TC02398

Appeal number: TC/2011/10182

VAT – DIY housebuilders' scheme – residential conversion of non-residential building into a building designed as a dwelling – planning condition imposed requiring the premises to be "occupied in a manner wholly ancillary to the residential use of the main dwelling"…. and not to be "used or occupied in any way as a separate dwelling" – conversion completed and then new planning permission obtained for use of the conversion as a separate dwelling – whether condition contained in note (2)(c) to Group 5, Schedule 8 VATA94 satisfied in relation to the conversion – whether later planning permission remedied the apparent failure to satisfy that condition

FIRST-TIER TRIBUNAL
TAX CHAMBER

MORGAN ANDREW RUSSELL ARTHUR **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
MOHAMMED FAROOQ

Sitting in public in Priory Court, Bull Street, Birmingham on 20 November 2012

Alan Rashleigh of Alan Rashliegh & Co for the Appellant

Harriet Jones, Presenting Officer of HMRC, for the Respondents

DECISION

Introduction

1. This appeal concerns a claim by the Appellant for a refund of VAT incurred by him in connection with the conversion of an old agricultural barn into a dwelling. The amount involved is a little over £63,000.

2. We are not asked at this stage to consider the detail of the Appellant's claim but to give a decision on a point of principle as to whether he is entitled to a refund of VAT at all.

3. The point at issue between the parties is a narrow one, so we do not propose to set out the full scheme of the legislation or the matters of agreement in full.

4. In principle, a person who is converting a non-residential building (such as a barn) into a dwelling or a number of dwellings for non-business purposes is able to obtain a refund of VAT incurred on buying building materials used in the conversion, or, where he employs a contractor to do the work, on employing that contractor.

5. There are various conditions which must be satisfied before such a refund can be obtained. In the present case, the parties agree there is only one condition which stands in the way of a successful refund claim. That condition is examined in detail below.

The facts

6. The Appellant is (and at all material times has been) the sole or joint beneficial owner of The Stables, adjacent to a large property known as The Abnalls near Lichfield (which was owned and occupied by his parents).

7. The Stables had formerly been a stable block associated with The Abnalls and then become dilapidated. For reasons which are not relevant to this decision, the Appellant's parents agreed to give The Stables to the Appellant and his wife in 2006. The intention was that they would convert The Stables at their own expense into a separate house for their own occupation, along with their young family.

8. The Appellant instructed architects, who prepared plans for the conversion of The Stables into a dwelling. The plans included an element of extension as well as conversion within the existing fabric, but HMRC take no issue with that fact. Once the plans had been drawn up, they formed the basis of an application to Lichfield District Council (the local planning authority) for planning permission. The Stables are within the green belt.

9. The planning application was submitted on 7 August 2006 and granted on 30 January 2007. When granted, it contained the following condition:

> "The accommodation hereby permitted shall be occupied in a manner wholly ancillary to the residential use of the main dwelling, The

> Abnalls, and shall not be used, or occupied in any way as a separate dwelling".

10. The planning permission also contained reasons for the conditions imposed by it, and the reason given for the above condition was as follows:

> "To prevent the use of the property as a separate residential unit, in order to safeguard the amenity of adjoining occupiers and the character of the area, in accordance with the requirements of Policies D5B and D2 of the Structure Plan and Policies E4, E5, E7 and DC1 of the Local Plan."

11. The conversion work started in the summer of 2007 and what the Appellant described as "the initial stages of the Works" were completed in or around December 2007. In the course of those works, the Appellants clearly changed their minds somewhat about the details, and a further planning application was submitted to the local planning authority on 13 November 2007. The planning permission that was granted pursuant to this application on 7 January 2008 described the development as "Alterations and incorporation of windows and dormer windows to stables".

12. The planning permission issued on 7 January 2008 contained the following condition:

> "The accommodation hereby permitted shall be occupied only by members of the immediate family of the occupants of The Abnalls in a manner wholly ancillary to the residential use of the main dwelling, and shall not be used, or occupied in any way as a separate dwelling."

13. The reason given in the planning permission for the imposition of this condition was exactly the same as the reason given in the earlier planning permission for the (slightly different) condition, except that it contained no reference to Policies E5 and E7 of the Local Plan.

14. It is not clear precisely what further work remained to be done at this point, or when it was started (though the architects' final certificate issued on completion of the works referred to the building contract as being dated 14 April 2008 and referred to total payments under that contract as being nearly £230,000, roughly half of the total overall cost of the project). The Appellant stated that he and his wife moved into The Stables in April 2009 (shortly before their son was born) and they were initially "living on a building site." The architects issued their final certificate for the works on 18 December 2009 and the Building Control Certificates of Completion in respect of both the conversion and the extension were issued on 20 April 2010.

15. The Appellant had initially been advised by his architects that he would have to accept the imposition of the above conditions if he wished to obtain planning permission for the conversion. Following completion of the conversion, he took new advice from a specialist planning consultant, who advised that it should be possible to have the restrictive condition removed. He was advised that "the neatest way" to deal with this, including the associated conditions for certain windows to be obscure

glazed and fixed shut, was to make a further planning application, which he did on 24 August 2010.

16. On 15 October 2010, the local planning authority issued a new full planning permission which excluded the "ancillary occupation" condition, and described the development as "use of existing residential accommodation as a separate dwelling." That planning permission included the following text under the heading "Summary of Reasons for Granting Planning Permission including Development Plan Policies that were relevant in the determination of this application":

> "The decision to grant planning permission has been taken because the principle of creating an ancillary unit of occupation at this site has already been established under 06/00743/FUL and the Local Planning Authority is satisfied that, subject to conditions, the amendments will enable the unit to be occupied independently of The Abnalls without causing detriment to the amenities of the occupants of that property…."

17. On 13 December 2010 the Appellant submitted a claim to HMRC for repayment of the VAT incurred on the conversion. Unfortunately, he used an out of date form and HMRC required resubmission of a new form, along with certain extra material. On advice from Mr Rashleigh (which was admittedly in error) the Appellant replied by submitting on 23 December 2010 a form appropriate for "new build" projects rather than "conversion" projects.

18. HMRC replied to the application on 11 January 2011. They rejected it essentially on two grounds:

(1) The Appellant appeared to be applying on the basis that the house had been built from scratch, whereas the planning permission clearly permitted only a conversion of the existing barn. It seemed to HMRC therefore that the claim must fail because the project, as represented by the Appellant, would have been unlawful under the terms of the planning permission (therefore failing the test set out in section 35(1)(b) Value Added Tax Act 1994 ("VATA94").

(2) In addition, HMRC pointed to the "ancillary occupation" condition contained in the January 2007 planning permission. They pointed out that this condition in their view disqualified the project from a refund because of the provisions of note (2)(c) to Group 5, Schedule 8 VATA94, which specifies that a refund is only available if:

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

19. The confusion about the incorrect form having been cleared up, HMRC maintained their refusal on the basis of the second ground outlined above and ultimately the Appellant's appeal against this refusal came before the Tribunal.

The law

20. We do not consider it necessary to set out in full the legislation governing the relevant relief. The only question before us is whether, in the circumstances, the condition contained in note (2)(c) of Group 5, Schedule 8 VATA94 disqualifies the Appellant from relief.

21. The wording of that note is set out above.

22. It is quite clear that, at all times during the carrying out of the conversion work, one or other of the two "ancillary occupation" conditions set out at [9] and [12] above were in force. The certificate of practical completion was issued by the architects on 18 December 2009 and the new planning permission (excluding any version of the "ancillary occupation" condition) did not come into force until 15 October 2010. Thus the conversion work had all been carried out while one or other of the "ancillary occupation" conditions imposed by the planning permissions was in force.

23. Mr Rashleigh accepted – rightly in our view – that the existence of an "ancillary occupation" condition at the time when the conversion work was completed would be fatal to the appeal. What he sought to persuade us was that the removal of that condition by the October 2010 planning permission should be treated, for the purposes of the VAT relief, as being retrospective. He pointed to the fact that the Appellant's planning law adviser had expressed the view that there was no good reason for the imposition of the conditions under relevant planning law and policies at the time of either the January 2007 or the January 2008 planning permission. This view was, he said, supported by the fact that it was a quick and easy matter in 2010 to obtain a new planning permission to remove it. In effect, he submitted, we should regard the 2010 planning permission as correcting the mistakes which had been made in the earlier permissions when the unnecessary conditions were included in them. That would enable us to view the 2010 planning permission as being effectively retrospective.

24. In reply, Ms Jones submitted that there was nothing in the legislation to support Mr Rashleigh's argument. The simple fact of the matter was that the refund claim did not qualify under the clear terms of the legislation, because of the existence of the "ancillary occupation" conditions. Whatever criticism might be levelled at the original inclusion of those conditions, the fact of the matter was that they had been included and it was not possible to re-write history as Mr Rashleigh sought to do in order to ignore them.

25. She referred us to the Upper Tribunal case of *HMRC v Lunn* [2009] UKUT 244 (TCC), in which that Tribunal held that "separate use" within note (2)(c) must denote a use separate from the main building (and accordingly any use which is required to be incidental or ancillary to the use of the main building cannot be a separate use). It seems to us that both the January 2007 and the January 2008 versions of the "ancillary occupation" condition in this appeal prohibited anything other than occupation ancillary to the residential use of The Abnalls and indeed they

went further than the condition being considered in *Lunn* because they also specifically prohibited the use of The Stables "as a separate dwelling". We therefore consider that *Lunn* provides very clear authority, if one were needed, to the effect that the "ancillary occupation" conditions in this case did indeed fall foul of note (2)(c), subject to Mr Rashleigh's argument about retrospective cancellation of them.

26. Ms Jones also referred us to a number of First-tier Tribunal and VAT and Duties Tribunal decisions. Accepting that such decisions are not binding on this Tribunal, she nonetheless sought to persuade us that the preponderance of authority at this level supported her arguments.

27. First, she referred us to *Harris v HMRC* [2004] VAT Decision 18822. In that case, the appellant raised a very similar argument to that being raised in the present appeal. Planning permission was obtained for an annexe, which included a condition for ancillary use only, and not as a separate unit of accommodation. The conversion work was completed and then an application was made for removal of the "ancillary use" condition. That application was granted (on certain conditions). The appellant argued that the condition should be regarded as having been retrospectively removed, but the Tribunal held that the existence of the condition at the time of completion of the conversion work was fatal to the appellant's claim.

28. Second, she referred us to *Watson v HMRC* [2010] UKFTT 526 (TC). In that case, the First-tier Tribunal appears to have been prepared to consider the possibility of the local planning authority using its statutory power under section 73A Town and Country Planning Act 1990 to act retrospectively in relation to the removal of a condition which fell foul of Note (2)(c); however, in that case it was clear that the local authority had not actually done so and therefore the appeal was bound to fail because the relevant condition was in place at the time when the conversion work was completed. Ms Jones pointed out that there was no attempt in the present appeal to persuade the local authority to issue an explicitly retrospective planning permission, so the Appellant could not argue that the 2010 permission had retrospective effect.

29. She also referred us to *Maurice Francis v HMRC* [2012] UKFTT 359 (TC), in which the Tribunal had made a finding of fact that the local planning authority had indeed backdated the removal of the relevant condition. This meant that the appeal in that case succeeded, but she submitted there was no basis for making a similar finding of fact in the present appeal.

Discussion and Decision

30. We consider that the conditions in the January 2007 and January 2008 planning permissions did preclude The Stables from satisfying the condition in Note (2)(c) at all times up to the granting of the final planning permission in October 2010, which was well after the conversion work was completed.

31. We do not consider that the local planning authority intended or were even asked to issue a retrospective decision which might have overcome the problem – indeed when explaining the reason for removing the "ancillary occupation" condition,

they specifically stated (see [16] above) that "the amendments *will [emphasis added]* enable the unit to be occupied independently…" We therefore express no view on the correctness of any argument that such a retrospective decision might have cured the position. In any event, we cannot accept Mr Rashleigh's submission that the issue of the October 2010 permission, insofar as it removed the "ancillary occupation" condition, was simply correcting an obvious error in the 2007 and 2008 permissions. Those permissions were in our view quite clearly valid and enforceable at all relevant times and the fact that the planning authority agreed to the removal of them in its October 2010 decision does not affect this view.

32. The appeal must accordingly be dismissed.

33. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 29 November 2012