Neutral Citation: [2023] UKFTT **** (TC)

Case Number: TC/2023/00327

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/00327

STAMP DUTY LAND TAX-mixed use-garage let on day of completion-time for considering status-whether property wholly residential-whether garage interest or right subsisting for benefit of the dwelling

Heard on: 24 July 2023
Judgment date: 8 August 2023

Before

TRIBUNAL JUDGE MARILYN MCKEEVER

Between

THOMAS KOZLOWSKI

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Patrick Cannon, Counsel, instructed by Cornerstone Tax 2020 Ltd.

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

DECISION

PRELIMINARY

1. The form of the hearing was V (video). All parties attended remotely, including several observers from HMRC, and the remote platform was the Tribunal's Video Hearing Service. The documents to which I was referred are a Document Bundle of 232 pages, an Amended Supplementary Bundle of 126 pages, a document entitled "Rights, easements, covenants, restrictions or other matters affecting the property" comprising seven pages, an Authorities Bundle of 337 pages and the skeleton arguments of both Appellant and Respondents.

2. I also heard oral evidence from Mr Kozlowski, the Appellant.

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.

INTRODUCTION

4. This is an appeal by Mr Kozlowski against a closure notice issued by HMRC on 28 September 2022. The decision maker assessed Stamp Duty Land Tax (SDLT) on the basis that the property purchased by Mr Kozlowski was wholly residential and that he was not entitled to calculate the SDLT due on the basis that the property was mixed use.

5. On the day of completion Mr Kozlowski let a garage included in the purchase for storage purposes. He argued that the letting was commercial and that the garage was not therefore residential property. Accordingly, the property was not wholly residential, and he was entitled to apply the lower, mixed use, rates of SDLT.

6. The issues which arise are as follows:

   (1) When does the status of the property fall to be determined: at the instant the purchase is completed or at the end of the "effective date"?

   (2) If the lease is taken into account, should the let garage be categorised as residential or non-residential property for SDLT purposes?

   (3) Was the garage an "interest in or right over land that subsists for the benefit of [the main house or its garden or grounds]".

7. I have carefully considered all the submissions that were made to me and all the authorities cited, although I have not referred to all of them in detail.

8. References below to schedules and section numbers are to schedules and sections of Finance Act 2003 unless otherwise stated.

THE FACTS

Procedural history

9. Mr Kozlowski bought a property on Esher Green, Esher (the "Property") on 12 January 2022 for £2.1million.

10. Also on 12 January 2022 Mr Kozlowski let a garage which formed part of the Property to S4 Financial Limited ("S4") for storage purposes at a rent of £50 a month.

11. On the same date, Mr Kozlowski's solicitors submitted an SDLT return on the basis that the property was wholly residential and paid the residential rates of SDLT. As Mr Kozlowski owned another residential property, the purchase of the Property was a "higher rates transaction" within schedule 4ZA and attracted the higher rates of SDLT set out in paragraph 1 of that schedule.

12. On 20 January 2022, Mr Kozlowski's agents, Cornerstone Tax 2020 Limited ("Cornerstone") sent a letter to HMRC amending the return stating that the SDLT return was incorrectly completed and that the mixed use rates of SDLT applied to the purchase. The letter stated that "our client did not know that the mixed use rate of SDLT applied". That is wrong, although nothing turns on it. In evidence, Mr Kozlowski said that he had discussed the possibility of S4 using the garage for storage with Mr Steven Vallery, a director of S4 and Mr Vallery had suggested this might mean the property was mixed use. As a result, Mr Kozlowski took advice from Cornerstone on 7 January 2022. On 10 January 2022, Cornerstone issued a note of advice stating that, as he intended to lease the garage, the mixed use rates of SDLT would apply to the purchase.

13. Following the amendment of the return, HMRC refunded to Mr Kozlowski the difference between the residential rates paid (£228,750) and the mixed use rates (£94,500) that is, £134,250.

14. On 17 August 2022, HMRC opened an in-time enquiry into the SDLT return. Following correspondence, HMRC issued a closure notice on 28 September 2022 concluding that the Property was wholly residential and that a further £134,250 SDLT was due. This decision was subject to a statutory review which upheld the decision on 15 December 2022. The Appellant made an in-time appeal to the Tribunal on 31 December 2022.

15. It is not clear why the SDLT return was submitted on the basis that the property was residential when the advisers and the Appellant were of the view that it was mixed use, but that does not affect the analysis of the position.

The Property

16. The various bundles included Land Registry plans, photographs and Google Earth pictures which assisted me in understanding the layout of the Property. The Property consists of two title numbers registered at HM Land Registry. Title number ending 884 relates to what I shall call "the main house". The main house is a very substantial property. It includes an integral garage and extensive gardens in which there is an outdoor swimming pool. Title number ending 015, which I shall call "the garage land" (to distinguish it from the garage itself) is a small strip of land adjoining the garden of the main house and at approximate right angles to it. The garage stands at the back of the garage land, nearest the main house garden and the garage can be accessed through a door opening onto the garden. There is land in front of the garage, then a wooden gate and in front of the gate is a further tarmacked area which can be used for parking and which gives onto a road (which is off Esher Green). Access to the garage from the main house is only for pedestrians through the door from the garden. Vehicle access to the garage is from the second road over the garage land.

17. Both titles have been in common ownership since at least 1987 and were purchased together by the Appellant under a single contract from the previous owner. A single TR1 transfer form also referred to both titles.

18. The Bundles contained two sets of estate agents' particulars. Whilst marketing materials are just that, it is helpful to consider how the Property was presented to prospective purchasers. The Curchods particulars state "there is a separate access to a driveway and further garaging, accessed from [the second road] adding to the flexibility the property offers". Among the features, it lists "integral and detached garaging with on-drive parking for plenty of cars". The Savills particulars summarise the Property as consisting of "4 reception rooms, kitchen, 4/5 bedrooms, 2 bathrooms, cellar, 2 garages, extensive walled garden, outdoor heated swimming pool". The detailed description states "An additional garage and off-street parking can be accessed from the garden with vehicular access obtained via [the second road]". The garage is shown in the floor plans of both sets of particulars and measures 5.8m by 3.3m. Mr Kozlowski

informed us that the garage had lighting. Savills' plan shows windows down one side of the garage.

The lease of the garage

19. The lease is in the form of a tenancy at will and is dated 12 January 2022, the same date as the purchase was completed. The parties are Mr Kozlowski (Landlord) and S4 Financial Limited (Tenant). Mr Cannon's skeleton argument referred to the grant of a lease by the Appellant to "an unconnected third party". At the hearing, Mr Cannon explained that he had meant "unconnected" in the tax sense. S4 provided financial services to Mr Kozlowski and Mr Kozlowski was a minority shareholder in the company. Mr Kozlowski's evidence was that he knew Mr Vallery, a director of and fellow shareholder in S4, and had consulted Cornerstone at his suggestion following discussions about S4's need to store some books. The Tenant was clearly not an "unconnected third party" in the general sense.

20. The "Premises" which are the subject of the Tenancy at Will are defined as "detached garage adjoining [number] Esher Green, Esher, Surrey shown for identification only edged red on the plan attached to this agreement". There was no plan in the Bundles and Mr Kozlowski stated that the lease had never had a plan attached to it. The lease includes a landlord's covenant to "allow the Tenant…access to and egress from the Premises over the Landlord's adjoining premises (if applicable)". Presumably, the "adjoining premises" are the garage land, but it is not clear if this also includes the garden of the main house.

21. The rent was £50 a month. Mr Kozlowski initially asserted that the rent was a commercial rent, but in cross-examination admitted that he didn't really know. He had taken Cornerstone's advice. They had produced the lease and suggested the rent. HMRC submitted that the rent was not a commercial rent but did not produce any evidence as to what a commercial rent might be. I am unable to make any finding as to whether the rent was in fact commercial.

22. Mr Kozlowski was also unclear as to whether the agreement was formal or informal. Mr Kozlowski's witness statement indicates that he had originally told Mr Vallery he could store some books in the garage. There was no mention of rent. The written agreement, drafted by Cornerstone, was entered into on Cornerstone's advice and Mr Kozlowski considered that a document creating a lease was formal.

23. The garage had lights. The electricity used was included in the bill for the main house although the lease required the Tenant to "pay or indemnify the Landlord against all charges incurred relating to…electricity…[and other services]". There was no evidence whether the Tenant did pay for the electricity or any other services.

24. The "Permitted Use" under the tenancy was "use as storage of business goods". The garage was used to store books and documents relating to a project S4 was carrying out and in which the Appellant had also invested.

25. By definition, the tenancy at will could be terminated by either party at any time. The books and documents have now been returned to S4 and the tenancy came to an end some months before the hearing.

26. The tenancy contained a number of covenants by the tenant including the following:

(1) Not to use the Premises otherwise than for the Permitted Use.

(2) Not to share occupation.

(3) To keep the Premises clean and tidy.

(4) To pay rates and taxes or indemnify the Landlord in respect of them.

(5) To pay for services supplied to the Premises or indemnify the Landlord in respect of them.

27. As noted, there is no evidence as to whether the required payments were made and in the case of electricity, which Mr Kozlowski said was metered to the main house, it would have been difficult to calculate what the Tenant owed.

28. There was no grant of exclusive possession, which is the hallmark of a tenancy and S4 did not, in fact, have exclusive possession. Mr Kozlowski gave evidence that he had stored possessions of his own in the garage at the same time as S4 had been storing their books.

BURDEN OF PROOF

29. The burden is on the Appellant to show that he has been overcharged by the closure notice and if he fails to do so, the closure notice stands good.

30. The standard of proof is the normal civil standard of the balance of probabilities.

THE RELEVANT STATUTORY PROVISIONS

31. SDLT is charged on land transactions (section 42).

32. A "land transaction" is the acquisition of a chargeable interest, which includes a freehold as in the present case (section 43).

33. Where, as in this case, a contract for a land transaction is entered into and the transaction is completed without having been substantially performed, the "effective date" of the transaction is the date of completion (section 44). Section 119 also defines the effective date of the land transaction as the date of completion.

34. So SDLT becomes due on a transaction on the effective date which is the date of completion.

35. Section 55 sets out the rates of SDLT chargeable according to two tables. Table A applies if the land consists "entirely of residential property" and Table B applies if the land "consists of or includes land that is not residential property". Any non-residential element converts the land to mixed use. The rates in Table A are higher than those in Table B. Section 55 is modified by paragraph 1 of schedule 4ZA, which applies to Higher Rates Transactions. In this case, a revised Table A applies which has still higher rates of SDLT.

36. Section 116 defines "residential property". It provides, so far as material:

> **"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. …
>
> (6) In this section "building" includes part of a building. …"

37. In the present case, the Appellant already owned a residence when he bought the property. It is common ground that schedule 4ZA applies. Schedule 4ZA, broadly, applies to the acquisition of a second residential property. Accordingly, the property acquired must be a

residential property within section 116 for schedule 4ZA to apply. The definition of residential property in schedule 4ZA is worded in a slightly different way from that in section 116 but the two provisions are essentially the same.

38. Paragraph 1 of schedule 4ZA (the schedule) provides for higher rates of SDLT to apply to a "higher rates transaction".

39. The meaning of a "higher rate transaction" is set out in paragraph 2 and following of the schedule. The material parts are set out below.

> **"[Meaning of "higher rates transaction" etc**
>
> **2**
>
> (1) This paragraph explains how to determine whether a chargeable transaction is a "higher rates transaction" for the purposes of paragraph 1.
>
> (2) In the case of a transaction where there is only one purchaser, determine whether the transaction falls within any of paragraphs 3 to 7; if it does fall within any of those paragraphs it is a "higher rates transaction" (otherwise it is not). …
>
> **Single dwelling transactions**
>
> **3**
>
> (1) A chargeable transaction falls within this paragraph if—
>
> (a) the purchaser is an individual,
>
> (b) the main subject-matter of the transaction consists of a major interest in a single dwelling ("the purchased dwelling"), and
>
> (c) Conditions A to D are met.
>
> …
>
> (2) Condition A is that the chargeable consideration for the transaction is £40,000 or more.
>
> (3) Condition B is that on the effective date of the transaction the purchased dwelling—
>
> (a) is not subject to a lease upon which the main subject-matter of the transaction is reversionary, or
>
> (b) is subject to such a lease but the lease has an unexpired term of no more than 21 years.
>
> (4) Condition C is that at the end of the day that is the effective date of the transaction—
>
> (a) the purchaser has a major interest in a dwelling other than the purchased dwelling,
>
> (b) that interest has a market value of £40,000 or more, and
>
> (c) that interest is not reversionary on a lease which has an unexpired term of more than 21 years.
>
> (5) Condition D is that the purchased dwelling is not a replacement for the purchaser's only or main residence…."

40. Paragraph 18 of the schedule sets out "what counts as a dwelling". This is, as noted, materially the same as the definition of residential property in section 116. Paragraph 18, so far as relevant, provides:

"**What counts as a dwelling**

18

(1) This paragraph sets out rules for determining what counts as a dwelling for the purposes of this Schedule.

(2) A building or part of a building counts as a dwelling if—

(a) it is used or suitable for use as a single dwelling, or

(b) it is in the process of being constructed or adapted for such use.

(3) Land that is, or is to be, occupied or enjoyed with a dwelling as a garden or grounds (including any building or structure on that land) is taken to be part of that dwelling.

(4) Land that subsists, or is to subsist, for the benefit of a dwelling is taken to be part of that dwelling. …"

THE PARTIES' SUBMISSIONS

41. Ms Man, for HMRC submits:

(1) The lease was entered into after the time of completion, so at the instant of completion, the property was wholly residential.

(2) In any event, the garage falls within the definition of residential property in section 116(1)(b) and the use of the garage is irrelevant.

(3) The garage is an interest in land which subsists for the benefit of the main house under section 116(1)(c).

42. Mr Cannon, for the Appellant, contends that:

(1) One must consider the status of the property at the end of the "effective date" of the transaction and it is not permissible to consider the timing of different events which take place during the effective date.

(2) As there was a commercial lease over the garage in place at the end of the effective date, the Property was mixed use.

(3) Section 116(1)(c) is not in point as this relates to the subject property's rights over another person's land.

THE TIMING ISSUE

43. Conceptually, Mr Kozlowski must have become the owner of the Property on completion before he was able to grant the lease over the garage. The first question is whether one examines the status of the property at the actual moment of completion, as Ms Man contends, or at the end of the "effective date", that is, at the end of the day of completion, as Mr Cannon submits.

44. Mr Cannon says his approach reflects the change from Stamp Duty (which was a tax on documents and became due on completion of the document) to SDLT which is a tax on transactions, and Parliament has chosen to refer to the **date** of completion. Accordingly, he says, one must look at the date and not the time of a transaction and characterise the property as residential or otherwise by reference to all the events occurring on the effective date, not by reference to the time of the event. If a property is mixed use at some time on the date of completion, then it counts as mixed use for the purpose of determining the appropriate rates of SDLT.

45. HMRC's argument, he says, is based on the notion of there being a *scintilla temporis* between the acquisition of the Property and the grant of the lease and that notion was firmly rejected in the House of Lords Cases of *Abbey National v Cann* [1990] 1 All ER 1085 and *Ingram v Inland Revenue Commissioners* [2000] 1AC 293. I do not find these cases of much assistance, despite their high authority. *Abbey National* concerned priorities under the Land Registration Act 1925 where Mr Cann bought a house for his mother's occupation with a pre-agreed mortgage and it was argued that his mother's occupation, which commenced between completion and registration, took priority over the mortgagee. The House of Lords held that Mr Cann acquired only an equity of redemption and not an unencumbered leasehold, so that his mother could not have acquired an interest which overrode that of Abbey National. *Ingram* was an inheritance tax avoidance case involving an analysis of the nature of property given away and retained. The contexts are entirely different from the present case and the starting point must be to consider the provisions of Finance Act 2003 itself and the cases on that Act.

46. The facts in *Brandbros Limited v HMRC* TC/2020/00442(V) are very similar to those in the present case. The First Tier Tribunal held that as SDLT is a transactional tax, one must look at the subject matter at the time of the transaction and that section 44 which provides that the effective date of the transaction is the date of completion has to be interpreted in this context. The judge held that the grant of a lease of a garage after completion but on the day of completion did not alter the nature of the subject matter of the transaction which was wholly residential. Mr Cannon submitted that this case did not take account of the House of Lords' cases on *scintilla temporis* and although SDLT is indeed a transactional tax, it does not follow that one can ignore further events on the effective date. He submits the case was wrongly decided and it is, of course, not binding on me but only persuasive.

47. Mr Cannon relies on the case of *Suterwalla and Suterwalla v HMRC* TC/2022/03979. In that case, Mr and Mrs Sutawalla purchased a property with extensive grounds which included a paddock. On the day of completion, they granted a grazing lease over the paddock and it was argued that the property should be classified as mixed use for SDLT. The judge in that case declined to follow *Brandbros*, and he distinguished the Upper Tribunal case of *Ladson Preston* (which I consider below) on the basis that it concerned Multiple Dwellings Relief. Instead, he adopted the approach in *Abbey National* and *Ingram* and found that one looks at the status of the property at the end of the day of completion. In any event, there were other grounds on which he allowed the appeal. HMRC are appealing this case.

48. Mr Cannon also referred to a further FTT case, *Ridgeway v HMRC* [2022] UKFTT 00412 (TC) where the judge had said at [50]:

> "I note HMRC's representation that the obiter comments by the FTT in *Brandbros* to the effect that the existence of a lease should not be taken into account in determining whether a property is residential property. I do not find those comments helpful."

49. In *Ridgeway*, the seller had granted a commercial lease of a building in the grounds of the main property (at the instigation of the buyer) two weeks before completion. The lease prohibited use as a dwelling and the building was in fact being used as a photographer's studio at the date of completion. The facts were therefore very different from *Brandbros* and, indeed, the present case. The judge decided that the property was mixed use at the effective date. However, she also decided that section 75A applied, on the basis that the grant of the lease was "involved in the scheme transactions" and so the full amount of SDLT was chargeable in relation to a notional transaction in which there was no lease. HMRC did not mention section 75A in the present case and I do not consider it.

50. Ms Man mentioned that *Ridgeway* is under appeal although the case also involved multiple dwellings relief and it was unclear what aspect was being appealed.

51. The Upper Tribunal case of *Ladson Preston Limited (1) AKA Developments Limited (2) v HMRC* [2022] UKUT 00301 (TCC) concerned multiple dwellings relief. The site acquired by AKA had been used for commercial purposes, but at the time of completion AKA had planning permission for the erection of a number of dwellings. On the day of completion, but after the transaction had completed, AKA started work for the removal of the existing (commercial) buildings. Multiple dwellings relief is available where the main subject matter of the transaction consists of "an interest in at least two dwellings" (paragraph 2(2) of schedule 6B). A "dwelling" includes a building which "is in the process of being constructed or adapted for such use" (paragraph 7(2) (b) of schedule 6B). AKA sought to argue that the works carried out after completion but on the day of completion meant that the property was "in the process of being constructed" for use as a number of dwellings and so it was entitled to multiple dwellings relief. AKA submitted that as the "effective date" was a whole day and so all the events on that day, including events after completion, could be taken into account in considering the application of MDR. The Upper Tribunal said, at [59]-[62]:

> "The essence of AKA's argument is that the FTT was wrong to conclude that works undertaken after the time of completion were irrelevant to AKA's entitlement to MDR. That, AKA submits, follows from the fact that the definition of "effective date" in s119 of FA 2003 specifies a whole day and not just the part of a day ending with completion. The definition, therefore, is of an "effective date" and not an "effective time" with the result that all works incurred on the effective date, whether before or after completion, are relevant to the availability of MDR.
>
> In support of that argument in his oral submissions, Mr Cannon took us through various provisions within the SDLT regime in which the concept of an "effective date" appeared, explaining how those provisions referred to the entirety of a day and anomalies that might arise if they were construed as dealing with a snapshot in time.
>
> We agree with HMRC, however, that paragraph 2 of Schedule 6B, the provision that confers MDR, does not refer to the effective date of a transaction at all, with the result that debates about whether the definition of "effective date" in s119 specifies the entirety of a day, or a point in time, have no bearing on the availability or otherwise of MDR in the circumstances of these appeals.
>
> 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."

52. Mr Cannon argues that *Ladson Preston* can be distinguished because it related to MDR and the relevant provisions do not refer to the effective date at all.

53. Ms Man submits that *Ladson Preston* is of wider application and that it applies in considering section 116 and paragraph 18 of schedule 4ZA as it focusses on the nature of the chargeable interest acquired at the time of completion. She pointed out that the Upper

Tribunal's approach was endorsed by the Court of Appeal which refused permission to appeal, saying:

> "The UT's answer at para 62 is compelling: the statutory requirements in this case should be tested at the moment of completion. Activity after that moment is irrelevant."

54. By paragraph 3 of schedule 4ZA, a chargeable transaction will be a higher rates transaction if "the main subject matter of the transaction consists of a major interest in a single dwelling" and conditions A to D are met. Paragraph 18(3) states that "Land that is, or is to be, occupied or enjoyed with a dwelling as a garden or grounds (including any building or structure on that land) is taken to be part of that dwelling." As noted, paragraph 18(3) echoes the definition of residential property in section 116.

55. As in the case of paragraph 2(2) of schedule 6B, paragraph 3 of schedule 4ZA is concerned with the nature of the main subject matter of the transaction. That is to say, the relevant question concerns the nature of the chargeable interest acquired and that must be considered at the **time** of acquisition.

56. The "effective date" appears throughout the SDLT provisions, but it relates to matters such as the time limits for submitting a return, paying the tax and raising an enquiry. There is nothing in the legislation to say that one considers the nature of the chargeable interest acquired on the effective date rather than at the time of completion. In the present case, as in *Ladson Preston*, the effective date is irrelevant in considering the nature of the chargeable interest acquired.

57. I agree with HMRC that the principle in *Ladson Preston*, that one looks at the nature of the chargeable interest acquired, at the time it was acquired, is applicable to mixed use in the same way as it is applicable to MDR.

58. At the point of completion, the chargeable interest acquired by Mr Kozlowski was clearly wholly residential. The fact that a lease was engrafted onto that interest after it had been acquired is irrelevant.

59. I accordingly find that the chargeable interest acquired by Mr Kozlowski was wholly residential.

60. That is enough to dispose of this appeal, but the remaining issues were fully argued before me and so I will go on to consider them.

WAS THE GARAGE NON-RESIDENTIAL PROPERTY?

61. HMRC referred to several cases which appeared to say that that a garage would be treated as residential property irrespective of the use to which it is put. In *Brandbros* the Tribunal said:

> "We are satisfied that the garage should be treated as a building or structure in the grounds or garden of the Property. Therefore, as a matter of statutory interpretation, the garage is treated as residential property under section 116 regardless of the use to which it is put."

62. *Goodfellow v HMRC* [2019] UKFTT 750 (TC) concerned a garage which contained an office used by the appellant in that case. The FTT found that the garage was wholly residential. In refusing permission to appeal, the Upper Tribunal said:

> "As far as the wording of s116(1)(b) is concerned, a building in the garden or grounds of a dwelling within subsection (a) such as the garage building including the office space in this case is residential irrespective of its use or suitability of use."

63. In *Gibson v HMRC* TC/2022/00804, the FTT said, at [133]:

> "133. The garage was on the 0.5 acre which was residential and the use to which the office/studio above the garage was put was not relevant, as set out clearly by Judge Bowler in *Brandbros Ltd* v *HMRC* at [40]:
>
> > "As a matter of statutory interpretation, the garage is treated as residential property under section 116 regardless of the use to which it is put…there is no limitation to areas which are used for residential purposes".

64. To the extent that HMRC was arguing that the use of the garage is irrelevant in determining the residential or non-residential status of the garage, this is clearly not correct.

65. Section 116(1)(b) includes within the definition of residential property "land that is or forms part of the garden or grounds of a building [which is used as a dwelling] (including any building or structure on such land).

66. In *Hyman v HMRC* [2019] UKFTT 469 (TC), in a passage which has been quoted in a number of subsequent cases, I said at [62]:

> "**[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.**" (my emphasis)

67. Mr Cannon reads the highlighted text to mean that if part of a property is used for a separate commercial purpose it does not form part of the garden or grounds in the first place so that part of the property is non-residential.

68. He also quotes HMRC's guidance in SDLTM00460 which states:

> "The aim of the legislation is to distinguish between residential and non-residential status, so it is logical that where land is in use for a commercial rather than purely domestic purpose, the commercial use would be a strong indicator that the land is not the 'garden or grounds' of the relevant building. It would be expected that the land had been actively and substantively exploited on a regular basis for this to be the case."

69. Mr Cannon's reading of my remarks is correct. The use of a particular part of a property is crucial in determining whether that part is residential or not. If that part has a separate non-residential (usually commercial) use, then it is not part of the garden or grounds of the property and it is non-residential property for the purposes of section 116(1)(b). Conversely if, despite the use of that part, it is still considered to form part of the garden or grounds of the property,

then the actual use to which it is put is irrelevant: that part is residential property by virtue of section 116(1)(b).

70. It seems to me that the cases mentioned at the beginning of this section of my decision were making this point.

71. The Upper Tribunal in *Hyman* approved the approach to determining whether part of a property is garden or grounds set out in SDLTM00455 and stated:

> "…the Manual states that when considering whether land forms part of the garden or grounds of a building, a wide range of factors come into consideration; no single factor is likely to be determinative by itself; not all factors are of equal weight and one strong factor can outweigh several weaker contrary indicators; where a number of contrasting factors exist, it is necessary to weigh up all the factors in order to come to a balanced judgment of whether the land in question constitutes "garden or grounds"…. We agree with this guidance in 00445 also."

72. Accordingly, the test is a multi-factorial test and the Tribunal must carry out a balancing exercise in respect of all factors in deciding whether land is part of the garden or grounds of a dwelling.

73. The principles on the identification of "garden or grounds" to be derived from the cases are helpfully set out in the recent case of *Faiers v HMRC* [2023] UKFTT 297 (TC). The Tribunal said, at [44]:

> "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 *Hyman* 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*).

74. I now consider the various factors applicable to the present case.

75. Although the Property is comprised in two title numbers, both titles have been in common ownership for many years and were acquired by the Appellant in a single transaction.

76. The Property was used as a single residential property at the time of the sale and was marketed as such. Although estate agents' particulars are marketing materials, they are helpful in indicating how a property is presented to prospective purchasers. Both sets of particulars in the bundle refer to the Property have two garages. Curchods state "There is further garaging and a driveway discreetly located to the side of the property. This area could be developed in the future for a host of different purposes, but now is ideal for those requiring an abundance of parking or garaging".

77. The Savills material refers to "2 garages" and states that "An additional garage and off-street parking can be accessed from the garden with vehicular access via T…"

78. This is consistent with the garage land forming part of the Property as a whole.

79. The garage land is contiguous with the main house and is accessible from the garden of the main house.

80. There is nothing special about the garage which might indicate a non-residential use. It is a normal garage.

81. At the time of purchase, the garage appears to have been used for residential purposes as an outbuilding in the grounds of the main house.

82. The Appellant's main argument is that the garage was being used for a separate, commercial purpose so that it was not part of the garden or grounds of the property.

83. In order to consider this point I must assume, contrary to my finding above, that the lease of the garage is relevant to the question whether the garage land is non-residential.

84. Mr Cannon asserts that the tenancy at will creates a commercial lease. If that is the case, the garage is used for a separate, commercial purpose so that it does not form part of the garden or grounds of the Property. Accordingly, that part of the Property is non-residential and the Property is mixed use for SDLT purposes.

85. Ms Man contends that the lease is not commercial and the garage is an ordinary domestic outbuilding within the garden or grounds of the Property. It is therefore residential property within section 116(1)(b). The Property is therefore wholly residential and the higher rates of SDLT apply.

86. The lease is a tenancy at will which could be terminated by either party at any time, and was terminated by the tenant.

87. The tenant was a company with which the Appellant was associated. It was not an arm's length third party. That is not necessarily fatal. Connected parties can enter into commercial arrangements on arm's length terms, but I am not persuaded that was the case here.

88. Mr Kozlowski's witness statement indicates that initially he had offered to store S4's books on an informal basis. It was only after taking Cornerstone's advice that the lease was put in place.

89. Mr Kozlowski seemed uncertain whether the lease was commercial or not. He simply signed the document produced by Cornerstone.

90. HMRC submits that the £50 a month rent was nominal, but they did not provide any evidence as to what a commercial rent might be. Mr Kozlowski said he did not know whether the rent was commercial or not. He charged the rent Cornerstone told him to charge. While I cannot find as a fact whether the rent was commercial or not, I can say that there were no negotiations as to the rent and Mr Kozlowski did not query the rent or address the question whether it was commercial or not.

91. The lease defined "the Premises" let as "the detached garage adjoining …Esher Green" shown for identification on a plan which had never been attached to the lease.

92. The lease provided that the Landlord was to allow the Tenant "access to and egress from the Premises over the Landlord's adjoining premises (if applicable)". It is unclear whether that gave a right of way over the garage land only or whether that included a right of way over the garden of the main house.

93. The lease requires the Tenant to pay certain outgoings including electricity, referrable to the garage. There is no evidence that any such payments were made. Given Mr Kozlowski's evidence that the electricity supplied to the garage was not separately metered, but was part of the power used by the main house, it is difficult to see how the cost of the electricity used by the Tenant in the garage could have been quantified so as to allow the Tenant to fulfil its covenant.

94. Mr Kozlowski gave evidence that while the tenancy at will subsisted, he also stored his own possessions in the garage. The Tenant did not therefore have exclusive possession of the Premises which is a fundamental attribute of a lease.

95. HMRC states that there was no "active and substantial exploitation" of the garage for commercial purposes which would be required to take the garage out of the garden and grounds of the main house (see *The How Development 1 Ltd v HMRC* [2023] UKUT 00084 (TCC)).

96. Having considered all these matters, I conclude that the lease was not a genuine commercial arrangement.

97. I have applied the multi-factorial test of the Upper Tribunal in *Hyman*, and have carried out the balancing exercise required by that test. I have concluded that the garage was not used for a separate non-residential purpose but is part of the garden or grounds of the Property. It follows that the garage, being part of the garden or grounds, or a building on the garden or grounds is residential property irrespective of the lease and the use of the garage by S4 for storage.

98. The whole of the Property is therefore residential property.

THE SECTION 116(1)(C) ISSUE

99. HMRC argue that in any event, the garage is an interest in land that subsists for the benefit of a dwelling, or land forming part of the garden or grounds of the dwelling, within section 116(1)(c) which is also within the definition of residential property.

100. As I said at [32] in Hyman:

> "…it seems to me to be right that para (c) [of section 116(1)] is not in point; that part is more apt to cover rights attaching to a property which are exercisable over *someone else's* land rather than rights or interests in the subject property itself."

101. I remain of that view. The garage is part of the Property and cannot be regarded an interest in land that subsists for the benefit of the Property.

DECISION

102. For the reasons set out above, I have decided:

(1) The nature of the property, as residential or non-residential, must be determined at the time the transaction is completed, not at the end of the "effective date". In the present case, the Property was wholly residential at the time of completion.

(2) Even if I have regard to the lease which was granted on the effective date but after completion, the garage was part of the garden or grounds of the Property, so that the Property was wholly residential.

(3) Section 116(1)(c) does not apply to a part of the subject property.

103. Accordingly, I uphold HMRC's closure notice and find that the additional SDLT of £134,250 is due. I dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

104. 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.

JUDGE MARILY MCKEEVER
TRIBUNAL JUDGE

Release date: 8 August 2023