



A
A
P
T
T
TC03726

TC/2013/00013

VATA 1994 Sch 8, Gr p 6, item 1 – whether house ‘substantially reconstructed’ – reliance on Cheltenham College decision – note (4) criteria – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BRUNSWICK PROPERTIES LTD

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MR JULIAN STAFFORD FCA**

Sitting in public at 1 Shaftesbury Avenue, Cambridge, on 12 May 2014

Mrs Elena Johnston, Director of the appellant company

Mr David Wilson of HMRC, for the Crown

CROWN COPYRIGHT 2014

DECISION

Introduction

5 1 This appeal concerns a refusal by HMRC to register the appellant company
Brunswick Properties Limited ('Brunswick') for VAT in respect of the acquisition and
resale of a property to which Brunswick carried out extensive work. The application
was made in July 2012 and was finally refused on review on 29 November 2012. The
appeal was lodged on 17 December 2012.

10

2 We had extensive documentary evidence (much of it in the form of detailed plans and
photographs) concerning the work done to the property acquired by Brunswick, and oral
evidence from Mrs Johnston on behalf of Brunswick. Mrs Johnston also presented the
case of behalf of the appellant company, very helpfully and with some skill. The facts
15 are not in dispute, and the matter before the tribunal is to relate them to the relevant
legislation and case law.

Facts

3 Brunswick is a small property development company that completed the renovations
20 of a Grade II listed property located at 7 Brunswick Walk, Cambridge; so far, this is the
only business which has been undertaken by the company. 7 Brunswick Walk was
purchased in October 2011 and the property was then advertised as a 'Grade II
townhouse requiring modernisation'. However, when a full building report was
commissioned, the full extent of the work needed became apparent.

25

4 Internally the house was in a very poor condition. It had a sitting tenant, who it is
believed had lived at the property for some forty years, and in the last few years of his
life the tenant had suffered a stroke and was bed-bound. It is believed that he died
sometime at the beginning of 2011 and that the property had been unoccupied since
30 then. The house was eventually bought for £392,500, the original sale price having
been advertised as £425,000. Following the purchase, an architect prepared plans, and
an application to obtain listed building consent and a planning permission, for the works
proposed.

35

5 As is often the case, the full extent of the works required at the property only became
apparent once they had started. During the works at the property timber props and
acroprops had to be used in the first floor sitting room, ground floor bedroom, first floor
bedroom and basement to secure the structure above and allow the works to proceed at
the property. A structural engineer was then commissioned to propose solutions for the
40 spreading roof and floors reinforcements.

45

6 The works to the roof included installation of the new steel ridge beam, two new steel
purlings, to stop the roof from spreading and pushing the front wall out; timber collars
were installed between every second rafter; supporting timber studs were installed; the
roof was insulated, and the top part of the front chimney stack was rebuilt and re-
pointed to stabilise it because it was leaning. Broken roof slates were also replaced.
The upgraded roof structure now supports the ceiling in the room below, undue stress
having previously been put on it by plasterboarding being applied to the lath and plaster
ceiling during previous ownership.

50

7 Once the property had been stripped, it was also discovered that the rear part of the party wall to the adjoining property, no. 8, was in fact extending further than the wall of no. 8 (meaning that no. 7 was a deeper house than its neighbour). This additional part of the wall was not tied to the main wall of the house and, in effect, was almost free-standing with a gap between the main wall and this additional wall, through which the daylight could be seen all the way from the first floor down to the basement. In the past various attempts to repair the gap had been made, mainly by rendering the wall and the gap in cement, which prevented the wall from moving naturally.

8 The cement render had to be hacked off to expose parts of the wall on either side of the gap and the structural engineer had to be called to the site to inspect the issue and propose a solution for structural repairs of the wall. In the end, the structural ties were used to tie two parts of the wall and then the expansion gap was formed to allow for a small movement in the wall, yet ensuring that the wall was structurally sound. The wall was then rendered in lime plaster, a material appropriate for a period property.

9 During the initial demolition works at the rear of the house, the original lath and plaster ceiling in the basement part-collapsed and had to be reconstructed. The load bearing wall (timber framed) in the basement was found to be rotted at the bottom and where it was bearing to the rear wall of the house. The structural engineer was called back to site to inspect and propose a solution to repair this wall, given that it was a structural wall. In the end the top part of the load bearing wall had to be braced to the rear and the opposite walls and the rotted timber frame of the load bearing wall cut out and rebuilt, before lath could be reconstructed and lime plaster installed.

10 In the past the walls of the basement had been rendered in cement, a material inappropriate for a period property. The cement had to be hacked off the walls, the retaining wall (rear wall) had to be repaired with Helifix (which is a crack stitching system that repairs and stabilises cracked masonry using stainless steel HeliBars bonded into cut slots with HeliBond grout), and a specialist hydraulic lime based plaster was then applied to all perimeter walls. A window in this room was removed and the opening blocked.

11 Floor joist reinforcements were made in the ground floor bedroom, future bathroom and the sitting room, thus in three out of four rooms in the main house. This involved lifting all floorboards, installing additional floor joists alongside the existing floor joists, reinstating the original floor boards and laying over the original floor a new floating floor, or carpet or stone floor, depending on the room.

12 Typically, the inadequate or deteriorated floor joists would be removed and replaced but, as every attempt was made to preserve the original fabric of the building, the new floor joists were installed alongside the existing ones. The ends of the floor joists in the sitting room where they were bearing to the wall were treated to prevent their deterioration. The rotted wall plate at the floor level in the future bathroom was replaced. A window in this room was removed and the opening blocked.

13 The old bathroom extension which had covered 7m² (4m² excluding the rear hall) was demolished and a new kitchen extension of approximately 19m² to 20m² was built in its place; the house and original extension had covered 86m², and was 99m² on completion. Internally, the property was rewired, replumbed and the gas piping rerouted; externally, the drainage was replaced except for the gutters and downpipes.

14 The total cost of the work done was £163,000, of which £30,000 was made up of architects' and surveyors' fees. 50% of the work is accepted to have consisted of repair

and maintenance and the other 50% to have been 'approved alterations' i.e. alterations for which either planning consent or listed building consent was required.

5 15 The rebuilding cost for insurance purposes of the house when it was acquired was put at £250,000, so that if £30,000 representing architects' etc. fees and VAT were to be subtracted from this, the sum of £178,000 resulting would be roughly comparable with the £163,000 spent on the work in fact done – the cost actually incurred can be seen as 92% of the net rebuilding cost. According to information Mrs Johnston cites from Homebuilding & Renovating magazine, a newly built house of this size (99m²) would
10 be between £93,357 and £147,213.

16 The following is a summary of the work completed at the property in each room: -

Ground floor hallway

floor void insulated
old services removed
new services installed
walls re-plastered (part)
new cast iron radiator installed
structural repairs to the wall (expansion gap) completed
door frame and the door to basement and former rear hall removed
front door and architraves replaced
walls and ceiling stripped of woodchip wallpaper and re-lined with lining paper and re-decorated
arch repaired
new floating floor installed
fire alarm system installed
new door and architraves to the new kitchen installed

Ground floor bedroom

door replaced
floor joists strengthened by inserting additional joists
floor void insulated
old services removed
new services installed
gas connection run to basement (in floor void of this room) from front of the house
new TV and telephone distribution installed
new cast iron radiator installed
window overhauled
two sashes replaced
60-s tiled surround removed and new reclaimed fireplace installed
some wall re-plastering required where the lime plaster came off when stripping off the woodchip wallpaper
walls and ceiling lined with lining paper and re-decorated
picture rail repaired
gas metering and boxing removed
new carpets installed

Basement

cement render removed from all walls
window removed and bricked up
retaining wall repaired with Helifix
fireplace opening blocked
all walls re-rendered using lime based hydraulic plaster. Appx. total 35m²
structural wall (load bearing) timbers of which rotted away the bottom and where the wall was bearing to the rear wall of the house, part reconstructed, laths restored and new lime plaster installed
part collapsed ceiling reconstructed, including laths restoration and new lime plaster installation

Delta membrane (a form of damp proofing) applied to the floor
new cement screed installed on the floor
new tiled floor installed
air bricks reinstated
new mechanical ventilation installed
old services removed
new services installed
new TV and telephone distribution installed
electrical meter, consumer unit and mains cables moved to the basement
new boiler and water tank installed
manifolds for kitchen under floor heating installed
steps to basement - all treads and some risers replaced
cupboard doors and room door and architraves replaced
lights changed to spot lights
new skirting boards installed

Bathroom (previously kitchen)

ceiling (plasterboard) taken down and new ceiling formed
floor joists strengthened
old services removed
new services installed
new waste pipe installed
window removed and bricked up
floor void insulated
door replaced
new stone floor installed
walls and ceiling re-plastered
new radiator installed

First floor landing (hallway)

window overhauled
two sashes replaced
structural repairs to the wall (expansion gap) completed
wall opposite part re-plastered (around 5.7m²)
steps to bedroom 2 repaired after old cabling taken out
old services removed
new services installed
fire alarm system installed
walls and ceiling lined with lining paper and re-decorated

Sitting room

back boiler removed
chimney flue lined
new working open fire fireplace installed
floor joists strengthened
window architraves and skirting boards stripped of old paint to the wood and restored
old services removed
new services installed
new TV and telephone distribution installed
new floating floor installed
two windows overhauled
door replaced
two new cast iron radiators installed
new carbon monoxide detection system installed
walls and ceiling lined with lining paper and re-decorated

Bedroom 2

cupboards on either side of chimney breast removed
old water tank removed
ceiling part reconstructed
old services removed
new services installed
new TV and telephone distribution installed
chimney breast stripped to brick due to plaster deterioration and re-plastered in lime plaster
walls either side part re-plastered
new cast iron radiator installed
lights changed to spot lights
window overhauled
new carpet installed
replacement skirting installed
replacement architraves installed
new door installed
walls and ceiling lined with lining paper and re-decorated

Outside front

all brickwork, front and back, re-pointed
window sill (ground floor) repaired with Helifix
window frame repaired
lead canopy over the front door renewed
front door doorframe repaired
paving installed
gas metering installed in the new semi-concealed box

Roof

top part of the front chimney re-built and re-pointed
broken roof slates replaced
lead flashing renewed
ridge tiles re-pointed
new steel ridge beam installed
two new purlins installed
timber collars installed every 2nd rafter
supporting timber studs installed
roof insulated

Outside back

all brickwork re-pointed
new extension and kitchen in place of demolished bathroom extension
party wall to No 6 part underpinned
cast iron vent pipe repositioned
main drainage system extended and replaced
new linear drainage installed
inspection chamber installed
new paving installed
new fence and gate installed
new steps from the street installed
neighbours roof adjusted to 'marry' their roof with extension roof
gap between No 7 and No 8 filled with Compriband to stop water ingress and damage to brickwork

Legislation

17 The Value Added Tax Act 1994, Schedule 8 (Zero-Rating), Group 6 provides:-

5 Item No

1 The first grant by a person substantially reconstructing a protected building, of a major interest in, or in any part of, the building or its site.

5 Note (4) of Group 6 then qualifies Item 1 above as follows:

(4) For the purposes of item 1, a protected building shall not be regarded as substantially reconstructed unless the reconstruction is such that at least one of the following conditions is fulfilled when the reconstruction is completed -

10 (a) that, of the works carried out to effect the reconstruction, at least three-fifths, measured by reference to cost, are of such a nature that the supply of services (other than excluded services), materials and other items to carry out the works, would, if supplied by a taxable person, be within either item 2 or item 3 of this Group; and

15 (b) that the reconstructed building incorporates no more of the original building (that is to say, the building as it was before the reconstruction began) than the external walls, together with other external features of architectural or historic interest;

20 and in paragraph (a) above “excluded services” means the services of an architect, surveyor or other person acting as consultant or in a supervisory capacity.

18 It is agreed that the necessary planning permissions and listed building consents were obtained and that Brunswick’s intention was to sell the property once the works were completed.

Submissions – the taxpayer

19 For Brunswick, Mrs Johnston made the following submissions.

20 First, that *Cheltenham College Enterprises Limited v RCC* [2010] SFTD 696 is the authority on the issue of substantial reconstruction because it is the most recent case, it significantly amended the test that was used in the previous cases, and it is the most comprehensive case in the line of argumentation put forward by the parties and in the reasoning behind every decision made there.

21 The test applied in *Cheltenham* and *Lordsregal Limited v CEC* (2003) VAT Decision 18535 is the correct one and the test is ‘substantially reconstructing’ not ‘reconstructing’, and should be given its ordinary everyday meaning. Extensive arguments were put forward by the appellant in *Cheltenham*, including citations from *Lordsregal*, where the tribunal construed the words ‘substantially reconstructing’ together, according to their ordinary everyday meaning. The tribunal in *Cheltenham* agreed with the appellant that he only had to show that the building was *substantially* reconstructed.

22 This point is made in the light of the fact that HMRC in the present case keep referring to the requirement for the property to be ‘reconstructed’ and then consider whether the reconstruction was ‘substantial’ rather than whether the property was ‘substantially reconstructed’. Relying on *Cheltenham*, Brunswick only has to demonstrate that the property was ‘substantially reconstructed’.

23 Whether or not the property has been substantially reconstructed is the only point of dispute at present, as HMRC has specifically stated that the property meets the criteria of the 60:40 test, and will qualify for zero rating provided the tribunal agrees that the property was substantially reconstructed. It is not in dispute that the building in question is a listed building, nor that the works have been carried out to the building.

24 HMRC concede that extensive work has been completed at 7 Brunswick Walk, which they refer to as ‘renovation, modernisation and refurbishment’ but they do not recognise renovation, modernisation and refurbishment works as reconstruction, as in
5 HMRC’s view reconstruction is only when there is a demolition and rebuilding.

25 This is however contrary to how *Cheltenham* viewed such works, holding that ‘reconstruction can include non-structural changes’. Brunswick argues that construction of the building includes structural and non-structural elements, and that
10 therefore reconstruction would by default include structural and non-structural elements. For example installation of new lath in place of deteriorated and lime plastering of the walls would amount to reconstruction of non-structural elements.

26 The tribunal in *Cheltenham* went on to say that ‘installing of new services or re-
15 instating services (such as gas, electricity, drainage etc.) are also works of reconstruction’; ‘ordinary repairs and maintenance are not reconstruction’, but added that ‘repairs could be so extensive that they amount to reconstruction’ and that ‘extensive repairs can amount to reconstruction, if viewed as a whole, the building was reconstructed’.

20
27 The tribunal continued: ‘repairs can amount to reconstruction, and reconstruction to repair’, ‘extensive refurbishment might involve reconstruction’. It was held that ‘construction of new extensions as part of the project are not works of reconstruction’ but where ‘existing sections of the building were demolished and replaced’ the tribunal
25 found ‘replacing sections of a building to be reconstruction’. In the case of 7 Brunswick Walk an existing extension was demolished and a new extension was built.

28 The tribunal in *Lordsregal* said ‘it may be always possible to describe particular items of work comprised within a larger project as works of repair when looked
30 individually, but if one stands back and looks at the property as a whole and what was done to it, we find it impossible to describe it as amounting to no more than a work of repair or restoration.’ Mrs Johnston urged that HMRC seemed to be lacking the ability to stand back and view the works that were done to the property as a whole and not as individual elements.

35
29 Mrs Johnston then pointed out that the tribunal in *Cheltenham* had expressed a view as to what ‘substantially’ means and they considered that it would mean ‘at least more than 50%’. Further, the tribunal considered that the cost of the works even though not a determining factor, is ‘... a useful indicator...’ in deciding ‘...whether something was
40 substantially reconstructed...’.

30 7 Brunswick Walk was purchased for £392,500. The direct cost of renovation/extension/alteration amounted to £163,000; approximately £50,000 out of £163,000 was expended on repair and maintenance and the rest was expended on approved alterations or works required as a result of approved alterations. Some further
45 £30,000 was spent on various professional fees. The project took some 7 months to complete.

31 The evidence showed that the cost of rebuilding was assessed for insurance purposes at £250,000 in 2011, which includes VAT and the cost of all professional services. If
50 VAT is taken off, and to simplify the calculations £30,000 is allowed for the professional services, the direct cost of rebuilding would have been in the region of £178,000, which would mean that the cost of the works on 7 Brunswick Walk amounted to around 92% of the cost of rebuilding.

32 A substantial amount of money was expended on the actual works at the property, especially given the size of the house (finished size is 99m²), the original purchase price and the potential cost of rebuilding for insurance purposes; moreover, the cost of rebuilding is higher than normal because the property is listed. The information from
5 Homebuilding & Renovating magazine was that a new built house of this size would cost between £93,357 and £147,213. Therefore the amount of money Brunswick Properties Ltd. expended on the project was the same as having the property entirely rebuilt.

10 33 HMRC contend that ‘no internal or external walls were taken down or rebuilt apart from those relating to the construction of the extension’. In fact, deteriorated walls in the basement were part-rebuilt and, as far as the extension is concerned, there was a structure (a bathroom extension) previously there which was demolished and a new structure was built in its place; the original structure was part of the original house.

15 34 Therefore when the walls of the bathroom extension were taken down and new walls of the new extension were built, Brunswick submit that the works were part of the reconstruction. This is supported by the decision in *Cheltenham*, where the tribunal disagreed with HMRC in their contention that ‘the works in respect of the extensions
20 amounted to construction and not reconstruction’ and found ‘replacing sections of a building [an existing extension was demolished and replaced] to be reconstruction’.

35 Brunswick contends that the appeal should be allowed and the company should be allowed to register for VAT with effect from 19 July 2011 and reclaim all VAT paid.

25 *Submissions – the Crown*

36 Mr Wilson, for HMRC confirmed that the matters not in dispute are: that this is a Grade II listed building and therefore a protected building for VAT purposes, that planning permission has been granted in this case, and that Brunswick are intending to
30 sell the building as a residential property; the only issue is whether the building has been ‘substantially reconstructed’.

37 Note (4) to Schedule 8, Group 1, clarifies that a building will not be regarded as substantially reconstructed unless the reconstruction is such that at least one of the
35 conditions is fulfilled - subparagraph (b) is agreed not to be relevant – and the dispute lies with regard to subparagraph (a), which provides in essence that the building is not substantially reconstructed unless 3/5th of the costs to effect the reconstruction are approved alterations.

40 38 HMRC do not dispute that 3/5th of Mrs Johnston’s costs are approved alterations, but contend that before the 3/5th test is even considered, the building has to have undergone “reconstruction”. If the tribunal do find in favour of Mrs Johnston, HMRC will not be challenging the 3/5th element of subparagraph (a).

45 39 The tribunal in *Cheltenham* stated: ‘reconstruction can include non-structural changes as construction of a building and would include both structural and non-structural elements, including plastering of walls’; ‘we consider that installing new services or re-stating services (gas, electric & drainage) are also works of reconstruction’; ‘ordinary repairs and maintenance are not reconstruction – however in
50 our view, repairs could be so extensive that they amount to reconstruction’; ‘we agree that extensive repairs can amount to reconstruction, if viewed as a whole, the building was reconstructed’; ‘repairs can amount to reconstruction and reconstruction to repair’; ‘extensive refurbishment might involve reconstruction’.

40 Mrs Johnston goes on to quote the tribunal in *Lordsregal*: ‘It may be always possible to describe particular items of work compromised within a larger project as works of repair when looked at individually, but if one stands back and looks at the property as a whole and what was done to it, we find it impossible to describe it as amounting to no more than a work of repair or restoration’. Mrs Johnston states that HMRC are lacking the ability to view the works carried out on the property as a whole, and not as individual elements, and submit that ‘reconstruction’ means only demolition and rebuilding.

10 41 Mrs Johnston adds that the tribunal in *Lordsregal* states that the costs of works, whilst not a determining factor, is a useful indicator in deciding whether something was substantially reconstructed; she contends that a substantial amount of money was spent on the property, especially given its size and the comparison with the cost of total rebuilding and gives an example of the costs of a newly built house of the same size from Homebuilding & Renovating magazine as between £93,357 and £147,213.

15 42 HMRC submit that reconstruction can be defined as the making anew of something that was already there, and that implicit in the act of reconstruction would be deconstruction or demolition and rebuilding of the property. Substantial reconstruction therefore would be the demolition and rebuilding of all or most of the original building.

20 43 HMRC do not dispute that the work carried out at 7 Brunswick Walk has been extensive, but they submit that the work completed does not amount to substantial reconstruction and that the property has been repaired, renovated, refurbished and modernised. HMRC does not regard the demolition and rebuilding of the extension to the rear of the property as reconstruction of the building as a whole.

25 44 Mrs Johnston has cited two cases in support of her case: *Cheltenham* and *Lordsregal*. In both of those cases it was ruled that substantial reconstruction had taken place. HMRC submits that the work carried out in *Cheltenham* and *Lordsregal* differs notably from the work carried out at 7 Brunswick Walk: at Cheltenham College the work included a significant element of rebuilding, the demolition and rebuilding of internal walls, the number of rooms were increased by 23%, the roof was retiled, chimneys were rebuilt, nearly all the ceilings were replaced; there was the demolition and rebuilding of two single story extensions and the foyer was increased in size by 50%.

30 45 In *Lordsregal* the position was even clearer: although previously occupied, the tribunal found that that the property was a ruin and it was unfit for human habitation, there was no sanitation, mains drainage or mains water, the house had to be scaffolded to help prevent the building from collapse and it was taken apart brick by brick and rebuilt; all tiles were removed from the roof and a new roof constructed, and all floors, internal walls and ceilings were removed.

35 46 HMRC contends that in both of these cases, significantly more rebuilding work took place than the work carried out on Brunswick Walk and submits Brunswick Walk has more in common with *Vivodean Limited v CEC* (1991) VAT Decision 6538.

40 47 Examples of some of the works carried out in *Vivodean* include: overhauling of the roof, replacing of gutters and downpipes, repairs to the flat roof and to chimneys and pots, complete rewiring, replacement of all lead piping and water tanks, re-pointing of external stonework, replacement of non-load bearing partitions, and repair or replacement of all windows; each flat in the property was given a new kitchen, the upper floors and wall linings in one of the extensions were replaced and the tribunal decided that there was some structural alteration, but that this did not amount to material

reconstruction. Nearly all of the work carried out in *Vivodean* was, as with Brunswick Walk, repair and maintenance.

5 48 HMRC also cite *Southlong East Midlands Limited v CEC* (2004) VAT Decision 18943. In that case, like this, it was also agreed that 60% of the works were approved alterations and the only dispute was over whether or not the work carried out was substantial reconstruction, or repair and maintenance. The property was described as lamentable and part of the house had been used as a pig sty.

10 49 The work carried out was: the brew house was demolished, the kitchen was extended, walls were removed to make some rooms larger, new internal walls were built and some internal and external walls were demolished and rebuilt; a new staircase was built, the ground floor was largely replaced, damp coursing was inserted, the kitchen boiler was removed and replaced with a fireplace, most of the windows were replaced,
15 the roof covering was completely renewed, the house was completely rewired, and a new drainage system installed.

20 50 The tribunal in *Southlong* compared that work to the work carried out in *Lordsregal* and concluded that it did not fall into the same category, or even approach it very closely. It was held that the work done was not reconstruction, but minor enlargement of a building and modernisation of the interior and the appeal was dismissed.

25 51 Brunswick has submitted that the high cost of the project should be considered as a factor. While HMRC disagree with this contention, we acknowledge that the project has been finished to a very high standard, and the fixtures and furnishings are a high quality and have added to the overall cost of the project: for example the kitchen is bespoke and has been hand-made. HMRC submits that using costs as an indicator in deciding if something has been substantially reconstructed could give an unfair advantage to developers using more expensive fittings and furnishings.

30

35 52 So, in conclusion, HMRC submits that the work carried out at Brunswick Walk was not a substantial reconstruction, especially when compared to the level of works carried out in *Cheltenham* and *Lordsregal*. The property was described by the original seller as 'a town house requiring modernisation', which is exactly what Brunswick have done. The company has modernised the property. HMRC accepts that Brunswick has probably spent more money on the project than initially envisaged because the property clearly had not had any modernisation or maintenance for decades, but it cannot be described as 'lamentable' as in *Southlong* or as 'in a state of dilapidation' as in
40 *Vivodean*. Nor should this case be compared with *Lordsregal* because the level of work carried out at Brunswick Walk does not come close to the level of work there.

45 53 HMRC ask the tribunal to find that Brunswick did not substantially reconstruct the property at Brunswick Walk and, as such, any onward sale or grant of that property should be exempt from VAT and ask the tribunal to confirm the decision not to register the company for VAT and to dismiss the appeal.

Conclusions

50 54 The tribunal's decision in *Cheltenham* examines and reviews the previous lines of case law connected with the decisions in *Barraclough* and *Lordsregal* respectively, and discerns a degree of difference in the approaches taken. No first instance decision is, of course, binding on us as to the correct interpretation of the law, but there is a clear public interest in the consistency of decisions taken by the tribunal where there is no reason for doing otherwise.

55 The decision in *Cheltenham* is the most recent of the line of first instance decisions hitherto and it contains a careful and extensive analysis of the statutory provisions. No argument as such has been put to us that *Cheltenham* was wrongly decided, or that the analysis there is at fault. HMRC urged us to have regard to all the decisions cited, which we will do, but we will proceed with reference to the legal criteria which *Cheltenham* establishes.

56 We summarise therefore the propositions of law we take to be relevant to this appeal, by reference to the paragraphs relating to them in *Cheltenham*, as follows:-

- a) The phrase ‘substantially reconstructing’ is used in the legislation with its normal everyday meaning – [22].
- b) The tests in note (4)(a) and (b) are additional – [23]
- 15 c) The works at issue must be works of reconstruction and amount to substantially reconstructing the building – [46].
- d) The phrase ‘substantially reconstructing’ does not envisage total rebuilding, nor does it necessarily mean the same as ‘constructing’ – [47] & [48].
- e) ‘Reconstructing’ may carry the implication that the rebuilt property is the same or very similar to the one that existed before – [49].
- 20 f) The Oxford English Dictionary definition is relevant and includes ‘to construct or put together again, esp. following damage or destruction, or by way of renovation’ – [50].
- g) Something may very well remain of the original building – [51].
- 25 h) Where the original building materials are used, the work can still be a reconstruction, and may be a complete replica – [51].
- i) Minimal changes to the layout of the building, and alterations being kept to the minimum, are not relevant to the question of ‘substantially reconstructing’ – [51].
- 30 j) Construction of new extensions (i.e. not rebuilding something previously in place) is not work of reconstruction – [51]
- k) Works can be included in a reconstruction even if they are not structural – [51].
- l) Installing new services or reinstalling services such as gas, electricity and drainage are works of reconstruction – [51].
- 35 m) Extensive repairs can amount to reconstruction if, viewed as a whole, the building was reconstructed – [51].
- n) ‘Substantially’ qualifies ‘reconstructing’ and has a meaning apart from the tests in note (4), and a building may be ‘substantially reconstructed’ but not come within note (4)(a) or (b) – [54] & [65].
- 40 o) ‘Substantially’ means of the most part, in the main, or at least more than 50% - [70] & [71].^{^^}

57 It is often not an easy matter – as the list of previous appeals cited in the *Cheltenham* decision illustrates – to relate the legislation applicable here to the facts of a very commonly undertaken type of operation, and it is unfortunate for taxpayers and tax authorities alike that this is the case. The present appeal is one such.

58 Looking at the list of works undertaken at paragraph 16 above, the overall impression given is one of major work being done on the house in question. When the work had been done, 7 Brunswick Walk was the same house as it was before, but now it was transformed from a run-down property in a poor and potentially dangerous condition, to a fully modernised, structurally sound, dwelling which – as far as the interior was concerned – was hardly recognisable from what it was before. From the point of view of the exterior, however, the onlooker would see little difference beyond a

general smartening up and the presence of the new extension at the rear of the property. A more detailed examination of the work done however shows a more nuanced picture.

59 Works which, on any analysis, can be regarded as relating to the structure, included:-

- 5 - *in the basement*, the removal and bricking up of the window, the repair of the retaining wall, the blocking of the fireplace, the repair of the load-bearing wall, the restoration of the partly collapsed ceiling, the insertion of a damp proof course to the floor, the installation of new services, boiler and water tank, the installation of the manifolds for kitchen underfloor heating, and the new cupboard and room doors;
- 10 - *in the ground floor hallway*, the installation of new services and radiator, work to the structural wall (the expansion gap), work to the door frame and door to the basement, the new front door, the new kitchen door, and the installation of a 'floating floor';
- *in the ground floor bedroom*, the new door, the strengthening of the floor joists, the installation of new services and radiator, and the replacement of the fireplace;
- 15 - *in the bathroom*, the new ceiling, the strengthening of the floor joists, the installation of new services and radiator, the removal and bricking up of a window, the new door, and the new stone floor;
- *in the first floor landing*, the structural repairs to the wall (the expansion gap) and the installation of new services;
- 20 - *in the sitting room*, the removal of the back boiler, the installation of an open fireplace, the strengthening of the floor joists, the installation of new services and radiators, the installation of the 'floating floor', and the new door;
- *in bedroom 2*, the removal of the built-in cupboards and the water tank, the reconstruction of part of the ceiling, the installation of new services and radiator, and
- 25 the new door;
- *to the roof*, the rebuilding of part of the chimney, the installation of the steel ridge beam, the two new purlins, and the installation of the timber collars on the rafters;
- *to the extension*, its total rebuilding and expansion, work to the main drainage system and inspection chamber, work to marry the neighbouring roofs, and work to the gap
- 30 between nos. 7 and 8 Brunswick Walk to prevent water ingress.

60 There was thus a considerable amount of structural work done, and it can be seen that no internal space in the house was without work which either affected or was directly involved with the structure itself. But much the greater part of the house after

35 the work was done consisted of the original building, albeit subject to items of work which can properly be regarded as repair and maintenance – and albeit of a significant or substantial nature.

61 In this context, we see repairs to the roof tiles, the lead flashing, the repointing of the

40 ridge tiles and the roof insulation, to take one example, as essentially works of repair and maintenance, which included upgrading and improvements such as the insulation. Other examples of work which we do not see as reconstruction, are the installation of TV and telephone distribution systems, the replastering of walls, changes to lighting, repair of windows, the reinstatement of airbricks, repair or replacement of picture rails

45 or skirting boards, and whatever is essentially decorative work.

62 The replacement extension is considerably larger than its predecessor, which was completely demolished, and bears no relation to it either in terms of use (it is a kitchen instead of a bathroom) or size (7m² to 20m²) or appearance (brick construction, visually

50 compatible with the remainder of the house to a white-framed glass-windowed 'conservatory' type appearance). In terms of the criteria adopted in *Cheltenham*, we see it as the construction of a new extension rather than the rebuilding of something previously in place, and it does not qualify as reconstruction.

63 That the cost of the work done was approximately the same as the amount insured was strongly urged upon us by Mrs Johnston as indicating, following the criteria formulated at [51] of *Cheltenham*, that in so far as her works amounted to repair they could still be regarded as reconstruction on account of their extent. Although it is true that the sheer scale of repair work can, in principle, be so extensive that a building can be said to have been reconstructed, the fact of a similarity in the amounts involved in either course does not of itself lead to that conclusion.

64 A considerable part of the work to 7 Brunswick Walk can be seen to have been in the nature of ordinary repair or renovation which every house is in need of, either in a single operation after years of neglect, or in the form of pieces of work done each time the need arises. It would need to be a truly exceptional case for repair as such to amount to reconstruction, or the normal distinction between the two would effectively disappear. In classifying items as works affecting the structure, we have arguably tended rather to the inclusion of debateable items than to their exclusion, and it would be extending the meaning of ‘reconstructed’ too far to include the repair work identified in the lists at paragraph 16.

65 Viewing 7 Brunswick Walk as a whole, it is not therefore possible to conclude that the house has – as to more than 50% of it – been ‘substantially’ reconstructed, and the appeal cannot succeed.

Further appeal rights

66 This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply in writing for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by the tribunal no later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE

RELEASE DATE: 11 June 2014

