Neutral Citation: [2025] UKFTT 00089 (TC)

Case Number: TC09415

FIRST-TIER TRIBUNAL
TAX CHAMBER

Sitting in public in Taylor House, London

Appeal reference: TC/2022/12305

STAMP DUTY LAND TAX – Multiple Dwellings Relief – Relevance of planning restriction - Appeal dismissed

Heard on: 24 June 2024
Judgment date: 24 January 2025

Before

TRIBUNAL JUDGE MALCOLM FROST
JULIAN SIMS

Between

SEAN FITZGERALD
VICTORIA FITZGERALD

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Louise Wise of Relatus Ltd

For the Respondents: Nina Stuart, litigator, of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal is about whether or not Mr and Mrs Fitzgerald were entitled to claim multiple dwellings relief ("MDR") on the purchase of a property (the "Property") in West Turville.

2. The appeal is against closure notices issued by HMRC concluding that MDR was not available and assessing additional tax due of £19,450.

3. For the reasons set out below we dismiss the appeal.

THE FACTS

Chronology

4. On 9 October 2020, Mr and Mrs Fitzgerald purchased the Property for a consideration of £889,000.00.

5. On 12 October 2020 Mr and Mrs Fitzgerald submitted a Stamp Duty Land Tax ("SDLT") return in respect of the purchase of the Property.

6. On 11 March 2021, the Fitzgeralds' Agent made an amendment to the SDLT return asserting that "MDR" was due on the grounds that the Annexe was a separate dwelling to the main house. A refund of overpaid SDLT of £19,450 was requested

7. On 22 November 2021 HMRC wrote to the Fitzgeralds opening an enquiry into the amended SDLT return.

8. After exchanges of correspondence and information, on 12 May 2022 HMRC closed their enquiry and issued closure notices on the basis that that MDR was not due. That closure notice forms the basis of the present appeal.

The Property

9. The Property consists of a five-bedroom detached main dwelling house with an annexe ("the Annexe"), garage, and carport.

10. The basis for claiming MDR is the suggestion that the Annexe was a separate dwelling to the main house.

11. We were provided with sales particulars, numerous photographs and a floorplan of the Property. Mr Fitzgerald also gave evidence and was cross-examined. From this evidence we make the following findings as to the physical layout of the main house and Annexe.

(1) The main house has five bedrooms and 3 bathrooms on the first floor. The loft space has been converted into a large games room. The ground floor of the main house consists of two reception rooms, a dining room, kitchen, utility room and garage.

(2) The marketing particulars for the Property refer to the Annexe as a "self-contained one-bedroomed annex"

(3) The Annexe has its own kitchen, living room, bedroom and bathroom.

(4) The Annexe has a separate front door. The Annexe is accessed across the driveway of the main house, with entry being gained through a door leading from a car port on the side of the main house into the Annexe kitchen.

(5) The Annexe is connected to the main house through a (lockable) door leading from the utility room of the main house to the kitchen of the Annexe.

(6) There is a lockable door between the main house kitchen and the utility room.

(7) It was suggested that the utility room should be considered as a communal area rather than a part of the main house but we do not accept this suggestion. From the planning drawings for the Annexe it is clear that the utility room was the original utility room for the main house. It contains the only downstairs toilet for the main house as well as the washing machine, tumble dryer and boiler for the main house. Access from the main house to the garage is through the utility room. We find that the utility room forms a part of the main house.

(8) The main house and Annexe share electricity and gas meters and receive a single utility bill.

(9) The boiler for the Annexe and associated gas isolation valve are in an external storeroom, accessed from the same car port through which the Annexe itself is accessed.

(10) The fuse box for the Annexe is in the Annexe kitchen.

(11) The Annexe stretches along the side of the garden of the main house, with French doors opening from the living room of the Annexe directly into the garden of the main house. The window of the annex bedroom faces directly into the garden. The Annexe occupies a significant proportion of the width of the garden. The arrangement of the windows and French doors of the Annexe (on the one hand) and the rear doors and outdoor seating of the main house (on the other hand) are such there can be little to no expectation of privacy between the occupiers of the main house (when using the garden), and the occupants of the Annexe.

(12) The Annexe is separately rated for Council Tax.

The planning condition

12. Planning permission for the construction of the Annexe was granted subject to a condition (which we shall refer to as the "Planning Condition") that:

> "The development hereby permitted shall not be used for any purposes other than as ancillary to the residential accommodation presently on the site as a single dwelling unit and not as a separate unit of residential accommodation in its own right"

13. The reason given for the Planning Condition in the grant of permission was that:

> "The proposed annexe has no independent curtilage and is therefore not acceptable as a separate dwelling unit and to comply with policy GP10 of Aylesbury Vale District Local Plan."

14. The planning case officer report that led to the grant of planning permission provides more detail as to the reasoning behind the Planning Condition:

> "Policy GP10 of the AVDLP states that residential annexes to dwellings in built up areas either as extensions or detached buildings will be permitted provided that they meet standards that apply to independent dwellings. In this case, the proposed annexe due to its size is considered as an extension as it is externally and internally connected to the house. The issue of an independent dwelling would not arise. However if the linkage to the garage is the only link to the main dwelling, the annexe could form an independent unit should the side door to the attached garage be blocked up.
>
> ...
>
> However the proposal could not be considered as an infill plot due to the positioning slightly to the rear and it would have no independent amenities.

> The proposed annexe would not meet the necessary standards for new dwellings given no separate curtilage and privacy between the annexe and the main dwelling.
>
> ...
>
> To ensure that the annex remains ancillary to the main property, the standard condition should be attached to any permission granted, in accordance with policy GPl0 of the AVDLP."

15. Expert evidence was provided on behalf of the Fitzgeralds by Stuart Thomas of Berrys. Mr Thomas has extensive knowledge and experience of the planning system.

16. In Mr Thomas' view, the Planning Condition is unenforceable. In his view the substance of the planning approval is for something that physically constituted a separate dwelling.

17. Mr Thomas told us that the council would have a discretion whether or not to bring enforcement proceedings if Mr and Mrs Fitzgerald sought to use the Annexe in breach of the Planning Condition. Mr Thomas stated that, if he were asked by the council to provide advice on the enforceability of the Planning Condition, he would advise that it could not be reasonably enforced and that no further action could be taken.

18. Mr Thomas was clear that he did not purport to be a tax expert and was only providing his view on the planning position. Mr Thomas also accepted that he was providing his view and that other planning experts may take a different view.

19. Mr Thomas told us that there is a process under s. 73 of the Town and Country Planning Act 1990 under which an application could be made to discharge or vary the Planning Condition. No such application has been made.

THE LAW

20. The law on SDLT is primarily set out in Part 4 the Finance Act 2003 ("FA 2003"). It is unnecessary to set out most of the legislative material at length, the key points are:

(1) SDLT is charged on a land transaction under s 42 of FA 2003.

(2) This means any acquisition of a 'chargeable interest' under s 43 of FA 2003, providing it is not a transaction which is exempt from charge.

(3) Schedule 6B of FA 2003 (since repealed) allowed for a claim for MDR to be made.

(4) If MDR is validly claimed, an alternative method for computing the amount of SDLT is used. This involves calculating the SDLT that would be due using the average consideration for one dwelling, then multiplying that amount by the number of dwellings. This generally results in a lower effective rate of tax overall.

21. As set out in Paragraph 2(2)(a) Sch 6B FA 2003, a transaction will qualify for MDR where its subject matter consists of an interest in at least two dwellings.

22. The definition of a dwelling for these purposes is set out in paragraph 7 of Sch 6B FA 2003, which provides (so far as is relevant):

> "7. What counts as a dwelling
>
> (1) This paragraph sets out rules for determining what counts as a dwelling for the purposes of this 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.

(3) Land that is, or is to be, occupied or enjoyed with a dwelling as a garden or grounds (including any building or structure on such land) is taken to be part of that dwelling.

(4) Land that subsists, or is to subsist, for the benefit of a dwelling is taken to be part of that dwelling."

23. The meaning of "suitable for use as a single dwelling" was considered by the Upper Tribunal (Judge Thomas Scott and Judge Greenbank) in *Fiander and Brower v HMRC* [2021] UKUT 156 ("*Fiander*") which observed, at [47] – [48], that:

"47. The HMRC internal manuals on SDLT contain various statements relating to the meaning of "dwelling" and "suitable for use as a single dwelling", but these merely record HMRC's views and do not inform the proper construction of the statute.

48. We must therefore interpret the phrase giving the language used its normal meaning and taking into account its context. Adopting that approach, we make the following observations as to the meaning of "suitable for use as a single dwelling":

(1) 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) 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.

(2) The word "dwelling" describes a place suitable for residential accommodation which can provide the occupant with facilities for basic domestic living needs. Those basic needs include the need to sleep and to attend to personal and hygiene needs. The question of the extent to which they necessarily include the need to prepare food should be dealt with in an appeal where that issue is material.

(3) The word "single" emphasises that the dwelling must comprise a separate self-contained living unit.

(4) The test is objective. The motives or intentions of particular buyers or occupants of the property are not relevant.

(5) Suitability for use as a single dwelling is to be assessed by reference to suitability for occupants generally. It is not sufficient if the property would

satisfy the test only for a particular type of occupant such as a relative or squatter.

(6) The test is not "one size fits all": a development of flats in a city centre may raise different issues to an annex of a country property. What matters is that the occupant's basic living needs must be capable of being satisfied with a degree of privacy, self-sufficiency and security consistent with the concept of a single dwelling. How that is achieved in terms of bricks and mortar may vary.

(7) The question of whether or not a property satisfies the above criteria is a multi-factorial assessment, which should take into account all the facts and circumstances. Relevant facts and circumstances will obviously include the physical attributes of and access to the property, but there is no exhaustive list which can be reliably laid out of relevant factors. Ultimately, the assessment must be made by the FTT as the fact-finding tribunal, applying the principles set out above".

24. Section 83 FA 2003 provides HMRC with powers as to assessments, penalty determinations etc, with further provisions in this respect being contained in Schedule 10.

25. Paragraph 12 of Schedule 10 FA 2003 provides, inter alia, for the time limit for opening an enquiry. Paragraph 23 provides for the completion of enquiry by the issue of a closure notice.

THE ISSUES

26. The sole issue in dispute between the parties is whether or not the Annexe was "used or suitable for use as a single dwelling", within the meaning set out above. The burden of proof in relation to that issue falls on the Fitzgeralds.

27. The existence of the Planning Condition is of some relevance to this question. To assist the Tribunal we asked the parties to provide submissions on the case of *HMRC v Daniel Ridgway* [2024] UKUT 00036 (TCC) which considered the effect of planning restrictions on the status of a property. Both Ms Wise (for the Fitzgeralds) and Ms Stuart (for HMRC) provided carefully-considered written submissions and we are very grateful for their assistance.

28. The parties also provided further submissions on the FTT decision of *James Winfield v HMRC* [2024] UKFTT 734 (TC). However, that decision is in essence an application of the multi-factorial test set out in *Fiander* and need not be explored in great depth.

SUBMISSIONS FOR THE APPELLANTS

29. Ms Wise's submissions on behalf of the Fitzgeralds can be summarised as saying that, applying the Fiander test, the Annexe is suitable for use as a separate dwelling because:

(1) It has an independent external entrance accessed from the driveway of the property which does not involve the occupiers of the Annexe passing any doors or windows of the main house thus ensuring the privacy of both dwellings.

(2) The Annexe has all of the day-to-day facilities required for a private domestic existence, a fully functioning kitchen, a bathroom, living and sleeping space

(3) The Annexe is private and secure from the dwelling by virtue of the lockable internal doors separating the Annex and the main house from the utility room (which Ms Wise describes as a 'communal area').

(4) The Annexe has an independent heating system, a separate fuse box, a separate internal water stop tap and a separate gas shut off valve allowing the occupiers of the Annex to control their own utilities.

(5) The Annexe is separately rated for Council Tax.

(6) The marketing details for the Property refer to the separate Annexe as a "self-contained one-bedroomed annex", the details go on to state how the Annexe is "offering the additional benefit of rental income".

30. In relation to the Planning Condition, and the relevance of *Ridgway*, Ms Wise submitted:

(1) The planning restriction was no more than an attempt by the Local Authority to restrict the use of the Annex.

(2) The restriction was not valid and was therefore unenforceable and not a relevant factor when considering suitability for use as a single dwelling.

(3) The planning position in *Ridgway* can be distinguished from the current appeal. Ridgway the restriction related to whether or not the relevant property could be used for residential purposes at all. In the current appeal it is common ground that residential usage is permitted. The issue is whether the attempt to limit the separate use of the Annexe through the planning system prevents it being used as a single dwelling. Ms Wise suggests that it does not.

(4) The physical attributes of the building carry far more weight when determining suitability for use as a single dwelling.

(5) The correct consideration when assessing those physical attributes is whether they would allow the Annex to be occupied as rented accommodation by a willing occupier.

DISCUSSION

31. The test we must apply is the multi-factorial approach put forward in *Fiander*. We must therefore take into account all the facts and circumstances in order to determine whether the Annexe was "suitable for use as a single dwelling" for the purposes of MDR.

32. Before applying that test, we first consider the significance of the *Ridgway* decision and how to treat the Planning Condition

Ridgway

33. In *Ridgway* the taxpayer bought a property which comprised two separate registered titles. The first was a semi-detached house and gardens, the second was adjoining land with a building, called 'the Old Summer House', which had originally been used as a garage and later as an artist's studio. The taxpayer's solicitor advised him that, if the Old Summer House were in commercial use at the time of completion, he would be able to apply the lower rate of SDLT for properties with mixed use.

34. Two weeks before completion, the taxpayer arranged for the vendors to grant a six-month commercial lease to a photography business to enable him to claim mixed use relief. The lease contained a covenant that the building should not be used for residential properties.

35. However, the Old Summer House was also subject to a planning restriction prohibiting non-residential use.

36. The taxpayer's SDLT return was made on the basis that the overall property was mixed use, but, following an enquiry, HMRC issued a closure notice charging SDLT at the residential rate. This was on the basis that the Old Summer House was residential property

because it was 'suitable for use as a dwelling'. The taxpayer appealed to the First-tier Tribunal ("FTT") and was successful in part. Both HMRC and the taxpayer appealed to the Upper Tribunal.

37. The FTT considered that the lease meant that the Old Summer House was not suitable for use as a dwelling.

38. The Upper Tribunal held:

(1) (at [64]) that the FTT's failure to take into account the planning position was a material error of law in its decision.

(2) (at [36]) that

> "In our view, suitability for use might involve consideration of a wide range of factors, including the physical attributes of the building but also any restrictions on use of the building, including legal restrictions. As [counsel for the Appellants] himself pointed out, there may be a range of legal restrictions on the use of a building. Private law restrictions, environmental law restrictions and planning restrictions. There is nothing in the words of section 116(1)(a) or in the context of FA 2003 as a whole which suggests that Parliament was concerned only with the physical suitability of the building for use as a dwelling. If that was Parliament's intent, it could easily have said so."

39. (at [47]) that:

> "In our view, the existence of restrictions on use, whether by way of freehold or leasehold covenants, planning law or other legal restrictions, must form part of the multi-factorial analysis as to whether a building is suitable for use as a dwelling. Ultimately, it is a matter for the FTT to decide what weight to place on the relevant factors in determining the issue."

40. From these points we draw the conclusion that we are obliged to take the Planning Condition into account in applying the multi factorial test, but that we must take account of all the circumstances in determining how much weight to give to it.

41. Ms Wise suggested that the Planning Condition here was (in the opinion of Mr Thomas) unenforceable. That point is (to an extent) dealt with in *Ridgway* (at [65]) as follows:

> "The likelihood of a planning authority taking enforcement action or granting retrospective permission, would not be a relevant, objective factor. Similarly, the likelihood of a landlord seeking to enforce a covenant in a lease would not be relevant. It is the existence of the restrictions which are relevant factors, not the likelihood of enforcement."

42. We appreciate that Ms Wise argues that the condition should be considered entirely unenforceable, but as we explain below, we do not accept that view.

43. In Ridgway itself, there was a perceived inconsistency between the legal restrictions. The Upper Tribunal decided that the physical attributes would therefore be considered to be dominant.

44. Ms Wise argues that in the present case the physical attributes should also be considered dominant as the planning condition "is inconsistent with the physical attributes of the development that was granted permission and the subsequent use of the Annex as a single dwelling".

45. This is a valiant effort to create an inconsistency of the sort found in *Ridgway* (where there were two conflicting legal restrictions - the lease restrictions and the planning condition). However, this is entirely distinguishable from the present case, where there is only a single legal restriction - the Planning Condition.

46. In any event, we do not consider that the Upper Tribunal was seeking to put forward a general proposition that competing conditions can simply be treated as cancelling one another out. The Upper Tribunal was simply demonstrating how different factors might interact in a given case.

47. We also note that in *Ridgway* the Upper Tribunal noted (at [71]):

> "There may be cases where legal restrictions carry particular weight in the overall analysis and lead to a conclusion that a building is not suitable for use as a dwelling, but this is not such a case."

48. As we have set out below, we consider that the present case is one where the legal restrictions are of considerable significance.

Conclusion on the multi factorial test

49. The Annexe here is described in the planning permission as a "granny annexe". This would normally connote an annexe built to accommodate a dependent relative.

50. In such an annexe there would be expected to be a degree of self-sufficiency and privacy between the annexe and the main accommodation but there may also be ready access between the two areas and an expectation of shared existence and reduced privacy. The degree of privacy between the two areas may be lesser than might be expected by a third-party tenant.

51. The Annexe in the present case entirely conforms to that characterisation. It is physically self-contained (in terms of having its own kitchen, bedroom, bathroom and utilities) but has limited privacy from the main house. Any occupant of the main house who was sitting in the garden could see directly into the living room and bedroom of the Annexe (unless curtains or blinds were drawn – depriving the Annexe of natural light). The simple internal (albeit lockable) door between the utility room of the main house and the Annexe also limits privacy.

52. As such, the Annexe is clearly suitable for occupation by relatives of the occupants of the main house. However, we would question whether the Annexe could realistically be suitable for occupation by a third-party tenant.

53. The Planning Condition provides that the Annexe "shall not be used for any purposes other than as ancillary to the residential accommodation presently on the site as a single dwelling unit and not as a separate unit of residential accommodation in its own right". There is no room for doubt that this was intended to prohibit occupation by a third-party tenant.

54. From the reasons given by the council for the condition, it is clear that the council considered that the physical characteristics of the Annexe were such that it included the basic elements of an independent dwelling and so put in place the limitation to make it clear that such use was not permitted.

55. We do not consider that it is appropriate for this Tribunal to effectively disregard the legal limitations placed on the use of the Annexe by the competent authority. The Annexe only came into being on the basis that it would not be used as a separate dwelling and the Tribunal ought to give effect to that position.

56. We do not consider that Mr Thomas' views on the enforceability of the condition alter the position. He freely accepts that the council may take a different view on the enforceability of the question and it does not appear that the view of the council has been sought.

57. As a matter of practical reality, the condition is in place and has not been removed. It would have been open to a previous owner of the Property to apply to have the condition removed but they did not do so.

58. As a result, if the Annexe were occupied by a third-party tenant, there would on the face of it be a breach of planning law.

59. In those circumstances we consider that the Planning Condition must be given particular weight in applying the multi-factorial test. However, weight must also be given to the physical factors which limit the suitability of the Annexe for occupants other than those closely linked to the occupier of the main house.

60. Applying that test, and having considered all the circumstances, our view is the Annexe is not suitable for use as a single dwelling within the meaning of the statute. Accordingly, the appeal must be dismissed.

CONCLUSION

61. For the reasons set out above, we dismiss the appeal.

62. The closure notices were correctly issued and MDR was not available. The additional tax of £19,450 is due.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

63. 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.

MALCOLM FROST
TRIBUNAL JUDGE

Release date: 24th JANAURY 2025