Neutral Citation: [2024] UKFTT 00244 (TC)

Case Number: TC09113

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/01355

Stamp Duty Land Tax – multiple dwellings relief - process of being adapted – evidence of water and sewer pipes – no separate meters for utilities – no separate postal address – appeal dismissed

Heard on: 11 March 2023
Judgment date: 21 March 2024

Before

TRIBUNAL JUDGE ALASTAIR J RANKIN MBE

Between

YISROEL DREYFUS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Elliot Hirsch of Tourbillon Tax LLP

For the Respondents: Mr Christopher Thompson-Jones, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The form of the hearing with the consent of the parties was by video using the Tribunal video hearing system. The documents to which I was referred were an electronic Hearing Bundle containing 123 pages, HMRC's Statement of Case dated 11 August 2023, the Appellant's Statement of Case dated 20 February 2024, HMRC's Skeleton Argument dated 20 February 2024 and an electronic Supplementary Bundle containing 132 pages, the latter being emailed to me by Mr Thompson-Jones at the start of the hearing.

2. 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.

3. This was an appeal by the Appellant against a closure notice issued by HMRC on 16 September 2022 for £74,750.00 under paragraph 23 of Schedule 10 to the Finance Act 2003 ("FA 2003") in respect of a Stamp Duty Land Tax ("SDLT") return.

4. There were two preliminary matters for me to decide. First, the appeal should have been made by the Appellant within 30 days of HMRC's Review Conclusion letter dated 8 February 2023. The Appellant did not lodge his Notice of appeal to this Tribunal until 23 March 2023 which was 13 days late. However, HMRC did not object to the appeal proceeding and accordingly I gave permission for the Appellant to bring a late appeal.

5. Secondly, HMRC had applied to have the appeal struck out due to the Appellant's failure to comply with directions. The Appellant had been directed to submit his skeleton argument 21 days prior to the hearing – on or before 19 February. The Appellant actually filed his statement of case dated 20 February 2024 on 21 February 2024. As this was only two days late I decided that the appeal should proceed.

BACKGROUND

6. On 6 April 2016, the Appellant was appointed as a director of Triplets Estates Limited, holding 1 ordinary share with Malya Dreyfuss holding the remaining 1 ordinary share.

7. On 7 June 2021, the Appellant entered into a contract for the purchase of 60a Cranbourne Gardens, London, NW11 0JD ('the Property') and on the same date agreed a "key undertaking" document the stated purpose being to allow the Appellant to carry out building works to construct a self-contained unit at the property. This document was not signed by the vendor though nothing turned on this omission.

8. On 10 June 2021 the Appellant contacted Mr Khan of Castle Maintenance Ltd to carry out various tasks at the Property in accordance with the key undertaking document. E-mails were exchanged between the Appellant and the vendor, regarding the works to be carried out. The Appellant states that his intention was to open a doorway into the garage/bedroom and to take pipes from the existing toilet room into the garage/bedroom.

9. On or around 15 & 16 June 2021 Mr Kahn carried out the various tasks listed below and supplied an invoice (dated 23 June 2021) to Triplets Estates Ltd, which included the following:

- Removed the second window in the side passage.
- Removed the brickwork and plasterboard internally and externally.
- Supplied and fitted a new UPVC door in the new gap.
- Supplied and fitted new plasterboard to the new reveals.

- Skimmed the area.
- Painted the area to existing.
- Brought cold water supply pipe from the toiled behind
- Brought a soil pipe inside for waste.

10. On 22 June 2021, the Appellant purchased the Property for £1,800,000 and this was the effective date of the transaction ('EDT").

11. On 22 June 2021, the SDLT Return was submitted on the EDT with the property identified as being of type '01' - residential (not including additional residential properties)'. MDR was claimed and the total amount due for this consideration was £40,000.00.

12. On 24 June 2021, W&CF Ltd supplied two estimated invoices for (1) the supply of laminate, fibreboard and beading and (2) the fitting of laminate and disposal of current flooring. There was no reference to the date that any fitting would be undertaken.

13. On 28 June 2021, the Appellant contacted a "Shragi Present Current" regarding whether "the house be open tomorrow morning". This was an arrangement for someone to attend the Property on Tuesday 29 June 2021 for floor fitting which continued until at least 1 July 2021.

14. On or around September 2021, the Appellant asserted that All Care Maintenance Limited was instructed to provide an estimate for further works following a disagreement with Mr Kahn. No documentary evidence was supplied to support this assertion.

15. On 10 March 2022, HMRC issued a notice of enquiry under Paragraph 12, Schedule 10 of the Finance Act 2003. The enquiry was opened within the prescribed legislative time frame.

16. On 17 May 2022, the Appellant's representative confirmed receipt of the notice of enquiry.

17. On 16 September 2022, HMRC issued a closure notice under Paragraph 23, Schedule 10 to the FA 2003. It was concluded that the Appellant was not entitled to claim MDR with the correct amount due being £114,750.00 – a difference of £74,750.00.

18. On 14 October 2022, the Appellant's representative appealed the decision, and HMRC subsequently issued their view of the matter.

19. On 8 February 2023, HMRC issued its statutory review conclusion letter upholding the conclusions reached in the closure notice.

20. On 23 March 2023, the Appellant filed his notice of appeal with this Tribunal, which was 13 days late.

21. The burden of proof lies with the Appellant that he was overcharged by the closure notice and that MDR is applicable pursuant to paragraph 21(2)(a) of Schedule 6B to FA 2003. The standard of proof is the ordinary civil test on a balance of probabilities.

WRITTEN ARGUMENTS ON BEHALF OF THE APPELLANT

22. On 7 June 2021, the same day as contracts were exchanged, the Appellant signed the Key Undertaking document whose purpose was:

> "To use the key for the purpose of entering the property for the purpose of carrying out building works to construct a self contained unit at the Property distinct from the house such works to include, structural and non-structural alterations including any electrical and plumbing works necessary."

23. The Appellant maintains that the Property in its current configuration includes two self-contained dwellings and in his Statement of Case maintains that each dwelling is fully self contained and include all the amenities required for everyday living – "bedroom, kitchen, bathroom, living area and storage space" and that each dwelling has its own supply of electricity and gas which can be used independently of the other dwelling.

24. The annex, the description used by the Appellant for the former garage, has a side door allowing for access from the outside. This is the door described as UPVC at paragraph 9 above. There is an outside gate preventing the occupier of the annex accessing the rear garden thus preserving the privacy of the main house. There is also an internal door between the annex and the main house which the Appellant claims is locked from both sides and provides privacy for both the main house and the annex.

25. The Appellant maintained that it was not necessary to obtain planning permission for the "minor internal conversion that does not affect the exterior of the house". He also referred to the Chancellor's 2023 Autumn Statement concerning a consultation on new permitted development rights for subdividing houses into two flats and presumed that this would include retrospective validation.

26. The Appellant had from the outset the intention of constructing a self-contained dwelling with the Key Undertaking and messages to his builder demonstrating his intention. The legislation did not require the works to be completed prior to EDT, merely to be in the process of being constructed.

WRITTEN ARGUMENTS ON BEHALF OF HMRC

27. The law on SDLT is mainly set out in Part 4 of FA 2003 with SDLT charged on a 'land transaction' under Section 42 of FA 2003. This means any acquisition of a 'chargeable interest' under Section 43 of FA 2003, provided it is not a transaction that is exempt from charge.

28. Section 55 of FA 2003 sets out the applicable amount of SDLT payable if the 'relevant land' consists entirely of "residential property" (Table A) or if the relevant land consists of or includes land that is "non-residential" property (Table B). The rates in Table A are higher than those in Table B. Section 55(1B) FA 2003 sets out the steps and rates applicable if the transaction is not one of a number of linked transactions, as in the present appeal, and the tax due is calculated as follows:

Relevant consideration	**Percentage**	**SDLT Due**
Up to £500,000	0%	£0
Above £500,000 and up to £925,000	5%	£21,250
Above £925,000 and up to £1,500,000	10%	£57,500
Above £1,500,000	12%	£36,000
Total SDLT due		**£114,750**

29. Schedule 6B provides for relief in the case of transactions involving multiple dwellings. This schedule applies, inter alia, to a chargeable transaction if its main subject-matter consists of an interest in at least two dwellings. MDR applies to this transaction as it falls within Paragraph 2(2).

30. The focus of this appeal is a transaction within Paragraph 2(2) and more specifically sub-paragraph (a):

"(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."

31. Paragraph 7 explains 'what counts as a dwelling' and the relevant part is:

"(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."

32. In order to claim MDR, HMRC submitted that the Appellant would need to demonstrate that, at the time of completion, the transaction consisted of an interest in at least two dwellings.

33. SDLT is a tax imposed on transactions that include the transfer of a chargeable interest in land. In *Ladson Preston (1) and Aka Developments Greenview Ltd (2) and The Commissioners for His Majesty's Revenue and Customs* [2022] UKUT 00301 (TCC) the Upper Tribunal said:

"30…. However the architecture of the tax suggests that it is intended to be capable of straight forward application with liability not depending on a detailed factual enquiry on matters that might be uncertain, such as relevant persons' subjective intentions as to the future use of the land. …

32…. In our judgment it is significant that the relevant question on which availability of MDR depends involves an examination of the nature of the chargeable interest that is acquired."

34. *Ladson Preston* provides instructive authority on the application of Paragraph 7(2)(b). The facts of this case concerned the grant of planning permission, but no actual construction of a building had commenced; the focus was on "being constructed". There had been digging of bore holes at the site, but they were there to test the ground rather than form part of the building. The Upper Tribunal concluded that, at the time of completion, there was no building in the process of being constructed and therefore no relief was due.

35. The Upper Tribunal considered that a physical manifestation of a dwelling is required:

"38 When paragraph 7(2)(b) is considered in its proper context, there is a clear indication that it is referring to some physical manifestation of a dwelling on the relevant land. The most obvious indication comes from the use of the word "building". We agree, of course, that paragraph 7(2)(b) does not require that there be a completed building since it is concerned with buildings that are in the "process of being constructed". However, in our judgment, a "building" can only be said to be "in the process of being constructed" if there is some physical manifestation of what is ultimately to become that "building". Without such a physical manifestation, there might well be an intention to construct a future building, perhaps even a firm intention, but no building that is in the process of being constructed."

36. In *Keith Fiander and Samantha Brower v The Commissioners for Her Majesty's Revenue and Customs* [2022] UKUT 0156 (TCC) the Upper Tribunal said:

*"*48…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…"

37. HMRC submitted that the evaluative assessment, per *Fiander and Brower*, is also applicable to cases under Paragraph 7(2)(b) in order to determine the physical attributes of the property at the time of completion. This would be an analysis of all the facilities that occupants generally would need for domestic living (i.e. living space, kitchen, bathroom, privacy and security). HMRC submitted that the relevant legislation and case law provide the following principles:

a. There is an objective assessment of all the relevant factors.

b. The test must be determined from the perspective of a reasonable objective observer, observing the physical attributes of the property at the time of completion.

c. Suitability for use as a single dwelling is to be assessed by reference to suitability for occupants generally.

d. The test in Paragraph 7(2)(b) is to be applied at the time of completion.

e. There must be a physical manifestation of the construction or adaptation.

f. The "process of…" should demonstrate that the end result will be an independent and separate dwelling. This may be by reference to plans, architects drawing or works that are at such an advanced stage that it is clear the end result will be a single dwelling.

g. Preliminary works or preparatory works are those prior to the physical manifestation. On their own, the ordering of products or materials, the production of drawings or plans or the scheduling of works are not sufficient to satisfy Paragraph 7(2)(b); these alone are too abstract.

38. Although it is not binding, HMRC has issued guidance, SDLTM00420 and SDLTM00430, on the kind of features they would expect to find in a dwelling, namely: basic living facilities, independent entrances, and privacy.

39. The Appellant has asserted that the annex, as currently configured, has all of the amenities required for independent living and is separate from the main house. Further, in relation to Paragraph 7(2)(b), the Appellant has asserted they intended for the annex to be "proper and lettable".

40. HMRC asserted that the following works were carried out prior to completion, namely:

a. Construction of an entry door to the outside.

b. Inserting new holes, adding electricity cables and water pipes.

HMRC submitted that the works carried out prior to completion were nominal and did not demonstrate that the end result would be a single dwelling. Nevertheless, the currently configured "annex" is not sufficiently independent of the main house and would fail the 'objective observer' test. The main item of evidence is the invoice from Castle Maintenance dated 23 June 2021.

41. HMRC understands that the "annex" was principally an empty room with no bathroom, kitchen facilities or a living space (bedroom/living room) for an occupant to use. There was only an external UPVC door, water pipes and a soil pipe in place for the kitchen area with no architects plans or other drawings in support.

42. In *Jonathan Ralph v The Commissioners for Her Majesty's Revenue and Customs* [2023] UKFTT 901 (TC) the First-tier Tribunal said:

> "82. However, the reasonable observer would consider the following features to indicate the Annex was not suitable for use as a dwelling:
>
> (1) the Annex did not have any equipment or identifiable area for the preparation, eating or storage of food, that is no work surfaces, kitchen units, tables or chairs;
>
> (2) there was no high-power electrical connections for installing a cooker, oven or hob;
>
> (3) there was no sink in the main room for washing food, crockery, cooking equipment and so on;
>
> (4) there was no plumbing for installing a washing machine or dishwasher;
>
> (5) it did not have its own separate utility meters, postal address, title number at Land Registry or Council Tax billing
>
> (6) the Annex is not separately registered for Council Tax
>
> (7) overall, given its location on the estate, not being separated from the main house, gardens and other outbuildings at the Property and without separate utility meters we find it unlikely the Annex could be sold to third party purchaser.
>
> 83. In our view a reasonable observer would consider the presence of kitchen facilities - being those features listed at paragraph 82(1)-(4) above - as an important factor in determining whether the Annex suitable for use as a dwelling.
>
> 87. Nevertheless, the main room in the Annex was essentially empty at completion. Aside from lights in the ceiling, normal power points and central heating radiators there were no other electrical or plumbing connections. Without carrying out works, an occupier could not connect and use a conventional cooker, oven, hob, washing machine or dishwasher. Further without carrying out plumbing works, an occupier could not install a sink for washing food and dishes"

43. There was a long delay between the EDT and the finalising of the remaining works. HMRC submitted that the end result of the "annex" would be wholly reliant on the main house for the supply of utilities or services, is missing crucial domestic facilities and/or has security and privacy issues, namely:

a. The water supply to the kitchen is derived from the downstairs toilet in the main house.
b. The kitchen has no space for the inclusion of a washing machine and/or dishwasher.
c. There is no evidence that there is a separate postal address, Land Registry registration or Council Tax billing nor is there evidence that the utilities are separated from the main house. This is a reliable indicator that the "annex" was not suitable for use as a dwelling.
d. The "annex" is reliant on the main house for any gas or electrical supplies.
e. There was no physical manifestation of bathroom facilities and/or any supply of water would be derived from the main house.
f. There is no evidence that an internal lockable door was present at the time of completion.

g. The “annex” is merely another room within the main house and must utilise a shared access way through the property’s front driveway and/or side passage. This impedes an occupier’s privacy and security.

44. HMRC submitted that the documentary evidence and the Appellant’s witness statement have failed to demonstrate:

a. That any plans, drawings or other evidence would indicate a separate dwelling with all of the facilities that occupants generally would need for domestic living.
b. The proposed kitchen had adequate space and infrastructure for a washing machine and/or dish washer.
c. There was an independent supply of hot and cold water to the kitchen and bathroom.
d. There was an independent and separately billed supply of gas, electricity, Council Tax and/or other services to the “annex”.
e. There was an internal lockable door at the time of completion which prevented access to the main house and vice versa.
f. The “annex” had sufficient sound and fire proofing for the occupant’s safety.
g. The “annex” is compliant with local planning requirements and building regulations to convert the garage into a habitable space.

EVIDENCE AT THE HEARING

44. Unfortunately, the Appellant was unable to attend. Mr Hirsch informed the Tribunal that he was confined to bed. HMRC were aware that he would not be attending when they submitted their skeleton argument dated 26 February. The Tribunal therefore had to rely on the information provided by Mr Hirsch which were often unconvincing.

45. Mr Hirsch informed the Tribunal that one of the aspects of the Property which attracted Mr Dreyfuss was the possibility of converting the existing bedroom/study to a self-contained unit which would provide some income to assist towards payment of his mortgage. Although the Appellant provided a witness statement dated 23 December 2023 he did not state when the works were completed. Mr Hirsch was unable to confirm when the works had been completed – he thought probably towards the end of 2021 or early 2022. However, he confirmed the property has never been let.

46. Mr Hirsch was unable to confirm where the water for the bathroom came from nor could he confirm that there was an extractor fan although the Tribunal thought it possible that a white box high up in the bathroom wall behind the garage door might be an extractor fan though this would possibly pass through the external garage door which is still in place – the bathroom wall behind the garage door having been built by a previous owner when converting the garage to a study/bedroom but leaving the external garage door in place.

47. No evidence was provided to indicate that the water supply or the electricity supply were being metered separately from the main house. Mr Hirsch suggested the utility bills would simply be apportioned.

48. Mr Hirsch suggested that the measurements on the plan which was part of the sales brochure were wrong. The plan indicated the room measured 4.77m by 2.29m or 10.92 square meters whereas he said the area was about 12 square meters. No evidence was produced to support this claim.

49. The Tribunal queried why the sewer pipe in the photographs showing the sewer pipe, water pipe and possible electric cable was not in fact required as the toilet was ultimately installed at the other end of the annex.

50. HMRC referred the Tribunal to an extract from the Planning Portal headed "Garage conversion" which stated that:

> "The conversion of a garage, or part of a garage, into habitable space will normally require approval under the Building Regulations.
>
> …
>
> Planning permission is not usually required, providing the work is internal and does not involve enlarging the building.
>
> If your intention is to convert a garage into a separate house (regardless of who will occupy it), then planning permission may be required no matter what work is involved. We advise that you discuss such proposals with your Local Planning Authority to ensure that any work you do is lawful and correctly permissioned.
>
> ….
>
> Sometimes permitted development rights have been removed from some properties with regard to garage conversions and therefore you should contact your local planning authority before proceeding, particularly if you live on a new housing development or in a conservation area. Where work is proposed to a listed building, listed building consent may be required."

DISCUSSION AND DECISION

51. Both parties agreed that the appeal centred around the interpretation of paragraph 7(2)(b):

> "it is in the process of being constructed or adapted for such use."

52. It was unfortunate that the Appellant was unable to be present. On the evidence before the Tribunal some initial work was carried out between the exchange of contracts on 7 June 2021 and completion on 22 June 2021. These works were the conversion of a window to an external door – possibly this window had previously been a door before the garage was converted to a study/bedroom. A soil pipe and a cold water pipe were inserted and possibly an electricity cable. After completion a new floor was laid but the work of installing the kitchen units and partitioning the bathroom from the rest of the room were not carried out for several months partly because the Appellant fell out with the original builder over the cost.

53. While the Tribunal was shown photographs of the internal door, there was insufficient evidence to show that this door could be locked on both sides which would be a requirement for the annex to be an independent property.

54. At first Mr Hirsch thought the fridge/freezer was situated below the kitchen sink. The Tribunal queried this as there was very little room below the sink. Mr Hirsch then thought the fridge/freezer was situated at the other end of the kitchen units behind the internal door but it did not appear in any of the photographs before the Tribunal. The Tribunal accepts that it is not necessary for the annex to have a washing machine and a dishwasher but I do believe a fridge is a necessary part of a separate annex. The Tribunal notes that over two years after the work had been completed there was no sign of a fridge in the annex.

55. It is possible the previous owner obtained planning permission and building control approval when converting the garage to a study/bedroom. The Appellant's solicitor should have queried this when acting in the purchase of the property. No evidence of either planning or building control approval was produced and the Tribunal queries whether such approval would have been forthcoming when the garage door remained and simply an inner wall built behind it.

56. The Tribunal considers that for the annex to be considered a separate unit there would need to be separate meters for both water and electricity. The Appellant would not be pleased if a tenant decided to leave the taps running all night and the electric radiator running 24 hours a day all year round.

57. The Tribunal notes the requirement of Paragraph 7(2)(a) that the building is" used or suitable for use as a single dwelling". For the following reasons the Tribunal has decided that the annex is not usable as a single dwelling:

a. The water supply is derived from the downstairs toilet area of the main house without a meter measuring the amount of water used by the annex.

b. The electricity is sourced from the main house again without any meter measuring the amount of electricity used by the annex.

c. No evidence was produced to show the annex had a separate postal address or Council Tax billing.

d. Insufficient evidence was produced to show that the internal door could be locked from both sides. In other words there was insufficient evidence to show that the Appellant living in the main house and the occupier of the annex both had to unlock the door before it could be opened.

e. There was no evidence of either planning permission or building control approval. While neither of these may be necessary the Appellant failed to prove that they were not necessary.

f. The original intention of the Appellant was to create an annex which he could let to provide income to assist with his mortgage. Mr Hirsch claimed the Appellant's circumstances may have changed in the interim but again no evidence was forthcoming to support this claim yet during the two years after the work was completed there were no tenants.

g. While paragraph 7(2)(b) of Schedule 6B allows for a building to count as a dwelling if it is in the process of being constructed or adapted for use the minimal work referred to in paragraph 40 above does not provide sufficient evidence of construction or adaptation especially when the sewer pipe was not in the end used as the toilet was ultimately installed at the other end of the annex.

h. While the legislation does not state construction or adaptation work must be completed within a specified time, it took the Appellant at least six months to complete the relatively simple work.

58. In reaching the conclusion that the annex is not usable as a single dwelling the Tribunal is following the guidance given by the Upper Tribunal in *Ladson Preston* and *Fiander and Brower* and also the First-tier decision in *Ralph.*

59. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

60. 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.

ALASTAIR J RANKIN MBE
TRIBUNAL JUDGE

Release date: 21st MARCH 2024