in part for commercial purposes. We start to shrink, therefore, from the idea that they are still "houses". However, when those commercial purposes have ceased, I see no reason why such properties should not, in appropriate cases, still be seen as houses "reasonably so called", even if we are less accustomed than former generations to seeing them as single residences. The property in the *Boss* case was just such an example. As Patten LJ said in *Jewelcraft Ltd. v Pressland* [2016] L&TR 73 at 77, paragraph [14] the s.2 definition was clearly intended to operate as a purpose-made, and therefore an extended, definition of the term.

76. The judge considered that our case fell precisely within *Boss*. The primary issue in that case, as we have seen, was whether the property was "designed or adapted for living in". Here there is no doubt that that criterion was satisfied whether as to the whole or at least part of the Property. In *Boss* the court felt no doubt that the building was a house reasonably so called. To that extent, I consider that this case is at least very close to the facts of *Boss*. I do not ignore the fact that in that case residential user of the top floors was required by the lease and commercial use of the lower floors was only permitted, provided that no show of business was visible externally. In our case, office user of the lower floors was required by the lease. Like Judge Gerald, however, I note that Lord Carnwath thought that the terms of the lease should not have been treated in *Prospect* "as the major factor", even though the ratio of that case had not been as confined as that seen by Lord Neuberger when the *Hosebay* case was in the Court of Appeal: see paragraph [41] in *Hosebay*.

77. While Lord Carnwath noted the tension between the acceptance by Lord Roskill in *Tandon* of counsels' agreed proposition that our question (house or no) is one of mixed law and fact and his later statement that the question is one of law, I also recall that in this court in *Jewelcraft* [2016] L&TR at 79, paragraph [20] Patten LJ said that the question whether a particular property is a house "has been authoritatively recognised to be a question of law and not a purely factual issue for the judge". It seems to me, however, that the law, in statute and decided cases, has not prescribed and cannot possibly prescribe a legal solution for every type of property. The problem in *Jewelcraft* was that the judge had said that a property, which was of essentially the same type and with the same user as the property in *Tandon*, was not a house. He had, in effect, rejected the legal analysis of the character of premises which consist of a shop with living accommodation above, as being a house within s.2, which had been authoritatively determined in *Tandon*. This court decided that that course was not open to him and so allowed the appeal.

78. In formulating his propositions of law in *Tandon* Lord Roskill was desirous of achieving "broad consistency in the conclusions reached" and said that the question must not, "save within narrow limits" be treated as a question of fact. Patten LJ in *Jewelcraft* said that the question was not "purely" a factual issue. Where the trial

court is faced with a property of a type not exactly similar to one previously characterised by the higher courts, it must surely do its best to apply the law to the facts as found and decide whether the property in question is or is not a house, with the benefit of its own evaluation.

79. Once one reaches that position, it seems to me that it would be misplaced to disturb the judge's conclusion that the Property here had essentially the same identity and function as the building in issue in *Boss*. *Boss* was the closest example for the purpose of trying to place the case within a defined legal category. Beyond that, one comes to a stage where, having paid due regard to the various formulations of legal principle in past cases, it becomes hard to fault or to better the final assessment made overall by a trial judge. However much one tries to squeeze particular types of property into watertight legal compartments, e.g. as in *Tandon*, the fact remains that buildings are infinitely variable in character and function, affected in part by historic user. The Supreme Court in *Hosebay* was clearly troubled by the rigidity imposed by the *Tandon* decision and said that the propositions formulated "do not…offer much assistance as such, at least beyond the facts of the case". Various types of building must, it seems to me, be amenable to varying characterisation by trial judges, doing their best to apply the principles emerging from decided cases. Any other solution is simply a recipe for an endless chain of appeals to the higher courts in an attempt to achieve a formal legal characterisation of individual properties to no advantage at all to the litigants involved.

80. Here the issue was whether this was a house, with traces of past office user, or was it a disused office building. Why, I ask, when a judge has taken full account (as this judge did) of all the guidance to be derived from precedent, should one overturn his assessment of whether or not this was a "house…reasonably so called"? I accept Mr Johnson's submission that we should not do so. The judge was in the best position to make that assessment which he made with the utmost clarity after an exhaustive factual analysis and, to my mind, a full and accurate noting of the legal principles which he had to apply. I can find no reason to interfere with his conclusion.

81. I would, therefore, dismiss this appeal.

Lord Justice Flaux:

82. I agree.

Lord Justice McFarlane:

83. I also agree.