Neutral Citation: [202*] UKFTT **** (TC)

Case Number: TC/2022/03979

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/20**/*****

Stamp Duty Land Tax – residential and non-residential rates of tax – was the paddock part of the grounds of the dwelling house – no – mixed use so non-residential rates apply

Heard on: 17 May 2023
Judgment date: 23 May 2023

Before

TRIBUNAL JUDGE ALASTAIR J RANKIN MBE

Between

Mr TAHER SUTERWALLA
AND
Mrs ZAHRA SUTERWALLA

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Patrick Cannon of Counsel

For the Respondents: Ms Fiona Man, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal by Mr Taher Suterwalla and Mrs Zahra Sutterwalla [the Appellants].

2. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video system. The documents to which I was referred were an electronic Document Bundle containing 248 pages, the Appellants' electronic skeleton argument containing 15 pages, Mr T Suterwalla's electronic witness statement containing seven pages, HMRC's electronic skeleton argument containing 15 pages, the electronic sales brochure for the sale of Woodlands House containing eight pages and two electronic Authorities bundles containing a total of 369 pages.

3. 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.

4. The appeal is against a closure notice issued by HMRC under paragraph 23, Schedule 10 Finance Act 2003 (FA 2003) on 8 November 2021.

5. The Closure Notice increased the Stamp Duty Land Tax ("SDLT") due in respect of the Appellants' acquisition of Woodlands House, Harpsden Woods, Harpsden, Henley on Thames RG9 4AE [the Property] on 11 December 2020.

6. The Appellant's self-assessment had treated the Property as residential and non-residential (mixed use) for SDLT.

7. HMRC's enquiry concluded on the basis that the Property was residential and there was no non-residential element.

8. As a result, the closure notice increased the SDLT liability on the transaction from the £169,500 self-assessed by the Appellant, to £330,750. An increase of £161,250.

BACKGROUND

9. On 11 December 2020 the Appellants acquired the property.

10. On 14 December 2020 the Appellants filed an SDLT return in respect of the transaction on the basis that the Property was residential and non-residential mixed use.

11. HMRC opened an enquiry into the return on 19 August 2021 and made a request for information.

12. The Appellants' representatives, Cornerstone Tax, provided information relating to the Property on 14 September 2021.

13. On 8 November 2021 HMRC issued the closure notice amending the SDLT return to charge SDLT at the residential rate.

14. On 23 November 2021 Cornerstone Tax appealed the closure notice on behalf of the Appellants.

15. On 29 November 2021 HMRC issued its view of the matter letter confirming the decision and offering a statutory review.

16. Cornerstone Tax accepted the offer of a statutory review on 3 December 2021.

17. The review conclusion letter upholding the decision was issued on 11 January 2022.

18. The Appeal to the Tribunal was made on 8 February 2022.

POINT AT ISSUE

19. Whether the Property acquired by the Appellants constitutes land consisting entirely of residential property or whether it also includes land that is non-residential property.

20. It falls to the Appellants to show that they have been overcharged by the closure notice. If they fail to discharge this burden, to the ordinary civil standard of the balance of probabilities, the closure notice will stand good due to paragraph 42 of schedule 10 FA 2003.

THE LAW

21. Section 42 FA 2003 provides that SDLT is charged on land transactions. A land transaction is defined by section 43 to be any acquisition of a chargeable interest. Section 48 defines the chargeable interest as including an estate, interest, right or power in or over land.

22. Section 53 FA 2003 sets out the amount of tax chargeable in relation to a chargeable transaction. There are differing rates for residential and non-residential or mixed properties. The section contains two tables and Table A applies "if the relevant land consists entirely of residential property". Table B applies "if the relevant land consists of or includes land that is not residential property.".

23. Section 116(1) FA 2003 provides as follows:

> "116 Meaning of "residential property"
>
> (1) In this Part "residential property" means—
>
> (a) a building that is used or suitable for use as a dwelling, or is in the process of being constructed or adapted for such use, 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."

CASELAW ON BEHALF OF THE APPELLANTS

24. In *Hymen and Goodfellow v HMRC* [2022] EWCA Civ 185 the Court of Appeal declined to place an objective limit on the meaning of "grounds" for SDLT purposes in section 116(1)(b) FA 2003 and said that this was a matter of policy with which the Court was not concerned. Lord Justice Lewison did however acknowledge that "there will be cases in which there is room for reasonable disagreement" (paragraph 11).

25. In particular, the Court said at paragraph 12 that:

> "The only question for us is whether that [i.e. the reasonable enjoyment test] is what section 116, as enacted, actually means. It is not uncommon for Parliament, even in a taxation context, to use coarse-grained words whose outer limits are left to the courts and tribunals to work out: "plant", "emoluments" and "resident" are but three examples."

26. The Court therefore declined to place any flesh on the bare bones of the definition of 'grounds of a building" for SDLT purposes, leaving it for the tribunals to work out while acknowledging that there will be cases in which there will be room for reasonable disagreement.

27. In *Sloss v Revenue Scotland* [2021] FTSTC 1, Judge Anne Scott found that in relation to the definition of residential property in section 59 Land and Buildings Transaction Tax Act

2013 (which is in all material respects the same as section 116 FA 2003), certain parts of the property purchased did not fall within the 'garden or grounds' of the dwelling. In particular Judge Scott said:

> "88. We therefore agree with Mr Small that there must be some link with the dwelling and the grounds beyond the fact that they had been purchased together in a single transaction. There must be a functional relationship between the dwelling and the grounds. Ms van der Westhuizen agreed with that analysis. ...
> 106. Even if we are wrong in saying that the grazing was, and is commercial, nevertheless we find that with the exception of field 7 and the paddock, the other fields have very little functional purpose for a house of this size and type. It is not a stately home. It is an attractive house that, with an adequate curtilage, is of a style and size that is available, for example, in Edinburgh.

28. In *Withers v HMRC* [2022] UKFTT 00433 (TC), the appellant had purchased a dwelling house plus gardens, fields and woodlands. The FTT said:

> "123. This Tribunal adopts the reasoning of Judge Citron in Myles-Till as follows: at [44]:
>
> > "what indicates that a piece of adjoining land has become part of the "grounds" of a dwelling building? Technically, fact that a dwelling building is sold together with adjoining land, as a single chargeable transaction for SDLT purposes, does not make that adjoining land, necessarily, part of the grounds of the dwelling building: section 55 clearly envisages the possibility that the subject matter of a single chargeable transaction will include both residential and non residential land. Common ownership is a necessary condition for the adjacent land to become part of the grounds of the dwelling building – but not, in my view, a sufficient one."
>
> 124. In respect of HMRC's submissions relating to the "use of land" the Tribunal does not accept their submission that it is sufficient that the adjacent land is available to the GW to use as he wishes. The Grazing agreement does contain restrictions on his use of the land as set out in his submissions. ... "

29. In relation to the commercial use of part of the land Judge Ruthven Gemmell WS said in *Withers:*

> "125. It is also necessary to look at the use or function of the adjoining land to decide if its character answers to the statutory wording in s116(1). Adopting Judge Citron's analysis: -
>
> > "is the land grounds "of" a building whose defining characteristic is its "use" as a dwelling? The emphasised words indicate that that the use or function of adjoining land itself must support the use of the building concerned as a dwelling. For the commonly owned adjoining land to be "grounds", it must be, functionally, an appendage to the dwelling, rather than having a self-standing function."

30. Judge Gemmell continued:

> "145. HMRC's manual, SDLT 00470 - extent of land and geographic factors states that the extent/size of land in question will also be relevant in relation to a building and that the test is not simply whether the land comprises garden or grounds but whether it comprises the gardens or grounds of the dwelling.
> 153. The Tribunal again adopts the approach of Judge Citron in Myles-Till that "the words "of" and "use" indicate that the use or function of adjoining land itself must

support the use of the building concerned as a dwelling. The grazing land and Woodland Trust land do not provide that support."

31. Mr Cannon informed the Tribunal that HMRC have not appealed the First-tier Tribunal decision in *Withers.*

32. In *The How Development 1 Ltd v HMRC* [2023] UKUT 00084 (TCC) the Upper Tribunal stated:

> "116. We have adopted the approach suggested in Hyman UT and endorsed by the Court of Appeal in Hyman of weighing up all material factors, based on the FTT's relevant findings of fact.

33. Judge McKeever in the First-tier Tribunal in *Hyman v HMRC* [2019] UKFTT 0469 (TC) said:

> "[62] In my view 'grounds' has, and is intended to have, a wide meaning. It is an ordinary word and its ordinary meaning is land attached to or surrounding a house which is occupied with the house and is available to the owners of the house for them to use. I use the expression 'occupied with the house' to mean that the land is available to the owners to use as they wish. It does not imply a requirement for active use. 'Grounds' is clearly a term which is more extensive than 'garden' which connotes some degree of cultivation. It is not a necessary feature of grounds that they are used for ornamental or recreational purposes. Grounds need not be used for any particular purpose and can, as in this case, be allowed to grow wild. I do not consider it relevant that the grounds and gardens are separated from each other by hedges or fences. This may simply be ornamental, or may serve the purpose of delineating different areas of land as being for different uses. Nor is it fatal that other people have rights over the land. The fact that there is a right of way over grounds might impinge on the owners' enjoyment of the grounds and even impose burdensome obligations on them, but such rights to not make the grounds any the less the grounds of that person's residence. Land would not constitute grounds to the extent that it is used for a separate, eg commercial purpose. It would not then be occupied with the residence, but would be the premises on which a business is conducted."

EVIDENCE FROM MR T SUTERWALLA

34. Mr Suterwalla provided two witness statements and gave oral evidence. His first witness statement dated 31 January 2023 stated that he and his wife had bought Woodlands House which he described as "The Property" and stated:

> "The Property consists of a paddock to the rear of the Property which is identified edged red on the plan annexed … and Woodlands House which is my residential house and gardens and identified blue on the plan …"

35. Unfortunately, the annexed plan only referred to Woodlands House and did not show the paddock.

36. In his second witness statement dated 12 May 2023, which I allowed to be admitted as HMRC did not object, Mr Suterwalla referred to two google images from a satellite view and to a Land Registry map which showed Woodlands House as being registered in folio ON53530 and the paddock being registered in folioON277027.

37. Mr Cannon referred Mr Suterwalla to the sales brochure from Knight Frank and Savills and in particular the view on the back page which clearly showed the paddock beyond the tennis court with a hedge dividing the two pieces of land and only a small gate giving access to the paddock from Woodlands House. Mr Suterwalla explained that after discussions with some people in the village he had agreed to let the paddock to Ms Pregnall for one year at a

rent of £1,000.00 per annum. I will refer to the lease later in this discussion but for present purposes it provided that Ms Pragnell had the "right to pass and repass over [the Suterwalla's property]. This in fact never happened as Ms Pragnell had direct access over some common land from a bridle path. If Ms Pragnell had exercised her right under the lease, it would have meant her horses having to walk over his lawns. It would not have been possible to access the paddock with vehicles as provided by clause 3. Mr Suterwalla had never designated a route as required by clause 3 nor had Ms Pragnell requested such a designation.

38. Mr Suterwalla confirmed that it was not possible to see the paddock from Woodlands House and that he had never used the paddock. He considered the grazing lease to Ms Pragnell was a commercial one as, although the rent of £1,000.00 per annum was relatively modest, the grazing by Ms Pragnell's horses meant that he did not have to worry about cutting the grass in the paddock. The photograph in the brochure showing the garden, tennis court and paddock must have been taken from a droan. He confirmed that he would not have purchased the paddock if it had been possible not to do so.

THE GRAZING LEASE

39. The appellants completed the purchase of the property on 11 December 2020 and on the same date granted a grazing lease of the paddock for one year to Ms Pragnell at an annual rent of £1,000.00. The lease described the "Permitted Use" as "use for grazing up to 2 horses for [Ms Pragnell's] private purpose only." The Appellants granted Ms Pragnell "the right to pass and repass over the [Appellants'] adjoining land (using a route designated by [the Appellants] from time to time with or without vehicles and horses to obtain access to and egress from the [paddock]."

40. Mr Cannon claimed the dwelling house with its garden and tennis court forms a coherent whole on its own. The paddock that was acquired with the Property (1) does not perform any function in relation to the dwelling and cannot be seen from the dwelling and so cannot be said to be "of the dwelling", and (2) is subject to the grazing lease which is a commercial arrangement that restricts the Appellants' use of the paddock and meets the test in the First-tier Tribunal decision in *Hyman* that: "*Land would not constitute grounds to the extent that it is used for a separate, eg commercial purpose.*"

41. On this basis it is not the case that the paddock "forms part of the garden or grounds of" the dwelling and as such it is not residential in nature so that for SDLT purposes the Property consists of both residential and non-residential property.

42. In relation to the entry into the Grazing Lease on the same day as completion of the purchase of the Property, Mr Cannon submitted that this does not affect the fact that the paddock is not "of the dwelling". Moreover, the grazing lease took effect on the effective date of the land transaction so that in the Appellants' hands the paddock had a commercial use from and including the day completion.

43. In *Brandbros Ltd v HMRC* [2021] UKFTT 157 (TC) the First-tier Tribunal decided that the grant of a commercial lease over a garage on the same date as completion of the purchase was a separate transaction and did not affect the treatment of the prior purchase of the dwelling earlier on the same day even though section 119 FA 2003 refers to the date of completion and not the time of completion.

44. Mr Cannon submitted that I should not follow the decision in *Brandbros* as the legislation refers to the effective date not the time and therefore because the Property became subject to the grazing lease during 11 December 2020 the Property should be regarded as mixed-use. HMRC's published guidance at the time, although not binding, confirmed that in HMRC's view "the use at the effective date overrides any past or intended future uses."

45. In Mr Cannon's opinion HMRC were relying on a "scintilla temporis" between the completion of the purchase of the Property and the grant of the grazing lease. He referred me to Lord Oliver's statement in *Abbey National v Cann* [1990] 1 All ER 1085 where he said that "the 'scintilla temporis' is no more than a legal artifice. Lord Hoffman stated in *Ingram v HMRC* [2001] 1 AC 303: "For my part I do not think that a theory based upon the notion of the scintilla temporis can have a very powerful grasp on reality."

HMRC'S CASE

46. Ms Man reminded the Tribunal that the Property is an impressive seven bedroom family house with indoor swimming pool, tennis court, pavilion and paddock. She maintained that the paddock forms part of the gardens and grounds of the Property.

47. In *James Faiers v The Commissioners for His Majesty's Revenue and Customs* [2023] UKFTT 00297 (TC) Judge Mark Baldwin in the First-tier Tribunal stated:

> "44. The pointers I take from these cases are as follows:
>
> (1) "Grounds" is an ordinary (albeit a little archaic, at least in the view of some of my fellow judges) English word which has to be applied to different sets of facts. So, in deciding whether a particular piece of land comprises all or part of the "grounds" of a dwelling, it is necessary to adopt an approach which involves identifying the factors relevant in that case and balancing them when they do not all point in the same direction.
>
> (2) The discussion in HMRC's SDLT Manual is a fair and balanced starting point for this exercise, but each case needs to be considered separately in the light of its own factors and the weight to be attached to them. Listing them briefly, the factors addressed in the SDLT Manual are: historic and future use; layout; proximity to the dwelling; extent; legal factors/constraints.
>
> (3) Section 116(1)(b) refers to a garden or grounds "of" a dwelling. The word "of" shows that there must be a connection between the garden or grounds and the dwelling.
>
> (4) Common ownership is a necessary condition for adjacent land to become part of the grounds of the dwelling, but it is clearly not a sufficient one.
>
> (5) Contiguity is important; grounds should be adjacent to or surround the dwelling; *Hyman*.
>
> (6) One requirement (in addition to common ownership) might be thought to be that the use or function of the adjoining land must be to support the use of the building concerned as a dwelling (*Myles-Till*). That may be putting the test too high to the extent it suggests that unused land cannot form part of the "grounds" of a dwelling (cp *Hyman* in the FTT at [62]). Such a requirement must also contend with the decision of the Court of Appeal in *Hyam and Goodfellow* that it is not necessary, in order for garden or grounds to count as residential property, they must be needed for the reasonable enjoyment of the dwelling having regard to its size and nature.
>
> (7) In that light, the "functionality" requirement might perhaps be put the other way round: adjoining land in common ownership will not form part of the "grounds" of a dwelling if it is used (*Hyman* in the FTT at [62]) or occupied (*Withers* at [158]) for a purpose separate from and unconnected with the dwelling. That purpose need not be (although it commonly will be) commercial (*Withers*). This is subject to the points discussed in (8) and (9) below.
>
> (8) Other people having rights over the land does not necessarily stop the land constituting grounds. For example, the fact that there is a right of way over

grounds might impinge on the owners' enjoyment of the grounds and even impose burdensome obligations on them, but such rights do not make the grounds any the less the grounds of that person's residence. As the recent decision of the Supreme Court in *Fearn and others v Board of Trustees of the Tate Gallery*, [2023] UKSC 4, indicates, other people may have a range of rights that can impact on a landowner's use and enjoyment of their land and statute law intervenes in a range of fields (planning and environmental law being obvious examples). Indeed, once one accepts (as we are bound by authority to accept) that "grounds" extends beyond the land needed for the reasonable enjoyment of a dwelling, it seems almost inevitable, particularly in a rural context, that third parties (not the landowner) may have rights over or use parts of the "grounds" without that affecting the status of the land for these purposes. All of that together must mean that, whatever else "available to the owners to use as they wish" (*Hyman* at [62]) may mean, it cannot mean (and Judge McKeever, who herself referred to others' rights, clearly did not intend it to refer to) untrammelled dominion unaffected by the presence or rights of others.

(9) Some level of intrusion onto (or alternative use of) an area of land will be tolerated before the land in question no longer forms part of the grounds of a dwelling. At one end of the spectrum, rights of way will generally not have this effect, even when the right is used for a commercial purpose and the existence and exercise of those rights is unconnected with the dwelling. At the other end of the spectrum, the use of a large, defined tract of land (which had historically been in separate ownership) for agricultural purposes by a third party who has rights enabling them to use that land in that way will result in that area of land not forming part of the grounds of a dwelling (*Withers*)."

48. Ms Man claimed that Land Registry documents showed that all of the land, including the paddock was comprised in one title since at least 1978. Mr Suterwalla's evidence showed this not to be the case – the paddock is clearly registered in a separate folio.

49. Ms Man claimed that the statement by the Appellants' agent in a letter dated 14 September 2021 that the Appellants were not aware of any commercial agreements in place for the use of the paddock prior to completion indicated that the entire Property was, prior to the grazing lease, considered as domestic. In any event Ms Man claimed that the grazing agreement is an irrelevant factor as it was entered into after completion.

50. The sales brochure stressed the privacy afforded by the garden and grounds. HMRC's view was that the Tribunal should follow the statement in *Goodfellow* where at paragraph 17 the First-tier Tribunal said:

> "17. Now putting those matters to one side, it seems to us, looking at the character of the property as a whole, that the land surrounding the house is very much essential to its character, to protect its privacy, peace and sense of space, and to enable the enjoyment of typical country pursuits such [as] horse riding. This is a country setting, in an area of outstanding naturel beauty."

51. Ms Man claimed the paddock was necessary land for "this equestrian property" and adds to the rural character.

52. Ms Man requested the Tribunal to consider the use of the Property at the time of completion – the Appellants could not grant the grazing lease until after completion so at completion the Property was residential. She referred the Tribunal to the decision in *Ladsdon*

Preston Limited (1) AKA Developments Greenview Limited (2) and The Commissioners for His Majesty's Revenue and Customs [2022] UKUT 00301 (TCC) where the Upper Tribunal stated:

> "62. Rather, as we have noted, paragraph 2 asks a question about the nature of the chargeable interest that AKA acquired. Moreover, in the circumstances of these appeals, the effective date of the transactions was the date on which the relevant land transactions completed (as there is no question of s44 of FA 2003 operating so as to treat the date of substantial performance as being the effective date). The chargeable interest that AKA acquired was the chargeable interest as it stood at the very time of completion. That conclusion depends, not on any definition of "effective date" but on an analysis of the nature of the chargeable interest acquired which is required by paragraph 2(2) of Schedule 6B.

53. The Tribunal notes this appeal concerned multiple dwellings relief and not SDLT. Ms Man submitted that as the grazing lease was not in place at the time of completion it should be ignored and the paddock was connected with the dwelling as an equestrian property.

54. Ms Man submitted the grazing lease was not a commercial agreement and the use of the paddock was for "private purposes only".

DECISION

55. HMRC maintain that the entire Property was residential at the time of completion based on the fact that the Property was registered in a single folio and that the Property was sold as an equestrian property. These two grounds were shown to be false during the hearing. There are clearly two separate folios ON53530 being the dwelling house, gardens and tennis court and ON277027 being the paddock. Nowhere in the sales brochure is the word "equestrian" used and there are no stables or other suitable accommodation for housing horses appearing in the sales brochure. Indeed, the paddock is almost an afterthought:

> "The lower garden has a Pavilion with covered veranda, and opposite is a fully enclosed hard surface tennis court. There is also a paddock."

56. Another paragraph appears under the heading Garden, grounds and paddock but the paddock is not in fact mentioned.

57. I consider I am not obliged to follow the Upper Tribunal decision in *Ladsdon Preston* as that appeal concerned multiple dwellings and not SDLT. The First-tier decision in *Brandbros* is only persuasive and I prefer to follow the dicta of Lord Oliver in *Abbey National* and Lord Hoffman in *Ingram.* However, if I am wrong on this point, there are sufficient other reasons to allow this appeal.

58. The grazing lease was of commercial benefit to the Appellants. Although the rent was not large, it was more than a peppercorn and the advantage of Ms Pragnell's horses keeping the grass in order was of considerable financial benefit to the Appellants.

59. Adopting the nine pointers identified by the First-tier Tribunal in *Faiers* I comment as follows:

(1) "Grounds of a dwelling" in this appeal clearly refers to the garden and tennis court;

(2) The discussion in HMRC's SDLT Manual refers to historic and future use; layout; proximity to the dwelling. The paddock, although lying alongside the end of the garden and tennis court is not close to the dwelling house and is not visible from it;

(3) There is only one small gate between the gardens and the paddock;

(4) There is common ownership between the dwellinghouse, gardens, tennis court and the paddock;

(5) Although adjacent to the gardens and tennis court the paddock does not form an integral part of the property;

(6) The paddock does not support the dwellinghouse nor the garden nor the tennis court;'

(7) The paddock is used for a separate purpose unconnected with the dwelling house;

(8) Although Ms Pragnell has a right of access to the paddock over the gardens, she does not in fact exercise this right and to do so would cause damage to the lawns.

(9) Ms Pragnell's grazing lease results in the paddock not forming part of the grounds of the dwelling.

60. I find the HMRC should not have issued the closure notice seeking additional SDLT for the following reasons:

(1) The paddock is not visible from the dwelling house nor from the gardens;

(2) There is only one small gate access from the gardens to the paddock;

(3) Ms Pragnell was able to access the paddock from the bridle path without having to enter the Appellant's garden;

(4) The grazing lease is commercial resulting in the Property consisting of residential and non-residential property;

(5) The title to the dwelling house, gardens and tennis court is distinct from the title to the paddock.

(6) The Appellants would not have bought the paddock if it had been possible to exclude it from the purchase;

61. The appeal is accordingly allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

ALASTAIR J RANKIN MBE
TRIBUNAL JUDGE

RELEASE DATE: 23 MAY 2023