[2020] UKFTT 00198 (TC)

TC07684

VAT – DIY housebuilders scheme – submission of claim within three months of certificate of completion – HMRC refusal of claim on the basis that it should have been made "by" one or more earlier dates – consideration of case law in Hall, Farquharson, Fraser and Dunbar – HMRC cannot displace certificate of completion as primary evidence of property's completion – reasons in Farquharson and Dunbar accepted and followed – further reasons – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01957

BETWEEN

CARL SANSOM **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS SONIA GABLE

Sitting in public at the Magistrates Court, Basildon, Essex on 20 February 2020

The Appellant in person

Ms Olivia Donovan, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction

1. Mr Sansom had constructed a house ("the Property") in Braintree, Essex. He and his family moved into the Property on 4 July 2013. On 6 April 2016, the Building Control inspector from Braintree Council ("the Council") refused to give the Property a certificate of completion.

2. Mr Sansom engaged in protracted correspondence with the Council and external experts in his efforts to persuade the Council that the Property met the necessary standard, and in particular that it met the regulatory requirements for energy efficiency. The Council eventually agreed and granted the certificate of completion on 19 June 2018. On 1 September 2018 Mr Sansom applied for VAT of £17,641.48 incurred on building the Property to be reimbursed under the DIY House Builders Scheme.

3. Regulation 201 of the VAT Regulations 1995 ("VATR") provides that a DIY refund claim must be made "no later than 3 months after the completion of the building", and be accompanied by "a certificate of completion or such other documentary evidence of completion of the building as is satisfactory to the Commissioners". Mr Sansom's application for a refund was made within three months of the issuance of the certificate of completion.

4. However, HM Revenue & Customs ("HMRC") refused to refund Mr Sansom's VAT, because they said the date of "completion" was not decided by reference to the certificate of completion, but by applying a multi-factorial test. Having applied that test, HMRC decided that the application had been made outside the three month time limit, and refused the claim.

5. We allowed Mr Sansom's appeal and found that he was entitled to be refunded the £17,641.48 on his claim form. In coming to our decision, we agreed with the statutory analysis set out in *Farquharson v HMRC* [2019] UKFTT 425 (TC) ("*Farquharson*") and *Dunbar v HMRC* [2019] UKFTT 747(TC) ("*Dunbar*"). We gave our judgment orally at the end of the hearing, along with brief reasons. Both parties asked for a full decision, and this is that full decision.

The evidence

6. Ms Donovan provided the Tribunal with a bundle of documents, which included:

   (1) the correspondence between the parties and between the parties and the Tribunal;

   (2) the certificate of completion and the planning consent for the Property;

   (3) communications between Mr Sansom and various specialists after the date the certificate was refused in June 2016; and

   (4) various articles downloaded by Ms Donovan about the Building Regulations 2010 ("the Building Regs").

7. Mr Sansom gave oral evidence, was cross-examined by Ms Donovan and answered questions from the Tribunal. He was an entirely honest and credible witness.

The facts

Purchase, planning and problems

8. In 2005, Mr Sansom decided to purchase land on which to build a house. Planning permission was granted on 5 May 2005. This was Mr Sansom's first DIY house-building

project, and he carried out the works himself in his spare time while continuing with his day job. The Property was modelled on a Dutch Barn with the large sloping roof which characterises that type of building, so that the windows of the upper floor were within the roof part of the structure.

9. Work could not begin on the Property until a dispute over a covenant had been resolved; this took around two years. Mr Sansom then instructed Mr Mervyn Perriman, a National Home Energy Rating Assessor, to conduct a "design final" submission on the expected energy efficiency of the Property; this was based on information provided by Mr Sansom. At that time Mr Sansom anticipated using man-made insulating materials in the roof, and the design final energy information was based on him using that material. The "design final" submission was sent to the Council in March 2007

10. Soon afterwards, Mr Sansom's mother passed away, and he was the executor of her estate which also took time and energy. He finally began work on the Property in 2009, but his income and cash flow was affected by the credit crunch, and this reduced the money available for the project. Mr Sansom purchased various building supplies, but all were of relatively low value until October of that year. Just as things began to improve financially, his wife had a series of seizures followed by a stroke and nearly died. She remained significantly affected by the stroke and was unable to carry out the majority of her previous day-to-day tasks. Mr Sansom took over childcare for their two children.

11. Because of his responsibilities for his wife and his children, Mr Sansom was only able to work on the Property intermittently. When doing so, he made a number of changes; in particular, he decided to use natural materials where possible, and purchased hemp and lamb's wool as insulating materials; he had been informed that these were just as energy efficient as the artificial products he had previously anticipated using. The lamb's wool was installed behind the plaster boarding in the roof.

July 2013 to March 2016

12. On 4 July 2013, Mr Sansom moved his family into the Property because they could no longer afford to live in their existing house and continue to develop the Property at the same time. Moving house made daily life more difficult for Mr Sansom, as the Property was not located close to shops or any form of transport. Mrs Sansom was not allowed to drive, and Mr Sansom had the additional responsibility of transporting his children to and from school and other locations. He also faced continuing and ever-present stress and anxiety from his wife's health condition and its uncertain prognosis.

13. When the family moved in to the Property, much of the work required under the approved plans and required by the building regulations was incomplete. However, the Property had one working bathroom and toilet ensuite with the main bedroom and running water in the kitchen, and Mr Sansom accepted that it was therefore "habitable". Ten days after moving into the Property, he applied for it to be added to the Council Tax register, and this was done with effect from that date. When he was able to, Mr Sansom continued to work on the Property, purchasing cement, sand, ballast, concrete, tubing, guttering, sockets, bricks, stone, and other building materials, together with equipment and tools; these were incorporated in, or used for, the building of the Property.

The Building Control inspection visit

14. On 6 April 2016, Mr Dave Jarvis, the Council's Building Control Services Manager, visited the Property to carry out a completion inspection. He emailed Mr Sansom the following day, listing 12 outstanding works, including:

(1) background ventilation of 5000m^2 to be applied to the main bathroom;

(2) soil vent piping incorrectly ducted;

(3) soil pipe to en-suite to be vented or extended to 900mm above window height;

(4) down pipes and guttering incomplete;

(5) external trickle vent covers not fitted;

(6) discharge pipe from hot water cylinder to be extended to just above ground level and protected with a wire guard.

15. In addition, Mr Jarvis required "information on loft insulation"; the energy performance certificate ("EPC"); the energy rating for the Property; the air pressure test result; commissioning certificates for the heat pump, hot water cylinder, and solar hot water systems; an electrical installation certificate and structural calculations for the first floor build.

June 2016 to March 2017

16. Mr Sansom sent Mr Jarvis the commissioning certificates and the electrical installation certificate by return. He then began carrying out work on the property to satisfy some of Mr Jarvis's requirements, using existing materials and purchasing new materials. He made 29 separate purchases of construction materials in the period from 6 April 2016 to 31 August 2016, including plasterboard, guttering, tiles, electrical and heating supplies, and cement. In October 2016, Mr Sansom purchased electrical supplies of £7.13. No construction materials were subsequently bought, although as can be seen from the following paragraphs, Mr Sansom spent significant sums on professional advice relating to the Property.

17. In order to obtain the EPC certificate, Mr Sansom contacted Mr Perriman, who said he first required the air pressure test result. On 25 August 2016, Mr Sansom contacted a firm called Elmhurst Energy and instructed them to provide this, and they did so on 27 October 2016. Mr Sansom sent this document to Mr Perriman the following day, saying "hopefully this is all you require" to produce the EPC, and asking for an indication of timescale, adding "this would be helpful as we are keen to get our completion certificate from Braintree District Council".

18. Mr Perriman responded on 1 November 2016, saying that although he was "semi-retired", he would finish this project. He attached his invoice, and asked whether there had been any changes since the design final submission. On 1 December 2016, Mr Sansom replied, confirming he would pay Mr Perriman's invoice by return, and saying that the design was unchanged but that instead of the anticipated man-made materials:

> "the walls…were constructed of a 150mm stud, covered externally by a hemp insulation board of 60mm deep, with weatherboarding fixed over 50mm battens. Between the studs there is 150mm of lamb's wool insulation. Internally the studs are covered by OSB board 9mm thick…the roof is also…constructed of 150mm rafter with a 60mm hemp board, fixed in place by 50mm of battens with a clay tile finish."

19. On 3 December 2016, Mr Perriman sent Mr Sansom a list of questions about the insulation:

(1) who supplied the hemp insulation as he needed to know the thermal conductivity;

(2) who supplied the lamb's wool as again he needed to know the conductivity;

(3) whether any insulation was used in the roof rafters; and

(4) whether there was insulation over the ceiling joists.

20. Mr Perriman also asked about the floor construction, the windows, the wood burner, the extractor fans, the hot water storage and the lighting. Mr Sansom responded on 16 January 2017, giving most of the requested information, but asking for clarification as to what Mr Perriman required to consider the floor construction and the lighting. He also said he needed to get this sorted out as soon as possible as he was thinking of selling the property and required the certificate of completion.

21. On 13 March 2017, Mr Perriman provided an "As Built SAP Specification Summary". This shows that the energy efficiency could not yet be established. It includes the following passages:

> "Floors: Ground Floor; drawings and calculations from Ken Rush Associates would be useful in particular the thermal conductivity (k value) of the insulation demonstrated for the attached Lamb's Wool. Your U-value calculations would be helpful.
>
> Walls: external wall timber frame…thermal conductivity (k value) of the insulation demonstrated with the attached lamb's wool…your U-value calculations would be helpful. Please confirm if layers in correct order.
>
> Roof: hemp board over or under rafters?
>
> Space and water heating: hot water cylinder – dedicated solar store volume required. Heat loss factor of kWh/day required."

22. Mr Perriman's covering email asked Mr Sansom to review and provide the missing information. He added that there was a "high risk" that the Council would "monitor" the Property because of the delay in finishing the works and "the nature of the build"; that they therefore needed "to be precise" and that he could not complete the EPC without the further information.

23. It was accepted by Ms Donovan, and we find as a fact, that there was a genuine and serious risk that the Council might require Mr Sansom to purchase and install artificial insulating materials to meet the energy efficiency requirements of the Building Regulations. Given in particular that the Property was a Dutch Barn with a sloping roof, the costs of stripping out and replacing the insulation would have been many thousands of pounds.

Mr Sansom's communications with Peak, and the issuance of the certificate

24. Despite his earlier promise to complete the project, Mr Perriman then retired and Mr Sansom had to find another firm. He instructed Peak Acoustics ("Peak") in October 2017, providing them with the plans and other information. On 12 December 2017, Peak asked Mr Sansom for details of "floor construction and/or U value, glazing U-values, M2 of solar tube". Mr Sansom responded with the relevant information on 21 January 2018. On 26 February 2018, Peak sent an email with one final question, and a request for him to sign the "developer

confirmation", and Mr Sansom responded. On 14 March 2018 he chased Peak, saying "did you receive my developer confirmation? What is the next step? When do I get my EPC? Is there anything else you need?".

25. Peak responded the following day, apologising for the delay and saying that everything was now ready and they would send a final invoice, after which they would lodge the EPC with the Council**.** On 16 June 2018, there was further contact with the Council about the chimney system, although this document had been omitted from HMRC's Bundle. The Council were satisfied and on 19 June 2016, issued the completion certificate. This states:

> "it is hereby certified that the building work described above, as far as the Authority has been able to ascertain after taking all reasonable steps in that behalf that the relevant applicable requirements of Schedule 1 [of the Building Regulations] have been complied with."

The VAT claim

26. On 1 September 2018, Mr Sansom's accountant, Quantic Accountancy ("Quantic"), submitted the VAT refund form, claiming £17,641.48. Quantic followed the instructions on HMRC's notes to that form, and attached all the documents listed in the checklist: the full planning permission; evidence that the work of construction was completed being the certificate of completion; a full set of building plans; all the original VAT invoices and a schedule of those invoices.

27. On 28 September 2018, Ms Hughes from HMRC wrote to Quantic asking why the claim had not been submitted earlier, given that the property had been occupied in 2013. Quantic explained that work was still being carried out on the property and that the certificate of completion was refused in April 2016, and attached a copy of the email from Mr Jarvis.

28. On 5 November 2018, HMRC refused Mr Sansom's claim on the basis that the building had been competed "at some point in October 2016" and the claim was therefore late. Unfortunately, that decision letter was also omitted from the HMRC Bundle, but its contents can be ascertained from the review letter, which followed on 28 February 2019.

29. The review officer, Mrs V Williams, upheld Ms Hughes's decision, saying that "there is no definitive document that evidences completion of a building", and that in HMRC's view "broadly speaking a building is regarded as being in the course of construction until all the main elements for it to function for its intended purpose are in place". She said that the building was completed "at the latest" by October 2016, as there was no claimed construction expenditure after that date. As a result, the claim was late. Mr Sansom appealed to the Tribunal.

The effect of the completion certificate

30. Ms Donovan provided various articles about the effect of a completion certificate. In reliance on that material, both parties accepted that it would be difficult to sell a property until the certificate had been granted, because the absence of the certificate would be identified by the purchaser's solicitor during local searches, and the purchaser would be likely to pull out of the sale, or else require a very steep discount on the price.

The legislation and regulations

The VAT legislation and regulations

31. Value Added Tax Act 1994 ("VATA") s 35 provides, so far as relevant to the issue in this appeal:

> "(1) Where –
>
> (a) a person carries out works to which this section applies,
>
> (b) his carrying out of the works is lawful and otherwise in the course or furtherance of any business, and
>
> (c) VAT is chargeable on the supply, acquisition or importation of any goods used by him for the purposes of the works,
>
> the Commissioners shall, on a claim made in that behalf, refund to that person the amount of VAT so chargeable.
>
> (1A) The works to which this section applies are –
>
> (a) the construction of a building designed as a dwelling…
>
> (2) The Commissioners shall not be required to entertain a claim for a refund under this section unless the claim –
>
> (a) is made in such time and in such form and manner, and
>
> (b) contains such information, and
>
> (c) is accompanied by such documents, whether by way of evidence or otherwise,
>
> as may be specified by regulations or by the Commissioners in accordance with regulations…"

32. We pause here to note that the only VAT which can be claimed under this scheme is that "chargeable on the supply, acquisition or importation of any goods used by him for the purposes of the works" and thus does not include VAT on services, including those of architects or specialist consultants.

33. Regulation 201 of the VATR is headed "method and time for making a claim" and reads:

> "A claimant shall make his claim in respect of a relevant building by –
>
> (a) furnishing to the Commissioners no later than 3 months after the completion of the building the relevant form for the purposes of the claim containing the full particulars required therein, and
>
> (b) at the same time furnishing to them:
>
> (i) a certificate of completion obtained from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners,
>
> (ii) an invoice showing the registration number of the person supplying the goods, whether or not such an invoice is a VAT invoice, in respect of each supply of goods on which VAT has been paid which have been incorporated into the building or its site,

(iii) in respect of imported goods which have been incorporated into the building or its site, documentary evidence of their importation and of the VAT paid thereon,

(iv) documentary evidence that planning permission for the building has been granted, and

(v) a certificate signed by a quantity surveyor or architect that the goods shown in the claim were or, in his judgment, were likely to have been, incorporated into the building or its site."

The Building Regs

34. Ms Donovan helpfully provided a copy of Schedule 1 to the Building Regs, which were made under the *vires* given by the Building Act 1984. Reg 4 of the Building Regs provides that building work "shall be carried out" in accordance with Schedule 1. Reg 17(1) provides that a completion certificate is to be given where the local authority is satisfied, after taking all reasonable steps, that the relevant applicable requirements of Schedule 1 have been complied with, and Reg 17(2) that the certificate is to be provided within eight weeks "from the date on which the person carrying out the building work notifies the local authority that the work has been completed".

35. Schedule 1 sets out numerous detailed requirements, including the provisions which underpinned Mr Jarvis's list of outstanding matters, such as a requirement for adequate ventilation, rainwater drainage, foul water drainage, and for the correct installation of combustion appliances. Part L is headed "conservation of fuel and power" and begins:

"Reasonable provision shall be made for the conservation of fuel and power in buildings by:

(a) limiting heat gains and losses-

(i) through thermal elements and other parts of the building fabric; and

(ii) from pipes, ducts and vessels used for space heating, space cooling and hot water services."

The issue in this appeal

36. HMRC's only reason for refusing repayment of the claim was that it was out of time. Ms Donovan agreed that the only issue we had to decide was whether Mr Sansom had made his claim within the three month time limit provided by Reg 201(a) of the VATR.

37. Since it was common ground that Mr Sansom had made his claim within three months of the issuance of the completion certificate, the dispute turned on:

(1) whether the three months ran from the date of issuance of that certificate, as Mr Sansom submitted; or

(2) whether "completion" was a multi-factorial test, which required considering when "all the main elements for it to function for its intended purpose were in place", as HMRC contended.

The submissions of the parties

38. Mr Sansom's grounds of appeal, drafted by Quantic and amplified in his oral submissions, were that:

(1) The Property was not complete until the completion certificate was issued.

(2) The completion inspection carried out on 6 April 2016 raised a large number of issues, including the lack of an EPC.

(3) The replacement of artificial materials by natural insulation products raised the significant issue of whether the Property had been constructed so as to meet the energy requirements of the Building Regs, or whether walls, ceilings, floors and major equipment installations would need to be "upgraded, reconfigured or even stripped out and replaced to conform with the required energy efficiency ratings" at a cost of many thousands of pounds.

(4) Mr Sansom had spent money sorting out that problem, but these were professional fees not building materials, and so did not appear on the schedule of costs submitted with his refund claim.

(5) The DIY refund claim was a "one off" opportunity to claim back the VAT incurred on the Property. Until the completion certificate was issued, there was no way for him to know whether he had still to incur significant building costs. HMRC's approach relied on hindsight and could not be correct.

39. Ms Donovan had drafted HMRC's Statement of Case and made oral submissions. She relied on the following arguments:

(1) Completion takes place "at a given moment in time" and that moment "is determined by weighing up the relevant factors of the project".

(2) HMRC's guidance note which accompanies the DIY refund form says "if you don't have a completion certificate yet", HMRC will accept one of the following documents: a habitation letter from the local authority; a Valuation Office Notice making an new entry into the Valuation List (or the equivalents for Northern Ireland and Scotland); a letter from a bank/building society saying that the final instalment of the loan secured on a building was released on a particular date, because the bank "then regarded that building as complete". She said that HMRC are therefore entitled to refuse to accept the date of the completion certificate as the date of "completion" of the Property and have done so in this case.

(3) Under the Building Regs, it is the builder who triggers the completion certificate. He could delay asking for that certificate and so artificially defer the start date for their claim. This was another reason why HMRC needed to be able to use a multi-factorial test to determine the "true" completion date.

(4) In this case, completion could have been in 2013, when Mr Sansom and his family moved in; the Property was clearly "habitable", and this was demonstrated by the fact that it had been included on the Council Tax register. It could have been in July 2016: although the certificate had been refused, only "minor" works were outstanding. In any event, the Property was completed by October 2016, because there had been no construction expenditure after that date. Ms Donovan accepted that had Mr Sansom been required to install different insulation throughout the property, this would have been eligible expenditure for the purposes of a VAT claim, and the position would have been different. However, on the facts that was not what happened.

(5) Mr Sansom had taken an inordinately long time to build the Property and to apply for the certificate of completion, and that too was a relevant factor to be taken into account when considering when completion had taken place.

40. Neither party relied on any case law. The Tribunal was aware of a number of relatively recent decisions considering the same issue: *Richard Hall v HMRC* [2016] UKFTT 632 (TC) (Judge Jones); *Farquharson* (Judge Poon and Mr Malcolm); *Stewart Fraser v HMRC* [2019] UKFTT 0573 (TC) (Judge Scott) and *Dunbar* (Judge Vos and Mr Robertson). In *Dunbar* the FTT had helpfully set out a summary of the earlier case law as well as their own conclusions.

41. We provided the parties with copies of *Dunbar* and drew their attention in particular to the summary of case law there set out. We directed a short adjournment for the parties to consider the arguments. When we reconvened, we asked whether either party wanted the appeal adjourned to another day so that they could more fully consider all the cases referred to in *Dunbar,* but both parties said that they wanted to continue. Mr Sansom said that he wished to adopt the analysis in *Dunbar* and asked the Tribunal to come to the same conclusion in his case, for the same reasons. Ms Donovan asked the Tribunal to follow the analysis in *Fraser,* which reflected her own submissions.

The case law

42. We first set out the conclusions in *Farquharson* and *Dunbar,* and then those in *Hall* and *Fraser.*

Farquharson and Dunbar

43. At [42] of *Farquharson,* the Tribunal held as follows:

> "(1) Applying the ordinary rules of statutory construction, the plain meaning of 'completion' under reg 201(a) is to be defined by the issue of a certificate of completion under reg 201(b)(i). It is a clear-cut definition for 'completion' that enables the claimant and the Commissioners to establish the common ground, and for the efficient administration of the refund scheme so that there is no cause for ambiguity or dispute such as the present case.
>
> (2) The primacy given to a certificate of completion is evident in the statutory wording; it is the *sine qua non* for the purposes of a VAT refund claim under the DIY Scheme. The statutory wording makes it clear that the preferred document is a certificate of completion, and it is only in the absence of which that the alternative should be provided in substitution.
>
> (3) It is only in the absence of a certificate of completion that the Commissioners would entertain a claim based on the alternative. What is satisfactory as an alternative is not specified by the statute in like manner as a certificate of completion. HMRC's guidance notes in relation to question 14 of the claim form then come in to fill the gap.
>
> (4) 'If you do not have a Completion Certificate *yet,* we will accept one of the following documents', states the guidance notes (see §7). From the word 'yet', it can be inferred that the alternative documentation is one that can be obtained before the house builder is able to obtain a completion certificate. In other words, the alternative documentation to a completion certificate has the effect of enabling the house builder to bring forward the claim ahead of the issue of a completion certificate.
>
> (5) Per the guidance notes, the alternative documentation that is satisfactory to the Commissioners are: a habitation letter or a Joint valuation Board Notice of Tax Banding (Scotland); a VOA (England

and Wales); a District Valuer's Certificate of Valuation (Northern Ireland); or a letter from a certified lender in relation to a loan secured on the new-build.

(6) The alternative documentation is to serve as evidence of completion, to enable a claim for a VAT refund to be made *before* a new build has obtained its completion certificate.

(7) The provisions under reg 201(b)(ii) to (v) concern the validity of the input VAT being claimed, by reference to the valid invoice from a registered supplier, in relation to the goods being imported, and in relation to whether the goods so claimed are genuinely used in the making of the supply of a new dwelling. None of these provisions pertain to the meaning of 'completion' for any further possible meaning of completion to be drawn after reg 201(b)(i)."

44. In *Dunbar*, the FTT adopted that analysis, and further developed it as follows:

> [41] First of all, regulation 201 VATR must be interpreted as a whole. This means that the phrase "the completion of the building" in regulation 201(a) cannot be interpreted in isolation. It is necessary to look at the rest of regulation 201. Regulation 201(b)(i) requires the taxpayer to furnish HMRC with "a certificate of completion obtained from a Local Authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners".
>
> [42] It could not be clearer from this that the primary evidence of completion in the context of regulation 201 VATR is therefore the certificate of completion. It is only if the taxpayer does not have a certificate of completion that he is at liberty to produce other documents which are acceptable to HMRC to try to persuade them that the building is complete.
>
> [43] The fact that documents other than the certificate of completion may be used to evidence the completion of the building does of course mean that completion must be capable of occurring before any certificate of completion is issued. However, it is equally clear, as the Tribunal in *Stuart Farquharson* points out at [51(7)], that it is for the taxpayer to bring forward the date on which a building is deemed to be complete for the purposes of regulation 201 VATR and not for HMRC to argue that completion has taken place before a certificate of completion has been issued.
>
> [44] It must in our view be assumed that the regulations have been framed in a way which is intended to make it relatively straightforward for both the taxpayer and for HMRC to determine when completion of the building has taken place. If, as Mr Hilton contends, the date of completion depends on all of the facts and circumstances, it would be almost impossible to be sure when completion had taken place. Indeed, in *Stewart Fraser*, it is clear that the Tribunal itself was not sure when completion had taken place. The judge says at [24-25] that:
>
> > '[24]. …..I find that the change in the plans was simply the rectification of a defect and the house had been completed by the end of 2015.

> [25]. Even if I am wrong in that it was certainly completed by June 2016 since no further work was done thereafter.'
>
> [45] This leaves the taxpayer in an impossible position. If the Tribunal was right that completion had taken place at the end of 2015, a claim would have to have been made by the end of March 2016. However, if completion had only taken place in June 2016, a claim made in March 2016 would not be valid as the claim would have been made prior to the completion of the building (which is not permitted by regulation 201 VATR).
>
> [46] We would stress that the phrase "completion of the building" must be interpreted in its own specific legislative context. The phrase appears in other parts of the VAT legislation and it may well have a different meaning for those purposes. We express no view on this.
>
> [47] Our conclusion therefore is that, for the purposes of regulation 201 VATR, the completion of a building takes place when a certificate of completion is issued or, if there is no certificate of completion, on such other date as may be evidenced by documents produced to HMRC by the taxpayer and which HMRC are prepared to accept as satisfactory evidence of completion."

45. As explained later in this Decision, this Tribunal agrees with the two judgments set out above. We have come to that view having also considered *Hall* and *Fraser,* which we consider below.

Hall

46. Mr Hall had made his original claim within three months after the date on the certificate of completion, and HMRC had refunded the VAT. He subsequently made a further claim for the VAT associated with installing cupboards. HMRC refused the clam on the basis that it was more than three months after the date on the completion certificate. Mr Hall appealed to the Tribunal. At the hearing HMRC's presenting officer, Ms Ashworth, did not seek to defend that reason for refusing the second claim. Judge Jones said she was right because the date on the certificate was not determinative. He said:

> "[3] A Certificate of Completion can be issued in respect of a dwelling house when the dwelling house satisfies the various criteria set out in the Building Regulations. That does not necessarily mean that the building works, for which planning permission has been granted in respect of a new dwelling, will have been completed. A Completion Certificate can be granted where the dwelling itself satisfies each of the applicable Building Regulations so as to qualify as being habitable, notwithstanding that, for example, the driveway, surrounding paths and/or boundary fences/walls have not been completed. Some may choose to reside in a new house whilst those outstanding works are done. The fact that they have not been done will not prevent a Completion Certificate being issued. Such a Certificate does not certify that the entire building works have been completed; only that the dwelling has been constructed so as to be habitable in accordance with the requirements of the Building Regulations.
>
> [4] It will always be a matter of fact and degree as to whether and when any particular building project has been finished and come to its actual

> completion. It will not necessarily be the date upon the Completion Certificate."

47. Thus, during the hearing of Mr Hall's appeal, neither party made submissions on the meaning of "completion", because HMRC had abandoned their earlier position (and the basis for the decision under appeal) that the time for a claim began running from the date of the completion certificate. Unlike *Farquharson* and *Dunbar*, there was no consideration of the statutory context. The judgment in *Hall* also refers to the certification as providing evidence that the building was "habitable", whereas there is no reference to that concept in the Building Regs.

48. It is no doubt true that a person may continue to do work on a self-build after it has been certified as complete, whether this be paths or boundary walls, or (as in Mr Hall's case), the installation of cupboards. But if a person incurs the related expenditure more than three months after the issuance of the certificate of completion, it is clear from Reg 201(a) that he will not be entitled to make a claim to recover the related VAT.

49. There is no unfairness here, because the issuance of the certificate is triggered by the individual informing the Council that the building is complete, see section 17(2) of the Building Regs. We therefore respectfully disagree with the approach taken by the Tribunal in *Hall*, while noting that the appeal was refused in any event, albeit for different reasons.

Fraser

50. Mr Fraser moved into his self-built property on 23 December 2015. On 21 January 2016, he applied for a completion certificate, but this was refused by his local council because he had not met the requirements relating to hazardous ground gases. In June 2016, he installed new fans for ventilation. On 3 June 2016, Mr Fraser was issued with a Council tax banding notice with an effective date of 23 December 2015. He continued to explore with the local authority how to resolve the toxic gas risk, but the issue was not settled until April 2018, after he had paid a £2,500 for a further validation. The certificate of completion was issued on 18 April 2018, and Mr Fraser applied to recover his VAT within three months of that date.

51. HMRC refused the claim, saying that the property was "was likely complete by the end of 2016" and that Mr Fraser "could have furnished other information such as the council tax banding". The Tribunal Judge upheld that decision, saying that "apart from the change to the fans "no work was done after 2015" and the property had therefore been completed by the end of that year, and "even if I am wrong in that it was certainly completed by June 2016". She also said that:

> "if the validation had established that the gas membrane was not fit for purpose then extensive work would have had to have been done on the house…there is no doubt that substantial works would have been required since the membrane, by definition, is embedded in the fabric of the building. However, that would not be completion of the building, that would be rectification of a very serious defect."

52. We respectfully disagree with this approach, for the reasons given in *Farquharson* and *Dunbar*, and for the further reasons set out below.

Discussion

The statute and the regulations

53. Our starting point is the statute. VATA s 35 provides that HMRC "shall not be required to entertain a claim for a refund" unless it is made "in such time and in such form and manner, and contains such information" and "is accompanied by such documents whether by way of evidence or otherwise" as "may be specified by regulations or by the Commissioners in accordance with regulations".

54. The time limit is set out at Reg 201(a) as "3 months *after the completion*". Reg 201(b)(i) provides that the claimant must also provide "a *certificate of completion* obtained from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners". As the Tribunals in *Farquharson* and *Dunbar* said, the word "completion" in Reg 201(a) cannot be seen in isolation, because Reg 201(b)(i) provides that evidence of "completion" is provided by the certificate issued by the local council. As a matter of statutory construction, the two must be read together and inform each other. Thus, the term "completion" in Reg 201(a) means "completion within the meaning of the Building Regulations".

55. That this is correct can be seen from the fact that the *only* reference in the VAT regulations to a specific document providing the evidence of completion is the certificate provided by the local authority. VATA s 35 allows HMRC to refuse to "entertain a claim for a refund" if the documents required by the regulations are *not* provided. Where a certificate of completion is provided within the time limit, along with the other specified documents, HMRC have no legal power to refuse the claim.

The restrictions on a claim

56. That this is right can be seen from nature of the claim itself, which is entirely unlike the rest of the VAT system. First, it is a one-off claim, whereas traders reclaim input VAT on a regular monthly or quarterly basis. Second, it has a strict three month time limit, in contrast to the normal position where a trader has four years to claim input VAT which has been overlooked, see VATA s 80(4).

57. As Quantic pointed out, Reg 201 gives the self-builder one single opportunity to reclaim the VAT incurred on his construction. If he does not meet the three month deadline, he can recover none of the VAT. If he claims too early, and incurs more VAT on subsequent work, he is unable to make a second claim to recover the further VAT.

58. It is thus vital for the regulations to be absolutely clear as to when that narrow window of time opens. Reg 201 meets that necessary requirement by prescribing that the window opens on the date given by the certificate of completion.

The alternative

59. Reg 201(b)(i) provides that a claimant must attach to his claim "a certificate of completion obtained from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners". The second part of that sentence does not displace the first. Instead, it gives them the power to accept *alternative* evidence.

60. HMRC's guidance, published as Notes to the claim form, says that HMRC will accept the following alternative evidence as "satisfactory": a habitation letter from the local authority; a Valuation Office Notice making an new entry into the Valuation List, or a letter from a

bank/building society saying that the final instalment of the loan secured on a building was released on a particular date, because the bank "then regarded that building as complete".

61. However, that guidance also states that these documents will be accepted "if you don't have a completion certificate *yet*". As the Tribunals said in *Farquharson* and *Dunbar,* providing one of these alternative documents allows the house builder to bring forward the claim ahead of the issue of a completion certificate, and so claim back VAT from that earlier date. It does not allow HMRC to ignore and displace the completion certificate.

62. In other words, the certificate of completion is the primary evidence that the building is complete, and the existence of an alternative route does not allow HMRC to refuse to accept that certificate on the basis that the house builder should have provided a different document at an earlier point in time.

A multi-factorial test?

63. In *Fine & Country Ltd v Okotoks Ltd* [2013] EWCA Civ 672 at [50], Lewison LJ was considering an appeal against a decision made after a multi-factorial assessment. He referred with approval to Lord Hoffmann's statement in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700 that this was a type of decision which "involves the application of a not altogether precise legal standard to a combination of features of varying importance".

64. It would be very surprising if Parliament had intended that a one-off claim with a very strict three month time limit should depend on "the application of a not altogether precise legal standard to a combination of features of varying importance". For the reasons given above, we have found that Parliament did not take that approach.

65. The operation of the supposed multi-factorial approach, and the consequential imprecision, can be seen in Mr Sansom's case. Ms Donovan said that "completion" could have been:

(1) in July 2013, when the building was habitable for council tax purposes;

(2) in June 2016, because no significant work or expenditure was required after that date;

(3) in October 2016, as there was no subsequent claimed expenditure; but

(4) had Mr Sansom had been required to purchase new insulation materials and use them in the Property, completion would have followed the finishing of that work.

66. The same issue can be seen in *Fraser,* where there were three possible dates:

(1) December 2016: HMRC said that the property was "was likely complete by the end of 2016";

(2) December 2015: the Tribunal held that "apart from the change to the fans "no work was done after 2015" and the property had therefore been completed by the end of that year; and

(3) June 2016: the Tribunal said that if it was wrong in deciding on December 2015, the building "was certainly completed by June 2016".

67. We agree with the Tribunal in *Dunbar* that this puts the self-builder in "an impossible position". First, there is no certainty. Mr Sansom cannot not know by which of HMRC's

suggested dates he must submit his time-limited claim: is it July 2013, when he moved into the Property; three years later in June 2016 when he was told by Mr Jarvis that it was far from complete, or on the date of his final building supply invoice in October 2016? The fourth of HMRC's dates could only be eliminated with hindsight, and it simply cannot be correct that the date of completion (on which a one-off time-limited claim depends) can vary depending on hindsight.

68. Second, Mr Sansom is in a Catch-22 situation:

(1) had he submitted alternative evidence of completion on any of the first three of HMRC's suggested dates, and subsequently incurred further construction costs, he would have been unable to claim the related VAT on these further costs, because he would already have made his one-off claim; but

(2) if as in fact happened, he decided to wait until he knew whether those further costs would be required, and succeeded in providing sufficient evidence to the Council so that no new insulation had to be installed, he would lose his only opportunity to reclaim *any* of his VAT.

69. Even that binary choice is an over-simplification. Had Mr Sansom made his claim within three months of October 2016, HMRC might have refused to accept it on the basis that completion was in June 2013, when he moved into the Property. But had he made the claim within three months of *that* date, he would have been prevented from claiming the VAT on a significant amount of his building work. These uncertain and capricious outcomes cannot be what was intended by Parliament.

70. We reject the multi-factorial approach applied to Mr Sansom for the following further reasons:

(1) It rests on establishing a date "by" which a building was completed. In Mr Sansom's case: HMRC said it was completed "by" October 2016, and in *Fraser* both HMRC and the Tribunal referred to the possible dates "by" which completion had taken place. But it is not sufficient to establish a date "by" which the building is complete. The claim must be submitted within three months "*after* the completion of the building". In other words, the regulations require that a particular, specific date be identified. That is exactly what the completion certificate provides.

(2) The Review Officer and Ms Donovan fixed on October 2016 as the date "by" which the Property was completed, because there was no expenditure on construction materials after that date, and this was thus a key element in their multi-factorial approach. However, there is nothing in Reg 201, or even in the guidance, which says that completion is to be established by the date of purchase of the some or all of the building supplies. Not only is there is no direct link between the purchase of building supplies and their usage, but constructing a building involves other costs for which the VAT cannot be reclaimed, including expenditure on professional fees, so the date of completion cannot be established by reference to the date on the invoices for which a VAT claim has been submitted.

(3) Ms Donovan said that HMRC needed the discretion of a multi-factorial test because it is the builder who triggers the completion certificate. He could therefore delay asking for that certificate and so artificially delay the start date for his claim. It is true that the completion certificate is issued after the builder informs the local authority the work has been completed, see Reg 17(2) of the Building Regs. However, he has no reason artificially to delay obtaining that certificate: it is a necessary precursor to being able to

sell the property, as well as being the identified document for obtaining a refund of the VAT which has already been expended. We could not see any risk to HMRC here, let alone any reason for displacing the statutory meaning of completion in Reg 201. If there is a delay caused by the need to satisfy the local authority that the Building Regs have been complied with, all that happens is that HMRC have the cashflow benefit of retaining the VAT for longer.

(4) Another of the factors on which Ms Donovan relied as being relevant to the multifactorial evaluation was the time taken by Mr Sansom to finish building the Property. Speaking generally, we cannot see how long a property takes to finish could be of any help in deciding whether it was completed. In any event, it is clear from our findings of fact (and not disputed by Ms Donovan) that Mr Sansom had to contend with a number of unexpected difficulties:

(a) the legal dispute over the covenant, which took two years to resolve;

(b) his mother passing away, and his role as executor;

(c) the credit crunch and its effect on cash flow;

(d) dealing with Mr Perriman and then with Peak; and

(e) his wife's serious and life threatening illness.

We emphasise the latter in particular. This was not only extremely worrying and stressful for Mr Sansom and his family, but it entirely changed the extent and nature of the demands made upon Mr Sansom by his wife and his children. His wife continues to be seriously unwell. These many difficulties caused Mr Sansom to describe the whole building project as a nightmare. He thought it was over when he finally obtained the certificate of completion, but that was followed by the further stress of HMRC's refusal of his VAT claim, and this appeal.

71. In coming to the above conclusions, we have not overlooked the Tribunal's comment in *Fraser*, that if a local authority refuses to grant a completion certificate and there is a risk that further costs have to be incurred before that certificate is granted, those further costs are not those of constructing the building but of rectifying a defect. However, there is in our judgment no legal basis for such a distinction. There may be many situations where a local authority requires a self-builder to make changes to construction work already carried out, and there is nothing in the regulations which requires the related expenditure to be excluded from the VAT claim. Indeed, Ms Donovan rightly accepted that had Mr Sansom been required to install different insulating materials in the Property, that would have been an allowable cost and would have changed the "completion" date.

Our conclusion

72. This is a one-off single claim with a tight time limit. It is therefore particularly important for the self-builder to know when the time limit begins. The VAT regulations provide the necessary certainty by linking the start of the three month time limit to the provision of a single document, the certificate of completion. HMRC cannot refuse to accept claims within three months of the issuance of that certificate on the basis that the individual has failed to meet some uncertain and imprecise multifactorial test.

Subsequent case law

73. As noted at the beginning of this decision, we gave our judgment orally at the hearing on the basis of the evidence and the case law set out above. In the period between the giving of that judgment and the writing of this decision, two further tribunal judgments have been

published, *Proffitt v HMRC* [2020] UKFTT 0120 (TC) (Judge Bailey and Mr Robertson) and *Wedgebury v HMRC* [2020] UKFTT 0125 (TC) (Judge Chapman and Mr Stafford). We have read those judgments, but nothing in them causes us to review the conclusions we gave to the parties on the day of the hearing, or our reasons for those conclusions, which are as set out above.

The finality of this decision

74. HMRC's only reason for refusing Mr Sansom's claim was that it had been submitted late. We have allowed his appeal against that decision because his claim was not made late. However, Ms Donovan said in her Statement of Case that "the invoices which the Appellant submitted have not been checked" and that HMRC "reserve the right to check the Appellant's invoices and make a later decision as to whether they are allowable".

75. HMRC made a similar statement in *Swales v HMRC* [2019] UKFTT 0277 (TC). This was also a DIY Builder appeal, although involving a different substantive issue. The Tribunal (Judge Thomas and Mrs Bridge) said at [153]:

> "In relation to the DIY Builders scheme in s 35 VATA, the only appealable decision is one with respect to the amount of any claim (see s 83(1)(g) VATA). HMRC's decision was that the amount was nil. As we have upheld the appeal it falls to us to say what the amount of the successful claim is, and it is therefore £12,731.62 (Item 21 on Form VAT431NB) that amount which falls to be repaid. It is irrelevant that HMRC purported to reserve the right to scrutinise the individual invoices should the appeal succeed: it is too late for that. This was established in *Lady Henrietta Pearson v HMRC* [2014] UKFTT 890 (TC) (Judge Howard Nowlan and Mr Richard Thomas). That was the decision in the second appeal in the case and arose because after Lady Pearson's claim was upheld on appeal in the 2013 decision (see §§106 to 109) HMRC had attempted to reduce the amount claimed on the grounds that the 5% reduced rate should have been charged on the goods acquired by Lady Pearson. The Tribunal held that to be an illegitimate attempt to reopen the appeal."

76. We agree. HMRC made an appealable decision in Mr Sansom's case that the amount of the claim was £nil. We have allowed his appeal and decided he is entitled to a refund of £17,641.48.

77. We note that in *Wedgebury* HMRC asked for an adjournment of the appeal to allow HMRC time to examine the invoices. The Tribunal hearing that appeal refused, saying that "it would not be fair and just to allow HMRC to have another chance to argue against the appeal as presented by the Appellants" as it would involve disproportionate extra time and costs. Ms Donovan did not ask for an adjournment, so we were not required to make that type of case management decision. But had she done so, we would similarly have found that it was unfair and unjust to extend the time, and increase the costs, expended by Mr Sansom on this case. We would also have taken into account his very difficult personal situation, given his wife's continuing serious illness.

Right to apply for permission to appeal

78. This document contains full findings of fact and reasons for the decision. If HMRC are dissatisfied with this decision, they have a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are to note that this time limit is unaffected by the general stay issued by the President of the First-tier Tribunal on 24 March 2020.

79. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON

TRIBUNAL JUDGE

RELEASE DATE: 23 APRIL 2020