[2021] UKUT 156 (TCC)

Appeal number: UT/2020/0059

STAMP DUTY LAND TAX – Multiple Dwellings Relief – whether annex of unoccupied property suitable for use as a single dwelling – test to be applied – dispute as to evidence presented to FTT – approach on appeal to record of evidence - HMRC v Royal College of Paediatrics followed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

KEITH FIANDER AND SAMANTHA BROWER **Appellants**

- and -

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

TRIBUNAL: JUDGE THOMAS SCOTT
JUDGE ASHLEY GREENBANK

Sitting in public by way of remote video hearing treated as taking place in London on 7 April 2021

Patrick Cannon of counsel for the Appellants

Michael Ripley of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is the decision on the appeal by Keith Fiander and Samantha Brower (the "Appellants") against the decision of the First-tier Tribunal (the "FTT") reported at [2020] UKFTT 190 (TC) (the "Decision"). The FTT decided that a property acquired by the Appellants did not qualify for "multiple dwellings relief" for the purposes of stamp duty land tax ("SDLT").

2. In addition to issues regarding the statutory test for the availability of the relief, the appeal raises the question of the circumstances in which a party to an appeal to this Tribunal can challenge the FTT's record of the evidence before it.

The facts

3. On 27 April 2016 the Appellants purchased a detached property (the "Property") for £575,000. The Appellants made a claim to reduce the SDLT due on the Property by £10,000 on the basis that the acquisition qualified for multiple dwellings relief ("MDR").

4. HMRC opened an enquiry into the SDLT return. On 24 August 2018 HMRC issued a closure notice amending the return so as to deny MDR. HMRC upheld that decision following a statutory review, and the Appellants appealed to the FTT.

5. The FTT set out the following findings of fact at [11]-[19]:

> 11. The property was a detached property consisting of: a main house; an annex situated to the rear of the main house and connected with it by a corridor; a garage; and a summer house. The main house was of post-war construction; the annex was a later addition.
>
> 12. The main house comprised a living room, a kitchen/breakfast room with an adjoining boot room, a bathroom, two bedrooms and two loft rooms. The main house was accessed from the outside via a front door leading to an entrance hallway, or via a side door into the boot room.
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> 13. The annex comprised a sitting room, a kitchen/utility room, a bedroom and a shower room. It could be accessed from the outside via glass "French doors" separating an outside wood "decking" area from the sitting room. It had a flat roof (in contrast to the pitched roof of the main house).
>
> 14. A corridor connected the main house and the annex. To use it to walk from the main house to the annex, one had to step down a single step, turn left, walk a few steps (about equal to the length of one of the bedrooms), and then turn right and go up one step. There were door jambs in place at the point at which one stepped down from the main house into the corridor (but no door).
>
> 15. The property was unoccupied at the time of purchase and was in some degree of disrepair - the heating was not working (the boiler

needed replacing); there were problems with damp such that some of the flooring needed replacing.

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

17. The "rightmove" website described the property as having three bedrooms ("bedroom 1" being in the annex) and two loft rooms. It did not mention the annex as such.

18. The local council had sent post addressed to "Geddington annex".

19. The following appears as "restrictive covenant" in the "charges register" section of the entry for the property in HM Land Registry (originating from a 1958 conveyance of land shaded pink in the title plans (which appears to include the main house and annex)): "There shall not be erected on the land hereby conveyed any building other than one bungalow of brick with a tiled roof for the private residence of one family only and a garage to be used by the occupiers of the such bungalow and no buildings erected on the said land shall at any time be more than one storey in height".

6. The FTT made further relevant findings in other passages of the Decision as follows:

(1) The physical attributes of both main house and annex accommodated the basic domestic living needs of occupants of either. The annex accommodated sleeping, eating, cooking and washing and sanitary needs: [54].

(2) The main house and annex were "physically distinct parts of the property". Either could be lived in without crossing through common areas that were not part of the relevant dwelling: [55].

(3) Both the main house and annex could be entered from the outside via a lockable door - in the case of the annex, via glass French doors into the living room: [55].

(4) While the Property was in a state of disrepair at the time of purchase, it was obvious on the completion date both that the property had been used for dwelling purposes in the relatively recent past and that the things that needed fixing (the boiler and flooring) were not so fundamental as to render the Property unsuitable for use as a dwelling: [56].

(5) The Property was marketed on the rightmove website as eminently suitable for use as one joined dwelling: [62].

Relevant legislation

7. The SDLT legislation is largely found in the Finance Act 2003. References below are to that Act unless otherwise stated.

8. SDLT is charged on "land transactions" which are not exempt: section 49. A land transaction means the acquisition of a "chargeable interest", which in this context means an estate or interest in or over land: section 48. SDLT applies by reference to

the ”effective date” of the land transaction, which in this case means the date of completion: section 119.

9. At the effective date in this appeal, the normal rates of SDLT for residential property were 0% for so much of the consideration as did not exceed £125,000; 2% for the consideration between £125,000 and £250,000, and 5% for the consideration between £250,000 and £925,000.

10. A reduced rate of SDLT is provided for in Schedule 6B where transfers involve multiple dwellings. The provisions of Schedule 6B relevant to this appeal are as follows:

> **Transactions to which this Schedule applies**
>
> 2
>
> (1) This Schedule applies to a chargeable transaction that is—
>
> (a) within sub-paragraph (2) or sub-paragraph (3), and
>
> (b) not excluded by sub-paragraph (4).
>
> (2) A transaction is within this sub-paragraph if its main subject-matter consists of—
>
> (a) an interest in at least two dwellings…
>
> **What counts as a dwelling**
>
> 7
>
> (1) This paragraph sets out rules for determining what counts as a dwelling for the purposes of this Schedule.
>
> (2) A building or part of a building counts as a dwelling if—
>
> (a) it is used or suitable for use as a single dwelling, or
>
> (b) it is in the process of being constructed or adapted for such use.
>
> …

11. Where MDR is available, the relief can lower the effective rate of SDLT by splitting the chargeable consideration among each dwelling, subject to a minimum SDLT charge of 1% on the total chargeable consideration.

12. Paragraph 3 of Schedule 6B divides all chargeable transactions into either “single dwelling transactions” or “multiple dwelling transactions”.

The Appeal

13. The FTT refused the Appellants’ application for permission to appeal. It will be necessary to refer below to that decision (the “Refusal Decision”). The Appellants now appeal with the permission of this Tribunal.

14. The ground of appeal is that (1) the FTT failed to take into account relevant considerations, namely crucial parts of the oral evidence given by Samantha Brower

at the FTT hearing (the "Disputed Evidence"), and (2) if the FTT had taken the Disputed Evidence into account, it could not have reached the conclusions it did.

15. In their appeal against the FTT's detailed conclusions, the Appellants also submit that the FTT made certain errors of law in its interpretation of the statutory provisions. However, the primary ground of appeal is a challenge to the FTT's findings of fact, based on its failure to take into account the Disputed Evidence. In the Refusal Decision, the FTT did not accept that the Disputed Evidence was in fact given. It is therefore necessary for us to determine whether that evidence can be relied on in the appeal.

16. We consider below the following issues:

(1) The approach to an appeal against the FTT's findings of fact.

(2) The admissibility of the Disputed Evidence.

(3) The meaning of "suitable for use as a single dwelling" in paragraph 7.

(4) On the assumption that the Disputed Evidence should have been taken into account, did the FTT err in law in reaching its conclusions?

Appealing against findings of fact by the FTT

17. An appeal to this tribunal lies only on a point of law: section 11(1) of the Tribunals, Courts and Enforcement Act 2007. While there cannot be an appeal on a pure question of fact which is decided by the FTT, the FTT may arrive at a finding of fact in a way which discloses an error of law. That is clear from *Edwards v Bairstow* [1956] AC 14. In that case, Viscount Simonds referred to making a finding without any evidence or upon a view of the facts which could not be reasonably entertained, and Lord Radcliffe described as errors of law cases where there was no evidence to support a finding, or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding. Lord Diplock has described this ground of challenge as "irrationality"[1].

18. The bar to establishing an error of law based on challenges to findings of fact is deliberately set high, and that is particularly so where, as in this appeal, the FTT is called on to make a multi-factorial assessment. As stated by Evans LJ in *Georgiou v Customs and Excise Commissioners* [1996] STC 463, at 476:

> … for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was

[1] *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 410F-411A.

> therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court.

19. Although the bar is set high, as is shown by the tribunal's decision in *Ingenious Games* itself, it is not insurmountable.

20. We have also adopted the guidance set out in *Stoke by Nayland Golf and Leisure Ltd v HMRC* [2018] UKUT 0308 (TCC) at [109], as follows:

> 109. Furthermore, the fact that we may find that one or more of the FTT's findings disclose errors of law on its part does not necessarily mean that we should allow the appeal and set aside the Decision. Section 12 TCEA provides that if the Upper Tribunal finds that the making of the relevant decision involved the making of an error on a point of law it "may (but need not) set aside" the decision. That language clearly indicates that we have a discretion in that respect. In our view, we should not exercise our discretion to set aside the Decision if we were satisfied, notwithstanding errors of law in the Decision, that there was a sufficient basis in the findings of the FTT which were fully reasoned and not subject to challenge to justify its conclusions that Leisure was a non-profit-making body. If we conclude that one or more of HMRC's criticisms of the FTT's findings of fact are made out, we may still consider whether the remainder, taken together with those matters relied upon by the FTT which were not challenged, nonetheless constituted a sufficient basis for the Decision. That is consistent with the passage from *Georgiou* quoted at [102] above: we should not regard any finding of fact as disclosing an error of law where it is not significant in relation to the finding in the Decision with which these appeals are concerned…

The Disputed Evidence

21. The Appellants say that the oral evidence given by Ms Brower at the hearing before the FTT was that it was "obvious" to the Appellants when they first viewed the Property, for sale and then at completion, that (1) the two buildings had originally been physically separate, (2) the buildings had later been joined by the construction of a brick corridor, and (3) after the brick corridor had been added there had been two internal doors in the corridor between the main house and the annex.

22. We were presented with a new witness statement from Ms Brower, dated 21 May 2020, which confirmed that this had been her oral evidence.

23. It was not in dispute that these points were not set out in Ms Brower's written witness statement before the FTT.

24. The Appellants sought a recording of the hearing before the FTT but were informed that recordings were not made and none was available.

25. Mr Cannon told us that his recollection was that this evidence had been given by Ms Brower orally, and that the two representatives present at the hearing from the Appellants' agents also recalled it.

26. However, Mr Ripley told us that Mr Adams, who appeared for HMRC before the FTT, did not recall such evidence being given.

27. The tribunal which heard the appeal comprised Judge Zachary Citron and member Mrs Jo Neill. In the Refusal Decision, Judge Citron stated as follows:

> I make the following observations on the evidence presented to the Tribunal:
>
> (1) Evidence was presented to the Tribunal (as part of Ms Brower's oral evidence, and at paragraph 5 and the photograph in exhibit SB6 of her witness statement) of the different styles of exterior brickwork as between the main house, the corridor and the annex, as well as Ms Brower's belief (based on those differences) that the corridor was added after the main house and annex were built.
>
> (2) Mrs Neill and I do not recall Ms Brower saying in her oral evidence that it was in her view "obvious" that the annex pre-dated the corridor (nor do our notes record such a statement).
>
> (3) Evidence was presented to the Tribunal (as part of Ms Brower's oral evidence, and in photographs at Exhibit SB5 of her witness statement) of door jambs at the entrance to the corridor from the main house.
>
> (4) Mrs Neill and I do not recall Ms Brower saying in her oral evidence that it was in her view "obvious" that there had been an internal door in the corridor between the annex and main house (nor do our notes record such a statement).

28. Mr Cannon submits that in the absence of a recording, Ms Brower's witness statement was "the next best available evidence", and should be admitted. The judge, he says, merely states that he "has no recollection" of the evidence, but does not state positively that these things were not said. Given the witness statement and the recollections of Mr Cannon and the Appellants' representatives, on a balance of probabilities it is more likely than not that Ms Brower did give the evidence to the FTT set out in her witness statement.

29. The Upper Tribunal Rules contain no express provisions as to how conflicts of evidence are to be dealt with after findings of fact by the FTT. However, Rule 15(2) does provide this Tribunal with power to admit evidence with would not be admissible in a civil trial[2], or which was not available to a previous decision maker[3], and to exclude evidence where it would be unfair to admit it[4].

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[2] Upper Tribunal Rules Rule 15(2)(a)(i).

[3] Rule 15(2)(a)(ii).

[4] Rule 15(2)(b)(iii).

30. The approach to such a conflict of evidence is well established in the Employment Appeal Tribunal (the "EAT"). In *Dexine Rubber Co v Alker* [1977] ICR 434 ("*Dexine Rubber*"), there was a conflict between the note of the proceedings produced by the industrial tribunal chairman and that produced by the counsel and solicitor for the employers. The employers applied to the EAT to admit the note from the counsel and solicitor and to prefer it where it differed from the chairman's note. The case report deals only with the procedural question of whether the accuracy of the chairman's note could be successfully challenged as inaccurate, in three specific respects, in appeal proceedings[5]. The EAT ruled as follows[6]:

> …where a party to proceedings in the industrial tribunal has received a chairman's note which he challenges as inaccurate, it is his duty, as was done here, to send the criticisms he wishes to make to the chairman for his observations. If the chairman replies that, having considered the criticisms, he is satisfied that his (the chairman's) recollection was accurate and that his note is the correct material for use in the appeal tribunal, the party who is criticising the chairman's note must accept the chairman's conclusion, unless, after submitting his criticisms to the advocate on behalf of the opposite party, there is confirmation from both sides that the chairman's note and recollection is incomplete or imperfect. That was not done in this case, and in that situation this appeal tribunal refused to admit any material other than that before them by the chairman's note of proceedings.

31. So, the procedure prescribed in *Dexine Rubber* is that, unless the representatives of both parties agree as to the evidence given, the judge's note should be obtained and any criticisms of the note put to the judge for comment. If the judge states that his or her note is correct, new evidence will not be admitted to challenge the judge's version of events.

32. That procedure has been applied in numerous reported decisions of the EAT. In *Aberdeen Steak Houses Group PLC v Ibrahim* [1988] IRLR 420, the EAT endorsed the "well-known" principle in *Dexine Rubber*, stating[7] that:

> It is clearly right that where the parties cannot agree between themselves upon the accuracy or inaccuracy of the notes of a court that the version given by the court should remain supreme. In the absence of some such rule it would be impossible to keep any control over the number of continuing issues on the subject.

33. The procedure in *Dexine Rubber* was cited with approval by the Court of Appeal in *King v Customs & Excise* [2001] EWCA Civ 819 (on appeal from the EAT) at [16].

34. The question of whether that procedure should be adopted in this Tribunal on an appeal from the FTT was considered by Birss J (as he then was) in *Royal College of Paediatrics and Child Healthcare v HMRC* [2015] UKUT 38 (TCC) ("*Royal*

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[5] Page 436.

[6] Pages 439-440.

[7] At page 423.

College"). One of the issues in that appeal was whether HMRC had been in possession of sufficient evidence to issue a VAT assessment within the normal statutory time limit. Counsel for HMRC sought to argue that oral evidence given during cross-examination supported HMRC's case that HMRC had not possessed such evidence, so that they were able subsequently to issue an out-of-time assessment. Both counsel for HMRC and counsel for the taxpayer had appeared before the FTT, but their recollections differed as to whether the evidence asserted by HMRC to have been given was so given. HMRC accepted that without the oral evidence they could not succeed on the point. Birss J stated as follows, at [55]-[58]:

> 55. The hearing before the FTT was not recorded. The parties have approached Judge Demack and he has provided a copy of his notes, which have been typed up and approved. They do not contain the evidence Mr Puzey wishes to rely on. Nor do the notes of Mr Conlon. The only source of a record of the critical evidence Mr Puzey says was given by Mr Staniforth at the FTT is Mr Puzey's own notes. Judge Demack was invited to make an order directing that his notes of the evidence be amended to include the passages from Mr Puzey's notes. He declined to do so, stating that he was unable to recall the cross-examination of Mr Staniforth.
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> 56. Mr Conlon submitted as follows. First the Upper Tribunal Rules contain no express provisions as to how conflicts of evidence are to be dealt with after findings of fact by the FTT (see rule 15). Mr Puzey did not disagree. Second the approach of the Employment Appeal Tribunal in *Dexine Rubber Co v Alker* [1977] ICR 434 should be applied. That approach was described as "well settled" in *Keskar v Governors of All Saints Church of England School* [1991] ICR 493 (EAT). Essentially the *Dexine* procedure amounts to obtaining the judge's note and putting the criticisms of the note by a party or the parties to the judge for comment. If the judge replies stating that he or she believes the note is correct, then the conclusion must be accepted. Mr Conlon also referred to the judgment of HHJ McMullen QC in *Company X v Mrs A, Mr B*, [2003] WL 21917453 (EAT) that in such circumstances "the record of the Chairman is conclusive".
>
> 57. Mr Puzey submitted that the Upper Tribunal should not follow the *Dexine* approach and that the UT retains the power to accept counsel's submission about what evidence was given below.
>
> 58. The *Dexine* approach is a sensible and workable one. It can and in my judgment it should be applied in the Upper Tribunal. At one stage Mr Puzey submitted that Judge Demack had not actually stated in terms that he believed his note was correct but that is a bad point. The parties put their rival contentions about the judge's note to the judge, he considered them and refused to change his note. Applying *Dexine* to this case would not permit Mr Puzey to advance the argument he does.

35. Mr Cannon did not deal with this authority in his skeleton argument, but submitted in oral argument that we should not adopt the *Dexine Rubber* procedure in this appeal. He asked us to decline to follow *Royal College*, noting that we were not bound by another decision of the Upper Tribunal. Now that recording of hearings is more commonplace, particularly given the recent increase in remote hearings, he

suggested that we should take the opportunity to bring the applicable practice up to date. He also sought to distinguish *Royal College* on the bases that in this appeal we were concerned with the evidence of the taxpayer rather than (or as well as) their counsel and that Judge Citron has not stated positively that the Disputed Evidence was not given but merely that he does not recollect it.

36. As to whether we should follow the decision in *Royal College*, a decision of this Tribunal is not binding on a later Upper Tribunal: *Raftopoulou v HMRC* [2018] EWCA Civ 818, [2018] STC 988, at [24]. However, as a tribunal of co-ordinate jurisdiction, the later tribunal will follow the decision of the earlier one as a matter of judicial comity unless it is convinced (or "satisfied") that the earlier decision is wrong: see the detailed analysis in *Gilchrist v HMRC* [2014] UKUT 169 (TCC) at [85]-[101], and in particular [94].

37. Far from being convinced that Birss J's adoption of the *Dexine Rubber* approach in this Tribunal is wrong, we agree with it and would follow it. We agree that it is "sensible and workable". That position is unaffected by the fact that the problem it caters for may arise less frequently as more hearings are recorded.

38. We do not accept that *Royal College* should be distinguished as Mr Cannon suggests. It makes no difference whether it is the taxpayer, HMRC or counsel for either party who asserts that certain evidence was given orally but not recorded in the decision. The disputed evidence in *Royal College* was said to have been given by one of the witnesses, and it is the resolution of a conflict between that assertion and the judge's notes which is dealt with by the procedure in *Dexine Rubber*. Nor does it make a difference whether the judge states positively that the evidence was not given or rather that they cannot recollect it being given; it is the judge's note, following consideration by the judge of the disputed evidence, which is to be taken as determinative.

39. In this case, the precise procedure laid down in *Dexine Rubber* was not followed, in that no request was made for the judge's note. No explanation for that was offered. The taxpayer cannot, however, be in a better position as regards the admissibility of the disputed evidence by declining to ask for the judge's note. In any event, the Refusal Decision makes clear that neither the judge nor the tribunal member could recollect the Disputed Evidence, and, critically, that it was not recorded in either of their notes of the hearing. The judge did not amend his note.

40. We determine in these circumstances that the Disputed Evidence should not be admitted, so that the Appellants' primary ground of appeal fails.

41. While it is not necessary for us to do so in light of this decision, since we heard arguments from the parties on the issue, we set out our conclusions on whether the appeal would have been allowed if the Disputed Evidence had been admitted. It is also necessary in any event to consider the Appellants' submissions that, regardless of the evidential issue, the FTT made errors of law in its interpretation of the relevant test.

42. Both of those issues require consideration of the test in paragraph 7.

"Suitable for use as a single dwelling"

43. There have been a number of FTT decisions relating to the application of the test in paragraph 7 of Schedule 6B. Since this is the first such decision of this Tribunal, it is appropriate to offer some general guidance. We neither make nor intend any comment on any individual FTT decisions other than that in this appeal.

44. As with any statutory phrase, "suitable for use as a single dwelling" must be construed purposively and in the context of the SDLT code as a whole. The FTT noted as follows, at [27]:

> The explanatory notes to Finance (No 3) Bill 2011 on what is now the Schedule said this (page 316):
>
> "18. Clause 83 and Schedule 22 are designed to strengthen demand for residential property. They will reduce a barrier to investment in residential property, promoting the supply of private rented housing. They do so by reducing the amount of SDLT payable on a purchase of multiple dwellings, so that it is closer to that charged when purchasing those properties singly.
>
> 19. ….
>
> 20. The measure takes the form of a relief which must be claimed in a land transaction return (or an amendment to such a return). Where a transaction, or a scheme, arrangement or series of linked transactions, includes multiple dwellings, the rate of tax charged in respect of those dwellings is determined by the mean consideration: that is, the total consideration attributable to the dwellings, divided by the number of dwellings."

45. While that may have been the intended target of the relief, we do not find that this is of any great assistance in interpreting the phrase, since the relief is clearly set out in terms which could apply on any residential sale.

46. However, since the phrase is used in the context of a potentially reduced rate of SDLT, we do not consider that decided cases in completely different contexts, such as council tax and VAT, including those referred to in the Decision, form the basis for any reliable guidance as to its meaning, construed purposively.

47. The HMRC internal manuals on SDLT contain various statements relating to the meaning of "dwelling" and "suitable for use as a single dwelling", but these merely record HMRC's views and do not inform the proper construction of the statute.

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.

The FTT's decision

49. Although we have decided that the Disputed Evidence is not admissible, we heard submissions as to whether this appeal would have succeeded if that evidence had been admitted. The Appellants also submit that, regardless of the evidential position, the FTT made errors of law in its formulation of the applicable test. We therefore set out our conclusions on those issues.

50. Before the FTT, Mr Cannon, who also appeared for the Appellants below, referred to various decisions in other areas, such as VAT and council tax. He submitted that, on the basis of those cases, the absence of lockable doors and separate utility meters was not necessarily fatal to the argument that there were separate dwellings. The annex was a clearly distinct unit of accommodation which was physically suitable for affording an occupier the means for a private domestic existence. The test was suitability as at the effective date, not use. The fact that there was no door in the corridor separating the house and the annex did not mean the annex was not suitable for use as a separate dwelling. In any event, an internal lockable door could be re-hung in the door jamb in the corridor "with no structural alteration and with minimal effort". Mr Cannon relied on certain statements in HMRC's internal manuals discussing suitability for use as a dwelling for SDLT purposes[8]. He also referred to a similar case involving another taxpayer in which HMRC had expressed a view which supported the Appellants' position.

51. HMRC argued before the FTT that several factors indicated that there were not two dwellings for SDLT purposes, as set out at [41]:

> (1) The annex was not in fact being used as a separate dwelling at the effective date;
>
> (2) There was no door fitting or any physical barrier in the doorway between the annex and the rest of the property, and therefore there is free access between the annex and the rest of the property;
>
> (3) Consequently, there is a lack of privacy and security between the two areas;
>
> (4) The material from "rightmove" described the property as a three bedroom detached house and the floor plan clearly indicates that there is only one property;
>
> (5) There is no separate council tax; and
>
> (6) There is no separate postal address.

52. It was also relevant background, said HMRC, that the Property was arranged as a single dwelling throughout; it was apparently occupied as a single dwelling;

[8] SDLTM 00385.

photographic evidence suggested that the annex was a mere extension, and the Property was "more like a single dwelling as a whole".

53. HMRC submitted that the possibility of partitioning the house and annex by installing a door was "irrelevant conjecture". On the effective date the annex might have had the potential to be suitable for use as a single dwelling, but adaptations would have been required. None of the statute or other case law in relation to other taxes provided any assistance in the appeal.

54. The FTT identified that as the Property was unoccupied at the time of acquisition, the question was one of suitability for use. It set out its approach at [51]-[52], as follows:

> 51. We approach "suitability for use" as an objective determination to be made on the basis of the physical attributes of the property at the relevant time. Suitability for a given use is to be adjudged from the perspective of a reasonable person observing the physical attributes of the property at the time of the transaction.
>
> 52. A dwelling is the place where a person (or a group of persons) lives. A building or part can be suitable for use as a dwelling only if it accommodates all of a person's basic domestic living needs: to sleep, to eat, to attend to one's personal and hygiene needs; and to do so with a reasonable degree of privacy and security. By requiring that the building or part be suitable for use as a "single" dwelling, the statutory language emphasises suitability for self-sufficient and stand-alone use as a dwelling. Use as a "single" dwelling excludes, in our view, use as a dwelling joined to another dwelling.

55. The FTT then considered, at [54]-[56], various characteristics which pointed towards the existence of two separate dwellings. It identified the main characteristic which pointed away from the existence of two separate dwellings at [57]:

> 57. We now turn to the main physical attribute of the property that points towards the main house and annex not being individually suitable for use as a single dwelling: the short, open corridor connecting them. The questions raised by the corridor are (i) whether either the main house or the annex were suitable for use as a "dwelling", when occupants of one would have unimpeded access to the other; and (ii) even if the answer to the first question is "yes", were either suitable for use as a "single" dwelling?

56. In addressing question (i), the FTT took as its starting point that "some degree of privacy and security is required for a building (or part) to be used as a dwelling": [58]. It noted that while generally provided via lockable doors, that is not the only way to provide privacy and security. However, it considered that although arrangements other than lockable doors might provide privacy for certain categories of occupier, the SDLT test of suitability for use as a single dwelling required that the building (or part) could generally be so used. It stated (at [61]):

> So, if one has a situation where a building (or part) is suitable for a use only in quite specific circumstances, this inclines against determining

> that the building is "suitable" for that use. That is our situation here: an objective observer of the property at completion could have envisaged circumstances where main house and annex could be used individually as dwellings (see [59] above), but only if a very particular kind of relationship were to subsist between the occupants of the two parts. Absent such a relationship - which would be the case where the occupant of the annex was a member of the general public - the main house and the annex would not be individually suitable for use as dwellings, due to the insufficiency of privacy and security for occupants of both parts. As we say, this inclines against a determination that both parts were suitable for use as dwellings.

57. In relation to the second question which it identified, namely the effect of the corridor, the FTT determined as follows, at [62]:

> The corridor as a physical feature compromised the stand-alone quality of both main house and annex as dwellings - and, in our view, the word "single" imports a requirement of suitability for use on a stand-alone basis. Due to the short, open corridor connecting them, the main house and annex were simply too closely physically connected for either to be suitable for use as a "single" dwelling. Rather - and this, indeed, is how the property was marketed, on the evidence of the "rightmove" materials - the property was eminently suitable for use as one joined dwelling.

58. The FTT then turned to Mr Cannon's alternative argument, that suitability for use encompassed a situation where "on the assumption of a relatively minor physical adjustment being carried out, it could be so used". In this case, he suggested, a door could be relatively easily installed in the door jamb in the corridor. The FTT considered that "to give occupants of both parts of the property sufficient privacy and security…the door would somehow need to be lockable from both sides (or two doors would be required)": [63].

59. It is helpful to set out the FTT's conclusion in full, as follows:

> 64. We agree (and state as much in our discussion of the property's state of disrepair at the time of completion at [56] above) that the test is not whether the building or part was ready for immediate occupation as a single dwelling at completion. As we observed, a building remains suitable for a certain use at a certain time if, at that time, it is clear to an objective observer it was used for such purpose in the relatively recent past, and all that has happened is that it has fallen into relatively minor disrepair.
>
> 65. The absence of any physical barrier between the two parts of the property at the point of completion raises different considerations, however:
>
> > (1) In our view it is significant that nothing in the physical state of the property at completion would have indicated to an objective observer that there had ever been a physical barrier between the annex and the main house sufficient to enable occupation of the annex by a member of the general public and establish it as a stand-

> alone dwelling: there was a door jamb in the entrance to the corridor from the main house, but this in our view falls short of evidence of a meaningful barrier between the two parts of the property in the recent past; and, consequently
>
> (2) Putting a lockable door, or some other kind of secure barrier between the two parts of the property, was not a matter of restoration or repair of physical features of the building to enable it to resume a use that would have been obvious to an objective observer of the property as at completion; rather, it was the addition of a new physical feature to enable it to serve a as a stand-alone (rather than a joined) dwelling.
>
> 66. These considerations incline us to conclude that it would be wrong to determine "suitability for use" at the time of completion on the assumption that a door, or doors, or some other physical barrier, would be introduced to the corridor. This is because the suitability test in paragraph 7 is an objective one based on the physical features of the property as at completion - it cannot be performed on the assumption that new physical features will be introduced to enable a new and different kind of use. This is the case even if the new physical features are relatively easy or quick to install.
>
> 67. Our inclination is strengthened by the point we make at the end of [62] above - that in the eyes of an objective observer at completion, the main house and annex were eminently suitable for use as one joined dwelling. In such circumstances it seems to us that such an observer would not reasonably conclude that they were suitable for a different sort of use on the basis of a new physical feature being added.
>
> 68. We therefore conclude that, applying paragraph 7, the annex and the main house did not each count as a dwelling for MDR purposes; rather, they together counted as a dwelling.
>
> 69. It will be seen from the foregoing discussion that we have not put a great deal of weight on the evidence that the annex had no separate utility meters or council tax status - this points in the same direction as our conclusion, but we did not place great weight on these factors. Similarly, we did not place great weight on the evidence of a separate postal address for the annex (we acknowledge that the sending of post to the annex was supportive of its "single" status, but do not consider this a very significant factor). We placed no weight on the evidence regarding the "restrictive covenant" in the land registry, which was unclear in itself and in its implications for the issues at hand.
>
> 70. The appeal is dismissed.

60. If we had determined that the Disputed Evidence was given and should be admitted in this appeal, would that have had the result that the FTT would have erred in law in concluding that MDR was not available?

61. The Disputed Evidence is summarised at [21] above. It records Ms Brower's view that it was obvious to the Appellants that the two buildings had originally been separate and had been joined subsequently by a brick corridor and that there had originally been two doors in the corridor between the main house and annex.

62. The additional evidence would not have affected the factors relied on by HMRC before the FTT as indicating that at completion there were not two dwellings (summarised at [51]-[53] above). The additional evidence relates only to the opinions of the Appellants as to the past history of the property. We agree with the FTT's statement at [51] of its decision that suitability for use as single dwelling is an objective determination to be made on the basis of the physical attributes of the property at the relevant time, namely completion. It therefore follows that the property's past history - which is the subject-matter of the additional evidence - is of limited relevance to suitability for use as at completion.

63. In this case, the FTT identified (at [57]) as "the main physical attribute" which pointed away from there being two separate dwellings the short, open corridor connecting the two properties. It considered (at [62]) that this feature compromised the stand-alone quality of both the main house and annex to a degree which meant they were not suitable for use as single dwellings, observing that this was consistent with the estate agent's marketing materials. The past history of the property arose only in the context of the FTT's discussion of Mr Cannon's alternative argument, that suitability for use extended to suitability "on the assumption of a relatively minor physical adjustment being carried out". The FTT had reached the view that a building could be suitable for use as single dwelling if "it is clear to an objective observer it was used for such purpose in the relatively recent past, and all that has happened is that it has fallen into relatively minor disrepair". In considering that question, the FTT made findings (at [65]) as to what might have been discernible objectively at completion as to the position "in the recent past", and concluded that the addition of a physical barrier between the two properties would not have been restoration or repair but the addition of a new physical feature. That fell outside the "suitability for use" test, even if the new physical features would be relatively easy or quick to install. The FTT considered that this conclusion was strengthened by its finding that "in the eyes of an objective observer at completion, the main house and annex were eminently suitable for use as one joined dwelling".

64. If the Disputed Evidence were to be admitted, we consider that the FTT's conclusion would still have been one which it was entitled to reach. The history of the Property was relevant only to the issue of whether the main house and the annex were, on the FTT's approach, separately suitable for use as single dwellings *at the date of completion* on the basis of some relatively minor repair or renovation. An opinion held by the Appellants that at some point in the past the buildings had been separate and had been joined by a corridor and there had been doors in the corridor would not mean that the only conclusion which could reasonably be reached was that the main house and the annex were separately suitable for use as single dwellings. The FTT would have been obliged to take that opinion into account as evidence, affording it whatever weight it judged appropriate and in light of its terms and relevance. We consider that it would have remained entitled reasonably to have concluded that the Appellants had not established, even taking their opinion into account, that the addition of a door or doors which would have provided sufficient privacy to both main house and annex would have merely been minor repair or renovation as opposed to alteration (or construction or adaptation). The evidence was not that the doors which the Appellants considered had previously been there were lockable so as to

have constituted a sufficient physical barrier. Moreover, as the FTT correctly pointed out in refusing permission to appeal, "the matter is determined not by the evidence of Ms Brower's opinion, but by the Tribunal's view of an objective observer's perspective". That view would necessarily have taken all the evidence into account.

65. We consider that the FTT applied the correct principles in addressing the question before it, and reached its decision on the basis of ample evidence, including witness evidence, photographs, marketing materials and floorplans. The weight to be attached to the evidence and to each relevant factor was a matter for the fact-finding tribunal.

66. The FTT's approach was to ask itself whether an objective observer would conclude that each part of the Property had been used as a single dwelling "in the relatively recent past", and it is not clear that the additional evidence would have informed a conclusion as to whether any such use had in any event been "relatively recent".

67. However, Mr Cannon argued that, irrespective of whether the Disputed Evidence was admitted, the FTT had erred in law in adopting a test which looked only at "relatively recent" use. There was nothing in the statute to warrant such a restrictive approach.

68. We do not consider that the FTT erred in law merely by considering what might have been objectively evident at completion in relation to the Property's relatively recent past. That comment was made, as we have discussed, in the context of Mr Cannon's alternative argument about minor modifications; as we have observed, the history of a property is of limited relevance to its suitability *at completion*. The FTT correctly identified that Mr Cannon's argument raised the question of whether any modification necessary to achieve a sufficient degree of privacy and security would have been assessed objectively as something which simply returned the main house and the annex to their previous single dwelling status (repair or renovation) or rather was an addition or adaptation. Tangible evidence of recent use of the main house and the annex as single dwellings would point towards a repair or renovation, and its absence would not. That is not an absolute test, or a legal requirement, but merely one factor which the FTT was entitled to take into account in the multi-factorial assessment before it, where, as here, the Property was in a state of "relatively minor disrepair" which meant it was not immediately suitable for use as a dwelling.

69. Mr Cannon also submitted that the FTT erred at [67] in stating that "the main house and annex were eminently suitable for use as one joined dwelling", because this misstated the statutory test. We do not agree. That observation was made in assessing what an objective observer would be likely to have concluded as at completion, and is merely a factor consistent with the FTT's conclusion, not some gloss on the statutory test.

70. The Appellants also argued that the FTT had erred in the final sentence of [52]. To recap, in context this stated:

> By requiring that the building or part be suitable for use as a "single" dwelling, the statutory language emphasises suitability for self-

> sufficient and stand-alone use as a dwelling. Use as a "single" dwelling excludes, in our view, use as a dwelling joined to another dwelling.

71. Taken in isolation, that final sentence is too broadly expressed. However, in context we think it was simply emphasising that dwellings which are not separated (and therefore not self-sufficient and stand-alone) cannot be single dwellings.

72. We therefore find no error of law in the FTT's reasoning or decision, and this conclusion would be unaltered even if, contrary to our decision, the Disputed Evidence were to be admitted.

Disposition

73. The appeal is dismissed.

Signed on Original

JUDGE THOMAS SCOTT

JUDGE ASHLEY GREENBANK

RELEASE DATE: 7 July 2021