Neutral Citation: [2024] UKFTT 00221 (TC)

Case Number: TC09103

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Taylor House, Rosebery Avenue, London EC1

Appeal reference: TC/2023/09861

PROCEDURE – application to strike out appellant's appeal on grounds that no reasonable prospect of success – rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – claim for multiple dwellings relief – Schedule 6B Finance Act 2003 – application refused

Heard on: 1 March 2024
Judgment date: 13 March 2024

Before

JUDGE ASHLEY GREENBANK

Between

NEWSAND LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Patrick Cannon, counsel, instructed by Cornerstone Tax 2020 Limited

For the Respondents: Mr Ellis Davies, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. By an application dated 6 November 2023, the respondents, the Commissioners for His Majesty's Revenue and Customs ("HMRC") applied, to strike out the appellant's appeal in this case on the grounds that there is no reasonable prospect of the appellant's case, or any part of the appellant's case, succeeding under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTRs").

2. The Tribunal gave its decision orally at the hearing in accordance with FTR 35(1). The Tribunal refused the application.

3. On 1 March 2024, the Tribunal issued a decision notice comprising a summary of the findings of fact and reasons for the decision as required by FTR 35(2) and (3). On 1 March 2024, the appellant applied to the Tribunal for full written findings and reasons under FTR 35(4). This decision notice contains the full written findings and reasons of the Tribunal for refusing the application.

THE UNDERLYING APPEAL

4. The appellant's appeal relates to a closure notice issued by HMRC under paragraph 23 of Schedule 10 to the Finance Act 2003 ("FA 2003") on 2 March 2023. In the closure notice, HMRC denied the appellant's claim for Multiple Dwellings Relief ("MDR") in respect of the acquisition of a property. The effect was that the appellant was charged to additional Stamp Duty Land Tax ("SDLT") in the amount of £252,324 (subsequently revised by statutory review to £251,731).

5. The appellant's claim for MDR was made under paragraph 2(2) Schedule 6B FA 2003. A transaction is within that 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". Paragraph 7 Schedule 6B defines what counts as a dwelling for this purpose. It provides, so far as relevant:

> **7 What counts as a 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 single dwelling, or
>
> (b) it is in the process of being constructed or adapted for such use.
>
> …

BACKGROUND FACTS

6. The facts are as follows.

7. On 2 December 2021, the appellant entered into a contract to purchase the freehold interest in a property at Midgate House, Midgate, Peterborough, PE1 1TN.

8. The acquisition of the property was completed on 18 February 2022. The consideration for the transaction was £6,700,000.

9. The land comprised a building which contained both retail units and offices.

10. It is the appellant's case that:

(1) the appellant acquired the property with the benefit of permitted development rights to convert the first, second and third floors of the building from offices into residential apartments along with commercial floorspace at ground floor level; and

(2) on the day of completion, work commenced to adapt the existing buildings into residential dwellings, which included the stripping out of internal walls, ceilings and floorboards within the property.

11. The appellant submitted a SDLT1 return and an SDLT4 return in respect of the transaction on 18 February 2022. The appellant claimed MDR under Schedule 6B FA 2003. The total amount of SDLT self-assessed by the appellant was £72,769.

12. On 15 November 2022, HMRC gave notice of their intention to enquire into the appellant's SDLT return under paragraph 12 Schedule 10 FA 2003.

13. On 2 March 2023, HMRC issued a closure notice to the appellant under paragraph 23 Schedule 10 FA 2003. In the closure notice, HMRC denied the appellant's claim for MDR in relation to the acquisition of the property and charged the appellant to SDLT at the "non-residential or mixed rate" set out in Table B in section 55 FA 2003 in the aggregate amount of £325,093. The amount of additional SDLT charged by the closure notice was therefore £252,324.

14. On 9 March 2023, the appellant's advisers, Cornerstone 2020 Limited ("Cornerstone"), wrote to HMRC on behalf of the appellant to appeal against the decisions in the closure notice.

15. After an exchange of correspondence, the appellant requested a statutory review. The statutory review was completed on 9 August 2023. The statutory review upheld the decision in the closure notice to deny MDR, but calculated the additional SDLT due as £251,731.

16. The appellant appealed to this Tribunal on 30 August 2023. The grounds of appeal state that the claim for MDR was valid. In summary, the reasons given were as follows:

(1) the requirement in paragraph 2(2) Schedule 6B FA 2003 that the main subject matter of the transaction consist of an interest in at least two dwellings was met by virtue of paragraph 7(2)(b) Schedule 6B, which provided that a building or part building counts as a dwelling if it is in "the process of being constructed or adapted" for use as a dwelling;

(2) the property was in "the process of being… adapted" for use as a dwelling.

(a) the appellant purchased the land with the benefit of permitted development to convert the property into residential apartments;

(b) on the day of completion, adaptation works had commenced which included stripping out internal walls.

17. The Tribunal issued initial directions to the parties on 2 October 2023. They provided for HMRC to provide its statement of case within 60 days and for both parties to provide their lists of documents to each other and the Tribunal within 42 days of provision of the statement of case.

18. On 6 November 2023, HMRC applied to this Tribunal to strike out the appellant's appeal under FTR 8(3)(c).

PRINCIPLES

19. Under FTR 8(3)(c), the Tribunal may strike out the whole or a part of the proceedings if "the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding". However, the Tribunal may not strike out the whole or a part of the proceedings

under FTR 8(3)(c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out (FTR 8(4)).

20. There was no dispute between the parties on the principles that the Tribunal should apply in cases where an application is made by HMRC to strike out an appellant's case under FTR 8(3)(c). They are set out in the decision of the Upper Tribunal in *The First De Sales Ltd Partnership and others v HMRC* [2018] UKUT 396 at [33] where the Upper Tribunal adopted the statement of principles applied by the High Court to applications for summary judgment as set out by Lewison J in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and as subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098 .

21. I will not recite those principles in full. The main points that I take from them are as follows.

(1) The Tribunal must consider whether the appellant has a "realistic" as opposed to a "fanciful" prospect of success.

(2) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.

(3) In reaching its conclusion the Tribunal must not conduct a "mini-trial".

(4) This does not mean that the Tribunal must take at face value and without analysis everything that an appellant says in his statements before the Tribunal.

(5) However, in reaching its conclusion the Tribunal must take into account not only the evidence actually placed before it, but also the evidence that can reasonably be expected to be available at a full hearing.

(6) The Tribunal should hesitate about making a final decision without a hearing, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a judge at a full hearing and so affect the outcome of the case.

(7) On the other hand, if the Tribunal is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

22. The Tribunal must exercise its power to strike out under FTR 8(3)(c) in accordance with the overriding objective in FTR 2(1) to deal with cases fairly and justly having regard to the factors listed in FTR 2(2).

PARTIES' SUBMISSIONS

23. HMRC's case is that the appellants' case has no reasonable prospect of success. Mr Davies, for HMRC, points to the similarities of this case with that of the decision of the Upper Tribunal in *Ladson Preston Limited and AKA Developments Greenview Limited v HMRC* [2022] UKUT 00301 ("*Ladson Preston*").

24. The key points in the Upper Tribunal's decision on which HMRC relies are:

(1) The proper construction of paragraphs 2(2) and 7(2) Schedule 6B FA 2003 required a "physical manifestation" of the building that was in the process of construction on the chargeable interest that is acquired at completion (*Ladson Preston* [43]-[45]).

(2) The obtaining of planning permission was not a sufficient part of "the process" of construction (*Ladson Preston* [47]).]

(3) The application for MDR had to be determined by reference to the nature of the chargeable interest that was acquired at completion. Works that commenced on the same day but after completion were not relevant (*Ladson Preston* [61]-[64]).

25. HMRC say that there is no material difference with the present case:

(1) There is no material difference between permitted rights of development and planning permission for these purposes.

(2) There is no distinction to be made between the fact that the property is to be adapted for use as dwellings in this case as compared with the construction of new dwellings in *Ladson Preston*. At the time of completion, the property was a commercial building. No work that was part of a process of adaptation had commenced.

(3) As with *Ladson Preston*, the application for MDR had to be determined by reference to the nature of the chargeable interest that was acquired at completion. Works that commenced on the same day but after completion were not relevant.

26. Mr Cannon, for the appellant, says this case is different from *Ladson Preston*:

(1) the questions before the Upper Tribunal in *Ladson Preston* were about what activities constituted a process of construction not a process of adaptation;

(2) there was a building on the land in this case (i.e. a physical manifestation of the building).

27. Furthermore, the appellant notes that the Upper Tribunal in *Ladson Preston* left it open for tribunals to decide on the facts whether a chargeable interest represents dwellings in the process of construction or adaptation. The appellant expected to present further evidence at a full hearing. The Tribunal does not have sufficient facts before it to decide this case on a strike out application.

28. At the hearing, Mr Cannon confirmed that the appellant no longer relies on the fact that the property was purchased with the benefit of permitted development rights in support of its argument that the property was in "the process of being… adapted" for use as a dwelling.

DISCUSSION

29. I have been directed by HMRC to the *Ladson Preston* case. In that case, the Upper Tribunal dismissed the appeals of two appellants against decisions of the First-tier Tribunal refusing their claims to MDR.

30. In both of their cases, the appellants in *Ladson Preston* had acquired land over which planning permission for the construction of multiple dwellings had been granted – in one appellant's case, the property was bare land on the day of completion; in the other, the appellant had dug several boreholes on the site before the effective date of the transaction and on that date, but after completion, began works demolishing existing buildings on the site. Both appellants claimed MDR on the grounds that the interests that they acquired comprised buildings "in the process of being constructed" for use as multiple dwellings within paragraph 7(2)(b) Schedule 6B FA 2003.

31. The main points that I take from the decision are as follows:

(1) Paragraph 7(2)(b) has to be construed in its proper context. When viewed in context, the provision requires some physical manifestation of a dwelling on the relevant land that is in the process of construction. Without any physical manifestation of a building, although there might be an intention to construct a future building, there is no building in the process of being constructed (*Ladson Preston* [30]-[32], [38]-[40], [44]).

(2) The availability of MDR is determined by reference to the nature of the chargeable interest that is acquired at completion. Works that commence on the same day but after completion are not relevant. (*Ladson Preston* [61]-[64]).

(3) Each case will turn on its facts. The Upper Tribunal says this (*Ladson Preston* [48]):

> 48. Beyond our conclusions set out above, we do not consider it would be appropriate to set out any guidance on what precise physical manifestation of the building in the process of construction for use as a dwelling is required by paragraph 7(2)(b) . Later in this decision, we will set out some conclusions on how paragraph 7(2)(b) applies to the boreholes on AKA's property, but those conclusions will simply represent what we consider to be an application of the correct statutory test to the facts of AKA's acquisition. Future FTTs considering similar issues will therefore be required to answer questions of fact and degree in the light of the correct construction of paragraph 7(2)(b)

32. In order to determine this case therefore, I would need to determine whether or not the property was "in the process of adaptation" for use as a dwelling at the time of completion for the purposes of paragraph 7(2) Schedule 6B FA 2003. The answer to that question – as the Upper Tribunal identified in *Ladson Preston* (at [48]) - requires an examination of the facts.

33. In an application such as this, it is not appropriate to conduct a mini-trial. A strike out application is designed to weed out cases that do not merit a full hearing. I have heard very little evidence of the facts. The summary that I have given above is taken largely from the parties' skeleton arguments. Although I did not understand there to be any material dispute about the facts that I have described, I am not satisfied that I have heard all the evidence that the appellant might wish to bring. I am not convinced that this case is such that the Tribunal has before it all the evidence that it may require to decide the case.

34. On the questions of law, I accept that there are many similarities between the *Ladson Preston* case and this case. For example, the issue concerning whether it is appropriate to take into account works that are commenced on the day of completion, but after the time of completion strike me as equally applicable to the present circumstances. However, *Ladson Preston* is not on all fours with this case. There are arguable differences between a "process of construction" and a "process of adaptation" – not least because in a process of adaptation an existing building will always exist and so the requirement for there to be "a physical manifestation" of a building in the case of a process of construction (which is critical to the reasoning in *Ladson Preston*) do not arise.

CONCLUSION

35. It follows that I am not persuaded that, even if the appellant were to succeed in proving all the facts that the appellant offers to prove, the appellant will not succeed in this case. In my view, therefore, the appellant's case has a realistic prospect of success in the sense that the appellant's case is not merely fanciful and should be permitted to proceed to full hearing.

36. In reaching this conclusion, I take into account the obligation on this Tribunal to decide cases fairly and justly in accordance with the overriding objective (FTR 2) and in particular the obligation to deal with a case in a way that is proportionate to the importance of the case and avoids unnecessary delay.

37. I can understand HMRC's desire to bring matters to a conclusion as swiftly as possible, but this case is not so clear cut as to justify depriving the appellant of the opportunity to present all its evidence and have the case determined following a full hearing.

DISPOSITION

38. For these reasons, I refuse this application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

39. 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.

ASHLEY GREENBANK
TRIBUNAL JUDGE

Release date: 13th MARCH 2024