Neutral Citation: [2023] UKFTT 317 (TC)

Case Number: TC08777

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/02868

House in need of re-wiring and other renovation works before it could safely be occupied – whether "suitable for use as a single dwelling" - paragraph 18, Schedule 4ZA Finance Act 2003 – yes – whether Table A in section 55 Finance Act 2003 the correct table to use to calculate SDLT on acquisition – yes – appeal dismissed

Heard on: 6 March 2023
Judgment date: 28 March 2023

Before

TRIBUNAL JUDGE MARK BALDWIN

Between

AMARJEET MUDAN AND TAJINDER MUDAN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Patrick Cannon of counsel, instructed by Cornerstone Tax 2020 Limited

For the Respondents: Christopher Vallis, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. On 5 August 2019 the Appellants ("Mr and Mrs Mudan") purchased 14 Liskeard Gardens, London SE3 ("the Property") for £1,755,000. They paid £177,000 by way of stamp duty land tax ("SDLT") on that purchase on the basis that the Property was residential property.

2. On 31 July 2020 Mr and Mrs Mudan wrote to the Respondents ("HMRC") to amend their SDLT return to show that only £77,250 was due. This was on the basis that the Property was not suitable for use as a dwelling, as it did not have basic living facilities, and so was not residential property within the meaning of section 116(1) Finance Act 2003 ("FA 2003"[1]). On 13 August 2020 a repayment of £99,750 was made to Mr and Mrs Mudan.

3. On 19 April 2021 HMRC opened an enquiry into the amended return and on 21 June 2021 HMRC issued a closure notice to Mr and Mrs Mudan under paragraph 23, Schedule 10, recording their conclusion that the Property was suitable for use as a dwelling on the effective date of the transaction and so constituted residential property. Accordingly, the amount of SDLT chargeable was £177,000.

4. The question for me is whether the conclusion in the closure notice was correct.

THE LAW

5. FA 2003 imposes a charge to SDLT on the acquisition of a chargeable interest, which includes an estate in land in England or Northern Ireland. The amount of tax chargeable is set out in section 55 FA 2003. Section 55(1) provides that:

> "The amount of tax chargeable in respect of a chargeable transaction to which this section applies is determined in accordance with subsections (1B) and (1C)."

6. Subsection (1B) applies to transactions which are not "one of a number of linked transactions" whereas subsection (1C) applies to transactions which are. Both subsections refer to Table A and Table B, which prescribe the rate of SDLT to be used. Table A is the appropriate table "if the relevant land consists entirely of residential property" and Table B is the appropriate table "if the relevant land consists of or includes land that is not residential property." The rates are higher (potentially much higher) in Table A than in Table B.

7. The meaning of "residential property" is found in section 116 FA 2003. Subsection (1)(a) provides that residential property means: "a building that is used or suitable for use as a dwelling, or is in the process of being constructed or adapted for such use…"

8. If the Property was a dwelling for the purposes of Schedule 4ZA on the effective date of the transaction, this would be a higher rates transaction and Schedule 4ZA would substitute Table A in section 55 with the table contained in paragraph 1(2) of Schedule 4ZA, effectively increasing the normal Table A rates by 3%. Paragraph 18 of Schedule 4ZA sets out the "rules for determining what counts as a dwelling" for the purposes of that Schedule:

> "(2) A building or part of a building counts as a dwelling if –
>
> (a) it is used or suitable for use as a single dwelling, or
>
> (b) it is in the process of being constructed or adapted for such use."

9. It is not disputed that, if it were a dwelling, the Property would be a single dwelling and so there is no difference, at least so far as this appeal is concerned, between the definition of "dwelling" in paragraph 18 of Schedule 4ZA and the definition of "residential property" in

[1] All statutory references in this decision notice are to provisions of FA 2003

section 116(1)(a). The correspondence between Mr and Mrs Mudan's agent and HMRC, including the closure notice, referred to section 116(1)(a) rather than paragraph 18 of Schedule 4ZA, but the conclusion in the closure notice (that the Property was suitable for use as a dwelling) is clear. The review conclusion letter used the correct statutory references, and neither party made anything of the incorrect statutory references in the closure notice or the correspondence leading up to it.

10. The question for me, therefore, is whether, on the effective date (the date of completion in this case), the Property was "suitable for use as a single dwelling" within paragraph 18(2) of Schedule 4ZA. HMRC say it was, whereas Mr and Mrs Mudan now say it was not.

PRELIMINARY MATTERS

11. Embedded in Mr Vallis' skeleton argument were comments about the relevance and admissibility of three reports which Mr and Mrs Mudan proposed to introduce. These are:

(1) an RICS building survey report (the "RICS Report") by Arnold & Baldwin (a firm of chartered surveyors) dated 13 April 2019 prepared following an inspection of the property in March 2019;

(2) a Statement of Condition ("the Redline Report") dated 20 July 2020 prepared by Redline Construction Group Ltd ("Redline");

(3) a survey report (the "Hanspal Report") prepared by S Hanspal dated 30 September 2022.

12. At the beginning of the hearing I asked Mr Vallis whether he wanted to object to the introduction of these reports. He replied that he did. Mr Vallis described Mr and Mrs Mudan's attempt to introduce these reports in evidence as "an attempt to introduce expert evidence by the backdoor". His comments about the reports were not entirely consistent with this position. In relation to the Redline Report and the RICS Report, he said that neither document was drafted for the purposes of litigation. They are not expert reports and their authors are not expert witnesses. The authors were not planning to attend the hearing to be cross examined and the reports do not contain statements of truth or comply with any other of the requirements of an expert witness report. He was more critical of the Hanspal Report, which (he said) appears to be tailored to this litigation. It also not an expert report. It does not comply with the requirements for such and its author will not attend the hearing to be cross examined.

13. Mr Cannon objected to the lateness of this application, which was only made in terms (rather than hinted at in Mr Vallis' skeleton argument, which was only served 14 days before the hearing) on the morning of the hearing. If Mr Vallis was concerned about the accuracy of the reports, he could have asked for the authors to attend. Mr Mudan would explain what the reports were in the course of his evidence. Mr Vallis' attempts to have the reports excluded was an "ambush" and the tribunal would be able to make up its own mind about the value of these reports in the light of Mr Mudan's evidence.

14. I refused Mr Vallis' application. Although hinted at in his skeleton argument, the application was only made in reply to the tribunal's question. If he had real concerns about the reports, he should have raised them earlier and, if necessary, the authors could have been required to attend and answer questions about their reports. Moreover, the reports do not seek to give expert evidence; they simply describe the condition of the Property. Mr Mudan could explain what they are and the tribunal could then decide what weight to put on them.

THE EVIDENCE

15. Evidence as to the condition of the Property on the effective date was given by Mr Mudan. In addition the three reports referred to above were in the hearing bundle along with a number of photographs of the Property.

16. Mr Mudan gave evidence to the Tribunal and was cross-examined by Mr Vallis. He had also previously provided a witness statement.

17. Mr Mudan began by setting out the timeline of his purchase and setting the three reports (referred to above) in context. He said that he had first visited the Property in August 2018. There were people living there at the time. He took his family to look at the Property and they could see the potential. He went to visit it again in the spring of 2019. There were still people living there, but he thought the people living there knew that they were going to be evicted and they were very reluctant for Mr Mudan to visit. He said that they had ten dogs and there was dog excrement in the house. It was at this point (in the spring of 2019) that the RICS Report was commissioned. This was done before Mr Mudan exchanged contracts to purchase the Property. As the report indicated, the Property was in a relatively bad state at the time, but it had not been vandalised in the way it had been by the time of completion.

18. The purchase of the Property was completed on 5 August 2019. It had taken over a year from the first viewing to completion. Mr Mudan said that this was because the Crown Court was involved. There were some kind of possession proceedings, although Mr Mudan was not aware of the details. The length of time it had taken to go through with the transaction meant that Mr Mudan had had to renew his mortgage application.

19. Mr Mudan said that the occupiers had been evicted and the Property had been empty for four or five months before completion. He thought that it had been vandalised during that period. He described the condition of the Property when he went to visit on the afternoon of the day of completion. He said the points of entry had been broken into both at the front and the rear. In the kitchen there was unbearable smell. All the kitchen units and appliances had been damaged and none of the utilities worked. They had been taped with tape telling people not to use them. There were mouse and rat droppings in the kitchen and Mr Mudan recalled seeing some mice running around.

20. Every room was a mess. The water, gas and electricity were not functioning safely. In the boiler room, the boiler had been ripped off the wall and rainwater was coming into that room, which also housed two water tanks and the hot water system.

21. Some of the bathrooms had been damaged, some more than others. Some of them were in reasonable condition.

22. The family were only able to move in in May 2020, when enough work had been done to make the Property suitable for a young family. There was still some more work to do and this went on for a few more months.

23. Mr Mudan said that he had not been aware that he was able to claim a lower rate of SDLT because of the state of the Property. He had been told about this later by a consultant. The other two reports, the Redline Report and the Hanspal Report, were prepared after the event to back up Mr Mudan's claim for a reduced rate of SDLT. However, Mr Mudan confirmed that both reports reflected the position at the effective date and what he saw when he first went into the Property.

24. The Redline Report indicates that the electrics were a disaster. For example, there were loose wires on the main fuse board. Redline had inspected the Property within the first ten days of completion. As a result of Redline's comments, the house was rewired completely, with new wires, sockets and fuse boards throughout the house. Mr Mudan also had builders

ready to go and Mr Hanspal had been instrumental in the work. The Hanspal Report and the Redline Report simply reflect what the authors saw at the time.

25. As far as Mr Hanspal's report is concerned, he was a builder that Mr Mudan had used on a number of occasions. Mr Mudan accepted that the report had been commissioned to backup his SDLT claim, but Mr Hanspal had visited the Property on a number of occasions and his report reflected the state of affairs at completion.

26. Mr Vallis asked Mr Mudan whether he thought that the Property could have been vandalised after completion, but Mr Mudan said that what he was describing (and what the reports reflected) was the state of the Property when he went in on the afternoon of the day of completion. The photographs in the hearing bundle reflect the state of the Property.

27. Mr Mudan agreed that the Property was still residential in nature. It had been someone's house for many years and it was not falling down. Nevertheless, he did not consider that it was safe to live in with a young family. This was so even though there was no structural damage to the Property and no structural work was required except to replace the missing roof over the boiler room. Mr Mudan was sure that there was a danger to life because of the state of the electrics. He accepted that he had no experience of domestic electrical systems, but he relied on Redline who told him that it was dangerous. Mr Vallis put it to Mr Mudan that he was overplaying the dangerousness of the Property, but Mr Mudan said that, based on the items identified by Redline, he would consider the Property was unsafe for a young family.

28. Mr Mudan agreed that a lot of the work that he had carried out was designed to make the Property a nice family home, but work had been required to make it safe. He commented that maybe about 20-30% of the total project costs were incurred on making the Property safe; the rest was incurred on making the house a pleasant family home. He had been able to spend more than he originally anticipated because of the SDLT refund. Mr Vallis put it to Mr Mudan that he had a vested financial interest in the litigation, given that he had spent the SDLT refund. Mr Mudan agreed that the claim was made after the event. Initially he had been reluctant to make it, but the tax consultant had told him that he was within his rights, and he was surprised (albeit pleasantly) when the claim was approved. He was then surprised (less pleasantly so) when HMRC launched their enquiry. Nevertheless, Mr Mudan said, the point is that the Property was not habitable when the purchase was completed.

29. Mr Mudan agreed that he had purchased the Property with the benefit of a mortgage and the mortgagee had clearly been happy to lend on the security of the Property.

30. In answer to a question from the Tribunal, Mr Mudan explained that the works that had been done to make the Property safe (as opposed to a pleasant place to live) was as follows:

(1) the electrical works of rewiring, with new switches, sockets and fuse panels;

(2) a new boiler, water pumps and pipes (works to gas as well as water - where the boiler had been pulled away from the wall there were damaged pipes that could be leaking and they had to be made safe) in the boiler house;

(3) a new roof over the boiler house designed to stop rainwater entering;

(4) broken windows were repaired and the Property made secure;

(5) The unbearable smell in the kitchen was cured by cleaning it out completely, removing all the units (and with them the rotting food etc). This had got rid of the smell and the vermin with it;

(6) The basement flooded to about six inches deep. There were some leaking pipes behind the walls and the plumbers had had to redirect the water supply and tank the cellar

to some extent as water still came through when it rained. As a result of rainwater entering, Mr Hanspal had suggested tanking the basement.

(7) Lots of rubbish had had to be cleared from the house and the garden. Several skips had been needed to accomplish.

31. A number of photographs were included in the hearing bundle, particularly in the Hanspal Report. They show damp in a wall in the exercise room, water penetration at roof level, unusable sanitary fittings and electrical wiring, a significant amount of rubbish around the Property and evidence of wilful damage (e.g. a ripped out fireplace). The text of the Hanspal Report (which is largely a factual narration of what the author observed and the works subsequently carried out rather than any expert opinion) and the appended pictures are all consistent with Mr Mudan's evidence.

32. Although Mr Mudan clearly has a financial interest in the outcome of this litigation (it is hard to think of a litigant who does not), I found him to be a straightforward witness who (particularly in answer to my question at [30]) did not strike me as exaggerating the state of the Property. Based on his account of the state of the Property on 5 August 2019 and the factual narrative in the Hanspal and Redline Reports (which are all consistent), I find as facts that, as at the effective date, the Property:

(a) had been used relatively recently as a dwelling; and

(b) was structurally sound; but

(c) was not in a state such that a reasonable buyer might be expected to move in straight away. I find that, before a reasonable buyer would consider the Property was "ready to move into", the following works would be needed:

(i) the Property would need complete rewiring;

(ii) a new boiler, pumps and gas and water pipes would be required in the boiler house, so that the water system operated safely and the boiler house roof would need fixing;

(iii) the leaking pipes in the cellar would need to be repaired or replaced;

(iv) the kitchen units and appliances would need to be stripped back to the bare walls and replaced;

(v) broken windows and doors (including locks) would need repairing and the Property made secure;

(vi) a lot of rubbish (inside and outside the house) would need clearing away.

33. Given that, on Mr Mudan's evidence, some bathrooms were in reasonable condition (see [21]), I do not consider that works to bathrooms would be required before an occupier would move in, nor do I consider that a reasonable occupier would require the cellar to be tanked before moving in. A few inches of water ingress in cellars is not uncommon, indeed I have lived with this myself; fixing this in most cases is a desirable rather than an essential task.

34. There was some disagreement between Mr Vallis and Mr Cannon about whether the test to be applied was whether a reasonable occupier would expect to see certain work carried out before they were prepared to move in (Mr Vallis' formulation) or whether the focus should be on this occupier (Mr Mudan and his young family, as Mr Cannon contended). The legislation asks whether this building is suitable for use as a single dwelling and so, it seems to me, the test must be applied by reference to the building only and without reference to the attributes of any particular intending occupier. That is why I framed my conclusions in [32] and [33] the

way I did. In any event, I do not consider that any reasonable (sensible) person would be prepared to occupy a house with potentially dangerous electrics, gas and water and a kitchen in the state Mr Mudan described, and so I do not think I would have come to a different conclusion (on the works an intending occupier would require) if I looked at Mr Mudan with his young family rather than a hypothetical reasonable occupier.

MR MUDAN'S SUBMISSIONS

35. For Mr Mudan, Mr Cannon said that the test to be applied was whether the Property was suitable for occupation. He accepted that relatively minor disrepair was clearly not sufficient. However, Mr Mudan's evidence and the three reports and the photographs clearly show that the Property was suffering from much more than relatively minor disrepair.

36. The extent and nature of the electrical defects posed a danger to life. The Property needed to be rewired as a whole. The question posed by the Upper Tribunal in *Fiander* and by Judge Helier in *Fish Homes* was whether ordinary people would say that it was too dangerous to live in the Property. Cladding had not been considered to have that result. This is because the dangerous cladding would make the Property more dangerous only in the event that fire broke out. However, the dangerous electricity system meant that it was just not possible to move in, certainly not with a young family. A positively dangerous electrical system is more serious than inert, dangerous cladding.

37. The RICS Report does not paint a particularly bleak picture of the Property, but it is important to remember that that was prepared in the spring of 2019 before the occupiers were evicted and the vandalism began. The Redline Report provides a clear account of the electrical system at the time of completion. Mr Vallis criticised Redline for not mentioning the vandalism, but Mr Cannon said that their role was not to act as detectives. They simply reported on the state of the electrics and did not speculate about how that state had come about.

38. At the date of completion the Property passed the threshold for not being suitable (safe) for use as a dwelling. It was only made suitable for use as a dwelling by the works to the electrics and, to a lesser extent, the other repair works (the boiler and the roof of the boiler house).

HMRC'S SUBMISSIONS

39. For HMRC, Mr Vallis said that the Property is a large detached house in a residential street, as Mr Mudan agreed. It had previously been used as a dwelling. It was occupied until April 2019 at least and then was purchased in August 2019. The sales brochure prepared in 2018 shows a very pleasant, well furnished property.

40. Against that background, HMRC submit that very serious, fundamental damage to the Property would be needed to prevent it being suitable for use as a dwelling. As *Fiander* makes clear, suitability is not equated with immediate readiness for occupation. Property can be in a state of disrepair and still be suitable for use as a dwelling. This is particularly the case if it has been used in the recent past as a dwelling. It is still suitable for use as such even though certain things need fixing. For disrepair to prevent property being a dwelling it must be so fundamental that the Property has effectively ceased to be a dwelling.

41. *Fish Homes* sets the bar very high. Faulty cladding (of the kind involved in Grenfell Tower) is not sufficient to go over the threshold.

42. *Bewley* involved an essentially derelict building that had to be demolished. That in Mr Vallis's view is a good example of the sort of dereliction and damage that would take a property over the threshold. The fundamental nature of the property in that case was affected the asbestos and the state of the Property. It had to be demolished and could never be safely occupied.

43. The RICS Report does not point to anything particularly serious in this regard. Given that Parliament intends a building in the course of construction to count as a dwelling, and similarly one which is in the process of being converted from another use into a dwelling, it would in Mr Vallis's submission be very surprising if a building which was already fundamentally a dwelling, but out of repair, ceased to be a dwelling just because works (even sometimes serious works) were needed before the property could first be occupied.

DISCUSSION

44. I will look first at the authorities discussed before me.

45. The main question in *Fiander & Another v HMRC*, [2020] UKFTT 190 (TC) and [2021] UKUT 156 (TCC), was whether the way an annex was connected to the main house meant that a property qualified for "multiple dwellings relief" for SDLT purposes on the basis that the annex was a second dwelling. That issue does not concern us, but the question of disrepair also arose and the Upper Tribunal had this to say about whether a building is "suitable for use as a single dwelling" (at [48]):

> "The word "suitable" implies that the property must be appropriate or fit for use as a single dwelling. It is not enough if it is capable of being made appropriate or fit for such use by adaptations or alterations. That conclusion follows in our view from the natural meaning of the word "suitable", but also finds contextual support in two respects. First, paragraph 7(2)(b) [of Schedule 6B (Transfers Involving Multiple Dwellings) of FA 2003] provides that a dwelling is also a single dwelling if "it is in the process of being constructed or adapted" for use as single dwelling. So, the draftsman has contemplated a situation where a property requires change, and has extended the definition (only) to a situation where the process of such construction or adaption has already begun. This strongly implies that a property is not suitable for use within paragraph 7(2)(a) if it merely has the capacity or potential with adaptations to achieve that status. Second, SDLT being a tax on chargeable transactions, the status of a property must be ascertained at the effective date of the transaction, defined in most cases (by section 119 FA 2003) as completion. So, the question of whether the property is suitable for use as a single dwelling falls to be determined by the physical attributes of the property as they exist at the effective date, not as they might or could be. A caveat to the preceding analysis is that a property may be in a state of disrepair and nevertheless be suitable for use as either a dwelling or a single dwelling if it requires some repair or renovation; that is a question of degree for assessment by the FTT."

46. The FTT had dealt with the question of disrepair as follows (at [56]):

> "We note that the property was in some degree of disrepair at the time of purchase (the heating was not working as the boiler needed replacing; there were damp problems such that some of the flooring needed replacing). We have considered if this meant it was not suitable for use as a dwelling as at completion. We are clear that "suitable for use" does not mean "ready for immediate occupation". It would have been obvious to a reasonable person observing the property on the completion date both that the property had been used for dwelling purposes in the relatively recent past and that the things that needed fixing - the boiler, replacement flooring - were not so fundamental as to render the property unsuitable as a place to live. Hence, in our view, the state of disrepair did not render the property unsuitable for use as a dwelling."

47. In in *PN Bewley Ltd v HMRC*, [2019] UKFTT 65 (TC), the FTT held that a derelict bungalow infused with asbestos was not a dwelling for the purposes of Schedule 4ZA because it was not suitable for use as such. Addressing the suitable/not suitable borderline and having

observed (at [39]) that they "accept that dilapidation of a dwelling does not necessarily prevent it being a dwelling", the FTT commented (at [53]):

> "No doubt a passing tramp or group of squatters could have lived in the bungalow as it was on the date of purchase. But taking into account the state of the building as shown in the photographs on Mrs Bewley's phone with radiators and pipework removed and with the presence of asbestos preventing any repairs or alterations that would not pose a risk to those carrying them out, we have no hesitation in saying that in this case the bungalow was not suitable for use as a dwelling."

48. The important point in *Bewley* is that the property was in need of renovation and, whilst the asbestos did not prevent re-occupation, it meant that "renovation was not a feasible proposition, because the asbestos would be disturbed" (see [45]); in order to be "suitable" to be used as a dwelling, the property needed renovation, but this could not be done because of the asbestos and the bungalow needed to be demolished.

49. *Fish Homes Ltd v HMRC*, [2020] UKFTT 180 (TC), concerned a taxpayer which purchased a flat in a block which was covered in cladding similar to that used on the Grenfell Tower block (in which there had been a disastrous fire exacerbated by the cladding). In light of the *Bewley* decision, the taxpayer argued that the acquisition of the flat was not a residential transaction because the danger created by the cladding meant that the flat was not suitable for use as a dwelling. Judge Hellier posed the question:

> "So when do defects in the building mean that it is not a dwelling or not suitable for use as a dwelling? Where a building has all the facilities of a dwelling - facilities for rest, sleep, storage, hygiene and the preparation and consumption of food, what can render such a building not suitable for use as a dwelling or cause it not to be a dwelling?"

Noting that people live in buildings built under earlier regimes, which do not comply with modern building regulations, Judge Hellier considered that, by itself, a failure to comply with building regulations was not enough, and then went on (at [62]) to observe;

> "But I accept that some defects in what could otherwise be a dwelling or suitable for use as such would mean that it is not so. Defects which make it dangerous to live in fall within that category but such danger must in my view be such that a reasonable person would say "it's too dangerous to live there". Some risks to health and safety may fall into this category: high radioactive pollution, the high probability of walls collapsing, and the kind of hazards which would spur a local authority to issue a prohibition notice restricting the use of the premises."

50. It is clear that there is a degree of disrepair that will result in a property, which may otherwise resemble and meet the requirements for (and indeed have been previously used as) a dwelling, not being suitable for use as a dwelling. However, a significant degree of disrepair is required. Although suitability is tested on the effective date, "suitable for use" on the effective date does not mean suitable for immediate use and occupation ("ready to move in") on that date. There is, as it were, a margin of appreciation, a degree to which a property can fall short of being ready for an occupier to move in without the property ceasing to be suitable for occupation as a dwelling. Disrepair which can be cured (things which are not fundamental but which need fixing, as the FTT put it in *Fiander*) is not enough, nor is it necessarily enough that there is a feature of the property which makes it potentially more dangerous to inhabit than one would normally expect (unsuitable and potentially dangerous cladding is the example from *Fish Homes*).

51. It must be unrealistic to expect someone to live in the property in its current state (perhaps because it is too dangerous or unpleasant to inhabit) and it must require more than repair/renovation (the words of the Upper Tribunal in *Fiander*) or "fixing" non-fundamental issues to make it suitable. If, as was the case in *Bewley*, the property could not realistically be occupied in its current state and (albeit for different reasons) the relevant defects could not be cured, so that demolition was the only way forward, the property will clearly not be suitable for use as a dwelling. Other examples of sufficiently fundamental problems might include a high risk of structural collapse or some other lack of physical integrity, such as the building being radioactive. Examples of failings which are not sufficient include the need for a new boiler, the heating system not working, damp problems or the flooring needing replacing.

52. I consider that there is considerable force in Mr Vallis' point that the statute treats as a dwelling a building in the course of being constructed or adapted for use as a dwelling. It does the same, where the effective date of a transaction is the date of substantial performance, for a purchase of a building (or part) which is to be constructed or adapted for use as a dwelling under the terms of the contract under which it is acquired and where the construction or adaptation has not begun by that time (so-called "off plan" purchases); paragraph 18(5) of Schedule 4ZA. The statute counts as a dwelling any building which (as at the effective date) is used or suitable for use as a dwelling, is in the process of being constructed or adapted for such use or is to be constructed/adapted for such use by the seller. Put the other way round, the only buildings which do not count as dwellings are those which do not exist or exist but are not used and not "suitable" for use as dwellings, where the construction/adaptation works required to construct or adapt them to be suitable as dwellings have not begun and where those works (if they have not started) are not the seller's responsibility. If part-constructed/adapted buildings and a developer's plans for a building can count as a dwelling, it would seem surprising for a property which had recently been used as a dwelling and was fundamentally capable of being so used again (there being no lack of structural or other physical integrity preventing this) not to count as a dwelling because there are obstacles to immediate occupation, even though those obstacles do not go to the physical integrity of the building and are capable of being fixed without too much difficulty.

53. Pulling all of this together, I consider that a building which was recently used as a dwelling, has not in the interim been adapted for another use and is capable of being so used again (a building, such as the one in *Bewley*, the defects in which cannot be put right at all, will not be capable of being so used) will count as a dwelling, even though it is not ready for immediate occupation, unless the reason/s why it is not ready for immediate occupation are so fundamental (being radioactive or at high risk of collapsing, for example) that the work required to put these problems right goes beyond anything that might ordinarily be described as repair, renovation or "fixing things" (examples of this sort of work being installing a new boiler or heating system, damp problems or floors needing replacing).

54. I do not consider that the works I have found a reasonable buyer would require to be carried out before they would consider that the Property was suitable for occupation ("ready to move into") given its state on 5 August 2019 (see [32] and [33] above) come anywhere near that threshold. I accept that the state of the gas and electrics and aspects of the water supply (including the need for a new boiler house roof) made the Property too dangerous for a reasonable person to occupy immediately, but the works required to put those problems right were not fundamental and were much closer to the new boiler/heating system/curing damp/new flooring end of the spectrum than the radioactive house/dangerous structure/potentially collapsing walls end. All the other problems and curative work (stripping and refitting the kitchen, sorting out some damp, clearing rubbish and mending doors and windows) were less significant than those items.

DISPOSITION

55. For the reasons set out above I have determined that, on 5 August 2019 (the effective date of the transaction), the Property was suitable for use as a single dwelling and so counted as a dwelling for the purposes of paragraph 18, Schedule 4ZA, FA 2003.

56. It follows that the closure notice was correct and this appeal must be, and is, dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

57. 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.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 28th MARCH 2023