FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2023/00910

STAMP DUTY LAND TAX - purchase of property comprising 3 acres of house garden and paddock – whether paddock of 1.5 acres contiguous with the house and garden comprised grounds – grazing agreement – entered into after the time of completion but on the same date – can it affect the nature of the property – no but the obligation to enter into it was in place before completion and so encumbered the property at completion – was the grazing agreement "commercial" – impact of "commercial" use - weight to be attributed to the agreement compared with the actual use of the paddock - impact on multifactorial test – held paddock comprised grounds – property entirely residential – appeal dismissed

Heard on: 20 February 2024
Judgment date: 18 March 2024

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MR SIMON BIRD

Between

JESSICA HARJONO & YUSDI SANTOSO

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Patrick Cannon of counsel instructed by Cornerstone Tax

For the Respondents: Kieran Gargan litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns Stamp Duty Land Tax ("**SDLT**"). On 20 December 2021 the appellants' purchased a property. That was a land transaction for SDLT purposes They submitted an SDLT return on the basis that the subject matter of the land transaction was not entirely residential (in SDLT terms, it was "mixed use"). The relevance for SDLT is that a lower rate of SDLT is payable on mixed-use property than on property which is entirely residential.

2. The SDLT return declared tax due of £124,500. Having enquired into that return, HMRC issued a closure notice concluding that the SDLT which should have been paid is £237,750. The amount of tax at stake in this appeal, therefore, is £113,250.

3. The focus of the appeal concerned the use of a paddock which comprised part of the property and which was subject to a grazing agreement in favour of a third party, Zoe Donnelly. And in particular whether the paddock comprised "grounds" of the dwelling (a barn conversion) at the relevant time. If it was not, so the argument runs, the subject matter of the land transaction was not entirely residential.

4. The appellants contend that the grazing agreement was in place at the effective date (completion) of the transaction and that it was a commercial arrangement. In their view this means that the paddock could not be grounds which in turn means that the property was not entirely residential at the date of completion and because it was mixed-use, they should pay SDLT at the lower rate.

5. HMRC contend that the grazing agreement was not in place at the effective date and that even if it was, it was a barter of convenience, and the paddock was still part of the grounds of the dwelling. The grazing agreement therefore was insufficient to render the nature of the property mixed-use. The appellant should therefore be paying SDLT at the higher residential rate.

6. For the reasons given later in this decision we have concluded that although the grazing agreement was, in essence, in place at the date of completion, a consideration of all the facts and circumstances do not enable us to conclude that the impact of the grazing agreement was to take the paddock outside the definition of grounds, and so render the nature of the property non-residential. We have therefore dismissed the appeal.

7. The appellants were represented by Patrick Cannon and Kieran Gargan appeared for HMRC. We were very much assisted by their clear submissions, both written and oral. However, although we have considered all of the evidence presented to us, we have not found it necessary to refer to each and every argument advanced, nor all of the authorities cited, in reaching our conclusions.

THE LAW

8. There was no dispute about the relevant law which is set out in the Finance Act 2003.

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

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

11. 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.

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

13. 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(3) provides that "the relevant land is the land an interest in which is the main subject-matter of the transaction".

14. 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. …".

THE EVIDENCE AND FINDINGS OF FACT

15. We were provided with a bundle of documents and two bundles of authorities. Mr Santoso gave oral evidence on behalf of the appellants. We found him to be a truthful and reliable witness. From this evidence we make the following findings:

Procedural background

16. On 20 December 2021 the appellant completed on the purchase of Culverton Barn, a barn conversion in a village near Oxford ("**the property**"). The price was £2.7 million.

17. On that date, the appellants' solicitor filed an SDLT return classifying the property as mixed-use.

18. On 26 September 2022, HMRC opened an in-time enquiry into that return which they closed on 6 October 2022. The closure notice amended the return on the basis that the property was entirely residential. This amendment resulted in additional tax of £113,250 becoming payable.

19. Cornerstone Tax ("**Cornerstone**") appealed against the closure notice on behalf of the appellants on 27 October 2022. HMRC's view of the matter letter, dated 17 November 2022 upheld the closure notice and offered a statutory review. The offer was accepted, and in a letter dated 21 January 2023, HMRC issued their statutory review conclusion letter, upholding the decision to amend the SDLT return. On 12 February 2023 Cornerstone, on behalf of the appellants, appealed to the FTT.

The property

20. The property, which was marketed by Savills, is a barn conversion comprising in total 3 acres of land. Approximately half of that land (i.e. 1.5 acres) is a roughly oblong fenced paddock ("**the paddock**") with two entry gates one "internal" facing the garden and providing access to and from the garden of the house, and the other one facing directly onto the access road. The house itself has a separate entry gate at the southern boundary directly onto that access road.

21. The fences bounding the paddock are wooden and, from the photographs we have seen, robust. Barbed wire runs along the fencing to provide additional protection.

22. The paddock is elevated when compared to the house and its garden. There is an elevated bank which runs up from the garden to the eastern boundary of the paddock. That bank is approximately 3m high. Looking back from the paddock, it is possible to see the house, but it is not possible, from the windows of the house, to see across the paddock (although the internal gate is visible).

23. It was Mr Santoso's evidence that as far as he knew, the property was part of a more significant farm estate and that the paddock had historically been used for horses and cattle grazing. Artefacts such as horseshoes have been found on the land.

24. Savills' sale particulars describe the property as a Grade 2 listed barn conversion in a remarkable setting with five reception rooms, a kitchen/breakfast room, a cloakroom/ utility room/second kitchen, six bedrooms (three ensuite), two further bath/shower rooms, a triple bay garage with room over, gardens & paddock. It goes on to explain that the property has been extensively renovated and extended in recent years to create "flexible living space". It describes access to the property as being via a gravel driveway with ample parking. It suggests that the storage room above the three-bay garage might lend itself to conversion to separate living accommodation (subject to planning). It goes on to say that "the interesting topography of the gardens offers a variety of mature trees, established borders, large lawns, terraces, a fire pit and a paddock, all of which makes for a wonderful outside space for families and friends to enjoy. In all about three acres".

25. The house and garden are registered under title number ON171796 at HM land Registry. The paddock is registered with title number ON 284053. In the property register for the paddock, it is described as "the freehold land shown edged red on the plan of the above title filed at the Registry and being Land associated with Culvercroft Barn…. Oxford".

26. The proprietorship register for the paddock notes that the price paid by the appellants on 20 December 2021 was for both title numbers.

The grazing agreement

27. Mr Santoso's evidence which we accept and which was unchallenged, was that it had taken some time to negotiate the purchase of the property. Before buying the property, the appellants had lived comparatively close (Banbury). They had joined a WhatsApp group comprising people who lived in the village in which the property was located and adjoining villages.

28. As far as the appellants were concerned, the paddock was surplus to their immediate domestic requirements. Mr Santoso thought that the paddock performed no useful function in relation to the barn and its garden. They therefore investigated, via the WhatsApp group, the possibility of letting the paddock to someone for grazing.

29. They had no success with this proposal via WhatsApp, but they knew Zoe Donnelly who lived near Banbury. The possibility of her using the paddock to graze her horse, cropped up in conversation with her, and it was subsequently agreed that they would enter into a formal arrangement to allow her to graze her horse on the paddock.

30. Mr Santoso ran off a draft grazing agreement from the Internet which he embellished and then sent to, and discussed with, Zoe Donnelly. They agreed terms. The fee of £50 a month was an amount which she had said was an amount which she had paid under previous grazing agreements and having done some low-level due diligence amongst their neighbours, Mr Santoso thought that this was roughly the going rate. No formal advice was taken by either party as to whether this was the case.

31. The grazing agreement was signed by both parties before completion of the purchase of the property on 20 December 2021, but left undated. It was Mr Santoso's unchallenged evidence which we find as a fact, that following completion of the purchase of the barn, his solicitor dated the grazing agreement.

32. The grazing agreement itself is a simple document comprising two pages of text. It is dated 20 December 2021 and identifies the parties. Permitted use is the use for grazing no more than two horses for the tenant's (i.e. Zoe Donnelly) private purposes only. In fact, Zoe Donnelly grazed only one horse. The premises comprise the paddock and the rent is £50 per month exclusive of VAT. The agreement describes itself as a "Lease". It ostensibly has a fixed term, from 20 December 2021 to 19 June 2022 (described as the "Term"). Yet clause 6.1 allows either party to terminate the agreement at any time after 20 February 2022 by giving one month's notice taking effect at the end of a month.

33. The agreement contains a number of covenants to which the tenant was subject including to use the paddock only for permitted use, make good any damage, maintain insurance, pay rent, and allow the appellants to enter onto the paddock at any reasonable time to check whether the terms of the agreement have been complied with and for any other purposes connected with the appellants' interest in the paddock. At the end of the agreement, there was a requirement to remove all items belonging to the tenant and return possession to the appellants. The appellants gave a quiet enjoyment covenant.

The subsequent use of the paddock

34. Zoe Donnelly lived some 20 miles from the paddock, and it became increasingly apparent that, given the traffic situation and the fact that she was travelling to the paddock on an almost

daily basis, it was not a particularly convenient arrangement for her. Accordingly, the grazing agreement ended in June 2022 and was not extended.

35. Thereafter the appellants allowed a local individual to graze his sheep on the paddock for £50 per month for about a year until the summer of 2023. Since then the appellants have permitted someone to use the paddock as an allotment (payment for which being in kind). There were no written agreements for either of these arrangements.

DISCUSSION

Burden of proof

36. The burden of showing that the closure notice, and the amendment made by it, overcharges the appellants, rests with the appellants. In essence this means that it is for the appellants to show that the property was not entirely residential at completion. The standard of proof is the ordinary civil test, namely the balance of probabilities.

Case law

37. Mr Cannon and Mr Gargan referred to a number of cases. Relevant extracts from some of these are set out below, but at this stage we simply identify them so that we can refer to them more easily when dealing with each party's submissions. The relevant cases comprise: *Hyman & Ors v HMRC* [2022] EWCA Civ 185 ("***Hyman***"); *The How Development 1 Ltd v HMRC* [2022] UKUT 00084 ("***How***"); Kozlowski v HMRC [2023] UKFTT 00711 ("***Kozlowski***"); *Ladson Preston and another v HMRC* [2022] UKUT 301 ("***Ladson Preston***"); *39 Fitzjohn's Avenue v HMRC* [2024] UKFTT 28 ("***Fitzjohn's Avenue***"); *Suterwalla v HMRC* [2023] UKFTT 00450 ("***Suterwalla***"); *Modha v HMRC* [2023] UKFTT 783 ("***Modha***"); *Faiers v HMRC* [2023] UKFTT 297 ("***Faiers***").

Submissions

38. In summary Mr Cannon submitted as follows:

(1) In *How*, the Upper Tribunal made clear that it approved the Court of Appeal decision in *Hyman* which recognised that grounds as an ordinary English word, and in deciding whether land adjoining a dwelling will be grounds we should adopt a multifactorial test weighing up all material factors based on our findings of facts.

(2) These factors were set out in *Faiers* which Judge McKeever approved in *Kozlowski*.

(3) Citing *Kozlowski*, land adjoining a dwelling which is in common ownership will not form part of its grounds if it is used for a purpose separate from and unconnected with the dwelling. This need not be, but commonly will be, commercial. Here the paddock was used/occupied for a commercial purpose separate from, and unconnected with, the dwelling namely the grazing of horses by a third party.

(4) The grazing agreement was a commercial agreement. There is no evidence that the £50 per month was uncommercial.

(5) The grazing agreement was entered into on the effective date. Given that Parliament has decided that the appropriate point at which the nature of the subject matter of a transaction is the effective date, and not the "effective time", the grazing agreement entered into after

completion can be taken into account when determining the nature of the property. In this regard, *Suterwalla* is to be preferred to *Kozlowski*.

(6) *Ladson Preston* can be distinguished as it relates to multiple dwelling relief.

(7) In this appeal the evidence shows that the appellants had agreed with Zoe Donnelly to grant the grazing agreement once they had completed the purchase of the property. This is clear from the fact that the undated agreement had been signed by the parties and held by the appellants' solicitor until completion had taken place. Thereupon it was dated. The nature of the property at completion, therefore, must take into account that the paddock was subject to a pre-existing agreement to grant the grazing agreement to Zoe Donnelly. It was encumbered by that obligation.

(8) It was never, therefore, possible for the appellants to enjoy any functional use of the paddock on and from completion since the grazing agreement gave Zoe Donnelly the right to graze her horses on it from that point in time.

(9) The paddock cannot be seen from the house. It was separated from the garden by a 3m bank.

(10) The paddock is registered under a separate title from that of the house and garden.

39. In summary Mr Gargan submitted as follows:

(1) In considering whether the paddock comprises grounds, the factors which we should consider have been neatly summarised in *Fitzjohn's Avenue*.

(2) The historic use of the land shows that the property was extensively renovated following the conversion from two barns in 1996 and the land registry records show that the paddock was used in conjunction with the house and garden from at least 2009. The entirety of the property, therefore, including the paddock, has been linked together for 12 years prior to the appellants' purchase.

(3) The grazing agreement could not have been put in place until the appellants had completed the purchase of the property. Thus, at the time of completion, the grazing agreement was not in place. Whether, therefore, it was commercial or not doesn't matter. We must judge the nature of the property at the point of completion and at that stage the paddock was not encumbered by any obligation to grant grazing rights. It comprises grounds and the property is wholly residential.

(4) The principle in *Ladson Preston* applies not just to multiple dwelling relief but to all elements of SDLT including the fundamental concept of effective date. One must consider the nature of the property at the point of completion and not later or at the end of the effective date. This principle was accepted in *Kozlowski*. We should follow that.

(5) Even if the grazing agreement was in place at completion, it is a "barter of convenience", the appellants obtaining the benefit of the horse keeping the paddock in good heart. It cannot therefore be commercial use within the meaning suggested by Judge McKeever in *Kozlowski*. He cites *How* at first instance: "certain types of land can be expected to be garden or grounds, so paddocks and orchards will usually be residential, unless actively and substantially exploited on a regular basis".

(6) No evidence has been provided of any commercial equipment to support commercial use on the paddock. The rights of access afforded to the appellants at clause 4.7 of the grazing agreement are indicative of the paddock being an integral part of the property.

(7) The amount of rent agreed under the grazing agreement is a nominal figure. There was no independent advice taken as to whether it was the market rate. Furthermore, the use of the paddock for grazing was minimal. Only one horse was grazed.

(8) The benefits accruing to the appellants under the grazing agreement supported the use of the property as a dwelling.

(9) The geographical factors are compelling. The sales brochure shows that the property comprised a large detached residential barn conversion, garage, gardens, and the paddock. This makes for a wonderful outside space for friends and family to enjoy. It was sold as a contiguous plot. The paddock was a selling point for the dwelling. It forms part of the land, lifestyle and residence which was marketed to, and subsequently acquired by, the appellants.

(10) The paddock is proportionate to the size of the house and garden. Furthermore, it is immediately adjacent to the garden and driveway and is sufficiently close to the house to serve it. The addition of the fence between the paddock and the garden does not prevent it from being so served.

Our view

40. We start by considering the relevant principles which we should adopt when determining the issue in this appeal, namely whether the paddock comprises grounds. We will then move on to a consideration of the timing issue (whether, as Mr Cannon submits, we can consider the nature of the property after completion but on the effective date, or, as Mr Gargan submits, we must consider it at the point of completion). We then consider whether on the facts of this case, the paddock was encumbered by an obligation to grant the grazing agreement at the point of completion. We then move on to a consideration of the "commerciality" or otherwise of the grazing agreement and the weight which any such commerciality should be given in the multifactorial test which we are obliged to carry out. We will finally apply that multifactorial test to the facts as found.

The principles

41. In *How*, the Upper Tribunal, endorsed a number of principles which had been set out by the Court of Appeal in *Hyman*. These included: garden or grounds are ordinary English words; they have to be applied to different sets of facts; where the relevant facts and considerations do not point in the same direction, the tribunal must carry out a balancing exercise; there is no requirement that garden or grounds only count as residential property if they are required for the reasonable enjoyment of the dwelling (in regard to its size and nature). The relevant extract is set out below:

> "31. The leading authority on section 116(1)(b) is the Court of Appeal's decision in *Hyman.* That case involved separate appeals which were heard together. The taxpayers each purchased a house with an area of land. The issue was whether all of the land sold together with the house was "part of the garden or grounds of" the house pursuant to section 116(1)(b). In each case the FTT found that all of the land was residential property only and fell within section 116(1)(b). Judge McKeever in *Hyman FTT* 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.

32. On appeal to the Upper Tribunal, the taxpayers argued that land could only be part of "the garden or grounds of" the house if the land was needed for the reasonable enjoyment of the house having regard to the size and nature of the house. The Upper Tribunal rejected this argument. The words "the garden or grounds of" were ordinary English words (see *Hyman UT* at [31]). In considering HMRC's guidance in the SDLT Manual the Upper Tribunal said:

> [48] In the guidance at 00440, the Manual states that the language of s 116 should be given its natural meaning. It also states that there is no statutory concept of 'reasonable enjoyment' and no statutory size limit that determines what 'garden or grounds' means. We agree that those statements are correct as they are in accordance with our Decision in this case.
>
> [49] In the guidance at 00455, 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'. This part of the guidance also refers to a number of factors which are individually discussed in other parts of the Manual but states that the list of other factors will not necessarily be comprehensive and other factors which are not mentioned there might be relevant. We agree with this guidance in 00445 also. We regard this guidance as being in accordance with our own interpretation of s 116 as explained in this Decision. Given that 'garden' or 'grounds' are ordinary English words which have to be applied to different sets of facts, an approach which involves identifying the relevant factors or considerations and balancing them when they do not all point in the same direction is an entirely conventional way of carrying out the evaluation which is called for.

33. The appeal to the Court of Appeal was again advanced on a relatively narrow ground. The taxpayers argued that in order for "gardens or grounds" to count as residential property, they

had to be required for the reasonable enjoyment of the dwelling, having regard to its size and nature, but that, in the instant cases, the garden or grounds exceeded what was needed for the reasonable enjoyment of the relevant dwelling, with the consequence that the taxpayers were only liable to pay SDLT at the lower of the two rates. The Court of Appeal rejected that argument (see *Hyman* at [31]-[32]) and affirmed the decision of the Upper Tribunal. The Court of Appeal held that the taxpayers were seeking, in effect, to imply into an Act of Parliament a limitation that was not there. The words of section 116 FA 2003 were clear and unambiguous and did not produce absurdity. The suggested qualification that there was a limiting factor that the garden or grounds had to be required for the reasonable enjoyment of the dwelling was simply not present in the statutory language.

34. Neither the Upper Tribunal nor the Court of Appeal in *Hyman* attempted to give a definition of the word "grounds". Therefore, as the Upper Tribunal held, the correct approach to determining whether land forms part of the "grounds" of a property involves looking at all the relevant facts and circumstances and weighing up the competing factors and considerations, where they point in different directions, in order to reach a conclusion. This is, essentially, an evaluative exercise".

42. There have been a number of cases since then including, significantly, *Faiers* and *Kozlowski* in which firstly Judge Baldwin and subsequently Judge McKeever (approving the sentiments expressed in *Faiers*) set out the factors which should be taken into account in this evaluative exercise. However, we have found the most recent exposition of those factors, again by Judge McKeever, in the case of *Fitzjohn's Avenue*, to be the most helpful, and the relevant extract is set out below:

"35. The Upper Tribunal in *Hyman and others v HMRC* [2021] UKUT 0068 (TCC) held that 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 that 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".

The timing issue

43. Mr Cannon's position on this is that one tests the nature of the chargeable interest acquired on the effective date, namely completion in this case, and not at the time of completion.

44. This is an argument which he has run in a number of cases including *Kozlowski*, *Suterwalla* and *Brandbros v HMRC* [2021] UKFTT 0157 ("***Brandbros***"). In *Kozlowsk*i and *Brandbros*, Judge McKeever and Judge Bowler respectively, found against him. In *Suterwalla*, Judge Rankin found in his favour. Unsurprisingly, therefore, he urged us to follow *Suterwalla* and to reject *Kozlowski* and *Brandbros*.

45. He distinguishes *Ladson Preston* (which is an unhelpful decision for him) on the basis that it relates to multiple dwelling relief and is not of general application across the SDLT regime.

46. We understand that the Upper Tribunal will consider this point in *Suterwalla*, and we hope that it will determine it conclusively one way or the other.

47. But in the meantime, and with respect to Mr Cannon, we disagree, wholeheartedly, with his submissions on this point.

48. We say this for a number of reasons.

49. Firstly, it is clear from the words of the statute that the rate of tax in section 55 FA 2003 is determined by the nature of the "relevant land", which is the land which is the "main subject matter of the transaction". The subject matter of the transaction is the land in the state which it enjoys at the time at which it is acquired by the purchaser.

50. Secondly, we agree with Judge McKeever that the purpose of identifying the effective date is more concerned with operational issues such as time limits for submitting a return, paying the tax, and raising the enquiry.

51. Thirdly, had Parliament intended the nature of the relevant land to be determined before the end of the effective date rather than at the time of completion, Parliament would have said so (as it has done in the context of the higher rate charge for additional dwellings at paragraph 3(4) of Schedule 4ZA FA 2003 ("Condition C is that at the end of the day that is the effective date of the transaction…"). Parliament has not legislated in the context of SDLT, generally, which suggests to us that one needs to gauge the nature of the land at the point at which completion takes place and not thereafter.

52. Fourthly, we can see no principled justification for Mr Cannon's submission that the principle set out in *Ladson Preston* applies only to multiple dwellings relief and is not of more general application to SDLT. At [62] of *Ladson Preston*, the Upper Tribunal stated that "…the chargeable interest that AKA acquired was the chargeable interest as it stood at the very time of completion. That conclusion depends, not in the 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. As Judge McKeever notes at [53] of *Kozlowski*, this approach was endorsed by the Court of Appeal when refusing to give permission to appeal against the Upper Tribunal's decision. "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. We have based our foregoing view on a literal interpretation of the legislation. But we have arrived at the same conclusion based on a purposive interpretation. This allows us to consider the purpose for which the legislation was introduced and then consider whether the construction of the statutory provision applies to the facts as found. Words are to be given ordinary meanings, and it is to be presumed that Parliament did not intend there to be either injustice or absurdity when introducing those statutory provisions.

55. In our view the legislation cannot be interpreted to permit a purchaser, after acquiring a piece of land, to change the nature of that land, and then submit that the land that he originally

acquired was in that changed state. That would be absurd. It would also be a passport to unconscionable avoidance and would lead to injustice.

56. For all these reasons, therefore, we reject Mr Cannon's submission that one considers the nature of the relevant land after, but on the same day as completion. We need to consider the nature of the subject matter of the transaction, which is the nature of the property at the point at which it was acquired by the appellants, i.e the time of completion.

The nature of the property at the time of completion

57. We now turn to consider the nature of the property at the time of completion.

58. It is clear from the evidence that before completion, the appellants had decided that the paddock was superfluous to their requirements and had discussed the possibility of letting it out to a third party. They could not find someone via the WhatsApp group, but, through their personal friendship with Zoe Donnelly, agreed that she would take it on, on and from completion, in order to enable her to graze her horse.

59. The evidence shows that they had gone beyond a mere discussion, and that prior to completion of the purchase, they had signed the grazing agreement and it had been lodged with the appellants' solicitor, to be dated (and thus completed) following completion of their purchase of the property.

60. So, the nature of the property at the point of completion was that it was encumbered by an obligation (and it is our view that this conferred a form of equitable interest over the paddock, perhaps an equitable agreement to grant the grazing agreement) to enter into the grazing agreement immediately after completion.

61. Mr Gargan takes the view that the appellants were not in any position, legally, to grant the grazing agreement until after completion and so the grazing agreement cannot therefore be taken into account when considering the nature of the property at the point of completion.

62. The evidence shows otherwise. Zoe Donnelly clearly had an interest in the paddock at the point of completion, namely the right to have granted to her the grazing agreement immediately following completion. The property was encumbered by this right. And it meant that the appellants, following completion, could not deal with the paddock in an unfettered way. They were obliged to complete the grazing agreement. And indeed, this is what happened.

63. It is interesting to see from HMRC's SDLT manual when considering sale and leaseback relief, that HMRC give an example where a developer sells an interest in land for a nominal sum but subject to an obligation to immediately grant the seller a long leaseback. In these circumstances they are prepared to treat the arrangement as being the acquisition of an encumbered freehold. It seems to us that this is the principle we should adopt, and HMRC should accept, in the circumstances relating to the paddock. It also reflects the principle set out by McGarry J, as he was, in *Sargaison v Roberts* [1 WLR] 951.

64. When considering the nature of the property at completion, and whether we can take into account the impact of the grazing agreement as part of the multifactorial test, it is our view that we can. It might be argued that the right to have the grazing agreement granted to Zoe Donnelly after completion is not the same as if the grazing agreement had actually been granted to her beforehand. But for the purposes of this decision, we are prepared to treat it as a right which is

tantamount to the grazing agreement itself and is something which we can take into account in the multifactorial test.

"Commercial use"

65. Mr Cannon has framed his submissions (and we hope we have not misunderstood them) on the basis that the grazing agreement comprises commercial use of the paddock by the appellants. And this, in and of itself, is conclusive in establishing that the paddock was not grounds and thus the property was mixed use.

66. He seems to do this on the basis of the principle set out in *Faiers* and by Judge McKeever in *Kozlowsk*i in which she said:

> "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)".

67. It is our view that so-called "commercial use" is not the slamdunk point that Mr Cannon suggests that it is. We say this for two reasons. Firstly, if he is saying it, then it misreads Judge McKeever's remarks in *Kozlowski*. After the passage cited above, she goes on to say:

> "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".

68. So, Judge McKeever recognises that the use to which land is put is simply one factor which must be weighed up when considering whether that land comprises grounds.

69. Secondly (as recognized by Judge McKeever) on the authority of *How*, we must consider all the facts and circumstances and undertake an evaluative exercise. The fact that a piece of land might be used "commercially" is not decisive, and merely something that needs to be weighed in the balance.

70. Recent cases (including those cited in this decision but there are others) show that taxpayers and their representatives are increasingly equating commercial use with mixed use. And that one needs to go no further than finding some form of commercial use of land to take it outside the entirely residential criterion. We think this is misconceived.

71. When considering the use to which land is put (a relevant but not conclusive) factor, it is our view that the weight given to that use is largely determined by the ultimate use of that land, and not by any "intermediate" use.

72. To illustrate this point. Let us say that the paddock was being used for quarrying operations at the point of completion. These quarrying operations were carried out by the sellers. The quarried materials were being sold as part of the seller's trade.

73. It is this sort of situation envisaged by Judge McKeever in *Hyman* and *Kozlowski*, and by Judge Baldwin at [44 (9)] in *Faiers*. It is at the end of the spectrum when commercial use is likely to be a very significant factor pointing away from the land being grounds.

74. And we think this would be the case, too, if instead of the quarrying operations being carried out by the sellers, they were carried out by a commercial organisation to whom the sellers had let, on a turnover rent arm's length commercial lease, the paddock to enable them to do so.

75. The extent and nature of the use would still be judged by the ultimate use to which the land was put (namely quarrying) rather than the terms of the lease.

76. If instead of the arm's length turnover commercial lease, the lease was on uncommercial terms (at a peppercorn say) what would be the impact on the ultimate commercial use, and the weight that should carry in the multifactorial test?

77. Our view is that the impact will be negligible. One would look through the terms of the arrangement with the quarrying company and consider the actual use to which the paddock was being put by that company. It would be surprising if HMRC were to argue that because the terms of the lease were uncommercial, the use to which that quarried paddock was put, which is clearly for a purpose separate from and unconnected with the dwelling, is brought back into domestic use.

78. In a similar vein, let us say that there was a dwelling on the contested land. If the use to which that dwelling was put by the houseowner comprised a business of letting either furnished or unfurnished accommodation, then that is likely to weigh heavily against the land on which that dwelling was located as comprising grounds. The further one moves away from that business use, through active investment through to passive investment and then down the scale to a one-off transaction, albeit on commercial terms, to an acquaintance, the weight one attaches to the use of that land diminishes when weighing it in the evaluation.

79. In circumstances where the letting is carried out by a third party, the terms of the arrangement between the householder and that party are clearly relevant. But they need to be more than just on "commercial" terms. The arrangements with that party need, too, to be more than just a bargain of convenience to carry significant weight. It will only be once the regularity of that letting tips into active investment/business that it is likely to affect the evaluation to any significant extent.

80. "Commercial" is a weasel word. In mixed-use situations it is increasingly being asserted that any letting of part of a property for a market rent is commercial and, as if by magic, the land leaves the residential pot and turns up in the mixed-use pot. As the cases show, this simplistic analysis is being rejected by the courts.

81. When looking at the use to which land is put, simply inserting some form of "commercial" agreement between a landowner and a third party does not, of itself, generate a use which is of significant weight in the multifactorial evaluation. One needs to look through that agreement and consider the end use of the land as well.

82. In the context of this appeal, we accept that the grazing agreement was on arm's length terms, and the rent was a market rent.

83. But the use of the paddock for grazing a pony is the paradigm use of a paddock. And this is the case whether that use is by a third party under a grazing agreement negotiated on arm's length terms and carrying a market "rent", or whether it is by the owners themselves. The same could be said of the use of the garage for storage, for example, in *Kozlowski*. What is of greater

significance in these sorts of situations is the use to which the land is ultimately put and whether that use is inconsistent with the householders' use of the dwelling as such.

Multifactorial evaluation

84. We now turn to an evaluation of all the factors and circumstances.

85. The factors and circumstances which weigh in favour of the paddock comprising grounds are:

(1) The total area of the property is approximately 3 acres of which the paddock comprises 1.5 acres. This acreage is consistent with and proportionate to the size and nature of the house and garden.

(2) The eastern edge of the paddock is bounded by the garden. There is an internal gate between the garden and the paddock. There is an external gate which can be used to access the paddock. The paddock is therefore contiguous with the house and garden and there is ready access between the two.

(3) The land registry records show that although there are two titles, the paddock has been used in conjunction with the house and garden since 2009.

(4) The house and garden on the one hand and the paddock on the other were purchased as part of a single land transaction.

(5) The paddock was a selling point for the house and gardens. It was part of the "wonderful outside space for families and friends to enjoy".

(6) The paddock was used for grazing a horse (albeit by Zoe Donnelly).

86. The factors and circumstances which weigh against the paddock comprising grounds are:

(1) The grazing agreement deprived the appellants of functional use of the paddock immediately on completion.

(2) The 3m bank between the gardens and the paddock meant that the paddock could not be seen from the house.

(3) The paddock is held under a separate registered title from that of the house and garden.

87. In carrying out our evaluation of these facts and circumstances, we bear in mind two things.

88. Firstly, the principles of statutory interpretation set out at [54] above. Secondly [30] of the Court of Appeal's judgment in *Hyman*, as recorded and emphasized at [125] of *How*, namely:

> By contrast, section 116 is concerned with characterising property either as residential property on the one hand, or non-residential property on the other. That characterisation of property applies generally for the purposes of SDLT; not merely to the availability of one form of relief against tax. **Land does not cease to be residential property merely because the occupier of a dwelling house could do without it.**

89. In this case the paddock was land which the appellants could do without. They decided to let it on a grazing agreement to Zoe Donnelly. It is this grazing agreement and its terms which, frankly, is the appellants' sole justification for arguing mixed-use. Had the paddock been used for the grazing of a horse owned by the appellants, we are in little doubt that they would have not brought an appeal against the closure notice.

90. We find as a fact that it was an arm's length document and that the rent of £50 per month was the going rate.

91. However, we also note that although ostensibly for a term starting on 20 December 2021 and ending on 19 June 2022, it could be terminated on one month's notice at any time after 20 February 2022. Notice could therefore have been given on 21 February 2022 terminating the agreement on 31 March 2022, by which time the agreement would have run for only just over three months and rent of perhaps £160 or so would have been paid. Parliament cannot have intended that an agreement on these terms would take the paddock outside the meaning of grounds for SDLT purposes.

92. In our judgment, the existence of this grazing agreement and its terms go nowhere near outweighing the factors which militate in favour of the paddock comprising grounds of the property. The paddock was marketed as an important aspect of the property and was purchased as part of the property in a single land transaction. It has been treated as part of the property since 2009. The fact that it is registered under a separate title carries little weight. The paddock is contiguous with the house and garden and its area is proportionate to it. It is accessed from the garden. In our view it is an integral part of the property. The fact that it is fenced off, again, does not militate against that integration.

93. The ultimate use to which the paddock was put was the grazing of a horse. That is entirely consistent with the use of land as grounds. The fact that it was used by Zoe Donnelly to graze her horse pursuant to the grazing agreement does not outweigh the other factors in favour of the paddock comprising grounds.

94. The paddock was grounds even though the appellants could do without it and had entered into the grazing agreement with Zoe Donnelly. The terms of that grazing agreement, albeit arm's length, do not outweigh the other factors mentioned above which point towards the paddock being grounds. Furthermore, given the terms of the grazing agreement, to construe the term "grounds" in light of facts of this appeal in a way which takes the property into the mixed-use category would, in our view, give rise to an injustice and absurdity.

DECISION

95. For the foregoing reasons it is our decision that the paddock comprised grounds of the property. The property is entirely residential. The appellants' appeal against the closure notice is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

96. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 18 March 2024