[2020] UKFTT 0120 (TC)

TC07614

Appeal number: TC/2019/01543

VALUE ADDED TAX – DIY House Builders scheme – Section 35 Value Added Tax Act 1994 – Regulation 201 Value Added Tax Regulations 1995 – date of completion of the building – divergent lines of authority –* Fraser *preferred – whether claim made in time in circumstances of case – yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NEIL PROFFITT **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY
MR DEREK ROBERTSON

Sitting in public at Centre City Tower, Birmingham on 16 December 2019

Mr Proffitt in person, supported by Mrs Proffitt

Mrs Sharon Hancox, presenting officer, for the Respondents

DECISION

Introduction

1. This appeal is against a review conclusion dated 12 February 2019, upholding HMRC's earlier decision to refuse Mr Proffitt's claim for repayment of £14,032.66 in VAT incurred on the construction of a building designed as a dwelling.

The issue between the parties

2. The sole dispute between the parties is whether Mr Proffitt's claim for a refund was made within time. HMRC argue that the relevant building was completed more than three months before Mr Proffitt's claim was submitted to them. Mr Proffitt argues that his claim was made in time.

Parties' submissions

3. We record our thanks to Mrs Hancox and to Mr and Mrs Proffitt for the helpful and constructive way each party put their case.

4. Mr Proffitt argued that the building project had been hands on and had taken an extremely long time. In providing their DIY claim, he and his wife had followed the guidance provided by HMRC, including advice given specifically to him at a VAT seminar, and they had submitted the claim when they considered the house was complete. Mr and Mrs Proffitt had not considered occupancy to be a key issue at the time, given many self builders occupy before completion, and they had understood that there was an unlimited time to complete their home.

5. Mr and Mrs Proffitt had not been aware of Regulation 201 until these proceedings, they had relied on the guidance provided by HMRC and had understood that the Completion Certificate was used to determine the date of completion. Mr Proffitt noted that all the cases cited by HMRC had nuances and that none exactly mirrored this appeal. Mr Proffitt pointed out that the purpose of the legislation was to allow claims by DIY builders, and suggested that the scheme should not be operated in such a way as to deny valid claims.

6. Mrs Hancox outlined the relevant legislation (set out below) and submitted that the three month time limit for making a claim was mandatory, that the Tribunal could not extend the time, and so the only issue for the Tribunal was whether the dwelling was completed earlier than three months prior to the claim being submitted.

7. Mrs Hancox referred to the cases of *Purdue v HMRC* [1995] (Case EDN/94/511), *Hall v HMRC* [2016] UKFTT 632, and *Fraser v HMRC* [2019] UKFTT 573. (Mrs Hancox also referred to a recent unpublished decision. As this contains only a summary of the reasons for the decision and should not have been cited, we do not refer to it again.) We refer to *Purdue*, *Hall* and *Fraser* further below. Mrs Hancox submitted that Mr and Mrs Proffitt had occupied the dwelling in 2010,

that there were only 7 invoices dated later than 2011 and that it was not necessary for the windows to be replaced for the dwelling to be complete. Mrs Hancox submitted that a Completion Certificate was an indicator of completion, it was not conclusive, and that alternative evidence could have been submitted either in 2010, following occupation, or in late 2016, once the windows had been replaced.

Evidence before us

8. We heard oral evidence from Mr and Mrs Proffitt as part of their submissions to us. We found both to be honest and credible and we accept their evidence in full. We also had the benefit of a bundle of relevant documents prepared by HMRC on behalf of the parties.

Background and facts found

9. On the basis of the documents before us, and the oral evidence of Mr and Mrs Proffitt, we find as follows:

a. Mr and Mrs Proffitt had, for a long time, wished to build their own home. Eventually they were able to purchase the rear garden of an existing house, on the basis that a boundary fence and foul drain connection were instigated immediately upon completion.

b. On 17 April 1998, Mr and Mrs Proffitt applied to Wychavon District Council for permission to erect a detached dwelling and double garage on their plot. Planning permission was granted on 30 September 1998 subject to nine conditions and a number of notes, including that the development must be begun within five years, that the permission related to amended plans received on 27 August 1998, and that the building could not be occupied until the driveway and vehicular turning area had been consolidated, surfaced and drained in accordance with details to be submitted and approved.

c. Mr and Mrs Proffitt did not initially have the funds or the time to work on the site full time. Mr and Mrs Proffitt lived in rented accommodation and undertook what work they could at evenings and weekends. The development was progressed as and when time and resources permitted.

<u>2010</u>

d. In March 2010, Mr Proffitt attended a VAT seminar at which he sought advice about making a DIY claim. Mr Proffitt understood from that advice that he and his wife had unlimited time in which to complete their home but that it was essential that a Completion Certificate be provided with the DIY VAT claim. By this time there was a shell of a building in place.

e. At about the same time as the VAT seminar, Mr Proffitt was made redundant. He used his redundancy money and additional time to good effect, preparing the shell of the building for plastering. Once the building had been plastered, the Local Authority notified Mr and Mrs Proffitt or their intention to start charging

council tax on the property. At about the same time, Mr and Mrs Proffitt were given notice to quit by their landlord who intended to sell the flat they were renting.

f. At that time, the fixes for the carpentry and services had not been completed and there was no storm drain connection for the building. A downstairs cloakroom had been installed but the two planned upstairs bathrooms had yet to be fitted. Despite the amount of work still to be undertaken, Mr and Mrs Proffitt felt that events had forced their hand; they decided that, rather than rent another flat, they would reduce their overheads by moving into the property.

g. Before Mr and Mrs Proffitt moved into the property, they had attended a meeting with a building control surveyor. Mr and Mrs Proffitt were informed that the windows did not meet the emergency egress standards in the 2010 Building Regulations. Mr and Mrs Proffitt were informed that a Completion Certificate could not be issued until this issue had been resolved and all the other work completed.

h. On 25 September 2010, Mr and Mrs Proffitt moved into the property. Some of the materials bought were also being stored in the house at that time. Following occupation, work continued to progress slowly.

Remainder of 2010

i. An en suite bathroom was installed to bedroom 1. Mr and Mrs Proffitt had used the downstairs cloakroom until this bathroom was complete.

2011

j. Lining boards and balusters were fitted to the main staircase; cupboards and appliances were fitted to the utility room; final wiring and duct extensions were installed for the whole house vacuum system; the second fix carpentry and decoration of bedroom 1 took place; construction of masonry stairway from garage to rear entrance door was undertaken; and the erection of fencing and gate at the side of the garage took place.

2012

k. The main bathroom was installed; the front pathway, side gate and fencing were installed; and a log retaining wall was installed across the rear garden;

2013

l. The gas central heating was commissioned; kitchen wall lights and an extract fan were fitted; and the second fix carpentry and decoration of bedroom 2 took place.

2014

m. Hard paving to the rear courtyard was installed; and the second fix carpentry and decoration to bedroom 4 took place.

2015

n. The ceiling boarding was completed, and permanent support to the entrance porch roof was installed; and non-slip porch tiles were installed.

2016

o. Some of the excavation spoil (which was preventing hard landscaping in garden) was removed.

p. Mr and Mrs Proffitt had deferred the replacement of the window frames until they had the funds in place. The replacement took place in late 2016. On 2 November 2016, a licensed window installer certified that it had installed 20 windows and 3 partly glazed doors on 12 October 2016.

2017

q. Further excavation spoil was removed; and some hard landscaping was installed.

r. Much of this work from 2010 onwards was undertaken by Mr and Mrs Proffitt themselves using materials they had bought in 2010 and stored in the property until ready to be put in place. Contractors were used to complete the paved drive way, the storm water mains connection and the pavement drop kerb.

The Completion Certificate

s. Mr and Mrs Proffitt regarded the installation of the new windows in October 2016, as the point at which they were able to apply for a Completion Certificate. Other work – an internal handrail and a discharge to a drain – were still not complete but it seems that Building Control were not concerned about these minor items. Once the windows were installed, Mr and Mrs Proffitt made arrangements to obtain an electrical certificate and a gas safe certificate (which they knew would be required to obtain a Completion Certificate). The initial inspection to obtain an electrical certificate resulted in Mr and Mrs Proffitt being required to install an extractor fan in the kitchen to satisfy regulatory requirements. The extractor fan was installed and the electrical certificate was issued after that.

t. Unfortunately, through events completely outside Mr and Mrs Proffitt's control, it took much longer to obtain the gas safe certificate. Mr Proffitt had installed the central heating system and engaged a heating engineer to connect the system. There had been a dispute with that engineer and the company subsequently went into liquidation. After discussions with the local authority

about how to obtain the necessary gas safe certificate in such circumstances, Mr and Mrs Proffitt instructed an independent firm to certify the gas connection.

u. Once Mr and Mrs Proffitt had their electrical certificate and their gas safe certificate, they were able to obtain an Energy Performance Certificate. This was around December 2017. Once the EPC was available, Mr and Mrs Proffitt promptly made their application for a completion certificate.

v. On 9 February 2018, South Worcestershire Building Control Partnership wrote to the Appellant as follows in relation to the building:

> I refer to the above, where the building works have recently been completed on site.
>
> I am pleased to enclose a completion certificate issued by South Worcestershire Building Control Partnership which should be considered as evidence (but not conclusive evidence) that, in so far as the authority has been able to ascertain, the works described in the certificate are in compliance with the requirements of the Building Regulations.

w. Enclosed with that letter was a Completion Certificate which described the works as a detached dwelling and which specified that full plans had been deposited under the Building Regulations on 3 November 1998 and the completion was 9 February 2018. A note at the bottom of the Certificate made clear that the Certificate only applied to the detached dwelling and did not apply to any work to which the regulations did not apply. We take that to mean any work to which the Building Regulations did not apply.

The DIY claim made to HMRC

x. On 27 March 2018, Mr and Mrs Proffitt submitted their DIY claim to HMRC. The total sum claimed was £14,032.66. HMRC acknowledged receipt of this claim on 12 April 2018. The claim made by Mr and Mrs Proffitt was accompanied by details of the invoices which supported their claim. These invoices were dated from November 1998 to November 2017. Ten invoices dated from 2011 or later, and these related to hard landscaping materials, whole house vacuum fittings, sharp sand, cement, fence posts and a concealed overflow system.

y. On 27 March 2018, when the DIY claim was submitted, Mr and Mrs Proffitt had still to complete the external landscaping works or rebuild the original retaining wall adjacent to the highway. Mr and Mrs Proffitt accepted that they would not be able to reclaim the VAT spent on the materials required for that forthcoming work. Even at the date of the hearing, some minor fixes to the house were yet to be completed and the boundary wall had yet to be built to the required height. Mr and Mrs Proffitt were still storing some materials for later fixes.

z. After acknowledging receipt of the DIY claim, HMRC asked Mr and Mrs Proffitt to provide more information about the claim which had been submitted. HMRC asked for details of the work undertaken after 2010 (when there were far fewer invoices) and after occupation, and for clarification of the delay between occupation and obtaining a Completion Certificate. Mr and Mrs Proffitt replied on 23 April 2018.

aa. On 21 May 2018, HMRC asked Mr and Mrs Proffitt for further information. Mr and Mrs Proffitt were asked to provide a detailed timeline of the woks undertaken, and to provide any documentary evidence stating that further work was required before the Completion Certificate could be issued. Mr and Mrs Proffitt replied on 12 June 2018, and Mr Proffitt mentioned the VAT seminar he had attended.

bb. On 9 August 2018, HMRC asked for information about the VAT seminar attended, and when the windows had been replaced. Mr and Mrs Proffitt replied on 12 August 2018.

cc. On 20 September 2018, HMRC refused Mr and Mrs Proffitt's DIY claim. The claim was rejected on the basis that the property was habitable by 2016 at the latest. The HMRC officer stated that determination of when a property was completed depended on a number of factors, including when the building becomes habitable.

dd. Mr and Mrs Proffitt sought internal review. Mr and Mrs Proffitt made the point that the eligibility of the claim depended on the issue of a Completion Certificate, and that they had delayed submission of their claim until they had a Completion Certificate. Mr and Mrs Proffitt also noted that there was no reference in Regulation 201 to the property being habitable, and that the first item required to be submitted was the Completion Certificate.

The decision under appeal

ee. On 12 February 2019, HMRC issued their review decision. The review officer upheld the earlier conclusion that the building was completed more than three months before the claim was submitted. This conclusion was reached on the basis that the more relevant factors to demonstrate completion were when the works had been completed in accordance with the planning permission and to make the building functional. Neither occupation nor a Certificate of Completion were conclusive. The review officer held open the possibility of HMRC extending the time in which a claim could be made if there was a reasonable excuse for the delay in making the claim, but made it clear that could be considered by the original officer only, and not at the Tribunal.

The appeal to this Tribunal

ff. On 12 March 2019, Mr Proffitt appealed to this Tribunal. No grounds of appeal were provided but the desired outcome was stated to be:

We would like HMRC to accept our claim for DIY Self-Build refund is valid and proceed to process the application as soon as possible.

Burden of proof

10. In their appeal against HMRC's refusal of a DIY claim, the onus is upon Mr and Mrs Proffitt. The standard of proof is the civil standard of the balance of probabilities. Therefore, it is for Mr and Mrs Proffitt to demonstrate, on the balance of probabilities, that they are entitled to make a DIY claim.

Discussion and decision

11. The DIY scheme allows individuals to claim VAT back on building materials purchased when building a new house. This is intended to put a DIY housebuilder in a similar position to commercial housebuilders. Despite the aim of parity, there are still some significant differences between the position of commercial housebuilders and DIY housebuilders, all to the disadvantage of DIY housebuilders. Commercial housebuilders can claim VAT incurred on both goods and services, and also can make a claim each quarter, giving them a cashflow advantage over DIY housebuilders. DIY housebuilders may reclaim the VAT incurred only on materials and, critically, they are restricted to making just one claim.

12. A DIY claim must meet the requirements set out in Section 35 Value Added Tax Act 1994 ("VATA 1994") and Regulation 201 of the Value Added Tax Regulations 1995 (the "VAT Regulations").

Relevant legislation

13. Section 35 VATA 1994 provides that where a person who carries out certain construction works and who incurs VAT on the supply, acquisition or importation of goods used in that construction, HMRC shall, on a claim made, refund to that person the amount of VAT charged. The relevant parts of Section 35 provide:

> **35.** Refund of VAT to persons constructing certain buildings
>
> (1) Where-
>
> (a) a person carries out certain works to which this section applies,
>
> (b) his carrying out of the works is lawful and otherwise than in the course or furtherance of any business, and
>
> (c) VAT is chargeable on the supply, acquisition or importation of any goods used by him for the purposes of the works,
>
> the Commissioners shall, on a claim made in that behalf, refund to that person the amount of VAT so chargeable.
>
> (1A) The works to which this section applies are-

(a) the construction of a building designed as a dwelling or number of dwellings;

…

(2) The Commissioners shall not be required to entertain a claim for a refund of VAT under this section unless the claim-

(a) is made within such time and in such form and manner, and

(b) contains such information, and

(c) is accompanied by such documents, whether by way of evidence or otherwise,

as may be specified by regulations or by the Commissioners in accordance with regulations.

14. Regulation 201 of the VAT Regulations sets out the manner in which a claim should be made. Regulation 201 provides:

201. A claimant shall make his claim in respect of a relevant building by—

(a) furnishing to the Commissioners no later than 3 months after the completion of the building the relevant form for the purposes of the claim containing the full particulars required therein, and—

(b) at the same time furnishing to them—

(i) a certificate of completion obtained from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners,

(ii) an invoice showing the registration number of the person supplying the goods, whether or not such an invoice is a VAT invoice, in respect of each supply of goods on which VAT has been paid which have been incorporated into the building or its site,

(iii) in respect of imported goods which have been incorporated into the building or its site, documentary evidence of their importation and of the VAT paid thereon,

(iv) documentary evidence that planning permission for the building had been granted, and

(v) a certificate signed by a quantity surveyor or architect that the goods shown in the claim were or, in his judgement, were likely to have been, incorporated into the building or its site.

15. As can be seen, a claim under Regulation 201 must be made "no later than 3 months after the completion of the building" and must be supported by documentary evidence of completion. To determine this dispute, we must decide whether the DIY claim was made within three months of the completion of the dwelling.

16. We were referred to a number of authorities. While previous decisions of this Tribunal are not binding upon us, we agree with Mrs Hancox that earlier cases can be helpful in helping us to determine the factors we should take into account in deciding whether this DIY claim was made in time. We also agree with Mr Proffitt that, as the issue for us to determine is fact-sensitive, the precise facts of other cases are likely to be less relevant: the fact that completion occurred at a particular stage in another case does not mean that Mr and Mrs Proffitt's home was completed at the same stage.

Our review of the authorities

17. We begin with *Purdue v HMRC* [1995] (Case EDN/94/511), cited to us by Mrs Hancox. In this case the VAT Tribunal concluded that they did not have the power to consider the application of an Extra Statutory Concession. That conclusion determined the appeal. Making obiter comments on the date of completion, the Tribunal briefly set out the chronology, including the fact that the Appellant had been allowed to occupy the relevant conversion in February 2013 on the basis that it was habitable. A Completion Certificate had been applied for at the same time but was not granted until March 1994, following the completion of outstanding work which was required to obtain an electrical certificate. The Appellant argued that, despite the Completion Certificate, the building was not completed until a later date. The Tribunal concluded that the building was complete when the building was habitable, safe and hygienic, and that this was demonstrated by the Completion Certificate.

18. The next case we have been able to locate is *Morris v HMRC* [2002] Lexis Citation 863 (not cited to us). Mr Morris had been granted a Completion Certificate in respect of the house but then undertook further work levelling the site and laying paths and a patio to the sides and rear of the dwelling. As recorded in *Morris*, HMRC's practice at that time was to treat the date on the Completion Certificate as the date on which the building was completed. Mr Morris, arguing for a later date, submitted that the building works were not completed simply because a Completion Certificate had been issued. Dismissing the appeal, the Tribunal held:

> 31. … It is open to the Commissioners under section 35(2) to make conditions for the time and evidence required for them to entertain such a claim for refund. What a claimant must do is to furnish the Commissioners not later than three months after the completion of the building the building regulations certificate in issue. The question of what is "the completion of the building" is, as the Commissioners have said, a question of fact. The Commissioners say and it is true as a statement of fact, that Notice 719 makes it clear that a building can still be regarded as under construction until the date when a certificate of completion is issued and all building regulations are complied with. It follows logically that subsequent to those two conditions it cannot. The letter from the Principal Building Control Surveyor of Caradon District Council does state that the

> issuance of the certificate implies no more than that the building is finished other than in respect of building regulation requirements. That leads to the conclusion that this building was complete in that sense.
>
> …
>
> 36. The Tribunal finds as a fact on the evidence before it that by the date of the certificate the Appellant had lawfully entered into a building which was habitable, safe and hygienic. The fact that the paths and patio were not complete does not detract from this, no matter how desirable such completion would have been. The Appellant explains the difficulties that he had in finishing this work, but it would have been open to him had he wished to avail himself of the possibility of claiming a refund, to have completed that work within the time limit set out. It is not possible for the Tribunal, in view of the power given to the Commissioners to fix a time limit, and the evidence necessary to establish it, to find that there is in fact an open-ended possibility in time to claim a refund outside that time limit. The Appellant suggests that the certificate is not a very good point of departure for the time limit, but it is laid down as evidence of the fact of completion. These are clearly good reasons for fixing a time limit, and for taking an official certificate of completion as the point of departure of that limit. There is further evidence of completion by the entry into occupation.

19. Following *Purdue* and *Morris*, it seemed to be settled that the date on the Completion Certificate indicated the date on which a dwelling had been completed. Certainly, it seemed, no later date would be possible.

20. A further thirteen years appear to have passed before the next reported decision. In *Bowley v HMRC* [2015] UKFTT 683 (not cited to us), the Tribunal allowed Mr Bowley's appeal. In this case the original planning permission was for a house with an attached garage. In 1993, the Appellant revised his plans and was granted planning permission for a detached garage block. In June 1994, the house, now without an attached garage, was completed and a Completion Certificate was granted. Mr Bowley wrote to HMCE regarding his DIY claim and, in September 1994, HMCE asked Mr Bowley to submit his DIY claim "as soon as possible". That DIY claim was submitted in 2014, following completion of the garage block, but was rejected by HMRC as being too late. The Tribunal relied on Note (3) to Group 5 of Schedule 8 to VATA 1994, which provided that a dwelling and a garage are to be regarded as built at the same time if part of a single continuous project. The Tribunal held that, despite a six month gap between Mr Bowley finishing the work on the house and beginning work on the garage, the garage groundwork had begun before the house was finished and so the house and garage were both part of a single continuous building project. Therefore, the claim was in time as it was submitted within three months of the completion of the garage.

21. *Bowley* was relatively quickly followed by *Hall v HMRC* [2016] UKFTT 632, cited to us by Mrs Hancox. In *Hall* the Tribunal held that the particular supply did not qualify under the DIY scheme. Although that conclusion determined the appeal, the Tribunal also commented on the date of completion, stating that it would be a matter

of fact and degree as to whether and when any particular building project was finished and – in a departure from *Purdue* and *Morris* – it would not necessarily be the date on a Completion Certificate. The Tribunal stated:

> A Certificate of Completion can be issued in respect of a dwelling house when the dwelling house satisfies the various criteria set out in the Building Regulations. That does not necessarily mean that the building works, for which planning permission has been granted in respect of a new dwelling, will have been completed. A Completion Certificate can be granted where the dwelling itself satisfies each of the applicable Building Regulations so as to qualify as being habitable, notwithstanding that, for example, the driveway, surrounding paths and/or boundary fences/walls have not been completed. Some may choose to reside in a new house whilst those outstanding works are done. The fact that they have not been done will not prevent a Completion Certificate being issued. Such a Certificate does not certify that the entire building works have been completed; only that the dwelling has been constructed so as to be habitable in accordance with the requirements of the Building Regulations.

22. Looking at these four decisions, there is limited assistance to be derived from *Bowley* as it did not contain a discussion about what should be considered to determine the date on which a dwelling or project is completed. We note that in both *Purdue* and *Morris* the Tribunal understood the Completion Certificate to be evidence that a dwelling was habitable, safe and hygienic, and therefore that it was completed. A later date for completion of the dwelling was rejected. It seems that a similar approach would have been taken in *Bowley* had the dwelling and garage not been a single project. By contrast, in *Hall,* the Tribunal regarded the Completion Certificate as evidence only that the dwelling was habitable, not that the entire building works had been completed. While the position is different where there is a garage – as discussed in *Bowley* – we note that Regulation 201 refers to a claim made in respect of a relevant building, i.e. one designed as a dwelling, and not to the development as a whole. Therefore, while we agree with *Hall* that a driveway or surrounding landscape works might not be complete at the time a Completion Certificate is issued, that fact does not help us to decide when a dwelling – the relevant building for the purposes of the legislation – has been completed.

23. It seems that at some time since 2016, HMRC changed their practice, described in *Morris*, of treating the date on the Completion Certificate as the date on which the building was completed. That change has resulted in a surprising number of reported decisions on this issue within the last year.

24. These recent decisions begin with *Farquharson v HMRC* [2019] UKFTT 425 (not cited to us). In *Farquharson*, the Appellant and his wife had begun building a house. After being made redundant, the Appellant converted the garage of the new building into a self-contained flat, and he and his wife moved into that flat in order to save funds. Work on the house progressed slowly and eventually the Appellant and his wife decided to sell the house in an incomplete state. After a year a buyer was found and the Appellant was advised that a Completion Certificate would be required in order to sell the property. A Completion Certificate was applied for, and granted,

despite one bathroom being without plumbing. The Appellant submitted a DIY claim within three months of the Completion Certificate being issued. HMRC refused the claim on the basis that the house was complete when the Appellant and his wife occupied the property, and they considered that the only remaining work was of a cosmetic nature. In a decision which harked back to *Morris*, the Tribunal held that the DIY claim was made in time as "completion" was to be defined by the Completion Certificate. The Tribunal reached this decision on the basis that the Regulations made it clear that completion was to be established by documentary evidence, and it was clear that the Completion Certificate was the preferred evidence. The Tribunal held, at paragraph 42:

> 42. From the statutory wording, the Tribunal finds that the meaning of 'completion' under reg 201(a) is to be given the plain meaning as referential to a certificate of completion for the following reasons:
>
> > (1) Applying the ordinary rules of statutory construction, the plain meaning of 'completion' under reg 201(a) is to be defined by the issue of a certificate of completion under reg 201(b)(i). It is a clear-cut definition for 'completion' that enables the claimant and the Commissioners to establish the common ground, and for the efficient administration of the refund scheme so that there is no cause for ambiguity or dispute such as the present case.
> >
> > (2) The primacy given to a certificate of completion is evident in the statutory wording; it is the *sine qua non* for the purposes of a VAT refund claim under the DIY Scheme. The statutory wording makes it clear that the preferred document is a certificate of completion, and it is only in the absence of which that the alternative should be provided in substitution.
>
> ….

25. At paragraphs 46 and 47, dismissing HMRC's arguments about the date of occupation and the date of the last invoice, the Tribunal held:

> 46. It is plain from the statutory wording that a bright-line definition is to be given to 'completion' by reference to the stipulated documentation alone. The definition of 'completion' is not to be founded on circumstantial factors, which are in turn subject to different documentation to establish. The date of occupation, or the date of last purchases are not provided as possible alternative points of completion in the statute, not to mention that these are facts that need to be established by evidence that has no reference in the statute whatsoever.
>
> 47. If two different dates of completion as reckoned by HMRC were indeed possible according to the statute, then the relevant provision would seem to us flawed in its conception because: (a) it would promote ambiguity in establishing 'completion' subject to arbitrary documentation as evidence, and (b) it would allow such wide margin of difference, with the range of some 8 years between the possible date of 23 December 2008, and a later date of 2 June 2016. Such

> ambiguity and wide margin in establishing 'completion' cannot be desirable in providing for an efficient scheme for administering refund, and cannot be the intention of the legislature.

26. We agree with the Tribunal panel in *Farquharson* that there are difficulties for a DIY builder (and for HMRC) in correctly identifying the date of completion if – as suggested in *Hall*, and argued for by HMRC in this appeal – it is a matter of fact and degree when a building is completed, and the date of completion can be different in each case. We also agree that that there may be difficulties in providing documentary evidence of completion if, for example, it was determined to be at a point where no third party documentation would usually be issued. For example, in the case before us, it might be argued that Mr and Mrs Proffitt's home was completed when they finished installing the en suite bathroom (and for the first time had the washing facilities normally expected in a home). It is difficult to see what document Mr and Mrs Proffitt might be expected to provide to support a DIY claim for that date.

27. Very shortly after *Farquharson*, the Tribunal issued its decision in *Fraser v HMRC* [2019] UKFTT 573. In this case the Appellant had occupied the relevant property from December 2015. The property had been banded for council tax with effect from the date of occupation but an application for a Certificate of Completion had been refused on the basis that guidelines, entitled "Good practice on the testing and verification of protection systems for buildings against hazardous ground gases", had not been met. Remedial work was undertaken and a report provided but the report was considered inadequate. Eventually, in April 2018, a more substantial report was provided and the Certificate of Completion was issued. A DIY claim was submitted to HMRC within three months of the Completion Certificate being issued. HMRC refused the claim as being out of time. The Appellant appealed. The Tribunal took the view that it was a question of fact and degree, and held that the date of completion was December 2015. This was on the basis that the Appellant had originally thought that the building was complete at that stage, as he had applied then for a Completion Certificate. The only works undertaken following occupation were remedial works. The Tribunal pointed out that other evidence, such as the council tax banding, would have been good evidence of completion, and it was not necessary to have a Completion Certificate to make a DIY claim.

28. It is clear that the Tribunal panels in *Fraser* and *Farquharson* have adopted a different approach. The panel in *Fraser* returned to the approach suggested in *Hall*, of completion being a matter of fact and degree, but with the added element of the Appellant's own perception about when he had thought the building was complete. There is some overlap between *Purdue*, *Morris* and *Farquharson*, regarding the primacy of a Completion Certificate. So, although we agreed with Mrs Hancox that earlier cases can be helpful in indicating the factors which are relevant for us to take into account, our review of the authorities thus far makes it clear that different Tribunal panels have construed the legislation differently, understood "completion" differently, and so considered different matters to be relevant.

29. Shortly after *Fraser*, and in quick succession, the Tribunal issued its decisions in *Arora v HMRC* [2019] UKFTT 731 and *Dunbar v HMRC* [2019] UKFTT 747

(neither of which were cited to us). In *Arora*, the Tribunal dismissed the Appellant's DIY claim because it was not made in time. In *Arora*, planning permission for a dwelling had been granted in 2012. The house was registered for council tax in July 2015, and occupied in August 2015. Mr and Mrs Arora accepted that the work was finished in December 2016, which is when they applied for a Completion Certificate. Problems with the electrical installation certificate, and the requirement to have a separate report, meant that the Completion Certificate was not issued until April 2018. The DIY claim was submitted to HMRC in July 2018 but rejected as being too late. The Tribunal noted that Mr and Mrs Arora had occupied their dwelling in August 2015, and had applied for their certificate in December 2016. Adopting a similar approach to *Fraser*, the Tribunal concluded that the dwelling must have been complete by December 2016, and so the claim was late. The Tribunal stated:

> 56. To determine when a building is complete, it is important to weigh all the evidence available. In essence, a building is deemed completed when the construction has been completed in accordance with the original plans, and as per HMRC's guidance in VCONST02530, "when all main elements for it to function for its intended purpose are in place". A completion certificate can sometimes be issued later than the date the property was actually deemed as habitable or fit for purpose, and therefore, whilst it can be used as evidence as to when a building was considered as complete, it is not the only factor which can be taken into consideration in determining whether the claim has been made in time.
>
> 57. Documentary evidence confirming completion of a new build property can take many forms. The property built by the appellants is a very substantial modern 5 bedroomed house, with integral garage. The appellants will have engaged the professional services of a builder and possibly an architect and surveyor. A new property will often have a ten year insurance warranty or guarantee covering structural defects, such as a NHBC Buildmark policy issued by a registered builder or a LABC self-build warranty, for which purpose inspections are carried out at appropriate intervals by the Institution that issues the policy which works closely with the building regulation department of the local authority. In other cases, an architect or appropriately qualified surveyor will carry out stage surveys and inspections in order to provide a certificate of practical completion. Such certificates are often required by a bank or building society providing mortgage finance. The RICS or other relevant regulatory body adopt certain practice standards which define "completion of construction work".
>
> 58. It is obviously necessary to determine the date of practical completion, if only for the purposes of establishing a defects liability period for the structure of the property or for example any installation (fenestration, electrical etc). If available, the appellants should have produced the documentation referred to in the previous paragraph, or as stated by HMRC, a habitation letter from the local authority or evidence that the property had been entered onto the valuation list, which was on 1 July 2015.

59. It is unclear why the appellants appear to think that they had to wait until a certificate of completion was issued by Bury Building Regulations department. The main builder's certificate of practical completion which would have been available at the time the appellants took beneficial occupation would have been sufficient evidence for HMRC to regard the provisions of regulation 201 VATR 1995 as having been complied with.

60. The appellants' letter of 4 September 2018 states that they occupied the property in August 2015. This supports that the view that the property was habitable and fit for purpose as at that date.

61. The earliest invoice to which the appellants claim relates is dated 19 March 2012. The last invoice is dated 17 November 2016, which is more than a year before the date of the Completion Certificate. This again suggests that the property was completed substantially more than three months before the date that the appellants made their claim.

30. In *Dunbar v HMRC* [2019] UKFTT 747, the Tribunal allowed the Appellant's appeal against a decision by HMRC that a DIY claim was not made in time. In *Dunbar*, planning permission to build the relevant dwelling was granted in 2015. Materials were purchased between July 2015 and January 2017, and the house was given a council tax banding in July 2016. Mr Dunbar began to occupy the house in March 2017, despite there being no permanent electrical supply or water supply. A Completion Certificate was issued in February 2018, after a re-test of air permeability, and Mr Dunbar submitted his DIY claim to HMRC within three months. There was still no permanent water supply at that time. HMRC rejected the claim as being too late. The Tribunal considered *Fraser* and *Farquharson*, and preferred the interpretation of "completion" reached in *Farquharson*. The Tribunal stated:

41. First of all, regulation 201 VATR must be interpreted as a whole. This means that the phrase "the completion of the building" in regulation 201(a) cannot be interpreted in isolation. It is necessary to look at the rest of regulation 201. Regulation 201(b)(i) requires the taxpayer to furnish HMRC with "a certificate of completion obtained from a Local Authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners".

42. It could not be clearer from this that the primary evidence of completion in the context of regulation 201 VATR is therefore the certificate of completion. It is only if the taxpayer does not have a certificate of completion that he is at liberty to produce other documents which are acceptable to HMRC to try to persuade them that the building is complete.

43. The fact that documents other than the certificate of completion may be used to evidence the completion of the building does of course mean that completion must be capable of occurring before any certificate of completion is issued. However, it is equally clear, as the Tribunal in *Stuart Farquharson* points out at [51(7)], that it is for the taxpayer to bring forward the date on

which a building is deemed to be complete for the purposes of regulation 201 VATR and not for HMRC to argue that completion has taken place before a certificate of completion has been issued.

44. It must in our view be assumed that the regulations have been framed in a way which is intended to make it relatively straightforward for both the taxpayer and for HMRC to determine when completion of the building has taken place. If, as Mr Hilton contends, the date of completion depends on all of the facts and circumstances, it would be almost impossible to be sure when completion had taken place. Indeed, in *Stewart Fraser*, it is clear that the Tribunal itself was not sure when completion had taken place. The judge says at [24-25] that:

> "24. …...I find that the change in the plans was simply the rectification of a defect and the house had been completed by the end of 2015.
>
> 25. Even if I am wrong in that it was certainly completed by June 2016 since no further work was done thereafter."

45. This leaves the taxpayer in an impossible position. If the Tribunal was right that completion had taken place at the end of 2015, a claim would have to have been made by the end of March 2016. However, if completion had only taken place in June 2016, a claim made in March 2016 would not be valid as the claim would have been made prior to the completion of the building (which is not permitted by regulation 201 VATR).

46. We would stress that the phrase "completion of the building" must be interpreted in its own specific legislative context. The phrase appears in other parts of the VAT legislation and it may well have a different meaning for those purposes. We express no view on this.

47. Our conclusion therefore is that, for the purposes of regulation 201 VATR, the completion of a building takes place when a certificate of completion is issued or, if there is no certificate of completion, on such other date as may be evidenced by documents produced to HMRC by the taxpayer and which HMRC are prepared to accept as satisfactory evidence of completion.

31. Most recently, and since the hearing of the appeal before us, the Tribunal has issued its decision in *Cotton v HMRC* [2020] UKFTT 57. In this case the property had been occupied in March 2017 but the Notification of Acceptance of a Completion Certificate had been issued in April 2018. The Appellants made their claim to HMRC in May 2018. HMRC refused this claim in part on the basis that it was made out of time. The Tribunal held that the Building (Scotland) Act 2003 prevented the building from legally being occupied until the Notice of Acceptance had been issued. Therefore, although the dwelling was, in fact, occupied by a series of short term tenants from March 2017, as a matter of law the property was not habitable at that time. Therefore, the appeal was allowed because the DIY claim had been made within three months of the property legally being completed.

32. What conclusions can we draw from the more recent authorities? Putting to one side *Cotton*, which (like *Bowley*) was decided on a specific point not present in the other cases, it appears that there are two main lines of authority. On the one hand, there are the decisions in *Fraser* and *Arora*, following *Hall*, which interpret "completion" as an ordinary term and which place focus upon a variety of factors, including occupation and the homeowner's subjective view, to determine when that has occurred. This approach depends heavily on the facts of the appeal, as determined by the Tribunal and can make it difficult for a DIY housebuilder to understand when a DIY claim should be made. On the other hand, there are the decisions in *Farquharson* and *Dunbar*, which (possibly drawing upon *Morris*) interpret "completion" in the context of Regulation 201 and the requirement that a valid claim be supported by a Completion Certificate or other documentary evidence. This interpretation enables the Regulations to be interpreted in a consistent manner which can be easily understood and applied by all taxpayers.

Our decision

33. Looking at those contrasting approaches, the *Fraser* approach requires us to look at all relevant factors to understand when the dwelling was completed. HMRC have submitted that we should follow this approach, and that the dwelling was completed either in 2010, when the building was occupied, or in 2016, when the windows were installed. Although we have no reason to suppose they were aware of *Farquharson*, Mr and Mrs Proffitt's submission was that we should have regard to the Completion Certificate as determining the date of completion, an approach which is broadly in line with *Farquharson*.

34. After prolonged consideration, we have concluded that the *Fraser* approach is to be preferred. Our role is to interpret the legislation and, while we do that in the context of the legislation as a whole, there is nothing in Regulation 201 to suggest that "completion" is anything other than an ordinary term or that we should give it a special meaning. That does not mean that we should ignore the regulatory framework which enables a DIY claim to be made to HMRC or the purpose of Regulation 201, but we do not give "completion" a special meaning which it is unlikely to bear elsewhere and we do not conclude that a Certificate of Completion is required for a dwelling to be complete.

35. We consider that for a dwelling to be complete, it must be finished in accordance with the plans for which planning permission was given, and that the dwelling must be able to fulfil its intended purpose. We consider that the primary purpose of a dwelling is to function as a safe, hygienic and habitable home.

36. In earlier cases, the factors considered relevant were the date of occupation, the dates of the invoices, and the DIY builder's own understanding of when the dwelling was complete.

37. Although other Tribunal panels found it a useful factor, we have concluded that occupation is not a helpful indicator of a building being completed. There are many reasons why DIY builders make the decision to occupy their building, including

financial need and the desire to protect their site. Some buildings are occupied when they are barely more than a shell, without electricity, running water or even the most basic facilities. Mr and Mrs Proffitt chose to occupy their dwelling before it had what most people would consider necessary by way of washing facilities. On the other hand, some dwellings are not occupied until long after all work is concluded and signed off. We conclude that occupation tells us more about the hardiness of the DIY builder than it does about whether a dwelling is able to function as a safe, hygienic and habitable home.

38. Similarly, we do not find the dates of the invoices to be particularly helpful in identifying when a building is complete (although we do agree that they are useful in showing that a building is still under construction). Many DIY housebuilders buy materials when they can, in bulk, and store those materials for later incorporation into the building. Mr and Mrs Proffitt are not unusual in that regard.

39. The third factor relied upon by earlier Tribunals was the DIY builder's own understanding of when the building was complete. In this case, Mr and Mrs Proffitt were clear in their understanding that a DIY claim should be made once they had a Completion Certificate, but they found it difficult to pinpoint a specific date when they considered the dwelling was complete. This is not surprising given the length of time over which they had been building their home, and the fact that there were still minor interior fixes outstanding, and they had yet to finish the landscaping. If, as earlier Tribunal panels determined, the date on which the appellant applied for a Completion Certificate is relevant, then the date of Mr and Mrs Proffitt's application suggests that the dwelling was not complete until just before February 2018.

40. We consider that the more useful factors for determining the date of completion are when the relevant building has been built in accordance with the relevant planning permission, when it meets the requirements of the Building Regulations and when it is compliant with all other legal obligations for a dwelling. This accords with Regulation 201(b)(iv) which requires a DIY claim to be accompanied by evidence that planning permission for the building has been granted, and Section 35(1)(b) requires the works to be lawful for a valid claim to be made.

41. We have concluded that Mr and Mrs Proffitt's home was not built in accordance with the relevant planning permission, and did not meet the requirements of the Building Regulations, until the replacement windows were installed in October 2016. Although landscaping works took place at a later date and further landscaping remains outstanding, the last regulated construction works in respect of the dwelling were the installation of the new windows.

42. However, as all works carried out must be lawful, and the dwelling must comply with all relevant legal obligations, we consider that the dwelling must not only be safe, hygienic and habitable but should be demonstrably so. As Regulation 201 requires a DIY claim to be supported with documentary evidence, we conclude that the completion of a building should be demonstrated by certificates showing the dwelling's safety and habitability.

43. Therefore, we conclude that the dwelling was not complete until Mr and Mrs Proffitt were issued with an electrical certificate, a gas safe certificate, and (in this case) a Completion Certificate. Those certificates demonstrated that the dwelling was safe, hygienic and habitable, meeting certain minimum standards. We conclude that a DIY builder should not be able to make a DIY claim in respect of a dwelling said to be lawfully completed until that dwelling can be demonstrated to finished to an equivalent standard to that which a commercial housebuilder would be obliged to meet.

44. Therefore, having regard to the facts of this case, we conclude that Mr and Mrs Proffitt's dwelling was completed for the purposes of Regulation 201 when the final certificate was issued. That was the Completion Certificate, issued on 9 February 2018. HMRC acknowledged receipt of the DIY claim on 12 April 2018. Therefore, the DIY claim was made within three months, and is within time.

45. On the facts of this case, our conclusion is the same as we would have reached had we followed the approach in *Farquharson* and *Dunbar*. The difference is that while, on the facts of this case, we have concluded that the dwelling was completed when the Completion Certificate was issued, we do not consider that completion is necessarily referential to the Completion Certificate. Each case will be decided on its own facts, and we can foresee that in a future appeal there may be other documentary evidence that the dwelling is safe, hygienic and habitable (for example a habitation letter as well as a gas safe certificate and electrical certificate) and so a DIY claim which had been delayed until the much later issue of a Completion Certificate might well be made too late for it to be considered by HMRC.

<u>In case our decision is wrong…</u>

46. In case we are wrong in considering that a dwelling should be demonstrated as safe, hygienic and habitable, we have considered what the position would be if no documentary evidence was required to demonstrate that a dwelling met these minimum standards. Even if the dwelling was not certified as being safe and habitable, we do not consider that Mr and Mrs Proffitt's building could be said to be completed at any date prior to the installation of the replacement windows. Prior to that, the dwelling was not built in accordance with the plans for which planning permission was granted.

47. If the building was completed on 12 October 2016 when the windows were installed, then the claim to HMRC would not have been made within three months of completion. The Tribunal does not have the power to extend the time for a DIY housebuilder to make a claim. In *HMRC v Asim Patel* [2014] UKUT 0361 (TCC), the Upper Tribunal made clear its decision that the requirements of Regulation 201 are mandatory. At paragraph 21 the Upper Tribunal stated:

> The requirements of the regulation are framed in mandatory terms; HMRC are allowed no discretion to accept something less than the prescribed documentation, nor to extend the time limit, and it is equally not open to the FTT or to us to do so.

48. Whether this conclusion is correct is open to debate, and in that regard we prefer the analysis and reasoning of the Tribunal panel in *Dunbar*. However, as we recognise, whether or not that statement of the law is correct, this Tribunal is bound by decisions of the Upper Tribunal. However, that would not the end of the matter. Although HMRC argue that *Asim Patel* means that neither they nor the Tribunal can extend the time limit in Regulation 201, HMRC's internal guidance suggests that they believe they have the power (presumably derived from a source other than Regulation 201) to extend the time limit. The relevant entry at page VCONST 24550 in HMRC's Manual states:

> **DIY builders and converters VAT Refund Scheme - eligibility of claims: condition 9: is the claim in time?**
>
> *Three month time limit*
>
> Refund Scheme claims must be made within three months of the date of completion. However, exceptionally, claims may be accepted on an individual basis if there is a reasonable excuse for the delay.
>
> The claimant must explain in writing why a claim is being submitted late. If no satisfactory explanation is received, the claim must be refused.
>
> Examples of reasonable excuse may include:
>
> - compassionate reasons
> - negligence of a professional adviser
> - circumstances outside the claimant's control, such as difficulty in obtaining invoices or completion certificates.

49. In this appeal, it is clear that the reasons for the delay between completing the building on 12 October 2016, and submitting the claim on 27 March 2018, were entirely due to circumstances outside Mr and Mrs Proffitt's control. We have found that the delay in this period was due to the difficulties in obtaining a gas safe certificate due to the dispute with the supplier. That gas safe certificate was required before Mr and Mrs Proffitt could apply for an EPC, and an EPC was required before Mr and Mrs Proffitt could apply for their Completion Certificate. Mr and Mrs Proffitt had been advised that a Completion Certificate was advised, and the legislation requires documentary evidence. The third point of HMRC's three examples of what might constitute a reasonable excuse appears to exactly fit the circumstances of this case.

50. Therefore, had we considered that it was not necessary for Mr and Mrs Proffitt to obtain certificates to demonstrate the safety and habitability of their dwelling before it could be said to be complete, we would have noted that the review decision left open the possibility of Mr and Mrs Proffitt's claim being considered by HMRC as if it was made in time if Mr and Mrs Proffitt provided HMRC with a reasonable excuse for their delay in making their claim. In such circumstances we would have expected HMRC to be guided by our finding that there was a reasonable excuse for that delay. Had it been open to us to grant an extension of time, and necessary for us to do so, we would have granted an extension.

HMRC's guidance in 2010 and in their manuals

51. Finally, for completeness, we briefly record Mr Proffitt's reference to the advice HMRC had given to him at the seminar in 2010 and to the public guidance provided to potential claimants. As Mr and Mrs Proffitt correctly recognised before us, we have no jurisdiction to consider whether the way that HMRC has behaved in carrying out their duties is such that they should be prevented from enforcing the correct legal position – see *HMRC v Abdul Noor* [2013] UKUT 71 (TCC). Therefore, we do not comment further on this point. In any event, we have held that the correct legal position in this case is that Mr and Mrs Proffitt's claim was made in time.

Conclusion

52. For the reasons set out above, this appeal is allowed.

53. 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 28 FEBRUARY 2020