TC03700

Appeal number: TC/2010/03120

VAT – preliminary hearing – claim to recover VAT incurred in period 1973-1997 on white goods and carpets installed in new build homes – meaning of 'incorporates' in Builders' Block – Claim Items all incorporated if part of zero rated supply – whether Claim Items 'ordinarily' installed at relevant date – no – whether extensions to Builders' Block lawful – whether Builders' Block lawful – effect on claim – parties to agree outstanding issue or revert to tribunal for determination

FIRST-TIER TRIBUNAL
TAX CHAMBER

TAYLOR WIMPEY plc **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square and the Rolls Building, London on 26 - 29 November and 2 – 4 December 2013

Mr J Peacock QC and Mr J Rivett, Counsel, instructed by PricewaterhouseCoopers Legal LLP for the Appellant

Mr A Macnab, Counsel, and Mr E West, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION on PRELIMINARY ISSUE

Background

1. On 26 February 2010 HMRC issued a decision to the appellant refusing its claim ('the Claim') made on 30 March 2009 for input tax of £33,850,109.64 (later increased to £60,808,411.37). The precise quantum of the Claim is irrelevant to my decision as the parties are agreed that I am to determine the Claim in principle and leave it to the parties to agree quantum if necessary.

2. The Claim is for input tax on certain items installed in newly built homes by companies now in the appellant's VAT group ('the Claimant Companies') in the period between the introduction of VAT on 1 April 1973 and 30 April 1997, which was the last date on which both the parties were agreed that the so-called three year cap on claims does not apply.

3. The appellant has also made a claim on the same basis for the period 1997 to 2007, in respect of which it is HMRC's position that the 3 year cap does apply, but those appeals were not part of this hearing. I also note that there are some other legal issues between the parties in respect of the claim 1973-1997. These cover matters such as whether the increase in quantum to £60million was an extension of an existing in-time claim or a new, out of time, claim; and, if the claim is good, whether the appellant as current but not historic VAT group representative member is the right person to claim it. I am not asked to determine any of these issues any more than I am asked to determine quantum. I am merely asked to decide the principle legal issue.

4. The Claimant Companies are all now members of the appellant's VAT group but many were not members of the group for all or part of the period covered by the Claim. When considering the facts, it is useful to consider the Claimant Companies individually. They are:

- Taylor Wimpey plc (formerly known as Taylor Woodrow Plc and before that Taylor Woodrow Ltd);
- Taylor Wimpey Holdings Ltd (formerly known as Taylor Woodrow Holdings Ltd, Bryant Holdings Ltd, Taywood Homes Limited and Taylor Woodrow Homes Ltd);
- George Wimpey Ltd (formally called George Wimpey plc);
- Wilson Connolly Ltd (formally called Wilcon Homes Ltd and Wilcon Construction Ltd);
- Bryant Homes Ltd (formerly known as Bryant Residential Developments Ltd and Bryant Homes Plc);
- McLean Homes Ltd (formerly known as John McLean & Sons Ltd);
- Admiral Homes Ltd;
- Laing Homes Ltd; and
- Wainhomes Ltd (formerly known as Wain Group plc, Whelmar Group plc and Cleveraim Ltd).

5. The items in respect of which the Claim was made were:

ovens	Low
surface hobs	specification
extractor hoods	appliances
microwave ovens	
washing machines	
dishwashers	High
washer dryers	specification
tumble dryers	appliances
refrigerators	
freezers	
fridge/freezers	
carpets and carpeting materials	

6. The Claim was made only in so far as these items were installed (to use a neutral term) in the new houses. I will refer to them, as the parties did, as the Claim Items.

7. In brief, but without prejudice to the complexity of the appellant's case, the appellant's position is that under the applicable law at the time the Claimant Companies were entitled to recover the VAT they paid on the Claim Items. In particular, it is the appellant's position that the 'Builders' Block' (originally introduced by Article 3 of the Input Tax (Exceptions) no 1 Order 1972 (SI 1165)('the 1972 Order') did not prevent the Claimant Companies recovering VAT on the Claim Items and that, under normal principles, the VAT was recoverable as it was attributable to a zero rated supply (the sale of the new houses). Their alternative case was that, if the Builders' Block in its amended forms of 1984 and 1987 did apply to block input tax, then it was unlawful under EU law and must be disapplied. Whether any of this is correct as a matter of law is the preliminary issue which I am to determine.

The facts

The agreed position

8. Before the hearing the parties attempted to agree the quantum of the claim if the appellant succeeded on the preliminary and other legal issues. They were able to agree that the appellant had proved that in 1973-1997 it had incurred (approximately) £30,000,000 in input tax on Claim Items which had been blocked from recovery. That left about half of the Claim in dispute and, as it was in dispute, and I was not asked to determine it, I do not refer to it again.

9. What I do refer to is what HMRC agreed was proved.

10. Firstly, they agreed how many completed houses some of the Claimant Companies sold in the period 1980-1997. In very rough terms, Wimpey completed about 10,000 homes per year in the 80s, although the figure was lower in the 90s (see §10). McLean was producing getting on for 5,000 per year in the early 80s, and was

up to 10,000 per year by 1986, but this also fell and was down to about 5,000 per year by 1996. Wilcon was producing around 2,000-3,000 per year in the 80s and was approaching 5,000 per year by 1993. The other Claimant Companies' production was smaller: Bryant produced less than 1,000 per year up to abut 1985 and then increased production up to about 3,000 per year by 1993. Laing was similar: it was up to 1,000 per year by 1982 and thereafter hovered around 2,000-3,000 per year. Taywood and Wain both produced less than 1,000 per year. Admiral was not operational in the 1980s and for the first six years of the 90s produced roughly 500 houses per year.

11. On the basis of the evidence I find that the UK's housing market saw some 150,000-200,000 new houses built each year. On the above figures, I find that Wimpey's share of this was 5-10%; the Claimant Companies' shares of the market in total was (very roughly) about 16%.

12. Then the parties largely agreed, in respect of George Wimpey and McLean, and on a year by year basis, what percentage of those completed houses contained:

(a) low specification appliances;

(b) some high specification appliances; and

(c) carpets.

The parties defined low specification appliances as a package containing an oven, hob and hood. High specification appliances were defined as a package containing some or all or the appliances listed under that heading at §5 above

13. They were unable to agree the percentage of McLean homes which contained low specification appliances in the period 1981-1995. Otherwise the figures were agreed, including in some cases that the percentage was 0%. I summarise the agreement as follows:

14. From and including 1973-1979 for both Wimpey and McLean the figure was 0% for all appliances and carpets. The agreed figure for all appliances and carpets was 0% for McLean in 1997 and following as the company had then ceased to operate.

15. For 1980, the figure was 10% for George Wimpey for items (a), (b) and (c). For the same year, the figure for McLean was 10% for low specification and 3% for high specification and 0% for carpets.

16. Thereafter, the figures for both companies were very different. For George Wimpey, the years of 1981 and 1982 saw significant and increasing percentages of installed items: 38.33% across the board in 1981 and 66.67% in 1982.

17. In 1983, the position for George Wimpey largely stabilised. From that point onwards the percentage of new homes with low specification appliances installed was never less than 95% and by 1997 was up to 98%. The percentage of homes with high specification appliances was similar but not quite as high or as consistent. It was up at 95% for the first three years from 1983, dropping to the 80-90% in the late 80s and early 90s, and down to 79.65% from 1993-1997. George Wimpey's position on

carpets was identical to that for high specification appliances from 1983-1992, but then showed a greater drop as it was down to 60% in 1993-1997.

18. As I have said the position for McLean from 1981-1995 was unagreed on low specification appliances. For 1996 it was 98%. For high specification appliances the agreed figure showed a steady increase over the years, (as I have said) 3% in 1980, then up to just over 10% by 1985, just over 20% by 1991 and up to just under 30% when it ceased to trade in 1997. For carpets the agreed figure was 0% throughout the whole period.

19. The agreed position on George Wimpey gave rise to an agreed quantum of just under £28 million and the agreed position on McLean (high specification and carpets) gave rise to an agreed quantum of just under £2.25 million. The two figures combined gave the agreed quantum of approximately £30 million mentioned at §8 above.

20. It was (in effect) agreed between the parties that the Claimant Companies had all already recovered VAT incurred on split level ovens and hobs from August 1975 to 31 August 1984 and on cooker hoods from 21 July 1994. This affects the quantum of the claim because these items are excluded from the quantum to prevent double counting. It also affects a point of principle and I refer to it again at §§425-6.

The unagreed claim

21. For all the other Claimant Companies (and for the unagreed part of McLean's claim), the appellant put forward proposed percentages. These had not been agreed with HMRC. However, on the reasonable assumption that the true amount would not prove to be higher (although it might be lower) than the appellant's claim, it is worth noting that the appellant claimed McLean installed high specification appliances in 10% of its properties by 1985; Bryant in 20-25% by 83/84; Laing, Taylor Woodrow, Wain, and Wilcon in under 10%. For carpets, the appellant claimed McLean and Wilcon installed them in 0% of their properties in 1986/87, Bryant in 30-40%; Laing, Taylor Woodrow, and Wain in 14%. It did not claim that they were installed as standard.

22. It was agreed that low specification appliances were installed by George Wimpey in virtually all of its homes in the 1980s but Wimpey at best represented only 10% of the market. The appellant claimed that Bryant, in addition, installed low specification goods in virtually all of its houses, but Bryant had a much smaller market share than Wimpey (see §10). Before the hearing it also claimed McLean, Laing, and Taylor Woodrow installed low specification items in over half of its homes and Wain and Wilcon in 30-40% of new homes. After hearing the evidence at the hearing, the appellant's revised position was that low specification appliances were installed as standard from the 1980s.

23. The claim before the hearing for the installation of high specification appliances and carpets in the 1990s was (very roughly) increasing from 20% in 1990 to 50% at

1993 (and thereafter). After hearing the evidence, the appellant's revised position was that high specification items and carpets were installed as standard in the 1990s.

24. I make findings of fact on these matters at §§149-162.

The law on burden of proof

25. The appellant did not dispute that it had the burden of proving its case. This is well established. See for instance *Tynewydd Labour Working Men's Club and Institute Ltd* [1979] STC 570 where Forbes J stated that (page 581b):

> "…..But that the onus of adducing evidence and satisfying the tribunal that the assessment is wrong lies on the appellant under [what is now s 83 VATA] I have not any doubt at all."

In the later case of *Grunwick Processing Laboratories Ltd* the Court of Appeal said

> "…At no time do the commissioners have any burden to prove anything before the tribunal. Neither its case nor any aspect of the matter, factually or evidentially, carries any burden imposed on the commissioners. It is throughout, in my judgment, up to the taxpayer company, if it can, to attack the assessment in whole or in part…."

26. Mr Peacock's position was, nevertheless, that the appellant had discharged the burden of proof by raising a prima facie case that:

- The low and high specification appliances and carpets were not incorporated;
- and, in any event, low specification appliances were ordinarily installed as fixtures from 1980 and high specification and carpets from 1990 onwards.

Having raised a prima facie case, Mr Peacock said it was for HMRC to disprove it. He relied on *Wood v Holden* [2006] STC 443. What Chadwick LJ said at page 641-3 of that case certainly supports the well understood rule that a party with the burden of proof can nevertheless provide sufficient evidence to discharge that burden so that the other party then has the evidential burden of disproving the evidence produced. I did not understand Mr Macnab to dispute that as a general principle: he did not accept that in this appeal the appellant had raised a prima facie case.

27. I consider the evidence and conclude at §§142-177 to what extent the appellant has proved its case.

28. What I understand Mr Peacock really to be saying was that the case largely turns on what happened in the 1980s and the appellant has found it very difficult to provide documentary evidence from the 1980s to supports its case. Mr Peacock considers that that should not be held against his client, while Mr Macnab does criticise the appellant's lack of documents to support its case.

29. To a limited extent I agree with Mr Peacock. If the witnesses were giving evidence about what they say happened within the last five years, then the lack of documents would be sufficiently surprising to give real doubts about the credibility of their evidence. However, the witnesses were giving evidence about what happened 30 years ago and the lack of documents is not surprising. Indeed, one of the witnesses (Mr Philips) was able to produce a schedule which listed when the documents relating to a particular development had been destroyed and all the dates for destruction for paperwork relating to developments in the 1980s were earlier than the date on which the appellant lodged its claim in 2009.

30. But while I agree with Mr Peacock that nothing should be read into the lack of documents so far as the witnesses' general honesty is concerned, I do not agree that I should accept without question the oral evidence of his witnesses. I have to take account that, after this length of time, recollections may be honest but less than perfect. And indeed what documents I have do indicate that in some instances recollections were less than perfect.

31. I also note that Mr Peacock seems to suggest I should not hold the lack of documents against the appellant because HMRC were (he said) to blame for the appellant making its claim 30 years late. I find that a rather surprising submission: while HMRC failed (despite a number of attempts to change the law) to prevent back claims from 1973 being made up until 2009, I see no reason why the appellant did not make its claim for VAT on the Claim Items at the time it was incurred other than, at the time, it did not believe it had a valid claim. All that has happened is that the appellant has changed its view of the law and now considers it has a valid claim. HMRC is not to blame for that.

32. I agree with what the Tribunal said in *WMG Acquisitions Co UK Ltd* [2013] UKFTT 215 (TC):

> "the burden of proving that the two companies have not recovered the input tax on employee's travel and subsistence expenses falls on the taxpayer in appeals such as the present one. And whilst only the civil standard of proof is involved, the tribunal cannot be expected to make decisions simply on the basis that a claim covers a period long ago for which a taxpayer cannot be expected to hold any records, so that its claims should be accepted without question and without evidence…."

33. It is open to me to say that the evidence is simply insufficient for me to be satisfied of what was 'ordinarily' installed and I do reach this conclusion to some extent as explained below.

34. The burden of proof is on the appellant. If they provide sufficient compelling evidence to satisfy me of their case or any aspect for it, their case will be proved to that extent unless HMRC can successfully attack that evidence. However, if they do not provide sufficient compelling evidence then they do not discharge the burden of proof and that aspect of their case fails without HMRC doing anything to disprove it.

The facts –the evidence

The adverts

35. Most of the documentary evidence in front of the Tribunal comprised adverts for new build homes. How reliable are the adverts as evidence of what was sold? Firstly, while I had a large number of adverts to look at, in reality it must have been only a small sample of what was actually sold bearing in mind the new house market in the UK was up to 200,000 houses per year. And of course, some adverts related to the same development but were simply in a different newspaper or from a few months later. When looking at the adverts, I discounted the duplicates.

36. Mr Southcombe (a witness) said, and I agree, that if an advert said a house included an item, then the item would be included in the sale of the house. Mr Macnab was not inclined to accept this. No sales particulars were produced but it seems to me to be more likely than not that, on the assumption that any house builder would wish to keep a good reputation and sell its houses, that it would include in the sale all that its advert said it would include. If the advert said carpets were included, I take it to be considerably more likely than not that carpets were indeed included in the sale.

37. However, the much more difficult question is what I should infer (if anything) if the advert did not specifically mention an item.

38. All the witnesses were consistent that low specification items are more basic than high specification items and this is logical. A cooker is more essential than a dishwasher. Therefore, if an advert mentioned high specification items being included, I infer that low specification items were also included even if the advert did not specifically mention them. On the other hand, if the advert mentioned low specification items but not high specification items, I infer high specification items were not included. Why only mention the cooker if a dishwasher was also included?

39. Mr Philips (a witness) suggested that some of the adverts could be wrong: the advertisers perhaps forgot to include items they should have included. This was a matter of opinion and not evidence and as I had no evidence that this actually happened, I find that the appellant has not proved this happened.

40. Some witnesses suggested that items included as standard by all builders would not be mentioned in the adverts. I am unable to agree that this is right. The evidence was that even in the 2000s, low specification items were still mentioned in some adverts even though they were by then likely to be included as standard (§§161-2).

41. Where the advert or brochure included a list of items, particularly where the items would appear not to involve the builder in much expense, such as offering a choice of colour, it seems right to infer that appliances and carpets were *not* included if not mentioned. This is logical: if offering free carpets and a choice of tile colour, why mention only the latter in the advert? I inferred, therefore, that if there was a list of items included in the house and carpets were not on it, then carpets were not included. What if there was a list of specifications but neither low and/or high

specification items were mentioned? Again, for the same reason, it seems to me that it was more likely than not that in such circumstances they were not included.

42. Mr Truscott's evidence was that he thought an advert which referred to a "fully fitted kitchen" meant it included at the very least low specification items. I am unable to agree. Many adverts referred to a fitted kitchen and then separately to appliances included in the kitchen. It seems to me that a fitted kitchen, while it could be used to describe a kitchen with integrated appliances, could also simply refer to the fitted kitchen units without any fitted appliances. I reject what Mr Truscott says on this as it was simply not consistent with the adverts in front of me. I note that Mr Southcombe agreed that there was a distinction between fitted kitchens and fitted appliances, although he appeared to think a "fitted kitchen" would be taken by the 1990s to include appliances and not just the sink and units. However, I am unable to agree on the basis of the evidence in front of me that people's expectations were higher in the 1990s than 1980s: some adverts in the 1990s continue to draw a distinction between fitted kitchens and fitted appliances and the evidence (see §60 and §73) was that after the housing crash of the late 80s builders on the whole offered less than before. My conclusion is that where the advert refers to "fitted kitchen" I do not find it right to infer from that by itself that low or high specification items were included.

43. What about the adverts which mentioned no specification at all? There were a great many adverts in this category: they might do little more than show a picture of a house and name its location, price and number of bedrooms. While the appellant has the burden of proof and was unable to prove *by relying on the advert* what the specification of the house was, it would be wrong to necessarily infer a nil specification. In other words, I discounted such adverts. They did not prove that any of the Claim Items were installed as standard but nor did they prove that they were not. The appellant was simply unable to rely on the advert to make out its case.

44. And in general I accept HMRC's point that the evidence was that house companies' policies varied region to region (eg see §93 and §107) and sometimes from development to development: while the advert ought to reflect what was installed as standard in the named development it could not be relied upon as an accurate guide to that company's policy on what was installed as standard in all developments and in all regions.

Reliability of witnesses' evidence

45. With the exception of Mr Bishop, who provided most of his own exhibits out of papers he had kept over the years, the adverts exhibited by the witnesses had been found for them by the appellant's legal team. The adverts were shown to the witnesses who had decided whether or not to exhibit them to their witness statement.

46. This raises the question whether the witnesses had any independent recollections of what happened 20-30 years ago at all. The witnesses denied that the adverts jogged their memories, in summary saying that the statements were largely drafted before they saw the adverts and the adverts were then incorporated into the draft statements.

47. I have no reason to doubt that this is what happened with Messrs. Truscott, Southcombe and Philips, and I note in any event that to some extent (eg see §99) that the adverts were not entirely consistent with their evidence (suggesting the adverts did not trigger the evidence). Nevertheless, while I accept that largely the adverts did not trigger what they said, it does not mean that I necessarily accept what they say as accurate as memories fade.

48. So far as Mr O'Sullivan was concerned, I do not know at what stage he was shown the adverts, and at least to some extent it seems possible his evidence was prompted by sight of adverts (see §84) which only contributes to my decision to place little weight on his evidence (see §92).

49. All of the witnesses were giving evidence about their recollections of what happened many years before, sometimes over thirty years ago. I have to consider whether their memories were as accurate as the witnesses considered them to be. In places, I have found that the recollections were not entirely accurate (see §§66, 75, 92, 116 & 121) and given the lapse of time this is not surprising. For instance, the agreed position (supported by the adverts) was that Wimpey installed carpets in some 95% of its new build homes by 1983, but Mr Southcombe's evidence was that carpets were not installed as standard by Wimpey until 1988.

Wimpey

50. There were two witnesses for Wimpey. In addition there was evidence in the form of accounts for years 1983 and 1995/1996. The accounts for the year ending in 1983 said

> "fully fitted modern kitchens, for example, were included in our prices….curtains and carpets, house contents insurance….are also available. Someone buying a £28,000 house, for example, can save around £600 on the retail price of carpets, curtains and kitchen appliances through the company's bulk purchasing power. But purchasers have the option to dispense with the whole or part of the package for a correspondingly discounted price although no less then 95% of them choose the package as against the basic home…"

51. The accounts for the year ended 1996 showed the company sold just over 5,000 houses in each of 1995 and 1996. The accounts referred to a choice of carpets being available but does not clearly state if they were available as standard or optional.

Mr Peter Truscott - Wimpey

52. Mr Truscott is currently divisional chairman for the southern region for the appellant. He joined Wimpey Homes (Holdings) Ltd in 1984, having previously been employed in a sales job unrelated to sales of new housing. I will refer to the company as Wimpey Homes. It was owned by George Wimpey plc.

53. He was taken on in 1984 as an assistant market researcher for West Sussex, Hampshire and Dorset and was in the land procurement team 1985-1993. His job was

to price houses to be sold by Wimpey Homes in order to inform the land procurement team. One of the ways he did this was constant monitoring of what the competition were selling and for how much. He said he often visited competitors' sites. He considered the competition to include Barrett, McLean, Bryant, Laing, Ideal, Westbury and Bovis. (Some of these companies are now Claimant Companies and no longer in competition with the appellant.) He needed to know what appliances Wimpey Homes and its competitors were installing in their new houses, as this affected price.

54. He worked for another much smaller house developer from 1993-1996 in the South doing a similar job. In 1996 he rejoined Wimpey Homes in more senior positions and worked in various offices in the South and Midlands.

55. His evidence was that in the 1980s Wimpey Homes' focus, all over the UK and not just in the South, was on one to three bedroom first time buyer homes. Its marketing strategy was to entice buyers by including as standard low specification items and some high specification items and carpets. This enticed buyers as it meant they could fund the purchase of the white goods on their 100% mortgage.

56. Even where goods offered as standard, the buyer could opt to pay more for better or more appliances, or pay a discounted price and get no appliances. Mr Truscott said about 90% of buyers went with the standard package and this is borne out by what Mr Southcombe said (§72), and is reflected in the accounts (see §§50-1) and I accept it. (Mr Truscott noted that Wimpey's adverts always showed the discounted price even while advertising the properties as including the standard package. This Tribunal is not here to determine whether the adverts were misleading and I say no more on this).

57. He recollected on his first day at work in 1984 seeing a show home with certain low and high specification appliances installed as standard. Mr Macnab suggested to him that after 30 years he could not possibly recall this amount of detail but Mr Truscott maintained that it was his first day at work, it really impressed him, and he remembers it clearly. I find the other evidence (Mr Southcombe's and the adverts) bears out that Wimpey was installing low and high specification items as standard at this time, and that his recollection is consistent with the agreed position, and so I have no reason to doubt the accuracy of Mr Truscott's memory on this and I accept it.

58. Mr Truscott said that competitors did not necessarily offer the same package. Indeed, his evidence was that offering these extras was a marketing strategy by Wimpey, although Wimpey also expected to make a profit on the items sold.

59. Advertisements which he exhibited to his statement show that from 1985-1997 Wimpey was installing low specification items as standard, high specification items as standard in 1985-88, although it was more variable thereafter. The position on carpets was the same. Mr Southcombe (see below) exhibited advertisements to his statement too. Again, all the houses advertised where some specification was given included low and high specification appliances and carpets. The agreed documents bundle included other Wimpey adverts not mentioned by either witness. Discarding

duplications, I find these show 1988-1991 that Wimpey always installed low and high specification appliances and carpets.

60. Mr Truscott's evidence was that in around 1992 in response to the recession since 1988 Wimpey Homes changed its strategy and only offered low specification goods as standard in order to make the homes cheaper. This was in line with what competitors were offering. Some wet appliances (washing machines and tumble dryers) may have been installed into flats if this was a building regulation requirement.

61. Wimpey acquired McLean in 1996 but McLean kept its name and marketing strategy, which was to build as cheaply as possible and install only low specification items.

62. Wimpey Homes' marketing strategy changed at that time (1996) to provide fully integrated kitchens. This meant that installed appliances (where appropriate) would be integrated into the fitted kitchen units (normally by having a matching door). Carpets were fitted.

63. In 2001 the two businesses were merged and Wimpey Homes adopted the McLean strategy of a minimum fit out (low specification only) with all other items available as optional extras. This policy continued to 2007. Mr Truscott exhibited some brochures to his statement which supported this evidence as I find they showed that in the 2000s Wimpey did not install carpets as standard. It only installed some high specification items in flats and not in houses; low specification items were (largely) installed as standard.

64. Mr Truscott estimated that from that date only at most 10% of Wimpey's projects might include some of the higher specification items as standard.

65. In conclusion, largely I accepted Mr Truscott's evidence (except to the extent it differed from the agreed position –see §§76-9) because, while recognising that at this distance in time a witness' recollection was likely to be unreliable particularly in tying events down to dates, nevertheless Mr Truscott's evidence was largely supported by the advertisements, the agreed position and the few other documents which were available.

66. To the extent that he dealt with Wimpey's competitors, I consider his evidence at this distance in time to be too vague to be relied on. For instance, his recollection was that in the 1980s Bryant and Barrett offered a similar package to Wimpey, but Laing only offered low specification items and a fridge as standard. His recollection may be correct for Bryant in the South of England: it is supported by Mr Phillip's evidence in respect of Bryant in the South (see §97) but it seems does not reflect the UK-wide picture for Bryant, which demonstrates yet again how unreliable (albeit unintentionally) some of this evidence is because not only are the witnesses speaking at a great distance in time but it is apparent that the different companies had different regional strategies at the same time and generalisations fail to reflect the reality. What

Mr Truscott said about Laing is not supported by the documentary evidence (see §122 below) either and I reject it as unreliable.

Mr M Southcombe- Wimpey

67. Mr Southcombe joined George Wimpey in 1971 and stayed with the group until he retired in 2009. For those 38 years he worked on private house construction and social housing projects. He started as a builder and moved on to positions as foreman and then construction manager from 1983 , almost entirely in London and the South

68. His evidence was that he would have known what kind of white goods Wimpey was installing into new homes, even though he was not really involved with marketing.

69. He said that in the 1970s Wimpey did not install appliances or carpets. He thought this was typical of builders at the time. This evidence is consistent with the position agreed with HMRC.

70. He said that in around 1982/83 Wimpey adopted a new marketing strategy which was to sell homes rather than houses, and it was exemplified by Wimpey's new advertising logo of a domestic cat. This meant, he said, that Wimpey installed as standard low specification appliances plus a fridge, including a washing machine, dishwasher and extractor fan from the mid-1980s and from mid-1988 or 1989 including carpets and curtains. The Northern arm of Wimpey was exempt from this policy until 1984. Larger houses would have even more as standard, such as microwaves. The exhibited adverts support his position (some even include a picture of the cat) and I accept his evidence on this. It is consistent with the agreed position (save in respect of carpets, where it was agreed and I find they were installed as standard from an earlier date- see §17).

71. He agreed that Wimpey increased the specification to get a competitive advantage.

72. Like Mr Truscott, he said that a purchaser could opt out of the high specification and carpets and curtains and get a lower price but that only about 5% did so. The witnesses' position on this is supported by the accounts (§§50-51) and the agreed position with HMRC and I accept it.

73. He agrees with Mr Truscott that when recession hit in 1988 Wimpey's response was to continue to offer the all inclusive package. But by the 1990s, he said Wimpey's standard had dropped and was only to install low specification and carpets, although some luxury sites had more as standard.

74. He considered Wimpey's main competitors to be Laing, Persimmon, Taylor Woodrow, Admiral, Bloor, Bryant, Costain and Barratt. He said Wimpey had to constantly monitor what the competition was doing. His view was that by the 1990s all house builders had standardised what they offered with each other but I do not accept that – see §161.

75. In so far as Mr Southcombe gave evidence on Wimpey's position it was largely consistent with Mr Truscott's evidence, the adverts and the agreed position and therefore I accept it. In so far as he gave evidence on Wimpey's competitors, I am more sceptical on how reliable it is as, what he said about McLean and Laing appeared to be based on single adverts, and I do not accept it as a reliable recollection of facts.

Conclusions on Wimpey

76. Mr Macnab's position was that the evidence on Wimpey was really irrelevant. There was an agreed position. Largely I would agree. The agreed position to a large extent corresponded with the evidence from the witnesses.

77. The main differences were Mr Southcombe's evidence that carpets were only standard from 1988 when under the agreed position they were standard from 1984. Mr Truscott's and Mr Southcombe's evidence was that the standard specification dropped down to only including low specification items from 1992 whereas the agreed position was that 80% of new homes still included high specification and 60% carpets up to 1997.

78. The oddity is that HMRC have agreed with the appellant a position that is more favourable to the appellant than supported by the appellant's own witnesses. Nevertheless, it is an agreed position and must be respected as such. I also note that the agreed position appears consistent with the accounts for 1983.

79. As will be apparent from the discussion of the law below, one of the crucial questions is whether high and low specification items were ordinarily installed by 1984 and carpets by 1987. As HMRC have effectively conceded the position on this with respect to George Wimpey, I find that all three types of items were installed as standard by George Wimpey by 1982/3 although not before that date. Whether they were ordinarily installed I consider below at §§371-385.

Mr M O'Sullivan - McLean

80. Mr O'Sullivan did not attend for cross examination as he was on a long cruise booked before this hearing was listed and, while the appellant's team had investigated whether he might give his evidence by video link, it had not proved to be possible. It was agreed that his evidence was not excluded but would carry less weight because Mr Macnab had been denied the opportunity to ask him the great many questions he had wished to put to him.

81. In any event, as I have said (§§14-5, 18) the position for McLean on high specification items and carpets was agreed from 1980 to when the company ceased independent trade in 1997. For high specification appliances the agreed figure showed a steady increase over the years, from 3% in 1980, then up to just over 10% by 1985, just over 20% by 1991 and up to just under 30% when it ceased to trade in 1997. For carpets the agreed figure was 0% throughout the whole period. Mr

O'Sullivan's evidence was therefore relevant to the unagreed position for McLean on low specification items.

82. Mr O'Sullivan started work as a quantity surveyor for a house builder in the midlands in 1973. He joined McLean in 1984 and stayed with companies within what became the Taylor Wimpey group until his retirement in 2006. While with McLean/Taylor Wimpey, he worked as a director with responsibility for many things including sales, and responsibility for McLean's business in areas all over the UK.

83. His recollection of the house building market in the 1970s was that the interior of properties were basic and no white goods were supplied. Kitchens did not contain integrated units and so builders would fit kitchens and leave spaces for buyers to install their own free-standing appliances. This is consistent with the agreed position. It is consistent with what few adverts for the 1970s were found.

84. He said in his witness statement that he thought that McLean occasionally installed low specification goods in houses in the 1970s but he did not think this was its normal policy. I discount this evidence that McLean occasionally installed low specification items in the 1970s because it appeared to be based on sight of an advert dating to the 70s which specified a "fitted …kitchen". As I have already said, (see §42) I do not accept that where advertisements referred to fitted kitchens that that would include fitted appliances, as it was clear many adverts made a distinction between fitted kitchens and fitted appliances.

85. Indeed, the evidence was that, in the 1980s, appliances were often still freestanding rather than integrated (see §§101, 123, & 177) so it seems to me that a reference to a fitted kitchen in the 1970s would most certainly not be taken to mean a reference to kitchen with integrated appliances, even if the phrase would be more ambiguous today when integrated appliances are far more common. For this reason, too, I do not consider that the two other 1970s McLean adverts to which I was referred, the specification both of which referred to fitted kitchens can be considered as any kind of proof that low or high specification appliances were included in the sale.

86. I was also referred by Mr Peacock to a McLean brochure from 1978 which showed a picture of kitchen with built in hob and oven, but there was no text to show what was included, and as other pictures in the same brochure showed furniture, carpets and furnishings, it seems more likely than not that the brochure was showing a house as it could look when occupied and was not making a representation of what was included in the sale of the freehold. I find this brochure of no use and it certainly does not support the contention that McLean sometimes supplied low specification items in the 1970s. In conclusion, I have no reliable evidence that McLean ever fitted appliances in their new houses in the 1970s.

87. Mr O'Sullivan's evidence was that in the early 80s McLean built 3-5 bed large homes and that by the 1980s consumers were starting to expect integrated kitchens. Not only were expectations increasing but it made financial sense to include appliances. His evidence was that purchasers wanted the white goods included in the

house price so they could put them on the mortgage. He said competitors had to follow suit and offer integrated kitchens.

88. He said by 1984 when he joined it was standard to install integrated kitchens including low specification items, plus a fridge (a high specification item) and in the larger properties other high specification items too. From 1986, he said even the 4 bed houses would have a washer-drier as well as a fridge as standard.

89. He indicated that McLean might have varying policies in different regions of the country but indicated that installation of low specification items was standard.

90. He said that in the 1980s McLean might install carpets in houses that were not selling well, thereby implying it was not their standard policy to install carpets. He exhibited documentary evidence which shows McLean arranging for some added extras to be supplied but it seemed to be a case that McLean had merely introduced their customer to a supplier who would supply them with carpets and a gas fire just after completion, and therefore this did not support the case that McLean itself supplied these items, let alone supplied them as standard. And as I have said the agreed position was that McLean never installed carpets.

91. Mr O'Sullivan exhibited a few adverts with his statement and more were included in the documents bundle. These show that some McLean houses had low specification items included. They do not support the contention that all McLean houses had low specification items included because some of the adverts do not make the position clear. The very small sample represented by the adverts (some 6 developments in the 1980s) indicates that only one development had had high specification items included and three had carpets included. It is true that there is a 1984 development with low and high specification items and carpets included as standard but this is a single development and can be compared to the advert for a 1988 development which did not appear to include carpets and high specification appliances and may not even have included low specification appliances.

92. I am unable to accept Mr O'Sullivan's evidence about what was standard in the 1980s and in particular what was standard from 1984 as reliable. He was not available to be cross examined, he was giving evidence about what happened 30 years ago, and what little documentary evidence there was and on which he appeared to rely, did not appear to me to support what he said in his witness statement. In other words, I do not find it proved that in the 1980s McLean installed low specification, high specification or carpets as standard. However, I do find that the evidence shows that in the 1980s McLean installed low specification appliances, high specification appliances and carpets in some houses, but the poor quality of the evidence was such that I am unable to be satisfied of what percentages.

93. The housing market recession in late 80s and early 90s created, Mr O'Sullivan said, greater regional variation, although he considered that McLean continued to always install low specification items. He exhibited two brochures to his statement for the 1990s which indicated McLean installed low specification items but not high specification items or carpets. Other 1990s McLean brochures were in the bundles

and I infer from them that high specification appliances and carpets were not included (they were not mentioned in the specification and indeed the specification was often "space" for washing machine or "plumbing" for washing machine making it clear that the purchaser had to provide their own appliance). Low specification items were not mentioned either. There were only about 3 adverts from the 1990s exhibited: two show low specification items were included and the other is unclear on the position.

94. He also included the only example of a contract for sale in the case. This was dated 1990 and related to a property in East Anglia. The vendor was Tarmac Homes Essex Ltd and the price was stated to include "carpets, curtains, ceiling light fittings, burglar alarm and landscaping" but I find that this tells me nothing. It was a sale of a single home out of thousands: it could have been a show home being sold with all the optional extras installed for advertising purposes. It may not have been a show home but the buyer could have opted to pay for added extras. It does not prove that any of the items were listed were installed into Tarmac homes in 1990 as standard, let alone into McLean homes.

95. I find, so far as the 1990s were concerned, Mr O'Sullivan's evidence was in any event that there was not really a standard position within McLean other than for low specification items. And so far as low specification items are concerned, there is very little documentary evidence, although on balance it indicates low specification items were included. I take account that live witnesses were of the view that a market standard was developing by the 1990s and that where I have evidence of what was standard in the 1990s, see §161, it was that low specification items were included. Therefore, while I do not place much weight on Mr O'Sullivan's witness statement, I accept that it is more likely than not that McLean installed low specification items as standard in the 1990s.

Mr N Phillips - Bryant

96. Mr Phillips, a civil engineer, started his career with a subsidiary of the Bryant Group plc in 1978. He started on the domestic side of construction in 1981.

97. He said when he joined in 1981, Bryant policy was to supply the same type and standard of homes all over the UK, albeit there was regional variation in that Bryant South supplied houses with low specification plus a fridge and in the Bryant in the Midlands merely supplied houses with low specification appliances. He said this policy remained unaltered during the property crash of the late 80s and early 90s.

98. Mr Philips was personally acquainted with a development in 1980 and these properties had integrated kitchens with low specification appliances plus a fridge and washing machine installed as standard. Carpets were an optional extra. He said that after 1981 it was standard specification for Bryant in the South to install low specification appliances plus a fridge and washing machine (and a dishwasher in 4-5 bed houses). He said this would be true of 80-90% of homes supplied by Bryant in the South.

99. However, I am unable to accept his recollections as entirely accurate. He referred to a site he worked on in the late 80s and said it included as standard high and low specification appliances. This he later agreed was not entirely accurate. Further, he gave evidence about a site of which he had personal experience where he said high and low specification appliances were supplied as standard. The 1988 advert for one of the house types at the site (a 3 bed house), however, mentioned only a fitted kitchen with oven and hob. His ultimate explanation was that the advert referred to the smallest house type at the site, and it would have been too small (so he said) for the high specification appliances but that nevertheless the larger house types would have had both high and low specification appliances as standard. In other words, he accepted that the advert did not refer to the high specification items because they were not included with that particular model. Overall, my conclusion is that after this length of time the witness' recollection is not perfect as he had forgotten until prompted by the advert that not all the houses on that site had high specification items.

100. Again, he recollected seeing a show home in the Midlands in 1983 and said he thought it included integrated appliances as standard. Yet an advert for that site shows only low specification appliances were installed as standard. On the basis of the advert I consider that his recollection was less than perfect; the showhouse may well have been fitted with high specification appliances but only as optional extras.

101. Mr Phillips exhibited a 1982 plan of a house showing the kitchen. His evidence was that this was a somewhat unusual house for Bryant. He also said that there would have been a kitchen layout plan showing more details but he has been unable to locate it. The black ink marks were Bryant's standard specification for that type of house; the red ink marks were amendments for a specific site. The black ink specification referred to oven housing but no oven, although the hood and hob were included. In red ink there was reference to a dishwasher and built under fridge. I find that this indicates that the high specification items were *not* included as standard for that house type on all sites although it shows that they were included as standard for that house type on that particular site.

102. Nevertheless, the adverts and brochures exhibited by Mr Phillips or contained in the agreed bundle, showed that in the 1980s (from at least 1983) Bryant always installed low specification appliances and often, although not invariably, installed high specification appliances.

103. Taking into account Mr Phillips' evidence, which was broadly supported by the documents albeit not in all details, Mr Truscott's evidence and the documentary evidence, I am satisfied that the appellants have proved that Bryant installed low specification items as standard in their homes from about 1981. I am not satisfied that Bryant installed high specification items as standard in the 1980s, although they installed them in some house types and in some areas.

104. I note in passing that the appellant's claim was only that 20-25% of Bryant's new homes had high specification items installed in 1983/84 and 33-38% had carpets in 86/87.

105. Mr Philips agreed that Bryant's decision to install appliances was a marketing tool designed to differentiate Bryant from its competitors. Bryant, he says, was one of the first companies to offer integrated kitchens (at least in 4-5 bed houses and some smaller houses within the M25).

106. Mr Philips said he did not know if carpets were offered as standard. The adverts indicate that (because carpets are never mentioned in the specification) they were never included. I find the appellant has not made out its case that Bryant installed carpets as standard at any time in the 1980s.

107. Mr Phillips said that in the 1990s Bryant in the South continued to offer low and high specification appliances as standard but in larger houses it increased the number of high specification appliances included beyond just a fridge and washing machine. He does not know the policy of Bryant in the Midlands at the same time.

108. His evidence was that the company's focus shifted in 1998 to increasing profits and decreasing specification. Bryant merged with Taylor Woodrow in 2001 and then adopted Taylor Woodrow's specification of installing as standard low and high specification appliances and carpets.

109. In so far as relevant, I accept his evidence for the 1990s. But it is limited as it relates only to Bryant in the South.

Mr L Bishop – Laing Homes

110. Mr Bishop is a Divisional Managing director of Taylor Wimpey and has worked for companies now within the Taylor Wimpey group for the last 25 years. However, he started his career in 1987 with Laing Homes Ltd where he was involved in the acquisition of land for building sites.

111. He gave evidence that in 1980s Laing targeted first time buyers and built standard houses and flats to appeal to them. Laing had 15 different house types each with a standard specification from which there was no deviation. Mr Bishop's evidence was that Laing fitted every house or flat with low specification items. He exhibited to his witness statement the inserts into brochures which he had kept from the late 1980s to early 1990s which indicated the house plan and a limited amount of detail about specification.

112. I find that these showed that carpets were not installed. High specification appliances were not installed either, other than in a few upstairs apartments where a washer/dryer was installed as standard. My finding is that most indicated that no low specification items were included, while a few had a hood installed (over a space for a cooker). I make this finding because the plans showed a sink but not a hob or cooker. Some of the plans clearly indicated that there was a space for a cooker implying no cooker was supplied. However, for a few of the bigger properties it appears a hob was included.

113. He says he bought a 'Cumberland' but he did not state when. The specification for this property appears to date from 1990. The specification indicates that none of three types of items were installed as standard but Mr Bishop's recollection was that his home came with an oven, hob and hood as standard.

114. He says his brother in law bought the 'Mayfair II' and he (ie the witness) can remember it came with oven, hob and hood. Nevertheless, the brochure insert refers to "space for fridge freezer and cooker" and the plan in the brochure shows a sink plus dotted line squares for utilities to be inserted.

115. Mr Bishop's evidence was that he knew that the specification for the houses on the first land he acquired on behalf of Laing included low specification items.

116. There was therefore a divergence between what Mr Bishop clearly remembered from various personal experiences and what his brochures showed from about the same time.

117. An internal Laing memo dated 1988 was also in evidence. It appeared to be a detailed specification for "collection two". The specification for the kitchen included built in kitchen units, worktop, sink, taps, a cooker hood and optional waste disposal unit. At the end it said "White goods – not available/supply at Laing homes area discretion"

118. Mr Bishop agreed that no white goods were specified in this document and agreed that the purpose of document was to cost the build. He said that nevertheless this 'standard' costing could be adjusted to include more items.

119. I consider that the document showed what was standard in 1988 even if after that date it was on a region by region basis adjusted to include more items. And it showed that in 1988 only the hood of the low specification items was standard although managers in different areas of the country had a discretion to include white goods if they chose.

120. Two further memos were in evidence. They dated to 1994. One was a standard specification for the East Anglia region and showed an oven, hob and hood were supplied as standard for flats, semis and terraces, but an oven, hob, hood and high specification items were supplied as standard for detached houses. A handwritten note on the memo queried whether this full specification on detached properties was necessary. The second memo showed that following a discussion, the specification was revised but no changes were made to the white goods supplied. Neither specification mentioned carpets and I find that carpets were not supplied as standard.

121. My conclusion is that Mr Bishop, who did not state the date on which he bought his Cumberland or his brother in law bought his Mayfair, must be remembering the situation after 1988 and what he remembers must reflect a local variation in the standard specification, as indicated in the 1988 memo.

122. His view was that the 1988 memo reflected the position which existed before 1988, but even if true, I find the evidence was such that it was impossible to identify

from when and to what extent there were local variations. The appellant has not made out its case that the standard specification before 1988 included even a hood. I find that the appellant has not made out its case that it ever installed low specification items before 1988 and it has only proved it installed a hood as standard from 1988.

123. Mr Bishop's evidence was that where Laing supplied an oven prior to the early 1990s, it would have been a free standing oven and not a built in oven and hob.

124. He says in around 1990 Laing rebranded itself, moved away from restricted house designs and aimed to be more 'aspirational'. Laing insisted all properties had low specification appliances installed as standard in the 1990s and this is supported by the 1994 memo. High specification items were not fitted as standard in all properties but might be in some of the larger properties. He says that from some point in the 1990s, Laing, which had not previously installed carpets, started to install carpets as standard but not necessarily in all properties. I find that on the basis of the 1994 memos referred to above, this could not have been before 1994.

125. There were a few Laing adverts in evidence, either exhibited by witnesses or included in the agreed bundle. They dated to the late 1980s and 1990s. One advert showed that low specification items were included in 3-4 bed houses in 1986 but as these were stated to be 'individually designed' they did not appear to be standard for Laing. Another advert, for 1990, did not show anything included but Mr Bishop's evidence was that he had bought the land and knew that low specification items were included as standard on the houses on that site, which evidence I accept. Other adverts indicate that in the 1990s low specification items were installed, which is also consistent with Mr Bishop's evidence and I accept it. So far as the 90s are concerned for high specification appliances and carpets, I find that they were installed in some houses by Laing, but due to the vagueness of the evidence, I am unable to determine what percentage.

126. His evidence was that by 2000 the Laing policy was to supply low specification items as standard and high specification appliances at additional cost and I accept this.

127. Laing was acquired by George Wimpey in 2002 but continued to operate as a separate business unit although he indicates that this ceased in 2007 with the merger with Taylor Woodrow.

Other claimants and competitors

128. The only evidence for what the other companies who are a part of the claim or their competitors were supplying comes from what the above witnesses said and adverts which were included in the agreed bundle.

Wain and Wilcon

129. Mr Philips said that in the 1990s Wain and Wilcon installed the same appliances as Bryant, in other words the low specification appliances plus a fridge and washing machine. However, I find this was not based on his recollection from the time but on

(a) seeing the adverts for this hearing and (b) a discussion with a colleague who had worked for Wilcon at the time. And I agree with Mr Macnab that it is not supported by the other evidence. The adverts tend to mention a fitted kitchen with oven hob hood and no other kitchen appliance. It seems carpets were occasionally installed but on such a small sample I cannot say how often. I find it more likely than not that in the 1990s, Wain and Wilcon installed low specification items as standard but neither high specification appliances nor carpets as standard.

Admiral

130. Admiral did not operate in the 1980s and ceased independent operation in 1996. I had virtually no evidence for Admiral. A few adverts from the 1990s showed that carpets were never installed. Low specification items did appear to be standard. High specification items were sometimes installed; it is possible that this depended on the year and/or size of house but on such a small sample it is impossible to draw reliable conclusions. Mr Southcombe said from knowledge of a site built in 1989, he knew Admiral installed low specification as standard and offered an optional upgrade for high specification items. I note in passing that even the appellant's claim was that high specification items and carpets were only installed in about 20-50% of Admiral homes.

131. Bearing in mind the overall evidence from the witnesses, referred to at §161 below, I find that in the 1990s a market standard for low specification items had evolved and they were installed as standard in most new homes in the 1990s and therefore I accept the evidence that this was the position with Admiral. I do not find it proved that they ever installed high specification items or carpets as standard during its period of operation, although I find that high specification items were installed in some houses although I am unable to determine in what percentage.

Taylor Woodrow

132. Mr Philips said that it was his understanding that Taylor Woodrow installed low and high specification appliances from the early 1990s. He did not work for Taylor Woodrow at the time and the basis of his recollection was that he was told Taylor Woodrow increased their specifications to match Bryant's. He later said that this recollection might simply have referred to a particular site on which both Taylor Woodrow and Bryant were building homes.

133. I cannot therefore take this as reliable evidence of what Taylor Woodrow's national policy was at any time. I did have before me a few adverts for Taylor Woodrow homes. These dated to 1985 and indicated that Taylor Woodrow installed low specification items but not high specification items or carpets. However, these adverts are necessarily a tiny sample of what the company sold and I do not find on the basis of this evidence that the appellant has proved that it installed anything as standard in the 1980s. I accept that there was market standard for low specification items to be supplied in the 1990s, but I am unable to find that the appellant has proved that Taylor Woodrow ever installed carpets in the 1990s, and, although I accept Mr Phillips' evidence that high specification appliances were installed on at least one site,

I am not satisfied that any other Taylor Woodrow sites in 1990s included high specification appliances.

Taywood

134. I had nothing reliable for Taywood. Mr Peacock showed me a 1995 price list for ovens hobs and hoods which appeared to have been supplied to Taywood. This does not tell me, however, whether Taywood were installing these low specification items as standard or at the option of the purchaser.

The (other) competitors

135. There were a lot of adverts in the bundles. I have not double counted where there was a duplicate advert for the same site. I have ignored a few adverts which appeared to be advertising just a single home at any location as it seemed to me this was unlikely to be representative of the new homes on offer. This was because it was likely either to be a showhome (and likely to be sold with what was in it rather than represent what was normally available) or to be a second hand house taken by housebuilder in part exchange.

136. I was shown a few brochures by Mr Peacock but I did not find these helpful: he relied on the fact that the plans had a symbol for electric cooker but as the same chart showed a symbol for a television, I find it more likely that it was simply showing the presence of appropriate power points for various appliances rather than the installation of the appliances themselves. Similarly he relied on a 1988 floor plan which showed a hob and housing for an oven and power supply for a hood. I do not find this shows that anything more than a hob was supplied.

137. After these exclusions, in summary I found the adverts showed as follows.

138. There were five adverts for 1982-1985. I discount the earliest one as not being representative: low specification, high specification and carpets were included in the price together with a week's holiday in Aviemore. Without any more to go by, common sense suggests that it was unusual for a house builder to offer holidays so it is as likely as not that the inclusion of appliances and carpets were out of the ordinary too.

139. However, the other four adverts for the period indicated (in so far as such a small sample can be indicative of anything) that most sites had low specification appliances installed (one type of house on one of the sites did not); no high specification appliances were installed; 1 out of 4 had carpets.

140. There were seven adverts for the period 1990-1995. They showed (in so far as there was an indication) that low specification items were installed; half had high specification items and only 1 out of the 7 had carpets.

141. There were five adverts for the late 1990s. In so far as it was possible to discern, all had low specification items installed, one had high specification appliances and half had carpets.

Conclusions on evidence of what was installed

142. I note in passing that the appellant's team produced a summary of the evidence. A schedule of the adverts and brochures (in date order) would have been useful but one was not produced, so I produced my own in order to fairly summarise what they showed. The appellant's summary of the evidence was necessarily biased as it took anything said by the appellant's witnesses as completely accurate and treated some adverts as evidence for something that I do not consider they fairly did evidence, so I was unable to derive assistance from it.

143. My findings are based, not on the appellant's summary, but on the documentary and witness evidence in front of the tribunal.

Contract and speculative builders

144. Mr Truscott and Mr Philips gave evidence that contract builders (building houses to order on land owned by their clients) were not considered to be competitors by speculative builders (ie the appellants in this case). Speculative builders required very substantial capital and took real risk when buying land and building speculatively and expected to make a profit of about 15% on sales. Contract builders simply built to order on their client's land and aimed to make about 3% profit on sales.

145. This evidence was not challenged by HMRC and indeed it stands to reason. While persons buying the 'off the shelf' new homes offered by the Claimant Companies might well consider buying a 'second-hand' home as an alternative, they were highly unlikely to consider as a real alternative buying land and paying a contractor to design and build a 'made to measure' home.

146. Speculative builders, such as those at issue in this appeal, were in competition with other speculative builders, and, to some extent, with the second-hand house market. I find they were not in competition with contract builders.

A package

147. Where the Claim Items were offered to customers, they were offered as a package with the house to entice the customer to buy the house. While it was put to the witnesses that they did not exhibit any contracts or conveyances, it was obvious from their evidence and the adverts, and indeed from common sense, that it was intended that where Claim Items were offered to a buyer of a new home, the intention of all parties was that ownership of them would pass to the buyer with the house. The price for the house would include the Claim Items. Indeed, inclusion of the Claim Items increased the house price (see §§56, 72, 87).

148. The evidence was also, which I accept, that the Claim Items, where offered, would be installed. They were not left in their wrappings on the doorstep. Fitted carpets would be fitted. White goods would be operational.

Market standard?

149. It was the appellant's case that the evidence showed that there was a market standard for what was installed at any time. Competitors had to keep up with the competition. I find this was not borne out by the evidence in general, although I find overall what any individual house builder offered in the way of appliances and carpets in the 1990s or 2000s was likely to be more than a house builder would have offered in the 1970s. Further, in the 1990s and 2000s house builders were more likely to operate on the same site as each other and where they did so, there was likely to be an assimilation of what was on offer as standard.

150. 1970s: There was no evidence that house builders installed low specification or high specification items or carpets at all in the 1970s. To the extent the appellant relied on evidence to establish this, I discount it (see §§83-86). It does seem, however, that some split level cookers were installed by contract builders in the 1970s because HMRC's Notice in 1975 specifically enabled input tax to be recovered on them (see §271). I find that high specification appliances and carpets were not installed in the 1970s and low specification appliances were rarely installed and certainly not installed as standard in the 1970s.

151. 1980s: Mr Truscott's evidence was that the various house builders had different policies on what they installed as standard in the 1980s. Both he and Mr Southcombe referred to Wimpey's policy in the 1980s on white goods and carpets as a means of distinguishing the company from its competitors: by necessary implication, it was therefore their evidence that there was no market standard to install high or low specification appliances or carpets in the 1980s.

152. And I find that there was great variation in what was offered in the 1980s. The evidence I had was that Wimpey and Bryant did offer low specification items as standard but considered that this was a marketing strategy as it distinguished them from the competition. I have found that McLean and Laing did not install low specification items as standard (at least until the very late '80s). There is no evidence on what many of the other companies did in the 1980s although a handful of adverts (referred to in §§135-141) indicate that Wimpey and Bryant were not the only companies who offered low specification items, but the sample is far to small for me to consider that they were offered as standard, particularly when I have found some large operators who are now Claimant Companies did not install them as standard.

153. In conclusion, there was no market standard to install low or high specification appliances or carpets in the 1980s.

154. Low specification items in 1983/4: In particular, although I find that that Wimpey and Bryant installed low specification items as standard at around 1983/84, there is no reliable evidence that any other house builder did so, particularly as the

evidence was that they did this as a marketing tool as it distinguished them from competitors. At best Wimpey and Bryant (a small operator) had around 10% of the market in new house builds at that time.

155. High specification items in 1983/4: I find that that Wimpey installed high specification appliances as standard at around 1983/84 but there is no reliable evidence that any other house builder did so, particularly as the evidence was that Wimpey did this as a marketing tool as it distinguished them from competitors. At best Wimpey had around 10% of the market in new house builds at that time.

156. While there is evidence is that some of the other builders installed high specification appliances in some houses, the evidence (and even the claim - §21) was that this was not a high percentage. In any event, the overall market share of the Claimant Companies was about 16% and I do not know if the Claimant Companies were typical.

157. The appellant effectively conceded that the evidence did not demonstrate that high specification Claim Items were installed as standard in the 1980s; the appellant claimed that the evidence showed this that these items were installed as standard in the 1990s. I deal with this below.

158. Carpets in 1986/7: I find that that Wimpey installed carpets as standard at around 1986/87 but there is no reliable evidence that any other house builder did so, particularly as the evidence was that Wimpey did this as a marketing tool as it distinguished them from competitors. At best Wimpey had around 10% of the market in new house builds at that time.

159. While there is evidence is that some of the other builders installed carpets in some houses, the evidence (and even the claim) was that this was not a high percentage. In any event, the overall market share of the Claimant Companies was about 16% and I do not know if the Claimant Companies were typical.

160. The appellant effectively conceded that the evidence did not demonstrate that carpets were installed as standard in the 1980s; the appellant claimed that the evidence showed this that carpets were installed as standard in the 1990s. I deal with this below.

161. 1990s: Low specification items were much more likely to be offered as standard in the 1990s. See my findings at §79 for Wimpey, §107-9 for Bryant in the South , §125 for Laing, §129 for Wain and Wilcon, §131 for Admiral and §140 for the non-Claimant Companies. But in so far as high specification items and carpets were concerned, a great deal of variation remained. For instance, it was the agreed position that Wimpey offered carpets up to 1996; but the evidence was that Laing only offered carpets as standard from 1994. Largely there was no evidence or simply insufficient evidence to determine whether any particular company offered high specification appliances or carpets as standard in the 1990s or 2000s.

162. Based on the consistency among the adverts and other evidence for low specification items in 1990s I find that they were installed as standard from 1990. I

am not satisfied that high specification items and carpets were installed as standard in the 1990s.

The facts – on how items were installed

Mr S Firth-Bernard

163. Mr S Firth-Bernard is owner and managing director of DBD Distribution Limited ('DBD') which is a kitchen appliance distributor and installation company. The company was established by his father in 1988 when Mr S Firth-Bernard was 7 years old. Since he was 16 (ie 1997) he has worked at the company in various roles.

164. DBD has had contracts with Taylor Wimpey for over 10 years. It has other house builders as clients. Its core work is supplying and installing ovens, hobs and hoods and has done this since 1988. It may be asked to install high specification items too but not as often. I note in passing that this bears out what I found in §162 above.

165. He gave evidence on the work required to install low specification and high specification items. I had no evidence about carpets, which Mr Firth-Bernard's company did not install.

166. In summary, his evidence was that electrical appliances had to be wired in. Gas appliances had to be connected to the gas supply by a permanent copper pipe connection. In addition, all appliances DBD installed had to be screwed in to the fitted kitchen units, or doors, and/or the worksurface, with the exception of the hood which was fixed directly to the wall. Further, wet appliances (dish washer and washing machine) had to be plumbed in (connected to the water supply and waste).

167. Only the hob required a hole to be cut in the worksurface; fixing none of the other appliances really resulted in damage to the kitchen units other than to the extent of requiring (normally) four screw holes to be made.

168. His witness statement said each item would take a team of two about 45 minutes. In examination in chief, his estimate was 15-20 minutes for white goods and 10-30 for a hood.

169. I accept Mr Macnab's criticism of this inconsistency in the witness' evidence. Mr Firth-Bernard's explanation of the longer estimate in his statement was that some very large items (an American fridge freezer which supplies iced water) would take longer to install. However, his father agreed with the time estimate in the written statement and the appellant relied on this statement. I conclude it is likely that the time a team of two trained installers would take to install any of the low and high specification items at issue in this appeal would be at the higher end of his time estimate given in cross examination and in some cases as long as the 45 minutes given in (effectively) both witnesses' statements.

170. I accept his evidence that it a similarly experienced person or team would be required to remove any of the items installed but it would take slightly less time to remove than install.

David Firth-Bernard

171. Mr David Firth-Bernard was Mr Sam Firth-Bernard's father and one of the founders of DBD. He made a witness statement but was too ill to attend the tribunal hearing.

172. Mr David Firth-Bernard agreed with his son's witness statement on the installation of the white goods. Mr Macnab indicated he accepted this evidence as it showed fitting was a skilled job done by trained fitters.

173. Mr David Firth-Bernard's witness statement went on to say that the fitting process described by his son has not changed since the company's inception in 1988. Mr Macnab did not challenge this either.

174. Mr Macnab did not accept the rest of Mr David Firth-Bernard's witness statement. In this Mr David Firth-Bernard says integrated kitchens (with appliances hidden behind doors) replaced free standing units in the 1970s. This dating is simply not consistent with the other evidence in the case, and not supported by documentary evidence. So although I recognise that some split level cookers were installed in the 1970s because HMRC's practice on split level cookers dates from 1975 (§271) I do not accept it was common, as Mr David Firth-Bernard suggests. See my findings of fact at §150.

Conclusions

175. What evidence there was, and which I accept, was that in the 1970s all appliances, including most cookers, were freestanding and not 'built in' or integrated with the kitchen. They would to the extent necessary be plugged into the electric supply (if electric) and plumbed in.

176. The evidence was that cookers, hobs and hoods might be 'built in' in the 1980s. The hob would fit into a hole cut in the worksurface, and be screwed in place. The oven would be slotted into a space in a kitchen unit and be screwed in place, The hood was attached to the wall. All were wired rather than merely plugged in.

177. Mr Truscott's evidence was that in the 1980s the high specification appliances were merely plugged and plumbed in. They were not built in or installed. Mr Phillips' evidence at §101 is consistent with this and I accept it.

The facts – on HMRC notices and leaflets

Mr Holt

178. Mr Holt has been an HMRC officer since 1983. He exhibited to his witness statement that VAT Leaflets and VAT Notices produced by HMRC over the years which included references to the Builders' Block. I agree with him that they were evidence of how HMRC interpreted the Builders' Block and how they would have applied it in their dealings with taxpayers at the time.

179. In so far as he stated his opinion of how the Leaflets and Notices should be interpreted, I disregard it.

180. He drew attention to the amendment to Notice 798 1975 (page 207 which stated HMRC's view that VAT on 'built-in split level cookers' was not blocked. HMRC withdraw this view in VAT Leaflet 708/2/84. He was unable to explain why HMRC in 1975-1984 had taken the view that split level cookers were not subject to the Builders' Block. I note that it was later submitted on behalf of HMRC by Mr Macnab that HMRC had at that time taken the view that split level cookers were 'ordinarily' installed but later they had decided that that view was wrong.

181. He was asked about why the 2007 Version of Notice 708 had long lists of exclusions from the Builders' Block, including items such as lifts, hoists, wind and water turbines, saunas and indoor swimming pools. I discuss this further at §363. Mr Peacock's point was that these items could only properly be excluded from the Builders' Block if they were 'ordinarily' installed. Put another way, the exclusion of these items from the Builders' Block appeared to indicate an intention by HMRC that VAT should be recoverable on them; but VAT would only be recoverable on them if they were 'ordinarily' installed by builders as fixtures. Therefore, logically HMRC's interpretation of the law appeared to be that what mattered was the particular type of dwelling, eg whether apartment block, an eco friendly property or a luxury property. Mr Holt's answer was rather difficult to follow. He was not prepared to accept that this was HMRC's interpretation and concluded that he did not actually know the basis for this long list of exceptions.

182. He confirmed that it was agreed between the parties that the appellant could not claim for VAT on split level cookers 1975-1984 because it was a reasonable assumption that, because the public notice at the time said that VAT was recoverable on such items, the Claimant Companies would have recovered this VAT at the time.

The law – zero rating

183. The appellant's position was that as the sale of new homes by the Claimant Companies was zero rated, therefore the sale of the Claim Items by the Claimant Companies as part of the sale of new homes was also zero rated. It was agreed by the parties that the sale of new homes by the Claimant Companies was zero rated throughout the period in question. Although the zero rating provisions have changed over time, in so far as the supply of freeholds in new homes are concerned these have

always been zero rated. The currently applicable provision is Group 5 of Schedule 8 to the Value Added Tax Act 1984 ('VATA') which provides zero rating for:

> 'The first grant by a person -
>
> (a) constructing a building -
>
> designed as a dwelling or a number of dwellings.....
>
> of a major interest in, or in any part of, the building, dwelling or its site.'

184. The appellant considered that the sale of the Claim Items when sold with the new home took on the same VAT treatment as the sale of the new home, and that this followed from the application of the rules on single and multiple supplies as explained by the CJEU in cases such as *CPP* (C-349/96) [1999] STC 270 and *Levob* C-41//04 [2006] STC 766 .

185. HMRC did not agree that those cases would apply to determine whether the Claim Items were part of a single supply with the house: Mr Macnab referred to the cases of *McCarthy & Stone (Developments) Ltd* [2013] UKFTT 727 (TC) and *Colaingrove Ltd (Verandahs)* [2013] UKFTT 343 (TC). In those two decisions, the FTT held that Parliament's intention when enacting the zero rate on houses (or in the second case, static caravans) must be understood in the context of what was then understood to be the law on single and multiple supplies, because *Talacre* C-251/05 [2006] STC 1671 had established that zero rates should be narrowly interpreted and only items intended by Parliament to be zero rated were properly zero rated.

186. Nevertheless, it was HMRC's primary contention that the Claim Items were 'incorporated' into the new homes and accepted that if they were 'incorporated' they were therefore part of the single zero rated supply. If they were wrong on this, and the goods were not incorporated, then HMRC considered that the goods were not part of the zero rated supply. If the Claim Items were not incorporated, HMRC's view was that they would have comprised a separate, standard rated supply. I return to this point in paragraph §§302-344 below.

187. HMRC accepted that if the Claim Items were not incorporated and not part of a single supply and that therefore the supply of the Claim Items was a separate, standard rated supply, it would automatically follow that the appellant would be entitled to recover the claimed input tax in principle. Nevertheless, HMRC considered that the claim would have to be netted off against the output tax that should have been, but was not, accounted for on the standard rated sale of the Claim Items. I refer to this as 'set off' question.

188. HMRC, like the appellant, however, had not come to Tribunal prepared to put their case on either the question of the law on single versus multiple supplies at all or in the context of zero rated supplies, nor the question of whether input tax must be netted off against output tax when it was many years too late for HMRC to assess the output tax. It was agreed that these issues would be left for the Tribunal to determine on another day should it become necessary and that I would merely now determine the issues in principle concerning the Builders' Block.

The law - the Builders' Block

189. The Builders' Block, in force from the moment that VAT was introduced on 1 April 1973, underwent many revisions over the years.

190. The Builders' Block 1973-1984: In summary, the effect of the Builders' Block was to prevent input tax recovery on certain items. In other words, the Builders' Block assumed that there could be a single supply of more than just the new house and that that supply would be zero rated leading to input tax recovery on those items without a concomitant output tax liability. It provided that, nevertheless, the input tax on the supply of some of the items comprised within this single zero rated supply would be blocked from recovery. Its first manifestation was in the Input Tax (Exceptions) (No 1) Order 1972 ("the 1972 Order") which provided:

> '3. Where a taxable person constructing a building for the purpose of granting a major interest in it or in any part of it incorporates in any part of the building or its site which is used for the purposes of a dwelling goods other than materials, builder's hardware, sanitary ware or other articles of a kind ordinarily installed by builders as fixtures, tax on the supply or importation of the goods shall not be deducted by him as input tax under section 3 of the Finance Act 1972'.

191. Article 3 of the 1972 Order was then re-enacted identically as Article 8 of the VAT (Special Provisions Order) 1977 (SI 1796)). It was then re-enacted in all material respects identically in Article 8 of the VAT (Special Provisions Order) 1981 (SI 174)('the 1981 Order'). The above provision therefore applied from 1 April 1973 to 31 May 1984.

192. The Builders' Block 1984-1987: Article 2 of the VAT (Special Provisions) (Amendment) (no 2) Order 1984 (SI 736) ('the 1984 Order') then amended the 1981 Order so that from 1 June 1984 to 24 June 1987 the Builders' Block was in this form:

> '(1) Subject to paragraph (2) below where a taxable person constructing a building for the purpose of granting a major interest in it or in any part of it incorporates goods in any part of the building or its site which is used for the purpose of a dwelling, input tax on the supply or importation of the goods shall be excluded from any credit under sections 14 and 15 of the Value Added Tax Act 1983.
>
> Paragraph (1) above shall not apply to materials, builder's hardware, sanitary ware or other articles of a kind ordinarily installed by builders as fixtures except -
>
> (a) finished or prefabricated furniture, other than furniture designed to be fitted in kitchens;
>
> (b) materials for the construction of fitted furniture, other than kitchen furniture; and

(c) domestic electrical or gas appliances, other than those designed to provide space heating or water heating or both.'

193. The difference between this incarnation of the Builders' Block and the original one, as can be seen, is merely that the legislation now specified that input tax on certain items was to be blocked even if they were within the description of 'materials, builder's hardware, sanitary ware or other articles of a kind ordinarily installed by builders as fixtures'. Otherwise the provision was in effect the same as the original Builders' Block.

194. The Builders' Block 1987-1995: The Builders' Block underwent yet another modification with effect from 21 May 1987. The VAT (Construction of Buildings) Order 1987 (SI 781) and the subsequent VAT (Construction of Buildings) (no 2) Order 1987 (SI 1072) ('the 1987 Orders') amended Article 8 of the 1981 Order to add a new item (d) to the list of items (a)-(c) which were within the block whether or not of a kind ordinarily installed by builders as fixtures. That new item (d) was:

'(d) Carpets or carpeting materials'

195. This version of the Builders' Block (although re-enacted by Article 6 of the VAT (Input Tax) Order 1992 (SI 3222) with effect from 1 January 1993) was in force from 21 May 1987 until 28 February 1995.

196. The Builders' Block 1995 onwards: From 1 March 1995, the Builders' Block was contained in Article 6 of the VAT (Input Tax) (Amendment) Order 1995 (SI 281) ('the 1995 Order'). This provision contained somewhat different wording. It provided:

'Where a taxable person constructing or effecting any works to a building, in either case for the purpose of making a grant of a major interest in it or any part of it or its site which is of a description in Schedule 8 to the Act, incorporates goods other than building materials in any part of the building or its site, input tax on the supply, acquisition or importation of the goods shall be excluded from credit under section 25 of the Value Added Tax Act 1994'

197. Article 2 of the same Order with effect from the same date provided:

' "building materials" means any goods the supply of which would be zero-rated if supplied by a taxable person to a person to whom he is also making a supply of a description within either item 2 or item 3 of Group 5, or item 2 of Group 6, of Schedule 8 to the Value Added Tax Act 1994'

198. Item 2 of Group 5 was the provision which zero rated building services in relation to the construction of dwellings (and certain other buildings). Item 3 of Group 5 related to the supply of services to a housing association in connection with buildings designed as dwellings or for a relevant residential purpose. Item 2 of Group 6 related to supplies in relation to domestic listed buildings. Neither Item 3 of Group 5 or Item 2 of Group 6 is directly relevant to this case.

Note (22) to Group 5 provided a definition of 'building materials':

> " 'Building materials', in relation to any description of building, means goods of a description ordinarily incorporated by builders in a building of that description, (or its site), but does not include -
>
> (a) finished or prefabricated furniture, other than kitchen furniture;
>
> (b) materials for the construction of fitted furniture, other than kitchen furniture;
>
> (c) electrical or gas appliances, unless the appliance is an appliance which is -
>
> (i) designed to heat space or water (or both) or to provide ventilation, air cooling, air purification or dust extraction; or
>
> (ii) intended for use in a building designed as a number of dwellings and is a door entry system, a waste disposal unit or a machine for compacting waste; or
>
> (iii) a burglar alarm, a fire alarm, or fire safety equipment or designed solely for the purpose of enabling aid to be summoned in an emergency; or
>
> (iv) a lift or hoist;
>
> (d) carpets or carpeting material.

Note (23) provided:

> "For the purpose of Note (22) above the incorporation of goods in a building includes their installation as fittings."

The appellant's case

199. The appellant's case was that:

(1) the Claim Items were not fixtures and not incorporated into the new build homes and therefore the Builders' Block did not apply to them.

(2) If wrong on this, then although the Claim Items were incorporated, they were fixtures of a kind ordinarily installed by builders and outside the scope of

the Builders' Block as originally enacted, and to the extent that they were later specifically excluded from the Block, the Block was unlawful under EU law.

Incorporation

Is incorporation co-extensive with 'installation as a fixture'

200. The first part of the appellant's case was that the Claim Items did not fall within the Builders' Block because they were not incorporated into the building. The Builders' Block as from the introduction of VAT in 1973 only applied where:

> Where a taxable person constructing a building … incorporates in any part of the building ….goods other than materials, builder's hardware, sanitary ware or other articles of a kind ordinarily installed by builders as fixtures,…..".

201. It was the appellant's case that only something affixed to the building as a fixture could be 'incorporated' into the building. It was necessarily also its case that the Claim Items were not installed as fixtures.

202. HMRC's case is that the meaning of "incorporation" was nothing to do with whether the items were installed as fixtures and the cases discussed below (§§304-342) on whether items like the Claim Items were fixtures were irrelevant to the question of 'incorporation'.

Dictionary definition of incorporation

203. The appellant referred me to the OED. Mr Peacock relied on the meaning of 'incorporated':

> 'united in, or into, one body, combined with another thing'

He also relied on the meaning of 'to incorporate':

> 'combine or unite into one body or uniform substance, or mix together, or put one thing in or into another to form one whole, including absorb'

204. His case was that Claim Items did not combine or unite with the house; the appellant's case was they were not fixtures and they retained their separate identity as, as the case may be, a cooker, fridge or carpet. They were not permanently combined or united into the fabric of the building.

205. It was Mr Truscott's evidence (which I accept) that a house was designed to last about 75 years although could last considerably longer if looked after. It is common knowledge that the appliances at issue in this appeal have a much shorter life expectancy, perhaps of 3 to 5 years and would be replaced when they failed. Carpets might have a longer life expectancy than white goods but it seems to me common knowledge that a fitted carpet would have a much shorter life expectancy than a new house in which it was fitted and would be replaced when it wore out, if not before. To

that extent, the appliances and carpets were not permanently united into the fabric of the building.

206. Needless to say, HMRC took the opposite view to the appellant. Mr Macnab pointed out that the Claim Items were physically installed in the new houses and sold as package with the house.

207. My conclusion is that the dictionary definition is, except in the most general sense, irrelevant. To understand what Parliament meant by 'incorporates', the first thing that the Tribunal must do is consider the context in which the word was used.

Literal reading of the legislation

208. HMRC say that the listed exceptions to the Builders' Block (set out at §190 above) should be read as applying to:

> (a) materials;
>
> (b) builders hardware;
>
> (c) sanitary ware; and
>
> (d) other articles of a kind ordinarily installed by builders as fixtures.

In other words, HMRC consider that the word 'fixtures' only qualifies (d) 'other articles'. Therefore, says HMRC, items (a)-(c) might include fittings (although they did not give any examples). Therefore, says HMRC, 'incorporates' was clearly intended to apply to both fittings and fixtures.

209. I agree with HMRC that the qualification 'of a kind ordinarily installed by builders as fixtures' was intended to apply only to the fourth item (d). This is because I do not think Parliament intended to limit the zero rate only to, say. builders' hardware which was 'of a kind ordinarily installed', but would have intended to mean all builders' hardware, even if unusual. There are different methods of construction and different materials used (for instance, the evidence was that a small proportion of the new houses at issue in the appeal were of timber frame construction). I think Parliament intended to zero rate all building materials, and not just the materials ordinarily, used in construction.

210. However, Parliament did clearly intend a limit on the meaning of (d) 'other articles'. There are more than two items in the list (a)-(d) and the normal rule would therefore be that 'other articles' would be limited in meaning by the meaning of the three previous items. In other words, 'other articles' would be of the same type as 'materials', 'builders' hardware' and 'sanitary ware'. It seems to me that the extra words 'of a kind ordinarily installed by builders as fixtures' is meant to limit its meaning even further and in particular to limit its meaning just to those types of articles 'of a kind ordinarily installed by builders as fixtures'.

211. Nevertheless, it is difficult to think of an item that would not be a fixture yet come within the definition of 'materials' 'builders' hardware', or 'sanitary ware'. But,

theoretically, I agree with Mr Macnab. Parliament did not expressly limit 'incorporates' to 'incorporates as a fixture.'

212. If Parliament had intended 'incorporation' to mean attachment as a fixture it could have said so. Parliament must not only be taken to know the law but it was in fact clearly aware of the legal concept of 'fixtures' as it used it in the definition:

> '3. Where a taxable person constructing a building for the purpose of granting a major interest in it or in any part of it incorporates in any part of the building or its site which is used for the purposes of a dwelling goods other than materials, builder's hardware, sanitary ware or other articles of a kind ordinarily installed by builders as fixtures, tax on the supply or importation of the goods shall not be deducted by him as input tax under section 3 of the Finance Act 1972'. (my emphasis)

If it had meant 'incorporates as fixtures' it could have said so. It could have said either "incorporates as fixtures" or "incorporates…..goods as fixtures other than ….". Instead it simply used the words "incorporates….goods….". The only appearance of the word "fixtures" is to qualify the exception to the rule and not the rule itself.

213. The literal reading is that 'incorporates' was not intended to be limited to 'incorporates as a fixture'. I address the purposive reading below.

214. I accept that the 1995 changes to the legislation made it clear that 'incorporated' includes incorporation as a fitting as well as a fixture but 1995 legislative changes cannot guide me in what Parliament intended in 1973. Nevertheless, a literal reading of the pre-1995 legislation is that the 1995 legislative changes on this point did nothing more than confirm what was always the case.

Interpretation of legislation - Explanatory notes to the legislation

215. The appellant challenges this by reference to the Explanatory notes to the 1972 Order, which read as follows:

> "This Order disallows deduction of input tax by builders on certain fittings incorporated as fixtures in dwelling accommodation in which they own a major interest."

216. This does appear to indicate that Parliament was thought to have limited the exclusion to items incorporated as fixtures, although it uses the curious phrase 'fittings incorporated as fixtures' and refers to builders *owning* a major interest rather than *supplying* such an interest, which might indicate a confusion about both land law and VAT law on the part of the author of the Note.

217. However, the Explanatory Notes to the 1984 Order read as follows:

> "This Order amends article 8 of [the 1981 Order] which prevents the deduction of input tax on non-standard fixtures and fittings incorporated by a speculative builder in a dwelling which he is

> building for supply by sale or long lease. Article 8 as amended will, with effect from 1 June 1984 prevent the deduction of input tax on certain specified items, viz furniture, domestic electrical or gas appliances (other than space and water heaters) as well as on any unspecified articles provided they are *not* of a kind ordinarily installed by builders as fixtures. Article 8 complements the zero rating provisions …the effect of which is that the standard rate tax will be due on the same fixtures and fittings even when supplied in connection with zero rated building construction services." (my emphasis)

218. The Explanatory Notes to the 1987 Orders are in much the same form except of course that they explain that "carpets and carpeting materials" are added to the list of non-standard fixtures and fittings excluded from deduction.

219. Explanatory notes to the legislation are legitimate aids to discern Parliament's intent. The notes from the 1984 Order and later support HMRC's view that incorporation had a much wider meaning that attachment as a fixture and in particular the Builders' Block excluded input tax recovery on fittings as well as fixtures (unless within the exceptions). However, it is HMRC's case, of course, that that was always the case. Yet the 1972 Explanatory Notes do not support that position.

220. I take the view that the 1972 Explanatory Notes are somewhat elliptical and ambiguous for the reasons given above (§216). It also appears to be the case that they were effectively 'corrected' in 1984 by a much fuller explanation and while later legislation cannot be a guide to Parliament's earlier intention, I see no reason why Explanatory Notes, which are only an aid to construction, cannot be read as altered by later Explanatory Notes dealing with effectively the same legislation.

221. I conclude that the 1972 Explanatory Notes are not a good guide to Parliament's actual intent. The 1984 Explanatory Notes, however, are a much fuller explanation, avoid the oddities of the brief 1972 Note and are consistent with a literal reading of the legislation, and I consider they are a good guide to Parliament's intent. 'Incorporated' is not limited to fixtures but includes incorporated fittings.

Purposive interpretation of 'incorporates'

222. Moving on to consider the purpose of the legislation, I consider that the appellant's interpretation leads to bizarre results which I do not think Parliament intended. The Builders' Block is structured so that input tax on fixtures other than those listed (a)-(d) cannot be recovered. The (a)-(c) list could be loosely paraphrased as 'core' installations, such as (to use Mr Macnab's expression) doors and loos. So input tax on core fixtures can be recovered, but not on other fixtures.

223. Yet the appellant's case is that fittings are not incorporated so that VAT on fittings supplied with a house is always recoverable. Fittings by their nature are less 'core' than fixtures (a light shade is less essential to the function of a house than, say, a door or loo), yet the appellant's case is that Parliament intended builders to recover VAT on all fittings but only 'core' fixtures. That requires me to assume that

Parliament acted illogically. Yet purposive interpretation requires me to assume that Parliament acted logically.

224. It seems to me that because Parliament permitted VAT to be recovered on only 'core' fixtures, it did not intend VAT on fittings to be recovered at all (unless and only to the extent, of course, there are any fittings within the description (a)-(c) (materials; builders hardware; sanitary ware)).

225. This is in any event consistent with the literal wording of the Builders' Block where 'fixtures' is used to qualify item (d) but not to qualify the word 'incorporates'. It is also consistent with the Explanatory Notes to the 1984 Order and later.

Social purpose

226. I raised with Mr Peacock the point that EU law provided that member States were only permitted to have zero rates for 'clearly defined social reasons'. At the time VAT was introduced in the UK, the relevant EU legislation was the Second VAT Directive. Article 17 of that Directive (not to be confused with Article 17 of the later Sixth VAT Directive ("6VD")) provided member States could maintain:

> "...even exemptions with refund, if appropriate, of the tax paid at the preceding stage, where the total incidence of such measures does not exceed that of the relief applied under the present system. Such measures may only be taken for clearly defined social reasons and for the benefit of the final consumer, …." (my emphasis)

227. This is the provision under which the zero rating of new homes is lawfully maintained by the UK Government. But it is difficult to see what social reason would justify a zero rate of, say, a washing machine supplied with a newly built house, when every other person in the UK has to pay VAT if they buy a washing machine.

228. Mr Peacock relied elsewhere on the decision in *EC Commission v UK* C-416/85 [1988] STC 456 where the CJEU upheld the zero rating on the UK's new build house market. But nowhere in that case was the CJEU asked to address the question of whether fixtures and fittings supplied with a new build house could be zero rated for 'clearly defined social reasons'.

229. On the contrary, it seems to me that Parliament's intention could not have been to grant a zero rate to fittings supplied with a domestic house, particularly when it was clearly its intention that only limited and 'core' fixtures would benefit from the zero rate.

230. Parliament must be assumed to legislate compliantly with EU law. EU law is that zero rates must be narrowly construed: see, for instance *Talacre*. Parliament must have intended a wide construction of 'incorporates' as that would lead a narrow zero rating. There cannot have intended a zero rate of fittings as such a zero rate would serve no social purpose.

Symmetry between contract and speculative builders?

231. Mr Macnab's main case was that Parliament's intent was always to achieve in broad terms equal treatment between speculative and contract builders and in particular that the same items should benefit from zero rating irrespective of whether a house was built to order or built speculatively. He thinks that the Tribunal should therefore interpret 'incorporates' as referring to everything that would be part of the single supply of the house. Such an interpretation would lead to broad symmetry between the VAT treatment of contract and speculative builders, as contract builders can only zero rate their services and goods within (a)-(d) as set out at §208 above.

232. Mr Macnab's view was that if the goods were not part of the single supply, then their VAT treatment would follow normal rules and the Builders' Block was not intended to apply to them. But if they were part of the single supply, then Parliament's intent was to limit the benefit of zero rating (by blocking the input tax) so that speculative builders could not (effectively) zero rate items which contract builders could not zero rate.

233. This was clearly a concern for Parliament in 1995 as the 1995 Order Article 2 aligns the VAT treatment of 'building materials' for speculative and contract builders. But what of before 1995 when there was no statutory link between the provisions affecting contract builders and those affecting speculative builders?

234. The Explanatory Notes to the 1987 Orders go on after the part referred to at §§217-218 above to say:

> "This latter change complements and produces the same net effect for speculative builders as the amendment to Note (2A) does for contract builders."

The 'change' referred to is the inclusion of fitted carpets into the Builders' Block.

235. This indicates that in 1987, if not before, Parliament did intend some kind of mirror image for the VAT position for contract and speculative builders.

236. <u>The law for contract builders:</u> Going right back to 1972, the zero rate for contract builders was in Group 8 Sch 4 of the FA 1972 which provided:

> "2. The supply in the course of construction…of any building…of any services other than the services of an architect, surveyor or any person acting as consultant or in a supervisory capacity."
>
> 3. the supply, in connection with a supply of services falling within item 2, of materials or of builder's hardware, sanitary ware or other articles of a kind ordinarily installed by builders as fixtures."

These provisions changed over the years, but in essence they provided a zero rate for a contract builder's services together with a zero rate of materials supplied by the contract builder if they were:

> "materials or of builder's hardware, sanitary ware or other articles of a kind ordinarily installed by builders as fixtures"

237. With effect from 1 June 1984, the 1984 Finance Act (paragraph 7 of Sch 6) made the same changes to Item 3 as the 1984 Order made to the Builders' Block. New Note (2A) to Item 3 provided for the identical exclusions (a) – (c) as provided by the 1984 Order and with effect from the same date (1 June 1984).

238. The 1987 Orders (referred to above in §194) varied Note (2A) to make the same change for contract builders as for speculative builders by excluding 'carpets and carpeting materials' from the zero rate. Again this was with effect from the same date (21 May 1987).

239. The next *material* change was with effect from 1 March 1995. Rather than make minor changes in wording, it was a wholesale re-write of the Block. The 1995 Order excepted "building materials" from the Block. It took the definition of "building materials" from Group 5 to Schedule 8 Note (22). In other words, for the first time the legislation used exactly the same definition of 'building materials' for both speculative and contract builders.

240. By way of slight digression, Mr Peacock indicated initially he was not certain that Note (23) qualified Note (22) for speculative builders as it did for contract builders. However, he then referred to the Interpretation Act 1978 s 20(2):

> "Where an Act refers to an enactment, the reference, unless the contrary intention appears, is a reference to that enactment as amended, and includes a reference thereto as extended or applied, by or under any other enactment, including any other provision of that Act."

He therefore accepted, and I agree, that Note (23) qualifies note (22) for all purposes.

241. Note (23) makes it clear that incorporation includes fixtures and fittings. The fact that the Block clearly applied to fittings as well as fixtures as from 1995 however is no guide to what it applied to before that date. I have concluded for other reasons that "incorporation" was always wider than "installation as fixtures". It therefore follows that for the purposes of the Builders' Block, Note (23) merely confirms, as Mr Macnab says, what was always the case.

242. The 1995 changes were the first time that "incorporation" appeared in the zero rate for <u>contract</u> builders' materials as Item 4 now read:

> "the supply of building materials to a person to whom the supplier is supplying services within item 2 … of this group which include the incorporation of the materials into the building (or its site) in question."

243. Therefore, I agree with Mr Macnab that the connection between the two provisions since 1973 is obvious. Whether or not contract and speculative builders are actually in competition with each other is irrelevant: it is clear that Parliament intended from 1973 a sort of symmetry in their respective zero rating positions. It chose to use, from 1973, the same definition of what was excluded from the zero rate (for contract builders) as what was included in the Builders' Block (for speculative

builders). When the definition for one changed, the definition for the other changed in the same way and on the same day.

244. Is there competition? The appellant's view was that there was no real competition between speculative and contract builders and I have accepted that that is correct at §144-6 above. But even though speculative builders were not and did not consider themselves to be in competition with contract builders, that does not mean that Parliament did not intend equal VAT treatment.

245. Included/excluded: The provisions for speculative and contract builders are not identical in wording or effect. One significant difference in wording is that the definition was for one 'positive' while for the other was 'negative'. For contract builders, supplies within the definition of building materials were *included* within the zero rate and anything outside the definition of 'building materials' could not benefit from the zero rate; for speculative builders, anything outside the definition of building materials but incorporated in the building was caught by the Builders' Block and *excluded* from the zero rate.

246. The distinction between a contract and speculative builder is that (in rough terms) the former builds a house on his customer's land and is therefore merely supplying his services. The speculative builder builds houses on his own land and supplies his customer with the legal title to the land (on which the newly built house stands). It seems in 1972 at least, and long before the CJEU cases on single supplies such as *CPP* and *Levob,* Parliament perceived that for speculative builders everything comprising the house would necessarily be zero rated but for the contract builder only his supplies of services would be zero rated. Therefore, Parliament brought supplies of 'core' materials positively into the zero rate for the contract builder but for the speculative builder, Parliament excluded anything that was not 'core'.

247. incorporation: the other main difference in wording was that for contract builders, up to 1995, building materials had to be supplied 'in connection' with their services; for speculative builders the word used was 'incorporates'. Again, I think that nothing should be read into this difference in wording. I find it merely reflected the different way in which goods and services were zero rated, as discussed above. The contract builder supplied services; the speculative builder goods. The difference in wording reflected the different legal nature of the supplies: it was not intended to lead to a different VAT treatment of items outside the definition of 'core' bulding materials.

248. Partial equalisation: The appellant is right that Parliament did not achieve equalisation of VAT treatment of the contract and speculative builder by the Builders' Block. Non 'core' materials supplied by a contract builder are standard rated. Anything that is non 'core' supplied together with the zero rated house by a speculative builder is simply blocked from input tax recovery. A zero rate without a refund is economically equivalent to exemption and not standard rating. However, exemption is closer to standard rating than zero rating is: the difference is only VAT on the suppliers' profit margin.

249. Mr Peacock's point is that if Parliament had really intended the provisions for speculative builders to mirror those for contract builders, they could have done what they did for static caravans and exclude specified items from the zero rate. The CJEU upheld this as effective in *Talacre*.

250. My view is that Parliament's choice of blocking input tax rather than excluding from the zero rate cannot, in these circumstances, be seen as indicating an intention to treat supplies of fittings by contract builders less favourably than those supplied by speculative builders. The use of virtual identical wording and the application of logic (as discussed in §§231-243 above) both strongly indicate that Parliament intended some kind of parity of treatment.

251. conclusion: Taking into account the virtually identical wording (and for the years after 1983 the fact that the definition was always changed in the same way on the same day), I find that this shows that there was a clear intent to equalise the position. I accept that it was far from perfect: an item outside the definition if supplied to someone employing a contract builder would be standard rated, but if 'incorporated' by a speculative builder would be zero rated subject to blocked input tax. In practice, assuming that the speculative builder supplied the item at a profit, this would make it cheaper to buy from the speculative builder than the contract builder as the profit would not carry VAT.

252. The appellant's position appears to be that because contract builders and speculative builders are not normally in competition that Parliament did not intend to equalise the VAT treatment. But that is making unjustified assumptions: even if they are not in competition, there is no reason to suppose that Parliament would have wished purchasers from speculative builders to obtain fittings free of VAT when purchasers from contract builders, and indeed, any other person in the country simply buying fittings without a house, could not do so.

253. It seems to me that what Parliament intended was that the zero rate would only apply to the bricks and mortar and 'core' fixtures. The zero rate was intended to apply to what was properly seen as the house. Parliament was not under the misapprehension that speculative and contract builders were in competition: it simply did not intend purchasers from either type of builder to acquire fittings (and non 'core' fixtures) free of VAT. It intended to equalise the position with all other purchasers of fittings. The symmetry achieved by the mirror provisions was not perfect but some kind of symmetry was clearly intended.

254. Despite the slight difference in wording, and the actually different VAT treatment, I find Parliament's intent was that fittings and non 'core' fixtures were caught by the Builders' Block and therefore 'incorporates' must be taken to include anything incorporated as a fitting as well as anything incorporated as a fixture, and indeed must be taken to mean any physical thing that was supplied as part of the single supply of the new house, as that is only way the clearly intended symmetry would be effective.

Fiscal neutrality?

255. Mr Macnab also relied on the EU principles of fiscal neutrality which is a principle of construction (*Deutsche Bank*). It is rather novel for HMRC to rely on this principle for the interpretation of a zero rating provision when in fact the UK was at liberty under EU law to retain a zero rate irrespective of the other provisions of the Directive.

256. His case was that Parliament must be taken to intend supplies of defined non-standard building materials by speculative and contract builders to have the same VAT burden: a contract builder would standard rate them, a speculative builder would zero rate them but be unable to recover input tax. This would not be an exact match but it would be much closer to fiscal neutrality that having the contract builder standard rate them and the speculative builder zero rate them.

257. Moreover, such an interpretation would help avoid a rather more real fiscal inequality in that it would remove a VAT inequality between a purchaser considering purchasing a home from a speculative builder who incorporated such items in its homes and one who did not. In the latter case the consumer would have to buy from another supplier and pay VAT. In the former, if the appellant was right, it could buy them with the house free of VAT.

258. While I am dubious that the principle of fiscal neutrality can be prayed in aid of the construction of a zero rating provision, I consider, as I have already said, that Mr Macnab's underlying reasoning is right. Parliament would not have intended to create a more favourable VAT position on white goods for consumers buying from speculative builders than consumers buying from anyone else, such as contract builders or ordinary household goods suppliers. It is likely Parliament intended that whether or not a speculative builder installs white goods and carpets in new homes should be a commercial decision and not dictated by VAT.

259. I reject the appellant's case that "incorporation" meant incorporated as fixtures.

Authority on meaning of 'incorporation' in this context

260. Neither party referred me to any binding authority on the meaning of 'incorporation' as used in the Builders' Block. I was referred to a number of Tribunal decisions where it had been considered.

261. *Rainbow Pools London Limited* (VTD 20800): The Tribunal ruled that a moveable, tiled floor over an indoor swimming pool was 'incorporated' into the house. The Tribunal's description at §8 made it clear that this floor was something of an engineering marvel and quite clearly a fixture.

> "In relation to the status of these moveable floors, they are manifestly attached and affixed to the pools, even though they move. They pass the test of being incorporated into the building."

262. The Tribunal also considered the more common retractable swimming pool covers and found they were incorporated into the structure of the pools. They were affixed and would have to be removed by tools.

263. Mr Peacock's point is that the tribunal approached the question of whether it was incorporated by looking to the degree of attachment. I consider that the case does little more than indicate that fixtures are incorporated in the sense intended by the Builders' Block. The case was about whether they were 'ordinarily incorporated' rather than whether they were 'incorporated' (which they plainly were). And this case concerned the law after the 1995 changes so it was clear fittings could be incorporated. The issue in this case was simply not an issue in that case.

264. *Rialto Homes plc* [1999] V&DR 477 (the trees and plants case): The Tribunal ruled that trees and shrubs planted in the ground were incorporated in the building sites. It seems the parties were agreed on this and the Tribunal heard no argument on it. It records at §21:

> "…the trees and shrubs, are plainly incorporated into the site of the buildings…."

265. Again this case says little useful for the matter before this Tribunal. The appellant accepts that plants and shrubs if planted are fixtures. The case indicates that fixtures are incorporated and the appellant does not dispute that. In any event, the case post-dated the 1995 change which stated 'incorporation…includes...installation as fittings" so the there was no issue on the meaning of incorporation.

266. *Rialto Builders' Ltd* (1974) VATTR 14 (the gas and electric fires case): This case, one of the first ever VAT cases, concerned a speculative builder of domestic houses who wanted to recover VAT incurred on gas and electric fires it installed in those dwellings prior to their sale. It was agreed that the fires were 'incorporated' into the houses: the disagreement with HMRC (as it is now) was whether they were 'other articles of a kind ordinarily installed by builders as fixtures'. The Tribunal said:

> "it is not clear to us how an article could be 'incorporated' in a part of the building...without becoming a fixture. However, … the Commissioners now concede that all the articles in question are fixtures...that would not appear to much of a concession ...became if the articles in question were not fixtures, we doubt whether they could be said to be incorporated in the buildings, and, if not so incorporated, they would not have come within the Exceptions Order at all, and that would have been the end of the Commissioners' case on this appeal...It may that [counsel for the appellant] welcomed [HMRC's] concession because, if these articles were not fixtures, although it would seem to provide the Appellant with an unchallengeable ground of appeal, it would also presumably mean that on sales of the Appellant's houses these articles would be deprived of the zero-rating provided for [in] item 1 of Group 8...."'

267. Decisions of the VAT & Duties Tribunal, like any decision of the FTT, are not binding on the FTT. But I do of course afford respect to such decisions.

Nevertheless, in this case the question of whether the articles were fixtures was conceded and the Tribunal's comment on the meaning of incorporation was made without hearing any argument or giving any reasoning. It was in that sense a sort of off the cuff remark and is not persuasive. The Tribunal went on to make the assumption that unincorporated goods would necessarily be standard-rated, again without reasons. And a further oddity is that one of the models of fire conceded by HMRC to be a fixture was portable, portability being the antithesis of a fixture. Something that is portable is a chattel, not even a fitting. I am not persuaded that this obiter comment about incorporation, relied on by the appellant, was right. Indeed for the reasons given in the above paragraphs, I think that it was wrong and I do not apply what was said.

HMRC's published guidance

268. The appellant relied on HMRC's published guidance. There are at least two aspects to this. The first is whether the guidance does give an unambiguous message that 'incorporates' is the same as 'installed as a fixture'. The second is whether it is relevant even if it does contain such a message.

269. <u>What the notices say:</u> VAT Notice 708 originally published in 1973 deals with 'Items installed in newly constructed dwellings' at §23. It says:

> "Goods which are *not* articles of a kind ordinarily installed by builders as fixtures are always liable to a positive rate of tax. This applies even when they are supplied in connection with zero-rated construction services….However, if such goods are incorporated in a *dwelling* which the builder is constructing on his own land in order to grant a zero-rated major interest in it, he is not making a separate taxable supply of the goods but in this case may *not* deduct input tax in respect of them…."

270. This seems an unexceptional contrast of the position between contract and speculative builders. Earlier in §23 HMRC had referred the reader to §§11(b) and 12 for the definition of what were articles of a kind ordinarily installed by builders. §§11(b) and 12 dealt with (respectively) 'materials' and 'items included as builders' hardware, etc. in dwellings'. There was no reference in §23 to §13 which immediately followed §12 but it was headed 'Items NOT included as builders' hardware, etc. in dwellings', and I consider no reader could reasonably have considered any item listed at §13 to be outside the restriction on input tax recovery for speculative builders mentioned in §23. In other words, I find the 1975 version of Notice 708 contained a clear statement the input tax could not be recovered, if they were incorporated, on:

- Fridges;
- Washing machines;
- Cookers
- Hoods;
- Fitted carpets.

While dishwashers and freezers were not mentioned, they were obviously akin to the items in §13 rather than §12.

271. That Notice was revised in August 1975 to exclude split level cookers from the Builders' Block. This was done by amending §13 to exclude split level cookers from 'cookers'.

272. A new version of Notice 708 was published in September 1982. In material respects to this appeal it merely reiterated the August 1975 revisions to the original Notice 708.

273. VAT Leaflet 708 was published in 1984. It informed the reader that if they were a speculative builder, they should also read Notice 742. At §29 this Notice had a statement similar to that in §23 in the earlier Notice 708. It referred to Leaflet 708 for the definition of 'goods which are **not** articles of a kind ordinarily installed by builders as fixtures' the supply of which was standard rated (contract builders) or blocked (speculative builders). That Leaflet at §6(d) referred to items which were always standard rated as including the items at §270 above, now with the addition of tumble dryers and split level cookers. In my opinion, §6 could only fairly be read as meaning items in §6(d) were standard rated for contract builders but (by implication from Notice 742) blocked for speculative builders if incorporated into the dwelling.

274. A new version of VAT Leaflet 708 was published in 1985. At §22, for speculative builders, it said:

> "…you cannot reclaim as input tax VAT you are charged on any of the goods mentioned in paragraph 21(a)-(c) which you incorporate in the parts of the building to be used as a dwelling or its site…."

Paragraphs 21(a)-(c) listed domestic electrical and gas appliances and carpeting. I consider a reasonable reading of this is that all white goods were within the block if incorporated but Annex V puts this beyond doubt by giving examples of appliances which included all the items mentioned at §273 above to which were added dishwashing machines and tumble dryers. It stated that 'cookers' included split level cookers.

275. Another new version of VAT Leaflet 708 was published in 1987. The summary of the previous paragraph is equally applicable to this version, except that it now referred to contract builders being able to zero rate

> "the materials, builders' hardware, sanitary ware and certain other articles of a kind ordinary installed by builders as fixtures which you *incorporate or fix* in the building. …"

276. The same expression was not used for speculative builders where the notice referred to 'incorporate'. Earlier versions had not used this wording. For instance, the 1984 version said 'use in connection with your work' of supplying zero rated construction services. I have already noted at §247 that until 1995 a different verb was employed for contract and speculative builders in the legislation too.

277. Yet another version of VAT Leaflet 708 was published in 1989. It was very similar to the 1987 version and similarly used the expression 'incorporate or fix' for contract builders. Again it said that for speculative builders input tax was blocked on items §23(a)-(d) which were incorporated into the dwelling. Items 23(a)-(d), as before, listed electrical and gas appliances and carpets. Annex D, as before, gave examples of appliances which included all the items mentioned at §247 above.

278. The VAT Leaflet was republished in 1990 and was very similar to the previous version. The section on contract builders again referred to 'incorporate or fix'. Again, the paragraph on speculative builders stated that they could not deduct tax on items which were listed in the previous paragraph, which was a list of items contract builders had to standard rate. That list included all the items mentioned at §274.

279. HMRC published a VAT Information Sheet 4/1994 which dealt with changes in the law relating to the construction of buildings. It recorded that there was a new extra statutory concession which took VAT on 'lifts or hoists' out of the input tax block.

280. VAT Notice 708 was republished in 1995. Its advice at §18.1 was very similar to what had gone before. Speculative builders were informed that input tax was blocked on items specified elsewhere in the notice as standard rated for contract builders. Cross referring to the relevant section for contract builders led to a list which included white goods and carpeting.

281. In the light of all this, I struggle to understand the appellant's submission that HMRC's published position could be read as a representation that 'incorporation' only means incorporation as a fixture. Read in context there is no representation that fittings are within the zero rate. Most significantly, the notices consistently state that input tax incurred by speculative builders on the type of goods at issue in this appeal (carpets and white goods) is blocked.

282. The appellant's case is that the notices only said that VAT on the Claim Items was blocked to the extent they were 'incorporated'. The notices contain no definition of 'incorporate' although in the section on contract builders some versions of the notice use the phrase 'incorporate or fix'. The appellant's case presumably is that the two words are synonyms but the conjunctive is 'or' so there is no reason to assume the words were meant to be synonymous. Further, there is no necessary correlation between 'fix' and 'fixtures.' In normal language, more than just fixtures could be fixed although I agree 'fix' is not apt to describe, say, simply plugging in a free standing oven. But in any event the phrase 'incorporate or fix' was used for contract builders and not speculative builders.

283. Overall, I find there was no representation that only fixtures could be incorporated and in any event a reader could not reasonably be under the misapprehension that VAT could be recovered by a speculative builder on any of the Claim Items.

284. Further, I find it is impossible for the appellant to succeed in making out any kind of claim that it found the notices misleading. They clearly did not do so at the time because they did not at the time seek to reclaim input tax on white goods and carpets (with the exception of split level cookers in the years, in respect of which the Notices clearly did permit recovery in the years 1975-1984).

285. The appellant really relied in the appeal on the version of Notice 708 which was first published in 2007 and long after the date of supply of the Claim Items at issue in this appeal. This contains an explicit definition of 'incorporated'. So it must be their case that although this explanation of HMRC's views of the meaning of the legislation post dates the facts at issue in this appeal, nevertheless it is correct and has always been correct.

286. This Notice says

> **13.3 What 'incorporated' means**
>
> An article is incorporated into a building (or its site) when they are fixed in such a way that their fixing or removal would either:
>
> - require the use of tools; or
> - result in either the need for remedial work to the fabric of the building (or its site), or substantial damage to the goods themselves'.
>
> Examples of articles 'incorporated' in a building (or its site) include:
>
> - built-in and fitted furniture (only built-in or fitted kitchen furniture are 'building materials' – see paragraph 13.5;
> - built-in, wired-in or plumbed-in appliances such as boilers or wired-in storage heaters (only certain gas and electrical applicances are 'building materials', but not items such as hobs and ovens – see paragraph 13.6)
> - flooring (carpets are not building materials – see paragraph 13.7); and
> - trees and plants….
>
> Examples of goods that are not 'incorporated' in a building (or its site) include free standing:
>
> - appliances that are merely plugged in; and
> - furniture…

287. In context, this paragraph follows paragraphs 13.1 and 13.2 where HMRC state that their interpretation of the law as follows:

> "If you are a **contractor** supplying zero rated or reduced rated services described in this notice, the building materials you supply with those services and incorporate in the building (or its site) will also be zero rated or reduced rated. Other articles are normally standard rated – see section 11.

If you are a **developer**, you may be blocked from deducting input tax on goods that cannot be zero rated to you.

288. This refers back to paragraph 12 where HMRC state:

> "[12.1] **What is the liability of goods I sell to the purchaser of a zero-rated property?**
>
> First you will need to know if the goods are 'incorporated' in the building (or its site). This is explained at paragraph 13.3.
>
> Goods that are incorporated in a zero-rated building (or part of a buiding) are zero-rated as part of you zero-rated supply of the building. But you may be 'blocked' from reclaiming input tax…
>
> **12.2 When am I 'blocked' from reclaiming input tax?**
>
> …if you intend to make a zero-rated sale..in a building, you cannot deduct input tax on goods that:
>
> - Are 'incorporated' in the building (or its site) – see paragraph 13.3; and
> - Would not be zero-rated to you if a VAT registered builder were to construct that building from scratch for you – see paragraph 11.2
>
> Typically, this means that you cannot reclaim input tax on items such as carpets, most fitted furniture, and most 'incorporated' gas and electrical appliances.
>
> …."

289. In short, HMRC in this notice states their view that free-standing appliances that are merely plugged in are not incorporated into the dwelling and not part of the zero rated supply. This is not in terms a representation that goods which are not fixtures are not incorporated but is a representation that at least one of the type of goods at issue in this appeal were not incorporated.

290. Yet by 1995, long before this Notice was published, the law was (§196-8) that 'incorporates' includes incorporates as fittings (see Note (23)). And I have found that 'incorporates' would include any fittings which were part of the zero rated supply of the house (see §254). Is the Notice wrong? Its conclusion appears to be that plugged in white goods are not 'incorporated' and not part of the zero rated supply. In so far as its basic premise that installed goods are incorporated where there are part of a single supply and not otherwise, the Notice is consistent with the conclusion which I have reached. Whether it correctly draws the line of when an installed item is incorporated and part of the zero rated supply is something I have not had to determine, as the appellant conceded that the Claim Items were part of a zero rated supply with the new houses (§184), so it follows that they were incorporated.

Reliance on guidance

291. The second issue with the appellant's reliance on HMRC's guidance is why they consider it relevant. If they rely on it to help with the interpretation of the legislation, then such reliance is misplaced. HMRC's interpretation of legislation cannot be used by a court or tribunal to discern Parliament's meaning. This is the case even though HMRC was presumably the government department which promoted the legislation and may have proposed the exact wording of the legislation to Parliament. And in any event both these interpretations used by the appellant to support its appeal were offered by HMRC long after the legislation was enacted.

292. The appellant might claim that they relied on 2007 Notice. However, I did not understand the appellant to be relying on these passages for that purpose and in any event the 2007 Notice was published *after* the period of claim and therefore clearly could not have been relied on at the time. In any event, I do not consider that the appellant can pick and chose which bits of the Notice on which it relies: it cannot rely on the part of the notice which said plugged in white goods are not incorporated unless it also relies on the part which said that they were not part of the zero rated supply.

293. The earlier representation ('incorporate or fix') dates back to 1987 and potentially covers the last eight years of the claim but, as I have said, it does not state that only fixtures are incorporated and therefore couldn't have been relied on by the appellant for this proposition. In any event, they did not plead reliance let alone detrimental reliance. Indeed, they clearly did not rely on the interpretation they now put forward as they did not reclaim the VAT at the time.

294. HMRC notices did permit for a limited period (see §§271-273) the recovery of VAT on split level cookers. If the appellant can make out its case that the vires for the Builders' Block was Article 17(6) of the 6VD, then the effective reintroduction of the block on recovery of VAT on split level cookers when this section of the Notice was withdrawn in 1984 would be unlawful and the appellant ought to succeed for periods after 1984 in so far as split level cookers are concerned. I reach a conclusion on this at §413.

295. In conclusion, HMRC's guidance is of no help to the appellant in making out its case.

Conclusions on meaning of incorporation

296. In very brief terms, it was the appellant's case that 'incorporation' was narrower than the applicable test for single supplies. In other words, an item could be a part of a single zero rated supply of the dwelling, yet not be incorporated, and therefore outside the Builders' Block.

297. A literal and purposive construction of the legislation is against it. There would be no rhyme nor reason to give 'incorporates' a narrow construction such that fittings would be zero rated, while non core fixtures would be (in effect) merely exempt.

298. Nevertheless, 'incorporates' is a more physical test than that for a single supply. It is possible that a supply of a service provided together with the sale of a house might be part of the single zero rated supply but cannot be caught by the Builders' Block as it is not goods and it cannot be incorporated in the house. But so far as goods are concerned, 'incorporates' in this context must mean incorporated such that they are part of the single zero rated supply of the dwelling house.

299. I recognise that the legislation requires the item in question to be incorporated into the house rather than incorporated into the supply; but the legislation does say incorporates

> 'for the purpose of granting a major interest in it or in any part of it'

So while I accept that there must be some kind of attachment to the house, it does not have to be attachment as a fixture; and Parliament's intent was clearly that, if the attachment was such that it was part of the zero rated grant of the major interest, then it was incorporated.

300. Mr Peacock, obviously, did not agree that the legislation could be interpreted in this manner. He said it was obviously ridiculous because such an interpretation would catch the sale of a house where the house builders had marketed it to include an electric car, which just happened to be plugged in charging in the garage at the moment of sale. But while I accept the example is ridiculous, because, unlike the appliances in this case, a car would only be intermittently connected to the electricity supply, it does rather prove the point. If, and it is a large assumption, in such circumstances the supply of the car was part of the zero rated sale of the house, then Parliament would most certainly have intended the Builders' Block to prevent recovery of the input tax on the car. So items, such as the appliances in this case, which are more likely to be part of a single zero rated supply of the house than a car, and which are constantly connected to the electrical supply, are 'incorporated' in the house in the sense intended by Parliament if they are part of the single supply of the house.

301. I consider that the Builders' Block would certainly apply to anything attached to the house by any means, including anything merely plugged or plumbed in *if* it was a part of the zero rated supply. Any other interpretation would go against Parliament's very obvious intent as explained at §§251-254.

302. My decision is that all the Claim Items, as they were at the very least operational and attached to the houses' power supply, were incorporated for the purpose of the Builders' Block to the extent that they were a part of the single zero rated supply of the new build. It was necessarily a part of the appellant's case that all the Claim Items were part of a zero rated supply and they did not contend otherwise (§184). It was HMRC's point that they did not accept that the Claim Items were zero rated but only if they were found not to be incorporated (§§185-6). Therefore, as the appellants have accepted that all the Claim Items were a part of a single zero rated supply, I find that the Claim Items were all incorporated within the meaning of the Builders' Block.

303. I note in any event that even if the appellant had contended and proved that some or all of the Claim Items were not part of the zero rated supply, the result would be that the supply of them should have been standard rated. While this would mean that the appellant would be in principle entitled to recover the input tax claimed, it leaves outstanding the question whether the unpaid output tax must be offset against the reclaim. In the event, this does not need to be resolved (as least so far as the appellant's case depends on UK law).

Were the Claim Items fixtures in the new build houses?

304. Both parties' cases were necessarily contradictory: it was the appellant's case that the Claim Items were not incorporated and in particular it was its case that 'incorporates' meant incorporates as a fixture. So its case was that the Claim Items were not incorporated as fixtures and therefore not caught by the Builders' Block. Its alternative case was that, if incorporation had a wider meaning, then the Claim Items were ordinarily installed as fixtures by builders. HMRC took the opposite view on both parts of the appellant's claim.

305. So far as the appellant's case that the Claim Items were not incorporated, I have rejected this on the law. 'Incorporates' meant anything physically attached to the house, even if merely plugged or plumped in, to the extent it was a part of the zero rated supply of the house. It is therefore irrelevant whether the Claim Items were or were not fixtures. Nevertheless, in case I am wrong on the law, and because it is relevant to their alternate case, I consider whether the Claim Items were fixtures.

306. The evidence was that the Claim Items fell into three categories:

- Free-standing white goods which were not physically attached to the kitchen but plugged in to the electrical supply and (if wet) plumbed into the water inlet and waste outlet;

- Integrated items which were physically attached to the kitchen walls or kitchen units or worksurface and which were wired into the electrical supply (or were connected by a pipe to the gas supply) and were (if wet) plumbed into the water inlet and waste outlet;

- Carpets.

307. It is possible that there was an intermediate category of white goods which were wired in but not physically attached to the kitchen walls, units or worksurface. The evidence for this was unclear: there was evidence that cookers were freestanding in the 1970s and often in the 1980s (see §85). There was no evidence on whether they were wired in or merely plugged in although it stands to reason that if they were gas they must have been 'plumbed' in to the gas supply by means of a permanent connection to copper piping in a rather more permanent manner than wet appliances are attached to the water inlet and waste outlet. I deal with this aspect at §342.

308. Most of the Claim Items stood by their own weight. In particular, white goods such as washing machines, dishwashers, fridges, and freezers must stand on their own feet. Carpets lay on the ground. The exceptions are:

a) extractor hood which was fixed to the wall;
b) hobs and split level cookers which were (respectively) inserted into the worksurface and kitchen units
c) microwaves (which if integrated were inserted into kitchen units).

309. All of the Claim Items were designed to be removable and replaceable. As the evidence of Mr Firth-Bernard established, for integrated units, fixings would have to be undone, and wiring and/or plumbing connections undone, but they could all be removed and replaced. The evidence from Mr Truscott, which I accept, was that the design life of a house would be about 75 years and it could last considerably longer: it is common knowledge that the working life of an appliance is considerably shorter, often less than five years. The useful life of a carpet might well be longer but I consider it common knowledge that its life would be considerably less than that of the house in which it was installed.

The test for fixtures

310. The test for fixtures determines whether something is a part of the land and passes automatically on the conveyance of that land and is inevitably therefore something that has triggered litigation. The problems in identifying whether something is a fixture has no doubt led to the modern conveyancing practice of specifying exactly what is or is not included in the sale without identifying whether or not the items actually are fixtures. But I have to go back to first principles.

311. Mr Justice Blackburn summarised the rules in *Holland v Hodgson* [1872] LR 7 CP 328, 333-334 and what he said was approved by the Court of Appeal in the recent case of *TSB v Botham,* which I discuss below. He said:

> "There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz, the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, then by its own weight it is generally to be considered a mere chattel….On the other hand, an article may be very firmly fixed to the land, and yet circumstances may be such as to shew that it was never intended to be part of the land, and then it does not become part of the land……
>
> ……Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who asset that they have ceased to be chattels,

> and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel..."

312. These comments are not, of course, directed to white goods and fitted carpets, which did not exist in 1872. Coming forward a hundred years, another leading case on fixtures is *Berkely v Poulett* [1977] 241 EG 911 where Scarman LJ said that there are two tests to decide if an item was a fixture:

(1) method and degree of annexation; and

(2) object and purpose of the annexation.

At page 913 Scarman LJ suggested that test (2) was becoming more important than (1) because of advance in technical skills in attaching and removing items:

> "….The same item may in some areas be a chattel and in others a fixture. For example, a cooker will, if free standing and connected to the building only be an electric flex, be a chattel. But it may be otherwise if the cooker is a split level cooker with the hot set into a work surface and the oven forming part of one of the cabinets in the kitchen. It must be remembered that in many cases the item being considered may be one that has been bought by the mortgagor on hire purchase, where the ownership of the item remains in the supplier until the instalments have been paid. Holding such items to be fixtures simply because they are housed in a fitted cupboard and linked to the building by an electric cable, and, in cases of washing machines by the necessary plumbing would cause difficulties and such findings should only be made where the intent to effect a permanent improvement in the building is incontrovertible. The type of person who installs or attaches the item to the land can be a further indicator. Thus items installed by a builder eg the wall tiles will probably be fixtures, whereas items installed by eg a carpet contractor or curtain supplier or by the occupier of the building himself ...may well not be."'

313. Scarman LJ is here dealing with some of the items that are at issue in this appeal. Free-standing appliances which are merely plugged in are not, he says, fixtures. Integrated appliances (ie wired in and fixed to the kitchen units) will only be fixtures if there was an 'intent to effect a permanent improvement'.

314. What does Scarman LJ mean by effecting a permanent improvement? How can affixing a washing machine ever effect a permanent improvement to a house (let alone the land) when by its very nature a washing machine will have a much shorter expected lifespan than the house?

315. It seems to me that what he says here only makes sense if by 'permanent improvement' he meant the item was intended to be left permanently in place until it reached the end of its expected life, rather than the expected life of the building. Very

little other than the bricks would be a fixture if to be a fixture it had to be intended to permanently increase the value of the building during the whole existence of the building. Windows are obviously fixtures yet would normally be replaced during the life of a house.

316. Scarman LJ may also have meant by 'intended to effect a permanent improvement' simply that the intention was that the items would be left in place when the building was sold. This is perhaps simply another way of saying that the item was fixed with the intention that it should stay there until the end of its expected life, even if the original owner of the house moved elsewhere.

317. Twenty years later, the Court of Appeal considered the matter again in the case of *TSB Bank plc v Botham* (1996) 73 P&CR D1. In this case, the owner of a flat assigned (or purported to assign) various items situated in his flat to his parents. The mortgagee (TSB) re-possessed the flat for non-payment of the mortgage. The parents, as assignees of the mortgagor, claimed ownership of the assigned items. The case turned on whether the items were fixtures. If they were fixtures, the mortgagor was unable to effectively assign them to his parents.

318. There were some 109 items in dispute which the court divided into 9 groups. Of relevance to this appeal were groups 1 (fitted carpets) and group 9 (white goods – including what in this appeal are described as high and low specification appliances).

319. Roch LJ, as I said, approved Blackburn J's statement in *Holland v Hodgson* which I cited above. Roch LJ went on to say that those principles had to be applied with what Scarman LJ had said in *Berkely v Poulett* in mind. Roch LJ said:

> "In fact these items remain in position by their own weight and not by virtue of the links between them and the building...All these items can be bought separately and are often acquired on an instalment payment basis, when ownership does not pass to the householder immediately. Many of these items are designed to last for a limited period of time and will require replacing after a relatively short number of years. The degree of annexation is therefore slight. Disconnection can be done without damage to the fabric of the building and normally without difficulty. The purpose of such links as there were to the building was to enable these machines to be used to wash clothes or dishes or preserve or cook food. Absent any evidence other than the photographs, it was not open to the judge, in my opinion, to infer that these items were installed with the intention that they were to be a permanent or lasting improvement to the building..."

320. Sir Richard Scott VC said:

> "...I do not think that an item of electrical equipment eg a dishwasher, a refrigerator, a deep freeze or a washing machine, affixed, if that is an apt word, by no more than a plug in an electric point, could ever be held to have become a fixture" but then once affixed "in a sufficiently substantial manner to enable a contention that it has become a fixture...the critical question will be that of intention."

321. Roch LJ also said:

> 'holding such items to be fixtures simply because ...they are linked...to the building...in cases of washing machines by the necessary plumbing would cause difficulties and such findings should only be made where the intent to effect a permanent improvement in the building is incontrovertible....'

322. The Court considered that the kitchen units and sink were fixtures. The degree of annexation was sufficient and the intention was to effect a permanent improvement. My understanding of what they meant here is that the expectation is that they would only be removed at the end of their useful life: they would not be removed and taken away by the owner when he sold the flat.

323. So the refinement of the test stated in *Holland* appears to be:

(1) is the annexation sufficient for it to be possible that the item is a fixture?

(2) if so, was the intention to effect a permanent improvement in the sense that the item would be left in situ for its lifetime? But this latter test must be applied on the basis that the lesser the degree of attachment, the stronger the evidence of intent to effect a permanent improvement must be before the item could be considered a fixture.

324. White goods. The Court of Appeal considered all the white goods to be fittings rather than fixtures. The only evidence they had was photographs and they did not know how the white goods were fitted.

325. This was a finding of fact following the application of the legal test set out at §323. Applying that legal test to the facts in this case, was the degree of annexation sufficient that it was possible that the white goods could be fixtures? Sir Richard Scott VC expressed the view there was insufficient annexation where an appliance was merely plugged in. This must be right. Plugging in an appliance requires no tools and is the work of a few moments. If it was not right, it would suggest a toaster or food processor could be a fixture. (I note in passing that *Rialto Homes* (§267) would appear to be wrong in considering that a portable electric fire was a fixture).

326. Therefore, to the extent that the white goods provided were merely plugged in, I find that they were not fixtures. This applies to some of the Claim Items but I do not have the evidence to quantify how many. I consider this true even if in addition they attached to the water supply and drains, as the evidence was that these attachments could be easily made and undone, although might require the use of tools to tighten up a jubilee clip.

327. The other white goods were attached with a greater degree of annexation. They were all wired in and attached by screws to the carcass of the kitchen units and/or the work surface and/or a kitchen unit door or (in the case of the hood) to the kitchen wall.

328. There was no suggestion in *TSB v Botham* that that degree of annexation of wired-in and integrated white goods was insufficient for them ever to be a fixture. The evidence in this case (which was lacking in *TSB)* was that it would take a team of two experienced fitters about 30-45 minutes to install each item (see §169). I consider that when goods are wired in and attached to the building or a fixture in the building (the kitchen units or worksurface), then the degree of annexation is such that it is legally possible for them to be fixtures.

329. It was accepted that sinks and kitchen units were fixtures but I had no evidence on how much work was involved in attaching those to the house, so it is difficult to make a comparison between say, the work involved in attaching a sink, a door, and an integrated fridge. I will not make the assumption that 'merely' because only 4 screws and wiring attach an integrated cooker to the house, that that is necessarily less work and a lesser degree of attachment than say a kitchen cupboard, which was accepted to be a fixture. The appellant certainly did not satisfy me that the degree of annexation of integrated white goods was such that they could never be fixtures.

330. The next question is whether there was the necessary intention for them to be fixtures. TSB failed to prove this in the Court of Appeal. As I have already said, here the evidence is somewhat different. In this case, the appellants intended to improve the value of the house or at least its saleability by including the white goods in the sale (§147). Even if the question is whether the items were installed with the intention of leaving them there for their useful life, then I would say as a matter of common sense integrated appliances in a kitchen are installed with the intention of leaving them in situ for their useful life. The expectation must be that they would not be removed until they failed and needed to be replaced. Indeed to the extent there was evidence on this, the suggestion from the witnesses was that they were replaced because they failed, and not for any other reason.

331. Therefore, on the evidence in this case, I find that the wired in and integrated white goods were fixtures. The only white goods which I am satisfied were not fixtures were those that were merely plugged in, including those which, where necessary, were also plumbed in to the water supply.

332. Carpets: The Court of Appeal ruled in *TSB v Botham* that the fitted carpets were not fixtures. They considered that carpets are only attached to the floor in order to be used and attached in an insubstantial manner. They considered that neither the degree of annexation nor surrounding circumstances indicated an intention to effect permanent improvement. The Court of Appeal disapproved a High Court case *Young v Dalgety* [1987] 1 EGLR 116 which had found carpets to be fixtures.

333. In *TSB v Botham* the Court of Appeal had very little evidence to go on: just photographs. The Court of Appeal in making its decision took judicial notice of matters which they thought were common knowledge, such as carpets being easy to take up and that people take them with them when they move. They also stated that they were not installed by house builders:

> "They are not installed , in the case of new buildings, by the builders when the building is constructed, but by the occupier himself ...or by specialist contractors who supply and install such items." Per Roch LJ

334. However, while there is very little evidence in this case about the carpets, what evidence there is differs from the assumptions made in *TSB v Botham*. Most significantly, the evidence here is that (where carpets were installed) they were installed by the house builders with the intention of leaving them in place on the sale of the house.

335. Moreover, I have some difficulties with the assumptions made by the Court of Appeal. It is common knowledge that carpets are held down by gripper rods but the Court of Appeal did not consider whether the rods were to be seen as part and parcel of the carpet. Gripper rods are no good for attaching any other form of floor covering and are not as easily taken up as the carpet and do damage the floor they are nailed onto.

336. And the fitted carpets themselves have to be cut to size and fitted by expert fitters. While it is physically possible to remove them, they could only be re-used in a smaller room. It seems to me that where the item in question has to be cut to size by an expert fitter it is more likely there was an intention to effect a permanent improvement in the sense that the item was likely to be left in place for its useful life and/or there is no intention by the owner to take them with him when he leaves.

337. The Court of Appeal's view was that people either took fitted carpets with them when they sold a house or demanded extra money for leaving them behind: yet they had no evidence that this was true and (speaking from my own experience of conveyancing) carpets are not like curtains: people rarely take fitted carpets when they leave and it would be unusual for a buyer to pay for the fitted carpets above the already agreed price for the house. I find the Court of Appeal's decision on the facts about carpets to be surprising, although it may be explained as a decision which rested on the failure of the appellant to discharge the burden of proof.

338. Mr Peacock's view is that it was a decision on the law and is binding on me. I do not agree. Whether fitted carpets are a fixture is a question of mixed law and fact. The law as discerned by the Court of Appeal was whether (a) the carpets were attached with sufficient annexation and (b) whether the intention was to effect a permanent improvement. The case was short on *facts* and the judges relied on their own experience (see the comment about radiator leaks below). To the extent it was factual or based on assumptions, the decision is not binding.

339. Applying the law, the first question to ask about a putative fixture is whether there is sufficient degree of attachment such that it could be a fixture. Sir Richard Scott VC (with whom Henry LJ) agreed appeared to think a carpet did not have a sufficient degree of attachment: Sir Richard said:

> "I very much doubt whether fitted carpeting could ever be held to be a fixture. It is relatively easy to take up fitted carpeting. A leaky

> radiator often necessitates that a carpet be taken up in order to allow the floor underneath to dry out..."

340. This is, however, a matter of fact, and I am not bound by their findings of fact. In any event, Roch LJ's decision was not clearly based on lack of annexation and Henry LJ agreed with him too. So I do not consider I am bound to find that carpets can never be fixtures because of a lack of annexation. And it seems to me that (taking judicial notice of the fact that) a fitted carpet is cut to size, fitted by expert fitters with tools, and held down by gripper rods nailed to the floor, that it has a sufficient degree of annexation that it is possible for it in some cases to be a fixture.

341. If attached with a sufficient degree of attachment, the next question is intention. In the *TSB v Botham* case it was considered (but without evidence) that house builders did not install carpets. This case only concerns carpets fitted by house builders. And where the house builder did fit carpets, it was clearly with the intention of passing title in them to the buyer. The entire purpose of the law on fixtures is to identify whether title to the thing in question passes with the land. Where it is intended that title to the putative fixture will pass with the land, this must be the archetypal 'intention' that the thing in issue is a fixture. Wimpey did not fit the carpets in order to use them: they fitted them with the intention of improving the value of the house. I find that on these facts the carpets, where fitted, were fixtures.

342. I am conscious that I have reached the opposite conclusion to the Court of Appeal on the same question, but I have done so where the facts are different. The cases could be distinguished on the basis of burden of proof: in *TSB* the bank had to satisfy the court that the fitted carpets and white goods were fixtures and they failed to do that. Here the appellant has failed to satisfy me that the fitted carpets and integrated white goods were not fixtures. However, I do not base my decision on the burden of proof. Bearing in mind this is a case where the appellant runs a contradictory case in the alternative (see §199), that would lead to a very strange and unsatisfactory result: deciding it on the burden of proof would mean that for its primary case the appellant has failed to satisfy me that the items were fixtures, but that in its alternative case the appellant has failed to satisfy me that the items were not fixtures. I find that I am satisfied on the facts of this case, and irrespective of where the burden of proof falls, that the fitted carpets and integrated white goods were fixtures. I am satisfied the other white goods (those merely plugged and sometimes plumbed in) were not fixtures. To the extent any white goods were in the intermediate category identified at §307, I consider that they were fixtures as there was just a sufficient degree of annexation for being a fixture to be a possibility, and there was clear intent to effect a permanent improvement.

Summary of findings on primary case

343. The appellant's case was that the Claim Items were not incorporated into the houses which were sold and that therefore, while a part of a single supply with the house, the input tax was not blocked as a matter of UK law because they were not incorporated.

344. I have found that as a matter of UK law, 'incorporates' meant anything physically attached to the house, even if merely plugged or plumbed in, to the extent it was a part of the zero rated supply of the house. It does not only refer to items incorporated as a fixture, although it obviously includes them.

345. Even if the appellant was right and 'incorporated' meant only incorporated as a fixture, I have found that only the plugged in free standing white goods were not fixtures so only those goods would be outside the Builders' Block.

346. And even if I am wrong on the meaning of 'incorporates' and some or all of the Claim Items were not incorporated, that would not have meant that the appellant wins its case. It would have to go on and establish that either those Claim Items were part of the zero rated supply with the house, which, if they were not 'incorporated', is not accepted by HMRC or that even if not zero rated, the appellant is entitled to reclaim its input tax without offsetting the output tax on what would have been a standard rated supply. This is also denied by HMRC. But in the event these issues do not arise as I have found all the Claim Items were incorporated.

Appellant's second case – the Claim items were ordinarily installed as fixtures

347. Mr Macnab originally objected that this was a new ground of appeal of which he had had no warning, but he withdraw that objection in the hearing and I do not consider it.

348. In brief, the appellant's position is that if they are wrong to say that the Claim Items were not fixtures, then the items were outside the Builders' Block as they were within the exclusion for 'articles of a kind ordinarily installed by builders as fixtures', and to the extent that later versions of the Builders' Block was amended to specifically remove the Claim Items from the exclusion to the Builders' Block, the amendments were unlawful under EU law. So the first part of its second case is based on UK law and the second part is based on EU law. I consider the UK law aspect first.

Meaning of ordinarily installed by builders as fixtures.

349. The meaning of this phrase was considered in the case of *Smitmit Design Centre Ltd* [1982] STC 525. This was a case about fitted wardrobes and was a decision of Mr Justice Glidewell.

350. The case (at page 531a) is authority for the proposition, which was not in dispute, that the phrase 'ordinarily installed by builders as fixtures' was not intended to draw a distinction between something installed by a builder and something installed, say, by an electrician or plumber, but meant 'were the articles ordinarily installed when houses are built'.

351. The phrase had also been considered in the earlier case of *F Austin (Leyland) Ltd* [1968] 2 All E R 13 (where the expression was used in the purchase tax legislation). In that case Mr Justice Stamp had said that 'ordinarily' meant 'as a matter of course'.

He said that they are articles the absence of which would cause the prospective purchaser [of a new house] surprise. Mr Justice Glidewell in *Smitmit*, however, considered that it meant "in the ordinary way', or 'commonly' or perhaps 'usually' but not 'invariably'.

352. The Tribunal in *Rialto Homes (the tree and shrub case)*, mentioned above, despite having had neither of these cases cited to it also considered that 'ordinarily installed' meant of 'ordinary occurrence' and 'usually' or 'commonly' (see page 488E and 489B).

353. So in deciding whether the Claim Items were 'ordinarily' installed the question is whether they were usually or commonly installed when homes were built. They did not have to be invariably installed.

Against what kind of building is 'ordinarily' measured?

354. Does the item in question have to be ordinarily installed in all houses, or only a particular kind of house? Earlier Tribunals have required 'ordinarily' to be measured against all new homes and not those of a particular class. See *Barrett Newcastle* (1994) *Tom Perry* VTD (19428) and *Rialto Homes (trees and shrubs case)* at page 488H:

> "one cannot just confine one's attention to the particular development in question…" but one must look at "the building of new houses in general".

The decision went on to say the sort of housing at issue in that case (new houses on developments rather than single house builds) was itself so common, that something common on that sort of development was of ordinary occurrence in respect of all new housing (§23).

355. I consider that these cases were correct to measure 'ordinarily' against all new dwellings rather than particular kinds of dwellings. The legislation (see §190) refers to 'articles of a kind ordinarily installed by builders' and refers to what I consider to be core items such as hardware and sanitary ware. The overall tenor is that Parliament only wished the zero rating to benefit 'core' items and not luxury or non-essential items. It meant ordinarily installed in all new dwellings.

356. The appellant relied on the later decision in *Rainbow Pools* referred to above. The case related to the legislation after 1995 which included the phrase 'any description of building' in the definition of 'building materials'. This is set out in full at §198 above but I repeat it here with emphasis on the relevant phrase:

> " 'Building materials', <u>in relation to any description of building</u>, means goods of a description ordinarily incorporated by builders in a building of that description, (or its site), but does not include - ……
>
> (a) finished or prefabricated furniture, other than kitchen furniture;
>
> (b) materials for the construction of fitted furniture, other than kitchen furniture;

(c) electrical or gas appliances, unless the appliance is an appliance which is -

(i) designed to heat space or water (or both) or to provide ventilation, air cooling, air purification or dust extraction; or

(ii) intended for use in a building designed as a number of dwellings and is a door entry system, a waste disposal unit or a machine for compacting waste; or

(iii) a burglar alarm, a fire alarm, or fire safety equipment or designed solely for the purpose of enabling aid to be summoned in an emergency; or

(iv) a lift or hoist;

(d) carpets or carpeting material.

357. The Tribunal's reading of this in *Rainbow Pools* was that it meant

> "'any description of building', including for instance 'a luxury dwelling house'."

358. So in the view of that Tribunal, swimming pools could be 'ordinarily installed' in luxury dwelling houses even though they are clearly not ordinarily installed in any other kind of house:

> "[21] Our decision on this issue is that 'any description of building' means 'any description of building' including for instance 'a luxury dwelling house...If...one is addressing what is ordinary incorporated in high-rise flats or luxury dwelling houses, it seems to us that those categories of buildings are 'buildings of a description' and they both falls within the overall category of 'dwelling houses'. Furthermore, the list of 37 items that HMRC give in their Public Notice ….only makes sense if one adopts this approach. Hoists, lifts and air conditioning are not ordinarily incorporated in dwelling houses in general, though they are ordinarily incorporated in high-rise flats, ….Saunas and swimming pools are ordinarily incorporated in luxury dwelling houses, rather than dwelling houses in general. If Note (22) had meant to refer to what was ordinarily incorporated into the various generic categories of building referred to in the Items of Group 5, it could have said precisely that, rather than refer to 'buildings of any description'."

359. However, I do not think that this was the meaning intended by Parliament. Firstly, there was no indication that they intended to change the law on this. And as I have said, prior to the 1995 legislation, it is clear that 'ordinarily' had to be measured against all dwellings. Secondly, 'any description of building' has to be seen in the full context of Group 5. Group 5 itself contains different descriptions of buildings. There are those 'designed as a dwelling', those 'designed as a…number of dwellings', those 'intended for use solely for a relevant residential' or those 'intended for use solely for … a relevant charitable purpose'. Therefore, the reference to 'any description of building' in context is a reference to the four different types of building identified within that Group.

360. As I have said, the Tribunal in *Rialto Homes*, where the same legislation was at issue, came to the same conclusion on the meaning of 'any description of building':

> "that takes one back, applying the statutory hypothesis in the Blocking Order, to a building of a kind described in items 2 or 3 of Group 5 and for the present purposes that is a 'building designed as a dwelling or a number of dwellings'..."

361. 'Any description of building' is not a reference to '2 bed homes' or 'large luxury homes' or any other such division. Such a meaning would allow non-core, non-essential luxury items to benefit from the zero rating even though this was clearly not intended by Parliament. I note that I have said at §209 that 'ordinarily' did not qualify the first three (a)-(c) exclusions from the Builders' Block so that Parliament did intend unusual building materials to benefit from zero rating; but item (d) was qualified by the word 'ordinarily' and Parliament's intent was to block input tax recovery on unusual fixtures and fittings.

362. Is this right? The appellant points out that HMRC's public notice permits VAT to be recovered on a number of items that are not 'ordinarily' installed in most dwellings such as lifts and hoists. However, the notice may be giving effect to concessionary treatment and certainly the earliest notice permitting VAT to be recovered on lifts and hoists referred to this as concessionary treatment.

363. More significantly, the legislation itself is phrased on the assumption that lifts and hoists are 'ordinarily' installed in at least one description of building because they are listed as exception (c)(iv) to the 1995 version of the Builders' Block (see §198). The intention of Parliament was clearly that lifts and hoists would be zero rated because it excepted them from the Builders' Block; but that exception is only effective on the assumption that otherwise they are 'goods of a description ordinarily incorporated by builders in a building of that description'. But lifts are not ordinarily incorporated into dwelling houses. But the answer to that is that a lift is ordinarily incorporated into a building of the description 'designed as a …number of dwellings'. In other words, they are ordinarily if not invariably incorporated into apartment blocks.

364. In conclusion, I do not agree that *Rainbow Pools* was rightly decided on this point. Parliament did not intend to give zero rating to items 'ordinarily' installed in luxury dwellings but no others. 'Ordinarily' since 1995 means ordinarily installed in one of the four types of building specified in Group 5; before that date it just meant ordinarily installed in 'buildings used as a dwelling'.

365. To a large extent, the point is not particularly relevant in this appeal. I understand Mr Peacock to be making the submission that some of the white goods in this appeal, such as dishwashers, were 'ordinarily' installed into large 5 bed houses before they were 'ordinarily' installed in studio flats. While there was evidence that the most expensive houses were more likely to have white goods installed, and evidence that some apartments without gardens might have wet appliances installed where other dwellings would not, the evidence was far too vague for me to be satisfied that either there was a date from which certain appliances were ordinarily

installed in high end homes or that at any time apartments without gardens would ordinarily have wet appliances installed.

366. So in other words, the evidence on which Mr Peacock could rest such a submission is lacking. But even if the evidence was there, my understanding of the law is that the appellants must demonstrate that the Claim Items were, up to 1995 ordinarily installed as fixtures by builders in a building (or its site) used for the purpose of a dwelling. And after 1995 they have to show that, where the builders built single houses, the Claim Items were ordinarily installed as fixtures in buildings 'designed as a dwelling', or, where the builder built flats and maisonettes, that the Claim Items were ordinarily installed in all buildings 'designed as a…number of dwellings'.

The time at which ordinarily installed should be measured

367. The assumption was that 'ordinarily installed' should be measured at the time in question. Yet it seems to me that it ought to be measured as at the date of the legislation. However, the legislation was re-enacted on a number of occasions and Parliament itself was clearly aware that what was ordinarily installed by builders was changing over time, as it extended what was caught by the Builders' Block. So it seems 'ordinarily' should be measured at the time of each re-enactment, which in reality amounts to much the same as measuring it at the date in question, as there were so many re-enactments, including re-enactments in 1977 and 1981.

368. While this was not specifically considered, I note in passing that if what was ordinarily installed increased over time, then (ignoring the amendments which removed specified items from the exclusion to the Builders' Block) the effect was that the scope of the UK's zero rate was increasing over time. Yet such an increase in scope would appear to be unlawful under EU law: see Article 28(2)(a) at §390 below. I revert to this point at §480 below.

Conclusions on the evidence

369. So which if any of the Claim Items were ordinarily installed and from what date? I have already reached conclusions at §§149-162 on what was installed as standard. I consider that, on the basis of my conclusion on the meaning of 'ordinarily' at §353, that if an item was installed as standard by house builders then it was 'ordinarily' installed within the meaning of the Builders' Block. But the converse is not true: if an item was *not* installed as standard it would not necessarily mean that it was not ordinarily installed. The witnesses seemed to take 'installed as standard' to mean that most houses would have the item installed, whereas the legal test is only that they should be 'usually' or 'commonly' installed. To me, 'ordinarily' means no more than the item in question was more likely to be installed than not.

370. With the exception of a handful of adverts mentioned at §§135-141 I had virtually no evidence about the practice of non-Claimant Companies. The Claimant Companies themselves appeared to represent around 16% of the market. As there were many variations between the practices of the Claimant Companies, it could not

be correct to assume that they were representative of the industry as a whole, except in respect of low specification appliances in the 1990s, when the practice of the various Claimant Companies were largely consistent. In other words, with the exception of low specification appliances in the 1990s, the practices of the Claimant Companies was so varied with respect to the Claim Items that I find the appellant has not proved that the Claimant Companies' treatment of Claim Items was representative of the industry of the whole.

371. 1970s: My conclusions at §150 were that there was no evidence that low or high specification appliances or carpets were installed by builders in the 1970s. I find that they were not ordinarily installed in the 1970s.

372. low specification appliances as at 1984: As at the date that low specification appliances were specifically removed from the exclusion to the Builders' Block in 1984, I found that the evidence was that they were not installed as standard. There was evidence, which I accept, that at this time low specification items were installed in most Wimpey and Bryant homes and were installed in *some* of the houses produced by *some* of the other builders including some of the other Claimant Companies, but I find the evidence before me does not show that they were 'ordinarily' installed in the sense of commonly or usually.

373. In particular, while the appellant claimed that Claimant Companies other than Wimpey and Bryant installed low specification appliances in 1984 in 30-50% of new homes, my findings of fact were that Laing did not, I had no evidence for Wain and Wilcon, and while McLean did install them in some new homes I had insufficient evidence to ascertain what percentage. The evidence for non-Claimant Companies was based on 4 adverts which was too small a sample to be satisfied of anything other than some house builders sometimes installed them. In conclusion, I was not satisfied that low specification appliances were ordinarily installed as at 1984 (or indeed at any other date in the 1980s).

374. high specification appliances as at 1984: So far as high specification appliances in 1984 were concerned, while they were installed in most Wimpey homes, Wimpey only had at best 10% of the market and the other builders for which I had evidence covered at best a similar market size and were shown only to install them in a minority of houses. Therefore, not only did I find they were not installed as standard as at 1984, the evidence was such that I could not conclude that they were 'ordinarily' installed by that date.

375. In particular, the appellant's claim before the hearing was only that at most high specification appliances were installed in 10% of new homes by Claimant Companies (plus 20-25% for Bryant and as standard for Wimpey). My findings of fact was that there was no evidence that they were installed by any other builders then Wimpey and Bryant. As Wimpey and Bryant's combined market share was at best around 10%, I am not satisfied that high specification appliances were ordinarily installed in the 1980s.

376. Carpets as at 1987: So far as carpets are concerned, I found at the date that carpets were specifically removed from the exclusion to the Builders' Block in 1987, Wimpey installed carpets as standard but there is no reliable evidence that any other house builder did so, particularly as the evidence was that Wimpey did this as a marketing tool as it distinguished them from competitors. While there is evidence, which I have accepted, that some of the other builders installed carpets in some houses, the evidence (and even the claim) was that this was not a high percentage. The evidence is such that I cannot conclude that carpets were 'ordinarily' installed in new homes as at that date.

377. In particular, the appellant's claim for the other Claimant Companies, with the exception of Bryant who was a small operator, was between zero and 14%. My findings of fact was that it was not proved that Bryant did install carpets in the 1980s, and that it was rare but not unknown for other companies to do so (§139). I am satisfied that fitted carpets were not ordinarily installed in the 1980s.

378. low specification appliances in the 1990s: I found at §161 that low specification items were installed as standard from 1990 and therefore I conclude that they were 'ordinarily' installed by that date.

379. high specification appliances and carpets in the 1990s: I found high specification items and carpets were not were not installed as standard in the 1990s and I find that the evidence is such that I cannot conclude that they were ordinarily installed as at that date.

380. In particular, the agreed position for Wimpey is (roughly) that high specification appliances were installed in 80% of new homes and carpets in 60% of new homes in the 1990s. For McLean, high specification appliances were installed in 20-28% of new homes and carpets in none in the 1990s. My findings of fact were that Bryant (a small operator) installed them as standard in the South but I had no evidence for the position elsewhere; Laing did not install them as standard but did install them in some new homes, although I was unable to be satisfied how often (§§124-5); Wain and Wilcon did not install them (§129); Admiral did not install carpets but did install high specification appliances in an unknown percentage of its new homes; nothing was proved for Taylor Woodrow; and the evidence for non-Claimant Companies was that they were installed in some cases but I was unable on such a small sample to ascertain what percentage. In conclusion, I was not satisfied that high specification appliances and carpets were ordinarily installed in new homes in the 1990s.

381. So I have found that during the period of the claim high specification appliances and carpets were never 'ordinarily' installed in dwellings. This means that as a matter of UK law they were never within the exclusion to the Builders' Block. This conclusion is unaffected by whether they were fittings or fixtures: if they were fittings they could never benefit from exclusion (d). If they were fixtures, they could never benefit from exclusion (d) because they were never 'ordinarily' installed in the claim period.

382. So far as low specification appliances are concerned, I have found that they only became 'ordinarily' installed in the 1990s. This means that as a matter of UK law they have never been able to benefit from the exclusion to the Builders' Block. They were not 'ordinarily' installed when in 1984 white goods were specifically removed from the exclusion; by the time they became 'ordinarily' installed, the law had been changed to specifically remove them from the exclusion to the Builders' Block.

383. However, there is a qualification to this. As a matter of HMRC practice, split level cookers (a low specification item) were able to benefit from the exclusion to the Builders' Block from 1975 to 1984. When this administrative practice changed in 1984, the input tax on them became blocked because, at that point in time, they had not yet become ordinarily installed. By the 1990s, when they did become ordinarily installed, they remained blocked because white goods had been specifically stated since 1984 to be blocked.

The Vires of the Builders' Block

384. That ends the appellant's alternative case so far as UK law is concerned. As a matter of UK law there was no point in time when UK law permitted the recovery of input tax on the Claim Items. The only qualification to that is the administrative practice on split level cookers from 1975-1984 and, as it is accepted that the Claimant Companies would have recovered VAT at the time under this concession, it means that its claim cannot succeed under UK law.

385. But as a matter of EU law, the appellant claims that, at some point in time, the Claim Items did become 'ordinarily' installed by builders and the changes to the Builders' Block in 1984 and 1987 which specifically included them in the Builders' Block were unlawful under EU law and that it follows the appellant should recover VAT on the Claim Items from the moment that they have proved that they became 'ordinarily' installed. As the appellant has only proved that low specification appliances ever became ordinarily installed (from 1990) this part of its case applies only to low specification appliances.

386. The Builders' Block is UK law. It does not reflect anything in what was the Second VAT Directive, the Sixth VAT Directive (6VD) or is now the Principle VAT Directive (PVD). I will refer to the 6VD in this decision as that was the Directive in force for most of the period at issue in this appeal; in any event there is no practical difference between the Directives on the relevant points.

387. Both parties considered a Builders' Block (in principle) lawful under the 6VD and PVD but they did not agree on why. The appellant's contention was that as a block on input tax it could only be lawful under Article 17(6) of the 6VD with the effect that it could not be extended after 1 January 1978. HMRC's contention was that it was lawful under the 'exemption with refund' provisions of Art 28(2)(a) 6VD and could be extended at any time.

388. Neither considered (before I raised it at the hearing) the possibility that the entire Builders' Block was unlawful. If the entire Block was unlawful, that potentially affects the entirety of the appellant's claim.

389. At the time VAT was introduced in the UK in 1973, the relevant EU legislation was the Second VAT Directive. Article 17 of that Directive (not to be confused with Article 17 of the 6VD) as I have already said provided Member States could grant:

> "…reduced rates or even exemptions with refund, if appropriate, of the tax paid at the preceding stage, where the total incidence of such measures does not exceed that of the relief applied under the present system. Such measures may only be taken for clearly defined social reasons and for the benefit of the final consumer…."

390. This was replaced by the 6VD (with effect, the parties agreed (see §417), from 1 January 1978) which provided as follows:

> Art 28(2)(a)
>
> "Exemptions with refund of the tax paid at the preceding stage... which were in force on 1 January 1991 and which are in accordance with Community law, and satisfy the conditions stated in the last indent of Article 17 of the Second Council Directive of 11 April 1967, may be maintained"

391. Both parties were agreed that the zero rating of the Claim Items was lawful. This seemed odd to me as (as I have said at §§226-230) there seems to be a good case that it is not lawful under EU law. Zero rating is lawful only on the grounds of social policy and, as I have already said, I see no reason why any social policy is served by allowing purchasers of new homes from speculative builders to acquire white goods and carpets zero-rated when everyone else in the UK must pay VAT on their white goods and carpets. A second reason why it might be unlawful in respect of the Claim Items once they were 'ordinarily' installed is mentioned at §368 and that is because it might represent an effective widening of the scope of the zero rate: on the facts this is only relevant to low specification items in the 1990s.

392. Of course, HMRC's position is that the Builders' Block in practical effect, if not in law, removed the zero rate from white goods and carpets, so that the UK was not in breach of the Directive even if Art 28(2)(a) did not permit the zero rate to cover or be extended to cover white goods and carpets.

393. So far as the appellant is concerned, it relies on the zero rate granted by UK legislation. It is entitled to rely on UK legislation and HMRC did not and would not be allowed to plead against them that it was unlawful. The appellant's case is that it can rely on the zero rate granted by UK law but reject the Builders' Block also imposed by UK law on the grounds recovery of input tax on taxable supplies is governed by Article 17 of the Sixth VAT Directive.

394. The appellant's case faces a number of hurdles:

- Its case is that the 1984 and 1987 extensions to the Builders' Block were unlawful, which requires it to show that the 'input tax' position of zero rated supplies is governed by Art 17(6) 6VD while the 0% charge rate is governed by UK law authorised by Art 28(2)(a) 6VD.

- if the Builders' Block and/or the extensions to it in 1984 and 1987 Orders were unlawful does that actually mean that the appellant can rely on the UK law 0% charge on the supply of the Claim Items but rely on EU law rights to reclaim its input tax on that same supply? In other words, can the appellant rely on UK law for the 'output' tax position but EU law for the 'input' tax position on the same supply?

I deal with these issues below:

Must the Builders' Block conform to Art 17(6) 6VD?

395. Article 17 of the 6VD provided as follows:

> Origin and scope of the right to deduct
>
> 1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.
>
> 2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:
>
> (a) Value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;
>
> ….
>
> 6. ….Value added tax shall in no circumstances be deductible on the expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment. ….Member States may retain all the exclusions provided for under their national laws when this Directive comes into force."

396. The appellant's case is that the UK's zero rating provisions treat zero rated supplies as taxable supplies (as indeed the name implies). Therefore, says the appellant, Article 17 applies as that is the provision which authorises deduction of input tax attributable to taxable supplies.

397. HMRC does not agree. While they accept that UK law treats zero rated supplies as taxable supplies, zero rating is a concept unknown in EU law. Under EU law the vires for the zero rating provisions is Article 28(2) of the Sixth VAT Directive and that permits members states to give certain supplies the status of 'exemption with refund'. For most purposes there is no practical distinction between zero rating (ie taxable at 0%) and exemption with refund. The ECJ clearly considers the UK zero

rating provisions as a lawful implementation of Article 28(2): see *Commission v UK* C-416/85 [1988] STC 456. The Judge Rapporteur at page 458d commented that:

> "Zero rating differs from the system of exemption with refund inasmuch as no VAT is charged on zero-rated goods and services at the various stages of the marketing chain. Consequently, at the retail stage there is no VAT to refund.
>
> Despite that difference, the Commission accepts that, as far as the fiscal result is concerned, the system of zero-rating as applied by the UK is equivalent to the system of exemption with refund of the VAT paid at the preceding stage, provided for by art 28(2) of the Sixth Directive"

The Advocate General said:

> "[5] Let me state right away that the *system itself* [ie zero-rating system] is not challenged by the Commission, which considers it to be equivalent to the system of exemption and refund. However, the Commission disputes the *application* of zero-rating to certain categories of goods and services...

Much the same comment was made by the CJEU itself at §10. The CJEU considered the UK zero rating provisions more recently in *Talacre* and again accepted that they were equivalent to exemption with refund. At §8 the CJEU said:

> "It is not disputed that that zero-rate [the caravan zero rate] may be treated as an exemption with refund of the tax paid within the meaning of Art 28(2) of the 6VD…."

398. But in neither of these cases was the Builders' Block considered and neither can be taken as authority that the Builders' Block itself is permitted under EU law.

399. And while the CJEU accepts that UK's zero rate is equivalent to exemption with refund, so far as EU law is concerned the supplies made under a national provision lawfully made under Art 28(2)(a) are exempt with refund. They are not taxable supplies. The CJEU's recognition of zero rating as a valid implementation of Article 28(2) does not make the supplies taxable under EU law. Under EU law they are exempt with refund.

400. Yet on its face, Art 17 6VD only applies to taxable supplies. This is because, as set out above, Art 17(2) grants a right of refund of input tax where it is attributable to taxable supplies:

> "Art 17(2) In so far as the goods and services are used for the purposes of his <u>taxable transactions</u>, the taxable person shall be entitled to deduct from the tax which he is liable to pay…." (my emphasis)

The right to refund for 'exempt with refund' transactions is granted by national law because member states are given the right to confer 'exempt with refund' status on supplies if they chose to and are entitled to implement Art 28(2)(a). The right to refund is not granted by Art 17.

401. Is this right? Could 'taxable transactions' in art 17(2) be a reference to transactions which are taxable under either or both EU or national law? I reject this analysis. The 6VD is a code of EU law. The reference to 'taxable transactions' must be a reference to transactions which are lawfully taxable under EU law. EU law does not permit zero rating; it only permits exemption with refund. Even if applying Art 28(2)(a) to white goods and carpets was a lawful implementation of it by the UK, under EU law that would make the supply exempt with refund but not taxable.

402. Alternatively, the appellant's submission might succeed if Art 17(6) had a wider scope than Art 17(2). In other words, Art 17(6) would have to be seen as the authority for all blocks, blocking VAT on more supplies than merely those taxable supplies contemplated by Art 17(2).

403. I do not accept that interpretation either. The wording of Art 17 indicates that art 17(6) is a qualification of the general right of recovery granted by Art 17(2). There is no reason to suppose it was intended to be of wider scope.

404. I recognise that that interpretation leaves 'exemption with refund' supplies of Art 28(2)(a) outside the normal system of refunds. So such supplies would not count towards partial exemption: but that follows in any event from Art 17(2) because the Directive grants exemption with refund and not zero rating (this distinction is one the CJEU has not considered – it might mean UK rules are too generous in allowing zero rated supplies to count as taxable in partial exemption methods). It also means that the Art 17(6) restriction on increases in blocks would not apply.

405. But it seems to me likely that that was intended. The 'norm' for the 6VD is standard rating. Any exception to that (such as exemption) must be construed narrowly. Zero rating is even more of an exception to the norm than exemption and the CJEU has indicated how very narrowly it should be construed in *Talacre*. There is absolutely no reason why the 6VD would have been intended to restrict a block on input tax recovery on a Art 28(2)(a) supply. So there is no reason to suppose Art 17(6) was intended to apply to a refund permitted under Art 28(2)(a).

406. The appellant's case relies on Art 17(6) which restricts a move away from the norm of input tax recovery. But it is obvious that if (as it seems it was) the purpose of Art 17(6) to prevent a move away from the norm, that norm is output tax charged plus input tax recovered (see §461). The nil output tax plus blocked input tax conferred by UK law on white goods and carpets is actually closer to this norm than the result the appellant seeks which is nil output tax plus full input tax recovery. There is no reason to suppose Art 17(6) was ever meant to achieve that.

407. The appellants rely on the case of *Royscot Leasing* [1999] C-305/97 which considered the block on input tax on cars. The decision of the ECJ was that Art 17(6) permitted member States to retain blocks even on what was strictly business expenditure. But it is difficult to see how the case helps the appellant here: the block in *Royscot Leasing* applied where the tax was attributable to standard rated supplies. 'Exemption with refund' supplies were not at issue in that case and it is not authority for the proposition that any input tax block must be authorised by Art 17(6).

408. At the hearing I asked whether Art 17 applied to refunds for supplies at the 'super' reduced rates permitted by Art 28(2)(a). I think that it does. The full text of art 28(2)(a) permits member states to maintain:

> "Exemptions with refund of the tax paid at the preceding stage and reduced rates lower than the minimum rate laid down….."

But unlike the 'exemption with refund', a supply at a super reduced rate is nevertheless a taxable supply, and the refund of attributable input tax would fall within Art 17(2). Indeed Art 28(2)(a) is not the vires for the refund on super reduced rates as it does not qualify 'reduced rates lower than the minimum laid down' with the words "with refund" so Art 17 must be the vires for the input tax refund on super reduced rates. But this fact does not alter the conclusion that Art 17(2) is not the vires for the refund on 'exemptions with refund'. The vires for the refund on zero rated supplies is Art 28(2)(a) itself.

409. I note that the right of refund on zero rated supplies was at issue in the *Marks & Spencer* case which I discuss more fully at §§457-460. I note here that there is no suggestion in the decision that the right to refund arises from Art 17(6). Only Art 28(2)(a) was considered. The CJEU's view appeared to be that as the UK government granted 'exemption with refund' the refund arose under national law but normal EU principles such as fiscal neutrality would apply to prevent retrospective loss of a claim to a refund.

410. So I do not accept that the appellant had a right to refund under art 17(2) or that Art 17(6) applied to prevent the UK government extending the scope of the Builders' Block.

411. HMRC relied on *McCarthy & Stone (1992)* where the Tribunal's decision was that Art17(6) did not limit the Builders' Block. Sir Stephen Oliver said:

> "[33] …The right to deduct in Art 17(2) is confined to the case of 'taxable transactions'. Zero rated transactions…are, however, in the scheme of the [6VD], a class of 'exemption with refund of tax'; consequently they are not covered by the mandatory direction in Art 17(2). Art 17(3) reinforces this…Art 17(6) which is expressed permissively appears therefore to be referring back to Art 17(2) and 17(3) and is limited in its application….It is also significant…that art17(2) by using the word deduct appears to be confined in its scope to the case of positive-rated transactions where there is in a real sense an output tax from which the related input tax can be deducted…"

412. Mr Peacock criticises this conclusion. I agree that the criticism is justified to the extent that Sir Stephen relied on the use of the word 'deduct'. 'Deduct' must be taken to refer to a 'refund' as well as a deduction as it is well established that where the taxpayer is entitled to rely on Art 17(2) he is entitled to a refund if there is no output tax against which to claim deduction. However, Sir Stephen's comment on the use of the word 'deduct' was a throwaway comment at the end of the paragraph and does not affect the validity of the reasoning which preceded it, and with which I agree.

413. My conclusion is that Art 17(6) does not apply to any refund granted in respect of a supply that is 'exempt with refund' under article 28(2)(a). The effect is that there is nothing in Art 17(6) that would prevent the UK expanding the scope of a block on 'exempt with refund' supplies.

414. Strictly therefore I do not need to consider the second part of this submission which is that the Orders did expand the scope of the Builders' Block. But in case it goes further, I record the parties' submissions and my views on them. The relevant findings of fact are made at §§369-383.

Has the extent of the block been expanded?

415. So if I am wrong on this and art 17(6) does authorise the Builders' Block in general, has the extent of the Builders' Block changed so that the extensions to it are unauthorised? Article 17(6) provides:

> "…Member States may retain all the exclusions provided for under their national laws when this Directive comes into force."

416. The appellant relies on *Magoora* C-414/07. At §45 the CJEU said:

> "….[art 17(6) of the 6VD] precludes, in any event, a member state from subsequently amending its legislation which entered into force on [the date the 6VD entered into force], so as to extend the scope of those restrictions as compared with the situation existing prior to that date."

417. I note in passing that there is an unresolved issue on which date is the right date: the date of the directive, the date it entered into EU law or the date it entered into national law? In practice these dates fall in the span of 17 May 1977-1 January 1979 and the correct date makes no difference in this case as national law did not alter in that time nor on the findings of fact (§§369-383) did any of the Claim Items become 'ordinarily' installed in that period. So without deciding the point, I treat the date of entry into force as 1 January 1978 which was when the directive became EU law as this is what the parties agreed.

418. Fundamentally, the submission was that Parliament could not lawfully under EU law increase the scope of the Builders' Block and that it had increased the scope of the Block either by:

- Expressly including words in the Block that were not there before even if in practice the effect of doing so did not alter the categories of goods on which tax was blocked; or

- In practice increasing the scope of the Block by increasing the categories of goods on which input tax was blocked.

419. Wording of Builders' Block: It is obviously the case that the *wording* of the Builders' Block changed over time: exclusions to the exemption from the Block were added as well as other changes to the wording (see §§190-198). But by itself that is irrelevant and I reject the appellant's case on this. Even assuming the appellant is

right that the UK could not lawfully increase the scope of the Block, EU law looks at the effect of the law and not the actual words used. See, for instance, what the CJEU said in *Magoora:*

> "….[art 17(6) of the 6VD] precludes, in any event, a member state from subsequently amending its legislation which entered into force on [the date the 6VD entered into force], so as to extend the scope of those restrictions as compared with the situation existing prior to that date."
>
> And
>
> "[37]…national legislation does not constitute a derogation permitted by the second subparagraph of Art 17(6) of [the 6VD] if its effect is to increase, after the entry into force of that Directive, the extent of existing exclusions…." (my emphasis)

420. It does not matter if the wording of the Block changed if the scope of it did not. So, in other words, if carpets were blocked in 1978 because in 1978 they were not ordinarily installed by builders as fixtures, and this remained the position for at least the next 20 years, yet the words of the Block were altered in 1987 to expressly refer to carpets, the scope of the Block so far as carpets are concerned did not change. As a category of goods, input tax on carpets was always irrecoverable when supplied with a new build dwelling.

421. Scope of block changed? The appellant's second submission was that the *scope* of the Block had changed and that the categories of goods to which it applied increased. It had two grounds for saying this:

- Firstly, that white goods and carpets were 'ordinarily' installed by builders *before* the dates on which they were specifically removed from the exclusion to the Block. In other words, at some point before the Orders amended the Block, VAT on white goods and carpets had become recoverable under UK law. As I have mentioned it no longer maintained this in respect of high specification appliances and carpets after hearing the evidence but it continued to maintain this position in respect of low specification items;

- Secondly, white goods and carpets were not 'incorporated' as at 1 January 1978 so input tax on them, had they been supplied, would not have been blocked. So the Orders which expressly blocked the VAT on them *increased* the practical scope of the Block.

422. not incorporated in 1978: I will deal with the second point first. If this submission was intended to rely on the appellant's case that the Claim Items were not incorporated, then this is contrary to my findings of fact at §254 & §302 and I reject it.

423. What I actually understand Mr Peacock means is that the evidence was that builders simply did not supply the Claim Items with new build houses as at 1 January 1978. The finding of fact was they were rarely installed (§150). However, the

question of the scope of the Builders' Block is not whether in practice it can be shown that VAT on actual white goods was actually blocked in practice, but whether, had white goods been sold with new houses as at 1 January 1978, the VAT on them would have been blocked by law.

424. As there is no evidence that white goods or carpets were installed in new build houses in the 1970s, it is the case that as at 1 January 1978 the Claim Items were not ordinarily installed by builders. Therefore, had white goods or carpets actually been incorporated into new build houses as at 1 January 1978, the Builders' Block would have (with an exception I deal with below) at that date applied to block the input tax and I reject the appellant's second point above, subject to that one exception.

425. The exception is split level cookers, which by administrative practice from 1975 to 1984 were outside the Builders' Block. HMRC do not suggest that I should disregard administrative practice and I agree. The CJEU considers administrative practice of equivalent effect to legislation in this respect (see *Danfoss* at §42) and I consider that the appellant is entitled to rely on it.

426. The appellant is therefore right to say that in respect of split level cookers the Builders' Block increased its scope as at 1984.

427. Mr Peacock developed this line of argument further. He submitted that if any of the Claim Items became 'ordinarily' installed in the 1990s, they became blocked by the specific exclusions to the Blocking Order and that therefore the practical scope of the Blocking Order was wider in the 1990s than as at 1 January 1978, when white goods and carpets were not installed in new homes and input tax on them was not in practice blocked. But this is just saying the same thing as before. And in law the answer is that it does not matter whether builders actually made a zero rated supply as at 1 January 1978 which included any of the Claim Items, but whether, if they had done so, the VAT on those Claim Items would have been blocked. And I find that (with the exception of split level cookers) the input tax would have been blocked as at 1 January 1978 because white goods and carpets were not 'ordinarily' installed at that date.

428. Mr Peacock's point also seems to be that it matters that the law changed the reason why the Claim Items were blocked. Firstly they were blocked, says Mr Peacock, because they were not 'ordinarily' installed. Later they were only blocked because they were specifically removed from the exclusion to the Builders' Block for 'ordinarily' installed fixtures.

429. Bearing in mind the findings of fact were that the appellant was only able to show that low specification items were ever 'ordinarily' installed in part of the period covered by the Claim, Mr Peacock's point only applies to low specification appliances and then only from when they became 'ordinarily' installed, which I have found was in the 1990s. And as a matter of law I reject it. For Art 17(6) (if it applied) it would not matter why the Claim Items were blocked. It only matters that they were blocked.

430. Mr Peacock relied on the CJEU decision in *Magoora*. The facts were that just before joining the EU, Poland had a block on recovery of VAT on fuel for vehicles used for taxable activities. It repealed this law on the day of entry and replaced it with a different block. Later it made the new block even more restrictive.

431. The CJEU noted that Member States are under Art 17(6) only able to retain existing blocks on taxable supplies; it said at §32 it was for the national courts to determine if the:

> "the effect of that legislation was to extend, after the entry into force of the [6VD], the scope of existing exclusions…."
>
> And
>
> "[37]…national legislation does not constitute a derogation permitted by the second subparagraph of Art 17(6) of [the 6VD] if its effect is to increase, after the entry into force of that Directive, the extent of existing exclusions…."
>
> [41] …Neither does [a legislative change on day of entry to the EU] automatically lead to the conclusion that there is an infringement of the second subparagraph of Art 17(6) of [the 6VD], provided, however, that it has not led to an extension, from the said date, of the previous national exclusions…

432. The later change extending the scope was held unlawful. Whether the original change was unlawful depended upon whether the national court found the scope of the original block had in fact been extended by the new legislation enacted on the day of joining.

433. It is difficult to see how this case supports Mr Peacock's submission. It is clear that a member State could repeal one law and replace it with another differently worded provision as long as the *scope* of the Block was the same (or at least no more restrictive). So it clearly would not matter whether a low specification appliance was blocked because it was not 'ordinarily' installed or because it was 'ordinarily' installed but specifically included within the Block. The question is the whether the low specification appliance, if incorporated, was blocked as at 1 January 1978. And I have found that they were (with the exception of spilt level cookers).

434. Therefore, with the exception of split level cookers, I reject the second submission. I turn to the first submission:

435. Scope of block - 'ordinarily' installed before Orders: HMRC's case is that while the world of new build housing was changing and it was becoming more common for builders to install more fittings and fixtures, nevertheless the changes to the Builders' Block were to forestall more items falling within the definition of "articles of a kind ordinarily installed by builders as fixtures" as what was ordinarily installed increased in type.

436. As I have said at §369-383, and as the appellant has effectively conceded on high specification appliances and carpets, the facts support HMRC's position. At the dates the wording of the Block was changing to include, firstly, white goods in 1984

and carpets in 1987, the findings of fact that neither at that point in time had ever been 'ordinarily' installed. They were blocked both before and after the change in the legislation. The scope of the Block did not change.

437. The appellant relied on the case of *McCarthy & Stone plc 1992 (7752)*. The case concerned domestic electrical appliances installed in sheltered housing (warden call systems, extractor fans, and fire alarm systems) and the 1984 Order. HMRC's case was that the input tax on these was blocked by the 1984 Order. The appellant challenged the legality of the additions to the builders block made by the 1984 Order. Sir Stephen Oliver said:

> "By 1984 changes to the VAT rules had evidently been called for. The increase in the range of fixtures ordinarily installed by builders in new houses and flats had resulted in goods that would otherwise have been standard-rated such as domestic electrical appliances being installed by both contract builders and speculative builders in the ordinary course. The result was that both the home owner buying from the speculative builder and the client who had his house built by a contract builder were getting these goods at effectively zero-rated prices ….Consequently the 'tax base' was being diminished and the scope for avoidance was increasing. Further , changes had to be made to the VAT rules which covered both contract builders and speculative builders. To have removed the benefit of zero-rating for non-standard fixtures installed by contract builders while leaving speculative builders unaffected would have produced a similar distortion to the one that the 1972 Order was designed to cope with."

438. Sir Stephen also said:

> "[32] The Tribunal accepts of course that the 1984 Order extends the class of goods for which credit to input tax is denied."

439. This was only an FTT decision and it not binding on me. Moreover, this was a comment made by Sir Stephen in explaining what he *inferred* was the rationale for the changes to the legislation. It does not appear to be based on evidence in that case, but even if it was, I can only decide this case on the evidence in front of me. And that evidence has led me to a different conclusion.

440. And in conclusion, in respect of the appellant's submission at §348 & §415, my decision is that as a matter of fact the scope of the Block with respect to white goods and carpets was not extended beyond its scope as at 1 January 1978 except with respect to split level cookers. But in any event, even the position on split level cookers is irrelevant as the Builders' Block was not governed by Art 17(6).

441. It should not therefore be necessary to go on to consider the second submission that if the Block was unlawful, the appellant could rely on EU law to justify its claim to recover the input tax on the Claim Items. However, as I have said, HMRC's defence to the appellant's submission on Art 17(6) was that the Block was justified by Art 28(2)(a). I was uncertain that this was right. If it was wrong, did that mean the entire Block was unlawful and if so, did that mean that the appellant was entitled to

recover the input tax on all the Claim Items irrespective of whether the scope of the Block was extended?

Is the Builders' Block unlawful anyway?

442. Sir Stephen in *McCarthy & Stone* said that the Builders' Block was an integral part of the UK's zero rating system and therefore authorised by Art 28(2):

> "[36] Article 28(2)...authorises the zero rating system....The words used 'exemption with refund...may be maintained' briefly described the systems covered by the derogation but they are in no sense designed to establish a comprehensive code.
>
> [37] Taking the UK zero-rating system for buildings as it existed on 31 December 1975, Art 3 of the 1972 Order was an integral part of it. This provided that the consequence of a speculative builder making a zero rated supply by granting a major interest in a building was for the builder to be excluded from the right to deduct the input tax incurred by him on non-standard fixtures. Thus at that time the description 'exemption with refund' did not appropriately cover the zero-rating system in the UK. The Tribunal does not therefore accept the Company's argument that the words 'with refund' must be taken literally.....
>
> [38] The Tribunal considers that the 1984 Order, in just the same way as the 1972 Order, was a necessary annexure to the zero-rating system relating to buildings.....the Tribunal has concluded that the effect of the 1984 Order has been, to adopt the contention put forward by the Crown, 'to move closer to the end result that would be achieved by the application of the normal rules laid down by the 6VD, and so reduce rather than to enlarge the extent to which the national measures derogate fro those rules."

443. The Tribunal in that case ruled the 1984 Order to be compatible with the 6VD. While the appellant considered the Builders' Block was lawful if at all under Art 17(6), both parties considered that if the appellant was wrong on this (as I have found it to be) what Sir Stephen said here is right. The Builders' Block is part and parcel of the 'exemption with refund' authorised by Art 28(2)(b) and lawful.

444. As I indicated in the hearing, I was concerned whether this was right.

445. HMRC's position was that Art 28(2)(a) authorised the zero rate and as the Builders' Block was an integral part of the UK's implementation of the zero rate on new dwellings, it was lawful. Further, as Art 28(2)(a) did not (in their view) expressly prevent a block, Parliament was at liberty to change the scope of the Builders' Block at any point in time. It was also Mr Macnab's case that the Block was fully compatible with the 6VD because it narrowed the extent of zero rating. As zero rating is a departure from the principles of the 6VD and like exemptions must be

interpreted narrowly, and the scope of it cannot be increased, any increase in the Builders' Block was a move towards the EU norm of standard rating.

446. My point was that Art 28(2)(a) authorised exemption *with* refund. So far as items which were 'zero rated' but caught by the Builders' Block were concerned under UK law they were liable to tax at 0% but without refund. That is exemption without refund; or put simply, exemption. Art 28(2)(a) authorised exemption with refund. It did not authorise exemption *without* refund. It did not authorise exemption.

447. Mr Macnab's response was that Art 28(2)(a) authorised the UK to retain its laws on 'exemption with refund' and as at 1 January 1978 the Builders' Block was very much a part of its rules on the zero rating of buildings. However, read literally, Art 28(2)(a) only permitted the UK to retain its 'exemption with refund'; not an exemption.

448. Art 28(2)(a) is plainly an authority only for 'exemptions with refund of the tax paid at the preceding stage' and super reduced rates. Art 17 of the second VAT directive, which preceded it, had slightly different wording. It referred to:

> "….reduced rates or even exemptions with refund, if appropriate, of the tax paid at the preceding stage,…."

Did this authorise 'exemptions' as well as 'exemptions with refund'? While it contains the phrase "if appropriate" I consider that clearly qualifies 'exemptions with refund' and not merely 'with refund', or else the commas would have been differently placed. It meant the government could retain 'exemptions with refund' if appropriate; it did not mean the government could retain 'exemptions, with refund, if appropriate'. In any event the position is made clear by the 6VD. Exemptions are not authorised by Art 28(2)(a).

449. I accept that this point is novel and clearly not beyond argument in view of the fact I take a different view to the Tribunal in *McCarthy*. Were the issue crucial to my decision it would be appropriate to refer it to the CJEU. It is not crucial to my decision because of what I say below.

Effect of illegality of Builders' Block

450. The appellant considers the 'extensions' to the Block unlawful; I consider the entire Block may be unlawful under EU law. The appellant's submission was that the Block, to the extent it was unlawful, had to be disapplied so that its supplies of white goods and carpets must be treated as zero rated and it is entitled to a refund of VAT on the Claim Items.

451. But this is a logical fallacy. Whether the entire Block was unlawful or merely the changes to it makes no difference. While zero rating which fulfils the requirements of Art 28(2)(a) is lawful under EU law, the zero rating is nevertheless not conferred by EU law. To obtain the right to input tax recovery under EU law, the appellant must show that zero rating (ie exemption with refund) was conferred by UK law.

452. But exemption with refund was not conferred by UK law. UK law conferred only exemption on the Claim Items (with the exception of split level cookers in the period 1975-1984 and in respect of which the appellant concedes it recovered the VAT at the time). The appellant is entitled to (and it did) rely on this exemption. It can now choose instead to rely on its EU law rights. But its EU law rights are to treat the supply as standard rated, because, as it is new build land, it is excluded from exemption by Art 13B(g) 6VD. The appellant has no *right* to an exemption under EU law let alone exemption with refund.

453. The single supply rules apply? The appellant's case is that EU law did confer zero rating on its supplies of Claim Items because they were part of a single supply with the new build house, and HMRC concede this to the extent that the Claim Items were incorporated (see §185-6). I have found all the Claim Items were incorporated and so it follows HM conceded that they were all part of a single supply with the new build house. But it does not follow as a matter of EU law that that single supply was zero rated. This is clear from the CJEU decision in *Talacre Beach.*

454. In that case, which concerned the zero rate on caravans, the question was whether it was effective for the UK to specifically exclude certain items from the benefit of zero rating even when they were part of a single supply with the caravan. The CJEU said:

> "[24] …the case law on the taxation of single supplies…does not relate to the exemptions with refund of the tax paid with which art 28 of the [6VD] is concerned. While it follows…from that case law that a single supply is, as a rule, subject to a single rate of VAT, the case law does not preclude some elements of that supply from being taxed separately where only such taxation complies with the conditions imposed by art 28(2)(a) of [6VD] …."

455. While it was done in a conceptually different manner for new houses than caravans (by a Block on input tax rather than an exclusion from the zero rate), UK law has provided a separate taxation position for white goods and carpets from the house with which they form part of a single supply. The CJEU decision in *Talacre* makes it clear that the single supply rules do not 'trump' that position.

456. It is not open to the appellant to say that, because the Builders' Block (or the extensions to it) were unauthorised by EU law that therefore the supply of the Claim Items under *EU law* was zero rated on the basis the principle element of the supply (the house) was zero rated and under the single supply rules that meant ancillary parts of that supply (the Claim Items) were also zero rated, because *Talacre* demonstrates that that is not true. *Talacre* shows that even where there is a single supply, EU law does not confer zero rating on any element of that supply that was not conferred by national law. And national law did not confer zero rating on the supply of Claim Items when they were part of a single supply. It conferred exemption.

457. The Marks & Spencer case: The appellant, needless to say, does not agree. It relies on the CJEU decision in *Marks & Spencer* [2008] STC 1408 (C-309/06) where the taxpayer was held entitled to rely on EU law rights to a refund on a zero rated

supply. But this reliance is misplaced. The legal point was different. In that case, it was established that, as a matter of *national law* the taxpayer had the *right* to zero rate its supply of teacakes, but national law had been misapplied and retrospectively the legislation altered to prevent back claims for under-reclaimed input tax. But it was never in doubt that the supplies of teacakes were zero rated under UK law, and therefore exempt with refund under EU law.

458. The CJEU held that taxpayers which had a *right* of refund under national law could rely on EU law rights that prevented retrospective alteration in that right. There was no suggestion that the UK government could not prospectively remove a zero rate: that was not an issue, and the answer is that obviously it can do so (and has done so). EU law does not compel the UK to grant zero rates. It just compels it to comply with general principles of European Law when enacting compulsory or merely optional laws on VAT.

459. The CJEU said:

> [28] ….where….a member state has maintained in its national legislation an exemption with refund of input tax in respect of certain specified supplies, a trader making such supplies does not have a directly enforceable Community-law right to have those supplies taxed at a zero rate of VAT."
>
> But
>
> [35] …the right to obtain a refund of charges levied in a member state in breach of rules of Community Law is the consequence and the complement of the rights conferred directly on individuals by Community law…That principle also applies to charges levied in breach of national legislation permitted under art 28(2) of the [6VD].
>
> [36] …where…under art 28(2) [6VD] a member state has maintained it in its national legislation an exemption with refund of input tax in respect of certain specified supplies but has misinterpreted its national legislation, with the result that certain supplies which should have benefited from exemption with refund of input tax under its national legislation have been subject to tax at the standard rate, the general principles of Community law, including that of fiscal neutrality, apply so as to give a trader who has made such supplies a right to recover the sums mistakenly charged in respect of them."

460. The appellant's position here is wholly different. There has been no misinterpretation of national law. The appellant's supplies of white goods and carpets were not zero rated: they were exempt under national law. In complete contrast to the appellant in *M&S,* national law did not confer 'exemption with refund' status on its supplies of white goods and carpets. It conferred only exemption. The *M&S* case is of no use to the appellant.

461. Right to deduct is core: Another limb of the appellant's case is that the right of refund is 'core' to the VAT system, as indeed the CJEU has frequently said is the case. The appellant relies on what the Advocate General said at §§34-35 of *Danfoss A/S* (C-371/07) [2009] STC 701 which explains why the right to deduct is

'fundamental and general'. But the Advocate General recognised that it is both the charging of output tax and recovery of input tax that is fundamental:

> "Any departure from that basic system of taxation and deduction must, as a derogation from a general principle, be interpreted strictly."

462. What the Advocate General says cannot in any way justify the result which the appellant seeks, which is the right to recover input tax without the right to account for output tax, in circumstances when such a departure from the basic system was neither conferred on it by EU or national law.

463. If the appellant chooses to reject the exemption that was conferred by national law, the result is that it must accept the tax treatment conferred by EU law: standard rating.

464. Block should be 'deleted': The appellant's case here seems to be based on some kind of 'red pen' approach: they seem to be saying that the Block was unlawful so the block can be 'deleted' from the law leaving behind the law that would treat the supply of the Claim Items as part of the single supply of zero rated new homes. But that is the wrong approach. The UK may have been entitled to zero rate the Claim Items (actually, as I have said at §§226-230, I consider that it wasn't) but the reality is that the UK did not confer zero rating on the Claim Items. It conferred exemption. It is irrelevant that the mechanism for doing so was by conferring a zero rate and then blocking the input tax. It is the *effect* that matters. The effect was to confer exemption. If that effect was unlawful under EU law, the appellant can chose: rely on exemption under UK law or standard rating under EU law. What the appellant cannot do is claim a zero rating (or 'exemption with refund') that was not conferred on it by either UK or EU law.

465. Moreover, if the appellant were right, the effect of this 'red line' or 'deletion' of text idea would be something expressly forbidden by the 6VD. It would lead to an increase in the scope of a zero rate. The Claim Items (with the exception of split level cookers) were not entitled to the benefit of the zero rate as at 1 Janaury 1978 as they were not ordinarily installed. Yet the appellant's case is that there were entitled to the zero rate in the 1980s and 1990s if and to the extent they had become 'ordinarily' installed. Yet the CJEU would clearly not interpet the 6VD in such a way to lead to an increase in the scope of a zero rate when the Directive expressly forbids member States from increasing the scope of zero rates (see Art 28(2)(a)).

466. And so far as split level cookers are concerned, the right to zero rating under UK law was removed before they became 'ordinarily' installed. So the same point can be made. For the appellant to succeed with its 'deletion' of Builders' Block case, it would require an interpretation of EU law that is not only wrong for the reasons given above, but would lead to an increase in the scope of the zero rate after the UK government had expressly decreased its scope in 1984. That is contrary to Art 28(2)(a).

467. The MDDP case: HMRC's position is that the appellant must take the rough with the smooth: it is not possible to treat the same supply as exempt under UK law

for output but taxable under EU law for input. It relied on the *MDDP* (C-319/12) case for this proposition, although to me it seems to be a proposition which is obviously right and not one for which authority is required. Although not cited to me, I note that the CJEU said in *Becker* (C-8/81):

> "[44]…persons coming within an exemption necessarily waive the right to deduct input tax if they claim the exemption…."

The *MDDP* case was about the interpretation of what was art 17(2) of the 6VD and the education exemption. MDDP was a commercial body not governed by public law supplying education. Under Polish law its services were nevertheless treated as exempt, which MDDP claimed was unlawful under the PVD. The taxpayer claimed it was therefore entitled to rely on the (incorrect) national exemption and not account for output tax but rely on the (correct) standard rating under EU law and recover its input tax.

> [40] ….the referring court seeks to ascertain whether a taxable person may rely on the fact that the exemption from VAT provided for by national law is incompatible with …the VAT Directive in order to claim a right to deduct input VAT, ….and benefit at the same time from that exemption for the supplies of professional educational and training services which it provides.
>
> [41] First of all, it should be noted that, …., it is a central principle of the VAT system that the right to deduct VAT levied on the purchase of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct.
>
> [42] It is apparent from the introductory part of Article 168 of the VAT Directive, which lays down the requirements for the origin and scope of the right to deduct, that only operations subject to input tax may give rise to the right to deduct the VAT levied on the purchase of goods and services used to perform those operations.
>
> [43] Consequently, according to the logic of the system established by the VAT Directive, the deduction of input taxes is linked to the collection of output taxes.
>
> [44] In that regard, the Court has already held that, except in the cases expressly provided for by the relevant directives, where a taxable person supplies services to another taxable person who uses them for an exempt transaction, the latter person is not entitled to deduct the input VAT paid ….
>
> [45] It follows from the foregoing that, <u>even where an exemption provided for by national law is incompatible with the VAT Directive, Article 168 of that directive does not permit a taxable person both to benefit from that exemption and to exercise the right to deduct tax</u>. (my emphasis)

468. The CJEU referred back to the national court to determine whether on the facts MDDP's supply was outside the exemption. If it was, MDDP could reject national law and rely on the direct effect of the EU directive but

> "in the latter case, the educational services supplied by that taxable person will be subject to VAT and that person could then benefit from the right to deduct input VAT."

469. Mr Peacock suggested that as this case concerned exemption it had no relevance to the appellant. But it seems to me that it is precisely in point. If the appellant rejects the (incorrect) VAT treatment of its supplies under UK law (zero rating without refund – or put more simply, exemption), and relies instead on its directly effective rights under EU law, its EU right is to have its supplies treated as standard rated. It has no directly effective right to have white goods and carpets (or indeed anything) treated as zero rated (or 'exempt with refund').

Conclusions on the second case.

470. I have found against the appellant on its case based on UK law that some or all of the Claim Items were 'ordinarily' installed before they were specifically named in the Builders' Block. Its case on European law that the Builders' Block is governed by Art 17(6) is to that extent irrelevant. However, it is the case that the appellant was entitled to recover VAT on split level cookers from 1975 to 1984, and to this extent its case on Art 17(6) is not hypothetical. But on this question of European law, I have found against the appellant. Art 17(6) does not limit the Builders' Block.

471. While I rejected the appellant's case on Art 17(6), I reached the view that as a matter of European law the Builders' Block in its entirety was probably not authorised by the 6VD. However, I also reached the conclusion that as a matter of European law, to the extent the Builders' Block was unlawful, that meant that the appellant could chose to rely on its position under UK law or to standard rate its supplies under EU law.

472. That conclusion would entitle the appellant, subject to one very important caveat, to recover the input tax at stake in this appeal. And that caveat is whether the appellant, if it opts to rely on EU law, must offset the output tax against the claimed input tax albeit that it may be too late for the HMRC to assess the output tax? As I said at the start, that was an issue that (surprisingly) neither party was prepared to address at the hearing.

473. So how to conclude this preliminary hearing? I have decided against all aspects of the appellant's case and alternative case based on UK law. But the resolution of the second part of the appellant's alternative case involved consideration of three issues of EU law, which were in summary:

(1) Did Art 17(6) 6VD govern the Builders' Block?

(2) If not, did any provision of the 6VD permit the Builders' Block?

(3) If the Builders' Block as a whole or the extensions to it were unlawful under EU law, what directly effective rights does the appellant have under EU law?

474. It does not matter to the appellant's case if it is successful on the first two of the above three points if:

- the answer to the last of the three questions is that its directly effective right is only to treat its supplies as standard rated; and

- if it must offset the resulting output tax against its input tax claim (the set-off question),

because in practice that will mean that HMRC can refuse its claim in its entirety. (Of course, I say this on the assumption that the output tax would equal or exceed the input tax claim: the only evidence in front of the Tribunal on this was that George Wimpey sold the white goods and carpets at a mark up – see §58 – but it was not in issue in this hearing which was only a preliminary hearing and I make no findings of fact on this.)

475. Even though I am not completely certain about what the CJEU's answer would be to the question of whether the Builders' Block as a whole was unlawful, there is no point in referring this issue to the CJEU unless the third EU point should be referred. So does the question, of what are the appellant's directly effective rights if the Builders' Block as a whole or the extensions to it were unlawful under EU law, need referral?

476. Whether an EU point should be referred depends on Art 267 of TEFU (Treaty on the Functioning of the European Union) which provides:

> "Where such a question is raised before any…tribunal of a Member State, that ...tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon."

477. Not all questions of European law should be referred. In the well-know case of *Ex parte Else* [1993] QB 534 the Court of Appeal ruled:

> "if the facts have been found and the Community Law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself….If the national court has any real doubt, it should ordinarily refer."

478. What is meant by 'complete confidence' and 'any real doubt'? The Court of Appeal in the later case of *Littlewoods Organisation plc* [2001] EWCA Civ 1542 said:

> "…A measure of self-restraint is required on the part of the national courts, if the Court of Justice is not to become overwhelmed….
>
> …[a] development which is unquestionably significant is the emergence in recent years of a body of case-law developed by this court to which national courts and tribunal can resort in resolving new questions of Community law. Experience has shown that, in particular in many technical fields, such as customs and value added tax, national courts and tribunals are able to extrapolate from the principles

> developed in this court's case law. Experience has shown that the case-law now provides sufficient guidance to enable national courts and tribunals – and in particular specialised courts and tribunals – to decide many cases for themselves without the need for a reference…"

It is clear that, even if there is no authority directly in point, I do not need to refer any of the three questions to the CJEU if I am confident that my decision on question (3) is right by extrapolating principles from other CJEU decisions.

479. In this case, I am quite confident relying on *MDDP* and general principles that the appellant is unable to rely on its UK-law effective 0% VAT rate on its supplies of Claim Items but, in respect of the same supply, rely on its standard rated position under EU law to recover the attributable input tax. This point does not need to be referred. But how confident can I be that the appellant's only directly effective right is to be standard rated rather than zero rated under EU law?

480. To me this seems obvious. There is no right to a zero rate under EU law. What is more, if the appellant succeeded in its claim it would require the CJEU to:

- effectively confer 'exemption with refund' where none is conferred by UK law;
- confer an 'exemption with refund' in circumstances where it does not appear to me that it is justified as part of social policy (see §§226-230) contrary to Art 28(2)(a);
- confer an 'exemption with refund' such that the result would make the zero rate more extensive than it was as at 1 January 1978 (see §368) contrary to Art 28(2)(a).

481. Extrapolating the principles expressed by the CJEU in *Talacre,* I am confident that the CJEU would not interpret the law in this manner. As it is clear that the appellant has no right to an exemption under EU law (and it would not assist its case if it did), its only directly effective right is to standard rate its supplies of the Claim Items.

482. So I will not refer the last issues of EU law identified at §474 to the CJEU but decide them myself. But doing so does not entirely resolve the preliminary issue which is whether in principle the appellant is entitled to recover VAT on the Claim Items. That depends on the answer to the 'set-off' question which the parties did not come to the hearing prepared to make submissions on (see §187-8).

483. I therefore direct that in the absence of agreement between the parties on the resolution of this one outstanding issue in this preliminary hearing, they must resolve it themselves or notify the Tribunal that they have been unable to resolve it and the matter will be brought on for hearing. It may be sensible, if the parties are unable to resolve the matter, to make an application as mentioned below to put off time running on notification of an appeal against this preliminary decision until after the 'set off' issue has been resolved by the FTT.

484. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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 must be received by this Tribunal not later than 56 days after this decision is sent to that party. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of other issues in the proceedings, but such an application should be made as soon as possible. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 12 June 2014