Neutral Citation: [2022] UKFTT 00170 (TC)

Case Number: TC08497

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/01587

STAMP DUTY LAND TAX – Multiple Dwellings Relief – para 7(2)(b) Schedule 6B Finance Act 2003 – whether 'self-contained' annexe 'suitable for use as a single dwelling' – lack of proper kitchen facilities – planning consent with covenant extant that annexe only be used as 'ancillary' accommodation – whether actual Airbnb usage means the statutory test met; no – the meaning of 'dwelling' in the SDLT context considered – Airbnb users not occupants generally where 'dwelling' connotes a residential abode suitable for use with a degree of settled permanence – the significance of no separate postal address or council tax account – ***appeal dismissed***

Heard on: 6 and 7 October 2021
Judgment date: 26 May 2022

Before

TRIBUNAL JUDGE HEIDI POON

Between

ALEX DOWER & SIAN LOUISE DOWER

Appellants

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Mr Edward Hellier, of counsel, instructed by Landstar Accountancy Limited

For the Respondents: Dr Jeremy Schryber, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

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

2. The Closure Notice amendment is pursuant to paragraph 23 of Schedule 10 to the Finance Act 2003, and the consequential additional SDLT payable is £81,250.

3. The principal issue for determination is whether the Property, at the effective date of transaction, constituted two dwellings for MDR purposes.

EVIDENCE

4. Mr Dower lodged a witness statement with exhibits and was cross-examined and answered supplemental questions from the Tribunal. I find Mr Dower to be a credible witness, and accept his evidence as to matters of fact, but have set aside aspects of his evidence which pertain to opinions.

5. The Tribunal is provided with a joint bundle of documents of 499 pages. By applications, the parties lodged additional documents after the close of evidence by reference to the List of Documents. No objection was raised by the opposing party to the respective lodgements, and the Tribunal gave permission for the following to be included.

(1) By HMRC's application dated 22 September 2021, an email from the appellants' agents dated 15 April 2021 to concede to the preliminary issue on behalf of the appellants.

(2) For the appellants by application dated 22 September 2021, to include a webpage from the Office for National Statistics on 'the median floor space for flats'.

LEGISLATION

6. The legislative framework for SDLT is largely contained in the Finance Act 2003 (FA 2003). Unless otherwise stated, references to sections and schedules are to the 2003 Act, and of which the following are directly relevant to this appeal.

(1) Section 55 provides for the applicable rates of SDLT, in accordance with the land transaction in question, by reference to factors such as residential or non-residential, whether as a transaction in a number of linked transactions, or any relevant relief is due.

(2) Section 58D provides for the claim of relief in relation to transfers involving multiple dwellings to be in a land transaction return, or an amendment of such a return.

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

> '(2) A transaction is within this sub-paragraph if its main subject-matter consists of—
>
> (a) an interest in at least two dwellings, or
>
> (b) an interest in at least two dwellings and other property.'

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

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

'(2) A building or part of a building counts as a dwelling if—
(a) it is used or suitable for use as a single dwelling, or
(b) it is in the process of being constructed or adapted for such use.'

7. Section 83 provides for HMRC with the power in relation to the formal requirements as to assessments, penalty determinations etc, with further provisions in this respect being contained in Sch 10, whereby para 12 in relation to the 'Notice of enquiry' provides, inter alia, for the time limit for opening an enquiry being nine months of the 'relevant date' of: (a) the filing date, (b) the date of return being delivered if after the filing date, or (c) the date amendment made to a filed return, and para 23 provides for the completion of enquiry by the issue of a closure notice.

THE FACTS

Preliminary issue

The First SDLT Return and closure notice

8. The key events leading to a closure notice being issued against the original SDLT return filed are as follows.

(1) The appellants purchased a residential property in Gerrards Cross ('the **Property**') for £2,750,000.

(2) The effective date of transaction ('EDT') for SDLT purposes is the date of completion of the contract and land transfer, which was 1 August 2018.

(3) On 2 August 2018, Mr Dower filed an SDLT return ('the **First SDLT Return**') and self-assessed the tax to be £243,750, which is the correct amount of SDLT payable on the acquisition of the Property if the transaction was not to qualify for MDR.

(4) On 25 October 2018, Landstar Accountancy Ltd ('**Landstar**') wrote to HMRC to amend the First Return by making a claim for MDR, which resulted in £81,250 being repayable to the appellants.

(5) On 19 July 2019, HMRC issued a notice of enquiry to Mr Dower that an enquiry would be made into the SDLT Return under para 12 of Sch 10 to FA 2003, and requested supporting documentary evidence for the MDR claim.

(6) On 14 August 2019, Landstar responded to the HMRC stating that the Property contained two dwellings: the main house and an 'Annexe', described as a detached 'staff/granny/au-pair' Annexe in the garage building of the Property.

(7) On 4 September 2019, HMRC wrote to Landstar requesting further information as regards whether the Annexe had surfaces for food preparation and a sink in the designated kitchen area, to which Landstar responded by enclosing further photographs.

Respondents' strike-out application

9. There followed a sequence of events that led to HMRC to the view that the original SDLT return was invalid.

(1) On 21 October 2019, HMRC sent a closure notice to Mr Dower with the conclusion that the Property did not qualify for MDR, and the closure notice increased the SDLT payable by £81,250 ('**the First Closure Notice**').

(2) On 15 November 2019, Landstar wrote to HMRC to appeal against the First Closure Notice. HMRC responded by sending their 'view of the matter' letter to Mr Dower (copied to Landstar) on 13 December 2019 in line with the conclusion of the First Closure Notice.

(3) On 9 January 2020, Landstar requested a statutory review, and on 26 March 2020, HMRC sent the review conclusion letter upholding the First Closure Notice.

(4) On 22 April 2020, the appellants submitted a Notice of Appeal to the Tribunal.

(5) On 20 July 2020, HMRC applied for the appeal to be struck out on the basis that the First Return was invalid; the appellants opposed the application.

(6) On 10 August 2020, HMRC issued notices of determination to the appellants in the absence of what HMRC regarded as a valid return for the transaction.

(7) On 10 September 2020, the Tribunal directed that HMRC's application would be dealt with as a preliminary matter at a composite hearing which would also address the substantive issue.

The Second SDLT Return and closure notice

10. The preliminary issue on the status of the First SDLT Return then led to the following:

(1) On 21 September 2020, the appellants jointly filed an SDLT return in relation to the purchase of the Property ('the **Second SDLT Return**') as a protective measure. The tax due was assessed at £162,500 on the basis of an MDR claim. HMRC accept that this self-assessment displaced the notices of determination issued on 10 August 2020.

(2) On 24 September 2020, HMRC applied for the directions of 10 September 2020 to be set aside and for a case management hearing to be listed.

(3) On 30 September 2020, the appellants objected to HMRC's application of 24 September 2020.

(4) On 1 October 2020, the Tribunal revoked the directions of 10 September 2020 and stayed all proceedings until HMRC's decision on the Second SDLT Return and any subsequent appeal by the appellants in relation thereto.

(5) On 9 October 2020, HMRC sent enquiry notices to the appellants in respect of the Second Return.

(6) On 19 October 2020, HMRC issued a closure notice ('**the Second Closure Notice**') to each of the appellants on the basis that the transaction did not qualify for MDR.

(7) On 21 October 2020, the appellants appealed to HMRC against the Second Closure Notice and notified their appeal to the Tribunal.

Disposal of the preliminary issue

11. On 11 November 2020, the Tribunal consolidated the appeals under the single reference TC/2020/01587, and directed for the preliminary and substantive issues to be heard together.

12. On 12 April 2021, Landstar wrote to make an 'offer to concede the preliminary issue' on behalf of the appellants in order to simplify the appeal 'on the basis that HMRC will apply a flat-rate penalty of £200 only', and on the understanding that the appellants' concession 'does not in any way prejudice or affect' the MDR claim. The letter of offer closed by reiterating that the concession is 'predicated on HMRC's agreement that, other than a fixed penalty of £200 only, no additional charge, penalty, interest or payment will be demanded by HMRC'.

13. HMRC accepted the offer of concession by its expiry of 15 April 2021. Consequently, the preliminary issue as concerns the validity of the First SDLT return, and the strike-out application of the first appeal, forms part of the background to the present appeal, but is no longer a matter being contended by the parties.

Substantive issue

The Property

14. The Property is in a county north-west to London. From exhibits of the floor plan and photographs, I make the following findings of fact in relation to the Property.

(1) The Property is situated in grounds in excess of half an acre, with south-facing landscaped gardens in the rear; mature hedging over low brick retaining walls marks the northern perimeter of the Property, and the boundary to the public pavement and road.

(2) The Property comprises a Main House of three storeys (internal area 428 sq m) with an external room (5 sq m); a double garage (internal area 38 sq m); and an Annexe (internal area of 50 sq m).

(3) From the perspective of the front elevation of the Property, the garage is situated to the left (east-end) of the Main House. The garage building with the Annexe above is a stand-alone construction without any walls adjoining the Main House. The Main House is Edwardian, and a 'sweeping carriage drive' leads up to the House and garage.

(4) The garage measures 4.11m at its widest, and 9.65m from the front to rear. Entrance to the garage is through its double door visible from the front elevation, and spans almost the entire width of the front entrance.

(5) A passageway down the east elevation of the Main House along the length of the garage leads to a set of wooden gates, and beyond which is the entrance of the Annexe with its lockable door. The Annexe entrance is situated lower than the ground level to the rear of the garage.

(6) The entrance porch of the Annexe has stairs leading to the upper level, where the accommodation areas are situated. The landing is lit with a French window. From the landing, the shower room is accessed towards the rear of the Annexe (i.e. south end), and towards the front are two adjoining rooms – the living room joins directly onto the bedroom at the north end of the Annexe. The bedroom is the biggest room, and its windows are above the double garage door from the front elevation.

(7) All windows (excepting the shower room) are on the west elevation of the Annexe and look out on to the east elevation of the Main House. The window in the shower room faces south and looks onto the rear of the Property. Comb ceilings run symmetrically along the east and west axes of the Annexe accommodation, and the restricted head height area of the Annexe is 8 square metres in total.

Facilities and utilities in the Annexe

15. The internal floor area of the Annexe is 50 square metres (543 sq ft). Reference is made to the Office of National Statistics published post on 21 February 2020, in which data on the median floor space for flats in London is stated to be 43sqm, 'just under the size of four car parking spaces', and is compared to the median floor space for houses in England and Wales of 99sqm, (about nine typical parking spaces).

16. The Annexe is accessed by a lockable front door, which is exclusive to the Annexe. It has its own boiler, stop tap, central heating controls, fuse box, security alarm system separate from the Main House.

17. The sale particulars for the Property referred to an 'Annexe with Sitting Room, Bedroom and Shower Room', and described the accommodation in the following terms:

> 'Above the double garage, a self-contained Annexe houses a large bedroom or office, a sitting room and a shower room.'

18. The Annexe does not have a gas oven or any designated kitchen area. It does not have a separate postal address, nor is it a separate property in its own right for council tax purposes.

The planning permission restriction

19. A planning application was submitted to the local council on 24 February 2000 by the previous owners of the Property. The 'Proposal' for which permission was granted by notice dated 26 April 2000 was described as: 'Front porch and detached two storey building incorporating double garage with ancillary residential accommodation above'. The planning application in relation to the detached building that houses the Annexe is related as follows:

> 'Involves demolition of existing garage and erection of replacement, a maximum of 4.6m wide and 14.7m long, and 5.1m high to ridge. Incorporates ancillary residential accommodation at first floor.'

20. The case officer considering the 2000 planning application originally recommended that the application should be refused, for the reason that 'the additional bulk resulting from the proposed extension would be intrusive within the landscape and would be detrimental to the openness of the Green Belt'. The recommendation to refuse the 2000 application drew on the refusal decision of a previous planning application in 1999 for a similar two-storey building on the site of an existing garage. The recommendation report highlighted the 'main issue' was whether 'the changes to the scheme' in the 2000 application was 'sufficient to overcome the reason for refusal' of the previous application, which 'centred on the height and size of the proposed building appearing cramped within the plot frontage and detrimental to the street scene and to the Conservation Area'.

21. The changes referred to include: (a) the reduction in the size of the building, (b) the lowering of ridge by sinking the building into the ground further, and (c) siting of the building 'well behind the building line of the house and back from the front boundary'. The Report gave prominence to 'the design of the building and its effect on the Conversation Area'; that 'the roof would be in clay tiles to match existing, the windows in a similar style to those of the house, and the walls rendered and painted white as is the case with the main house'. The recommendation then changed to granting 'Conditional permission' from the initial refusal recommendation (which was recorded at the start of the Recommendation Report, and crossed out with a diagonal line). The recommendation for 'Conditional permission' was subject to several conditions, two of which are as follows:

> '(3) C197 Ancillary residential buildings at [Property address].
>
> (5) … no windows shall be installed at any time in the southern elevation of the building hereby approved.
>
> Reason: In order to protect the amenities and privacy of adjoining residential occupiers.'

22. By notice dated 26 April 2000, the Council granted planning permission subject to conditions and reasons set out in an appended schedule. Paragraph 3 of the schedule sets out the specific restrictions in relation to the use of the detached building as follows:

> 'The building hereby permitted shall only be used for the purposes in connection with and incidental to the occupation of [Property's address] as a private dwelling. It shall not be used for any business, commercial or industrial purposes at any time. *For the avoidance of doubt, it shall not at any time be used as a separate dwelling.*
>
> Reason: To prevent the undesirable establishment of any business, commercial or industrial use within the curtilage of *this dwelling house*, to the detriment of the amenities of the occupiers nearby properties; …' (italics added)

23. An excerpt from Planning Portal Guidance is lodged in the authorities bundle, and so far as relevant, it states the position in relation to a planning breach when a development that has been given permission subject to conditions breaks one or more of those conditions:

> 'Your local planning authority can serve an enforcement notice on you when they consider you have broken planning control rules. Normally this will be because they consider what you are doing, or have done, is harmful to your neighbourhood.'

Use of the Annexe

24. Mr Dower spoke of the use of the Annexe in his evidence as summarised below:

(1) The previous owners 'let out to friends and friends of friends who came to work in the area for long periods of time', but Mr Dower does 'not know the precise details of the arrangements'.

(2) From June to October 2020, the Dower family was 'living' in the Annexe while the Main House was under renovation. Water was cut off in the Main House during this period, and the kitchen was 'out of action'. For these four months, Mr and Mrs Dower with their two teenage children 'lived' in the Annexe, cooking their meals with a microwave oven and a slow cooker, and meeting all their hygiene needs with the facilities in the Annexe. For two of the four months, Mr and Mrs Dower slept in the Annexe while their children returned to sleep in the Main House.

(3) The Annexe has since been advertised as 'a self-contained private apartment' via the Airbnb website, and is let out to guests on business trips for the duration of usually a week at a time. The Dowers have not much contact with the Airbnb guest users other than to issue keys.

25. Mr Dower emphasised in evidence that Mrs Dower is a nutritionist, and that the family was able to maintain a 'perfectly healthy diet' with the facilities available per exhibits in the Annexe (and a slow cooker) in the four months when the kitchen in the house was out of action.

26. Photographs included as exhibits show the 'kitchen area' as located in the landing area of the Annexe; a kettle and a coffee-making machine on a pedestal table are placed in front of the mullioned French windows of the landing. To the left of the French window is a butcher's block unit with shelving below, and head room restriction from comb ceiling above. To the right of the window is an under-counter fridge, placed within what appears to be the inner shell of a kitchen cabinet unit (without a door), and the drawer opening of the shell unit is used as a cutlery and crockery compartment; a microwave oven is placed on top of the shell unit, again with head room restriction above.

27. The water supply for kitchen use comes from the taps in the shower room adjacent to the landing area. The sink is an integral part of a vanity unit, which has a counter surface with chamfered corners to its left about the size of a folded tea towel for drying dishes. The end of the vanity unit is aligned with the edge of the windowsill in the shower room.

28. The toilet runs parallel to the front of the vanity unit. One stands in the gap between the toilet and the vanity unit to access the taps of the sink. Head room restriction means that the right-hand side of the vanity unit has an overall head room clearance of about 1.5 times the height of the vanity unit. Taking the standard height of a vanity unit to be 80cm, the head room clearance at the far end of the vanity unit is circa 120cm at its lowest from floor level.

29. The door to the shower room is on the opposite wall to the window. The shower cubicle is situated behind the door, diagonally across the room from the vanity unit corner.

APPELLANTS' CASE

30. Mr Hellier submits that the Annexe was 'suitable for use as a single dwelling' at the time of completion of the purchase and is therefore a 'dwelling' for SDLT purposes. He takes the Tribunal to the statutory context of the SDLT regime within FA 2003 in relation to the definition of 'dwelling' with reference to the following provisions.

(1) Section 116 defines '*residential property*' as a building '*that is used or suitable for use as a dwelling*' along with its garden and grounds.

(2) This is the definition that underpins the application of a higher rate of SDLT to certain transactions under Sch 4A; for the purchase of additional dwellings under Sch 4ZA; and the application of relief for first-time buyers under Sch 6ZA.

(3) When Parliament added Sch 6B by enactment of the Finance Act 2011, it would have been aware of the definition in s 116, and adopting the same for Sch 6B purposes according to *Bennion*: the 'presumption that the same words have the same meaning'.[1]

(4) The definition of a '*dwelling*' under Sch 4ZA includes annexes and outbuildings, and Parliament introduced Condition C into FA 2003 Sch 4ZA para 5 to exclude such buildings from triggering the higher rates of SDLT by that schedule, the explanatory notes to the Finance Bill 2016 state relevantly:

> 'Clause 117 is amended to address an issue where the higher rates of SDLT apply to purchases of dwellings with annexes and other buildings that are, themselves, self-contained dwellings. The changes to the clause remove some transactions from the higher rates of SDLT where such an annex or outbuilding is the only reason that the higher rates can apply.'

(5) The UT in *Fiander and Brower* [2021] UKUT 156 (TCC)('*Fiander*') when stating that suitability is '*by reference to suitability for occupants generally*', Mr Hellier submits that the UT meant that the definition of 'suitability' is not to be taken by reference to a narrow group of occupants who will accept, or forced to accept, living conditions that are otherwise unsuitable. Furthermore –

(a) the UT was not suggesting that to be a 'dwelling', a building must be suitable for occupation by literally anyone; otherwise, a vicarage tied to a church, or retirement flats restricted to use by those over a certain age, or houses subject to an Agricultural Workers planning permission restriction would cease to be dwellings;

(b) restriction against a 'type of occupant' being a 'relative' is to say that one cannot rectify unsuitability for use as a single dwelling by restricting the test to an occupant who requires significantly less privacy than would normally be expected;

(c) restriction against a 'type of occupant' being a 'squatter' is directed at the degradation of the '*suitable*' test to a building which is otherwise unsuitable for human occupation: see *PN Bewley v HMRC* [2019] UKFTT 530 (TC) at [52]-[53].

31. Taken the statutory meaning of 'dwelling', together with the exposition of UT's guidance on 'occupants generally', Mr Hellier submits that the suitability test does not mean suitable for use by each and every person, or every class of person. A building's use may be restricted to being a dwelling for certain classes of people and remain a 'dwelling' for SDLT purposes.

32. Mr Hellier applies the statutory meaning of 'dwelling' as established above to the facts pertaining to the Annexe, and submits that the Annexe is a 'dwelling' for MDR purposes:

[1] *Bennion on Statutory Interpretation* Seventh Edition, s.21.3.

> 'It is suitable for use as a single dwelling: (a) the Dowers lived there for four months; (b) the Annexe is let out to third-parties as a 'self-contained private apartment' usually for a week at a time; (c) it was let out by the previous owners for 'long periods of time'. The juxtaposition of 'used' and 'suitable for use' in Sch 6B para 7 suggests that there is a close tie between suitability for use and actual use when applying the statutory definition.'

33. It is submitted that the Annexe is a 'substantial size' and exceeding the median floor space of a London flat. It has its independent access, facilities and utilities to be a 'single' dwelling separate from the Main House. It is within walking distance a local range of amenities to meet the necessities of an occupant.

34. In relation to the restriction of use by planning permission, Mr Hellier cites *Carson Contractors v HMRC* [2015] UKFTT 530 (TC) ('*Carson*') where the FTT found that a planning permission restriction of a building to purposes ancillary to another large house did not prevent the building from being 'self-contained living accommodation'.

35. Mr Hellier refers to the HMRC's guidance SDLTM00430 published on 1 October 2019 entitled '*Residential Property – How many dwellings? Control of utilities and other factors*'. The salient aspects of this guidance to support the appellants' case are:

(1) Control of utilities: A single dwelling should be able to control all or most of the utilities serves supplied to it – gas and electricity, cold water, heating.

(2) Other factors including legal constraints:

> 'The property may be subject to legal conditions, including planning restrictions and restrictive covenants, where public or private law, which inhibit use as a separate dwelling. These conditions will be a factor in considering suitability of use as a dwelling, although where these conditions are not being respected for any reason, actual use will prove more helpful than theoretical use.'

HMRC'S CASE

36. HMRC contend that at the EDT the Property was a single dwelling (of which the purported Annexe formed part) and not two dwellings. The purported Annexe was not a single dwelling within the meaning of para 7(2) Sch 6B. The factors that HMRC consider material to the fact that the Annexe was not a single dwelling include:

(1) The Annexe did not have any kitchen facilities and infrastructure suitable for independent day-to-day living.

(2) No separate council tax, or postal address.

(3) The Property has planning permission which supports the contention that at the EDT the Property consisted of one single dwelling. HMRC submit that using the Annexe as a separate dwelling would have breached planning rules and is therefore an objective indicator that the Property was not suitable for such use.

(4) Viewed realistically, the Annexe provided additional living space, given the arrangement of the purported Annexe within the garage of the Property, and there were not two separate dwellings for MDR to apply.

(5) HMRC do not accept that chattels such as a microwave is evidence of kitchen facilities within the Annexe fell below the objective standard for suitability and did not amount to being a kitchen.

37. Although it is not binding, the respondents submit that their published guidance SDLTM00410-415 provides assistance in determining what constitutes a single dwelling:

> 'The test of whether a property is "suitable for use" as a single dwelling is a more stringent test than whether it forms a self-contained part of a larger dwelling. Furthermore, whether or not it is suitable for use as a single dwelling requires consideration whether it is sufficiently independent to be considered a dwelling on its own. In the case where a building is considered to contain more than one dwelling, evidence will be needed to show that each "dwelling" in question is sufficiently independent to count as a separate dwelling in its own right. In the absence of sufficient evidence, it may be decided that it is more appropriate to consider that there is one dwelling, not two or more.'

DISCUSSION

Issue for determination

38. The substantial issue in this appeal is whether the Property at the effective date of transaction on 1 August 2018 consisted of two dwellings (the Main House and the Annexe) for the claim of MDR to be valid. The Upper Tribunal's guidance on the application of the statutory test under para 7(2) Sch 6B is set out at [48] of *Fiander*:

> '(1) The word "*suitable*" implies that the property must be appropriate or fit for use as a single dwelling. It is not enough if it is capable of being made appropriate or fit for use by adaptations or alterations. […] The question of whether the property is suitable for use as a single dwelling falls to be determined by the physical attributes of the property as they exist at the effective date, not as they might or could be. […]
>
> (2) The word "*dwelling*" describes a place suitable for residential accommodation which can provide the occupant with facilities for basic domestic living needs. Those basic needs include the need to sleep and to attend to personal and hygiene needs. The question of the extent to which they necessarily include the need to prepare food should be dealt with in an appeal where that issue is material.
>
> (3) The word "*single*" emphasises that dwelling must comprise a separate self-contained living unit.
>
> (4) The test is objective. The motives or intentions of particular buyers or occupants of the property are not relevant.
>
> (5) Suitability for use as a single dwelling is to be assessed by reference to suitability for occupants generally. It is not sufficient if the property would satisfy the test only for a particular type of occupant such as a relative or squatter.
>
> (6) The test is not "one size fits all": a development of flats in a city centre may raise different issues to an annex of a country property. What matters is the occupant's basic living needs must be capable of being satisfied with a degree of privacy, self-sufficiency and security consistent with the concept of a single dwelling. How that is achieved in terms of bricks and mortar may vary.
>
> (7) The question of whether or not a property satisfies the above criteria is a multi-factorial assessment, which should take into account all the facts and circumstances. Relevant facts and circumstances will obviously include the physical attributes of and access to the property, but there is no exhaustive list which can be reliably laid out of relevant factors. Ultimately, the assessment must be made by the FTT as the fact-finding tribunal, applying the principles set out above.'

The meaning of 'dwelling' in the SDLT context

39. For there to be two dwellings at the effective date of transaction, the Annexe had to meet the test under para 7(2) Sch 6B to FA 2003 as being '*used or suitable for use as a single dwelling*'. The statutory test is a multi-factorial, objective assessment of the attributes of the Property within the SDLT context. In my judgment, the crucial finding of fact which determines this appeal hinges on the meaning of 'dwelling' in the SDLT context.

40. Mr Hellier refers to *Carson* for support that there were two dwellings at EDT. The issue in *Carson* is whether a converted barn on the grounds of the main house (a listed building) was part of one dwelling for VAT purposes. The Tribunal found that the barn had been renovated to become a building with all the essential features 'suitable for use as a self-contained dwelling', and not a part of the dwelling to the main house (at [62]). The Tribunal therefore found that there were two dwellings for VAT, and the listed building status of the main house could not be conferred on the barn for its renovation costs to benefit from zero-rating.

41. When considering the relevant test within the VAT context, the Tribunal in *Carson* has specifically distinguished it from similar tests for dwellings in other contexts, as set out at [42]:

> 'We consider that there is a distinction to be drawn between a person's dwelling and a building designed as a dwelling. An ordinary house, for example, will cease to be someone's dwelling when it becomes unoccupied or used as short term temporary accommodation. It will nevertheless be designed as a dwelling. The test in Item 2 [Group 6 Schedule 8 to VATA 1994] is not in relation to the actual use of the building but relates to the nature of its design. That in our judgement is an objective test. The way a building has been used can at best only be evidence of one way it could be used.'

42. The fact that the Tribunal in *Carson* found that there were two dwellings for VAT purposes therefore does not assist the appellants' case in the SDLT context. A building designed as a dwelling for VAT purposes does not equate to it being suitable for use as a dwelling in the SDLT context. If anything, when the Tribunal in *Carson* observed that an ordinary house which is used for short-term temporary accommodation ceases to be a 'dwelling', that observation would directly render the Annexe *not* a dwelling, since the relevant test for MDR is about usage, and the Annexe has been for temporary or short-term accommodation use only.

43. The Upper Tribunal in *Fiander* observes at [46] that the phrase 'suitable for use as a single dwelling' is used 'in the context of a potentially reduced rate of SDLT', and therefore does not consider that 'decided cases in completely different contexts, such as council tax and VAT, … form the basis for any reliable guidance as to its meaning, construed purposively'.

44. To construe the meaning of 'dwelling' purposively in the SDLT context, I have regard to the fact that land and buildings transactions are categorised into 'residential property', or 'non-residential property', (and 'mixed' is a property with both elements). The term 'residential property' is specifically defined under s 116(1)(a) FA 2003 as '*a building that is used or suitable for use as a dwelling*' including the land that forms part of the garden or grounds, whilst '"*non-residential property" means any property that is not residential property*'. A property transaction that is 'non-residential' is therefore likewise determined by reference to s116(1) as the antithesis of a residential property.

45. The term 'dwelling' is central to the statutory definition of 'residential property' (and hence, also 'non-residential property') in the SDLT context. It is not an overstatement to say the term 'dwelling' carries the weight of determining the applicable SDLT rates and eligibility of reliefs for all property transactions, since it not only defines what a residential property is, but also defines what a non-residential property is by contrast.

46. Despite its central importance to the operation of the SDLT regime, the word 'dwelling' is not a term of art with a specialised legal meaning, but an ordinary word where the dictionary meaning can inform its construction. The word 'dwelling' is defined by the Oxford English Dictionary as '*a place of residence*; *a habitation*; *a house*', and ties in with the meaning of 'dwell' as an intransitive verb in the sense of '*reside, live, have one's home*'; the dictionary meaning of 'reside' is to '*settle; take up one's station*'; *'remain or continue in a certain place or position*'. In other words, a dwelling connotes a physical place which a person occupies with regularity and continuity.

47. In *Uratemp Ventures Ltd v Collins* [2001] UKHL 43 ('*Uratemp*'), the House of Lords considered whether a hotel room (without cooking facilities) could qualify as a 'dwelling house' in the context of the Housing Act 1988 by virtue of the occupant being a long-term resident. The Lord Chancellor remarked at [3] that:

> '"Dwelling" is not a term of art, but a familiar word in the English language, which in my judgement in this context connotes a place *where one lives, regarding and treating it as home*.' (italics added)

48. Referring to the different statutory contexts that had given rise to 'this jungle of judicial glosses on the meaning of dwelling house' (at [14]), Lord Steyn in *Uratemp* made the pertinent observations in relation to statutory construction of this familiar word 'dwelling' at [15]:

> 'The starting point must be that "dwelling house" is not a term of art. It is an ordinary word in the English language. While I accept that dictionaries cannot solve issues of interpretation, it nevertheless is helpful to bear in mind that dwelling house has for centuries been a word of wide import. … In ordinary parlance a bed-sitting room where somebody habitually stays is therefore capable of being described as a dwelling house. So much for generalities. The setting in which the word appears in the statue is important. It is used in legislation which is intended to afford a measure of protection to tenants under assured tenancies. This context makes it inappropriate for the court to place restrictive glosses on the word "dwelling". On the contrary, as counsel appearing as *amicus curiae* accepted, the courts ought to interpret and apply the word "dwelling house" in s 1 the 1988 Act in a reasonably generous fashion.'

49. *Uratemp* has been relied upon in some MDR appeal cases to argue that 'dwelling' should be given a wide meaning, and that the absence of cooking facilities (as in *Uratemp*) is not detrimental to meeting the MDR test of suitability for use as a 'dwelling'. However, as Lord Steyn's exposition has made clear, the meaning of 'dwelling' has been given a 'reasonably generous' interpretation in *Uratemp* due to the purpose of the Housing Act, which is to afford a measure of protection to tenants. It is not to say that there is no intersection in 'this jungle of judicial glosses on the meaning of dwelling house' between different statutory contexts, but what is a 'dwelling' in one statutory context cannot be transposed into another directly.

50. In the SDLT context, a residential property that is used or suitable for use as a 'dwelling' is to be construed as a building (or part of a building per s 116(6)) whereby the occupier can inhabit with a degree of settled permanence so as to form the centre of his existence. The interpretation that the term 'dwelling' for SDLT purposes connotes a place of abode being inhabited with a degree of settled permanence is consistent with the fact that the average purchaser of a residential property is typically a home-owner, buying 'a place where one lives, regarding and treating it as home' (Lord Chancellor in *Uratemp*). Even if a residential property is purchased by a landlord investor, the occupier of the investment property is likely to be a tenant renting the place to be his home for the duration of the lease.

51. I agree with Mr Hellier's reference to *Bennion* that there is a presumption that the same words have the same meaning in statutory construction. To that extent, the meaning of 'dwelling' in the SDLT context intersects with what Lord Millet observed in *Uratemp* at [30] and [31]: that the words 'dwell' or 'dwelling' mean the same as 'inhabit' and 'habitation', or more precisely 'abide' and 'abode', and refer to 'the place where one lives and makes one's home'. Lord Millet continued by saying:

> 'They [i.e. "dwell" and "dwelling"] suggest a greater degree of settled occupation than "reside" and "residence", connoting the place where the occupier habitually sleeps and usually eats, … In both ordinary and literary usage, residential accommodation is a "dwelling" if it is the occupier's home (or one of his homes). It is the place where he lives and to which he returns and which forms the centre of his existence.'

52. For MDR purposes, whilst case law development has focused on the exposition of the phrase 'used or suitable for use as a dwelling', it is important not to lose sight of the fact that the qualifying condition for MDR relief is in fact the exact wording used to define 'a residential property' under s 116 FA 2003. It is as apt therefore to ask whether the purported second dwelling in a transaction could have been sold separately as a 'residential property' at the effective date of transaction for the transaction to be eligible for MDR.

Whether Annexe 'used or suitable for use as a dwelling'

53. With the meaning of 'dwelling' apposite to the SDLT regime in mind, I conclude that the Annexe was not a second dwelling at the EDT to qualify for MDR for the following reasons.

(1) It is not disputed that the Annexe is 'self-contained' in the sense that it has: (a) an independent lockable entrance, (b) separate connections to utilities (water, gas, electricity), and (c) its own boiler, central heating and security alarm systems. However, these self-contained features are necessary, but not sufficient, conditions for meeting the multi-factorial statutory test of 'suitable for use as a dwelling'.

(2) Access to the Annexe from the street is through the front drive of the Property, and involves passing the front and the side of the Main House and the garage, which are not part of the Annexe. The internal access of the Annexe is gained through a gate that leads to the rear end of the garage to the entrance porch. It is not evident that there was any physical barrier to the rear garden of the Property after the gate per sales particulars.

(3) It is noted that the planning consent stipulated that 'no windows shall be installed at any time in the southern elevation of the building hereby approved' (§21(5)) in order 'to protect the amenities and privacy of the adjoining residential occupiers'; yet mullioned windows of at least 5 square panes in height have been installed on the southern elevation (i.e. in the shower room) which overlook the rear garden, even if the width of vision may be restricted depending on its relative position to the Main House.

(4) The situation of the Annexe in relation to the Main House, together with its widows on the southern elevation, means that it is not without a degree of compromise of privacy and security to the occupants of the Main House. For these reasons, the planning consent has stipulated that the Annexe is an *ancillary* residential building to the Main House, and 'shall only be used for the purposes in connection with and incidental to the occupation' of the Property as '*a private dwelling*' and 'shall not at any time be used as a separate dwelling' (§22).

(5) In the SDLT context, the relevance of this planning consent stipulation at the effective date of transaction meant that the Annexe could not possibly have been sold separately as a 'residential property' in its own right. As set out earlier, it is as apt to ask

whether the purported second dwelling in a transaction could have been sold separately on the effective date of transaction to address whether MDR could have been in point. Quite apart from the physical attributes of the purported second dwelling, the planning consent restriction would have prohibited the possibility of the Annexe being 'conveyed' as a separate, second dwelling from the Main House, which is an eminently appropriate consideration for SDLT purposes.

(6) The absence of proper kitchen facilities weighs heavily against the Annexe being suitable for use as a dwelling. Airbnb users are short-term temporary occupants of the Annexe (staying for a week at a time), and some prospective users may be prepared, as a trade-off for its location, to make do with the make-shift arrangements as described from the exhibits, to negotiate the head room restriction in one's daily movements to use the vanity sink, or the butcher's block for kitchen functions, or to put up with the proximity of the toilet when washing up dishes. To an objective observer, and notwithstanding the nearby shopping amenities, the Annexe is not suitable for use as a dwelling by occupants generally, who intend to inhabit the place with a degree of settled permanence, which entails the requirement to have proper facilities to prepare and cook food for daily consumption with sufficient ease and hygiene standards,.

(7) No evidence has been produced in relation to the use of the Annexe under the previous owners other than the alleged hearsay from Mr Dower for any finding of fact to be made, but its actual usage under previous occupiers makes no difference to the objective assessment required as regards suitability for use as a dwelling. As to the use of the Annexe by the Dower family for four months when the Main House was under renovation, it is an effective testimony of the Annexe being ancillary accommodation to the Main House. The convenience and self-sufficiency with which the Annexe afforded the Dowers during that period of disruption to the Main House speaks for the tie between the Annexe and the House as a single dwelling, and the temporary nature of the use by the Dowers does not detract from my finding that the Annexe is not suitable for use as a dwelling in the sense of an abode to be inhabited with a degree of settled permanence.

Airbnb usage

54. In other decided MDR appeal cases, the argument has been advanced on the premise that if the purported second dwelling is suitable for use by Airbnb users, then it meets the suitability test for use as a dwelling. It is for this reason that I have considered the merits of such premise by deliberating over the purposive construction of the term 'dwelling' in the SDLT context.

55. I do not doubt that the Annexe in question has been found to be suitable accommodation by Airbnb users. However, the relevant comparator of suitability for Airbnb usage is hotel accommodation, which falls to be categorised as non-residential property. The commonality between hotel and Airbnb is the temporary nature of the accommodation in terms of days, or a week or two at a time, rather than months. In contrast, a place suitable for use as a dwelling is a place where 'one lives, regarding and treating it as home'. Whilst a place suitable for use as a dwelling is undoubtedly suitable for Airbnb usage, the converse is not self-evident, as illustrated by the factual matrix in the present case.

No separate council tax or postal address

56. A dwelling in the SDLT context is to be construed as a physical abode being inhabited by its occupants with a degree of settled permanence. To all intents and purposes therefore, the occupants of a dwelling form a household unit. No separate council tax or postal address for a purported second dwelling are reliable indicators that the property in question is one dwelling, and these useful indicators should not be downplayed, even though they are not determinative of the substantive issue. The suitability criterion for use as a single dwelling means that the

occupants of the main dwelling have to countenance the prospect of the occupants of the purported second dwelling being 'occupants generally', and therefore totally unrelated to the occupants in the main dwelling.

57. To decide if the Annexe was suitable for use as a second dwelling at the EDT, an objective assessment is whether the Annexe, without its own postal address and council tax account, was suitable for use as a dwelling by occupants generally, who are unrelated to the occupants in the Main House. Quite apart from the daily inconveniences, a shared council tax account between two households is open to undesirable financial entanglement in relation to liability allocation or non-payment by one household, while the potential abuse from a shared address can be far-reaching due to the myriad significance being attached to a postal address, from the electoral roll to credit and security checks, and for personal identify profile purposes.

58. If the Annexe is to be a qualifying single dwelling suitable for use as an abode to be occupied with a degree of settled permanence by unrelated third-parties (i.e. occupants generally), the inhabitants of the House would most probably consider the sharing of communal grounds for access, of facilities for waste disposal, and of the common address for post, etc. a severe curtailment to the full enjoyment of the Property in its overall situation with extensive grounds for such enjoyment. I have no difficulty therefore in finding that at the effective date of transaction, an objective observer, such as prospective owners of the Property like the Dowers, would not regard the Annexe a separate dwelling from the Main House, so as not to countenance the prospect of sharing the postal address and council tax account, or the grounds for access, let alone the perennial presence of some unrelated occupiers above their garage.

DISPOSITION

59. The appeal is accordingly dismissed. The Property at the effective date of transaction was one dwelling for SDLT purposes. Consequently, the transaction does not qualify for Multiple Dwellings Relief. The closure notice amendment in the sum of £81,250 is confirmed in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

60. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR HEIDI POON
TRIBUNAL JUDGE

Release date: 27 MAY 2022