Neutral Citation: [2023] UKFTT 00739 (TC)

Case Number: TC08922

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/02928

STAMP DUTY LAND TAX – whether property was suitable for use as a dwelling – yes – appeal dismissed

Heard on: 18 August 2023
Judgment date: 31 August 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC
IAN SHEARER

Between

HENDERSON ACQUISITIONS LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Gary Henderson, director of the Appellant

For the Respondents: Vicki Ann Wood, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

1. With the consent of the parties, the form of the hearing was Video using the Tribunal video hearing system. A face-to-face hearing was not held because it was expedient not to do so. We were provided with a bundle of documents (including authorities) of 582 pages.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

INTRODUCTION

3. This matter concerns an appeal bought by Henderson Acquisitions Limited (**Appellant**) against a decision of HM Revenue & Customs (**HMRC**) dated 30 March 2020 refusing a claim for a refund of stamp duty land tax (**SDLT**) made by the Appellant in the sum of £12,350 following the acquisition of a property on Bedford Road in Letchworth Hertfordshire (**Property**) on 26 August 2016.

4. As we announced at the hearing, and for the reasons set out below, we determined that the Property was suitable for use as a dwelling and the SDLT originally paid by the Appellant at the time of purchase was the correct sum such that no refund was due.

5. We consider it important that there be a further published decision on this issue in order to protect taxpayers such as the Appellant from being persuaded to make unmeritorious claims for repayment of SDLT contrary to the purpose and intention of the statutory provisions.

THE LAW

6. Finance Act 2003 (**FA03**) imposes a charge to SDLT on the acquisition of chargeable interests in land in England and Northern Ireland. Section 55 and paragraph 4 Schedule 4ZA FA03 prescribe how the tax is charged. The provisions are complicated. The amount of SDLT charged is determined by reference to three factors:

(1) whether the land interest acquired is, on the date of completion (the effective date of the transaction (**EDT**)), residential or non-residential;

(2) if the land interest acquired is residential, whether the purchaser is a company or, if a private individual, whether it is their main residence or a second home; and

(3) in each case the consideration paid.

7. In the present appeal it is the first factor which is at issue. Because the Appellant is a company the relevant definition of residential property is provided by paragraph 18(2) to Schedule 4ZA FA03: "a building or part of a building … a) … used or suitable for use as a single dwelling". However, and for present purposes, that definition is the same as that which would apply were the Appellant to have been a private individual, under section 116(1) FA03.

8. If the property is suitable for use as a dwelling (there is no question in this case that it may be multiple dwellings) then SDLT will be due at the highest rates prescribed under the statute and chargeable in slices on the purchase price.

EVIDENCE AND FACTUAL FINDINGS

9. The hearing was held informally. Mr Henderson gave a full description of the Property at the EDT by reference to pictures which had been taken by him during the renovation which was undertaken, or which were produced (including outline floor plans) for the purposes of its later marketing. He answered questions from both the Tribunal and HMRC. We found him to be an honest witness and we accept his evidence.

10. On the basis of the correspondence and other documents and Mr Henderson's description we find the following facts relevant to the determination of the appeal:

(1) The Appellant's business is the purchase, renovation and resale of domestic houses.

(2) On 26 August 2016 the Appellant acquired the Property from the estate of its former owner who had died some time previously. Mr Henderson understood that the deceased had lived in the property prior to her death but the property had been vacant following her death whilst probate was obtained.

(3) At the time of purchase SDLT was paid by the Appellant on the basis that the Property was residential and had been purchased by a company such that the higher rates of SDLT applied.

(4) Mr Henderson had visited the property once prior to purchase. At the time he considered it a suitable property for renovation. The property appeared sound but needed modernising.

(5) When he visited it on or shortly after completion, the ceiling in the kitchen had partially collapsed as a result of what Mr Henderson believed and understood was a leaking water pipe in the central heating system. The leak had caused damage to the joists supporting the floor in the bathroom (which was above the kitchen) and the kitchen ceiling. As a consequence of the damage he considered it necessary to put in place Acrow props to support the upper floor across both the kitchen and the adjacent dining room as the affected joists ran the length of both rooms. This limited safe access to the kitchen, dining room, and to the bathroom and one bedroom (above the dining room) on the upstairs floor.

(6) It was candidly accepted that the damage to the joists was not primarily threatening any load-bearing wall.

(7) The joists required replacement as they were rotten and could not be repaired. Replacing the joists took the workman 2-3 days and the cost of doing so was about £1.5 – 2k.

(8) The stairs from the ground to first floor remained useable throughout the renovation works despite the damage. There was no limit to access to the remaining two bedrooms and the sitting room throughout. Looking at a floor plan of the house, the damage affected less than half of its floor area.

(9) In addition to the works required to replace the joists the Property required full rewiring. By reference to a letter prepared by a construction specialist on a "to whom it may concern basis" on 21 April 2020 we accept that the electrical installation was dangerous having been "subject to multiple DIY alternations … [using] incorrect cable sizes and types, termination points in inaccessible locations and numerous potential fire hazards from incompetent workmanship".

(10) The central heating system also needed to be fully replaced in order to meet current building regulation standards.

(11) At least in part in consequence of the works referenced above the Property needed to be and was fully replastered and redecorated. New kitchens and bathrooms were also installed.

(12) The works were all undertaken without the need to demolish any part of the building which, at all times remained sound, including the roof (this is so despite an indication to the contrary in a letter from a surveyor originally representing the Appellant:

Mr Henderson's evidence was that the roof was sound and the surveyor had undertaken only a paper exercise to determine the condition of the Property).

(13) The works were all of a type which might have needed to be undertaken in respect of an occupied house.

(14) At some point prior to 11 May 2019 the Appellant was in contact with Stamp Duty Savers and was advised that in light of the judgment of the First-tier Tribunal (**FTT**) in *PN Bewley Ltd v HMRC (**Bewley**)* there was scope to claim a refund of SDLT on the basis that due to the nature and extent of the renovation works the Property was not "suitable for use as a dwelling" and did not meet the definition of a residential property. Therefore SDLT should have been payable at the lowest rates i.e. those applicable to non-residential buildings.

(15) On 11 May 2019, Stamp Duty Savers made the refund claim on behalf of the Appellant. The claim was supported by a "to whom it may concern" opinion that due to: roof leaks resulting in damage to internal plasterworks, missing/defective plasterwork, partial rebuilding of internal brickwork walls (and use of Acrow props), defective heating system, defective electrics and consequential works the Property was not suitable for use as a dwelling. This was in reliance on *Bewley* as it did not "as a minimum provide facilities for personal hygiene, facilities to enable the consumption of food and drink, … safe storage of belongings and a place of an individual to rest and sleep. In addition the property had health and safety concerns which could have presented a danger to any occupant residing within." Evidence supporting the need for the works identified to have been undertaken was provided with the letter, that being the same evidence as was available to us.

(16) On 13 February 2020 HMRC opened an enquiry into the claim seeking further information regarding the state of the Property. Responses were provided on 3 March 2020. Having considered the response HMRC closed the enquiry rejecting the claim on 30 March 2020. Further information was provided by the Appellant when requesting a review of the decision and raising a complaint that it was not for HMRC to challenge the view of a qualified surveyor as to the state of the Property. The complaint is not relevant to us but it is worth noting that Stamp Duty Savers considered that HMRC were not in a position to challenge the view of a surveyor as to the Property's suitability for use as a dwelling. Plainly, the surveyor is capable of forming a view (though as noted above this surveyor did not actually visit the property) but whether <u>for tax purposes</u> the building is suitable for use as a dwelling in the context of FA03 is not a question the surveyor is qualified to opine upon. His/her/their view on the state of the Property is a relevant factor to be taken into account but will not be determinative.

(17) On 15 July 2020 HMRC upheld the decision on the basis that the renovations necessary at the Property were not akin to those in *Bewley* in particular because in *Bewley* the property had needed to be demolished and was irreparable. It was considered that a better comparator was to be made to the FTT judgment in *Fiander and Bower v HMRC* [2020] UKFTT 190 (TC) in which it had been determined that matters such as the replacement of central heating systems, damp proofing, replacing flooring etc were not sufficient to render any dwelling unsuitable for use as such.

(18) The Appellant lodged its appeal on 13 August 2020.

THE ISSUE

11. The issue we have to determine is whether the property was suitable for use as a dwelling on 26 August 2016.

SUBMISSIONS OF THE PARTIES

Appellant's submissions

12. The Appellant's case, as articulated on its behalf in correspondence, relied exclusively on the judgment in *Bewley*. The facts of that case were that the taxpayer had purchased a derelict bungalow. It had not been in use as a dwelling at the time of the transaction and had lain empty for a number of years. There were no floorboards, pipework or radiators, asbestos was extensively present which precluded renovation and required that the property be demolished. The Tribunal determined on the facts that the bungalow was not suitable for use as a dwelling with the consequence that the charge to SDLT was to be calculated on the basis that it was a non-residential property. In reaching its conclusion the Tribunal recorded:

> "No doubt a passing tramp or group of squatters could have lived in the bungalow as it was on the date of purchase. But taking into account the state of the building as shown in the photographs on Mrs Bewley's phone with radiators and pipework removed and with the presence of asbestos preventing any repairs or alterations that would not pose a risk to those carrying them out, we have no hesitation in saying that in this case the bungalow was not suitable for use as a dwelling."

13. Prior to the hearing we circulated to the parties the judgment of the Upper Tribunal in *Fiander and Bower v HMRC* [2021] UKUT 156 (TCC) (***Fiander***) and the FTT judgment in *Mudan v HMRC* [2023] UKFTT 317 (TC) (***Mudan***). As set out more fully in the discussion section below these cases confirm that the need to carry out works such as replacement of central heating and rewiring will not be sufficient to render a building unsuitable for use as a dwelling. On the basis of these judgments Mr Henderson accepted that the only works which were relevant in determining suitability for use as a dwelling were those concerning the replacement of the joists and the collapsed ceiling which, in his view, were structural and more akin to those identified as sufficient in *Bewley*.

HMRC's submission

14. HMRC's position was that in order to render a building unsuitable for use as a dwelling the building in question must be derelict and require demolition. Where a property can be renovated without demolition it will remain suitable for use as a dwelling.

15. In this case the property had been actually used as a dwelling by the former owner with the dangerously defective wiring and aged central heating system. HMRC considered that whilst the works to the joists required the use of structural Acro props, that did not mean that the building was structurally unsafe and therefore unsuitable for use as a dwelling. Ms Wood pointed out that many people will live in houses with leaks in the pipework that result in collapsed ceilings, they may or may not move out whilst the works to repair are ongoing but that does not render the property in question unsuitable for use as a dwelling merely that it may not be immediately habitable. Ms Wood relied on *Fiander* in support of this distinction.

DISCUSSION

16. In our view the purpose of the SDLT provisions is to tax transactions relating to residential property at a higher rate than non-residential property, and for transactions in relation to residential property by developers and second homeowners to be taxed more highly than a dwelling in which people live as their primary home. It is therefore right to construe the phrase "suitable for use as a … dwelling" by reference to that statutory purpose.

17. This was recognised in *Fiander* in which the Upper Tribunal (**UT**) at paragraph 48 confirmed that:

> "The word "suitable" … follows in our view from the natural meaning of the word "suitable", but also finds contextual support in two respects. First,

> paragraph 7(2)(b) [of Schedule 6B (Transfers Involving Multiple Dwellings) of FA 2003] … . Second, SDLT being a tax on chargeable transactions, the status of a property must be ascertained at the effective date of the transaction, defined in most cases (by section 119 FA 2003) as completion."

18. *Fiander* concerned a dispute as to whether a property which included an annex was suitable for use as a single dwelling or whether, by virtue of the annex, it was two dwellings (and thereby excluded from the residential SDLT rate). However, the property also needed renovation. In this latter context the UT noted (also in paragraph 48) that:

> "a property may be in a state of disrepair and nevertheless be suitable for use as either a dwelling or a single dwelling if it requires some repair or renovation; that is a question of degree for assessment by the FTT."

19. The UT therefore found no basis of undermining the conclusion of the FTT which, in this regard, had determined:

> "We note that the property was in some degree of disrepair at the time of purchase (the heating was not working as the boiler needed replacing; there were damp problems such that some of the flooring needed replacing). We have considered if this meant it was not suitable for use as a dwelling as at completion. We are clear that "suitable for use" does not mean "ready for immediate occupation". It would have been obvious to a reasonable person observing the property on the completion date both that the property had been used for dwelling purposes in the relatively recent past and that the things that needed fixing – the boiler, replacement flooring – were not so fundamental as to render the property unsuitable as a place to live. Hence, in our view, the state of disrepair did not render the property unsuitable for use as a dwelling."

20. It is therefore plain that the question to be determined is suitability for use and not a question of readiness for occupation/immediately habitable.

21. That view was recently endorsed by the FTT in *Mudan*. That case concerned the same issue as in the present appeal. The facts as determined in that case were that the building was structurally sound but substantial works were required to be undertaken in order for it to be made safe to live in, including rewiring, new central heating and water system, partial replacement of the roof, repair to windows and thorough cleaning (the property having been occupied by squatters prior to purchase). The FTT in that case considered that there was a marked difference between the state of the property in question and *Bewley*, and that the Mudans' purchase was more akin to *Fiander*. The Tribunal noted that even in *Bewley* the FTT had commented that "dilapidation of a dwelling does not necessarily prevent it being a dwelling".

22. The judge in *Mudan* also referred to the earlier FTT case in *Fish Homes Ltd v HMRC* [2020] UKFTT 180 (TC) which considered whether cladding similar to that used on Grenfell Tower rendered a building unsuitable for use as a dwelling and concluding that as building regulations changed regularly and over time, non-compliance with then current regulations could not render a building unsuitable for use as a dwelling, as progressively all buildings would become unsuitable.

23. On the facts in *Mudan* the judge concluded that there was not a sufficient degree of disrepair to render the property unsuitable for use. The Tribunal noted:

> 50. … Disrepair which can be cured (things which are not fundamental but which need fixing, as the FTT put it in *Fiander*) is not enough, nor is it necessarily enough that there is a feature of the property which makes it potentially more dangerous to inhabit than one would normally expect

> (unsuitable and potentially dangerous cladding is the example from *Fish Homes*).
>
> 51. It must be unrealistic to expect someone to live in the property in its current state (perhaps because it is too dangerous or unpleasant to inhabit) and it must require more than repair/renovation (the words of the Upper Tribunal in Fiander) or "fixing" non-fundamental issues to make it suitable. If, as was the case in Bewley, the property could not realistically be occupied in its current state and (albeit for different reasons) the relevant defects could not be cured, so that demolition was the only way forward, the property will clearly not be suitable for use as a dwelling. Other examples of sufficiently fundamental problems might include a high risk of structural collapse or some other lack of physical integrity, such as the building being radioactive. Examples of failings which are not sufficient include the need for a new boiler, the heating system not working, damp problems or the flooring needing replacing."

24. We agree with the above analysis. The question of determining suitability for use of a building as a dwelling (or as relevant a single dwelling) is a question of fact in which all the circumstances will need to be considered. As noted in *Bewley* a dwelling can be expected to have facilities for washing, cooking and sleeping. A property which entirely lacks such facilities is unlikely to suitable for use as a dwelling; such a property would not be ratable as a dwelling and, for instances, for the purposes of the VAT rules concerning a dwelling would not represent a dwelling. However, where a property has such facilities which are unserviceable but can be repaired or replaced, the property will continue to be suitable for use as a dwelling.

25. A building which has the facilities to be a dwelling, but which is so structurally unsound or has some other feature (such as asbestos) which precludes repair/rennovation then the building will cease to be suitable for use as a dwelling. In essence, in such cases, the land acquisition is of a plot suitable for development and not the building on it. These situations will, in our view, be relatively unusual (*Bewley* was however, one such example). In our view the majority of renovations will involve making a house which is suitable for use as a dwelling a habitable residence meeting modern building regulations and becoming a comfortable home ready for immediate occupation. The statutory intention was to tax such properties at the residential or higher rate of SDLT (the higher rate applying where the purchase is by a company or as a second home).

26. In the present case, as was accepted by Mr Henderson, the Property as a whole was structurally sound. A number of joists were unsound but had not fallen. Ceilings had come down and it was not considered that part of the house was safe, but it was a property which had all the required facilities for living. It had fallen into a state of disrepair in one part – which formed less than half of the floor area of the house. The Appellant renovated it into a beautiful house ready for immediate occupation. They did not take a non-residential building and make it into a dwelling.

DISPOSITION

27. For the above reasons we dismiss the appeal.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 31st AUGUST 2023