FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2023/09861

BETWEEN

NEWSAND LIMITED **Appellant**

-and-

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ASHLEY GREENBANK

Sitting in public at Taylor House, Rosebery Avenue, London on 1 March 2024

I heard Mr Patrick Cannon, counsel, for the appellant and Mr Ellis Davies, Litigator of HM Revenue and Customs' Solicitor's Office for the respondents.

DECISION

1. By an application dated 6 November 2023, the respondents, the Commissioners for His Majesty's Revenue and Customs ("HMRC") applied, to strike out the appellant's appeal in this case on the grounds that there is no reasonable prospect of the appellant's case, or any part of the appellant's case, succeeding under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTRs").

2. The Tribunal decided to refuse the application.

3. The Tribunal gave its decision orally at the hearing in accordance with FTR 35(1). This decision notice comprises a summary of the findings of fact and reasons for the decision as required by FTR 35(2) and (3).

SUMMARY FINDINGS OF FACT AND REASONS FOR THE DECISION

Principles

4. The parties agreed on the principles that the Tribunal should apply in these cases. They are set out in the decision of the Upper Tribunal in *The First De Sales Ltd Partnership and others v HMRC* [2018] UKUT 396 at [33] where the Tribunal adopted the statement of principles applied by the High Court to applications for summary judgment as set out by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and as subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098 .

5. I will not recite those principles in full. The main points that I take from them are as follows.

(1) The Tribunal must consider whether the appellant has a "realistic" as opposed to a "fanciful" prospect of success.

(2) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.

(3) In reaching its conclusion the Tribunal must not conduct a "mini-trial".

(4) This does not mean that the Tribunal must take at face value and without analysis everything that an appellant says in his statements before the Tribunal.

(5) However, in reaching its conclusion the Tribunal must take into account not only the evidence actually placed before it, but also the evidence that can reasonably be expected to be available at a full hearing.

(6) The Tribunal should hesitate about making a final decision without a hearing, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a judge at a full hearing and so affect the outcome of the case.

(7) On the other hand, if the Tribunal is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

6. I must also take into account that the Tribunal must exercise its power to strike out under FTR 8(3)(c) in accordance with the overriding objective in FTR 2(1) to deal with cases fairly and justly having regard to the factors listed in FTR 2(2).

Background

7. As I understand it, the facts are, in outline, as follows.

8. On 2 December 2021, the appellant entered into a contract to purchase the freehold interest in a property at Midgate House, Midgate, Peterborough, PE1 1TN.

9. The acquisition of the property was completed on 18 February 2022. The consideration for the transaction was £6,700,000.

10. The land comprised a building which contained both retail units and offices.

11. It is the appellant's case that:

(1) the appellant acquired the property with the benefit of permitted development rights to convert the first, second and third floors of the building from offices into residential apartments along with commercial floorspace at ground floor level; and

(2) on the day of completion, work commenced to adapt the existing buildings into residential dwellings, which included the stripping out of internal walls, ceilings and floorboards within the property.

12. The appellant submitted an SDLT return on 18 February 2022. The appellant claimed Multiple Dwellings Relief ("MDR") under Schedule 6B Finance Act 2003 ("FA 2003"). The total amount of SDLT self-assessed by the appellant was £72,769.

13. On November 2022, HMRC gave notice of their intention to enquire into the appellant's SDLT return under Paragraph 12 of Schedule 10 to the FA 2003.

14. On 2 March 2023, HMRC issued a closure notice to the appellant under paragraph 23 Schedule 10 FA 2003. The closure notice concluded that the appellant's claim for MDR was denied.

15. The effect of the closure notice was to charge the appellant to SDLT at the "non-residential or mixed rate" set out in Table B in section 55 FA 2003. The amount of SDLT charged by the closure notice was £252,324.

16. After a statutory review, the appellant appealed against the closure notice on the grounds that the claim for MDR was valid:

> (1) The requirement in paragraph 2(2) Schedule 6B FA 2003 that the main subject matter of the transaction consist of an interest in at least two dwellings was met by virtue of paragraph 7(2)(b) Schedule 6B, which provided that a building or part building counts as a dwelling if it is in "the process of being constructed or adapted" for use as a dwelling.
>
> (2) The property was in "the process of being… adapted" for use as a dwelling.
>
> > (a) The appellant purchased the land with the benefit of permitted development to convert the property into residential apartments.
> >
> > (b) On the day of completion, adaptation works had commenced which included stripping out internal walls.

17. At the hearing, Mr Cannon, counsel for appellant, confirmed that the appellant no longer relies on the fact that the property was purchased with the benefit of permitted development rights in support of its argument that the property was in "the process of being… adapted" for use as a dwelling. I have not referred to that issue further in this decision notice.

Parties' submissions

18. HMRC's case is that the appellants' case has no reasonable prospect of success. HMRC points to the similarities of this case with that of the decision of the Upper Tribunal in *Ladson Preston Limited and AKA Developments Greenview Limited v HMRC* [2022] UKUT 00301 ("*Ladson Preston*").

19. In *Ladson Preston*, the Upper Tribunal refused two claims for MDR in relation to the acquisition of land with planning permission to construct dwellings – in one case where the acquisition was of bare land, and another where works demolishing existing buildings commenced on the day of completion. The key points in the Upper Tribunal's decision on which HMRC relies are:

> (1) The proper construction of paragraphs 2(2) and 7(2) Schedule 6B FA 2003 required a "physical manifestation" of the building that was in the process of construction on the chargeable interest that is acquired at completion (*Ladson Preston* [43]-[45]).
>
> (2) The application for MDR had to be determined by reference to the nature of the chargeable interest that was acquired at completion. Works that commenced on the same day but after completion were not relevant (*Ladson Preston* [61]-[64]).

20. HMRC say that there is no material difference with the present case:

> (1) There is no distinction to be made between the fact that the property is to be adapted for use as dwellings in this case as compared with the construction of new dwellings in *Ladson Preston*. At the time of completion, the property was a commercial building. No work that was part of a process of adaptation had commenced.
>
> (2) As with *Ladson Preston*, the application for MDR had to be determined by reference to the nature of the chargeable interest that was acquired at completion. Works that commenced on the same day but after completion were not relevant.

21. The appellant says this case is different from *Ladson Preston*:

(1) the questions before the Upper Tribunal in *Ladson Preston* were about what activities constituted construction not adaptation;

(2) there was a building on the land in this case (i.e. a physical manifestation of the building).

22. Furthermore, the appellant notes that the Upper Tribunal in *Ladson Preston* left it open for tribunals to decide on the facts whether a chargeable interest represents dwellings in the process of construction or adaptation. The appellant expected to present further evidence at a full hearing. The Tribunal does not have sufficient facts before it to decide this case on a strike out application.

Discussion

23. I have been directed by HMRC to the *Ladson Preston* case, in which the Upper Tribunal dismissed the appellants' appeals against a decision of the First-tier Tribunal refusing their claims to MDR.

24. I will not set out the facts and reasoning in that case in detail in this summary decision. The points that I take from the decision are as follows:

(1) When paragraph 7(2)(b) was referred to in its proper context, there was a clear indication that it was referring to some physical manifestation of a dwelling on the relevant land. The most obvious indication came from the word "building". The building did not have to be completed since it was concerned with those that were "in the process of being constructed". Without any physical manifestation, there might well be an intention to construct a future building but no building that was in the process of being constructed (*Ladson Preston* [30]-[32], [38]-[40], [44]).

(2) The availability of MDR is determined by reference to the nature of the chargeable interest that is acquired at completion. Works that commence on the same day but after completion are not relevant. (*Ladson Preston* [61]-[64]).

(3) Each case will turn on its facts (*Ladson Preston* [48]).

25. In order to determine this case, I would need to determine whether or not the property was "in the process of adaptation" for use as a dwelling at the time of completion for the purposes of paragraph 7(2) Schedule 6B FA 2003. The answer to that question requires an examination of the facts.

26. In an application such as this, it is not appropriate to conduct a mini-trial. A strike out application is designed to weed out cases that do not merit a full hearing. I am not satisfied that I have heard all the evidence that the appellant might wish to bring. So, I am not convinced that this case is such that the Tribunal has before it all the evidence that it may require to decide the case.

27. On the questions of law, I accept that there are many similarities between the *Ladson Preston* case and this case. For example, the issue concerning whether it is appropriate to take into account works that are commenced on the day of completion, but after the time of completion strike me as equally applicable to the present circumstances. However, *Ladson Preston* is not on all fours with this case. There are arguable differences between a "process of construction" and a "process of adaptation" – not least because in a process of adaptation an existing building will always exist and so the requirement for there to be "a physical manifestation" of a building in the case of a process of construction (which is critical to the reasoning in *Ladson Preston*) do not arise.

28. It follows that I am not persuaded that, even if the appellant were to succeed in proving all the facts that the appellant offers to prove, the appellant will not succeed in this case. In my

view, therefore, the appellant's case has a realistic prospect of success in the sense that the appellant's case is not merely fanciful and should be permitted to proceed to full hearing.

29. In reaching this conclusion, I take into account the obligation on this Tribunal to decide cases fairly and justly in accordance with the overriding objective (FTR 2) and in particular the obligation to deal with a case in a way that is proportionate to the importance of the case and avoids unnecessary delay.

30. I can understand HMRC's desire to bring matters to a conclusion as swiftly as possible, but this case is not so clear cut as to justify depriving the appellant of the opportunity to present all its evidence and have the case determined following a full hearing.

31. For these reasons, I refuse the application.

32. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

ASHLEY GREENBANK
TRIBUNAL JUDGE
RELEASE DATE: 08 March 2024