Bewley Case Study: "Dwelling" and Residential Property

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SDLT Guide

BLAKE MORGAN

CONTENTS

1. INTRODUCTION

As a result of a First Tier Tribunal decision released on 28 January 2019, P N Bewley Ltd escaped the higher rates of stamp duty land tax (SDLT) on the purchase of a bungalow which it bought for demolition and redevelopment. This was on the basis that on the date of completion the building was not "suitable for use as a single dwelling". The central heating system had been removed; some floorboards were missing and the presence of asbestos made refurbishment unviable.

2. THE FACTS

P N Bewley Ltd bought a bungalow called Rosemount at Hillcote, Bleadon Hill, Weston-Super-Mare for £200,000. The bungalow had been constructed on a modest plot in about 1950 using a prefabricated timber frame with asbestos cement infill panels. It had been occupied by an elderly lady who had moved out by 2014. It was being marketed as an "ideal refurbishment project" in September 2014. The property had been left empty and had deteriorated since, with the heating system, copper pipes and floorboards having been removed.

Sales particulars issued after a 2016 planning consent for demolition and rebuilding referred to: "a detached bungalow occupying an elevated location on Bleadon Hill with planning permission for demolition and erection of replacement dwelling amounting to some 1937 sq. ft."

A survey on behalf of a lender on 16 November 2016 said that there was a "derelict bungalow to be demolished" on the site. It recorded that water, drainage, electricity and gas were connected. A demolition survey of 13 December 2016 for the buyer found the asbestos-containing materials were in good condition but with a recommendation for urgent removal. The survey noted that the heating system had been removed.

There was a simultaneous exchange of contracts and completion on 24 January 2017. The buyer submitted a land transaction return and paid SDLT of £1,500. The bungalow was subsequently demolished and a new four bedroom house built; work started in April 2017. The new house was put up for sale at £500,000.

3. THE HMRC CHALLENGE

On 8 November 2017 HMRC opened an enquiry into the return and in due course made an amendment to it, increasing the SDLT payable from the £1,500 paid to £7,500 on the basis that the bungalow was a dwelling, so the higher rates of SDLT (with the 3% surcharge) applied to the purchase.

4. THE STATUTORY PROVISIONS

The focus of the case was on the meaning of "dwelling" as set out in paragraph 18 of Finance Act 2003 / Schedule 4ZA (the schedule containing the provisions for the 3% surcharge). The relevant wording reads: "A building or part of a building counts as a dwelling if— (a) it is used or suitable for use as a single dwelling".

The decision did not need to examine the other part of the definition: "(b) it is in the process of being constructed or adapted for such use".

5. DECISION BASED ON A READING OF THE PROVISIONS

The Tribunal said the sole issue to determine was whether the bungalow was, at the date of completion, **suitable** for use as a single dwelling. They considered that the legislation could have used other definitions, such as whether the building was **capable** of being used as a dwelling. Here are some quotes from the judgement (with my emphasis):

- *"It seems to us that the legislation contemplates that there must be and is a class of buildings that might not meet the test and the likely class is those which are **capable** of being a dwelling but which are **unsuitable** for that purpose. The question then is: where is the suitable/not suitable boundary."*

- *"No doubt a passing tramp or group of squatters could have lived in the bungalow as it was on the date of purchase. But taking into account the state of the building … with radiators and pipework removed and with the presence of asbestos preventing any repairs or alterations that would not pose a risk to those carrying them out, we have no hesitation in saying that in this case the bungalow was not suitable for use as a dwelling."*

The Tribunal made a point of saying that the intentions of the buyer for the future use of the property are irrelevant (HMRC sought to describe the property as a residential plot in a residential area with the buyer's intention being to continue that). The Tribunal found the planning permissions for future development (which HMRC said were indicative of intentions as to use) irrelevant; also irrelevant was anything done after completion.

The Tribunal said that whether the building could be renovated and then occupied as a dwelling was not relevant: "*The test set out clearly in paragraph 18(1)(a) Schedule 4ZA is whether it was "suitable" to be used as a dwelling at the time of purchase: it is not whether it was capable of becoming so used in the future*."

6. CASE LAW, HMRC GUIDANCE AND OTHER MATERIALS

The Tribunal had decided, based on the relevant statutory provisions, that the building was not suitable for use as a dwelling in its state on the completion date. The Tribunal then considered the case law, HMRC guidance and other materials to "test" their conclusion.

They compared the statutory definition used for the 3% surcharge to the definitions used for the Annual Tax on Enveloped Dwellings and Capital Gains Tax. Those had special provisions ignoring unsuitability for periods when physical changes to the building or its environment made a building temporarily unsuitable for use as a dwelling. The Tribunal said the recognition that a building can be temporarily unsuitable for use as a dwelling supported its conclusion for SDLT (which looks at an instant of time rather than a period of time). The Tribunal recognised that a: "*physical change to the building or its environment could make a building unsuitable for use as a dwelling. The fact that the unsuitability might be temporary is not relevant for our purposes, looking as we are at an instant of time, whereas ATED and CGT are looking at tracts of time.*"

They quoted with approval passages from judgments in previous cases: "'*Dwelling" is not a term of art, but a familiar word in the English language, which in my judgement in this context connotes a place where one lives, regarding and treating it as home.' In our judgement a dwelling will, as a minimum, contain facilities for personal hygiene, the consumption of food and drink, the storage of personal belongings, and a place for an individual to rest and to sleep."*

The Tribunal referred to HMRC's 16 March 2016 Guidance Note on the 3% surcharge called "Stamp Duty Land Tax: higher rates for purchases of additional residential properties." The Tribunal quoted the passage: " "*Dwelling" takes its everyday meaning; that is a building, or a part of a building that affords those who use it the facilities required for day-to-day private domestic existence. In most cases, there should be little difficulty in deciding whether or not particular premises are a dwelling."* The Tribunal said that in their view such facilities were not present in the bungalow on the completion date.

The Tribunal also quoted from Statement of Practice 1/2004. That Statement refers to the now repealed Disadvantaged Areas Relief from SDLT which used the same definition of residential property.

"17 Whether a building is suitable for use as a dwelling will depend upon the precise facts and circumstances. The simple removal of, for example, a bathroom suite or kitchen facilities will not be regarded as rendering a building unsuitable for use as a dwelling. Where it is claimed that a previously residential property is no longer suitable for use as a dwelling, perhaps because it is derelict or has been substantially altered, the claimant will need to provide evidence that this is the case."

Having so "tested" their interpretation of the definition of dwelling, the Tribunal felt fortified in their decision. As the property was not a dwelling, the higher rates of SDLT could not apply.

7. NON-RESIDENTIAL PROPERTY

Having decided that the property was not a "dwelling" the Tribunal went on to consider whether SDLT should be charged at the standard residential rates or at non-residential rates. Oddly the buyer's return had said the property was "residential" and it had paid SDLT of £1,500 at the standard residential rates. The Tribunal said *"given our decision that the building was not suitable to be used as a dwelling and the fact that it was not so used at the time of purchase, means that it was non-residential".*

The Tribunal reduced the SDLT to £1,000 on the basis that the property (as well as not being a dwelling) should be assessed on the non-residential rates.

8. HMRC RESPONSE AND GUIDANCE

The time limit for appealing the decision passed without an appeal being lodged.

HMRC have said very little publicly since the decision, but have addressed the issue to some extent in one of the pages added to the SDLT Manual on 1 October 2019. Here is what they say at SDLTM00385:

"A residential property that is no longer habitable as a dwelling, due to dereliction for example, would not be residential property, on the basis that it is not suitable for use as a dwelling."

"However, there is a clear distinction between derelict property and a dwelling that is essentially habitable, but in need of modernisation, renovation or repair, which can be addressed without materially changing the structural nature of the property. In this case, if the building was used as a dwelling at some point previously and permission to use as a dwelling continues to exist at the effective date of transaction, it will be considered suitable for use as a dwelling. Whether a property is derelict to the extent that it no longer comprises a dwelling is a question of fact and should only apply to a small minority of buildings."

"The removal of, for example, a bathroom or kitchen facilities before sale will not be regarded as making a building unsuitable for use as a dwelling. These are internal fittings and would not constitute structural changes to the dwelling that would mean the building is no longer suitable for use as a dwelling. A new kitchen or bathroom suite could be fitted relatively quickly and cheaply and is a common improvement to a dwelling. Likewise, substantial repairs required to windows or a roof would also not make the building unsuitable for use as a dwelling. Other examples of issues which may be easily addressed in the short term include the need to switch services back on and dealing with an infestation of pests."

No mention is made in this guidance of the Bewley case; HMRC appear to see it as being of narrow application on the basis that there the building could not safely be repaired, but required demolition. HMRC appear to set a higher threshold for what would count as sufficient dereliction for a property not to be suitable for use as a dwelling than the reasoning of the Tribunal would justify.

There had been indications in April and May 2019 that HMRC would refer back to a 2002 consultation paper published ahead of the introduction of SDLT which had said that a property which is out repair, but which can be repaired at reasonable cost, should be treated as a dwelling. Some wording about "beyond economic repair" was included in a draft of the new guidance, but was omitted from the final version.

9. JUDICIAL CONSIDERATION SINCE

The issue of disrepair was considered briefly by the First Tier Tribunal in a decision released on 9 April 2020 in the case of Fiander and Brower v HMRC. The case was mainly about multiple dwellings relief, but the judge referred to the issue of disrepair:

"We note that the property was in some degree of disrepair at the time of purchase (the heating was not working as the boiler needed replacing; there were damp problems such that some of the flooring needed replacing). We have considered if this meant it was not suitable for use as a dwelling as at completion. We are clear that "suitable for use" does not mean "ready for immediate occupation". It would have been obvious to a reasonable person observing the property on the completion date both that the property had been used for dwelling purposes in the relatively recent past and that the things that needed fixing – the boiler, replacement flooring – were not so fundamental as to render the property unsuitable as a place to live. Hence, in our view, the state of disrepair did not render the property unsuitable for use as a dwelling."

There are other aspects of the decision in Fiander and Brower and its approach to the taxpayer seeking to link:

(a) the extent of works of repair to be done for a property previously used as a dwelling so it would be suitable for use as a dwelling again; with

(b) the extent of works to make an annexe separate enough to qualify for multiple dwellings relief.

See section 18 below.

10. IMPLICATIONS FOR BUYERS OF DERELICT OR SEMI-DERELICT PROPERTY

A buyer of a derelict or semi derelict property can now refer to the Bewley case when self-assessing SDLT in making a decision as to whether the property should be subject to SDLT at the higher residential rates or at the non-residential rates. A buyer might seek to use the argument that even if the building is "capable" of use as dwelling, the test is one of "suitability" which requires rather more of the building.

The case also supports the argument that even if the factors making the building unsuitable for use as a dwelling are temporary ones, the statute requires the tests to be applied to the building as it is at the completion date, giving little weight to whether the building can be made suitable for use as a dwelling.

11. EARLIER TRANSACTIONS

As a result of this decision the SDLT treatment of some earlier purchases has been reviewed by taxpayers. It is relatively simple to amend a return within 12 months of the filing date of the transaction. (The filing date was usually 30 days from completion for transactions before 1 March 2019, but for transactions from that date is 14 days.) There is an "overpayment relief" for transactions within four years where the date for amendment has passed, but this is not so straightforward.

12. OTHER IMPLICATIONS OF THE DECISION

The Tribunal decision might tell us something about other SDLT issues:

- Cases where the buyer of a dwelling (Property 2) might have to pay the higher rates (the extra 3%) on account of owning another property (Property 1) and whether Property 1 is too derelict to count as a dwelling. The status of Property 1 would have to be considered as at the date of the purchase of Property 2. See 13 below.

- Cases where a person owning other dwellings has disposed of a previous home and whether that property was a "dwelling" at the time of the disposal, so that the person can benefit from the "replacement exception" to escape the 3% surcharge. See 14 below.

- Claims for first time buyers' relief, including where the buyer has previously acquired a property, but there is a question as to whether it was "suitable for use as a dwelling" on the date of its acquisition. See 15 below.

- Where a number of properties are bought in one transaction and the consequences of one or more not counting as a "dwelling" meaning that overall the transaction is of "mixed use" property. See 16 below.

- Whether older guidance is relevant when looking at SDLT issues generally. This was particularly relevant to the issue of whether a property counts as mixed use when it came with land which might go beyond the "garden and grounds" of the dwelling. Fresh guidance published on the garden and grounds issue makes this less relevant now, but the points are considered at 17 below, especially in the context of HMRC enquiries into previous returns.

- Assessing whether a property is suitable for use as more than one dwelling in the context of multiple dwellings relief (MDR), see 18 below.

- The interpretation of provisions which are intended to prevent the avoidance of tax. See 19 below.

- The interaction between the definitions of "residential property" and "dwelling". See 20 below.

A building might not be suitable for use as a dwelling but can still count as a dwelling because it is in the process of construction or adaptation to a dwelling. That is the result of a specific statutory provision extending the meaning of dwelling.

It should be noted that First Tier Tribunal decisions are not binding, merely persuasive, on other tribunals and some of the points considered below did not arise in the Bewley decision.

13. SURCHARGE, OTHER PROPERTY OWNED IS NOT A DWELLING?

The nature of another property owned (Property 1) might be relevant to whether the buyer of a dwelling (Property 2) has to pay the higher rates (with the 3% surcharge) on account of owning another dwelling. Condition C for the surcharge to apply to Property 2 is that another dwelling is owned. It might be an issue whether Property 1 is too derelict to count as a dwelling.

The status of Property 1 has to be considered as at the date of the purchase of Property 2. If on that date it is in the process of being restored for residential use, it will count as a dwelling even before it is suitable for use as a dwelling. There might be cases where Property 1 is uninhabitable and does not qualify a dwelling for these purposes. If so, it would not "count against" the buyer when assessing whether the higher rates apply to the purchase of Property 2.

14. SURCHARGE, RELYING ON A DISPOSAL OF A DWELLING

The higher rates of SDLT do not apply if Condition D is not met. This is about the "replacement exception". There are a number of conditions to be met to come within the replacement exception. One is that there is a disposal of a previous "dwelling" (there are other conditions to be met, such that the buyer had lived in that dwelling as their only or main residence). The property disposed of would have to be a "dwelling" at the time of the disposal.

So for example someone with a number of properties might be buying a new home to live in and might want to rely on the sale within the last three years of a previous home. If by the date of the sale the property was not a dwelling (for example the person might have partially demolished the building ahead of the sale to make the property more attractive to a developer) then the person does not have a disposal of a "dwelling" to rely on to come within the replacement exception.

15. FIRST TIME BUYERS' RELIEF

First time buyers' relief is only available for someone who acquires a "dwelling". It would not therefore be available if on the date of completion of the purchase the property is not suitable for use as a dwelling (nor is it in the process of construction or adaptation).

The status of a property acquired previously (Property A) could be relevant for a claim for first time buyers' relief on the acquisition of a dwelling (Property B), where there is a question as to whether Property A was "suitable for use as a dwelling" on the date of its acquisition.

First time buyers' status is not lost merely by having owned a dwelling, but by having acquired a dwelling. So if Property A when it was acquired was in such a poor condition that it was not a dwelling, but it has been disposed of since (even if it was brought into use as a dwelling in the meanwhile) then the purchase of Property B can still potentially qualify for the relief, particularly if Property A has since been dispose of.

There is more detail about first time buyers' relief available here.

16. ONE DERELICT PROPERTY MAKING TRANSACTION MIXED USE?

Let us take as an example the purchase of four properties in a single transaction for a total of £1.1M with the price apportioned as to £300K each for three dwellings and £200K for a property in poor condition which might not count as a dwelling.

If all four are dwellings then with MDR the SDLT comes to £48,000 (worked out on the average price of £275K at higher rates giving £12,000 which is then multiplied by 4).

If one of the properties is so derelict it does not count as a dwelling, then the mixed rates of SDLT apply which would mean (absent a claim for MDR) that the SDLT would be rather less, at £44,500.

It becomes complicated if one of the properties is not a dwelling, but MDR is claimed for the other three, with the application of the rules being unclear. The issues are explored in this paper about the interaction between MDR and the higher rates for mixed use transactions. There is uncertainty as to whether the standard rates of SDLT or the higher rates of SDLT apply to the dwellings element in this scenario.

- Either way the SDLT on the derelict property works out at £8,090 (£44,500 x £200,000 / £1,100,000).

- The SDLT on the dwellings element is either £42,000 (if higher rates apply) or £15,000 (if standard rates apply).

So the totals on the basis of the fourth property not being a dwelling and MDR being claimed are either:

- £50,090 if the correct interpretation of the rules is that the higher rates apply (not attractive when without MDR the SDLT would have been £44,500) or

- £23,090 if the correct interpretation of the rules is that standard rates of SDLT apply (meaning much less SDLT to pay).

The paper referred to includes a discussion as to how to approach the issues arising.

17. MIXED USE PROPERTY, ARCHIVED GUIDANCE

The treatment of mixed use property is an example of the possible impact of the Tribunal being prepared to look at archived HMRC guidance; it is likely to be more relevant to ongoing HMRC enquiries into returns for transactions completing before 25 June 2019 than to purchases since then of properties with extended areas of land.

Since the first version of this article on 20 February 2019, HMRC on 25 June 2019 published new pages of their Manual from SDLTM00440 to SDLTM00480. This sets out their views on the meaning of "garden and grounds" for the purpose of establishing whether a dwelling bought with a large area of land is subject to SDLT at the residential rates or at the lower mixed property rates. But before that date there was little guidance; the clearest statement of HMRC's views was in SP1/2004.

In the Bewley hearing, HMRC were selective in which parts of their guidance they brought to the Tribunal's attention, limiting it to SDLTM00365. HMRC did not show them SDLTM09525 which then

led the Tribunal to more detail about the meaning of "dwelling" in the archived Statement of Practice 1/2004 which the Tribunal appeared to find useful and which it found consistent with its decision.

There is also material in SP1/2004 on mixed use and garden and grounds which HMRC liked to say is not relevant. HMRC sometimes say that the SP1/2004 guidance was limited to Disadvantaged Areas Relief which has been abolished and downplay the fact that it is interpreting the meaning of "residential property" in Finance Act 2003 section 116 which applies widely. The reference to this archived material by the Tribunal might assist taxpayers (for purchases up to 25 June 2019) who have been relying what is said in SP1/ 2004 about mixed use property:

"35. Section 116(1)(b) includes within the definition of residential property 'land that is or forms part of the garden or grounds of a building within paragraph (a) (including any building or structure on such land)'. The test HMRC will apply is similar to that applied for the purposes of the capital gains tax relief for main residences (section 222(3) of the Taxation of Chargeable Gains Act 1992). The land will include that which is needed for the reasonable enjoyment of the dwelling having regard to the size and nature of the dwelling."

This text goes to the heart of the difficulties which have been experienced over the boundary between residential and non-residential property when looking at houses sold with significant areas of land. Typically this might be a country house with a large garden, an orchard and paddocks and / or fields. There has been controversy in establishing whether:

(a) The land with a dwelling is the "garden and grounds" of the dwelling (so that the whole purchase is charged at the appropriate residential rates) or

(b) Part of the land goes beyond that, so it counts as "non-residential" and results in the property as a whole counting as mixed use and so charged at the lower rates.

A large amount of SDLT often depends on what can be a nuanced test.

HMRC had apparently originally been prepared to apply the tests in a similar way to capital gains tax as suggested in SP1/2004. This attitude changed as the gulf widened between the residential rates of SDLT and the lower mixed property rates of SDLT. HMRC compliance teams have been conducting enquiries into many cases where mixed use treatment has been used. In the absence of helpful guidance available to them they often appeared to apply spurious tests, with a tendency to demand evidence of active non-residential use of part of the property on the day of completion and enquire in detail as to the use the buyer has made of the property after completion.

It is thought likely now that compliance teams will apply the tests in the new Manual pages, but it is an open question as to how to treat purchases completed before the date of publication of those pages.

There have now been four First Tier Tribunal cases on mixed use treatment looking at the "gardens and grounds" issue:

- Hyman
- Pensfold
- Goodfellow
- Myles-Till v HMRC

18. MULTIPLE DWELLINGS RELIEF

The Bewley case could be relevant when assessing whether a building or part of a building is a dwelling (I am calling it an "annex" for simplicity) for MDR purposes. There is more detail about MDR in the context of annexes and granny flats here. The definition of dwelling for MDR purposes is almost identical to the definition for higher rates purposes considered in Bewley. A question might be whether an annex, as well as being **capable** of use as a single dwelling, is also **suitable** for use as a single dwelling.

HMRC published guidance on the issue of whether a property counts as one or as two dwellings on 1 October 2019 running from pages SDLTM00410 to SDLTM00430. The guidance does not refer expressly to the Bewley case.

If the Bewley test is applied to MDR cases then perhaps a higher threshold applies as to the accommodation and facilities required for an annex to qualify as suitable for use as a single dwelling (it not being enough that it is capable of use as a dwelling). The decision emphasised the condition of the property as it was on the day of completion. For example weight was given to the absence of a central heating system, even though it might well have been that one could have been put in relatively easily (asbestos notwithstanding). This could raise further questions over MDR cases for annexes without a kitchen on the completion day, even if one could easily be fitted. SDLTM00385 suggests the removal of a fitted kitchen does not make a property unsuitable for a dwelling as the units could easily be replaced (presumably the room would have hot and cold water supplies, drainage and power suitable for a kitchen).

As mentioned at 17 above, the Tribunal was willing to look at archived guidance in SP1/2004. It might therefore be relevant that in para 41 of that guidance HMRC commented on the test of whether there are "six or more separate dwellings" in a transaction. They say: *"41.To qualify as 'separate', the dwellings must be self-contained. So for example, flats within a block, sharing some common areas but each with their own amenities will qualify as separate dwellings. Rooms let within a house will not constitute separate dwellings if tenants share amenities such as a kitchen and bathroom."*

The word "single" rather than "separate" is used in the definition of "dwelling" for MDR, but the guidance in SP1/2004 might still be of some relevance, despite being archived.

The case of Fiander and Brower mentioned at section 9 above shows another interaction between the Bewley issues of disrepair and multiple dwellings relief:

- Counsel for the taxpayer quoted the guidance HMRC had published in SDLTM00385 after Bewley where HMRC indicated that if works (such as refitting a kitchen) could be done relatively quickly and easily to make a property suitable for use as a dwelling, then it should still count as a dwelling.

- Counsel said that the fact that a corridor between the main house and the annex did not have a door could quickly and easily be dealt with by putting in a door so the two parts would have the necessary degree of privacy.

- The judge rejected this argument, saying *"Putting a lockable door, or some other kind of secure barrier between the two parts of the property, was not a matter of restoration or repair of physical features of the building to enable it to resume a use that would have been obvious*

to an objective observer of the property as at completion; rather, it was the addition of a new physical feature to enable it to serve a as a stand-alone (rather than a joined) dwelling."

So the "door was closed" on the argument that for multiple dwellings relief one should take into account minor alterations which could easily be made. If in another case it was a matter of replacing a door previously in place, then the argument might gain more sympathy.

These issues are highly topical, with many buyers of properties with annexes receiving unsolicited letters from up to six companies suggesting that they might have overpaid SDLT.

19. "READING DOWN" ANTI-AVOIDANCE PROVISIONS

The Tribunal looked at the structure of the provisions for the 3% surcharge; especially how for individuals the surcharge was not intended to apply where only one dwelling is owned. In contrast there is no "let out" for a first residential company acquisition. Those provisions charging a company buying a property were referred to by the Tribunal as "a blanket untargeted anti-avoidance provision":

"In our view, in the circumstances of this case where there can be no avoidance, we should be slow to find that a corporate purchase is liable to the higher rates of SDLT, especially by a developer as in this case who was to and did create a habitable and suitable dwelling on the site after demolition of the bungalow."

A problem with this approach is that the Tribunal have given a narrow interpretation to a definition of a "dwelling", which is defined for higher rates purposes generally, in order to restrict its meaning in an anti-avoidance provision. Can the same word mean different things in different contexts within the same schedule of the statute? Or can the same word, defined in a virtually identical way in another part of the statute, have different meanings depending on whether avoidance of SDLT might be an issue?

The answer seems to be: "yes, sometimes" for the SDLT provisions. For example, HMRC had a firm view that the defined expression "major interest" as used in Schedule 4ZA for the higher rates included an undivided share even before express provision to this effect was introduced on 29 October 2018. But they said same expression "major interest" might well not include such shares elsewhere in the legislation, despite being a defined term!

The word "transaction" clearly has different meanings in the SDLT legislation depending on the context.

The same word can have different meanings in different SDLT contexts, but it seems to be a bridge too far to say that "dwelling" would mean something different in the provisions for higher rates for acquisitions by development companies to the provisions for acquisitions by individuals.

It would have been much better had the Government included in the higher rates legislation the widely expected relief for developers. The Government could now do so, perhaps basing it on the relief from the 15% higher rate for "non-natural persons" buying a dwelling for over £500,000.

20. "DWELLING" AND "RESIDENTIAL PROPERTY" ARE NOT ALWAYS THE SAME

The expressions "dwelling" and "residential property" cannot always be used interchangeably.

There are some cases where a property is not a "dwelling" (so it cannot be taxed at surcharged rates), but is nevertheless "residential property" and so should be taxed at standard residential rates (rather than the lower rates for non-residential property). An example of such property is garden land alone, bought without the dwelling. If a developer buys from a house owner the garden of the house to develop, but not the house itself, SDLT would be assessed at the standard residential rates, though the garden would not be a "dwelling" to which higher rates apply.

The Tribunal in Bewley did not need to address the issue of whether a property can ever count as a dwelling but not be "residential property". It is thought that the rules should be interpreted so as to avoid such a strange result.

Consider the wording in Schedule 4ZA at para 8(3) about a dwelling including *"land that is, **or is to be**, occupied or enjoyed with a dwelling as a garden or grounds (including any building or structure on that land) is taken to be part of that dwelling."* It is different from the equivalent wording in the definition of residential property in s116 (which omits the "or is to be" wording).

Take as an example a house bought with a field. The field is in agricultural use at completion, but the buyer intends later to use it as part of the grounds of the house. That is clearly mixed use for s116 so the property would not count as residential property. In line with that, the "or is to be" wording in the definition of "dwelling" for higher rates purposes should not include that field, otherwise the same property would count as a "dwelling" for higher rates purposes even though not "residential property"!

It is thought the meaning of "or is to be" in the definition of "dwelling" for higher rates purposes is much narrower. Probably it is limited to the case of dwellings in the process of construction or adaptation, intended to cover the land earmarked to be their gardens and grounds.

HMRC updated guidance in SDLTM09750 on 30 March 2020 to say that the wording "or is to be" *"relates only to scenarios where a dwelling is already in the process of being constructed or adapted, not to any subsequent intentions of the purchaser once they acquire the land."*

21. CONCLUSION

Although only a First Tier Tribunal decision, the Bewley case gives food for thought on a number of SDLT issues which at present are causing difficulty.

By John Shallcross

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Offices in:

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Reading
Oxford
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