



**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2023/16164

STAMP DUTY LAND TAX – mixed use – whether part of a building was suitable for use as a dwelling – s 116(1)(a) Finance Act 2003

Heard on: 6 November 2024

Judgment date: 18 December 2024

Before

**TRIBUNAL JUDGE ROBIN VOS
DR CAROLINE SMALL**

Between

ANDREI TRETYAKOV

Appellant

and

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

Representation:

For the Appellant: **Patrick Cannon**, instructed by Broadway International Law Limited

For the Respondents: **Christopher Jones**, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This appeal turns on whether a building known as the Bacon Factory purchased by the appellant, Mr Tretyakov in June 2021 for £5.75 million was entirely residential or whether, as Mr Tretyakov contends, part of it was not residential.
2. Mr Tretyakov submitted his SDLT return on the basis that the building was mixed use resulting in a liability to stamp duty land tax (“SDLT”) of £277,000.
3. HMRC however are of the view that the building is entirely residential. If they are right, the SDLT liability is £761,250, a difference of £484,250.
4. Mr Tretyakov does not raise any procedural challenges to HMRC’s enquiry and closure notice. Nor does he take issue with HMRC’s calculation of the SDLT due should his appeal fail. The only issue for the Tribunal to determine is therefore whether the building was wholly residential or whether it was mixed use. The burden of proof is on Mr Tretyakov to show that the building was not entirely residential.

THE EVIDENCE OF THE BACKGROUND FACTS

5. We had before us a bundle of documents and correspondence which included various photographs of the building. The bundle also contained witness statements from Mr Tretyakov, his conveyancing solicitor, Mrs Pope, the vendor of the property from whom Mr Tretyakov purchased the building in June 2021, Mr Mark Stephen and Mr Stephen’s wife, Mrs Lauren Stephen who was also occupying the property at the time it was purchased by Mr Tretyakov.
6. Mr Tretyakov’s evidence was not challenged by HMRC and he was not cross-examined. This is not surprising as he was not occupying the property at the time of the purchase and could not therefore give any direct evidence of the use of the property prior to his purchase as opposed to his plans for the future use of the property (which both parties accept are not relevant to the issue which the Tribunal has to determine).
7. Mrs Pope did appear at the hearing and was cross-examined. However, again, there was little she was able to say which added anything to the documentary evidence available to the Tribunal as she had never visited the property and so her knowledge of the property was limited to what she had been told by the seller’s solicitor and the selling agents together with what was revealed by the searches which her firm undertook.
8. The evidence given by Mr and Mrs Stephen was however much more relevant as they were able to explain a great deal about the nature of the property and how it had been used. We will return to their evidence in more detail when we come to consider the main issue which we need to determine.
9. We should note that Mr Jones, on behalf of HMRC, sought to suggest that the evidence of Mr and Mrs Stephen should be given limited weight. He noted that the correspondence showed that Mr Stephen had been threatened with a possible claim by Mr Tretyakov’s lawyers should he refuse to co-operate in assisting Mr Tretyakov with HMRC’s investigation and invited the Tribunal to infer that, as a result of this, Mr and Mrs Stephen were likely to want to put a particular slant on the facts, noting that their witness statements focused on the commercial use of the building and made no mention of any non-commercial use.
10. Mr Stephen’s explanation for this was that the witness statements were drafted primarily as a response to various points made by HMRC in their review conclusion letter which itself dealt principally with the commercial activities. We accept this explanation.

11. In any event, our clear conclusion, having heard Mr and Mrs Stephen give their evidence under cross-examination, was that they answered the questions put to them openly and honestly. For the most part we therefore accept the evidence which they have given although we note that there were one or two minor inconsistencies between their witness statements and their oral evidence which we do think can be attributed to a desire to stress the commercial use of the building.

12. For example, in their witness statements, they say that the whole of the ground floor of the building was used for commercial purposes whilst it was clear from their oral evidence that only part of the ground floor was used for Mrs Stephen's business which was the only commercial use which was made of the building at the relevant time. To the extent that there were such inconsistencies, the evidence which they gave under cross-examination appeared to us to be more consistent with the documentary evidence (and in particular the photographs) with which we were provided.

13. At this stage, we will set out the background facts which are uncontroversial. We will deal with the nature, characteristics and use of the building later in our decision.

14. The Bacon Factory comprises three floors. It was originally used for smoking bacon. By 1985, permission had been given to convert the upper two floors to residential accommodation. The ground floor remained designated for planning purposes as light industrial. The ground floor has been subject to non-domestic rates (business rates) from at least 1990 and this continues to be the case.

15. Mr Stephen originally rented the upper two floors from the previous owner who used the ground floor to carry on a sculpture repair business.

16. At some point, the previous owner of the property applied for planning permission to convert the ground floor to residential use but was told that the application would be refused and so withdrew the application.

17. Mr Stephen purchased the entire building in June 2016. During 2017 and 2018, Mr Stephen undertook a complete renovation of the property engaging a business called Caldera Construction to carry out the work. The property was stripped to a shell and so everything was renewed.

18. Mr Stephen had intended to use the ground floor as a gin distillery connected with an Australian business he had invested in called Patient Wolf. However, in the end, terms could not be agreed with the Australian business and so this never went ahead.

19. We will say more about the characteristics of the ground floor in due course. For present purposes, it is sufficient to note that the ground floor was split into two parts. The front area consisted of a garage space with storage including an area which was walled off with fire proof glass which had been intended to house the gin still. The garage area had two sunken car spaces which allowed cars to be stored underground. The rear part of the ground floor contained a large bar area and games room, a wine cellar, sauna and further storage.

20. The ground floor was accessed either by a large roller door in the garage area (through which cars could enter) as well as a side entrance which was the main entrance for the building and through which both the ground floor and the upper floors could be directly accessed. There was a further set of stairs at the rear of the building connecting the ground floor to the upper floors.

21. The renovation was completed in January 2019. The building control certificate issued in January 2019 on completion of the renovation described the work as "refurbishment of first and second floor living accommodation and alterations to ground floor workspace".

22. Caldera Construction featured the refurbishment on its website describing it as a “high-end private residence”. It refers to the residence as “spanning three large floors and a multitude of rooms”. It goes on to note that “our team stripped the property to its shell in order to create a completely tailored and bespoke residence for our client”.

23. In October 2019, Lauren Stephen (then Lauren McMullen as she and Mr Stephen were not married at that stage) set up a company, Altra Living Limited (“Altra”) to create home accessories made from materials salvaged from commercial projects which had been repurposed and upcycled.

24. Mr Stephen allowed Altra to use the front part of the ground floor (the garage and storage area) for the purposes of its business. This included, in particular, storage of the salvaged materials, some work on the products such as wiring lamps and sewing, storing completed products, photographing items and packaging and shipping the goods to customers. The use of the garage area by Altra did not involve the installation of any plant or machinery.

25. Unsurprisingly, given the relationship between Mr and Mrs Stephen, there was no written agreement relating to the use of the ground floor by Altra and no rent was paid. Mr Stephen paid the business rates personally.

26. We should note that, in their statement of case and skeleton argument, HMRC disputed whether any commercial activity was in fact being carried on on the ground floor of the building. However, having heard the evidence from Mr and Mrs Stephen, Mr Jones conceded that the garage area (or at least part of it) was used for the purposes of Altra’s business.

27. When Mr Stephen came to sell the property in 2021, he used an agent called Nest Seekers. The marketing materials produced by Nest Seekers had this to say about the ground floor:

“Continuing the party atmosphere after hours takes you down to the ground floor, where the current owner has, quite frankly, gone to town. Yes, we are talking about a 40 foot private bar and games room. This is a fully stocked, fully functioning bar, the like of which you do not see in a private house; this is a gaming table, this is a pool room and this is a bespoke 900 bottle wine cellar.

The ground floor is so flexible, depending on what makes you tick, but currently it also houses a large gym and sauna/spa with chill-out zone, a large storage area (personal gin distillery anyone?) and a large garage area incorporating two sunken car spaces that keep your classics safely stored underground.”

28. Despite this description, Nest Seekers notified Mr Tretyakov that the mixed use rate of SDLT would apply. In addition, Mr Stephen’s solicitor produced a contract based on the standard commercial property conditions of sale. Separate energy performance certificates were provided for the ground floor and the upper two floors. The energy performance certificate for the ground floor incorrectly noted that the permitted use of the ground floor was “D2 general assembly and leisure plus nightclubs and theatres” as opposed to D1 – light industrial (which was the actual categorisation).

29. Following the purchase, Mr Tretyakov submitted his SDLT returns on the basis that the ground floor was used as a “factory”. HMRC opened an enquiry into the return, concluding, in January 2023, that the property was entirely residential. Mr Tretyakov appealed to HMRC and asked for an independent review. The review conclusion, which was issued on 19 September 2023, upheld HMRC’s original decision. Mr Tretyakov’s appeal to the Tribunal was lodged on 19 October 2023.

RESIDENTIAL PROPERTY – LEGAL PRINCIPLES

30. The amount of SDLT payable on a purchase of land depends on whether that land “consists entirely of residential property” or whether it “consists of or includes land that is not residential property” (s 55(1B) Finance Act 2003).

31. Residential property is defined in s 116(1) Finance Act 2003. To the extent relevant, this provides as follows:

“(1) In this Part ‘residential property’ means –

(a) a building that is used or suitable for use as a dwelling, or is in the process of being constructed or adapted for such use.

...

and ‘non-residential property’ means any property that is not residential property.”

32. There is no suggestion in this case that the Bacon Factory was in the process of being constructed or adapted for use as a dwelling. As we have already mentioned, HMRC now accept that part of the ground floor was used for commercial purposes (and so was not “used...as a dwelling) at the date of the completion of the purchase (which, in normal circumstances, is the “effective date of a land transaction” (see s 44(3) Finance Act 2003)).

33. The only question for the Tribunal to determine therefore is whether the ground floor was residential property on the basis that (in conjunction with the remainder of the building) it was “suitable for use as a dwelling” at the date of completion of the purchase.

34. Fortunately, the Upper Tribunal has provided some guidance as to the principles which should be applied in determining whether a building is suitable for use as a dwelling.

35. The most recent decision is *Mudan v HMRC* [2024] UKUT 307. The circumstances of that case are somewhat different to this appeal as the question was whether a dwelling which was in need of renovation and repair was suitable for use as a dwelling, whereas the question in this case is whether the ground floor of the Bacon Factory is suitable for use as part of the dwelling which comprises the remainder of the building. However, in our view, some of the principles explained by the Upper Tribunal are nonetheless relevant.

36. The Upper Tribunal in *Mudan* notes at [34] that:

“The words ‘suitable for use as a dwelling’ in s 116 must be construed by reference to the words used, in the context in which they are used, and taking into account the importance of the purpose of the legislation: *Rossendale Borough Council v Hurstwood Properties (A) Limited* [2021] UKSC 16.”

37. As far as the purpose of the legislation is concerned, the Upper Tribunal in *Mudan* refers at [36] with approval to the description of that purpose in *Henderson Acquisitions Limited v HMRC* [2023] UKFTT 739 (TC) where the First-tier Tribunal states at [16]:

“In our view the purpose of the SDLT provisions is to tax transactions relating to residential property at a higher rate than non-residential property... It is therefore right to construe the phrase ‘suitable for use as a ... dwelling’ by reference to that statutory purpose.”

38. In reality, the description in *Henderson* does not take matters much further other than perhaps to emphasise that the property in question must be able to be used for residential purposes.

39. In relation to this, the Upper Tribunal in *Mudan* agrees at [35] with the conclusion in *HMRC v Daniel Ridgway* [2024] UKUT 36 (TCC) at [32] that:

“...the purposive approach laid down by the Supreme Court in *Hurstwood* involves ‘ascertaining the characteristics of the buildings intended to be covered by the phrase ‘suitable for use as a dwelling’, and considering whether the [relevant property] falls within that class of buildings’.”

40. The Upper Tribunal in *Mudan* also reviewed the decision of the Upper Tribunal in *Fiander v HMRC* [2021] UKUT 156 (TCC). Although that case related to multiple dwellings relief, it considered at [41] the following principles to be equally applicable to the question as to whether a building is suitable for use as a dwelling (the paragraph numbers being the paragraph numbers in the decision of the Upper Tribunal in *Fiander*):

“(1) It is not enough to make a building suitable for use ‘if it is capable of being made appropriate or fit for such use by adaptations or alterations’: [48(1)].

(2) Suitability for use falls to be determined by the physical attributes of the property, with the caveat that ‘a property may be in a state of disrepair and nevertheless be suitable for use as either a dwelling or a single dwelling if it requires some repair or renovation’: [48(1)].

(3) There is an important distinction between adaptations or alterations and repairs or renovation: that is apparent when one reconciles points (1) and (2) above, and is made explicit in the discussion of the distinction at [68].

(4) Whether a building which does require some repair or renovation is suitable for use is a question of degree for assessment by the FTT: [48(1)].

(5) There are a number of factors relevant to suitability for use, and the question involves a multi-factorial assessment, taking into account all the facts and circumstances: [48(7)].

(6) In considering that distinction, recent use and the history of the property are relevant factors: [67] and [68].

(7) The test is not whether the building was ready for immediate occupation as at completion: *Fiander* FTT at [64], implicitly approved in *Fiander* UT at [65] and [68].”

41. The conclusion of the Upper Tribunal in *Mudan* at [47] was that:

“...the focus of the enquiry made necessary by the wording in s 116 is to determine whether the essential characteristics and nature of the chargeable interest that is acquired are those of a dwelling...”

42. Although this conclusion was in the context of a property that needed repair, in our view the focus of the enquiry is the same in all cases, being based on whether the essential characteristics and nature of the relevant land or the relevant part of the land mean that it is suitable for use as a dwelling. This must be assessed taking into account all relevant circumstances.

43. Mr Cannon, appearing for Mr Tretyakov submitted that, if property is being used for commercial purposes at the relevant time, it cannot be said to be suitable for use as a dwelling.

This is, he says, particularly the case with a property which has consistently been used for commercial purposes.

44. By way of example, Mr Cannon referred to barristers' chambers which may have say three floors used as chambers and an upper floor used as residential accommodation. It may be the case that the floors used as the barristers' chambers could, without difficulty, be used as residential accommodation as they may just contain a number of rooms together with a kitchen and bathroom. However, he suggests that, as a matter of policy, it would be wrong to bring such buildings within the scope of residential property.

45. However, when pushed by the Tribunal to say where the line should be drawn between property which should be treated as residential and property which should not, he accepted that no dividing line could be drawn and that, in accordance with the principles set out above, each case will be a matter of evaluation for the Tribunal taking into account all of the relevant characteristics of the land.

46. As set out above, one of those characteristics includes the way in which the land has been used in the recent past as well as the history of the property. That might indicate that a typical barristers' chambers which has been used as such for many years would not be residential property. We do not however accept that the mere fact that the property has been used for commercial purposes of itself means that it is not suitable for use as a dwelling. It is simply one of the factors to take into account.

47. We should mention two other points. The first is that the parties were agreed that a purchaser's intentions as to the future use of the property are irrelevant to the determination as to whether that property was residential at the time of completion (see *Ladson Preston Limited v HMRC* [2022] UKUT 00301 (TCC) at [30]).

48. The second point relates to the relevance of any planning restrictions, bearing in mind that, in this case, it is common ground that the permitted use of the ground floor of the Bacon Factory was for light industrial purposes and not for residential purposes. Ultimately, both parties accepted that planning restrictions are a relevant factor but are not determinative. It will of course be for the Tribunal to determine what weight should be placed on this particular factor. As mentioned by Mr Jones, who appeared for HMRC, this is confirmed by the Upper Tribunal in *HMRC v Ridgway* [2024] UKUT 00036 (TCC) at [47].

SUITABILITY OF THE GROUND FLOOR OF THE BACON FACTORY FOR USE AS A DWELLING

49. The question as to whether the Ground floor of the Bacon Factory was suitable for use as a dwelling at the date of the completion of the purchase by Mr Tretyakov was approached by the parties on the basis as to whether it was suitable to be comprised in the dwelling which undoubtedly was contained on the first and second floors of the building. There was no suggestion that the ground floor on its own might be suitable for use as a separate dwelling. We therefore approach the question on this basis as well.

50. Before turning to the parties' submissions, we should first set out our findings in more detail as to the nature and the characteristics of the Ground floor of the Bacon Factory.

51. As we have said, the Ground floor consists of two main areas. The area at the front of the building immediately behind the roller door is a garage and storage area with a concrete floor and bare walls. There are some relatively small windows with opaque glass but it is apparent from the photographs that we have seen that there was plenty of electric lighting. Mr Stephen's evidence, which we accept, is that this area was not insulated.

52. The bar and games room to the rear of the Ground floor has no windows. However, the division between the games area and the garage is a glass partition and so some nature light

comes through the windows in the garage area. We are able to see from the photographs that the bar area and games room are carpeted and have bespoke lighting.

53. Turning to the use of the Ground floor of the Bacon Factory, it is clear that, until Mr Stephen purchased the property in 2016, the Ground floor had been used continuously for commercial purposes. Mr and Mrs Stephen both confirmed in their oral evidence that, from the completion of the renovation in January 2019 at least until Altra was established in October 2019, the garage area was used for parking their cars and that they made personal use of the bar and games area including, in particular, for hospitality purposes. This use of the bar and games area continued after Altra was established as the business was only using the front part of the ground floor.

54. As we have already mentioned, the rear part of the ground floor also contained a wine cellar. Mr Stephen confirmed that this was used personally by him.

55. Mr Cannon makes a number of points in support of his submission that the ground floor of the Bacon Factory is not suitable for use as a dwelling.

56. He notes first that, historically, this part of the property has been used for commercial purposes. Although the property was fully renovated in 2017/2018, the renovations to the ground floor were carried out with a view to its continued use for commercial purposes, being the proposed Patient Wolf Gin Distillery. The bar area would have been used for tastings and the wine cellar for storage whilst the gin still itself would be within the fire proof glass enclosure in the garage area. Although that did not come to fruition, the front part of the ground floor was, of course, used by Altra for its business and so continued to be used for commercial purposes.

57. All of this, Mr Cannon argues, is supported by the fact that the planning restrictions in place required the ground floor to be used for commercial purposes and did not permit it to be used for residential purposes and that business rates continued to be payable throughout the entire period. Given the history, Mr Cannon suggests that the planning restrictions should be given significant weight.

58. Turning to the physical characteristics of the property, Mr Cannon submits that the concrete flooring, the lack of insulation, the roller door and the restricted windows all mean that the ground floor is unsuitable for use as a dwelling. In addition, he notes that the area which is walled off with fire proof glass is not something which would be expected in premises used as part of a dwelling but instead is appropriate to commercial use.

59. Mr Cannon also relies on the separate energy performance certificate and the fact that the contract for sale was based on the standard commercial conditions of sale as supporting the proposition that the ground floor was suitable for commercial use rather than residential use.

60. Whilst Mr Cannon accepts that the rear of the ground floor was not used for commercial purposes, he described its use as being for hospitality rather than living. He also made the point that the ground floor only represented one third of what was a very large building and speculated that an occupier of the upper two floors would have no need to use the ground floor for residential purposes given the extent of the upper two floors.

61. Mr Cannon acknowledges that there is no real separation between the ground floor and the upper floors but suggests that this is not a significant issue where the question is whether the relevant part of the building is suitable for use as a dwelling as opposed to the question (which arises in the context of the multiple dwellings relief) as to whether the relevant part of the building is a separate dwelling.

62. As far as the marketing materials from Nest Seekers and Caldera Construction are concerned, Mr Cannon argues that, as these are just designed to attract business or to sell the property, they cannot be relied on as an accurate description of the property.

63. Mr Jones, on behalf of HMRC, submits that as a result of the renovation, there was a fundamental change in the character of the property by 2019 when the work was completed. On this basis, he suggests that the historic use of the building is irrelevant and that what should be considered is the way the building was used since 2019.

64. Mr Jones notes that both Mr and Mrs Stephen accepted that the ground floor could be used in a variety of ways and that the rear of the ground floor was in fact used personally. He observes that the flexibility of the use of the ground floor is supported by the marketing materials provided by Nest Seekers.

65. As far as the commercial use by Altra is concerned, Mr Jones suggests that there was no permanence to the occupation of the space by Altra as Mrs Stephen accepted that the arrangement could be brought to an end at any time. Given that there was no plant or machinery installed in the premises, if Altra were to move out, he submits that there is no reason why the front area of the ground floor should not be used as a garage and a storage area for personal items, as indeed appears to be the case prior to Altra being established.

66. Whilst there may be little natural light on the ground floor and a lack of insulation in the front area as well as a concrete floor, Mr Jones makes the point that this is entirely consistent with the front area being a garage for private parking.

67. As far as planning permission is concerned, Mr Jones submits that, given the evolution of the property, little weight can be placed on the planning restrictions particularly given that, at least parts of the ground floor, have been used for personal as opposed to commercial purposes. In addition, he notes that, on his own evidence, Mr Stephen knew that it was likely that an application for use of the ground floor for residential purposes would be refused given what the previous owner had told him about their own application.

68. Mr Jones submits that the payment of business rates is irrelevant. He agrees that the ground floor had been within the scope of business rates for many years but, based on information provided by the local authority, observes that, once the property was within the scope of business rates, it would remain subject to business rates unless somebody made an application for the property to be removed from the non-domestic rates register.

69. As explained below, taking all of the factors into account, we have no hesitation in concluding that the ground floor of the Bacon Factory was suitable for use as part of the overall dwelling at the date of completion of the purchase by Mr Tretyakov.

70. We agree with Mr Jones that, as a result of the renovation, the historical use of the property prior to 2019 is a fact which, although not irrelevant, carries little weight. The ground floor after the renovation was completely different to the ground floor before the renovation. For example, Mr Stephen explained in his evidence that, before the renovation, the ground floor contained a sand blasting room used for the purposes of the previous owners' sculpture repair business. That is very different to the wine cellar, bar and games room which replaced it in the rear of the building.

71. As part of the evidence, we were provided with a floor plan of the building. This describes the front part of the ground floor as "garage/gym" together with some storage (including the area walled off by the fire proof glass). The other areas of the ground floor are labelled "sauna", "bar", "games room", "wine cellar" as well as a storage room and a utility room. The floor plan also shows the two underground car ports. There is no mention or suggestion of any commercial use.

72. As we have just mentioned, the garage area is also shown on the floor plan as a gym. We note that in a number of the photographs provided, there is gym equipment in the garage area as well as the items being stored for Altra. Whilst Mr and Mrs Stephen were not specifically asked whether the garage area had been used as a gym, Mrs Stephen agreed that it was suitable to be used as such. Given the presence of the gym equipment, we infer that it was used as a gym.

73. In our view, the lack of separation between the ground floor and the upper floors is also relevant. There were two staircases through which the ground floor could be accessed from the first floor. In addition, the main entrance to the property provided direct access both to the ground floor garage area and to the upstairs floors.

74. Although we accept that the garage area was being used by Altra between October 2019 and the date of sale in June 2021 and that this part of the building was not therefore used as a dwelling, that does not mean that this part of the ground floor was not suitable for use as a dwelling.

75. It was clearly designed and constructed as a garage with storage and, as Mr Jones says, it would not be expected that a garage would have carpets, insulation or significant natural light. Mr Cannon accepted in his submissions that a garage would form part of a dwelling if it was not used for commercial purposes.

76. In our view, it cannot be said that just because a garage is used for commercial purposes, it is not suitable for use as part of the dwelling. The reality is that the bulk of the commercial use consisted in the storage of salvaged items in the garage area. There is no reason at all why the storage areas could not have been used to store personal items. Indeed, it is no doubt the case that many people do use their garages for storage in this way.

77. As far as the rear is concerned, both Mr and Mrs Stephen readily accepted that this had been used by them for personal purposes. We do not accept Mr Cannon's distinction between hospitality and living. An area used for personal hospitality can be just as much part of a dwelling as rooms that are used on a daily basis.

78. In addition, we can see no possible reason for having a sauna on the ground floor other than for it to be used as part of the dwelling. There was no suggestion from Mr Stephen for example that, if his gin distillery business had come to fruition, the sauna would have been used as part of that business.

79. No modification or adaptation at all would have been needed for the ground floor to be used in its entirety as part of the dwelling given that there was no plant or machinery associated with the Altra business. All that was needed was for the stock to be removed.

80. We agree with Mr Jones that, in this case, the planning restrictions do not tip the balance in favour of the ground floor being unsuitable for use as part of the dwelling. Although such use would be in breach of the planning restrictions, the fact that the ground floor could easily be used as part of the overall dwelling and that Mr and Mrs Stephen in fact used the ground floor for personal purposes between January 2019 and October 2019 in our view carries more weight than the planning restriction.

81. We also do not consider that the payment of business rates is a significant factor. Given that there was a planning restriction requiring the ground floor to be used for commercial purposes and part of the ground floor was being used for commercial purposes, it would perhaps be surprising if Mr Stephen had taken steps to get the ground floor removed from the register of non-domestic rates. The fact that he did not do so therefore tells us nothing. The same is true of the fact that there was a separate energy performance certificate for the ground floor.

82. Our conclusion that the ground floor of the Bacon Factory was suitable for use as a dwelling is supported both by the testimony of Caldera Construction on their website and the marketing materials produced by Nest Seeker for the purposes of the sale of the property by Mr Stephen.

83. These cannot, in our view, be as easily dismissed as Mr Cannon suggests. Although Caldera Construction of course has an interest in attracting business, their description of the ground floor is entirely consistent with the floor plan and other evidence with which we have been provided. The same is true of the description provided by Nest Seekers. Whilst it may be the case that the ground floor was designed with a commercial purpose in mind, and could be used for a commercial purpose, we have no doubt that it was also suitable for use as part of the overall dwelling.

84. Mr Cannon's suggestion that the occupiers of the upper two floors would have no need of further space is, in our view, purely speculation. The attractions of having parking for four cars as well as a wine cellar, sauna, games room, bar and gym are obvious even though, to most people, they may be unnecessary.

CONCLUSION

85. Although a part of the ground floor of the Bacon Factory was used for commercial purposes at the relevant date, the property, taken as a whole, was either used as a dwelling or suitable for use as a dwelling and therefore comprised residential property in its entirety. The higher rates of SDLT applied by HMRC in their closure notice are therefore due and this appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

86. 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.

**ROBIN VOS
TRIBUNAL JUDGE**

Release date: 18 December 2024