TC06951

Appeal number: TC/2018/03175

STAMP DUTY LAND TAX – bungalow and plot of land acquired with planning permission for demolition and building of new dwelling on site – whether higher rates of SDLT in Schedule 4ZA FA 2003 apply – whether bungalow building "suitable for use" as a dwelling on date of transaction – held not so suitable – self-assessment as amended by HMRC reduced to remove higher rate charge and to reflect non-residential rate.

FIRST-TIER TRIBUNAL
TAX CHAMBER

P N BEWLEY LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
WILLIAM HAARER

Sitting in public at Civil & Family Justice Centre, Redcliff St, Bristol on 9 January 2019

Mr Paul and Mrs Nikki Bewley, directors, for the Appellant

Ms Helen Davies, litigator HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal by P N Bewley Ltd ("the appellant") against the amendment of a stamp duty land tax ("SDLT") return made by them on 8 February 2017. The amendment was made by Mr Joel Lord, an officer of the respondents ("HMRC") and was notified to the appellant in a letter of 26 January 2018 giving the officer's conclusion of his enquiry into the return. The amendment increased the SDLT payable from £1,500 to £7,500.

2. The return related to the purchase by the appellant of Rosemount, Hillcote, Weston-super-Mare ("Rosemount").

Evidence

3. Our bundle contained the SDLT1 return, the correspondence between the officer, Mr Lord, and the appellant's solicitors, and several substantial documents appended to the correspondence. It also included some black and white photocopies of photographs of the building in question, which were difficult to examine, but we were immensely helped by Mrs Bewley showing us the originals on her mobile phone, from which we were also able to confirm the date they were taken.

4. Mr and Mrs Bewley gave us oral evidence in explanation of the photographs and other documents and of their actions before the purchase. We accept their evidence without any reservation.

Facts

5. In this section we make findings of fact from the documentary and oral evidence.

The existing building at Rosemount

6. From a notice of decision issued by North Somerset Council on 18 February 2016 to Mr R Cooke, the then freehold owner of Rosemount, we find that the description of Mr Cooke's application for planning permission was:

> "Demolition of existing dwelling and erection of replacement building"

7. We find from the evidence of Mr Bewley that the bungalow at Rosemount had been occupied by an elderly lady but the she had moved out in 2014 or earlier, some time before their purchase.

8. From a demolition survey issued on 13 December 2016 commissioned by the appellant and prepared by Philip Love of Enfield Group Ltd we find that:

(1) Asbestos-containing materials had been identified during the Demolition Survey.

(2) The asbestos materials identified were in "good condition" with risk scores of 3 to 6 (out of 10). The recommendation for these materials was "urgent removal".

(3) "Building Notes" showed that the heating system had been removed and the remains of hessian insulation was still under the floor boards.

(4) The survey was a "disruptive, fully intrusive survey that involves destructive application techniques …. involving breaking into floors, through walls voids ceilings …".

(5) Asbestos materials might remain identified buried in the fabric.

9. From a survey, which was not a building survey, made by Andrew Forbes, Chartered Valuation Surveyors, and dated 16 November 2016 on behalf of Lloyds Bank in connection with the appellant's application for finance to build a new dwelling on the site of Rosemount, we find that the executive summary of the survey said that there was a building on the site described as a "derelict bungalow to be demolished".

10. In the survey itself under the heading "property" the description was:

> "The existing property is a derelict bungalow in poor internal condition, which we understand is to be demolished …"

11. They add that "we understand that the building is connected into the following services" and they show "Yes" against water, drainage, electricity and gas.

12. Under "Condition and State of Repair" they say:

> "The existing property is in a poor state of repair and condition and will be demolished …"

13. Chrysotile (white asbestos) was found in floor tiles, celling panels, wall panels behind plasterboard, the soffit roofline, roof slates, the roof void and in the outer wall behind fibreboard.

14. A letter of 19 February 2018 from the appellant to HMRC making its appeal said that while HMRC had researched the property (on the internet) and found that it was being marketed as an "ideal refurbishment project" in September 2014, the agent's details did not contain any photographs of the condition of the property at the time and the property had been left empty and deteriorated since then, not being habitable due to the removal of the heating, copper pipes and floorboards.

15. They added that any refurbishment would mean disrupting the asbestos, and in support enclosed an email from Chris Penny of R M Penny (Plant & Demolition) Ltd, the demolition contractor for the bungalow, to Mrs Bewley dated 26 January 2018 said:

> "the former dwelling known as Rosemount was constructed circa 1950 using a typical prefabricated panel system which was common at the time comprising a timber frame and asbestos cement infill panel. … Living in a home with intact asbestos does not necessarily pose a health risk but these materials do deteriorate over time and when disturbed or damaged asbestos fibres can be released into the air … to successfully remove the asbestos cement materials from the dwelling necessitated in the structure being virtually dismantled in the process and therefore left uninhabitable."

16. We are satisfied from the photos we saw dated November 2016 that the appellant's description in this letter was correct. We asked Mr Bewley about the demolition survey's reference to services being still connected, such as water. He said that this was correct though water had been turned off outside the building.

The return and the enquiry

17. On the return (SDLT1):

(1) The contract date and completion date are both shown as 24 January 2017.

(2) The "type of property" is Code 01, which according to the Notes for Guidance in completing the return covers a "building used or suitable for the use of a dwelling".

(3) The consideration was £200,000.

(4) The "Tax Assessed" printout from the SDLT1 does not show any tax assessed or indeed any entries except property type 01.

(5) The date the return was received by HMRC was shown as 9 February 2017.

18. On 8 November 2017 Mr Joel Lord, an officer of HMRC, opened (in time) an enquiry into the return under paragraph 12 Schedule 10 Finance Act ("FA") 2003. A letter to the appellant's solicitors, Lyons, was apparently sent the same day seeking the answer to certain questions, but we do not have a copy of the letter in the bundle.

19. On 16 November 2017 Lyons replied to say they were seeking their client's authority to release the information requested.

20. On 22 November 2017 Lyons provided what had apparently been requested, the contract and completion statement, the amount of the consideration, the Land Registry transfer and details of the land purchased. Lyons said that the clients had told them that the building in place was not capable of being a dwelling and they attached the demolition report.

21. On 7 December 2017 Mr Lord replied to Lyons (copied to the appellant) with his findings from his review of the information supplied. He said that based on the information the transaction met all the conditions in paragraph 4 Schedule 4ZA FA 2003 which made it a chargeable transaction for the purpose of that paragraph and so the higher rates of stamp duty were payable. He calculated the revised amount payable as £7,500 (being 3% of £125,000 and 5% of the remaining £75,000) compared with £1,500 shown on the return and paid.

22. He also mentioned penalties and sought answers to questions about Lyons' actions in submitting the return (and he sent the appellant Factsheets FS7a and FS9).

23. Lyons replied to the penalty questions on 20 December 2017 to the effect that they were aware of the higher rates of SDLT and that they had informed the appellant of them, but they refused to disclose the appellant's response without their permission. On 10 January 2018 they gave the appellant's response which was the property was not a dwelling.

24. They also submitted the lender's valuation report, the email from Chris Penny and the vendor's planning permission to HMRC.

25. On 26 January 2018 Mr Lord gave his conclusion of his enquiry, that additional SDLT of £6,000 was due and that he had amended the return accordingly, and the amount was payable. The appellant was informed of their appeal right, within 30 days

of 26 January. This letter also informed the appellant that HMRC had decided not to charge a penalty.

26. On 19 February 2018 the appellant appealed against the amendment to their return, repeating their view that the property was not habitable at the time of purchase and unviable as a renovation or refurbishment. Mr Lord gave his view of the matter and said that his decision had been referred for review (although he had not offered one, nor had the appellant requested one).

27. On 20 April 2018 Lesley Turner, an officer of HMRC who reviewed the decision, said that her conclusion was that the "determination" listed should be upheld. That was said to be a "determination" in the amount of £6,000, but what paragraph 36E Schedule 10 FA 2003 required her to do was to uphold HMRC's view of the matter.

28. On 5 June 2018 the appellant notified their appeal to the Tribunal.

Law

29. The charge to the higher rates is in Part 1 Schedule 4ZA FA 2003:

> "*Part 1 Higher Rates*
>
> **1**(1) In its application for the purpose of determining the amount of tax chargeable in respect of a chargeable transaction which is a higher rates transaction, section 55 (amount of tax chargeable: general) has effect with the modification in sub-paragraph (2).
>
> (2) In subsection (1B) of section 55, for Table A substitute—
>
> 'Table A: Residential

Relevant consideration	*Percentage*
So much as does not exceed £125,000	3%
So much as exceeds £125,000 but does not exceed £250,000	5%
So much as exceeds £250,000 but does not exceed £925,000	8%
So much as exceeds £925,000 but does not exceed £1,500,000	13%
The remainder (if any)	15%'"

30. Part 2 sets out what a higher rates transaction is:

> "**2**(1) This paragraph explains how to determine whether a chargeable transaction is a "higher rates transaction" for the purposes of paragraph 1.
>
> (2) In the case of a transaction where there is only one purchaser, determine whether the transaction falls within any of paragraphs 3 to 7; if it does fall within any of those paragraphs it is a "higher rates transaction" (otherwise it is not)."

31. Paragraph 4 is the paragraph that HMRC say applies here:

"**4** A chargeable transaction falls within this paragraph if—

(a) the purchaser is not an individual,

(b) the main subject-matter of the transaction consists of a major interest in a single dwelling, and

(c) Conditions A and B in paragraph 3 are met."

32. Those conditions A and B are:

"(2) Condition A is that the chargeable consideration for the transaction is £40,000 or more.

(3) Condition B is that on the effective date of the transaction the purchased dwelling—

(a) is not subject to a lease upon which the main subject-matter of the transaction is reversionary, or

(b) is subject to such a lease but the lease has an unexpired term of no more than 21 years."

33. Paragraph 18 says what counts as a dwelling in the Schedule:

"**18** (1) This paragraph sets out rules for determining what counts as a dwelling for the purposes of this Schedule.

(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.

(3) Land that is, or is to be, occupied or enjoyed with a dwelling as a garden or grounds (including any building or structure on that land) is taken to be part of that dwelling.

(4) Land that subsists, or is to subsist, for the benefit of a dwelling is taken to be part of that dwelling.

…

(7) A building or part of a building used for a purpose specified in section 116(2) or (3) is not used as a dwelling for the purposes of subparagraph (2) … [*there is no such relevant purpose*]

…"

Submissions

34. HMRC say:

(1) In Part 4 FA 2003 "dwelling" takes its ordinary meaning, and they say they cite the Oxford English Dictionary and the National Census.

(2) That ordinary meaning does not require the property to be mortgageable, meet the better homes standard or to be of standard construction, and a dwelling does not change its nature because it falls into dilapidation.

(3) The building came within the meaning of "residential property" for the purposes of s 55 FA 2003 because it was not excluded by s 116 FA 2003; the plot

was a residential plot in a residential area; and the intention was at all times for the plot to continue to be a residential plot comprising a dwelling and its grounds.

(4) A building under construction for use as a dwelling comes within the definition.

(5) The appellant used a code on the SDLT return which identified it as residential.

(6) The fact that no buyer could be found to refurbish it did not mean the property ceased to be a dwelling or was not capable of being renovated and occupied as a dwelling.

(7) The planning permission was indicative of the intention that the property was to remain a residential property. This "course of action" was a commercial decision, and does not indicate that the existing property was not capable of being utilised as a dwelling.

(8) The presence of asbestos in the existing building did not prevent its renovation or reoccupation, as the critical risk would come during demolition.

35. In their appeal to HMRC the appellants grounds of appeal were that the property was not habitable and refurbishment was not viable because of the asbestos content.

36. In their notification to the Tribunal they repeated this and said that they had provided evidence that the property was not capable of being used as a dwelling. They pointed to the valuation report and the demolition survey report, and added that the property had no form of heating, old electrics, the kitchen and bathroom were dated and the building was in poor condition in general. Any renovation would have been extensive and would have disturbed the asbestos. It would not comply with the Decent Homes Standard and would be unmortgageable because of the prefabricated construction method with timber frame and asbestos cement infill panels.

Discussion

Making sense of HMRC's submissions

37. On several occasions during HMRC's submissions on the case we found ourselves wondering what the relevance of the point being made was. We still do wonder, and so in an effort to assist HMRC in similar cases in future we make these preliminary comments.

38. We agree with point (1) of their submissions, but not that any definition given to us assists.

39. We agree with point (2). We also accept that dilapidation of a dwelling does not necessarily prevent it being a dwelling, though we are not clear what HMRC mean by "change its nature".

40. We agree with (3) insofar as the building is "residential property" within the meaning in s 116(1)(a) and is not excluded by s 116(3). But the building was not a residential plot whether in a residential area or not and the intention of the purchaser is not relevant to anything in Schedule 4ZA FA 2003.

41. We agree with (4) that such a building is within s 116(1)(a). It is also a dwelling within the provision relevant to this case, paragraph 18 Schedule 4ZA. But on the date of completion no building was under construction, so the point is not relevant.

42. As to (5), indeed it did. HMRC say it used the wrong code: it should have used 04 which is also "residential". But so what?

43. As to (6) whether it could be renovated and occupied as a dwelling is not relevant. The test set out clearly in paragraph 18(1)(a) Schedule 4ZA is whether it was "suitable" to be used as a dwelling at the time of purchase: it is not whether it was capable of becoming so used in the future.

44. The planning permission obtained by the vendor in 2016 (see (7)) is equally irrelevant. The building did not *remain* a residential property, and in any case the planning permission was to demolish and construct a new building, which is what was done, though again anything done after the purchase is irrelevant. We do not know what HMRC intended to signify by "course of action" or why the question whether it was a "commercial decision" affects anything. Are HMRC saying that they would not have queried the SDLT return if the purchaser had not been a builder? The last clause of (7) is the closest HMRC come to actually addressing the question in issue: was the building suitable to used as a dwelling, which however is not, as we hold later, the same as being capable of being a dwelling.

45. As to (8) we agree that the asbestos did not prevent re-occupation, but again that is not the test. And renovation is irrelevant as it was not renovated at the time of purchase, and we accept Mr Bewley's evidence that renovation was not a feasible proposition, because the asbestos would be disturbed (as the demolition survey said).

46. The submission by HMRC took as its starting point HMRC's description of the point at issue, which was whether the acquisition of the property comes within the definition of "residential property" in s 116 FA 2003. This is where they go wrong, as, leaving aside the ungrammaticality (the point is whether the *property acquired* comes within a given definition), the issue is whether the building is suitable to be used as a dwelling and so falls within paragraph 3(3) Schedule 4ZA where "dwelling" has the meaning given in paragraph 18 Schedule 4ZA. We are not called upon to construe the words "residential property" or examine s 116 FA 2003 except where paragraph 18(7) requires it, which in this case it does not.

47. The word "suitable" does not appear in HMRC's statement of case. This is surprising as the correct test was considered by the reviewing officer (even though she also referred to s 116 FA 2003 instead of paragraph 18 Schedule 4ZA). In the end we have decided to take parts of HMRC's submission in (7) and (8) to be that the building was suitable to be used as a dwelling at the time of purchase and to ignore the rest.

48. We also think that some of the appellant's arguments miss the mark, but that is understandable as by the time of the notification of the appeal they were no longer represented. We have taken their submission to be that the building was not at the time of purchase suitable for use as a dwelling, and that that is supported by their evidence.

49. We should also clarify one point made during the hearing by HMRC. In seeking to rebut the appellant's claim that the building was not mortgageable, Ms Davies referred to the contract between the appellant and Mr Richard Cooke, the seller to the appellant as freehold owner of Rosemount. The contract had been included in the bank's surveyor's report and referred, against the wording "…ct rate", "4% above the base rate of Lloyd's Bank plc." Ms Davies said that this showed that the building was indeed mortgageable as the appellant had obtained a loan on the security of it with that interest rate.

50. Mr Bewley explained that the interest rate was simply the rate in the purchase contract that would apply if payment of the price was late. The loan was not secured on the existing building and the bank knew that it was to be imminently demolished. We accept Mr Bewley's evidence on this, but the fact that it was not mortgaged by the appellant does not mean that it was not mortgageable at all, though as we have said the question of mortgageability is not really relevant to our decision.

Our conclusion

51. The sole issue for us is whether the bungalow, which is undoubtedly a building, was, at the date of completion, suitable for use as a single dwelling. That it was not at that date used as a dwelling is not in dispute. Nor is there any dispute about whether it was a single dwelling.

52. We start by approaching this issue by looking only at the words of paragraph 18(1) Schedule 4ZA FA 2003 – "used or suitable for use as a single dwelling". The "used as" test at a single time is a clear binary issue – either the building was on completion date used as a dwelling or it was not. For buildings that were not so used on the completion date it would be possible to have a yes/no test: eg had its last use been as a dwelling, or if never used was it designed for use[1] as a dwelling? But the test is not like that – it asks the single question: was it "suitable" to be used as a dwelling? There could have been other descriptions used: eg whether it was capable of being used as a dwelling. It seems to us that the legislation contemplates that there must be and is a class of buildings that might not meet the test and the likely class is those which are capable of being a dwelling but which are unsuitable for that purpose. The question then is where is the suitable/not suitable boundary.

53. 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.

54. We wish to stress that in this case the Tribunal has used the expertise of its non-legal member. Mr Haarer is a retired chartered surveyor and his immediate reaction after the end of the hearing was that the building was not suitable for use as a dwelling in its then current state.

[1] A test familiar in VAT – see Note X Group Y Schedule Z Value Added Tax Act 1994 and the considerable case law on that subject.

55. We have tested this decision based only on our construction of paragraph 18(1)(a) by considering what other material is available to us to indicate the purpose of the legislation or the policy rationale for the distinctions paragraph 18(1)(a) makes, and whether there is any case law or para-statutory material available to us. We have also considered the guidance HMRC have referred us to as well as other HMRC guidance while bearing in mind that such guidance is not the law.

56. Having looked at this material we have not sought to give HMRC or the appellant any opportunity to comment on it, because it is ancillary to our decision.

57. As to the policy, the oddity about Schedule 4ZA is that if one removes paragraphs 4 and 7, the policy is clear. The charge to the higher rates on individuals applies only if the dwelling acquired is not the first dwelling belonging to that individual.

58. The Government issued a consultation document ("condoc") in December 2015 on the proposed additional rates.

59. The Foreword, by David Gauke MP, then Financial Secretary to the Treasury, said:

> "Owning a home is an aspiration for millions of people in our country. This government is committed to helping people achieve that aspiration, by supporting those who want to work hard, save and buy their own home. Home ownership is also a key part of the government's plan to provide economic security for working people at every stage of their life.
>
> In the last Parliament, we took significant steps to support housing supply and low-cost home ownership, and at the Spending Review and Autumn Statement 2015 we went further by announcing a bold Five Point Plan for housing. This Plan re-focuses support for housing towards low-cost home ownership for first-time buyers.
>
> Alongside delivering 400,000 affordable housing starts by 2020-21, extending the Right to Buy to housing association tenants, accelerating housing supply and introducing London Help to Buy, the Five Point Plan includes the introduction of higher rates of Stamp Duty Land Tax (SDLT) on purchases of additional residential properties.
>
> The higher rates will be 3 percentage points above the current SDLT rates, and will take effect from 1 April 2016. The government will use some of the additional tax collected to provide £60 million for communities in England where the impact of second homes is particularly acute.
>
> The tax receipts will help towards doubling the affordable housing budget. This will help first time buyers and is part of the government's commitment to supporting home ownership.
>
> This consultation represents a real opportunity to inform and develop a key part of the government's Five Point Plan for housing, and I look forward to the contributions of all interested parties."

60. At 1.1 (Background) it said:

> "The higher rates of SDLT are part of the government's commitment to supporting home ownership. The higher rates will apply to most

> purchases of additional residential properties in England, Wales and Northern Ireland where, at the end of the day of the transaction, individual purchasers own two or more residential properties and are not replacing their main residence.
>
> …
>
> The government will use some of the additional tax collected to provide £60 million for communities in England where the impact of second homes is particularly acute. The tax receipts will also help towards doubling the affordable housing budget."

61. At 1.3 (Policy context) it said:

> "…
>
> Higher rates of SDLT on additional residential properties form part of the government's Five Point Plan for housing. The government believes it is right that people should be free to purchase a second home or invest in a buy-to-let property.
>
> However, the government is aware that this can impact on other people's ability to get on to the property ladder. Applying higher rates of SDLT to additional residential property purchases is part of the government's commitment to supporting home ownership and first time buyers.
>
> …"

62. The policy was therefore to discriminate against second home and buy to let purchases in favour of purchases of a sole residence by making the tax payable on the former higher than on the latter.

63. That this was the policy driver behind Schedule 4ZA can be seen from the Explanatory Notes to Clause 117 of the Finance Bill, that clause becoming s 128 in the Finance Act 2016.

> "76. The higher rates of SDLT for additional dwellings and dwellings purchased by companies was introduced by the Government's [*sic*] to support home ownership."

64. This refers of course to Schedule 4ZA as a whole including paragraphs 4 and 7. Those paragraphs they do not require the purchase to meet Conditions C and D in paragraphs 3 and or the condition in paragraph 6(1)(e) respectively. Condition D in paragraph 3 and paragraph 6(1)(e) require the purchase in question to be of a dwelling or dwellings *additional* to one already owned by the same person (or attributed to that person). Accordingly the higher rates apply to a first purchase of a dwelling by a company. How then does this fit with the policy?

65. The foreword to the condoc drafted for David Gauke MP has this:

> "The higher rates will also generally apply to purchases of residential property by companies."

66. But no more. It is however more than is said under "Policy context" in paragraph 1.3, which is nothing.

67. The first reference to what became paragraph 4 Schedule 4ZA is in the main part of the condoc headed, strangely, "Policy Design". It is:

> "2.20 The first purchase of a residential property by a company or collective investment vehicle
>
> As made clear in this consultation, where an individual purchases their first residential property the higher rates will not apply. If the government mirrored this treatment for purchases made by companies and collective investment vehicles this would create a potential tax avoidance opportunity.
>
> In particular, an individual could purchase an additional property via a company to avoid the higher rates of SDLT.
>
> To guard against this avoidance risk the government proposes that the first purchase of a residential property by a company or collective investment vehicle is subject to the higher rates of SDLT (subject to the final decision on the treatment of significant investors as discussed in section 2.19).'

68. As this section suggests, corporate vehicles had been mentioned in the previous section which was about a possible relief for additional purchases by certain types of collective investment vehicles including those in corporate form (the relief was never enacted).

69. In March 2016 the Government published its response to the condoc. There is no mention in the Foreword of corporate purchases. In section 1.46 it says:

> "The higher rates of SDLT form part of the government's overall housing strategy including support for home ownership. The higher rates of SDLT are therefore intended to apply to the vast majority of circumstances where individuals or companies and other non-natural persons purchase *additional properties*, which can impact on other people's ability to get on the housing ladder." [emphasis added]

70. Despite this, paragraph 4 was enacted in the simple terms it was – with no let out for a first residential dwelling company acquisition. Thus what paragraph 4 is is a blanket untargeted anti-avoidance provision with no let outs, eg by a motive test or through "guidance" as with the notorious example of the CGT loss TAAR[2]. In our view, in the circumstances of this case where there can be no avoidance, we should be slow to find that a corporate purchase is liable to the higher rates of SDLT, especially by a developer as in this case who was to and did create a habitable and suitable dwelling on the site after demolition of the bungalow,.

71. It is ironic that had the consideration for this purchase been over £500,000 so as to attract the 15% rate given by Schedule 4A FA 2003 it is quite likely that the relief given in paragraph 5 of that Schedule, which disapplies the 15% rate where the interest in the land is acquired for development and resale in the course of a property development trade, would have applied. Of course we are not seeking to apply this relief as if it were in Schedule 4ZA because Parliament has decided not to give similar relief in that Schedule. What we are doing by referring to this relief in Schedule 4A is

[2]

to point up the extreme bluntness of the corporate provisions of Schedule 4ZA as an anti-avoidance mechanism.

72. We also note that s 138 FA 2013 gives an equivalent developers' relief in the rules for the tax on enveloped dwellings known as ATED.

73. We turn now to other tax law which uses the phrase "suitable for use as a single dwelling" ("the exact phrase") or closely similar expressions ("similar phrase") to see if any light is cast on the ambit of it in such provisions.

74. A similar phrase appeared in s 116 FA 2003, in Part 4, the part of that act which introduced SDLT. It omits the word "single". Section 116 is a section defining the term "residential property", but says no more than is said by paragraph 18(1)(a) Schedule 4ZA.

75. A similar phrase (without "single") also appears in para 7 Schedule 6A FA 2003 (relief for certain acquisitions of residential property), inserted by Schedule 39 FA 2004 and in paragraph 7 Schedule 4A FA 2003 (higher rate for certain transactions) inserted by Schedule 35 FA 2012 but without any more said relevantly for the purposes of this case[3].

76. The exact phrase appears in paragraph 7 Schedule 6B FA 2003 (transfers involving multiple dwellings) inserted by FA 2011, but again without any more said relevantly for the purposes of this case.

77. A similar phrase (without "single") does appear outside SDLT legislation in similar circumstances. Schedule 29A FA 2004 (inserted by FA 2006) provides for certain tax consequences for pension schemes investing in property. Taxable property includes "residential property" and by paragraph 7 such property includes a building used or suitable for use as a dwelling, but again without any more said relevantly for the purposes of this case.

78. In FA 2013 Parliament introduced the ATED (annual tax on enveloped dwellings) legislation imposing an annual charge on dwellings held in a corporate vehicle. Section 112 defines "dwelling" and in subsection (1) uses the exact phrase. However (and to our minds relevantly) subsection (6) expands on subsection (1) saying:

> "(6) If a building or part of a building becomes temporarily unsuitable for use as a dwelling for any reason (including accidental damage, repairs or any other physical change to the building or its environment), that temporary unsuitability is ignored in determining whether or not the building or part of a building is, during the period in question, a dwelling for the purposes of this Part."

79. Section 131 also expands on s 112(1):

> "*131 Damage to a dwelling*

[3] The same applies to paragraph 9 Schedule 6ZA (relief for first time buyers) but this was inserted into FA 2003 by FA 2018 so postdates our case and so cannot be used as a guide to the interpretation of Schedule 4A.

(1) This section applies where a dwelling is damaged so as to be temporarily unsuitable for use as a dwelling.

(2) The unsuitability for use as a dwelling is taken into account in applying the definition of "dwelling" for the purposes of this Part (see section 112) only if the first and second conditions are met.

(3) The first condition is that the damage is—

(a) accidental, or

(b) otherwise caused by events beyond the control of the person entitled to the single-dwelling interest.

(4) The second condition is that, as a result of the damage, the building concerned is unsuitable for use as a dwelling for at least 90 consecutive days.

(5) Where the first and second conditions are met—

(a) the entire period of unsuitability for use as a dwelling (including the first 90 days) is taken into account in applying the definition of "dwelling", and

(b) work done in that period to restore the building to suitability for use as a dwelling does not count, for the purposes of section 112 or 113, as construction or adaptation of the building for use as a dwelling.

(6) The first condition is regarded as not being met if the damage occurs in the course of work that—

(a) is done for the purpose of altering the dwelling (or a building of which it forms part), and

(b) itself involves, or could be expected to involve, making the building unsuitable for use as a dwelling for 30 days or more.

(7) In this section—

(a) references to alteration include partial demolition;

(b) references to a building include a part of a building."

80. FA 2015 introduced a charge to CGT on residential property sold by non-residents. Schedule B1 TCGA, inserted by that Act, defines "UK residential property interest" ("UKRPI") (the subject matter of a taxable disposal). By paragraph 1(2) the first condition for a disposal of a UKRPI is that that land has at any time consisted of or included a "dwelling", which term is defined in paragraph 4. Paragraph 4(1) sets out a definition including the exact phrase, and paragraph 4(1) adds:

"(10) A building which (for any reason) becomes temporarily unsuitable for use as a dwelling is treated for the purposes of sub-paragraph (1) as continuing to be suitable for use as a dwelling; but see also the special rules in—

(a) paragraph 6 (damage to a dwelling), and

(b) paragraph 8(7) (periods before or during certain works)."

81. Paragraph 6 reproduces s 131 FA 2013 about damage to a dwelling. Paragraph 8 provides:

"(1) This paragraph applies where a person disposes of an interest in UK land, and a building which is (or was formerly) on the land and has at any time in the relevant ownership period been suitable for use as a dwelling—

(a) has undergone complete or partial demolition or any other works during the relevant ownership period, and

(b) as a result of the works, has, at or at any time before the completion of the disposal, either ceased to exist or become unsuitable for use as a dwelling.

(2) If the conditions in sub-paragraph (4) are met at, or at any time before, the completion of the disposal, the building is taken to have been unsuitable for use as a dwelling throughout the part of the relevant ownership period when the works were in progress.

(3) If the conditions in sub-paragraph (4) are met at, or at any time before, the completion of the disposal, the building is also taken to have been unsuitable for use as a dwelling throughout any period which—

(a) ends immediately before the commencement of the works, and

(b) is a period throughout which the building was, for reasons connected with the works, not used as a dwelling.

(4) The conditions are that—

(a) as a result of the works the building has (at any time before the completion of the disposal) either ceased to exist or become suitable for use otherwise than as a dwelling,

(b) any planning permission or development consent required for the works, or for any change of use with which they are associated, has been granted, and

(c) the works have been carried out in accordance with any such permission or consent."

82. What these ATED and CGT provisions show is that Parliament assumed that accidental damage, damage which is not accidental but was caused by events beyond the control of the owner, partial demolition, repairs or any other physical change to the building or its environment could make a building unsuitable for use as a dwelling. The fact that the unsuitability might be temporary is not relevant for our purposes, looking as we are at an instant of time, whereas ATED and CGT are looking a tracts of time.

83. Clearly Parliament is not saying that every event of the types described will make a building unsuitable to be used as a dwelling, and there is a value judgement to be made as to whether the damage etc did actually make the building unsuitable. We think however that these provisions point very much in the same direction as our decision based on the wording of the legislation.

84. We next look to see if there is any relevant case law. HMRC did not mention any. There are cases in this Tribunal on Schedule 4A FA 2003 and on Schedule 29A FA 2004 but none of them cover the issue here. But in *Carson Contractors Ltd v HMRC* [2015] UKFTT 530 (TC) Judge Charles Hellier and Mr Charles Baker FCA CTA discuss the meaning of dwelling in the context of Group 6 Schedule 8 Value Added Tax Act 1994 (zero rating of alterations to protected buildings). In the case the question

was whether two buildings within a single curtilage, the main building and a converted barn, constituted a single dwelling. The Tribunal said:

> "44. In *Daniel Nabarro*[4] the question was whether construction work fell within Group 6 Sch 7A. The relevant test was whether or not the conversion of premises "consisting of a building" resulted, after the conversion, in a different number of dwellings in the building than before. The works concerned the demolition of a flat attached by a garage wall and a covered way to a house, and the addition of two storeys to the house. The tribunal had to decide whether before the conversion there were two dwellings in one building or one dwelling comprised of two buildings. It found that there were two dwelling in one building before the conversion and one dwelling in one building afterwards. In assessing how many dwellings there were the tribunal had regard to what was said in *Uratemp*[5].
>
> 45. In *Uratemp*, the Lord Chancellor said '"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.' *In our judgement a dwelling will, as a minimum, contain facilities for personal hygiene, the consumption of food and drink, the storage of personal belongings, and a place for an individual to rest and to sleep*." [our emphasis]

85. The bungalow at the date of completion did not contain what the Tribunal in *Carson* considered were the minimum facilities for a building to be a home and therefore a dwelling. This decision while not binding on us is helpful confirmation of our decision.

86. In *ACC Loan Management Ltd v Browne and another* [2015] IEHC 722 (Mrs Justice Baker) the High Court in Ireland considered whether a loan which the plaintiff lender had called in was a "housing loan". The lender argued that it was a housing loan (something which took it outside consumer protection legislation) because it met the requirements in s 2(1) Consumer Credit Act 1995[6] as being:

> "(d) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land on which a house is, or is to be, constructed where the person to whom the credit is provided is a consumer;"

87. Section 2 also defines a "house" as:

> "any building or part of a building used or suitable for use as a dwelling and any outoffice, yard, garden or other land appurtenant thereto or usually enjoyed therewith".

88. The building in question was described at [60]:

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[4] *Daniel Nabarro and The Commissioners for Her Majesty's Revenue and Customs,* [2014] UKFTT 633 (TC).
[5] *Uratemp Ventures Limited v Collins* [2001] UKHL 43.
[6] No 24 of 1995 (Acts of the Oireachtas).

> "The evidence is that there was a ruin on the Donegal lands. The defendants say that since at least 1999 the house was fully derelict, and had no roof, the walls had collapsed, and what remained was an outline of approximately three blocks in height where they once stood. The Bank offered no contrary evidence and the credit memorandum, one of the Bank's internal documents, described the house as 'remains of an old stone house', and also refers to it in another place as a 'ruin'."

89. Baker J goes on:

> "64. Counsel for the Bank argues that the condition of a building does not, of itself, determine whether a building is a house. He argues that a "house" within the meaning of the Act of 1995 does not need to be habitable. However, this argument ignores that fact that the statutory definition requires the building to be "suitable" for use as a dwelling. It may in fact be more correct to identify a house as building which is not, or not likely to be, an office, a factory, or another commercial building.
>
> 65. Because there was no evidence before me of an intention on the part of the defendants to improve the ruin with a view to making it suitable for habitation, I will leave for decision in a suitable case the question of whether the definition includes a house which may be made suitable for use as a dwelling, because it seems to me that counsel for the defendants is correct that at the least a house has to be a building. She argues that the ruin in its present form is not even a building.
>
> 66. A building, in its widest sense, can include any form of structure including the example given by counsel for the defendants: the Spire on O'Connell Street or a coffee kiosk or pod on a public street. While in certain circumstances one could consider that a caravan or mobile home is a building used as a dwelling, I consider for the purposes of the legislation that a house must have at least some structures which would provide shelter including, at least, some walls, windows or window opes [sic], and a roof, even if that roof was not watertight. Thus, I consider that a house, for the purposes of the Act of 1995, given that the definition includes an element of suitability for use as a dwelling, must be a building which offers some degree of enclosure or shelter. There was nothing on the Donegal land that could have even conceivably offered shelter in which any person might have dwelled, even uncomfortably and without modern conveniences. A degree of shelter, protection from the elements, is in my view a necessary element."

90. This is far more extreme example of dereliction than the bungalow[7]. The judge found that walls and a roof, protection from the elements was a necessity, but she did not find that it was sufficient to make a building a dwelling. The decision (also not binding) does not persuade us that we were wrong to find that the bungalow, even though it did had basic protection from the elements was not suitable for use.

91. Finally we look at the guidance, both that relied on by HMRC and that found by us.

[7] Reading Irish decisions can give the impression at times that the arguments put forward owe more to the imagination and writings of Flann O'Brien/Myles na gCopaleen (Brian O'Nolan) than a study of the law.

92. HMRC produced a definition of "dwelling" from an unidentified internet source. It seems to be from Google dictionary. It is:

> "a house, flat, or other place of residence."

And a quotation is given:

> "the proposed dwelling is out of keeping with those nearby"

93. This did not help us to find the meaning of what we needed to find. Dictionary definitions, however eminent the dictionary, rarely assist, especially when what we have to find the meaning of is the phrase "a building suitable to be used as a … dwelling" and in particular of "suitable" in that context.

94. They also produced from the GOV.UK website a "Definition of general housing terms" prepared in 2012 by the Ministry of Housing, Communities and Local Government and intended for "local authorities compiling data." All we learned from this is that a bungalow would be classified as a dwelling for the purposes intended. The document does not discuss what facilities are need to make a building a dwelling, but assumes their existence.

95. HMRC also showed us paragraph 00365 of their Stamp Duty Land Tax Manual which says:

> "**Scope: what is chargeable: land transactions: residential and non-residential property: further notes**
>
> In most cases, there will be no difficulty in establishing whether or not a property is residential property.
>
> Use at the effective date of the transaction overrides any past or intended future uses for this purpose. If a building is not in use at the effective date but its last use was as a dwelling, it will be taken to be 'suitable for use as a dwelling' and treated as residential property, unless evidence is produced to the contrary.
>
> Undeveloped land is essentially non-residential but may be residential property if, at the effective date, a residential building is being built on it.
>
> Where, at the effective date, an existing building is being adapted or marketed for, or restored to, domestic use, it is treated as residential property.
>
> A building that is used only partly as a dwelling may nevertheless be suitable for use wholly as a dwelling. Its overall suitability will be judged from the facilities available at the effective date. For example, if two rooms of a house were in use as a dentist's surgery and waiting room at the effective date, HMRC would nevertheless normally consider this property suitable for use as a dwelling.
>
> Cases involving bed and breakfast establishments or guest houses will be treated on their merits. However, a bed and breakfast (B&B) establishment which has bathing facilities, telephone lines etc installed in each room and is available all year round would be considered non-residential."

96. Only the second sentence in the second paragraph here is relevant. "[i]t will be taken" is clearly a taking by HMRC and is a reasonable stance to adopt in an enquiry. The problem for HMRC here is that the appellant has produced evidence to the contrary, not just at the hearing but also before it. And we have accepted that evidence.

97. We have looked at other material. The Explanatory Notes (see §63) are, on the question of the definition in paragraph 18 Schedule 4ZA FA 2003 quite useless (and lazy) as they simply say that the definition is the same as in Schedule 6B FA 2003. The Explanatory Notes for paragraph 7 of that Schedule say, relevantly:

> "Paragraph 7 of new Schedule 6B provides rules to establish what constitutes a dwelling for the purposes of relief under Schedule 6B." [1 SEP]

Equally useless.

98. However on 16 March 2016 HMRC published a "Guidance Note" on "Stamp Duty Land Tax: higher rates for purchases of additional residential properties." This says at 2.7"

> "2.7 "Dwelling" takes its everyday meaning; that is a building, or a part of a building that affords those who use it the facilities required for day-to-day private domestic existence. In most cases, there should be little difficulty in deciding whether or not particular premises are a dwelling."

99. In our view such facilities were not present in the bungalow on the completion date.

100. HMRC did not however shows us SDLTM09525 which is in the part of the manual dealing with Schedule 4A (the 15% rate) and where the definition of residential property uses the same phrase as in Schedule 4ZA but without the word "single". The Manual says on this phrase:

> "**Scope: when is Stamp Duty Land Tax (SDLT) chargeable: higher rate charge for acquisitions of residential property by certain non-natural persons FA03/S55/SCH4A: when is a property 'suitable for use as a dwelling'?**
>
> Guidance on when a property is 'suitable for use as a dwelling' can be found in Statement of Practice 1/2004. This guidance is supplemented by SDLTM20076. Whether a property is suitable for use as dwelling is a question of fact. SDLTM20076 states that:
>
> 'Use at the effective date of the transaction overrides any past or intended future uses for this purpose. If a building is not in use at the effective date but its last use was as a dwelling, it will be taken to be 'suitable for use as a dwelling' and treated as residential property, unless evidence is produced to the contrary.
>
> …"

101. This is what SDLTM00365 says but that paragraph does not refer to the Statement of Practice 1/2004. That Statement refers to the now repealed disadvantaged areas relief which used the same definition of residential property. SP1/2004 says:

"SUITABLE FOR USE AS A DWELLING

15 The suitability test applies to the state of the building at the effective date of the transaction, having regard to the facilities available and any history of use. For example, HMRC will not regard an office block as "suitable for use as a dwelling", but a house which has been used as an office without particular adaptation may well be so.

16 If a building is not in use at the effective date of the transaction but its last use was as a dwelling, it will be taken to be "suitable for use as a dwelling" and treated as residential property for the purposes of the relief, unless evidence is produced to the contrary (see paragraph 17).

17 Whether a building is suitable for use as a dwelling will depend upon the precise facts and circumstances. The simple removal of, for example, a bathroom suite or kitchen facilities will not be regarded as rendering a building unsuitable for use as a dwelling. Where it is claimed that a previously residential property is no longer suitable for use as a dwelling, perhaps because it is derelict or has been substantially altered, the claimant will need to provide evidence that this is the case. See also paragraph 34.

18 Where a building has been used partly for residential purposes and partly for another purpose, its overall suitability for use as a dwelling will be judged from the facilities available at the effective date of the transaction. For example, if two rooms of a house were in use as a dentist's surgery and waiting room at the effective date of the transaction, HMRC would nevertheless normally consider this property suitable for use as a dwelling unless the claimant provided evidence to the contrary. A building that is used only partly as a dwelling may nevertheless be suitable for use wholly as a dwelling, with the effect that the £150,000 limit applies to the whole of the consideration. Where only a distinct part of the building is used and suitable for use as a dwelling, that part will be residential property for the purposes of the relief and the mixed use provisions will apply (See paragraphs 19 and 20 below). "

102. Paragraph 17 is more explicit than the Manual in that it accepts that dereliction or alteration could make a dwelling unsuitable, even if the "simple" removal of kitchen facilities or a bathroom suite, would in what was the Inland Revenue's view, not make it unsuitable.

103. We can see nothing in HMRC's guidance in whatever form that alters our view as to the unsuitability of the bungalow.

What rate of stamp duty is due?

104. The SDLT1 return was made on the basis that Code 01 applied – this is for "residential (not including additional residential properties)". HMRC said that Code 04 for "Residential additional properties" should have been used, pointing out that even though the property is not an additional property, the rubric for Code 04 says it must be used for a purchase by a company purchasing any residential property even if it is the only such property owned". Oddly Lyons said to Mr Lord that their client told them the building was not capable of being a dwelling, yet they still used Code 01.

105. The charge to tax and the rates in s 55 FA 2003 apply, in a case where Schedule 4ZA does not, differently to residential property and to non-residential property.

Residential property is defined in s 116(1) FA 2003 and means a building used or suitable for use as a dwelling and land that forms part of the garden etc of that dwelling, and "non-residential property" is, logically, any property that is not residential property. The purchase of the land and building by the appellant, given our decision that the building was not suitable to be used as a dwelling and the fact that it was not so used at the time of purchase, means that it was non-residential (and the Code should have been 03).

106. For non-residential property the rates of tax are 0% on the first £150,000 of the consideration and 2% on the balance, ie 2% of £50,000 or £1000, not £1,500 as self-assessed. We have considered whether it is in our power to reduce the assessment to below the amount self-assessed. It is clear from *d'Arcy v HMRC*[8] that where the Tribunal is exercising the power it has in s 50 Taxes Management Act 1970 ("TMA") it is doing it to the self-assessment as amended by HMRC following a closure notice. But it does not seem limited to reducing or cancelling the additional amount, even though the appellant would be out of time to amend it. We can see no reason not to apply this reasoning to the equivalent provision to s 50 TMA in paragraph 42 Schedule 10 FA 2003.

Decision

107. And so our decision under paragraph 42(2)(a) Schedule 10 FA 2003 is that the appellant is overcharged by a self-assessment (both as originally made and as amended by HMRC) and we reduce the self-assessment to £1,000.

108. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 28 JANUARY 2019

[8] [2006] SpC 549 (Special Commissioner John Avery Jones).