



Appeal number: FTC/125/2013

VALUE ADDED TAX - zero rating - DIY residential conversion scheme - conversion of two commercial buildings on same site into live/work unit consisting of residential building and workshop/office building - whether residential building designed as a dwelling - whether planning permission description of development as live/work unit and/or condition that workshop/office only to be used/operated by occupiers of dwelling prohibited separate use or disposal of dwelling - no - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

ANTHONY BARKAS

Respondent

Tribunal: JUDGE GREG SINFIELD
JUDGE CHARLES HELLIER

Sitting in public at 45 Bedford Square, London WC1 on 4 September 2014

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

Michael Jones, counsel, instructed by HSKS Greenhalgh, chartered accountants,
for the Respondent

DECISION

Introduction

1. The Appellants (“HMRC”) appeal against a decision of the First-tier Tribunal (Tax Chamber) (“the FTT”) released on 13 March 2013, [2013] UKFTT 186 (TC),
5 (“the Decision”). In the Decision, the FTT (Judge Kevin Poole and Ms Beverly Tanner) allowed an appeal by the Respondent (“Mr Barkas”) against HMRC’s decision to refuse his claim under the “DIY Builders Scheme” in section 35 of the Value Added Tax Act 1994 (“VATA”) for repayment of VAT incurred on materials used in the conversion of a commercial building into a dwelling. The appeal turned
10 on whether the planning permission prohibited the separate use or disposal of the dwelling, which was part of a “live/work unit”. The FTT held that the permission did not, on its terms, prohibit the separate use, or disposal of the dwelling and, accordingly, Mr Barkas was entitled to the repayment.

The statutory VAT provisions

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

“(1) Where -

- (a) a person carries out works to which this section applies,
- 20 (b) his carrying out of the works is lawful and otherwise than in the course or furtherance of any business, and
- (c) VAT is chargeable on the supply, acquisition or importation of any goods used by him for the purposes of the works,

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

25 (1A) The works to which this section applies are -

- (a) the construction of a building designed as a dwelling or number of dwellings ...”

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

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

- 35 (a) the dwelling consists of self-contained living accommodation;
- (b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;
- (c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar
40 provision; and

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

The facts

5 4. The FTT set out the facts, which were not disputed, at [8] to [18] of the Decision. The relevant facts for this appeal are as follows.

5. The site at Sich Lane, Woodhouses, Yoxall, Staffordshire originally included two separate barn-like buildings for which there was class B1 light industrial use planning consent. There was no physical connection between the buildings, though
10 they were only a short distance apart on the same curtilage. The properties had been occupied for the purposes of a small business, which had failed. All attempts to re-let the premises to another business user had failed, over a period of just under 12 months.

6. On 27 September 2010, an application was made to the local planning authority (the East Staffordshire Borough Council (the “ESBC”)) for planning consent. We shall not attempt to summarise the terms of the application at this stage since part of Mr Zwart’s argument related to the proper construction of the application, but it involved an application for a “live/work unit” and the conversion of one of the two buildings (the “left hand building”) into a dwelling.

20 7. On 16 November 2010, the ESBC granted planning consent. We set out the details of that consent below but it was subject to number of conditions. Condition 6 read:

25 “The workshop/office within the application site shall only be used/operated by the occupiers of the dwelling hereby granted permission.”

8. Thereafter, the left hand building was converted into a dwelling and the other remained an office.

9. Mr Barkas applied for a refund of the VAT incurred on the costs of the conversion of the left hand building into a dwelling. HMRC refused Mr Barkas’s
30 claim for repayment of VAT on the ground that the condition in Note (2)(c) to Group 5 of Schedule 8 to the VATA was not satisfied because the separate use of the dwelling was prohibited by Condition 6 of the planning consent. HMRC had written to the ESBC which replied saying that they considered the two buildings to be a single live/work unit and that they would not permit the separate disposal of the
35 dwelling. In their review letter, HMRC said that they considered that the fact that planning permission was given for one live/work unit indicated that the two buildings should be used together as one live/work unit and, as a result, there was a prohibition on separate use. In the alternative, HMRC stated that the ESBC’s view that they would not permit the separate disposal of the dwelling showed that there was a
40 prohibition on separate disposal.

The FTT's decision

10. At [35] of the Decision, the FTT limited its consideration to “whether the ‘separate use or disposal of the dwelling’ was ‘prohibited’ by any ‘term’ of condition 6”. It gave no weight to the opinion of the ESBC.

- 5 11. The FTT found that Condition 6 did not prohibit the separate disposal of the dwelling, stating at [38]:

10 “Whilst the practical effect of Condition 6 was (and is) to make it unlikely that the owner would ever wish to dispose of the dwelling separately from the commercial unit, Condition 6 does not, in our view, ‘prohibit’ such disposal. Condition 6 simply means that if the owner of the dwelling chooses to dispose of it separately, he is likely to be left with a white elephant in the form of a commercial building which he cannot lawfully use or operate. However unlikely an outcome that may be in practical terms, it does not, in our view, amount to a prohibition within the meaning of Note 2(c).”

- 15 12. In relation to the question of separate use, the FTT said:

20 “39. Similarly, when considering separate ‘use’ rather than ‘disposal’, the owner of the dwelling would be entitled either to use/occupy the commercial building or he would be entitled to leave it unused and unoccupied, without any breach of Condition 6. The fact that the owner is unlikely, in practical terms, to leave the commercial building completely unused/unoccupied cannot in our view be regarded as meaning that there is some kind of prohibition, imposed by Condition 6, against the separate use of the dwelling. We cannot see therefore how it could be said that the separate use of the dwelling is ‘prohibited’ by Condition 6.

25 40. In short, if there is a prohibition against the use or operation of building B by any person other than the occupier of building A, that will clearly amount to a prohibition against the separate use of building B. However, it cannot properly be said that the same prohibition also takes effect to prohibit the owner or occupier of building A from separately using or disposing of building A in whatever way he wishes, however ill-advised he may be in practical terms to do so.

- 30 13. The FTT therefore allowed the appeal.

35 The parties' arguments

14. Mr Zwart's principal submission before us was that, although it addressed the effect of Condition 6, the FTT did not address the restrictions imposed by the description of the permitted development in the planning permission as a live/work unit. He contended that, properly construed, that description precluded the separate use of the dwelling from the other building.

- 40 15. In more detail, Mr Zwart submitted:

- (1) a planning authority has no power to grant permission for more than was applied for (*Uttlesford District Council v Secretary of State for the Environment* (1989) JPL 685 at 688);
- 5 (2) properly understood, that which was applied for in this case was use as a live/work unit in which the dwelling would not be used separately from the workshop. The permission had to be construed as restricted to such use;
- 10 (3) a permission is to be construed as a reasonable reader would understand it and not by reference to the parties' intentions (*Carter Commercial Developments Ltd (in Administration) v Secretary of State for Transport Local Government and the Regions* [2002] EWCA Civ 1994, [2003] JPL 1048 at 27-38 applying *R v Ashford Borough Council ex parte Medway District Council* [1999] PLCR 12 at 19 paragraphs (1) to (4));
- 15 (4) as a general rule regard may be had only to the planning permission itself in that exercise but where the permission incorporated other documents by reference - such as the application, they become part of the permission and the permission is to be construed accordingly;
- (5) the permission in this appeal expressly incorporated the application documents;
- 20 (6) a description of the permitted development could have the effect of limiting the development to which consent was given (*Wilson*, cited below, and *Uttlesford*)
- (7) properly construed, the permission given by the ESBC, taken with the application documents, gave permission for the use of the site as a whole as a live/work unit in which the separate use of the dwelling from the workshop building was prohibited;
- 25 (8) further, and in the alternative, the evidence that the ESBC would not permit the separate disposal of the dwelling meant that its separate disposal should be regarded as prohibited.
- 30 16. The grounds of appeal also included a contention that the FTT had erred by not interpreting "prohibited" in Note (2)(c) sufficiently broadly; had they done so, they would have treated the consequences of failing to comply with the development restriction as a prohibition on separate use or disposal.
- 35 17. Mr Michael Jones, who appeared for Mr Barkas, submitted that the planning consent in this case is unambiguous: there is no prohibition on the separate use or disposal of the dwelling. Even if the application is taken into account, the same conclusion applies. The ESBC gave permission on the basis that the "live" element and the "work" element were to comprise separate buildings each with different uses. The only restriction was in Condition 6, which the FTT correctly construed as not limiting the separate use of the dwelling. The local authority's view of the law was
- 40 irrelevant.

The application for the admission of further documents.

18. HMRC made an application that this tribunal consider, in addition to the documents considered by the FTT, certain documents which were annexed to the application for planning permission. The basis of HMRC's application was that these documents were relevant to the proper construction of the terms of the planning permission. We set out our conclusion on this application after considering the approach to be taken to that task.

Discussion

The approach to be taken to the construction of a planning permission

19. In *HMRC v Shields* [2014] UKUT ***** TCC, the Upper Tribunal (which included one of the panel in this appeal) considered the argument advanced on behalf of HMRC (represented in that case, as in this, by Mr Zwart) that the description of a permitted development in a planning consent permitting the use of the building as an equestrian manager's residence so limited the permitted use of the dwelling that there was a prohibition on separate use so that the condition in Note (2)(c) was not satisfied. The Upper Tribunal said this:

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

43. The effect of the term should be determined by construing the words of the planning permission, including any conditions and reasons, and applying those words to the facts of the particular case. The terms of the permission include any approved plans and drawings that show the detail of what has been permitted. Where the words of the term are ambiguous or unclear then it may be possible to resolve the meaning of the term by reference to the context in which the term was imposed, eg the application and correspondence relating to it. In this approach, we follow that of the courts in construing planning permissions which was summarised by Keene J (as he then was) in *R v Ashford Borough Council ex parte Shepway District Council* [1999] PLCR 12 at 19-20:

5 ‘(1) The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions: see *Slough Borough Council v Secretary of State for the Environment* (1995) JPL 1128, and *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196.

10 (2) This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application: see *Slough Borough Council v Secretary of State* (ante); *Wilson v West Sussex County Council* [1963] 2 QB 764; and *Slough Estates Limited v Slough Borough Council* [1971] AC 958.

20 (3) For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as ‘... in accordance with the plans and application ...’ or ‘... on the terms of the application ...,’ and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted: see *Wilson* (ante); *Slough Borough Council v Secretary of State for the Environment* (ante).

35 (4) If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity: see *Staffordshire Moorelands District Council v Cartwright* (1992) JPL 138 at 139; *Slough Estates Limited v Slough Borough Council* (ante); *Creighton Estates Limited v London County Council*, *The Times*, March 10, 1958.

40 (5) If a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at extrinsic evidence to resolve that issue: see *Slough Borough Council v Secretary of State* (ante); *Co-operative Retail Services v Taff-Ely Borough Council* (1979) 39 P&CR 223 affirmed (1981) 42 P&CR 1.’

45 44. As Keene LJ made clear subsequently in *Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476 at [21], what he said in *Ashford* related to an outline planning permission and was not intended to apply to the interpretation of a full detailed planning permission. A full planning permission would always require plans and drawings in order to be understood because it does not purport to be a complete and self-contained description of the

permitted development. Accordingly, there is no need for a full planning permission to contain express terms in order for the plans and drawings to be incorporated. In this case, however, the planning permission for the proposed development expressly stated that it was granted in accordance with the application and subject to the conditions.

Development description

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

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

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

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

'It seems to me that it can be said in the present case that the form of permission, referring to an agricultural cottage, has in fact specified the purposes for which the building may be used ...

... the applicant asked for and received permission to erect 'an agricultural cottage' and she asked for nothing else ... The cottage, therefore, was one which was, as I see it, limited as regards occupation to an occupant in connection with agriculture.'

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

application and plans]’. In the High Court, the judge referred to a number of cases, including *Wilson*, and observed that:

‘... where the description of the development permitted contained a restriction or limitation relevant for planning purposes, it had the effect of limiting the development.

...

In reconsidering the matter, the Secretary of State had to start from the position that there was already a restriction on occupancy arising from the terms of the application, and then had to decide whether a condition on occupancy was required. The fact that there was a restriction on occupancy arising from the terms of the application did not necessarily mean that a condition was mere duplication. There were differences, for example in respect of enforcement, which could mean that an occupancy condition was desirable in addition to the restriction of the development.’

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

20. We adopt the same approach to the construction of the planning permission in this case as the Upper Tribunal in *Shields*. Accordingly, we accept Mr Zwart’s submission that the terms of the planning permission, and in particular its use of the description ‘live/work unit’, may affect the permitted use of the dwelling. However, we also accept, as Mr Jones says, that a “live/work facility” or a “live/work unit” is not a term of art.

21. We consider that in relation to the description of the permitted development in this case as a ‘live/work unit’, two questions overlapping must be answered, namely:

(1) What, in the context of the planning permission in this case, does ‘live/work unit’ mean?

(2) Does the description ‘live/work unit’, properly understood, prohibit use or disposal of the left hand building (the ‘live’ part) separately from the right hand building (the ‘work’ part)?

22. We discuss these points below after considering HMRC’s application to adduce further evidence.

HMRC's application to adduce further documents

23. HMRC applied to put before us those documents that had formed part of the application for planning permission which had not been before the FTT. The FTT had before it: the permission granted by the ESBC, some plans, the application form and a five paragraph letter from Peter Diffey & Associates (town planning consultants) without the Appendices to that letter. The additional documents for which HMRC sought permission consisted of: (i) a location map and a smaller scale plan of the whole site edged in red (the FTT had a somewhat larger scale plan but it was not edged in red), (ii) a plan of the existing ground floor of the left hand building, (iii) Appendix 1 to the letter from Peter Diffey, headed "Design and Access and Sustainability Statement" and (iv) Appendix 2 to that letter which was a report by an agency which had attempted to let the buildings and their letting conditions.

24. HMRC sought to introduce this evidence in their application to the FTT for permission to appeal to this tribunal. The FTT refused permission to appeal. HMRC applied to the Upper Tribunal for permission to appeal. In their application they said

"By its renewed application to the Upper Tier (sic), the Respondents seek permission to appeal on the narrower and following basis (limited to those documents before the FTT ..."

25. Permission to appeal was given on that basis. HMRC now seek to rely on the additional evidence. Mr Zwart says that it is clear from *Wilson* that it is "proper and indeed necessary" to refer to the terms of the application and that it is thus just to admit the extra documents. Mr Jones replies that the discretion to admit further evidence given to this tribunal by Rule 15(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules") is to be exercised in accordance with the overriding objective of dealing with cases justly and fairly; he draws our attention to *Reed Employment Plc and others v HMCR* [2014] UKUT 0160 (TCC) in which the Upper Tribunal said that the case of *Ladd v Marshall* [1954] 1 WLR 1489 was "of persuasive authority as to how to give effect to the overriding objective of doing justice". That case set out three conditions for giving leave to adduce further evidence on appeal, namely that leave should only be given if:

- (1) it is shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- (2) the further evidence is such that if given it would probably have an important influence on the result of the case, though it need not be decisive; and
- (3) the evidence is such as is presumably to be believed.

26. If the additional documents were of any importance then we would have had to have struck a balance between the availability of the documents to HMRC on the local authority's website, the fact that they were originally produced by or on behalf of the taxpayer and thus their contents can have been no surprise to him, their relevance, and the nature of the permission to appeal given to HMRC. In this case, however, that is not necessary.

27. Whilst we accept that the ESBC's planning consent was expressed to be "in accordance with the submitted documents and plans" and that, as a result, the contents of these documents were potentially relevant to the construction of the terms of the planning permission, we found them of very little assistance. We set out below those
5 elements of the Appendices that have a bearing on the nature of the permission granted. To our minds, they simply replicate information in documents already before the FTT. Nor did we find the red lined plan of any significance: the site for which permission was sought was clear from the plans before the FTT. Indeed Mr Zwart only referred us to the red lined plan and to two short passages in the report from the
10 letting agents. The application was ill-founded. We refuse it, although our decision would have the same if we had allowed it.

The planning permission application

28. In this appeal, the terms of the planning application are relevant to the nature of the permission granted for two reasons. First, because we accept that planning
15 permission cannot be given for more than that which is applied for; and second, because the terms of the application are relevant to the construction of the permission since, as will be seen, the letter from the ESBC giving permission expressly incorporated the application,

29. We therefore start by considering the terms of the application: asking whether
20 the application, in using the term live/work facility or otherwise, seeks a permitted use in which the dwelling may not be used or disposed of by a person separately from the other non-residential part of the unit.

30. On the application form, the proposal is described as "conversion of B1 (light industrial) workshop to live/work unit". The application refers to a report and a
25 "design and access and sustainability report", and specifies the site area as 0.16 hectares. The report referred to appears to be the letter from Peter Diffey and Associates, and the "design and access and sustainability" report appears to be Appendix 1 to that letter.

31. The letter is headed "Change of use from B1 (light industrial use) to live/work
30 facility (dwelling and B1 use)". In that letter, the proposal is described thus:

"It is proposed that the existing building's [*sic*] permitted use changes from (B1) light industrial workshop to a live/work facility with the left hand building being converted to a dwelling whilst the right hand building is used as offices/storage/workshop (general B1 use). ... The
35 business in the right-hand building will be carried on by the occupier of the left-hand building (the applicant intends to live at and relocate his business to this site - see further information below)."

32. The first part of this passage is confusing. It refers to changing the existing
40 "building's" (in the singular) permitted use to a live/work facility but refers to that facility involving both the left and right hand buildings. We consider that "building's" was a typographical error for "buildings". It is clear that, in this first sentence, the letter is seeking a change of permitted use which applies to the site as a

whole and in which different buildings will have different uses rather than simply a change of use of the left hand building.

33. We note the use of ‘facility’ rather than ‘unit’ in this passage. The use of that term possibly suggests a limitation on the separate use of the buildings but may also suggest merely a place where a person may (but not must) both live and work; further “facility” may have been used simply because it did not seem appropriate to describe two separate buildings as a unit. We did not think that the difference in terms was significant. At best, the use of “facility” here and in the rest of the letter rather than “unit” suggests neither an application predicated on a prohibition of separate use of the dwelling nor one without that prohibition.

34. The latter part of the passage states that the right hand building will be used by the occupier of the left hand building for his business. That, to our minds, is no more than a statement of the intentions of Mr Barkas. It does not suggest that Mr Barkas was seeking planning permission that incorporated a restriction on the separate use of either of the buildings. A restriction so that the right hand building could be used only by the occupier of the left hand building would not be inconsistent with Mr Barkas’s expressed intentions but the passage does not indicate that Mr Barkas was applying for a permission which contained such a restriction. Nor does the passage indicate that a restriction was sought so that the left hand building could be occupied only by a user of the right hand building.

35. Under the heading “Marketing and demand”, the letter says:

“... The proposals retain the right-hand building mainly in B1 use whilst the left hand building is converted to residential use. The proposals provide a practical live/work facility ensuring this presently vacant building is brought into positive use.”

36. This passage links the two buildings and indicates that the effect of what is sought. That effect could be achieved both by a permission which restricted the use or disposal of the dwelling and by one which did not. It does not therefore clearly suggest any restriction on the use or disposal of the dwelling.

37. Under the heading “Policy issues” the letter says:

“... The proposed use provides for commercial use of the site associated with residential use, minimising the need to travel. ... Commercial use can be retained if a live/work unit is established in this location.”

38. This paragraph indicates that the commercial and residential uses of the site were intended to be linked. Although it suggests an intention that the two buildings would in fact be used together, it does not show that Mr Barkas was applying for a restriction on the separate use of either building. Commercial use of the right hand building is retained because the occupier of the left hand building may work in the right hand building, not because he or she must work there.

39. The FTT also noted, at [10], that:

5 “One of the planning authority’s policies apparently required that
‘conversion of buildings to residential use will only be supported
where every reasonable attempt to secure commercial use has been
made or where the residential use is a subordinate use to the
commercial use’. The agents addressed that point by stating ‘The
present proposals retain economic use on site, therefore, even though
the residential use is not subordinate, the live/work facility retains a
significant floor area for commercial activity. Policy is complied
with.’”

10 The reference in the application to the residential not being subordinate to B1 use
suggests that the application contemplated the separate use of the buildings. The
agents also enclosed a letting report evidencing the unsuccessful attempts made to let
the buildings: that indicates that they sought to show that “every reasonable attempt
had been made to secure commercial use” and that as a result that permission for
15 subordinate use was not being sought. These factors do not indicate that what was
being sought was a dwelling which could only be occupied if the occupier worked in
the workshop.

39. Appendix 1 (which was not seen by the FTT) contains the following:

“Design Issues

20 *The amount of development proposed*

No significant alterations are proposed to the existing building. ... The
left hand building will change its use from a workshop to a dwelling.

...

Access statement

25 ...

Employment is available especially within the Barton area (although
the dwelling will provide live/work facilities).

...

Sustainability statement

30 ...

7) Business

... The existing workshop has been advertised to let for almost 12
months. No interest has been shown in the property. It is now
proposed to use it as a live/work facility. ...

35 **CABE Building for Life ‘20 criteria’**

...

11: Is the scheme design specific: the buildings were designed as
workshops but can easily and simply be converted to live/work use.”

40. These passages provide no clear guide: the first makes no reference to combined
40 use; the qualified reference to employment being available in the area in the second

indicates at the very least that it was not intended that every occupier of the dwelling must work in the workshop; and the final two shed no light on live/work use.

41. Appendix 2 is the letting agents' report. Mr Zwart drew our attention to one passage that said that the buildings comprised two traditional brick buildings available in May 2010. This afforded us no assistance save, as noted above, that it suggested that subordinate use was not being sought. .

42. Overall, our impression of this letter (with or without the Appendices) is that it is to some extent ambiguous. It describes an intended use of two separate buildings as a live/work facility, with one building providing residential accommodation and the other continuing as a workshop. The letter asks for planning permission which encompasses that use. The letter does not state that the application is made on the basis that the dwelling can be occupied only by someone who uses the workshop nor that the separate disposal of the two buildings would be prohibited. The letter allowed the possibility of the planning authority imposing conditions or describing the permitted use more restrictively than that applied for but it did not request such conditions expressly or impliedly.

43. We conclude that (whether the terms of the Appendix are taken in to account or not) neither in the use of the term "live/work unit" nor in any other part of the application did the applicant seek a permission which prohibited the separate use or disposal of the left hand building; and that the terms of the application do not indicate that the letter of permission should be construed as if it contained that restriction.

The planning permission letter

44. We now consider whether there is anything in the planning permission letter itself that prohibited the separate use or disposal of the left hand building after it had been converted into a dwelling. The planning permission dated 16 November 2010 states, so far as is relevant:

"EAST STAFFORDSHIRE BOROUGH COUNCIL ... PERMITS:

Conversion of workshop (Class B1) to form live/work unit ... in accordance with the submitted documents and plans and subject to the conditions specified hereunder:

...

2. The development hereby permitted shall be carried out in accordance with the following approved plans...

[The plans identify on a location plan a rectangle of land of about 0.16 hectares and on it two buildings. This plan shows that it is the left hand building (seen from the entrance) which is to be converted into a dwelling.]

...

6. The workshop/office within the application site shall only be used/operated by the occupiers of the dwelling hereby granted permission.

Reason: To safeguard the amenities of occupiers of the converted barn and the character of this rural locality ...”

42. The initial words of the planning permission itself are, like those of the application letter, not wholly clear. They speak of the conversion of the workshop (in the singular) to form a live/work unit. But it is plain from the plans that there are two workshops and that one will be a dwelling and the other a workshop: the live/work unit must comprise them both. At the very least, the terms of the planning permission must be construed as referring to the permitted use of the two buildings together.

43. The permission letter refers expressly to the application. The permission must therefore be construed with reference to the application. But for the reasons set out above, the application does not indicate that a live/work unit is intended to mean a unit in which the “live” part may not be used or disposed of separately from the “work” part.

44. Mr Zwart said that the planning permission benefited and burdened the land for which it was sought. That was the land edged red on the plan. We agree. It is also clear from the terms of the permission itself, and from the application, that permission was sought and given for the site as a whole. But that conclusion leaves open the question of whether the permission to use the site as a live/work unit contained, explicitly or implicitly, a prohibition on the separate use or disposal of one of the buildings, the dwelling, in the unit. To put it another way, did planning permission to use the site as a live/work unit require the occupier of the workshop to live in the dwelling or require the (or an) occupier of the dwelling to use the workshop?

45. It seems to us that any doubt as to the extent of any restriction in the description of the development as a live/work unit is resolved by the presence of Condition 6 in the planning permission. On its own, the term ‘live/work unit’ as it is used in the planning application or in the planning permission does not clearly indicate that it is intended that the two buildings could not be used separately: it seems to us capable of being read as conferring an ability (a facility) for a person to dwell in one and work in the other. Condition 6 dispels this uncertainty: it does not compel the occupiers of the dwelling to use/operate the workshop/office. Nor does it restrict the permitted use of the dwelling to use by a user of the workshop. Instead, Condition 6 says that the workshop/office shall only be used/operated by the occupiers of the dwelling: it makes clear that only one of the possible restrictions is intended.

46. In our view, the effect of the presence of Condition 6 in the permission is that the permission must be construed as restricting the persons who can lawfully use the workshop/office but also as contemplating that it might not be used. The effect of the permission is therefore that a person who occupies the building must be able to use the workshop but need not use it, but that a person who uses the workshop must occupy the dwelling.

47. In our construction of the terms of the letter of permission, we have so far concentrated on whether the permission prohibits the separate use of the dwelling. We also have to consider whether the separate disposal of the dwelling is prohibited. The permission does not do so in clear terms nor by implication although it could

make the separate disposal of the dwelling or the workshop commercially very unattractive. That is because the separate disposal of the dwelling would convey to the purchaser a building which could be used only as a live/work facility, that is to say a place where the occupier could both live and work. Without ownership of the workshop, the use of the building without the right to use the workshop would be problematic. Thus the value of the dwelling on its own could be very small. However that effect is not a prohibition on separate disposal but merely a disincentive to separate disposal.

48. Accordingly, we conclude that neither the description of the development as a live/work unit nor the terms of Condition 6 prohibited the separate use or disposal of the dwelling.

49. Finally, we observe that a permission that restricted the occupation of the dwelling to a person who worked in the workshop/office would cause hardship to the relevant occupier on the failure of his business or on retirement. We consider that such a restriction would require express words to alert any potential occupier. The absence of clear words reinforces our conclusion that the permission is not to be construed to have that effect.

ESBC Letter

50. The FTT did not regard the ESBC planning permission letter as giving rise to a prohibition on separate use or disposal. Mr Zwart submitted that developments carried out in breach of planning permission are to be regarded as prohibited for the purpose of Note (2)(c). We agree. He says that, in its letter, the ESBC said that they would not permit separate use, and therefore such use would be a breach of the permission and so must be regarded as prohibited. We do not agree. The separate use would be prohibited only if carried out in breach of the planning permission given by the authority. On our interpretation of the permission, separate use would not breach the permission. The expressed intention of the ESBC to prevent such use could not amount to a prohibition if the authority would be unable to enforce its view and, on our finding as to the meaning of the permission, it would not be able to do so.

51. We noted at [16] that the grounds of appeal also included a contention that the FTT had erred by not interpreting “prohibited” in Note (2)(c) sufficiently broadly; for, had they done so, they would have treated the consequences of failing to comply with the development restriction as a prohibition on separate use or disposal. If the planning permission has the meaning we ascribe to it, the separate use of the dwelling would not be a failure to comply with the development restrictions in the permission. As a result this argument cannot succeed.

Decision

52. We conclude, taking the permission as a whole together with the application (and with or without the additional appendices), that the FTT came to the correct conclusion and the terms of the permission do not prohibit the use or disposal of the dwelling separately from the workshop. Accordingly, we dismiss the appeal.

Costs

53. Any application for costs in relation to this appeal must be made within one month after the date of release of this decision. As any order in respect of costs will be for a detailed assessment, the party making an application for such an order need
5 not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the UT Rules.

10 **Greg Sinfield**
Judge of the Upper Tribunal

15 **Charles Hellier**
Judge of the Upper Tribunal

Release date: 15 January 2015