[2016] UKUT 0020 (TCC)

Case number: FTC/54/2013

VALUE ADDED TAX –- DIY Builders Scheme – construction of dwelling - whether designed as a dwelling for purposes of subsection 35(1A)(a) and Note (2)(c) to Group 5 of Schedule 8 to VAT Act 1994 - whether descriptions and other details of development contained in planning application and/or in planning consent prohibited "separate use" of dwelling for purposes of Note (2)(c) leaving aside terms of occupancy condition in planning consent - no - whether that condition amounted to such a prohibition - yes - appeal allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS Appellants

- and -

RICHARD BURTON Respondent

TRIBUNAL: The Honourable Mr Justice Barling

Sitting in public in London on 23rd and 24th November 2015

Christiaan Zwart instructed by the General Counsel and Solicitor to HM Revenue and Customs **for the Appellants**

The Respondent did not appear and was not represented at the hearing, but sent to the Tribunal written submissions prepared by Andrew McDonald MAAT FCCA

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DECISION

Introduction

1. By a decision released on 6 February 2013 the First-Tier Tribunal ("FTT") allowed an appeal by Mr Richard Burton ("Mr Burton") against a formal internal review determination by HMRC dated 17 February 2012, in which HMRC had upheld their decision of 13 October 2011 refusing a claim for refund of VAT under section 35 of the Value Added Tax Act 1994 ("the 1994 Act") in the sum of £8,566.72, incurred by Mr Burton in connection with the construction of a building at Hall Lake Fishery, The Fairways, Mansfield Woodhouse, Nottingham ("the Building").

2. Section 35 of the 1994 Act provides in certain circumstances for a refund of VAT incurred "on the construction of a building designed as a dwelling". By subsection 35(4), the notes to Group 5 of Schedule 8 to the 1994 Act "shall apply for construing this section".

3. Note (2)(c) to Group 5 ("Note 2(c)") provides:

> "A building is designed as a dwelling……where in relation to each dwelling the following conditions are satisfied –
>
> ……
>
> (c) the separate use or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision;….."

4. A statutory planning consent was granted under section 78 of the Town and Country Planning Act 1990 (as amended) ("the 1990 Act") in respect of land at Hall Lake Fishery. The planning consent contained a condition ("Condition 4") that:

> "the occupation of the dwelling shall be limited to a person solely or mainly employed or last employed in Park Hall Lake Fishery or a widow or widower of such a person, or any resident dependants."

5. In allowing Mr Burton's appeal against HMRC's refusal of a VAT refund under section 35, the FTT held (amongst other findings) that the Building was "designed as a dwelling" within the meaning of section 35 and Note 2(c), as its "separate use or disposal" was not "prohibited" by the planning consent.

6. HMRC appeal to this Tribunal pursuant to permission granted by the FTT on 19 April 2013. The appeal concerns the correct interpretation and application of Note 2(c) in the context of the planning consent.

7. Mr Zwart appeared on behalf of HMRC. Mr Burton did not appear and was not represented at the hearing before me. However, the Tribunal has been provided with three sets of written submissions on his behalf dated 16, 19 and 23 November 2015 prepared by Andrew McDonald MAAT FCCA. I have taken all these into account.

The facts

8. The background facts are largely uncontroversial. A brief summary of them is sufficient for present purposes.

9. In 2003 Mr and Mrs Burton bought approximately ten acres of land in Mansfield Woodhouse, Nottinghamshire. The site, which was outside the local urban boundary, included a lake approximately one third of a mile long. Mr Burton dredged, improved and stocked the lake, and in 2004 opened it to anglers on a day permit basis as Park Hall Lake Fishery. At that time Mr and Mrs Burton lived about two miles from the site and there were no structures on it, apart from an equipment storage container at the entrance.

10. On 15 May 2008 Mr Burton applied for outline planning consent to construct a dwelling on the site. Permission was refused on 7 August 2008. Mr Burton appealed to the Secretary of State for Communities and Local Government, and his appeal was upheld by the Secretary of State's inspector on 11 March 2009.

11. The inspector's decision ("the Inspector's Decision") contained the following:

> "**Decision**
>
> 1. I allow the appeal, and grant planning permission for a new occupational dwelling with disabled accessible w/c facilities at Park Hall Lake Fishery, off The Fairways, Mansfield Woodhouse, Nottingham in accordance with the terms of the application, Ref 2008/0465/NT, dated 15th May 2008, and the plans submitted with it, subject to the following conditions:
>
> …
>
> 4) The occupation of the dwelling shall be limited to a person solely or mainly employed or last employed in Park Hall Lake Fishery or a widow or widower of such a person, or any resident dependants.

…

The main issue

4. The main issue is whether the scale and nature of the fishery business … creates a demonstrable need for the proposed development having regard to its countryside location.

Reasons

…

8. … a dwelling at or close to the site is necessary in order to carry out the daily tasks necessary to adequately care for the fish.

9. … A permanent presence on the site would provide a significant deterrent to intruders, thus protecting the welfare of the fish and the business….

…

11. The appellant has provided details of work associated with the business. … From this information I am satisfied that the functional need relates to a full time worker.

…

16. … the combination of the improvements that an on-site presence would bring in terms of tending to the needs of the fish and the very significant benefits it would bring in terms of security are such that the functional need for a dwelling could not be satisfactorily met by any existing nearby dwelling.

…

21. I have attached a condition restricting the occupancy of the dwelling to ensure that it is retained in connection with the fishery. I have required details of the floor levels and boundary treatment to be provided and have restricted permitted development rights to ensure the satisfactory appearance of the development.

…"

12. A further condition of the Inspector's Decision was that details of the "reserved matters" relating to access, appearance, landscaping, layout and scale were to be submitted to and approved by the local planning authority ("LPA"), and the development was to be carried out as approved. Following an application by Mr Burton pursuant to this condition, written approval was granted by a decision of the LPA dated 2 July 2009 for the reserved matters "described in the application form and plans and in relevant correspondence accompanying the application" subject to specified conditions ("the LPA Decision").

13. The LPA Decision stated that:

"Failure to comply with any conditions attached to this decision notice may result in any person with an interest in the land being liable to enforcement actions … Further, the breach of any

conditions may also result in any person carrying out development on the land being liable to prosecution."

14. One of the conditions was that the reserved matters approval

"shall be read in accordance with [the plans submitted with the application for the LPA's approval]".

The reason stated for this condition was:

"To define the permission, for the avoidance of doubt."

15. Building works apparently commenced in July 2009, and Mr Burton states that the Building, comprising a house with four bedrooms, three bathrooms and three reception rooms, was occupied from about the end of August 2010.

16. It is convenient to mention here one feature of the factual position which was referred to in both parties' submissions. As stated above, the planning consent granted by the Inspector's Decision was for "a new occupational dwelling with disabled accessible w/c facilities…" The plans which were the subject of the LPA Decision show a ground floor wc accessible both from within the Building and from the outside. Mr Burton states that the access from the exterior to the part of the Building where the wc is situated is via steps, and that neither the plans submitted to the Planning Inspector and the LPA nor the Building itself contains a "disabled" wc. He states that the plans for the Building were approved without such facilities, and that separate wc facilities for the fishery were the subject of a later planning process.

17. Mr Zwart accepts that there is nothing in the available material which would enable HMRC to challenge Mr Burton's evidence, and that there is to that extent an apparent mismatch between the terms of the planning consent and the Building as constructed. However, he stated at the hearing that, despite what appears in HMRC's Response Skeleton at paragraph 21, HMRC are not pursuing an argument that the requirements of Note 2(d)[1] of Group 5 are not satisfied, and HMRC were proceeding on the assumption that the Building has been constructed in accordance with the planning consent.

[1] "(d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent."

18. On 26th September 2011 Mr Burton submitted to HMRC a claim for a refund of VAT of £8,566.72 under section 35 of the 1994 Act. On 13th October 2011 HMRC rejected the claim on the ground that it failed to satisfy the condition in Note (2)(c), since Mr Burton could not use the property "separately" from another property. HMRC maintained their position on a review, and Mr Burton appealed to the FTT, which allowed the appeal.

Relevant legislation

19. By virtue (and subject to the provisions) of the 1994 Act, VAT is charged on the supply of goods or services in the United Kingdom where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

20. Mr Zwart provided me with some helpful background to the VAT refund scheme, the current version of which is to be found in section 35 of the 1994 Act. From the outset of the implementation of the VAT regime in the United Kingdom through the enactment of the Finance Act 1972, particular supplies have been "zero-rated" so that the recipient of relevant goods or services is not charged VAT thereon. Supplies relating to the construction of buildings have benefited in certain circumstances from zero-rating. However, this benefit did not extend to supplies to people who built their own homes. To address what was perceived as an anomaly, the Government introduced the self-build refund regime in the Finance Act 1975. This made provision for the refund of VAT incurred by DIY home builders, thus putting them in an equivalent position to those who engage a contractor to build their home.

21. When more comprehensive VAT rules were introduced through the implementation of the Sixth VAT Directive, the United Kingdom was entitled to retain its existing zero rates under the so-called "stand-still" provision of the Directive. However, that provision did not cover refund regimes such as the self-build scheme. The UK has nevertheless retained the scheme as constituting Government expenditure outwith the scope of the VAT regime, and no objection has apparently been raised by the EU Commission. Although EU VAT measures are therefore not directly applicable to the section 35 refund scheme, the domestic legislation has been drawn (by subsection 35(4)) so as to be interpreted consistently with the Notes to Group 5 of Schedule 8 to the 1994 Act.

22. So far as relevant, section 35 of the 1994 Act provides:

> (1) Where –
>
> (a) a person carries out works to which this section applies,
>
> (b) his carrying out of the works is lawful and otherwise than in the course or furtherance of any business, and
>
> (c) VAT is chargeable on the supply, acquisition or importation of any goods used by him for the purposes of the works,
>
> the Commissioners shall, on a claim made in that behalf, refund to that person the amount of VAT so chargeable.
>
> (1A) The works to which this section applies are –
>
> (a) the construction of a building designed as a dwelling or number of dwellings;
>
> ……
>
> (4) The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group….
>
> …..”

23. The only relevant note is Note 2(c), the terms of which have already been set out at paragraph 3 above.

The FTT decision

24. Before the FTT, HMRC took two objections to the claimed refund: first, that the construction of the Building was “in the course or furtherance of a business” and therefore fell foul of subsection 35(1)(b) of the 1994 Act; and second, that the terms of Condition 4 were such that the requirements of Note 2(c) were not satisfied.

25. The FTT found in favour of Mr Burton on both points.

26. On the issue concerning the meaning and application of Note 2(c), the FTT held that “separate use or disposal” of the Building was not “prohibited” by the terms of the planning consent, and that therefore the condition in Note 2(c) was satisfied, with the result that there was no bar on that ground to the Building being “designed as a dwelling” for the purposes of subsection 35(1A)(a) of the 1994 Act. The FTT’s reasoning on the point is contained in the following passage of their decision:

> “12. We consider that “prohibited” is a strong word. It is not sufficient for HMRC to show that there are restrictions that may have an adverse effect (even a serious one) on the value of the

> property, nor that separate use or disposal of the Building was de facto difficult or even unlikely – Note 2(c) expressly requires a prohibition. We have considered the views put forward by HMRC in their publications – cited at para 7(6) above – but we conclude that those do not give sufficient weight to the word "prohibited". The Condition limits the occupation of the Building to present or past employees of the fishery business (and their dependents). Had the planning inspector granting the Planning Permission intended to prohibit the separate use or disposal of the Building then such a condition would have been imposed; instead, the Condition is a limitation on occupancy which does not constitute a prohibition on the separate use or disposal of the Building.
>
> 13. Accordingly, we conclude that Note 2(c) does not prevent the Building from constituting a dwelling for the purposes of s 35."

The scope of the present appeal

27. The scope of HMRC's appeal against the decision of the FTT is relatively narrow. Although several issues are canvassed in the grounds of appeal and skeleton arguments, these have been narrowed down in the course of Mr Zwart's oral submissions. In particular, he stated that although HMRC did not agree with the FTT's reasoning on the issue of whether the construction of the Building was carried out "in the course or furtherance of any business" within the meaning of subsection 35(1)(b), HMRC were withdrawing their challenge on that ground. For the avoidance of doubt he also made clear that HMRC were not relying upon any point which was dependent upon the fishery business being classified as an agricultural holding (a matter which Mr Burton addressed in his skeleton argument).

28. I am therefore concerned only with the meaning and application of Note 2(c), and essentially with the question whether on the (effectively undisputed) facts of the present case "the separate use or disposal of the [Building] is not prohibited by the term of any covenant, statutory planning consent or similar provision". This question is apparently the subject of interest beyond the scope of the present appeal.

Submissions and discussion

29. The following propositions appear not to be in dispute, and are in any event clearly correct:

- that the 1994 Act requires VAT to be charged on the supply of goods and services, and that Mr Burton was required to be charged VAT on the supply of goods used in the construction of the Building;

- that he is entitled to a refund of that VAT by virtue of subsection 35(1) if he can satisfy the criteria identified or referred to in that subsection;

- that in the context of this case, these criteria include the requirement that the Building is "designed as a dwelling" within the meaning of subsection 35(1A);

- that by subsection 35(4), the Notes to Group 5 of Schedule 8 apply for construing section 35 as they apply for construing that Group;

- that by Note 2 a building is designed as a dwelling where (so far as relevant) "(c) the separate use or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision …"

Meaning of "separate use"

30. Mr Zwart submitted that in Note (2)(c) "separate use" means "separate from". For this proposition he relied on *HMRC v Lunn* [2010] STC 486, a decision of the Upper Tribunal which concerned a materially identical provision to Note 2(c), contained in the notes to *Group 6* of Schedule 8 to the 1994 Act.

31. In that case a new self-contained dwelling had been built within the curtilage of a manor house. Both houses were in common ownership. The planning approval contained a condition that "the development …shall only be used for purposes either incidental or ancillary to the residential use of the [manor house]". The issue was whether "separate use" of the new house within the meaning of the provision equivalent to Note 2(c) was "prohibited" by the planning condition.

32. In concluding that it was, the Upper Tribunal held that "separate use" in the note in question meant use that is separate *from* that of the main building (rather than merely distinct use or use as a separate household, for example by guests or dependant relatives), and that a use which is required to be incidental or ancillary to the use of the main house cannot be a "separate use" for this purpose. In reaching that conclusion the Upper Tribunal noted *inter alia* that the purpose of the note was to prevent zero-rating unless the new house could, consistently with the terms of the planning consent, be used independently of the main house. (See paragraphs 5-6, 10, and 15 of the decision.)

33. Mr McDonald, in his written submissions on behalf of Mr Burton, makes no positive submissions as to the meaning of "separate use" in Note 2(c), or as to the correctness of the decision in *Lunn*. He submits that the case concerned "a use condition and not occupancy and so was argued in a different context." (Paragraph 98 of the Respondent's Skeleton.)

34. Although the facts (including the terms of the planning condition in issue in that case) are indeed different in *Lunn*, the Upper Tribunal's finding as to the meaning of "separate use" in this context is clearly in point in the present case. I agree with the interpretation placed on that phrase by the Upper Tribunal, and with their reasons. I would only add that their interpretation may perhaps be seen as reinforced by the juxtaposition of the words "or disposal" in Note 2(c); the alternative meaning of "separate use" discussed (and dismissed) in *Lunn* is even more difficult to envisage where "separate disposal" is concerned.

Meaning of "not prohibited"

35. Mr Zwart then turned to the phrase "not prohibited", and submitted that the FTT had erred in considering it to be a "strong phrase"; it was simply a statutory phrase. However, it was one which fell to be interpreted strictly (which in this context meant widely) because it formed part of a potential exemption from the general rule that a supply is subject to VAT. In this regard he referred to Case C-169/00 *Commission v Finland* [2004] STC 1232, and the statement of the ECJ to that effect, at paragraph 33.

36. Giving a strict/wide interpretation to "not prohibited" would, he said, encompass the full range of its ordinary meanings including "forbidden" and "out of bounds". Whether "separate use" was or was not "out of bounds" involved questions of fact and planning law. The phrase could be satisfied only if the "separate use" of the Building was not out of bounds of the terms of the planning permission (in fact and in planning law), such that those terms permitted unconstrained use of it.

37. I have found nothing in Mr McDonald's written submissions which specifically addresses these points, save that reliance is placed on the findings of the FTT.

38. It is no doubt correct that a derogation or exemption from the general application of VAT to what would otherwise be a taxable supply by a taxable person is, as a matter of EU law, to be strictly construed, as *Finland* (above) confirms. However, as noted earlier, section 35 is not a provision which implements any directive or other EU rule. Save that it relates to the refund of VAT (a tax based on EU directives) it is a purely domestic measure. As such it would at first sight appear a paradox to apply an EU rule of construction to such a provision. However, although he did not articulate the argument precisely in these terms, I understand Mr Zwart's point to be that EU law is applicable by proxy, because the EU rule of construction applies to Group 5 (as a derogating measure relating to zero rating of construction works), and subsection 35(4) provides that the notes to Group 5 "shall apply for construing this section as they apply for construing that Group".

39. In my view that argument is correct. It would surely be anomalous and wrong, not least in the light of subsection 35(4), if the phrase "not prohibited" in Note 2(c) should be construed differently depending on whether the context is section 35 or an issue relating to zero rating under Group 5.

40. Having said that, it is not clear that there is all that much scope for a "strict" (ie wide) construction of this particular phrase, and the only alternatives referred to by Mr Zwart are "forbidden" and "out of bounds". The latter appears to be a concept familiar to planning lawyers, but if it is synonymous with "forbidden" and "prohibited" it hardly takes the matter much further. I would have thought that a use which is a breach of the terms of a planning consent would be prohibited in this sense.

Is there a prohibition in the present case:

(i) absent Condition 4?

41. Mr Zwart pointed out that Mr Burton's claim under section 35 relied on the grant of outline planning permission in the Inspector's Decision and the consequent reserved matters approval given, pursuant to the that Decision, by the LPA Decision.

He said that, as well as reciting verbatim the terms of Mr Burton's application for permission as follows: "A new occupational dwelling with disabled accessible w/c facilities to enable the owners/managers of the fishery to meet the necessary management, supervisory and security requirements of the fishery", the Inspector's Decision also stated that the permission was "for the proposed occupational dwelling with disabled accessible w/c facilities at Park Hall Lake Fishery, off The Fairways, Mansfield Woodhouse, Nottingham *in accordance with the terms of the application….and the plans submitted with it,* subject to the following conditions…".

42. In those circumstances Mr Zwart submitted that the application, together with material supplied in support of it, were incorporated into and formed part and parcel of the planning consent. In that connection he referred me to the approach of the courts in construing planning permissions, summarised by Keene J (as he then was) in *R v Ashford Borough Council ex parte Shepway District Council* [1999] PLCR 12 at pp.19-20:

> "(1) The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions: see *Slough Borough Council v Secretary of State for the Environment* (1995) JPL 1128, and *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196.
>
> (2) This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application: see *Slough Borough Council v Secretary of State* (ante); *Wilson v West Sussex County Council* [1963] 2 QB 764; and *Slough Estates Limited v Slough Borough Council* [1971] AC 958.
>
> (3) For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as '... in accordance with the plans and application ...' or '... on the terms of the application ...,' and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted: see *Wilson* (ante); *Slough Borough Council v Secretary of State for the Environment* (ante).
>
> (4) If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to

> resolve that ambiguity: see *Staffordshire Moorelands District Council v Cartwright* (1992) JPL 138 at 139; *Slough Estates Limited v Slough Borough Council* (ante)*; Creighton Estates Limited v London County Council*, The Times, March 10, 1958."

43. I was also shown a ruling of the Upper Tribunal (Judge Colin Bishopp) on 13 May 2014. That was an interlocutory matter relating to the present appeal. Judge Bishopp, after taking account of principles set out by Keene J in *R v Ashford Borough Council*, directed that at the hearing of this appeal HMRC be permitted "to produce and refer to the entirety of the planning permission….together with any documents incorporated by reference into the said permission." In his reasons Judge Bishopp indicated that the FTT was not (but should have been) supplied with all the material which had been provided to the planning authority in order to obtain consent and which was referred to in the consent (paragraphs 5, 7, 8, 9 11 and 12 of his reasons).

44. Mr Zwart submitted that one of the documents supplied by Mr Burton as part of his application was the Planning Statement. He placed considerable emphasis on this detailed document, only limited extracts of which had been made available to the FTT. Mr Zwart took me to several passages in it which had not been before the FTT. It is not necessary to cite all of them here. They highlight the central importance of the Building to the existing fishery business and its future development and expansion. They state that the "main objective" of the Building would be to facilitate the provision of "essential 24 hour supervision and management of the current fishery enterprise and additional requirements following the expansion of the business in the future". There are references to "The present labour force", to Mr and Mrs Burton's proposed occupation of the Building as "key workers", and to an assessment that "an onsite dwelling is essential for the adequate management of the Fishery as a commercial venture".

45. Mr Zwart submitted that in applying for planning consent on the basis of this material, and in describing the Building as set out in paragraph 41 above, Mr Burton circumscribed both that for which he was applying and that for which it was within the power of the planning authority to grant consent. This was because the power of the authority to grant planning consent was confined by the terms of the application itself, and the authority was not entitled in law to grant permission in wider terms than applied for. He relied for this upon *Uttlesford DC v Secretary of State for Environment and Leigh* (1989) JPL 685, a decision of Mr D. Widdicombe QC, sitting

as a Deputy High Court Judge, in which he held that the authority "had no power to grant a permission in wider terms than that applied for." The learned Deputy Judge referred to the words of the relevant legislation "which provides that what is to be determined is the application for planning permission….Furthermore, if the permission granted was allowed to go wider than the application, it would defeat the consultation process." The Judge pointed out that, on the other hand, an authority could, where appropriate, grant a more limited permission than applied for. (See page 688.)

46. In the light of this, Mr Zwart submitted that even if the Inspector's Decision had not included an express restriction on separate use in Condition 4, Note 2(c) would still not have been satisfied: the application, and therefore the consent, were not for a dwelling as such, but for an *occupational* dwelling whose very description pre-supposed an association with a specific rural enterprise. Thus, the description of the proposed development in the application and supporting material, together with the terms of the consent at paragraph 1 of the Inspector's Decision (see above at paragraph 11), had to be construed as limiting the use of the Building, both as to the category of person and as to a particular place. Therefore, precisely the same prohibition was imposed as in Condition 4, preventing use of the Building separate from the fishery to which it relates.

47. In *Revenue and Customs v Shields* [2014] UKUT 453 (TCC), to which I refer again below, the Upper Tribunal (Judges Sinfield and Devlin) rejected a similar argument by Mr Zwart based on the development description in a planning permission. The Tribunal held that, whilst in the light of the case law (including *Uttlesford* (above) and *Wilson v West Sussex County Council* [1963] 2 QB 764) it was clear that the description of a development could, without more, constitute a prohibition on certain uses, the description there[2] was not such as to engage Note 2(c). It did not prohibit the use of the dwelling separately from the land on which the relevant business was sited; that business could be re-sited, and as long as the dwelling was used as a residence by the business's manager there would be no inconsistency with the description. (Paragraphs 48-49 of the decision.) However, the

[2] "Construction of equestrian facilities managers residence"

Tribunal went on to find that a prohibition nevertheless existed on the basis of a more specific condition in the permission.

48. Mr Burton submits that the planning consents and the application, including the Planning Statement and other supporting documents, contain no prohibition on the separate use or disposal of the Building within the meaning of Note 2(c). He points out that the application was not mentioned until it was raised in the grounds of appeal against the FTT's decision. Had the documents in question been before the FTT they would have made no difference to the FTT's decision. Further, the emphasis placed in the application on the business was purely to justify the need for a new dwelling outside the urban boundary, pursuant to planning guidance. Absent justification of that nature, such applications would be refused. He states that in fact the Building is not attached to or associated in title or used with any other property. It is a new dwelling in its own right which Mr and Mrs Burton personally occupy as their home. The business exists in its own right and is operated separately from the Building, which in his submission can be used and/or sold separately from the business.

49. I note that when the present matter was before the FTT this particular point, relating to the effect of the description of (and justification for) the proposed development contained in the application and supporting documents, was not taken by HMRC, who were then represented by different counsel. Certainly the FTT do not record any such argument as having been made, and deal with the Note 2(c) issue soley on the basis of Condition 4.

50. In my view the fact that the application and Planning Statement were not before the FTT in their entirety would not have precluded the point being taken, since Mr Burton's description of the proposed development (which is an important aspect of the material relied upon by Mr Zwart in this limb of his argument) is cited verbatim in the Inspector's Decision. Moreover, the main features for which Mr Zwart relies upon the Planning Statement are also identified in the Inspector's Decision, albeit in less detailed terms. I do not consider that in relation to this argument the further material produced in this Tribunal adds much, if anything, of significance to that which was before the FTT. Therefore, had HMRC wished to raise the argument at that stage they could have done so. In those circumstances it is unsatisfactory that they should seek to

raise it now, and that in their skeleton argument they complain that the FTT did not address the issue, when it does not appear to have been raised.

51. In the event it is not strictly necessary for me to decide the point for reasons which will become clear. However, as the matter was canvassed at some length by Mr Zwart, I will express my views on it briefly.

52. I do not consider that there is anything significant in the application, Planning Statement and other supporting documents which is not identified in the Inspector's Decision, salient extracts from which are set out at paragraphs 11 and 41 above. Although Mr Zwart took me to a good many passages in these documents, ultimately it was on Mr Burton's description of the proposed development that he placed particular emphasis (as indeed he appears to have done also in *Shields* in relation to a description in the planning permission itself). He pointed not just to the express linkage with the fishery business at Park Hall by the reference to "disabled accessible w/c facilities" and the enabling of "the owners/managers of the fishery to meet the necessary management, supervisory and security requirements of the fishery", but also to the term "occupational dwelling". He submitted this was a term of art derived from Planning Policy Statement 7, identifying a new category (in addition to agriculture and forestry) of potentially permissible rural development, requiring special justification by the need for workers to live at or near their place of work.

53. I accept, as did the Upper Tribunal in *Shields*, that the description of a development could itself constitute a prohibition on a certain use or uses, without an express mandatory condition or equivalent provision. However, in my view one should be cautious when asked to construe a description, whether contained in the application (if incorporated into the permission) or in the permission itself, as importing a prohibition in the sense of Note 2(c). The reasons are obvious. The word "prohibited", including its equivalents of "forbidden" or "out of bounds", carries with it a requirement for legal certainty. Legal certainty is clearly required for the purposes of Note 2(c), because the legal entitlement to a refund of tax depends upon whether or not that provision is satisfied. Such certainty is also required in the planning context, because owners and those interested or potentially interested in a property need to be in a position to know their rights and obligations in relation to a planning consent which relates to it. Given what I accept is the appropriate interpretation of Note 2(c),

namely “separate *from*”, and given the consequent requirement that there be no such formal/obligatory link with other land/building which that interpretation imports, it is, in my view, likely to be relatively rarely that a description alone will be such as to give rise to a prohibition on “separate use or disposal” for the purposes of Note 2(c). It is one thing to find that a description “pre-supposes an association with a specific rural enterprise” (to borrow Mr Zwart’s expression), and quite another to construe it as a prohibition on separate use or disposal. (I say nothing about other types of restrictions that may be imposed on the use of a property.)

54. In this connection it is worth noting the observations about implied conditions made by Beatson LJ when he was summarising the effect of the authorities on the construction of a planning permission and of the conditions in it, in *Telford and Wrekin Council v Secretary of State for Communities and Local Government & Anor* [2013] EWHC 79 (Admin) (29 January 2013):

> “There is no room for an implied condition in a planning permission. This principle was enunciated in *Trustees of Walton on Thames Charities v Walton and Weighbridge District Council* (1970) 21 P & C R 411 at 497 (Widgery LJ), in the following terms:
>
> 'I have never heard of an implied condition in a planning permission and I believe no such creature exists. Planning permission enures for the benefit of the land. It is not simply a matter of contract between the parties. There is no place, in my judgment, within the law relating to planning permission for an implied condition. Conditions should be express, they should be clear, they should be in the document containing the permission.' "
>
> This principle also precludes implying an obligation by way of an addition to an existing condition: *Sevenoaks DC v First Secretary of State* [2004] EWHC 771 (Admin) at [45] (Sullivan J)”

55. Although to derive a prohibition from a description is not the same exercise as the implication of a condition, some of the effects of each are similar, if not the same. This confirms the need for caution before construing a description in that way for the purposes of Note 2(c).

56. With these considerations in mind, I do not accept Mr Zwart’s contention that, absent Condition 4, the permission here is subject to a prohibition on separate use or disposal within the meaning of Note 2(c). Neither the description in the application, nor that in the Inspector’s Decision, nor any of the contents of the other material relied upon, produce that effect, whether taken in combination or individually. It cannot be read into the terminology “occupational dwelling”, nor derived from the

references to "disabled accessible w/c facilities", to Park Hall Lake Fishery, or to the enabling of the duties of the owners/managers. These are all indicative of the reasons why planning permission was granted for the Building, but in my view it is a step too far to suggest that they can properly be construed as giving rise to a prohibition on separate use or disposal of the Building.

57. In reaching this conclusion I am aware that the descriptions in the present case are different from that in *Shields.* Unlike this case, the *Shields* description did not contain a reference to the existing business premises, and the comments of the Upper Tribunal could be taken to imply that their decision on the point might have been different had such a reference been included. However, they did not need to decide whether, if the description had contained such a reference, a prohibition would have existed on that basis alone, and they did not express the view that it would. The Upper Tribunal determined the appeal on the basis of a condition, and not the description.

58. Mr Zwart submitted that in any event Condition 4 was sufficient for HMRC's case, and my view is that if a prohibition is to be found in the present case it must be looked for in that condition, as properly construed in its context.

(ii) Prohibited by Condition 4?

59. In addition to his remarks about the implication of conditions into a planning consent (above), Beatson LJ, in *Telford and Wrekin Council v Secretary of State for Communities and Local Government & Anor* made the following further observations about the construction of consents (including conditions):

> "(1) As a general rule a planning permission is to be construed within the four corners of the consent itself, i.e. including the conditions in it and the express reasons for those conditions unless another document is incorporated by reference or it is necessary to resolve an ambiguity in the permission or condition: *R v Ashford DC, ex p Shepway DC* [1998] PLCR 12 at 19 (Keene J); *Carter Commercial Developments v Secretary of State* [2002] EWCA Civ. 1994 at [13] and [27] (Buxton and Arden LJJ); *Sevenoaks DC v First Secretary of State* [2004] EWHC 771 (Admin) at [24] and [38] (Sullivan J); *R (Bleaklow Industries) v. Secretary of State for Communities and Local Government* [2009] EWCA Civ. 206 at [27] (Keene LJ); *R (Midcounties Co-operative Limited) v. Wyre Forest DC* [2010] EWCA Civ. 841 at [10] (Laws LJ).
>
> (2) The reason for the strict approach to the use of extrinsic material is that a planning permission is a public document which runs with the land. Save where it is clear on its face that it does not purport to be complete and self-contained, it should be capable of being relied on by later landowners and members of the public reading it who may not have access to extrinsic material: *Slough Estates v Slough Borough Council* [1971] AC 958 at 962 (Lord Reid); *Carter Commercial Developments v Secretary of State* at [28] (Arden LJ); *R (Bleaklow*

Industries) v. Secretary of State for Communities and Local Government [2009] EWCA Civ. 206 at [27]) (Keene LJ); *Barnett v Secretary of State* [2009] EWCA Civ 476 at [16] – [21] (Keene LJ, approving Sullivan J at first instance); *R (Midcounties Co-operative Limited) v. Wyre Forest DC* [2010] EWCA Civ. 841 at [10] (Laws LJ).

(3) It follows from (2) that in construing a planning permission:-

a. the question is not what the parties intended but what a reasonable reader would understand was permitted by the local planning authority, and

b. Conditions must be clearly and expressly imposed, so that they are plain for all to read.

…..see *Sevenoaks DC v First Secretary of State* [2004] EWHC 771 (Admin) at [38] and [45] (Sullivan J).

(4) Conditions should be interpreted benevolently and not narrowly or strictly (see *Carter Commercial Development Ltd v Secretary of State for the Environment* [2002] EWHC 1200 (Admin) at [49], per Sullivan J) and given a common-sense meaning: see *Northampton BC v First Secretary of State* [2005] EWHC 168 (Admin) at [22] (Sullivan J).

(5) ….

(6) If there is ambiguity in a condition it has to be resolved in a common sense way, having regard to the underlying planning purpose for it as evidenced by the reasons given for its imposition: *Sevenoaks DC v First Secretary of State* [2004] EWHC 771 (Admin) per Sullivan J at [38] accepting the submission at [34]."

60. Thus, in construing a condition in a planning permission, the whole consent falls to be considered, and a strict or narrow approach is to be avoided, in favour of one which is benevolent, applies commonsense and, where appropriate, takes account of the underlying planning purpose for the condition as evidenced by the reasons expressed.

61. Further helpful guidance was provided by the Upper Tribunal in *Shields*, at paragraph 53:

> "Our view is that the issue of whether Note 2(c) applies should be determined in the light of the precise wording of the condition and the factual context in which it applies. It follows that an analysis of different cases with differently worded conditions and different facts is unlikely to assist in determining whether Note 2(c) is satisfied in another case. Accordingly, we prefer to focus on the terms of the planning permission and, in particular, Condition 3 in this case rather than engage in a detailed discussion of the other more or less similar cases considered by the FTT in this appeal."

62. Condition 4, together with the reason for it as expressed in paragraph 21 of the Inspector's Decision, are set out above at paragraph 11.

63. HMRC submit that Condition 4 prohibits use which is separate from the fishery business situated at Park Hall, and that therefore Note 2(c) is not satisfied. They rely

in particular on the reasoning and conclusion of the FTT in *Swain v HMRC* [2013] UKFTT 316 (TC), and invite me to endorse and adopt the approach of the FTT in that case.

64. *Swain* concerned the conversion of a barn into a dwelling as part of a holiday cottage development. The dwelling was to be accommodation for the manager or proprietor of the holiday cottage business, and condition 10 of the planning permission was in these terms:

> "The occupation of [the dwelling] shall be limited to a manager or proprietor of the holiday accommodation being operated from [the other buildings on the site] and any residential dependants.
> **Reason**: To ensure that this dwelling is kept available for meeting the need to accommodate a manager or proprietor of the business on a site where residential development would not normally be permitted …."

65. After reviewing a number of similar cases in the tribunals (including the decision of the FTT in the present case) the FTT (Judge Poole and Ms Clarke) stated:

> "It can readily be seen that in the [appeals where the taxpayer was unsuccessful] the relevant conditions all imposed restrictions which were expressed in one way or another to apply directly to the properties in question, whereas in the [appeals where the taxpayer was successful] the restrictions were expressed to apply to limit the persons who could occupy the properties in question. The Tribunals in *Phillips*, *Wendels* and *Burton* clearly felt this was a crucial distinction."
> (See paragraph 66)

66. The FTT disagreed with those decisions and the approach taken. In summary, this was because a condition in a planning permission which prohibits the use of the property in a certain way would not necessarily be contrary to Note 2(c). Note (2)(c) was only engaged where the prohibition was on "separate use", as that phrase was interpreted in *Lunn*, and not where the prohibition was on "use" more generally (see paragraphs 67-69 of *Swain*). The crucial passage in the FTT's judgment is as follows:

> "The clear effect of Condition 10 is to prohibit anyone from occupying Barn D who is not "a manager or proprietor of the holiday accommodation business being operated from Barns A, B and C...., or any residential dependants". To comply with Condition 10, either such a person must occupy Barn D, or it must be unoccupied. If it is unoccupied, it is not being used at all. If it is occupied, it must be occupied only by appropriately "qualified" persons. The lawful use of Barn D is therefore circumscribed by reference to a relationship between its occupier(s) and a business being operated out of neighbouring premises. In that situation, we cannot see how it could properly be argued that there is no prohibition on the separate use of Barn D imposed by Condition 10; it cannot lawfully be used except by an occupier who fulfils the requirements of Condition 10 and who

> must therefore own or manage the neighbouring holiday letting development (or be a residential dependant of such owner or manager). Any use "separate from" that neighbouring development is therefore, in our view, prohibited by Condition 10." (Paragraph 71)

67. On the basis of that analysis, the FTT in *Swain* held that Note 2(c) was engaged, and the section 35 refund was not available.

68. The same analysis was adopted by the Upper Tribunal in *Shields*. The relevant passage of the decision in that case is as follows:

> "In our view, a condition of planning permission for a dwelling that requires it to be occupied by a person who works at a specified location prohibits the use of the dwelling separately from the specified location. The dwelling at 274 Bangor Road can only properly be used to provide accommodation for a person employed in the equestrian business at the facilities (stables etc) at that address. Any use of the dwelling at 274 Bangor Road "separate from" the equestrian business carried on at the same address is therefore, in our view, prohibited by Condition 3. That is a prohibition within the meaning of Note (2)(c) to Group 5 of Schedule 8 to VATA94 and the dwelling is not, therefore, a building "designed as a dwelling" for VAT purposes.

69. Mr Burton submits that Condition 4 does not prohibit the use or disposal of the Building separately from the fishery business. The lake can be used and sold separately from the Building, and the planning permission is subject to no enforceable condition which would prevent this. He submits that Condition 4 is loosely written, covers a wide range of persons and is therefore not prohibitive. It does not say what is to happen if the fishery business ceases, and Mr Burton contends that in that event he and Mrs Burton could continue to live in the Building and the lake could be disposed of separately.

70. He refers to the February 2008 version of HMRC's own published guidance in Notice 708 (Buildings & Construction), which he submits is supportive of his interpretation of Condition 4. This states at paragraph 14.2.2:

> "Is an occupancy restriction a prohibition on separate use or disposal?
>
> No. Occupancy restrictions are not prohibitions on separate use or disposal and do not affect whether a building is "designed as a dwelling or number of dwellings". Common examples of occupancy restrictions include those that limit the occupancy to people:
>
> · working in agriculture or forestry; and
>
> · over a specified age."

71. Mr Burton points out that the examples given there are no more than that, ie examples, and are not exclusive.

72. The FTT noted that Notice 708 was revised in 2011 so that the corresponding passage was changed to:

> "14.2.3 Is an occupancy restriction a prohibition on separate use or disposal?
>
> It will depend on the wording but if all it does is restrict the occupancy of a building to a certain type of person such as persons working in agriculture or forestry; or persons over a specified age, the answer is No.
>
> On the other hand, if the wording of the restriction prevents the building from being used separately from another building or from being sold (or otherwise disposed of) separately from another building, the answer is Yes.
>
> If in doubt, the appropriate planning authorities should be consulted."

73. Both Mr Burton and the FTT referred to the guidance on Note 2(c) in HMRC's VAT manual at VCONST141404. The version which was current at the time of the hearing in the FTT included the following (and a possibly more recent version set out in Mr Burton's submissions seems to be materially identical):

> "To meet this condition, neither separate use nor separate disposal of the dwelling must be prohibited. If either separate use or disposal is prevented by covenant, planning or similar permission, the condition isn't met.
>
> …
>
> Occupancy restrictions don't prevent the separate use or disposal of a dwelling. They are, therefore, not Note 2(c) prohibitions. Examples include restrictions that limit occupancy to people:
>
> • working, or last working, in the locality in agriculture or in forestry, or a widow or widower of such a person, and to any resident dependents
>
> • over a certain age.
>
> Note: Where the restriction goes beyond identifying a particular class of person and ties use of a dwelling to, say, a commercial activity being carried on in another building, this is a prohibition on separate use or disposal of the dwelling."

74. This guidance, of course, simply represents the views of HMRC, and is not conclusive of the legal position.

75. Mr Burton went on to state that Condition 4 was an adapted standard condition taken from Circular 11/95, appendix A of which contains suggested models of conditions for use in appropriate circumstances. The model condition on which Condition 4 is based contains an occupancy limitation relating to "a person soley or

mainly working, or last working, in the locality in agriculture or forestry, or a widow …" etc. Mr Burton submits that had the Inspector wished to restrict the use of the Building in any way there were other model conditions within Circular 11/95 which could have been, but were not, adopted by him. He relies upon the FTT's observation that

> "Had the planning inspector granting the Planning Permission intended to prohibit the separate use or disposal of the Building then such a condition would have been imposed; instead, the Condition is a limitation on occupancy which does not constitute a prohibition on the separate use or disposal of the Building." (Paragraph 12)

76. Mr Burton emphasised that pursuant to Planning Policy Statement 7 – Sustainable Development in Rural Areas, isolated new houses in the countryside require special justification for the grant of planning permission, but this does not mean that a permitted new dwelling has not been created in its own right. He prayed in aid the FTT's comment that:

> "….in determining whether the VAT reclaim is barred by s 35(1)(b) we are cautious about interpreting contentions designed to convince a planning authority to grant planning permission."

77. As to the case law, Mr Burton understandably placed strong reliance on *Wendels v HMRC* [2010] UKFTT 476 (TC). In that case the FTT were considering the effect of a planning condition which was almost identically worded to Condition 4. A dwelling had been built on the site of a cattery business. The planning permission was subject to a condition that:

> "The occupation of the dwelling hereby permitted shall be limited to a person solely or mainly employed or last employed in the cattery business … or a widow or widower of such a person, or any resident dependant."

78. The FTT in *Wendels* decided that the condition did not prohibit the separate use or disposal of the dwelling, and allowed the taxpayer's appeal. Distinguishing *Lunn* (above), they found that the condition did not link the use or disposal of the dwelling with the cattery business, and that it was an occupancy condition which limited the occupation of the property to a specified category of persons, and in no way restricted its separate use or disposal as a dwelling house.

79. The FTT, too, placed reliance on *Wendels* (see paragraph 14 of their decision).

80. In his submissions Mr Burton also referred to *Cussins v HMRC* [2008] UKVAT V20541, *Edmont Ltd v HMRC* [2015] UKFTT 0527(TC), *Shields* (above), *Lunn* (above), and *HMRC v Barkas* [2014] UKUT 0558 (TCC).

81. In *Cussins*, a decision of the VAT and Duties Tribunal, the taxpayer had converted redundant farm buildings to form residential accommodation, offices and workshop. The same rules in relation to a claim under the DIY Builders Scheme applied. The planning permission included a condition that:

> "The residential accommodation hereby permitted shall only be occupied in conjunction with the commercial use hereby approved. Reason: The site lies in an area where new residential development is restricted."

82. The Tribunal concluded that it was clear that the separate use of the residential premises from the commercial part was prohibited by the condition.

83. This decision relates to a differently worded condition and may therefore be seen as only of limited assistance in the present case.

84. In *Edmont* the FTT were considering whether Note 2(c) was satisfied in the context of the construction of a dwelling described in the application variously as "a permanent equestrian worker's dwelling" and a development "in connection with the equestrian facilities". In addition the planning consent was subject to the following condition:

> "The occupation of the dwelling hereby permitted shall be limited to a person soley or mainly working, or last working, in the locality in agriculture, forestry or an equestrian business, or a widow or widower of such a person and to any resident dependants."

85. There was a further condition restricting "alienation" of any part (as distinct from the whole) of the relevant land and buildings without the prior consent of the local authority.

86. The FTT held that separate *use* of the dwelling was not prohibited by the descriptions of the development nor by the occupancy condition. The permission process had, in the FTT's view, "evolved" as witnessed by the movement away from references to "*the* equestrian business" in the earlier documents, to the much less specific description in the occupancy condition. As to whether separate *disposal* was prohibited by the other condition, the FTT held that it was not. They found that a real

possibility of the local authority consenting to separate alienation meant that the condition was not a "prohibition" within Note 2(c).

87. This decision does not, in my view, throw further light on the present case, given the very different circumstances, and the fact that the occupancy condition was expressed in terms which did not link the occupancy to any specific premises.

88. In relation to *Shields*, Mr Burton draws attention to the comment made by the Upper Tribunal about the present case:

> "The conditions in both *Wendels* and *Burton*, which were substantially identical, were more widely expressed than the conditions in the other cases discussed. The conditions restricted occupation of the dwelling to a person solely or mainly employed or last employed in the [specified business carried on at a specified property] or a widow or widower of such a person, or any resident dependants. It appears to us that it could be argued that such a condition extends the category of person permitted to occupy the dwelling so far that the condition can be said not to prohibit separate use. As we did not hear any argument on the point and the Upper Tribunal will consider the effect of the condition in *Burton*, we make no further comment in relation to those cases."
> (Paragraph 53 of the decision)

89. Mr Burton submits that the distinction referred to there by the Upper Tribunal is important, and has the effect that there is no prohibition on separate use here.

90. In relation to *Lunn*, Mr Burton states that that case involved a condition relating to "use" and not one concerned with "occupancy" as in the present case, and that the facts were very different.

91. I agree that the facts in *Lunn* were different, and that the condition there was very differently framed. However, I do not understand the distinction between a "use" condition and an "occupancy" condition. Occupation of a dwelling is clearly a use of it.

92. As for *HMRC v Barkas*, the facts and the relevant permission condition are entirely different, and there is nothing in that case which is of particular assistance here.

93. In the light of the authorities I have come to the firm conclusion that the FTT erred in law in finding that Condition 4 did not give rise to a prohibition on the separate use of the Building within the meaning of Note 2(c). In my view it clearly did.

94. There is no question but that the limitation in the condition is in sufficiently mandatory and clearly defined terms to be capable of amounting to a "prohibition" within Note 2(c). I do not accept Mr Burton's submission that it is too loosely worded for that purpose.

95. I also consider that what is prohibited is *separate* use as explained by the Upper Tribunal in *Lunn*, that is, use which is separate from the fishery at Park Hall. The aim of Condition 4 is manifestly to ensure, by means of the occupancy restriction, that the accommodation is retained for the purposes of the Park Hall fishery business. Indeed, the relevant reason set out in the Inspector's Decision expressly says so. This is confirmed by the planning consent as a whole, which explains in detail how certain important requirements of the Park Hall fishery business are to be met through the occupation of the Building.

96. It is true, as the Upper Tribunal in *Shields* pointed out, that the permitted occupants are more widely defined than in *Swain* and in some of the other cases discussed above. However, I do not consider that the condition is disqualified as a prohibition on separate use simply because the class of occupants is expanded, beyond the Park Hall fishery's workers or retired workers, to include their widows, widowers and resident dependants. Each such occupant must still have a specific link with the fishery at Park Hall. It is that required link to specific land or premises which is crucial, and which puts cases such as the present in a different category from those which have no such link or in which any link is too general or too tenuous (see, for example, the condition in *Edmont*, set out in paragraph 84 above). No doubt there will be cases which are borderline and therefore difficult to call, but I do not regard the present case as one of those. Here the link between the occupancy of the Building and the Park Hall fishery is sufficiently close, specific, clear and unequivocal.

97. The conclusion I have reached is not affected by whether Mr Burton is correct, as he may be (although this was not debated at the hearing, and so I make no finding), that Condition 4 does not prohibit the cesser of the fishery business or the user or disposal of the lake separately from the Building. As long as Mr and/or Mrs Burton or their dependants continue to live in the Building they are unlikely to be in breach of the planning consent. On the other hand, an issue would be likely to emerge when they or their dependants ceased to reside there, and a person outside the Condition 4

class did so. Whether, and at what stage, need for an application for change of use would be triggered is a matter of planning law on which I was not addressed and which does not concern me.

98. The FTT were influenced by the fact that Condition 4 was not framed *expressly* in terms of a prohibition on the separate use of the Building, when it would have been open to the Inspector to frame it in that way, had he wished to do so. However, in my view a condition framed in those terms, and a condition which limits the occupation of the Building to present or past employees of the fishery business (and their dependents), are but two sides of the same coin. This is reinforced by the Inspector's reason for imposing Condition 4:

> "I have attached a condition restricting the occupancy of the dwelling *to ensure that it is retained in connection with the fishery*." (My emphasis)

99. I confirm that I am in complete agreement with the approach and analysis of the FTT in *Swain,* as revealed in the passages from their decision which I have cited above. This means that I agree, too, that the approach in some of the other cases to which reference has been made was erroneous. This applies to the decision in *Wendels.* The condition there incorporated a link of precisely the same nature and extent as Condition 4, between the occupancy of the new building and the existing business premises, and in my view also amounted to a prohibition on separate use.

Conclusion

100. For these reasons the separate use of the Building is prohibited by the planning consent. As a result the Building is not "designed as a dwelling" for the purposes of subsection 35(1A)(a) of the 1994 Act and Note 2(c), and its construction does not attract a refund of VAT pursuant to subsection 35(1).

Relief

101. In the light of the above, the appeal must be allowed to the extent necessary to give effect to this decision. I invite the parties to agree and submit to me for approval an order reflecting it, including any consequential orders or directions.

102. In the latter regard, Mr Zwart informed me in the course of argument that in the event that HMRC were successful in this appeal they would not seek an order for

costs in their favour, particularly in view of the desirability of guidance from this Tribunal as to the interpretation of Note 2(c). He also stated that, for the same reason, if HMRC were unsuccessful they would not oppose a standard order for costs in favour of the taxpayer.

The Honourable Mr Justice Barling

Judge of the Upper Tribunal

Release date: 21 January 2016