STAMP DUTY LAND TAX—Multiple Dwellings Relief (FA 2003 Sch 6B)—Entitlement to claim relief—Multiple dwellings not yet physically constructed on the property on the effective date of the transaction (EDT)—Relevance of the grant, prior to the EDT, of planning permission for the construction of multiple dwellings—Relevance of work undertaken on the property prior to the EDT or on the day of the EDT after the transaction has been completed

FIRST-TIER TRIBUNAL **Appeal number: TC/2019/06063**
TAX CHAMBER **TC/2020/00031**

BETWEEN

LADSON PRESTON LIMITED
AKA DEVELOPMENTS GREENVIEW LTD **Appellants**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER

The hearing took place on 9 June 2021. The form of the hearing was V (video). The remote platform was the Tribunal Video Platform. A face to face hearing was not held due to the Coronavirus (Covid-19) pandemic. The documents to which the Tribunal was referred are the hearing bundle (278 pages), the authorities bundle (110 pages), the skeleton arguments of the parties, and post-hearing notes and material submitted by the Appellant and HMRC on 15 June 2016.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Patrick Cannon, counsel, for the Appellants

Pirimi McDougall-Moore, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION AND SUMMARY

1. These two Stamp Duty Land Tax ("**SDLT**") appeals were heard together. Both concern the availability of Multiple Dwellings Relief ("**MDR**") under Schedule 6B to the Finance Act 2003 ("**FA 2003**"). Both have been designated as lead appeals, with two groups of appeals having been stayed behind them:

   (a) Group 1 consists of appeals where the appellants contend that the existence of planning permission satisfies the statutory language set out in paragraph 7 Schedule 6B FA 2003 ("is in the process of being constructed") in situations where no physical works of construction or adaptation have been undertaken either before or on the effective date of transaction ("**EDT**").

   (b) Group 2 consists of appeals where varying levels/types of physical works have been undertaken towards construction or adaptation either before or on the EDT but HMRC do not agree that the works satisfy the relevant statutory language.

2. In both of these lead appeals, the transaction upon which SDLT was payable was the acquisition by the Appellant of the freehold title to certain land. In both cases, planning permission had been granted prior to the EDT for the construction of multiple dwellings on the land, but no dwellings yet stood on the property on the EDT. After the EDT, each Appellant then constructed multiple dwellings on the property in accordance with the planning permission that had previously been granted.

3. In the case of the first Appellant, on the EDT the property was bare land.

4. In the case of the second Appellant, the property was on the EDT land on which various structures and buildings stood. Prior to the EDT, the second Appellant had dug several bore holes on the site. On the very day of the EDT, but after the transaction for the acquisition of the property had been completed, the second Appellant commenced work for the removal of the existing buildings.

5. In this decision, the Tribunal concludes that neither Appellant is entitled to claim MDR. The Tribunal finds as follows:

   (a) SDLT is a tax on a transaction. For a transaction to fall within Schedule 6B FA 2003 on the basis of paragraph 2(2) Schedule 6B, such that there is an entitlement to MDR in respect of that transaction, the *main* subject matter of *that transaction* must consist of "an interest in at least two dwellings", or of "an interest in at least two dwellings and other property".

   (b) Anything that is to count as a "dwelling" pursuant to paragraph 7 Schedule 6B (including a dwelling in the process of being constructed) must therefore be something in respect of which a chargeable interest can be, and is, acquired from the seller by the purchaser as, or as part of, the subject matter of the transaction that is subject to SDLT.

   (c) Planning permission is not something that a person can own, or that can be sold or transferred by one person to another. Planning permission therefore cannot be acquired from the seller by the purchaser as part of the subject matter of a land transaction on which SDLT is payable.

   (d) A buyer's own plans and arrangements made before the EDT for constructing dwellings on a property (such as obtaining architect's plans, or concluding contracts with suppliers or sub-contractors for the construction project, or securing

finance for the project) similarly are not something that is acquired from the seller by the purchaser as part of the subject matter of the transaction that is subject to SDLT.

(e) Works undertaken on the property after the transaction is completed cannot have formed part of the subject matter of the transaction, even if performed on the very day of the EDT.

(f) In the case of the second Appellant, the bore holes that were on the property on the EDT were the consequence of activities undertaken by the second Appellant itself in advance of the EDT. The bore holes were not something title to which the seller transferred to the Appellant as part of the subject matter of the transaction that was subject to the SDLT.

BACKGROUND FACTS

LPL

6. The Appellant in the first appeal, Ladson Preston Limited ("**LPL**"), acquired the freehold interest in certain land in Preston. The date of completion of the purchase, 15 June 2017, was the effective date of the transaction ("**EDT**") for purposes of s 44 FA 2003.

7. Prior to the EDT, Preston City Council had on the application of LPL granted planning permission for the erection on the property of two four storey buildings containing 218 flats and commercial space on the ground floor. That planning permission remained in force at all material times.

8. On the EDT, the property was bare land. After the EDT, LPL erected the two buildings containing the flats in accordance with the planning permission.

9. LPL's SDLT return, submitted on 4 July 2017, indicated that the property was non-residential, and self-assessed what was the correct amount of SDLT on that basis.

10. In May 2018, LPL's agent wrote to HMRC to amend the SDLT return to include a claim for MDR, on the basis that the property was acquired with the planning permission referred to above. The effect of the amendment was to reduce significantly the amount of the SDLT self-assessment.

11. On 31 December 2018, HMRC issued a notice of enquiry into the SDLT return pursuant to paragraph 12 Schedule 10 FA 2003.

12. On 13 May 2019, HMRC issued a closure notice under paragraph 23 Schedule 10 FA 2003. This concluded that the transaction for the acquisition of the property did not qualify for MDR.

13. LPL appealed against the closure notice. On 9 August 2019, HMRC issued a review conclusion letter upholding the decision to refuse MDR and consequently to refuse the requested repayment of SDLT.

14. LPL now appeals to this Tribunal.

AKA

15. The Appellant in the second appeal, AKA Developments Greenview Ltd ("**AKA**"), acquired on 6 November 2018 the freehold interest in certain property in Waltham Abbey. The date of completion of the purchase, 6 November 2018, was the EDT.

16. Prior to the EDT, Epping Forest District Council had granted planning permission for the demolition of existing commercial buildings on the property and for the erection of nine detached dwellings. That planning permission remained in force at all material times.

17. On the EDT, various structures and buildings stood on the land. The evidence of Mr Edge (see below) is that prior to the EDT the property had been a commercial yard, and that the structures had been used by different companies as storage units.

18. AKA's evidence is that prior to the EDT, it had already dug several bore holes in the ground at the property, and that on the very day of the EDT, immediately after the transaction had been completed, AKA commenced work for the removal of the existing buildings.

19. After the EDT, AKA completed the erection of the nine dwellings in accordance with the planning permission.

20. The SDLT return filed on the EDT indicated that the property was residential property, and self-assessed what was the correct amount of SDLT on the basis that MDR was claimed and that the 3% higher rates of SDLT in Schedule 4ZA FA 2003 applied.

21. In November 2018, AKA's agent wrote to HMRC amending the SDLT return. The amendment changed the classification of the property to "mixed use" (mixed residential and non-residential property), and did not use the 3% higher rate of SDLT in Schedule 4ZA. The effect of the amendment was to reduce significantly the amount of the SDLT self-assessment.

22. On 5 August 2019, HMRC issued a notice of enquiry to AKA in respect of the acquisition of the property.

23. On 11 September 2019, HMRC issued a closure notice to AKA, concluding that on the EDT the transaction did not qualify for MDR. The validity of this closure notice is disputed by the Appellant.

24. AKA appealed against the closure notice. On 15 November 2019, HMRC issued a review conclusion letter upholding the closure notice.

25. AKA now appeals to this Tribunal.

WITNESS EVIDENCE

LPL

26. No witness evidence was called for LPL.

AKA

27. Mr Kevin Edge gave evidence on behalf of AKA. He is the Managing Director of AKA and of Civic Construction Ltd. He adopted and confirmed a formal witness statement dated 10 February 2021.

28. His witness statement included the following points. In the days prior to completion, a number of bore holes were dug across the site and in particular around the proposed building foundation areas which form part of the initial groundworks design and investigation. On 6 November 2018, the completion date, the site was a scaffolding yard with unmade ground covered in crushed concrete, sufficient to make a temporary road for works and vehicles to drive on. The site was also covered in temporary buildings made of scaffolding and covered in tin sheets as well as temporary office buildings. On the day of completion, Mr Edge and others turned up and commenced the clearance of the temporary office buildings and

demolition of the tin sheeted scaffold buildings. The demolition was started with the debris being left on site for removal and also some being reused for the groundworks.

29. In examination in chief, he added as follows. The bore holes had been dug to test the make up of the ground. The site had planning permission for nine houses which have since all been built and sold. Two thirds of the land was used for the residential property development, and a piece of land on the side remains non-residential. The structures that were on the land on the EDT had been used by different companies as storage units, but by the EDT they had removed their items and the property was sold with vacant possession.

30. In cross-examination he said as follows. All of the structures that were on the site on the EDT were for commercial use. None was suitable for use as a dwelling.

31. When it was put to him in cross-examination that planning permission was not construction, Mr Edge agreed that it was not. When it was suggested to him by Mr Cannon in re-examination that obtaining planning permission was the start of the process of construction, Mr Edge said that he was not sure, and stated that "I think of construction as building things".

LEGISLATION

32. SDLT is a tax on "land transactions" (s 42(1) FA 2003). A "land transaction" is the acquisition of a "chargeable interest" (s 43(1) FA 2003). A "chargeable interest" is "an estate, interest, right or power in or over land" or "the benefit of an obligation, restriction or condition affecting the value of any such estate, interest, right or power" (s 48(1) FA 2003).

33. Section 44 FA 2003 makes provision for determining the EDT. Section 44(3) provides:

> (3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction. In this case the effective date of the transaction is the date of completion.

34. Section 119(1) FA 2003 further provides in this respect that:

> (1) Except as otherwise provided, the effective date of a land transaction for the purposes of this Part is
>
> (a) the date of completion, or
>
> (b) such alternative date as the Commissioners for Her Majesty's Revenue and Customs may prescribe by regulations.

35. Section 58D and Schedule 6B FA 2003, which were introduced by the Finance Act 2011, provide for the form of relief from SDLT generally known as Multiple Dwellings Relief ("**MDR**").

36. If MDR is validly claimed, then instead of using the total consideration for the transaction to determine the SDLT due, an alternative method for computing of the amount of SDLT is used. This method involves dividing the total consideration payable for the transaction by the number of dwellings on the property. The amount of SDLT that would be payable on the quotient is then multiplied by the number of dwellings. This usually results in a lower effective rate of tax overall, but the effective rate of tax cannot fall below 1%.

37. To qualify for MDR, a land transaction must fall within either paragraph 2(2) or 2(3) of Schedule 6B, and not be excluded by paragraph 2(4) (see paragraph 2(1)). It is common ground that paragraphs 2(3) and (4) are not relevant to these appeals, so that the availability of MDR in these appeals depends on paragraph 2(2) being satisfied.

38. Paragraph 2(2) Schedule 6B FA 2003 provides:

> (2) A transaction is within this sub-paragraph if its main subject-matter consists of—
>
> (a) an interest in at least two dwellings, or
>
> (b) an interest in at least two dwellings and other property.

39. Paragraph 7 Schedule 6B FA 2003 provides:

> **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.
>
> (5) The main subject-matter of a transaction is also taken to consist of or include an interest in a dwelling if—
>
> (a) substantial performance of a contract constitutes the effective date of that transaction by virtue of a relevant deeming provision,
>
> (b) the main subject-matter of the transaction consists of or includes an interest in a building, or a part of a building, that is to be constructed or adapted under the contract for use as a single dwelling, and
>
> (c) construction or adaptation of the building, or the part of a building, has not begun by the time the contract is substantially performed.
>
> (6) In sub-paragraph (5)—
>
> *"contract"* includes any agreement (including, in the case of Scotland, missives of let not constituting a lease);
>
> *"relevant deeming provision"* means any of sections 44 to 45A or paragraph 5(1) or (2) of Schedule 2A or paragraph 12A or 19(3) of Schedule 17A;
>
> *"substantially performed"* has the same meaning as in section 44.
>
> (7) Subsections (2) to (5) of section 116 apply for the purposes of this paragraph as they apply for the purposes of subsection (1)(a) of that section.

40. Paragraph 6 Schedule 6B FA 2003 provides:

> **6 Adjustment for change of circumstances**
>
> (1) This paragraph applies if—
>
> (a) relief under this Schedule is claimed for a relevant transaction,
>
> (b) an event occurs in the relevant period, and
>
> (c) had the event occurred immediately before the effective date of the transaction, more tax (calculated according to the effective date of the

transaction) would have been payable, whether because the transaction would not have been a relevant transaction or otherwise.

(2) If this paragraph applies, tax is chargeable on the transaction as if the event had occurred immediately before the effective date of the transaction.

…

(5) *"The relevant period"* means the shorter of—

(a) the period of 3 years beginning with the effective date of the transaction, and

(b) the period beginning with the effective date of the transaction and ending with the date on which the purchaser disposes of the dwelling, or the dwellings, to a person who is not connected with the purchaser.

…

(7) In this paragraph—

…

"event" includes any change of circumstance or change of plan …

41. Part 3 of Schedule 10 FA 2003 deals with enquiries by HMRC into SDLT returns. Its paragraph 12 provides:

12 Notice of enquiry

(1) The Inland Revenue may enquire into a land transaction return if they give notice of their intention to do so ("notice of enquiry")—

(a) to the purchaser,

(b) before the end of the enquiry period.

42. Paragraph 23 Schedule 10 FA 2003 provides:

23 Completion of enquiry

(1) An enquiry under paragraph 12 is completed when the Inland Revenue by notice (a "closure notice") inform the purchaser that they have completed their enquiries and state their conclusions.

(2) A closure notice must either—

(a) state that in the opinion of the Inland Revenue no amendment of the return is required, or

(b) make the amendments of the return required to give effect to their conclusions.

(3) A closure notice takes effect when it is issued.

43. Section 83 FA 2003 provides:

83 Formal requirements as to assessments, penalty determinations etc

(1) An assessment, determination, notice or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty under this Part must be in accordance with the forms prescribed from time to time by the Board and a document in the form so prescribed and supplied or approved by the Board is valid and effective.

(2) Any such assessment, determination, notice or other document purporting to be made under this Part is not ineffective—

(a) for want of form, or

(b) by reason of any mistake, defect or omission in it,

if it is substantially in conformity with this Part and its intended effect is reasonably ascertainable by the person to whom it is directed.

(3) The validity of an assessment or determination is not affected—

(a) by any mistake in it as to—

(i) the name of a person liable, or

(ii) the amount of the tax charged, or

(b) by reason of any variance between the notice of assessment or determination and the assessment or determination itself.

HMRC GUIDANCE

44. The HMRC Stamp Duty Land Tax Manual states at paragraph SDLTM09740 as follows:

> **SDLTM09740 - SDLT - higher rates for additional dwellings - higher rates transactions - Para 3 Sch4ZA FA2003**
>
> (Please note that this page was signficantly amended on 13 November 2020)
>
> …
>
> **What is not a "higher rates transaction"**
>
> The following transactions will not comprise higher rates transactions and the higher rates will not apply. Purchases of: -
>
> -- non-residential or mixed residential and non-residential properties, except for a transaction which incorporates more than one dwelling, when
>
> a 'Multiple Dwellings Relief' claim is made in respect of the residential element of the transaction, and
>
> the non-residential element of the transaction is negligible or artificially contrived.
>
> (See SDLTM29900 for more details on 'Multiple Dwellings Relief')

APPELLANTS' SUBMISSIONS

LPL

45. The land was purchased by LPL with the benefit of planning permission for the erection of dwellings thereon, which dwellings have now been completed. The requirements for MDR were met in two ways under Schedule 6B, namely under paragraph 7(2)(b) as well as under paragraph 7(4).

46. As to paragraph 7(2)(b), Parliament's purpose in enacting the MDR legislation, which was to address an accommodation shortage by encouraging the construction of dwellings, requires its wording to be given a wide meaning (relying on *Mullane v Revenue and Customs (SDLT Multiple Dwellings Relief)* [2021] UKFTT 119 (TC) ("***Mullane***") at [27]). The obtaining of planning permission for dwellings should be characterized as part of the "process" of their construction for purposes of this provision. The land was therefore in the process of being constructed on the EDT. A more restrictive interpretation would discourage developers from acquiring properties for purposes of residential developments. The margins for developers are at present so thin that the amount of SDLT payable can make the difference when deciding whether or not to proceed with a particular development project.

47. The Collins English Dictionary defines “process” as “a series of actions which are carried out in order to achieve a particular result”, and the grant of planning permission for the construction of certain dwellings on certain land is part of the “process” of constructing those dwellings on that land.

48. As to paragraph 7(4), as a matter of plain English, the land acquired was to subsist for the benefit of a dwelling or dwellings.

49. The definition of a dwelling in the legislation extends to dwellings that are yet to be constructed (reliance is placed by analogy on paragraph 7(5)(b) which is not directly applicable in the present case, as well as on the words “is to subsist” in paragraph 7(4)).

AKA

Validity of the closure notice

50. The 11 September 2019 purported closure notice issued to AKA was invalid because it failed to state that it was amending the Appellant’s return and stated an incorrect amount of SDLT due, thereby failing to comply with the mandatory requirements in paragraph 23(1) and (2) Schedule 10 FA 2003. The purported closure notice is therefore a nullity. The return has accordingly not been amended. The error cannot be corrected by way of a review conclusion letter. Section 83 FA 2003 does not save the closure notice from invalidity.

Entitlement to MDR

51. AKA relies on the arguments in paragraphs 45-49 above.

52. AKA additionally argues in its case as follows.

(a) The drilling of the bore holes on the property prior to the EDT was part of the process of construction.

(b) The clearance and demolition work that commenced on the very day of the EDT was part of the process of construction. It is accepted that this work commenced on the day of the EDT only after the transaction for the purchase of the property had already been completed. However, the result is nonetheless that the dwellings were under construction *on* the EDT, since the EDT is the *day* of completion, not the *time* of completion.

53. By virtue of the matters in paragraphs 51 and 52 above, separately or cumulatively, the dwellings were in the process of being constructed on the EDT. The meaning of the phrase “in the process of being constructed” in paragraph 7(2)(b) Schedule 6B is a question of law, so that Mr Edge’s understanding of the word “construction” (paragraph 31 above) is immaterial for present purposes.

Applicability of the 3% higher rates in Schedule 4ZA

54. Part of the land acquired was not developed and so the property remained mixed use. On the basis that MDR is available in respect of the dwellings, then because the property acquired was mixed use the 3% higher rates in Schedule 4ZA FA 2003 did not apply. Reliance is placed on paragraph SDLTM09730 of the HMRC SDLT Manual and paragraph 5(1)(b) Schedule 4ZA FA 2003.

HMRC SUBMISSIONS

LPL

55. MDR is not due on the acquisition. There was no building on the EDT that was used or suitable for use as a dwelling.

56. The existence of the planning permission did not bring any part of the property within the meaning of paragraph 7(2)(b) Schedule 6B FA 2003. Even if appropriate planning permission may be a pre-requisite that must be obtained in order that subsequent construction work may lawfully begin, it is not part of the process of construction itself. The Cambridge English Dictionary defines "construct" as "to build something or to put together different parts to form something whole". If a prospective dwelling not yet under construction was supposed to be included as a dwelling for MDR purposes, then this would have been set out in paragraph 7(2) Schedule 6B FA 2003.

57. Paragraph 7(4) only applies to land which "subsists, or is to subsist," for the benefit of a "dwelling" which exists or is under construction (or adaptation) at the EDT. There was no such dwelling at the EDT, and there therefore cannot have been any land at the EDT which subsisted, or was to subsist, for the benefit of a dwelling.

58. LPL therefore acquired non-residential land. The acquisition was subject to the non-residential rates of SDLT found in Table B of s 55 FA 2003, and MDR is not claimable.

AKA

Validity of notices

59. The enquiry notice was valid. Despite the error, it would have been clear to AKA that HMRC were enquiring into AKA's request for a refund as a result of amending their return.

60. The closure notice was valid. It made HMRC's conclusions clear and it stated the amount of tax due as a consequence (paragraph 23(2)(b) Schedule 10), even if the review conclusion letter subsequently stated the wrong figure.

61. Alternatively, any deficiency that might otherwise invalidate the enquiry notice or the closure notice is rectified by s 83 FA 2003.

Entitlement to MDR

62. MDR is not due on the acquisition. Reliance is placed on the arguments in paragraphs 55 to 58 above.

63. Work carried out on the EDT after taking possession should not be taken into account in determining the nature of the land acquired (reliance is placed on *Brandbros Ltd v Revenue and Customs* [2021] UKFTT 157 (TC) at [47]).

64. In any case, site clearance, bore hole drilling and utilities work were not part of the process of construction of the dwellings.

Applicability of the 3% higher rate in Schedule 4ZA

65. Even if MDR were due on the transaction, AKA's MDR calculations are incorrect. Furthermore, HMRC have seen no evidence in support of the Appellant's claim that the property consisted of a mix of residential and non-residential property, and HMRC disputes this contention.

THE TRIBUNAL'S FINDINGS

LPL

General

66. LPL argue that paragraph 2(2) Schedule 6B is satisfied in two ways, first by virtue of the operation of paragraph 7(2)(b) Schedule 6B, and secondly by virtue of the operation of paragraph 7(4) Schedule 6B.

Paragraph 7(2)(b) Schedule 6B

67. This provision stipulates that for purposes of Schedule 6B, a building or part of a building counts as a dwelling if "it is in the process of being constructed". The Appellant argues that although on the EDT no physical construction work had yet commenced, the grant of planning permission prior to the EDT was part of the process of construction. Thus, it is argued, the flats were already in the process of being constructed from the time that the planning permission was granted.

68. LPL contends that the Tribunal should adopt this wide interpretation of the phrase "in the process of being constructed" in order to give effect to Parliament's purpose in enacting the MDR legislation. It is said, relying on *Mullane* at [27], that "the object or purpose of the MDR [is] to increase the supply of rented accommodation".

69. However, even assuming that this is the policy intention of the MDR legislation, it does not follow from this that Parliament necessarily intended paragraph 7(2)(b) to be given a wide interpretation.

70. Many kinds of reliefs and other provisions in tax legislation may have the policy intention of incentivizing or encouraging specific kinds of activity. However, that does not mean that the intention of Parliament is that all such legislation should be interpreted as broadly as possible in order to maximize the range of circumstances in which taxpayers can avail themselves of the benefits of such legislation. This kind of legislation is self-evidently intended to apply in certain situations and not others. The mere fact that legislation is intended to incentivize certain activity is not of itself an indicator that Parliament intended the legislation to be interpreted either broadly or narrowly.

71. During the hearing, reference was made by the parties to a consultation paper that was published prior to the adoption of the MDR legislation. The Tribunal invited the parties to submit after the hearing a copy of the consultation paper and any other such materials that they consider might assist in the interpretation of paragraph 7(2)(b). HMRC subsequently submitted the explanatory notes to the Finance (No 3) Bill 2011 which introduced Schedule 6B, as well as a copy of HM Treasury, *Government response to the consultation on investment in the private rented sector*, September 2010 (ISBN 978-1-84532-775-0). Neither party made further written submissions on the significance of these documents. On its own examination of them, the Tribunal sees nothing in them that assists in the determination of the issue now under consideration.

72. Both parties rely on dictionary definitions. The Appellant relies on the dictionary definition of "process", and HMRC on that of "construction". The Tribunal finds neither of these dictionary definitions to be of help in these appeals.

73. At the hearing, neither party cited any judicial authority, either in the context of SDLT or of any other tax, or indeed in the context of any other area of the law, for the proposition that a building or dwelling can be considered to be "under construction" or "in the process of

being constructed" if planning permission has been granted, but no physical construction work has yet commenced.

74. When asked by the Tribunal whether such judicial authorities exist, Mr Cannon acknowledged that in the context of VAT, there is in fact case law to the contrary effect. However, Mr Cannon insisted that SDLT is a different tax to VAT, to which different rules apply.

75. At the request of the Tribunal to provide references to such authorities, Mr Cannon submitted a post-hearing note referring to paragraph VCONST03550 of the HMRC internal manual on VAT Construction, and to *Virtue t/a Lammermuir Game Services v Revenue & Customs* [2007] UKVAT V20259 ("***Virtue***").

76. Paragraph VCONST03550 of the HMRC manual states, referring to *Stapenhill Developments Limited* (VTD 1593), that:

> It is accepted that a building is being constructed when work has progressed above foundation level. This is usually when walls begin to be constructed upon the foundations. These walls need not be above ground level. However, simply digging and concreting foundations is not sufficient and in such cases the grant of a major interest in the land is not zero-rated.

77. In *Virtue*, the Tribunal dealt with the question of whether a particular supply was a "supply in the course of construction of …. a building designed as a dwelling … of any services related to the construction", within the meaning of item 2 of Group 5 in Schedule 8 to the Value Added Tax Act 1994. The Tribunal said at [35]:

> From the authorities cited to us we derive the following propositions relevant to this issue, namely (1) the services must be connected with the construction of the building; (2) services which facilitate or have a substantial connection with the construction such as preparatory or site clearance work or ground or earthworks are connected with the construction of the building; (3) there must be a temporal connection between those services and the construction of the building; whether there is such a connection is a question of fact and degree.

78. Given the Tribunal's findings below, it has ultimately proved unnecessary to consider these authorities in further detail.

79. A premise of LPL's argument is that without obtaining planning permission "construction could not lawfully occur", and that obtaining planning permission is "necessary for construction to occur" (Appellant's skeleton, paragraph 15). LPL contends that for this reason, obtaining planning permission is part of the process of construction.

80. However, no legislation or judicial authorities relating to planning permission were cited in argument in support of this premise. When asked by the Tribunal about the legal effects of planning permission, Mr Cannon accepted the following.

(a) Anyone can apply for planning permission for a property, even if that person has no interest in the property. For instance, planning permission may be applied for by a person who is potentially interested in making an offer to purchase a property, and who wants to be sure before doing so that the property if purchased can be used for the desired purpose. Such a person might, after obtaining the planning permission, ultimately never buy the property in question.

(b) It is possible for different planning permissions for different purposes to be granted and to be in force in respect of the same property at the same time. Thus, for instance, a particular property that is bare land might at the same time have planning permission for the construction of a single dwelling, and separate

planning permission for the construction of multiple dwellings, and further separate planning permission for use for non-residential purposes.

(c) Building without planning permission is not an offence. If a building is constructed without planning permission, it is possible to apply for planning permission retrospectively, although in this situation there is the risk that planning permission will be refused, with the result that the building will have to be demolished. There is however a concept of "established use" under which planning permission will effectively be granted automatically if the building has stood in plain sight without objection for at least four years.

81. Mr Cannon was asked by the Tribunal whether he contends that dwellings would be "in the process of being constructed" on the EDT if planning permission for the dwellings has been obtained beforehand by potential purchaser A, but the property is in fact then bought instead by B who has no intention of erecting dwellings on the land. Could B claim MDR on the transaction despite having no intention to construct multiple dwellings, merely because planning permission for multiple dwellings has previously been obtained by A? Mr Cannon accepted that in this situation, the mere fact that planning permission has been granted for multiple dwellings would be insufficient. He clarified that in order for the dwellings to be "in the process of being constructed" on the EDT, it is necessary not only that planning permission for the dwellings has been granted, but that the person acquiring the land has the intention of constructing the dwellings in accordance with that planning permission. Mr Cannon also accepted that the purchaser's intention must have a realistic prospect of being realized.

82. Mr Cannon was asked by the Tribunal what the position would be if, despite having such intentions on the EDT, the purchaser subsequently never constructs the dwellings, due to a change in plans.

83. Mr Cannon submitted as follows. If the purchaser has such a change of plans within the "relevant period" (paragraph 6(1)(b) and (5) Schedule 6B FA 2003), this would be an "event" requiring the amount of the MDR to be repaid (paragraph 6(1)(b) and (7) Schedule 6B FA 2003). However, construction of the multiple dwellings does not in fact need to be completed within the relevant period. Thus, if at the end of the relevant period the purchaser still has the intention of constructing the multiple dwellings which are still in the process of being constructed, the claw-back provision in paragraph 6 Schedule 6B FA 2003 will not operate.

84. Mr Cannon also submitted that obtaining planning permission is not the only way in which the process of construction of dwellings can commence. Thus, if multiple dwellings are constructed without planning permission having been obtained, this would be immaterial if before the EDT the process of construction has begun by other means.

85. On the basis of the above, the Tribunal does not accept the submission in the Appellant's skeleton that obtaining planning permission must be part of the construction process because it is "necessary for construction to occur", and because "construction could not lawfully occur" without it. While the grant of planning permission may in practice be a step almost always taken by developers before commencing physical construction of buildings, the physical construction can in fact occur without it. Furthermore, the mere fact that planning permission has been obtained for the construction of dwellings does not mean that anyone has actually decided to build them, or that anyone ever will decide to do so, or that anyone will in fact do so.

86. Ultimately, even Mr Cannon accepted this, given his refinement to his argument described in paragraph 81 above. The argument that was ultimately put on behalf of the Appellants, as the Tribunal understands it, might be articulated as follows. The "process of construction" is not confined to the physical process of construction, but includes also related

non-physical activities. If a person decides to undertake a project to build multiple dwellings, then the process of construction (the building project) commences when these non-physical activities commence, even if physical construction work on the dwellings themselves has not yet commenced. If the process of construction has been commenced in this way, then even if physical construction has not yet started by the EDT, the dwellings will be "in the process of being constructed" on the EDT, provided that the intention to complete the process still exists.

87. Such an argument assumes that obtaining planning permission is one kind of "non-physical" activity that may suffice to commence the process of construction, and implies that there may be other kinds of non-physical activities that would similarly suffice. These appeals do not directly raise the question of what such other activities might be, if this argument is correct. However, it can be easily imagined that purchasers in other cases might argue, for instance, that it is sufficient to begin the process of construction that architect's plans have been prepared (or possibly even just commissioned), or that contracts have been concluded with suppliers or sub-contractors for the building project, or that finance for the project has been secured, and so forth.

88. Having carefully considered the Appellants' argument, the Tribunal finds that it contains a fundamental flaw.

89. The Appellants' argument assumes that for MDR to apply, it is sufficient that multiple dwellings are in the process of being constructed on the EDT. However, that is not correct.

90. Paragraph 7(2)(b) is not an independent basis of entitlement to claim MDR. In other words, the mere fact that paragraph 7(2)(b) is satisfied does not mean that MDR applies. This provision says merely that a dwelling in the process of being constructed counts as a dwelling for purposes of Schedule 6B. In order to determine whether there is an entitlement to claim MDR, this provision needs to be read together with all of the other relevant provisions of the FA 2003, especially those referred to in paragraphs 32 and 38 above.

91. SDLT is a tax on a *transaction*. The transaction in this case is the acquisition by LPL from the seller of the freehold title to the property. For that transaction to fall within Schedule 6B FA 2003, such that there is an entitlement to MDR in respect of *that transaction*, paragraph 2(2) Schedule 6B FA 2003 requires that the *main* subject matter of *that transaction* must consist of "an interest in at least two dwellings", or of "an interest in at least two dwellings and other property".

92. The Tribunal therefore concludes that anything that is to count as a "dwelling" pursuant to paragraph 7 Schedule 6B (including a dwelling in the process of being constructed) must be something in respect of which a chargeable interest can be, and is, transferred from the seller to the purchaser as, or as part of, the subject matter of the transaction that is subject to SDLT.

93. The question in this case is therefore whether the main subject matter of the transaction of sale by the seller to LPL was an interest in any "dwellings" (as defined in paragraph 7 Schedule 6B).

94. The planning permission was not something that was transferred from the seller to LPL as part of the subject matter of the transaction. Apart from anything else, planning permission is not something that a person can own. There is no property title to planning permission that can be transferred from one person to another, and which LPL could have acquired as part of the subject matter of the transaction. Nor is planning permission any other kind of right held by one person that can be sold or transferred to another. As stated in *Signature Realty Ltd v Fortis Developments Ltd* [2016] EWHC 3583 (Ch) (a case not cited in argument) at [22], "There are no statutory or other intellectual property rights in the planning permission itself; anyone may avail themselves of it so long as they satisfy its conditions". Thus, even if it had

been the seller rather than LPL who had applied for and been granted planning permission, this planning permission could not have formed part of the subject matter of the land transaction between the seller and LPL on which SDLT was payable.

95. Furthermore, the planning permission was in fact applied for by LPL itself, and not the seller. LPL therefore had that planning permission even before it acquired the property, and LPL would have continued to have that planning permission, whether or not it had ultimately ever completed the transaction for the purchase of the property.

96. Other kinds of "non-physical" activities of the kind referred to in paragraph 87 above are similarly activities undertaken by the buyer. They are not something that is acquired from the seller by the purchaser as part of the subject matter of the transaction that is subject to SDLT. A buyer's own plans and arrangements made before the EDT for constructing dwellings on the property do not form part of the subject matter of the transaction.

97. The Tribunal therefore concludes that the main subject matter of the transaction did not include any interest in any "dwellings". LPL is therefore not entitled to claim MDR in respect of the transaction.

Paragraph 7(4) Schedule 6B

98. By reason of the same conclusions above, LPL's argument in relation to paragraph 7(4) must also be rejected. Because the subject matter of the transaction that was subject to SDLT did not did not consist of any interest in any dwellings, the subject matter of the transaction cannot have included any land subsisting for the benefit of any such dwellings.

AKA

Validity of the enquiry notice and the closure notice

The enquiry notice

99. The Appellant's skeleton argument does not challenge the validity of the 5 August 2019 enquiry notice (as opposed to the closure notice), but HMRC nonetheless acknowledge that it contains an error and seek to defend its validity.

100. The error in the enquiry notice is a statement that the enquiry is being conducted pursuant to Schedule 11A FA 2003 into a claim made by AKA for overpayment relief in respect of SDLT. In fact, AKA had not made a claim for overpayment relief pursuant to Schedule 11A, but rather had applied to amend the SDLT return pursuant to paragraph 6 of Schedule 10 FA 2003, and the enquiry was thus in fact to be conducted pursuant to Part 3 of Schedule 10.

101. By virtue of s 83(2) FA 2003, this mistake will not invalidate the enquiry notice, provided that the enquiry notice is nonetheless substantially in conformity with Part 4 FA 2003 and its intended effect was reasonably ascertainable by the Appellant.

102. The Tribunal is satisfied that apart from this error, the enquiry notice was substantially in conformity with the relevant provisions of the FA 2003.

103. The enquiry notice gave the correct details of the property and the unique transaction reference number. The enquiry notice, which was sent following a request made by the Appellant for repayment of an amount of SDLT on the ground that the SDLT return had been incorrectly completed, stated that "I am checking into your claim for overpayment relief regarding their Stamp Duty Land Tax return for the above acquisition". The Appellant's agent responded to the enquiry notice on 27 August 2019, providing information that had been requested by HMRC. There is no suggestion in that letter that the agent did not understand

what the enquiry was about. On the material before the Tribunal, it is not apparent that there was anything else that AKA could have thought that the enquiry was about. The Tribunal is accordingly satisfied that the intended effect of the enquiry notice was reasonably ascertainable by the Appellant and its agent.

104. The Tribunal therefore finds that the enquiry notice was valid.

The closure notice

105. AKA argues that the closure notice is not substantially in conformity with Part 4 FA 2003, for two reasons. First, it is said that the closure notice fails to state that it is amending the Appellant's SDLT return as required by paragraph 23(2)(b) Schedule 10 FA 2003. Secondly, it is said that the closure notice fails to state the true amount of the tax claimed by HMRC, contrary to the requirement in paragraph 23(2)(b) Schedule 10 FA 2003 that the closure notice must "make the amendments of the return required to give effect to [HMRC's] conclusions".

106. As to the first of these points, it is correct that the closure notice does not state in terms that it is amending the SDLT return. However, it does state in terms that it is a closure notice under paragraph 23 Schedule 10 FA 2003, that the amount of SDLT due as a result of HMRC's check, less the amount of SDLT already paid, is a specified amount, and does conclude by stating: "Please pay this amount now. We'll continue to add interest on a daily basis until all the tax has been paid." The Tribunal is satisfied that it was necessarily implicit that the closure notice was amending the SDLT return, and rejects the first of AKA's points.

107. As to the second of these points, there has been some confusion.

108. The grounds of appeal in the Appellant's notice of appeal did not include a challenge to the validity of the closure notice.

109. The HMRC statement of case subsequently stated at paragraph 45 as follows:

> HMRC regrets to inform the Tribunal that the closure notice sent on [11 September 2019] stated an incorrect amount due, but the correct amount was stated in HMRC's view of the matter letter.

110. The Appellant's skeleton argument then challenges the validity of the closure notice, contending that the amount stated in the closure notice was not the correct amount "required to give effect to [HMRC's] conclusions" within the meaning of paragraph 23(2)(b) Schedule 10 FA 2003, and contending that this error could not be remedied by the HMRC review conclusion letter because paragraph 23(3) FA 2003 provides that "A closure notice takes effect when it is issued".

111. However, the HMRC skeleton argument at paragraphs 51, 55 and 58 then states:

> HMRC apologise that paragraph 45 of the joint statement of case was wrong about the above point, in that the correct amount due was stated in the original closure notice. …
>
> On 15 November 2019, HMRC sent the review conclusion letter to AKA informing them that the closure notice had been upheld. It was in this correspondence that an incorrect amount due was quoted to AKA.
>
> … the Appellants have misunderstood the position at paragraph 18 of their skeleton, possibly due to the error in HMRC's joint statement of case. The closure notice correctly stated the additional tax …; it was the review conclusion letter which regrettably stated the wrong figure.

112. At the hearing, HMRC confirmed its position that the closure notice states correctly the amount of additional tax that will be due if the conclusions in the closure notice are correct, and that it is the review conclusion letter that states an incorrect figure.

113. The Tribunal finds as follows.

(a) No challenge to the closure notice was included in the AKA's grounds of appeal. This challenge was raised for the first time in the Appellant's skeleton argument. Before raising it, the Appellant should have applied to the Tribunal for permission to add a new ground of appeal.

(b) If the closure notice were a legal nullity as a result of giving an incorrect figure for the amount of tax due, the result would be that the HMRC enquiry is still open, and it would fall to HMRC now to issue a valid closure notice. Given that there is no time limit within which HMRC must issue a closure notice, the only practical effect of nullity of the closure notice would be to cause delay.

(c) Furthermore, if the error were to invalidate the closure notice, such that it is a legal nullity, there would be no closure notice against which an appeal could be brought. That would call into question the validity of this appeal.

(d) AKA's argument is that the closure notice will be invalid if it contains an error as to the amount of tax charged, and that its validity cannot be saved by s 83(3) FA 2003, since s 83(3) FA 2003 (unlike s 82(2)) only applies to assessments and determinations and not to closure notices. The Tribunal does not accept that argument. If the amount of tax stated in a closure notice is considered to be wrong, the person to whom the closure notice is addressed can appeal against the closure notice, and the figure if incorrect can be corrected by a statutory review decision of HMRC, or by the Tribunal. This is so, regardless of whether the figure in the closure notice is wrong (1) due to an error in HMRC's substantive conclusions in the closure notice, or (2) due to a clerical or arithmetical error. There is no reason in principle for treating the latter kind of error differently to the former.

(e) AKA's appeal against the closure notice is therefore validly before the Tribunal.

Entitlement to MDR

114. AKA relies on the same arguments as LPL in relation to the grant of planning permission. The Tribunal rejects those arguments for the same reasons given in paragraphs 89-97 above.

115. AKA also relies on the further considerations referred to in paragraphs 52-53 above.

116. As to the works undertaken by the Appellant on the land on the day of the EDT after the transaction for its purchase had been completed, the Tribunal finds that works undertaken on the property after the transaction was completed cannot have formed part of the subject matter of the transaction (within the meaning of paragraph 2(2) Schedule 6B FA 2003), even if they were performed on the very day of the EDT.

117. As to the bore holes that were present on the property on the EDT, these were the consequence of activities undertaken by AKA itself in advance of the EDT, albeit presumably with the permission of the seller. AKA's activities in digging the bore holes are similar to the kinds of non-physical activities of a buyer referred to in paragraphs 87 and 96 above, in the sense that they are not something title to which the seller transferred to AKA as part of the subject matter of the transaction that is subject to the SDLT. The bore holes certainly cannot be characterized as the *main* subject matter of the property transaction between the seller and AKA.

118. The Tribunal therefore concludes that the main subject matter of the transaction did not include any interest in any "dwellings". AKA is therefore not entitled to claim MDR in respect of the transaction.

Applicability of the 3% higher rate in Schedule 4ZA

119. The closure notice concludes that the transaction for the acquisition of the land was subject to the 3% higher rates of SDLT in Schedule 4ZA FA 2003. The Appellant challenges this conclusion. However, one of the essential elements of the Appellant's challenge is the proposition that the transaction is subject to MDR. Given that the Tribunal has found above that the transaction is not subject to MDR, there is no need to give further consideration to this aspect of AKA's appeal.

OTHER MATTERS

120. The decision deals only with the specific issues that the parties have requested the Tribunal to address.

121. It may be that in light of this decision on these issues, there are other matters that need to be determined in order to calculate the final amount of SDLT due in both appeals. For the eventuality that there is any future dispute between the parties in relation to such additional matters, appropriate permission will be given to the parties to bring such additional matters back before the Tribunal for an additional decision.

CONCLUSION

122. Neither Appellant is entitled to claim MDR in respect of the transactions to which these appeals relate.

123. If the parties are unable to agree on the consequences of this decision for either of the closure notices under appeal, either party is at liberty to request the Tribunal within 90 days of the date of release of this decision to determine the matter remaining in dispute.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

124. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 07 JULY 2021