Neutral Citation Number: [2023] EWCA Civ 106

Case No: CA-2022-000178

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
MR JUSTICE LEECH AND UPPER TRIBUNAL JUDGE RICHARDS
[2021] UKUT 290 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 February 2023

Before:

LORD JUSTICE PETER JACKSON
LADY JUSTICE WHIPPLE
and
LADY JUSTICE FALK

- -

Between:

Greenspace (UK) Ltd	**Appellant**
- and -	
The Commissioners for HM Revenue and Customs	**Respondents**

- -
- -

Edward Hellier (instructed by **Direct Access, Greenspace (UK) Ltd**) for the **Appellant**
Joanna Vicary (instructed by **HM Revenue and Customs**) for the **Respondents**

Hearing date: 19 January 2023

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Approved Judgment

LADY JUSTICE WHIPPLE:

Introduction

1. This is an appeal against the decision of the Upper Tribunal reported at [2021] UKUT 290 (TCC) (Leech J sitting with UTJ Jonathan Richards) which dismissed an appeal from the First Tier Tribunal, [2020] UKFTT 349 (TC) (Judge Rachel Short), which dismissed the Appellant's appeal against VAT assessments issued by HMRC for a total of £2,581,092 for the periods 12/17 to 12/19.

2. The Appellant is in the business of supplying roofing panels which are designed to insulate conservatory roofs. HMRC assess those supplies to be taxable at the standard rate of VAT but the Appellant has applied the reduced rate of VAT. The assessments represent the difference in those two VAT rates for the relevant period.

3. The issue in the case is whether the roof panels come within the scope of Note 1 to Group 2 of Schedule 7A of the Value Added Tax Act 1994 ("VATA") which confers the reduced rate on "insulation for … roofs".

The Facts

4. The primary facts are not in dispute and I summarise them by drawing on the UT's decision, which in turn refers to paragraphs of the FTT decision:

> "21. Greenspace's principal business is the supply and installation of insulated roof panels ("Panels") to residential customers which are fitted onto their customers' pre-existing conservatory roofs ([35] and [71]).
>
> 22. The Panels comprise a layer of close cell extruded polystyrene foam (supplied under the trade name "Styrofoam") which is around 71mm thick. The Styrofoam is covered with a thin aluminium layer and a protective powder coating which are together around 2mm thick. The Panels are manufactured by a company called Thermotec Roofing Systems Ltd ("Thermotec") which holds a patent entitled "Method of lowering the conductivity of a building roof" ([13], [14] and [27]). It is common ground that the Panels have insulating properties.
>
> 23. Before supplying or fitting the Panels, Greenspace will visit its customer, work out what the customer requires and take detailed measurements. The Panels are then made to measure by Thermotec with protective coating added by a separate company and usually coloured so as to match the customer's existing roof colour ([15]).
>
> 24. The process of fitting the Panels involves the following:

> (1) Existing top caps and end caps are lifted from the conservatory roof and the existing glass or polycarbonate panels are removed ([15]).
>
> (2) The Panels are slotted into place on the existing roof structure. Greenspace does not replace its customer's existing roof framework when doing this: the struts and glazing bars that supported the previous glass or polycarbonate panels are left in place. The top caps and end caps that were removed to enable the Panels to be fitted (described in (1) above) are replaced once fitting is complete ([71]).
>
> (3) The ability to fit the Panels without replacing the existing roof structure is possible because the Panels are made with a custom-built tongue, the width and depth of which are tailored to the specifications of the existing structure, that enables the Panels to be slotted into the bars of the existing roof structure. No bolts or screws are needed to fit the Panels ([82(2)]). Because the process simply involves slotting the Panels into place, fitting typically takes less than a whole day ([15]).
>
> 25. It is apparent from the above findings of fact that the Panels are not self-supporting and can be used only if the customer already has an existing conservatory roof structure. Moreover, while the FTT did not make a specific finding to this effect, it was common ground that it was important that the installation of the Panels disturbed as little as possible of a customer's pre-existing roof structure after the removal of the existing panels in order to prevent leaks.
>
> 26. Some customers ask Greenspace to remove the existing panels and fit the Panels to part only of the remaining conservatory structure leaving large areas of the pre-existing glass or plastic panels untouched. However, the unchallenged evidence of Greenspace's managing director, Mr Jacomb, before the FTT (see [31(3)] was that most customers would choose to replace all of the existing glass panels with the Panels. In those rare cases where Greenspace both fitted Panels and replaced the supporting structure, Greenspace would treat the entire supply as standard-rated (see [80]).”

The Legislation

5. By s 29A of VATA, a reduced rate of 5% applies to supplies of a description falling within Schedule 7A. Section 96(9) provides that Schedule 7A is to be interpreted in accordance with its notes, which notes in consequence have legislative force.

6. At the material time, items 1 and 2 of Group 2 of Schedule 7A provided:

> “GROUP 2

> INSTALLATION OF ENERGY-SAVING MATERIALS
>
> Item No.
>
> 1 Supplies of services of installing energy-saving materials in residential accommodation.
>
> 2. Supplies of energy-saving materials by a person who installs those materials in residential accommodation."

7. The notes to Group 2 provided as follows, so far as relevant:

> "NOTES
>
> Meaning of "energy-saving materials"
>
> 1. For the purposes of the Group "energy-saving materials" means any of the following-
>
> (a) insulation for walls, floors, ceilings, roofs or lofts or for water tanks, pipes or other plumbing fittings;
>
> (b) draught stripping for windows and doors;
>
> (c) central heating system controls (including thermostatic radiator valves);
>
> (d) hot water system controls;
>
> (e) solar panels;
>
> (f) wind turbines;
>
> (g) water turbines.
>
> (h) ground source heat pumps;
>
> (i) air source heat pumps;
>
> (j) micro combined heat and power units;
>
> (k) boilers designed to be fuelled solely by wood, straw or similar vegetal matter."

8. The relevant note for present purposes is Note 1(a), and the relevant part comprises the words "insulation for … roofs".

9. Provision for a reduced rate of VAT was introduced on 1 May 1995 by Schedule A1 to VATA. The reduced rate was first applied to certain energy saving materials from 1 July 1998 by means of the VAT (Reduced Rate) Order 1998 (SI 1998/1375) which amended Schedule A1, applying the reduced rate to certain grant-funded supplies to the homes of individuals on specific benefits. The Finance Act 2000 (s 135 and Schedule 35) amended Schedule A1 VATA to extend the reduced rate on energy saving

materials, whether grant funded or not, supplied to all residential accommodation. Schedule A1 was re-enacted without substantial amendment as Schedule 7A VATA by the Finance Act 2001 (s 99 and Schedule 31). Items 1 and 2 of Group 2 were narrowed by the Value Added Tax (Reduced Rate) (Energy-Saving Materials) Order 2019 (SI 2019/958) with effect from 1 October 2019, which post-dates the assessments and is not therefore relevant to this appeal.

10. Schedule 7A is contained in primary legislation. It can be amended by way of primary legislation or by the Treasury, which has power under section 29A(3) VATA to amend it by statutory instrument. Any such instrument would be subject to the negative procedure unless the amendments caused VAT to be charged on a supply at a rate in force under s 2 VATA (the standard rate) in which case the procedure would be affirmative: section 97(4)(c)(ii)(a) VATA.

Previous UT Authorities

11. No case involving Note 1(a) has previously come before this Court. Note 1(a) has, however, been considered by the Upper Tribunal on two previous occasions and much of the argument, and the reasoning in the FTT and UT, related to those cases.

12. The first case is *Pinevale Ltd v HMRC* which concerned polycarbonate materials manufactured into a cellular structure which, because it lacked rigidity, was fitted into an aluminium frame forming panels. The product had a thickness of 25mm or 35mm. The panels could be used to replace or constitute the entire roof or could be used to replace part of a roof. Their purpose was to achieve much higher levels of insulation than would be the case with a conventional conservatory roof, including a double-glazed roof. The FTT allowed the taxpayer's appeal, holding that the terms of Note 1(a) were met ([2012] UKFTT 606 (TC)). The UT allowed HMRC's appeal ([2014] UKUT 204 (TCC)). The taxpayer was not present or represented before the UT, having by that point become insolvent. David Richards J, sitting in the UT, recorded HMRC's argument that the panels were not insulation for roofs but were the roof itself ([10]). He held that the FTT had erred in its interpretation of Note 1(a) ([15]). He said that Note 1 provided an exhaustive definition of "energy-saving materials" for the purposes of items 1 and 2 of Group 2 and permitted the reduced rate only on certain specified types of goods ([16]). He distinguished between the items listed at (a) and (b) of Note 1, which items specified "insulation for" certain things, including roofs, and the items listed at (c) to (j) of that Note which specified particular products, such as central heating controls or solar panels ([17]). He held:

> "17. … A material which is insulation for a roof is not the same thing as the roof itself. It presupposes that there is a roof to which the insulating material is applied. …"

He allowed the appeal, concluding as follows:

> "19. The error, in my judgment, made by the F-tT was to construe 'insulation for roofs' as extending to the roof itself when it has energy-saving properties, rather than being confined to insulating materials attached or applied to a roof."

13. The second case is *Wetheralds Construction Ltd v HMRC* which concerned a product known as the 'Solid Roof System' for conservatories. The existing glazing bars of the conservatory roof acted as the primary roofing structure for the product. The existing translucent panes were removed exposing the bars and then a lightweight roof structure comprising a number of joints, insulation layers and a roof covering were mounted. The result was a thermally insulated roof without the need for the existing conservatory roof to be completely dismantled. The FTT ([2016] UKFTT 0827 (TC)) determined that for VAT purposes the various components amounted to a single supply, applying Case C-349/96 *Card Protection Plan v Customs and Excise Commissioners* [1999] STC 270 and Case C-41/04 *Levob Verzekeringen v Staatssecretaris van Financien* [2006] STC 766, which cases I shall refer to as *"CPP/Levob"*. The FTT held that there was a single composite supply, the predominant element of which was insulation and that the supply was to be characterised as one of insulation materials. The FTT held that that supply fell within the terms of Note 1(a) and was to be taxed at the reduced rate. The UT (Judge Roger Berner with Judge Thomas Scott) ([2018] UKUT 173 (TC)) allowed HMRC's appeal. They held that the question for the FTT was not whether the supply was a single composite supply and it followed that *CPP/Levob* were of no relevance ([25] and [31]). Instead, the question was the one posed by Note 1(a) as interpreted by *Pinevale*:

> "31. … As *Pinevale* sets out, in interpreting the statutory language, the critical question is whether the supply of energy-saving materials is "for" a wall, floor, ceiling etc, or is a more extensive supply such as the wall, floor, ceiling etc itself. That was the question on which the FTT should have focussed. On the facts found by the FTT, the supply by Wetheralds was effectively all of the elements comprised in a new roof save for the original glazing bars. The old roof covering was removed, and a new roof covering (tiling) was added, as well as the plasterboard ceiling, soffits and rainwater goods. However one defines "roof", we can see no reasoned basis on which that supply was no more than insulation.
>
> 32. …. In our view, therefore, the scope of the reduced rate for supplies within Note 1(a) is not determined by whether or not the materials are "attached or applied", but by whether what is supplied is confined to insulation or extends further than that, to a roof or a replacement roof itself".

First Tier Tribunal

14. The FTT had the benefit of extensive evidence summarised at [21]-[31], including two uncontested witness statements from Mr Jacomb, the Appellant's managing director, who contrasted the Appellant's roof panels with the products at issue in *Pinevale* and *Wetheralds* and sought to distinguish those cases on their facts. In submissions on behalf of the Appellant, Mr Hellier (then being led by Ms Hui-Ling McCarthy KC) accepted that *Pinevale* established that there was a distinction to be drawn between insulation for roofs and the supply of the roof itself, but argued that the distinction was one of fact and degree (or was on a "sliding scale"), and that, on a proper analysis, the Appellant's roof panels were supplies of insulation, the panels themselves consisting of 95% Styrofoam, in a thin aluminium coating with a protective powder on top, which

did not detract from the essence of the supply as insulation. These panels could not be said in any meaningful sense to be the roof itself because the Appellant's customers already had a conservatory roof and it was to that existing roof that the Appellant's roofing panels were applied. It was clear from the marketing material, including a survey of consumers expressing their views on why they purchased these panels from the Appellant, that what was being paid for was improved insulation of their existing conservatory, sometimes in relation to only some (not all) panels on the existing roof. The Appellant argued that the tribunal should have regard to the substance of the supply and not merely the form of the supply.

15. In its submissions before the FTT, HMRC relied on *Pinevale* to argue that there was a distinction between insulation for roofs and a roof itself, and that the reduced rate could not apply because the Appellant's panels formed part of the roof of the conservatory, being used to replace the existing roof panels; the supply was of more than mere insulation, it was the roof itself.

16. The judge made findings of fact at [71] which are not challenged and which are in large part incorporated into the UT's own summary of the facts, which I have set out at para 4 above.

17. The judge set out her approach to interpretation. This has been subject to extensive challenge by the Appellant, so I set out the relevant part in full:

> "73. I have considered whether it is fair interpretation of the words "insultation for roofs" to include the type of roofing panels supplied by Greenspace. I do not consider that Greenspace's roofing panels fall within a fair interpretation of those words because:
>
> (1) The wording in the legislation is making a clear distinction between something which is "for" a roof and something which "is" a roof. This is supported by the other categories of supply listed in Schedule 7A, all of which are the type of product which are added to an existing structure, rather than being a structure themselves. This is in line with the test as it was formulated and applied in *Pinevale* and *Wetheralds.*
>
> (2) The primary test in the legislation is one of form; is what has been supplied a roof or something for a roof. Greenspace's roof panels are in form roof coverings. Greenspace has provided a supply in the form of a roof.
>
> (3) I accept that the Greenspace panels have a dual function; they provide both a roof covering and insulation. However, in my view the question of whether they have that additional function, of providing insulation, is not relevant.
>
> (4) Any attempt to argue about the "substance" of the supply, or the dual nature of the supply, falls into the error of law which was rejected in *Pinevale* of ignoring the manner in which this legislation categorises the type of supply which can fall

> within this exemption, which is by reference only to the form of the supply. An approach which was rejected by the Upper Tribunal in *Wetheralds*:
>
> > "The FTT erred by considering the application of *Pinevale* to the facts only after determining, on a *CPP/Levob* analysis, that the supply was single supply of insulation. Such an approach begs the very question which must be determined, namely whether the supply was "of insulation for roofs". [31].
>
> 74. I do not agree with Greenspace that excluding their roofing panels from the scope of this exemption is applying an overly restrictive meaning of this exemption by reference to a more restrictive meaning of the words of Schedule 7A: Those words refer to "insulation for roofs" and by definition cannot apply to something which is itself part of a roof."

18. She rejected the Appellant's attempts to distinguish *Pinevale,* a case that was binding on her, and emphasised that any approach which involved looking at predominant purpose was not correct ([75]-[77]). At [78] she stated that:

> "On that basis, the supplies made by Greenspace must also be treated as something which is more than insulation, the supply of a roof rather than something for a roof."

19. She rejected the Appellant's arguments that its roofing panels did not amount to a roof or a replacement roof ([79]). She held that the Appellant's supplies could not be treated as anything other than a new roof or part of a roof [82]. She referred to the "form-based nature" of the VAT exemption ([82] and [84]) and rejected the Appellant's submissions based on the "predominant character" of the supply ([84]). She rejected the sliding scale approach and said the question was simple: "if what has been provided is a roof, or part of a roof, that supply cannot fall within the definition of energy saving materials 'for a roof'" ([86]). At [87] she accepted that this conclusion might seem perverse because if the Appellant had simply stuck Styrofoam to existing roof panels, it would have been able to benefit from the reduced rate, but at [88] she accepted that questions of categorisation of supplies like those which arose in relation to the provisions of Schedule 7A could give rise to fine distinctions and at [89] she said that the answer to any such perversity was to argue for a change in the legislation.

Upper Tribunal

20. The Appellant appealed to the UT, advancing four grounds of appeal (set out at [35] of the UT decision). Those grounds of appeal did not succeed in the UT and are substantially repeated in the Appellant's appeal to this Court so I need not set them out here. The UT reminded itself that the FTT's task was evaluative, and that the UT was not entitled to interfere with the FTT's conclusion in the absence of some error of principle, either an untenable view of the law or a plain misapplication of the law to the facts (citing *HMRC v Proctor & Gamble UK* [2009] EWCA Civ 407 at [73]-[74]) (see [36]-[37]). It considered *Pinevale* and *Wetheralds,* decisions which were, if not quite binding on it, strongly persuasive, and it maintained the distinction established by those

cases between insulation for a roof on the one hand, and a roof on the other (see eg [47]). Although it identified some errors in the FTT's approach, it did not consider any of them to have been material to the outcome. The UT dismissed the appeal.

Grounds of Appeal

21. Before this Court, the Appellant advances four grounds of appeal, which I summarise from the Grounds of Appeal (and which, as will be seen, overlap substantially):

    i) The UT (and the FTT before it) erred in their interpretation of Note 1(a), by failing to give effect to the purpose of the legislation and/or misapplying *Pinevale* and *Wetheralds.*

    ii) The UT (and the FTT before it) erred in rejecting a test based on the nature and extent of the supply. *Wetheralds* made clear that this is the critical question imposed by the statute.

    iii) The UT erred in failing to characterise as a material error of law the FTT's approach to considering the state of a customer's conservatory mid-way through the process of installing the roofing panels.

    iv) The UT (and the FTT before it) wrongly held that because the Appellant's supplies consisted in part of a roof covering, so the Appellant was necessarily supplying a roof rather than 'insulation for … roofs'.

22. HMRC submitted a Respondents' Notice which challenged the grounds of appeal and sought to uphold the reasoning of the UT in all respects. In it, HMRC also answered a specific argument advanced in the Appellant's grounds but in the event, the Appellant did not advance that argument before us and so there is no need to further detail the Respondents' Notice.

The parties' arguments

23. For the Appellant, Mr Hellier argued that the statute imposes a test which is concerned with the extent of the supply, considered by reference to the substance of the supply. The question posed by the statute is whether the supply is of insulation for a roof or something more extensive, namely the installation of the roof itself. This was the test laid down in *Pinevale* and *Wetheralds;* once the distinction was drawn between 'insulation for roofs' and 'roofs' logic required that questions of the extent of the supply were fundamental to determining which of the two had been supplied. *Coleborn (T) & Sons Ltd v Blond* [1951] 1 KB 43 and *Customs and Excise Commissioners v Marchday Holdings Ltd* [1996] EWCA Civ 1171, [1997] STC 272 supported the argument that the extent of the supply was key to the legal test, accepting that those cases involved different tax legislation.

24. He invited a purposive approach to Note 1(a), taking account of whether the supply in question is aimed at energy-saving. The method of the supply in question was not relevant, and on a proper analysis, the Appellant's supplies were properly characterised as a means of providing insulation for roofs. The thin aluminium coating and protective powder applied to the exterior did not detract from the predominant feature of the product which was the Styrofoam insulation. The panels were slid into place using the

existing roof furniture or fixings and replaced panels which had been removed. This was not to install a new roof.

25. The FTT's conclusions were perverse because it meant that Styrofoam stuck to the existing roof would qualify for the reduced rate, but Styrofoam delivered in this form would not, and that was to penalise efficiency of delivery and the design of the product, which verged on the absurd. The Court should seek to avoid a construction of Note 1(a) that produced absurdity: see eg *Stock v Jones* [1978] 1 WLR 231 at 236 C-G. Furthermore, the principle of fiscal neutrality required the Court to interpret Note 1(a) so that like supplies are treated alike, citing Case C-174/11 *Finanzamt Steglitz v Zimmerman* [2016] STC 2104 at [48] and [59].

26. *Pinevale* and *Wetheralds* were correct to distinguish between insulation for roofs on the one hand and the supply of a roof on the other. But in applying that test, the FTT had been wrong to consider the state of the conservatory mid-way through the process of installing the panels from the point of view of what the reasonable man would think was being supplied at that point. This led the FTT to an error of logic. Note 1(a) referred to insulation "for" roofs, not to "to" or "of" roofs. There was no need for any roof to pre-exist the installation of these roof panels.

27. The FTT had erred in law in these ways, which were material. The UT had recognised some of those errors but had still upheld the FTT. The UT was wrong because these errors were material and vitiated the FTT's decision. The appeal should therefore be allowed.

28. For HMRC, Ms Vicary, who appeared in the UT and in this Court, submitted that the FTT and the UT had correctly applied the test in *Pinevale* and *Wetheralds* and had correctly concluded that the Appellant's supplies were of a roof, and not of insulation for a roof. That finding was, she said, fatal to this appeal. There was no perversity in that conclusion, even though 95% of the volume of the product consisted of insulating material. There needed to be a pre-existing roof for the Appellant to succeed; but in this case, there was no pre-existing roof to which the panels were applied, because the panels were the roof. No reasonable person looking at the roof frame after removal of the old panels and insertion of the new panels would say that there was a roof: it was the new panels that made the roof.

29. It was clear, having regard to Note 1, that Parliament had chosen to limit the ambit of the reduced rate. There was no room for a purposive construction; the reduced rate only extended to the items listed. Note 1(a) meant that insulation had to remain separate from the roof itself in order to be charged at the reduced rate. It was not right to consider the substance or real character of the supply, the test was one of form; the Appellant was wrong to suggest that you could take account, for example, of the comparative volume of the insulation material compared to the volume of the protective coating. The test did not depend on the extent of the supply, or on fact, degree and impression; *Coleborn* and *Marchday* were irrelevant.

30. The FTT was right to conclude that the Appellant supplied insulated roof panels which did not come within the terms of Note 1(a) and the UT had been right to uphold that decision.

31. Both parties accepted that the supplies in issue in this case amounted to a single supply comprising the panels and their installation. They agreed that no issue about *CPP/Levob* arose.

Discussion

32. I am grateful to both parties and to their legal teams for their detailed and knowledgeable submissions. I have derived great assistance from them. However, for reasons I shall detail below, I am not in entire agreement with either party's case. I conclude that this appeal must be dismissed, but not precisely for the reasons advanced by HMRC – indeed in some respects, I agree with Mr Hellier. But in the end, the facts of this case are not in dispute and the appeal must be dismissed on those facts.

The meaning of Note 1(a)

33. It is common ground that the provisions contained in Schedule 7A, by which the reduced rate is conferred on certain supplies, are exceptions to the general rule that supplies should be taxed at the standard rate. Accordingly, they are to be interpreted strictly but not restrictively. This follows the established rule in relation to exemptions from VAT, considered in *Expert Witness Institute v HMRC* [2001] EWCA Civ 1882, [2002] 1 WLR 1674, where the Court held that an exemption should not be subject to a strained or even particularly narrow construction, rather the Court's task was to give the words of the statute a "fair interpretation" (per Chadwick LJ at [16] and [17]), and Case C-445/05, *Haderer v Finanzamt Wilmersdorf* [2007] CMLR 17, where the CJEU said that the exemptions should not be construed in such a way as to "deprive them of their intended effect" ([18]).

34. I make two points on the language of the Note. The first is that Items 1 and 2 refer to "energy-saving materials", a term defined by Note 1. However, the words in Note 1 are not further defined. They must therefore bear their ordinary meaning.

35. The second is that Note 1(a) applies only to insulation for any one of the various items listed. Note 1(b) adopts a similar approach, applying the reduced rate only to draught stripping for windows and doors. A contrast is to be drawn between Note 1(a) and (b) (and possibly (c) and (d) as well, which relate to controls on central heating systems and hot water systems), which identify items which are typically attached or additional to a larger thing, and (e) to (k) which specify particular products such as solar panels and wind turbines, which are not identified by reference to any other thing. In my judgment the limitation on the content of Note 1(a) and (b) is deliberate and indicates that it is *only* insulation in Note 1 (a) or draught stripping in Note 1(b) for the things specified which are within the reduced rate. It would have been easy as a matter of drafting to broaden the words in (a) and (b) beyond insulation or draught stripping, but that was not done. The contrast with the way (e) to (k) are drafted is significant.

36. I infer that the purpose of Note 1 is, quite simply, to list those supplies of energy saving materials which benefit from the reduced rate. Whatever the wider context of this reduced rate may be, and one can assume that it forms part of a larger national strategy to encourage people to save energy for environmental and economic purposes, Note 1 cannot be extended beyond its plain words. The note represents a legislative choice about where to draw the boundary between supplies at the reduced rate and supplies subject to the general rule (ordinarily, of taxation at the standard rate). Because the

reduced rate results in a lower tax yield for the Exchequer, the choice of where to draw the line is essentially political; it is not for the Courts or Tribunals to attempt any redefinition of that boundary. It follows that there may be fine distinctions between supplies which fall on each side of the line. It also follows that there may well be supplies which have energy-saving qualities which fall outside the reduced rate. For example, a hot water tank with lagging built in would not qualify, nor would double glazing; both fall outside Note 1(a) and (b), respectively, notwithstanding their energy-saving qualities.

37. In my judgment, the question posed by Note 1(a) is whether supplies are 'insulation for roofs' using those words in their ordinary sense, applied strictly but not restrictively. If the supply in question is of something more than or different from insulation for roofs, then it will fall outside Note 1(a) and the reduced rate will not apply.

38. I agree with the UT (at [36]) that the application of this test to the facts is an essentially evaluative exercise. The FTT must consider all the evidence before it and apply the law, properly construed, to determine whether Note 1 applies. What evidence the FTT permits to be adduced before it, and what weight it gives to what parts of that evidence, is a matter for the tribunal.

39. I come then to *Pinevale* and *Wetheralds.* In large part I agree with the approach and reasoning of the two UTs, and I have no reason to doubt the outcome in either case. However, those two cases have been understood to lay down a test which depends on whether the supply is of insulation for roofs or a roof (see [17] of *Pinevale* and [32] of *Wetheralds* as the apparent origin of such a test). I do not accept that test in its entirety: I would remove the "or a roof" rider to the test. There are some VAT cases where two descriptors can be lined up alongside one another and the tribunal can conveniently ask itself which description best fits: one such case was *Mainpay Ltd v HMRC* [2022] EWCA Civ 1620 where I held at [51] that the choice was between supplies of exempt medical services on the one hand or taxable supplies of staff on the other, because the two were mutually exclusive. But that approach does not work in every case and I doubt it is useful in many cases on Note 1(a). I conclude that the test articulated in *Pinevale* and *Wetheralds* went too far in suggesting a binary choice between insulation for roofs on the one hand and a roof on the other. The true test asks only whether the supply is of insulation for roofs: see paragraph 37 above.

40. In applying that test, I think the Appellant is right to suggest that the concept of "nature and extent" may assist, but not for the reason the Appellant argues (ie to test whether the supply is of insulation for roofs *or of a roof itself*) but rather to test the limits of what is meant by insulation for roofs. The point is this: a supply may have insulating properties, but if that supply extends beyond what might fairly be described as "insulation for roofs" it will not benefit from the reduced rate. I am not, however, assisted by *Coleborn* or *Marchday* which are illustrations of the Court having to decide whether the description in different legislation was met on the facts (whether a substantially rebuilt vehicle had undergone 'a process of manufacture' in *Coleborn,* and whether an office block was a 'conversion, alteration or enlargement of an existing building' in *Marchday*).

41. I see no utility in the other formulations of the test articulated at various stages in this litigation: Note 1(a) does not require a test of form over substance as the FTT maintained or of substance over form as the Appellant maintained in this Court. There

is no sliding scale, nor any need to distinguish between insulation for a roof as opposed to insulation 'to' or 'of' a roof, as the Appellant suggested. It is not part of the test that there should be a pre-existing roof, as HMRC suggested.

Response to Grounds of Appeal

42. I can now deal with the Appellant's Grounds of appeal, albeit briefly given my conclusions on the approach to Note 1(a). As to Ground 1, I accept that the FTT and in turn the UT erred in their approach to the statutory question, although not quite in the ways suggested by the Appellant. As to Ground 2, I accept that there is merit in considering the nature and extent of the particular supply as part of the assessment, but I do not accept that there is a sliding scale, or that the tribunal is faced with a binary choice as to whether the particular supply is of insulation for roofs or a roof itself. The particular criticism in Ground 3 was bound up with the Appellant's challenge to the way the FTT went about deciding that its supplies were <u>of a roof</u> (as part of which the FTT considered what the reasonable man would say at the mid-point of the installation work), but this ground falls away in light of my conclusion that the FTT did not apply the right test. Ground 4 overlaps with ground 1 and has merit in so far as it challenges the approach of asking whether the supply was of a roof, which is not the statutory question. But those Grounds, and my answers to them, do not determine the answer to this appeal, to which I now turn.

Disposal of the Appeal

43. The FTT posed the right question in the opening words at [73] (set out at paragraph 17 above) in asking whether it was a fair interpretation of the words 'insulation for roofs' to include the type of roofing panels supplied by the Appellant. But for reasons which I understand, and which involve no criticism of the FTT (or the UT), the FTT went wrong in answering that question by reference to a distinction between something which is for a roof and something which is a roof [73(1)]. In my judgment, the FTT's conclusion that the Appellant's supplies were "of a roof" (at [78], repeated at [79] and [82]) cannot stand because that conclusion, which is of mixed fact and law, is infected by the error of law which I have identified. In short, the FTT constrained itself to find that the supplies, if not of insulation for roofs, must have been a roof. That was a material error. For my part, I would question whether this Appellant could be said to be supplying a roof, applying the ordinary meaning of that word, in light of the undisputed facts which show that the Appellant supplied roofing panels only.

44. Before considering the statutory question, I wish to deal with other errors in the FTT's approach which the UT identified and explained. I agree with the UT that these other errors were not material and are not sufficient, in and of themselves, to vitiate the FTT's conclusion. I note in particular the FTT's adoption of a test of "form over substance" at [73(2)], [73(4)] and elsewhere. That approach is not part of Note 1(a) and I agree with the UT at [58] that it was rather confusing. But by putting the test this way, I think the FTT was trying to steer clear of *CPP/Levob* (which invites attention to the 'predominant purpose' of a composite single supply which was not an issue in this case) and was instead seeking to focus on the objective characteristics of the supply, which would be in line with the established approach (see eg Case C-4/94 *BLP Group plc v Commissioners of Customs and Excise* 2 CMLR 750 at [24], cited by the Supreme Court in *Frank A Smart & Son Ltd v Revenue and Customs Commissioners* [2019] UKSC 39, [2019] 1 WLR 4849: "… the VAT system's objectives [are] of ensuring legal certainty

and facilitating application of the tax by having regard, save in exceptional cases, to the *objective character* of the transaction in question." (emphasis added)). In the end, even if rather difficult to follow, I do not think this aspect of the FTT's reasoning discloses a material error.

45. CPR 52.21(3) provides that an appeal will be allowed where the decision of the lower court or tribunal was wrong or unjust because of a serious procedural or other irregularity in the proceedings. The first question for this Court is, therefore, whether the FTT was wrong to dismiss the appeal. Although I have identified a material error in the test of law applied by the FTT at paragraph 43 above, once that error is corrected and the true test set out at para 37 above is applied to the facts, there is only one possible answer, which is that the Appellant's supplies were not of insulation for roofs. The primary facts are not in dispute, they are set out at paragraph 4 above. The key point I take from them is that the panels are manufactured with a waterproof aluminium casing with protective powder coating around the Styrofoam; without that, the Appellant's products would be seriously defective because they would let the rain in. The inference I draw, which I consider to be unavoidable, is that the Appellant's panels do provide insulation for the conservatory on which they are installed but they also protect the conservatory from the outside elements. They may have other characteristics as well, but these two characteristics are fundamental aspects of the product and mean that the supplies fall outside Note 1(a).

46. That is not to reach a conclusion which is perverse or absurd, as Mr Hellier suggests. As I have noted above at paragraph 36, there can be fine distinctions between cases falling on either side of the line, given the specificity of Note 1. If the insulation had been applied without the weatherproof coating, then the reduced rate might have applied; but then the Appellant would have been providing a different product with different characteristics. That is the answer to Mr Hellier's fiscal neutrality point too: a panel without weatherproofing is objectively not the same as a panel with weatherproofing, so that no issue of equal fiscal treatment arises by comparing the two.

47. In my judgement, standing back, the FTT was not wrong to dismiss the appeal.

48. I consider then the second question, whether there has been any injustice. Although it might be said that the application of the wrong legal test was an irregularity (although not a procedural irregularity), in my judgment that has not led to any injustice, because the appeal was destined for dismissal even on the basis of the correct legal test, for reasons I have explained.

49. For those reasons I would dismiss this appeal.

50. Alternatively, and if the decision of the FTT and UT should, in light of the material error I have identified, be set aside, then this Court would have all the powers of the lower court in determining the outcome of the appeal (see CPR 52.20(1)). The lower court would have had the option of remitting the case to the FTT with directions for its reconsideration or re-making the decision itself (s 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007). I would not consider there to be any good reason to remit this case to the UT or the FTT: the primary facts have been found and are not challenged, and the only issue is whether the Appellant's supplies, defined by reference to those facts, come within Note 1(a). I would be confident that this Court could address that issue. My answer would be that the supplies do not come within Note 1(a), for the

reasons I have given already. I would therefore, on this alternative hypothesis, re-make the decision to dismiss the appeal.

Conclusion

51. The approach to Note 1(a) adopted by the FTT and UT was not correct, although it did reflect the case law of the UT on the meaning of that provision. The revised approach to Note 1(a) is set out at paragraph 37 above; it is to ask whether the supply in question is of insulation for roofs, and it carries no rider.

52. That revised approach does not, however, alter the outcome of this appeal. The reduced rate of VAT does not apply to supplies of roof panels by the Appellant because those supplies are not of "insulation for roofs".

53. I would dismiss this appeal.

LADY JUSTICE FALK:

54. I agree.

LORD JUSTICE PETER JACKSON:

55. I also agree.