[2021] UKFTT 0305 (TC)

TC08247

STAMP DUTY LAND TAX – Multiple Dwellings Relief – para 7(2)(b) Schedule 6B Finance Act 2003 – whether annex of property 'suitable for use as a single dwelling' – case law meaning of 'dwelling' in other legal contexts and extrinsic aid to statutory construction set aside – guidance from Fiander UT *followed – objective assessment of physical attributes of property at effective date – integral character in design layout and access – whether privacy and security critically compromised – whether separate, self-contained living unit – absence of kitchen facilities considered – suitability for use limited to a particular type of occupant –* ***appeal dismissed***

Appeal number: TC/2019/09351

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN

ROBERT DAVID GEORGE
RACHEL CLAIRE GEORGE **Appellants**

-and-

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

TRIBUNAL: JUDGE HEIDI POON

The hearing took place on 27 January 2021

With the consent of the parties, the form of the hearing was V (video) on Tribunal video platform. 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 Patrick Cannon, Counsel, instructed by Relatus Limited, Property Tax Accountants, for the Appellants

Dr Jeremy Schryber, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Robert George and Mrs Rachel George ('the appellants') appeal against the review conclusion decision of the respondents ('HMRC'), which upheld the closure notices issued to amend the appellants' Stamp Duty Land Tax ('SDLT') return in relation to their acquisition of a property in England ('the Property') by disallowing the Multiple Dwellings Relief ('MDR') that had been claimed.

2. The Closure Notice amendment is pursuant to paragraph 23 of Schedule 10 to the Finance Act 2003, and the consequential additional SDLT payable is £21,250.

3. The principal issue for determination is whether the Property, at the effective date of transaction, constituted one dwelling, or two dwellings for MDR purposes. The respondents specifically requested a full decision as there are appeal proceedings stayed behind this case.

EVIDENCE

4. Mr George lodged a witness statement with exhibits of images of the Property, being a floor plan of the Property, and 19 coloured photographs of aspects of the interior and exterior. The floor plan is from the sale particulars, and the photographs would appear to be a mixture of some being from the sale particulars, and some taken at a later date for the purpose of the hearing. No issue was taken as regards the exhibits collectively provided a fair representation of the Property as it stood at the relevant time. Mr Geroge was cross-examined, and answered supplementary questions from the Tribunal. I find Mr George to be a credible witness on the whole, and accept his evidence as to matters of fact.

5. By notice dated 13 January 2021, HMRC applied to lodge additional documents. The items covered by the application were:

> (1) Two letters from HMRC to the appellants' representative, Relatus Limited ('Relatus') dated 16 July 2019 and 16 August 2019, which respectively opened and closed the check into the SDLT return. These letters are duplicates of the principals sent to the appellants, which have been included in the listed documents.
>
> (2) The second item in the application related to Relatus' response to the enquiry dated 31 July 2019. The first page of the letter was included in the hearing bundle, but the accompanying pages and enclosures were omitted.
>
> (3) The third item is a screen shot of HMRC's Digital Mail Service to evidence the date of receipt of the correspondence to amend the SDLT return.

6. I granted the HMRC's application in full, giving as reasons that the additional documents are either the full version of a principal or supplemental to a document already lodged; and that the appellants are not prejudiced by the admission of these documents, while their provision would assist the Tribunal in having sight of the actual documents which would otherwise be only referred to in evidence or submission.

Amendment to SDLT return

7. The appellants purchased the Property for £1,150,000 on 9 March 2018; that being the date of completion of the contract and transfer of title was the effective date of transaction ('EDT') for SDLT purposes.

8. On 9 March 2018, a land transaction return was filed and the amount of SDLT by self-assessment was £58,750 on the basis that the Property was a single dwelling.

9. A claim for MDR was made on behalf of the appellants by a letter from Relatus dated 10 September 2018, with its stated purpose being 'a voluntary full disclosure of the circumstances

surrounding the Taxpayer's request for amendment to SDLT1 to include a claim for Multiple Dwellings Relief and consequential refund of overpaid SDLT' (emphasis original).

10. The disclosure letter was accompanied by: (i) a floor plan, (ii) 3 photocopied photographs of the Property, (iii) a letter of authority to appoint Relatus as agent, signed and dated 2 October 2018 by the appellants, (iv) the contract of sale incorporating standard conditions, (v) TR1 form, and (vi) a calculation to quantify the MDR relief. The SDLT payable was reduced to £37,500 by the MDR, and a refund of £21,250 was requested.

Enquiry to Closure Notice

11. The letter and its enclosures, though dated 10 September 2018, were received by HMRC on 26 October 2018, as evidenced by the record on HMRC Digital Mail Service system.

12. On 16 July 2019, HMRC sent a notice to each of the appellants and Relatus to open an enquiry into the SDLT return. On 31 July 2019, Relatus responded to HMRC's questions, and provided additional photographs to those accompanying the disclosure letter, to show the interior of the so-called 'Annex' and the connecting doorway to the rest of the Property.

13. On 16 August 2019, HMRC issued a closure notice to each appellant and Relatus to state the conclusion that the Annex did not qualify as an additional dwelling for MDR to apply. The notices were appealed on 6 September 2019. On 19 September 2019, HMRC issued their 'View of the Matter' letter, confirming the conclusion reached in the closure notice. A request for statutory review was made on 26 September 2019, and the review conclusion letter dated 15 November 2019 upheld the closure notice amendment.

The Property

14. From Mr George's evidence and exhibits of the floor plan and photographs, I make the following findings of fact in relation to the Property.

(1) The Property is a two-storey building, and the floor plan comprises the 'Ground Floor', the 'First Floor' and an 'Outbuilding'. The 'approximate gross internal area' (including garage) is 302.3 square metres (3254 sq ft); with the outbuilding being separately stated as of 16.8 square metres (181 sq ft).

(2) The Property has a two-tiered roof lines across the front elevation. The lower section of the roof slops from the floor level of the upper storey with overhang guttering. The Annex is to the right end of the front elevation. The upper storey does not extend over the Annex; the lower section of the roof line therefore extends to form a pitch roof over the Annex.

(3) The façade of the lower storey has a form of symmetry, with a double garage to the far left, and the Annex to the far right. In the middle is the main door entrance, flanked on either side by a bay window with muntined square panes. (A 'bay' window in the sense of being in three sections, but it is unclear if the sections are angled at the wings.)

(4) The Property is approached through a paved driveway, with a forecourt which can take up to 7 cars. At the garage end, a hedgerow marks the boundary of the forecourt. At the Annex end, solid wood panels of 1.8 metres high, chain-linked with metal mesh on either side form the boundary all the way to the pavement. A narrow gap (about a metre wide) is left between the end elevation of the Annex and the boundary panels.

(5) A gate to the side elevation at the garage end gives access to the back of the house and the back garden.

(6) The floor plan of the ground floor in sections from *front to rear* is as follows:

(i) Section 1 – Double garage with a rear door to an internal corridor, utility room to the left, and across the corridor into the rear Extension 1 (the Family Room);

(ii) Section 2 – Kitchen (7.58m x 3m) adjacent to the garage extends for the full length of the Property; (the *left* bay window in the frontage belongs to the kitchen); window to the rear looks on to the back garden; (entry to the kitchen is through double doors in the dining room in section 3);

(iii) Section 3 – Main door leading into vestibule (WC to the right), through double doors into the hallway, with staircase on the right (i.e. aligned along the WC with a dividing wall); dining room to the rear with window to back garden; double door in dining room to access kitchen;

(iv) Section 4 – 'Playroom' to the front (the *right* bay window in the façade belongs to the Playroom), adjoining the sitting room in the rear, which opens into Extension 2 (the Conservatory);

(v) Section 5 – to the front the Annex bathroom, which opens into a bedroom in the rear (denoted as 'Bedroom 5' in the floor plan).

(7) The upper storey rises above the sloping lower-tier roof, with six muntined windows aligned symmetrically; from the centre to either side are a small, then a medium-sized, then a bay window to the far left (above the garage) and to the far right (above the Playroom). Accommodation on the first floor comprises 4 bedrooms, 1 dressing room, and 3 bathrooms. The master bedroom suite (at the garage end) comprises an en-suite bedroom, the dressing room, a balcony to the rear. The dressing room, and bedrooms 2 and 3 all face the rear; bedroom 4 faces the front, and is above the Playroom.

(8) The back elevation of the house has only one roof line overhanging the upper storey. The ground floor extensions are both prominent, measuring 4.26m (the Family Room) and 4.64m (the Conservatory) from the original perimeter. The Family Room extension (to the rear of the garage) has two large windows facing onto the back garden, and patio doors to the side that open outwards to access the garden. The Conservatory has chamfered corners with windows on all sides, and patio doors on the side opening outwards to the garden. The patio doors of these extensions face onto each another diagonally, and are in the visual orbit of the kitchen and the dining room from the rear.

(9) The Annex is situated on the conservatory end of the Property. The additional floor area created by the Annex accommodates a bathroom to the front (with a frosted glass window facing the driveway), and a bedroom to the rear. There were two stages to the construction of the Annex. A bathroom was first added in the 1980s, and the bedroom some 20-25 years later (after 7/7/ 2005). The bathroom takes in the front-right corner of the Playroom to accommodate a walk-in shower; the Annex bedroom measures 4.87m longitudinally x 3.53m laterally. The bedroom cum bathroom aligns just short of the full length of the side elevation, so as not to obstruct a small side window to the Sitting Room.

(10) The Annex bedroom has two velux windows on the posterior section of the roof, while the anterior section of the Annex roof is over the bathroom (walk-in shower, no bathtub). About two-thirds of the rear elevation of the Annex is covered by glazing from floor to ceiling by four sections of muntined panels, the middle two sections openable as patio doors. It is possible to enter the Annex via these patio doors from the back garden.

(11) For the MDR claim, the Annex was marked as comprising the bedroom, the shower-room, and the 'Playroom'; designated as the 'Annex living room' (henceforth 'Annex Lounge' to distinguish from the Sitting Room in section 4 of floor plan that leads

onto the Conservatory). The lounge has two doorways on opposite walls; one to enter the Annex bedroom, one to enter the hallway of the ground floor. The door to the hallway is described in the MDR claim as an 'Internal dividing door' ('the Dividing Door').

(12) The main door entrance of the Property leads into a small vestibule, then into the hallway through a pair of double doors, with the staircase rising to the right of these double doors. Opposite the staircase are two doors aligned side by side to access the Dining room (section 3 of floor plan) and the Sitting room (section 4 of floor plan). At a sharp 90-degree turn from the Sitting Room doorway is the Dividing Door, (right-hand-side hung and opening into the Annex from the hallway perspective). The architraves of the Dividing Door are edge-to-edge with the Sitting Room door. The proximity of the Dividing Door to the Sitting Room door is such that when both doors are closed, an average person can reach both door handles *at once* and at ease, with the right hand on the Dividing door handle, and the left hand on the sitting-room door handle. The Dividing Door entrance into the Annex from the hallway end is sandwiched by the doorway to the Sitting Room on the left, and by the staircase on the right. For clearance, the gap between the Sitting Room doorway and the staircase is the width of the Dividing Door, plus about *half a door width* to the right of the Dividing Door.

15. Mr George's evidence in relation to the Property is as follows:

(1) A 'detached property which consists of a main house and an integral double garage, an outbuilding and attached to the main house is an annex'; (the outbuilding is a timber structure with a concrete base, not plastered nor insulated and was once used as a gym).

(2) 'The annex has its own external entrance at the rear of the property which is accessed via a side gate. The annex comprises a living room, bedroom and shower room.'

(3) The main house and the annex are separated by a lockable internal door.

(4) The annex does not have a fully fitted kitchen; however, there is plumbing and waste in the wall between the annex living room (labelled as the playroom on the floor plan) and the WC of the main house. There is also plumbing and waste leading from the annex shower room to the annex bedroom and living room.

(5) When viewing the Property, 'we were aware that some minor adaptations we could, if we wished install a kitchen sink in the annex using the infrastructure which already existed.' No adaptations have been made to date as 'our occupation of the property does not require it', but is 'something we are considering as an option for caring for our parents as they get older'.

(6) Mr George confirmed that the Annex is not currently separately occupied and is being used as a 'guest bedroom when family and friends visit', and the living room is being used as 'a playroom for our two young children'.

(7) At the early part of his evidence, Mr George stated that the Annex was added in the 1980s. Towards the end of his evidence, he related that the former owner of the Property was injured in the 7/7 terrorist attacks, and became wheelchair bound. The Annex was purposely built to be accessible by wheelchair, and was used as the master bedroom and living area of the former owner. It was then that he clarified the date of 1980s given earlier was the time when the Annex bathroom was added, and that the bedroom was later added after the 7/7 bombings in 2005.

16. When asked what had triggered the amendment being made to the SDLT return filed some 6 months previous at the date of completion, Mr George confirmed that he responded to

a letter from Relatus, which advised that the appellants' property to be eligible for MDR, and to get in touch with Relatus to take matters forward.

17. Other relevant findings as concerns the Annex include:

(1) The Annex does not have a separate title number.

(2) The Annex has no separate postal address, and not separately listed for council tax.

(3) The Annex does not have its separate gas or electricity meters. The water stop for the mains is located in the garage and there is no separate turn-off in the Annex.

(4) Mr George confirmed that the gas and electricity meters are sited in the double garage and register the power consumption of the Property including the Annex. A pressurised gas-fired boiler sited in the garage supplies the Property and the Annex with hot water. The central heating system is integral for the Property (including the Annex). Individual radiators have adjustable thermostats, but the thermostat control for the central heating system is located in the stairwell.

(5) Mr George stated that the intruder alarm system operates 'only in the main house'; that there is 'no operational sensor' in the Annex. It is unclear what 'no operational sensor' in the Annex meant, since it is evident from the photograph of Dividing Door from the Annex Lounge that there is (or was) a motion sensor to the top of the right-hand corner of the Dividing Door within the Annex Lounge. In re-examination, Mr George stated that the Dividing Door is lockable, and agreed that sliding bolts can be fitted to the Dividing Door for security and privacy.

(6) Mr George described the back garden as extending some 50 metres from the rear of the Property, and the boundary to the back garden is marked by a row of evergreen conifers, 5 of which are more than 20 metres tall, and interplanted with 6 or 7 smaller trees. From the row of conifers, the ground slops down to a row of 'public trees on the verge of the dual carriageway', which has two lanes on both sides of the road.

(7) In re-examination, Mr George was asked if he considered it realistic to let the Annex as AirB&B, and he replied in the affirmative.

LEGISLATIVE FRAMEWORK

18. The legislative framework for SDLT is largely contained in the Finance Act 2003, all references to sections and schedules are to that Act unless otherwise stated. The relevant sections for present purposes are the following:

(1) Section 55 provides for the applicable rates of SDLT, in accordance with the land transaction in question, for example, whether consists entirely of residential or non-residential property, whether it is a transaction in a number of linked transactions, or whether any relevant relief is due.

(2) Section 58D provides for the claim of relief in relation to transfers involving multiple dwellings to be in a land transaction return or an amendment of such a return. The amendment made to the appellants' SDLT return was pursuant to the para 6 of Sch 10, which provides that:

> '(1) The purchaser may amend a land transaction return given by him by notice to the Inland Revenue.
>
> (2) The notice must be in such form, and contain such information, as the Inland Revenue may require.
>
> (2A) If the effect of the amendment would be to entitle the purchaser to a repayment of tax, the notice must be accompanied by—

(a) the contract for the land transaction; and
(b) the instrument (if any) by which that transaction was effected.

(3) Except as otherwise provided, an amendment may not be made more than twelve months after the filing date.'

(3) Schedule 6B contains the provisions for MDR, and sub-para 2(2) states as follows:

'(2) A transaction is within this sub-paragraph if its main subject-matter consists of—

(a) an interest in at least two dwellings, or

(b) an interest in at least two dwellings and other property.'

(4) Schedule 6B para 4 provides for the calculation of the relief. There is no dispute between the parties in terms of the quantification of the relief.

(5) Schedule 6B para 7 defines '*What counts as a dwelling*', and sub-para 7(2) states:

'(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.'

(6) Section 83 provides for HMRC with the power in relation to the formal requirements as to assessments, penalty determinations etc, with further provisions in this respect being contained in Sch 10, and para 12 of Sch 10 provides:

12 Notice of enquiry

(1) The Inland Revenue may enquire into a land transaction return if they give notice of their intention to do so ("notice of enquiry")—

(a) to the purchaser,

(b) before the end of the enquiry period.

(2) The enquiry period is the period of nine months—
(a) after the filing date, if the return was delivered on or before that date;

(b) after the date on which the return was delivered, if the return was delivered after the filing date;

(c) after the date on which the amendment was made, if the return is amended under paragraph 6 (amendment by purchaser).

(7) Schedule 10 para 23 provides the completion of enquiry by way of a closure notice, and a closure notice takes effect when it is issued.

THE APPELLANT'S CASE

19. Mr Cannon, for the appellants, submits that the Annex is a separate dwelling within the meaning of para 7(2)(a) of Sch 6B, and the purchase of the Property was an acquisition of *two* dwellings for SDLT purposes and eligible for MDR.

20. Mr Cannon submits that the legal meaning of a dwelling is being '*suitable for use as a single dwelling*', and in the absence of any further statutory definition in the context of MDR, 'dwelling' must take its ordinary everyday meaning as a 'self-contained unit of residential accommodation that provides an occupier with the means for a private domestic existence by having its own means of lockable entry and exit, and living, sleeping, bathing facilities, or which is <u>suitable</u> for doing so' (emphasis original); that the definition should focus on whether the physical configuration of the Annex is suitable for an occupier to live privately and separately from the residential accommodation in the main dwelling.

21. While the respondents' case focuses on the absence of actual kitchen facilities in the Annex, there is no requirement in the legislation for a kitchen when considering whether there

is a separate dwelling. In any event, appliances could be placed in the Annex to enable the occupier to prepare and consume food, and to 'wash up' after the consumption of food. Given the 'paucity of the statutory definition of "dwelling" for MDR purposes', Mr Cannon submits that 'assistance can be derived from other contexts' such as:

(1) HMRC's SP1/04 entitled '*Stamp Duty Land Tax: Disadvantaged Area Relief*' (now archived as the relief has been withdrawn) at paragraph 17:

> 'Whether a building is suitable for use as a dwelling will depend upon the precise facts and circumstances. The simple removal of, for example, a bathroom suite or kitchen facilities will not be regarded as rendering a building unsuitable for use as a dwelling …'

(2) Case law definition of 'dwelling' in other legal contexts where the judicial reasoning is persuasive should be applied here:

(a) In *Uratemp Ventures Limited v Collins* [2001] UKHL 43, the House of Lords considered the effect of the lack of a kitchen area in defining the meaning of 'dwelling' for the purposes of s 1 of the Housing Act 1988 and concluded that: 'The presence or absence of cooking facilities in the part of the premises of which the tenant has exclusive occupation is not relevant.'

(b) In *Carson Contractors Limited v HMRC* [2015] UKFTT 0530 (TC), the tribunal in considering whether zero-rating was available to the conversion of a barn stated that: '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.'

(3) For council tax purposes, under s 3(5) of the Local Government Finance Act 1992, the Secretary of State can order what might otherwise be one dwelling to be treated as two or more, pursuant to provisions under article 3 of the Council Tax (Chargeable Dwellings) Order SI 1992/849:

> 'Where a single property contains more than one self-contained unit … the property shall be treated as comprising as many dwellings as there are such units included in it and each such unit shall be treated as a dwelling.'
>
> 'A building or part of a building which has been constructed or adapted for use as separate living accommodation' (definition for 'self-contained unit' under article 2).

(4) In the context of VAT, items 1, 2 and 3 of Group 5, Schedule 8 VATA 1994 provide for the zero rating of supplies in relation to a 'building designed as a dwelling or number of dwellings'. The interpretation of 'dwelling' is informed by note (2) and requires each dwelling to meet the following conditions: (a) the dwelling consists of self-contained living accommodation; (b) no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling.

(5) The qualifying test for a dwelling is more specific for VAT than for MDR and it relates to the phrase '*designed as a dwelling*' and refers to specific elements that constitute the dwelling. However, the VAT and MDR tests both seek to establish whether a building or part of a building can be used solely as a dwelling.

22. Mr Cannon makes detailed submissions on the design aspects of the Property:

(1) *Separating door* – a 'lockable' door was not a 'necessary condition' for a self-contained unit: *Jorgensen (LO) v Gomperts* [2006] EWHC (Admin) 1885, and was only a 'necessary pre-condition': *Ramdhun v Coll (LO)* [2014] EWHC 946 (Admin).

(2) *Shared utility meters* – in *Ramdhun* the valuation tribunal held that there was no requirement to have separate meters for there to be a dwelling for council tax purposes. In *Agudas Israel Housing Association Ltd* [2005] BVC 4029 held that residential units without their own 'separately monitored electricity supply' was not fatal to them being self-contained living accommodation for the purpose of VAT.

(3) *Kitchen facilities – Uratemp* supports the appellant's case that 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 Annex to allow food to be heated up. Appliances such as a hot plat, microwave, kettle or grill are 'readily available' and do not have to be 'fixed to enable an occupier to make use of them'.

(4) *Plumbing and electrical infrastructure in place* – the Annex has the necessary plumbing and electricity supply for an occupant to instal a kitchen sink and a food preparation area. The guidance at SDLTM00425 supports the appellant's case:

> 'It is not necessary for a kitchen to have a cooker or white goods … present at the effective date of the transaction, because these are sometimes removed on a house sale. However, there should be space and infrastructure in place e.g. plumbing for sink, power source for cooker etc.'

(5) *Access* – the Annex has its own means of entry and exit with its own key.

23. Mr Cannon submits that the test is about *suitability* for use rather than actual use at the effective date, which is the determinative test. The fact that the Annex is not separately occupied is neither here nor there. In terms of 'suitability', Mr Cannon emphasises that the absence of formal kitchen facilities is not determinative, 'particularly in the context of modern lifestyles' with meal delivery or ready-made meals for reheating becoming more common. Indeed, Mr Cannon refers to Katherine Whitehorn's *Cooking in a Bedsitter* (1961), which was a guide to cooking without a kitchen, and was a one-time bestseller.

HMRC'S CASE

24. In relation to the procedural aspect of the Closure Notice, Dr Schryber submits that the date of amendment was the date of receipt on 26 October 2018

(1) The letter from Relatus for the appellants to amend their return, while dated 10 September 2018, could not have been sent on that date, since the letter of authority signed by the appellants was dated 2 October 2018.

(2) It cannot be established when the letter was posted, though HMRC can confirm that it was received on 26 October 2018 as recorded on HMRC's Digital Mail Service.

(3) The enquiry was opened on 16 July 2019, and therefore within the time limit of 9 months after the date of amendment.

25. The respondents submit that for the purposes of MDR, the only relevant time was the EDT, and that the Property was only one single dwelling at EDT, of which the Annex formed a part. The purported Annex was not a separate single dwelling within the meaning of para 7(2)(a) Sch 6B due to the following factors.

(1) The purported annex does not have any kitchen facilities to make it suitable for independent day-to-day living. At EDT, there was no separate sink, no kitchen units or worktops for the preparation and storage of food.

(2) There was a lack of privacy and security between the purported annex and the rest of the Property.

(3) The purported annex can only be accessed from the outside by way of a circuitous route across the front, side and rear of the house, and this is not a practical design for two separate dwellings.

(4) The Property is plainly laid out as a single dwelling with access to the whole of the Property through the front door; the external access from the purported annex are patio doors into the rear garden.

(5) Internal access to the purported annex would have to be from the entrance hallway on the ground floor, which would compromise the security and privacy of both the occupants of the purported annex and occupants of the rest of the house, with the latter being subject to 'regular intrusion into their "dwelling" – wholly beyond their control – by the occupants of the purported annex and their guests.

26. Dr Schryber submits that it is the physical configuration of the Property on EDT which must be considered, and this should take into account the domestic facilities, access and privacy. Other factors such as no separate postal address, or council tax, or utilities meters are indicators that the Property was a single dwelling at EDT.

27. HMRC have relied on their published guidance (SDLT M00410-415, and 420) on what constitutes a single dwelling, and on *Fiander and Brower v HMRC* [2020] UKFTT 190 (TC) ('*Fiander FTT*'), in which the First-tier Tribunal set out at [27] the Explanatory Notes to Finance (No 3) Bill 2011 relevant to the introduction of MDR. Dr Schryber also provided by email after the hearing (on 28 January 2021) the url-links to two documents: (a) *Government response to the consultation on investment in the private rented sector* published by HM Treasury; and (b) *Explanatory notes on Finance (No. 3) Bill*.

THE APPELLANTS' POST-HEARING SUBMISSION

28. In response to HMRC's post-hearing correspondence, Relatus wrote on 29 January 2021 to highlight that HMRC's guidance on MDR of March 2016 was changed in November 2016; and that the latest guidance 'was issued to avoid the higher rate of SDLT applying to Annexes' (these being Relatus' words, not necessarily from the guidance). The url-link to access the House of Commons speech in which the amendments to the guidance were discussed by Mr Gauke and Sir Eric Pickles on 4 November 2016 at column 102 of *Hansard* was attached.

DISCUSSION

The issue for determination

29. The issue as concerns whether the enquiry was opened within the statutory time limit is referable to the date of the amendment to the SDLT return. The enquiry was opened on 16 July 2019, while the disclosure letter amending the return was dated 10 September 2018. HMRC's Digital Mail Service system registered the letter as received on 26 October 2018. The authority mandate was dated 2 October 2018 by the appellants. There is no challenge as to the date of receipt by HMRC being 26 October 2018. I find that the check into the amended return was opened within the statutory time limit of nine months as provided under para 12 Sch 10.

30. The closure notice assessment at £21,500 is based on the quantification of the relief as notified by Relatus. The parties agreed that the quantification of the relief is correct.

31. Consequently, the only issue for determination in this appeal is whether the so-called Annex was a 'single dwelling' for SDLT purposes at the date of completion for the transaction to qualify for MDR.

Statutory construction

32. The legal meaning of any statutory phrase or term is specific to its legislative context. For this reason, the meaning of 'dwelling' for MDR purposes must be derived within the

context of the SDLT code. Mr Cannon's submissions draw widely on the case law meaning of 'dwelling' in other legal contexts. However, the judicial formulations of 'dwelling' for the purposes of the Housing Act, Council tax regulations, or VAT, are of no direct relevance. While I have registered the chief tenor of Mr Cannon's submissions as set out above, the legal meanings of 'dwelling' drawn on are specific to their respective legislative frameworks, and do not inform the proper construction of the legal test for MDR purposes within the SDLT code. I have special regard that the legal test at para 7(2) is multi-factorial and encompasses facets other than the mere definition of 'dwelling'. The meaning of 'dwelling' falls to be construed in conjunction with 'suitable' and 'single' within the specific legal context of SDLT, which is a capital tax on chargeable transactions of a qualifying interest in land and buildings.

33. As to the references to extrinsic material in the form of Explanatory Notes or *Hansard* as an aid to statutory construction, I have adopted the *de bene esse* approach in hearing the parties' submissions. In my view, however, quite apart from the meta-issues involved[1], there is generally no good reason to import extrinsic material in aid of statutory construction. Judges are to interpret the statute proper, and Lord Hoffmann's observation at [40] in *Robinson v Secretary of State for Northern Ireland and others* [2002] All ER (D) 364 is instructive.

> 'I am not sure that it is sufficiently understood that it will (sic) very rare indeed for an Act of Parliament to be construed by the courts as meaning something different from what it would be understood to mean by a member of the public who was aware of all the material forming the background to its enactment but who was not privy to what had been said by individual members (including Minsters) during the debate in one or other House of Parliament. And if such a situation should arise, the House may have to consider the conceptual and constitutional difficulties which are discussed by my noble and learned friend Lord Steyn in his Hart Lecture ((2001) 21 Oxford Journal of Legal Studies 59) and were not in my view fully answered in *Pepper v Hart*.'

34. Both parties have cited HMRC manuals on SDLT in their submissions, but I have not founded my decision with reference to any part of these manuals. The purpose of these internal manuals is to guide HMRC officers, and do not inform the proper construction of the statute. Instead, I have the benefit of the decision released on 7 July 2021 by the Upper Tribunal in *Fiander and Brower v HMRC* [2021] UKUT 156 (TCC) ('*Fiander UT*'). Mr Cannon, who represented the taxpayers in *Fiander*, had informed me at the hearing that the Upper Tribunal had granted permission to appeal of *Fiander FTT*. It is opportune to wait for the release of *Fiander UT* before the issue of this decision. The guidance by the Upper Tribunal in relation to the application of the test in para 7 of Sch 6B is at [48] of *Fiander UT*, and reads as follows:

> '(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 use by adaptations or alterations. […] 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. […]

[1] The extra-judicial statement by Lord Steyn, given as the Hart Lecture at the University College, Oxford on 16 May 2000, was a closely reasoned criticism of the decision by the House of Lords in *Pepper v Hart* [1993] AC 593, on grounds both of principle and practicality. See also: (i) 'A Retreat from *Pepper v Hart*? A Reply to Lord Steyn' by Professor Stefan Vogenauer, (2005) 25 *Oxford Journal of Legal Studies*, 629; and (ii) 'Interpretation of Legislation in England: The Expanding Quest for Parliamentary Intention' by Roderick Munday, Cambridge, *The Rabel Journal of Comparative and International Private Law,* October 2011, Bd 75.

> (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 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 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.'

Whether 'suitable for use as a single dwelling'

35. The statutory wording for the test at para 7(2) Sch 6B is 'used or suitable for use as a single dwelling'. It is not disputed that the Annex was not used as a single dwelling at the effective date, and the relevant issue is therefore as regards its suitability for use as a single dwelling. Applying the principles in *Fiander UT*, I will address each criterion in turn in the following order: (i) the '*singlei*' criterion; (ii) the '*dwelling*' criterion; and (iii) the '*suitable*' criterion. The test at para 7(2) is multi-factorial; a degree of circularity inevitably follows when the three factors are considered separately in turn, as the findings for one criterion necessarily inform the findings for the next criterion. However, the merit in considering each criterion separately is that it helps to bring clarity to the specific factors relevant to the consideration of each criterion, thereby making the analysis of the factual matrix more systematic, and the reasoning easier to follow.

The 'single' criterion

36. Whether the Annex is suitable for use as a 'single' dwelling falls to be assessed by reference to its situation in relation to the rest of the Property; that is to say, the main dwelling. To an objective observer, the main physical attribute of the Property is its integral design to function as a dwelling for a family. The Property is finished to a high standard internally, with public rooms on the ground floor and bedrooms upstairs (excepting the Annex). The infrastructure of the Property, namely: the supply of utilities, the plumbing control of water mains, the boiler capacity, the centrally controlled heating system, the intruder alarm system, all point towards the Property (inclusive of the Annex) functioning as one single unit.

37. In terms of the access and approach to the Property, the layout reflects the design intention in safeguarding the privacy and security of its inhabitants. The Property is environed with extensive grounds in the front and back, with hedging, fencing, and rows of trees (private and public) which together ensure that the inhabitants of the Property could enjoy a high level of privacy. The dual carriageway with its embankment and rows of trees safeguards the rear access to the Property. The access to the inside of the Property is restricted to the main door entrance in the front, which leads to the hallway as the hub, giving access to different parts of the ground floor, and through the staircase to the upper storey.

38. It is in this hub that the internal access to the Annex can be gained. To an objective observer, the Dividing Door to the Annex is an internal door just like the other doors in the hallway, which leads separately to the Dining and Sitting Rooms. To be suitable as a separate and self-contained unit, the Annex would need to possess its independent means of access without intruding upon the territory of the main dwelling. To an objective observer, the Annex did not possess such an independent means of access. That the Dividing Door is lockable would not cure the defect that the Annex did not possess its independent means of access. The privacy and security of the main dwelling remains critically compromised by the extreme proximity of the Dividing Door to the living areas of the main dwelling (see §14(12)).

39. The very prospect of an occupant of the Annex having access at will through the Dividing Door would not only be a constant intrusion to the privacy of the occupants of the main dwelling, it would also pose a security risk to the inhabitants of the main dwelling, as the hallway leads directly to all the rooms on the ground floor and bedrooms via the staircase. The proximity of the Dividing Door to the various access points in the main dwelling renders it incompatible to regard the Annex as a self-contained unit suitable for occupants generally, other than for a particular type of occupant, such as a friend or a relative.

40. The alternative access to the Annex would be from the side gate near the garage, and across the full extent of the rear elevation of the main dwelling. The physical configuration of the main dwelling is such that all living areas are in the rear: from Family room, to kitchen to Dining and Sitting rooms, to Conservatory, all with windows to the rear. The Family room and Conservatory are prominent extensions, with patio doors for direct access into the back garden. An occupant accessing the Annex via its patio door would need to traverse the back garden, and would be in the visual orbit from these rear windows. The full glazing of the Conservatory, and its proximity to the patio door entrance of the Annex bedroom mean that there could be near to full view from either room of the occupants and their activities in the adjacent room. The privacy and security issues posed to the main dwelling are not resolved by the external access into the Annex. For these reason, the Annex was not a self-contained unit for occupants generally, other than for specific occupants related to the inhabitants of the main dwelling.

The 'dwelling' factor

41. For there to be a 'dwelling', the internal space has to provide the facilities to meet a range of basic domestic living needs of an occupant. The guidance at [48(2)] of *Fiander UT* specifies the basic needs as including 'the need to sleep and to attend to personal and hygiene needs', which were met at the effective date by the main physical attribute of the Annex with its principal room being the bedroom with en-suite facilities. The Upper Tribunal in *Fiander* left open the question as to the extent to which the basic needs of an occupant of the Annex necessarily include the need to prepare food. The question is to be dealt with if the issue is material in an appeal, such as in the present case.

42. I approach the question by noting that the term 'dwelling' in the SDLT context is the statutory term reserved for a subject-matter in a land transaction which is for *residential* purpose, (as distinct from 'non-residential' or commercial). A dwelling for residential purpose

encompasses a range of accommodation, from 'homes' as a place of abode with some degree of permanence, to 'lodgings' as a temporary place of sojourn. Given the quintessential character of a dwelling being residential, the presumption must be that the basic domestic needs of an occupant necessarily include the need to prepare food.

43. This presumption may be rebutted depending on the physical attributes of a particular type of 'dwelling'. The basis of rebuttal may be correlated, to some extent, with the reasonably expected duration of occupation for the type of accommodation in question. What is 'the reasonably expected duration' is adjudged from the perspective of an objective observer, not by the intention of a particular buyer or occupant. From the perspective of a reasonable person observing the physical attributes of the Property at the time of the transaction, the Annex is suitable for a specific type of occupant, such as a relative, or a guest to an inhabitant of the main dwelling (as found in relation to the 'single' criterion). On that basis, the expected duration of occupation of the Annex would be a short sojourn, in terms of days, or weeks, but not months. Due to the reasonably expected duration of occupation being short, the basic needs of the occupant of the Annex would not necessarily include the need to prepare food, on the premise that the Annex occupant would either be catered for by the occupants of the main dwelling, or be given leave to use the kitchen facilities of the main dwelling for the duration of stay, or a mixture of both.

44. The critical question as concerns whether the Annex was a 'dwelling' at the effective date is referential to whether the basic needs of its occupant necessarily include the need to prepare food, which is not to be adjudged by the presence or absence of a kitchen, (for that would be to beg the question). If the 'dwelling' criterion is considered separately on its own terms, the Annex was sufficient in meeting the basic needs of its occupant insofar as those needs were limited to sleeping and attending to personal hygiene. However, the very fact that the basic need to prepare food could be taken out of the Annex and be met by alternative arrangements is due to the Annex being suitable for use as a dwelling *only* by a particular type of occupant. Here lies the circularity of the multi-factorial test, in that the finding as concerns the 'single' criterion (i.e. not suitable for use by occupants generally) informs the finding as regards the 'dwelling' criterion. To an objective observer, the basic needs of an occupant of the Annex did not necessarily include the need to prepare food because the Annex was not suitable for use as a dwelling for occupants generally.

The 'suitable' criterion

45. Suitability for use as a single dwelling is to be assessed by reference to suitability for occupants generally. It has been suggested that the Annex was suitable for use as AirB&B accommodation. I accept that AirB&B accommodation would be for occupants generally and not for occupants specifically. To an objective observer, the basic needs of an occupant generally of AirB&B accommodation would include the need to prepare food.

46. The appellants would seem to agree that the suitability test would have to include the provision of kitchen facilities. Mr George spoke of the infrastructure for plumbing and waste being present for a kitchen to be fitted in the Annex lounge. However, such facts are irrelevant to the suitability test, which is referable solely to the state of the Annex at the effective date; the capacity or potential to have a fitted kitchen is not relevant.

47. Mr Cannon's submission by reference to Katherine Whitehorn's book is to say that the need to prepare food can be met not necessarily by means of a kitchen conventionally conceived. In my view, the context which befitted Whitehorn cooking in a bedsitter in the 1960s is distant in time and place to the facts of the present case. In the SDLT context, a dwelling is a subject-matter for conveyance under a contract of sale, where a purchasing conveyancer will be scrutinising the subject-matter, *inter alia*, for compliance with all aspects

of building regulations. It is in the conveyancing context as to whether a subject-matter can stand up to the description as comprising the necessary facilities to meet the need of food preparation that the suitability test is to be applied. How the accommodation arrangement of a bedsitter in the 1960s could enable food preparation to take place is irrelevant. At the effective date, to an objective observer, the Annex as conveyed could not stand up to any description as comprising facilities for food preparation which were compliant with regulatory standards.

48. For the appellants, it has also been argued that kitchen facilities could be readily provided by plugged-in appliances. I accept that kettle, fridge, hot-plate, microwave, and a host of kitchen gadgets powered by electricity can be quickly brought into use, but a functioning kitchen is more than the summation of electrical appliances and gadgetry. Water supply for cooking and washing up, a sink and hygienic surfaces for food preparation, waste drainage and disposal, ventilation and fumes extraction with ducting to the exterior, are other essential aspects of kitchen facilities, together with measures to comply with environmental and fire safety regulations. These essential aspects were absent at the effective date to provide the necessary facilities to meet the basic need of an occupant generally for food preparation. The Annex therefore did not meet the suitability test for use as a single dwelling, nor did it meet the 'single' and 'dwelling' criteria as related above at the effective date.

DISPOSITION

49. The appeal is accordingly dismissed. The Annex was not 'suitable for use as a single dwelling' at the effective date of the transaction for Multiple Dwellings Relief to apply.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 26 AUGUST 2021