[2013] UKFTT 316 (TC)

TC02719

Appeal number: TC/2012/07592

VAT – DIY residential conversion – conversion of barn to house – planning permission limiting occupation of property to manager or proprietor of holiday accommodation business to be operated from adjacent barns (for which planning permission also obtained) – whether conversion work was carried out in course or furtherance of a business – no – whether the separate use, or disposal of the property was prohibited by the planning permission for the purposes of Note (2)(c) to Group 5, Schedule 8 VAT Act 1994 – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LESLEY SWAIN **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE KEVIN POOLE
NORAH CLARKE

Sitting in public in Plymouth on 11 April 2013

The Appellant appeared in person

Martin Priest, Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal concerns a claim under the DIY builders' scheme contained in section 35 Value Added Tax Act 1994 ("VATA94") for a refund of a little under £23,000 of VAT incurred in the conversion of a redundant agricultural barn into a dwelling.

2. HMRC give two reasons why the refund should not be allowed.

3. First they argue that, on the facts, the relevant work was carried out in the course or furtherance of a business, namely the creation of an integrated holiday accommodation complex with on-site residential accommodation for its manager or proprietor. They say the work is therefore disqualified from relief under section 35(1)(b) VATA94.

4. Second, they argue that the separate use, or disposal of the new home is prohibited by the term of the planning consent which permitted the conversion.

5. The planning consent in question contains a condition (set out in full at [12] below) which limits the occupation of the new home in a particular way. They say that the existence and terms of this condition mean that the new home does not satisfy one of the conditions required for the relief to apply, namely that contained in Note (2)(c) to Group 5, Schedule 8 VATA94 ("Note (2)(c)").

6. The questions before us therefore are whether:

   (1) the conversion was carried out in the course or furtherance of a business; or

   (2) the effect of the planning condition is to disqualify the conversion from relief under the DIY builders' scheme.

7. If the answer to either of these questions is yes, the appeal must fail.

8. The parties asked us to issue a decision on a preliminary issue, namely whether the conversion qualified in principle for relief. We were not asked at this stage to consider the detail of the claim which would, if our decision were favourable to the Appellant, be separately discussed and, if possible, agreed between the parties.

The facts

9. The appeal concerns a property at Trenant Barns, Pengover Green, Liskeard, Cornwall.

10. The Appellant bought the property in 2009, using her life savings and the sale proceeds from her previous home. She had seen the property (which, at the time, was a collection of derelict barns owned by the County Council) and fallen in love with it. She wanted to live there and agreed to buy it on condition that she could get planning permission to live in one of the barns.

11. She engaged an architect and he submitted a planning application on her behalf on 9 December 2009. There had been a previous planning permission which permitted the use of all the barns as holiday lets – i.e. with no full time residential element. He was able to obtain a planning permission which allowed instead for one of the barns (Barn D) to be used as residential accommodation – but subject to a particular condition (see below).

12. The formal planning consent was dated 28 January 2010, and contained the following condition ("Condition 10"):

> "10. The occupation of Barn D *[i.e. the building the subject of this appeal]* shall be limited to a manager or proprietor of the holiday accommodation business being operated from Barns A, B and C as shown on approved plan 10407/27, and any residential dependants.
>
> Reason: To ensure that this dwelling is kept available for meeting the need to accommodate a manager or proprietor of the business on a site where residential development would not normally be permitted in accordance with the aims and objectives of Policies HO7 and HO8 of the Caradon Local Plan First Alteration 2007."

13. The Appellant told us she only became aware of Condition 10 when the planning permission was received. She does not have the finance available to convert the remaining barns (which are still derelict) to holiday accommodation and her motive from the outset was mainly to live in Barn D. She does however hope to convert the other barns in the near future (though she has subsequently obtained a further planning consent to permit one of the other barns to be used as a standalone full-time residential dwelling – see below). Her evidence was unchallenged and we accept it.

14. The Appellant went ahead with the conversion work on Barn D, which was certified as complete by Cornwall Council for buildings regulations purposes on 9 February 2012. The Appellant submitted her claim to HMRC for a VAT refund on 17 February 2012. The other barns remain derelict.

15. HMRC rejected her claim (and that rejection was upheld on review). The Appellant appeals against that rejection.

16. In the course of considering the claim, HMRC wrote to Cornwall Council (the planning authority) on 22 February 2012. Having set out the relevant planning condition, they asked the following questions:

"1. Can Barn D be used as a dwelling by an individual with no connection at all to the holiday accommodation business or is it tied to the business? Yes or No.

2. Could the dependants live permanently in Barn D without the manager or proprietor living with them? Yes or No.

3. Would another planning application be required if the dependants lived in Barn D without the manager or proprietor living with them? Yes or No.

4. Would another planning application be required for Barn D to be used as a dwelling by an individual with no connection at all to the holiday accommodation? Yes or No. On what basis would such an application be considered?

5. Would the conversion to a dwelling of Barn D have been allowed if there was no holiday accommodation business?"

17. Cornwall Council replied on 24 February 2012, as follows:

"1. Condition 10 of the Planning Decision E2/09/01889/FUL restricts occupation of Barn D to a manager or proprietor of the holiday accommodation business. As such, Barn D cannot be occupied by anyone other than the manager/proprietor of the holiday business and their resident dependants.

2. Condition 10 restricts occupation to a manager or proprietor of the holiday accommodation and to any residential dependants of that manager/proprietor. If 'dependants' were living permanently without the manager/proprietor, they would not be classed as dependants and would not satisfy the requirements of the planning condition.

3. A planning application for a variation of Condition 10 would be required if dependants of the manager/proprietor wished to occupy the dwelling without the manager/proprietor. (Although in these circumstances they wouldn't be considered dependants).

4. A planning application for a variation of Condition 10 would be required if any person other than the manager/proprietor of the holiday business, together with their resident dependants wished to occupy the dwelling.

In terms of any such planning application, the Local Planning Authority would expect evidence to demonstrate that the holiday business is no longer viable and that manager's accommodation is no longer required. Relevant policies include Policy HO8 of the Caradon Local Plan First Alteration 2007, which aims to ensure the conversion of buildings within the open countryside for economic re-use is sequentially preferable to the conversion of buildings to unrestricted residential accommodation.

> 5. The conversion of Barn D to an unrestricted residential dwelling would only be supported by the Local Planning Authority if the applicant had provided compelling evidence to demonstrate every reasonable attempt has been made, but without success to secure a suitable re-use for economic development purposes (please see Policy HO8 of the Caradon Local Plan)."

18. On 2 July 2012, the Appellant applied for planning permission to convert one of the other barns ("Barn A") to a full-time residential dwelling (rather than holiday accommodation). This application was granted on 24 September 2012.

The law

19. There was agreement about the effect of most of the relevant legislation, which we do not therefore set out at length in this decision.

20. There were essentially two grounds on which Mr Priest argued. The first was that, under section 35(1)(b) VATA94, relief is only available for goods used for the purposes of work "carried out otherwise than in the course or furtherance of any business". He argued that the terms of the planning permission and the circumstances in which it was granted made it clear that the conversion work done to Barn D was done for the purposes of the Appellant's intended business.

21. His second argument was that the terms of the planning permission were such that the conversion of Barn D failed to meet the requirements for being a residential conversion. This, he argued, was because the separate use of Barn D was prohibited by Condition 10.

22. The relevant requirement is contained in Note (2)(c). Relief is only available where the work satisfies the definition of "residential conversion" set out in sub-section 35(1D) VATA94. One of the requirements of that sub-section is that the final building should be "a building designed as a dwelling or a number of dwellings". To meet that requirement, the dwelling (or, where a number of dwellings are concerned, each dwelling) must satisfy the four conditions set out in Note (2) to Group 5 of Schedule 8 VATA94. It is common ground that three of those four conditions are satisfied. The condition at issue in the present appeal is that contained in Note (2)(c):

> "(c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision;"

Submissions

First argument – course or furtherance of a business

23. In relation to his first argument, Mr Priest pointed to the fact that the Appellant had obtained a single planning consent for what should properly be seen as a single business project, namely the development of a holiday letting complex with on-site accommodation for a manager/proprietor and his/her dependants. He submitted that the purpose of converting Barn D to a dwelling was to ensure the

proper functioning of the overall business. There was in his submission a sufficient nexus between the costs of conversion of Barn D and the intended business activities in Barns A to C.

24. The Appellant (whose evidence was not challenged, and which we accept) said that the detailed terms of the planning consent had come as something of a surprise to her. Her main intention had been to live in Barn D and any intention to generate an income from the other parts of the property was quite vague. She did not currently have the funds to redevelop the other barns as holiday letting units, indeed she had subsequently obtained a planning consent to convert one of the other barns to a standalone dwelling without the "holiday letting" restriction.

25. The Appellant referred to the First-tier Tribunal case of *Wendels v HMRC* [2010] UKFTT 476 (TC). In that case, HMRC had put forward a similar argument in relation to the building of a house pursuant to a planning consent which limited occupation of the house to "a person solely or mainly employed or last employed in the cattery business occupying the plot edged blue on drawing no. C27-05-01-1…. or a widow or widower of such a person, or any resident dependent." The Tribunal found that the "real nature of the activity involved in the construction" was to provide a home for Mr & Mrs Wendels and it was not carried out in the course or furtherance of the cattery business. They pointed to a line of cases which supported the general proposition that construction or conversion of a dwelling for personal occupation was a non-business purpose, and followed that approach themselves.

Second argument – Note (2)(c) and Condition 10

26. Mr Priest said it was accepted that Condition 10 did not impose any prohibition on the separate disposal of Barn D. His submission was that it prohibited its separate use. He submitted that Note (2)(c) should be interpreted as meaning that the relevant condition was failed if either separate use or separate disposal was prohibited by the planning condition. He cited paragraph [17] of *Giblin v HMRC* [2007] VATD 20352 (agreeing with *Cartagena v HMRC* [2006] VATD 19454, paragraph [10]) in support of this submission. The Appellant did not argue to the contrary. We agree with Mr Priest on this point, indeed we regard it as uncontroversial following the decision of the Upper Tribunal in *HMRC v Lunn* [2009] UKUT 244 (TC).

27. So the question to be decided is whether "the separate use" of Barn D was "prohibited" by Condition 10.

28. Mr Priest started by submitting that Note (2)(c) should be construed broadly because it was a restriction on an exemption from VAT (and general principles required all exemptions from VAT to be "construed narrowly", therefore by implication requiring all restrictions on such exemptions to be construed broadly).

29. He then referred us to the underlying purpose of Note (2), which he described as being that "there should be no relief where there is a legal or physical connection between the dwelling in question and other buildings". He submitted this was a

different matter from whether there was a restriction on occupancy – so, for example, a condition which restricted occupation to persons falling within a particular class (such as agricultural or forestry workers) was not within Note (2) at all. In the present case, he said, Condition 10 established a legal connection between Barn D and the other barns that was fatal to the claim, rather than a mere occupancy restriction (which would not have been fatal).

30. He referred us to a number of earlier decisions of the Tribunal and its predecessor tribunal. In particular, he invited us to follow *Giblin, Cussins v HMRC* [2007] VTD 20541, *Sherratt & Sherratt v HMRC* [2011] UKFTT 320 (TC) and *Cartagena*, and to disregard *Phillips* and *Wendels*.

31. *Giblin* concerned the conversion of some farm buildings into a "granny annexe". The relevant planning was that the development:

> "shall not be used for any purposes other than as ancillary to the residential accommodation presently on the site as a single dwelling unit and not as a separate unit of residential accommodation in its own right."

32. The Tribunal held this was a clear prohibition on separate use of the granny annexe and the appeal was therefore dismissed.

33. *Cussins* concerned the conversion of some redundant farm buildings to a live/work unit. The relevant planning condition was as follows:

> "The residential accommodation hereby permitted shall only be occupied in conjunction with the commercial use hereby approved. Reason:- The site lies in an area where new residential development is restricted."

34. The Tribunal held this was also a clear prohibition on separate use of the residential part and the appeal was therefore dismissed.

35. *Sherratt* concerned the construction of a new farmhouse on a farm. The relevant planning conditions were as follows:

> "5. The occupation of the dwelling shall be limited to a person solely or mainly employed, or last employed, in the locality in agriculture, as defined in section 336(1) of the Town and Country Planning Act 1990, or in forestry, or a dependant of such person residing with him/her, or a widow or widower of such person.
>
> 10. The proposed development shall always remain ancillary to the existing agricultural use of the site and shall not be sold, leased nor otherwise disposed of separately from, the remainder of the premises."

36. The Tribunal held that condition 10 was a clear prohibition on separate disposal of the farmhouse and the appeal was therefore dismissed. The Tribunal

expressed no clear view on whether there was also a prohibition on separate use of the new farmhouse.

37. *Cartagena* concerned the conversion of a redundant barn in the grounds of a house to residential use. The relevant planning condition was as follows:

> "The change of use hereby approved shall not be used except for providing ancillary accommodation in association with the main use of Rose Bank Farm as a dwellinghouse."

38. The Tribunal held this was a prohibition on separate use of the new house and the appeal was therefore dismissed.

39. Mr Priest submitted that the decisions in *Phillips v HMRC* [2011] UKFTT 372 (TC) and *Wendels v HMRC* [2010] UKFTT 476 (TC) (both considered in more detail at [59] to [62] below) were wrong insofar as they dealt with the interpretation of Note (2)(c), and the views expressed in the other cases were to be preferred. Though he was not specific on the point, this appears to have been on the basis that *Phillips* and *Wendels* interpreted the relevant conditions, wrongly in his view, as mere "occupancy" conditions which imposed no prohibitions on the separate use of the relevant buildings. The actual conditions in *Phillips* and *Wendels* are set out at [59] and [61] below respectively.

40. The Appellant argued that her situation was effectively the same as in *Phillips* and *Wendels* and she should therefore benefit from the same outcome. The restriction in her case was, she argued, a restriction on occupation (as in those cases) and not a prohibition on separate use.

41. She also pointed out that she had subsequently obtained a planning permission to change the use of Barn A from holiday accommodation to full time residential use. This, she said, illustrated how arbitrary the planning permission situation was, and pointed to the fact that it could be changed again in the future. She invited the Tribunal to draw a number of conclusions about how the situation "on the ground" could change again in the future, with the consequence that the existing planning conditions would be rendered invalid or would have to be removed altogether or substantially changed.

Discussion and conclusions

First argument – course or furtherance of a business

42. It was clear to us that the Appellant has only ever had at most a very vague and generalised intention to run a holiday lettings business at the property. Her motive in carrying out the conversion work on Barn D was simply to provide herself with a home.

43. No business existed at the time the work was carried out, nor does one exist now. In the absence of any business or reasonably clear plan to start one, we cannot see how the work could be said to have been carried out in the course or furtherance

of such a business. Clearly it could only be "in the course" of a business if a business existed at the time (which it did not); and in our view the possibility of starting such a business at some point in the future was far too vague for it to be properly said that the work could have been carried out "in furtherance" of the business. The Appellant's motive in carrying out the work was simply to provide herself with a home.

44. In this respect her position differs materially from that of the appellant in *Flynn v CCE* [2000] VTD 19630, to which we were not referred by Mr Priest. In that case, the taxpayer constructed a house pursuant to a planning consent permitting a "dwelling house incorporating bed and breakfast facilities". He had effectively negotiated that condition in advance in order to obtain the consent at all. In the circumstances the Tribunal had no difficulty in finding there to be a business intention to the construction work. This case is very different.

45. The fact that Condition 10 effectively requires the Appellant to start a holiday letting business on the other parts of the property (if she wishes to continue to use Barn D as her dwelling) does not affect our conclusion. The Appellant may well have been guilty of burying her head in the sand on this issue, but enforcement action by the local planning authority is clearly a discretionary matter and from the residential planning permission subsequently obtained for Barn A it is clear that there is a degree of flexibility over the enforcement of the existing conditions. If faced with enforcement action and a refusal by the planning authority to amend Condition 10, the Appellant will no doubt either have to comply with it or sell the property to a buyer who is prepared to do so. But this does not in our view affect the fact that, at the time the work was carried out and completed, the Appellant's motive was to provide herself with a home.

46. We therefore find that when she carried out the conversion work, she did so "otherwise than in the course or furtherance of any business" within the meaning of section 35(1)(b) VATA94.

Second argument - Note (2)(c) and Condition 10

47. The question we have to decide is whether the separate use of Barn D was, at the relevant time or times, prohibited by Condition 10.

48. We take the relevant time or times for this purpose to be no later than completion of the conversion of Barn D in February 2012. We therefore disregard the subsequent planning permission in relation to Barn A for the purposes of this decision. We similarly discount as irrelevant all speculation about how the planning permission situation might change in the future. The Appellant seems to hold the view that if events occur at the property that are inconsistent with the planning permission, then the planning permission will have to change. She is clearly wrong in this and it is to be hoped she is not relying on this misconception to persuade herself that she can safely ignore Condition 10 as it stands.

49. We do not find helpful the correspondence between HMRC and the local planning authority. We consider the interpretation of the planning condition and its effect is a matter for the Tribunal and expressions of opinion on the matter by the planning authority at the request of HMRC are not relevant for this purpose.

50. Neither party referred us to the Upper Tribunal decision in *Lunn*. We find that decision quite difficult in some respects, but it is the only case in which Note (2)(c) has received attention from the higher courts, so it deserves consideration. It should be borne in mind, however, that the facts were very different from the present case.

51. *Lunn* involved a residential conversion of some old buildings into a residential building in the grounds of a listed manor house. The issue was whether Note (2)(c) applied to prevent zero-rating of the conversion work, given the terms of the relevant planning permission:

> "The development hereby permitted shall only be used for purposes either incidental or ancillary to the residential use of the property known as Radbrook Manor and shall not be used for commercial purposes."

52. The question was whether this planning condition "prohibited" the "separate use" of the new building.

53. The Upper Tribunal considered two conflicting possible meanings of the "separate use" element of Note (2)(c), which it called the "separate household" and "separate from" meanings.

54. The "separate household" meaning contended for by the taxpayer was "distinct use or use as a separate household" and on this interpretation, his counsel contended, the most that the relevant planning condition did was to impose a <u>restriction</u> and not a <u>prohibition</u> on the type of use.

55. The "separate from" meaning contended for by HMRC was simply "use that is separate from that of the main building", in which case the Upper Tribunal said that "it follows that a use which must be incidental or ancillary to the use of the main building cannot be a separate use".

56. The Upper Tribunal held that the "separate from" meaning was the correct one. It also said that "a restriction to purposes incidental or ancillary to that of the main dwelling is necessarily a prohibition on use separate from the main dwelling." As a result, it went on to hold that "the planning restriction in this case means that the Building cannot be used separately from that of (sic) Radbrook Manor. Note (2)(c) is not satisfied".

57. The question that did not arise in *Lunn*, but which arises centrally in the present case, is whether a restriction on the persons permitted to occupy a property, imposed by reference to their involvement in a particular business run from an adjacent property, should also be treated as a prohibition on the "separate use" of the first property. Thus *Lunn* is of limited assistance.

58. The Tribunals in both *Phillips* and *Wendels* however referred to the decision in *Lunn*. These were the two cases primarily relied on by the Appellant.

59. In *Phillips*, the appeal concerned a newly-built house for the son and daughter-in-law of a couple who owned and ran a holiday chalet business in Scotland. The local planning authority imposed a planning condition in the following terms:

> "That the house …… shall be occupied only by persons engaged in the management or operation of the business trading as Wester Brae Highland Lodges, together with family members."

60. The Tribunal in *Phillips* distinguished the condition from that in *Lunn* (and the other cases referred to in it) on the following basis at [43] and [50]:

> "The circumstances of *HMRC v Lunn* and each of the cases referred to, all contain a direction for the use of the particular property in relation to the adjoining subjects. This is in contrast to the present case where the Agreement contains an occupancy restriction on the proprietor…
>
> *[The text of the Planning Agreement with the local authority and of the subsequent planning condition – as above – were then set out. The Planning Agreement was in slightly different form to the eventual planning condition as it also included an extra obligation on "the Proprietor" to "ensure that the house is occupied" only by the persons stated.]*
>
> The essential element in each case is that there is a positive obligation on one or more of the occupants of the house to be engaged to a greater or lesser extent in the management of Wester Brae Highland Lodges. There is no obligation which requires the *house* to be used in the management of the same
>
> ….
>
> [50] In the opinion of the Tribunal, the restriction relating to Ardachy was an occupational restriction which did not affect the *use* of the property; and it is in this context that the Tribunal finds the provisions of Note (2)(c) do not take Mr Phillips' claim outwith the Scheme."

61. In *Wendels*, the appeal concerned the building of a new dwelling adjacent to the taxpayer's husband's cattery business. The following condition was included in the planning permission:

> "The occupation of the dwelling hereby permitted shall be limited to a person solely or mainly employed or last employed in the cattery business occupying the plot edged blue on drawing no……, or a widow or widower of such a person, or any resident dependent".

62. The Tribunal in *Wendels* distinguished that condition from *Lunn* in the following way (at [46]):

> "It is clear from the wording of the *Lunn* condition that the use of the disputed development was subservient and connected with the residential use of the larger development known as Radbrook Manor. In contrast the condition imposed on *Benaiah* did not link its use or its disposal with the cattery business. The condition imposed related to the category of persons occupying the property, and in no way restricted its separate use or disposal as a dwelling house."

63. Since the hearing of the appeal, it has come to our attention that another appeal on a very similar point has been considered by the Tribunal. This is the appeal in *Burton v HMRC* [2013] UKFTT 104 (TC).

64. *Burton* was concerned with the erection of a residential dwelling to provide a home for the owner of a fishery business operating from a fishing lake at the relevant site. The following condition was included in the planning permission for the building:

> "The occupation of the dwelling shall be limited to a person solely or mainly employed or last employed in Park Hall Lake Fishery or a widow or widower of such a person, or any resident dependents."

65. The Tribunal held that this condition did not disqualify the building from relief under Note (2)(c). The relevant part of its decision was as follows:

> "12. We consider that "prohibited" is a strong word. It is not sufficient for HMRC to show that there are restrictions that may have an adverse effect (even a serious one) on the value of the property, nor that separate use or disposal of the Building was *de facto* difficult or even unlikely – Note 2(c) expressly requires a *prohibition*. We have considered the views put forward by HMRC in their publications – cited at para 7(6) above – but we conclude that those do not give sufficient weight to the word "prohibited". The Condition limits the occupation of the Building to present or past employees of the fishery business (and their dependents). Had the planning inspector granting the Planning Permission intended to prohibit the separate use or disposal of the Building then such a condition would have been imposed; instead, the Condition is a limitation on occupancy which does not constitute a prohibition on the separate use or disposal of the Building.
>
> 13. Accordingly, we conclude that Note 2(c) does not prevent the Building from constituting a dwelling for the purposes of s 35."

66. It can readily be seen that in the "unsuccessful appeals", the relevant conditions all imposed restrictions which were expressed in one way or another to apply directly to the properties in question, whereas in the "successful appeals" the restrictions were expressed to apply to limit the persons who could occupy the properties in question. The Tribunals in *Phillips*, *Wendels* and *Burton* clearly felt this was a crucial distinction.

67. With respect, we do not feel able to agree with them. Section 75 Town & Country Planning Act 1990 ("TCPA 1990") makes it clear that planning permission

enures for the benefit of the land and all persons interested in it. Any conditions included in a planning permission under section 70 TCPA 1990 therefore apply in the same way. Effectively, the planning permission and all conditions associated with it bind the land directly. Any failure to comply with a condition when carrying out any development (which includes "change of use" – see section 55 TCPA 1990) leads potentially to the full range of enforcement action available under the Town and Country Planning Acts for breach of the relevant permission, just as much as it would if development were carried out without any permission at all. This is the case whatever the terms of the particular permission and associated conditions (as long as they are legally valid). It must therefore be the case that any development carried out in breach of planning permission (and any non-compliance with a condition contained in a planning permission) are to be regarded as "prohibited" under planning law.

68. In a situation where a planning condition limits residential occupation of a property to persons having a particular occupation (e.g. agriculture), the condition certainly therefore has the effect of "prohibiting" any non-qualifying person from occupying the property as his/her residence. It follows that such a condition "prohibits the use" of the property in a certain way.

69. But it is clear (and HMRC explicitly accept) that such a prohibition does not fall foul of Note (2)(c). This is because Note (2)(c) only applies where the prohibition is on "separate use", in the sense explained by the Upper Tribunal in *Lunn*, and not where the prohibition is on "use" more generally.

70. Which side of this line does Condition 10 fall? If *Phillips*, *Wendels* and *Burton* are correct, it might be characterised as a mere occupancy condition which does not prohibit the "separate use" of Barn D (though it admittedly imposes some restriction on its use by limiting the persons who may occupy it).

71. However we take a different view. The clear effect of Condition 10 is to prohibit anyone from occupying Barn D who is not "a manager or proprietor of the holiday accommodation business being operated from Barns A, B and C...., or any residential dependants". To comply with Condition 10, either such a person must occupy Barn D, or it must be unoccupied. If it is unoccupied, it is not being used at all. If it is occupied, it must be occupied only by appropriately "qualified" persons. The lawful use of Barn D is therefore circumscribed by reference to a relationship between its occupier(s) and a business being operated out of neighbouring premises. In that situation, we cannot see how it could properly be argued that there is no prohibition on the separate use of Barn D imposed by Condition 10; it cannot lawfully be used except by an occupier who fulfils the requirements of Condition 10 and who must therefore own or manage the neighbouring holiday letting development (or be a residential dependant of such owner or manager). Any use "separate from" that neighbouring development is therefore, in our view, prohibited by Condition 10.

72. We consider that in *Phillips*, *Wendels* and *Burton* the Tribunal took an unduly narrow view. By simply focusing on the fact that the restrictions in question were expressed in terms of the occupation of the properties, we consider they disregarded

the full effect of those restrictions which, in our view, was to prohibit the separate use of the property in each case.

Conclusion

73. We do not consider that the conversion of Barn D was undertaken by the Appellant in the course or furtherance of a business (see [46]).

74. We do however consider that the separate use of Barn D was at all material times prohibited by the terms of Condition 10 (see [71]).

75. It follows that the appeal must be dismissed.

76. We understand that HMRC have been given permission to appeal the decision in *Burton*. It is to be hoped that the Upper Tribunal will take this opportunity to bring some clarity and certainty to the law in this area. In the circumstances, we consider it appropriate to extend the time limit for the Appellant to appeal our decision until 56 days after the release of the decision of the Upper Tribunal in *Burton.* We so direct.

77. If HMRC do not in fact submit an appeal in *Burton*, or if any appeal is concluded without the need for the Upper Tribunal to issue a decision, then we direct that HMRC should notify the Appellant of that fact and she shall have until 56 days after the date on which such notification is sent to her to lodge any application for permission to appeal with the Tribunal.

78. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application would normally have to be received by this Tribunal not later than 56 days after this decision is sent to that party, but that time limit has been extended by the Directions in [76] and [77] above. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 20 May 2013