[2021] UKFTT 0190 (TC)

TC08140

Appeal number: TC/2019/00825

VAT – supply of construction services on the construction of a dwelling – initially zero rated – HMRC have assessed on basis that they were standard rated – whether the construction was carried out in accordance with the terms of a statutory planning consent – held no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CMJ (ABERDEEN) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Hearing held in public by video on 31 March 2021 with additional written submissions from both parties received on 29 and 30 April and 15 May 2021

Mrs Seonaid McIntosh, Director of the Appellant, for the Appellant

Mr Gordon Hume, Officer of HM Revenue and Customs, for the Respondents

DECISION

Background

1. This is a VAT case. It concerns the rate at which VAT should have been charged on construction services supplied by the appellant in 2013 and 2014 in relation to the construction of a property known as Drumduan Coach House (the "**property**"). The appellant had originally zero rated these supplies. Following an enquiry, HMRC considered that they should have been standard rated and issued assessments for VAT totalling £59,167 for the three VAT periods ended 09/13, 03/14 and 06/14.

2. VAT is generally charged on supplies at the standard rate but under schedule 8 to the VAT Act 1994 ("the **VAT Act**"), supplies of construction services may be zero rated provided they meet certain conditions.

3. I set these out in more detail later in this decision, but simply stated, zero rating is available where a new dwelling is constructed (and this does not include the conversion alteration or enlargement of an existing building), and only then when statutory planning consent has been obtained for that construction which is carried out in accordance with that consent.

4. In this appeal, it is HMRC's view that although planning consent was in place at the time the construction services were supplied by the appellant, that planning consent permitted only the alteration or enlargement of a dwelling and did not allow for the construction of a dwelling. HMRC accept that the property was constructed as a new building, but that this was not permitted by the planning consent and so the construction was not carried out in accordance with it.

5. The appellant contends that statutory planning consent had been obtained for the construction by dint of a combination of the planning consent and a construction building warrant which it had obtained from the relevant authority and which allowed for the construction of a new building.

6. The issue which I have to decide is whether the appellant is correct in this submission.

7. There is very little dispute between the parties concerning the facts or the relevant law.

The legislation

8. The legislation all of which is set out in the VAT Act and which is relevant to this appeal is set out or summarised below:

9. Section 6 sets out the basic rule for the time of supply of services, which is the date on which the services are performed. This basic rule is displaced in certain circumstances, for example if invoices or payment for those services are given or received, before or after the date of performance.

10. Section 30(2) provides that a supply of services is zero-rated if the services are of a type specified in Schedule 8 to the VAT Act.

11. Item 2 of Group 5 of Schedule 8 provides for zero rating of

> *"*The supply in the course of the construction of –
>
> (a) a building designed as a dwelling…..
>
> of any services related to the construction…."

12. The Notes to Group 5 of Schedule 8 to the VAT Act include the following:

> "(2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied—
>
> (a) the dwelling consists of self-contained living accommodation;
>
> (b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;
>
> (c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision; and
>
> (d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent.
>
> …
>
> (18) A building only ceases to be an existing building when:
>
> (a) demolished completely to ground level; or
>
> (b) the part remaining above ground level consists of no more than a single facade or where a corner site, a double facade, the retention of which is a condition or requirement of statutory planning consent or similar permission."

Case law

13. In the FTT decision of *Nigel Williams v HMRC* [2017] UKFTT 0846, Tribunal Judge Jones stated:

> "94. The Tribunal agrees with the submissions of HMRC that the relevant time to examine for the purposes of VAT liability is the time at which the supplies were made. The time of supply is dictated by EC Directive 2006/112, Article. 63 – "*The chargeable event shall occur when the goods or the services are supplied."*

> 95. This interpretation is entirely consistent with the statutory language of zero rating for 'supply of services in the course of construction of a building designed as a dwelling where planning permission has been granted and the construction carried out in accordance with that permission.' The Tribunal considers that the ordinary and natural meaning of the statutory wording is that the planning permission has been granted at or before the supply of the services."

14. In her decision in *The Master Wishmakers Ltd v HMRC* [2017] UKFTT 0130, Judge Amanda Brown at [57] of that decision, agreed with the foregoing passage in *Williams.*

15. Having considered both cases and the authorities cited therein, and although not binding upon me, I agree with the sentiments expressed by both Judge Jones and Judge Brown.

16. In the Upper Tribunal decision of *HMRC v Astral Construction Ltd* [2015] UKUT 0021, ("*Astral*") the Tribunal when considering the zero rating of construction services in relation to the conversion enlargement or extension of a church said this:

> "Approach to interpretation of zero rating provisions
>
> > 37. It was common ground that, like provisions for exemption (see Case C-348/87 Stichting Uitvoering Financiele Acties v Staatssecretaris van Financien [1989] ECR 1737 at [13]), provisions for zero rating, such as those at issue in this appeal, must be interpreted strictly. It was also agreed that the requirement of strict interpretation does not mean that the provisions must be interpreted restrictively (see Expert Witness Institute v Customs and Excise Commissioners [2001] EWCA Civ 1882, [2002] STC 42 at [17] and HM Revenue and Customs v Insurancewide.Com Services Ltd [2010] EWCA Civ 422, [2010] STC 1572 at [83])."

The Evidence and findings of fact

17. I was provided with a comprehensive bundle of documents. Mrs McIntosh gave oral evidence and I found her to be a convincing and truthful witness. On the basis of this evidence I find the following facts:

The procedural background

(1) The appellant is a joinery and construction services company and has been registered for VAT since 31 August 2008.

(2) Following a visit to the appellant in April 2017, HMRC sought further information concerning construction works which had been carried out to the property in 2013 and 2014, and following receipt of that information, on 18 September 2017, issued an assessment for the VAT period 09/13 for £25,000. This is reflected in HMRCs view that the construction works were standard rated

and not zero rated.

(3) Following further correspondence in 2017 and 2018, on 26 March 2018, HMRC issued a letter to the appellant indicating that in their view the construction services should have been standard rated and notify the appellant that a further assessment for £25,001 would be raised related to the VAT period 03/14.

(4) There was further correspondence between the parties between April 2018 and June 2018 in which the appellant asserted its view that the services were zero rated, and HMRC maintained their view that they were standard rated.

(5) On 27 June 2018 HMRC issued an assessment for £9,166 for the VAT period 06/14.

(6) The appellant requested a review of HMRC's decisions in relation to these assessments and following receipt of further information, on 7 January 2019, HMRC issued a review conclusion letter upholding their decisions in full. On 6 February 2019 the appellant submitted an appeal against the decisions and the assessments to the Tribunal.

The construction of the building and the planning history

(7) On 7 June 2012, Mr and Mrs McIntosh (the "**applicants**") made a general application for planning to Aberdeenshire Council (the "**Council**"). The description of the proposed development in that application was "Demolition of existing dwelling and garage and reinstatement with new build dwelling and garage".

(8) On 2 August 2012 the Senior Planner at the Council wrote to the applicants' agent to express "significant concerns" over the application. Following exchanges of correspondence between the agent and the Council's planning officials, in which the agent indicated that the applicants were considering whether an extension to the property might be the way forward, that application was withdrawn as evidenced by a letter to that effect from the Council to the applicants' agent dated 5 September 2012**.** I shall refer to this withdrawn application as the "**withdrawn application**".

(9) On 17 December 2012, the applicants made a further householder planning application to the Council. The description of the proposed development, which required boxes to be ticked, indicated that it was to be an extension and a garage.

(10) The detailed plans which accompanied that application declared that they related to a "Proposed extension" at the property. It was part of this application that the newly designed house would sit within the same footprint as the existing house and retain two of its original walls.

(11) The letter from the Council to the applicants' agent dated 24 January 2013 which comprises the grant of planning permission states that it is "full planning

permission for alterations and extension to [the property]". I shall refer to this permission as the "**alteration consent**".

(12) No building warrant was applied for at this time. However, in February 2013 the roof of the property was taken off and a structural inspection showed that the walls were not suitable to hold the weight of the proposed new extension.

(13) Following discussions with the Council the appellant was informed that a construction warrant rather than a demolition warrant was required since the property was going to be rebuilt rather than demolished and then left in a demolished state.

(14) An application for a suitable building warrant was made by appellants on 7 March 2013. The summary of that application included a description of the works as "Erection of detached 2 storey 9 apartment dwelling with attached double garage". The summary also described the application type as "Domestic New Build (Other)". That application was made to the Council. The warrant was approved by the Council on 17 June 2013, and building works to construct the new dwelling started in July 2013.

(15) The work continued until July 2014 during which time they were inspected regularly by representatives from the Council, and on 18 August 2014 an application was made for a completion certificate. At that stage, the appellant was informed by the Council that retrospective planning consent would be required, and an application for that retrospective consent was made on 11 September 2014 by the applicants. That application declared that the application was for Planning Permission and the description of the proposal was "Demolition of existing property and replacement dwelling (retrospective)". The application went on to declare that the applicants had previously received advice from the Council by way of a telephone call with Joshua Mclean who had confirmed the requirement for a full application. Retrospective planning permission was granted on 10 November 2014. In the meantime, it seems that on 24 October 2014 a completion certificate had been issued (evidenced by the fact that it is referred to in the demolition building warrant).

(16) The Kincardine & Mearns Area Committee Report of 28 October 2014 relating to this application reports that "on site previously was a former coach house of traditional vernacular design and form which received planning permission……. for alteration and extension including a large contemporary extension. As part of the approved proposal, the existing building footprint was to be retained with the stonework on the North and West elevations remaining visible. However, it was later discovered after the works had been completed that the existing stone building had been completely demolished and replaced. The completed building remains of the same scale and footprint as previously approved……. To rectify the situation the Planning Service sought a further application as the relevant ALDP policy relating to the green belt does not permit

replacement dwelling houses and the loss of vernacular buildings."

(17) The report went on to say that on the applicants appointed engineer's advice, the original walls were not structurally strong enough to support the proposed extension and that the existing walls should be demolished and rebuilt with modern replacements. The building "is now complete and appears almost identical to the approved plans with the exception of the non-inclusion of the previous stone walls. Enforcement action was taken against the applicant to submit a new planning application, however, as the building is now fully constructed, it is deemed to be unreasonable to request that the building be re-in stated to the original approved plans".

(18) It went on to say that the Planning Service supported the proposal given that the "finished design is of high quality, is appropriate within its rural context, and that the scale and footprint is identical to the previous plan and the finished design".

(19) The committee's recommendation was the grant of full planning permission and on 10 November 2014 the Council granted full planning permission for "Demolition of existing steading and erection of new dwelling house (retrospective) at [the property]".

The planning correspondence

18. There has been a considerable amount of correspondence concerning the planning issues and their impact on the appellant's VAT position, the contents of which pre-empt many of the submissions made by both parties. I set out below a synopsis of that correspondence.

(1) In their letter dated 23 January 2019 to HMRC the appellant's accountants, Hall Morris, raised the following points: In the normal course of events planning consent is granted before the granting of a building warrant. A building warrant must be held before works commence on site. The original planning consent granted by the Council was for the extension of an existing building. Following a review of the condition of the existing building, it was concluded that the remaining walls were too unstable and needed to be demolished. At this point the Council verbally granted planning consent to the appellant to demolish the existing walls and construct an entirely new dwelling on the site. The Council issued a building warrant for the construction of a new dwelling. The works commenced. The Council confirmed to the appellant that the Council would issue retrospective planning consent following concerns raised by the appellant that the description of works in the building warrant did not match the written planning consent. No formal written planning consent was applied for at this time since the appellant had verbal planning consent and the building warrant for the agreed demolition and new build works. Planning law and guidance does not specifically state that planning consent needs to be confirmed or held in writing. At the time of constructing the new dwelling, the appellant did not hold planning consent for a new building but it had the Councils verbal assurance supported by building

warrant.

(2) And in their letter dated 5 March 2019 they added. Zero rating applies to works where a new building makes use of no more than a double façade of a pre-existing building and this is a condition of planning consent, which could be applied in this case. The Council chose to take an administrative shortcut and issue verbal permission to demolish the existing walls and construct a new dwelling, instead of issuing written documentation to support this permission. Most importantly, law and guidance does not specifically state that planning consent needs to be held in writing. A completion certificate for a new building would not have been issued by the Council if the building works had not been performed in line with the Council's planning consent. The works were undertaken in accordance with the Council's verbal planning consent for a new dwelling which was confirmed by the building warrant issued before any works were commenced on the site. It is clear that in practice the new dwelling has been constructed on the site. The completion certificate confirms that the building works were carried out in accordance with the agreed planning consent.

(3) HMRC responded, substantively, to this correspondence in a letter dated 15 May 2018. They set out their view that there was no evidence of appropriate planning permission being in place at the time of construction of the building. There is no proof of the verbal planning permission given by the Council. The building warrant does not constitute planning permission. The giving of verbal planning consent contradicts the declared procedures followed by the Council. HMRC would be prepared to reconsider the position if the appellant could provide a written declaration from the Council that it had chosen not to follow their own guidelines to avoid administrative time and effort. HMRC had concerns about the sequence of events. In the letter of 5 March 2019, the appellant had said that before any works took place a review of the existing building was carried out and that the Council concluded that the remaining walls were too unstable and required demolition and that at that point verbal planning consent was given to the appellant for demolition and construction of new building. However according to the Council, the walls were demolished without the planning department's knowledge. The Council requested that an application for planning permission should be submitted retrospectively. HMRC found it difficult to understand how prior verbal permission could have been given by the Council in respect of the demolition of the existing walls when they were unaware of demolition until after it had taken place.

(4) In an email dated 13 June 2018 from Jeremy Mitchell at the Council, to the appellant (the "**June email**"), Mr Mitchell confirmed that the applicants had planning permission for alteration and extension to the dwelling which was exactly the same as the "end house" but named an extension due to two walls remaining. The building warrant was clearly for a new build. The approved drawings indicated that two parts of the wall had to remain. During construction these walls were not stable enough so it was deemed necessary to demolish them, resulting in a completely new building being erected. An amendment to the building warrant was submitted and approved. A building warrant should be used

as regards construction methods. Since the end product was the same, the Council could understand why the building went ahead as it did. The Council also granted retrospective planning permission for the dwelling. The property was inspected during its construction. The Council was satisfied that the new dwelling has all the correct planning and building warrant approval in place and there are no outstanding planning building warrant issues with the property.

(5) In their letter of 12 July 2018, which asked for a formal reconsideration of the decision, Hall Morris considered that the June email did fulfil the criteria set out in the HMRC letter of 15 May 2018 and HMRC should have reconsidered the appellant's situation in light of that email. It was their view that the email clearly confirms that the Council knew that the works are being carried out and that it accepted as a new dwelling had been constructed.

(6) In their review conclusion letter dated 7 January 2019, HMRC concluded that the assessments had been made to best judgment, that they were in time, and that since the appellant did not have statutory planning consent in place for the construction of a new dwelling at the time that it carried out the works for that construction, its services should have been standard rated. A building warrant is not statutory planning consent. Although retrospective planning consent had been obtained, zero rating can only apply to services supplied after the issuing of that retrospective consent. The review officer upheld HMRC's decisions and assessments.

Burden of proof

19. The burden of establishing that the assessments are in time best judgment assessments lies with HMRC. The standard of proof is the balance of probabilities.

20. If HMRC can establish this, then the burden of proving that they are incorrect rests with the appellant. It must show that on the balance of probabilities, the assessments are wrong.

The assessments

21. The appellant has not suggested at any stage in this appeal that the assessments are anything other than in time best judgment assessments. The only time that I can see this being dealt with is in the reviewing officers review letter. Nowhere in the correspondence, appeal papers or skeleton argument can I see the appellant suggesting that the assessments are invalid. I have considered the position and I have concluded that they are valid in time best judgment assessments.

Submissions

22. I am grateful for the helpful submissions, both written and oral which have been made by the parties representatives and which I have carefully considered in reaching my conclusions. However, in reaching those conclusions I have not found it necessary to refer to each and every argument advanced on behalf of the parties.

23. Following the hearing, once I had had an opportunity to consider the parties arguments in detail, I found that I needed additional submissions in relation to Scottish planning and building warrant law. Accordingly I issued directions seeking submissions on two points. The first was whether, under Scottish planning law, it was possible for statutory planning consent or a variation to statutory planning consent to be validly granted verbally or whether it had to be in writing. The second, in connection with the building warrant regime, was the extent to which that regime differed from the building regulation regime in England. I also asked for submissions about how breaches of planning consent in Scotland and building regulation and building warrant conditions are enforced. In setting out the parties submissions below, I shall deal first with their original submissions at the hearing and in the papers prepared therefore, and deal with their supplemental submissions relating to the two foregoing points, thereafter.

24. The appellant's position was set out in its grounds of appeal (which attached and referred to much of the correspondence to which I have referred above) as well as in its written submissions and oral submissions at the hearing eloquently made by Mrs McIntosh.

25. In summary its position is: as a matter of fact the original building was demolished and a new building constructed on the site. The case of *Astral* suggests that the terms of planning permissions are in the main irrelevant and the Tribunal should look at the reality of the situation. Zero rating should apply whereas a matter of fact a new building has been constructed even if this is not in strict compliance with the written planning consent. In this case the original planning consent for alteration or enlargement was then replaced or varied by the verbal planning consent for demolition and construction of a new building. This is evidenced by the evidence given by Mrs McIntosh of her conversation with the Council's planning department in February 2013 and the building warrant which was issued in June 2013 which identified the works that would be carried out as a domestic new build. It was therefore apparent to the Council that the construction works would be supplied in connection with the construction of a new building. Zero rating is available where a façade is retained which was the case here. The alteration consent clearly demonstrates that two walls were to be retained. There is no statutory requirement for planning consent to be in writing. The verbal planning consent given to the appellant comprises statutory planning consent for the purposes of the VAT legislation. The appellant did not seek formal written planning consent for the construction of the building since it had the verbal planning consent and the building warrant. The Council chose not to issue formal consent at that stage but rather to issue retrospective consent once the building had been completed. This was for administrative convenience. This administrative shortcut is the reason why the appellant is in its current predicament. The Council would not have issued a completion certificate if the works had not been carried out in accordance with the valid planning consent in place at the time. Since that completion certificate was issued before the issue of the retrospective consent, it indicates that the Council considered that the alteration consent gave consent for the construction of a new building. The Council, by its own admission in the June email and on the evidence of Mrs McIntosh regularly inspected the construction works. If the Council had considered that those works contravened the alteration consent, then it would have taken enforcement action, which it did not. The June email is evidence that the Council knew that a new building was

being constructed on the site. It was also sufficient to enable HMRC to review its position in light of the statement, in their letter of 15 May 2018, that they would do so if the appellant could supply alternative evidence in support of the zero rating, but HMRC have changed their position and have failed to honour that promise. The cases cited by HMRC in support of their position are all based on the provisions of English planning law. In Scotland the position is different. Building warrants in Scotland comprise legal permission to start building work and concerns how a building is constructed. In England and Wales, works are regulated by building standards and a formal legal document (i.e. a building warrant) is not issued.

26. HMRC's position is straightforward. They do not deny that as a matter of fact, the original building was demolished, nor that a new building has been erected on the site. However the only planning consent which was in force at the time of construction of the new building was the alteration consent which did not give consent for a new building, merely the alteration and extension of an existing building. The legislation requires that "statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent." Furthermore, zero rating does not apply to, simply stated, alterations or extensions to an existing property. Since the statutory consent under which the construction services were supplied by the appellant was the alteration consent, then zero rating could not have been possible if the works had been carried out in accordance with that consent, since that consent only allowed works of alteration or extension, and did not allow for a new build. No planning consent for the demolition and construction of a new building was provided until after the building had been constructed. That planning consent was the retrospective consent. Case law shows that zero rating is only possible when planning consent for a new build has been granted before the works commence. Since the relevant planning consent is the retrospective consent which was granted after the works had finished, then zero rating was not possible by dint of the retrospective consent. The building warrant is not planning consent. The verbal planning consent is not supported by the evidence and/or is not valid since planning consent must be in writing. The case of *Astral* dealt with the enlargement or extension to a church. The building was constructed in accordance with planning consent. It therefore dealt with a different point from the one under consideration in this appeal and the irrelevance of planning consent suggested in *Astral* should be seen in this context. Since the statutory requirements for zero rating set out in note 2(d) in Schedule 8 to the VATA ("**note 2(d)**") were not met by the appellant, the construction services were standard rated and the assessments should be upheld.

27. In their submissions in response to my Directions HMRC submit that the relevant Scottish legislation which deals with planning consent is The Town and Country Planning (Scotland) Act 1997 (the "**Planning Act**"). Section 37 of that Act provides that the date of the grant (or indeed refusal of) planning permission "shall be the date on which the notice of the planning authority's decision bears to have been signed on behalf of the authority". Since the notice has to be signed, any planning consent must be in writing. Section 64 of the Planning Act allows an authority to vary the planning consent, but that section is silent on whether that variation needs to be in writing. However section 65 which gives a planning authority power to modify or revoke a planning permission, provides that that modification or revocation must be "by order"

and hence must be in writing too. In their view any change to the alteration consent to permit the construction of a new building would not have been a variation but a modification and thus would have needed to be in writing. As regards the building warrant and the appellant's submissions on those, HMRC say that a building warrant is not planning permission; a builder needs both planning permission and building warrant before it starts construction operations; planning permission is about how your house will look whilst a building warrant is about whether it meets building standards (extracted from the Scottish government website); they also say that the Council's website makes clear that building warrant and planning permission are two entirely different authorisations and in most cases you need both to carry out work legally. This is evidenced, too, by the fact that the Council required retrospective planning application to be submitted following construction of the works.

28. The appellants further submissions included a detailed and eloquent synopsis of the planning regime in both England and Scotland. Building warrants are granted under the auspices of The Building (Scotland) Act 2003 which empowers local authorities to take enforcement action where works are carried out without a building warrant or contrary to the conditions of a building warrant. A building warrant and planning permission are not one and the same. The building warrant gives permission for the design and construction of the work and includes things like fire protection and escape, drainage, energy conservation and safety and well-being of occupants and users. Planning permission mainly relates to the siting, appearance and use of the building and the effect that this will have on neighbouring properties in the surrounding environment. In the appellant's view, the building warrant is therefore the most important document for VAT purposes as it gives permission for the design and construction of the works. However, this point is not specifically acknowledged in current VAT law guidance. The appellant also provided a number of extracts from websites which reflected the fact that both planning permission and a building warrant are required before construction works on a new building can commence. The distinction between the building regulation regime in England and the building warrant regime in Scotland is that in the former, works can be undertaken by a person who has building regulation approval and is deemed competent; whereas in Scotland, each individual property or development requires a specific building warrant. Even though I had not asked for further general submissions, the appellant reiterated many of those which it had made in its written and oral submissions prior to and at the hearing.

Discussion

29. Having considered the parties respective positions, it is my judgment that the building warrant cannot comprise statutory planning consent for the purposes of note 2 (d). I say this for a number of reasons:

> (1) They operate under different statutory regimes. Planning consent is governed by the Planning Act. Building warrants are dealt with under the Building (Scotland) Act 2003 and the Building (Procedure) (Scotland) Regulations 2004. Applications for planning consent are made on a different form

from an application for a building warrant.

(2) Breach of planning consent is dealt with separately from a breach of the building warrant legislation/regulations, and each is dealt with by the specific statutory regime to which they are beholdent. If there is a breach of planning consent, it will not per se affect the validity of the building warrant, and vice versa. Furthermore, the sanctions are dealt with under different statutory regimes.

(3) The Building Standards Procedural Handbook third edition (which deals with building standards in Scotland) makes clear that the purpose of the building standards system in Scotland (through the use of building warrants) sets out the standards to be met when building work takes place to the extent necessary to meet the building regulations. I accept that this system of building standards does, as the appellant submits, relate to the design and construction of works, fire protection and escape, drainage, energy conservation and safety and well-being. But as the appellant recognises, this is distinct and different from planning consent which is basically consent to allow the relevant authority to permit development on a piece of land, and when considering granting permission, according to the Scottish government website, a decision on whether to grant consent will require consideration of the layout size siting and external appearances of buildings, available infrastructure, landscaping, use to which the development will be put, and environmental impact. In other words they are distinct and separate regimes aimed at distinct and separate issues. In simple terms, as that website states, "while planning permission is about how your house will look, a building warrant is about whether it meets building standards".

(4) It is clear from all of the information that I have read and which has been submitted to me that before starting building works, both planning permission and a building warrant is required. One is no substitute for the other.

(5) Whilst it is clearly possible to get retrospective planning consent (as has happened in this case) I do not believe it is possible to get a retrospective building warrant.

30. The appellant submits that for VAT purposes the building warrant is the most important document but accepts that this is not specifically acknowledged in current VAT law guidance. And that is the nub of it. For VAT purposes "statutory planning consent" as set out in note 2 (d) is the most important document. The appellant is wrong in its submission. In this case there was no statutory planning consent permitting construction at the time that the construction works were carried out.

31. No one disputes that a new building was constructed, but for VAT purposes, that is not enough. There must be a valid statutory planning consent permitting construction and the construction works must have been carried out in accordance with that consent. The appellant submits that verbal consent was given. But as a matter of law, I do not think that this is sufficient. As is set out above, Section 37 of the Planning Act makes clear that planning consent can only be granted in writing. Although that Act is silent on whether a variation can be made orally, I think it is highly unlikely given that

planning permission is extremely important statutory consent, and although there might be some dispute about the interpretation of written terms, I do not believe that the terms of planning consent should be determined by who said what to whom. And in any event, like HMRC, it is my view that any variation to the alteration consent which would have granted the right to not just alter but instead demolish and construct a new dwelling would not have comprised a variation, but would have been a modification (and a very significant one) if not a revocation. And thus could only have been made by order which in my view is a written order.

32. The appellant also submits that the fact that the Council issued a completion certificate on 14 October 2014 i.e. before the retrospective planning consent was granted on 10 November 2014 is in an indication that the alteration consent gave consent for the construction of a new building. I disagree. The appellant's submission is that a completion certificate is only issued once a dwelling has been constructed in accordance with an approved planning consent and building warrant. The completion certificate may have been incorrectly issued on the basis that the works have been carried out in accordance with the building warrant rather than in accordance with a valid planning consent. But it does not go as far as the appellant submits and reflect that there was a valid planning consent in place during the construction works. It was in response to the appellant's application for a completion certificate, on 18 August 2014, that the Council told the appellant that a retrospective planning consent would be required. I cannot accept that in light of that, the Council were accepting, by issuing a completion certificate on 14 October 2014, that retrospective planning consent was not so required. And the only reason the retrospective planning consent was required is, in my judgment, because the alteration consent did not cover the works of demolition and construction which had been undertaken by the appellant.

33. The appellant also submits that if during the inspections by the Council that had been carried out during the construction of the new building, then if they had been in breach of the alteration consent, enforcement action would have been taken. This, and the June email, makes it clear that the Council knew that a new building was being constructed. That might well be the case, and I have no idea why the Council if it knew that a new building was being constructed in contravention of a planning consent, took no enforcement action. But from a VAT position, the question is whether there was a valid planning consent in place prior to the date on which the building works were commenced, and in my view there clearly was not. This view is reinforced by the fact that the appellant applied for, and was granted, retrospective planning consent following completion of the works. If the appellant were so certain that it had valid planning consent during the construction phase then there would have been no need to apply for this retrospective consent. And it would have made that view plain when, in August 2014, the Council told the appellant that it required retrospective consent The fact that it applied for such consent suggests to me that it was not wholly confident that it had constructed in accordance with a statutory planning consent and that there was a chance that if it did not rectify the position through seeking retrospective consent, the Council might take enforcement action.

34. I also accept the appellant's submissions that many of the cases cited by HMRC (and which I have cited above) deal with English planning law and not Scottish

planning. And there are distinctions between the way in which the building regulations regimes in the two countries operate. But I do not think there is anything to suggest that this difference elevates a building warrant in Scotland to the status of statutory planning consent. It seems to me that the difference is that in England a lighter touch is adopted, authorised entities being able to self certify (in effect) that it will carry out building operations in accordance with the relevant building regulations, whilst in Scotland there is no such light touch and a building warrant must be obtained before any building operations are carried out irrespective of the standing of the builder.

35. The appellant suggests the case of *Astral* is authority for the proposition that planning consent is irrelevant and one must look at the facts of the matter. I disagree and it is my view that, as submitted by HMRC, *Astral* dealt with an entirely different point from the one under consideration in this appeal.

36. The appellant also submits that because two walls from the existing building had been retained and incorporated into the new building, zero rating can extend to the construction of the new building even though the old building had not been completely demolished. I accept that principle given that it is set out in note (18) to group 5 of schedule 8 VAT Act 1994. But that only applies where it is a condition of the planning consent that the single façade or, where a corner site, a double façade, is retained. And in this case the relevant planning consent was the alteration consent which anticipated incorporating all of the existing walls into the altered building. Clearly if the planning consent had been a demolition planning consent, and it was a condition of that consent that the single or double façade had to be retained, then it would have been a consent for the demolition of the building and thus enabled zero rating to apply (potentially). But the alteration consent was not a demolition and construction consent, and so it inevitably was given on the basis that more than just a single or double façade had to be retained, and so did not comply with note (18).

37. Finally, the appellant suggests that in compliance with the suggestion set out in HMRC's letter of 15 May 2018, that if it was "able to provide proof that a formal planning permission was given by the Council prior to formalisation of consent AND that the permission related to the building which was eventually completed and not the projected plan for which permission had earlier been approved, then HMRC would review their decision", it supplied such proof and HMRC have gone back on their promise. I disagree. The proof on which the appellant relies is the email from Jeremy Mitchell of 13 June 2018, which simply confirms that the applicants had the alteration consent, deals with the building warrant situation, and the fact that the Council granted retrospective planning consent. And at that date, the Council were satisfied that the new dwelling had all the correct planning and building warrant approval in place. It does not provide proof that the Council had given consent for demolition and reconstruction prior to granting formal retrospective consent in November 2014.

38. I am conscious that I must construe a zero rating provision strictly (albeit not restrictively). To my mind this means that "statutory planning consent" for the purposes of note 2(d) means just what it says on the tin. Unfortunately for the appellant, at the time that it carried out the construction works in 2013/2014, there was no statutory planning consent in place for the demolition of the property and the construction of a

new building on the site. The alteration consent which was in place did not give permission to demolish and reconstruct and so even if the works were carried out in accordance with that consent, those works could only be alteration. It was not possible to carry out works of construction in accordance with a valid statutory consent, since no such consent had been given for construction at the time that the building works were carried out. It was only given retrospectively. The time at which I must consider when statutory planning consent needs to be in place is the date of commencement of the works. No such planning consent for demolition and construction was in place on that date.

Decision

39. For the foregoing reasons I dismiss the appellant's appeal.

Appeal rights

40. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 25 MAY 2021