TC02601

Appeal number: TC/2012/03740

VAT – DIY residential conversion scheme – conversion of commercial unit comprising two separate buildings into a "live/work" unit – one building converted to residential dwelling – planning permission restricting operation/use of remaining commercial building to occupiers of dwelling – whether the dwelling was "designed as a dwelling" – Note 2(c) to Item 4, Group 5, Schedule 8 Value Added Tax Act 1994 – whether the planning permission prohibited the separate use or disposal of the dwelling – held no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANTHONY BARKAS **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
BEVERLEY TANNER

Sitting in public in Priory Court, Bull Street, Birmingham on 4 March 2013

Michael Jones of Counsel, instructed by HSKS Greenhalgh, Chartered Accountants, for the Appellant

Cheryl Payne-Dwyer, Presenting Officer of HMRC, for the Respondents

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DECISION

Introduction

1. This decision concerns a claim for a refund of VAT under the "DIY Builders Scheme" in respect of the conversion of a non-residential building to a building designed as a dwelling.

2. The only issue in dispute related to the application of Note 2(c) to Item 4, Group 5, Schedule 8 of the Value Added Tax Act 1994 ("VATA94").

3. That note effectively precludes any relief in relation to the VAT on materials used in the residential conversion if, inter alia, any term of any statutory planning consent prohibits the separate use or disposal of the dwelling.

4. The present appeal concerns the effect of a particular planning permission condition in relation to a "live/work" unit. One of two commercial buildings on a property was converted to a residential dwelling, whilst the other remained subject to a commercial use planning permission.

5. The relevant planning permission imposed a restriction on the use of the continuing commercial building (requiring that it should only be used/operated by the occupiers of the residential dwelling). The effect of the condition was that in practical terms it was extremely unlikely that the residential dwelling would be used or disposed of separately from the commercial dwelling. It did not however on its face impose any express restriction on the separate use or disposal of the residential dwelling.

6. The question for determination in the appeal was therefore essentially whether the practical effect of the restriction was to impose a prohibition that should be seen as disqualifying the VAT repayment claim for failing to satisfy Note 2(c).

The facts

7. The parties had agreed a short statement of facts. The facts were not disputed and were quite clear.

8. The site in question was at Sich Lane, Woodhouses, Yoxall, Staffordshire. It originally included two separate barn-like buildings for which there was a class B1 light industrial use planning consent. There was no physical connection between the buildings, though they were only a short distance apart on the same curtilage. The properties had been occupied for the purposes of a small business which had failed. All attempts to re-let the premises to another business user had failed, over a period of just under twelve months.

9. On 27 September 2010 application was made, through an agent, for planning permission to convert one of the two buildings into a dwelling house; the other building was to be retained as a commercial building with B1 planning consent. It was envisaged that the two buildings would be used together as what is commonly

called a "live/work" unit. The Appellant's wife worked in a small business which was capable of being run from the continuing commercial building, and the Appellant envisaged that he and his wife would live in the newly converted dwelling, with the business being operated from the adjacent commercial unit.

10. The planning application was accompanied by a letter from the Appellant's agents. They summarised the proposal, emphasising the ways in which it would accord with the various relevant planning policies. They stated that "The proposals provide a practical live/work facility ensuring this presently vacant building is brought into positive use." They referred to the residential use as being "associated" with the continuing commercial use. One of the planning authority's policies apparently required that "conversion of buildings to residential use will only be supported where every reasonable attempt to secure commercial use has been made or where the residential use is a subordinate use to the commercial use". The agents addressed that point by stating "The present proposals retain economic use on site, therefore, even though the residential use is not subordinate, the live/work facility retains a significant floor area for commercial activity. Policy is complied with."

11. On 16 November 2010 the local planning authority (East Staffordshire Borough Council – "ESBC") granted planning permission for the conversion. There were a number of conditions imposed, the relevant one of which reads as follows:

> "6. The workshop/office within the application site shall only be used/operated by the occupiers of the dwelling hereby granted permission."

12. The Appellant thereafter commenced the conversion works on the building intended for residential use, completing those works on 13 July 2011.

13. In the course of the conversion, the Appellant incurred £40,047.05 of VAT on materials which were incorporated into the dwelling as part of the conversion. He made a claim for repayment of that amount on 7 October 2011 under section 35 VATA94, a claim which was refused by HMRC on 11 October 2011.

14. The essential basis for their refusal was set out in their letter of that date:

> "Because of the above quoted condition 6 from your planning permission it is not possible to use the dwelling separately from the working space. As a result your dwelling is not eligible for VAT refund under the DIY scheme."

15. In a further letter dated 3 November 2011, HMRC enlarged slightly on their reasoning when they said:

> "You have stated in your letter that there is no restriction on the property being sold separately. I agree that there is no specific condition in the planning permission restricting the separate sale of the dwelling [from] the workshop/office. However it is clear that the separate use of the workshop/office from the dwelling is restricted by the terms of the planning permission.

…..

> Although *[Condition 6]* would seem to only prevent the separate use if *[sic]* the office from the dwelling I can only assume that the same restriction would apply to the use of the dwelling from the office. The restriction imposed on the planning permission means the dwelling and workshop/office can only be occupied as a single unit by the occupiers of the dwelling."

16. HMRC were asked to undertake a statutory review of their decision. Before doing so, they wrote to ESBC in relation to the condition in the planning permission. Their letter dated 23 January 2012 included the following:

> "The interpretation by HM Revenue & Customs of Condition 6 is that the workshop can only be used by the occupier of the dwelling, but the occupier of the dwelling is not obliged to use the workshop.
>
> HM Revenue & Customs understand that the Local Planning Authority consider the two buildings as one live/work unit and would not permit the separate disposal of the dwelling from the work unit.
>
> If this is an incorrect understanding of the planning permission clause I would be grateful if you would be willing to provide a full explanation for the purpose and effect of Condition 6."

17. In reply, ESBC sent an email on 27 January 2012, which included the following text:

> "Your interpretation of the planning condition is correct, and the Local Planning Authority consider the two buildings as a single live/work unit, and the separate disposal of the dwelling would not be permitted."

18. On 13 February 2012, HMRC issued their statutory review, in which they upheld their earlier decision. In their letter, they stated the following:

> "The planning permission was granted in respect of the conversion of the workshop (Class B1) to form live/work unit; although the wording indicates that the workshop may only be used by the occupier of the dwelling, but the occupier of the dwelling is not obliged to use the workshop, the fact that the planning permission was granted for one live/work unit does suggest the intention that it should be considered as such.
>
> …
>
> Your representative considers that the planning condition places no condition on the use or sale of the dwelling.
>
> Although the wording of the planning condition restricts the use of the workshop to the occupier of the dwelling, the conversion of the Class B workshop into a dwelling was granted in relation to the workshop/office

> within the application site, which indicates that the two buildings should be used together as one live/work unit.
>
> The planning permission was not granted in respect of a dwelling with no connection to another building or use and as such "separate use" has not been demonstrated.
>
> …
>
> In the alternative, although your representative considers there would be no condition on the sale of the dwelling, HM Revenue & Customs consider the two separate buildings are one live/work unit and 'separate disposal' of the dwelling from the work unit would not be permitted.
>
> This interpretation has been confirmed with East Staffordshire Borough Council.
>
> Conclusion
>
> In conclusion, the Officer's decision to reject of *[sic]* the claim as ineligible under the DIY Scheme is upheld: the dwelling in question may not be used or disposed of separately from the B1 use and as such the *designed as a dwelling* conditions of Note 2(c), Group 5, Schedule 8 of the VAT Act 1994 have not been fulfilled."

19. The Appellant now appeals against this decision.

The law

20. This appeal is concerned with a very narrow point of interpretation on Note 2(c) to Group 5, Schedule 8 VATA94. We do not therefore set out at length the uncontentious provisions of section 35 and Schedule 8 VATA94.

21. The key question is whether the property in question was "designed as a dwelling" for the purposes of section 35(1D)(a) and 35(4) VATA94.

22. The relevant provisions in Item 4, Group 5, Schedule 8 VATA94 are as follows:

> "Notes –
>
> ….
>
> (2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied –
>
> ….
>
> (c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision"

Arguments

Appellant's arguments

23. On behalf of the Appellant, Mr Jones argued that Note 2(c) was quite clear. It only gave rise to a problem if the planning permission contained a term which "prohibited" the separate use or disposal of the dwelling. Condition 6 did not do so. It simply placed limitations on what use could be made of the remaining commercial building.

24. Condition 6 could undoubtedly be expected to have the practical effect that the dwelling would only be sold together with the commercial building, but there was nothing in Condition 6 that "prohibited" the Appellant (or his successors in title) from doing anything in relation to the dwelling.

25. They could, if they liked, sell it and retain the commercial building. That would give rise to practical problems because it would prevent them from using or operating the commercial building retained by them – but this was irrelevant. They were free to leave it vacant and unused if they wished. The use of the word "prohibited" in Note 2(c) made it quite clear that it was only if some substantial legal restriction operated to prevent the separate use or disposal of the dwelling that Note 2(c) would operate to deny the VAT reclaim.

26. Mr Jones referred us to *Simon Jones v HMRC* [2012] UKFTT 503 (TC). In that case, an agreement under section 106 of the Town and Country Planning Act 1990 included provisions which bound the land on which two buildings stood. The agreement contained a covenant "(a) not at any time to occupy or allow or permit the occupation of the office other than by an occupier of the residential premises ("the barn") and by up to three employees of the occupier of the barn and (b) not to sell lease or otherwise dispose of the barn separately from the office and vice versa".

27. *Simon Jones* was decided on the basis that the section 106 Agreement could not, as a matter of law, prevent a separate disposal of the two parts of the property if the owner so chose. The only question therefore was whether the condition prohibited the separate use of the dwelling. The Tribunal held, on the basis that the owner was free to leave the commercial building unused, that there was no prohibition of any separate use of the dwelling; effectively, the fact that the owner could not use the commercial building separately from the dwelling did not mean that he could not use the dwelling separately from the commercial building – he was always free to leave the commercial building unused.

28. In *Simon Jones*, HMRC had also obtained confirmation from the local planning authority to the effect that, in their opinion, the relevant condition meant that "ownership of the residential and commercial premises could not be split." The Tribunal gave no weight to that opinion, finding it to have no legal effect.

29. Although that case was not binding upon us (as another First-tier Tribunal decision), Mr Jones invited us to follow the same line of reasoning.

30. Mr Jones also invited us to disregard the various other authorities cited by Mrs Payne-Dwyer as being irrelevant. He pointed out that:

(1) The relevant planning condition in *Cussins v HMRC* [2008] UKVAT V20541 applied specifically to the residential dwelling (unlike the present case);

(2) The planning condition in *Oldrings Development Kingsclere Limited v HMCE* [2002] VATD 17769 was entirely different from the present case – it simply said "[T]he approved domestic studio shall not be used for any commercial purpose" and the VAT and Duties Tribunal declined to accept the local planning authority's interpretation or gloss on the meaning of the relevant condition;

(3) The planning condition in *Kear v HMRC* [2013] UKFTT 095 (TC) also specifically applied to the residential premises:

> "The residential floorspace of the livework unit shall not be occupied other than by a person solely or mainly employed or last employed in the business occupying the business floorspace of the unit, a widow or widower of such a person, or any resident dependents."

This meant that *Kear* was entirely irrelevant to the present case.

(4) In *Gardiner v HMRC* [2012] UKFTT 726 (TC), the main concern appeared to be whether the building work was done for business or non-business purposes. The terms of the relevant planning condition were only peripherally considered as part of an entirely different argument, namely whether the repayment claim failed because it was incurred "in the course or furtherance of any business" pursuant to section 35(1)(b) VATA94.

HMRC's arguments

31. On behalf of HMRC, Mrs Payne-Dwyer argued that the two parts of the site were "inextricably linked" to make a single live/work unit. There was an obvious close nexus between the two parts, clearly demonstrated by the terms of Condition 6. It was also clear that the intention of the Appellant was to occupy and use the two parts of the site as a single unit. Paragraph [37] of *Gardiner* made it clear this was highly relevant:

> "It is our view that the primary question is to determine the Appellants' intention in carrying out the building work."

32. She also pointed out that in *Catchpole v HMRC* [2012] UKFTT 309 (TC) it was held that two buildings could be considered together as a single dwelling, and she invited us to find that in the present case there was a single live/work unit, comprising two buildings, to which composite entity Condition 6 applied so as to preclude a separate use or disposal of either part of the combined entity.

33. In effect, she was arguing that it was appropriate to consider the actual effect of the condition, which was (both in the light of the terms of the condition itself and also in the light of the Appellant's actual intentions) to preclude any kind of separate use

or disposal of the dwelling, even though on its face Condition 6 only mentioned the commercial building.

34. She also submitted that the opinion of ESBC should be given weight as it was a single, clear expression of opinion – unlike the numerous and conflicting opinions offered by the planning authority in *Oldrings*, which clearly purported to add to the existing condition rather than simply interpret it.

Discussion and decision

35. We are concerned to establish whether the "separate use, or disposal of the dwelling" was "prohibited" by any "term" of Condition 6, in a situation where the terms of Condition 6 were expressed to apply to the commercial building and not to the dwelling.

36. For the reasons submitted by Mr Jones, we find that Condition 6 contains no such prohibition.

37. We give no weight to the opinions expressed by ESBC. The provisions of Condition 6 must be interpreted by the Tribunal as they stand, not given some wider meaning by reference to the expressed opinion or wishes of the local planning authority.

38. Whilst the practical effect of Condition 6 was (and is) to make it unlikely that the owner would ever wish to dispose of the dwelling separately from the commercial unit, Condition 6 does not, in our view, "prohibit" such disposal. Condition 6 simply means that if the owner of the dwelling chooses to dispose of it separately, he is likely to be left with a white elephant in the form of a commercial building which he cannot lawfully use or operate. However unlikely an outcome that may be in practical terms, it does not, in our view, amount to a prohibition within the meaning of Note 2(c).

39. Similarly, when considering separate "use" rather than "disposal", the owner of the dwelling would be entitled either to use/occupy the commercial building or he would be entitled to leave it unused and unoccupied, without any breach of Condition 6. The fact that the owner is unlikely, in practical terms, to leave the commercial building completely unused/unoccupied cannot in our view be regarded as meaning that there is some kind of prohibition, imposed by Condition 6, against the separate use of the dwelling. We cannot see therefore how it could be said that the separate use of the dwelling is "prohibited" by Condition 6.

40. In short, if there is a prohibition against the use or operation of building B by any person other than the occupier of building A, that will clearly amount to a prohibition against the separate use of building B. However, it cannot properly be said that the same prohibition also takes effect to prohibit the owner or occupier of building A from separately using or disposing of building A in whatever way he wishes, however ill-advised he may be in practical terms to do so.

41. It follows that we find Note 2(c) is satisfied in relation to the dwelling in this case; accordingly it satisfies the definition of "building designed as a dwelling" and the appeal must therefore be allowed.

42. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 13 March 2013