Matter of multiplication

All tax practitioners want to avoid accusations of professional negligence. Max Schofield explains the importance of multiple dwellings relief when considering stamp duty land tax.

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Tax practitioners involved with stamp duty land tax will probably have encountered letters that are sent to homeowners purporting to recover a tax refund on the basis of multiple dwellings relief (MDR); a phenomenon probably attributable to the media coverage of 'granny annexes' during the passage of FA 2016 (discussed below). A corollary of this, in my experience, is the rise in claims for professional negligence against conveyancing solicitors for failing to advise on, or failure to submit a return for, MDR.

Legislation

In a transaction involving *at least two dwellings*, FA 2003, Sch 6B permits SDLT to be calculated by reference to the average chargeable consideration rather than the aggregate. In other words, the total chargeable consideration attributable to the dwellings can be divided by the number of dwellings and the SDLT rates applied to the result. That tax charge is then multiplied by the number of dwellings to arrive at the total liability.

By way of example (and ignoring the recent SDLT holiday), let's say that Mr Fuller buys a house for £1m and a flat for £300,000, (total £1,300,000) both from a Mrs Briggs. The SDLT would be as follows:

House	£75,192
Flat	£22,557
Total	£97,750.

Key points

- Multiple dwellings relief allows SDLT to be calculated by reference to the average consideration.
- Planning permission may not be a definitive clue as to whether multiple dwellings relief is due.
- Is a dwelling suitable for use on a stand-alone basis?
- Did the advice fall below the standard that could be expected of a reasonably competent practitioner?
- Retain records to show that multiple dwellings relief was considered.

However, under MDR, the calculation would be as follows:

Total consideration:	£1,300,000
Divided by the number of dwellings	2
Average consideration	£650,000
SDLT on £650,000	£27,000
Multiplied by the number of dwellings	2
Total SDLT	£54,000.

Crucially, under Sch 6B para 7, to count as a dwelling it must be 'used or suitable for use as a single dwelling' or be in the process of being constructed or adapted for such use. Those with a keen eye will note that, in essence, this is circular and sheds very little light on the definition of dwelling.

Case focus

I am usually instructed by recipients of refund letters to advise on their accuracy and applicability but, earlier this year, I found myself in a county court instructed to defend a law firm from a small claim brought by the recipient of such a letter.

Without identifying the parties, the claim involved a purported failure to advise on the availability of MDR on the purchase of a property in 2014. The house had what was repeatedly termed a 'pool room' in the garden. The claim was defended successfully but, during the proceedings, counsel for the claimant handed me an approved judgment on which they said they would rely. It is that case which, albeit unreported, deserves some critical attention.

The case of *Ransom v Brewer Wallace Limited* was heard before Recorder Little QC at the Leeds county court in June 2020. In *Ransom*, a husband and wife bought a residential property in Hull in October 2013. The defendant was a firm of solicitors which acted for the claimants in that purchase.

Before the sale of the property, planning permission had been obtained for an extension to create a garage and workshop on the ground level with an annex on the first floor. The planning permission stated:

> 'The annex hereby approved shall only be occupied as an extension to and ancillary to the dwelling known as [the property]... And shall not be used as a separate, independent unit of living accommodation.'

The completion certificate that followed referred to a two-storey extension with a 'skylight window in bedroom'. The mortgage valuation document described it as a 'garage/workshop and self-contained one-bedroom annex'. The annex included a bedroom, dining room and dressing room, as well as its own utility supplies, but had no separate post or council tax billing.

The recorder, despite some difficulty because the solicitor in charge of the sale had since died, found that there was no advice given to the claimants on SDLT and that a reasonably competent solicitor would have made further enquiries about the annex. This is a finding of 'breach'.

As to 'causation', the recorder held that it was 'more likely than not' that the claimants would have succeeded in a claim for MDR had one been made and that 'HMRC would have applied MDR'. He was influenced by the facilities in the annex and the fact that one of the claimants had intended that her elderly mother would come to live with them in due course.

The recorder opined that the planning permission – stating that the annex was not meant to be used as a stand-alone property – 'points away from MDR', but this could not be regarded as definitive. This was despite having a letter from HMRC in March 2020 stating that MDR was not available 'due to the planning restrictions on the extension/annex'. The recorder referred to HMRC's *Stamp Duty Land Tax Manual* which stated that planning restrictions inhibiting use as a separate dwelling will be '*a* factor' in considering suitability of use as a dwelling although actual use will prove more helpful than theoretical use.

In light of the above, Mr and Mrs Ransom were awarded the difference between the SDLT paid and that which would have been payable under MDR.

Recent First-tier Tribunal cases

In *Fiander and Brower* (TC7676), the First-tier Tribunal assessed an appeal concerning the availability of MDR on the purchase of a main house with an annex, which took place on 27 April 2016. The annex – a later addition to the main house – was situated to the rear of the property connected by a corridor. The annex did not have a separate post box, council tax bill or utility supply. It also had planning permission for a bungalow to be used as a private residence.

The tribunal, refusing the appeal, said:

> 'A dwelling is the place where a person (or a group of persons) lives. A building or part can be suitable for use as a dwelling only if it accommodates all of a person's basic domestic living needs: to sleep, to eat, to attend to one's personal and hygiene needs; and to do so with a reasonable degree of privacy and security.'

In relation to privacy and security, the tribunal explained that it was possible to imagine an annex being used as a 'granny flat' or by a lodger with sufficient ties of trust with the occupants of the main house. Both could be satisfied with the privacy and security available to them, but only if a very particular kind of relationship were to subsist between the occupants of the two parts. The tribunal continued:

> 'Absent such a relationship – which would be the case where the occupant of the annex was a member of the general public – the main house and the annex would not be individually suitable for use as dwellings, due to the insufficiency of privacy and security for occupants of both parts.'

The tribunal stressed that the test was for suitability for use as a *single* dwelling rather than as separate living accommodation, and thus requires suitability for use on a stand-alone basis. In this case, the buildings were 'too closely physically connected' owing to the short corridor connecting the two buildings. Thus, MDR was not available.

The very recent case of *Merchant and Gater* (TC7783) concerned a property bought on 24 March 2016 for £1,920,000 for which a return was completed by the conveyancers on the basis of that it was a single dwelling. However, the taxpayer averred that the lower ground floor was an annex with a kitchen, living room and bathroom, and was suitable for use on its own as a single dwelling.

Again the annex did not have a separate postal address, council tax billing or utilities. Following *Fiander*, the tribunal held that the shared access through the 'common hallway' in the main house led to the conclusion that it was not suitable for use as a single dwelling.

> "In this case, the buildings were 'too closely physically connected'. Thus, multiple dwelling relief was not available."

Tax perspective

MDR appeals that have reached the First-tier Tribunal have been unsuccessful. Professional negligence claims in the small claims court have also failed, but *Ransom* will be used by claimants or the refund letter firms despite it not being binding on the lower courts.

It is fair to say that *Ransom* can be distinguished from *Fiander* and *Merchant* because the annex could 'be accessed by doors entirely independent from the main home'. Readers will note that this does not go so far as to say that it could be accessed independently: one may still have to walk through the garden or paths on the property, passing by the door and windows of the main house for example. However, and importantly, it was 'not possible to move internally between the two properties'.

Interestingly, the judgment in *Ransom* made no reference to any tax tribunal case law or alternative sources of defining 'dwelling'. In light of the circular definition in Sch 6B, there has been discussion of the crossover of legal tests between VAT, council tax and SDLT.

For example, in the SDLT case of *PN Bewley Ltd* (TC6951), the First-tier Tribunal approved a discussion on the meaning of dwelling in the VAT case of *Carson Contractors Limited* (TC4679). VATA 1994, Sch 8 gp 5 permits zero-rating of the first grant by a person constructing a building 'designed as a dwelling or number of dwellings'.

The notes to gp 5 explain that:

> 'A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied:
> 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 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.'

This provision is interesting because it clarifies 'designed as a dwelling' as requiring the separate use of the dwelling to not be prohibited by planning consent. It also refers to the availability of internal access, as was mentioned in *Ransom*.

Suitability

Under SDLT, the test is 'suitable for use as a single dwelling'. This is different from 'designed as a dwelling' and very different from a common slip of the tongue found in some commentary: 'capable for use as a single dwelling'. In *Ransom*, the annex appears to have been capable for use as a single dwelling because it had the basic living facilities that might be required. However, one must question whether it was 'suitable'. The *Cambridge Dictionary* (online) defines 'suitable' as 'acceptable or right for someone or something'. *Merriam-Webster* (online) defines it as 'adapted to a use or purpose'. Suitable, therefore, indicates some sort of *adaptation and acceptability for a specific reason or purpose*, unlike capable which is the mere ability to do something.

In *Ransom*, the planning permission was clear: the annex was to be occupied only as an extension to and ancillary to the dwelling (main house) and not used as a separate, independent unit of living accommodation.

I contend that, were the First-tier Tribunal to have assessed the facts in *Ransom*, it is possible that it would have arrived at a different conclusion for the following reasons.

First, the planning permission referred to the annex being *ancillary* to *the* dwelling. The main house is the single dwelling and the annex is not a separate single dwelling.

Second, although the test refers to 'design', the VAT law makes it clear that prohibitions in planning consent can be relevant. In the recent VAT case of *David Stewart* (TC7561), the taxpayer was barred from reclaiming VAT because the dwelling had not been constructed in line with the planning permission despite it having met the exact specifications of the planning permission. The planning permission in *Ransom* expressly prohibited the building from being used as a separate independent unit of living accommodation. It may

well have been capable of use as an independent unit, as found by the recorder, but how can it be found to be suitable (adapted or acceptable) for such use if that use is specifically prohibited – and could be the subject of an enforcement notice to prohibit said use?

Third, the evidence was that it was intended to be used to house the claimant's elderly mother. Although future use is not relevant under Sch 6B, the evidence indicates that it was suitable for use 'if a very particular kind of relationship were to subsist'. That is insufficient under *Fiander*'s requirement for privacy and security for occupants of both parts 'absent such a relationship'.

Further, Sch 6B para 7(2)(b) states that a building also counts as a dwelling if 'it is in the process of being constructed or adapted for use as such'. This limb is even closer to the 'design' test under VAT law. Were *Ransom* to be correct, it presents the bizarre situation whereby a building (that would be capable for use as a dwelling) under construction which is barred for use as a dwelling by planning restrictions would not be eligible for MDR because it could not be said to be 'constructed for use' as a dwelling. But once the construction has completed and 'suitability' is introduced, relegating the planning permission, it would be suitable for MDR.

Ransom was not an unarguable case when it comes to the tax treatment. *Fiander* repeatedly referred to the view of 'an objective observer of the property as at completion'. One might find that the man passing by on the Clapham omnibus peering over the fence would think the new extension suitable for use as a single dwelling, although his opinion might change if, as the bus came to a stop, he saw the planning restrictions affixed to the scaffolding. Further, HMRC's *Stamp Duty Land Tax Manual* states that in considering whether or not a property includes one or more dwellings (and if so, how many) a wide range of factors come into consideration. As above, planning conditions will be a factor (SDLT00430) and the physical configuration of the property on the effective date of the transaction is 'very important' in determining how many dwellings there are (at SDLT00420). However, the case was not argued in the First-tier Tribunal, it was a matter of professional negligence and, in *Ransom*, that makes a big difference.

Professional negligence perspective

Perhaps the key factor, of which the recorder made no mention, was that the purchase in *Ransom* was made in October 2013; before FA 2016.

The question in negligence cases is whether the solicitor's actions fell below the standard which could be expected of a reasonably competent solicitor acting at the time. Crucially, there was no practice in claiming MDR on annexes until the introduction of the surcharge legislation in FA 2003, Sch 4ZA inserted by FA 2016, s 128. This section introduced condition C and the concept of subsidiary dwellings situated within the grounds of or in the same building as the main dwelling if the chargeable consideration attributable to the main dwelling is equal or greater than two thirds of the total sum. This was the result of Sir Eric Pickles' urgent campaigning during the passage of the bill to exempt from the higher rate what the press referred to as 'granny annexes' (See Ann Humphrey's article, 'What about granny?' *Taxation*, 6 October 2016 page 12).

As Sean Randall, partner at Blick Rothenberg told me, generally speaking, these professional negligence actions for purchases before 2016 are weak because no stamp duty practitioners (let alone residential property lawyers, paralegals and licenced conveyancers) had considered that MDR could be claimed on annexes at that time. An annex then was reasonably regarded for SDLT purposes as part of the main dwelling, rather than a separate dwelling. The 2016 exemption for 'subsidiary dwellings' would be otiose if annexes were not a separate dwelling; hence, the exemption was the catalyst for MDR claims on annexes.

Unfortunately, having kindly been afforded the opportunity to speak to the defendant's counsel in *Ransom*, I am informed that permission to appeal was refused. The judgment therefore stands.

Conclusion

There are three points worthy of highlighting. First, those involved in conveyancing must be aware of the need to not only advise on MDR, but to be seen to advise on MDR. This is the case even in the weaker cases, so as to avoid litigation years down the line. Including MDR advice in pro forma checklists and property enquiries documents would be a prudent move.

Second, in the small claims court, expert evidence is seldom allowed owing to the need to keep costs low. Expert evidence from lawyers is even more rare (see the discussion in *London Aviation Limited v RBS Plc* [2017] EWHC 037). This means there will be opportunities for old conveyancing cases like *Ransom* to slip through the net.

Third, there is the potential for divergence in the judicial treatment of MDR claims between the tax tribunals and civil courts. However, I am aware of three small claim cases (including my own) where the deputy district judges have dismissed claims against law firms because MDR would not have been available. It will be interesting to keep an eye out for any appeals from the small claims court or even for references to county court judgments in the First-tier Tribunal. ●

Planning point

If advising on stamp duty land tax, ensure that multiple dwellings relief is considered and that a note to that effect has been made.

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