Neutral Citation: [2024] UKFTT 00230 (TC)

Case Number: TC09109

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

Taylor House, London

Appeal reference: TC/2021/16760

*Annual tax on enveloped dwellings – higher rate of SDLT for high-value residential transaction - relief for interest exclusively acquired for the purpose of a property development trade – no - not held exclusively for the purpose of a property development trade – whether non-qualifying individual permitted to occupy the property – no – appeal dismissed*

**Heard on:** 6-7 February 2023
**Judgment date:** 18 March 2024

**Before**

**TRIBUNAL JUDGE GERAINT WILLIAMS**
**TRIBUNAL MEMBER MIKE BELL**

**Between**

**INVESTMENT AND SECURITIES TRUST LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Laurent Sykes KC, of counsel, instructed by Wilson Wright LLP

For the Respondents: Ms Natasha Henshaw, litigator of HM Revenue and Customs' Solicitor's Office

## DECISION

### INTRODUCTION

1. This is an appeal by Investment and Securities Trust Limited ("IST") against an assessment in the sum of £372,000 to additional Stamp Duty Land Tax ("SDLT") dated 26 June 2017 (notified to IST on 27 March 2018) and against three closure notices issued by HMRC on 23 July 2020 in respect of IST's Annual Tax on Enveloped Dwellings ("ATED") returns for the chargeable periods ending 31 March 2015 (£35,900), 31 March 2018 (£54,950) and 31 March 2020 (£17,766). The assessment and three closure notices were issued by HMRC following an Option Agreement dated 27 March 2014 entered into by IST with Ms Lisa Voice in respect of the potential future purchase of 1A Cavendish Avenue, St John's Wood, London NW8 9JE ("the Property").

2. It was accepted by HMRC that the incorrect amounts of ATED were charged in the three closure notices as the open market value of the Option was £4,650,000 and correct amounts of ATED chargeable are as follows: £15,400 for the chargeable period ending 31 March 2015; £23,550 for the chargeable period ending 31 March 2018 and £7,589 for the chargeable period ending 31 March 2020.

### EVIDENCE

3. We were provided with an electronic hearing bundle containing the appeal documents, relevant correspondence and the following witness statements:

On behalf of HMRC:

(1) Ms Siobhan Jenner ("Ms Jenner"), HMRC officer, dated 13 October 2022;

(2) Ms Dawn Daley ("Ms Daley"), HMRC Officer, dated 14 October 2022;

On behalf of IST:

(3) Mr David Rubin ("Mr Rubin"), Chartered Accountant and Licensed Insolvency Practitioner, dated Mr Rubin founded David Rubin and Partners in 1984 and in March 2021, David Rubin and Partners became part of the Begbies Traynor Group and is currently a senior partner;

(4) Ms Lisa Voice ("Ms Voice"), director of IST and shareholder of IST through her holding in Woolcastle Limited, dated 15 December 2022; and

(5) Mr Michael Voice ("Mr Voice"), son of Ms Voice, shareholder in IST and former director of IST, dated 15 December 2022.

4. Mr Rubin, Ms Voice and Mr Voice gave oral evidence and were cross-examined. Ms Jenner and Ms Daley formally adopted their witness statements but they were not cross-examined as it was accepted at the start of the hearing that the conditions for a valid discovery were met and the amended discovery assessments were made in the corrected amount.

### FACTS

5. On the basis of the evidence, both written and oral, we find the material facts to be as follows. We have begun with the background and primary facts which were not disputed or challenged. We consider disputed matters later in the discussion.

6. IST was incorporated in England and Wales on 2 May 1946. Ms Voice has been a director of IST since 8 April 1993. Mr Voice was appointed as director of IST on 28 March 2013 and, because of Ms Voice's personal and health issues, ran IST from that date until his resignation as a director on 17 July 2019. IST is a wholly owned subsidiary of Woolcastle

Limited. IST has 100 issued Ordinary £1.00 shares, 99 are held by Woolcastle Limited and the remaining share held by Ms Voice. Woolcastle Limited has 616 issued Ordinary £1.00 shares, 366 are held by Ms Voice and the remaining 250 held equally by Mr Voice and his sister, Kimberly Voice.

7. Mr Voice considered that, prior to his appointment as a Director, development opportunities had been missed and IST were operating in a less than productive manner. Ms Voice was drawing substantial funds from IST (approximately £1m and £3m per annum) and Mr Voice considered that that meant IST needed to become more profitable to sustain the level of Director's emoluments paid to Ms Voice.

8. Following his appointment as Director, Mr Voice focused on cost cutting and increasing revenue streams for IST through property development, investment and trading more actively. Shortly after his appointment, IST developed several assets including property assets in Swadlincote, Roehampton and Kentish Town. At that time, IST was reviewing the viability of its existing sites and scanning the market for potential projects.

9. Mr Voice was aware of Ms Voice's intention to sell the Property to ease her financial situation and decided that IST should acquire the Property as it represented a good development opportunity for IST. Mr Voice knew the road in which the Property was located and had seen the road improve over time with many basements being redeveloped in the general area. Mr Voice had viewed several of the basement conversions and concluded that a reasonable sized basement redevelopment conversion could add significant value to the Property

10. In 2014, the Property was in a state of disrepair and would have required a substantial outlay of funds to refurbish. The state of disrepair and Ms Voice's health issues contributed to her intention to sell the Property.

11. At the time the Option Agreement was entered into, Mr Voice was running IST. Mr Voice decided not to acquire the Property outright as he did not want to finance the purchase with debt as the Property would not have been generating any income during the lengthy planning phase. At the time, IST did not have the funds to acquire the Property outright. IST's accounts for the year ended 31 March 2013 show a cash balance of only £45,565. Mr Voice was aware that planning permission and consent from the heritage bodies would be expensive to obtain and would take time. Mr Voice had been advised and was aware from experience that obtaining planning permission for a basement conversion is an extensive and time-consuming process.

12. Mr Voice confirmed that the reason for instalment payments for the Property was that IST did not have the funds to pay the option price outright. Instalment payments were preferable to an outright purchase. Unless IST had paid some money upfront, Ms Voice would have sold the Property on the open market.

13. Mr Voice confirmed that it was not the case that the Option Agreement was taken out so that Ms Voice could find somewhere to live while she looked for a new home. There was no reason to think that Ms Voice could not have sold the property quickly with the result that IST would then have lost out.

14. On 10 January 2014, Giles Elliott of Savills Limited Chartered Surveyors ("Mr Elliott") wrote to Mr Voice following an inspection of the Property. In his letter, Mr Elliott described the Property as a "handsome and substantial detached period home" and a "house". Mr Elliott stated that the "guide price" for the Property "in its current condition given current market conditions" was £9,300,000. If the Property were completely refurbished, the guide price

would increase to £13,000,000 and if the Property were refurbished and enlarged, the guide price would increase to £15,000,000.

15. A business plan ("Business Plan") was produced which projected a profit of approximately £3,000,000 if IST exercised its option at the end of the option period and subsequently developed and sold the Property. The terms of the Option Agreement allowed IST to purchase the Property within five years. The Business Plan stated:

> "The option allows the company to secure a very desirable property while giving itself time to assess and consolidate its financial position so that a decision can be made on the most prudent course of action following acquisition.
>
> The option agreement also allows the company to purchase the property without entering into a bidding war with rival developers.
>
> Immediate Sale of Property
>
> The exercise of the option and immediate sale of the property offers the opportunity to cash-in on the current growth in the London housing market. At a growth rate of 2% pa the property can be expected to be worth £10.2m in 5 years' time, an increase in market value of £960k. Once stamp duty and other costs have been taken into account, any profit on a 2% growth rate would be minimal.
>
> However, the London property market is expected to perform better than 2% pa, and a growth rate of 5%pa gives an increase in market value of £2.5m over 5 years, and a growth rate of 8% gives an increase in market value of £4.3m.
>
> Possible Development of Property
>
> The property also offers the opportunity for significant profit should development be undertaken.
>
> The property's value could be maximised by modernising the existing layout and adding a sub-basement with a gym, swimming pool and entertainment room, adding an additional 1,500sqft to the property, bringing the total size to circa 6,600sqft. It is estimated that the costs of carrying out this work is between £1.8m and £3m, at today's rates. This quote is informal, but from a trusted firm of contractors.
>
> Once redeveloped it is estimated that the property would be worth £14.5m at today's prices. This valuation has been carried out by Knight Frank. With 6 years' growth (allowing 1 year for development) at 2%, 5% and 8% this equates to a market value of £16.3m, £19.4m and £23m respectively.
>
> …
>
> Risk factors
>
> There are a number of risk factors that have been taken into consideration, including:
>
> - Lower than expected growth in the London property market;
> - Stagnation of property market, making property difficult to sell;
> - Other changes to the property market that may devalue the property, including "the Mansion Tax" and further increases in the rate of SDLT.
> - Redevelopment cost overruns and unforeseen difficulties;
> - Inaccurate projected property valuations.

> It is considered that there is sufficient margin in the above figures to absorb any risk factors and remain profitable. If development is deemed uncommercial, there is the ability to sell the property as it is."

16. Preliminary architect's plans for three design options were drawn up AU Architects Ltd on 1 March 2014. The three options were: the addition of a large basement, the addition of a smaller basement and without the addition of a basement. The addition of a smaller basement was chosen on the basis of cost and funding.

17. A meeting of IST's board of directors (Ms Voice and Mr Voice) took place on 20 March 2014. The minutes of that meeting recorded that discussions took place as to IST entering into an Option Agreement to buy the Property with the option sum and the purchase price being £4,650,000 and £9,300,000 respectively. The minutes noted that the profit projection is based on independent valuations and quotations for building works from reputable contractor and that the Property is owned by Ms Voice. After discussion it was agreed that IST should enter into an Option Agreement with Ms Voice in respect of the Property and Mr Voice was instructed to prepare all the documentation.

18. On 27 March 2014, IST and Ms Voice entered into the Option Agreement. Under the terms of the Option Agreement, Ms Voice granted the IST an option to purchase the Property. The period in which the Option Agreement could be exercised (the "Option Period") was the period of three months from a date being five years from the date of the Option Agreement. The Option Agreement stated that the purchase price of the Property was £9,300,000, and the consideration paid by IST for the grant of the option was £4,650,000, which formed part of the purchase price. The Property remained at Ms Voice's risk until the option was exercised. The Option Agreement provided that the Property was to be sold with vacant possession on completion.

19. On 31 March 2014, two entries were made in the Property's Register of Title:

> "No disposition of the registered estate by the proprietor of the registered estate is to be registered without a written consent signed by Investment & Securities Trust Limited"; and
>
> a charge in the Charges Register, which stated, "Option to purchase in favour of Investment & Securities Trust Limited contained in an Agreement dated 27 March 2014 made between (1) Lisa Fiona Voice and (2) Investment & Securities Trust Limited upon the terms therein mentioned".

20. On 2 April 2014, Knight Frank sent a letter to Mr Voice stating " *... it is understood that you require a guide as to the likely price the property may achieve on the open market. It should be understood that the comments made below and guidance given is not a formal valuation*". The letter went on to say that, "*we would expect a guide price of £9,300,000. We would estimate the property to be worth around £14,500,000 once completely modernized with an addition of a small sub basement increasing the total sq footage to approximately 6,600 sq ft*". The Property was described in the letter as "substantial detached period house with a beautiful garden that features 5 bedrooms, 3 reception rooms, 4 bathrooms, private parking and is approximately 5,200 sq ft".

21. IST's accounts for the accounting period ended 31 March 2014 were approved by its board of directors on 12 February 2015. The Directors' Report stated that IST's "principal activity is that of property dealing and investment". The acquisition of the Option was, following discussion with the ICAEW technical department, recorded as a fixed asset investment. The total value of the Option recorded in IST's accounts was £5,003,724, representing the consideration paid for the Option plus costs.

22. In 2016, Ms Voice contacted Mr Rubin as she was concerned about IST's level of debt. Shortly afterwards, Ms Voice became very unwell.

23. The process of obtaining planning permission, British Heritage approvals and finance continued throughout the option period. IST applied for and was granted planning permission on 18 April 2017.

24. Mr Rubin was appointed a Director of IST in 2018, he took over the running of IST when Mr Voice resigned in July 2019. Mr Rubin was involved in obtaining finance from Coutts Bank to develop the Property. Coutts Bank, as a condition for providing finance, required a value of £12m for the finished project, at the time that valuation was considered to be easily met.

25. On March 2019, Cluttons provided a valuation report to IST which valued the Property at £7.5m in its undeveloped state and at £11m once the development works had been completed. This was the "bombshell" moment when it was realised that the development project was no longer viable. The property market was in a state of decline and the projected development costs had begun to escalate as a result of Brexit and the changes to non-domicile rules.

26. The decision was taken to pull the project in late March/early April and IST exercised the Option to purchase the Property on 26 June 2019. Completion was delayed by enquiries made on behalf of lawyers acting for Coutts Bank, IST acquired the freehold interest in the Property on 22 July 2019. Ms Voice vacated the Property on 15 June 2019 and, following a holiday in the South of France, entered into a tenancy agreement for a property in St John's Wood commencing on 5 July 2019. The decision was taken to sell the Property rather than assume the development risks and it was initially marketed for £11m. An early offer of £9m was turned down and the Property was eventually sold for £6.9m.

**PROCEDURAL BACKGROUND**

27. IST completed Form SDLT 1 (the 'SDLT return') in respect of its acquisition of the Option and submitted it to HMRC on 14 April 2014. The SDLT return was completed on the basis that IST had acquired an interest in residential property and no relief from SDLT was claimed. SDLT of £325,500 was self-assessed.

28. On 7 January 2015, HMRC wrote to IST stating :

> "I hold information to suggest that you may have had a chargeable interest in [the Property] from 27 March 2014 for the purposes of the Annual Tax on Enveloped Dwellings (ATED). If this is the case an Annual Tax on Enveloped Dwellings Return is required for the period from 27 March 2014 to 31 March 2014 and another for the period from 1 April 2014 to 31 March 2015. A search of our database has not identified ATED returns having been submitted in respect of this property for the above periods".

29. HMRC requested information to check IST's ATED position, as well as an explanation as to why IST self-assessed SDLT at the rate of 7% as opposed to the higher rate of 15%.

30. IST's representative, Wilson Wright LLP ("WW"), replied to HMRC on 25 February 2015. WW explained that IST acquired an option to purchase the Property but did not own an interest in it in accordance with section 95 FA 2013, such that IST was not required to submit an ATED return. WW further stated that IST acquired the Property in the course of a property trading or redevelopment business, so was exempt from the 15% rate of SDLT outlined in paragraph 3 of Schedule 4A to the FA 2003 by virtue of paragraph 5 of that schedule. The letter enclosed copies of the following documents: IST's accounts for the APE 31 March

2014 and the business plan which was presented to IST's board of directors before the Option Agreement was entered into.

31. On 31 March 2015, WW sent a copy of the Option Agreement to HMRC.

32. HMRC wrote to IST on 12 June 2015 setting out their view that the Option was a chargeable interest as defined by section 107(1)(b) FA 2013. HMRC considered that IST was liable to ATED and that no relief was available under section 141 FA 2013 ("Property Traders Relief"). HMRC further stated that IST was not eligible for relief from the higher rate of SDLT by virtue of Paragraph 5 of Schedule 4A to the FA 2003.

33. WW replied on 22 July 2015 stating: " … we accept that the option agreement falls within s107(1) FA 2013, although we believe it is s107(1)(a), rather than s107(1)(b), which is in point" and that IST carried on a property development trade as defined by section 138(4) FA 2013 and the Option was an interest which was "held exclusively for the purpose of developing and reselling the land in the course of the trade". Therefore IST was entitled to relief under section 138 FA 2013 ("Property Developers Relief"). WW confirmed that ATED returns would be submitted in due course and further stated that, for SDLT purposes, the exemption in paragraph 5 FA 2003 was met.

34. On 1 September 2015, IST submitted its ATED return for the chargeable period ending 31 March 2015 to HMRC. In the return, IST claimed Property Developers Relief, such that no tax was payable for the period.

35. On 21 September 2015, HMRC wrote to IST giving notice of their intention to enquire into its ATED return for the chargeable period ending 31 March 2015, pursuant to Paragraph 8 of Schedule 33 to the FA 2013.

36. WW wrote to HMRC on 26 November 2015 and reiterated their view that IST carried on a property development trade, within the meaning of s138(4) FA 2013. WW agreed that Ms Voice was a "non-qualifying individual" for both ATED and SDLT purposes but that IST had not permitted her to occupy the Property as in the period before the exercise of the Option, Ms Voice occupied the Property as the owner of the freehold interest and not because she was permitted to do so by IST and IST had no intention of allowing Ms Voice to occupy the Property after the exercise of the Option as "Clause 8 of the option agreement specifically requires vacant possession on completion and that we understand reflects the intentions of the parties". Therefore, the conditions for relief from the ATED were met and the higher rate of SDLT did not apply. WW stated that relief from the higher rate of SDLT was not withdrawn under Paragraph 5G of Schedule 4A to the FA 2003 because IST still held the Option for the purpose of developing and selling the land and had taken reasonable steps with respect to the future development of the land. Enclosed with the letter was a personal statement of Mr Voice dated 24 November 2015 which explained IST's trading activities and the background to IST entering into the Option Agreement.

37. HMRC replied on 29 July 2016 disagreeing that the word "permitted" is restricted to permission by the entity potentially within the scope of ATED and 15% SDLT i.e. the company. The letter concluded stating that that relief from the ATED and the higher rate of SDLT was not available to IST.

38. On 28 April 2017, IST submitted two ATED Relief Declaration Returns to HMRC for the chargeable period ending 31 March 2018, one for PDR and one for Property Rental Business Relief. HMRC wrote to WW on 8 June 2017 setting out their view that IST did not hold the Option to purchase the Property exclusively for the purposes of developing and reselling the land in the course of its trade and restated their view that IST permitted Ms Voice to occupy the Property.

39. On 26 June 2017, HMRC wrote to IST in relation to its SDLT position and stated that, based on the information provided to HMRC, their view was that IST was not eligible for relief from the higher rate of SDLT and was liable to additional SDLT of £372,000, plus interest of £35,984.62.

40. On 29 August 2017, WW wrote to HMRC stating: "The option was acquired so that the company would be in a position to purchase the property when the requisite funds were available and for no other reason" and "At the time, Ms Voice … had a pressing need for funds, hence the company needed to purchase the option in order to ensure that the property was not sold to third parties before the company could purchase it itself".

41. On 1 September 2017, WW wrote to HMRC in relation to their letter dated 26 June 2017 stating: "It is not clear from your letter whether it is intended to amount to an assessment".

42. On 13 September 2017, HMRC sent a letter to IST entitled "Information about our check of your Stamp Duty Land Tax return". The letter stated, "I have now completed my check of your Stamp Duty Land Tax (SDLT) return for the above acquisition. This letter is a closure notice issued under paragraph 23, Schedule 10 of the Finance Act 2003". The closure notice concluded that the incorrect rate of SDLT was paid by the Appellant on acquisition of the Option and additional SDLT of £372,000 was due, plus interest of £34,749.90.

43. On 5 October 2017, WW wrote to HMRC and appealed against the closure notice.

44. On 27 March 2018, HMRC sent a "Notice of SDLT assessment" to IST pursuant to Part 5 of Schedule 10 to the FA 2003. The assessment charged IST to additional SDLT of £372,000 plus interest of £43,512.14.

45. WW wrote to HMRC on 25 April 2018 stating that it wished to appeal the notice of assessment issued on 27 March 2018. The letter also stated that IST filed two ATED Relief Declaration Returns for the chargeable period ending 31 March 2018.

46. On 27 April 2018, HMRC wrote to IST giving notice of their intention to enquire into its ATED return for the chargeable period ending 31 March 2018, pursuant to paragraph 8 of Schedule 33 to the FA 2013.

47. On 17 April 2019, IST submitted two ATED Relief Declaration Returns for the chargeable period ending 31 March 2020, one for Property Developers Relief and one for Property Rental Business Relief.

48. On 5 February 2020, HMRC wrote to IST giving notice of their intention to enquire into its ATED return for the chargeable period ending 31 March 2020, pursuant to paragraph 8 of Schedule 33 to the FA 2013.

49. On 23 July 2020, HMRC issued three closure notices to IST pursuant to paragraph 16 of Schedule 33 to the FA 2013 in respect of the enquiries opened into its ATED returns. As a result of the closure notices, the Appellant was charged to the ATED as follows:

| Chargeable Period | ATED charged | Interest |
| --- | --- | --- |
| 1 April 2014 to 31 March 2015 | £35,900 | £6,773.60 |
| 1 April 2017 to 31 March 2018 | £54,950 | £5,516.48 |
| 1 April 2019 to 2 January 2020 | £17,766 | £711.85 |

50. The closure notices for the chargeable periods ending 31 March 2015 and 31 March 2018 concluded that no relief from ATED was due for those periods. The closure notice for the chargeable period ending 2 January 2020 concluded that no relief from ATED was due

for the period 1 April 2019 to 21 July 2019. Relief from ATED was available from 22 July 2019. The reasons given by HMRC why no relief from ATED was due were the same in all the specified periods were:

(1) IST did not hold the Option to purchase the Property exclusively for the purpose of developing and reselling the land in the course of its property development trade, such that the conditions for Property Developers Relief were not met, and

(2) a non-qualifying individual was permitted to occupy the Property.

51. On 4 August 2020, WW appealed against the closure notices and on 29 March 2021, WW requested a statutory review of the SDLT assessment and ATED closure notices.

52. The HMRC caseworker wrote to IST outlining her view of the matter in relation to both the SDLT assessment and the ATED closure notices on 27 April 2021.

53. On 12 November 2021, HMRC confirmed that, following the statutory review, the SDLT assessment and ATED closure notices were upheld.

54. On 10 December 2021, IST appealed the SDLT assessment and ATED closure notices to the Tribunal.

## RELEVANT LEGISLATION

### SDLT

55. Paragraph 3(1)(a) of Schedule 4A to the FA 2003 provides for SDLT to be charged at 15% of the chargeable consideration in certain circumstances. Paragraph 3(2) of Schedule 4A to the FA 2003 states that 15% rate of SDLT applies where:

> (a) the transaction is a high-value residential transaction, and
>
> (b) the condition in sub-paragraph (3) is met.

56. The conditions in Paragraph 3(3) of Schedule 4A to the FA 2003 are that:

> (a) the purchaser is a company,
>
> (b) the acquisition is made by or on behalf of the members of a partnership one or more of whose members is a company, or
>
> (c) the acquisition is made for the purposes of a collective investment scheme.

57. Paragraph 2 of Schedule 4A to the FA 2003 defines a "high-value residential transaction" for the purpose of Paragraph 3. Paragraph 2(2) states that, "If the main subject-matter of the transaction consists entirely of higher threshold interests, the transaction is a high-value residential transaction …"

58. The meaning of a "higher threshold interest" can be found in paragraph 1 of Schedule 4A to the FA 2003, which provides as follows:

> (1) In this paragraph "interest in a single dwelling" means so much of the subject-matter of a chargeable transaction as consists of a chargeable interest in or over a single dwelling (together with appurtenant rights).
>
> (2) An interest in a single dwelling is a higher threshold interest for the purposes of this schedule if chargeable consideration of more than [£500,000] is attributable to that interest.

59. Paragraph 7 of Schedule 4A to the FA 2003 explains what is meant by the term "dwelling" for the purpose of that Schedule. It states that a "dwelling" is "a building or part of a building" which is "used or suitable for use as a single dwelling", or "is in the process of

being constructed or adapted for such use", per section Paragraph 7(2). A "dwelling" also includes:

> "Land that is, or is at any time intended to be, occupied or enjoyed with a dwelling as a garden or grounds (including any building or structure on such land)", [paragraph 7(3) of Schedule 4A to the FA 2003, and
>
> "Land that subsists, or is at any time intended to subsist, for the benefit of a dwelling", [paragraph 7(4) of Schedule 4A to the FA 2003].

60. Paragraph 5 Sch 4 FA 2003 states:

> 5(1) Paragraph 3 does not apply to a chargeable transaction so far as its subject-matter consists of a higher threshold interest that is acquired exclusively for one or more of the following purposes—
>
> (a) exploitation as a source of rents or other receipts (other than excluded rents) in the course of a qualifying property rental business;
>
> (aa) use as business premises for the purposes of a qualifying property rental business (other than one which gives rise to income consisting wholly or mainly of excluded rents);
>
> (ab) use for the purposes of a relievable trade;
>
> (b) development or redevelopment and—
>
> (i) resale in the course of a property development trade, or
>
> (ii) exploitation falling within paragraph (a) or use falling within paragraph (aa) or (ab);
>
> (c) resale in the course of a property development trade (in a case where the chargeable transaction is part of a qualifying exchange);
>
> (d) resale (as stock of the business) in the course of a property trading business.
>
> (2) A chargeable interest does not count as being acquired exclusively for one or more of those purposes if it is intended that a non-qualifying individual will be permitted to occupy a dwelling on the land.
>
> (3) In this paragraph—
>
> "excluded rents" has the same meaning as in section 133 of the Finance Act 2013;
>
> "property development trade" means a trade that—
>
> (a) consists of or includes buying and developing or redeveloping for resale residential or non-residential property, and
>
> (b) is run on a commercial basis and with a view to profit;
>
> "part of a qualifying exchange" is to be construed in accordance with section 139(4) of the Finance Act 2013;
>
> "property trading business" means a business that—
>
> (a) consists of or includes activities in the nature of a trade of buying and selling dwellings, and
>
> (b) is run on a commercial basis and with a view to profit;
>
> "qualifying property rental business" has the same meaning as in section 133 of the Finance Act 2013.

"relievable trade" means a trade that is run on a commercial basis and with a view to profit."

**ATED**

61. Section 94(2) of the FA 2013 provides for the ATED to be charged if, on one or more days in a chargeable period:

> (a) the interest is a single-dwelling interest and has a taxable value of more than [£500,000], and
>
> (b) a company, partnership or collective investment scheme meets the ownership condition with respect to the interest.

62. A "single dwelling interest" is defined by section 108 of the FA 2013. The relevant definition is at section 108(2):

> "A chargeable interest that is exclusively in or over land consisting (on any day) of a single dwelling is a single-dwelling interest (on that day)".
>
> A "dwelling" is "a building or part of a building" which is "used or suitable for use as a single dwelling", or "is in the process of being constructed or adapted for such use", per section 112(1) of the FA 2013. A "dwelling" also includes:
>
> "Land that is, or is at any time intended to be, occupied or enjoyed with a dwelling as a garden or grounds (including any building or structure on such land)" [section 112(2) of the FA 2013], and
>
> "Land that subsists, or is at any time intended to subsist, for the benefit of a dwelling" [section 112(3) of the FA 2013].

63. Relief for property developers is provided by s138 FA 2013:

> 138 Property developers
>
> (1) A day in a chargeable period is relievable in relation to a single-dwelling interest if on that day—
>
> > (a) a person carrying on a property development trade ("the property developer") is entitled to the interest, and
> >
> > (b) the interest is held exclusively for the purpose of developing and reselling the land in the course of the trade.
>
> (2) If the property developer holds an interest for the purpose mentioned in subsection (1)(b), any additional purpose the property developer may have of exploiting the interest as a source of rents or other receipts in the course of a qualifying property rental business (after developing the land and before reselling it) is treated as not being a separate purpose in applying the test in subsection (1)(b).
>
> (3) A day is not relievable by virtue of subsection (1) if on the day a non-qualifying individual is permitted to occupy the dwelling.
>
> (4) In this Part "property development trade" means a trade that—
>
> > (a) consists of or includes buying and developing for resale residential or non-residential property, and
> >
> > (b) is run on a commercial basis and with a view to profit.
>
> (5) In this section references to development include redevelopment

## ISSUES IN DISPUTE

64. At the start of the hearing, IST confirmed that it was not disputed that the conditions for making a valid discovery were met nor was it disputed that the discovery assessments (as revised) were made in the correct amount.

65. It was also common ground that Ms Voice is a non-qualifying individual per paragraph 5A Sch 4A FA 2023, the Option Agreement was a transaction whose subject matter was a higher threshold interest (paragraph 1 Sch 4A FA 2003) such that the transaction was a high-value residential transaction (paragraph 2 Sch 4A FA 2003) and therefore the higher rate of SDLT provided for at paragraph 3 Sch 4A FA 2003 potentially applies.

66. It was accepted by HMRC in their Statement of Case at [154] that:

> "the Appellant carried on a property development trade between 27 March 2014 and 3 January 2020."

67. It was further accepted by HMRC in their Statement of Case at [165]-[167]:

> 165. The Respondents accept that, as the Appellant held the freehold interest in the Property from 22 July 2019 until 3 January 2020:
>
> > 165.1 the interest was held exclusively for the purpose of its property development trade,
> >
> > and
> >
> > 165.2. a non-qualifying individual was not permitted to occupy the Property.
>
> 166. Consequently, the Respondents accept that the Appellant was eligible for Property Developers Relief from 22 July 2019 until 3 January 2020, which falls within the chargeable period ending 31 March 2020.
>
> 167. The Respondents acknowledge that the freehold interest in the Property, held by the Appellant from 22 July 2019, was a different interest to the Option to purchase the Property that it had held until 21 July 2019. The Respondents therefore accept that the "look forward" rule in section 135 FA 2013 does not apply so as to render the Appellant ineligible for Property Developers Relief in the period 22 July 2019 to 3 January 2020".

68. In respect of ATED, the only relief relevant to this appeal is the Property Developers Relief, s138 to s140 FA 2013. It is accepted that IST carried on a property development trade between 27 March 2014 and 3 January 2020, such that the condition in section 138(1)(a) is met. Ms Henshaw submitted that the word "exclusively" in s138(1)(b) FA 2013 has the same meaning as that in paragraph 5(1) of Schedule 4A FA 2003. Mr Sykes agreed with Ms Henshaw's submission that the same questions determine relief from ATED as well as whether or not the higher rate of SDLT applies.

69. We agree with the parties, the issues to be determined are as follows:

(1) Was the Option acquired exclusively for the purpose of the property development trade (this is relevant to both SDLT and ATED)?

(2) Was Ms Voice permitted to occupy the property (this is relevant to both SDLT and ATED)?

## SUBMISSIONS

70. HMRC's submissions are summarised as follows.

71. IST's interest in the Property was not acquired exclusively for the purpose of development or redevelopment and resale in the course of a property development trade per

the requirements of par 5(1) Sch 4A FA 2003. It is the purpose at the time the interest was acquired which determines whether Paragraph 5(1) of Schedule 4A to the FA 2003 applies.

72. The meaning of the phrase "wholly and exclusively for the purposes of the trade" has been considered by the courts in the context of legislation such as section 34 of the Income Tax (Trading and Other Income) Act 2005 and section 54 of the Corporation Tax Act 2009. These provisions state that, in calculating the profits of a trade for tax purposes, no deduction is allowed for expenses that were not incurred wholly and exclusively for the purposes of the trade.

73. In *Vodafone v Shaw* [1997] STC 734 ("*Vodafone*"), the Court of Appeal considered how the exclusivity test had been applied in modern cases on the issue, and at [742] said that the following propositions may be derived from the leading modern cases on the application of the exclusively test:

> "(1) The words for the purposes of the trade mean to serve the purposes of the trade. They do not mean for the purposes of the taxpayer but for the purposes of the trade, which is a different concept. A fortiori they do not mean for the benefit of the taxpayer.
>
> (2) To ascertain whether the payment was made for the purposes of the taxpayer's trade it is necessary to discover his object in making the payment. Save in obvious cases which speak for themselves, this involves an inquiry into the taxpayer's subjective intentions at the time of the payment.
>
> (3) The object of the taxpayer in making the payment must be distinguished from the effect of the payment. A payment may be made exclusively for the purposes of the trade even though it also secures a private benefit. This will be the case if the securing of the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment.
>
> (4) Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made."

74. The meaning of the word "exclusively" in the context of paragraph 5(1) of Schedule 4A FA 2003 was considered in *Consultus Care and Nursing Limited v HMRC* [2020] UKFTT 179 ("*Consultus*"). At [24], the Tribunal said:

> "It is notable that paragraph 5(1) requires that a property is acquired "exclusively" for one of the specified purposes. It is not a main purpose test (which could be satisfied where there was more than one purpose and one of those could be said to be the main purpose). The express language requires that the only purpose of CCN is one of those specified (in this case for exploitation as a source of rents as a qualifying property rental business)".

75. The word "exclusively" in context paragraph 5(1) of Schedule 4A to the FA 2003 should be interpreted as imposing a requirement that restricts the availability of the exemption to circumstances where the only purpose for acquiring the interest is the purpose that is specified in the legislation. The Option was not acquired exclusively for the purpose of development or redevelopment and resale in the course of a property development trade as, whilst IST may have acquired the Option with one of these purposes in mind, the facts demonstrate that there were also other purposes. Those purposes were: to provide IST time to raise the funds needed to purchase the freehold of the Property; to assist with Ms Voice's pressing need for funds, prevent the sale of the Property to a third party and to provide Ms Voice with somewhere to live whilst she looked for another home.

76. IST required more time to purchase the Property freehold and whilst this is likely in the course of its trade it does not come within the narrower requirement of being "acquired exclusively" for developing and reselling the land set out in paragraph 5(1) of Schedule 4A FA 2003 nor was it "merely incidental" but was "so inevitably and inextricably" linked to the decision to acquire the Option that it must be taken to be have been a purpose.

77. Ms Voice, through her ownership of more than half of the issued share capital of Woolcastle was able to exercise direct or indirect control over IST including the decision to enter into the Option Agreement. The failure by IST to obtain a formal valuation of the Property before entering into the Option Agreement demonstrates a lack of commerciality and demonstrates that the provision of funds to Ms Voice was a key purpose. Similarly, preventing the sale of the Property to a third-party and the additional time afforded to Ms Voice to find somewhere to live were not "merely incidental" but were "so inevitably and inextricably" linked to the decision to enter into the Option Agreement that they must be taken as purposes for entering into the Option Agreement.

78. In the event that the Tribunal finds that the Option was acquired exclusively for the purpose of development or redevelopment and resale in the course of a property development trade, it is submitted that it was intended that a non-qualifying individual would be permitted to occupy the Property, such that the exemption in paragraph 5(1) of Schedule 4A to the FA 2003 does not apply. It was not in dispute that Ms Voice was a non-qualifying individual. It is HMRC's position that there is nothing within paragraph 5(2) of Schedule 4A FA 2003 which stipulates that it is the purchaser that must intend that a non-qualifying individual will be permitted to occupy the property. There is nothing within paragraph 5(2) which stipulates that the purchaser must grant the non-qualifying individual permission to occupy the property. Paragraph 5(2) simply requires that there is some party who has the power to permit or revoke occupation, and that person permits the non-qualifying individual to occupy and the words "it is intended that" in paragraph 5(2) is sufficiently broad to cover the intention of the purchaser, where somebody else has control over the occupancy of the Property and the intention of any one of the parties to the land transaction, or a common intention of the parties involved.

79. As Ms Voice had both the right and intention to occupy the Property at the time the Option was granted, the test in paragraph 5(2) is met.

80. HMRC submit that the word "exclusively" in context of section 138(1)(b) of the FA 2013 should be interpreted as imposing a requirement that restricts the availability of Property Developers Relief to circumstances where the only purpose for holding the interest is the purpose that is specified in the legislation. Whilst one of the purposes for which IST held the Option may have been the development and resale of the Property in the course of its property development trade, the facts of the case demonstrate that there were also other purposes such that the interest was not held exclusively for the purpose of developing and reselling the land in the course of its property development trade.

81. Mr Sykes' submissions on behalf of IST are summarised as follows.

82. The words chosen by Parliament in paragraph 5(2) do not permit HMRC's interpretation of permitted and the statutory context does not require a departure from the meaning of the words.

83. In *Tophams Ltd v Sefton (Earl)* [1967] 1 A.C. 50 at [68], Lord Guest said:

> "Apart altogether from authority I would think that outside the sphere of purely polite social language, the word "permit", used even between laymen bent on serious business or other affairs intended to have legal consequences, would be used as a word connoting on the part of the one

> whose permission is asked the right effectively to refuse and on the part of the applicant the necessity to ask for and obtain permission, so as lawfully to undertake his proposed course of action. This, in my view, is its legal meaning."

84. This borne out by the cited cases and is the short answer to HMRC's case on "permitted". See Broad v Parish (1941) 64 CLR 588, an Australian case, Rich ACJ at [594]; *Reg. v. Staines Local Board* (1888) 60 L. T. 261, Field J. at [264]; *Berton and Others v Alliance Economic Investment Company* [1922] 1 K.B. 742 Bayley J at [755] and Atkin J at [759] and *Toleman v Portbury* L.R. 5 QB 288 Cleasby B. at [296]. Further support is found in the Tribunal decisions in *Forest Commercial Services Ltd v HMRC* [2020] UKFTT 0470 (TC) at [89]-[91] and *Waterside Escapes Ltd v HMRC* [2020] UKFTT 0404 (TC) at [33]-[53].

85. Had Parliament intended to subject purchasers to higher-rate SDLT and ATED simply if "a non-qualifying individual will be occupying a dwelling on the land", paragraph 5(2) would have said so. The permission element must indicate that it is being given by a party who is in position to meaningfully give it through their real control of who may use the property. IST purchased the Option which did not grant it any possession over the Property and did not give it the ability to influence whether or not Ms Voice occupied the property. It is and has always been IST's position that Ms Voice occupied the Property as of right as the freeholder. IST did not permit this as IST had no control over this.

86. Whilst it is unnecessary for the Tribunal to determine "who permits", the strong implication is that this is the purchaser. This inference is explicitly made by the Tribunal in *Hopscotch Limited v HMRC* [2019] UKFTT 288 (TC) where the "non-qualifying individual" condition was stated at [25] as being that:

> "the taxpayer must show that it did not permit a "non-qualifying individual" to occupy the property"

87. The natural reading suggests that the requirements relate to the control that the purchaser had over the property. As Ms Voice's occupation of the Property was as of right as the freeholder this was beyond IST's control and so it cannot have permitted the occupation. This is reflected in HMRC's guidance at SDLTM09660: "no non-qualifying individual is permitted, by the purchaser, to occupy the dwelling."

88. HMRC accept that IST's pursuit of their property development trade was at least one of the purposes behind the purchase. HMRC's argument is therefore limited only to whether this was the exclusive purpose.

89. The facts confirm that IST's trade was the exclusive purpose behind the purchase of the Property and not the three other purposes claimed by HMRC: (1) to provide IST more time to raise funds for the purchase and development; (2) to prevent Ms Voice from selling the Property to a third party and (3) to provide somewhere for Ms Voice to live while she looked for new home.

90. The focus in paragraph 5(1) is on the purpose of the acquisition of the land interest rather than any other part of the transaction, if it were concerned with the purposes of the transaction, it would be worded differently. Therefore, what is required is to determine the purpose for which the land interest is acquired and whether that purpose falls within paragraph 5(1)(a)-(d). There is no basis, as HMRC seek to do, to look at alternative ways in which the transaction could be structured whereby the freehold interest is acquired directly; the purpose is determined by looking at the actual transaction undertaken. The attainment of a purpose will, as a matter of logic, necessarily involve steps to get there and those steps will be in furtherance of that purpose. The purported purposes identified by HMRC are therefore

clearly preliminary steps and not alternative purposes and so they do not justify a conclusion that the development purpose is not the exclusive purpose. It is well established in case law on exclusive purpose tests that steps towards fulfilling a purpose do not amount to a separate purpose, *Mallalieu v Drummond (Inspector of Taxes)* [1983] 2 A.C. 861 at [870] and *Samarkand Film Partnership No.3 & Ors v Revenue & Customs* [2011] UKFTT 610 (TC) at [355].

91. It is accepted that a benefit of the Option was that it gave IST more time to raise funds for the purchase and development but this was a means of furthering the wider purpose of developing and selling the Property. If providing more time to fund the purchase were an impermissible purpose that common approach by property developers would always have an additional purpose of "giving more time" and not the exclusive purpose of carrying on the property development trade, with wide reaching impact. Preventing Ms Voice from selling the Property to a third party was a means of furthering the wider purpose of developing and selling the Property. The Option did not grant Ms Voice somewhere to live whilst she looked for a new home as she already owned the freehold and the right to reside at the Property was an effect of the transaction.

**DISCUSSION**

**WAS THE OPTION ACQUIRED EXCLUSIVELY FOR THE PURPOSE OF A PROPERTY DEVELOPMENT TRADE?**

92. Before considering the purpose for which the land acquisition was acquired, we deal briefly with HMRC's submission that IST could have structured the transaction differently such that IST acquired the freehold interest directly. We do not accept that submission.

93. HMRC accept that IST carried on a property development trade between 27 March 2014 and 3 January 2020 but do not accept that the interest was held exclusively for the purpose of the property and development trade. Accordingly, HMRC accept that the pursuit of IST's property development trade was at least one of the purposes behind the purchase but contended that there were additional purposes for the purchase such that the pursuit of the property development trade is not an exclusive purpose. It is HMRC's case that the other purposes were to give IST more time to raise funds for the purchase and development of the Property; to assist with Ms Voice's pressing need for funds, to prevent the sale of the Property to a third party and to provide Ms Voice with somewhere to live while she looked for a new home.

94. IST contended that it was clear from the evidence that IST's property development trade was the exclusive purpose behind the purchase of the Property. In addition, Mr Sykes submitted the focus in paragraph 5(1) is on the purpose of the acquisition of the land interest rather than any other part of the transaction.

95. HMRC referred us to the Court of Appeal decision in *Vodafone* at [742] which set out four propositions that may be derived from the leading cases dealing with the application of "wholly and exclusively". Whilst Ms Henshaw accepted that the test was not the same as in this case, it was her position that it was useful to consider the four propositions in *Vodafone*. We disagree. We do not consider that the propositions derived from cases considering whether payments in the context of Income and Corporation Tax were "wholly and exclusively" incurred for business purposes assist us in determining this appeal. Similarly, we do not accept Mr Sykes submission that case law on exclusive purpose tests that steps towards fulfilling a purpose do not amount to a separate purpose are of assistance.

96. In our judgment, the wording in paragraph 5(1) is clear and requires that the property is acquired "exclusively" for one of the specified purposes. "Exclusively" is defined in the OED

as: "*So as to exclude all except some particular object, subject, etc.; solely*". We therefore agree with and adopt the statement at [24] in the Tribunal decision in *Consultus*:

> "[24] It is notable that paragraph 5(1) requires that a property is acquired "exclusively" for one of the specified purposes. It is not a main purpose test (which could be satisfied where there was more than one purpose and one of those could be said to be the main purpose). The express language requires that the only purpose of CCN is one of those specified (in this case for exploitation as a source of rents as a qualifying property rental business)."

97. We note that at [25], the Tribunal concluded that on the basis of the evidence the acquisition of the property by CNN was not the only purpose:

> "[25] On the basis of the evidence, we have concluded that the directors of CCN had (at least) two purposes in acquiring the Property. These were to obtain a better return on the company's surplus funds than that which was available at the bank, with the rental income expected to be higher, and also to support the provision of training by the business by having cheap accommodation available for carers. The first of these may well have been the main purpose of the directors (and we accept Mr Seldon's evidence that this was the case) but it is not the only purpose. It is not relevant that the rental income received by CCN from the two properties exceeds the turnover for the provision of training courses (thus illustrating that the provision of training is a smaller component of the business). Accordingly, and whilst acknowledging that the test may be perceived as harsh, this does not meet the "exclusively" requirement of paragraph 5(1) and CCN does not qualify for relief from the higher rate charge."

98. For the reasons set out at paragraph 96. (acknowledging that *Consultus* was concerned with paragraph 5(1)), we consider that the wording in s138(1)(b) is equally clear and requires that the interest is held exclusively for the purpose of developing and reselling the land in the course of a trade. The requirement that the exemption is to be narrowly construed and only available if the interest is acquired or held "exclusively" for one of the stated purposes is not surprising. As stated by the authors of Sergeant & Sims on Stamp Taxes, both paragraph 5(1) and s138(1)(b) were part of a package of targeted anti-avoidance measures aimed at high-value residential properties. Section AB1.1 titled "Background to the introduction of ATED" states:

> "2012 was a significant year for stamp taxes. It is not uncommon, of course, for taxes (including stamp taxes) to be the subject of targeted anti-avoidance rules, usually announced in the Budget. Indeed, stamp duty land tax (`SDLT') has been particularly susceptible to this over the years, culminating in its own form of general anti-avoidance rule in 2006 (FA 2003 s 75A). This reflects the approach taken by HMRC to combat perceived tax avoidance schemes between 2003 and 2010, using legislation not litigation.
>
> …
>
> The political determination to counter perceived widespread abuse of SDLT, or be seen to do so, fuelled by considerable media comment in the year or so preceding Budget 2012, led to the birth of a new tax, annual tax on enveloped dwellings (`ATED'), which most regard as a form of stamp tax due to its origin and interaction with SDLT, and to substantial changes to two others, SDLT and capital gains tax (`CGT').
>
> …
>
> The package of three measures (SDLT, ATED and ATED-related CGT) was designed to stop a particular type of practice connected with high-value

> residential property sales that the Government pejoratively refer to as 'enveloping': ie, acquiring a residential property using a company to act as a `special purpose vehicle', then selling the shares in that company rather than the property to avoid SDLT being chargeable."

99. On the basis of the evidence and the findings of fact below, we have concluded that IST did not acquire or hold the interest in the Property for the exclusive purpose of its property development trade but also for the purposes of addressing Ms Voice's pressing need for funds, preventing the sale of the Property to a third party and providing IST with time to raise the funds to acquire and develop the Property. We accept that the additional purposes would readily fall within the ambit of a property development trade but, for the reasons set out below, have concluded that when the purposes are considered as a whole, pursuance of a property development trade was not the exclusive purpose.

100. As stated at paragraph 93. above, it was accepted that IST carried on a property development trade between 27 March 2014 and 3 January 2020. We have no hesitation in accepting that IST fully intended to develop the Property on a commercial basis. The Business Plan presented to the IST Board on 20 March 2014 was comprehensive and set out the reasons for entering into the Option Agreement, considered the merits of an immediate sale of the Property versus possible development of the Property, set out various risks factors that had been considered before concluding that "*there is sufficient margin in the above figures to absorb any risk factors and remain profitable. If the development is deemed uncommercial, there is the ability to sell the property as it is*." We find that the Business Plan was posited on a commercial basis and atypical of a business plan for a business considering the acquisition of a property for the purpose of its property development trade.

101. We accept that the quote for the costs of the works was not a formal quotation and the valuation obtained from Knight Frank on 2 April 2014 was also not a formal valuation but do not agree with HMRC's submission that this meant that the Business Plan was "uncommercial". A marketing and sale advice report had been obtained from Savills on 10 January 2014 (three months prior to the granting of the Option) which valued the Property at £9m and at £13m with the addition of a basement; the "informal" valuation by Knight Frank valued the Property £9.3m and at £14.5m following modernisation and the addition of a basement. We do not consider the two informal valuations are so far apart such that reliance upon the valuations demonstrated a lack of commerciality. We do not consider that a formal valuation would have provided IST with any greater degree of certainty nor demonstrated "commerciality"; at that point in time IST was considering three possible options and did not have a settled plan for the Property. Similarly, we do not consider that a formal quote for building works at that time would have provided anything different to what was provided by the informal quote: only an estimated range of costs could be provided until such time as a decision was made whether to sell or develop the Property and architect's plans obtained. IST commissioned architects to provide plans for three possible options and planning permission was applied for and obtained. No insignificant cost was incurred on architect's plans, planning permission, dealing with British Heritage, etc.

102. As stated above, we do not accept that development of the Property by IST was the exclusive purpose for entering into the Option Agreement, we find that it also had the following three purposes.

**MS VOICE'S PRESSING NEED FOR FUNDS**

103. Ms Voice explained in her witness statement that "*In the period leading up to the grant of the Option I was in need of cash and was going to sell 1A Cavendish Avenue to ease my financial situation*." and "*Had the Option not been granted in return for a payment of £4,650,000, I would have sold 1A Cavendish Avenue on the open market.*" Ms Voice

accepted in cross-examination that the Option payment was credited to the director's loan account, interest at the rate of 4% pa was earned on the balance and that she was able to immediately access the funds whilst she continued to live at the Property. She further accepted in cross-examination that there was no real risk that the option would not be exercised, IST always intended to purchase the Property, she agreed the Option was in essence a delayed purchase and, at the time the Option Agreement was entered into, she had the majority shareholding in the parent company (Woolcastle) that controlled IST.

104. Mr Voice was referred to WW's letter to HMRC dated 29 August 2017 which stated "*At the time, Ms Voice, who does not work, had a pressing need for funds, hence the company needed to purchase the option in order to ensure that the property was not sold to third parties before the company could purchase it itself*." Mr Voice did not agree with the WW's comments (despite WW being IST's appointed advisers) stating: "*personally, that was not how he viewed it*" as Ms Voice "*has money, a very comfortable lifestyle*" and that he was not concerned with Ms Voice's stated need for funds ("*she is wealthy*", "*has money*" and "*a very comfortable lifestyle*") but rather was motivated and focused on securing the Property for IST to either develop and sell or sell it undeveloped. We find as fact that Ms Voice's did have a pressing need for funds and, despite Mr Voice's claimed lack of concern for Ms Voice's need for funds, one of the purposes of the Option Agreement was to provide her with immediate and unrestricted access to those funds.

105. That conclusion is supported by WW's letter dated 10 August 2018 responded to HMRC's letter dated 18 May 2018 stating:

> 1. While Mrs Voice's need for funds was pressing, it was not pressing to the full extent of the option price (nor the full extent of the property value). This has allowed Mrs Voice to be pragmatic about the balance, allowing for flexibility over cash flow.
>
> 2. As Mrs Voice's need for the funds was a long term need rather than an immediate one, Mrs Voice's loan account was credited by £4,650,000 on the date of grant. £636,955 was used immediately to clear an existing debt. Over the course of the 12 months following grant [sic], £552,847 was drawn by Ms Voice; the balance of the funds have continued to be drawn down by Mrs Voice as and when required. Again, as above, this flexibility has lessened the cash flow constraints on the Company.

106. It can be seen from paragraph two above that £636,955 was drawn immediately to clear the overdrawn shareholders' loan account, confirming Ms Voice's pressing need for funds, with a further £552,847.00 drawn during the first 12 month period. In total, £1,189,802.00 was drawn by Ms Voice during the 12 month period immediately following the grant of the Option. We consider that the Option Agreement was unusual in that it provided that the Option Sum was stated to be part of the purchase price rather than a separate payment. When that point was put to Mr Voice, he professed to not know why that was the case and was unable to provide an answer. Mr Voice accepted in cross-examination that Ms Voice "*desired some funds*" but stated that no discussion was had between Mr Voice and Ms Voice regarding the rate of drawdown from the directors' loan account and he accepted that Ms Voice could take the whole sum immediately. Accordingly, we find that one of the primary purposes of the Option Agreement was to address Ms Voice's pressing need for funds.

**PREVENTING THE SALE OF THE PROPERTY TO A THIRD PARTY**

107. Mr Voice's unchallenged evidence, which we accept, was that he wanted to ensure that IST did not miss the opportunity to secure the Property in order for IST to develop and/or sell. We accept that if IST had not entered into the Option Agreement, Ms Voice would have sold the Property on the open market. The Business Plan confirmed that "*The option*

*agreement also allows the company to purchase the property without entering into a bidding war with rival developers.*" We further accept that a property development company, having identified a significant potential property development opportunity, would seek to prevent third parties from acquiring, developing and turning a profit in relation to that property. Some form of option agreement is not untypical in the property development industry and accords with standard commercial practice but in this instance an untypically high grant price of £4.65m (representing nearly 50% of the Property value) was paid by IST.

108. There was no evidence of any negotiations between IST and Ms Voice to agree a lower grant price (reflecting, in our judgment, the reality of Ms Voice's control of IST's parent company) nor any evidence that Mr Voice would have entered into a similar Option Agreement with an unconnected third party. We consider that, particularly in light of Mr Voice's experience in the property development trade, that the payment of the high grant price and way in which the Option Agreement was structured was intrinsically linked to the pressing need to provide drawable funds to Ms Voice rather than for the sole purpose of preventing the sale of the Property to a third party. Structuring the Option Agreement in this way provided IST with a source of funds such that during the option agreement period it could continue to make significant payments to Ms Voice that did not impact on IST's operating results nor create additional loans to a participator that would incur a tax charge under s455 Corporation Tax Act 2010.

**PROVIDING IST TIME TO RAISE THE FUNDS TO ACQUIRE AND DEVELOP THE PROPERTY**

109. Mr Voice was clear in his evidence that he did not want IST to acquire the Property outright as he did not want to finance the purchase with debt as the Property would not be generating any income during the lengthy planning phase and "*Purchase by way of an Option secured the property, and the development opportunity, for the business and afforded the company more time to obtain the necessary planning permissions and to raise the necessary funds to fully purchase the property and to carry out the development works*." Mr Voice accepted in cross-examination that one of the reasons for the Option Agreement was to provide IST with more time to raise the funds. The unchallenged evidence of Mr Voice, as confirmed by the accounts, was that IST had insufficient funds to purchase the Property outright, it only held a cash balance of £45,565 at the time the Option was granted. We accept that, in isolation, providing IST with more time to raise funds to develop the Property would be considered as an integral part of the IST's trading activity and in accordance with standard commercial practice but we find this common commercial purpose undermined by the high option price paid which was in effect funding by way of 'internal debt' (a loan to Ms Voice). We find that, whilst the Option Agreement did provide IST with more time to raise funds, its primary purpose was to provide IST with a "pool of funds" from which Ms Voice was able to continue to draw down not insignificant sums on an annual basis.

**PROVIDING MS VOICE WITH SOMEWHERE TO LIVE WHILE SHE LOOKED FOR NEW ACCOMMODATION**

110. We agree with IST, and the evidence was clear on this point, that the Option Agreement did not grant Ms Voice somewhere to live as she continued to own the freehold of the Property and continued to occupy the Property as of right. That conclusion is correct as a matter of the law of Real Property.

**RESULT OF OUR CONCLUSION**

111. In light of the conclusion we have reached at paragraphs 103. to 109. that IST also had three other purposes for acquiring the Property via the Option Agreement means that IST's appeal fails as the Property was not acquired "exclusively" for one of the specified purposes and we are not required to make a decision on whether Ms Voice was permitted to occupy the

Property. However, as the matter was argued before us, we have proceeded to consider the matter and reach a conclusion on this alternative ground.

**WAS MS VOICE PERMITTED TO OCCUPY THE PROPERTY?**

112. As stated above, it was not disputed that Ms Voice was a non-qualifying individual for the purposes of SDLT and ATED, who occupied the Property on each day within the chargeable periods until IST exercised the Option and acquired the freehold interest.

113. HMRC submitted that because Ms Voice occupied the property following the Option Agreement, she was permitted to occupy the Property such that the interest cannot be considered to have been acquired exclusively for the qualifying business purpose. HMRC rely upon the fact that IST voluntarily entered into the Option Agreement which provided that Ms Voice would continue to occupy the Property until the Option was exercised and there is nothing in s138(3) of FA 2013 which states that it is the purchaser that must permit a non-qualifying individual to occupy. Paragraph 5(2) simply requires that there is some party who has the power to permit or revoke occupation, and that person permits the non-qualifying individual to occupy. IST voluntarily entered into a legal agreement to acquire an interest in the Property, and it was clear by the terms of that agreement that Ms Voice would continue to occupy the Property until the Option was exercised. Therefore, in addition to there being an intention that a non-qualifying individual would be permitted to occupy the Property, a non-qualifying individual was, in fact, permitted to occupy.

114. Mr Sykes contended that had it been intended to subject purchasers to higher-rate SDLT and ATED simply if "a non-qualifying individual will be occupying a dwelling on the land", paragraph 5(2) would have said so. The permission element must indicate that it is being given by a party who is in a position to meaningfully give it through their real control of who may use the property. That contention is supported by established case law. We agree with Mr Sykes' submissions.

115. In *Tophams Ltd v Sefton (Earl)* [1967] 1 A.C. 50 at 68, Lord Guest said:

> "Apart altogether from authority I would think that outside the sphere of purely polite social language, the word "permit", used even between laymen bent on serious business or other affairs intended to have legal consequences, would be used as a word connoting on the part of the one whose permission is asked the right effectively to refuse and on the part of the applicant the necessity to ask for and obtain permission, so as lawfully to undertake his proposed course of action. This, in my view, is its legal meaning."

116. The meaning of the "permit" was considered by Atkin LJ in *Berton and Others v Alliance Economic Investment Compan*y [1922] 1 K.B. 742. He said at [755]:

> "Now the words 'permitting and suffering' do not bear the same meaning as 'knowing of and being privy to'; the meaning of them is that the defendant should not concur in any act over which he had a control."

117. And at [759]:

> "To my mind the word 'permit' means one of two things, either to give leave for an act which without that leave could not be legally done, or to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it."

118. We find that the Option did not grant IST any possession over the Property and did not give it the ability to influence or decide whether or not Ms Voice occupied the Property. The evidence on this point was clear and we accept it: it is and has always been IST's position

(confirmed in correspondence and witness evidence) that Ms Voice occupied the Property as of right in her capacity as freeholder.

119. HMRC alternatively contended in their Statement of Case at paragraph 129: "that, by voluntarily entering into an agreement which allowed, or did not prevent, the occupation, [Ms Voice] was permitted to occupy the Property". We can deal with this point in short order. We cannot find any support for such an interpretation of "permitted" in the established case law.

120. Whilst it is unnecessary for us to determine "who permits", we agree with Mr Sykes that the strong implication is that this is the purchaser. We agree with the Tribunal in *Hopscotch Limited v HMRC* [2019] UKFTT 288 (TC) where the "non-qualifying individual" condition was stated at [25] as being that:

> "the taxpayer must show that it did not permit a "non-qualifying individual" to occupy the property"

121. The natural reading suggests that the requirement relates to the control that the purchaser had over the property. As Ms Voice's occupation of the Property was as of right as the freeholder this was beyond IST's control and so it cannot have permitted the occupation. This is, correctly in our view, reflected in HMRC's guidance at SDLTM09660 "*Scope: when is Stamp Duty Land Tax (SDLT) chargeable: higher rate charge for acquisitions of residential property by certain non-natural persons FA03/S55/SCH4A*":

> "no non-qualifying individual is permitted, by the purchaser, to occupy the dwelling."

#### CONCLUSION

122. For all the reasons set out above, IST's appeal is dismissed. IST's acquisition of the Option to purchase the Property is chargeable to SDLT at the rate of 15% per paragraph 3 of Sch 4A of FA 2003. IST was not entitled to relief from ATED by virtue of s138 FA 2013 and the closure notices issued under paragraph 23 of Schedule 10 FA 2003 are confirmed as varied.

#### RIGHT TO APPLY FOR PERMISSION TO APPEAL

123. 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.

**GERAINT WILLIAMS**
**TRIBUNAL JUDGE**

**Release date: 18th MARCH 2024**