[2021] UKUT 0290 (TCC)

Appeal number: UT/2020/000336 (V)

VALUE ADDED TAX – Whether supplies of insulated panels for conservatory roofs fall within Note 1(a) to Schedule 7A of the Value Added Tax Act 1994 – no – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

GREENSPACE LIMITED **Appellant**

-and-

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

TRIBUNAL: MR JUSTICE LEECH
JUDGE JONATHAN RICHARDS

Sitting in public by way of remote video hearing treated as taking place at The Royal Courts of Justice, Rolls Building, London on 3 November 2021

Hui Ling McCarthy QC and Edward Hellier, instructed by Mazars, for the Appellant

Joanna Vicary, instructed by the General Counsel and Solicitor for Her Majesty's Revenue and Customs, for the Respondents

DECISION

1. Conservatories can be too hot in summer and too cold in winter. The appellant company ("Greenspace") seeks to address this problem by supplying and fitting insulated roof panels to its customers' conservatories. The question raised in this appeal is whether the supply of these panels is subject to a reduced rate of VAT on the basis that it is a supply of insulation for roofs, or whether it is subject to the standard rate of VAT on the basis that it is a supply of a conservatory roof itself. In a decision released on 27 August 2020 (the "Decision") and reported with reference [2020] UKFTT 349 (TC), the First-tier Tribunal (Tax Chamber) (the "FTT") held that Greenspace's supplies were of roofs and so were standard-rated. With the permission of the Upper Tribunal, Greenspace appeals against that decision.

Legislation and authorities

2. Greenspace argues that the FTT failed to apply the legislation correctly, having regard to the relevant authorities. We therefore start with the legislation and those authorities.

Statute

3. By s29A of the Value Added Tax Act 1994 ("VATA 1994"), a reduced 5% rate of VAT is charged on any supplies of a description specified in Schedule 7A. Group 2 of Schedule 7A specifies:

> 1. Supplies of services of installing energy-saving materials in residential accommodation.
>
> 2. Supplies of energy-saving materials by a person who installs those materials in residential accommodation.

4. Note 1 to Group 2 provides a definition of "energy-saving materials" which, so far as material to these proceedings, is as follows:

> 1. For the purposes of this group "energy-saving materials" means any of the following:
>
> > (a) insulation for walls, floors, ceilings, roofs or lofts or for water tanks, pipes or other plumbing fittings.

5. Both parties agree that a distinction is to be drawn between a supply of "insulation … for roofs" (which is subject to the reduced 5% rate of VAT) and a supply of a "roof" itself, which is standard-rated for VAT purposes. That distinction was articulated in the decision of the Upper Tribunal (David Richards J as he then was) in *HMRC v Pinevale* [2014] UKUT 204 (TCC).

Pinevale

6. The Upper Tribunal's decision in *Pinevale* was brief and needs to be understood in the light of some of the FTT's findings of fact, which were not challenged or over-turned on appeal (even though the appeal was successful). Pinevale supplied and fitted

"Insupolycarbonate Roofing Panels", which had some insulating properties, as replacements for existing conservatory roof panels with few insulating properties. The FTT's decision in *Pinevale* contained relatively few findings as to how Pinevale fitted the replacement panels. Greenspace showed us pictures of Pinevale's panels and invited us to draw the inference that since (i) they were thicker than glass and (ii) they were being supplied as replacements for glass panels, some significant modifications to the conservatory structure would be required in most cases to accommodate the thicker panels. We do not consider that, at this remove from the facts of *Pinevale*, we are in a position to make this finding. However, we are prepared to draw the inference that the process of fitting Pinevale's products would have been more involved than the process for fitting Greenspace's products that we summarise at [24] below.

7. It is not entirely straightforward to tell how precisely HMRC put their case before the FTT. Paragraph 17 of the FTT's decision suggests that HMRC denied that Pinevale's panels were "energy-saving" and characterised them instead as "a more efficient way of double-glazing your house without the use of energy saving materials". However, paragraph 17 also suggests that HMRC went further and argued (i) that there was a distinction between replacement of a whole roof and the provision of insulation for a roof and (ii) that a supply of "new roof panelling" was not a supply of insulation for a roof.

8. The Upper Tribunal's summary of the case advanced by HMRC indicates that it involved both propositions set out in paragraph [7] above:

> 10. HMRC's case before the F-tT, and on this appeal, is that the panels are not "insulation for roofs" but are the roof itself. So, if an entire existing roof is replaced, the panels constitute the new roof, not just insulation for a roof. Likewise, the replacement of individual panels with Pinevale's panels was the supply of new roof panels, not the supply of insulation for a roof.

9. In paragraph 17 the Upper Tribunal said:

> 17. There is a distinction between Note 1(a), which specifies insulation "for walls, floor, ceilings, roofs or lofts or for water tanks, pipes or other plumbing fittings" and paragraphs (c) to (j) which specify particular products such as central heating system controls or solar panels. A material which is insulation for a roof is not the same thing as the roof itself. It presupposes that there is a roof to which the insulating material is applied. If the intention had been to apply the reduced rate of VAT to energy-efficient roofs or walls, this could have been specified, just as more generally building materials are specified in schedule 8…

10. However, this paragraph did not differentiate between the replacement of "entire existing roofs" and "individual panels" as HMRC had in their submissions. There is a suggestion (but no more) that the Upper Tribunal regarded an individual panel as a "particular product" (of the kind dealt with in paragraphs (c) to (j) of Note 1) which did not constitute insulation "for" a roof falling within paragraph (a). However, that is a suggestion only and it did not form an express part of the Upper Tribunal's reasoning.

11. In paragraph 19, the Upper Tribunal concluded by saying:

> 19. The error, in my judgment, made by the Tribunal was to construe "insulation for roofs" as extending to the roof itself when it has energy-saving properties, rather than being confined to insulating materials attached or applied to a roof.

12. Again, this paragraph does not distinguish expressly between the replacement of entire existing roofs and the supply of individual panels. We therefore accept that Ms McCarthy QC was substantially correct to describe the *ratio* of the decision in *Pinevale* in the following terms:

> (1) There is a distinction between "insulation for roofs" and the "roof itself".
>
> (2) The Upper Tribunal made no determination of law to the effect that roof panels are necessarily precluded from constituting "insulation for roofs".
>
> (3) The Upper Tribunal gave no guidance in *Pinevale* itself how to apply the distinction between "insulation for roofs" and the "roof itself" in particular cases. The taxpayer in *Pinevale* was not represented and there is no record of any submissions being made to the effect that Pinevale's products, despite being "roof panels", nevertheless constituted "insulation for roofs".
>
> (4) In the particular case before it, the Upper Tribunal must have concluded that Pinevale's products were not "insulation for roofs" as it allowed HMRC's appeal.

Wetheralds

13. This same issue came before the Upper Tribunal (Judges Roger Berner and Thomas Scott) in *HMRC v Wetheralds Construction Limited* [2018] UKUT 173 (TCC). In *Wetheralds*, the taxpayer made a more complicated supply which the FTT concluded consisted of four elements. The FTT considered that its first task was to apply CJEU jurisprudence on "composite supplies" set out in Case C-349/96 *Card Protection Plan Ltd v Customs and Excise Commissioners* ("*CPP*") and Case C-41/04 *Levob Verzekeringen v Staatssecretaris van Financie* ("*Levob*") and to identify whether the supply of these four elements should be treated as a single supply of "insulation … for roofs". Having performed that analysis, it considered that there was a "single supply of insulation materials with their supporting framework and the other elements that make it both more pleasing to look at and more durable". It concluded that this single supply was of "insulation … for roofs".

14. The Upper Tribunal held that the FTT was wrong to apply a *CPP/Levob* analysis at this first stage because it begged the very question which the FTT had to determine. It also concluded that the FTT had failed to apply *Pinevale* correctly:

> 31 … [A]s *Pinevale* sets out, in interpreting the statutory language the critical question is whether the supply of energy-saving materials is "for" a wall, floor, ceiling etc, or is a more extensive supply, such as the wall, floor, ceiling etc itself. That was the question on which the FTT should have focussed. On the facts found by the FTT, the supply by

> Wetheralds was effectively of all the elements comprised in a roof save for the original glazing bars. The old roof covering was removed, and a new roof covering (tiling) was added, as well as a new plasterboard ceiling, soffits and rainwater goods. However one defines "roof", we can see no reasoned basis on which that supply was no more than insulation.

15. The Upper Tribunal in *Wetheralds* also added the following:

> 32. The FTT appears to have interpreted Pinevale (at [175] and [176]) as determining that the relevant test is whether or not what is supplied is "attached or applied" to a "roof". However, although Richards J does use those words, he does so only in illustrating his analysis of the words "insulation for" and his conclusion in relation to the Pinevale product. In our view, therefore, the scope of the reduced rate for supplies within Note 1(a) is not determined by whether or not the materials are "attached or applied", but by whether what is supplied is confined to insulation or extends further than that, to a roof or a replacement roof itself.

16. Greenspace places considerable reliance on the Upper Tribunal's references to the "extent" of the supply in paragraphs 31 and 32 of *Wetheralds*. By contrast, HMRC seek to extract a general test from paragraph 32 that only supplies "confined to insulation" are capable of falling within Note 1(a). We do not consider, however, that it would be appropriate to treat concepts of "extent" or "confinement to insulation" as tests derived from the legislation itself. It was natural in *Wetheralds* for the Upper Tribunal to focus on the "extent" of the supplies. The FTT reasoned that the insulating materials in question were "insulation … for roofs" because they were attached to the roof structure: see the quotations in paragraph 20. HMRC challenged that conclusion on the basis that the insulating materials were provided as part of a much more extensive supply consisting of the provision of what amounted in substance to a new roof. Questions of "extent" and "confinement" were therefore relevant in *Wetheralds*. We accept that they may well be relevant in other disputes (including this appeal). However, that does not elevate these factual considerations into a "test" to be applied in all cases in determining whether a particular supply is of "insulation for… roofs".

17. In *Wetheralds* HMRC also relied upon the description of the supply in patent applications, local authority building certificates ("LABCs") and marketing material (see paragraph 33). Those materials were relevant to the determination of the dispute because they provided evidence that Wetheralds generally presented their works as involving "reroofing" or "new roofs" and their presentation was obviously relevant in considering both the "extent" of the works and the extent to which they were confined only to the supply of insulation. However, that does not mean that patents, LABCs and marketing material will be of equal significance in all cases, including the present one.

18. Greenspace also relied upon *Wetheralds* for the proposition that because evidence such as patents LABCs and marketing material were relevant to the inquiry in that case, it must follow that roof panels are capable of being "insulation … for roofs". Ms McCarthy submitted that if their status as roof panels automatically disqualified them from being "insulation ... for roofs", then it must follow that there would be no point in looking at this evidence. We do not accept that submission. The Upper Tribunal in *Wetheralds* did not lay down any general principle that patents, LABCs and marketing

material were determinative, or even relevant, in every case. Furthermore, the tribunal expressed no view on whether, or not, roof panels are inherently capable or incapable of constituting "insulation … for roofs".

19. We therefore derive the following propositions of law from *Wetheralds*:

> (1) The statutory question remains whether a particular supply is "insulation for… roofs" and in determining this question the Tribunal must follow *Pinevale* and draw a distinction between the supply of a roof and the supply of insulation for a roof.
>
> (2) Considerations of the "extent" of a supply can, in principle help the FTT to determine whether a particular supply is of either a roof or of insulation for a roof.
>
> (3) The question whether an item is "insulation for" a roof is not determined conclusively by considering whether it is "attached or applied" to the roof. Nor is it determined conclusively by asking whether the item is a "roof panel".
>
> (4) Evidence of extraneous materials such as patents, LABCs and marketing literature may be of relevance in particular cases. But it is a matter for the FTT to assess the relevance and weight of such material.

The Decision

Findings of fact

20. Greenspace does not challenge the FTT's findings of primary fact. Rather, it challenges the conclusions which the FTT reached based on its findings of fact. In this section, therefore, we set out a summary of the FTT's central findings of fact with references to numbers in square brackets being to paragraphs of the Decision (unless we state otherwise).

21. Greenspace's principal business is the supply and installation of insulated roof panels ("Panels") to residential customers which are fitted onto their customers' pre-existing conservatory roofs ([35] and [71]).

22. The Panels comprise a layer of close cell extruded polystyrene foam (supplied under the trade name "Styrofoam") which is around 71mm thick. The Styrofoam is covered with a thin aluminium layer and a protective powder coating which are together around 2mm thick. The Panels are manufactured by a company called Thermotec Roofing Systems Ltd ("Thermotec") which holds a patent entitled "Method of lowering the conductivity of a building roof" ([13], [14] and [27]). It is common ground that the Panels have insulating properties.

23. Before supplying or fitting the Panels, Greenspace will visit its customer, work out what the customer requires and take detailed measurements. The Panels are then made to measure by Thermotec with the protective coating added by a separate company and usually coloured so as to match the customer's existing roof colour ([15]).

24. The process of fitting the Panels involves the following:

> (1) Existing top caps and end caps are lifted from the conservatory roof and the existing glass or polycarbonate panels are removed ([15]).
>
> (2) The Panels are slotted into place on the existing roof structure. Greenspace does not replace its customer's existing roof framework when doing this: the struts and glazing bars that supported the previous glass or polycarbonate panels are left in place. The top caps and end caps that were removed to enable the Panels to be fitted (described in (1) above) are replaced once fitting is complete ([71]).
>
> (3) The ability to fit the Panels without replacing the existing roof structure is possible because the Panels are made with a custom-built tongue, the width and depth of which are tailored to the specifications of the existing structure, that enables the Panels to be slotted into the bars of the existing roof structure. No bolts or screws are needed to fit the Panels ([82(2)]). Because the process simply involves slotting the Panels into place, fitting typically takes less than a whole day ([15]).

25. It is apparent from the above findings of fact that the Panels are not self-supporting and can be used only if the customer already has an existing conservatory roof structure. Moreover, while the FTT did not make a specific finding to this effect, it was common ground that it was important that the installation of the Panels disturbed as little as possible of a customer's pre-existing roof structure after the removal of the existing panels in order to prevent leaks.

26. Some customers ask Greenspace to remove the existing panels and fit the Panels to part only of the remaining conservatory structure leaving large areas of the pre-existing glass or plastic panels untouched. However, the unchallenged evidence of Greenspace's managing director, Mr Jacomb, before the FTT (see [31(3)]) was that most customers would choose to replace all of the existing glass panels with the Panels. In those rare cases where Greenspace both fitted Panels and replaced the supporting structure, Greenspace would treat the entire supply as standard-rated (see [80]).

The FTT's reasoning

27. The bulk of the FTT's reasoning is found in the section headed "Discussion and Decision" which starts after previous sections in which the FTT made findings of fact and summarised the legislation and the parties' competing cases.

28. At paragraph [73(1)] the FTT noted the distinction, made in *Pinevale* and *Wetheralds*, between something which is "for" a roof and something which "is" a roof. No criticism is made of this paragraph. However, Greenspace criticises the three subsequent paragraphs of the Decision (paragraphs [73(2)] to [73(4)]) arguing that the FTT adopted and applied a flawed test of "form over substance" and a "confused" reference to *CPP* and *Levob*. It is necessary, therefore, for us to set out those paragraphs in full:

> (2) The primary test in the legislation is one of form; is what has been supplied a roof or something for a roof. Greenspace's roof panels are in form roof coverings. Greenspace has provided a supply in the form of a roof.
>
> (3) I accept that the Greenspace panels have a dual function; they provide both a roof covering and insulation. However, in my view the question of whether they have that additional function, of providing insulation, is not relevant.
>
> (4) Any attempt to argue about the "substance" of the supply, or the dual nature of the supply, falls into the error of law which was rejected in *Pinevale* of ignoring the manner in which this legislation categorises the type of supply which can fall within this exemption, which is by reference only to the form of the supply. An approach which was rejected by the Upper Tribunal in *Wetheralds*:
>
> > "The FTT erred by considering the application of Pinevale to the facts only after determining, on a *CPP/Levob* analysis, that the supply was single supply of insulation. Such an approach begs the very question which must be determined, namely whether the supply was "of insulation for roofs". [31].

29. Paragraph [75] to [78] appear in a subsection headed "Comments on *Pinevale*". In paragraph [75] the FTT considered what it described as Greenspace's attempts to "distinguish *Pinevale*". It concluded that the supplies considered in *Pinevale* were different from those made by Greenspace but "in form what has been supplied is the same thing; a form of roof covering". It also concluded that it was not necessary to consider whether the "predominant purpose" of Greenspace's supplies was different from that in *Pinevale* since the test to be applied was not concerned with the "purpose" of the supply.

30. In paragraphs [76] and [77] the FTT referred to the importance of not starting with a *CPP/Levob* analysis. Greenspace criticises those paragraphs as showing that the FTT misunderstood the issues because any *CPP/Levob* analysis was unnecessary in the present case. In paragraph [77] the FTT also set out the following quotation from paragraph 31 of *Wetheralds:*

> The old roofing cover was removed and a new roof covering (tiling) was added.... However one defines "roof" we can see no reasoned basis on which that supply was no more than insulation."

31. Finally, in paragraph [78] the FTT concluded that "on that basis" the supplies made by Greenspace "must also be treated as something which is more than insulation, the supply of a roof, rather than something for a roof". HMRC submitted that this was a reference back to the distinction drawn in *Pinevale*.

32. Before the FTT, as before us, Greenspace submitted that its supplies were the application or addition of insulation to an existing roof and not the provision of a new roof. By reference to *Wetheralds* Ms McCarthy (who also appeared below) argued that the appropriate way to apply the *Pinevale* distinction was to determine the "extent" of the supply and to evaluate the works which Greenspace performed on a "sliding scale". In support of this argument she relied on two decisions: *Customs & Excise*

Commissioners v Marchday Holdings Ltd [1996] EWCA Civ 1171 and *Coleborne (T) & Sons Ltd v Blond* [1951] 1 KB 43. The FTT considered this submission in paragraphs [79] to [82]. Before us, Ms McCarthy argued that the FTT gave insufficient reasons for rejecting that submission.

33. In paragraph [82] the FTT considered whether Greenspace was supplying a "new roof" or an "improved roof". It concluded that Greenspace was supplying a "new roof" for reasons which we can summarise as follows:

> (1) Greenspace's work involves the removal of existing glass or polycarbonate panels. No reasonable person looking at the structure remaining once those panels had been removed would consider that the conservatory in question had a roof. It followed that the Panels which Greenspace then fitted fulfilled the essential functions of a roof, namely, by protecting the conservatory against the elements ([82(1)]).
>
> (2) The fact that bolts or screws were not needed to fix the Panels did not prevent the fixing of those Panels resulting in the creation a new structure. By analogy, the process of building an igloo involves no bolts or fixings but it still results in the creation of a new structure ([82(2)]).
>
> (3) Greenspace's evidence was that local authorities would describe their works in LABCs differently depending on whether Greenspace was just supplying and fitting Panels or replacing a whole roof, including its supporting structure. The FTT considered that shed little light on the issue for two reasons: first, LABCs would not have been drafted with the correct VAT analysis in mind and, second, because only two LABCs were in evidence which was not enough to provide a representative sample ([82(3)].
>
> (4) The FTT derived little assistance from Greenspace's evidence suggesting that its customers viewed the main purpose of the Panels as being to provide insulation rather than a new roof. In a passage that Greenspace criticises, the FTT stated this at [82(4)]:
>
> > As I have already made clear, the problem with this approach is that it assumes that the categories stipulated in Schedule 7A are determined by substance rather than form. The fact that Greenspace's customers chose the Greenspace roofing panels because they provided significant insulation properties does not mean that what Greenspace provided must be limited to the supply of insulation when that insulation was provided in the form of roofing panels making up a roof.

34. In paragraphs [83] to [86] the FTT characterised Greenspace's submissions as focusing, wrongly, on the "substance" of the supply, or its "predominant purpose". In paragraph [86] the FTT said:

> > 86. In my view in taking this approach Greenspace is attempting to apply the arguments accepted by the FTT in *Pinevale* looking at the substance of the supply, or the predominant purpose of the supply; an approach which was rejected in both *Pinevale* in the Upper Tribunal and *Wetheralds*. There is no sliding scale here; the question is simple, if what

> has been provided is a roof, or part of a roof, that supply cannot fall within the definition of energy saving materials "for a roof".

The grounds of appeal

35. Permission to appeal has been granted by the Upper Tribunal and Greenspace appeals against the Decision on the following grounds:

> (1) The FTT wrongly rejected Greenspace's submission that the question whether any given supply is of either insulation for a roof or of the roof itself, is a question of fact and degree (not law) and that it depends upon the nature and extent of the supply. In particular, the FTT was wrong to reject Greenspace's argument that there was a "sliding scale" relevant to the question whether it was supplying a new roof, or insulation for a roof.
>
> (2) In paragraph [82(1)] of the Decision, the FTT wrongly predicated its decision on the state of a conservatory mid-way through the installation process.
>
> (3) The FTT wrongly approached matters on the basis that, because the Panels consisted, in part, of a roof covering, Greenspace was necessarily supplying a roof rather than "insulation for … roofs".
>
> (4) In addition to the above errors of approach, the FTT also made various discrete errors of law throughout its decision. Rather than itemising those here, we will set them out, and deal with them, in a subsequent section of this decision.

The approach we must take

36. The FTT's task in this appeal was evaluative. Such evaluative questions frequently arise in VAT disputes given that superficially similar supplies can be treated very differently for VAT purposes. In *HMRC v Procter & Gamble UK* [2009] EWCA Civ 407, the question of evaluation was whether Pringles were "similar to potato crisps and made from the potato" and Mummery LJ said this about the approach that should be taken on an appeal against the FTT's findings:

> 73. The Tribunal's decision in favour of HMRC was not an absolute answer to a pure question of fact or to a pure question of law. It was a judgment of mixed fact and law on the classification of Regular Pringles for VAT purposes. "Similar to" and "made from" are loose textured concepts for the classification of the goods. They are not qualified by words such as "wholly" or "substantially" or "partly" which have crept into the legal arguments. Those words are not in the legislation itself. The Tribunal's conclusions were on matters of fact and degree linked to comparisons with other goods and related to the composition of the goods themselves. Some aspects of the similarity of Regular Pringles to potato crisps are close to the centre, others are on the fringes. This exercise in judgment is pre-eminently for the specialist Tribunal entrusted by Parliament with the task of fact finding and with using its expertise to make the first level decision, subject only to appeal on points of law.

> 74. For such an appeal to succeed it must be established that the Tribunal's decision was wrong as a matter of law. In the absence of an untenable interpretation of the legislation or a plain misapplication of the law to the facts, the Tribunal's decision that Regular Pringles are "similar to" potato crisps and are "made from" the potato ought not to be disturbed on appeal. I cannot emphasise too strongly that the issue on an appeal from the Tribunal is not whether the appellate body agrees with its conclusions. It is this: *as a matter of law, was the Tribunal entitled to reach its conclusions*? It is a misconception of the very nature an appeal on a point of law to treat it, as too many appellants tend to do, as just another hearing of the self-same issue that was decided by the Tribunal.

37. We must apply the same approach. We are not entitled to interfere with the FTT's evaluation of the primary facts in the absence of some error of principle: an "untenable view of the legislation or a plain misapplication of the law to the facts" as Mummery LJ puts it.

38. It was also common ground that, since Note 1(a) sets out an exception to the usual scheme of VAT by applying a reduced rate, the scope of that exception should be construed "strictly", by analogy with the approach taken to the construction of provisions that confer a VAT exemption. Accordingly, Greenspace is entitled to the benefit of the reduced rate only if it can establish that its supplies fall within a fair interpretation of the words of Note 1(a) having due regard to the objectives that are pursued by the presence of that exception. However, this does not mean that we should construe Note 1(a) "restrictively". If Greenspace's supplies fall within a fair interpretation of Note 1, it is not to be denied the benefit of the exception because it is capable of another, more restricted, meaning: see *Expert Witness Institute v HMRC* [2001] EWCA Civ 1882 and Case C-445/05 *Haderer v Finanzamt Wilmersdorf*.

Ground 1

39. Greenspace's Ground 1 starts from the premise that the question before the FTT was one of "fact and degree". If by this Greenspace means that the FTT had to express an evaluative conclusion, having directed itself correctly as to the law, and after taking into account all relevant circumstances, we agree. It is often the case that different facts point in different directions. Where that happens, the process of evaluation requires the FTT to resolve those competing indications in order to reach an overall conclusion.

40. In our judgment, however, Greenspace's additional arguments on Ground 1 take it no further. Ms McCarthy argued that, in performing its evaluation of whether it had supplied "insulation … for a roof" or the roof itself, the FTT was obliged to answer that question by applying a "sliding scale" analysis to determine whether what Greenspace supplied was a "new" roof or merely alterations to an existing roof. She also argued that the FTT was obliged to answer that question by reference to authorities on different taxing provisions, namely, *Coleborn* and *Marchday*.

41. We reject those broad submissions and, because they formed the basis of Ground 1, we dismiss Greenspace's appeal on that ground. The authorities on the interpretation of Note 1(a) are *Pinevale* and *Wetheralds*. Neither *Coleborn* nor *Marchday* concerned

Note 1(a). As we have noted, *Pinevale* and *Wetheralds* establish a difference between a supply of a roof and of insulation for a roof, but neither sets out any mandatory process that an FTT must follow in order to determine the nature of a supply in any particular case. Nor does Note 1(a) in terms require any analysis of whether what is supplied is a "new roof" or merely an "alteration" to an existing roof.

42. We are reinforced in this conclusion by a consideration of the statutory provisions with which *Coleborn* and *Marchday* were concerned.

43. *Coleborn* was concerned with purchase tax chargeable under the Finance (No. 2) Act 1940. The report of the case does not, unfortunately, set out the statutory provisions in full. However, it appears as though purchase tax was chargeable on the provision of specified goods (including "road vehicles constructed or adapted solely or mainly for the carriage of passengers") where those goods were "chargeable goods" because they resulted from a "chargeable process" which included a process of manufacture. The defendant in *Coleborn* owned an ex-military vehicle whose main function was to convey an officer when reconnoitring or observing if guns were in action. The vehicle carried a radio set which was used for receiving and issuing orders to fire artillery. The defendant handed over the vehicle to the plaintiffs, who performed works on it and handed it back. The result of the works was that the vehicle had eight seats, a pair of back doors, a permanent roof and new floor. The question was whether the plaintiffs' provision of the vehicle attracted purchase tax. The statutory provisions in issue in *Coleborn* therefore explicitly required an examination of the process by which the vehicle came to its final state and for that reason both Denning LJ and Bucknill LJ approached the question by asking whether that process involved mere alterations to the original vehicle or the creation of something new. No such examination of process is mandated by Note 1(a), although we quite accept that an FTT might find it helpful, in performing its evaluation, to consider Greenspace's process in deciding whether what was supplied was a roof, or insulation for a roof.

44. *Marchday* was concerned with Item 2 of Schedule 5 of the Value Added Tax Act 1983. That provided for certain services supplied in connection with the construction of a building to be zero-rated. However, "construction" was expressed to exclude the "conversion, reconstruction, alteration or enlargement" of an existing building. The taxpayer in *Marchday* carried out substantial works on an existing building and the question arose whether these works involved the conversion etc. of an existing building or something else. Given the statutory framework under consideration in *Marchday*, the Court of Appeal naturally framed its judgment by considering the scope of the words "conversion, reconstruction, alteration or enlargement". However, those words form no part of Note 1(a) which is in issue in this case.

45. To meet these points Greenspace argued that, even if Note 1(a) does not expressly invite a consideration of whether its supplies were alterations to an existing roof (or a new roof), a similar analysis is required because *Wetheralds* lays emphasis on the "extent" of the supplies that it makes. However, as we have explained at [16] above, while an FTT may well find it instructive to consider the extent of supplies, that will simply represent a consideration it might wish to take into account when performing its

evaluation. Considerations of "extent" are not necessary parts of the statutory test and so do not import considerations similar to those that arose in *Coleborn* and *Marchday*.

46. Finally, Greenspace referred us to the decision in *Conservatory Roofing Systems Limited v HMRC* [2020] UKFTT 0506 (TC) made by a differently constituted FTT, which had not been referred to either *Coleborn* or *Marchday*. Ms McCarthy submitted that the FTT "instinctively" applied the approach set out in those cases when considering whether a supply was of insulation for a roof, or of the roof itself. We do not consider that decision to be of any assistance. We quite accept that an FTT might, in an appropriate case, wish to address questions similar to those raised in *Coleborn* or *Marchday* in performing its overall evaluation. However, our conclusion is that such an analysis is not mandatory.

47. It follows, in our judgment, that the FTT was not obliged to look at a customer's roof before Greenspace's works, compare it with the roof after the works and then ask the question whether Greenspace had carried out "alterations" deciding that question by reference to a "sliding scale" derived from *Coleborn* and *Marchday* (both of which are authorities on different statutory provisions). Rather, the FTT was entitled, as it did, to focus on what Greenspace actually provided, namely Panels which, in most cases, constituted the majority of the surface area of a conservatory roof, together with the service of installing those Panels. Furthermore, the FTT was entitled to consider the Panels and their installation and ask itself whether the overall supply of Panels involved Greenspace in supplying a roof or insulation for a roof. We, therefore, dismiss Greenspace's appeal on Ground 1.

Ground 2

48. Greenspace's Ground 2 focuses on paragraph [82(1)] of the Decision. Greenspace argues that the Decision was flawed because the FTT "wrongly predicated its decision on the state of a customer's conservatory mid-way through the installation process". That, it argues, was contrary to the approach followed by the Court of Appeal in *Marchday* and *Coleborn* and, in particular, Stuart-Smith LJ's rejection in *Marchday*, of the "three-stage" approach: see 279g-j.

49. Ground 2 can be dismissed shortly as a consequence of our conclusions on Ground 1. Neither *Marchday* nor *Coleborn* prescribed an approach to the analysis of Note 1(a) which the FTT was bound to follow. The "three-stage" approach of which Stuart-Smith LJ disapproved related to the question whether particular works amounted to the "conversion, reconstruction, alteration or enlargement" of an existing building. Where the works in question involved demolition works, he expressed the view that it was not correct to ask whether, after those demolition works, an "existing building" remained. He also expressed the view that the correct approach was to look at the building before the works, compare it with the building after the works and ask whether those completed works involved the conversion etc. of the existing building. That analysis was particularly relevant to the statutory context which he was considering, namely, Item 2 of Schedule 5 of the Value Added Tax Act 1983. The FTT was not obliged to adopt it in the very different statutory context of Note 1(a) to Group 2 of Schedule 7A.

50. But in any event we consider that Greenspace's submissions involve a misunderstanding of paragraph [82(1)] of the Decision. In that paragraph the FTT was considering Greenspace's contention that its supplies were insulation for a roof. It was appropriate for the FTT to test that contention by considering which roof those supplies were insulating. In paragraph [82(1)], the FTT did so by asking whether the relevant "roof" was the structure as it existed after Greenspace had removed the original glass or polycarbonate panels and concluding that since this structure was not a "roof" at all, it could not be the relevant roof. The FTT had before it all the evidence. It had seen videos of the installation process. Its conclusion that the structure in question was not a roof formed part of its overall evaluation and involved no error of law. We, therefore, dismiss Greenspace's appeal on Ground 2.

Ground 3

51. Ground 3 of Greenspace's grounds of appeal is that the Decision was vitiated by the flawed assumption that because the Panels took the form of roof coverings, they were necessarily incapable of constituting "insulation for … roofs". Ms McCarthy argued that this flawed assumption appears both in paragraphs [77] and [78] of the Decision and in particular, in the statement in paragraph [78] that Greenspace's supplies "must" be treated as something more than insulation. As stated above, this statement follows the quotation from *Wetheralds* discussing roof tiles at the end of paragraph [77].

52. We have already reached the conclusion that *Pinevale* establishes no principle of law that roof tiles or roof panels are incapable of constituting "insulation… for roofs". However, when the Decision is read as a whole, we do not agree that the FTT assumed otherwise.

53. If the FTT had assumed that the Panels' status as a roof covering was determinative, the Decision would have been much shorter. In particular, the FTT would not have embarked on the analysis set out at [82] which considered the question whether Greenspace was providing a "new roof" or an "improved roof". The FTT's engagement with this question, which was a central plank of Greenspace's case, demonstrates by itself that the FTT was not making the unwarranted assumption that is alleged.

54. We also consider that Greenspace's argument places undue emphasis on the word "must" in paragraph [78]. The FTT expressed a conclusion at [78]. However, it went on to test that conclusion against Greenspace's other arguments.

55. We acknowledge that, if paragraphs [77] and [78] are read purely in isolation, there is some suggestion that the FTT was engaging in the kind of "fact-matching" that the Chancellor of the High Court deprecated at paragraph 29 of his judgment in *Waste Recycling Group Ltd v HMRC* [2008] EWCA Civ 849. But a mere inference arising from two paragraphs in a decision of a specialist tribunal is not enough to establish an error of law. The inference is negated when the Decision is read as a whole and, in particular, when it is read together with the analysis in paragraph [82] and the correct statement of the law at [84].

56. We also acknowledge that the FTT's references to the issue being one of "form" in paragraphs [75(1)], [82(4)] and [83] to [86] gives rise to the possible inference that the FTT took the narrow view that because the Panels were in form roof coverings they were necessarily incapable of being "insulation … for roofs". But we do not consider that this inference is justified when the Decision is read as a whole. Whilst we would not have framed the issue as being one of "form over substance", we do not consider that the use of this phrase betrays any error of law. The FTT explained what it meant at [83] to [86] of the Decision. In our judgment it was addressing Greenspace's argument (set out in paragraph 36 of its skeleton argument before the FTT) to the effect that:

> **Greenspace is literally supplying its customers with large chunks of moulded blue Styrofoam, thinly coated with aluminium, and shaped to be attached or applied directly to a customer's pre-existing roof**. The thin aluminium coating in no way detracts from the predominant feature of the product (thick Styrofoam insulation) and Greenspace supplies no other fixtures or roof furniture whatsoever in addition to these insulating blocks. [emphasis in original]

The FTT's point was that, even though this was an accurate description of what Greenspace was supplying, the reduced rate would not be available if the Styrofoam blocks, when fitted, answered to the description of a "roof".

57. This context also explains the references in the Decision to *CPP* and *Levob* (see, for example, paragraphs [73(4)], [76], [77] and [84]). Ms McCarthy submitted that these references were unclear and that the FTT had misdirected itself because, by contrast with the situation in *Wetheralds*, Greenspace was making simple single supplies (of Panels and installation services) rather than anything even capable of giving rise to a composite supply.

58. Some of these references are readily explicable. Paragraphs [76] and [77] appear in a section headed "Comments on *Pinevale*" but that section also included a discussion of *Wetheralds*. In that section the FTT was addressing an aspect of the *Wetheralds* decision that it did not altogether understand. We accept that the implicit references to *CPP* and *Levob* in paragraphs [73(4)] and [84] are less straightforward to explain given that there was no question of Greenspace making composite supplies in this case. Nevertheless, there is an explanation. In the paragraph of its skeleton argument that we have set out at [56], Greenspace was arguing that the predominant characteristic of its Panels was insulation. In her oral submissions before us, Ms McCarthy made similar points to the effect that the Panels' 5% aluminium content was *de minimis* or "a better way to enjoy the insulation". These points were not actually based on *CPP* or *Levob* because Greenspace was not making any composite supplies. However, Greenspace's arguments used similar language and it was understandable for the FTT to use the terminology of *CPP* and *Levob* in addressing those arguments. We agree with Greenspace that it was confusing to use this terminology and it left the FTT open to possible misinterpretation. But we do not consider that the references to *CPP* and *Levob* by themselves demonstrate an error of law in the Decision.

59. Greenspace also argued that, because of its flawed application of a "form over substance" test, the FTT proceeded on the basis that the Panels' obvious insulating

qualities were not relevant (see paragraph [73(3]). Again, we accept that the way in which the FTT dismissed the dual function of the Panels may have left it open to misinterpretation. However, reading the Decision as a whole, the FTT clearly treated the Panels' insulating properties as relevant to its overall evaluation not least because it referred throughout the Decision to the fact that 95% of the Panels by volume consisted of insulating Styrofoam. In our judgment, the point which the FTT was seeking to make in paragraph [73(3)] was that it could not determine whether the Panels fell within the exception in Note 1(a) by a simple analysis of whether the Panels' insulating properties were more important than their function as roof coverings. Indeed, this point is made clear in paragraph [73(4)] (the next paragraph) although the FTT also referred to *CPP* and *Levob*.

60. Finally, Greenspace relied on the statement in paragraph [74] of the Decision that:

> 'insulation for roofs' … by definition cannot apply to something which is itself part of a roof.

61. We agree with Greenspace that neither *Pinevale* nor *Wetheralds* establishes any rule of law to the effect that something which is or forms "part of" a roof is incapable of being insulation for a roof because it also performs that function. However, although the precis in paragraph [74] is somewhat inaccurate, we do not consider that it betrays any error of law when the Decision is read as a whole. The precis must also be read in the context of the argument which the FTT was addressing, namely, that to exclude roof panels involved an unduly restrictive construction of Note 1(a). The FTT was doing no more than restating the proposition to be derived from *Pinevale* that if the Panels together formed a roof rather than insulation "for" a roof, they could not fall within the scope of the reduced rate.

62. It is clear from other parts of the Decision that the FTT had not taken the simplistic view that "Panels = roof coverings = roof" and could not attract the reduced rate. The FTT had already quoted from *Wetheralds* in paragraph [61] and was thus aware that the question was not simply whether materials were "attached or applied" to a roof. Moreover, in paragraph [87] the FTT considered what the position would have been if Greenspace had simply stuck Styrofoam blocks to customers' existing glass or polycarbonate panels, without removing those panels, and concluded that, in that case it might well have been supplying insulation for roofs, rather than a roof itself.

63. Greenspace submitted that the FTT must have been proceeding on the basis of the false assumption that the Panels were <u>incapable</u> of being "insulation … for roofs" because those Panels, when they were sitting in the back of Greenspace's van, self-evidently met that description. We do not accept that argument. The FTT was not obliged to confine its evaluation to the Panels "in the back of the van". The Panels were intended to be fitted to conservatory roofs and Greenspace itself fitted them. When fitted, the Panels would, in most cases, comprise the entirety of the roof covering for the conservatory in question. No unwarranted assumption is indicated by the FTT's conclusion that the Panels so fitted constituted a "roof". We dismiss Greenspace's appeal on Ground 3.

Other errors alleged

64. The above sections have dealt with most of Greenspace's challenges to the Decision. Paragraph 20 of Greenspace's application for permission to appeal to this tribunal (which stands as its grounds of appeal following the grant of permission) set out further discrete errors of law that were said to be present in the Decision. We will now deal with those remaining issues, to the extent we have not already addressed them in the discussion above by reference to Greenspace's grounds of appeal.

(1) *Paragraph 20(1)*: The FTT did, throughout the Decision, incorrectly refer to Schedule 7A as containing an "exemption" from VAT rather than as applying a reduced rate. However, this was not material to the FTT's decision. Indeed, both parties are agreed that the same "strict" interpretation to exemptions from VAT should be applied to provisions providing for a reduced rate.

(2) *Paragraph 20(2)*: The FTT did incorrectly summarise the terms of the Thermotec patent in paragraph [82(5)]. However, that was not material to the FTT's decision, which was based on its evaluation that the Panels, once fitted, constituted a "roof".

(3) *Paragraph 20(10)*: Greenspace criticised the analogy of the igloo in paragraph [82(2)] but we consider that criticism misplaced. In that paragraph the FTT was considering (as Greenspace had asked it to do) whether its customers obtained a "new roof". In paragraph [82(2)] the FTT was simply saying that the absence of bolts or fixings shed little light on whether a "new" structure resulted since some new structures, such as igloos, require no bolts or fixings.

(4) *Paragraph 20(11)*: It was a matter for the FTT to decide how much weight to give to building control certificates issued by local authorities.

(5) *Paragraph 20(12)*: It was also a matter for the FTT to decide how much weight to give to evidence from Greenspace's survey of its customers as to the main purpose of the Panels.

(6) *Paragraph 20(14)*: The FTT was not bound to conclude that there would be a "perverse result" if Greenspace's supplies fell outside the scope of the reduced rate. The Upper Tribunal in *Wetheralds* itself noted that the difference between "roofs" and "insulation for…roofs" could give rise to fine distinctions.

Disposition

65. For these reasons we dismiss Greenspace's appeal.

Signed on Orignal

MR JUSTICE LEECH
JUDGE JONATHAN RICHARDS

RELEASE DATE: 22 November 2021