NCN: [2021] UKFTT 322 (TC)

TC08263

STAMP DUTY LAND TAX – multiple dwellings relief - whether part of a residential property was suitable for use as a single dwelling – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/01186

BETWEEN

SIMON OGBORN **Appellant**

-and-

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

The hearing took place on 7 June 2021. With the consent of the parties, the form of the hearing was V (video). A face to face hearing was not held because of the Covid pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public. The hearing was attended by the Appellant, the parties' representatives named below and four observers for the Respondents, including Dr Jeremy Schryber.

Patrick Cannon, Counsel, instructed by the Wilton UK (Group) Limited, for the Appellant

Kirsty Harding, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant (Mr Ogborn) purchased Harriages, Dairy Lane, Crockham Hill, Edenbridge ("the Property") on 1 November 2017. On 3 November 2017 an SDLT return was filed, self-assessing the Stamp Duty Land Tax ("SDLT") due as £57,850. On 27 November 2018 the Respondents ("HMRC") received an SDLT Relief Claim Report from Mr Ogborn's agent, Wilton UK (Group) Limited ("Wilton"), on the basis of a claim for Multiple Dwellings Relief ("MDR") that reduced the self-assessed SDLT to £37,050. HMRC paid the £20,800 refund claimed on 7 December 2018.

2. On 31 October 2019 HMRC issued a closure notice ("the Closure Notice") to Mr Ogborn in accordance with paragraph 23 Schedule 10 Finance Act 2003 ("FA 2003"). The Closure Notice amended the return submitted by Mr Ogborn as HMRC had concluded that Mr Ogborn's purchase did not qualify for MDR. The Closure Notice increased the self-assessed SDLT by £20,800. This is an appeal against the Closure Notice.

3. The issue for determination in this appeal is whether the acquisition of the Property by Mr Ogborn qualified for MDR.

RELEVANT LAW

4. Section 58 FA 2003 is the enabling section for MDR set out in Schedule 6B FA 2003. The relevant statutory provisions are that if MDR is available, it may reduce the amount of SDLT payable as a result of splitting the chargeable consideration between each dwelling, subject to a minimum SDLT charge of 1% on the total chargeable consideration. The issue in this case is whether the Property is a single dwelling or multiple (two) dwellings for the purpose of calculating the SDLT.

5. The key provisions in Schedule 6B FA 2003 are as follows:

> "*Transactions to which this Schedule applies*
> 2 (1) This Schedule applies to a chargeable transaction that is—
> (a) within sub-paragraph (2) or sub-paragraph (3), and
> (b) not excluded by sub-paragraph (4).
> (2) A transaction is within this sub-paragraph if its main subject- matter consists of—
> (a) an interest in at least two dwellings, or
> (b) an interest in at least two dwellings and other property…
>
> *Key terms*
> 3 (1) A chargeable transaction to which this Schedule applies is referred to in this Schedule as a "relevant transaction".
> …
> (4) A relevant transaction is a "multiple dwelling transaction" if its main subject-matter consists of—
> (a) an interest in at least two dwellings, or
> (b) an interest in at least two dwellings and other property.
> …
> *What counts as a dwelling*
> 7 (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 single dwelling, or
> (b) it is in the process of being constructed or adapted for such use.
> …"

6. Section 73 FA 2003 requires a purchaser to submit a land transaction return within 14 days of the effective date of the transaction ("EDT").

7. The Appellant has referred me to legislation and guidance in relation to the meaning of a "dwelling" for council tax charging purposes and the meaning of a "dwelling" for VAT zero-rating purposes.

8. HMRC have referred me to extracts from guidance provided in HMRC's Internal Manual on SDLT.

9. The parties have referred me to the following cases that are discussed or referred to in context below:

SDLT cases

(1) *Keith Fiander and Samantha Brower v The Commissioners for Her Majesty's Revenue and Customs* [2020] UKFTT 00190 (TC) ("*Fiander and Brower*")

(2) *David Merchant and Sarah Gater v The Commissioners for Her Majesty's Revenue and Customs* [2020] UKFTT 0299 (TC) ("*Merchant and Gater*")

(3) *Partridge v The Commissioners for Her Majesty's Revenue and Customs* [2021] UKFTT 6 (TC) ("*Partridge*")

(4) *Doe v The Commissioners for her Majesty's Revenue and Customs* [2021] UKFTT 17 (TC) ("*Doe*")

(5) *Wilkinson v The Commissioners for Her Majesty's Revenue and Customs* [2021] UKFTT 74 (TC) ("*Wilkinson*")

(6) *Mullane v The Commissioners for Her Majesty's Revenue and Customs* [2021] UKFTT 119 (TC) ("*Mullane*")

(7) *Mobey v The Commissioners for Her Majesty's Revenue and Customs* [2021] UKFTT 122 (TC) ("*Mobey*")

VAT cases

(8) *Carson Contractors Limited v HMRC* (2015) UKFTT 0530 (TC) ("*Carson*")

(9) *Agudas Israel Housing Association Ltd* (18798) [2005] BVC 4029 ("*Agudas Israel*")

Council tax case

(10) *James Ramdhun v Coll* (Valuation Tribunal of England [2014] EWHC 946 ("*Ramdhun*").

10. The parties referred me to the passage of the decision of the First-tier Tribunal (FTT) in *Fiander and Brower* at paragraph 51. This was approved by the Upper Tribunal (at paragraph 62) and is respectfully adopted here. The FTT approached "suitability for use" as "an objective determination to be made on the basis of the physical attributes of the property at the relevant time…to be adjudged from the perspective of a reasonable person observing the physical attributes of the property at the time of the transaction."

11. At the hearing Mr Cannon made helpful submissions in relation to the decision of the FTT in *Fiander and Brower*, confirming that the appeal to the Upper Tribunal was on the grounds of an evidential point, and that he largely doesn't dispute the FTT's interpretation of the statutory provisions in that case. The decision of the Upper Tribunal in *Fiander and Brower* has been published under the reference [2021] UKUT 156 (TCC) since the date of the hearing in this appeal. The Upper Tribunal's decision notes the number of other FTT decisions relating to the application of the test in paragraph 7 of Schedule 6B (presumably those listed at paragraph 9(2) to (7) above), and sets out seven general observations to guide the FTT as to the meaning of "suitable for use as a single dwelling" [at para 48]:

> "(1) The word "suitable" implies that the property must be appropriate or fit for use as a single dwelling. It is not enough if it is capable of being made

appropriate or fit for such use by adaptations or alterations. That conclusion follows in our view from the natural meaning of the word "suitable", but also finds contextual support in two respects. First, paragraph 7(2)(b) provides that a dwelling is also a single dwelling if "it is in the process of being constructed or adapted" for use as single dwelling. So, the draftsman has contemplated a situation where a property requires change, and has extended the definition (only) to a situation where the process of such construction or adaption has already begun. This strongly implies that a property is not suitable for use within paragraph 7(2)(a) if it merely has the capacity or potential with adaptations to achieve that status. Second, SDLT being a tax on chargeable transactions, the status of a property must be ascertained at the effective date of the transaction, defined in most cases (by section 119 FA 2003) as completion. So, the question of whether the property is suitable for use as a single dwelling falls to be determined by the physical attributes of the property as they exist at the effective date, not as they might or could be. A caveat to the preceding analysis is that a property may be in a state of disrepair and nevertheless be suitable for use as either a dwelling or a single dwelling if it requires some repair or renovation; that is a question of degree for assessment by the FTT.

(2) The word "dwelling" describes a place suitable for residential accommodation which can provide the occupant with facilities for basic domestic living needs. Those basic needs include the need to sleep and to attend to personal and hygiene needs. The question of the extent to which they necessarily include the need to prepare food should be dealt with in an appeal where that issue is material.

(3) The word "single" emphasises that the dwelling must comprise a separate self-contained living unit.

(4) The test is objective. The motives or intentions of particular buyers or occupants of the property are not relevant.

(5) Suitability for use as a single dwelling is to be assessed by reference to suitability for occupants generally. It is not sufficient if the property would satisfy the test only for a particular type of occupant such as a relative or squatter.

(6) The test is not "one size fits all": a development of flats in a city centre may raise different issues to an annex of a country property. What matters is that the occupant's basic living needs must be capable of being satisfied with a degree of privacy, self-sufficiency and security consistent with the concept of a single dwelling. How that is achieved in terms of bricks and mortar may vary.

(7) The question of whether or not a property satisfies the above criteria is a multi-factorial assessment, which should take into account all the facts and circumstances. Relevant facts and circumstances will obviously include the physical attributes of and access to the property, but there is no exhaustive list which can be reliably laid out of relevant factors.

Ultimately, the assessment must be made by the FTT as the fact-finding tribunal, applying the principles set out above"

12. The Upper Tribunal in *Fiander and Bower* also stated (at paragraph 46) that they "do not consider that decided cases in completely different contexts, such as council tax and VAT, including those referred to the [FTT's decision], form the basis for any reliable guidance as to [the meaning of "suitable for use as a single dwelling"], construed purposively." I have referred

to these cases in the context in which they were raised by Mr Cannon and by reference to the parties' submissions, and have followed this guidance.

13. The burden of proof is on the Appellant to establish on the balance of probabilities that the Property was suitable for use as two dwellings and that its purchase qualifies for MDR.

BACKGROUND

14. Mr Ogborn completed the purchase of the Property on 1 November 2017. This is the effective date of transaction ("EDT") for the purchase of the Property. The SDLT return for the purchase was filed with HMRC on 3 November 2017. This self-assessed the SDLT due as £57,850.

15. On 27 November 2018, HMRC received a letter from Wilton amending the SDLT return and requesting a refund on the basis that the transaction qualified for MDR. As a result, £20,800 of tax was repayable to the Appellant, being the difference between the SDLT that was originally paid on the basis that the Property did not quality for MDR, and the amount that would be due if the relief applied.

16. On 15 August 2019, HMRC sent a notice of enquiry to Mr Ogborn stating that HMRC would be enquiring into the SDLT return under paragraph 12, Schedule 10 FA 2003. This was within the statutory time limit. In their letter, HMRC asked for the reasons why it was considered that MDR applied to the purchase and requested supporting documentary evidence.

17. On 22 October 2019, Wilton wrote to HMRC stating that the Property contained two dwellings: the main house and an annex ("the Annex"). A floor plan and photographs were provided to HMRC.

18. On 31 October 2019, HMRC issued the Closure Notice, stating that they had completed their check of the amendment to the SDLT return and confirmed that the transaction did not qualify for MDR. The Closure Notice was issued in accordance with paragraph 23, Schedule 10 of the FA 2003. HMRC amended the SDLT return accordingly and concluded that the self-assessment should be increased by £20,800 from £37,050 to £57,850.

19. On 28 November 2019, Wilton appealed to HMRC against the Closure Notice. On 10 December 2019, HMRC responded with their "view of the matter" letter. On 10 January 2020, Wilton sent a letter to HMRC requesting a statutory review. On 21 February 2020, HMRC issued their review conclusion letter, stating that the Closure Notice had been upheld.

20. On 20 March 2020, the Appellant submitted a notice of appeal to the Tribunal.

SUBMISSIONS

21. Mr Cannon submits that the Annex has the facilities necessary for privacy, personal hygiene, the storage of belongings and space to live and sleep. As such the Annex has the facilities necessary for it to be suitable for use as a separate dwelling, and MDR is applicable to the purchase of the Property. Mr Cannon submits that the appeal should therefore be allowed, and the additional £20,800 SDLT charged by the Closure Notice dated 31 October 2019 should be cancelled.

22. Mr Cannon submits that the evidence establishes that the Annex is a clearly distinct unit of accommodation, and that the Annex is physically suitable for affording an occupier with the means for a private domestic existence in terms of having its own external means of entry and exit with its own living and sleeping accommodation, kitchen, washing and toilet facilities. The absence of formal bathroom facilities is not determinative.

23. Mr Cannon submits that the statutory test is directed at physical suitability for separate use and not the intangible status of the accommodation in terms of separately metered utilities and council tax liability. It is suitability for use, rather than actual use at the EDT that is

determinative, and the fact that certain facilities are compressed should not matter. HMRC's manual at SDLTM00425 accepts that a studio flat may combine two or more areas into one room and that this could meet the requirements.

24. HMRC submit that at the EDT the Property was a single dwelling, of which the Annex formed part, and not two dwellings. The Annex was not a separate single dwelling within the meaning of paragraph 7(2)(a) of Schedule 6B for the purposes of qualifying for MDR.

25. HMRC submit that the physical configuration of the Property on the EDT must be considered, including the domestic facilities, access and privacy. HMRC consider that there are several factors in this case that, taken together, compellingly indicate that the acquisition of the Property did not qualify for MDR and that, taking into account all the circumstances, the Property was a single dwelling. The transaction was therefore not a multiple dwellings transaction and MDR was not due.

26. HMRC submit that the Closure Notice should stand good.

FINDINGS OF FACTS AND RELATED SUBMISSIONS IN RELATION TO THE PROPERTY

27. The evidence consists of the bundle of documentary evidence, including photographs and a floor plan of the Property, Rightmove's description of the Property and the evidence of Mr Ogborn. Mr Ogborn is still the owner of the Property, but he has made changes to the Property since the EDT. These changes are not relevant to my findings of facts, but affected Mr Ogborn's ability to recall details such as the lock on an internal connecting door. Mr Ogborn provided clear responses, making clear when he could not recall such facts. On the basis of the evidence, I have made the following findings of fact.

(1) The Property was used as a single dwelling prior to the EDT and following its purchase by Mr Ogborn.

(2) The floor plan of the Property attached to Mr Ogborn's witness statement shows an area highlighted in yellow. Mr Ogborn referred to this area as the Annex. He described the Annex as self-contained.

(3) There is a driveway at the front of the Property. There is an entrance to the front of the main house and a separate entrance to the Annex from the driveway. The front door to the Annex leads into the area labelled on the floor plan as 'the workshop'. Mr Ogborn and Mr Cannon refer to this area as the hallway. There is a separate entrance/exit at the back of the workshop/hallway to the garden.

(4) The workshop/hallway has a door on the left hand side that leads into an area labelled on the floor plan as 'the study'. There are steps up to a utility room from the workshop/hallway. The utility room has a sink. The photograph on the utility shows a microwave, kettle and toaster. These were not present at the EDT. There is also plumbing for a washing machine and tumble dryer. These appliances were installed after the EDT. There was no space for a fridge at the EDT, but a cupboard could be removed to make space. Similarly, there was no cooker at the EDT.

(5) The utility room has a sliding door that leads to a WC. This is a small narrow space, not much wider than the toilet seat. There is no shower, bath or hand basin in this space. There is a second door from the WC to the workshop/hallway. Mr Ogborn described the door as bolted so that the only access to the WC is through the sliding door from the utility room.

(6) Mr Cannon submits that there are washing facilities in the Annex as there is a tap, hot water and a sink in the utility room. He referred me to archived HMRC guidance on disadvantaged areas that stated that the removal of a bathroom suite or kitchen facilities

would not be regarded as rendering a building unsuitable for use as a dwelling. Mr Cannon also referred me to the VAT case of *Carson* in which the FTT stated that it is not the actual use but the design of the building that will determine if it is one dwelling or two, and that "a dwelling will, as a minimum, contain facilities for personal hygiene, the consumption of food and drink, the storage of personal belongings, and a place for an individual to rest and to sleep." HMRC submit that it is neither realistic nor practical for the sink in the utility room to be used for washing and personal hygiene.

(7) I have considered the submissions in relation the personal hygiene arrangements. I consider that HMRC's archived guidance in relation to another SDLT relief is not reliable guidance in relation to the requirements of a dwelling. Mr Cannon also referred me to in HMRC's manual on this relief at SDLTM00425 that concludes that a studio flat "which may combine two or more areas into one room, would meet the requirements", referring to a sleeping area, a living area, bathroom and kitchen. With regard to the bathroom, the guidance states that "it would be essential for a dwelling to have its own washing and toilet facilities, which would usually include a bath or shower, a toilet and sink." I agree that washing and toilet facilities "usually" include a bath or shower, and there may be circumstances in which this is not the case in a single dwelling, but I consider that it is not practical, private or indeed hygienic, to have no bath, shower or hand basin for personal hygiene in the Annex.

(8) The utility room has an interconnecting door to the kitchen of the main house. Mr Ogborn doubts that the door was fireproofed, or sound proofed at the EDT. It had an old fashioned lock, but Mr Ogborn cannot recall if it could be locked from both sides as it has been changed since the EDT. There is no photograph of the interconnecting door in the bundle, but the floor plan shows it as the entrance to the utility room from the kitchen and so it is unlikely to provide privacy on either side.

(9) The main house and Annex shared the utilities and the same postal address, and the Property was a single dwelling for council tax purposes on the EDT. Mr Cannon referred me to the Council Tax (Chargeable Dwellings) Order SI 1992/849 and the High Court case of *Ramdhun* that found that shared utility meters were not fatal to there being a self-contained unit for council tax purposes. A similar conclusion was reached in relation to separate electricity in the VAT case of *Agudas Israel.* These non-SDLT cases are not reliable guidance in relation MDR, but I consider that shared utilities raise the question of the practicality of shared control, usage and payment for the utilities. These issues, and the consequent effect on privacy and self-sufficiency, are relevant. The shared postal address and council tax do not affect suitability as regards the physical attributes of the Property, but they affect privacy and self-sufficiency to some extent.

(10) The sale particulars on Rightmove describe the Property as a "family home of character offering enormous potential" with three bedrooms and two bathrooms. The three bedrooms and two bathrooms are shown on the floor plan on the first floor of the main house. As Mr Cannon submits, these marketing materials are of no significance to the physical suitability and attributes of the Annex as a separate dwelling. Similarly, HMRC's SDLT manual states at SDLTM00430 that this information is "a useful tool to assist in consideration of how many dwellings a property might comprise" but it is "not determinative". I agree that it is the physical reality on the EDT that should carry most weight, but the Rightmove marketing particulars assisted in clarifying what was comprised in the Property on that date.

APPLICATION OF LAW TO FINDINGS OF FACT

28. As the parties agree that the Closure Notice was validly issued, the issue for determination is whether the Closure Notice should stand good or whether it overcharges Mr Ogborn. The Closure Notice overcharges Mr Ogborn if the purchase of the Property was eligible for MDR on the basis that the Annex was "used or suitable for use as a single dwelling" within paragraph 7(2)(a) Schedule 6B FA 2003 at the EDT.

29. The statutory test is objective, as the FTT stated at paragraph 51 in *Fiander and Bower* (see paragraph 10 above). I have set out the guidance provided by the Upper Tribunal in *Fiander and Bower* in paragraph 11 above, and I respectfully follow this in my consideration of the relevant factors. The factors have either been agreed by the parties or are based on my findings of facts from the evidence, including the photographs, floor plan, marketing description and witness evidence. No single factor is determinative and not all of the factors have equal weight, but I consider the following factors to be most relevant:

(1) The lack of a bath, shower or hand basin for personal hygiene that is separate from the sink for food preparation and washing up in the utility room weighs most strongly against the Annex being suitable for use as a single dwelling. It is not simply a question of there being no bathroom; as I concluded in paragraph 27(7) above, it is not practical, private, or indeed hygienic, to have no bath, shower or hand basin for personal hygiene in the Annex. Similar facts were considered in *Wilkinson* in which there was small hand basin in the ensuite shower, but no plumbing for a sink in the area suggested for food preparation. Judge Bowler considered (at paragraph 89) that Mr Cannon's suggestion of carrying a plastic washing-up bowl of water across a bedroom to another space to do the washing-up stretched the meaning of suitability as a single dwelling "to, if not beyond, its reasonable limits". Similarly, I consider that lack of a bath, shower or even a hand basin for personal hygiene, and the suggestion that the sink in the utility could be used for this purpose stretches the meaning of "suitable". As the Upper Tribunal commented at paragraph 48(5) in *Fiander and Brower*, the test is not whether the property "would satisfy the test [of suitability] only for a particular type of occupant such as a relative or squatter", but whether it is suitable for occupants generally.

(2) The Annex and the main house have separate entrances. The fact that two dwellings are part of the same building does not mean that they cannot be single dwellings with separate entrances. The separate access to the main house and the Annex supports the claim that they are two single dwellings.

(3) It was not established that the communicating door between the main house and the Annex was lockable from both sides at the EDT. The communicating door was not a fire door or sound proofed as it had been the door between the kitchen and utility room. These factors limited both the security and privacy of both the Annex and the main house at the EDT. Adopting the language at paragraph 51 in *Fiander and Bower*, a reasonable person observing this physical attribute would find it unsuitable for separate dwellings.

(4) The Annex and main house each have adequate space for sleeping, eating and storing belongings.

(5) The utility room in the Annex has no cooker or existing space for a fridge. Mr Ogborn added a microwave, toaster and kettle after the EDT. The suggestion that the cupboard could be removed to make space for a fridge is an adaptation that does not reflect the position at the EDT. An objective observer would consider that the kitchen and utility room were suitable for use together at the EDT, with the cooker and dishwasher in the kitchen and the washing machine and tumble dryer in the utility. This lack of white goods in the Annex carries considerably less weight than the lack of a bath,

shower or hand basin, but contributes to the overall circumstances as to the suitability for use as a single dwelling at the EDT.

(6) The main house and Annex do not have separate metred utilities. This is relevant for the reasons given above in paragraph 27(9) above, but not determinative.

(7) The Property has a single postal address and is a single property for council tax. This carries less weight as regards suitability, but is relevant as part of the surrounding circumstances.

30. I have weighed all the factors and surrounding circumstances, and come to the conclusion that the factors against there being two dwellings outweigh those in favour of Mr Ogborn's claim that the Annex and main house are two separate dwellings.

DECISION

31. The appeal is dismissed for the reasons set out above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

32. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 07 SEPTEMBER 2021