STAMP DUTY LAND TAX – acquisition of freehold property and acquisition of right to use nearby communal garden – amount of tax chargeable – section 55 Finance Act 2003 – Table A or Table B rates? – were there linked transactions? Held: no, as different vendors – did the relevant land include non-residential property? – Held: no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/02510 V

BETWEEN

NAEL KHATOUN **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ZACHARY CITRON

The hearing took place on 11-12 November 2020. The form of the hearing was V (video) and was held on the Tribunal's video platform. A face to face hearing was not held because of the risk to public health during the coronavirus pandemic. The documents to which I was referred were a hearing bundle of 110 pdf pages, an authorities bundle of 203 pdf pages, skeleton arguments and revised skeleton arguments, and a supplemental authorities bundle of 42 pdf pages.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr P Cannon of counsel for the Appellant

Dr J Schryber, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

1. This appeal was about whether the fact that, at the same time as buying a freehold property, Mr Khatoun also acquired rights to enter and use a nearby communal garden, meant that the applicable rates of stamp duty land tax ("SDLT") on his purchase were those for "mixed" rather than purely "residential" properties.

2. I gave my decision orally at the end of the hearing, finding that the "residential" rates applied and so dismissing the appeal. Mr Cannon asked that I provide a decision notice accompanied by full written findings of fact and reasons for the decision.

BACKGROUND TO THE APPEAL

3. On 15 August 2018 Mr Khatoun submitted an SDLT return self-assessing tax of £1,320,000 on the basis of the rates for "residential" properties.

4. On 24 August 2018 Mr Khatoun submitted an amended SDLT return on the basis of the rates for "mixed-use" properties, as the property in question had the benefit of a right to use a communal garden; the self-assessment was reduced by £861,750.

5. On 19 October 2018 HMRC notified Mr Khatoun of their intention to enquire into his SDLT return.

6. On 20 December 2018 HMRC issued a closure notice stating SDLT was due at the residential rate. HMRC therefore rejected Mr Khatoun's claim for a refund.

7. On 18 January 2019 Mr Khatoun appealed and requested a review.

8. On 5 March 2019 a review conclusion letter upheld HMRC's original decision.

9. On 30 April 2019 Mr Khatoun appealed to the Tribunal.

PRELIMINARY MATTER

10. The appeal to the Tribunal was made 25 days late due to some confusion over the deadline. HMRC did not object to the late appeal. In all the circumstances, I decided to permit the late appeal to the Tribunal.

FINDINGS OF FACT

11. Mr Khatoun acquired the freehold interest in 25 Tedworth Square, London (title number BGL41559) (the "property") on 15 August 2018 from a Mr Ipkendanz for a consideration of £9,375,000.

12. On the same date Mr Khatoun signed a one-page "key fine form" issued by Cadogan Estates Limited and relating to Tedworth Square garden (the "communal garden"), a communal garden situated across the street from the property.

13. Then or shortly afterwards, Mr Khatoun received a key to the communal garden.

14. On 1 April 2019, Mr Khatoun entered into a deed of agreement (the "deed of agreement") with Cadogan Holdings Ltd ("Cadogan"), a sister company of Cadogan Estates Ltd, with an attached "code of conduct" and "FAQs" relating to the communal garden (totalling seven pages in all). I infer from the circumstances that the deed of agreement was a formalisation of the terms under which Mr Khatoun was given the key – i.e. access to the communal garden – some months earlier. The essential terms of the deed of agreement were that

> (1) Cadogan granted permission to Mr Khatoun for occupants of the property to enter and use the communal garden as a pleasure garden in common with Cadogan and other persons having permission from Cadogan; and
>
> (2) Mr Khatoun covenanted to pay Cadogan the annual "garden rate".

15. Other terms of the deed of agreement included:

(1) it was expressed to include Mr Khatoun's successors in title to the property;

(2) it could be terminated by Cadogan on three months' notice, upon which it was expressed to be null and void and of no further effect.

THE LAW

16. SDLT law is largely set out in Part 4 Finance Act 2003 (and references to sections in what follows are to sections of that Act). SDLT is charged on "land transactions" (s42) – which means any acquisition of a "chargeable interest" (s43). A land transaction is a "chargeable transaction" if it is not a transaction that is exempt from charge (s49).

17. Under s48(1), "chargeable interest" means

(a) an estate, interest, right or power in or over land in England and Northern Ireland, or

(b) the benefit of an obligation, restriction or condition affecting the value of any such interest, right or power,

other than an "exempt interest"; and

a licence to use or occupy land is an exempt interest under s48(2).

18. Section 55 deals with the amount of tax chargeable in respect of a chargeable transaction:

(1) It has two tables of rates: Table A (residential) and Table B (non-residential or mixed). Table B has lower rates where the consideration exceeds £925,000.

(2) Table B (rather than Table A) applies where the "relevant land" consists of or includes land that is not residential property. The "relevant land" is the land an interest in which is the "main subject-matter of the transaction" (or, if the transaction is one of a number of linked transactions, it means any land an interest in which is "the main subject-matter of any of the linked transactions").

(3) Section 43(6) provides that references to "the subject-matter of a land transaction are to the chargeable interest acquired (the "main subject-matter"), together with any interest or right appurtenant or pertaining to it that is acquired with it".

19. Under s108, transactions are linked if they form part of a single scheme, arrangement or series of transactions between the same vendor and purchaser or, in either case, persons connected with them.

20. Under s116(1), "residential property" means

(a) a building that is used or suitable for use as a dwelling …, and

(b) land that is or forms part of the garden or grounds of a building within paragraph (a) (including any building or structure on such land), or

(c) an interest in or right over land that subsists for the benefit of a building within paragraph (a) or of land within paragraph (b);

and "non-residential property" means any property that is not residential property.

21. Under paragraph 4 Schedule 4, consideration attributable to two or more land transactions is to be apportioned on a just and reasonable basis.

APPELLANT'S ARGUMENTS

22. Mr Cannon's position was that the relevant land in the chargeable transaction by which Mr Khatoun acquired the property included land that was not residential property – namely, an equitable interest over the communal garden. Hence the rates in Table B of s55 applied.

23. Mr Cannon argued that Mr Khatoun acquired, from Mr Ipkendanz , a "personal" right to use the communal garden, coupled with an equitable interest over the communal garden. Mr Khatoun therefore acquired a "chargeable interest" (being an (equitable) right or power over the communal garden) that was not exempted by reason of being a licence to use or occupy land.

24. Mr Cannon referred to a form TP1 (transfer of part of registered title) dated 31 May 2002 in respect of 25 Tedworth Square, London. The transferors were Cadogan (as special executor of the will of Earl Cadogan) and Vanessa Ling (as headlessee). The property there was sold subject to and with the benefit of a lease, to the intent that such lease should merge with the fee simple of that property. The lease was for 49¾ years running from 1952 at a rent of £75 "plus garden rent". The parties to the lease were (1) Earl Cadogan, (2) Cadogan Settled Estates Company, and (3) Leslie Ling.

25. Mr Cannon said that the reference to "garden rent" in the 1952-2002 lease indicated, on the balance of probabilities, a right to use the communal garden; Mr Cannon submitted that this right was originally an "interest" in the communal garden within that lease (which, in May 2002, merged with the fee simple of the property). Mr Cannon argued that, after 2002, the right to enjoy the communal garden was treated by the freehold owner of the communal garden (i.e. Cadogan) and owners of the property as an "interest" that was more appropriately and conveniently dealt with by way of a deed of agreement of the kind entered into by Mr Khatoun and Cadogan on 1 April 2019.

26. At completion, Mr Cannon argued, the right to use the communal garden and the burden of that right, namely the obligation to pay the "garden rate", passed from Mr Ipkendanz to Mr Khatoun in equity by operation of law - by acquiring the property, Mr Khatoun became entitled immediately to enjoy the communal garden. This, he said, can be seen from the terms of the deed of agreement and the key fine form.

27. Mr Cannon argued that Mr Khatoun's right to use the communal garden was an equitable proprietary interest on the following basis:

(1) The benefit of the right to use the communal garden is enforceable against the successors of the freehold owner of the communal garden because s79 Law of Property Act 1925 provides (emphasis added):

> "79 Burden of covenants relating to land
>
> (1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor *on behalf of himself his successors in title and the persons deriving title under him or them*, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed.
>
> This subsection extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.
>
> (2) For the purposes of this section in connexion with covenants restrictive of the user of land "successors in title" shall be deemed to include the owners and occupiers for the time being of such land.
>
> (3) This section applies only to covenants made after the commencement of this Act."

(2) Mr Cannon argued that Mr Khatoun's right to use the communal garden had the benefit of the above provision called a "covenant relating to land" – and so was not a mere licence to use the communal garden. Mr Cannon referred to *Halsall v Brizell* [1957] 1 AER 371, where the obligation to observe a positive covenant was held to run with the land – but one may not take a benefit of a right (e.g. the right to use the communal garden)

without accepting the burden that goes with it (i.e. the obligation to pay the "garden rate").

(3) Mr Cannon said that this rule in *Halsall v Brizell* was considered and confirmed in *Wilkinson v Kerdene* [2013] EWCA Civ 44; and that in *Elwood v Goodman* [2013] EWCA Civ 1103 it was held that the burden of a positive covenant (the right to use a road in return for contributing to the cost of maintaining the road) bound a successor in title in equity under the principle of benefit and burden in *Halsall v Brizell* even when it had not been registered. Mr Cannon submitted that this decision demonstrates that the right in question is an equitable right or power over the communal garden and as such is a chargeable interest (and more than a mere licence).

(4) The nature of the right as something that passed from Mr Ipkendanz to Mr Khatoun is also confirmed by s62 Law of Property Act 1925 which so far as material provides (emphasis added):

> "62 General words implied in conveyances
>
> (1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.
>
> (2) *A conveyance of land, having houses* or other buildings thereon, shall be deemed to include and shall by virtue of this Act *operate to convey*, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, *rights*, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or *enjoyed with*, or reputed or known as part or parcel of *or appurtenant to, the land*, houses, or other buildings conveyed, or any of them, or any part thereof."

28. In summary, according to Mr Cannon, the right to enjoy the communal garden is a proprietary equitable right enjoyed by Mr Khatoun in person, the benefit and burden of which binds Cadogan (as the freehold owner of the communal garden) and which passes from owner to owner of the property. As such it is more than a mere exempt licence: as a right or power over the land constituting the communal garden, it is a chargeable interest for SDLT purposes separate from the freehold to the property but which was sold by Mr Ipkendanz to Mr Khatoun at the same time as Mr Khatoun acquired the property. As such, the right to use the communal garden, being a right over non-residential property (as it was neither the garden of a dwelling building nor, as a right, did it subsist for the benefit of such a building), relates to non-residential property and makes Mr Khatoun's acquisition of the property a mixed-use acquisition for SDLT purposes.

HMRC'S ARGUMENTS

29. HMRC's position was that the relevant land in the chargeable transaction by which Mr Khatoun acquired the property consisted entirely of residential property: Mr Khatoun's right to use the communal garden was not a chargeable interest; and, in any case, the right was residential property. Hence the rates in Table A of s55 applied.

30. Dr Schryber submitted that it was not proven that any rights over the communal garden were given to the lessee under the 49¾ year lease that terminated in 2002 – there was simply a reference to "garden rent" payable in addition to the rent. In any case, that lease expired in 2002 – there was no evidence of any right over the communal garden enduring after that date.

More generally, there was nothing to connect Mr Khatoun's rights over the communal garden with any such rights contained in the 49¾ year lease. There was evidence that Mr Khatoun received a key to the communal garden – but no evidence of any more general "equitable interest" in the communal garden to which he was entitled.

31. Dr Schryber submitted that if Mr Khatoun had the kind of equitable interest in the communal garden for which Mr Cannon contended, it would have made no sense for Mr Khatoun to agree to Cadogan revoking his rights on three months' notice under the terms of the deed of agreement.

32. Dr Schryber submitted that even if the Tribunal were to find that Mr Khatoun's right to use the communal garden formed part of the "main subject-matter" of the transaction, Table A would still be the appropriate table for the acquisition, as the right to use the communal garden fell within the definition of "residential property", as the right subsisted for the benefit of a dwelling building (25 Tedworth Square).

DISCUSSION

33. Mr Khatoun's acquiring rights to enter and use the communal garden raises the following questions, which could be relevant to calculating the amount of tax chargeable under s55 in respect of his acquisition of the property:

(1) was acquiring those rights a chargeable transaction in its own right?

(2) was acquiring those rights a linked transaction with the acquisition of the property?

(a) if so, was the main subject-matter of the 'communal garden transaction' land that was not residential property?

(b) if not, did the main subject-matter of the 'property acquisition transaction' include land that was not residential property?

Question (1): Was Mr Khatoun's acquiring rights to enter and use the communal garden a chargeable transaction in its own right?

34. This question turns on what kind of rights over the communal garden Mr Khatoun acquired. I find, based on the evidence, that he acquired, from Cadogan, in August 2018, a right for occupants of the property to enter and use the communal garden as a pleasure garden, in return for Mr Khatoun paying the "garden rate". I infer this from the evidence

(1) that Mr Khatoun was given a key to the communal garden, by Cadogan, around the time of his purchase of the property; and

(2) of the terms of the deed of agreement between Cadogan and Mr Khatoun signed seven months later, which I have found, on the balance of probabilities, to be a document that reduced to writing the basic terms on which Mr Khatoun was given the key by Cadogan.

35. Further support to this conclusion is in my view given by:

(1) the FAQs at the back of the Code of Conduct annexed to the deed of agreement, referring to "membership" of the communal garden: although of doubtful legal authority in and of themselves, this was a standard document circulated by Cadogan and so in my view supports the conclusion, on the balance of probabilities, that the grant of permission to use the communal garden was similar to admission to a membership, and that such admission was at the discretion of Cadogan; and

(2) the text at the bottom of the "key fine form" signed by Mr Khatoun on 15 August 2018, which states: "We will endeavour to deal with your application within 2-3 working days. By signing this form you are agreeing to our terms and conditions as set out in the

Code of Conduct attached. Non compliance with this Code is liable to risk forfeiting the privilege of using the garden." In my view, it is probable, given the references to the code of conduct and to the consequences of non-compliance, that the "application" referred to here is not application for a replacement key, but application for permission to use the communal garden through "membership".

36. I have not therefore been persuaded, on the balance of probabilities and the evidence before the Tribunal, that Mr Khatoun's right to enter and use the communal garden was an equitable interest in the communal garden transferred to him by Mr Ipkendanz. In particular, the reference in the 2002 Form TP1 to "garden rent" being payable, in addition to rent, under a 49¾ lease expiring in that year, is insufficient evidence of such an equitable interest having been passed from Mr Ipkendanz to Mr Khatoun in August 2018, particularly when set against the terms of the deed of agreement, which indicate a newly-granted (and revocable) right given by Cadogan.

37. As a right over land, Mr Khatoun's right to enter and use the communal garden was, potentially, a chargeable interest. The question is whether that right was an exempt interest because it was a licence to use land. I find that it was: it was, under the clear terms of the deed of agreement, permission to enter and use the communal garden, along with Cadogan and others to whom Cadogan gave similar permission, revocable on three months' notice. Hence it was not a chargeable interest.

38. This means that Mr Khatoun undertook only one land transaction (and so only one chargeable transaction) in August 2018: the acquisition of the property.

39. In reaching these conclusions, I have considered Mr Cannon's arguments, including:

(1) section 79 Law of Property Act 1925: this provision does not seem to me to shed light on the nature of Mr Khatoun's right to enter and use the communal garden and whether it was a licence to use land – it simply says that "covenants" relating to land are binding on the covenantor's successors. I am doubtful that the revocable permission granted by Cadogan under the deed of agreement amounts to a "covenant"; but even if it does, s79 says no more than that such covenant binds Cadogan's successors – which is not a point at issue here;

(2) the cases indicating that a successor to the benefit of a covenant is also subject to the burden: for similar reasons to those just given, these cases do not in my view assist in deciding the nature of Mr Khatoun's right to enter and use the communal garden or whether it was a licence to use land;

(3) sub-section 62(2) Law of Property Act 1925: on the evidence before the Tribunal – and, in particular, the terms of the deed of agreement - Mr Khatoun's right to enter and use the communal garden was not in my view a right

(a) appertaining or reputed to appertain to the property; or

(b) enjoyed with the property;

rather, it was a new, self-standing right granted to Mr Khatoun, and revocable on three months' notice, by Cadogan.

40. I note that if, contrary to my conclusion, Mr Khatoun's acquiring rights to enter and use the communal garden was a land transaction (and so a chargeable transaction), the consequence would be that the consideration given by him would be apportioned on a just and reasonable basis between the 'property acquisition transaction' and the 'communal garden transaction' (unless they were linked transactions, which I consider below).

Question (2): Was Mr Khatoun's acquiring rights to enter and use the communal garden a linked transaction with his acquisition of the property?

41. Given my analysis above, the answer to this question must be "no", as the vendor as regards the 'communal garden transaction' (Cadogan) was different from (and unconnected with) the vendor in the 'property acquisition transaction' (Mr Ipkendanz).

Question (2)(a): Was the main subject-matter of the 'communal garden transaction' land that was not residential property

42. This question arises only if I am wrong in my conclusion that the 'communal garden transaction' was not linked with the 'property acquisition transaction'. On that (hypothetical) basis, my answer to this question is "no": Mr Khatoun's right to enter and use the communal garden was a right that subsisted for the benefit of a dwelling building (25 Tedworth Square), because, based on the deed of agreement, it was granted only because Mr Khatoun owned that property. Hence the right was residential property. This means that, even if (contrary to my finding above) the 'communal garden transaction' and the 'property acquisition transaction' were linked transactions, the rates in Table A of s55 would apply (and so the appeal would be dismissed).

Question (2)(b): Did the main subject-matter of the 'property acquisition transaction' include land that was not residential property

43. The main subject-matter of the 'property acquisition transaction' was the chargeable interest acquired – the property – together with any interest or right appurtenant or pertaining to it that was acquired with it.

44. The question is whether Mr Khatoun's right to enter and use the communal garden was an interest or right appurtenant or pertaining to the property that was acquired with it. Based on my analysis above, I find that it was not, principally because the right was not acquired with the property: it was acquired by means of a separate transaction with a different person (Cadogan, rather than Mr Ipkendanz). In addition, Mr Khatoun's right was not appurtenant to the property; and whilst there was clearly a connection between the right being granted to Mr Khatoun and his ownership of the property, the right did not itself pertain to the property: it pertained to the communal garden.

45. This means that the rates in Table A, rather than Table B, of s55 apply to determine the amount of tax chargeable in respect of Mr Khatoun's acquisition of the property.

46. I note that even if, contrary to my finding, Mr Khatoun's right to use the communal garden was an interest or right appurtenant or pertaining to the property that was acquired with it, I still would have found that the rates in Table A, rather than Table B, of s55 applied, given my finding at [42] above that this right was residential property.

CONCLUSION

47. The tax chargeable on Mr Khatoun's acquisition of the property is calculated using the rates in Table A, rather than Table B, of s55.

48. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

49. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ZACHARY CITRON
TRIBUNAL JUDGE

Release date: 12 APRIL 2021