[2018] UKUT 66 (TCC)
Appeal number: UT/2016/0238

VAT – zero-rating -sale of part of building designed as a dwelling-whether requirement for statutory planning consent satisfied at time of sale- VATA 1994 schedule 8 group 5 Note (2)-whether fresh evidence should be admitted on appeal-no-appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CAVENDISH GREEN LIMITED **Appellant**

- and -

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

TRIBUNAL: Mr Justice Snowden
Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 23 February 2018.

Mr Christiaan Zwart, Counsel, for the Appellant

Ms Joanna Vicary, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant ("Cavendish Green") appeals against a decision of the First-tier Tribunal ("FTT") (Judge Marilyn McKeever and Dr Caroline Small) released on 5 September 2016 ("the Decision") which recorded the FTT's dismissal of Cavendish Green's appeal against a Notice of Assessment in the sum of £12,851.98 issued against Cavendish Green for the VAT period ending November 2012.

2. The appeal to the FTT concerned whether the supply constituted by the sale of a development site in the St George's Hill Estate in Weybridge, Surrey was to be zero-rated for VAT purposes as a consequence of the application of the provisions of Group 5 in Schedule 8 to the Value Added Tax Act 1994 (VATA) ("Group 5"). In summary, those provisions state, among other things, that a first grant (including an assignment) by a person "constructing a building designed as a dwelling, of a major interest in, or any part of, the building or its site" is to be zero rated, subject to compliance with certain other conditions.

3. There were two issues in dispute. First, could Cavendish Green be said to be "constructing a building designed as a dwelling" when at the time of sale, the only part of the development which had been constructed was a garden wall. Secondly, if the first issue was decided in Cavendish Green's favour, was the condition in Note 2(d) to Group 5 satisfied? That condition requires that "statutory planning consent has been granted in respect of that dwelling and its… construction has been carried out in accordance with that consent".

4. On the first issue, the FTT decided that in considering what is comprised in a "building designed as a dwelling" one can look at the entirety of the buildings and constructions which are an integral part of the dwelling as a whole, which can include a garden wall. The FTT found that the garden wall was an integral part of the overall design, that at date of the sale it had been built above its foundations, and accordingly there was a building designed as a dwelling in the course of construction at the relevant date for the purposes of Group 5.

5. On the second issue, the FTT found that there was no express planning consent in respect of the wall at the time of supply. It also found that there was no statutory planning consent. This issue raised the proper interpretation of Article 3 (1) of The Town and Country Planning (General Permitted Development) Order 1995 ("the 1995 Order") and Part 2 of Schedule 2 of the 1995 Order, Class A of which ("Class A") grants planning permission, among other things, for the "erection…of a…wall or other means of enclosure." However, pursuant to sub-paragraph A.1(b) of Part 2 of Schedule 2, development is not permitted by Class A if "the height of any…wall or means of enclosure erected or constructed would exceed 2 metres above ground level."

6. The FTT interpreted sub-paragraph A.1(b) to refer to the intended height of the wall when completed, and found on the facts that it was intended that the garden wall at the property would, when completed, exceed 2 metres in height. Accordingly, it held that the erection of the wall was not at any time permitted by Class A. The FTT went on to find that even if it was wrong on the question of interpretation, and that the wall's construction was therefore permitted by Class A at the outset and for so long as it did not exceed 2 metres in height, on the facts the wall had been completed and that its height materially exceeded 2 metres at 31 May 2012, the date of the sale, and so it was not permitted under Class A at the relevant time. Accordingly, the appeal was dismissed.

7. There has been no cross-appeal by HMRC against the FTT's decision on the first issue. However, on 3 March 2017, following an oral hearing, Judge Berner granted permission to Cavendish Green to appeal in respect of the second issue. The following grounds of appeal were then filed:

> (1) the FTT erred in interpreting the statutory planning consent to mean that the developer's prior anticipated design of the wall to be materially above 2 metres precluded the site from benefiting from the relevant statutory planning consent; and/or
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> (2) the FTT erred in concluding that the height of the wall materially exceeded 2 metres on the date of the supply.

8. In support of these grounds, Cavendish Green contended, in relation to Ground 1, that the subjective intention of a developer is irrelevant to the interpretation of a statutory planning consent because, being a public document, such intention can play no part. In relation to Ground 2, Cavendish Green contended that the FTT's conclusion was an irrational conclusion, (as in, based on no evidence), or was reached without regard to relevant other evidence before the FTT which was said to show that on the date of sale the wall had not been completed but was only 2 metres high and thus within the scope of the statutory planning consent.

9. In response, HMRC contend that the use of the word "would" in sub-paragraph (b) of Class 1A demonstrates that a wall designed to exceed 2 metres at completion would not benefit from Class A planning permission. In any event, HMRC contend that the FTT's finding that the wall was fully completed at the time of the sale and exceeded 2 metres in height was open to it on the evidence.

The proceedings before the FTT

10. Cavendish Green's Notice of Appeal demonstrates that its case for the application of Group 5 was based on it having "commenced the construction of a new dwelling on the site" and the contention that HMRC should have accepted that the sale on 31 May 2012 was that of "a partly constructed residential property and therefore zero rated." It contended that the construction of the garden wall was part of the overall construction of new dwelling and attracted a zero rating.

11. As is clear from HMRC's Statement of Case filed in the FTT proceedings, HMRC's primary case was that construction of boundary walls does not constitute proof that the building was under construction. HMRC did not seek, at that stage, to make any case based on the height of the garden wall or the lack of any express or statutory planning permission. Its case was that at the time of the sale it was unlikely that construction of the walls of the dwelling (as opposed to the boundary walls) had proceeded above ground level.

12. Mr Chris Pettie, a director of Igloo Developments (South) Ltd, the main contractors to Cavendish Green on the development of the site, filed a witness statement on which he was cross-examined at the hearing before the FTT. His witness statement referred to the express planning permission previously obtained for the building of the house on the site and made no mention of any statutory planning permission in relation to the wall. His only reference to the construction of the wall was that in addition to reusing bricks already on site, it was necessary to purchase an additional 6,500 bricks of which "a large portion we used on the boundary wall."

13. There was some documentary evidence before the FTT as to the intended height of the wall and the state of its construction at the time of the sale of the site on 31 May 2012.

14. The FTT had before it a party wall agreement, plans and an architect's drawing of a section of the wall which showed the intended height of the boundary wall to be 2.738 metres high above ground level with a further 0.450m below ground level, giving a total height of 3.188m.

15. During HMRC's investigations which led up to the issue of the Notice of Assessment, HMRC had separately written to Igloo asking it to "provide photos of the site at the time of the sale" and to Cavendish Green to provide "evidence to show the state of the land at the time the land was sold.". Expressly responding to both those letters, on 15 May 2014 Cavendish Green wrote to HMRC confirming that as at the completion of the sale on 31 May 2012, work was well underway to construct the new residential property and work had been done to the adjoining party walls. Cavendish Green's letter stated that it attached "some photographs as requested". Those photographs showed a construction worker standing in front of a fully completed wall which was clearly in excess of 2 metres in height.

16. There was also before the FTT a copy of the sales invoice dated 21 March 2012 in relation to the bricks referred to in Mr Pettie's witness statement which showed the delivery of bricks having taken place on 13 March 2012.

17. In addition, the FTT had a copy of a subsequent invoice dated 13 June 2012 ("the June 2012 Invoice") which related to construction work done on the site by a subcontractor to Igloo Developments. Attached to that invoice was a schedule showing a breakdown of the work undertaken and a schedule of variations. Item 6 on that schedule was described as "Garden Wall" and shown as valued to 100% of completion. Item 12 on that schedule was described as "Additional height" and shown as valued to 0% of completion.

18. At [29] of its Decision, the FTT made express reference to item 6 on the schedule of variations and recorded that "Mr Pettie's evidence also indicated that the wall was complete by the time of the sale." In submission, Mr. Zwart told us that he surmised that this was a reference to an answer given to the FTT at the hearing by Mr Pettie whilst being asked questions about the schedule of variations in the context of the issue of whether construction of the wall had progressed beyond ground level at the date of sale. Mr. Zwart submitted that Mr. Pettie's evidence had been misconstrued by the FTT.

19. On the basis of these references, the FTT made an express finding of fact at [30] of the Decision that the wall had been completed as at 31 May 2012. The FTT did not refer in its Decision to item 12 in the schedule of variations or to the correspondence between Cavendish Green and HMRC and the photographs.

20. On appeal, Cavendish Green contends that the FTT failed to take account of the "additional height" item 12 in the schedule of variations. It contends that the FTT should have appreciated that item 6 in that schedule only related to the height of the wall up to the maximum 2 metres allowed by the statutory planning consent (which was 100% completed as at 31 May 2012); but that item 12 related to the additional height up to the agreed level that was only intended to be added after a specific application for planning permission had been made and permission granted (that application was made in July 2012 and granted retrospectively).

21. Mr. Zwart also contends that the FTT misunderstood his submissions and erroneously recorded at [122] of the Decision that "at the hearing, he sought to persuade us, and did persuade us, that the wall was fully completed at the time of sale, i.e. at that time, it had reached its full height of over two metres." Mr Zwart told us that his submissions at the hearing focussed on the issue of whether construction of the wall had advanced beyond ground level and not whether it had been completed at the time of sale.

22. Mr. Zwart's account of the focus of the hearing on 19 May 2016 is consistent with the fact that the FTT subsequently gave directions on 3 June 2016 for written submissions to be made regarding the planning permission for the boundary wall. The FTT stated that the question for written submissions was whether the retrospective planning permission granted in respect of the wall was sufficient to enable Cavendish Green to satisfy Note 2 (d) to Group 5.

23. In its written directions seeking further submissions, the FTT referred to the evidence previously before it that an application for a retrospective planning permission for the wall had been made on 9 July 2012 which stated that the works were started on 28 May 2012 and completed on 4 July 2012. The FTT then clearly stated its understanding of the evidence that it had heard at the hearing:

> "We heard evidence at the hearing that the construction of the wall began before this date and had been completed at the time of sale."

24. The FTT gave the parties liberty to apply for its directions to be amended, suspended or set aside or to apply for further directions.

25. In his written submissions to the FTT in response to these directions, Mr Zwart referred to the June 2012 Invoice and the schedule referred to at [17] above stating:

> "…Item 6 "Garden Wall" shown as "100% complete" when "valued to 1 June 2012" necessarily infers that extent of Garden Wall had (by the end of May 2012) actually been erected (consistent with wall construction ongoing from about the end of April 2012)".

Mr. Zwart made no reference in his written submissions to item 12 of the schedule of variations and did not suggest that the reference to "additional height" had any significance.

26. Although Mr. Zwart's written submissions later accepted that from the date that the wall had reached sufficient height to have materially exceeded 2 metres it would have fallen outside the terms of Class A, again he made no reference to item 12 of the schedule of variations nor any clear submission as to when any height over 2 metres might have been reached. Instead, his summary of the evidence also simply referred to the builder's valuation to 1 June 2012 valuing "the then Garden wall as 100% complete". His final conclusion on the facts was simply,

> "The overall evidence shows that there was actually present some substantial form of garden wall (even if then part completed or not a hundred percent finished) and standing on the pre-existing foundations as at 31 May 2012 and that, for VAT purposes, no more is required."

27. Unsurprisingly, HMRC's written submissions to the FTT were made on the basis that the wall had been completed by 31 May 2012.

Issues on this appeal

28. It was accepted by Mr Zwart that if we were to find against Cavendish Green on the second ground of appeal then this appeal must fail. If the FTT's finding that the wall had been fully completed and had exceeded 2 metres in height at the time of the sale of the site stands, then inevitably there was no lawful planning permission in place at the time of the sale, with the result that Condition 2 (d) in Group 5 was not satisfied and accordingly the supply cannot be zero rated.

29. We shall therefore consider Ground 2 before Ground 1 but before doing so will turn to the question as to whether we should permit Cavendish Green to adduce fresh evidence on appeal.

Admission of fresh evidence: relevant law

30. The power for the Upper Tribunal to admit fresh evidence on appeal derives from Rule 15 of The Tribunal Procedure (Upper Tribunal) Rules 2008. Rule 15(2) provides:

"(2) The Upper Tribunal may –

(a) admit evidence whether or not -

(i) the evidence would be admissible in a civil trial in the United Kingdom; or

(ii) the evidence was available to a previous decision maker; or

(b) exclude evidence that would otherwise be admissible where –

(i) the evidence was not provided within the time allowed by a direction or a practice direction;

(ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or

(iii) it would otherwise be unfair to admit the evidence."

31. The Tribunal must exercise any discretion under Rule 15 with regard to the overriding objective in Rule 2 of the Upper Tribunal Rules to deal with cases "fairly and justly". Rule 2(2) states that dealing with the case fairly and justly includes, among other things, dealing with the case in ways that are proportionate, avoiding unnecessary formality, and avoiding delay, so far as compatible with proper consideration of the issues.

32. The principles to be applied in exercising this discretion were considered recently by this Tribunal in *Bramley Ferry Supplies Ltd v HMRC* [2017] UKUT 0214 (TCC). In particular, the Tribunal considered the extent to which the well-known principles laid down by the Court of Appeal in *Ladd v Marshall* [1954] 1 WLR 1489 are applicable when considering the application of Rule 15 and the overriding objective. The Tribunal said this at [20] to [23] of its decision:

"20. …. we should refer to one particular issue that was presented in argument, namely the relevance of the criteria for the admission of new evidence set out in the decision of the Court of Appeal in *Ladd v. Marshall* [1954] 1 WLR 1489.

21. In *Ladd v. Marshall*, Denning LJ, as he then was, set out three conditions that should be fulfilled to justify the admission of new evidence when he said (at page 1491):

"…first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

> 22. Given the rather different context of the Upper Tribunal Rules, we accept the points raised by Mr Bedenham that we should not apply the criteria in *Ladd v. Marshall* as strict rules in the exercise of our discretion as to whether to admit new evidence. The principle governing the exercise our discretion under Rule 15(2) must be that we should deal with cases fairly and justly in accordance with the overriding objective. That requires us to take into account all of the circumstances of the case.
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> 23. That having been said, the *Ladd v Marshall* criteria are not irrelevant. We agree with the Tribunal in *Reed Employment* that the *Ladd v. Marshall* criteria are of "persuasive authority as to how to give effect to the overriding objective": see *Reed Employment* [97]. The *Ladd v. Marshall* criteria should therefore be borne in mind when exercising our discretion under Rule 15(2)(a): see *Reed Employment* [100]. So whilst we take into account the fact the stay has been granted and that there is a possibility for HMRC to respond to the introduction of new evidence, we also have regard to the fact that the first of the criteria in *Ladd v Marshall* is not fulfilled. The Appellant has had an opportunity to put this evidence before the FTT; the evidence of Ms Wallis could have been obtained with reasonable diligence before the hearing."

33. We agree with this analysis and we did not take Mr Zwart to argue to the contrary.

34. It is important to appreciate that it is not sufficient for an appellant to say that the overriding objective should be to achieve the right result on the appeal come what may. An appeal hearing is not a hearing de novo, and it is inherent in the *Ladd v Marshall* approach that even if new evidence is credible and may have an important influence on the result of the case, an appellate court may decline to admit that evidence if the first of the criteria is not met. That is because an appeal inevitably involves delay, expense and the increased utilisation of the limited resources of the tribunal system. Hence there is a clear policy justification for requiring a party to present his entire case at first instance and not, without good reason, giving him a "second bite of the cherry" on different facts on appeal. The first-tier hearing and any appeal should not simply become an iterative process.

35. We shall therefore apply the overriding objective with the principles from *Ladd v Marshall* clearly in mind.

Admission of fresh evidence: procedure

36. In support of its appeal, Cavendish Green sought to adduce fresh evidence in the form of a second witness statement from Mr Pettie, giving evidence that the construction of the wall was arranged in two parts. The first was building a wall up to 2m and the second being the completion of additional height up to the agreed total of 2.738m above ground level. The reason given for this was that the statutory planning consent permitted a wall of up to 2m whereas he knew that there would have to be further planning permission when the wall reached a materially higher height than

2m. Mr. Pettie referred to additional correspondence in support of his evidence, including further invoices and emails with sub-contractors.

37. Cavendish Green also sought to adduce further documentary material relating to the planning permission for the construction of the dwelling at the site.

38. We have to say that the manner in which this matter has been dealt with by Cavendish Green has been most unsatisfactory. In particular, no evidence or even written submissions have been advanced addressing the *Ladd v Marshall* criteria.

39. Instead, Mr. Zwart's Notice of Appeal filed with the Tribunal in April 2017 alluded to an intention to "supplement" the evidence below with further evidence from Mr. Pettie on the state of the wall on the supply date, and he observed that HMRC had not indicated any objection to that course in its response to the Notice of Appeal filed in May 2017. Mr. Zwart therefore concluded in a document described as a "Response …to the Response of the Respondents to the Notice of Appeal" filed in June 2017 that,

> "Having had the opportunity, the Respondents have raised no objection in their Response to the adducing of the further statement and evidence of Mr Pettie …Therefore the Appellant reasonably anticipates adducing that evidence before the UT".

40. Mr Zwart did submit what purported to be an application to adduce fresh evidence one week before the hearing, after HMRC had indicated that it would object to any fresh evidence. However, that application was unsupported by any evidence and did not deal at all with the *Ladd v Marshall* criteria.

41. Although the Overriding Objective in Rule 2(2) indicates that dealing with a case fairly and justly in the Upper Tribunal includes avoiding *unnecessary* formality, this approach to the introduction of new evidence on an appeal simply will not do. It is well understood that an appeal to the Upper Tribunal is not simply a hearing de novo, and it must be emphasised that as Rule 15(2) makes clear, the admission on appeal of new evidence that was not before the FTT is not a matter of right, but a matter upon which the Upper Tribunal must exercise a discretion.

42. In our view, an appellant seeking to adduce fresh evidence on appeal should make a formal written application, supported by evidence addressing the *Ladd v Marshall* criteria or providing other reasons for the exercise of discretion by the Upper Tribunal, as soon as practicable on or after the submitting of a Notice of Appeal. The Upper Tribunal can then seek the respondent's representations on the application, which may be capable of being dealt with as an interlocutory application before the substantive hearing, thus saving both time and costs. An appellant cannot simply indicate informally an intention to submit fresh evidence, and take the silence of the respondent (notwithstanding the absence of an application), to be consent.

Admission of fresh evidence: discussion

43. Turning to the facts of this particular case, as we indicated at the hearing, we were prepared to accept that the evidence in Mr. Pettie's second witness statement met the second and third of the *Ladd v Marshall* criteria (namely that it would probably have an important influence on the result of the case and was apparently credible). Ms Vicary did not disagree.

44. As far as the first of the *Ladd v Marshall* criteria is concerned, Mr Zwart accepted that the additional evidence now sought to be adduced as to the height of the wall at the date of sale was available to Cavendish Green at all material times prior to the hearing before the FTT. However, he submitted that it could not have been obtained with reasonable diligence for use before the FTT for the following reasons:

> (1) the papers received from HMRC, including the Statement of Case, focused only on the question of whether there had been sufficient construction above ground at the site;
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> (2) he was only instructed on the matter two days before the hearing before the FTT, and the parties ran out of time at the hearing to deal with the planning permission issues; and
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> (3) accordingly, he could not reasonably have been expected to obtain the further documents dealing with the planning permission issue in advance of the hearing and neither could that be expected of the appellant itself, as a lay person.

45. We reject those submissions. Any force that there may have been in them up to the conclusion of the oral hearing before the FTT is negated by the fact that the planning permission point and the factual understanding of the FTT that the construction of the wall had been completed by 31 May 2012 were raised expressly by the FTT in its directions dated 3 June 2016. Cavendish Green then had ample opportunity to deal with the point and to adduce the additional evidence necessary to address the impression that the FTT had gained as to the height of the wall. But it neither drew attention to item 12 of the schedule of variations, nor sought to adduce any new evidence.

46. Mr Zwart suggested to us that he did not think it was open to him to take that course because all that was being sought by the FTT was submissions on the planning permission issue rather than the adducing of further evidence. We would make the obvious point that an application to adduce additional evidence at the FTT stage is far more appropriate and efficient than seeking to do so for the first time on appeal to the Upper Tribunal. In any event, the FTT's directions made it clear that there was liberty to apply for a variation or extension of the directions, which plainly could have been utilised for that purpose at the time.

47. In short, the FTT made it abundantly clear that it was proceeding on the factual basis that the wall had been completed at the time of the sale; and it was open to Cavendish Green to take any necessary steps to put the FTT right before the Decision was given, but it failed to do so. This was therefore an issue that could and should have been resolved at the FTT level.

48. Mr. Zwart did not advance any other convincing reasons why, exceptionally, the further evidence of Mr. Pettie should be admitted. It was also apparent that without such evidence, the new material from the planning portal would not take matters further.

49. Accordingly, we conclude that it is not fair or just to admit any fresh evidence on this appeal and Cavendish Green's application in that regard is dismissed.

Ground 2: whether the FTT was entitled to conclude that the wall had been completed by 31 May 2012

50. In the light of our decision on the application to adduce fresh evidence, we must decide this issue solely by reference to the evidence that was available to the FTT at the time that it made the Decision.

51. It is well-established that an appellant faces a high hurdle if it is to satisfy an appeal tribunal that the findings of fact of tribunal below disclose an error of law. The relevant test is that set out by Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 at page 36 where he said:

> "If the case contains anything ex facie which is bad law which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it is much matters whether the state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

52. We have set out above the evidence that was available to the FTT as to the time at which the wall was completed. Given the terms of item 6 and in the absence of any explanation of the significance of item 12 on the schedule of variations to the June 2012 Invoice, and in the light of the correspondence with HMRC that resulted in the photographs referred to at [15] above being provided, it is clear to us that there was ample evidence upon which the FTT could rationally and reasonably have concluded that the wall had been completed by 31 May 2012. Indeed, we think that was the natural conclusion for it to reach.

53. In particular, we do not consider that the FTT is to be criticised for not undertaking its own forensic examination of the variations schedule to the June 2012 Invoice or that it could sensibly have been expected to discover for itself the hidden significance of item 12 described as "additional height". There was no indication on the face of the schedule that that item referred to the garden wall and it was incumbent on Cavendish Green to explain its significance to the FTT, particularly where as in this case, it was properly represented. Whilst the FTT does on occasion adopt a more inquisitorial role, particularly where an appellant is unrepresented or poorly represented, this was not one of those occasions where it should have done.

54. Further, although the FTT did not in fact rely upon the photographs that were provided with the response to HMRC in the Decision, that evidence was available before it and would have justified the conclusion it came to. The request from HMRC was clear; it was seeking evidence as to the state of the construction of the wall and photos as at the time of the sale 31 May 2012. Cavendish Green's letter expressly confirmed that the photos were being provided "as requested", and in the absence of any other explanation, the FTT would have been entitled to conclude that those photographs did clearly show the position at that date.

55. Moreover, even though there may have been a misunderstanding by the FTT of the evidence given by Mr. Pettie at the oral hearing, we do not think that the FTT can sensibly be criticised in circumstances in which it very clearly stated its understanding that the construction of the wall had been completed by 31 May 2012 in its directions of 3 June 2016. Far from being corrected, if anything the written submissions that were then filed on behalf of Cavendish Green served only to reinforce that view (see in particular the statement quoted at paragraph [25] above).

56. For these reasons, we are satisfied that there was no error of law on the part of the FTT in relation to Ground 2.

Ground 1: whether the planning permission condition was satisfied

57. In the light of our conclusions on Ground 2, it is not necessary for us to consider Ground 1 of the appeal. We therefore make no findings on it, other than to observe that it appears to us from the evidence, that looking at matters objectively, it was always clear and had been agreed between the relevant parties that the garden wall would exceed 2m in height when completed.

Disposition

58. As we informed the parties following the conclusion of the hearing, the appeal is dismissed.

Costs

59. At the conclusion of the hearing, Ms Vicary applied for costs on behalf of HMRC. Mr Zwart did not resist that application and accordingly we direct that

HMRC be awarded its costs of and occasioned by this appeal on the standard basis, the amount of such costs, if they cannot be agreed between the parties within one month of the date of this decision, to be subject to summary assessment by the Tribunal or, if the Tribunal considers it cannot undertake a summary assessment, the amount of such costs to be subject to detailed assessment by a Costs Judge of the Senior Courts Office.

MR JUSTICE SNOWDEN **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES
RELEASE DATE: 8 March 2018