[2015] UKUT 0021 (TCC)

Appeal number: FTC/122/2013

VALUE ADDED TAX - zero rating - construction of nursing home on site of and incorporating redundant church building - whether construction of building for purposes of Item 2 Group 5 Schedule 8 VAT Act 1994 - yes - whether enlargement of or extension to existing building - no - whether special residential conversion of building – yes - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

ASTRAL CONSTRUCTION LIMITED

Respondent

Tribunal: Judge Greg Sinfield
Judge Judith Powell

Sitting in public at 45 Bedford Square, London WC1 on 20 October 2014

Eleni Mitrophanous, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants

Timothy Brown, counsel, instructed by Essential VAT Services, for the Respondent

DECISION

Introduction

1. The Respondent ("Astral") supplied construction services relating to the development of a nursing home on the site of and incorporating a redundant church. Astral treated the supplies as zero-rated supplies in the course of construction of a building designed for use for a relevant residential purpose. The Appellants ("HMRC") decided that the construction works were not the construction of a building but were an enlargement of or extension to an existing building and, accordingly, not zero-rated. HMRC considered that the works were the conversion of the church to a relevant residential purpose chargeable to VAT at the reduced rate of 5% and assessed Astral accordingly. Astral appealed to the First-tier Tribunal (Tax Chamber) ("the FTT").

2. The appeal turned on whether the construction works were a conversion of and/or an enlargement of or extension to an existing building, namely the church, and thus excluded from being the construction of a building by Note (16)(a) and/or (b) to Group 5 of Schedule 8 to the Value Added Tax Act 1994 ("VATA"). In a decision released on 2 July 2013, [2013] UKFTT 374 (TC), ("the Decision"), the FTT (Judge Lady Judith Mitting and Mr Derek Robertson) decided that the works were not a conversion of or enlargement of or an extension to the church and allowed Astral's appeal.

3. HMRC appealed against the decision of the FTT on the ground that the supplies by Astral were an enlargement of or an extension to an existing building, namely the church. HMRC made no appeal in relation to the FTT's decision that the works were not a conversion of the church.

4. Although it had not been part of the decision subject to appeal or argued before the FTT, HMRC amended their grounds of appeal to contend additionally that, if they succeeded in their appeal, the supplies of construction services by Astral were not chargeable to VAT at the reduced rate but at the standard rate because, after the conversion (which HMRC did not accept), the church did not form the entirety of the nursing home. Notwithstanding the fact that neither party appealed against the FTT's conclusion that the works were not a conversion, we considered that, in view of HMRC's further ground of appeal, we should consider whether the works were a conversion.

5. Shortly before the hearing of this appeal, HMRC applied to make a further amendment to their grounds of appeal to submit that the construction of a building in Item 2 of Group 5 of Schedule 8 to the VATA means the erection of a building as a whole. HMRC contend that, even if the works are not an enlargement of or an extension to the church, the supplies would not be zero-rated because they were not in the course of the construction of a completely new building as the new structure incorporated the church.

6. An appeal to the Upper Tribunal from a decision of the FTT can only be made on a point of law (section 11 Tribunals, Courts and Enforcement Act 2007). The

authorities on the nature of an appeal to the Upper Tribunal and the approach that the Tribunal should take to an appeal such as this were conveniently set out by Arnold J in *Smith v HMRC* [2011] UKUT 270 (TCC); [2011] STC 1724, at [46] – [50]. From those authorities, it is clear that we can only allow the appeal if we are satisfied that there was an error of law by the FTT. Error of law in this context is not only a failure to apply the relevant legislation or authorities in arriving at the relevant decision but also includes making a finding of fact which was not supported by the evidence, as described by Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 36. The question in such cases is not would we have made the same finding or reached the same conclusion as the FTT but was the FTT entitled to make that finding or reach that conclusion.

7. For the reasons given below, we have decided that the FTT were entitled to conclude that the building work carried out by Astral to create the nursing home was the construction of a building for the purposes of Item 2 of Group 5 of Schedule 8 to the VATA and that the development was not an enlargement of or extension to an existing building within Note 16(b) to the Group. Accordingly, HMRC's appeal against the Decision is dismissed.

Legislation

8. Section 30(2) of the VATA provides that a supply of goods or services is zero-rated if the goods or services or the supply are of a description specified in Schedule 8 to the VATA. Item 2 of Group 5 of Schedule 8 describes the following supply:

> "2. The supply in the course of the construction of
>
> (a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose; or
>
> (b) …
>
> of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity."

Supplies of building materials by a supplier of services within Item 2 that include the incorporation of the materials into the building or its site are also zero-rated by Item 4 of Group 5.

9. By virtue of section 96(9) of the VATA, Schedule 8 must be interpreted in accordance with its notes. It was common ground that the nursing home was intended for use solely for a relevant residential purpose as defined by Note (4) to Group 5 of Schedule 8.

10. Note (16) to Group 5 of Schedule 8 provides as follows:

> "(16) For the purpose of this Group, the construction of a building does not include

(a) the conversion, reconstruction or alteration of an existing building; or

…

(b) any enlargement of, or extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling or dwellings; or

(c) … the construction of an annexe to an existing building."

11. Note (18) to Group 5 of Schedule 8 is as follows:

"(18) A building only ceases to be an existing building when:

(a) demolished completely to ground level; or

(b) the part remaining above ground level consists of no more than a single facade or where a corner site, a double facade, the retention of which is a condition or requirement of statutory planning consent or similar permission.

12. Section 29A of the VATA provides that VAT is charged at the reduced rate of 5% on any supply of a description specified in Schedule 7A to the VATA. Item 1 of Group 6 of Schedule 7A specifies the supply of qualifying services in relation to a qualifying conversion. Item 2 of Group 6 specifies the supply of building materials supplied by a supplier under item 1 who also incorporates the materials in the building or its site. Note 2 to Group 6 provides that a qualifying conversion means, among other things that are not relevant, a special residential conversion. A special residential conversion is defined by Note 7 to the group as including "a conversion of premises consisting of … a building or two or more buildings" provided that two conditions specified in Note 7 are satisfied. There was no dispute that the first condition in Note 7 to Group 6 of Schedule 7A was satisfied in this case. The second condition is that where the premises being converted are intended to be used for an institutional purpose, such as a nursing home, they "must be intended to form after the conversion the entirety of an institution used for that purpose".

Facts

13. The FTT set out the facts, which were not disputed, at [5]-[11] of the Decision. The relevant facts for this appeal, drawn from the facts found by the FTT and documents before it, are as follows.

14. Molescroft Nursing Home (Holdings) Limited ("Molescroft") acquired a redundant church and its land in Kingston upon Hull. The site consisted of the main church building, which had been extended to the rear (east) at some time in the past, a presbytery with access into the church on the north side of the church and a social club to the south. The site also contained several freestanding garages and outbuildings.

15. In June 2010, the local authority granted Molescroft planning permission for the development of a new 72 bed nursing home on the site of the church in the following terms:

> "(1) Erection of 72 bed care home with associated car parking, bin store and landscaping following demolition of former vicarage, former social club, single storey extensions to church and garages.
>
> (2) Change of use of existing church to purposes ancillary to the use of the residential care home."

16. In April 2011, Molescroft entered into a contract with Astral for the construction of the new nursing home. Astral demolished all the buildings on the site, including the presbytery, the social club and the single storey extension to the back of the church. All that remained on the site was the church in its original unextended form. The FTT described the completed development, in [8] of the Decision, as follows:

> "The development carried out by Astral retained the church as its centrepiece. Two new 2-storey wings were built, one to the north and one to the south of the church. Each wing contained, on each of the two floors, en suite bedrooms situated opposite each other divided by a central corridor and at the end of each of the corridors on both floors, facing into Hall Road were large dayrooms. Each of the two wings, at their rear, were connected into a further wing running at right angles to each of them. This further wing contained further bedrooms, bathrooms, dining rooms, dayroom and treatment rooms. There had therefore, in effect, been created three new sides of a square with the church and each of the ends of two of the wings making up a fourth side. To the rear of the connecting wing, and connected into it, at ground floor level were kitchen and staff facilities. The three new wings were all connected into the church by five brick and glass walkways, three at ground floor level and two at first floor level."

17. The original church building formed the main entrance and reception area for the nursing home. It had an office, shop, activity room and a small chapel on the ground floor. There was also a new mezzanine floor with some additional accommodation and storage. The floor area of the original church was 315 square metres. After the works and including the mezzanine floor, it was 455 square metres. The floor area of the new parts was 2,910 square metres.

18. The only issues at the hearing before the FTT were whether the building work to create the nursing home was:

(1) zero-rated as the construction of a qualifying building for the purposes of Item 2 of Group 5 of Schedule 8 of the VATA; or

(2) chargeable to VAT at the reduced rate as a qualifying conversion under Item 1 of Group 6 of Schedule 7A.

The answer turned on whether the work carried out should be regarded as a conversion or enlargement of or an extension to the church.

19. At [16], the FTT set out the applicable principles, taken from the cases to which they had been referred, as follows:

> "(a) The test which we should apply to determine whether the works carried out constitute enlargement or extension involves two stages. It requires an examination and comparison of the building(s) as it or they were before the works were carried out and the building or buildings as they will be after the works are completed (*Cantrell No 1)*.
>
> (b) The answer to the two stage test must be given after an objective examination of the physical characters of the building or buildings at the two points in time, having regard (inter alia) to similarities and difference in appearance, layout and how they are equipped to function (*Cantrell No 1*).
>
> (c) The terms of the planning permissions are in the main irrelevant.
>
> (d) The examination of the works involves a question of fact, degree and of impression. Whilst enlargement clearly involves some addition to the existing building and an increase in space, it will be a question of fact and degree whether something can properly be described as an enlargement of an existing building. The additional works may be so extensive in comparison with the original that that would be a misnomer (*Marchday Holdings*)."

20. Applying those principles, the FTT held that the work was not a conversion or enlargement of or an extension to the church and, accordingly, Astral's supplies were zero-rated supplies in the course of the construction of a qualifying building. In relation to the question of whether the work was an enlargement or extension, the FTT set out its reasoning at [17] as follows:

> "Viewing the final construction here, we believe that the point is certainly reached where it can only be a misnomer to describe the works as an extension. Viewed structurally and as a whole the church can only be described as being dwarfed by the new build. This is apparent from the front where the church is flanked by the two new wings each of roughly equivalent width to the church itself. It is more apparent from all other views where the church is all but unseen within and behind the three new wings. We accept that the church is a focal point looked at from Hall Road but even on this easterly aspect, in the most generous definition of the word, it does not "dominate" the façade as contended by [HMRC]. Looking at the final complete structure one sees a large fully functioning care home of modern design. In a very attractive way it has incorporated an old and disused church. No objective observer however could see the new build as an extension or enlargement to the church. There is just no impression of enlargement. The sheer scale of the works precludes this."

21. The FTT summarised its conclusion at [20] as follows:

> "In summary, the structure which now exists is one single fully functioning nursing home. As a matter of impression, size, shape, function and character it is so vastly different from the existing church that it cannot be said to constitute the conversion of the church or an enlargement of or extension to the church. We therefore find that the works do fall to be zero rated within Item 2 and we reject the

> Commissioners' contention that they are taken out of zero rating by Notes 16(a) or 16(b). The appeal is therefore allowed."

22. By an application dated 27 August 2013, HMRC applied to the FTT for permission to appeal against the Decision. The only ground of appeal was that the FTT erred in concluding that whether building work was an enlargement of or an extension to a building was a question of degree. Accordingly, the FTT was wrong to hold, at [17] of the Decision, that the sheer scale of the works precluded them from being regarded as an enlargement of or an extension to the church. HMRC did not appeal against the FTT's decision that the work was not a conversion. The FTT gave permission to appeal in a decision released on 25 September 2013.

Application to amend the grounds of appeal

23. On 10 September 2013, after lodging its grounds of appeal with the FTT but before permission had been granted, HMRC applied to amend the grounds of appeal to contend that the development did not meet one of the conditions for a reduced rate conversion. HMRC sought to argue that the works were not a special residential conversion within Group 6 of Schedule 7A of the VATA because they did not form, after conversion, the entirety of the relevant institution, ie the nursing home, as required by Note 7 to Group 6. Ms Mitrophanous, who appeared on behalf of HMRC, submitted that the grant of permission to appeal showed that the FTT had allowed HMRC's application to amend even though the decision released on 25 September 2013 made no mention of the application. Ms Mitrophanous contended that the reduced rate point was not a new ground in the appeal against the Decision but was a further submission on what the correct rate should be in the event that HMRC's appeal succeeded. Whereas HMRC had taken the view that, if the supplies were not zero-rated, VAT should be charged at the reduced rate, HMRC now considered that the applicable rate was the standard rate.

24. On 7 October 2014, ie 13 days before the hearing, HMRC applied for permission to amend their revised grounds of appeal to include the new ground that, relying on *Customs and Excise v Viva Gas Appliances Limited* [1983] STC 819, 'the construction of a building' in Item 2 of Group 5 of Schedule 8 to the VATA means the erection of a building as a whole. If construction of a building is so defined then, even if the supplies in this appeal do not fall within the terms 'any enlargement of or extension to an existing building', they do not qualify for zero-rating because they are not supplies in the course of 'the construction of a building' within Item 2.

25. Ms Mitrophanous submitted that the question of whether the works were 'the construction of a building' had to be considered in order to determine whether the supplies in this case were zero-rated. She contended that it was a short point of statutory construction and Astral had had time to consider the new ground of appeal and was not prejudiced by it being raised at this stage.

26. Astral objected to HMRC's applications to amend the grounds of appeal as originally notified. In relation to the first application to amend, Astral opposed HMRC's application on the ground that, if HMRC had argued that the services did not qualify for the reduced rate before the FTT, Astral Construction would have

argued, in the alternative, that its supplies were chargeable to VAT at the reduced rate. Mr Brown accepted that the evidence that Astral presented to the FTT would not have changed if HMRC had argued that the reduced rate did not apply but submitted that the conduct of the case would have been completely different. Astral Construction contended that to allow HMRC to rely on the new ground of appeal would be unfair and would cause prejudice to Astral. In the event that we granted the application, Mr Brown asked us to allow him to argue that the reduced rate did apply. In relation to the second application to amend in order to argue the *Viva Gas Appliances* point, Mr Brown submitted that the point had not been argued below and it was raised now at a very late stage.

27. Mr Brown referred us to *Lowe v W Machell Joinery Ltd* [2011] EWCA Civ 794, in which Rix LJ, giving the minority judgment, helpfully summarised the position on allowing an appellant to introduce new points of law, in terms that were not controversial, at [81] as follows:

> "It is a long-standing and fundamental principle of this court that a new point of law which was not presented to the court of trial may be raised on appeal, but normally only where there is no possibility of any injustice occurring by reason of the fact that, if it had been raised at trial, it might have affected the conduct and in particular the evidence or its evaluation in those proceedings: see *Pittalis v Grant* [1989] QB 605 (CA) at 611C/F, citing earlier authority. Chief among such earlier authority is *The Tasmania* (1890) 15 App Cas 223 where Lord Herschell said this (at 225):
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> > 'My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
> >
> > It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation had been afforded them when in the witness box.'"

28. In *Pittalis v Grant* [1989] 1 QB 605 (CA), Nourse LJ at 611, stated as follows:

> "The stance which an appellate court should take towards a point not raised at the trial is in general well settled: *Macdougall v. Knight* (1889) 14 App Cas 194 and *The Tasmania* (1890) 15 App Cas 223. It is perhaps best stated in *Ex parte Firth, In re Cowburn* (1882) 19 Ch D 419, 429, per Sir George Jessel M.R.:
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> > 'the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot

be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.'

Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it."

29. The point was also considered in *Jones v MBNA* [2000] EWCA Civ 514. Peter Gibson LJ gave the first judgment and said this at paragraph 38:

"38. It is not in dispute that to withdraw a concession or take a point not argued in the lower court requires the leave of this court. In general the court expects each party to advance his whole case at the trial. In the interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this court. That consideration is the weightier if further evidence might have been adduced at the trial, had the point been taken then, or if the decision on the point requires an evaluation of all the evidence and could be affected by the impression which the trial judge receives from seeing and hearing the witnesses. Indeed it is hard to see how, if those circumstances obtained, this court, having regard to the overriding objective of dealing with cases justly, could allow that new point to be taken."

30. May LJ put the matter more broadly:

"51. If, as in the present case, a claim is presented at trial on the basis that it should succeed if bad faith is established, but will not succeed if it is not, it might be said that that was a forensic concession that the only basis on which the claim might succeed was if bad faith was established. We may then debate whether Mr Jones should be permitted to withdraw the concession. But I am inclined to think that this is really a case to which wider principles apply.

52. Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally, each party should bring before the court the whole relevant case that he wishes in advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view,

> obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case."

31. In *Paramount Export Ltd (in Liquidation) v New Zealand Meat Board* [2004] UKPC 45, the issue was whether permission should be given to raise a new point in relation to the construction of a contract in an appeal about the interpretation of a contract where the underlying factual issues had been fully investigated at trial. The majority of the Privy Council held:

> "[47] It therefore appears to their Lordships that despite the fact that the true construction of the contract was not argued before the judge, the plaintiffs could not have complained of prejudice if the point had been taken before the Court of Appeal. It was a question of law on which no further evidence could have been called. The position is the same before their Lordships' Board. It is no doubt very disappointing for the plaintiffs, having succeeded in the courts below, to lose on a new point in the final court. On the other hand, it would be a miscarriage of justice if the Meat Board were required to pay some $7m out of public funds when it had no legal liability to do so, merely on account of the way its advisers had conducted the litigation. Mr Cooke referred their Lordships to a recent observation of Lord Bingham of Cornhill in *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 1 WLR 3024, 3034, para 21:
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> > 'Only rarely and with extreme caution will the House permit counsel to withdraw from a concession which has formed the basis of argument and judgment in the Court of Appeal.'
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> That is a sound policy and in deciding to allow the concession to be withdrawn, their Lordships hope they have displayed the same caution as the House did in *Grobbelaar's* case. If there were any possibility that the outcome could have been affected if the point had been taken earlier, that would of course have been an entirely different matter. But their Lordships consider that in this case the plaintiffs can be adequately compensated by a suitable order for costs."

32. In *Crane (t/a Indigital Satellite Services) v Sky In-Home Limited* [2008] EWCA Civ 978, Arden LJ said at [22]:

> "The circumstances in which a party may seek to raise a new point on appeal are no doubt many and various, and the court will no doubt have to consider each case individually. However, the principle that permission to raise a new point should not be given lightly is likely to apply in every case, save where there is a point of law which does not involve any further evidence and which involves little variation in the case which the party has already had to meet (see *Pittalis v Grant* [1989] QB 605). (If the point succeeds, the losing party may be protected by a special order as to costs.) Sometimes a party will seek to raise a new point because of some other development in the law in other litigation, which he could not fairly have anticipated at the time of the trial. In some cases, the court may wish to take into account the importance of the point raised. Likewise, in [*Paramount Export*], one of the factors which influenced the Privy Council was the fact that it was in the public interest to allow a public body, which would otherwise end up liable to pay large sums, to raise on appeal a point of construction involving no new evidence."

33. The point was also considered by the Upper Tribunal (Tax and Chancery) in *Tanjoukian v HMRC* [2012] UKUT 361 (TCC), [2013] STC 825. In that case, the appellant sought to raise a new point of law on appeal that had not been argued in the FTT. Henderson J summarised the position, in terms which both parties before us were happy to adopt, at [58] as follows:

> "There is a strong public interest in finality in litigation of all kinds, and one facet of this is that parties are not normally permitted to raise on appeal arguments which they could perfectly well have run below, but for whatever reason failed to do so. Where the new point is a pure question of law, and where its admission on appeal would not occasion any injustice of the type referred to by Rix LJ in *Lowe v W Machell Joinery Ltd* at [81], the interests of justice will normally favour the grant of permission to argue the point. But the position is very different where the conduct of the trial below either would, or might, have been significantly different if the new point had been taken. In those circumstances, the balance will nearly always come down the other way and permission to argue the new point will be refused."

34. We consider that it is in the interests of justice that all the issues relevant to the VAT liability of the supplies should be explored and dealt with in the appeal provided that we are satisfied that there would not be any injustice or prejudice to Astral. In our view, allowing HMRC to raise the further arguments at this stage would not cause injustice or prejudice to Astral. Mr Brown accepted that the new arguments would not have changed the evidence that Astral presented to the FTT. He submitted that the conduct of the case would have been different but we consider that the only difference would have been that Astral would have made further submissions that the reduced rate applied and that 'construction of a building' was not restricted to construction of a whole building. As in the *Paramount Export* case, these are questions of law on which no further evidence could have been called. As there is no dispute about the facts, Astral is able to make its submissions in relation to the new arguments before us. The new arguments are short points and Mr Brown did not suggest that he was not prepared to meet them.

35. Our decision, given at the hearing, was that HMRC should be allowed to amend their grounds of appeal to argue both points and that Astral should be allowed to argue, in the alternative to its main submission, that the works were a special residential conversion within Group 6 of Schedule 7A of the VATA. We indicated that, in the event that HMRC succeeded in the appeal because of either of the amended grounds, we would be unlikely to look favourably on any application for costs by HMRC.

Issues

36. HMRC's primary case was that the FTT had applied the wrong test in deciding whether the completed development was an enlargement of or extension to the church within Note 16(b) to Group 5 of Schedule 8 of the VATA. It seems to us, however, that the first issue that we must consider is whether the building work carried out by Astral to create the nursing home was the construction of a building for the purposes of Item 2 of Group 5 without regard to Note 16. If the work was not the construction of a building then the exclusions provided by Note 16 are irrelevant. If Astral's supplies were made in the course of construction of a building then we must consider whether the development was excluded from being regarded as the construction of a building by Note 16(b) as an enlargement of or an extension to an existing building, namely the church. If we determine that the development was not the construction of a building then we must consider whether it was a conversion of the church to a nursing home. If so, we must consider whether the church was intended to form after conversion the entirety of the nursing home, as required by Note 7(6) to Group 6 of Schedule 7A to the VATA.

Approach to interpretation of zero rating provisions

37. It was common ground that, like provisions for exemption (see Case C-348/87 *Stichting Uitvoering Financiele Acties v Staatssecretaris van Financien* [1989] ECR 1737 at [13]), provisions for zero rating, such as those at issue in this appeal, must be interpreted strictly. It was also agreed that the requirement of strict interpretation does not mean that the provisions must be interpreted restrictively (see *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882, [2002] STC 42 at [17] and *HM Revenue and Customs v Insurancewide.Com Services Ltd* [2010] EWCA Civ 422, [2010] STC 1572 at [83]).

Was the work the construction of a building?

38. The first issue in this appeal is whether the building work carried out by Astral to create the nursing home was the construction of a building for the purposes of Item 2 of Group 5 without regard to Note 16. HMRC rely on the decision of the House of Lords in *Viva Gas* as authority for their submission that the phrase 'construction of a building' in Item 2 of Group 5 to be interpreted as only applying to the erection of a building as a whole. The issue in *Viva Gas* was whether work undertaken in installing gas fires in houses that did not have them amounted to an alteration of a building within Item 2 of Group 8 of Schedule 4 to the Finance Act 1972 and so was zero-rated. The wording of the 1972 legislation was very different from that in Item 2 of

Group 5 of Schedule 8 of the VATA. The 1972 Act zero-rated supplies "in the course of the construction, alteration or demolition of any building …". In giving his opinion that the work was an alteration of a building, Lord Diplock, with whose speech the other Law Lords agreed, stated at 823g:

> "Once what constitutes the relevant 'building' has been identified, 'construction', as the Court of Appeal had earlier pointed out, in the absence of any reference to 'part of a building', means erecting the building as a whole and 'demolition' means destroying it as a whole, so 'alteration' is left to cover all works to the fabric of the building which fall short of complete erection or complete demolition."

39. HMRC submitted that although the relevant provisions today differ, in particular because alterations are now not zero-rated, there is no reason to consider that 'construction' has a different meaning. If one understands 'construction' as the House of Lords did, then only new buildings constitute constructions.

40. Ms Mitrophanous acknowledged that in *Customs and Excise v London Diocesan Fund* [1993] STC 369, McCullough J upheld a tribunal's conclusion that the *Viva Gas* definition of what was meant by 'alteration' did not apply to 'alteration' as used (then) in Note (1A) and therefore doubted that 'construction' bore the same meaning as in *Viva Gas*. However, he did recognise at 378f that the aim of the amended legislation was to zero-rate "only work resulting in new buildings and not work done on existing buildings."

41. In *London Diocesan Fund*, an old church was partially demolished and a new one built to replace it incorporating some 10 % of the old church and with the tower of the old church retained as a separate structure. The issue was whether the work was an alteration of the old church. The VAT Tribunal held that the works were not an alteration and *Viva Gas* was of no assistance as it considered the word 'alteration' in a different legislative context. On appeal, HMRC submitted that the meanings given to construction and alteration in *Viva Gas* had the same meaning in the new legislation as in the old. McCullough J rejected this submission and held, at 378, that:

> "The phrase 'constructing a dwelling' … is wide enough to include the doing of work to an existing building such that a dwelling is created.
> …
> In *Viva* the decision as to whether or not the work was zero-rated did not depend on the type of work that had been done to the buildings, but on the amount of work that had been done to them. The decision did not depend on the ambit of either the word 'construction' or the word 'alteration', let alone the relationship between them. Both sides agreed that the work was an 'alteration', provided it was sufficient in amount to reach the quantum that item 2 required. The ratio was that whatever was more than de minimis sufficed."

42. *Customs and Excise v Marchday Holdings Ltd* [1997] STC 272 concerned whether the demolition of a large part of a former industrial building and construction of an office block in its place was a conversion, reconstruction, alteration or enlargement of the former industrial building. The issue eventually reached the Court

of Appeal. The majority in *Marchday* held that whether a building had been altered was a question of fact, degree and impression, ie a jury question. They decided that the tribunal had been entitled to conclude that the works had resulted in a new building. We discuss the decision further below but here note the views of Ward LJ in his dissenting judgment, which was the only one that referred to *Viva Gas*. Ward LJ accepted that 'construction' means the erection of the whole building. Ward LJ stated at 282:

> "To my mind the meaning of Schedule 5 is clear and simple. If there is a construction of a whole building where no building was in existence when the work started, or if the demolition is of the entire building, then the case falls under Items 1 and 2. If, on the other hand, there is an existing building, then the supply is almost inevitably standard-rated (which, after all, is how most supplies are treated) because, unless it is de minimis, the work will inevitably fall within a description of conversion, reconstruction, alteration or enlargement. The difficulty in separating the Item 2 case from the Note (1A) case will often be in deciding whether - and this is a matter of fact and degree - what one starts with is a 'an existing building' or whether the original structure has been so damaged or decayed that it can no longer be properly so described."

43. HMRC did not rely on *Viva Gas* before the FTT in this case but the issue of whether the building work carried out by Astral to create the nursing home was the construction of a building was clearly considered by the FTT. Applying the approach of the majority in *Marchday Holdings* and the two-stage test set out in *Cantrell and another (t/a Foxearth Lodge Nursing Home) v Customs and Excise* [2000] STC 100 ('*Cantrell No 1'*), the FTT found at [20], that the works fell within Item 2 of Group 5 of Schedule 8 of the VATA, ie were the construction of a building, and, secondly, were not taken out of Item 2 by Note 16.

44. We do not accept HMRC's submission that the decision of the House of Lords in *Viva Gas* requires the phrase 'construction of a building' in Item 2 of Group 5 to be interpreted as only applying to the erection of a building as a whole. We agree with McCullough J in *London Diocesan Fund* that *Viva Gas* was not concerned with the meaning of construction in its current context. We consider that, without the gloss provided by Note 16, the phrase construction of a building is not restricted to the construction of a wholly new structure. Indeed, if construction of a building were to be so construed then Note 16 would be unnecessary. Ms Mitrophanous submitted that Note 16 merely clarified the position but we consider that it goes further than that and shows that an enlargement or extension can be a construction of a building. The exception in Note 16(b) is predicated on the assumption that an enlargement or extension that creates an additional dwelling or dwellings is capable of being the construction of a building within Item 2. If HMRC's interpretation were correct then Note 16(b) could not simply state that construction of a building includes the construction of any enlargement or extension that creates an additional dwelling or dwellings. As Ms Mitrophanous acknowledged in her skeleton, a supply can only be zero-rated if it qualifies within Item 2 as a supply of a service in the course of the construction of a building. If 'construction of a building' is restricted to the erection

of a wholly new building then there would have to be a separate provision in Group 5 to zero-rate supplies in the course of construction of any enlargement or extension that creates an additional dwelling or dwellings. The fact that there is no such provision indicates that Parliament considered that an enlargement or extension is capable of being the construction of a building.

45. In our view, the FTT did not make any error of law when they proceeded on the assumption that the phrase construction of a building was wide enough to include the construction of a new building or buildings connected to and incorporating the church. Disregarding, for the moment, Note 16(b), whether certain works are the construction of a building, as opposed to the construction of something else, is a question of fact for the FTT to determine. HMRC have not sought to challenge the FTT's conclusion on grounds described by Lord Radcliffe in *Edwards v Bairstow* and we hold that the FTT was entitled to find that the works were the construction of a building.

Was the work an enlargement of or an extension to an existing building?

46. Even if, as we have decided, the FTT was entitled to find that the work carried out to create the nursing home was the construction of a building for the purposes of Item 2 of Group 5 of Schedule 8 to the VATA, it is excluded from being a construction of a building by Note 16(b) if it is an enlargement of or an extension to an existing building, namely the church. The FTT found that the work was not an enlargement of or an extension to the church because, applying *Marchday Holdings*, as a question of fact and degree and considering the size, shape, function and character of the new work, the completed building was so different from the existing church that it could not be said to constitute an enlargement of or extension to the church.

47. As well as *Marchday Holdings*, the FTT was referred to *London Diocesan Fund* on this point. In that case, McCullough J said at 380h:

> "Where, as will ordinarily be so, it is beyond argument that a building was in existence before the work began, all that para (a) of note (9) [the predecessor of Note 16 in terms that were not materially different] requires is to consider the building as it was, to consider the end result and to ask whether the work done amounts to the conversion, reconstruction, alteration or enlargement of the original building in the sense in which those words are commonly used or whether the end result is a new building. If a number of buildings existed before the work began the question will be whether the work amounted to the conversion, reconstruction, alteration or enlargement of one or more of them. The matter is one of fact and degree."

48. In *Marchday Holdings* the issue was whether the works were excluded from being the construction of any building by Note 1A(a) to Group 8 of Schedule 5 to the VAT Act 1983 which provided:

> "(1A) Any reference in item 2 or the following Notes to the construction of any building or the construction of any civil engineering work does not include a reference to
>
> (a) the conversion, reconstruction, alteration or enlargement of any existing building …"

49. Stuart Smith LJ at 278 agreed with submissions on behalf of Marchday Holdings that:

> "… the reference in Note (1A)(b) [this must have been intended to be a reference to Note (1A)(a)] to existing building supports the conclusion that what must still be there after the conversion, alteration or enlargement is something that as a matter of common sense must be described as the existing building. Obviously it will not be precisely the same, however minor the works of alteration that are carried out. But a reasonable person, who is fully informed as to the work that has been carried out both externally and internally can say whether or not the old building has been altered. I would regard this as a jury question; and is very much a question of fact, degree and also of impression."

50. At 278-9, Stuart Smith LJ considered the meaning of enlargement:

> "Enlargement clearly involves some addition to the existing building and involves an increase in the available space. Again in my view it will be a question of fact and degree whether something can properly be described as an enlargement of an existing building. The additional works may be so extensive in comparison with the original, that it would be a misnomer."

51. *Cantrell No 1* concerned the meaning of 'annexe' in Note 16(c) of Group 5 of Schedule 8 to the VATA. Mr and Mrs Cantrell operated a nursing home which consisted of two units, in separate buildings, accommodating patients with different needs. Having obtained planning consent, Mr and Mrs Cantrell demolished an existing building at their nursing home and built a new one to house elderly and severely mentally infirm patients. The new building was completely self-contained. It abutted an extension ("the New Barn") to the other unit's building at one corner; a fire door, which was for emergency use only, connected the two units. HMRC considered that the construction of the new building was standard rated as the enlargement of or an extension or annexe to an existing building. Mr and Mrs Cantrell appealed to the VAT and Duties Tribunal which held that the new structure was an enlargement and might also be an annexe. Mr and Mrs Cantrell appealed to the High Court.

52. In *Cantrell No 1*, Lightman J held that the Tribunal had made a material mistake of fact and had taken into account extraneous and irrelevant considerations. He remitted the matter for a rehearing. At [3] of his judgment, Lightman J noted that:

> "The question for the tribunal was whether the works were in the course of an 'enlargement' of or 'extension' within the meaning of note (16) or an 'annexe' to an existing building, so as to be excluded

> from zero-rating. The question whether the works carried out constituted an enlargement, extension or annexe is a question of fact, not law (see *[London Diocesan Fund*] at 383 per McCullough J). Therefore the tribunal's decision cannot be disturbed unless it misdirected itself in law or the true and only reasonable conclusion on the facts found is inconsistent with the decision (see [*Edwards v Bairstow*])."

53. Lightman J set out the two stage test to be used at [4] of the judgment as follows (using the version quoted by Sir Andrew Morritt V-C in *Cantrell No 2* - see below):

> "The two stage test for determining whether the works carried out constituted an enlargement, extension or annexe to an existing building is well established. It requires an examination and comparison of the building as it was or (if more than one) the buildings as they were before the works were carried out and the building or buildings as they will be after the works are completed; and the question then to be asked is whether the completed works amount to the enlargement of or the extension or the construction of an annexe to the original building (see [*Marchday Holdings*]). I must however add a few words regarding how the question is to be approached and answered … First the question is to be asked as at the date of the supply. It is necessary to examine the pre-existing building or buildings and the building or buildings in course of construction when the supply is made. What is in the course of construction at the date of supply is in any ordinary case (save for example where a dramatic change is later made in the plans) what is subsequently constructed. Secondly the answer must be given after an objective examination of the physical characters of the building or buildings at the two points in time, having regard (inter alia) to similarities and differences in appearance, the layout, the uses for which they are physically capable of being put and the functions which they are physically capable of performing. The terms of planning permissions, the motives behind undertaking the works and the intended or subsequent actual use are irrelevant, save possibly to illuminate the potential for use inherent in the building or buildings."

54. Lightman J remitted the case to the VAT and Duties Tribunal. In its second decision, the tribunal found that the new building was an annexe and dismissed the appeal. Mr and Mrs Cantrell appealed again to the High Court. In *Cantrell and another (t/a Foxearth Lodge Nursing Home) v Customs and Excise (No 2)* [2003] EWHC 404 (Ch), [2003] STC 486 (*'Cantrell No 2'*), Sir Andrew Morritt V-C observed, at [20] of the judgment, that:

> "The judgment of Lightman J was directed primarily to the conclusion of the Tribunal in their first decision that the Phase I works constituted the enlargement of the New Barn. In that context, and in the context of an extension, I understand and agree that the relevant considerations are those which arise from the comparison of physical features of the existing building before and after the works in question."

55. Ms Mitrophanous submitted that the FTT had erred when it relied on *Marchday Holdings* as authority for the proposition that the question whether the building work was an enlargement of or an extension to an existing building was one of degree and

impression. Ms Mitrophanous said that the issue in *Marchday Holdings* was concerned with whether the existing building continued to retain its identity after the new works had been completed. She stated that the nature of the issue in *Marchday Holdings* was clear from the passages from the judgment of Laws J, as he was then, at first instance cited by Stuart Smith LJ at 277-8:

> "Mr Pleming [counsel for Customs and Excise] submits that the tribunal's approach confuses the extent of the work of conversion, alteration and enlargement, with the fact of such conversion etc. The concept of newness is an unnecessary and confusing gloss on the language of the statute.
>
> Laws J rejected Mr Pleming's submission. The core of his reasoning is where he said (at 904):
>
> > 'If the matter were res integra, my view of the relationship between item 2 and note (1A) would be as follows: (1) The notion of 'the construction … of any building' is capable of embracing the notion of 'the conversion, reconstruction, alteration or enlargement of any existing building' since otherwise note (1A)(a) would be redundant. (2) Note (1A)(a) excepts from item 2 a case where works falling within the meaning of any of the four nouns in note (1A)(a) are carried out to an existing building, and such works may plainly be very substantial. (3) The touchstone for the application of note (1A)(a) is whether a reasonable person, apprised of all the facts, would conclude that the building which existed before the works started still retains its identity -in that sense, still exists- at their completion, though it may have been transformed by conversion, etc. Whether that is the correct conclusion in any particular case will be a matter of fact and degree. The key is the continuity or otherwise of the identity of the building which was there before the works started.'
>
> Referring to Mr Pleming's argument that the tribunal had confused the extent of conversion etc with the fact of it, he said (at 905):
>
> > 'His position entails the proposition that the continuity of the pre-existing building's identity is not at all the touchstone for the proper application of the note. The difficulty with this argument, in my judgment, is not only that it fails to give due weight to the expression 'existing building', but also that it fails to confront the very sense of the four nouns used in the note-or at least three of them. The words 'conversion', 'alteration', and 'enlargement' seem to me to connote a state of affairs in which the building upon which such works are done necessarily remains after they are done. One cannot sensibly ascribe any of these three descriptions to a case where the old building is, in effect, destroyed by the works in question. As a matter of language each of the three implies the contrary. If a building has been converted, altered, or enlarged, it has plainly not been destroyed; it continues to exist though it may have been substantially transformed.'
>
> For my part I agree with and would adopt the judge's reasoning. It seems to me that Mr Pleming's construction does not give any or

> sufficient weight to the word 'existing'. Indeed it could perfectly well be omitted."

56. Ms Mitrophanous pointed out that Note 18 to Group 5 of Schedule 8 to the VATA had not been enacted at the time of the events with which *Marchday Holdings* was concerned. In so far as relevant to this case, Note 18 provides that a building only ceases to be an existing building when demolished completely to ground level. Ms Mitrophanous's submission was that Note 18 showed that the church was at all times 'an existing building' for the purposes of Note 16 and it followed that there was no longer any question, as there had been in *Marchday Holdings*, whether it could be said that the existing building had been enlarged or extended. Ms Mitrophanous contended that the question was not whether the works were an enlargement of or extension to the church, ie did the church retain its identity, but whether the existing building was enlarged or extended. Ms Mitrophanous also submitted that the word 'any' in Note 16(b) showed that the size of the enlargement or extension was irrelevant and it followed that the FTT were wrong to consider the matter as a question of degree. Ms Mitrophanous met the objection that the High Court in *Cantrell No 2* had adopted the same approach as in *London Diocesan Fund* and *Marchday Holdings* by pointing out that the issue was not in dispute and so no submissions had been made on Note 18 in that case.

57. We do not accept Ms Mitrophanous's submission that Note 18 to Group 5 of Schedule 8 to the VATA has made the fact and degree test, as propounded in *London Diocesan Fund* and *Marchday Holdings* and applied in *Cantrell No 1* and *Cantrell No 2*, irrelevant in this case. Note 18 defines when a structure ceases to be an existing building. It does not say what is or is not an extension or enlargement. Note 18 does not mean that all work, no matter how extensive, done on the site of a building that is not completely demolished to ground level must be regarded as an enlargement or extension. We do not accept that the word 'any' in Note 16(b) affects our conclusion on this point. We consider that 'any' cannot be construed as applying to treat all works in relation to a building that has not been completely demolished to ground level as enlargements or extensions. That would be to place too much weight on the word 'any' and not enough on 'enlargement' and 'extension'.

58. We have held that the FTT were entitled to regard the phrase 'construction of a building' in Item 2 of Group 5 of Schedule 8 of the VATA as wide enough to include the construction of a new building or buildings connected to and incorporating an existing building if such works are not an enlargement or extension excluded by Note 16. The issue in this case was whether the works were an enlargement of or extension to an existing building, namely the church. The FTT found that the work was not an enlargement of or an extension to the church because, applying *Marchday Holdings*, as a question of fact and degree and considering the size, shape, function and character of the new work, the completed building, the nursing home, was so different from the existing building, the church, that it could not be said to constitute an enlargement of or extension to the church. We consider that the FTT applied the correct test. It is clear from *Marchday Holdings* that the question of whether the construction of a new building or buildings connected to the church was an enlargement of or extension to the church is a question of fact, degree and impression.

In the absence of any challenge on *Edwards v Bairstow* grounds, we hold that the FTT was entitled to conclude that the works were not an enlargement of or extension to the church.

59. We have decided that the FTT were entitled to conclude that the building work carried out by Astral to create the nursing home was the construction of a building for the purposes of Item 2 of Group 5 of Schedule 8 to the VATA and that the development was not an enlargement of or extension to an existing building, namely the church, excluded from Item 2 by Note 16. Accordingly, HMRC's appeal is dismissed.

Was the work a conversion of the church to a nursing home?

60. Before the FTT, HMRC argued that the new building works were not zero-rated supplies in the course of construction of a building but were a special residential conversion within Group 6 of Schedule 7A to the VATA chargeable to VAT at the reduced rate. The FTT concluded that the works were not a conversion of the church to a nursing home for the reasons set out in [18] of the Decision as follows:

> "The external structure of the church remains unchanged but there has been a conversion of the church in the sense of its appearance, internal layout and use having been altered. In external appearance, it is no longer freestanding but to each side gives into glass and brickwork walkways. It is very obviously now a fully integrated part of another structure. Internally, it is structurally transformed from being of a single storey to having the mezzanine floor added. Additionally, further rooms have been made out of the open space in the form of a shop, activity room and office. In terms of use there is a clear conversion from that of a church or former church into a fully functioning reception and office area serving a care home. However, conversion there may have been but in no way can it be said that the church has been converted into the care home. Again it involves a question of degree. The church has been structurally integrated into the care home but forms a proportionately very small area of it in terms of size and a function."

61. In [20], the FTT concluded that as a matter of impression, size, shape, function and character the nursing home was so different from the church that it could not be said to constitute the conversion of the church. It is clear that, in finding that the works were not a conversion of the church into a nursing home, the FTT applied the same fact and degree test that they used when considering whether the works were an enlargement or extension.

62. HMRC has not made any appeal against the FTT's finding that the development was not a special residential conversion. Ms Mitrophanous did not seek to argue before us that the works could be regarded as a conversion. Her submission was that the conversion was not a special residential conversion within Group 6 of Schedule 7A of the VATA because one of the conditions in the Notes to the Group was not satisfied. Mr Brown submitted that if existence of the church meant that the

development could not be regarded as the construction of a building then it should be regarded as the conversion of the church to the nursing home.

63. Strictly, it was not necessary for the FTT to find that the church was not converted into the nursing home once they had found that the works were zero-rated supplies in the course of construction of a building. Section 30(1)(a) of the VATA provides that where a supply is zero-rated then it is treated as zero-rated even if VAT would be chargeable on the supply under another provision. As we have held that that the FTT were entitled to conclude that the building work to create the nursing home was a zero-rated construction of a building, it is not necessary for us to decide whether the FTT made any error of law in reaching the conclusion that the development was not a conversion of the church into the nursing home. In our view, however, it must follow from the authorities discussed above in relation to the FTT's decision that the works were not an enlargement of or extension to the church that, for the same reasons, the FTT was entitled to conclude that the works were not a conversion of the church.

Was the church intended to form after conversion the entirety of the nursing home?

64. Although, on our view, it is not necessary to decide this point, because we heard submissions on it, we consider whether the development was capable of being a special residential conversion within Group 6 of Schedule 7A to the VATA. Ms Mitrophanous submitted that the conversion was not a special residential conversion within Group 6 of Schedule 7A to the VATA because the premises being converted, ie the church, did not form, after conversion, the entirety of the relevant institution, ie the nursing home, as required by Note 7(6) to Group 6. Ms Mitrophanous stated that it appeared that there was no case law on this point. She submitted that the wording of the condition was clear. The phrase "the premises being converted" referred to the original building prior to the conversion, ie the church. The converted church was never intended to form the entirety of the nursing home after the conversion. The conversion in this case resulted in the church being turned into a reception area with a mezzanine floor. The work in relation to the new wings was on the land surrounding the church. The condition in Note 7(6) meant that the reduced rate for a special residential conversion could not apply to premises that were enlarged as a result of the conversion.

65. Mr Brown submitted that HMRC's interpretation of the condition in Note 7(6) was restrictive and went against the purpose of the legislation, which was to promote such conversions. He accepted that Note 7(1) defined a special residential conversion as a conversion of premises consisting of a building but contended that did not mean that a wider view could not be taken. The Note could have simply referred to buildings.

66. The relevant wording of the condition in Note 7(6) is as follows:

> "… where the relevant residential purpose for which the premises are intended to be used is an institutional purpose [eg as a nursing home],

> the premises being converted must be intended to form after the conversion the entirety of an institution used for that purpose."

67. The phrase "the premises being converted" can only refer, in this case, to the original church. The use of the words "after conversion" clearly indicates that the test is to be applied to the premises after the conversion works have been completed. The question is whether the premises that are to be considered in determining whether the condition is satisfied are the pre-conversion premises, ie the original church building, or the post-conversion premises, ie the nursing home.

68. The words "after the conversion" do not preclude an increase in the size of the premises as a result of the conversion. We note that, in Note 16 to Group 5 of Schedule 8 to the VATA, 'conversion' appears with 'reconstruction' and 'alteration' and separately from enlargement and extension. That suggests to us that, for the purposes of Group 5, conversion is a distinct concept from enlargement and extension. There is no equivalent distinction in Group 6 of Schedule 7A. If HMRC's interpretation of the condition in Note 7(6) is correct then no conversion that increased the size of the building being converted could ever qualify as a special residential conversion. We would regard such a result as surprising as it would restrict the availability of the reduced rate not according to use, which is the qualifying criterion, but by reference to the size of the converted premises. We would expect the condition to be more clearly worded if that were the intended result. It would have been simple enough for the draftsman to have made it a condition that the premises after conversion must not be larger than the premises before the conversion.

69. In our view, the correct approach to the condition in Note 7(6) is to consider the premises after the conversion has been carried out, ie the nursing home. On our interpretation, the condition is that there must be an intention that, after the conversion, the converted premises must form the entirety of an institution used for an institutional purpose, as defined. In this case, that condition was satisfied as there was no dispute that, after the conversion, the converted premises formed the entirety of the nursing home. Accordingly, had it been necessary to decide it, we would have held that the church, as converted, formed the entirety of the relevant institution, ie the nursing home, and satisfied the condition in Note 7(6) to Group 6 of Schedule 7A to the VATA

Decision

70. For the reasons set out above, HMRC's appeal is dismissed.

Costs

71. Any application for costs in relation to this appeal must be made within one month after the date of release of this decision. As any order in respect of costs will be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Judge Greg Sinfield
Judge of the Upper Tribunal

Judge Judith Powell
Judge of the Upper Tribunal

Release date: 20 January 2015