Case Number: TC/2022/13095

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/13095

STAMP DUTY LAND TAX-whether property "mixed use"-railway tunnel ventilation shaft and steel fence on the land-rights of way- building and other restrictions-workshop in house occupied on completion-whether used or suitable for use as a dwelling

Heard on: 1 December 2023
Judgment date: 4 January 2024

Before

TRIBUNAL JUDGE MARILYN MCKEEVER
MR IAN PERRY

Between

39 FITZJOHNS AVENUE LIMITED

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 Limited

For the Respondents: Mr Christopher Thompson-Jones, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The form of the hearing was V (video). All parties attended remotely and the hearing was held on the Tribunal's VHS platform. The documents to which we were referred are a Document Bundle of 262 pages, a Supplementary Document Bundle of 39 pages, an Authorities Bundle of 257 pages and the skeleton arguments of both parties.

2. We also heard oral evidence from Mr Paul Godfrey, a former director of 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.

4. References to section numbers, schedules and paragraphs are references to the Finance Act 2003 unless otherwise stated.

5. We have carefully considered all the submissions and authorities referred to by the parties but, in the interests of brevity, we have not referred to them all in detail below.

THE APPEAL

6. This is an appeal against HMRC's closure notice of 1 December 2021 refusing a claim for overpayment relief in respect of Stamp Duty Land Tax (SDLT) under paragraph 11 of Schedule 11A.

7. The Appellant company purchased 39 Fitzjohn's Avenue, Hampstead, London NW3 (the Property) on 18 May 2018 for £19,750,000. The company paid SDLT on the basis that the property was wholly residential.

8. On 1 April 2021, the Appellant's agent, Cornerstone Tax 2020 Limited (Cornerstone) submitted an overpayment relief claim under paragraph 4 of schedule 10, on the basis that the Property should have been classified as "mixed use".

9. That letter referred only to one ground for claiming mixed use: a ventilation shaft for an underground railway tunnel which was situated at the rear of the Property was said to constitute non-residential property so that the whole Property was mixed use. Cornerstone subsequently also argued that there was a commercial tenancy or licence allowing a carpenter to use a workshop inside the house at the time of completion.

10. The amount of SDLT reclaimed was £1,899,250.

11. Following an enquiry, the closure notice issued on 1 December 2021 refused the claim. This decision was upheld by the review conclusion letter dated 15 July 2022 and the Appellant made an in-time appeal on 11 August 2022

12. The two grounds of appeal are:

    (1) that the presence on the Property and commercial use by Network Rail and Thameslink of the ventilation tunnel under the Indenture dated 7 October 1886 granted by The Midland Railway Company ("the Lease") and the significant restrictions on how the land affected now owned by Network Rail and leased to the Appellant can be enjoyed as set out in the Lease mean that the land affected cannot be classified as a part of the grounds of the dwelling and as such, is not residential in nature; and,

    (2) that a workshop in the building at 39 St John's Avenue was occupied for a separate commercial purpose at the time of completion on 18 May 2018 and so that part of the Property was not of residential use.

THE LAW

13. This case turns on whether the Property falls wholly within the definition of residential property set out in section 116.

14. As a company, the Appellant is subject to the higher rates of SDLT as provided by schedule 4ZA. Schedule 4ZA charges SDLT by reference to a "dwelling", but the definition of "dwelling" in paragraph 18 of schedule 4ZA is substantially the same as the definition in section 116 and we refer to this section below.

15. Section 116 defines "residential property" as follows:

> "(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."

16. The question is whether the presence of the ventilation shaft and its surrounding apparatus prevents the whole of the land around the Property from being the "grounds" of the house and/or whether there was a commercial letting of the workshop and, if so, whether that affected the use or suitability for use of the house.

THE FACTS

17. On 18 May 2018 the Appellant purchased the Property. The Property is part freehold and part leasehold. It was originally marketed with another, smaller, property, 46 Maresfield Road, but the Appellant did not purchase 46 Maresfield Road. 39 Fitzjohn's Avenue consisted of five Land Registry titles. The total area of the site (including 46 Maresfield Road) is 1.72 acres.

18. 39 Fitzjohn's Avenue is a very substantial detached residential dwelling. The main part of the house was built in 1885 and it was extended in the 1930s, 1950s and 1980s. The Property was originally a single residential dwelling. For some years, the Property was used for Residential Institutional Use being occupied by the "Southwell House Youth Project". It seems the later extensions were to provide dormitory rooms. This institution vacated the Property in 2010 and since then the Property has been used as a single residential dwelling. That use was confirmed by a planning decision in 2015. It seems that the Property was occupied by a single family until 2018.

19. Planning permission was granted in 2019 for a scheme which involved the redevelopment of the site to provide a single dwelling within the existing house, the demolition of the extensions and the building of 20 flats.

20. The original 1985 building has four floors, lower ground, ground and first and second floors. The Savills marketing brochure includes floor plans which show a room labelled "workshop" on the lower ground floor and two further "workshops" on the ground floor.

21. The Property is currently occupied by guardians as a security measure.

22. There are substantial grounds at the back of the house, including a tennis court.

23. A railway tunnel operated by National Rail and Thameslink and carrying the main Thameslink line through London passes under the grounds and house at the Property.

24. Towards the rear of the Property there is a ventilation shaft for the tunnel, one of many along the line. Mr Godfrey estimated the dimensions of the ventilation shaft and surrounding apparatus as follows. The ventilation shaft is approximately 2.5m-3m in diameter and is surrounded by a brick wall which came to Mr Godfrey's shoulders and is covered by a steel mesh cover and steel girders. There is a steel palisade fence, topped with sharp spikes which surrounds the shaft at a minimum distance of approximately one metre. The fence is about 1.6-1.7m tall and forms a rectangle about 4m by 10m around the shaft which forms an "island" in the grounds. Although this is clearly intended to keep people away from the shaft, it seems that Mr Godfrey had gained access as he had looked down the shaft and estimated the tunnel to be 10m below the ground.

25. There was a dropped kerb and double gates at the rear of the Property, on Maresfield Gardens, giving vehicular access to the Property. (There was also such access elsewhere.) The gates opened onto what was variously described as a "road" or "track" which was intended to provide Network Rail with access to the ventilation shaft to enable it to carry out inspections/repairs etc. The images provided showed a gravel track, very overgrown, leading from the gates. Mr Godfrey stated that the track continued past the ventilation shaft to a point three or four metres beyond the steel fence to allow a vehicle access to the shaft with room to turn.

26. We were shown various images of the site, some taken at ground level and some aerial photographs. The gates were originally wooden and photographs taken in 2018 showed that the trees and shrubbery had been cut back.

27. Following the Appellant's acquisition, the wooden gates were replaced by other, larger gates which Mr Godfrey stated were not locked, and the entrance appeared to have been widened by demolishing a brick pier. The more recent photographs showed that the area at the rear of the Property which included the shaft, fence and road was very overgrown with trees, shrubs and other vegetation. Indeed, the shaft and fence could not be seen at all in the aerial photographs.

28. The ventilation shaft itself was excluded from the lease of the relevant title acquired by the Appellant, but the land around it, including the land on which the fence and track were built were part of one of the leasehold titles.

29. The lease was granted by an indenture dated 7 October 1886 made between the Midland Railway Company and a Mr Yarrow (the Indenture) for a period of nine hundred and ninety nine years from the date of the Indenture. The Midland Railway Company reserved to itself and it successors and assigns (which includes Network Rail/Thameslink):

(1) The line of the railway, the tunnel and the retaining walls, drains and other works under the surface of the land (the Works);

(2) The substratum and soil and minerals under the surface of the land;

(3) The full use and benefit of the Works

(4) The right for the company, its successors and assigns and their agents "at all times to enter into and upon the said piece of land" in order to do such works as are necessary or convenient for the purpose of maintaining, repairing, renewing or altering the Works.

30. There was no specific obligation on the Tenant to keep the way to the ventilation shaft clear. The Landlord had a right to come on the land for the specified purposes, but the Tenant did not have an obligation to keep the land in a state which would facilitate that right.

31. The Tenant covenanted that:

> "…no building or erection whatsoever (except erections of a temporary nature) shall be raised erected or constructed upon the said piece of land or any part thereof except with the consent in writing of the Surveyor for the time being to the Company but such consent shall not be capriciously or vexatiously withheld nor shall any pecuniary consideration be required for such consent by the Company. …"

32. The ventilation shaft itself is not included in the Appellant's title, but the surrounding land and the fence are part of the title.

33. Mr Godfrey did not know how frequently (if at all) Network Rail/Thameslink exercised their rights under the Indenture to come on the land. Considering the overgrown state of the track and the whole area surrounding the shaft and the fence we infer that there had certainly been no recent access.

DISCUSSION

34. The issues to be determined are:

(1) Whether the ventilation shaft and surrounding fence and the restrictions imposed by the Indenture have the effect that part of the land acquired by the Appellant is not part of the "garden or grounds" of 39 Fitzjohn's Avenue. If that is the case, the Property will be mixed use and the non-residential rates of SDLT apply. If the whole of the land constitutes "garden or grounds", the higher residential rates of SDLT apply.

(2) Was there a commercial tenancy in respect of one of the workshops in the house such that part of the house was not "used or suitable for use as a dwelling". If so, the mixed use rates apply. If not, the residential rates apply.

THE VENTILATION SHAFT

35. The Upper Tribunal in *Hyman and others v HMRC* [2021] UKUT 0068 (TCC) held that the test to be applied when considering whether land forms part of the garden or grounds of a building is a multifactorial one. The Tribunal must take account of a wide range of factors. No one factor will be determinative. Different factors will be given different weight and the Tribunal must carry out an evaluation of all the factors and reach a balanced judgement. The Upper Tribunal also approved the list of factors set out in HMRC's guidance on the point in its SDLT manual (to which we return below). The Court of Appeal in *Hyman and Goodfellow v HMRC* [2022] EWCA CA Civ 185 endorsed this approach, refusing to formulate a more prescriptive test and stating that the "outer limits" of "coarse-grained words" like garden and grounds should be left to the courts and tribunals to work out.

36. The cases, including *Hyman*, *Thomas Kozlowski v HMRC* [2023] UKFTT 711 (TC), *James Faiers v HMRC* [2023] UKFTT 00297 (TC) and *The How Development 1 Limited v HMRC* [2021] UKFTT 248 (TC) set out a number of factors which should be considered, along with any other relevant factors.

37. These may be summarised as follows:

(1) Grounds is an ordinary English word.

(2) HMRC's SDLT manual is a fair and balanced starting point (considering historic and future use, layout, proximity to the dwelling, extent, and legal factors/constraints).

(3) Each case must be considered separately in the light of its own factors and the weight which should be attached to those factors in the particular case.

(4) There must be a connection between the garden or grounds and the dwelling.

(5) Common ownership is a necessary condition, but not a sufficient one.

(6) Contiguity is important, grounds should be adjacent to or surround the dwelling.

(7) It is not necessary that the garden or grounds be needed for "reasonable enjoyment" of the dwelling having regard to its size and nature.

(8) Land will not form part of the "grounds" of a dwelling if it is used or occupied for a purpose separate from and unconnected with the dwelling.

(9) Other people having rights over the land does not necessarily stop the land constituting grounds. This is so even where the rights of others impinge on the owners' enjoyment of the grounds and even where those rights impose burdensome obligations on the owner.

(10) 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. There is a spectrum of intrusion/use ranging from rights of way (still generally grounds) to the use of a large tract of land, historically in separate ownership used by a third party for agricultural purposes under legal rights to do so (not generally grounds).

(11) Accessibility is a relevant factor, but it is not necessary that the land be accessible from the dwelling. Land can be inaccessible and there is no requirement for land to be easily traversable or walkable.

(12) Privacy and security are relevant factors.

(13) The completion of the initial return by the solicitor on the basis the transaction was for residential property is irrelevant.

(14) The land may perform a passive as well as an active function and still remain grounds.

(15) A right of way may impinge an owner's enjoyment of the grounds or even impose burdensome obligations, but such rights do not make the grounds any less the grounds of that person's residence.

(16) Land does not cease to be residential property, merely because the occupier of a dwelling could do without it.

38. With these points in mind, we will start our analysis by considering the parties' contentions under the headings of the factors set out in HMRCs SDLT manual as this was the approach which they adopted.

Historic and future use

39. Mr Cannon submitted that there was continuous historic and future use of the relevant land including the ventilation shaft for the commercial railway undertaking and this was an active, not merely passive use of the land.

40. Mr Jones contended that the historic use of 39 Fitzjohn's Avenue is as a single residential dwelling. The house has been used as such since 1885 except for the period when it was occupied as a residential institution for young people. Since the time when the institution vacated the Property in 2010 until shortly before its acquisition by the Appellant in 2018 the Property had been in the occupation of a single family.

41. We prefer Mr Jones' approach. That is, we must consider the nature and use of the whole of the Property to begin with. The use of the ventilation shaft and its apparatus is a separate factor which we consider below.

42. The actual residential use is consistent with the planning statement prepared by Savills and there is no suggestion that the Property had been used for any commercial activity or that planning permission had been granted for any such use.

43. The Property was marketed as a residential dwelling (strictly dwellings as 46 Maresfield Gardens was also originally marketed with the Property) on a site extending to 1.72 acres. The brochure mentioned the potential for conversion and/or development. We recognise that this is marketing material but it is helpful in indicating the way in which it was presented to prospective purchasers.

44. It is clear that the Property has been used solely for residential purposes for many years and under the present planning permissions cannot be used for anything else.

45. We agree with Mr Jones and the SDLT manual that future use is not relevant, as the status of the Property for SDLT purposes must be established at the time of completion.

Use of the land

46. Mr Cannon submits that the ventilation shaft and the constructions round it-the wall and the fence (which we will refer to as the ventilation shaft) were used for the commercial operations of Network Rail and ThamesLink. The ventilation shaft did not support the use of the house as a dwelling and that part of the land was occupied or used by a third party for a purpose separate from and unconnected with the house.

47. Mr Jones submits that the use or function of the ventilation shaft is not sufficient to make that part of the land non-residential. That is to say, its use does not cause the ventilation shaft to cease to be part of the grounds of the dwelling so the grounds are wholly residential.

48. As the grounds are wholly residential, the ventilation shaft is merely a structure on the land and its use is irrelevant.

49. Mr Jones considered that any use of the ventilation shaft is passive. There is no active use of that part of the land. Although it is part of a commercial operation-the running of a railway-no active part of that business is carried on at the Property.

50. Mr Jones compared the present case to *Faiers*, which concerned an electricity distribution operation consisting of a pole and overhead high voltage cables in the grounds of a dwelling. It was argued that the presence of these structures limited the use to which the grounds could be put and took the land affected by the structures out of the definition of "grounds". The Tribunal found that the structures were at the rights of way end of the spectrum of intrusion and that the whole of the land constituted the grounds of the dwelling.

51. Mr Jones argued that in the present case the ventilation shaft was simply passively present on the land and the level of intrusion was minimal and did not make the affected land any less part of the grounds of the dwelling.

52. Mr Cannon strongly disagreed with that proposition. In his view, the ventilation shaft performed a very active function of ventilating the railway line which is necessary for the safe operation of the railway. Given that ThamesLink trains pass every few minutes, the ventilation shaft performs a positive and active function of enabling the safe operation of the railway underneath.

53. In addition, the ventilation shaft constituted a severe intrusion into the use of land. The ventilation shaft itself was surrounded by a large and ugly brick wall topped with a steel mesh surrounded by a tall steel fence. Mr Godfrey described the fence as "razor topped". From the photographs, the fence was topped with sharp spikes, but we could see no razor wire. Mr Godfrey conceded that the ventilation shaft could not be seen from the ground floor of the dwelling.

54. Mr Godfrey stated that the trains passing through the tunnel underneath made a lot of noise which also intruded on the use of the Property as a dwelling. There was no further evidence of the loudness or frequency of the noise or whether it continued into the night.

55. Mr Cannon argued that the level of intrusion and alternative use of the ventilation shaft took it to the far end of the intrusion spectrum such that the land was not part of the grounds of the dwelling.

Geographical factors: location, proximity and layout

56. Mr Cannon accepts that the land on which the ventilation shaft is located is contiguous with the rest of the land acquired. In relation to layout, he argues that the ventilation shaft and the track are a material interference with the residential use of the land and the enjoyment of it.

57. As to extent, the ventilation shaft does not support the use of the building as a dwelling and in fact is an interference with such use.

58. Although he accepts the Court of Appeal ruling in *Hyman* that the test for grounds is not whether the land is required for the enjoyment of the Property, he argues that it is significant that the dwelling appears to have an adequate area of land for enjoyment with the Property without needing to use the land on which the ventilation shaft is located.

59. Mr Jones argues that all the titles were acquired by the Appellant and have been in common ownership for many years.

60. All the titles are contiguous.

61. The layout is what one would expect for a residential property with the house at the front and the gardens at the back. In this case, the gardens are extensive and include a tennis court.

62. The dwelling is in a residential area.

63. There is no commercial equipment on the land except for the ventilation shaft which is a passive structure.

64. The ventilation shaft is located centrally in the grounds.

65. The owner of the Property can use the access track and the rear gates to enter the Property.

66. The grounds are easily accessible from the Property and are adjacent to it; there is no separation.

67. In relation to extent, Mr Jones submits that this is a large Property of approximately 1.5 acres and the ventilation shaft is not disproportionately large in relation to this.

Legal factors and constraints

68. Mr Cannon submits that the restrictions and obligations imposed on the Property represent severe constraints on the enjoyment and use of the land for residential purposes. The subsurface is not part of the land subject to the lease. No building is allowed on the land above or below the surface. The Appellant must keep the track open and clear. Network Rail have access to the Property at all times and can come without notice to do works/operations.

69. He adds that there is no connection between the ventilation shaft and the dwelling; the ventilation shaft does not perform any function in relation to the dwelling.

70. Although the titles are in common ownership, the relevant title is leasehold only.

71. The ventilation shaft land is not unused. It is used for the commercial operations of Network Rail and Thameslink. It is occupied (per *Hyman*) or used (per *Withers*) for a purpose separate from and unconnected with the dwelling.

72. Although Mr Cannon accepted that land can still be grounds even where others have rights over the land, he argued that the present case was different. This land is leasehold only and this is not just a right of way but an intrusive structure on the land coupled with limitations on the use of the land and the ability to build on it. The level of intrusion is towards the far end of the "spectrum" and is comparable with a well-established commercial lease for agricultural purposes granted to a third party. Accordingly, the land affected by the ventilation shaft is not part of the grounds.

73. Mr Jones points out that the planning status of the Property is as a single dwelling house. There is no reference to business or industrial uses.

74. The Indenture provides for access for repair and maintenance. As set out in *Hyman* and accepted in other cases, a right of way does not prevent the grounds being residential.

75. Mr Godfrey had said that the company was prevented from building anything on the land. The Indenture allows temporary structures and permanent buildings may be erected with consent.

76. There are many other shafts in the area.

77. Mr Godfrey had mentioned the noise. There was no evidence as to its impact and Mr Jones took us to images of other residential properties with ventilation shafts in their gardens and concluded it could not be a major problem.

78. Mr Jones argued that, taking things in the round, the applicable restrictions and obligations were not such as to prevent the whole of the land being grounds of the dwelling.

Balancing all the factors

79. There is no doubt that in the absence of the ventilation shaft and its apparatus, all the land at 39 Fitzjohn's Avenue acquired by the Appellant would constitute the garden and grounds of the dwelling. This is a large dwelling in a residential area and it has a correspondingly large garden. Mr Cannon's comments about there being adequate land without taking the ventilation shaft into account appear to be an attempt to rerun the arguments rejected by the Court of Appeal in *Hyman*.

80. The question for us is whether the presence of the ventilation shaft and the fence and the rights and obligations reserved and imposed by the Indenture take this area of land outside the definition of "grounds" so that the Property becomes mixed use.

81. We first consider the track and the rights of Network Rail to enter the Property at any time. Mr Godfrey said both that the track had to be kept clear and that the company could not touch it because of the constraints in the Indenture. He admitted that he had not actually read the Indenture but was relying on the advice his lawyers had given him.

82. The Indenture did indeed reserve to what is now Network Rail the right to come on the land at any time to carry out works, but they are required to do the work expeditiously and to restore the surface to its original condition. No specific obligations are imposed on the lessee other than the obligation to allow access. This is simply a right of way which does not prevent the land constituting the grounds of the dwelling.

83. There is no mention in the Indenture of any track or road or any obligation to keep it clear, or any prohibition on the owner of the land using any part of the land in a particular way (except in relation to building). We note that the Appellant did not keep the track clear. The photographs showed that the track was overgrown and the whole area around the ventilation shaft was so covered with trees and other vegetation that the shaft and fence could not be seen from the air.

84. This also suggests that it had been some time since Network Rail had exercised its right of access. Mr Cannon argued that the right to come on the land at any time of the day or night was the important thing. We do not accept this. Although Mr Godfrey had no knowledge of how often the right of access was exercised, he was not aware of any such exercise and, from the state of the track and the area surrounding the ventilation shaft, it would appear that the right of access has been excercised infrequently, if at all. This is relevant to Mr Cannon's argument that the ventilation shaft consititutes a severe intrusion into the Appellant's use of the land.

85. Mr Cannon argued that the fact that the land was leased and that only the surface was leased was relevant. We do not consider that the fact the land is leasehold rather than freehold affects whether it constitutes grounds or not. During the term of the lease, which in this case was granted for 999 years, the lessee has the right to use the land. Nor do we consider it relevant that the lessor retained rights to the subsoil and minerals. That does not, of itself, impinge on the Appellant's rights to use the land as grounds.

86. Mr Cannon suggested that the restrictions on building were a severe constraint on the Appellant's use of the land. The Indenture permits temporary structures to be erected without the need for consent. This would allow the erection of garden sheds, greenhouses and similar items common in a garden. Although written consent is needed to build permanent structures, such consent must not be "capriciously or vexatiously" withheld and no payment is required for consent. In other words, although there is no automatic right to consent, there must be a good reason for refusing it. While an inability to build in the grounds of a dwelling, or to build without consent, might be a significant matter for a developer, it less of an issue for an ordinary, domestic purchaser of a dwelling. The existence of such restrictions is not so severe an interference with the use of the land to prevent the land being grounds of the dwelling.

87. The ventilation shaft itself, the wall with its steel cover and the surrounding fence are undoubtedly unsightly. They are also part of the commercial operation of the railway, performing the function of ventilating the railway tunnel and allowing access to it. However, despite Mr Cannon's strenuous arguments that the ventilation shaft and its apparatus has an active function, it seems to us that it is entirely passive.

88. It clearly performs an important function, but it performs it simply by being there. There is no active or regular exploitation of the shaft for any commercial use, or indeed, any use at all. We also note that the ventilation shaft itself, which is the thing that performs the function, albeit in a passive way, is excluded from the land acquired by the Appellant. While the ventilation shaft and its apparatus does not perform any function in relation to the dwelling, that is not the test. The question is whether the use or function of that part of the land is such that it cannot be considered to be part of the grounds of a dwelling. That will usually be the result of an active commercial use. As Judge Baldwin said in *Faiers*:

> "…adjoining land in common ownership will not form part of the "grounds" of a dwelling if it is used …or occupied … for a purpose separate from and unconnected with the dwelling. That purpose need not be (although it commonly will be) commercial."

89. Judge Baldwin also observed that rights of way do not necessarily prevent land being grounds and that "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."

90. We do not consider that the intrusion of the ventilation shaft and its apparatus is sufficiently severe in relation to the size and nature of the Property as a whole to take it to the far end of the spectrum where it is no longer part of the grounds of the dwelling.

91. We have taken account of the fact that the area of land within the fence is not accessible to the owners of the Property. At least, it is not meant to be accessible, presumably on safety grounds. It seems that Mr Godfrey and/or others have climbed over the fence in order to look down the shaft. We did not have any evidence as to the size of the area enclosed by the fence other than Mr Godfrey's estimate. Even if it was as extensive as he indicated (4m x10m) this is not particularly large in comparison with the land as a whole and does not affect the ability of the owner of the Property to use the land as a whole as the grounds of the dwelling.

92. We also bear in mind that the ventilation shaft itself is excluded from the leasehold title although the land around it is included in the title. The Appellant has not acquired any interest in the shaft itself which is the thing that performs the function of ventilating the railway tunnel.

93. Mr Godfrey made much of the noise caused by the trains passing through the tunnel but there was no evidence that the degree of noise was any more severe than that to which many residential properties which adjoin railway lines are subject.

94. Having considered matters in the round, and taking into account our findings and assessment of the factors as set out above, we conclude that all of the land acquired by the Appellant is part of the grounds of the dwelling at 39 Fitzjohn's Avenue. The wall around the ventilation shaft and the fence are structures on the grounds so that the whole of the Property is residential.

THE WORKSHOP

95. The Appellant's second ground of appeal is that, at the date of completion, there was a commercial tenancy for the use of the workshop at basement and ground floor level. Mr Godfrey clarified that it was one of the workshops on the ground floor which was relevant. There were two areas labelled as workshops in the particulars, but "workshop" as a word covers a multitude of uses. Often, a workshop is a hobby room.

96. Mr Godfrey's witness statement said that the dwelling was partly occupied at completion by "some small business who used it as a workshop".

97. In their statement of case, HMRC formally put the Appellant to proof that a tenancy was in place, the terms of the agreement, the monthly rent, the activity that took place and that it was more than a mere leisure activity. The standard of proof required is the normal civil standard; on the balance of probabilities.

98. The only documentary evidence in the bundle was an email from the previous owner, a Mr Ambrose, dated 27 June 2021 (well after completion) which stated:

> "I can confirm that prior (sic) selling my house in 2018 known as "39 Fitzjohns Avenue N23 5JT" to 39 Fitzjohns Avenue Ltd the workspace at ground floor level was let on a license to a tenant who paid me on a monthly basis."

99. Mr Godfrey said that Cornerstone had asked whether there was a workshop there at completion and upon being told there was, they had asked him to obtain more information about the "commercial tenancy". Following discussions between Mr Godfrey and Mr Ambrose, Mr Ambrose sent the email.

100. At the hearing, Mr Godfrey gave evidence that a carpenter had been using the workshop on the ground floor. There were some carpentry materials in the room including cutting materials. The Property was purchased subject to the arrangement and Mr Godfrey was not concerned whether the Property was acquired with vacant possession. The carpenter left a few days after completion. There was no written tenancy or licence agreement. Mr Godfrey did not know the name of the tenant. He "thought" the annual rent was about £5,000-£6,000 but did

not know exactly how much, nor had he done any comparisons to ascertain whether that was a commercial rent. He had no other information.

101. We note that the contract for sale of the Property stated:

> "The Property is sold with vacant possession (here meaning vacant of persons and free from any occupational interests) on completion… ."

102. The Appellant had been put to proof of the existence and commerciality of the alleged tenancy/licence. The Appellant has failed to discharge the burden of proof and the contract of sale suggests that any arrangement which might have been in place was no longer in existence at completion.

103. We find that no part of the Property was subject to a commercial lease or licence at the time of completion.

104. Even if such a tenancy existed, the Appellant would need to show that that made the Property mixed use. Mr Cannon sought to rely on my statement in *Hyman* at [62], presumably the statement "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."

105. That statement is concerned with the question whether the grounds of a dwelling are residential property, It is not apt to cover the situation where the commercial use takes place within the dwelling itself. The test here is set out in section 116(1)(a): residential property includes "a building that is used or suitable for use as a dwelling". The test is whether the commercial use renders the building unsuitable for use as a dwelling. HMRC's guidance at SDLTM00390 indicates that it is not just the actual use of part of a dwelling for non-residential purposes which is important, but the suitability for use as a dwelling. A building which has been divided into separate areas, one of which has been adapted for use as business premises eg a building consisting of a shop with a flat above is likely to be mixed use.

106. In other situations, the suitability for use as a dwelling depends on the degree of separation from the residential areas and the degree of conversion required to reinstate the business part into the dwelling. If part of the building has planning restrictions which prevent it being used for residential purposes it would be more likely to be unsuitable for use as a dwelling. For example, if two rooms in a house are used as a doctor's surgery and those rooms could easily be reincorporated into the residential part, the whole property would remain used or suitable for use as a dwelling. If the surgery area had been converted and specialist equipment installed, it may not be suitable for use as a dwelling.

107. HMRC guidance is just that: guidance. The above approach does not seem unreasonable, but the outcome will be fact dependent and we do not need to explore the extent of the concept for the purposes of this case. The permitted use of 39 Fitzjohn's Avenue is for a single residential dwelling and it appears to have been used as such for most of its existence and most recently, at least from 2010. There are three rooms labelled "workshop" on the floor plan of the Property and we have had no evidence that any of them had been used or adapted in such a way as to constitute a separate business area or in a way which would make it difficult to reincorporate the rooms for residential use. A workshop can be used in a residential property for domestic or hobby purposes and does not, of itself, make the building unsuitable for use as a dwelling.

108. The Appellant has failed to discharge the burden of proving that there was a commercial tenancy in place at the time of completion and has failed to prove that any part of the dwelling was unsuitable for use as a dwelling.

109. Accordingly, the Appellant's second ground of appeal fails to establish that the Property is mixed use.

DECISION

110. For the reasons set out above, we have decided:

(1) The ventilation shaft and its apparatus, and the land on which it is constructed constitute the grounds of the dwelling or a structure on the grounds; and

(2) The dwelling is used or suitable for use as a dwelling.

111. The Property is therefore wholly residential for the purposes of SDLT.

112. We accordingly dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

113. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

Release date: 4 JANUARY 2024