[2020] UKUT 294 (TCC)

Appeal number: UT/2019/0099

ANNUAL TAX ON ENVELOPED DWELLINGS – whether appellant carrying on a trade – no – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

HOPSCOTCH LIMITED **Appellant**

-and-

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

TRIBUNAL: MR JUSTICE BIRSS
JUDGE ANDREW SCOTT

Sitting in public by way of video hearing treated as taking place in London on 9 July 2020

Mr David Southern QC for the Appellant

Mr Julian Hickey, instructed by the General Counsel and Solicitor for HM Revenue & Customs, for the Respondents

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DECISION

Introduction

1. Hopscotch Limited appeals to this Tribunal against a decision of the First-tier Tribunal (the FTT) released on 2 May 2019 under neutral citation [2019] UKFTT 288 (TC). The FTT dismissed the company's appeal against HMRC's decision to assess it to the annual tax on enveloped dwellings (ATED) for two chargeable periods – the 12 months ending 31 March 2017 and the 12 months ending 31 March 2018.

2. The FTT granted permission to appeal against its decision.

3. ATED is a charge to tax on companies which own residential property in the United Kingdom. The tax also extends to certain partnerships and collective investment schemes. Relief from the tax is available if (among other cases) the property is held for the purposes of a property development trade.

4. The company, which was established in the British Virgin Islands, had acquired residential property in London in 1993. The property is a Grade II listed property in a designated conservation area. The company has been trying to sell the property since 2011 – but, so far, without success.

5. In the chargeable periods ending 31 March 2014, 2015 and 2016 the company paid ATED in full.

6. In 2014 the company received advice that it should redevelop the property before re-offering it for sale.

7. The actual redevelopment works commenced in April 2016. The appellant contended that this redevelopment constituted the carrying on by it of a property development trade. The company sought, on that basis, to claim relief from the charge to ATED for periods since 1 April 2016. Whether the company was carrying on a trade was to be determined by the relevant test applicable for the purposes of corporation tax.

8. HMRC did not agree that the company was entitled to any relief. Among other things, HMRC's view was that the company was not carrying on a trade at all. The FTT agreed.

9. It is on that issue alone that the company appeals to this Tribunal.

Relevant legislation relating to ATED

10. Part 3 of the Finance Act 2013 (FA 2013) established the charge to ATED.

11. The liability to tax is imposed by s.94(2), which states:

> "(2) Tax is charged in respect of a chargeable interest if on one or more days in a chargeable period—

> (a) the interest is a single-dwelling and has a taxable value of more than £500,000, and
>
> (b) a company, partnership or collective investment scheme meets the ownership condition with respect to the interest."

12. Section 94(4) of FA 2013 provides that: "a company meets the ownership condition with respect to a single dwelling interest on any day on which the company is entitled to the interest…".

13. The amount of ATED chargeable is determined by s.99 of FA 2013. In this case (and subject to the availability of any relief) the annual chargeable amount would be £109,050 (in respect of the chargeable period 2016/17) and £110,100 (in respect of the chargeable period 2017/18). Those figures are arrived at as a result of the taxable value of the property being more than £10 million but not more than £20 million.

14. ATED is subject to a number of reliefs.

15. The relevant statutory provision providing for the reliefs is s.132 of FA 2013. So far as material, that section provides as follows:

> "**132 Effect of reliefs under sections 133 to 150**
>
> (1) Subsection (2) applies where tax is charged, in respect of a single-dwelling interest, for a chargeable period that includes one or more days that are relievable as a result of any of the provisions listed in subsection (3) (or for more than one such period).
>
> (2) For any such period, the adjusted chargeable amount is to be calculated on the basis that the chargeable person is not within the charge with respect to the interest on any relievable day.
>
> (3) The provisions are—
>
> section 133 (property rental businesses);
>
> [...]
>
> section 138 (property developers);
>
> [...]
>
> section 141 (property traders);
>
> [...]
>
> (4) [...]"

16. For the purposes of this appeal the relevant relief is the one relating to property developers although it is to be noted that other commercial (and taxable) ways of generating profits from holding or dealing in residential property are also included: see, in particular, s.133 (property rental businesses) and s.141 (property traders).

17. Section 138 of FA 2013 deals with property developers and provides as follows:

> "**138 Property developers**

> (1) A day in a chargeable period is relievable in relation to a single-dwelling interest if on that day—
>
> > (a) a person carrying on a property development trade ("the property developer") is entitled to the interest, and
> >
> > (b) the interest is held exclusively for the purpose of developing and reselling the land in the course of the trade.
>
> (2) If the property developer holds an interest for the purpose mentioned in subsection (1)(b), any additional purpose the property developer may have of exploiting the interest as a source of rents or other receipts in the course of a qualifying property rental business (after developing the land and before reselling it) is treated as not being a separate purpose in applying the test in subsection (1)(b).
>
> (3) A day is not relievable by virtue of subsection (1) if on the day a non-qualifying individual is permitted to occupy the dwelling.
>
> (4) In this Part "property development trade" means a trade that—
>
> > (a) consists of or includes buying and developing for resale residential or non-residential property, and
> >
> > (b) is run on a commercial basis and with a view to profit.
>
> (5) In this section references to development include redevelopment."

18. Section 174(1) of FA 2013 provides that, for the purposes of Part 3 of that Act (which includes s. 138), ""trade" has the same meaning as in section 35 of CTA 2009 (and cognate expressions are to be read accordingly)", with s.235(1) of FA 2013 providing that the abbreviation CTA 2009 used in FA 2013 is a reference to the Corporation Tax Act 2009, an abbreviation we also adopt in this judgment.

19. Section 35 of CTA 2009 provides for the charge to corporation tax on trading income: "the charge to corporation tax on income applies to the profits of a trade."

20. The definition of "trade" is not provided by that Act but by s.1119(1) of the Corporation Tax Act 2010 (CTA 2010). The definition is a simple one:

> ""trade" includes any venture in the nature of trade".

21. That definition applies for the purposes of the Corporation Tax Acts: see s. 1118(1) and (2) of CTA 2010, which provide that a definition set out in full in s.1119(1) (such as the definition of "trade") applies for the purposes of those Acts.

22. No doubt because ATED is a tax that is payable mainly by companies, Part 3 of FA 2013 chose to use the corporation tax definition of "trade". We note this albeit that nothing turns on it because, as between corporation tax and income tax, there is one concept for both taxes.

Meaning of trade

General principles

23. The meaning of "trade" has been considered on numerous occasions by the courts. A great many of the cases are decisions that turn on their particular facts. So far as principles that have been found, they remain best expressed in the decision of the House of Lords in *Ransom (Inspector of Taxes) v Higgs* [1974] STC 539 and the decision of the High Court in *Marson (Inspector of Taxes) v Morton* [1986] STC 463.

24. That was confirmed as much by the Court of Appeal in *Degorce v HMRC* [2017] STC 2226 where reference was made to the earlier decisions of the Court of Appeal in *Eclipse Film Partners (No 35) LLP v HMRC* [2015] STC 1429 and *Samarkand Film Partnership No 3 v HMRC* [2017] STC 926 as providing "an authoritative and recent re-statement of the principles which should be applied in deciding whether activities undertaken by a taxpayer constitute a trade for tax purpose."

25. In *Ransom*, Lord Wilberforce made the following observations about the meaning of "trade" at [554b, d and e]:

> "Trade has for centuries been, and still is, part of the national way of life; everyone is supposed to know what 'trade' means; so Parliament, which wrote it into the law of income tax in 1799, has wisely abstained from defining it and has left it to the courts to say what it does or does not include.
>
> [...]
>
> 'Trade' cannot be precisely defined, but certain characteristics can be identified which trade normally has. Equally some indicia can be found which prevent a profit from being regarded as the profit of a trade. Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact finding body to decide on the evidence whether a line is passed."

26. In *Marson*, Sir Nicolas Browne-Wilkinson V-C made some general comments at [470 c – e] about the wide scope for reasonable views to differ in evaluating the facts when considering whether a trade exists:

> "It is well established in dealing with appeals of this nature that there is a band of cases, sometimes referred to as 'no-man's-land', in which different minds come to different conclusions in the circumstances on the question of whether or not there was an adventure in the nature of trade. There are some cases where the position is so clear, one way or the other, that there is only one true and reasonable conclusion. If so, then if the commissioners reached something other than that conclusion, an error of law was disclosed. But if the case falls within the band where more than one conclusion is possible on the basis of the facts found, then in the absence of misdirection on the face of the decision the court has no jurisdiction or right to intervene."

27. He then set out what he had been able to discern from the authorities as guidance in determining whether one-off transactions with a view to making a capital profit were adventures in the nature of trade. Before listing the things, which he described as "badges of trading", he made a plea for those badges to be seen for what they were, namely as at most common sense guidance to the appropriate conclusion:

> "But I would emphasise that the factors I am going to refer to are in no sense a comprehensive list of all relevant matters, nor is any one of them so far as I can see decisive in all cases. The most they can do is provide common sense guidance to the conclusion which is appropriate."

28. So concerned was he that this point might be overlooked that he repeated the injunction again at [470 g] in these terms:

> "I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question—and for this purpose it is no bad thing to go back to the words of the statute—was this an adventure in the nature of trade?"

29. His conclusion in the particular case was that it was one "which falls in the no-man's-land where different minds might reach different conclusions on the facts found."

30. The badges of "trading" were set out by Sir Nicolas Browne-Wilkinson V-C at [470 j to 471 f]. There is no need to set them out here (they were set out by the FTT at [41]).

31. A much earlier illustration of the nature of the factual enquiry to determine whether a profit on the sale of an asset is a trading transaction or the realisation of an investment is *Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes)* 5 TC 159, released on 7 November 1905. That case concerned a company which bought property and then resold it. It was cited by the appellant and referred to by the FTT at [43], quoting a passage from the judgment of Clerk LJ. The passage highlights the difficulty in defining the line which separates cases in which a gain on sale of an asset is a mere enhancement of value by realising it as opposed to a gain made in an operation of business in carrying out a scheme for profit-making.

32. In our judgment *Californian Copper Syndicate* does not lay down any principle of law different from that established by *Ransom* or *Marson*. Nevertheless, as we explain below, it is significant that the court in that case drew a distinction between "mere enhancement of value" and a "scheme for profit-making".

Intention to trade formed after purchase

33. In *Californian Copper Syndicate* the company had been formed in order to acquire certain mineral fields solely with the view and purpose of reselling them at a profit. However, intentions are not always fixed. They can change. This situation was considered and by the House of Lords in *Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners* [1980] STC 350. *Simmons* was

referred to by the FTT in its decision in this case. A similar situation was considered by the Court of Appeal in in *Taylor v Good (Inspector of Taxes)* [1974] STC 148 but there is no need to go into that separately.

34. In *Simmons* a change in intention after purchasing an asset was considered. Lord Wilberforce put matters in these terms at [page 352 f to j]:

> "Trading requires an intention to trade; normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve any operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock, and, I suppose, vice versa. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and, possibly, a liability to tax (cf *Sharkey (Inspector of Taxes) v Wernher*). What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor for it to possess an indeterminate status, neither trading stock nor permanent asset. It must be one or the other ..."

35. We take the following principles from the authorities:

> (1) an asset can be held as trading stock, or it can be held for non-trading purposes as investment for capital appreciation or income generation or otherwise;
>
> (2) an asset is either held for a trade or it is not. There is no indeterminate status;
>
> (3) the mere fact that an asset was acquired for one purpose does not preclude the asset from being subsequently held for another purpose;
>
> (4) steps taken to enhance the value of an asset in the market are capable of being either steps taken for the purposes of a trade or for the purposes of a non-trading activity;
>
> (5) in determining the question of whether it is held for the purposes of trade, it is relevant to consider whether the asset is brought into use for the purposes of a pre-existing trade; and
>
> (6) in a case where there is no pre-existing trade, there needs to be evidence that a trade has been newly set up that entitles the fact-finding body to come to a view that it is more than the taking of steps simply to enhance the value of the asset: in the words of Lord Wilberforce in *Simmons* "precision is required" before finding that an asset has changed its status.

36. In relation to that last point, we consider that, as a matter of principle, this must be so: if an intention has changed where the intention has such significant fiscal and other consequences, there must be evidence to bear out the change.

The FTT's decision

The findings of fact

37. The principal findings of fact were set out at [3] of the FTT's decision. The FTT noted that there was no dispute between the parties about the primary facts relevant to the appeal. Having set out those facts, the FTT emphasised the unchallenged nature of those facts at [4].

38. In summary, the facts found by the FTT were as follows.

39. The company purchased a residential property (which was a listed building) in 1993 for £1.25m. The property was occupied by persons permitted to do so by the directors of the company from the time of its acquisition until 2007. As from 2008 the use of the property declined, and it was occupied solely by domestic staff (a state of affairs that prevailed until April 2016).

40. The company decided to sell the property in 2011, placing it on the market at a price of £13.5m. The property was re-marketed at the same price in June 2013 with a different estate agent (Knight Frank).

41. However, the property could not be sold at that price. In the absence of anyone willing to buy the property at the asking price (or at a price acceptable to the appellant), Knight Frank advised the company in 2013 to take the property off the market and redevelop it in order to maximise value through the addition of "space, functionality and technology, the improvement of lighting and the addition of an elevator". The aim was to make the property an attractive "near new build" despite its listed status.

42. A board meeting of the company was held on 25 March 2014 to consider this proposal with the minutes recording the decision and the reasoning for it in these terms:

> "According to the feedback received by Knight Frank from the prospective buyers, the agent has informed that the property being old, it has to undergo total redevelopment and therefore presents itself as a redevelopment opportunity which would result not only in sale but in additional profits from development. They suggested that the building has to be modified externally and internally and also to install a lift to give a new and modern look to the building and make it attractive for the prospective buyers. They feel that the property should be taken off the market and redeveloped….After detailed deliberations and consideration on the above suggestions, the Board is also of the opinion that …there is an opportunity to redevelop the property and create substantial additional value through such a process. We have been provided comparable data which shows that whilst the highest value today might be less than £13mm [sic], the redevelopment could make the property worth significantly more. The Board accordingly decided to develop the property and entrusted Mr. Sasi Nambiar, Secretary, to get the process started by arranging required documentations for obtaining necessary approval from the concerned authority(ies) as early as possible."

43. Subsequent to that decision made by the company, the following took place:

> (1) the company, having taken advice and carried out research, concluded that the property was capable of achieving a sale price of £3,000 per square foot, which was much more than the price for square foot obtained for the next door site;
>
> (2) the company engaged a number of consultants and advisers in relation to the redevelopment, including an architectural firm, a conservation architect and structural engineers;
>
> (3) the planning application of October 2015 summarised the proposed works as involving:
>
> > "the minor alteration, replacement of mansard roof finishes, existing dormer windows and replacement of conservatories on ground and first floor. It also includes installation of lift from lower ground to second floor landing";
>
> (4) the company borrowed monies to finance the cost of the construction work;
>
> (5) planning permission for the redevelopment was granted on 15 December 2015 with the works starting in April 2016 and finishing in September 2017;
>
> (6) the property in its redeveloped state was listed for sale in October 2017 at an asking price of £15.9m;
>
> (7) the company was, however, unable to sell the property at that price and, consequently, the price was reduced to £13.95m; and
>
> (8) as at the date of the hearing before the FTT and this Tribunal, the property remained unsold.

44. The estimate for the construction work was £2.75m but the actual costs were approximately £1m.

45. Finally, the FTT concluded its findings at [3] of its decision by noting that the appellant had not registered itself as a company liable to pay corporation tax in the United Kingdom or filed any company tax returns.

46. The matters above were set out by the FTT under a heading 'BACKGROUND AND FACTS'. Nevertheless, a number of further material facts were found by the tribunal at [56] to [59] of its decision in the part of its judgment headed 'DISCUSSION', as follows:

> (1) the minutes of the board meeting held on 25 March 2014 did not mention the expected cost of the redevelopment or the amount of profit to which the redevelopment was expected to give rise. Nor did they record what the cost to the company of carrying out the redevelopment was expected to be, what the increase in value of the property as a result of the

redevelopment was expected to be or the relationship between the anticipated cost and the anticipated increase in value (see [56]);

(2) there was no evidence (whether before or during the redevelopment works) that the company produced any trading accounts, or a business plan, which showed the level of profit to which the company's redevelopment activity was expected to give rise (see [57]);

(3) however, it was acknowledged that, as a matter of British Virgin Islands company law, the company was not required to prepare and file annual financial statements with the authorities there (see [57]);

(4) there was no paperwork evidencing the reasons for, and the impact on the anticipated realisation value and anticipated profit of, the "eventual massive underspend", which was the FTT's description of the actual costs being about £1m rather than an estimated £2.75m (see [58]);

(5) the underspend was attributable to the fact that part of the works originally proposed had to be abandoned because planning permission for that part was refused (see [58]);

(6) there was no contemporaneous evidence in the form of revised trading accounts, business plans or minutes of board meetings referring to the impact of that refusal on the cost of the redevelopment, the anticipated realisation value or the anticipated profit (see [58]); and

(7) the minutes of other board meetings of the company held during the redevelopment work lacked financial information: three of the board minutes – the ones relating to the meetings on 21 September 2016, 26 July 2017 and 30 September 2017 – contained references to the relationship of actual costs to anticipated costs but no detail was given about the actual figures in each case or the impact on the anticipated profit of exceeding the budget (see [59]).

The decision on whether there was a trade

47. At [40] to [44] the FTT referred to the submissions made by the appellant on the relevant principles for determining whether an activity constituted a trade. Those submissions included a detailed account of the "badges of trading" in *Marson* as well as a discussion of *Californian Copper Syndicate* and *Simmons*. The FTT also expressly contemplated at [53] that "it is perfectly possible for the redevelopment of a single property to amount to a venture in the nature of trade and for a person holding a property as an investment on capital account to resolve, at a particular point in time, that it will henceforth hold the property for a trading purpose and thereby appropriate the property from capital account into trading account".

48. The FTT dealt with most of the "badges of trading" at [52] and [53]. They noted that the badges did not all point in one direction. Some such as badge 8 (intention as to resale at the time of purchase) and badge 9 (whether the property was for enjoyment) were irrelevant because of the alleged change of purpose of the company in holding the property. Others might be taken to suggest that the company was carrying on a trade:

that was the case for badge 5 (the fact that the company did borrow) and badge 6 (work was done on the property for the purposes of resale before being remarketed). But other badges might be taken to suggest that the company was not carrying on a trade, namely:

> (1) badge 1 (the redevelopment and sale of the property was a one-off transaction);
>
> (2) badge 2 (the transaction did not relate to a pre-existing trade);
>
> (3) badge 3 (the subject-matter was perfectly capable of being held as an investment on capital account and was not like whisky or toilet paper, which is essentially a subject matter of trade as opposed to enjoyment); and
>
> (4) badge 7 (although work was done on the property, it remained a single, large dwelling that would appeal to a very small class of potential buyers: it was not broken down into saleable lots).

49. Having referred at [53] to the possibility that a company could, at a time after the acquisition of the property, resolve to hold it for a trading purpose, the FTT considered at [54] that the facts did not support that conclusion. It was then that the FTT considered the remaining badge (badge 4), namely, "was the transaction carried through in a way typical of a trade of property development?".

50. The FTT answered that question in the negative. Their reasoning was set out at [56] to [60]. In particular the FTT:

> (1) considered that the failure of the board to consider at its meeting on 25 March 2014 the expected costs, the amount of expected profit, and the relationship between the anticipated cost and the anticipated increase in value was "inconsistent with the conclusion that the Appellant was about to embark on a trade" ([56]);
>
> (2) noted that, despite the absence of a requirement to do so under the law of the British Virgins Island, "if the Appellant had truly been carrying on a trade, we would have expected the Appellant to have produced something akin to those financial statements in relation to its business affairs or a plan of some kind in relation to the business which it claims to have been conducting" but it had produced neither of those things ([57]);
>
> (3) considered that the absence of paperwork evidencing the reasons for, and the impact on the anticipated realisation value and anticipated profit of, the underspend "tends to highlight the absence of the level of financial planning in relation to the redevelopment to which we have referred above and which we would have regarded as distinguishing a trade from the taking of steps to maximise the value of an investment held on capital account" ([58]);
>
> (4) stated at [58] that "it seems unlikely to us that a person carrying on a trade of property development would have suffered such a significant change in the scope of the redevelopment work without there being some contemporaneous paper trail indicating the impact of that change on the

expectations of the Appellant's director in relation to the profit of carrying out the redevelopment";

(5) held at [59] that the minutes of board meetings of the company held during the redevelopment work lacked "the level of financial information which one would expect from a company carrying on a trade of property development";

(6) held that, in the case of the board meetings on 21 September 2016, 26 July 2017 and 30 September 2017, the minutes "show that, like any other owner of a property who is carrying out extensive work to his property with a view to sale, the Appellant was concerned with the nature and cost of the work which was being carried out at the site" but they "suggest no more than that" and "to the extent that cost overruns are mentioned in the minutes, the concerns expressed are no different from those which any property owner carrying out extensive construction work would have had in relation to controlling the cost of carrying out that work" ([59]); and

(7) finally, noted that "although it is not, in and of itself, evidence that the Appellant was not carrying on a trade – because whether or not the Appellant was carrying on a trade is a question of fact to be determined by reference to the Appellant's purposes and activities" the fact that the company had not registered for corporation tax or filed company tax returns "tends to support the conclusion which we have reached above".

51. As a result, the FTT concluded at [61] that the appellant had not begun to carry on a trade as a result of implementing its decision of 25 March 2014 to redevelop the property: it was not "carrying out a scheme for profit-making" (adopting the language of Clerk LJ in *Californian Copper Syndicate*). Instead, the appellant, having failed to sell the property between 2011 and 2013, simply resolved that, in order to obtain an acceptable offer, it would need to carry out substantial work to the property before putting it on the market again. In the FTT's view, the implementation of that decision did not cause the property to cease to be held as an investment on capital account and, accordingly, it had not started to carry on a trade.

Grounds of appeal

52. Permission to appeal was given on seven grounds but, before us, Mr Southern presented his case by making six submissions on behalf of the appellant. We have considered only those six submissions.

53. In summary, those submissions were as follows:

(1) There was a basic contradiction in the decision. The FTT concluded that the company had resolved that, in order to obtain an "acceptable offer", it would need to carry out substantial works before putting the property on the market again. That was sufficient to constitute trading. The concept of "an acceptable offer" implied a profit motive. Moreover, the company was a "commercial" company and there were a number of findings which unequivocally pointed to trading as a property developer. The key factor

was the decision not just to sell but to redevelop the property to maximise the sale price. The redevelopment was not solely to facilitate the sale;

(2) The FTT was required to answer a single question: was the company carrying on a property development trade within the meaning of the statute in the two years in question? Instead it asked a composite question: was the company carrying on a trade in a generic sense? And then: was it carrying on a property development trade? The FTT wrongly overlooked the statutory context in which the question arose;

(3) The purpose for which the property was initially acquired was irrelevant because: (i) intentions can change; (ii) there was evidence of a change of intention; (iii) new legislation was introduced in 2013 creating a new category of trade for the specific purposes of the legislation; and (iv) the legislation did not require that the property should have been bought with a trading intention but looks solely at the state of affairs prevailing after 1 April 2013;

(4) There was ample evidence before the FTT that the company had decided to sell the property and that, to be able to do so at an acceptable price, the property had to be redeveloped. The FTT reached a conclusion against the weight of the evidence;

(5) In reaching its conclusion the FTT was materially influenced by irrelevant factors. The FTT sought to second guess how property development should be organised and conducted. It also wrongly considered an alleged requirement to "register" for corporation tax as well as overstating the relevance of accounting requirements relating to the company;

(6) The FTT also failed to make findings of primary fact which were essential to its conclusion.

Jurisdiction of this Tribunal

54. An appeal to this Tribunal lies on a point of law only (see s.12(1) of the Tribunals, Courts and Enforcement Act 2007) and so it is important to determine what it is that is alleged to constitute the error of law.

55. In his submissions, Mr Southern adopted a roving approach without relating his points with any precision to the way in which they constituted an error of law. He did, though, make the general claim that all four of the categories of an error of law as discussed in *Murray Group Holdings Ltd v HMRC* [2016] STC 468 were engaged. And he also suggested that those categories needed to be read in the light of the Supreme Court's decision in *Pendragon plc v HMRC* [2015] STC 1825.

56. Mr Hickey submitted on behalf of HMRC that, despite the ranging nature of the submissions made by Mr Southern, there was in reality a simple *Edwards v Bairstow* challenge to the FTT's decision to the effect that no reasonable tribunal could, on the evidence before it, have reached the decision that it did.

57. In this context the recent decision of the Court of Appeal in *Degorce* is relevant. In that case, Henderson LJ (giving the decision of the Court of Appeal) endorsed in particular the following passages from Sir Terence Etherton's judgment in *Eclipse*:

> "[112] ... [The meaning of "trade"] in tax legislation is a matter of law. Whether or not a particular activity is a trade, within the meaning of the tax legislation, depends on the evaluation of the activity by the tribunal of fact. These propositions can be broken down into the following components. It is a matter of law whether some particular factual characteristic is capable of being an indication of trading activity. It is a matter of law whether a particular activity is capable of constituting a trade. Whether or not the particular activity in question constitutes a trade depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles. To that extent the conclusion is one of fact, or, more accurately, it is an inference of fact from the primary facts found by the fact-finding tribunal.
>
> [113] It follows that the conclusion of the tribunal of fact as to whether the activity is or is not a trade can only be successfully challenged as a matter of law if the tribunal made an error of principle or if the only reasonable conclusion on the primary facts found is inconsistent with the tribunal's conclusion. These propositions are well established in the case law …"

58. Those passages encapsulate the principles affirmed by the House of Lords in the well-known decision of *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14. It is only necessary to mention what Lord Radcliffe said in *Edwards v Bairstow* about the meaning of a trade and the wide room for reasonable views to differ:

> "In effect [the law] lays down the limits within which it would be permissible to say that a "trade" as interpreted by section 237 of the Act does or does not exist.
>
> But the field so marked out is a wide one and there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other. If the facts of any particular case are fairly capable of being so described, it seems to me that it necessarily follows that the determination of the Commissioners, Special or General, to the effect that a trade does or does not exist is not "erroneous in point of law" ..."

Approach to submissions in this case

59. We start by classifying what sort of error Mr Southern's submissions assert the FTT made.

60. The first and fourth submissions are variants on a theme in asserting that the FTT had reached a decision that no reasonable tribunal could properly have reached.

61. Mr Southern's second submission, and in effect his third, aim to establish an error of principle in the way in which the FTT understood and applied the relevant statutory provisions. If made out, that would constitute an error of law.

62. Mr Southern's fifth submission and some of his third submission are aimed at establishing a different legal error, that the FTT took into account manifestly irrelevant considerations.

63. There was no overt challenge to the principles adopted by the FTT in determining whether a trade exists for the purposes of corporation tax.

64. In what follows, it is logical to start with the question (a) whether the FTT made an error of principle by asking itself the wrong question or misunderstanding the statutory question in some other way. Next we will consider at (b) whether its approach considered materially irrelevant matters. We then consider, at (c), the overarching challenge to the FTT's decision as one that no reasonable tribunal could, have properly made. Finally we will address at (d) the submission that the FTT had failed to find material facts relevant to the making of the decision (Mr Southern's sixth submission).

(a) Error of principle

65. Mr Southern submitted that the FTT drew a misleading distinction between the carrying on of a trade in general and the carrying on of a particular trade (i.e. property development). In so doing, it ignored the statutory definition of that particular trade in s.138(4) of FA 2013. He said that the FTT erred in asking whether there was a trade in general, and having concluded that the company was not carrying on a trade, did not consider adequately whether there was a particular trade. He pointed to the FTT's observation at [38] and [39] of its decision that there were two aspects of the definition: the first was focused on whether there is a trade and the second on whether the trade is of a particular kind. That led the FTT to state at [62] that, having considered that no trade was being carried on, the appeal "necessarily falls at the first hurdle".

66. In addition, Mr Southern submitted that the charge to ATED operates by reference to a chargeable period (the 12 month period beginning with 1 April in a year) and the relief in question is determined by reference to the situation in the chargeable period concerned and not by reference to earlier events and, certainly, not by reference to events existing before the date on which the charge to ATED came into force (1 April 2013). In particular, Mr Southern submitted that the FTT was wrongly influenced by the intention of the company in acquiring the property and, as he put it in his skeleton argument, "by looking at the transactions through the general spectacles of trade, the Tribunal missed the newness of the 2013 legislation so its analysis went astray".

67. The terms of s.138(4) of FA 2013 which define a property development trade have been set out above. So too is the definition of the relevant relief in s138(1) of that Act.

68. It is plain from the terms of s.138(1) that the relief operates by reference to particular days in a chargeable period. Whether the relief is available on a day is determined by reference to a number of conditions being met on the day concerned. One of the conditions is whether, on the day in question, the person is "carrying on a property development trade". In order for an activity to constitute a "property development trade", it has to be a trade that meets the particular tests set out in s.138(4)(a) and (b) of FA 2013. In our judgment there is no need to consider those particular tests unless the

activity is, on analysis, a trade in the first place. If it is not a trade, then it inevitably cannot be a trade of a particular kind.

69. As addressed above already, whether or not an activity is a "trade" for the relevant purposes depends on an analysis of all the relevant facts, which include, in the case when intentions are alleged to have changed, those that exist before the day in question.

70. Accordingly, in determining whether on any day in the chargeable periods concerned, the company was carrying on a trade, the FTT was right and obliged to consider all relevant circumstances. It was essential to consider whether, despite the admitted fact that the property was acquired otherwise than for trading purposes, it had subsequently become an asset held for trading purposes. It would have been impossible to determine that question in favour of the taxpayer without some evidence of a change of intention in the way in which the company held the asset.

71. For these reasons the submission that the FTT made an error of principle is wrong.

A further point – part of a suite of changes

72. Before leaving this issue, we will address another point Mr Southern made in his oral submissions. He referred to the fact that the introduction of ATED in 2013 was part of a suite of changes made by Parliament in taxing property in the United Kingdom held by persons not resident in the United Kingdom. Among other changes, he referred to those made by the Finance Act 2016 in relation to non-UK resident companies carrying on a trade of dealing in or developing UK land: see the amendments made by sections 76 and 77 of that Act.

73. We do not consider that, save in one possible respect, the provision made by that Act (or any other later Act dealing with taxes other than ATED) has any relevance to the operation of the charge to ATED. The one possibly relevant point is the definition of a "trade of dealing in or developing UK land" in s.5B of CTA 2009 (as inserted by section 76(5) of the Finance Act 2016), which referred, among other things, to activities that consist of "developing UK land for the purpose of disposing it". However, we do not accept that that definition sheds any light on the definition of trade which the FTT had to apply.

74. , The point was referred to in the FTT's conclusion at [68] to [75] of its decision. It is not germane to this appeal but we wish to note that it seems to us that the words of the legislation may mean what they say in defining a "property development trade" as the "<u>buying</u> and developing for <u>resale</u> residential or non-residential property" (our emphasis), a possibility reinforced by the way in which Parliament had confined the relief to a limited set of circumstances. However, HMRC did not seek to challenge that aspect of the decision and we say no more about it.

(b) irrelevant considerations

75. In essence, this was a challenge to the way in which the FTT had evaluated some of the "badges of trading" and considered "typical" property development trades.

76. The caveats that Sir Nicolas Browne-Wilkinson V-C made in setting out those badges and the reference in *Edwards v Bairstow* to the many combinations of circumstances in this area have been set out above. Therefore, there will be cases where a painstaking consideration of each of the "badges of trading" is not a productive way of evaluating the particular factual circumstances. In our judgment this is such a case.

77. There was no dispute between the parties that residential property could be held as trading stock (badge 3). There was no dispute that a one-off transaction could constitute a venture in the nature of a trade (badge 1). There was no dispute that works had been done on the property (badge 6): HMRC accepted that the property had been redeveloped..

78. There was also no dispute that, absent the development of the property, there was no existing trade (badge 2). Contrary to Mr Southern's submissions, this finding was relevant in the particular circumstances of this case. And although there was no dispute that the property had originally been acquired for non-trading purposes (badge 8), it was recognised by the FTT that this did not preclude the possibility of the property being subsequently appropriated to a trade.

79. The FTT was entitled to have regard to the fact that the property remained a single dwelling and was not broken down into smaller units for sale (badge 7). There is little doubt that, if the property had have been broken down into units, this would have been a factor in pointing towards a trading conclusion. The FTT considered that the absence of this "might be taken to suggest" that the company was not carrying on a trade. Indeed it might; but really this was an issue of relatively little significance.

80. Equally, the FTT considered that the borrowing of the company (badge 5) to finance the works "might be taken to suggest" that the company was carrying on a trade. We doubt that there is much weight that could reasonably be put on this factor; and, of course, this was a factor taken by the FTT to be in favour of the appellant. This was not a case where a person was quickly turning over trading stock where the need for resale arose from the nature of the borrowing. As observed by HMRC, the works involved in redeveloping the property share similarities with those routinely undertaken by owners of land not carrying on trades where the costs are defrayed by borrowings (whether secured on the property or otherwise).

81. But, properly read in context, the FTT was placing limited weight on either of these matters (badges 5 and 7) or, indeed, on the other badges that we have discussed above. The FTT dealt with them very briefly at [52].

82. In our view, the FTT correctly stated the core issue at [53] of its decision (quoted above). The critical question was whether there was sufficient evidence that the company had resolved to hold the property for a trading purpose. In answering that question, it was open to the FTT, citing badge 4 in *Marson*, to consider whether the transaction was carried through in a manner typical of a trade of property development.

In framing the question in the way it did at [53] of its decision, the FTT was, as a specialist tribunal, entitled to use the experience that it had to assess the way in which

trades are ordinarily carried on. The FTT was looking for evidence to establish whether the company was doing more than merely improving the property to facilitate its sale: that was how the FTT in substance, articulated the test at [61] of its decision. We cannot see any basis for challenging the factual findings made by the FTT that we have set out above. The question then turns to the FTT's evaluation of its findings of fact.

The FTTs evaluation of its findings

83. Once those findings had been made, did the FTT make a legal error in its evaluation of those findings? The answer is no. In relation to each of the findings the FTT was considering whether there was any evidence of a change of intention. The facts were consistent with the sort of steps that any owner of property might seek to take in order to increase the chances of a sale of the property that had, so far, been difficult to sell. Equally, the FTT considered that there was an *absence* of evidence pointing to anything more than that. That is why they referred to the lack of financial statements and any meaningful consideration of the relationship of costs to profit. The critical issue was that the company was focused only on costs. There was a lack of evidence as to how those costs bore on profits, an altogether different matter but one on which it might reasonably be expected companies carrying on trades to be focused.

84. We turn to the question of the materiality of the failure of the company to register for corporation tax or file company tax returns. The FTT held that this "tends to support the conclusion which we have reached above" and acknowledged that "it is not, in and of itself, evidence that the Appellant was not carrying on a trade – because whether or not the Appellant was carrying on a trade is a question of fact to be determined by reference to the Appellant's purposes and activities".

85. Therefore this issue had no material bearing on the FTT's decision-making and so there is no need to consider whether the company was actually obliged to notify HMRC of being within the charge to corporation tax. Despite the detailed written submissions on this issue made after the hearing before us, we prefer to leave a consideration of that issue open to a case where it has a bearing on the outcome of an appeal.

(c) No reasonable tribunal could have made the decision

86. Mr Southern's first and fourth submissions were wide-ranging. The pertinent points were:

> (1) an alleged illogicality in the decision;
>
> (2) the submission that a company that was "commercial" but not an "investment" company must necessarily be a "trading" company; and
>
> (3) the evidence before the FTT was all one way: everything pointed to the transaction being of a trading nature, and there was nothing pointing in the other direction.

(1) Illogicality of decision

87. Mr Southern submitted that there was a circularity in the FTT's reasoning by reference to its statement at [76] that "if the company had been carrying on a trade as a result of the actions which it took following its decision to redevelop the Property, then the "trade" would have satisfied the conditions in Section 138(4)(a) of the FA 2013".

88. That submission is wrong. The statement was a simple recognition by the FTT that the test in s.138(4)(a) of FA 2013 only fell to be considered once a trade had been established and that, in the particular circumstances as they were, if a trade had been established then it would then have satisfied the test in s138(4)(a). This has no bearing on whether the FTT erred in determining the quite separate question of whether the company was carrying on a trade at all.

89. Mr Southern also submitted that there was a basic contradiction in the decision. The FTT concluded that the company had resolved that, in order to obtain an "acceptable offer", it would need to carry out substantial works before putting the property on the market again. That was said to be sufficient to constitute trading. The concept of "an acceptable offer" implied a profit motive.

90. We do not accept this either. The FTT was reflecting the reality of the case before it. The company had, without success, been trying to sell the property for £13.5m. It took advice that the company needed improvements in order to sell. The improvements in question were such that they could, in addition, generate a return beyond the simple recovery of costs. As things turned out, the property could not in fact sell for a higher price.

91. The mere existence of this possibility cannot be sufficient to automatically constitute trading. Whether it does in fact do so depends on the evaluation of the overall circumstances, as the FTT did. What the FTT was doing at [56] to [59] was pointing out the relatively unsophisticated way in which the company had approached the redevelopment. The company had assumed that the property in its undeveloped state might be worth £13.5m. There is some recognition in the board minutes for the meeting on 25 March 2014 that the value might be less than that: see the reference to "comparable data which shows that [...] the highest value today might be less than £13m". However, it is telling that the minutes did not go on to record what the company considered the true market value of the property to be in its undeveloped state.

92. If costs of £1m were incurred and the property sold for the new asking price of £15.9m, that would mean there would be a profit of £2.4m. However, the FTT was, in effect, challenging the basis of that profit calculation and whether the company was, in any meaningful sense, concerned with *profit* (as opposed to costs). The very issue facing the company was that the property in its undeveloped state could not be sold in the market at a price of £13.5m. In effect, Knight Frank had reported back to the company that prospective purchasers were expecting a property on the market for that price to be in a better condition. And that is simply another way of saying that the property was overpriced (in its then condition).

93. The FTT was clearly aware of the terms of the board minutes for the March 2014 meeting, which, in recording the company's decision to undertake the works, referred to the feedback from the estate agents. That feedback began by saying that, as the property was old, "it has to undergo total redevelopment". In other words, it is clear that the estate agents were saying that the property would not sell without significant works. It was only then that, once that conclusion had been reached, it went on to say that "therefore [this] presents itself as a redevelopment opportunity which would result not only in sale but in additional profits". In other words, the advice to the company was: you have no choice but to redevelop the property to sell but you might recover more than your outlay.

94. Although there are bound to be cases where a person spends £1 on a property in order to increase its value by £1 (so that the person's net assets remain the same), there is nothing unusual in the person hoping or expecting that there is an increase in the value of the person's net assets. In other words, the mere fact that a person might recoup more than the expenses incurred in increasing the value of an asset cannot by itself be enough to constitute a trading transaction where previously the asset was held for non-trading purposes.

95. Understood in that way, it does not follow that a hope to recover more than the outlay of expenses necessarily turns the transaction into a venture in the nature of trade. The FTT was rightly focused on whether what was done was a "scheme for profit-making". In answering that question, it was entirely appropriate for the FTT to have asked itself whether the evidence showed that that company was focused on *profit*. We can detect no error of law in its approach.

(2) The distinction between an investment company and a trading company

96. There were other matters on which Mr Southern sought to rely that have, in our view, no bearing on the issue to be determined. Mr Southern sought to submit that the appellant was a "commercial" company and, as it was not an "investment" company, it must, therefore, be a "trading" company.

97. There was, though, no evidence that the company was a "commercial" company. Moreover, such evidence as there was tends to point in the opposite direction. It was common ground that the company had at no time sought to make money from its holding of the property (otherwise than through its future sale). It appeared to be no more than a passive property-owning vehicle established for the purpose of "enveloping" the ownership of the property in corporate form. It was telling that it had prior to the 2016/ 2017 chargeable period paid the ATED charge in full because there was no ground entitling it to any of the reliefs. As mentioned above, there were reliefs available for companies that could accurately be described as "commercial" companies. The intention of the legislation was, as the name of the tax indicates, to tax companies that existed as simple corporate "wrappers" or "envelopes" for holding property the occupation of which was enjoyed by a defined class of individuals.

98. In any event, the submission rests on the false notion that tax legislation necessarily distinguished between trading companies and investment companies. It is true, and was

accepted by HMRC, that the appellant was not holding the property as an investment to generate an income return. It is also true that it could not be reasonably regarded as carrying on an investment business. However, it does not follow from this that the company must, therefore be a trading company. The question whether the company was carrying on a trade is determined by reference to the particular facts, applying the relevant principles as discussed above.

99. The fallacy is that it assumes, without evidence, that the company must, as a result of its corporate status, necessarily be carrying on a business, and, as the business was not one of investment, it must therefore be a trading business.

100.Similarly, no weight can be put on the fact that there was no evidence of an intention to retain the property for use and enjoyment. It was, indeed, common ground between the parties that the company was not intending to keep the property, which led the FTT – rightly in our view – to the conclusion that badge 9 of *Marson* was irrelevant (whether the property was held for enjoyment). The company wanted to sell the property and had indeed been trying to do so for several years. A simple decision to sell tells one little of significance.

(3) Decision against weight of all evidence

101. There were parts of Mr Southern's submissions that sought to establish that the FTT had overlooked material evidence and other parts that suggested that the weight of the evidence was firmly, or indeed wholly, in favour of the finding of a trade.

102. As pointed out by Mr Hickey on behalf of HMRC, it was for the appellant to put evidence before the FTT and invite the tribunal to make findings of fact that supported its case. We could find nothing to suggest that any relevant evidence had been put to the FTT that it had failed to consider. The material to which Mr Southern referred in his submissions before this Tribunal consisted of correspondence between the parties that was included in the bundle of documents before the FTT. That was not relevant evidence.

103. Mr Southern also submitted that there was a series of findings that "unequivocally" pointed to trading and that those pointing in the opposite direction were of no material weight. We disagree. This is simply a disguised attempt to reargue the factual finding by the FTT.

104. Mr Southern also submitted that the scale of the redevelopment, and the expectation of a significantly higher selling price, were not given sufficient weight by the FTT in its decision. However, nothing in the FTT's decision bears out this submission. The FTT was clearly aware that a number of advisers were appointed. It recorded the terms of the planning application as involving "the minor alteration, replacement of mansard roof finishes, existing dormer windows and replacement of conservatories on ground and first floor. It also includes installation of lift from lower ground to second floor landing." The tribunal established that the costs of the project were significantly less than estimated. And it also recorded the prices at which the property was listed for sale, both before and after it was redeveloped.

105. All of these things were before the tribunal. It was, indeed, precisely because it was aware of those matters that, on its own initiative, it sought other matters of evidential weight and then went on to consider whether there was any evidence as to how the company had in the course of the project assessed the impact on profit of the changes in the costs (arising because of the reduction in the scale of the works proposed). As noted above, the FTT carefully considered a number of matters before concluding that the company had not done more than take steps to redevelop the property in order to secure an acceptable offer for a property that it had hitherto been unable to sell. That was a conclusion that was open to the FTT to reach.

(d) Failure to make primary findings of fact essential to decision

106. Finally, we turn to Mr Southern's sixth submission that the FTT had failed to make primary findings of fact essential to its decision. We reject that submission for the following reasons

107. Mr Southern claimed that the FTT failed to make findings as to the purpose of the development of the property. However, the FTT was properly addressing that question throughout the course of its analysis on whether the company was trading. There is no sensible way of reading the key analysis at [56] to [59] as an attempt to do anything else.

108. It is also wrong to assert that the FTT made no finding as to why the redevelopment was undertaken. The FTT explicitly decided that the company had redeveloped the property in order to increase the saleability of the property as an asset that it held otherwise than for trading purposes.

109. Nor does it help to claim that the FTT made no finding as to whether the company intended to hold the property as an investment for use or enjoyment. The FTT asked the pertinent question, namely whether the works carried out constituted a venture in the nature of trade. They made findings of fact that enabled them to evaluate whether, looking at the whole picture, sufficient evidence had been suggested to establish a change in the purpose for which the property was hold.

110. Finally, it is simply wrong to say, as Mr Southern submits, that, in order to establish whether a company was carrying on a trade, the FTT needed to consider the wholly separate question of whether the activities were "carried on on a commercial basis with a view to profit" (see s.138(4)(b) of FA 2013). As rightly explained by the FTT, that was a question that did not fall to be considered once it had come to a decision that the company was not in fact carrying on a trade.

Disposition

111.For the reasons we have given, there was no error of law in the FTT's determination that the appellant was not carrying on a trade in either of the chargeable periods concerned. The appeal is dismissed.

MR JUSTICE BIRSS

JUDGE ANDREW SCOTT

[Signed on original]

RELEASE DATE: 29 October 2020