**TC07127**

[2019] UKFTT 288 (TC)

*ANNUAL TAX ON ENVELOPED DWELLINGS – relief for interests held in the course of a property development trade – in the absence of evidence to establish that the Appellant was carrying on a trade, appeal dismissed – consideration of the definition of "property development trade" and of the procedural issues arising out of the terms of the closure notices*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/2017/09538**

**BETWEEN**

**HOPSCOTCH LIMITED** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE TONY BEARE**
**MR CHARLES BAKER**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 18 April 2019**

**Mr Charles Bradley, for the Appellant**

**Mrs Christine Cowan, Officer of Her Majesty's Revenue and Customs, for the Respondents**

## DECISION

## INTRODUCTION

1. Appeal against an imposition of the Annual Tax on Enveloped Dwellings (the "ATED") on the grounds that the Appellant was entitled to relief from the ATED by virtue of carrying on a "property development trade" and holding the relevant property for the purposes of that trade.

## THE SUBJECT OF THE APPEAL

2. This decision relates to an appeal under paragraph 35 of Schedule 33 to the Finance Act 2013 (the "FA 2013") against closure notices which were issued to the Appellant under paragraph 16 of Schedule 33 to the FA 2013 on 30 June 2017 in relation to two periods in respect of which the ATED regime applied (each, an "ATED chargeable period") - the ATED chargeable period from and including 1 April 2016 to and including 31 March 2017 (the "2017 Period") and the ATED chargeable period from and including 1 April 2017 to and including 31 March 2018 (the "2018 Period").

## BACKGROUND AND FACTS

3. There is no dispute between the parties in relation either to the background to the appeal or to the primary facts which are relevant to the appeal. Those are as follows.

(1) the Appellant purchased a residential property at 27 Thurloe Square (the "Property") in 1993 for £1.25m;

(2) over the period between that purchase and 2007:

(a) the Property was occupied from time to time by persons who were permitted to do so by the directors of the Appellant; and

(b) certain features were added to the Property;

(3) from 2008, the use of the Property declined – from then until the commencement of the works described in paragraph 3(12) below, it was occupied solely by domestic staff;

(4) the Appellant decided to sell the Property in 2011 and the Property was placed on the market with Savills at an asking price of £13.5m;

(5) from June 2013, the Property was marketed by Knight Frank LLP ("Knight Frank") at the same asking price;

(6) in the absence of anyone willing to buy the Property at the asking price – or at a price which the Appellant was willing to accept – Mr Alexander Millet of Knight Frank advised the Appellant in 2013 that it would be advisable to take the Property off the market and redevelop the Property in order to maximise value through the addition of space, functionality and technology, the improvement of lighting and the addition of an elevator. The aim was to make the Property, notwithstanding the fact that it was listed, an attractive "near new build";

(7) accordingly, at a board meeting of the Appellant held on 25 March 2014, which was attended by the sole director of the Appellant, Mr Manraj S Bindra, and the Appellant's company secretary, Mr Sasi Nambiar, Mr Bindra, as the sole director, referred to the discussions which had taken place with Knight Frank in relation to the poor response to the Property from the market.

The minutes of that meeting continued:

> "According to the feedback received by Knight Frank from the prospective buyers, the agent has informed that the property being old, it has to undergo total redevelopment and therefore presents itself as a redevelopment opportunity which would result not only in sale but in additional profits from development. They suggested that the building has to be modified externally and internally and also to install a lift to give a new and modern look to the building and make it attractive for the prospective buyers. They feel that the property should be taken off the market and redeveloped….After detailed deliberations and consideration on the above suggestions, the Board is also of the opinion that …there is an opportunity to redevelop the property and create substantial additional value through such a process. We have been provided comparable data which shows that whilst the highest value today might be less than £13mm [sic], the redevelopment could make the property worth significantly more. The Board accordingly decided to develop the property and entrusted Mr. Sasi Nambiar, Secretary, to get the process started by arranging required documentations for obtaining necessary approval from the concerned authority(ies) as early as possible";

(8) following that meeting, the Appellant took advice in relation to the nature of the work which should be carried out and, after looking at the sale prices which had been achieved in relation to properties which were of a similar size, and in a similar location, to the Property, concluded that it should be able to achieve a sale price for the Property of £3,000 per square foot, a considerable uplift on the price for square foot obtained for the next door site;

(9) the Appellant engaged a number of consultants and advisers in relation to the redevelopment. These included the architectural firm, Stanhope Gate, who advised the Appellant in relation to its application for planning permission, a conservation architect named Mr Hilary Bell, who specialises in the specific requirements associated with developments of listed buildings and in conservation areas and the structural engineers Price & Myers, who advised in relation to the structure of the developed building and the construction management plan;

(10) the planning application of October 2015 summarised the proposed works at the Property as involving "the minor alteration, replacement of mansard roof finishes, existing dormer windows and replacement of conservatories on ground and first floor. It also includes installation of lift from lower ground to second floor landing";

(11) planning permission for the redevelopment was granted on 15 December 2015;

(12) the construction work commenced in April 2016 and ended in September 2017. Although Stanhope Gate, in its letter to the Appellant of 8 July 2014, estimated that the construction work, leaving aside its fees, would amount to £2.75m, we were informed at the hearing that, in the end, the total redevelopment cost was approximately £1m;

(13) the Appellant borrowed in order to finance the cost of the construction work;

(14) the Property in its redeveloped state was listed for sale in October 2017 at an asking price of £15.9m but, as at the date of the hearing, it had yet to be sold and the asking price had been reduced to £13.95m; and

(15) the Appellant has at no time sought to register as a company which is liable to UK corporation tax or filed company tax returns.

4. Much of the above information was provided by Mr Nambiar, who has been the company secretary of the Appellant since July 2008 and was the only person to testify at the hearing. None of the facts described above was challenged by either party at the hearing and we

therefore adopt them as the findings of fact on which we base our decision in relation to the appeal.

**THE ATED RETURNS**

5. When the ATED regime was introduced by the FA 2013, the Appellant submitted ATED returns for the first three ATED chargeable periods – the ATED chargeable period from and including 1 April 2013 to and including 31 March 2014, the ATED chargeable period from and including 1 April 2014 to and including 31 March 2015 and the ATED chargeable period from and including 1 April 2015 to and including 31 March 2016 – on the basis that the Appellant was liable to the ATED in respect of the Property based on the then value of the Property (£13.5m) without any relief.

6. However, in its ATED returns for the 2017 Period and the 2018 Period, the Appellant claimed relief from the ATED on the basis that the board of the Appellant was of the view that the conditions in Section 138 of the FA 2013 were satisfied in relation to the Property throughout both of those ATED chargeable periods. The terms of Section 138 of the FA 2013, so far as they are material to the present dispute, are set out in paragraph 19 below.

**THE ENQUIRY AND THE DISPUTE**

7. On 16 November 2016, the Respondents opened an enquiry into the Appellant's ATED return for the 2017 Period by way of notice under paragraph 8 of Schedule 33 to the FA 2013 and, on 19 May 2017, the Respondents opened an enquiry into the Appellant's ATED return for the 2018 Period by way of notice under paragraph 8 of Schedule 33 to the FA 2013.

8. The notice of enquiry into the 2017 Period asked for certain information and documents in relation to that ATED chargeable period. Of those requests, the last two asked about the occupants of the Property since 1 April 2016. They were the only requests in the notice of enquiry which related to the occupancy of the Property (as distinct from the question of whether or not the Appellant was carrying on a "property development trade").

9. The Appellant responded to the requests on 11 December 2016. In its response to the questions about occupancy mentioned above, the Appellant informed the Respondents that the Property had been a building site since 1 April 2016 and that, accordingly, no-one had occupied the Property since that date. The remaining part of the Appellant's response of 11 December 2016 related to the issue of whether or not the Appellant was carrying on a "property development trade".

10. There then ensued a protracted exchange of correspondence between the parties. Communications passed between them on 21 December 2016, 19 January 2017, 15 March 2017, 5 April 2017, 6 April 2017, 8 May 2017, 19 May 2017, 30 May 2017, 1 June 2017, 6 June 2017, 9 June 2017 and 13 June 2017. The entire content of each of those communications related to the issue of whether or not the Appellant was carrying on a "property development trade" in the 2017 Period and, following the notice of enquiry of 19 May 2017 in relation to the 2018 Period, the 2018 Period. There was no mention in any of those communications of the issue of occupancy of the Property at any time.

11. On 30 June 2017, the Respondents issued closure notices in respect of both of the relevant ATED chargeable periods under paragraph 16 of Schedule 33 to the FA 2013. Both closure notices were expressed in the same terms. In view of the significance of the terms of the closure notices to one of the issues which is relevant in the appeal, we set out extracts from each closure notice below.

12. Each closure notice started by stating that the enquiry was now complete and that it was a closure notice issued under paragraph 16 of Schedule 33 to the FA 2013. It went on:

"**My decision**

I have examined all of the information and documentation received. Whilst I am satisfied that the company has shown that 27 Thurloe Square is being developed, I am not satisfied that it has been demonstrated that a development trade exists.

The company's letter dated 11 December 2016 and the supporting evidence received show that "No buyers were available without…" development. Without consent no development could take place.

Your letter dated 6 June 2017 details the arduous "planning journey". However, similar constraints, issues and delays can be faced by persons seeking to carry out a development whether they are trading or not.

Assembling a team of people would be necessary to realise the development.

Making a property more marketable can be one of a number of indicators of trading activity. However, there has been no other evidence to allow me to be satisfied that a trade exists.

The company did not purchase the property for development purposes. Hopscotch originally marketed the property in an "undeveloped form" (source Alexander Millet's letter). When this was unsuccessful the company was faced with the choice of no sale or development.

My view is that developing 27 Thurloe Square does not make Hopscotch Ltd a person carrying on a property development trade. As a result I am withdrawing the relief claimed.

I have amended your ATED return to reflect my decision, as below."

13. On 25 July 2017, the Appellant notified the Respondents of its appeal against the closure notices.

14. On 25 August 2017, the Respondents confirmed their view of the matter and offered the Appellant a review.

15. On 20 September 2017, the Appellant accepted the Respondents' offer of a review.

16. On 30 November 2017, the Respondents notified the Appellant of the review conclusion, which was to uphold the original decision. In the review conclusion letter, the reviewing Officer, Mr Charles Agg, described the point at issue as follows:

"The point at issue is whether, during the two years concerned, (a) the company was carrying on a property development trade, and (b) its single-dwelling interest in the property at 27 Thurloe Square, London SW7 was held exclusively for the purpose of developing and reselling the land in the course of the trade."

17. On 29 December 2017, the Appellant notified the First-tier Tribunal of its appeal against the conclusion set out in the review conclusion letter.

18. On the same day, the Appellant applied for, and was accepted into, the Alternative Dispute Resolution ("ADR") process. However, despite the efforts of both parties, the dispute has not been resolved by the ADR process.

## THE RELEVANT LEGISLATION

19. Section 138 to the FA 2013, to the extent that it is relevant to the appeal, provides as follows:

**"138 Property developers**

(1) A day in a chargeable period is relievable in relation to a single-dwelling interest if on that day—

(a) a person carrying on a property development trade ("the property developer") is entitled to the interest, and

(b) the interest is held exclusively for the purpose of developing and reselling the land in the course of the trade.

(2)...

(3) A day is not relievable by virtue of subsection (1) if on the day a non-qualifying individual is permitted to occupy the dwelling.

(4) In this Part "property development trade" means a trade that—

(a) consists of or includes buying and developing for resale residential or non-residential property, and

(b) is run on a commercial basis and with a view to profit.

(5) In this section references to development include redevelopment."

20. Section 174(1) of the FA 2013 provides that, for the purposes of Part 3 of the FA 2013, which includes Section 138 of the FA 2013, a ""trade" has the same meaning as in section 35 of CTA 2009 (and cognate expressions are to be read accordingly)".

21. The definition of "trade" which is relevant to Section 35 of the Corporation Tax Act 2009 (the "CTA 2009") is the one set out in Section 1119 of the Corporation Tax Act 2010 (the "CTA 2010"). That provides that, for the purposes of the Corporation Tax Acts, "trade" includes "any venture in the nature of trade".

22. The exclusion set out in Section 138(3) of the FA 2013 for occupation by a "non-qualifying individual" is extended by the operation of Section 140 of the FA 2013, which, to the extent that it is relevant to the appeal, provides as follows:

"**140 Property developers: supplementary**

(1) Subsection (2) applies if on a day in a chargeable period—

(a) a person carrying on a property development trade ("the property developer") is entitled to a single-dwelling interest that has been acquired in the course of that trade (whether or not the acquisition was part of a qualifying exchange for the purposes of section 139), and

(b) a non-qualifying individual is permitted to occupy the dwelling.

(2) No subsequent day is relievable in the case of the single-dwelling interest by virtue of section 138(1) or 139(1) if—

(a) the day falls within that chargeable period, or any of the subsequent 3 chargeable periods, and

(b) there is continuity of ownership on that day.

(3) There is "continuity of ownership" on any day on which—

(a) the property developer is entitled to the single-dwelling interest, or

(b) if the property developer carried on the property development trade in partnership, another member of the partnership is entitled to the interest.

(4) Subsection (5) applies if—

(a) on a day in a chargeable period ("the day of non-qualifying occupation") a person who is a non-qualifying individual in relation to a single-dwelling interest is occupying the dwelling in question, and

(b) on an earlier day in that, or the preceding, chargeable period ("the earlier day") the conditions in section 138(1)(a) and (b) are met in relation to the same single-dwelling interest.

(5) The earlier day is not relievable by virtue of section 138(1) in the case of the single-dwelling interest if—

(a) a person who is entitled to the interest on the earlier day is also entitled to it on the day of non-qualifying occupation, or

(b) if the trade mentioned in section 138(1) is carried on in partnership, a person who has at any time carried that business on in partnership is entitled to the interest on the day of non-qualifying occupation.

(6)…

(7)…

(8)….

(9) For the purposes of sections 138 and 139 and this section—

(a) "non-qualifying individual" has the meaning given by section 136(1);

(b) occupation of any part of a dwelling is regarded as occupation of the dwelling."

23. Finally, Section 136 of the FA 2013 sets out the definition of a "non-qualifying individual" which applies for the purposes of Sections 138 and 140 of the FA 2013. It provides as follows:

**"136 Meaning of "non-qualifying individual"**

(1) In sections 133 and 135 "non-qualifying individual", in relation to a single-dwelling interest, means any of the following—

(a) an individual who is entitled to the interest (otherwise than as a member of a partnership),

(b) an individual ("a connected person") who is connected with a person entitled to the interest,

(c) if a person is entitled to the interest as a member of a partnership, an individual who is, or is connected with, a qualifying member of that partnership,

(d) an individual ("a relevant settlor") who is the settlor in relation to a settlement of which a trustee is (in the capacity of trustee) connected with a person who is entitled to the interest,

(e) the spouse or civil partner of a connected person or of a relevant settlor,

(f) a relative of a connected person or of a relevant settlor, or the spouse or civil partner of a relative of a connected person or of a relevant settlor,

(g) a relative of the spouse or civil partner of a connected person or of a relevant settlor,

(h) the spouse or civil partner of a person falling within paragraph (g), or

(i) an individual who is a major participant in a relevant collective investment scheme or is connected with a major participant in a relevant collective investment scheme.

(2) In subsection (1)(c) "qualifying member", in relation to a partnership, means a member of the partnership who is entitled to a 50% or greater share—

(a) in the income profits of the partnership, or

(b) in the partnership's assets.

(3) In subsection (1)(i) "relevant collective investment scheme", in relation to a single-dwelling interest, means a collective investment scheme that meets the ownership condition with respect to the interest.

(4) A person who participates in a collective investment scheme is a "major participant" in the scheme if the person—

(a) is entitled to a share of at least 50% either of all the profits or income arising from the scheme or of any profits or income arising from the scheme that may be distributed to participants, or

(b) would in the event of the winding up of the scheme be entitled to 50% or more of the assets of the scheme that would then be available for distribution among the participants.

(5) The reference in subsection (4)(a) to profits or income arising from the scheme is to profits or income arising from the acquisition, holding, management or disposal of the property subject to the scheme.

(6) For the purposes of subsection (1), section 1122 of CTA 2010 (as applied by section 172) has effect as if subsections (7) and (8) of that section (application of rules about connected persons to partnerships) were omitted.

(7) In this section—

"relative" means brother, sister, ancestor or lineal descendant;

"settlement" and "settlor" have the same meaning as in Chapter 5 of Part 5 of ITTOIA 2005 (see section 620 of that Act).

(8) In subsection (1)(d) "trustee" is to be read in accordance with section 1123(3) of CTA 2010 ("connected persons": supplementary)."

24. It can be seen that, in order for relief to be available to a taxpayer under Section 138 of the FA 2013 in respect of an interest in a property on a day falling within an ATED chargeable period, the taxpayer needs to show that, on the relevant day:

(1) it was a "property developer" – that is to say, it carried on a "property development trade";

(2) it held its interest in the property exclusively for the purpose of developing and reselling the property in the course of that trade; and

(3) no "non-qualifying individual" was permitted to occupy the property.

25. In addition, in order for relief to be available to a taxpayer under Section 138 of the FA 2013 in respect of an interest in a property on the relevant day, the taxpayer must show that it did not permit a "non-qualifying individual" to occupy the property on any day in an ATED chargeable period falling within the three years preceding the ATED chargeable period within which the relevant day falls on which the taxpayer was entitled to the interest in the property and was carrying on a "property development trade" in the course of which it acquired its interest in the property (see Sections 140(1) to 140(3) of the FA 2013).

26. Similarly, relief under Section 138 of the FA 2013 in respect of an interest in a property on the relevant day is denied if, on a later day in the same ATED chargeable period (or in the subsequent ATED chargeable period) on which the taxpayer remains entitled to the interest in the property, a "non-qualifying individual" is permitted to occupy the property (see Sections 140(3) to 140(6) of the FA 2013).

**THE ISSUES**

27. For the purposes of the appeal, it is common ground that:

(1) in relation to each of the 2017 Period and the 2018 Period, the notice of enquiry which was given to the Appellant by the Respondents complied with the requirements of paragraph 8 of Schedule 33 to the FA 2013;

(2) the closure notice which was given to the Appellant by the Respondents in relation to each of the 2017 Period and the 2018 Period informed the Appellant that the relevant enquiry was complete, stated the conclusions reached in the enquiry by the Officer of the Respondents in relation to the enquiry and made the amendments of the relevant return which were required to give effect to that conclusion, so that each closure notice complied with the requirements of paragraph 16 of Schedule 33 to the FA 2013; and

(3) if the relief which the Appellant has claimed under Section 138 of the FA 2013 is not available in relation to the 2017 Period and the 2018 Period, then the Appellant is liable to the ATED in respect of those ATED chargeable periods as set out in the closure notices.

28. It is also common ground that the scale of the works which were carried out at the Property between April 2017 and September 2018 amounted to the "development" (or, perhaps more accurately, the "redevelopment") of the Property. For example:

(1) in an email of 9 June 2017, Ms Dawn Daley, the Officer of the Respondents who conducted the enquiry, said:

"For the avoidance of doubt, I accept that the property is being redeveloped and not just redecorated. The company has provided sufficient information which shows that this is the case";

(2) in each of the closure notices, Ms Daley said:

"I am satisfied that the company has shown that 27 Thurloe Square is being developed"; and

(3) in the Respondents' "view of the matter" letter of 25 August 2017, the relevant Officer of the Respondents, Mr Dane Skiba, said:

> "...there is acceptance by the caseworker that the property in question has been developed. That is, development works have taken place, and with this I would agree".

29. Finally, it is common ground that the Property has been in the same ownership throughout the period from the date when it was purchased in 1993 until the date of the hearing but that no-one occupied the Property at any time during the 2017 Period or the 2018 Period or, so far as we could determine from the Respondents' submissions at the hearing, in the ATED chargeable period commencing on 1 April 2018. (The latter would technically be potentially relevant to the relief from the ATED in respect of the 2018 Period pursuant to Section 140(3) to 140(6) of the FA 2013 if we were to conclude that the conditions set out in Sections 138(1)(a) and 138(1)(b) of the FA 2013 were satisfied throughout the 2018 Period.)

30. However, the parties disagree on whether the Appellant has established that, throughout (or, indeed, at any point within) the 2017 Period and the 2018 Period:

(1) the Appellant was carrying on a "property development trade", as defined in Section 138(4) of the FA 2013; and

(2) the Appellant held its interest in the Property exclusively for the purpose of developing and reselling the Property in the course of that trade.

31. In addition, the parties disagree on whether, if each of the above conditions were to be satisfied:

(1) the Respondents are entitled to raise the issue of whether the Appellant has established that no "non-qualifying individual" occupied the Property on any day in an ATED chargeable period falling within three years prior to the 2017 Period on which the Appellant was carrying on the "property development trade (the "140 issue") - on the basis that the 140 issue did not form part of the conclusion which was reached in the closure notices; and

(2) if so, whether the Appellant has in fact established that no "non-qualifying individual" occupied the Property on any day in an ATED chargeable period falling within three years prior to the 2017 Period on which the Appellant was carrying on the "property development trade".

## THE ARGUMENTS OF THE PARTIES

32. We set out in the "Discussion" section of this decision below the detailed arguments of the parties in relation to each of the issues described above. However, we think that it is helpful at this stage to summarise, in general terms, each party's position on the issues in question.

33. In relation to the issues set out in paragraph 30 above, Mr Bradley, on behalf of the Appellant, submitted that, with effect from 1 April 2016, when the redevelopment work commenced, the Appellant was carrying on a "property development trade" and therefore the Property, which had hitherto been held as an investment on capital account, should be regarded as having become trading stock on that date. In effect, the Property was appropriated from capital account into the accounts of the supervening trade which had arisen as a result of the

Appellant's decision on 25 March 2014 to redevelop the Property. Accordingly, with effect from 1 April 2016, the Appellant should be treated as having met both of the conditions set out in Sections 138(1)(a) and 138(1)(b) of the FA 2013 in relation to the Property in that it was carrying on a "property development trade" (as defined in Section 138(4) of the FA 2013) and held the Property exclusively for the purposes of redeveloping and selling the Property in the course of that trade.

34. In reply in relation to those issues, Mrs Cowan, on behalf of the Respondents, submitted that, whilst the Respondents accepted that the work carried out at the Property between April 2016 and September 2017 was so substantial that it amounted to "redevelopment", that "redevelopment" did not take place in the course of a "property development trade" (as defined in Section 138 (4) of the FA 2013) because:

(1) the Appellant had failed to establish that it was carrying on a "trade" at all – instead, the Appellant was doing no more than any other owner of an investment held on capital account who wished to sell the investment and to maximise the value of the investment before doing so; and

(2) in any event, in order to satisfy the definition of "property development trade", the Appellant would need to have had the intention to develop and resell the Property at the time when it first bought the Property and, on the facts of this case, the Appellant did not have that intention in 1993, when it first acquired the Property.

35. In relation to the issues set out in paragraph 31 above, Mr Bradley, on behalf of the Appellant, submitted that:

(1) the Respondents were precluded from raising the 140 issue in relation to the appeal because the scope and subject matter of an appeal against a closure notice are limited by the conclusions reached in the closure notice – as to which, see the decision of the Supreme Court in *The Commissioners for Her Majesty's Revenue and Customs v Tower MCashback LLP and another* 80 TC 64 ("*Tower MCashback*"), as summarised by Kitchin LJ in *Fidex Limited v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 385 ("*Fidex*") at paragraph [45] - and the conclusions reached in the closure notices in this case related solely to the conditions in Sections 138(1)(a) and 138(1)(b) of the FA 2013 and did not touch on the question of the occupancy of the Property at any time; and

(2) even if the Respondents were entitled to raise the 140 issue in relation to the appeal, Sections 140(1) to 140(3) of the FA 2013 applied to render occupancy on a day falling within a prior ATED chargeable period relevant only in a case where the property was held in the course of a "property development trade" on that day. In this case, as the Appellant did not start the "property development trade" until 1 April 2016, it followed that any occupancy of the Property prior to 1 April 2016 could not preclude the relief in Section 138 of the FA 2013 from applying in relation to the 2017 Period or the 2018 Period.

36. In reply in relation to those issues, Mrs Cowan, on behalf of the Respondents, submitted that:

(1) the Appellant's argument set out in paragraph 35(1) above was based on its confusing the conclusion reached in the relevant closure notices from the process of reasoning which had been adopted by the Respondents in reaching that conclusion. The conclusion reached in the relevant closure notices was that the relief from the ATED set out in Section 138 of the FA 2013 was not available. The reason for that conclusion was that the Appellant was not carrying on a "property development trade" but that was the

ground for the conclusion and not itself the conclusion. Thus, the Respondents were not precluded from raising, at this stage, an alternative ground for the conclusion reached in the relevant closure notices; and

(2) the Appellant had not established that the "property development trade" – if indeed it was carrying on such a trade – commenced only in April 2016. The Appellant had resolved to carry out the redevelopment as early as 25 March 2014 and had, immediately after that date and before April 2016, when the actual construction work commenced, taken steps to enable it to carry out the redevelopment. It therefore followed that the "property development trade", if it existed, started before April 2016. That being the case, occupancy of the Property before 1 April 2016 was potentially relevant to the availability of the relief in the 2017 Period and the 2018 Period and, by the Appellant's own admission, the Property had been occupied in the period prior to 1 April 2016 by domestic staff. The Appellant had not established that none of the occupants during that period was a "non-qualifying individual".

## DISCUSSION

A "property development trade"?

37. In order for the Appellant to satisfy the conditions set out in Sections 138(1)(a) and 138(1)(b) of the FA 2013, it must establish that, throughout each of the 2017 Period and the 2018 Period, it was carrying on a "property development trade", as defined in Section 138(4) of the FA 2013. The definition in question is set out in paragraph 19 above.

38. The dispute between the parties centres on two aspects of the definition.

39. The first is the requirement in the preamble of the definition to the effect that there must be a "trade" and the second is the requirement in Section 138(4)(a) of the FA 2013 to the effect that that "trade" must "[consist] of or [include] buying and developing for resale residential or non-residential property".

Was the Appellant carrying on a "trade"?

*The arguments of the parties*

40. In relation to this question, Mr Bradley began by helpfully directing us to the decision of Sir Nicolas Browne-Wilkinson in *Marson v Morton* [1986] STC 463 ("*Marson*") at pages 470 et seq..

41. From this, Mr Bradley abstracted the following key principles which were pertinent to the appeal in this case:

(1) first, a single, one-off transaction can be a venture in the nature of trade (and, therefore, a "trade" as defined in Section 1119 CTA 2010 (see paragraph 21 above)) – see *Marson* at page 470e and also *Rutledge v The Commissioners of Inland Revenue* 14 TC 490 at page 497;

(2) secondly, in determining whether or not there is a trade, one needs to "find principle, and not to seek analogies on the facts" – see *Marson* at page 470f;

(3) thirdly, "whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case" – see *Marson* at page 470g;

(4) fourthly, in that regard, "there are certain features or badges which may point to one conclusion rather than another". However, those features "are in no sense a comprehensive list of all relevant matters, nor is any one of them …decisive in all cases. The most they can do

is provide common sense guidance to the conclusion which is appropriate" – see *Marson* at page 470g;

(5) fifthly, the badges of trade can be described as follows:

"(1) That the transaction in question was a one-off transaction. Although a one off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else.

(2) Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on? For example, a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel.

(3) The nature of the subject matter may be a valuable pointer. Was the transaction in a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realisation, such as referred to in the passage that the chairman quoted from *Reinhold*? For example, a large bulk of whisky or toilet paper is essentially a subject matter of trade, not of enjoyment.

(4) In some cases attention has been paid to the way in which the transaction was carried through: was it carried through in a way typical of the trade in a commodity of that nature?

(5) What was the source of finance of the transaction? If the money was borrowed that is some pointer towards an intention to buy the item with a view to its resale in the short term; a fair pointer towards trade.

(6) Was the item which was purchased resold as it stood or was work done on it or relating to it for the purposes of resale? For example, the purchase of second-hand machinery which was repaired or improved before resale. If there was such work done, that is again a pointer towards the transaction being in the nature of trade.

(7) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots? If it was broken down it is again some indication that it was a trading transaction, the purchase being with a view to resale at profit by doing something in relation to the object bought.

(8) What were the purchasers' intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a trading deal. On the other hand, if before the contract of purchase is made a contract for resale is already in place, that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of investment rather than by way of a deal. However, as far as I can see, this is in no sense decisive by itself.

(9) Did the item purchased either provide enjoyment for the purchaser (for example, a picture) or pride of possession or produce income pending resale? If it did, then that may indicate an intention to buy either for personal satisfaction or to invest for income yield, rather than do a deal purely for the purpose of making a profit on the turn. I will consider in a moment the question whether, if there is no income produced or pride of purchase pending resale, that is a strong pointer in favour of it being a trade rather than an investment."

- see *Marson* at page 470i to page 471f; and

(6) finally, "in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at [the badges of trade], and having looked at the whole picture and ask the question…was this an adventure in the nature of trade? In some cases perhaps more homely language might be appropriate by asking the question, was the taxpayer investing the money or was he doing a deal? – see *Marson* at page 471g".

42. Mr Bradley added that the authorities show that:

(1) an asset which was originally acquired as an investment on capital account can subsequently be appropriated to trading stock – see *Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners* [1980] STC 350 at page 352g and *Alabama Coal, Iron, Land and Colonization Co Ltd v Mylam* [1926] 11 TC 232 at page 253; and

(2) there may be a trade of property development even where there is only a single transaction – see *Commissioners of Inland Revenue v Toll Property Co, Ltd (In Liquidation)* 34 TC 13.

43. Finally, Mr Bradley referred to the decision of Clerk LJ in *Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes)* 5 TC 159 ("*Californian Copper*") at pages 165 and 166, where the following was said:

"It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being - Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?".

44. Mr Bradley submitted that, in order to determine on which side of the dividing line particular circumstances fell, one should look to what the taxpayer in question actually did and the purposes of the taxpayer in question in doing what he actually did.

45. As far as we were able to determine, Mrs Cowan, in her submissions, did not demur from any of the propositions set out in paragraphs 40 to 44 above. In particular, she did not express any doubt that a single transaction involving the redevelopment of a property with a view to deriving a profit from so doing could, in certain circumstances, amount to a venture in the nature of trade and therefore fall within the definition of "trade" in Section 1119 of the CTA 2010. However, in her view, the redevelopment of a property with a view to deriving a profit from so doing could also, in other circumstances, not amount to a trade and amount instead to no more than an attempt by the owner of the property to maximise the value at which the owner of the property could realise an investment held on capital account.

46. In short, where the parties diverged was that, whereas Mr Bradley was of the view that the actions and purposes of the Appellant demonstrated that, with effect from the start of the 2017 Period, when the redevelopment work commenced, the Appellant began to carry on the trade of being a property developer, Mrs Cowan was of the view that the actions and purposes

of the Appellant demonstrated no more than that the Appellant was determined to realise as much value as possible from an existing investment which it had always held, and continued to hold, on capital account.

47. In support of his view that the Appellant had started a trade of property redevelopment and had appropriated the Property into the trading stock of that trade, Mr Bradley drew a distinction between a person who wished to sell an existing capital asset and resolved to carry out some prior refurbishment to the asset before putting the asset on the market, in order to make the asset more saleable, and a person, such as the Appellant, who wished to redevelop the asset in order to maximise the value of the asset on a subsequent sale. In his opinion, the former person would be approaching the prior work on the basis that:

(1) it wished to sell;

(2) the refurbishment work would make the property easier to sell; and

(3) it was merely looking to ensure that it could recover the cost of the refurbishment work in the eventual sale proceeds,

whereas the latter person would be approaching the prior work with a view to maximising its profit from the asset. Thus, the former person was merely taking certain preliminary steps required to realise an investment held on capital account whilst the latter person was carrying on a trade.

48. Mr Bradley said that the steps taken by the Appellant following its decision to take the Property off the market and redevelop the Property showed that this was very much an example of the latter case. He said that, here, the Appellant had taken a considerable amount of professional advice as to how to redevelop the Property and the redevelopment work in question had been substantial. The Appellant had not simply taken steps which it believed would enable it to realise the value of the Property. It had instead carried out a comprehensive and carefully thought-out plan to redevelop the Property. This meant that the Appellant had gone beyond merely realising the value of the Property and had instead entered into "a scheme for profit-making", to quote Clerk LJ in *Californian Copper*.

49. In support of her view that the Appellant had merely taken steps to realise the value of the Property as an investment held on capital account, Mrs Cowan submitted that the Appellant had always intended from the time of first acquisition that it would ultimately realise a profit from any sale of the Property. That much was clear from the statements made by the Appellant in the grounds of appeal and the evidence of Mr Nambiar. It was also clear from the fact that the Appellant had tried to sell the Property over the period from 2011 to 2013. Accordingly, the only change which had occurred as a result of the decision at the board meeting of the Appellant on 25 March 2014 was that the Appellant had decided to adopt a different means of ensuring that it realised a profit from the disposal of the Property. The Appellant had been disappointed with the response from the market to its attempts to sell the Property in the Property's then condition and had therefore, upon advice, resolved to carry out substantial redevelopment work in order to achieve a sale.

50. She pointed out that the mere fact that the redevelopment work was substantial and that the Appellant had taken professional advice before carrying out the redevelopment work did not mean that the Appellant had thereby begun to carry on a trade. In that regard, she noted the omission of any trading accounts or business plans showing the profit which the Appellant had anticipated making as a result of the redevelopment. In addition, she said that the Appellant had not registered for UK corporation tax or submitted any company tax returns, which would have been required if the Appellant had been carrying on a trade.

*Our conclusion*

51. In our view, the submissions of Mrs Cowan are to be preferred in relation to this question.

52. We should start by saying that the various badges of trade described above do not all point in one direction or the other. Some of the badges of trade, such as the ones described in paragraphs 41(8) and 41(9) above, are simply irrelevant in the present context because of the alleged change of purpose for which the Property was held following the Appellant's initial acquisition of the Property. There are others which, when applied to the present facts, might be taken to suggest that the Appellant did carry on a trade, such as the fact that:

(1) the Appellant borrowed in order to carry out the redevelopment (see paragraph 41(5) above); and

(2) work was done on the Property for the purposes of resale prior to the Property's being remarketed (see paragraph 41(6) above).

However, there are also badges of trade which, when applied to the present facts, might be taken to suggest that the Appellant did not carry on a trade, such as the fact that:

(a) the redevelopment and proposed sale of the Property was a one-off transaction (see paragraph 41(1) above);

(b) the transaction did not relate to a trade which the Appellant otherwise carried on (see paragraph 41(2) above);

(c) the subject matter of the transaction – that is to say, the Property – was perfectly capable of being held as an investment on capital account and was not like whisky or toilet paper, which is essentially a subject matter of trade as opposed to enjoyment (see paragraph 41(3) above); and

(d) despite the fact that work was done to the subject matter of the transaction – that is to say, the Property – the Property remained a single, large dwelling that would appeal to a very small class of potential buyers. It was not broken down into saleable lots (see paragraph 41(7) above).

53. The above reflects the fact that, in certain circumstances, it is perfectly possible for the redevelopment of a single property to amount to a venture in the nature of trade and for a person holding a property as an investment on capital account to resolve, at a particular point in time, that it will henceforth hold the property for a trading purpose and thereby appropriate the property from capital account into trading account.

54. However, notwithstanding the considerable forensic skill of Mr Bradley, we do not think that the facts in the present case support the conclusion that that is what has occurred in relation to the Property in the present case. In that regard, we would note that one of the badges of trade which we did not mention in paragraph 52 above is the one mentioned in paragraph 41(4) above – namely, was the transaction carried through in a way typical of a trade of property development?

55. In our view, it was not.

56. First, when one looks at the minutes of the board meeting of the Appellant held on 25 March 2014, which the Appellant claims to be the watershed moment in the eventual commencement of its "property development trade", it is striking that no mention is made of the expected cost of the redevelopment or the amount of profit to which the redevelopment was expected to give rise. Instead, the sole director simply noted the failed attempts to sell the Property thus far (and the feedback from Knight Frank that "total redevelopment" was needed in order to maximise the profit on eventual sale) and then resolved that "whilst the highest value

today might be less than £13mm, the redevelopment could make the property worth significantly more". The minutes did not record what the cost to the Appellant of carrying out the redevelopment was expected to be, what the increase in value of the Property as a result of the redevelopment was expected to be or the relationship between the anticipated cost and the anticipated increase in value. Those matters appear not to have been considered or addressed at the meeting. In our view, those omissions are inconsistent with the conclusion that the Appellant was about to embark on a trade.

57. Similarly, we have not been provided with any evidence that either before the commencement of the redevelopment work, or during the course of that work, the Appellant produced any trading accounts or business plan which showed the level of profit to which the Appellant's redevelopment activity was expected to give rise. We accept that, as a matter of British Virgin Islands ("BVI") company law, the Appellant was not required to prepare and file annual financial statements with the authorities in the BVI. However, if the Appellant had truly been carrying on a trade, we would have expected the Appellant to have produced something akin to those financial statements in relation to its business affairs or a plan of some kind in relation to the business which it claims to have been conducting.

58. At the hearing, we were:

(1) directed to a letter from Stanhope Gate of 8 July 2014, in which Stanhope Gate informed the Appellant that it estimated that the cost of the redevelopment, excluding the Stanhope Gate fees, would be £2.75m; and

(2) then informed by the Appellant that the actual cost of the redevelopment was in fact closer to £1m.

In our view, the discrepancy between those two figures – without any paperwork evidencing the reasons for, and the impact on the anticipated realisation value and anticipated profit of, the eventual massive underspend - tends to highlight the absence of the level of financial planning in relation to the redevelopment to which we have referred above and which we would have regarded as distinguishing a trade from the taking of steps to maximise the value of an investment held on capital account. Following the hearing, Mr Nambiar sent an email to us explaining that the underspend was attributable to the fact that part of the works originally proposed had to be abandoned because planning permission for them was refused. However, we have not been provided with any contemporaneous evidence in the form of revised trading accounts, business plans or minutes of board meetings which refers to the impact of that refusal on the cost of the redevelopment, the anticipated realisation value or the anticipated profit. It seems unlikely to us that a person carrying on a trade of property redevelopment would have suffered such a significant change in the scope of the redevelopment work without there being some contemporaneous paper trail indicating the impact of that change on the expectations of the Appellant's director in relation to the profit of carrying out the redevelopment.

59. Following the hearing, the Appellant also provided us, at our request, with the minutes of other board meetings of the Appellant which were held during the term of the redevelopment work. The content of those minutes also lacks the level of financial information which one would expect from a company carrying on a trade of property development. The minutes show that, like any other owner of a property who is carrying out extensive work to his property with a view to sale, the Appellant was concerned with the nature and cost of the work which was being carried out at the site. However, the minutes suggest no more than that. Three of the board minutes – the ones relating to the meetings on 21 September 2016, 26 July 2017 and 30 September 2017 – contain references to the relationship of the actual costs to date to the anticipated costs but no detail is given in relation to the actual figures in each case or, more importantly, the impact on the anticipated profit of exceeding budget. In short, to the extent

that cost overruns are mentioned in the minutes, the concerns expressed are no different from those which any property owner carrying out extensive construction work would have had in relation to controlling the cost of carrying out that work.

60. Finally, although it is not, in and of itself, evidence that the Appellant was not carrying on a trade – because whether or not the Appellant was carrying on a trade is a question of fact to be determined by reference to the Appellant's purposes and activities – we think that the fact that the Appellant has never registered for UK corporation tax and has never filed company tax returns tends to support the conclusion which we have reached above. If the Appellant had been carrying on a trade, then one would have expected its director to have acted in a manner which was consistent with that conclusion and to have taken steps to register the Appellant for UK corporation tax and to have filed company tax returns on behalf of the Appellant.

61. In conclusion, we believe that it is not correct to say that, as a result of implementing its decision of 25 March 2014 to redevelop the Property, the Appellant began to carry on a trade. Adopting the language of Clerk LJ in *Californian Copper*, the Appellant was not "carrying out a scheme for profit-making". Instead, the Appellant, having failed to realise the sum which it desired for the Property in the course of its marketing of the Property between 2011 and 2013, simply resolved that, in order to obtain an acceptable offer for the Property, it would need to carry out substantial work to the Property before putting the Property on the market again. In our view, the Property did not, as a result of the Appellant's implementing that decision, cease to be the investment held on capital account which it had always been for the Appellant since the Appellant first acquired the Property in 1993 and the Appellant did not, as a result of implementing that decision, start to carry on a trade.

*The result of our conclusion*

62. The conclusion which we have reached in paragraphs 51 to 61 above means that the appeal necessarily falls at the first hurdle. It is therefore unnecessary for us to consider:

(1) the second question which arises in connection with the definition of "property development trade" – namely, whether, had the Appellant been carrying on a "trade", that "trade" "[consisted] of or [included] buying and developing for resale residential or non-residential property"; or

(2) the two issues described in paragraph 31 above in relation to the occupancy of the Property by "non-qualifying individuals".

63. However, in deference to the fact that both parties made detailed submissions in relation to these matters at the hearing, we have set out briefly below our conclusions in relation to certain of those matters.

<u>Did the trade "[consist] of or [include] buying and developing for resale residential or non-residential property"?</u>

*The arguments of the parties*

64. The dispute in relation to this issue related to the question of whether the phrase "buying and developing for resale" should be construed disjunctively – that is to say as requiring, first, "buying" and, secondly, "developing for resale" – or, instead, conjunctively – that is to say as requiring, first, "buying for resale" and secondly, "developing for resale". This is because the latter construction would mean that the Appellant would not be regarded as carrying on a "property development trade" even if it was carrying on a "trade" on and after 1 April 2016, on the basis that it is common ground that, at the time when the Appellant first acquired the Property in 1993, it did not do so for the purposes of resale but rather for the purposes of holding the Property as a long-term investment on capital account.

65. In support of the former construction, Mr Bradley accepted that, on a purely literal construction, it was perhaps the less attractive of the two options but that, when one took into account the purpose of the reliefs in Sections 133, 138 and 141 of the FA 2013, it was the better option. That purpose was to provide relief from the ATED to persons who were deriving income from the enveloped property in question and, in that regard, it made no sense to discriminate against a person who decided to turn its property to account at some point following the initial acquisition of the property, as opposed to having that purpose in mind *ab initio*. Mr Bradley said that it was clear from the judgment of Lewison LJ in *Pollen Estate Trustee Company Ltd and another v The Commissioners for Her Majesty's Revenue and Customs* [2013] EWCA Civ 753 ("*Pollen*") at paragraphs [20] to [26] and [46] to [51] that, in construing a relieving provision in the UK tax legislation, one should start by identifying the policy underlying the relief and, in this case, that policy clearly showed that the former, disjunctive, construction was to be preferred.

66. Mr Bradley helpfully provided an example to support his position, involving a person who, having decided that its property should be redeveloped, could effect that redevelopment either by starting to carry on a redevelopment trade itself or by selling the property to a property developer who would then carry out the redevelopment work in the course of its existing trade. Relief from the ATED would plainly be available to the property developer in the second case and therefore, Mr Bradley submitted, common sense dictated that the same relief should be made available in the first case. Otherwise, there would be an anomaly.

67. In response, Mrs Cowan submitted that the Respondents' policy was to apply the conjunctive construction to the words in question in order to avoid the difficulties arising out of circumstances such as those involved in the present case, where a person who decided to redevelop a property which had hitherto been held as an investment on capital account then sought to argue that it had commenced a trade and appropriated the property in question to that trade. By confining the relief to persons who had the intention of redeveloping and reselling the property in question at the time of acquisition, such difficulties could be avoided.

*Our conclusion*

68. In our view, the submissions of Mr Bradley are to be preferred in relation to this question.

69. We agree with him that, taking into account the obvious purpose of the relief in Section 138 of the FA 2013, it makes no sense to prevent a person who, having initially acquired a property as an investment on capital account, subsequently begins to carry on a trade of property development and appropriates the property in question to that trade from claiming the relief for periods following that appropriation given that:

(1) a person who is carrying on a trade of property development at the time when the property is acquired is entitled to the relief; and

(2) had the relevant person sold the property in question to a developer, that developer would have been entitled to the relief.

70. To construe the relevant language in a way which would preclude the first-mentioned person from claiming the relief would be to create an anomaly which would clearly cut across the purpose of the legislation and, as it is possible to construe the legislation in a manner which does not have that result by the simple expedient of limiting the application of the words "for resale" so that they qualify only the word "developing" and not both that word and the word "buying", we consider that we are entitled to adopt that simple expedient. It is plain from the judgment of Lewison LJ in *Pollen* that the purpose of the relief must inform the construction of the language conferring the relief.

71. There are two possible counter-arguments to the above conclusion.

72. The first is that the use of the word "buying" in Section 138(4)(a) of the FA 2013 limits the availability of the relief in any case to circumstances where a person has acquired the relevant property by way of purchase. The relief is therefore not available in cases where a person carrying on a trade of developing property acquires a property other than by way of purchase (for example by way of legacy or gift) or a person who has acquired a property as an investment on capital account other than by way of purchase subsequently starts to carry on a trade of property development and appropriates the property to trading account. Thus, even after adopting the construction mentioned above, Section 138 of the FA 2013 would still give rise to anomalies in those circumstances.

73. The second is that it might be said that the use of the phrase "acquired in the course of that trade" in Section 140(1) of the FA 2013 – see paragraph 22 above - casts doubt on the conclusion reached above because, read literally, the word "acquired" is not apt to extend to the act of appropriation of an asset previously held as an investment on capital account. The argument would be that, if the operation of Sections 140(1) to 140(3) of the FA 2013 is restricted to cases where the relevant property has been acquired in the course of the trade and does not extend to cases where the relevant property has been appropriated into the trade following its acquisition, then, logically, the relief in Section 138 of the FA 2013 should also be so limited.

74. In our view, the first counter-argument does not hold much force. It is no argument against a construction which has the effect of avoiding a clear anomaly in the application of a relief to say that that construction still leaves unaddressed other anomalies in the application of that relief. A construction which reduces the number of anomalies that arise in the application of a relief without itself giving rise to any others is still a construction which is worth adopting. And, in any event, it is conceivable that a case can be made for construing the word "buying" in Section 138(4)(a) of the FA 2013 as being apt to include acquisitions other than by way of purchase, based on the judgment of Lewison LJ in *Pollen*.

75. A similar point can be made in relation to the second counter-argument. Leaving aside the fact that, for similar reasons to those given by Lewison LJ in *Pollen*, the word "acquiring" in Section 140(1) of the FA 2013 might purposively be construed as being apt to include "appropriation" to the trade, there is no reason why a defect in the way in which Section 140 of the FA 2013 is drafted, and which therefore gives rise to anomalies in the circumstances in which the disapplication of the relief effected by Sections 140(1) to 140(3) of the FA 2013 occurs, should prevent a construction of the language used in Section 138(4)(a) of the FA 2013 which accords with the policy underlying the relief.

*The result of our conclusion*

76. In conclusion, therefore, we consider that, if the Appellant had been carrying on a "trade" as a result of the actions which it took following its decision to redevelop the Property, then that "trade" would have satisfied the condition in Section 138(4)(a) of the FA 2013. We do not address in this decision the further question which would then arise before we could conclude that the "trade" in question was a "property development trade" – namely, whether the "trade" was being "run on a commercial basis and with a view to profit" and therefore satisfied the condition in Section 138(4)(b) of the FA 2013 - because we were not presented with detailed submissions in relation to that question at the hearing.

<u>Occupancy</u>

77. As noted in paragraph 31 above, two questions arise in relation to the occupancy test set out in Sections 140(1) to 140(3) of the FA 2013.

78. The first is whether the Respondents are precluded from raising the 140 issue at this stage on the basis that the issue of occupancy did not form part of the conclusion which was reached in the closure notices.

79. The second – which arises only if the Respondents are entitled to raise the 140 issue at this stage – is whether the Appellant has established that no "non-qualifying individual" occupied the Property on any day in an ATED chargeable period falling within three years prior to the 2017 Period on which the Appellant was carrying on the "property development trade".

*Can the Respondents raise the question of occupancy?*

80. It is common ground that, on the basis of the decision of the Supreme Court in *Tower MCashback*, as summarised by Kitchin LJ in *Fidex* at paragraph [45], the subject matter of the appeal is constrained by the conclusion reached in the closure notices.

81. Where the parties differ is that the Appellant maintains that, when one looks at the terms of the original notices of enquiry, the terms of the correspondence which passed between the parties in relation to the enquiries and the terms of the closure notices, the only logical interpretation of the closure notices is that the conclusion reached in those notices was that the Appellant was not carrying on a "property development trade". In contrast, the Respondents say that the conclusion reached in the closure notices was that no relief from the ATED was due in respect of the Property in the ATED chargeable periods in question and that the fact that the Respondents considered that the Appellant was not carrying on a "property development trade" was simply the reason why the Respondents reached that conclusion.

82. If the Respondents submission is right, then they would not at this stage be precluded from raising the occupancy issue because it is clear from the above authorities that the scope of an appeal is constrained solely by the conclusions which were reached in the relevant closure notice and that alternative reasons for reaching the same conclusion can subsequently be advanced at the hearing.

83. When one looks at the terms of the closure notices, as set out in paragraph 12 above, the final two sentences before the revised calculations reads as follows:

"My view is that developing 27 Thurloe Square does not make Hopscotch Ltd a person carrying on a property development trade. As a result I am withdrawing the relief claimed."

84. We can see how, taken in isolation, those final two sentences could lead to the view that the conclusion reached in the closure notices was that no relief from the ATED was available and that the reason for that conclusion was that the Appellant was not carrying on a "property development trade". However, we think that, when one looks at those sentences in the light of all that preceded the closure notices, and the other terms of the closure notices themselves, the better construction of the closure notices is that the closure notices were reaching the conclusion that the Appellant was not carrying on a "property development trade" and that the fact that no relief from the ATED was due was simply the result of that conclusion. In other words:

(1) the fact that, in the Respondents' view, the Appellant was not carrying on a "property development trade" was not merely a reason which led to a conclusion in the closure notices that no relief from the ATED was due but was itself the conclusion reached in the closure notices; and

(2) in contrast, the fact that, in the Respondents' view, no relief from the ATED was due was simply the practical consequence of that conclusion, and not a conclusion in and of itself.

85. Expanding on the opinion set out in paragraph 84 above, we accept that, in the context of a closure notice, it can be difficult to distinguish between:

(1) the reason for reaching a conclusion;

(2) the conclusion itself; and

(3) the result of the conclusion.

86. These were distinctions which exercised the courts at each level in *Tower MCashback* and *Fidex*. However, in our opinion, the statement in the closure notices that the Appellant was not carrying on a "property development trade" clearly fell within the category described in paragraph 85(2) above (and not within the category described in paragraph 85(1) above) and the statement in the closure notices that no relief from the ATED was available clearly fell within the category described in paragraph 85(3) above (and not within the category described in paragraph 85(2) above).

87. We say this because, at no point in any of the notices of enquiry, the correspondence or the closure notices was reference made to the issue of occupancy of the Property before 1 April 2016. In fact, occupancy was mentioned only twice in any of those documents - both times in the notice of enquiry in relation to the 2017 Period - and that was in the context of occupancy during the 2017 Period itself. As a result, we do not see how the absence of a "property development trade", which was central to the terms of those documents, can be said to be merely part of the reasoning which led to the conclusion that the relief was not available, as opposed to being the conclusion, in and of itself.

88. We believe that the terms of the closure notices in this case are distinguishable from the terms of the closure notice in *Tower MCashback*, where the reference in the notice to the correspondence which preceded the notice was held not to limit the scope of the conclusion which was reached in the notice. In *Tower MCashback*, the closure notice clearly stated that its conclusion was that "[the]claim for relief under section 45 CAA 2001 is excessive". It is therefore not surprising that the Supreme Court held that, notwithstanding the reference, in the preamble to that conclusion, to the correspondence which preceded the closure notice and which pertained solely to Section 45(4) of the Capital Allowances Act 2001 ("Section 45(4)"), the Respondents were not precluded from relying, in the ensuing proceedings, on reasons other than Section 45(4) for denying the capital allowances under Section 45 of the Capital Allowances Act 2001.

89. Similarly, although the position in this case is somewhat closer to the position in *Fidex*, we believe that the terms of the closure notices in this case are distinguishable from the terms of the closure notice in *Fidex*. In *Fidex*, the relevant officer set out various statements sequentially, to the effect that:

(1) the disputed loss should not have arisen as a result of applying the correct accounting treatment;

(2) the disputed loss could therefore not be claimed; and

(3) "[further] analysis may reveal additional grounds supporting the conclusions I have reached".

90. In that case, the Court of Appeal upheld the conclusion reached by the First-tier Tribunal to the effect that the statement summarised in paragraph 89(1) above was just a reason for the conclusion set out in the statement summarised in paragraph 89(2) above. The latter was the conclusion reached on the basis of the former, as was made clear by the statement set out in paragraph 89(3) above. The latter was not, as counsel for the taxpayer contended, simply stating the amendments required to give effect to the conclusion reached in the former.

91. Whilst we have taken on board the admonition of Kitchin LJ at paragraph [51] in *Fidex*, echoing the views of the Upper Tribunal in that case, to the effect that it is not appropriate to construe a closure notice as if it is a statute, we believe that, when the language used in the closure notices in this case is read in the context of the documentation which preceded the closure notices, the better construction of the closure notices is that the final sentence in the extract from the closure notices set out in paragraph 83 above did not form any part of the conclusion reached by the closure notices. Instead, in each case, that sentence was merely setting out the result of the conclusion previously reached in the relevant closure notice.

92. We would add that some support for this conclusion may be found implicitly in the terms of the review conclusion letter referred to in paragraph 16 above. In that letter, Mr Aggs made no mention of any issue other than the ones relating to the existence of a "property development trade".

93. We therefore consider that the Respondents are precluded from raising the question of occupancy at this stage of the appeal.

*Did the Appellant fail the occupancy test?*

94. It follows from this conclusion that there is no need for us to address the second question which arises in relation to occupancy in this case – namely, whether the Appellant has established that no "non-qualifying individual" occupied the Property on any day in an ATED chargeable period falling within three years prior to the 2017 Period on which the Appellant was carrying on the "property development trade".

## CONCLUSION

95. It follows from the above that, in our view, the appeal should be dismissed on the basis that the Appellant was not carrying on a "trade" at any point in the 2017 Period or the 2018 Period and therefore the Appellant did not satisfy the conditions set out in Sections 138(1)(a) and 138(1)(b) of the FA 2013 for entitlement to relief from the ATED in respect of the Property in either of those ATED chargeable periods.

## RIGHT TO APPLY FOR PERMISSION TO APPEAL

96. 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.

**TONY BEARE**
**TRIBUNAL JUDGE**

**RELEASE DATE: 02 MAY 2019**