[2018] UKUT 0176 (TCC)

Appeal number: UT/2017/0138

VAT – supplies in the course of construction of student accommodation – Item 2 of Group 5 of Schedule 8 to VATA 1994 – Note (2)(c) – whether separate use of dwelling is prohibited by planning consent – No – Appeal dismissed

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

- and -

SUMMIT ELECTRICAL INSTALLATIONS LIMITED **Respondent**

TRIBUNAL: MR JUSTICE NUGEE
JUDGE JUDITH POWELL

Sitting in public at the Rolls Building, London EC4A 1NL on 16 May 2018

Edward Brown, instructed by the General Counsel and Solicitor for HM Revenue and Customs, for the Appellants

Michael Thomas, instructed by MHA MacIntyre Hudson LLP, for the Respondent

DECISION

Introduction

1. This is an appeal by the Commissioners for Her Majesty's Revenue and Customs (**"HMRC"**) from a decision (**"the Decision"**) of the First-tier Tribunal (Judge Amanda Brown) (**"the FTT"**) dated 28 June 2017, the respondent being Summit Electrical Installations Ltd (**"Summit"**). The Decision is reported as *Summit Electrical Installations Ltd v HMRC* [2017] UKFTT 0564 (TC), and references below to numbers in square brackets are, unless otherwise apparent, references to paragraphs of the Decision. Permission to appeal was granted by the Upper Tribunal (**"UT"**) (Judge Roger Berner) on 12 October 2017.

2. The appeal concerns the question whether supplies made by Summit are zero-rated for VAT. The supplies were made by Summit as an electrical sub-contractor to Create Construction Ltd in connection with student accommodation at Primus Place, Jarrom Street, Leicester (**"Primus Place"**). The particular question is whether the supplies, as Summit contends and the FTT held, are zero-rated as supplies in the course of construction of buildings designed as a number of dwellings. If they are not, as HMRC contends, they will be standard rated.

3. Before the FTT two points were argued. The first, referred to by the FTT as the Condition 2(c) issue, was resolved against HMRC by the FTT (at [33]-[48]). It is this issue with which the appeal is concerned. The other issue, referred to by the FTT as the Relevant Residential Issue, was also resolved against HMRC by the FTT (at [49]-[59]) but HMRC has not appealed this issue and we need say no more about it.

The statutory provisions

4. It is convenient at the outset to refer to the relevant statutory provisions. These are found in the Value Added Tax Act 1994 (**"VATA"**). By s. 30(2) VATA, a supply of services is zero-rated if the supply is of a description specified in Schedule 8.

5. Schedule 8 refers to a number of different types of supply of goods and services, arranged in Groups. Group 5 is headed "Construction of Buildings etc." Item 2 in Group 5 is as follows:

> "The supply in the course of 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."

Item 4 in Group 5 is as follows:

"The supply of building materials to a person to whom the supplier is supplying services within item 2 or 3 of this Group which include the incorporation of the materials into the building (or its site) in question."

6. By s. 96(9) VATA, Schedule 8 is to be interpreted in accordance with the notes contained in the Schedule. Note (2) to Group 5 of Schedule 8 defines what it is for a building to be designed as a dwelling or number of dwellings as follows:

"A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied—

(a) the dwelling consists of self-contained living accommodation;

(b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;

(c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision; and

(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."

The facts

7. The facts were not in dispute before the FTT or before us and can be taken from the Decision at [3]-[17] as follows:

"3 [Summit] is an electrical contracting company. It undertakes electrical installations in commercial buildings, schools, public buildings and larger residential blocks. It employs 36 people.

4 In late 2014 following the submission of a tender, [Summit] was appointed as the electrical subcontractor working to Create Construction Ltd ("Create") on a development known as Primus Place.

5 Primus Place is a block of student studio flats. By reference to the planning permission it is a seven storey building comprising 140 studio flats and associated facilities. By reference to the plans it appears that each of floors 1 – 6 are substantially similar in layout with the majority of the studio flats being the same size approximately 5m by 3m and rectangular in shape. There are some larger studios on some of the floors and these are not all rectangular in shape. On the ground floor there is a communal reception, cycle store, and laundry. In addition management offices, stores, bins and

plant rooms are situated on the ground floor.

6 The planning permission is granted subject to one relevant condition which provides:

> "A minimum of 126 flats within the development, [which] shall be identified on a plan that has been submitted to and approved in writing by the local planning authority, shall not be occupied other than as student accommodation. Other than staff associated with the management, maintenance and security of the development, no person other than a full time student attending the University of Leicester or DeMontfort University (or such [other] higher/further educational establishment as may be agreed in writing by the local planning authority) shall occupy these flats at any time. At no time shall more than 140 students occupy the development…."

7 Mr Chand, director of [Summit] gave evidence that each of the studio flats was fitted out with a bathroom pod (ie a unit including shower, sink and toilet) installed in the corner of the room. In addition there was a small kitchenette with dish washing sink, countertop, cooker, fridge and microwave. Through a stud wall with no door was an open plan/sleeping area and walk in cupboard.

8 The work summary provided indicates that the works undertaken included the installation of: lighting and power for all studios and communal areas, data and telephone cabling, TV and AV systems, fire alarms, disabled alarms etc. The work under the contract commenced in December 2014 and was completed in September 2015. The final sum paid for all works was £605,500.

9 By reference to the evidence of Mr Chand the Tribunal understands that the flats were made available to purchasers […] on a buy to let basis. As per the planning consent use of the flats was restricted to use as student accommodation. Occupation was restricted to full time students attending one of the identified universities.

10 By its return for the VAT quarter ended 31 March 2015 [Summit] claimed repayment of £36,316.02 representing the excess input tax incurred in that period over output tax declared. [Summit] considered that its supplies in connection with three developments including Primus Place were zero rated.

11 [Summit]'s return was selected for a credibility check. In the course of this check HMRC and [Summit] were able to agree the liability of supplies in connection with two of the three development[s]. However, in connection with Primus Place they were unable to agree.

12 Create provided to [Summit] what is known as a zero rating certificate. This certificate certifies that the developer of the site (and the party that engaged Create to construct the buildings) intended to use the buildings for a relevant residential purpose, namely student living accommodation.

> 13 On the basis that the zero rating certificate was evidence of Create's intention to zero rate its supplies to the developer and on the basis that the buildings were therefore to be used for a relevant residential purpose (rather than on the basis that the accommodation created was a series of flats designed as a dwelling) HMRC refused to permit [Summit] to zero rate its supplies to Create.
>
> 14 On the basis of this decision HMRC adjusted the return for period 03/15 reducing the VAT credit by £1,365.62 by assessing [Summit] to output tax in respect of the value of supplies in that period made to Create which HMRC considered to be subject to VAT at the standard rate.
>
> 15 [Summit] approached Create and proposed to issue VAT only invoices. Create refused to accept the invoices on the basis that, in its view, the VAT was not properly chargeable (and thereby recoverable as input tax) and that in any event it had a significant impact on its cash flow.
>
> 16 With its customer refusing to accept and pay the VAT only invoices [Summit] was left with little choice but to obtain a judicial determination of the liability of the supplies. Either to confirm its entitlement to zero rate or to compel Create to accept that the supplies were to be properly zero rated.
>
> 17 The decision in this appeal is relevant to the determination of the liability of supplies made in connection with Primus Place in subsequent VAT periods and will provide guidance in relation to the work undertaken in relation to Primus Place Phase 2. The matter is also of importance to other suppliers of Create who, the Tribunal was told, have similar appeals."

8. There is only one factual matter to add to this statement. At [6] above the FTT set out the most directly pertinent terms of the relevant condition in the planning permission for Primus Place, but Mr Brown, who appeared for HMRC, placed some reliance on other parts of the condition, and we should therefore set it out in full. The planning permission was granted by Leicester City Council on 20 December 2013, and the full terms of the relevant condition, which is No 2 (**"Condition 2"**) are as follows:

> "A minimum of 126 flats within the development, which shall be identified on a plan that has been submitted to and approved in writing by the local planning authority, shall not be occupied other than as student accommodation. Other than staff associated with the management, maintenance and security of the development, no person other than a full time student attending the University of Leicester or DeMontfort University (or such other higher/further educational establishment as may be agreed in writing by the local planning authority) shall occupy these flats at any time. At no time shall more than 140 students occupy the development. The owner, landlord or authority in control of the development shall keep an up to date register of the name of each person in occupation of the development together with course(s) attended, and shall make the register available for inspection by the local planning authority on demand at all reasonable times. (To ensure the development is only occupied by students and remains well integrated with the surrounding area in terms of its effect on the living conditions of nearby residents, the amount of parking

> available, and to enable the planning authority to assess any continuing need for the site to contribute towards affordable housing in the city in the event of changes to non-student tenancy which would require assessment of such provision in accordance with Core Strategy policies CS06, CS07, CS15 and policy PS10 of the City of Leicester Local Plan)"

9. In his written submissions in support of HMRC's appeal Mr Brown referred to both Leicester and De Montfort Universities as *"campus"* universities, but he accepted in oral argument that this went too far: it is not one of the facts found by the FTT and not something of which we can take judicial notice, and he accepted that we can only decide the appeal on a point of law and he could not ask us to take into account new facts.

10. We should also record that we have no factual information as to how close either University is to Primus Place. We know Primus Place has an address in Leicester, and we are prepared to assume that both Universities are also based in or near to Leicester, but we have no indication of where in the city Primus Place is or where either University is, or whether each of the Universities is on a single site or spread over multiple sites.

The FTT Decision

11. The basis for Summit's contention that its supplies were zero-rated was that they fell within Items 2 and 4 of Group 5 of Schedule 8 of VATA because Primus Place was a *"building designed as a … number of dwellings"*. That meant it had to comply with the requirements set out in the 4 sub-paragraphs of Note (2). There was no dispute that it satisfied the requirements of sub-paragraphs (a), (b) and (d). The question was whether it also satisfied the requirements of sub-paragraph (c).

12. HMRC submitted to the FTT that it did not, because the effect of Condition 2 was that *"the separate use … of the dwelling is … prohibited by the term of any … statutory planning consent"*.

13. The FTT rejected this submission for the reasons given at [33] to [48]. At [32]-[43] the FTT referred to two UT decisions which were binding on it, namely *HMRC v Shields* [2014] UKUT 453 (TCC) (***"Shields"***) and *HMRC v Burton* [2016] UKUT 0020 (TCC) (***"Burton"***). We consider those cases below. At [44] the FTT then expressed its conclusion as follows:

> "44 It is the Tribunal's view that the terms of the planning condition are clearly not a prohibition of the type envisaged in note 2(c). The language of the planning condition is very broad and limits the class of user and that those students should be studying full time at Leicester or DeMontfort universities. But by reference to the judgment of the Upper Tribunal attendance at one of the universities cannot be equated with a link to specific land; a link which the Upper Tribunal identifies as crucial. HMRC contended that the Tribunal should interpret the planning condition as representing to link to specific university buildings. When challenged as to which university buildings Ms Hargun answered "all of them." "

The FTT therefore held that the requirements of sub-paragraph (c) of Note 2 were satisfied, and that Primus Place was a building designed as a number of dwellings by reference to Note (2): see at [48].

The appeal

14. The sole issue on appeal is whether the FTT erred in concluding that Condition 2 did not constitute a prohibition on the separate use of the flats. For the reasons given below, we do not consider that the FTT erred in this respect and we propose to dismiss the appeal.

The law

15. Although it initially appeared from the written submissions that there might be some differences between counsel as to the law, by the end of the argument there did not appear to be any, and in reply Mr Brown expressly accepted that the law was all common ground. We set out the law by reference to the authorities to which we were referred. They are all decisions of the UT. As such they are not technically binding on us, but we should follow them unless convinced they are wrong, and far from being so convinced, as we have said we were not in the end invited to depart from any of them.

16. The first is *HMRC v Lunn* [2009] UKUT 244 (TCC), a decision of Judges John F Avery Jones and Adrian Shipwright. This in fact concerned Group 6 of Schedule 8 of VATA, which as it then stood provided for zero-rating of certain services supplied in connection with protected buildings (including listed buildings); but one of the requirements for zero-rating was that the building in question had to be designed to remain as or become a dwelling or number of dwellings and Note (2) specified what that required in terms not dissimilar to those in Note (2) to Group 5. In particular it was a requirement by sub-paragraph (c) of Note (2) that:

> "the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision"

This wording is identical to that of sub-paragraph (c) of Note (2) to Group 5, and must have the same meaning.

17. The appeal concerned a new building providing self-contained accommodation within the curtilage of a Grade II* listed building called Radbrook Manor. The relevant planning condition required that the new building should:

> "only be used for purposes either incidental or ancillary to the residential use of the property known as Radbrook Manor."

The UT held that this was a prohibition on separate use. In so doing they held that *"separate use"* did not mean *"a distinct use, or use as a separate household"*, but meant *"use that is separate from the main building"*. What

is of interest for present purposes is that Mr Owain Thomas, who appeared for HMRC, put forward (at [7]) an explanation of the purpose of Note (2), namely that it was to restrict the availability of zero-rating to separate dwellings which do not exist in a physically (Note (2)(a) and (b)) or legally (Note (2)(c)) dependent relationship with another dwelling. The UT appears to have accepted that the purpose of the Note was to prevent zero-rating unless the new subsidiary dwelling could be used independently of the main building (at [10], read with their conclusion at [15]), giving the example of a *"granny"* annexe, and setting out typical planning restrictions that applied to such an annexe (at [10] and [13]). As subsequent cases illustrate, it is not in fact necessary that the use of the dwelling in question be ancillary to another *dwelling*, but the principle that the purpose of Note (2)(c) (in both Group 5 and Group 6) is to prevent zero-rating if the building in question is not an independent dwelling, in the sense that it cannot lawfully be used separately from other premises, is entirely consistent with the later cases.

18. The second case is *Shields*, a decision of Judges Sinfield and Devlin. This appeal concerned the application of s. 35 VATA, popularly known as the DIY Builders Scheme, which provides for a refund of VAT to those building their own dwellings. The provisions of s. 35 again refer to a building designed as a dwelling or a number of dwellings, and s. 35(4) provides that the notes to Group 5 of Schedule 8 apply for this purpose. In this way the provisions of sub-paragraph (c) of Note (2) to Group 5 applied.

19. This is a significant decision for the resolution of the present case and we therefore refer to it in some detail. Mr Shields ran an equestrian business at an address in County Down, namely 274 Bangor Road, Newtownards. He wanted to build himself a new house on the site, and applied for, and was granted, permission for a development described as:

> "Construction of equestrian facilities manager's residence".

The permission contained a condition limiting the occupation of the dwelling to:

> "a person solely employed by the equestrian business at 274 Bangor Road, Newtownards, and any resident dependants."

Mr Shields built the house, and the question was whether the separate use of the building was prohibited by the planning permission.

20. Two arguments were put forward by Mr Zwart, who appeared for HMRC, in support of the argument that the separate use was prohibited. His primary argument was that this was the effect of the description of the development by itself. The UT rejected this submission. It accepted that the description of a development might on its own terms and without more prohibit a building from being developed in certain ways (at [48]). But it held that Note (2)(c) was to be applied as follows (at [42]) (in this and other citations the emphasis has been added by us):

> "The phrase "separate use or disposal" refers to use or disposal that is **separate from the use** or disposal **of some other land** (including any building or other structure on it). A term prohibiting use for a particular activity or disposal generally would not fail to satisfy Note 2(c) unless the effect of the term in that particular case was to prohibit use or disposal **separately from use** or disposal **of other land**."

That meant that the development description did not itself amount to a prohibition on separate use (at [49]):

> "The description "equestrian facilities' manager's residence" is a restriction on who can occupy the dwelling by reference to the equestrian facilities business. It does not, on its terms, prohibit Mr Shields from using the dwelling **separately from land** on which the equestrian facility is sited. Mr Shields could move his equestrian business to stables elsewhere and use the property at 274 Bangor Road entirely for his landscape business. Provided that Mr Shields continued to be the manager of the equestrian facilities, there would be no inconsistency with the development description. Mr Zwart submitted that moving the equestrian business might require planning permission for a change of use. It seems to us that, even if Mr Zwart is correct (and we express no opinion on the point), it is not an answer to the fact that the development description does not prohibit the manager's residence being used separately from the equestrian facilities at 274 Bangor Road. As in *Wilson*, the development description limits the use of the dwelling by reference to the occupation of the occupants: it does not prohibit the use of the dwelling **separate from the use of other land**."

The reference to *Wilson* is to *Wilson v West Sussex CC* [1963] 2 QB 764 where the relevant condition limited the occupation of a cottage to persons employed locally in agriculture or in forestry and their dependants.

21. The UT however accepted Mr Zwart's second contention, which was that the effect of the condition as to occupancy did impose a relevant restriction. At [53] they said that the issue of whether Note (2)(c) applies should be determined in the light of the precise wording of the condition. At [55] they said:

> "Unlike the condition in *Wilson* which required the occupant to be employed in agriculture or forestry generally, Condition 3 referred to employment **in a specific business at a specific address**."

They then gave their conclusion at [56] 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."

22. It follows from the different way in which the UT dealt with Mr Zwart's two submissions that they drew a distinction between a term of the planning permission which merely required the building to be used by a person employed in a business, and a term which required it to be used by a person employed in a business at a particular address. This is entirely consistent with what they had said about a term not failing to satisfy Note (2)(c) unless its effect was to prohibit use separately from use of other land.

23. The third case is *Burton*, a decision of Barling J. This was another appeal concerned with the DIY Builders Scheme in s. 35 VATA. Mr Burton and his wife bought a site which included a lake, and opened the lake to anglers as the Park Hall Lake fishery. He then applied for planning permission to construct a dwelling. This was granted by the inspector on appeal. The inspector's decision referred to the permission as

> "permission for a new occupational dwelling … at Park Hall Lake Fishery, off the Fairways, Mansfield Woodhouse, Nottingham…"

The permission was subject to a number of conditions including a condition 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."

24. HMRC submitted that this condition prohibited use separately from the fishery business situated at Park Hall (see at [63]). Barling J accepted this submission. At [95] he said:

> "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."

At [96] he said:

> "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…"

25. We were also referred to *Akester v HMRC* [2017] UKUT 404 (TCC), a decision of Judges Sinfield and Falk. At [35] the UT repeated what had been

said in *Shields* at [42], including the statement that the phrase "separate use or disposal" referred to use or disposal that was separate from the use or disposal of some other land, but beyond that the decision takes matters no further.

26. Mr Thomas, who appeared for Summit, submitted that these cases showed that what was required in order for there to be a prohibition on separate use for the purposes of Note (2)(c) was a prohibition on use of the premises separate from the use of some other specific land or premises. It was not enough that there was a link to a business or an activity.

27. We accept this submission. In the end, as we have said, we did not understand Mr Brown to take issue with Mr Thomas's submission, but we consider that the authorities do justify it. In particular, the way in which the UT in *Shields* dealt differently with the two limbs of Mr Zwart's submission illustrates the difference between restricting the occupation of a building to a person employed in a particular business (which is not enough to constitute a prohibition on separate use) and restricting the occupation to a person employed in a business at a particular address (which is). Moreover the repeated reference in the authorities, which we have highlighted above, to there needing to be a prohibition on use separate from the use of *other land*, or separate from a *specified location*, or a link with *specific land or premises* being crucial, all support this submission.

28. Some of the expressions in *Burton* might be thought to give support to a wider reading under which it was enough for there to be a link to a particular business: see for example the reference in [95] to the accommodation being retained *"for the use of the Park Hall fishery business"*, and at [96] to the occupants having a specific link *"with the fishery at Park Hall"*. But we do not think that Barling J can have meant that a link to a specific business would suffice even without a specific location, as he immediately goes on to refer to the link to the fishery at Park Hall as *"that required link to specific land or premises, which is crucial"*. Rather we think he was referring to the Park Hall fishery business or the fishery at Park Hall as the fishery business carried on at the particular location identified as Park Hall Lake. This was how the business was identified in the inspector's decision which granted permission, namely Park Hall Lake Fishery at a specific address.

29. We therefore take the law to be as follows. A prohibition on separate use for the purposes of Note (2)(c) to Group 5 of Schedule 8 of VATA will not be found unless the effect of the relevant term in the particular case is to prohibit use of the premises separately from the use of other specific land.

Application to the facts of the present case

30. Mr Brown accepted that the question was whether Condition 2 in the grant of planning permission for Primus Place was intended as a restriction on the use of Primus Place by reference to the business of the Universities or the buildings of the Universities. He submitted that it was intended to be by

reference to the buildings of the Universities.

31. We are unable to accept this submission.

32. In the first place, we accept, as was said by the UT in *Shields* at [53], that the issue should be determined in the light of the precise wording of the condition in question. There is no reference in the wording of Condition 2 to any particular buildings or premises at all. That seems an unpromising start for a submission that what was intended by Condition 2 was to restrict the use of Primus Place by reference to specific university premises.

33. Mr Brown said that the City Council would have known where the Universities are, and that they are long-lived institutions which have been in the same place for a long time. That may be so, although we in fact have no factual findings to that effect. But that does not affect the fact that the City Council has not referred to the use of Primus Place in connection with particular university campuses or particular sites, but to its use in connection with particular universities. A university is not just a building or collection of buildings; it is an educational institution. Like other educational institutions, a university can change its physical location. In the case of schools, for example, it is not at all uncommon for a school to move to a completely new site – in some cases some distance away – but it remains the same institution and the same school. In the same way a university could in principle move to an entirely new site and remain the same university. If either of the named Universities in Condition 2 were to do so, it seems to us clear that this would not mean that there would be a breach of the condition simply because flats at Primus Place were let to students attending courses at the new site. That demonstrates that what Condition 2 requires is use by students attending particular Universities, not use by students attending particular premises.

34. The possibility of one of the Universities moving to a completely new site might be thought somewhat unlikely (although not impossible), but there are other examples which are very far from theoretical. Mr Brown's submission must we think amount to a submission that Condition 2 implicitly refers to all the premises of the named Universities. But, as pointed out in the course of argument, and as Mr Brown accepted, it is entirely possible that a student enrolled in Leicester University or De Montfort University might attend part of their course in buildings not owned by one of those Universities at all but owned by another University or institution. We do not think that letting a flat at Primus Place to such a student would entail a breach of Condition 2.

35. Another example would be if one of the Universities expanded onto a new site. While it may be uncommon for universities to move wholesale to a completely new site, it is far from uncommon for universities to take on new sites. But if Leicester University were at the date of the planning permission carried on on sites A, B and C, and later expanded onto site D, we cannot think that letting a flat at Primus Place to a student enrolled at Leicester University but who only ever attended site D would be a breach of Condition

2. Both this and the previous example illustrate that what the condition requires is not use in connection with certain specified locations, but use in connection with specified Universities.

36. Mr Brown pointed to the language of Condition 2 which twice refers to attending the Universities (*"a full time student attending the University of Leicester or DeMontfort University"* and *"register of the name of each person in occupation of the development together with course(s) attended"*). He said that this showed that what the City Council as planning authority had in mind was that the students should actually physically attend at the Universities' buildings. We consider this is to read too much into these words. Indeed as Mr Brown accepted, there would not be a breach of Condition 2 if a flat at Primus Place were let to a full time student enrolled at one of the Universities who chose not to attend any lectures or otherwise use the University facilities at all.

37. Mr Brown sought to derive some support from the words in brackets at the end of Condition 2 which explain the City Council's reasons for imposing the condition. We do not think they assist him. The first reason given (*"To ensure the development is only occupied by students"*) refers only to the use of Primus Place as student accommodation. It says nothing about the desirability of letting it to students using any particular university premises. Indeed the fact that the City Council referred to the possibility of agreeing to other higher/further educational establishments being added suggests that the City Council was not concerned to limit its use to connection with specific sites. The second reason given (*"To ensure the development ... remains well integrated with the surrounding area in terms of its effect on the living conditions of nearby residents"*) does not seem to us to say anything about the desirability of supporting the particular University campuses, but to be referring to the impact on local residents, and so far as we can see is likely to have been related to the limit on numbers rather than anything else. The remaining reason envisages a change of use away from student accommodation.

38. In these circumstances we do not discern in the language of Condition 2 any prohibition on the use of Primus Place separately from the use of other specified land or premises. On the basis of the law as we have summarised it above (which was as we have said ultimately common ground) it follows that there is no such prohibition on separate use as would prevent the requirements of Note (2)(c) being fulfilled.

39. We add two points by way of footnote. First, Mr Thomas told us that all the decided cases concerned dwellings which were on the same site as something else. That does appear to be borne out by the examples in the particular authorities we were shown (a dwelling in a curtilage of a listed building, a granny annexe, a house for the manager of equestrian facilities at the same address, a house on the same site as a fishery). His submission was that the policy behind Note (2)(c) was that it was designed to exclude dwellings which

were really part of a single unit. That may well be so, and it is noticeable that the present case, where as we have said we have no factual findings as to how far removed Primus Place is from any site of either University, seems a long way from that paradigm case. We have not however found it necessary to consider whether a dwelling will only fail to meet the requirements of Note (2)(c) if it can be said to be part of a single unit with some other premises. We prefer to base our decision on the wording of the statutory language as expounded in the authorities we have referred to.

40. Second, the FTT said this at [46]:

> "The Tribunal was given by HMRC a copy of a report that indicated that there were, in 2013 just shy of 30,000 students in Leicester attending the two universities. There are many villages and towns smaller than the student population of Leicester. To see a restriction narrowing the class of occupier not to the user of any specific or identified land but to such a vast class of people cannot, in the Tribunal's view, represent a prohibition on separate use."

Mr Brown submitted that this was erroneous: since the use condition was framed by reference to two large universities, it was inevitable that the class of potential occupier would be a large one. Mr Thomas agreed that the size of the class was essentially irrelevant to the statutory question.

41. We did not hear extended argument on the point but we agree that the size of the class of potential occupier is not itself something that can be determinative, and if the FTT had meant this it would have erred. But this does not detract from the essential point made by the FTT that the class of occupier was not limited to the user of some other specific or identified land.

42. For the reasons we have given above we agree. In our judgment therefore the FTT did not err in its Decision. On the contrary we agree with both the result and (subject to the point about the size of the class of potential occupier) the reasoning. We therefore dismiss the appeal.

MR JUSTICE NUGEE

JUDGE JUDITH POWELL

RELEASE DATE: 18 May 2018