[2014] UKUT 0453 (TCC)

Appeal number: FTC/128/2013

VALUE ADDED TAX – input tax - DIY Builders Scheme – construction of dwelling as equestrian facilities managers residence - whether designed as a dwelling for purposes of Group 8 of Schedule 5 VAT Act 1994 - whether description in planning application as equestrian facilities managers residence prohibited separate use of dwelling - no - whether planning permission condition that occupation of dwelling be limited to person solely employed by the equestrian business and any resident dependants prohibited separate use of dwelling - yes - appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

ROY SHIELDS

Respondent

Tribunal: Judge Greg Sinfield
His Honour Judge Alistair Devlin

Sitting in public in the Tribunal Hearing Centre, Bedford House, Bedford Street, Belfast on 9 September 2014

Christiaan Zwart, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants

David Donaldson of Donaldson Planning for the Respondent

DECISION

Introduction

1. The Appellants ("HMRC") appeal against the decision of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 7 August 2013 with neutral citation [2013] UKFTT 424 (TC) ("the Decision"). In the Decision, the FTT (Judge Ian Huddleston and Ms Celine Corrigan) allowed an appeal by the Respondent ("Mr Shields") against HMRC's refusal of Mr Shields's claim under section 35 of the Value Added Tax Act 1994 ("VATA94"), popularly known as the DIY Builders Scheme, for repayment of VAT of £6,189.56 incurred on the construction of a dwelling to be occupied by Mr Shields and his family on the site of his equestrian business.

2. It appears from the Decision that two issues had been the subject of argument at the hearing of the appeal. The first issue was whether Mr Shields carried out the construction of the dwelling otherwise than in the course or furtherance of any business which would preclude recovery of input tax under section 35 VATA94. The FTT found that the dwelling was not built in the course or furtherance of any business.

3. The second issue concerned a condition of the planning permission for the construction of the dwelling that limited the occupation of the dwelling to a person solely employed by the equestrian business and any dependants. If that condition prohibited the separate use of the dwelling then the building was not "designed as a dwelling", as defined by Note 2(c) to Group 5 of Schedule 8 VATA94. If the building was not designed as a dwelling for VAT purposes then it could not qualify for a refund under the DIY Builders Scheme. The FTT held that the relevant condition in the planning permission was an occupancy condition and did not amount to a prohibition of the separate use of the dwelling. As the FTT had found in favour of Mr Shields on both points, they allowed the appeal. HMRC applied for and the FTT (Judge Jonathan Cannan) granted permission to appeal in relation to both issues.

4. At the hearing before us, HMRC did not pursue the appeal in relation to the first issue but maintained that the FTT had erred in failing to conclude that the planning permission for the construction of the dwelling imposed a prohibition on the separate use of the dwelling. For the reasons given below, we have decided that the condition in the planning permission restricting occupation of the dwelling to a person solely employed by the equestrian business and any resident dependants was a prohibition of the separate use of the dwelling. Accordingly, HMRC's appeal against the Decision is allowed.

Legislation

5. Section 35 of the VATA provides for the refund of VAT to persons constructing certain buildings. So far as relevant to this appeal, section 35 is as follows:

> "(1) Where -
>
> (a) a person carries out works to which this section applies,

(b) his carrying out of the works is lawful and otherwise than in the course or furtherance of any business, and

(c) VAT is chargeable on the supply, acquisition or importation of any goods used by him for the purposes of the works,

the Commissioners shall, on a claim made in that behalf, refund to that person the amount of VAT so chargeable.

(1A) The works to which this section applies are -

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

6. Section 35(4) of the VATA provides that the notes to Group 5 of Schedule 8 apply for construing section 35 as they apply for construing that Group. By virtue of section 96(9) of VATA, Schedule 8 must be interpreted in accordance with its notes. Note (2) to Group 5 of Schedule 8 is as follows:

"(2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied

(a) the dwelling consists of self-contained living accommodation;

(b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;

(c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision; and

(d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent."

Facts

7. The FTT set out the background facts to the appeal, which were not disputed, at [2]-[14] of the Decision. One statement of fact by the FTT requires correction. At [8], the FTT referred to the planning permission dated 28 March 2003 reference X/2001/1360/O. There had been such a permission but both parties agreed that the relevant planning permission for the appeal was that dated 17 October 2006 reference X/2006/0138/F which replaced the 2003 permission. Nothing turned on the FTT's slip as the FTT went on to quote and consider the disputed condition from the 2006 permission. The relevant facts for this appeal, drawn from the facts found by the FTT and documents before it, are as follows.

8. Mr Shields has kept horses at 274 Bangor Road, Newtownards, County Down, since 1993. He was already living at the property in 2003. The equestrian business was not registered for VAT. In 2011, the annual turnover of Mr Shields's equestrian business was said to be approximately £50-60,000. Mr Shields also carried on another business, called "Landscape Supplies", from the property in partnership with his son. That business was registered for VAT.

9. By an application dated 15 February 2006, Mr Shields applied to the Planning Service, an agency within the Department of the Environment, for planning permission for a development on land at 274 Bangor Road. The proposed development was described as "Construction of equestrian facilities managers residence".

10. On 17 October 2006, the Planning Service granted planning permission, under reference X/2006/0138/F, for the proposed development, in accordance with the application and subject to compliance with six conditions. Condition 2 stated that:

> "The permission is granted solely as a substitute for the permission for a dwelling previously granted on the site under (X/2001/1360/O) on 28 March 2003 and only one dwelling shall be constructed on the site.
>
> Reason: To ensure that only one dwelling is constructed on the site in accordance with the Department's policies for the control of residential development in the countryside in 'A Planning Strategy for Rural Northern Ireland'."

11. Condition 3 was that:

> "The occupation of the dwelling shall be limited to a person solely employed by the equestrian business at 274 Bangor Road, Newtownards, and any resident dependants.
>
> Reason: The site is located within a Greenbelt where it is the policy of the Department to restrict development and the consent hereby permitted, is granted solely because of the applicant's special circumstances."

12. Mr Shields constructed the dwelling between April 2008 and September 2009. He occupied the dwelling with his wife from 1 April 2010.

13. On 25 January 2011, Mr Shields made a claim to HMRC for a refund of the VAT he had incurred on goods used in the construction of the new dwelling. The amount claimed was £6,189.56.

14. HMRC refused the claim in a letter dated 28 January 2011. Having referred to (but not quoted) Note 2(c) to Group 5 of Schedule 8 VATA94, the letter stated that:

> "[Condition 3] means that the council have allowed the property to be built on the understanding it provides a residence for someone working at the business. Therefore, the property does not qualify for a VAT refund under the DIY Scheme."

15. Mr Donaldson, who represented Mr Shields in the FTT and before us, wrote a letter, dated 8 February 2011, to HMRC seeking a review of the decision to refuse the claim for a refund. In a letter to Mr Donaldson dated 12 April 2011, HMRC confirmed that the claim would not be accepted on the basis that:

> "… unfortunately under the VAT regulations namely Note 2(c) Group 5 of Schedule 8 to the VAT Act 1994 the claim for your client does not

> qualify due to the imposition of an occupancy prohibition as mentioned in the planning permission supplied with the claim."

16. Mr Shields appealed to the FTT by a notice of appeal dated 3 May 2011. The grounds of appeal were that the occupancy condition imposed by the Planning Service restricted occupation to someone involved in the adjacent equestrian business, it did not prevent the separate use or disposal of the building. The grounds also referred to another tribunal decision, *Wendels v HMRC* [2010] UKFTT 476 (TC), in which the FTT had allowed an appeal in relation to a very similar occupancy condition.

17. On 24 May 2011, Mr Shields made a further application (reference X/2011/0368), for the occupancy condition to be removed on the ground that the policy in relation to rural development in Northern Ireland had changed. The Department of the Environment granted planning permission removing the occupancy restriction with effect from 13 February 2012.

18. The appeal was heard on 12 March 2012. At the hearing, Mr Donaldson, who represented Mr Shields, submitted that Condition 3 was an occupancy condition and did not create a prohibition on "separate use or disposal" of the dwelling now occupied by Mr Shields and his family.

19. Before the FTT, HMRC contended that the dwelling was not a building designed as a dwelling for VAT purposes because it did not satisfy Note (2)(c) to Group 5 of Schedule 8 VATA94. HMRC accepted (see [28] of the Decision) that a clause in a planning permission relating to the occupancy of a house did not, of itself, prohibit the use or disposal of it. HMRC submitted that, where the occupancy condition extended beyond a class of person or activity into specified persons or a specified activity, the condition should be regarded as prohibiting use separate from the commercial activity carried on and, accordingly, did not satisfy Note 2(c). HMRC do not appear to have submitted, as Mr Christiaan Zwart, who appeared for HMRC, did before us, that the description of the development, without more, operated as a prohibition of the separate use of the dwelling. Mr Zwart contended that the matter was raised in HMRC's Statement of Case. We do not accept this. The passages relied on in the Statement of Case are in paragraph 9(h), which specifically addresses the argument that the works were not in the course or furtherance of any business, and paragraph 9(i) which refers only briefly to the description of the development and otherwise concerns the wording of Condition 3. In our view, the fact that the Decision, written by an experienced Judge of the FTT, does not contain any discussion of whether the development description operated as a prohibition indicates that HMRC did not make any submissions on that point at the hearing.

20. The Decision was issued on 7 August 2013. In relation whether the works were eligible under section 35(1)(b) VATA94, the FTT decided that Mr Shields carried out the construction otherwise than in the course or furtherance of any business. At the hearing of this appeal, Mr Zwart confirmed that HMRC no longer sought to argue that the FTT had been wrong to find that the construction of the dwelling had been carried out by Mr Shields otherwise than in the course or furtherance of any business. We consider that HMRC were right not to pursue this ground as it was, essentially, a

challenge to a finding of fact by the FTT and nothing in the material before us suggests that the FTT was not entitled to make that finding.

21. In [57]-[68], the FTT reviewed a number of decisions of other tribunals relating to Note (2)(c) to group 5 of Schedule 8 VATA94. The difficulty faced by the FTT was that the cases showed that different tribunals had reached different conclusions on whether or not similarly worded planning conditions prohibited separate use or disposal. Having reviewed the cases, the FTT concluded at [67], that:

> "The one thing that it is possible to distil from a review of the cases is that each planning condition must be considered on its own terms."

We agree. Nevertheless, it is helpful to discuss some of those cases at this stage in order to explain how the FTT reached its conclusion and to put our discussions below in context.

22. In *Cussins v HMRC* [2008] UKVAT V20541, the appellant had converted redundant farm buildings to form residential accommodation, offices and workshop. Although it was a conversion and not a new construction, the same rules applied in relation to a claim under the DIY Builders Scheme. The planning permission for the conversion included a condition that:

> "The residential accommodation hereby permitted shall only be occupied in conjunction with the commercial use hereby approved. Reason: The site lies in an area where new residential development is restricted."

On the basis of the wording of the condition and the close connection of the residential and commercial parts, the VAT and Duties Tribunal concluded that "it is clear that the separate use of the residential premises from the commercial part is prohibited by the condition in the planning condition" and dismissed the appeal.

23. *HMRC v Lunn* [2009] UKUT 244 (TCC), [2010] STC 486, concerned the construction of a new residential building within the curtilage of a listed building, Radbrook Manor. The planning permission included a condition that:

> The development hereby permitted shall only be used for purposes either incidental or ancillary to the residential use of … Radbrook Manor ..."

24. The planning condition in *Lunn* was not explicitly stated to be an occupancy condition but the Upper Tribunal accepted, as the FTT in that case had done, that "used" included occupation. The VAT and Duties Tribunal in *Lunn* had concluded that the condition did not prohibit the separate use of the new building by a separate household, provided that use was incidental or ancillary to the use of Radbrook Manor. The Upper Tribunal concluded that separate use meant use separate from the actual use of another property and not a physical separation. At [12], the Upper Tribunal held that "it follows that a use which must be incidental or ancillary to the use of the main building cannot be a separate use". The Upper Tribunal held that the condition meant that the new residential building could not be used separately from Radbrook Manor and reversed the decision of the VAT and Duties Tribunal.

25. In *Wendels* a dwelling was built on the site of a cattery business. The planning permission was subject to the condition that:

> "The occupation of the dwelling hereby permitted shall be limited to a person solely or mainly employed or last employed in the cattery business … or a widow or widower of such a person, or any resident dependant."

26. The FTT in *Wendels* decided that the condition did not prohibit the separate use or disposal of the dwelling and allowed the appeal. The FTT found that the condition imposed did not, on its terms, link the use or disposal of the dwelling with the cattery business. The FTT held that the condition was an occupancy condition that restricted the occupation of the property to a specified category of persons, and in no way restricted its separate use or disposal as a dwelling house.

27. *Phillips v HMRC* [2011] UKFTT 372 (TC) concerned the construction of a dwelling associated with and adjacent to some chalets which were operated as a holiday letting business. The planning permission was subject to the following condition:

> "That the house … shall be occupied only by persons engaged in the management or operation of the [holiday chalet letting] business … together with family members."

The FTT, at [49], drew a distinction between an occupancy restriction that is personal in nature and a restriction that is associated with the property itself. The FTT concluded that, although the condition in that case imposed a positive obligation on one or more of the occupants of the house to be engaged in the management or operation of the holiday chalet letting business, there was no obligation which required the house to be so used. The FTT allowed the appeal.

28. In relation to Mr Shields, the FTT concluded, at [70] and [74]-[75] of the Decision, that, although Condition 3 contained a limitation as to the occupancy of the dwelling, the condition did not amount to a prohibition on disposal or use such as to engage Note 2(c).

29. Since the hearing of the appeal in this case, there have been some other decisions of the FTT which have reached different conclusions on whether Note 2(c) was satisfied by similarly worded occupancy conditions. Although these decisions were not before the FTT and did not feature in the Decision, it is convenient to mention them at this point.

30. In *Holden v HMRC* [2012] UKFTT 357 (TC), a new flat was constructed adjacent to an existing photographic studio and workshop. The planning permission included the following condition:

> "The flat hereby permitted shall be occupied only in conjunction with the operation of the photographic studio …"

The FTT followed *Cussins* and concluded that the condition essentially required the residential and business accommodation to be in common occupation and held that disposal of the residential part without the commercial part would be unlawful.

31. *Bull v HMRC* [2013] UKFTT 92 (TC), like this case, concerned a dwelling constructed on an equestrian centre. The planning permission included the following condition:

> "The occupation of the dwelling shall be limited to a person or persons employed in the operation of the adjoining equestrian centre."

32. The FTT, applying *Wendels* and distinguishing *Holden*, allowed the appeal The FTT decided that the condition:

> "…does no more than stipulate the category of person who should be an occupier of the dwelling. It does not impose any stronger link than that between the house and the business. It does not prohibit or restrict the separate use and disposal of the property."

33. In *Burton v HMRC* [2013] UKFTT 104 (TC), the appellant operated a fishery business. The appellant obtained planning permission to build a dwelling on the site of the fishery. The planning permission was subject to the condition that:

> "The occupation of the dwelling shall be limited to a person solely or mainly employed or last employed in the [fishery business] or a widow or widower of such a person, or any resident dependants."

34. The condition was almost identical to the one considered in *Wendels*. As in that case, the FTT held that the condition limited the occupation of the dwelling to present or past employees of the fishery business (and their dependants) which was a limitation on occupancy and did not constitute a prohibition on the separate use or disposal of the dwelling. The FTT allowed the appeal. *Burton* is under appeal to the Upper Tribunal and is due to be heard in 2015.

35. *Swain v HMRC* [2013] UKFTT 316 (TC) related to the conversion of a barn into a dwelling as part of the creation of a holiday cottage development. The new dwelling was intended to be accommodation for the manager or proprietor of the holiday letting business. The planning permission was subject to the following condition ("Condition 10"):

> "The occupation of [the dwelling] shall be limited to a manager or proprietor of the holiday accommodation being operated from [the other buildings on the site] and any residential dependants.
>
> Reason: To ensure that this dwelling is kept available for meeting the need to accommodate a manager or proprietor of the business on a site where residential development would not normally be permitted …."

36. The FTT in *Swain* reviewed all the cases discussed above and observed at [66]:

> "It can readily be seen that in the "unsuccessful appeals", the relevant conditions all imposed restrictions which were expressed in one way or another to apply directly to the properties in question, whereas in the

> "successful appeals" the restrictions were expressed to apply to limit the persons who could occupy the properties in question. The Tribunals in *Phillips*, *Wendels* and *Burton* clearly felt this was a crucial distinction."

37. The FTT then went on to disagree with those decisions and set out the reasons for doing so at [67]-[69]. In summary, the FTT held that a condition in a planning permission prohibits the use of the property in a certain way. Such a condition will not necessarily be contrary to Note 2(c). For example, Note (2)(c) only applies where the prohibition is on "separate use", as explained in *Lunn*, and not where the prohibition is on "use" more generally. The FTT set out its reasons for dismissing the appeal in *Swain* at [71] as follows:

> "The clear effect of Condition 10 is to prohibit anyone from occupying Barn D who is not "a manager or proprietor of the holiday accommodation business being operated from Barns A, B and C...., or any residential dependants". To comply with Condition 10, either such a person must occupy Barn D, or it must be unoccupied. If it is unoccupied, it is not being used at all. If it is occupied, it must be occupied only by appropriately "qualified" persons. The lawful use of Barn D is therefore circumscribed by reference to a relationship between its occupier(s) and a business being operated out of neighbouring premises. In that situation, we cannot see how it could properly be argued that there is no prohibition on the separate use of Barn D imposed by Condition 10; it cannot lawfully be used except by an occupier who fulfils the requirements of Condition 10 and who must therefore own or manage the neighbouring holiday letting development (or be a residential dependant of such owner or manager). Any use "separate from" that neighbouring development is therefore, in our view, prohibited by Condition 10."

Submissions and discussion

Preliminary matters

38. Some matters were not the subject of any disagreement between the parties. Mr Zwart accepted, rightly in our view, that the building in this case is a dwelling for the purposes of the planning regime. It was common ground that conditions (a), (b) and (d) of Note 2 were satisfied. The only condition at issue in the present appeal was that contained in Note (2)(c). Mr Zwart acknowledged that HMRC's case related to the prohibition of separate use in Note 2(c) rather than the prohibition of separate disposal.

39. Mr Donaldson, for Mr Shields, accepted that:

(1) planning permission is a statutory requirement for the development of land; and

(2) the planning authority cannot extend the scope of a planning permission beyond that which is applied for.

40. Mr Donaldson did not dispute that the removal of the occupancy condition in 2012 is irrelevant to the claim under appeal. We consider that is correct. Whether or not Mr Shields was entitled to recover VAT incurred in constructing the dwelling under section 35 VATA94 must be considered in the light of the facts when the construction or conversion has been carried out and the claim is made (see section 35(1)(c) and (1B) and Note 2(d) to Group 5 of Schedule 8 VATA94). The construction of the dwelling and the claim in this case pre-dated the new planning permission (reference X/2011/0368) which was not retrospective and only removed the condition with effect from 13 February 2012.

41. Mr Zwart's skeleton and submissions on behalf of HMRC focussed almost entirely on the effect of the description of the development proposal as "Construction of equestrian facilities managers residence" ("the development description issue") and hardly mentioned the terms of condition 3 of the planning permission ("the occupancy condition issue"). This may have been because HMRC's grounds of appeal, settled by Mr Zwart, stated that "the (additional) terms of consent condition 3 assume that antecedent development description and, given those description terms, the consideration of condition 3 in this appeal was, essentially, irrelevant." Notwithstanding HMRC's view of condition 3, we consider that it is necessary to analyse the terms of the condition carefully to determine whether it prohibits the separate use of the dwelling. We do so after having considered the significance of the development description.

42. Before discussing the two issues, we set out how we approach note 2(c) to Group 5 of Schedule 8 to VATA94. Note 2(c) is satisfied where the separate use or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision. In considering whether Note 2(c) is satisfied, it is necessary to ascertain whether a term of any statutory planning consent (or covenant or similar provision) prohibits the separate use or separate disposal of the dwelling. By using the word "term", it is clear that Note 2(c) is not merely concerned with the conditions that may be imposed by the planning authority. Note 2(c) also requires consideration of any part of the covenant, statutory planning consent or similar provision that prohibits separate use or disposal. The phrase "separate use or disposal" refers to use or disposal that is separate from the use or disposal of some other land (including any building or other structure on it). A term prohibiting use for a particular activity or disposal generally would not fail to satisfy Note 2(c) unless the effect of the term in that particular case was to prohibit use or disposal separately from use or disposal of other land.

43. The effect of the term should be determined by construing the words of the planning permission, including any conditions and reasons, and applying those words to the facts of the particular case. The terms of the permission include any approved plans and drawings that show the detail of what has been permitted. Where the words of the term are ambiguous or unclear then it may be possible to resolve the meaning of the term by reference to the context in which the term was imposed, eg the application and correspondence relating to it. In this approach, we follow that of the courts in construing planning permissions which was summarised by Keene J (as he

then was) in *R v Ashford Borough Council ex parte Shepway District Council* [1999] PLCR 12 at 19-20:

> "(1) The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions: see *Slough Borough Council v Secretary of State for the Environment* (1995) JPL 1128, and *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196.
>
> (2) This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application: see *Slough Borough Council v Secretary of State* (ante); *Wilson v West Sussex County Council* [1963] 2 QB 764; and *Slough Estates Limited v Slough Borough Council* [1971] AC 958.
>
> (3) For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as '... in accordance with the plans and application ...' or '... on the terms of the application ...,' and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted: see *Wilson* (ante); *Slough Borough Council v Secretary of State for the Environment* (ante).
>
> (4) If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity: see *Staffordshire Moorelands District Council v Cartwright* (1992) JPL 138 at 139; *Slough Estates Limited v Slough Borough Council* (ante); *Creighton Estates Limited v London County Council*, The Times, March 10, 1958.
>
> (5) If a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at extrinsic evidence to resolve that issue: see *Slough Borough Council v Secretary of State* (ante); *Co-operative Retail Services v Taff-Ely Borough Council* (1979) 39 P&CR 223 affirmed (1981) 42 P&CR 1."

44. As Keene LJ made clear subsequently in *Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476 at [21], what he said in *Ashford* related to an outline planning permission and was not intended to apply to the interpretation of a full detailed planning permission. A full planning permission would always require plans and drawings in order to be understood because it does not purport to be a complete and self-contained description of the permitted development. Accordingly, there is no need for a full planning permission to contain

express terms in order for the plans and drawings to be incorporated. In this case, however, the planning permission for the proposed development expressly stated that it was granted in accordance with the application and subject to the conditions.

Development description

45. Before this Tribunal, Mr Zwart's primary submission was that the description of the development proposal in the planning permission under reference X/2006/0138/F as "Construction of equestrian facilities managers residence" was required (for planning purposes) to be construed as limiting the use of that development.

46. Mr Zwart relied on two planning cases as authority for his submission. The first was *Wilson v West Sussex County Council* [1963] 2 QB 764. In that case, planning permission had been granted for an "agricultural cottage". The planning authority subsequently inserted a condition to the planning permission in the following terms:

> "… the occupation of the cottage shall be limited to persons employed … locally in agriculture … or in forestry and dependants of such persons."

The owner of the land to which the planning permission related claimed compensation and the matter came before the Lands Tribunal to determine a preliminary question of law, namely whether the planning permission for an "agricultural cottage" limited the type or class of occupants of the cottage. The matter eventually came before the Court of Appeal where all three judges held that the phrase "agricultural cottage" meant a cottage to be occupied by an agricultural worker or person substantially engaged in agriculture and limited the use to which the cottage could be put. Willmer LJ held, at 777, that the phrase "must be construed as limiting the user of the building that is proposed to be erected." Danckwerts LJ said, at 780, that:

> "It seems to me that it can be said in the present case that the form of permission, referring to an agricultural cottage, has in fact specified the purposes for which the building may be used …
>
> … the applicant asked for and received permission to erect 'an agricultural cottage' and she asked for nothing else … The cottage, therefore, was one which was, as I see it, limited as regards occupation to an occupant in connection with agriculture."

47. In *Uttlesford District Council v Secretary of State for the Environment and Leigh* (1989) JPL 685 at 689 planning permission was granted for the conversion of a small cart shed to a dwelling. The applicant for planning permission had offered to enter into an agreement under section 52 of the Town and Country Planning Act 1971 limiting the class of occupant. On appeal, the inspector failed to impose an occupancy condition but granted permission for "the proposed conversion of an obsolete cart shed into a residence for a member of the occupant family or service accommodation of Sharpes Farm House at Sharpes Farm … in accordance with the terms of [the application and plans]". In the High Court, the judge referred to a number of cases, including *Wilson*, and observed that:

> "… where the description of the development permitted contained a restriction or limitation relevant for planning purposes, it had the effect of limiting the development.
>
> …
>
> In reconsidering the matter, the Secretary of State had to start from the positon that there was already a restriction on occupancy arising from the terms of the application, and then had to decide whether a condition on occupancy was required. The fact that there was a restriction on occupancy arising from the terms of the application did not necessarily mean that a condition was mere duplication. There were differences, for example in respect of enforcement, which could mean that an occupancy condition was desirable in addition to the restriction of the development."

48. Mr Donaldson did not accept that the description of a proposed development necessarily limits or restricts the scope of that permission, especially when a development falls comfortably within a specific use class under the Planning (Use Classes) (NI) Order 2004. Mr Donaldson contended that the description on the planning approval did not alter or inhibit residential use in any way. We do not accept this submission. In our view, it is clear from *Wilson* and *Uttlesford* that the description of a development may, on its own terms and without more, prohibit a building from being used in certain ways. The issue in this case is whether the description of the building in the application for planning permission as "equestrian facilities managers residence" means that the planning permission must be taken to prohibit the separate use (there is no issue about separate disposal) of the dwelling.

49. Mr Zwart submitted that, in this case, Note 2(c) to Group 5 of Schedule 8 to VATA94 could not be satisfied because Mr Shields could not exclude "equestrian facilities" from the development description in the planning permission. He contended that the FTT had erred in law in failing to hold that the description of the development in this case was a prohibition on Mr Shields using the dwelling separately from the equestrian facility. We consider that this submission goes too far and we reject it. While the description "equestrian facilities' manager's residence" restricts who can occupy the dwelling and that is a prohibition on the use of the property, it is not enough to engage Note 2(c) to Group 5 of Schedule 8 to VATA94. Note 2(c) requires a prohibition on the separate use (or disposal) of the dwelling. The description "equestrian facilities' manager's residence" is a restriction on who can occupy the dwelling by reference to the equestrian facilities business. It does not, on its terms, prohibit Mr Shields from using the dwelling separately from land on which the equestrian facility is sited. Mr Shields could move his equestrian business to stables elsewhere and use the property at 274 Bangor Road entirely for his landscape business. Provided that Mr Shields continued to be the manager of the equestrian facilities, there would be no inconsistency with the development description. Mr Zwart submitted that moving the equestrian business might require planning permission for a change of use. It seems to us that, even if Mr Zwart is correct (and we express no opinion on the point), it is not an answer to the fact that the development description does not prohibit the manager's residence being used separately from the equestrian facilities at 274 Bangor Road. As in *Wilson*, the

development description limits the use of the dwelling by reference to the occupation of the occupants: it does not prohibit the use of the dwelling separate from the use of other land.

Occupancy condition

50. Mr Zwart's submission in relation to the occupancy condition was, in essence, that the decision in *Swain* was right and the decisions in *Wendels*, *Phillips*, *Bull* and *Burton* were wrong.

51. Mr Donaldson submitted that the occupancy condition restricted the person who could occupy the dwelling and, as an occupancy condition, did not prohibit the separate use of the property. Mr Donaldson referred to HMRC's guidance on occupancy conditions published in Notice 719 VAT Refunds for 'do it yourself' builders and convertors (May 2002). The guidance stated, at paragraph 4.2.2, that:

> "Is an occupancy restriction a prohibition on separate use or disposal?
>
> No. Occupancy restrictions are not prohibitions on separate use or disposal and do not affect whether a building is 'designed as a dwelling'. Common examples of occupancy restrictions include those that limit the occupancy to people:
>
> - Working in agriculture or forestry, or
> - Over a specified age."

Mr Donaldson accepted that the guidance is no more than HMRC's view of the meaning of a provision at a particular time. It does not replace or amend the legislation. In any event, that particular guidance was withdrawn and replaced by VAT431NB Notes on VAT refunds for DIY housebuilders in August 2009. VAT431NB is silent on occupancy conditions but it does contain guidance on the separate use or disposal condition at [13] as follows:

> "Do the terms of your Planning Permission (or similar permission) prevent the separate disposal or separate use of the new building from any other pre-existing building?
>
> …
>
> The purpose of this question is to establish whether the work has created a new building in its own right. The building must possess that status independently from any other property.
>
> If the building is an annexe, extension, or any other form of ancillary structure or building which cannot be disposed of or used separately from another property, then it does not have independent status and cannot qualify for a refund under this Scheme."

52. Mr Donaldson submitted that the intention of Note 2(c) to Group 5 of Schedule 8 to VATA94 was to exclude buildings that were not freestanding dwellings, such as granny annexes, workshops, playrooms and pools. The legislation was not intended to exclude dwellings that were subject to an occupancy condition. The fact that the occupation of the dwelling was restricted to a person solely employed by the

equestrian business at 274 Bangor Road and any resident dependants did not mean, in his submission, that the separate use of the dwelling was prohibited. Mr Donaldson contended that *Swain* had been wrongly decided and the decisions in *Wendels, Phillips, Bull* and *Burton* were correct.

53. Our view is that the issue of whether Note 2(c) applies should be determined in the light of the precise wording of the condition and the factual context in which it applies. It follows that an analysis of different cases with differently worded conditions and different facts is unlikely to assist in determining whether Note 2(c) is satisfied in another case. Accordingly, we prefer to focus on the terms of the planning permission and, in particular, Condition 3 in this case rather than engage in a detailed discussion of the other more or less similar cases considered by the FTT in this appeal.

54. Condition 3 provided that:

> "The occupation of the dwelling shall be limited to a person solely employed by the equestrian business at 274 Bangor Road, Newtownards, and any resident dependants."

The issue is not whether Condition 3 is an occupancy condition: it plainly is. The fact that a condition in a planning permission is an occupancy condition does not determine whether Note 2(c) to Group 5 of Schedule 8 is satisfied. That can only be determined by considering whether the occupancy condition prohibits the separate use or disposal of the dwelling. The issue in this case is whether the effect of Condition 3 is to prohibit use of the dwelling at 274 Bangor Road separate from the equestrian business at the same address.

55. We considered whether the reference to "solely employed by the equestrian business" could be construed as a general restriction on the occupation of the occupant, as in *Wilson*, and not a prohibition on the use of the dwelling separately from the rest of the site. We concluded that it could not be so construed. Unlike the condition in *Wilson* which required the occupant to be employed in agriculture or forestry generally, Condition 3 referred to employment in a specific business at a specific address.

56. In our view, a condition of planning permission for a dwelling that requires it to be occupied by a person who works at a specified location prohibits the use of the dwelling separately from the specified location. The dwelling at 274 Bangor Road can only properly be used to provide accommodation for a person employed in the equestrian business at the facilities (stables etc) at that address. Any use of the dwelling at 274 Bangor Road "separate from" the equestrian business carried on at the same address is therefore, in our view, prohibited by Condition 3. That is a prohibition within the meaning of Note (2)(c) to Group 5 of Schedule 8 to VATA94 and the dwelling is not, therefore, a building "designed as a dwelling" for VAT purposes.

57. Given our views, it follows that we consider that *Phillips* and *Bull* were wrongly decided and, in our view, should not be followed.

58. The conditions in both *Wendels* and *Burton*, which were substantially identical, were more widely expressed than the conditions in the other cases discussed. The conditions restricted occupation of the dwelling to a person solely or mainly employed or last employed in the [specified business carried on at a specified property] or a widow or widower of such a person, or any resident dependants. It appears to us that it could be argued that such a condition extends the category of person permitted to occupy the dwelling so far that the condition can be said not to prohibit separate use. As we did not hear any argument on the point and the Upper Tribunal will consider the effect of the condition in *Burton*, we make no further comment in relation to those cases.

Decision

59. For the reasons set out above, we allow HMRC's appeal and reverse the decision of the FTT.

Costs

60. At the hearing, HMRC applied for costs in the event that the appeal was allowed. As discussed above, the submissions of HMRC in their skeleton and at the hearing were directed almost entirely to the development description issue, in relation to which we found in favour of Mr Shields. In the circumstances, we make no order as to costs.

Judge Greg Sinfield **His Honour Judge Alistair Devlin**

Judge of the Upper Tribunal **Judge of the Upper Tribunal**

Release date: 24 October 2014