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UT (Tax & Chancery) Case Number: UT/2021/000183

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Remotely via Microsoft Teams

Heard on: 27 October 2022
Judgment: 15 November 2022

STAMP DUTY LAND TAX – Multiple dwellings relief – whether buildings in process of being constructed for use as dwellings – no - effective date of transaction – whether activities undertaken after time of completion of transaction relevant to determining chargeable interest acquired – no - appeal dismissed

Before

JUDGE JONATHAN RICHARDS
JUDGE PHYLLIS RAMSHAW

Between

LADSON PRESTON LIMITED (1)
AKA DEVELOPMENTS GREENVIEW LIMITED (2)

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Patrick Cannon, Counsel, instructed by Goldstone Tax Limited

For the Respondents: Ben Elliott, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue & Customs

DECISION

1. The appellants ("LPL" and "AKA") appeal against a decision (the "Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 7 July 2021. By the Decision, the FTT held that neither appellant was entitled to multiple dwellings relief ("MDR") when determining the amount of stamp duty land tax ("SDLT") due on acquisitions of land that they had effected.

The relevant aspects of the SDLT regime

2. SDLT is chargeable, by s42 of the Finance Act 2003 ("FA 2003"), on a "land transaction" which, in turn, is defined, by s43, as any acquisition of a "chargeable interest".

3. It is common ground that both appellants acquired chargeable interests so as to trigger a charge to SDLT. The phrase "chargeable interest" is defined, pursuant to s48(1) as:

> (a) an estate, interest right or power over land in England or Northern Ireland, or
>
> (b) the benefit of an obligation, restriction or condition affecting the value of any such estate, interest, right or power (other than an exempt interest)

4. By s49 of FA 2003, land transactions are treated as "chargeable transactions", so that they are within the charge to SDLT, unless they are exempt. No question of exemption arises in these proceedings.

5. Section 55 of FA 2003 deals with rates of SDLT. Where a chargeable transaction consists entirely of "residential property" then SDLT is chargeable at potentially higher rates than those applicable to transfers of non-residential or mixed use property. Still higher rates of SDLT are chargeable on "higher rates transactions" involving dwellings by Schedule 4ZA of FA 2003. We do not need to set out in full the definitions of "residential property" and "dwelling" that apply for these purposes, but note only that those definitions are worded very similarly to those found in paragraph 7 of Schedule 6B of FA 2003 on which the appellants rely as conferring entitlement to MDR.

6. Sometimes the SDLT legislation invites an analysis of the precise nature of a chargeable interest that is acquired. MDR is an example of such a provision since that relief operates if the "main subject-matter" of a land transaction is of a particular nature. Section 43(6) of FA 2003 contains the following definition:

> (6) References in this Part to the subject-matter of a land transaction are to the chargeable interest acquired (the "main subject-matter"), together with any interest or right appurtenant or pertaining to it that is acquired with it.

It can be seen that the definition of "main subject-matter" in s43(6) of FA 2003 simply focuses on the chargeable interest acquired without requiring an analysis of the significance of that chargeable interest in comparison with other property

7. Section 119 of FA 2003 defines the concept of the "effective date" of a land transaction which is used throughout the SDLT legislation for the purposes, among others, of determining when SDLT has to be paid. We need not set out the full provisions that determine the effective date and just point out the following aspects of the definition that are common ground between the parties:

> (1) Section 119 specifies an effective <u>date</u> but does not expressly specify a <u>time</u> on that date.
>
> (2) In the circumstances of these appeals, the effective date was the date of completion of the relevant land transactions.

(3) However, had the circumstances been different, s119 and other provisions of the SDLT might have specified a different effective date. For example, both appellants acquired their respective chargeable interests pursuant to a contract. Had those contracts been "substantially performed" before completion, s44(4) of FA 2003 could have treated the contracts themselves as being land transactions whose effective date was the date of substantial performance. That possibility is of no direct relevance in the circumstances of these appeals (given the parties' agreement on paragraph (2) above). However, we mention s44(4) since it has some bearing on our later analysis of relevant statutory provisions.

8. SDLT is normally charged as a percentage of the "chargeable consideration" given for the chargeable interest acquired or, if multiple interests are acquired, the aggregate chargeable consideration given for all such interests. However, if MDR is validly claimed, then instead of using the total consideration for the transaction to determine the SDLT due, an alternative method of computation is used. This method involves dividing the total consideration payable for the transaction by the number of dwellings on the property. The amount of SDLT that would be payable on the quotient is then multiplied by the number of dwellings. It might be thought that this alternative calculation would have no effect on the amount of SDLT payable since the process involves first dividing, and then multiplying by the number of dwellings. However, since lower value acquisitions attract SDLT at lower rates, the process usually results in a lower effective rate of tax overall, but the effective rate of tax cannot fall below 1%.

9. The conditions for MDR are set out in Schedule 6B of FA 2003. To qualify for MDR, a chargeable transaction must fall within either paragraph 2(2) or 2(3) and must not be excluded by paragraph 2(4). Since the parties agreed that the circumstances set out in paragraph 2(3) cannot be met, and nor is the exclusion in paragraph 2(4) applicable, we set out only paragraph 2(2) which provides as follows:

> (2) A transaction is within this sub-paragraph if its main subject-matter consists of—
>
> (a) an interest in at least two dwellings, or
>
> (b) an interest in at least two dwellings and other property.

10. Central to the operation of MDR, therefore, is the concept of an "interest in" a "dwelling". Paragraph 2(5) provides that:

> (5) A reference in this Schedule to an interest in a dwelling is to any chargeable interest in or over a dwelling.

11. Paragraph 7 of Schedule 6B contains definitions that are at the heart of this appeal:

> **7 What counts as a dwelling**
>
> (1) This paragraph sets out rules for determining what counts as a dwelling for the purposes of this Schedule.
>
> (2) A building or part of a building counts as a dwelling if—
>
> (a) it is used or suitable for use as a single dwelling, or
>
> (b) it is in the process of being constructed or adapted for such use.
>
> …
>
> (4) Land that subsists, or is to subsist, for the benefit of a dwelling is taken to be part of that dwelling.

(5) The main subject-matter of a transaction is also taken to consist of or include an interest in a dwelling if—

(a) substantial performance of a contract constitutes the effective date of that transaction by virtue of a relevant deeming provision,

(b) the main subject-matter of the transaction consists of or includes an interest in a building, or a part of a building, that is to be constructed or adapted under the contract for use as a single dwelling, and

(c) construction or adaptation of the building, or the part of a building, has not begun by the time the contract is substantially performed.

…

(7) Subsections (2) to (5) of section 116 apply for the purposes of this paragraph as they apply for the purposes of subsection (1)(a) of that section.

The decision of the FTT and the grounds of appeal against it

12. References to numbers in square brackets in the remainder of this decision are to paragraphs of the Decision unless specified otherwise.

The FTT's findings of fact

13. None of the FTT's findings of primary fact is challenged. The relevant facts as applicable to LPL's acquisitions are as follows:

(1) LPL acquired the freehold interest in land in Preston under a contract dated 2 June 2017. Completion took place on 15 June 2017 which was the effective date for SDLT purposes ([6]).

(2) Prior to completion, on 14 February 2017, Preston City Council had, on LPL's application, granted LPL planning permission for the erection on the property of two four-storey buildings containing 218 flats and commercial space on the ground floor. That planning permission remained in force at all material times ([7]).

(3) At completion, the property in question was bare land. After the effective date, LPL erected the two buildings containing the flats in accordance with the planning permission ([8]).

(4) LPL treated its acquisition in its land transaction return as an acquisition of non-residential property. It subsequently amended its return so as to claim MDR ([9] and [10]).

14. The relevant facts as applicable to AKA's acquisitions are as follows:

(1) AKA acquired the freehold interest in land in Waltham Abbey under a contract dated 6 November 2018. Completion took place at the same time with the date of completion constituting the effective date for SDLT purposes.

(2) Prior to completion, Epping Forest District Council granted planning permission for the demolition of existing commercial buildings on the property and the erection of nine detached dwellings. That planning permission remained in force at all material times.

(3) On the date of completion, there were various structures and buildings on the land. The FTT summarised the evidence of Kevin Edge, managing director of AKA, on the nature of the buildings as follows ([28]):

> On 6 November 2018, the completion date, the site was a scaffolding yard with unmade ground covered in crushed concrete, sufficient to make a temporary road for works and

> vehicles to drive on. The site was also covered in temporary buildings made of scaffolding and covered in tin sheets as well as temporary office buildings.

(4) All of the structures described in (3) above were for commercial use. None was suitable for use as a dwelling ([30]).

(5) Before the date of completion, AKA had, with the vendor's permission dug several bore holes in the ground on the property "to test the makeup of the ground" ([29]).

(6) On the very day of completion, but after the transaction had completed, AKA commenced work for the removal of the existing buildings. The FTT summarised Mr Edge's evidence on the nature of those works as follows ([28]):

> On the day of completion, Mr Edge and others turned up and commenced the clearance of the temporary office buildings and demolition of the tin sheeted scaffold buildings. The demolition was started with the debris being left on site for removal and also some being reused for the groundworks.

(7) AKA initially computed its SDLT liability on the basis that the property it acquired was "residential" and it claimed MDR. It subsequently amended its return, claiming that the property was "mixed use" ([20] and [21]) but maintained its claim for MDR.

The FTT's conclusions and reasoning

15. We will not summarise the entirety of the FTT's reasoning, but rather will address aspects of it when we express our own conclusions, in the section that follows, on the appellants' grounds of appeal. For present purposes it is sufficient to note that the FTT reached the following key conclusions on the proper construction of the relevant provisions of FA 2003.

16. At [91] to [93], the FTT noted that paragraph 2(2) of Schedule 6B provides for MDR to be available only where the "main subject-matter" of a transaction consists of an interest in two or more dwellings, possibly with other property. The statutory definition in s43(6) of FA 2003 links the definition of the "main subject-matter" to the chargeable interest being acquired which led the FTT to conclude:

> 92. The Tribunal therefore concludes that anything that is to count as a "dwelling" pursuant to paragraph 7 Schedule 6B (including a dwelling in the process of being constructed) must be something in respect of which a chargeable interest can be, and is, transferred from the seller to the purchaser as, or as part of, the subject matter of the transaction that is subject to SDLT.

17. LPL had argued that, even though, on completion, it had acquired only "bare land", the grant of planning permission prior to the effective date was part of the process of constructing the dwellings. Therefore, argued LPL, it had acquired an interest in dwellings that were in the process of being constructed for the purposes of paragraph 7(2)(b) of Schedule 6B and so qualified for MDR.

18. The FTT's conclusion that we have summarised in paragraph 16 above led it to reject that argument. It considered the nature of planning permission and concluded at [94] that it was not something that could be transferred from the seller to LPL. Moreover, the FTT noted at [95] that LPL had itself obtained that planning permission and so would have the benefit of it even if it had not acquired property from the vendor. Both of these points led the FTT to conclude that the planning permission could not form part of the "main subject-matter" of the transaction and so had no bearing on whether LPL was acquiring an interest in two or more dwellings. It followed that, since LPL was just acquiring "bare land", it was not acquiring any interest in dwellings and so was not entitled to MDR ([94] to [97]).

19. AKA advanced the same argument, based on pre-existing planning permission, which the FTT rejected for identical reasons (see [114]).

20. The site that AKA acquired consisted of more than just "bare land", by contrast with the site acquired by LPL. AKA argued that the bore holes on the land that had been drilled before the effective date and the clearance and demolition work that AKA had started on the effective date itself both formed part of the process of construction of dwellings so that AKA satisfied the requirements of paragraph 7(2)(b) of Schedule 6B by acquiring an interest in dwellings that were in the process of being constructed.

21. The FTT rejected AKA's arguments based on the bore holes reasoning as follows:

> 117. As to the bore holes that were present on the property on the EDT [the expression the FTT used to refer to the "effective date"], these were the consequence of activities undertaken by AKA itself in advance of the EDT, albeit presumably with the permission of the seller. AKA's activities in digging the bore holes are similar to the kinds of non-physical activities of a buyer referred to in paragraphs 87 and 96 above, in the sense that they are not something title to which the seller transferred to AKA as part of the subject matter of the transaction that is subject to the SDLT. The bore holes certainly cannot be characterized as the main subject matter of the property transaction between the seller and AKA.

22. The parties are agreed that there is an error of law in [117] since, whether dug by AKA or the vendor, the boreholes were indisputably physically present on the chargeable interest that was transferred to AKA.

23. The FTT also dismissed AKA's arguments based on the works conducted on the effective date itself concluding, at [116]:

> 116. As to the works undertaken by the Appellant on the land on the day of the EDT after the transaction for its purchase had been completed, the Tribunal finds that works undertaken on the property after the transaction was completed cannot have formed part of the subject matter of the transaction (within the meaning of paragraph 2(2) Schedule 6B FA 2003), even if they were performed on the very day of the EDT.

24. Before the FTT, LPL advanced a fall-back argument to the effect that even if it had not acquired interests in dwellings by virtue of paragraph 7(2)(b) of Schedule 6B, it satisfied the necessary conditions by virtue of paragraph 7(4). AKA also advanced challenges to the validity of a closure notice that HMRC had issued following the completion of their enquiry into AKA's SDLT return. The FTT determined both of these issues against the appellants and since neither appellant seeks to challenge these aspects of the Decision, we will not set out the FTT's reasons for doing so.

The grounds of appeal against the Decision

25. With permission granted by the Upper Tribunal, the appellants appeal against the Decision on the following grounds:

> (1) The FTT erred in law at [88] to [97] of its decision in its analysis of the combined effect of paragraphs 7(2)(b) and 2(2) of Schedule 6B Finance Act 2003
>
> (2) The FTT erred in law in its conclusion as to the relevance and significance of planning permission.
>
> (3) In relation to AKA's appeal, the FTT erred in law in its assessment of the relevance of the bore holes

(4) In relation to AKA's appeal, the FTT erred in law in deciding that actions taken after the time of completion but on the effective date of the transaction were not relevant.

Discussion

The proper interpretation of paragraph 7(2)(b) of Schedule 6B

26. At the heart of the parties' disagreement on Grounds 1 to 3 is a dispute about the proper construction of paragraph 7(2)(b) of Schedule 6B and we therefore start with that issue.

27. The appellants' position is that the focus of paragraph 7(2)(b) is on what they describe as the "process of construction" (which they use as a shorthand for the concept of a "building in the process of being constructed for use as a single dwelling" which is the statutory definition as relevant in these proceedings once all relevant parts of paragraph 7(2) are collapsed into a single expression). That "process of construction" is not confined to the physical process of constructing the building itself, but also includes activities carried on as a prelude to actual construction, including non-physical activities such as the grant of planning permission that was necessary for both appellants to undertake their proposed construction works lawfully. Since both appellants acquired land on which a process of construction was ongoing, paragraph 7(2)(b) resulted in the presence of "deemed dwellings". The requirements of paragraph 2(2)(b) were met because the appellants acquired an interest in at least two dwellings (namely the deemed dwellings arising by operation of paragraph 7(2)(b)) together with other property with the result that MDR is available.

28. HMRC argue for a more restrictive interpretation of paragraph 7(2)(b) as requiring a physical manifestation of a building being in the "process of being constructed for use as a single dwelling". It is argued that the appellant errs by referring to the "process of construction". The statutory definition requires all aspects of paragraph 2(2) to be satisfied. There must be a building that is in the process of being constructed and it must be for use as a dwelling. HMRC also point out that it is somewhat unusual for taxpayers to be arguing for an expansive definition of the concept of a "building in the process of being constructed for use as a single dwelling", with HMRC arguing for a more restrictive definition. Very similar wording appears in the definition of "residential property" in s116 of FA 2003 and in the definition of "dwelling" in paragraph 18 of Schedule 4ZA of FA 2003. Often, satisfaction of either of these definitions will result in SDLT being charged at additional or higher rates so in other cases it might be expected that the roles would be reversed with taxpayers arguing for a more restrictive interpretation of similar statutory definitions and HMRC arguing for an expansive definition.

29. We note the oddity to which HMRC refer. It is perhaps a consequence of the fact that, in these appeals, the appellants argue that they are not subject to the additional or higher rates of SDLT applicable to "residential property" or second dwellings, but that they are still entitled to MDR. We agree with the appellants that the oddity HMRC have identified has no direct impact on the task of statutory construction which we must perform. If the appellants' interpretation truly is the correct one, it will not cease to be correct simply because other taxpayers might find themselves paying more SDLT than they had hoped. That said, it is permissible for us to consider, when considering the competing interpretations of paragraph 7(2)(b) that the parties advance, what effect those interpretations would have on the application of similarly worded definitions in order to determine the meaning that Parliament truly intended.

30. The words of paragraph 7(2)(b) are not to be considered in isolation. Their true meaning needs to take into account the statutory context in which they appear. In our judgment it is relevant to note that SDLT is a tax imposed on transactions that include the transfer of a chargeable interest in land. Taxpayers are required to file an SDLT return, and pay any SDLT due, within 14 days of the effective

date of the relevant transaction. Of course, there is always the possibility for the tax treatment of particular transactions to be unclear or uncertain. However, the architecture of the tax suggests that it is intended to be capable of straightforward application with liability not depending on a detailed factual enquiry on matters that might be uncertain such as relevant persons' subjective intentions as to the future use of the land.

31. Paragraph 7(2)(b) is not the operative provision that provides for MDR to be available. The operative provision is found in paragraph 2. In the context of these proceedings, the operative provision is engaged if the "main subject-matter" of the chargeable transaction in question consists of an interest in at least two dwellings and other property. As noted in paragraph 6, the "main subject-matter" is simply a reference to the chargeable interest acquired.

32. In summary, the question whether MDR is available involves an analysis of the "chargeable interest acquired" and whether that chargeable interest consists of an interest in at least two dwellings and other property. Paragraph 7(2)(b) explains what is to count as a "dwelling" for these purposes but is not the provision that itself confers MDR. In our judgment it is significant that the relevant question on which availability of MDR depends involves an examination of the nature of the chargeable interest that is acquired.

33. The appellants' case involves the proposition that the application of paragraph 7(2)(b) in the present case results in the creation of a "deemed dwelling" that is sufficient to satisfy the requirements of paragraph 2. We agree with the parties that the debate on the proper construction of paragraph 7(2)(b) is not greatly advanced by an analysis of whether the paragraph is a "deeming provision" (as the appellants argue) or a "definitional provision" (as HMRC argue). That is simply a debate about labels, whereas the proper question is what the relevant provisions mean. However, in our judgment, the appellants' contention that paragraph 7(2)(b) is a "deeming provision", which is normally understood as a provision that treats a particular thing as being something that it is not, or as treating particular circumstances as existing, when they do not, serves as an introduction to the flaws in their interpretation of paragraph 7(2)(b).

34. We agree with HMRC that the appellants' approach just summarised, "shorthand" though it was expressed to be, overlooks key parts of the statutory test. Paragraph 7(2)(b) does not focus just on whether particular activities can be described as part of a "process of construction". The true position is that paragraph 7(2)(b) is part of a wider definition of what is to count as a "dwelling" that is used to answer the question posed by paragraph 2(2)(b) which involves a consideration of the nature of the chargeable interest acquired.

35. Before addressing the detailed wording of paragraph 7(2)(b), we can deal briefly with an argument that the appellants make on the purpose of the relevant provision. The appellants argue that paragraph 7(2)(c) should be interpreted expansively to achieve the intended Parliamentary purpose. Specific reliance is placed on the Explanatory Notes to the Finance (No. 3) Bill 2011 in which it was stated that MDR was being enacted to strengthen demand for residential property to be achieved by reducing barriers to investment in residential property thereby promoting the supply of private rented housing. We reject that argument. We are quite prepared to accept that Parliament enacted MDR to reduce barriers to investment in residential property. However, that statement sheds no light on how paragraph 7(2)(b) is to be applied in the circumstances of this case.

36. Having introduced the context in which paragraph 7(2)(b) must be addressed, it is now appropriate to consider carefully the precise words of that provision. Paragraph 7(2)(b) forms part of the analysis of the nature of the chargeable interest that is required by paragraph 2(2)(b). The question is whether that chargeable interest consists of an interest in at least two dwellings and other property.

Focusing only on those parts of the definition that are relevant to these appeals paragraph 7(2)(b) provides that:

> A building … counts as a dwelling if … it is in the process of being constructed … [for use as a single dwelling]

37. HMRC are correct to observe that this is a "composite phrase". Significantly it includes the concept of a "building", whether that building is "in the process of being constructed" and the use to which the building will be put. Each aspect of that composite phrase informs the proper interpretation of the totality of it. The appellants' approach suffers from the considerable defect that it focuses on what it terms the "process of construction" and so overlooks other indications of meaning that can be drawn from the rest of the composite phrase.

38. When paragraph 7(2)(b) is considered in its proper context, there is a clear indication that it is referring to some physical manifestation of a dwelling on the relevant land. The most obvious indication comes from the use of the word "building". We agree, of course, that paragraph 7(2)(b) does not require that there be a completed building since it is concerned with buildings that are in the "process of being constructed". However, in our judgment, a "building" can only be said to be "in the process of being constructed" if there is some physical manifestation of what is ultimately to become that "building". Without such a physical manifestation, there might well be an intention to construct a future building, perhaps even a firm intention, but no building that is in the process of being constructed.

39. In our judgment, the interpretation set out in paragraph 38 is supported by a consideration of paragraph 7(5) of Schedule 6B. That paragraph deals with a different situation from that arising in these appeals namely where a contract for a land transaction is substantially performed so that the date of substantial performance is the "effective date" for SDLT purposes rather than the date of completion (which was the effective date in both appeals). Paragraph 7(5) is therefore concerned with what are generally described as "off-plan" purchases. It provides, in essence, that if the main subject matter of the contract is a building that "is to be constructed or adapted … for use as a single dwelling" then provided that construction of that building is provided for under the contract, the main subject matter is taken to consist of an interest in a dwelling. Significantly, this treatment is only available where construction or adaptation of the building has not begun by the date of substantial performance.

40. Although paragraph 7(5) deals with a different situation, its drafting is instructive. Where construction, "has not begun" (see paragraph 7(5)(c)) then the building can only be described as a "building that is to be constructed" (in paragraph 7(5)(b)). That tends to support the conclusion that Parliament means that there is a distinction between a building that "is to be constructed" and a building that is "in the process of being constructed" with a physical manifestation of the construction work being necessary for the latter.

41. It is also instructive to consider how the legislation would operate if steps such as the obtaining of planning permission, or other steps that resulted in no physical manifestation of the intended dwelling, were sufficient to constitute a dwelling falling within paragraph 7(2)(b). As HMRC point out, it is quite possible for multiple planning permissions to exist over the same land. If relevant land has the benefit of planning permission for development both as a dwelling and as office space, paragraph 7(2)(b) provides no clear means of determining whether, on the appellants' case, the building that is in the "process of being constructed" is a dwelling or an office. Conceivably that question could be resolved by looking at the subjective intentions of the purchaser but that does not sit comfortably with the need for certainty and speed in the determination of the SDLT liability that we have highlighted in paragraph 30. Moreover, a test that is based on the subjective intentions of the

purchaser is some way removed from the test that Parliament has enacted which, as we explain in paragraph 34, invites an analysis of the nature of the chargeable interest acquired.

42. A consideration of the consequences of the appellants' argument reinforces that interpretation. The logic of the appellants' case is not limited in its application to planning permission. On the appellants' case other preliminary steps such as the engagement of architects could, if accompanied by a sufficiently firm intention, conceptually start a "process of construction". Moreover, the logic of the appellants' position is that this would apply to the definition of "residential property" in s116 of FA 2003 which is worded almost identically to paragraph 7 of Schedule 6B and to paragraph 18 of schedule 4ZA which is identically worded. The amount of SDLT chargeable on residential property is greater for residential property (section 55) and higher rates may apply on the purchase of a second or multiple dwellings (schedule 4ZA). Therefore, on the appellants' case, a taxpayer acquiring bare land with some hope or expectation of constructing a dwelling on that land would need to conduct a careful audit of that hope or expectation to ascertain whether a "process of construction" has commenced so that SDLT is chargeable at higher rates. Potentially large amounts of SDLT would depend on the outcome of a largely subjective examination. Moreover, since HMRC would have no direct knowledge of a taxpayer's subjective intentions, the only way they could check whether higher rate SDLT is payable would involve opening an enquiry into the land transaction return and asking detailed questions about the taxpayer's intention. We see no reason why Parliament should have intended such an outcome in the context of a tax with the hallmarks we have described above.

43. We accept of course, that a physical manifestation of construction works cannot of itself be enough to satisfy the requirements of paragraph 7(2)(b). For example, even if foundations and the beginnings of a wall are present on a piece of land, it is still necessary to consider whether there is building that is in the process of being constructed for use as a single dwelling. However, we do not consider that question raises any of the difficulties we have outlined in paragraphs 41 and 42. The final use of the building will, in most cases, be capable of being demonstrated by reference to the planning permission granted, where relevant, architect's plans or similar.

44. Our first conclusion on the question of construction, therefore, is that the grant of planning permission for the construction of dwellings on bare land is not in itself enough to satisfy the requirements of paragraph 7(2)(b) because, properly construed, paragraph 7(2)(b) requires some physical manifestation on the land before it can be said that there is a building in the process of being constructed for use as a single dwelling.

45. The next logical question is what kind of physical manifestation is required. In his oral submissions on behalf of the appellants, Mr Cannon showed us "wiki pages" consisting of commentary by, among other bodies the Institution of Civil Engineers, on the scope of various terms relating to construction used in various building and other regulations. He also showed us extracts from other statutory provisions in, for example, the Town and Country Planning Act 1990 that explain when development is treated as commencing. Those submissions were made in support of the appellants' argument that the "process of construction" should be interpreted broadly as including activities preparatory to the commencement of actual construction work such as the demolition of existing buildings and the obtaining of planning permission which we have already discussed.

46. We consider, however, that the reliance on the wiki pages and other statutory provisions was misplaced. As we have explained, paragraph 7(2)(b) does not simply require an examination of whether a particular activity can, at a high level of generality, be described as part of a "process of construction". Rather, the question in essence is whether there was a building in the process of being constructed for use as a dwelling on the chargeable interest acquired. Once the actual statutory words are appropriately focused on, it is clear that the physical manifestation required by paragraph 7(2)(b)

must be of the very building that is in the process of construction for use as a dwelling, rather than simply of something that can be described, at a high level of abstraction, as being part of a process of construction.

47. In his oral submissions, Mr Cannon argued that, even before physical construction of dwellings actually starts, a developer might be expected to erect hoardings on land recording the grant of planning permission and showing an attractive picture of the expected final development. People walking past such hoardings might note to themselves that the developer is "building houses" demonstrating, he argued, the arbitrariness of any requirement in paragraph 7(2)(b) for actual construction to have started. We reject that submission. As we have explained, paragraph 7(2)(b) does not focus on how people might be expected to describe proposed construction works. Rather, the question is whether there is a building, in the process of being constructed for use as a dwelling, physically present on the land.

48. Beyond our conclusions set out above, we do not consider it would be appropriate to set out any guidance on what precise physical manifestation of the building in the process of construction for use as a dwelling is required by paragraph 7(2)(b). Later in this decision, we will set out some conclusions on how paragraph 7(2)(b) applies to the boreholes on AKA's property, but those conclusions will simply represent what we consider to be an application of the correct statutory test to the facts of AKA's acquisition. Future FTTs considering similar issues will therefore be required to answer questions of fact and degree in the light of the correct construction of paragraph 7(2)(b).

Grounds 1 and 2

49. It follows from our conclusion in paragraph 44 above that the FTT made no error in concluding that the grant of planning permission to the appellants was insufficient to enable the requirements of paragraph 7(2)(b) of Schedule 6B to be met. Ground 2 accordingly fails.

50. The FTT reached its overall answer on the planning permission in part by reference to its conclusion, set out at [94] to [97], that planning permission was not something that was transferred from the vendors of the relevant land to the appellants and related conclusions. We have reached the same overall answer as the FTT as a consequence of our decision on the proper interpretation of paragraph 7(2)(b). Since that was the issue on which the parties focused most of their submissions, we heard little oral argument as to the correctness or otherwise of the FTT's reasoning set out at [94] to [97]. In those circumstances, we decline to express any view on Ground 1 as, whether or not the FTT did err at [94] to [97], there can be no effect on the overall outcome of the Decision.

Ground 3

51. As we have explained in paragraph 22 above, both parties agree that the FTT erred in law at [117]. In our judgment there were two errors. First, the boreholes were physically present on the chargeable interest transferred to AKA. The question was not who dug those boreholes but rather whether they were a physical manifestation of a building that was in the process of being constructed for use as a dwelling. Second, the FTT was wrong to conclude that the boreholes were too insignificant to constitute the "*main* subject matter" (with the FTT's emphasis). Given the definition in s46(3) of FA 2003, the "main subject-matter" of a transaction is simply a reference to the chargeable interest transferred. Since the FTT's errors were material to its conclusion on the boreholes, we will set aside that aspect of the Decision.

52. We have considered carefully whether we can remake the FTT's decision by applying what we consider to be the correct statutory test to the FTT's findings relating to the boreholes. The FTT made few factual findings relating to the boreholes beyond reciting evidence that Mr Edge of AKA gave at

[28] and [29]. The FTT cannot be criticised for this. Mr Edge's witness statement before the FTT ran to just six paragraphs extending to just half a page. The totality of his evidence on the boreholes in his witness statement was reproduced word for word at [28] and consisted of the following:

> In the days prior to completion, we dug a number of bore holes across the site and in particular around the proposed building foundation areas which form part of the initial groundworks design and investigation.

53. The FTT recorded, at [29], that in his oral examination in chief, Mr Edge confirmed that the boreholes had been dug "to test the make up of the ground".

54. If Mr Edge had changed his evidence in cross-examination, we are sure that the FTT would have said so in its careful and detailed decision. Therefore, we proceed on the basis that the only evidence as to the nature of the boreholes is as summarised above.

55. There is no suggestion that the boreholes were to form part of the buildings that were to be constructed on the site. They were dug "around" the proposed building foundation areas. We did wonder briefly about the grammar of Mr Edge's witness statement and what precisely it was that formed part of "initial groundworks design and investigation". It is difficult to see how "foundation areas" could be part of something that constitutes "design and investigation" and therefore we can only conclude that it was the boreholes themselves that formed "part of the initial groundworks design and investigation". That impression is confirmed by the FTT's record of Mr Edge's oral evidence-in-chief at [29].

56. We conclude, therefore, that the boreholes did not form part of the proposed building or its foundations. Rather, their function was to test the ground so that the construction work, when it commenced, would proceed in a manner appropriate to that kind of ground. If AKA had wished to suggest that the boreholes were to form part of the building or its foundations, it bore the burden of establishing that, but did not choose to attempt to discharge that burden.

57. Those findings as to the nature of the boreholes lead us to the clear conclusion that they did not represent any physical manifestation of a building that was in the process of construction for use as a dwelling. On the contrary, they represented the outcome of testing operations that would determine the nature of future construction works.

58. We conclude that the presence of the boreholes, whether alone or together with other physical aspects of the land in question, was incapable of meeting the requirements of paragraph 7(2)(b). Therefore, while we have set aside the FTT's conclusion on the boreholes because it was vitiated by an error of law, we remake that decision so as to lead to the same end result as that arrived at by the FTT.

Ground 4

59. Ground 4 is a challenge to the FTT's conclusions at [116] which relate only to AKA. The essence of AKA's argument is that the FTT was wrong to conclude that works undertaken after the time of completion were irrelevant to AKA's entitlement to MDR. That, AKA submits, follows from the fact that the definition of "effective date" in s119 of FA 2003 specifies a whole day and not just the part of a day ending with completion. The definition, therefore, is of an "effective date" and not an "effective time" with the result that all works incurred on the effective date, whether before or after completion, are relevant to the availability of MDR.

60. In support of that argument in his oral submissions, Mr Cannon took us through various provisions within the SDLT regime in which the concept of an "effective date" appeared, explaining

how those provisions referred to the entirety of a day and anomalies that might arise if they were construed as dealing with a snapshot in time.

61. We agree with HMRC, however, that paragraph 2 of Schedule 6B, the provision that confers MDR, does not refer to the effective date of a transaction at all, with the result that debates about whether the definition of "effective date" in s119 specifies the entirety of a day, or a point in time, have no bearing on the availability or otherwise of MDR in the circumstances of these appeals.

62. Rather, as we have noted, paragraph 2 asks a question about the nature of the chargeable interest that AKA acquired. Moreover, in the circumstances of these appeals, the effective date of the transactions was the date on which the relevant land transactions completed (as there is no question of s44 of FA 2003 operating so as to treat the date of substantial performance as being the effective date). The chargeable interest that AKA acquired was the chargeable interest as it stood at the very time of completion. That conclusion depends, not on any definition of "effective date" but on an analysis of the nature of the chargeable interest acquired which is required by paragraph 2(2) of Schedule 6B.

63. We acknowledge that the question might be more complicated if s44 treats an effective date as arising on the date of substantial performance and that between that date and the date on which the land is actually conveyed, construction of a dwelling commences. It may well be that entitlement to MDR in that case would depend simply on whether the requirements of paragraph 7(5) of Schedule 6B are met, but we will express no conclusion on that issue since we do not need to do so. In the circumstances of this appeal, where the effective date is the date of completion, the FTT made no error of law in concluding that it should apply the requirements of paragraph 2(2) of Schedule 6B by reference to the chargeable interest as it stood at the time of completion, that being the chargeable interest that AKA acquired.

64. In those circumstances, we see no reason to express any conclusion on whether the works undertaken after completion were, as a matter of evaluation, capable of satisfying the requirements of paragraph 7(2)(b) of Schedule 6B. The FTT, rightly in our judgment, saw no need to express any such conclusion and we do not consider that it would be right for the first evaluative conclusion on those works to come from an appellate tribunal such as us in the absence of an error of law by the FTT.

Disposition

65. The appeals on Grounds 2 and 4 are dismissed.

66. There is no need for us to determine Ground 1 and we decline to do so.

67. The FTT erred in law as the appellants submit under Ground 3. We set aside the parts of the Decision dealing with the boreholes. However, we remake that part of the Decision so as to leave the result unchanged: the presence of the boreholes did not, whether alone or together with other aspects of the chargeable interest that AKA acquired, result in AKA's acquisition qualifying for MDR.

68. The parties indicated that the Decision was a "decision in principle" and that the final amount of SDLT properly chargeable may remain in dispute between them. By [123] of the Decision, the FTT granted the parties permission to ask the FTT to resolve any remaining issues that they could not agree between themselves. Therefore, in our judgment, the proceedings before the FTT remain live. The parties should apply to the FTT if they consider further issues need to be determined in order to dispose of the FTT proceedings.

JUDGE JONATHAN RICHARDS
JUDGE PHYLLIS RAMSHAW

RELEASE DATE: 17 November 2022