[2021] UKFTT 119 (TC)

TC08100

Keywords: SDLT Multiple Dwellings Relief- whether property comprises two dwellings- whether each part suitable for use as a dwelling. No appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/02159/V

BETWEEN

MICHAEL AND ANTHEA MULLANE **Appellants**

-and-

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

TRIBUNAL: JUDGE Gething

The hearing took place on 12 April 2020. With the consent of the parties, the form of the hearing was V (video) all parties attended remotely and the remote platform using the Tribunal video platform. The documents to which I was referred are contained in a Trial bundle of 109 pages, an authorities bundle and skeleton arguments of both parties.

Mr Patrick Cannon, counsel for the Appellants

Dr Jeremy Schyber, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This case concerns whether multiple dwellings relief ("**MDR**") from stamp duty land tax ("**SDLT**") under Schedule 6B to the Finance Act 2003 ("**FA 2003**") and ("**Schedule 6B**") is available in respect of a land transaction that comprised the purchase of premises at 24 Abbey Water, Romsey, Hampshire ("***the Property***"). The issue is whether at the date of completion of the transaction, the property which comprised a main house and an annex joined by a glass conservatory, consisted of "*an interest in … two dwellings*". The term "*dwelling"* is not defined in Schedule 6B so must be given its ordinary meaning so far as consistent with the context and purpose of the legislation. The test is an objective one - would a reasonable person consider both parts of the Property to be dwellings or suitable for use as a dwelling, without further work being undertaken, other than obtaining appropriate or updated fire and building regulation certificates, to enable the parts of the Property to be let, having regard to the purpose of the relief to increase the accommodation available for letting.

2. Having taken all the facts and circumstances into account, and the object of the legislation, I consider that MDR is not available in this case. I dismiss the appeal.

THE LEGISLATIVE BACKGROUND

3. Schedule 6B was introduced by Finance Act 2011. Schedule 6B provided relief from SDLT by dividing the consideration payable for an entire building between the number of dwellings in the building, thus potentially reducing the consideration for each dwelling below the threshold at which higher rates of SDLT are payable. I was informed by HMRC's representative that the background purpose to the introduction of the legislation was the object of increasing the supply of residential dwellings, and thereby increasing the supply of rented accommodation. Counsel for the Appellants did not disagree with this.

4. To qualify for MDR, a land transaction must fall within either Para 2(2) or 2(3) of Schedule 6B, and not be excluded by Para 2(4). The parties agreed that Para 2(2)(a) was in point and the transaction would not have been excluded by Para 2(4). Para 2(2) provides as follows:

> "*(2) A transaction is within this subparagraph if its main subject matter consists of –*
>
> *(a) an interest in at least two dwellings*
>
> *(b) ….*"

5. Paragraph 7(1) and (2) deal with what is meant by dwelling.:

> "*(1) This paragraph sets out rules for determining what counts as a dwelling for the purposes of this Schedule.*
>
> *(2) A building or part of a building counts as a dwelling if –*
>
> *(a)* ***it is*** *used or* ***suitable for use as a dwelling****, or*
>
> *(b) it is in the process of being constructed or adapted for such use.*"
>
> [My emphasis]

6. As SDRT is payable following completion of a land transaction, the test of whether a building or part is suitable for use as a dwelling and therefore for eligible for relief, must be determined by reference to the attributes of the Property or parts at completion.

7. The parties agree that the main house and annex were not being used as separate dwellings at completion of the land transaction. The issue before the Tribunal is therefore

whether the annex was suitable for use as a dwelling at completion. The burden lies on the Appellants to demonstrate that the Property was in the necessary condition that it was suitable to be let as a dwelling at completion.

THE FACTS

8. I heard evidence from Mrs Mullane and read her two witness statements and attached plan and photographs of the Property. She was cross examined by HMRC's representative.

9. I find the following facts:

(1) The Appellants acquired Property in August 2018. The Property comprised a main house and an annex. The Property had originally comprised two separate buildings; the annex was a coach house. They were separated by an elaborate wrought iron frame through which one could walk to reach the garden.

(2) The former owner joined the two buildings by the creation of a "T" shaped glass conservatory style area five feet wide. The long leg of the T is about 18 feet long and top of the T about 16 feet wide. The main house is on the left of the conservatory style hall and the annex is on the right. The glazing panels of the conservatory style area are in the same style as the windows in the Annex.

(3) There is a door at each end of the long leg of the T. One leads to the road, the other to the garden.

(4) There are two doors at each end of the top of the T, one on the right is the entrance to the annex and one on the left is an entrance to the kitchen of the main house. The kitchen door had a lock but the annex door had no lock at completion. One has been added subsequently.

(5) There is a further door in the long leg of the T on the left towards the rear, that is an entrance to the living room of the main house. This was an original door and had a lock at completion.

(6) The annex may also be accessed via a door from a rear patio.

(7) The original main entrance to the main house is at the left-hand side of the house. There is access between the kitchen and living room of the main house without the necessity of using the conservatory style room.

(8) There is currently no tenant occupying the annex and there has not been a tenant since the purchase although, one or two family friends of the Appellants have occupied rooms in the annex.

(9) Mrs Mullane informed the Tribunal that should she let the annex she would:

(a) not intend that any occupant of the annex should have access to the garden. The garden would be for the exclusive use of the occupant of the main house, although it is clear that the occupant of the annex would benefit from the amenity the garden, given that there are views of the garden from the annex; and

(b) expect the occupants of the annex and the main house would share the conservatory style hall.

(10) The main house comprises all the facilities normally associated with a dwelling, in terms of eating, sleeping, washing, security and privacy.

(11) The annex is on two levels. The ground floor comprises a large room and bathroom. The large room has two large windows on adjacent sides. One faces the garden and the other faces the kitchen of the main house. One can see through the window at the front of the annex into the garden.

(12) A photo of the living room in the annex showed a microwave on a stool or low table.

(13) The first floor of the annex is accessed by a staircase at the top of which there is another large room and to one side of the stairs there is an area where there is a kitchen sink, drainer, and small work top with two cupboards below, and a set of cupboards above the drainer. There are floor to ceiling storage cupboards to the left of the drainer and a fridge. At completion, there was no cooker in this area although there is one now. It is free standing rather than being affixed to the building. There was a 13 Amp socket in the area in front of the sink but no dedicated cooker point. The area is lit by a window in the eaves above the cooker at head height which does not open. There are opening windows in the upper room and on the hallway.

(14) There is no washing machine or place designed to accommodate a washing machine in the annex.

(15) Mrs Mullane did not know whether the arrangement satisfied applicable building or fire regulations. HMRC raised the issue of there being no fire or building regulation certificates but did not elaborate on which regulation would, if not satisfied, prevent letting the annex to a tenant.

(16) The Property was advertised as a single dwelling in the estate agent's particulars when the property was purchased by Mr and Mrs Mullane. The rooms in the annex were described as bedroom 3/study and bedroom 4.

(17) The area outside the conservatory at the front of the house is illuminated by a lantern which is heat and light sensitive and can be operated from inside the conservatory.

(18) There are no separate council tax bills or utility bills for the annex.

(19) An SDRT return was originally submitted in August 2018 stating the SDLT payable was £26,500 but an amended return was filed on 27 November 2018 claiming MDR and reducing the SDLT to £16,400.

(21) The claim for MDR led to an enquiry, a decision declining the relief and the issue of a closure notice. The Appellants appealed but sought a statutory review of the decision to decline the relief. The Review Officer upheld the original decision, and the appeal was referred to the Tribunal.

(22) Mr and Mrs Mullane have lived in the main house alone for three years since completion. I infer she will have records of water, gas and electricity consumption by the main house. I also infer she would be able to identify the surplus consumption by any tenant to be able fairly to allocate the appropriate costs to a tenant of the annex.

Appellants' position.

10. The Appellants position is that, as the term "*dwelling*" is not defined in Schedule 6D it must be given its ordinary meaning. The Appellants say that the ordinary meaning of dwelling is one which "*is a self-contained unit of residential accommodation, that provides the occupant with the means for a private separate existence by having its own means of lockable entry and exit, with living, sleeping, washing and food preparation facilities or, one which is suitable to be so used*".

11. Both the annex and the main house are separate dwellings.

12. In relation to the annex:

(1) A dwelling can exist notwithstanding that the cooking facilities are limited, or the kitchen area is small, or where there is no separate kitchen at all, as is often the case in studio flats.

In this case there is a designated kitchen area for food preparation at the top of the stairs in the annex. HMRC seem to have overlooked the existence of this area.

(2) The annex also enjoys separation from the main house through the front door and the shared use of the entrance in the conservatory style hallway which is common in blocks of flats. It also enjoys a rear entrance via a patio.

(3) The necessary structure exists for privacy of the annex and if further privacy were required by any occupant of the annex, blinds could be installed.

(4) The annex does not have any garden or rights of access to the garden at the rear. But that would not affect the status of the annex as a separate dwelling. Many dwellings have no garden and yet SDLT is still payable on the consideration.

(5) The lack of a separate council tax bill is indicative only of the lack of knowledge of the council that the annex is suitable for use as a dwelling. The lack of utility bills does not prevent the annex being suitable for use as a separate dwelling.

(6) Although there had been no tenants in occupation, and it is recognised some tenants may demand more facilities, the annex was suitable for letting to air bnb tenants.

13. The main house is also a separate dwelling. It has all the necessary facilities for separate occupation as a dwelling. It enjoys security in terms of lockable doors leading into the conservatory style hall, access to and exclusive use of the garden and its own separate front door.

14. In support the Appellants referred the Tribunal to guidance issued by HMRC:

(1) SDLTM 00425 which confirms HMRC's view that to constitute a dwelling there should be a number of facilities including an area where a meal can be prepared. It is not necessary for the white goods appropriate for food preparation to be present at completion because these goods are often removed on sale. There should be space and infrastructure in place such as plumbing for a sink and power source for a cooker. In this case there was a sink and a socket in the kitchen, and a cooker was subsequently acquired. Nothing has changed at the house since it was acquired 3 years ago.

(2) Para 17 of Statement of Practice 1/2004 which states that whether "*a building is suitable for use as a dwelling will depend on the precise facts and circumstances. The simple removal of, for example, a bathroom suite or kitchen facilities will not be regarded as rendering a building unsuitable for use as a dwelling…"*

15. The Appellants also referred to the following authorities on what constitutes a dwelling in other contexts:

(1) Uratemp Ventures Limited v Collins [2001] UKHL 43 ("***Uratemp Ventures***") where the issue under consideration was the definition of dwelling in the Housing Act 1988 and whether a dwelling house had been "*let as a separate dwelling"* The issue was whether a room occupied by Mr Collins in the Viscount Hotel could in law qualify as a dwelling only if cooking facilities were available. The House of Lords decided that the absence of cooking facilities was not a barrier for a unit to be regarded as a dwelling for the purposes of security of tenure, see Lord Irvine at [2] and [3]. At [3] he states, "*Dwelling is not a term of art, but a familiar word in the English language, which in my judgment, in this context connotes a place where one lives, regarding and treating it as home. Such a place does not cease to be a "dwelling" merely because one takes all or some of one's meals out; or brings take-away food in to the exclusion of home cooking; or because one prepares some food for consumption on heating devices that fall short of a full cooking facility.*" See also Lord Millett at [31] and [58].

(2) Carson Contractors Limited v HMRC [2015] UKFTT 0530 (TC) ("*Carson*") a case concerning zero rating for the purposes of VAT of the costs of construction services as part of approved alterations to a protected building under Schedule 8 Group 6 item 2, VAT Act 1994 ("**VATA**"). The construction in Carson was making available more accommodation to be used in connection with the occupation of Bridges Court. The new accommodation could not be used or sold separately from the principal house. The issue was whether the house and the annex were "*designed as two separate dwellings*" not whether they were used as such. In that case HMRC argued there were two separate buildings The factors under consideration were a single council tax bill and a single letter box and lack of planning permission. The FTT found that the lack of separate letter boxes was not problematical as another could be added and the fact that the council issued a single council tax bill could be due to the fact that the council were unaware of the conversion. Lack of planning permission would not prevent the use of the conversion as a dwelling. The FTT held that there were two separate dwellings.

(3) The Appellants stated that cases concerning the zero rating of supplies in relation to a "*building designed as a dwelling or number of dwellings*" under the VAT Act, items 1, 2 and 3 of Group 5, Schedule 8 were of assistance because note 2 to item 1 indicates the following conditions must be satisfied: the dwelling consists of self-contained accommodation, there is no provision for internal access from the dwelling to any other dwelling or part, separate use of the dwelling or disposal is not prohibited by the terms of any covenant or statutory planning consent, and planning permission has been granted for the construction or conversion and the construction has been carried out in accordance with it. The Appellant also submitted that cases concerning council tax were also of assistance as Section 3(5) Local Government Finance Act 1992 the secretary of State can determine whether what might otherwise be one dwelling be treated as two or more dwellings:

(a) 18798 Agudas Israel Housing Association Limited v HMRC [2005] VATT BVC 4029 ("***Agudas Israel***")

(i) Premises with their own front door, ensuite bathing facilities and the ability to cook with a microwave and kettle are self-contained living accommodation for the purposes of Schedule 8, Group 5 item 1, VAT Act.

(ii) Further the lack of separate utility meters did not prevent the establishment of a separate dwelling.

(b) McColl v Sabacchi [2001] EWHC - Admin 712, ("***McColl***") the High Court placed weight on the fact that the apartment had its own lockable door in determining whether an apartment was a separate unit for the purposes of council tax.

(c) Jorgensen (LO) v Gomperts [2006] EWHC (Admin) 1885, ("***Jorgensen***") lockable door was not a necessary condition for council tax purposes for there to be a self-contained unit.

(d) Ramdhun v Coll [LO] [2004] EWHC 949 (Admin) ("***Ramdhun****"*) Haddon Cave J held that:

(i) It was plainly not the case that a lockable front door was necessary pre-condition of having a self-contained unit for council tax purposes. The necessary degree of separation and privacy can be created by stairs or simple geographical separation.

(ii) The absence of separate utility meters was not an impediment for the establishment of a separate dwelling for council tax purposes.

(e) Fiander & Brower v HMRC [2020] FTT TC 2019/00071 ("***Fiander***") (which has been appealed to the Upper Tribunal) Judge Citroen placed little weight on the lack of separate council tax bills and utility bills.

(f) Merchant v Gater ("***Merchant***") [2020] UKFTT TC 07783, an annex was entered by a common hall and was not problematical. In this case the annex is entered via a common corridor, one turns left into the main house and right into the annex. Nothing said the Appellants should turn on the common ownership or shared access of the hall.

(g) Partridge v HMRC [2021] UKFTT TC 7991*("**Partridge**")* the FTT considered at [48] that the test of whether a part of a building was suitable for use as a dwelling must be considered at completion by reference to physical attributes of the building at that date. The Appellants pointed out that in this case, the sink and unit below, the storage cupboards above the sink and by the side of the sink, and electricity supply were all integral features of the building. These features allow for the storage and preparation of food and would have been observed by an independent viewer at completion. The test would, according to the Appellants, be met. The cooker and other equipment are chattels and are not uncommonly removed by a seller before completion. There is no requirement for a kitchen to be of any specific size. They are often small and not in a designated room in small dwellings such as bedsits. But the Appellants point out that gourmet meals can be cooked in a bedsit as can be seen from the book by Katherine Whitehorn. The Appellants considered HMRC's approach to be a very middle-class approach and does not allow for how others live.

HMRC's position

16. HMRC consider that the test as to whether the annex is "*suitable for use as a dwelling"* is, following ***Fiander*** at [51] and [52] and [66], an objective test based on the physical features of the property at completion adjudged by a reasonable person at that time and not adjudged by reference to new features added or that may be added, however easily, after purchase. To be a separate dwelling all a person's basic living needs must be met: to sleep, to eat, to attend to one's personal hygiene and to do so with a reasonable degree of privacy and security. The reasoning in ***Fiander*** was followed by the FTT in ***Merchant*** at [42], and ***Partridge*** at [49] and [50]. The Tribunal must take a realistic view of the facts in the context of the legislation. It is necessary to look at both parts of the building and each part must be suitable for use as a dwelling. In HMRC's view neither the main house nor the annex would be capable of use as a separate dwelling. Rather, 24 Abbey Water comprises only one dwelling which comprises the main house and the annex.

17. All facts and circumstances must be taken into account in this case in determining whether the physical configuration is such as to provide the annex and the main house sufficient independence to be able to conclude each is a separate dwelling. This is a balancing exercise but not all facts are to be given equal weight. It is not sufficient for each part of the premises to be a self-contained unit. There must be independent access, privacy from other dwellings, and sufficient facilities to meet the needs of the occupant. Based on the following facts HMRC concluded that there is only a single dwelling of which the annex is part and that neither the annex nor the main house is suitable for use as a separate dwelling:

(1) The Property was advertised and sold as a single dwelling with four bedrooms and one kitchen. There is no mention in the particulars of the area above the stairs in the annex.

(2) The main house has kitchen facilities.

(3) A kitchen must be acceptable to everyone. The annex lacks a kitchen of appropriate size with a dedicated space for an oven and washing machine, a storage space for food, direct

ventilation and appropriate fire certificate. Independent living is not possible. The appliances which are now in the annex on the landing were not present at the date of completion and as there was no designated space for them the objective observer at completion would not consider the facility sufficient to constitute a kitchen. The electrical appliances now in the area would not have become fixtures at completion. The facilities were suitable only to make a cup of tea or glass of water.

(4) There was a lack of privacy in the annex owing to the large glass windows at ground floor level. Whereas a barrier could be constructed to provide the degree of privacy that would be a later step which cannot be considered.

(5) There was no barrier separating the main house from the annex. On the contrary there was a shared space in the form of the glass conservatory.

(6) There was no security in the annex as the lock was added to the door to the annex after completion.

(7) Shared use of the glass conservatory area was unusual. This glass conservatory style area was added to join the two buildings. It was designed to ensure light flooded into the building. It provided unity between two buildings.

(8) There was no access to the rear garden for the main house except through the glass conservatory. This is unsatisfactory for the main house.

(9) The arrangement indicates that the annex is within the property rather than separate from it.

(10) There were no separate utility bills and no separate council tax assessment

(11) Viewed realistically and objectively:

> (a) The annex is additional living space for the main house and is not suitable for separate use as a dwelling.
>
> (b) The lack of independent access to the garden by the occupants of the main house except through the conservatory style area means the arrangement is not suitable for the main house to be used as a single dwelling.

18. HMRC consider authorities on what constitutes a dwelling in other legislative contexts are not persuasive authority in relation to the meaning of the expression "suitable for use as a dwelling" in the context of SDRT MDR. Specifically:

(1) In *Uratemp Ventures*, Lord Bingham indicated at [10] that the concept of dwelling is clear enough. "*It describes a place where someone dwells, lives or resides. In deciding in any given case whether the subject matter of a letting falls within that description it is proper to have regard to the object of the legislation, directed as it is, to giving a measure of security to those who make their homes in rented accommodation at the lower end of the housing market. It is not to be expected that such accommodation will necessarily offer all the amenities to be found in more expensive accommodation.*" HMRC say that the decision is not relevant having regard to the legislation under consideration but the approach that was adopted to identify the meaning of the term dwelling is helpful. The purpose of the MDR relief from SDRT was to remove barriers to investment and boost availability of rented accommodation.

(2) Carson Contractors was concerned with whether a barn was designed as a dwelling. The barn was a dwelling and it had a kitchen. The test is not the same and the facts are different.

(3) The cases concerning council tax require only that there is a self-contained unit. There is no requirement for the accommodation to amount to a dwelling. It is a different test.

(4) In *Agudas Israel*, the issue was whether units of accommodation in a carehome were separate units for VAT. This is not the same test and not the same facts.

(5) *Jorgenson* and *McColl* is relied upon by the Appellants to say that it is not fatal for MDR that there is no lockable door at completion. HMRC accept that fact but no single factor will determine the issue. HMRC consider the test requires a multi-factorial approach to identify which direction the facts point to when all the facts are considered by the independent objective observer at completion.

19. Similarly, HMRC guidance on what is a dwelling for the purposes of disadvantaged areas relief (which has since been withdrawn) is not relevant.

20. HMRC sought an order that closure notice be upheld, and the appeal be dismissed.

Discussion

21. The modern approach to the construction of taxing statutes was identified in *BMBF v Mawson* [2004] HL (2005 STC 1) as requiring the legislation to be construed purposively and applied to the facts viewed realistically.

22. The statutory test in this case, to qualify for MDR, is set out at paras [3] and [4] above. The Property must consist of an interest in at least two dwellings. A part of a building counts as a dwelling if –

"*(a)* ***it is*** *used or* ***suitable for use as a dwelling****, or*

(b) it is in the process of being constructed or adapted for such use." [Emphasis added].

23. I note HMRC's explanation of the object of MDR (which was not challenged by the Appellants) was to increase investment and increase the supply of rented accommodation.

24. The test is expressed as an objective one as the wording of Schedule 6B does not specifically direct enquiry to the intentions of the purchaser of the Property.

25. As SDRT is payable following completion of a land transaction, the test of whether a building or part is suitable for use as a dwelling and therefore for eligible for relief, must be determined by reference to the attributes of the Property or parts at completion. In a case such as this where the Property has been used as a single dwelling prior to purchase and sold as a single dwelling, the burden lies on the Appellants to demonstrate that the property is in the necessary condition that it is suitable to be let as a dwelling.

26. Given the object of MDR is to increase the supply of rented accommodation, the test in this case was whether each of the annex and the main house would have been suitable for use as separate dwellings at completion.

27. This issue must be determined by considering all the facts which I have outlined at [8] above. I comment on those facts as follows:

(1) The shared use of the glass conservatory between the main house and the annex is irrelevant. It is a common feature in the UK housing market that two separate dwellings can share a common entrance and hall. It is irrelevant that the previous owner created the glass conservatory to link the main house to the annex for the better enjoyment by the main house of the annex. The motives of the previous owner are not relevant to the issue to be determined at the date of completion of the purchase by the Appellants.

(2) The glass conservatory is operating as the dividing line between the main house and the annex. It provides an effective geographic separation of the two parts.

(3) The annex has its own front entrance which is accessed via the shared glass conservatory. There is also a rear access via a patio. This is compatible with the annex being suitable for use as a separate dwelling.

(4) The main house has its own front entrance and further entrances via the shared glass conservatory each of which has its own lock. This is compatible with the main house being suitable for use as a separate dwelling. The occupants would enjoy the necessary security.

(5) In terms of necessary security required by a tenant of the annex vis a vis the outside world, the lock on the glass conservatory door and the security lantern outside would provide adequate protection. I expect that every tenant would also require a lock on the door to the annex to secure the tenant's privacy against the occupant of the main house but I think that alone would not prevent the annex being regarded as suitable for use as a dwelling at completion albeit that a lock would be needed after completion.

(6) In terms of privacy, the annex has large windows at the ground floor level on two sides which HMRC consider deprives the annex of the necessary degree of privacy for the annex to be regarded as a dwelling. I cannot accept that is true. All occupants of properties with significant windows have the choice to cover with blinds or voile curtains or leave them uncovered. Such a step to provide more privacy would not require any alteration to the premises post completion. The main house would also enjoy sufficient privacy with the use of blinds or curtains as the occupants wish.

(7) In terms of access to and necessity for a garden; I think it is unnecessary for a dwelling to have access to a garden to qualify as a dwelling. The intention that the main house should have the exclusive right to use the garden is not an impediment to qualifying for MDR. Further, that the access to the garden by the occupant of the main house is via the rear door in the glass conservatory is not significant or an impediment to enjoyment of the garden.

(8) That there is only one council tax bill would not prevent the annex from being regarded as being suitable for use as a dwelling at completion. If the annex had already been in use as a separate dwelling before completion, separate council tax registration at completion might be required to qualify for MDR. However, in this case the claim for MDR is on the basis that the property is suitable for use as a dwelling, and that implies that the separate council tax registration is not required at completion and can be obtained as that must be a mere formality.

(9) That there is a single utility bill would not be an absolute barrier to the letting of the accommodation to a tenant. Given Mrs Mullane has experience of consumption of water, gas and electricity I infer she will be able to identify the consumption by a tenant of the annex and it is not uncommon for the utility bills to be included in the rent. I expect that the lack of separate meters would be a barrier to sell the annex to a purchaser. But given the objective of the legislation is to increase the number of properties available to rent that would not be an impediment to claim MDR.

(10) In terms of facilities necessary to meet the needs of a tenant to sleep, wash and eat, there is no doubt that main house has sufficient facilities. There is no doubt that the annex has facilities to allow for sleeping and washing and there would seem to be sufficient space to eat. I consider that the most significant issue in relation to the annex is the quality of the facilities to prepare and cook food for two adults (which I have assumed is the expected maximum occupancy of a one-bedroom dwelling).

(11) I note the guidance of the House of Lords in *Uratemp Ventures* that an ability to cook food was not necessary for the purposes of establishing whether accommodation was a dwelling for the purposes of affording the occupant security of tenure. In such cases the

occupants have unequal bargaining power and it was natural for the Court to disregard the lack of amenity in the premises in favour of the tenant in such a case. The legislation in this case is quite different. The objective of this legislation is to increase the supply of rented accommodation and it is for the Appellants to demonstrate that the objective of the legislation would be met by the granting of the MDR in this case. The Appellants have identified the kitchen facilities in the annex as satisfying the need of a tenant to store, prepare and cook food. The Appellants seem to have abandoned the point that a microwave alone in the living room might be sufficient. I do not accept a microwave in a living room would be sufficient given the objective of the legislation. There is in my view an expectation that the food and the cooking should take place in a single area, and on the same floor, in a dwelling.

(12) Objectively, there are sufficient facilities to store food, including fresh food storage in a fridge. There is a sink and a small work top to enable preparation to take place. The area is small but that is not significant.

(13) The issue is whether food could safely be cooked in the kitchen to enable the premises to be regarded as suitable for use as a dwelling. The arrangements would have to be capable of satisfying building and fire regulations to allow the annex to be lawfully let. I found it incredible that Mrs Mullane had no knowledge, more than two years after making the claim for MDR in respect of the annex, whether any building regulation control or fire certificates would be required to lawfully let the annex. HMRC had raised the issue of fire safety but not identified specific regulatory impediments to the lawful letting of the property.

(14) In my experience an electric accessory should be positioned to enable safe operation and avoid the harmful effects of heat, and steam from cooking activities or splashing from use of a sink or wash basin and that a cooker should be a suitable distance away from the sink.

(15) The photographs of the location of the cooker in the annex attached to the second witness statement of Mrs Mullane show:

(a) The cooker standing on a low table immediately in front of the sink and between the sink and the bannister.

(b) There is very little space, if any, on either side of the cooker.

(c) The bottom of the cooker is just below the level of the sink.

(d) The cooker is about 12 inches high and comprises a grill/oven and two hobs on top.

(16) I cannot see how the cooker can be safely operated in order to avoid splashes from the sink, nor now the hobs can be operated safely given the height of the cooker. I would have the same concerns if the microwave were placed on the counter by the sink or replaced the large cooker on the table in front of the sink.

(17) HMRC raised concerns about the open-plan nature of the kitchen from a fire prevention perspective. I share those concerns. Fire alarms and fire doors would be needed to give the occupants of the upper room time to escape in case of fire.

(18) In my view, MDR is capable of being claimed in a situation where premises are capable of satisfying building regulations but all that is required at completion is for a certificate to be obtained.

(19) In a case such as this, where premises have been used previously as a single dwelling and sold as a single dwelling, but the purchasers claim MDR, I would expect that the purchasers intend to let the premises and would take the necessary steps to obtain building

regulation control approval to be able to let the premises lawfully. That would be consistent with the object or purpose of the MDR to increase the supply of rented accommodation.

(20) Given the object of the legislation to increase the supply of rented accommodation, I consider that the occasional use by friends of the Appellants is insufficient to demonstrate that the annex is suitable for use as a separate dwelling.

(21) Taking *air bnb* guests would not be sufficient to demonstrate the purpose of the legislation was met as in my experience such guests expect breakfast to be provided and do not expect to cook breakfast themselves.

DECISION

28. The burden is on the Appellants to demonstrate that the annex was suitable for use as a dwelling and could lawfully be let as a dwelling. They have failed to do so. I dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. 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.

HEATHER GETHING
TRIBUNAL JUDGE

RELEASE DATE: 26 APRIL 2021