



[2021] UKFTT 0292 (TC)

TC08234

STAMP DUTY LAND TAX – transactions involving multiple dwellings – purchase of property with a building in addition to the main dwelling – did the building count as a second dwelling? – was the building suitable for use as a single dwelling? – recent guidance of Upper Tribunal in Fiander applied – building lacked kitchen facilities – held: balance of factors indicated building was not suitable for use as single dwelling – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/01149

BETWEEN

GORDON AND MARGARET MORSE

Appellants

-and-

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

Respondents

TRIBUNAL: JUDGE ZACHARY CITRON

The hearing took place on 19 April 2021. The form of the hearing was V (video) and was held on the CVP platform. A face to face hearing was not held because of the risk to public health during the coronavirus pandemic. The documents to which I was referred were a hearing bundle of 159 pdf pages, an authorities bundle of 178 pdf pages and skeleton arguments.

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.

Mr P Cannon of counsel for the Appellant

Dr J Schryber, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

1. The issue in this appeal was whether a building (the “**building**”) acquired as part of a single freehold title that included a main dwelling building, was suitable for use as a single dwelling, such that the acquisition qualified for multiple dwellings relief (“**MDR**”) from stamp duty land tax (“**SDLT**”).

THE APPEAL

2. HMRC issued a closure notice on 29 October 2019 amending the appellants’ SDLT return to show that the acquisition by the appellants on 14 August 2018 of a freehold title (the “**property**”) known as Chapel Farm Barn in rural Somerset did not qualify for MDR, resulting in a further liability to SDLT of £10,000.

3. The appellants notified their appeal to HMRC by letter dated 28 November 2019. The appellants requested a statutory review by HMRC; this was concluded by letter dated 17 February 2020, upholding HMRC’s decision.

4. The appellants notified their appeal to the tribunal by notice dated 17 March 2020.

EVIDENCE

5. I had a joint witness statement from both appellants and heard oral evidence from one of the appellants, Dr Gordon Morse.

6. The hearing bundle had Tribunal documents and correspondence between the parties, and included (inter alia):

- (1) an ‘SDLT relief claim report’ dated 28 November 2018 by the appellants’ agents containing, inter alia, a ‘property description’;
- (2) a further floorplan of the property;
- (3) photographs of the building; and
- (4) planning permission decision in relation to the property dated 16 December 2010.

FINDINGS OF FACT

7. I make the following factual findings based on the documentary evidence and Dr Morse’s oral evidence (which I accepted as to matters of fact (as opposed to matters of opinion)).

8. The appellants completed their purchase of the property for £601,000 on 14 August 2018.

9. The main dwelling building on the property was a barn that had been converted for residential use in around 2011. The building was built around the same time as the barn conversion.

The ‘property description’

10. The ‘property description’ provided by the appellants contained a floor plan that labelled the ground floor of the building as “garage/barn/store” and the first floor as “bedroom/office”. The ‘property description’ also had a page of text, with three large headings: “Ground Floor”, “First Floor” and “Externally”. The “Ground Floor” and “First Floor” sections described the main dwelling building. The “Externally” section included the following::

“There is a summerhouse and detached barn/garage building with carport which has a double doors leading to the garage area.

Garage and studio

with pitched roof, solid flooring, has an oil fired boiler for the domestic hot water and central heating, shower room with double shower cubicle, low flush WC, pedestal wash hand basin, mixer tap, tiled flooring, downlighting

extractor fan, water heated towel rail; staircase rising up to the first floor, landing within that building. First floor with a study room which has a Velux windows, eave storage cupboards and radiator.”

The 2010 planning permission

11. The “proposal” for which planning permission was given to Mr Hill, one of the sellers to the appellants, in December 2010 was: “conversion and extension of barn to form a dwelling and erection of detached carport/workshop building with associated access and parking”.

12. Statements which follow concerning the property describe it as at the completion of the appellants’ purchase, unless otherwise indicated.

The main dwelling building

13. The main dwelling building on the property comprised an open-plan living room/kitchen downstairs, with an adjoining utility room (with a toilet); and, upstairs, two bedrooms and a bathroom/toilet. It was accessed via a front door leading to an entrance hallway, or via a side door into the utility room. The ground floor area was approximately 82 square metres; the upstairs area was approximately 97 square metres.

The building

14. The building comprised a ground floor of 4.75 metres by 4.48 metres (about 21 square metres); most of this area was open space; there was a double glazed window and power sockets. There was also a separate toilet/shower room (with a hand sink) occupying about one-sixth of the downstairs area; and stairs leading upstairs. The first floor area of the building was 7.78 metres by 3.41 metres (about 26.5 square metres). The building had oil powered heating. There was a hot water boiler on the ground floor.

15. The building had two external doors: a conventional-sized door, with a handle, leading (when stepping out of the building) to an area sheltered by the over hang of the first floor; and a set large double doors on one side, which had no external handle. The doors were lockable.

16. The building was not being used as a dwelling.

17. The building had none of the fixed physical features of a domestic kitchen; specifically, it did not have

- (1) a sink for food preparation and dishwashing (as opposed to the hand sink in the toilet/shower room downstairs);
- (2) fixed raised flat surfaces for food preparation and resting dishes and utensils; or
- (3) cupboards for storing food and dishes.

18. The building did not have its own separate postbox, council tax bill or utility supply.

LAW

SDLT legislation

19. SDLT law is largely set out in Part 4 Finance Act 2003 (and references to sections in what follows are to sections of that Act). SDLT is charged on “land transactions” (s42) – which means any acquisition of a “chargeable interest” (s43). A land transaction is a “chargeable transaction” if it is not a transaction that is exempt from charge (s49). Under s48, “chargeable interest” is (in this context) an estate or interest in or over land. The effective date for a land transaction for SDLT purposes is the date of completion (except as otherwise provided) (s119).

20. Section 55 deals with the amount of SDLT chargeable in respect of chargeable transactions. Different rates are applied to the different parts of the consideration; in this context, the relevant rates are: 0% for so much of consideration as does not exceed £125,000,

2% for so much as exceeds £125,000 but does not exceed £250,000, and 5% for so much as exceeds £250,000 but does not exceed £925,000.

21. Schedule 6B provides for relief in the case of transfers involving multiple dwellings (see s58D). References in what follows to the Schedule and to paragraphs and sub-paragraphs are to that schedule and its paragraphs and sub-paragraphs.

22. The Schedule applies, inter alia, to a chargeable transaction if its main subject-matter consists of an interest in at least two dwellings (see subparagraphs 2(1)(a) and 2(2)(a)).

23. A reference in the Schedule to an interest in a dwelling is to any chargeable interest in or over a dwelling.

24. The rules for determining what counts as a dwelling the purposes of the Schedule are set out in paragraph 7, the relevant part of which provides as follows:

“(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 ...”

25. If it were found in this case that there was an acquisition of two dwellings (the main house and the pool building/barn building), then paragraphs 4 and 5 provide that SDLT is charged as follows (in simplified summary):

(1) Step 1: determine the tax that would be chargeable under s55 if the total consideration was divided by the number of dwellings

(2) Step 2: multiply the amount determined at step 1 by total dwellings

(3) But if the amount found at step 2 is less than 1% of the total consideration, then the tax is that 1% amount

Fiander v HMRC (Upper Tribunal – released 7 July 2021)

26. In *Fiander & anor v HMRC* [2021] UKUT 0156 (TCC) the Upper Tribunal offered some general guidance on the meaning of the phrase “suitable for use as a single dwelling” in paragraph 7. Having said (at [46]) that it did “not consider that decided cases in completely different contexts, such as council tax and VAT ... form the basis for any reliable guidance as to its meaning, construed purposively”, it then said this at [48]:

“We must therefore interpret the phrase giving the language used its normal meaning and taking into account its context. Adopting that approach, we make the following observations as to the meaning of “suitable for use as a single dwelling”:

(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.”

Wilkinson v HMRC

27. *Wilkinson v HMRC* [2021] UKFTT 0074 (TC), which concerned MDR but was decided before the Upper Tribunal’s decision in *Fiander*, had the following discussion of food preparation and washing up facilities in the property concerned:

“88. With sufficient space in the Bedroom’s walk-in wardrobe to be able to plug in a microwave and to prepare food it would be entirely possible for meals to be prepared without even having to rely upon ready meals and deliveries. However, at the time of completion of the purchase the walk-in wardrobe was set up as just that. While it had a plug socket the evidence does not show that it had a surface on which a microwave could be placed and food prepared. For the reasons explained earlier the relevant time is the time of completion of the purchase with the features present at that time.

89. Even if I took into account the possibility of providing such a surface in the walk-in wardrobe, there is no plumbing for a sink in the wardrobe. Washing-up would therefore need to be done in either the small hand basin in the ensuite shower, or as Mr Cannon [taxpayer’s counsel] suggested, by filling a plastic washing-up bowl and carrying it across the bedroom from one side

to the other to get from the shower room to the wardrobe area. The suitability as a single dwelling is being stretched to, if not beyond, its reasonable limits.

90. Overall the lack of food preparation and washing up facilities weighs against the Bedroom being suitable for use as a single dwelling, although it is not determinative.”

Uratemp v Collins

28. In *Uratemp Ventures Limited v Collins* [2001] UKHL 43, a case referred to by Mr Cannon, Mr Collins occupied a “modest” room in a hotel; the question for decision was whether the room he occupied could not constitute a “dwelling” (so precluding Mr Collins from enjoying security of tenure) because cooking facilities were not available. Lord Irvine said (at [2-3]) that he:

“.. would impose no such restrictive interpretation. Such a restrictive interpretation would both be unwarranted by the statutory language and an inappropriate gloss on provisions designed to give some protection to tenants in modest rented accommodation under assured tenancies.

3. "Dwelling" is not a term of art, but a familiar word in the English language, which in my judgment in this context connotes a place where one lives, regarding and treating it as home. Such a place does not cease to be a "dwelling" merely because one takes all or some of one's meals out; or brings take-away food in to the exclusion of home cooking; or at times prepares some food for consumption on heating devices falling short of a full cooking facility.”

29. Lord Bingham said (at [10]) that “the concept [of a dwelling-house] is clear enough: it describes a place where someone dwells, lives or resides. In deciding in any given case whether the subject matter of a letting falls within that description it is proper to have regard to the object of the legislation, directed as it is to giving a measure of security to those who make their homes in rented accommodation at the lower end of the housing market. It is not to be expected that such accommodation will necessarily offer all the amenities to be found in more expensive accommodation.”

30. Lord Millet said:

“31. In both ordinary and literary usage, residential accommodation is "a dwelling" if it is the occupier's home (or one of his homes). It is the place where he lives and to which he returns and which forms the centre of his existence. Just what use he makes of it when living there, however, depends on his mode of life. No doubt he will sleep there and usually eat there; he will often prepare at least some of his meals there. But his home is not the less his home because he does not cook there but prefers to eat out or bring in ready-cooked meals. It has never been a legislative requirement that cooking facilities must be available for a premises to qualify as a dwelling. Nor is it at all evident what policy considerations dictate that a tenant who prepares his meals at home should enjoy security of tenure while a tenant who brings in all his meals ready-cooked should not. How, then, have the courts reached the conclusion that, as a matter of law, the presence of cooking facilities is an indispensable characteristic of "a dwelling"?

...

[58] In my opinion the position is relatively straightforward. The first step is to identify the subject matter of the tenancy agreement. If this is a house or part of a house of which the tenant has exclusive possession with no element of sharing, the only question is whether, at the date when the proceedings were brought, it was the tenant's home. If so, it was his dwelling ...”

Carson Contractors v HMRC

31. *Carson Contractors Limited v HMRC* [2015] UKFTT 0530 (TC), another case referred to by Mr Cannon, concerned zero-rating for VAT purposes on building work for the conversion of a barn for residential use. The Tribunal said at [36] that the issue was whether the main house and the converted barn were two separate dwellings – it was accepted that a single dwelling could consist of two or more buildings. The Tribunal noted at [42] that the VAT test did not relate to the actual use of the building but to the nature of its design; and this was an objective test. At [45], the Tribunal quoted *Uratemp* at [3], and added: “In our judgement 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.”

32. The Tribunal considered placed little weight on the facts that there was only one post box and only one council tax bill for the entire property. It found that the prohibition on separate occupation in the planning permission did not prevent the use of the converted barn as a dwelling by a person whose occupation served the main house. Just before concluding (at [59]) that the converted barn and main house were separate dwellings, the Tribunal found (at [58]) that the converted barn had “all the facilities of a dwelling”:

“... It has a separate entrance. Downstairs there is a large room with a kitchen and providing areas for living and dining. There are separate toilet and shower rooms and a conservatory. Upstairs there are several bedrooms, a bathroom with toilet and a separate WC. It has all the essential features of a dwelling.”

APPELLANTS’ ARGUMENTS

33. Mr Cannon submitted that there is no requirement in the legislation for a kitchen when considering whether there is a separate dwelling. An occupier of the building could be expected to be able to prepare food, cook food or wash up afterwards; this is quite possible because appliances could be placed in the building which would allow the occupier to prepare and consume food. Appliances could also be placed in the building to “wash up” after the consumption of food.

34. Mr Cannon submitted that the building had the facilities necessary for privacy, personal hygiene, the storage of belongings and space to live and sleep. With regard to the consumption of food, as stated in *Uratemp*, it is for the occupier to choose whether to consume food prepared elsewhere, eat out or indeed to place electrical and white goods in the building to allow food to be heated up. Appliances are readily available which would enable an occupier to prepare and heat food in the building, for example a hot plate, microwave, kettle or grill. Any such appliances could be placed in the building based on the occupation at that time; they do not have to be fixed to enable an occupier to make use of them.

35. With regard to kitchen facilities Mr Cannon submitted that the necessary plumbing and electrical infrastructure was present should an occupant of the building or the owners wish to instal a kitchen sink and a food preparation area.

36. Mr Cannon submitted that the building was a clearly distinct unit of accommodation and was 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 key plus living and sleeping accommodation, shower room and toilet and facilities. The absence of formal kitchen facilities would not be determinative. Moreover, in the context of modern lifestyles where it is becoming increasingly common, particularly for younger and busy people, to prefer to order in meal delivery and/or to purchase ready made meals that can be heated in a microwave, formal kitchen facilities are often redundant and are not regarded by the general public as absolutely necessary for a self-contained dwelling.

37. The fact that the building did not have a separate utility supply and had no separate council tax liability is not relevant to the question of whether it was suitable for use as a separate dwelling because 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.

38. Mr Cannon suggested that the building would be suitable for a holiday let.

HMRC'S ARGUMENTS

39. Looking at all the circumstances in the round on the completion date, HMRC submitted that

- (1) the building was not suitable for use as a single dwelling;
- (2) the property as a whole was suitable for use as a single dwelling;
- (3) the property was one dwelling of which the building was a part, rather than being made up of two separate dwellings;
- (4) the transaction was therefore not a multiple dwellings transaction and so MDR was not due.

DISCUSSION

40. This case is about whether the building was suitable for use as a single dwelling as at the time of the appellants' purchase of the property, and so counted as a second dwelling for MDR purposes (in addition to the main dwelling building).

41. This decision follows the recent general guidance given by the Upper Tribunal in *Fiander* as to a building's suitability for use as a dwelling at a given time.

42. The Upper Tribunal's general guidance is that decided cases in completely different contexts are of little assistance in interpreting the statutory words considered here – the building's suitability for use as a single dwelling. I would put *Uratemp* in this category of cases: it considered whether a room actually being occupied was a "dwelling" in the context of a statute designed to protect security of tenure – it thus offers little meaningful assistance as regards suitability for use as a single dwelling, in the context of counting the number of dwellings in a property for SDLT. Similarly, *Carson Contractors* (which is not in any case binding precedent) considered whether a building was a dwelling in the context of VAT zero-rating, and, like *Uratemp*, did not have to consider either suitability for use, or the meaning of single dwelling.

43. I now turn to a multifactorial assessment of whether the building was suitable for use as a single dwelling as at the time of completion of the appellants' purchase, taking into account relevant facts and circumstances.

44. In assessing the position – and following the Upper Tribunal's guidance that potential adaptations or alterations after completion are not relevant to an assessment of suitability for use as at completion – I accord no weight to the possibility that physical features might or could be added later (such as installing a kitchen sink and a food preparation area).

45. Several physical attributes of the building as at completion point towards its being able to provide the occupant with facilities for basic domestic living needs: it had adequate living space on the ground floor, and space for a bedroom upstairs; it had a shower/toilet room downstairs; it had its own lockable door; it was heated and had some natural light.

46. A number of its characteristics pointed the other way. Starting with the factors to which I would give relatively less significance:

(1) The set of large double doors on one side of the building suggested that the ground floor area was suitable for use as a storage space for vehicles (and, indeed, the building was labelled as a “garage/barn/store” in the ‘property description’ provided by the appellants); however, this potential use does not rule out an alternative use of the ground floor for ordinary domestic living.

(2) The building had no separate postal address or utilities. However, these are in my view relatively lightweight factors in an assessment of suitability for use as a single dwelling, as they do not directly impinge on the usability of the building for basic domestic living.

47. More significantly, in my view, was the physical attribute of the building that it had none of the fixed physical features of a domestic kitchen (see my finding at [17] above):

(1) The Upper Tribunal’s guidance is that whether food-preparation facilities are required for basic domestic living needs (and so for a building to be a “dwelling”) should be dealt with in an appeal where that issue is material. Its guidance is also that the paragraph 7 test is not “one size fits all”: 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.

(2) The absence of kitchen features in the building means that, in order to satisfy the basic domestic living need of eating, an occupant would have to do some or all of the following on an ongoing basis:

- (a) eat out;
- (b) eat food prepared outside the building and brought in to the building;
- (c) find ways to work around the absence of kitchen features such as: cooking in the ground floor open space with a microwave or plug-in cooker resting on a table; and accessing water from the hand sink in the adjoining shower/toilet room.

48. The core issue is whether these constraints on the occupant’s eating habits tip the balance in favour of the building being unsuitable for use as a single dwelling, because

- (1) it is unrealistic to expect occupants to live with these constraints on an ongoing basis; and /or
- (2) only a particular type of occupant would be prepared to live with these constraints on an ongoing basis; occupants generally would not be so prepared (noting the Upper Tribunal’s guidance that suitability means suitability for occupants generally, rather than a particular type of occupant).

49. In my view, it is unrealistic to expect an occupant of the building to “make do” without a proper kitchen, in the manner described at [47(2)] above, on an ongoing basis: I note that access to restaurants and take-aways is more limited in the Somerset countryside than in a large city; and preparing, cooking, and washing up regularly in a makeshift manner (as per [47(2)(c)] above) falls below the objective standard for ‘suitability for use’. Alternatively, even if a particular type of occupant would be prepared to live with these constraints on an ongoing basis – say, occupants prepared to eat ready-made supermarket meals on an ongoing basis; or those prepared, on an ongoing basis, to prepare and cook food in the ground floor open space but with access to water solely from the hand sink in the toilet/shower room – that does not alter the position that occupants “generally” would not be so prepared, in my view.

50. I note the Mr Cannon’s suggestion that the building would be appropriate for holiday lets (on the basis that occupants would be prepared to tolerate these constraints for perhaps a week

or two). In my view, “suitability for use as a dwelling” means such suitability on an ongoing basis – in other words, a building that is arguably suitable for use as a holiday let (i.e. very short-term) may nonetheless not be “suitable for use as a single dwelling”.

51. The constraints imposed by the lack of kitchen facilities do therefore tip the balance of factors in favour of the building being unsuitable for use as a single dwelling as at completion of the appellants’ purchase; and so the building did not constitute a second dwelling in the property, in addition to the main dwelling building.

52. The appeal is accordingly dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

53. 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.

**ZACHARY CITRON
TRIBUNAL JUDGE**

RELEASE DATE: 16 AUGUST 2021