TC04676

Appeal number: TC/2013/01603

TYPE OF TAX – VAT – DIY residential construction – planning permission limiting occupation to agricultural, forestry or equestrian workers and dependants – restriction of separate sale in planning permission subject to Council's written consent - whether the separate use, or disposal of the property was prohibited by the planning permission for the purposes of Note (2)(c) to Group 5, Schedule 8 VAT Act 1994 – no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

EDMONT LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT
RUTH WATTS DAVIES

Sitting in public at Oxford on 12 and 13 October 2015

Mr Sarabjit Singh, of Counsel, for the Appellant

Mr Christiaan Zwart, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Edmont Ltd ("the company") against HMRC's review decision dated 12 February 2013 in which HMRC decided that the supply by the company to Mark Stoneham of services related to the construction of a house at Grey Fox Stables, Coldharbour Farm, Hatford, Faringdon, Oxfordshire SN7 8JE was not zero-rated under Item 2 of Group 5 of Schedule 8 to the Value Added Tax Act 1994 ("VATA").

2. As a consequence HMRC upheld their assessment issued to the company on 18 January 2013 for VAT of £7,500. This assessment however relates to only part of the services in question and the actual VAT at stake is a considerably higher figure. The overall value of the services provided by the company related to the construction of the house was approximately £400,000 to £500,000. The VAT in issue therefore is of the order of £80,000.

3. On 17 April 2013 HMRC applied to the Tribunal to stay the company's appeal on the grounds that the outcome of an appeal from the FTT in an unrelated earlier case, *HMRC v Richard Burton* [2013] UKFTT 104(TC), might be useful in considering the current appeal. On 29 August 2013 the Tribunal directed that the company's case be stayed until 60 days after the release of the Upper Tribunal decision in *HMRC v Richard Burton* unless an objection was received within 14 days. The company objected to the stay on 9 September 2013 and the application for a stay was heard on 14 August 2014 by Judge Redston. Judge Redston refused the application on the grounds that the case of *HMRC v Richard Burton* was unlikely to be of material assistance. The case therefore came before this tribunal on 12 and 13 October for a hearing of the substantive appeal.

4. We heard evidence from Mr Mark Stoneham, the owner of the land and buildings in question, and from Mr Neil Keen, the finance director of the company.

The Facts

5. Mark Stoneham acquired the bulk of the land known as Coldharbour Farm and New Barn in the early 2000s from a Mr Charlie Cox, who retained approximately 34 acres of the original estate together with an agricultural barn. In January 2006 planning permission was obtained for the conversion of use of this barn to equestrian use and the erection of a store building. Later in 2006 Mr Cox was joined by Mr Sean Curran who had just gained his trainer's licence to train racehorses.

6. In December 2006 Mr Cox sold the 34 acres, together with the barn, to Mr and Mrs Lee Power, who established Grey Fox Racing as a partnership, and then employed Sean Curran as their trainer. At some time in 2007 Grey Fox Racing applied for planning permission to erect a temporary dwelling in order to house a resident worker in close proximity to the stables, to take care of the horses and to

protect them from theft. Permission was granted for a temporary dwelling on 24 April 2008. A condition of this permission was that the temporary dwelling was to be occupied only by a person employed full time in the equestrian business on the site.

7. Sometime during the financial year to March 2009 Mr and Mrs Power sold the land and buildings to Mr Stoneham, who then rented the yard and land back to Grey Fox Racing. The trainer, Sean Curran, lived in the temporary dwelling.

8. On 29 December 2009 Grey Fox Racing applied for outline planning permission for the erection of a permanent dwelling at Grey Fox Stables to replace the temporary dwelling. Mr Stoneham, as the owner of the land in question was a party to this application. The aim of the proposed development was stated to be to "site a permanent equestrian worker's dwelling to service the existing (equestrian) business.

9. On 20 September 2010 Mr Stoneham and his wife, Hayley, entered into a deed under s106 Town and Country Planning Act 1990 ("the s106 Deed") with Vale of White Horse District Council ("The Council") in respect of the land which was the subject of the planning application and was defined as the 34 acres plus the adjoining land, also in the ownership of Mr Stoneham, on which the dwelling was to be built. HSBC Private Bank (UK) Ltd was also a party to the deed, in its capacity as mortgagee.

10. The s106 Deed contained the following covenants binding on the owner of the land:

> "1.0 Not at any time to cause or permit the residential accommodation constructed pursuant to the planning permission to be occupied except by a person or persons:
>
> 1.1.1 Solely or mainly employed working or last working in the locality in an equestrian business or a widow or widower of such a person or any resident dependants, or
>
> 1.1.2 Solely or mainly employed working or last working in the locality in agriculture or in forestry or a widow or widower of such a person or any resident dependants.
>
> 2.0 To retain the whole of the Land together as one parcel and in one ownership and not to alienate any part of the land or any building erected thereon without the prior consent in writing of the Council PROVIDED ALWAYS that this Deed shall not operate to prevent the disposal alienation or leasing of the whole of the land (including any building erected thereon together as one parcel).
>
> 3.0 Not to use or permit any other person to use the Land or any part thereof for any purpose other than for the commercial equestrian business or for agriculture or forestry.
>
> 4.0 Upon completion of the development to cease occupational use and secure the removal of the mobile home currently situated on the Land."

11. Outline planning permission was granted by the Council on 1 October 2010.

12. On 14 March 2011 Grey Fox Racing applied for full planning permission to erect a permanent dwelling at Grey Fox Stables and on 2 June 2011 the Council granted full planning permission for the construction of the dwelling. The s106 Deed was varied to incorporate references to the full planning permission such that the s106 Deed was binding in respect of the full planning permission.

13. Subsequently the company, which is a specialist builder, joiner and interior fit-out carpenter, entered into a contract with Mr Stoneham dated 29 May 2012 to construct the dwelling. It is the VAT treatment of the services supplied under this contract which is the subject of this appeal.

The Law

14. The key elements of the legislation relevant to this appeal are contained at Item 2 of Group 5 of Schedule 8 of the VATA which states that certain supplies in the course of construction shall be zero-rated for VAT purposes. Item 2 reads as follows:

> "2. The supply in the course of the construction of –
>
> (a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose; or
>
> (b) any civil engineering …
>
> of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity."

15. The definition of this Item is then, importantly, qualified by various conditions set out in Note (2) to Group 5 as follows:

> "(2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied –
>
> (a) the dwelling consists of self-contained living accommodation;
>
> (b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;
>
> (c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision; and
>
> (d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent."

16. The arguments put forward by HMRC in this case at the hearing relate entirely to Note (2)(c). Counsel for HMRC did at one stage indicate that HMRC might argue that the dwelling had not been constructed in accordance with the planning consent, in contravention of Note (2)(d), but this argument was dropped and not advanced by counsel for HMRC. We did not therefore hear any argument on this point and make no further comment on it.

Discussion

17. It was agreed that the key words in Note (2)(c) were 'separate', 'use', 'disposal' and 'prohibited' and that these should all be considered by reference to the conditions effectively imposed by the planning permission documents. We were also referred to a number of decisions of other tribunals in similar cases which showed that different tribunals had reached different conclusions in respect of similarly worded planning conditions. We therefore concluded that each planning condition must be considered in its own context, drawing as much assistance as we could from decisions of other tribunals.

18. As regards the word 'separate' the question automatically arises as to separate from what. We did not hear extensive argument or guidance from counsel on the meaning of the word 'separate' but we believe it should be interpreted, in the context of the facts of this case, as meaning separate from the equestrian barn and other facilities which were included in the planning applications. There was no dispute between the parties on this point.

19. As regards the possible restrictions on separate use or disposal we heard submissions from both Mr Singh and Mr Zwart as to which elements and terms of the planning permission documents we should take into account. A useful analysis of this is set out at para 43 in the decision of the Upper Tribunal in the case of *HMRC v Shields* [2014] UKUT 453 (TCC):

> "The effect of the term should be determined by construing the words of the planning permission, including any conditions and reasons, and applying those words to the facts of the particular case. The terms of the permission include any approved plans and drawings that show the detail of what has been permitted. Where the words of the term are ambiguous or unclear then it may be possible to resolve the meaning of the term by reference to the context in which the term was imposed, eg the application and the correspondence relating to it."

20. The Upper Tribunal then went on to quote the words of Keene J (as he then was) in *R v Ashford BC, ex p Shepway DC* [1999] PLCR 12 at 19-20:

> (1) "The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions, if any, on it and the express reasons for those conditions: see *Slough BC v Secretary of State for the Environment* [1995] JPL 1128 and *Miller-Mead v Minister of Housing and Local Government* [1963] 1 All ER 459, [1963] 2 QB 196.
>
> (2) This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. […]
>
> (3) For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the

permission. While there is no magic formula, some words to inform a reasonable reader that the application forms part of the permission are needed, such as "… in accordance with the plans and application …" or "on the terms of the application …", and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These would need to govern the description of the development permitted.

(4) …

(5) …"

21. In the current case the full planning permission granted on 2 June 2011 states specifically that this is a development "to be carried out in accordance with the application and accompanying plans." We therefore considered it correct to examine the application in full in order to reach a conclusion as to the effect of any restrictions imposed as part of the planning process.

22. Mr Zwart directed us to a number of references in the application documents describing the development variously as "a permanent equestrian workers dwelling", and a development "in connection with **the** equestrian facilities" (counsel's emphasis). He argued that this therefore restricted the use of the property to a person working in the equestrian business sited at Grey Fox Stables.

23. A similar argument was raised in the Upper Tribunal in the case of *HMRC v Shields*. The Upper Tribunal agreed that what was effectively a description in a planning application could limit the use of a property and said, at para 48, that:

"It is clear from *Wilson v West Sussex CC* [1963] 1 All ER 751, [1963] 2 QB 764, CA and *Uttlesford DC v Secretary of State for the Environment and Leigh* [1989] JPL 685 that the description of a development may, on its own terms and without more, prohibit a building from being used in certain ways. The issue in this case is whether the description of the building as "equestrian facilities manager's residence" means that the planning permission must be taken to prohibit the separate use (…) of the dwelling".

24. The Upper Tribunal considered that in the *Shields* case these words did not go far enough so as to create a prohibition on the separate use of the dwelling sufficient to engage Note (2)(c). We came to a similar conclusion in the current case and agreed that these descriptions did not by themselves restrict the occupation of the dwelling as contended by HMRC.

25. In addition we considered that we also needed to look at other language within the planning documents, including the Notice of Permission stating that the full planning permission had been granted and the s106 Deed which had been drawn up as a condition of the granting of outline planning permission, and which had also been incorporated into the final full planning permission. The full planning permission was granted on 2 June 2011, and the Notice of Permission describes the proposed development as "Erection of a four bedroom dwelling". It also repeats a key condition set out in the s106 Deed, specifically that:

> "3. The occupation of the dwelling hereby permitted shall be limited to a person solely or mainly working, or last working, in the locality in agriculture, forestry or an equestrian business, or a widow or widower of such a person, and to any resident dependants."

26. These words seem to us to be at odds with the descriptions contained in the earlier documents and at the very least broaden any intended limitation on occupation from that of an equestrian worker to occupation by persons with broader agricultural, forestry and equestrian connections, even to the extent of changing "**the** equestrian business" to "**an** equestrian business". In our view this indicated that the position of the Council had evolved during the planning process. If this evolution had not been intended by the Council then this condition 3 was almost entirely otiose. This seemed to us to be extremely unlikely and we therefore preferred the broader terms of the conditions as stated in the Notice of Permission and the s106 Deed.

27. We heard evidence from Mr Mark Stoneham, the owner of the property, who stated that in his view the planning process was "dynamic" and that a number of facets of the planning permission had changed during the process. In particular he explained that he was intending to move into the property in July 2016 and that he understood that he qualified as a permitted occupant because he was a farmer, even though he was not and had not been actively involved in the equestrian business.

28. We therefore decided that in our view the restrictions contained in the planning permission did not prohibit the use (or occupancy) of the dwelling separate from the equestrian facilities. In respect of the question of use therefore we decided that Note (2)(c) did not operate so as to prevent the zero-rating of the services in question.

29. We then moved on to consider the question of disposal. In this context we were referred by Mr Singh to the case of *JFB and JR Sharples v HMRC* [2008] UKVAT V20775. The Tribunal in that case (Charles Hellier and Sheila Wong Chong) considered in some detail the meaning of the word 'disposal' in Note (2)(c) to Group 5. 'Disposal' could of course encompass a wide range of alienation actions, ranging from the grant of a licence to occupy to a full sale of the freehold, including the granting of a long lease. The tribunal in *Sharples* considered that the proper meaning of 'disposal' in this context was coloured by its proximity to the word 'use'. They therefore decided that in this context 'disposal' could mean something as limited as simply the disposal of occupancy or the right to use the property, and not necessarily the disposal of the full freehold. This seems to us to be a very low threshold.

30. However, we are required in the present case to ask ourselves whether or not separate 'disposal' of the dwelling is prohibited for the purposes of Note (2)(c) by the terms of the planning permission, which uses the word 'alienate' in the relevant condition, ie condition 2 in the s106 Deed. This states that Mr Stoneham is required:

> "To retain the whole of the Land together as one parcel and in one ownership and not to alienate any part of the land or any building erected thereon without the prior consent in writing of the Council PROVIDED ALWAYS that this Deed shall not operate to prevent the disposal alienation or leasing of the whole of the land (including any building erected thereon together as one parcel)."

31. Given the subsequent use in this condition of the words "disposal alienation or leasing" we believe that these words are probably intended to mean different things and that alienation is something less than a full disposal of the legal interest. Therefore, if it does indeed mean something less than a full disposal, the condition contained in the s106 Deed is more restrictive than if it referred to a full disposal of the freehold or, for example, the granting of a long lease.

32. We then move on to the meaning of 'prohibited'. We were referred by Mr Zwart to the cases of *EC Commission v United Kingdom* (Case 416/85) [1988] STC 456 and *EC Commission v Finland* (Case C-C169/00) [2004] STC 1232. In particular Mr Zwart referred us to the words from the *Finland* case:

> "the terms used to specify the exemptions which constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person must be interpreted **strictly**." (Counsel's emphasis)

33. We took this to mean that we should seek to interpret the precise words of the statute and the planning permission and should not insert any assumed words which might qualify the meaning of those words in any way. We therefore sought to interpret the meaning of 'prohibited' in its normal sense.

34. It was common ground between the parties that the word 'prohibited' is a very high threshold and means a strict prohibition, ie that something is totally forbidden.

35. It is clear that the first part of condition 2 of the s106 Deed is a prohibition on the separate alienation of any part of the land and buildings in that the owner is required:

> "to retain the whole of the Land together as one parcel and in one ownership and not to alienate any part of the land or any building erected thereon …"

36. The key question therefore is whether or not the fact that the land and buildings can be sold separately with the written consent of the Council means that this is an absolute prohibition on the separate sale of the building or merely a disposal which is permitted on the fulfilment of certain conditions.

37. In his evidence Mr Stoneham stated that his solicitor had advised him that he could read into those words something of the nature of "such consent not to be unreasonable withheld". Given that we are required, in accordance with the *Finland* case, to interpret the words strictly, we do not believe that we can read such words into condition 2. We must therefore interpret the words as they stand.

38. However, in our view, if the Council had intended that this should be an absolute prohibition on the separate disposal of the dwelling then there would have been no point in including the words "without the prior consent in writing of the Council" in the agreement. Even without those words, it would always have been open to Mr Stoneham to have approached the Council at a later date to vary the terms of the s106 Deed to permit a separate disposal. The fact that the Council did include

those specific words in the agreement suggests strongly to us that they must have contemplated the possibility of a separate sale from the outset.

39. If these words had been omitted from the s106 Deed that might have meant that there was an absolute prohibition on the separate sale of any part of the land or buildings. However the fact that the words "without the prior consent in writing of the Council" were written into the s106 Deed persuades us that this condition should not be regarded as an absolute prohibition and that it was quite possible that the Council would give such consent at a later date.

40. We therefore decided that the planning documents did not contain a prohibition on the separate alienation or sale of the dwelling separate from the land and equestrian buildings.

Decision

41. Having considered the planning documents as set out above we therefore decided that there was nothing in the planning permission or the related documents which constituted a prohibition on the separate use or disposal of the dwelling for the purposes of Note (2)(c) to Group 5 of Schedule 8 VATA.

42. We therefore decided that the company's appeal should be ALLOWED and that the VAT assessment for £7,500 issued on 18 January 2013 should be quashed.

43. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. 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.

PHILIP GILLETT

TRIBUNAL JUDGE
RELEASE DATE: 22 OCTOBER 2015