Neutral Citation: [2024] UKUT 00036 (TCC)

Case Number: UT/2022-000128

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing Venue: The Rolls Building,
Fetter Lane, London EC4A 1NL

STAMP DUTY LAND TAX – mixed use property – section 116 Finance Act 2003 – suitable for use as a dwelling – relevance of covenant in a lease not to use the premises for residential purposes – relevance of planning law restrictions – whether the FTT failed to take into account all relevant factors – enquiry into land transaction return – HMRC concluding that not mixed use property – absence of any claim for multiple dwellings relief in the return or an amended return – whether HMRC should have given the benefit of multiple dwellings relief when closing the enquiry

Heard on: 06 November 2023
Judgment date: 09 February 2024

Before

Judge Jonathan Cannan
Judge Vimal Tilakapala

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

DANIEL RIDGWAY

Respondent

Representation:

For the Appellants: Ross Birkbeck, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Michael Ripley, instructed directly by the Respondent

DECISION

INTRODUCTION

1. The appellants ("HMRC") appeal against a decision of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 29 April 2022 with neutral citation [2022] UKFTT 0412 (TC) ("the Decision"). The FTT held that the respondent ("Mr Ridgway") was entitled to multiple dwellings relief for the purposes of stamp duty land tax ("SDLT") on his purchase of property comprising land and buildings in Oxford ("the Property").

2. The Property comprised two separate registered titles. The first was a semi-detached house and gardens on Crick Road. The second was adjoining land and a building known as the Old Summer House which also had a separate access via Norham Road. The Old Summer House had originally been used as a garage and later as an artist's studio.

3. Mr Ridgway purchased the Property from its joint owners on 23 August 2017 for £6.5m. On advice from his solicitor, he had taken steps to reduce the SDLT payable on the purchase. He was advised that if the Old Summer House was in commercial use at the date of completion then "mixed use relief" could be claimed. In fact, this is not a relief as such but a lower rate of SDLT on commercial and mixed use property. Mr Ridgway was also advised that if there was no commercial use, then multiple dwellings relief could be claimed.

4. Two weeks prior to completion, at the instigation of Mr Ridgway, the vendors granted a commercial lease of the Old Summer House for a term of 6 months to a photographic studio business called Vine House Studios. The FTT incorrectly records this as a 9 month lease. Mr Ridgway had identified Vine House Studios as a potential commercial user of the Old Summer House. The lease contained a covenant that the Old Summer House should not be used for residential purposes.

5. Mr Ridgway submitted a land transaction return on 1 September 2017 in which it was stated that the Property was mixed use, part residential and part commercial. SDLT of £314,500 was paid at the lower non-residential rate. If SDLT had been paid at the residential rate it would have amounted to £888,750. With the benefit of multiple dwellings relief, the SDLT would have amounted to £577,500.

6. HMRC opened an enquiry into the land transaction return on 29 May 2018. A closure notice was issued on 8 February 2021. The closure notice stated HMRC's conclusion that the Old Summer House was residential property as defined in section 116 Finance Act 2003 ("FA 2003") because it was "*suitable for use as a dwelling*". The land transaction return was therefore amended to charge SDLT at the residential rate and without the benefit of multiple dwellings relief.

7. Mr Ridgway appealed against the amendment to his land transaction return on the basis that the Old Summer House was not residential property. In the alternative he said that if the Old Summer House was residential property, then he ought to be entitled to multiple dwellings relief pursuant to section 58D and Schedule 6B FA 2003.

8. The FTT held as follows:

   (1) The Old Summer House was not residential property because it was not suitable for use as a dwelling. In reaching that conclusion, the FTT took into account the physical attributes of the building and the existence and terms of the commercial lease. In particular the term which provided that it could not be used for residential purposes.

   (2) However, section 75A FA 2003 was engaged. The FTT considered that this required the actual land transaction and the grant of the lease to be disregarded in

calculating the amount of SDLT. Mr Ridgway was to be treated as having acquired the Property pursuant to a notional land transaction and the lower rate for mixed use property was not applicable to that notional land transaction.

(3) Multiple dwellings relief was available in relation to the notional transaction because the requirements of Schedule 6B were satisfied. There was no requirement for Mr Ridgway to claim that relief.

9. The effect of these findings was that the FTT allowed the appeal in part, with SDLT to be calculated at the residential rate but with the benefit of multiple dwellings relief.

10. We should say at this stage that we were told that neither party before the FTT submitted that section 75A FA 2003 was engaged and the point was not raised by the FTT at the hearing. The parties only became aware that the FTT considered that section 75A was engaged when the Decision was released. Mr Ridgway was acting in person before the FTT and HMRC were represented by their own litigator. Before us, both parties have been represented by counsel. We are sure that the FTT was intending to be fair to the parties in raising section 75A as a point of law. However, in circumstances where a significant issue has not previously been canvassed, fairness and justice demands that the FTT should indicate to the parties that it considers the issue to be relevant. A letter to the parties raising the issue and inviting written submissions would suffice.

11. On this appeal both parties acknowledge that section 75A is not engaged. We agree, for the reasons given below.

12. HMRC appeal with permission from the Upper Tribunal. Their grounds of appeal may be summarised as follows:

(1) The FTT erred in law in concluding that a private law obligation in a lease was capable of rendering an otherwise residential property, non-residential within the meaning of section 116.

(2) Alternatively, the FTT erred in law in treating the restriction against residential use in the lease as determinative, and failed to take into account the existence of planning obligations that restricted the use of the Old Summer House to residential use.

(3) The FTT erred in law in finding that section 75A FA 2003 was engaged.

(4) In any event, the FTT erred in law in finding that multiple dwellings relief was available in the absence of a claim for that relief in a land transaction return or an amendment to a land transaction return.

13. Mr Ridgway was also granted permission to appeal by the Upper Tribunal on Ground 3, albeit in slightly different terms. As stated, his position is that section 75A is not engaged. He contends that the FTT ought to have found that SDLT was payable at the non-residential rate, alternatively that the FTT was right to find that multiple dwellings relief was available.

14. We shall address the relevant statutory provisions and authorities when we come to consider each ground of appeal. First, we set out the FTT's findings of fact.

THE FTT'S FINDINGS OF FACT

15. The FTT provided a helpful chronology of events in relation to the transaction and HMRC's enquiry into the land transaction return:

Date	Transaction/event
09/08/17	Completion of the grant of the commercial lease

23/08/17	Completion of the land transaction
01/09/17	Filing of the land transaction return
09/02/18	Expiry of the commercial lease (recorded by the FTT as 9/05/18)
29/05/18	HMRC open enquiry into the land transaction return
22/09/18	Expiry of the time to amend return (recorded by the FTT as 23/08/18)
08/02/21	Closure notice issued
10/03/21	Notice of appeal and request for review 30 days after receipt of the closure notice
13/05/21	HMRC issue a review conclusion letter
12/06/21	Appeal notified to the Tribunal

16. The FTT made its principal findings of fact at [12] to [16] as follows:

> 12. Mr Ridgway was involved in finding Vine House Studios, a photographic studio business, to take a commercial lease of and occupy the Old Summer House as a studio for [6] months, at a rent.
>
> 13. The commercial lease granted to Vine House Studios restricted the use of the Old Summer House to commercial use, prohibited use as a dwelling and prohibited sub-letting.
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> 14. The Old Summer House was originally a garage. I observe from the photographs and plans that it has a section with a pitched roof which houses two rooms described as an office and a large storeroom with a corridor between them which has an outside door at one end with French doors and a large heptagonal space at the other end. The heptagonal room has a large heptagonal sky light in the roof. There is a kitchenette and shower room that form two sides of the heptagon on the lefthand side of the corridor. The doorway into the office, another set of French doors to the outside and a storeroom on the right-hand side of the corridor form three more sides of the heptagon. There is a window in the wall opposite the corridor which forms the seventh side of the heptagon.
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> 15. A photo of the interior of the heptagonal room shows that the window in the seventh side of the heptagon is likely to have been the original side window in the garage as it looks to be at least four feet from the floor. It is a very strange room. The plan states that the room's dimensions are 19 feet six inches and 16 feet five inches (I assume this means at the two most extreme points) but there are doorways on six of the seven sides of the room and the doorways are roughly the length of the side of the heptagon. The radiator occupies the side without a doorway. It is apparent why the Old Summer House has historically been used as an artist's studio and why Vine House Studios took the nine-month lease. In my view this would be a difficult space to use as a living room. A "corridor" would need to be left around the outside to be able to move from the kitchen to the toilet to the office and storerooms and the outside terrace etc, so the actual living space available for sitting and dining would be smaller than the dimensions suggest and there would seem to be no wall space for normal amenities of a living room and dining room such as bookcases, sideboard/dresser, TV, and record player. In my view this property is well suited for use as an artist's studio, although I have no doubt that absent the commercial lease, individuals would be able to occupy the Old Summerhouse as a dwelling.
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> 16. I find as a fact that the Old Summer House was not capable of being lawfully occupied as a dwelling at completion of the purchase of the Old Summer House owing to the existence of the commercial lease.

17. The FTT also made a finding of fact at [51(4)]:

> (4) Mr Ridgway was involved in identifying the Vine House Studios as a lessee of the Old Summer House and required that the agreement for disposal and acquisition of the properties was conditional on there being a commercial lease over the Old Summer House in place at completion.

18. We shall now consider each of the grounds of appeal.

Ground 1

19. Section 116 FA 2003 provides as follows:

> 116(1) In this Part "residential property" means –
>
> (a) a building that is used or suitable for use as a dwelling, or is in the process of being constructed or adapted for such use, and
>
> (b) land that is or forms part of the garden or grounds of a building within paragraph (a) (including any building or structure on such land), or
>
> (c) an interest in or right over land that subsists for the benefit of a building within paragraph (a) or of land within paragraph (b);
>
> and "non-residential property" means any property that is not residential property.
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> This is subject to the rule in subsection (7) in the case of a transaction involving six or more dwellings.

20. This appeal is concerned principally with section 116(1)(a). Residential property means a building which is actually used as a dwelling at the time of a land transaction as well as a building which is suitable for use as a dwelling. Section 116(7) provides that where six or more separate dwellings are the subject of a single transaction involving the transfer of a major interest or the grant of a lease over them, then the dwellings are treated as not being residential property.

21. For present purposes, the significance of the distinction between residential and non-residential property lies in the rate of SDLT. Section 55 FA 2003 makes provision for different rates of SDLT by reference to the "appropriate table" as follows:

> 55(1) The amount of tax chargeable in respect of a chargeable transaction to which this section applies is determined in accordance with subsections (1B) …
>
> (1B) … "The "appropriate table" is —
>
> (a) Table A, if the relevant land consists entirely of residential property, and
>
> (b) Table B, if the relevant land consists of or includes land that is not residential property.
>
> (3) For the purposes of subsection (1B) —
>
> (a) the relevant land is the land an interest in which is the main subject-matter of the transaction…

22. The FTT found at [49] that "*the terms of the Commercial Lease and the consequences of breach of the terms, render the Old Summer House not 'suitable for use' as a dwelling at the effective date*".

23. HMRC say that the FTT was wrong to have regard to the terms of the commercial lease in deciding whether the Old Summer House was suitable for use as a dwelling at the effective date of the transaction.

24. There is previous authority on the meaning of the word "dwelling" in the context of multiple dwellings relief. As set out below, Schedule 6B makes provision for multiple dwellings relief. Paragraph 7 defines what counts as a dwelling for the purposes of the relief. A building counts as a dwelling if it is "*suitable for use as a single dwelling*". The meaning of that phrase was considered by the Upper Tribunal in *Fiander and Bower v HM Revenue & Customs* [2021] UKUT 0156.

25. In *Fiander*, the land transaction concerned a detached property with an annex connected to the main house by a corridor. The property was unoccupied at the date of the transaction and in a state of disrepair. The FTT had found on the facts that the annex was not suitable for use as a single dwelling. The Upper Tribunal offered general guidance on the meaning of that phrase as follows:

> 48. We must therefore interpret the phrase giving the language used its normal meaning and taking into account its context. Adopting that approach, we make the following observations as to the meaning of "suitable for use as a single dwelling":
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> (1) The word "*suitable*" implies that the property must be appropriate or fit for use as a single dwelling. It is not enough if it is capable of being made appropriate or fit for such use by adaptations or alterations. That conclusion follows in our view from the natural meaning of the word "suitable", but also finds contextual support in two respects. First, paragraph 7(2)(b) provides that a dwelling is also a single dwelling if "it is in the process of being constructed or adapted" for use as single dwelling. So, the draftsman has contemplated a situation where a property requires change, and has extended the definition (only) to a situation where the process of such construction or adaption has already begun. This strongly implies that a property is not suitable for use within paragraph 7(2)(a) if it merely has the capacity or potential with adaptations to achieve that status. Second, SDLT being a tax on chargeable transactions, the status of a property must be ascertained at the effective date of the transaction, defined in most cases (by section 119 FA 2003) as completion. So, the question of whether the property is suitable for use as a single dwelling falls to be determined by the physical attributes of the property as they exist at the effective date, not as they might or could be. A caveat to the preceding analysis is that a property may be in a state of disrepair and nevertheless be suitable for use as either a dwelling or a single dwelling if it requires some repair or renovation; that is a question of degree for assessment by the FTT.
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> (2) The word "*dwelling*" describes a place suitable for residential accommodation which can provide the occupant with facilities for basic domestic living needs. Those basic needs include the need to sleep and to attend to personal and hygiene needs. The question of the extent to which they necessarily include the need to prepare food should be dealt with in an appeal where that issue is material.
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> (3) The word "*single*" emphasises that the dwelling must comprise a separate self-contained living unit.
>
> (4) The test is objective. The motives or intentions of particular buyers or occupants of the property are not relevant.
>
> (5) Suitability for use as a single dwelling is to be assessed by reference to suitability for occupants generally. It is not sufficient if the property would satisfy the test only for a particular type of occupant such as a relative or squatter.
>
> (6) The test is not "one size fits all": a development of flats in a city centre may raise different issues to an annex of a country property. What matters is that the occupant's basic living needs must be capable of being satisfied with a degree of privacy, self-sufficiency and security consistent with the concept of a single dwelling. How that is achieved in terms of bricks and mortar may vary.
>
> (7) The question of whether or not a property satisfies the above criteria is a multi-factorial assessment, which should take into account all the facts and circumstances. Relevant facts and circumstances will obviously include the physical attributes of and access to the property, but there is no exhaustive list which can be reliably laid out of relevant factors.

26. The arguments in *Fiander* concerned the significance of the physical separation of the main building and the annex and whether they were separate dwellings. The taxpayers argued that they were separate dwellings. Further, that the FTT had failed to take into account historic use of the annex, and that historically there had been no corridor linking it to the main building.

27. The guidance given in *Fiander* was endorsed by the Upper Tribunal in *Andrew and Tiffany Doe v HM Revenue and Customs* [2022] UKUT 2 (TCC); [2022] STC 287. In the course of summarising the guidance, the Upper Tribunal in *Doe* stated at [24(1)]:

> (1) The word "suitable" implies that the property must be appropriate or fit for use as a single dwelling. The status of a property must be ascertained from its physical attributes at the effective date of the transaction…

28. The Upper Tribunal went on to say at [48] that although the building in question was not in use as a dwelling at the effective date of the transaction, the FTT was entitled to take into account historic use in determining whether it was suitable for use as a dwelling.

29. It is worth noting that in neither of these cases was there any restriction on use, whether by reference to the freehold or leasehold title or by reference to permitted planning uses. The tribunals in question were concerned solely with the physical attributes of the relevant buildings and the actual or historical use.

30. In the present case, the FTT referred to *Fiander* and *Doe*. Its conclusion on the issue of whether the Old Summer House was suitable for use as a dwelling was set out at [47] – [49]:

> 47. The guidance in the UT decision in *Fiander* at [47] and [48] requires this Tribunal to apply a multi factorial test, consider all facts and circumstances, including the physical attributes of and access to the property. But the UT indicated that there is no "exhaustive list" which can be reliably laid out of relevant factors. The test is an objective one in each case.
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> 48. Looking at the physical attributes of the Old Summer House it has a kitchenette, a shower room (albeit that some repairs were needed) and two rooms that could be used as bedrooms. I have some concerns about the heptagonal area with the heptagonal skylight in the centre which make it eminently suitable to be an artists' or photographer's studio rather than a living room, but I accept that it would not be impossible to use it as a sitting and dining area.
>
> 49. However, as *Fiander* points out, this Tribunal must consider not just the physical attributes of the property but all the facts and circumstances. That requires this Tribunal to consider the existence and terms of the Commercial Lease granted to Vine House Studios and the restrictive covenants in that lease which prevented the Old Summer House from being used as residential accommodation. The lease was in place on 9 August 2017, two weeks before the effective date. If a person sought to use the property for residential purposes at the effective date, there would be a breach of the term of the lease which would result in forfeiture of the lease and the person seeking to occupy the property as a residential property would be liable to damages or injunctions. The terms of the Commercial Lease and the consequences of breach of the terms, render the Old Summer House not "*suitable for use*" as a dwelling at the effective date. Mixed Use Relief was available subject to the operation of section 75A and 75C FA 2003.

31. HMRC's case is that the FTT erred in law in finding that the existence of the restriction on residential use in the lease rendered the Old Summer House non-residential property. It is said that the existence of the restriction was not capable of rendering the property non-residential. The FTT ought to have had regard solely to the objective, physical characteristics of the building.

32. It is common ground that the test for whether a building is suitable for use as a dwelling is an objective test. Any intention the purchaser might have to put the building to a particular use is irrelevant. It is also common ground that in construing section 116(1)(a), we must interpret the statutory provision in the light of its purpose. In the present context, that involves ascertaining the characteristics of the buildings intended to be covered by the phrase "suitable for use as a dwelling", and considering whether the Old Summer House falls within that class of buildings (see *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2022] AC 690).

33. Mr Birkbeck submitted that in distinguishing between residential and non-residential buildings, Parliament intended to reflect their different roles in society and the actual physical and environmental characteristics of buildings as they exist in the real world. Parliament did not intend that regard was to be had to any private law restrictions on the use of a building. The reference to "suitable for use" ensures that it is not open to a purchaser to simply arrange for a building to be used commercially in order to obtain a lower non-residential rate of SDLT. The application of different rates of SDLT was not intended to be subject to the whim or arrangements of individual purchasers. The test involved looking at facts on the ground, not the existence of any private law interests.

34. Mr Birkbeck further submitted that contractual restrictions in a lease establish nothing more than the subjective intentions of the parties to the lease and are therefore irrelevant to the test of whether a property is suitable for use as a dwelling. Having said that, he acknowledged that some types of legal restriction may be relevant. For example, environmental restrictions on the use of land imposed by the state and which apply to everyone may be relevant factors. For present purposes however, the limit of his submission was that private law covenants involving a party to the land transaction cannot affect the status of the building. Otherwise, the transaction would be open to manipulation.

35. In support of those submissions, Mr Birkbeck suggested that the SDLT provisions generally make reference to what might be described as land law terminology, such as "interests in land", but also uses non-land law terminology, such as "building" and "residential property". Hence, section 55(3) defined the "relevant land" by reference to the physical land in which there was an interest. Similarly, he submitted that section 116(1)(a) and (b) use terminology that looks at the physical nature of the building or land, rather than interests in or rights over the land. The terminology used focuses largely on the objective, physical nature of the building and land.

36. We consider that Mr Birkbeck is seeking to put a gloss on the language of section 116(1)(a). Parliament has used simple, straightforward language to distinguish residential property and non-residential property. The focus in section 116(1)(a) is on whether the building in question is actually used as a dwelling at the time of the transaction and if not whether it is suitable for such use. In our view, suitability for use might involve consideration of a wide range of factors, including the physical attributes of the building but also any restrictions on use of the building, including legal restrictions. As Mr Birkbeck himself pointed out, there may be a range of legal restrictions on the use of a building. Private law restrictions, environmental law restrictions and planning restrictions. There is nothing in the words of section 116(1)(a) or in the context of FA 2003 as a whole which suggests that Parliament was concerned only with the physical suitability of the building for use as a dwelling. If that was Parliament's intent, it could easily have said so.

37. Nor do we consider that Parliament used the phrase "suitable for use" to ensure that parties to a transaction could not introduce private law legal restrictions to avoid SDLT. As Mr Ripley pointed out, when section 116 was introduced in 2003 as part of the SDLT regime, there was no difference between the rate of SDLT for residential and non-residential property save for very slight differences in the nil rate band. It was only in 2012 that the rate for residential property was significantly increased. Further, Parliament's treatment of mixed use property means that a small element of non-residential use leads to SDLT being calculated at the non-residential rate. Whilst Parliament anticipated that residential property might in the future be taxed at a different rate to non-residential property, we do not consider that section 116(1)(a) is an anti-avoidance provision as such. Parliament was simply concerned to distinguish buildings which were used or could be used as a dwelling, and other non-residential buildings. In doing so, it used an objective test of suitability for use, leaving the question of whether a

building was suitable for use as a dwelling to be determined on the facts of the particular case. It did not seek to distinguish private and public restrictions on use, or to treat them as irrelevant.

38. Mr Birkbeck relied heavily on the Upper Tribunal Decisions in *Fiander* and *Doe*, which he said properly focused on the objective, physical characteristics of the buildings in question. He accepted that the existence of a legal restriction, whether in a private law agreement or as a matter of public law, was an objective factor. However, he submitted that a private law contractual restriction reflected the subjective intention of the parties and could not be taken into account. It did not affect the character of the building. Otherwise, it would be open to all buyers to avoid the higher rate of SDLT on residential property by leasing part of it as an office or for another commercial use at the effective date of the transaction. This case is just such an example.

39. We consider that Mr Birkbeck is reading too much into those decisions. *Fiander* and *Doe* were concerned only with the physical attributes of the buildings in question because that was the principal issue between the parties. They are not authority for the proposition that it is only the physical attributes of a building that are relevant. Similarly, Mr Ripley submitted that the multi-factorial assessment referred to by the Upper Tribunal at [48(7)] should be viewed as encompassing non-physical attributes, including any restrictions on use of the building. We do not consider that these decisions support either party's submissions.

40. We were referred by Mr Ripley to the decision of the Upper Tribunal in *The How Development 1 Limited v HM Revenue and Customs* [2023] UKUT 84 (TCC). That case was concerned with section 116(1)(b) and whether land formed part of the garden or grounds of a residential building. The Upper Tribunal recognised that use for a commercial purpose was a relevant factor in determining whether land was part of the garden or grounds of a building. In that case the question was whether woodland sold with a large country house formed part of the grounds. There have also been a number of decisions of the FTT which have taken into account that use of the land in question was subject to commercial agreements in determining whether the land forms part of the grounds of a residential building. See for example, *Withers v HM Revenue and Customs* [2022] UKFTT 433 (TC), where part of the land in question was leased to a farmer for grazing, and *Faiers v HM Revenue and Customs* [2023] UKFTT 297 (TC), where there was a wayleave permitting an electricity pole and cables to be maintained on the land.

41. Mr Ripley submitted that these cases on section 116(1)(b) illustrate that legal rights and restrictions are relevant to the definition of residential property. However, they are not concerned with suitability for use as a dwelling. We can see that the existence of commercial agreements may be relevant in determining whether certain land is part of the grounds of a building, but it does not follow that they are relevant to the hypothetical question of whether a building is suitable for use as a dwelling. In our view they do not assist on the interpretation of section 116(1)(a).

42. In *The How Development 1 Limited* at [50], the Upper Tribunal described the word "grounds" in section 116(1)(b) as an ordinary English word that should not be given any extra-statutory gloss. We respectfully agree, and consider that the same can be said of whether a building is "suitable for use as a dwelling". Suitable is an ordinary English word. We should not read into the phrase words of limitation which it does not contain.

43. We recognise that it might not be easy to balance physical attributes against legal restrictions in carrying out the multi-factorial assessment required to determine whether a building is suitable for use as a dwelling. There may also be difficulty in balancing different types of legal restrictions. However, Mr Ripley accepted, rightly in our view, that the existence of a legal restriction would not be determinative, it would simply be one factor in the analysis.

We shall describe what we consider to be the proper approach to the balancing exercise when we come to consider Ground 2.

44. Mr Birkbeck was right to point out that whether a covenant in a lease will be enforced is in one sense subjective, in that it would be a matter for the landlord to decide whether to enforce the covenant. However, in our view, that does not mean that the existence of the covenant is to be ignored.

45. Similarly, the existence of a qualified covenant not to use a building as a dwelling without the consent of the landlord, not to be unreasonably withheld, would be a relevant factor. The FTT would be entitled to look at whether the building would be suitable for use as a dwelling despite the existence of the covenant. The weight to be attached to such a covenant would be a matter for the FTT.

46. We note that if a lease prohibits use as a dwelling, but the building is actually used as a dwelling at the time of the transaction then it will be residential property. The landlord may acquiesce in such use and waive the breach or may not be aware of the breach. The existence of the restriction is irrelevant in those circumstances, but that does not mean that it is irrelevant in considering suitability for use as a dwelling.

47. In our view, the existence of restrictions on use, whether by way of freehold or leasehold covenants, planning law or other legal restrictions, must form part of the multi-factorial analysis as to whether a building is suitable for use as a dwelling. Ultimately, it is a matter for the FTT to decide what weight to place on the relevant factors in determining the issue.

48. We are fortified in that conclusion by HMRC's publicly available internal guidance at SDLTM00380 which states as follows:

> Private/public legal conditions (including planning permission) affecting use are a factor in assessing suitability for use. However, although these may dissuade an occupier from using a building as a dwelling, they are not necessarily determinative of whether that building is suitable for use as a dwelling. This is particularly the case where there are restrictions in place which impact on use as a dwelling for only part of the year.

49. The guidance is not authoritative and we have not relied on it in reaching our conclusion. It is however entirely consistent with our conclusion.

50. Mr Ripley also relied for the purposes of this Ground on the fact that at the time of the transaction, the Old Summer House was actually being used as a photographic studio and therefore it could not be used as a dwelling. In our view, that fact is not relevant. The test is wholly objective and does not take into account that the only person entitled to occupy the building is a tenant. The question is whether the building was suitable for use as a dwelling by a hypothetical occupier, not whether it could actually be used as a dwelling at the time of the transaction.

51. For all these reasons, we do not consider that the FTT erred in law in taking into account the existence of a covenant against residential use in the lease.

Ground 2

52. HMRC say that if the FTT did not make any error of law in taking into account the restriction on residential use in the lease, then the FTT erred in failing to take into account the planning position. Namely that the Old Summer House could only be used for residential purposes.

53. The FTT recorded Mr Ridgway's submissions on the appeal at [41] – [43] and HMRC's submissions at [44]. Mr Ridgway's submissions included at [41(13)]:

(13) No planning permission was obtained to use the Old Summer House as a photographic studio. Mr Ridgway considers that this is irrelevant. Such use is not unlawful. The lack of planning permission is only unlawful if the local authority has issued an Enforcement Notice which is not complied with. Mr Ridway's (*sic*) solicitor and Oxford City Council confirmed this in August 2017. No Enforcement Notice was issued at the effective date or at all. HMRC's own guidance at SDLTM00475 confirms that planning permission is not determinative. HMRC accept that planning permission is not determinative in their Closure Notice.

54. HMRC's submissions included at [44 (10)]:

(10) There was no planning permission for the use of the property as a photographic studio. HMRC states that only residential use was lawful.

55. The FTT did not make any findings of fact as to the planning position in relation to the Old Summer House. When it came to consider the question of whether the Old Summer House was suitable for use as a dwelling at [45] – [50], there was no mention of the planning position. It is not clear why that should be the case, given that both parties addressed the planning position in their submissions. HMRC's statement of case had also addressed the planning position and described the planning history of the Old Summer House by reference to documents available online and which were in evidence before the FTT:

48. Planning permission records and summaries which are available online, in the public domain, show that in:

48.1. May 1956, an application was granted for a private garage and playroom to be built for the benefit of 29 Norham Road.

48.2. September 1979, conversion of the garage into a summerhouse garden workshop and conservatory was applied for and granted.

48.3. October 1996, an application was granted to certify that the existing use of the summerhouse as an independent residential unit is lawful.

49. From at least October 1996, a certificate of lawful use was issued permitting residential use of the property - which was the existing use at that time. This means that the planning permission for The Old Summerhouse was for residential use at the EDT.

50. The Respondents contend that the Lease could not change such extant planning permission at the EDT, and the planning permission is evidence that The Old Summerhouse was "*suitable for use as a dwelling*".

51. The Respondents have no evidence of permissions for use other than residential, nor has the Appellant provided such.

52. As planning consent permitted residential use at the EDT and the Lease could not change that consent regardless of the Permitted Use provisions, the Respondents contend however, that the physical characteristics of The Old Summerhouse are determinative for SDLT purposes.

56. Mr Ripley submitted that the FTT was entitled to attach no weight to the planning position. He argued that there was no "planning restriction" restricting use of the Old Summer House to residential use. Further, where there is a material change of use the local planning authority can, if it chooses, issue an enforcement notice. If it fails to do so within the statutory time limits then the use is automatically deemed to be lawful. He observed that there was no evidence of any enforcement action in relation to the Old Summer House, nor any evidence to suggest that it was likely. He pointed to the historic use of the Old Summer House as an artist's studio, inviting an inference that enforcement action was not likely.

57. As to the latter point, it does not appear that there was any evidence before the FTT that the use of the Old Summer House as an artist's studio was anything other than incidental to its residential use. Certainly, the FTT made no finding that there had been any history of commercial use of the Old Summer House.

58. The evidence before the FTT clearly established that there was planning permission for use as a summerhouse, garden workshop and conservatory. There was a certificate that use as an independent residential unit was lawful. Use as a commercial photographic studio pursuant to the lease was an unauthorised development for planning purposes. Mr Ripley did not suggest otherwise. It amounted to a breach of planning control laws and gave rise to the possibility of enforcement action by the local planning authority.

59. Mr Ripley submitted that there was nothing to suggest that the FTT did not take the planning position into account. The FTT referenced the parties' submissions and we can infer that it took those submissions into account.

60. We acknowledge that the FTT did record the parties' submissions on the planning position. However, the absence of any reasoning is a clear indicator that it did not take the planning position into account. If it had taken the planning position into account, it would have explained what weight it gave to the planning position, or why it gave no weight to the planning position. A failure to give reasons would itself have been a legitimate ground of appeal. See most recently, the Upper Tribunal in *United Grand Lodge of England v HM Revenue and Customs* [2023] UKUT 00307 (TCC) at [29] – [34].

61. We note that when the FTT refused permission to appeal on this ground it did so in terms which suggest both that the FTT considered the planning position to be irrelevant but also that it took into account the planning position when weighing up all the factors. The Judge stated as follows:

> I do not consider the absence of planning permission is a relevant criterion in this case nor a matter which would override the lease restrictions, in the way necessary in the making of the necessary factual determinations. The significance of the planning position was considered by me and is entirely a matter of fact reviewable only to the extent permitted by the Edwards v Bairstow principles. Lack of planning permission would only be problematical if an enforcement notice had been issued. No enforcement notice was issued. HMRC did not assert that an enforcement notice had been issued.

62. In so far as the FTT Judge was intending to give additional reasons for the Decision, we do not consider that those reasons are valid. In our view, for present purposes a breach of planning law is analogous to the breach of a covenant in a lease. The result of a breach is that the local planning authority or the landlord, as the case may be, has a discretion to take enforcement action. In the case of the planning authority, that could be by way of an enforcement notice or a stop notice. In the case of the landlord, it could be by way of forfeiture of the lease.

63. Overall, we are satisfied that the FTT did not take the planning position into account in deciding that the Old Summer House was not suitable for residential use.

64. We are satisfied that the FTT's failure to take into account the planning position was a material error of law in the Decision. In our judgment, the planning position was a relevant factor to take into account, for the same reasons that the covenant in the commercial lease was a relevant factor. We therefore set aside the FTT's decision that the Old Summer House was not suitable for use as a dwelling and will remake the decision.

65. Mr Ripley submitted that we should give little or no weight to the planning position because the local planning authority had not taken any enforcement action and there was no

evidence to suggest that enforcement action was likely. We do not consider that these are relevant factors. We are satisfied that Parliament intended suitability for use as a dwelling to be determined by reference to objective factors. The likelihood of a planning authority taking enforcement action or granting retrospective permission, would not be a relevant, objective factor. Similarly, the likelihood of a landlord seeking to enforce a covenant in a lease would not be relevant. It is the existence of the restrictions which are relevant factors, not the likelihood of enforcement.

66. In any event, the lease was concluded just two weeks prior to the date of the transaction and was for a term of 6 months. There is no finding as to when Vine House Studios commenced occupation of the Old Summer House or whether such occupation was likely to come to the notice of the local planning authority. In those circumstances, the absence of evidence to suggest that enforcement action was likely is not significant.

67. Mr Birkbeck made various submissions as to the evaluative exercise involved where legal restrictions on use are relevant factors:

> (1) The planning position carries more weight than the existence of the lease. Planning laws apply to everyone, objectively, whereas the lease is simply the agreement reached between the vendors and Vine House Studios. It is binding only between those two parties.
>
> (2) If a dwelling is built without planning permission or in breach of a condition attaching to the planning permission then it could still be treated as suitable for use as a dwelling.
>
> (3) In a case where a building is clearly physically suitable for use as a dwelling, legal restrictions are not relevant, or at least carry less weight.

68. In our view, it is not possible to generalise in this way. Each case must be considered on its own particular facts. In remaking the decision, we take into account the FTT's findings as to the physical attributes of the Old Summer House. Having looked at the plans and photographs of the building we consider that it was physically suitable for use as a dwelling. We agree with the FTT at [15] where it said it had "*no doubt that absent the commercial lease, individuals would be able to occupy the Old Summer House as a dwelling*".

69. The building itself had planning permission for use as an independent residential unit, by virtue of the certificate for lawful use. There was no history of any separate commercial use of the building, although we accept that it was suitable for such use. The only factor which might suggest that the Old Summer House was not suitable for use as a dwelling is the existence of the commercial lease and the restrictive covenant in that lease.

70. Mr Ripley acknowledged that the length of a lease might be a relevant factor and whether the building had been used in accordance with the terms of a lease. He suggested that if a building could clearly be used as a dwelling but a lease was entered into two weeks before a land transaction at a peppercorn rent then a tribunal might be entitled to say that the building was suitable for use as a dwelling. This effectively invites a tribunal to take a realistic view of the facts, and we agree that is what we should do. There is no suggestion that the rent for the Old Summer House was anything other than a commercial rent, but we take into account that the lease was entered into two weeks before the land transaction and was for a relatively short term of 6 months.

71. The position overall is that commercial use was restricted by planning law and residential use was restricted by the lease. We do not consider that this means that the Old Summer House was not suitable for any use for the purposes of section 116(1)(a). Both parties accepted that where a building was actually used as a dwelling at the time of the land transaction, section

116(a) would be satisfied even if that actual use was in breach of a legal restriction. On the facts of this case, it seems to us that the legal restrictions on use carry less weight in assessing suitability for use than the physical attributes of the building. There may be cases where legal restrictions carry particular weight in the overall analysis and lead to a conclusion that a building is not suitable for use as a dwelling, but this is not such a case. In the present case, where the legal restrictions are effectively inconsistent, it is the physical attributes which are dominant. We are satisfied that the Old Summer House was suitable for use as a dwelling at the effective date of the land transaction.

Ground 3

72. Both parties agree that the FTT was wrong to find that section 75A FA 2003 was engaged in the circumstances of Mr Ridgway's transaction. We agree, and state our reasons quite briefly.

73. Section 75A was enacted to counter tax avoidance where a number of transactions are used to effect the disposal and acquisition of a chargeable interest. In broad terms, it applies where those transactions result in a reduced liability or no liability to SDLT compared to a notional transaction in which the chargeable interest is acquired directly by the purchaser. Where section 75A is engaged, any of the scheme transactions which amount to land transactions are disregarded and there is deemed to be a notional land transaction by which the chargeable interest is transferred. The chargeable consideration for that notional transaction is the largest amount given or received by any person by way of consideration for the scheme transactions.

74. Section 75A has a heading "Anti-avoidance", but it does not require any tax avoidance motive to be engaged (see *Project Blue v HM Revenue and Customs* [2018] UKSC 30 at [42]). The circumstances in which it is engaged are set out in section 75A(1):

> (1) This section applies where —
>
> (a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,
>
> (b) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition ("the scheme transactions"), and
>
> (c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.

75. The FTT held that the requirements of section 75A(1) were satisfied. It is common ground and we agree that sub-sections 1(a) and (b) are satisfied. The vendors disposed of a chargeable interest in the Property to Mr Ridgway. There were a number of transactions involved in connection with that disposal, namely the execution of the lease and the transfer of the freehold.

76. We agree with the parties that sub-section 1(c) is not satisfied. To explain why, we must identify the amount of SDLT payable on the notional transaction referred to in section 75A(1)(c).

77. Section 75A(4) sets out the effect where the conditions in section 75A(1) are satisfied:

> (4) Where this section applies —
>
> (a) any of the scheme transactions which is a land transaction shall be disregarded for the purposes of this Part, but

(b) there shall be a notional land transaction for the purposes of this Part effecting the acquisition of V's chargeable interest by P on its disposal by V.

78. The chargeable consideration in respect of the notional transaction is defined in section 75A(5):

(5) The chargeable consideration on the notional transaction mentioned in subsections (1) (c) and (4)(b) is the largest amount (or aggregate amount) —

(a) given by or on behalf of any one person by way of consideration for the scheme transactions, or

(b) received by or on behalf of V (or a person connected with V within the meaning of section 1122 of the Corporation Tax Act 2010) by way of consideration for the scheme transactions.

79. The amount paid for the Property by Mr Ridgway was £6.5m, which was also the amount received by the vendor. There was no finding that the vendor received any additional amount under the lease. The chargeable consideration for both the scheme transactions and for the notional transaction was therefore £6.5m. Accordingly, the SDLT payable on the scheme transactions and the notional transaction would be the same, whether or not the relevant land was residential property or non-residential property.

80. The FTT appears to have considered that in calculating the amount of SDLT payable on the notional transaction for the purposes of section 75A(1)(c), the existence of the lease was to be disregarded. As a result, the SDLT payable on the notional transaction would be calculated on the basis that the Property was residential property. It would therefore be greater than the SDLT payable on the scheme transactions which the FTT had found would be calculated on the basis that the Property was mixed use property.

81. The FTT thereby applied the disregard in section 75A(4)(a) in order to see whether section 75A was engaged. However, the disregard in section 75A(4)(a) only applies where section 75A is engaged. The FTT was wrong to apply the disregard in considering whether section 75A(1)(c) was satisfied. Section 75A(1)(c) simply requires a comparison between the SDLT payable on the scheme transactions and the SDLT payable on the notional land transaction. The Property was either residential property or non-residential property pursuant to section 116 for the purposes of all those transactions.

82. In the circumstances, it is not necessary for us to have regard to section 75A in re-making the decision.

Ground 4

83. Ground 4 concerns the availability of multiple dwellings relief. It arises because in re-making the decision of the FTT we have found that the Property was residential property.

84. The FTT considered the availability of multiple dwellings relief in the context of calculating SDLT on the notional transaction required to be considered where section 75A is engaged. We have found that section 75A is not engaged which means that the FTT's analysis at [51(10)] of the Decision is no longer in point. However, it is Mr Ridgway's case that when HMRC closed their enquiry into his land transaction return, if the Property was residential property he ought to have been given credit for multiple dwellings relief.

85. This issue did not specifically fall within the grounds of appeal of either party, but it was raised in Mr Ripley's skeleton argument. Both parties were content for us to address it. In so far as necessary we permit Mr Ridgway to amend his grounds of appeal to raise the issue.

86. The starting point is section 58D, which introduces multiple dwellings relief as follows:

> 58D(1) Schedule 6B provides for relief in the case of transfers involving multiple dwellings.
>
> (2) Any relief under that Schedule must be claimed in a land transaction return or an amendment of such a return.

87. It is common ground that if the Property was residential property, the conditions set out in Schedule 6B were satisfied. Broadly, Schedule 6B applies where the main subject-matter of a chargeable transaction consists of an interest in at least two dwellings (paragraph 2 Schedule 6B). In this case the main house and the Old Summer House.

88. A building counts as a dwelling where it is "*suitable for use as a single dwelling*" (paragraph 7). Where multiple dwellings relief applies, SDLT is calculated in accordance with paragraphs 4 and 5 of Schedule 6B. Broadly the relief can lower the rate of SDLT by splitting the chargeable consideration between each dwelling and calculating the SDLT payable as if there were separate land transactions for each dwelling. It is subject to a minimum SDLT charge of 1% on the total chargeable consideration.

89. HMRC say that in accordance with section 58D(2), multiple dwellings relief is only available where it has been claimed in a return or an amendment to a return. In this case, Mr Ridgway made no such claim and no relief is available.

90. Mr Ridgway completed his land transaction return on the basis that the Property was non-residential property. There is no provision in the prescribed form of land transaction return whereby a claim can be made in the alternative to the treatment which the taxpayer has adopted in the return. It was therefore not open to Mr Ridgway to make a claim for multiple dwellings relief in the return whilst maintaining his case that the Property was non-residential property. Further, the time for amending the return expired on 22 September 2018. That was some three months after HMRC's enquiry had been opened, but well before the closure notice was issued on 8 February 2021. Mr Ridgway made no amendment to his return.

91. In his notice of appeal to HMRC dated 10 March 2021, Mr Ridgway stated:

> If a tribunal were to rule that [the Property] was "suitable for use" as residential accommodation on 23rd August 2017 then I believe that Multiple Dwellings Relief would apply to the transaction.

92. HMRC's review letter dated 13 May 2021 refused multiple dwellings relief on the basis that Mr Ridgway had not made a claim in the return or in an amendment to the return.

93. The FTT found at [26] – [32] that at the time of the transaction, Mr Ridgway and his solicitor understood from HMRC guidance that where a building was in use at the effective date of a transaction then that use would determine whether it was residential property or not. The FTT found at [32] that if Mr Ridgway had known that HMRC had changed its view on this then he would have amended his return to claim multiple dwellings relief.

94. Mr Ripley submits that no claim for relief is required where HMRC amend a land transaction return following an enquiry. HMRC should give effect to the relief in their closure notice notwithstanding there has been no claim pursuant to section 58D(2). If HMRC fail to give effect to the relief then the FTT has jurisdiction to do so on an appeal against the closure notice.

95. We start by setting out various provisions of FA 2003 which are relevant to the parties' submissions. Firstly, section 76 provides for the duty to deliver a land transaction return:

> *76 Duty to deliver land transaction return*
>
> (1) In the case of every notifiable transaction the purchaser must deliver a return (a "land transaction return") to the Inland Revenue before the end of the period of 30 days after the effective date of the transaction.
>
> …
>
> (3) A land transaction return in respect of a chargeable transaction must —
>
> > (a) include an assessment (a "self-assessment") of the tax that, on the basis of the information contained in the return, is chargeable in respect of the transaction, and
> >
> > (b) be accompanied by payment of the amount chargeable.

96. The following provisions of Schedule 10 FA 2003 are relevant to the parties' submissions, including provisions whereby HMRC may open an enquiry into a land transaction return and issue a closure notice. Schedule 10 also contains provisions for repayment of overpaid tax and for appeals against closure notices:

> *Contents of return*
>
> 1(1) A land transaction return must —
>
> > (a) be in the prescribed form,
> >
> > (b) contain the prescribed information, and
> >
> > (c) include a declaration by the purchaser (or each of them) that the return is to the best of his knowledge correct and complete.
>
> *Amendment of return by purchaser*
>
> 6(1) The purchaser may amend a land transaction return given by him by notice to the Inland Revenue.
>
> …
>
> (3) Except as otherwise provided, an amendment may not be made more than 12 months after the filing date.
>
> *Notice of enquiry*
>
> 12(1) The Inland Revenue may enquire into a land transaction return if they give notice of their intention to do so ("notice of enquiry") —
>
> > (a) to the purchaser,
> > (b) before the end of the enquiry period.
>
> (2) The enquiry period is the period of nine months —
>
> > (a) after the filing date, if the return was delivered on or before that date;
>
> …
>
> *Scope of enquiry*

13(1) An enquiry extends to anything contained in the return, or required to be contained in the return, that relates —

(a) to the question whether tax is chargeable in respect of the transaction, or

(b) to the amount of tax so chargeable.

Amendment of return by taxpayer during enquiry

18(1) This paragraph applies if a return is amended under paragraph 6 (amendment by purchaser) at a time when an enquiry is in progress into the return.

(2) The amendment does not restrict the scope of the enquiry but may be taken into account (together with any matters arising) in the enquiry.

Completion of enquiry

23(1) An enquiry under paragraph 12 is completed when the Inland Revenue by notice (a "closure notice") inform the purchaser that they have completed their enquiries and state their conclusions.

(2) A closure notice must either —

(a) state that in the opinion of the Inland Revenue no amendment of the return is required, or

(b) make the amendments of the return required to give effect to their conclusions.

(3) A closure notice takes effect when it is issued.

Claim for relief for overpaid tax etc

34(1) This paragraph applies where —

(a) a person has paid an amount by way of tax but believes that the tax was not due, or

(b) a person has been assessed as liable to pay an amount by way of tax, or there has been a determination to that effect, but the person believes that the tax is not due.

(2) The person may make a claim to the Commissioners for His Majesty's Revenue and Customs for repayment or discharge of the amount.

(3) Paragraph 34A makes provision about cases in which the Commissioners for His Majesty's Revenue and Customs are not liable to give effect to a claim under this paragraph.

Cases in which Commissioners not liable to give effect to a claim

34A(1) The Commissioners for His Majesty's Revenue and Customs are not liable to give effect to a claim under paragraph 34 if or to the extent that the claim falls within a case described in this paragraph.

(2) Case A is where the amount paid, or liable to be paid, is excessive by reason of —

(a) a mistake in a claim or election, or

(b) a mistake consisting of making or giving, or failing to make or give, a claim or election.

Making a claim

34B(1) A claim under paragraph 34 may not be made more than 4 years after the effective date of the transaction.

Right of appeal

35(1) An appeal may be brought against —

(a) …

(b) a conclusion stated or amendment made by a closure notice …

Assessments and self assessments

42(1) In this paragraph any reference to an appeal means an appeal under paragraphs 33(4) or 35(1).

(2) If, on an appeal notified to the tribunal, the tribunal decides —

(a) that the appellant is overcharged by a self-assessment; or

(b) that the appellant is overcharged by an assessment other than a self assessment,

the assessment shall be reduced accordingly, but otherwise the assessment shall stand good.

97. *Candy v HM Revenue and Customs* [2022] EWCA Civ 1447 concerned a claim for repayment of SDLT where a contract for the sale of land was substantially performed resulting in a liability to SDLT by virtue of section 44(4) FA 2003. In the event, the contract was not subsequently carried into effect because there was a novation. Section 44(9) provided that in those circumstances the tax should be repaid but that repayment had to be claimed by way of an amendment to the land transaction return. However, the novation was entered into after the 12 month time limit for amending the land transaction return in paragraph 6(3). The FTT accepted the taxpayer's argument that the time limit in paragraph 6(3) applied "except as otherwise provided" and that section 44(9) did otherwise provide that there was no time limit. The Upper Tribunal rejected that argument and upheld HMRC's appeal.

98. It was common ground in the Court of Appeal that at least one of the purposes of section 44 was to deal with a stamp duty avoidance technique whereby a sale of land "rested in contract" with no conveyance. However, Parliament recognised the potential for section 44 to operate unfairly where there was substantial performance of a contract which was not subsequently completed. The purpose of section 44(9) was to provide a safeguard. It reads as follows:

(9) Where subsection (4) applies and the contract is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect, the tax paid by virtue of that subsection shall (to that extent) be repaid by the Inland Revenue.

Repayment must be claimed by amendment of the land transaction return made in respect of the contract.

99. The Court of Appeal noted at [47] that SDLT was a self-assessed tax and that there were strict time limits for delivering returns, making amendments to returns and opening enquiries into returns:

> 47. The SDLT scheme operates as a self-assessed tax: section 76 FA 2003. Taxpayers are required to complete a return and include a self-assessment to tax in the return. There are strict time limits for delivering returns: at the material time returns had to be submitted 30 days after the effective date of the transaction (that period is now 14 days). Returns must comply with the requirements of Schedule 10 FA 2003, including the time limits imposed for amending returns in paragraph 6(3), and those imposed on HMRC for opening an enquiry in paragraph 12. As Mr Afzal [for HMRC] emphasised, the self-assessment system imposes hard-edged deadlines, both on taxpayers and HMRC, for the sound administration of the tax system and to achieve certainty and finality. If HMRC make no enquiry and a taxpayer has not amended his or her return once the time limits have expired, the self-assessment return becomes final. So, if HMRC fail to open an enquiry in time, the correct amount of tax will not be recoverable by HMRC in respect of an insufficient self-assessment (unless the case falls within the exceptions in Part 5 Schedule 10 FA 2003, which has its own time limits). Likewise, if a taxpayer has mistakenly overpaid tax or been subject to an excessive assessment but made no in time amendment, the tax cannot be reclaimed unless Part 6 Schedule 10 FA 2003 provides a remedy.

100. The Court of Appeal did not accept the taxpayer's construction of section 44(9) as having the effect of dispensing with the time limit in paragraph 6(3). It stated at [50]:

> 50. Nor can I see any rational reason why Parliament would have wished to dispense altogether with the generally applicable time limit in paragraph 6(3), enabling taxpayers to make claims for repayment without any time limit, even decades later when memories may have faded and documents relating to the original land transaction may have been lost. There is nothing inconsistent in Parliament providing a right to reclaim tax paid as a safeguard for innocent taxpayers caught by the widely worded charge in section 44(4), but at the same time making that right subject to clear procedural rules, including time limits on the right to reclaim payment. It is of the essence of a self assessment system that tax effects can be undone by administrative failure and merely meeting the substantive conditions for the grant of a relief is rarely enough to secure that a taxpayer receives the relief in question. Where the relief requires a claim, and the claim is not made in accordance with any procedural requirements, the taxpayer will not be given the relief.

101. Mr Ripley's submission that no claim is required in the circumstances of this case was based on certain provisions in Schedule 10. His core submission was that when HMRC closes an enquiry, it can give effect to a claim for multiple dwellings relief which the taxpayer wishes to make, even though the claim was not made in accordance with section 58D. If HMRC were able to give effect to such a claim, it follows that the Tribunal can also give effect to the claim on an appeal against the closure notice. In making that submission, he referred us to the following provisions in Schedule 10.

102. Paragraph 13(1) provides that HMRC's enquiry into a return extends to anything "required to be contained in the return". Mr Ripley did not seek to argue that because a claim was required to be contained in a return it was therefore within the scope of HMRC's enquiry. His submission was that HMRC's amendment to the return in their closure notice ought to have given effect to multiple dwellings relief, which engages the jurisdiction of the FTT to give effect to the relief. However, that begs the question of whether HMRC were required to give effect to the relief in the absence of a claim in accordance with section 58D.

103. Paragraph 18 provides that where the taxpayer amends a return in time, but after an enquiry has been opened, then the amendment and any matters arising out of the amendment may be taken into account in the enquiry. We do not consider that this paragraph assists in determining whether HMRC were required to give effect to the relief in the absence of a claim.

104. Mr Birkbeck referred us to paragraph 23, which provides that when HMRC issue a closure notice on completion of the enquiry, the closure notice can make amendments to the return to give effect to their conclusions. We accept his submission that HMRC's conclusions are impliedly restricted by the scope of the enquiry, which is anything contained in the return or required to be contained in the return. A claim for multiple dwellings relief is at the option of the taxpayer and as such it is not required to be contained in the return. The scope of the enquiry does not extend to a claim for relief which has not been made.

105. As Mr Birkbeck pointed out, multiple dwellings relief is optional. It may not always be beneficial for a taxpayer to claim the relief. By way of illustration, if a taxpayer purchases 6 or more dwellings, section 116(7) provides that the dwellings will be treated as non-residential property. However, this is subject to any claim for multiple dwellings relief in which case the residential rate applies. It may or may not be beneficial to claim multiple dwellings relief at the residential rate rather than rely on the rate of SDLT applicable to non-residential property. We do not consider that HMRC would be required to give effect to relief in such circumstances in the absence of a claim.

106. Paragraph 42(2) provides that if on an appeal the tribunal decides that the appellant is overcharged by a self-assessment, then the assessment shall be reduced accordingly. Mr Ripley acknowledged that this does not apply where the overcharge is caused by something outside the scope of the appeal. He submitted that entitlement to the relief was within the scope of the appeal to the FTT because the appeal was made pursuant to paragraph 35(1)(b) and was against an amendment made by the closure notice. However, the amendment was made by HMRC and did not relate to multiple dwellings relief. We cannot see therefore that entitlement to multiple dwellings relief was within the scope of the appeal.

107. At our invitation, the parties made submissions on a recent decision of the FTT in *L-L-O Contracting Limited v HM Revenue & Customs* [2023] UKFTT 859 (TC) ("LLO"). In that case, the taxpayers made their land transaction returns and paid SDLT. They subsequently sought to claim multiple dwellings relief. However, the claims were not made in the returns or by way of amendment to the returns. We assume that is because the taxpayers were out of time to amend their returns. Instead, they submitted "free-standing claims" pursuant to paragraph 34 for relief for overpaid tax which has a 4 year time limit. HMRC refused the claims on the basis that they were not required to give effect to the claims because they fell within Case A in paragraph 34A(2). Case A includes where the amount of tax paid is excessive by reason of failing to make a claim.

108. HMRC applied to strike out the appeals and the FTT determined various preliminary issues on that application. The FTT described the issues and summarised its conclusion that the appeals should be struck out because they had no reasonable prospect of success at [7] – [9]:

> 7. The purpose of this hearing was to decide the preliminary issues, which were as follows:
>
> > Issue 1(a): Whether Sch 10, para 34 allows a claim to be made for overpayment relief notwithstanding s 58D.
> >
> > Issue 1(b): Whether as a result of s 58D(2), a person who failed to amend his return for MDR has not "overpaid" any SDLT.

Issue 2: Whether HMRC were not liable to give effect to a repayment of SDLT because Case A applied.

8. The parties agreed that the answer to Issue 1(a) was "yes", and they also agreed that if HMRC won either of the other two Issues, the strike out applications succeeded.

9. I decided Issue 1(b) in favour of the Appellants, but found that HMRC succeeded on Issue 2. As a result, there is no reasonable chance of the Appellants' appeals succeeding, and they are struck out.

109. Issue 1(b) is relevant for present purposes and it is described more fully at [18] as follows:

If the answer to part (1)(a) is 'yes', whether, as a matter of law, an overpayment of SDLT can arise for the purposes of a claim for overpayment relief pursuant to paragraph 34 of Schedule 10, Finance Act 2003 from the purported availability of MDR, in light of the provisions of Section 58D(2) Finance Act 2003 and in the absence of a claim to MDR in a return or an amendment to a return.

110. The reasoning of the FTT in deciding that there was an overpayment of SDLT even without any claim pursuant to section 58D was as follows:

21. In my judgment, the answer to this issue can be found in paras 34 and 34A, which operate as follows:

(1) A claim can be made under para 34 if a person believes they have overpaid SDLT, see Issue 1(a).

(2) Para 34(3) then provides that HMRC do not have to consider claims which come under the Cases set out in para 34A,

(3) Case A applies where "the tax paid is excessive" including where a taxpayer failed to make a claim or election, see para 34A(2).

(4) The words "is excessive" only make sense if the SDLT has been overpaid. If, as HMRC submitted, in this situation there was no overpayment because by virtue of s58D(2) the MDR was nil, the SDLT would not be "excessive".

22. I therefore decide Issue 1(b) in favour of the Appellants, and find that where a person has failed to claim MDR in accordance with s 58D(2), an SDLT overpayment can arise for the purposes of a claim for overpayment relief under para 34. The answer to Issue 1(b) is therefore "yes".

111. Mr Ripley relied on the FTT's conclusion in LLO as being persuasive on the question of whether Mr Ridgway had been overcharged by his self-assessment following the amendment in HMRC's closure notice.

112. LLO was not concerned with the position where HMRC had enquired into an SDLT return and issued a closure notice without giving credit for multiple dwellings relief. Paragraph 34 does not actually use the term "overpaid", although the preliminary issue which the FTT was determining appears to use the term as a shorthand for an amount of tax which has been paid but which was not due. The heading to paragraph 34 uses a similar shorthand. The FTT was therefore considering whether the taxpayers had paid an amount of tax which was not due.

113. The FTT held that the reference in Case A to the amount paid being "excessive" by reason of a mistake in not making a claim, meant that an amount could be paid when it was not due despite the absence of a claim pursuant to section 58D.

114. We understand that the decision in LLO is the subject of an application for permission to appeal and Mr Birkbeck submitted that on this point it had been wrongly decided. It is not necessary for us to express any view on the reasoning of the FTT on Issue 1(b). The fact an amount of tax has been paid which was not due for the purposes of paragraph 34, does not mean that a taxpayer in the circumstances of Mr Ridgway has been overcharged by his amended self-assessment for the purposes of paragraph 42. Paragraph 34 is a broad provision intended to rectify injustice where a taxpayer believes that an amount of tax has been paid which was not due. It has an exclusion for cases where the overcharge arises as a result of failing to make a claim. Paragraph 42 is concerned with the position where a tribunal has determined that a taxpayer has been overcharged by a self-assessment, the effect of which is that the assessment is reduced accordingly. In our view, Mr Ridgway was not overcharged by the self-assessment in the amended return because the self-assessment charged the right amount of tax, taking into account that Mr Ridgway had made no claim to multiple dwellings relief and where there was no obligation on HMRC to give effect to the relief in the absence of a claim.

115. Mr Ripley pointed to what he said were undesirable consequences if HMRC were not required to give effect to multiple dwellings relief in closing their enquiry. He submitted that taxpayers would be in a difficult position. Taxpayers in the position of Mr Ridgway may be encouraged to forgo the correct treatment to ensure that they at least have the benefit of multiple dwellings relief. If HMRC were to challenge the availability of multiple dwellings relief, the taxpayer could still assert that the non-residential rate should apply because that would not require a claim.

116. We accept that HMRC's position might be said to give rise to unfairness to taxpayers in the position of Mr Ridgway. In our view, the answer to that lies in what the Court of Appeal said in *Candy*. SDLT is a self-assessed tax which imposes hard-edged deadlines. Where a relief requires a claim, and a claim is not made in accordance with any procedural requirements, the taxpayer will not be entitled to relief. In the present context, section 58D(2) is clear that relief "must" be claimed in a return or an amended return. The relevant facts were known to Mr Ridgway at the time he made his return. He made an error in concluding that the Property was non-residential property. The absence of any provision for Mr Ridgway to make a claim out of time or during the course of an enquiry is consistent with the benefit of certainty and finality referred to by the Court of Appeal in *Candy*.

117. Mr Ripley also submitted that there would be far-reaching consequences in relation to enquiries and claims concerning direct taxes which were governed by similar provisions in the Taxes Management Act 1970. We were not taken to any specific provisions, but in any event we are concerned solely with the statutory regime for SDLT.

118. We are satisfied therefore, albeit for reasons which were not canvassed before the FTT, that the FTT was wrong to allow the appeal in part and reduce the self-assessment by reference to multiple dwellings relief.

DISPOSITION

119. For the reasons given above we allow HMRC's appeal and set aside the decision of the FTT. We have re-made the decision and dismiss Mr Ridgway's appeal against the amendment to his self-assessment made by the closure notice.

JUDGE JONATHAN CANNAN
JUDGE VIMAL TILAKAPALA

Release date: 09 February 2024