Case Number: TC/2022/13097

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video/telephone hearing]

Stamp Duty Land Tax-purchase of dwelling house and land - whether the dwelling house and land included land that was not garden and grounds of a building - yes. Finance Act 2003, sections 55 and 116. Appeal allowed.

Heard on: 09 May 2024
Judgment date: 14 June 2024

Before

TRIBUNAL JUDGE RUTHVEN GEMMELL WS
TRIBUNAL MEMBER JANE SHILLAKER

Between

MARIE GUERLAIN-DESAI

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Patrick Cannon, Counsel, instructed by Cornerstone Tax, ("counsel for MGD")

For the Respondents: Maria Spalding, Litigator of HM Revenue and Customs' Solicitor's Office, ("counsel for HMRC")

DECISION

INTRODUCTION

1. The form of the hearing was by video, and all parties attended remotely. The remote platform used was the Tribunal video hearing system. The documents which were referred to comprised of a Hearing bundle of 614 pages, skeleton arguments for both parties, additional First-tier Tribunal ("FTT") decisions, a witness statement of the Appellant, Marie Guerlain-Desai, ("MGD"), a series of photographs of the woodlands and a Knight Frank ("KF ") sales brochure.

2. 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.

3. MGD appealed against the decision by the Respondents ("HMRC") to issue, on 25 February 2022, a closure notice in the sum of £225,250 of Stamp Duty Land Tax ("SDLT"), under paragraph 23, schedule 10, Finance Act 2003 ("FA 2003"), as they believed that the residential rate of SDLT applied to the whole property transaction and that the use of the property was wholly residential at the date of acquisition.

Background

4. On 15 January 2021, MGD purchased Durford House ("the dwelling house"), Upper Durford Wood, Petersfield, Hampshire, GU31 5AW ('the Property') which was the effective date of transaction. The Property title number was WSX182425.

5. On 25 June 2021, an equitable charge dated 15 January 2021 in favour of Durford Wood Landowners Limited ("DWLL") was added to the Property title.

6. Durford House comprised of a six-bedroom property set in 16.6 acres of land, including a triple garage, outbuildings, approximately 4 acres of private formal gardens ("the private garden"), and approximately 12 acres of mature woodlands at the rear of the Property("the woods") .

7. On 18 January 2021, MGD submitted her SDLT return on the basis that the Property transaction was 'Code 04' (residential – additional properties). The total consideration paid for the acquisition of the freehold interest in the Property was £3,160,000 leading to a SDLT tax liability of £372,750.

8. On 1 April 2021, MGD's representative, Cornerstone Tax, ('the Agent'), issued a letter to HMRC making amendments to the SDLT return, filed on 18 January 2021, on the basis that non-residential property was included in the transaction and requested a refund of SDLT paid of £225,250 plus interest.

9. On 13 December 2021, HMRC issued a formal notice of enquiry to MGD, pursuant to paragraph 12, schedule 10, FA 2003, to check the amended SDLT return.

10. On 21 January 2022, the Agent responded to the notice, asserting that the woods to the rear of the Property were non-residential and was not being used.

11. On 8 February 2022, the Agent confirmed to HMRC that the Property was mortgage free.

12. On 25 February 2022, HMRC issued a Closure Notice pursuant to paragraph 23, schedule 10, FA 2003. It concluded that the amended SDLT Return was incorrect because the Property was

residential and the higher rates of SDLT applied in an amount of £372,750, compared with MGD's amended SDLT return showing £147,500; a difference of £225,250.

13. On 17 March 2022, MGD appealed against HMRC's decision on the grounds that part of the Property was non-residential property and on 30 March 2022, HMRC provided their view of the matter, concluding the Property was residential property.

14. On 22 April 2022, the Agent requested a statutory review of the decision and on 8 June 2022, HMRC issued their statutory review conclusion letter upholding the decision that the Property was entirely residential property.

15. On 22 August 2022, MGD notified her appeal to the FTT.

16. After a number of procedural hearings before the FTT, directions were issued by the FTT on 08 February 2024 for a substantive appeal to take place.

POINT AT ISSUE

17. Whether the Property, at the date of acquisition, consisted entirely of residential property or if it consisted of or includes land that was not residential property and whether the woods are part of the gardens and grounds of the dwelling house.

BURDEN OF PROOF

18. The burden of proof is on MGD to evidence that she was overcharged by the amendment pursuant to paragraph 42, schedule 10, FA 2003.

19. The standard of proof is the ordinary civil test, on the balance of probabilities.

EVIDENCE

20. MGD gave evidence and was a credible witness. She had provided a witness statement and was examined and cross examined.

21. HMRC confirmed that no one from HMRC had visited or had actually seen the Property.

22. MGD stated that the dwelling house, has a private garden of approximately 4 acres. The woods, of approximately 12 acres, surround the 4 acres on all but the northmost boundary.

23. The woods are bounded on the west by a public road; on the south by fields; on the east by National Trust woodlands; and on the north, other than where it bounds the private garden by more of the Upper Woods. Much further to the north are the Lower Woods. The Upper Wood and Lower Woods comprise of approximately 30 acres and are situated in the South Downs National Park.

24. Over many decades, the residents of Durford Wood, used each other's woodland areas for daily walks but more recently and significantly the general public walk through the woodlands and it had, consequently, become a favoured spot for the local community.

25. As a result, MGD said the woods are not considered part of the property or private grounds, but instead a commonly used wooded area. MGD said that she invested considerable time and effort into the yearly upkeep of the woods to preserve them in good condition.

26. Access to the woods is open and there is no wall or fence surrounding them. There is some internal fencing and timber stops, which were shown in the photographs to which the tribunal was referred, which were erected particularly on the narrow parts of paths to stop cyclists and, therefore, avoid accidents. Notwithstanding this, the public do not always use the footpaths when

walking or exercising their dogs and many other footpaths had been created by use. MGD was aware that there were also some 'proper public footpaths', established by right over a period of time.

27. MGD said that there was some signage stating that the woods were private, but the reality was that they were not.

28. Reference was made to the series of photographs which showed some clear paths, which connected the woods to other woodland areas, including the woodland open to the public owned by the National Trust.

29. MGD stated that there was continuous use by other neighbouring residents and the public of the woods and that the neighbours and public in the woods could be clearly heard in the private garden.

30. As a consequence, over a number of years the owners of the dwelling house had erected fencing separating the dwelling house and private garden from the woods with, what are now, mature trees and bushes to screen for privacy ("the privacy screen").

31. Reference was made to a number of photographs of the property contained in the KF brochure showing different aspects of the southerly view of the private garden from the dwelling house which showed a number of mature trees and bushes which MGD confirmed were the ones grown in the private garden, and not in the woods, and only the top of the trees in the woodland could be seen.

32. Consequently, MGD stated, there was no view of the woods from the dwelling house and no view of the dwelling house from the woods.

33. MGD stated that the KF brochure was deceptive, and it also included a large photograph of a field looking on to South Downs which, contrary to what the brochure suggested, could not be seen from the dwelling house at all and required a 10 minute walk to the boundary of the Property in order to do so.

34. Consequently, although the Property was advertised as having "views to the South Downs", this was not true as it was impossible because of the privacy screen around the private garden.

35. MGD was unclear as to the exact conveyancing formalities that had resulted in her ownership of the woods, but she was aware she was under an obligation to maintain them. She did not feel as though the woods were hers because of the considerable public use, which was considerably in excess of the use suggested in the 'At Home in Durford Wood' document ("At Home in Durford").

36. At Home in Durford, dated January 2021,explained that:

> "Durford Wood sits in the South Downs National Park and "despite the 35 properties nestling within its perimeter, retains its wholly rural character and appearance. The Wood is an important habitat for wildlife and makes an immense contribution to the natural beauty of the landscape. Many of the original houses in the Wood were designed by a well-known local architect and have common style, features and internal layout……National parks have common cause, existing to conserve and enhance the natural beauty of the areas they span, maintain their tranquil character, wildlife and cultural heritage."

37. Subheading 2, 'The Durford Wood Estate – A Brief History' stated:

> "The idea of Durford Wood Estate was conceived in 1923 and at the time of its formation it was a unique concept. The Legge family decide to develop and area of some 300 acres of woodland, building a substantial road and water supply system to serve 30 houses. Each property, some with their own service cottage, was situated in an average of 10 acres, ample space to enjoy the benefits of a secluded and peaceful country life in surroundings of great natural beauty."

38. Subheading 3, 'The Residents' Wood' stated:

> "In 1959 the residents thought ahead and decided to secure additional long term protection for the Estate by purchasing some 30 acres of woodland between the Upper and Lower Woods. They achieved this by subscription to debentures in the management company. Today's residents benefit from their farsightedness and inherit the right to walk this land. It is a fine legacy."

39. Subheading 5, 'Footpaths' stated:

> "Public footpaths are clearly marked…. The informal footpaths in the Residents' Wood are for the exclusive use of residents, their family and friends."

MGD stated that the reality is that this is not the case and that everyone uses the woods freely and she did not know of or could identify any footpaths restricted to residents, their family and friends.

40. At Home in Durford, set out a number of other matters and conditions including security, emergency services, waste and recycling collection, litter/dumping, dogs, and general noise.

41. It explained that DWLL had been established in 1933 to maintain roads, water services and other amenities and any access roads and verges on each side. The proposed budget for DWLL is discussed each year and all shareholders/residents are required to contribute to the annual running costs as well as to an adequate sinking fund and a road reserve fund for the maintenance of access roads.

42. MGD is liable to make these payments and has an obligation to maintain the woods and abide by the decisions of the management company, DWLL. DWLL have a charge on her property to secure payment of her obligations.

AUTHORITIES

43. Section 43 of FA 2003: land transactions.

44. Section 48 of FA 2003: chargeable interests.

45. Section 55 of FA 2003: amount of tax chargeable.

46. Section 103 of FA 2003: joint purchasers.

47. Section 116 of FA 2003: meaning of "residential property".

48. Schedule 4ZA of FA 2003: higher rates for additional dwellings and dwellings purchased by companies.

49. Schedule 10 of FA 2003: returns, enquiries, assessments and appeals.

CASES REFERRED TO

50. Hyman v HMRC [2019] UKFTT 469 (TC) ('*Hyman*')

51. Goodfellow v HMRC [2019] UKFTT 750 (TC) ('*Goodfellow*')

52. Myles-Till v HMRC [2020] UKFTT 127 (TC) ('*Myles-Till'*)

53. Hyman & Goodfellow v HMRC [2021] EWCA Civ 185 ('*Hyman & Goodfellow EWCA*').

54. Hyman & Goodfellow v HMRC [2021] UKUT 68 (TCC) ('*Hyman & Goodfellow UT'*)

55. Khatoun v HMRC [2021] UKFTT 104 (TC) ('*Khatoun*')

56. The How Development 1 Ltd v HMRC [2021] UKFTT 428 (TC) ('*How*')

57. Ladson Preston v HMRC [2022] UKUT 301 (TCC) ('*Ladson Preston*')

58. Withers v HMRC [2022] UKFTT 433 (TC) ('*Withers*')

59. Sexton & Anor v HMRC [2023] UKFTT 73 (TC) ('*Sexton*')

60. The How Development 1 Limited v HMRC [2023] UKUT 84 (TC) ('*How UT'*)

61. Faiers v HMRC [2023] UKFTT 297 (TC) ('*Faiers*')

62. Kozlowski v HMRC [2023] UKFTT 711 (TC) ('*Kozlowski*')

63. Espalier Ventures Property (Lansdowne Road) Ltd v HMRC [2023] UKFTT 725 (TC) ('*Espalier*')

64. 39 Fitzjohn's Avenue Ltd v Revenue and Customs Commissioners [2024] UKFTT 28 (TC) ('*Fitzjohn's*')

65. Bonsu & Anor v HMRC [2024] UKFTT 158 (TC) ('*Bonsu*')

66. Harjono & Anor v HMRC [2024] UKFTT 228 (TC) ('*Harjono*')

67. Michael v HMRC [2024] UKFTT 301 (TC) ('*Michael*')

68. Sloss and Another v Revenue Scotland [2021] FTSTC 1 ('*Sloss*')

HMRC's SUBMISSSIONS

SDLT Part 4 FA 2003

69. SDLT is charged on a 'land transaction' under Section 42, FA 2003. This means any acquisition of a 'chargeable interest' under Section 43 FA 2003, provided it is not a transaction that is exempt from charge.

70. Section 55, FA 2003 sets out the applicable amount of SDLT payable on property consisting entirely of residential property and property that is non-residential property or a mix of residential and non-residential property.

71. The freehold interest in the Property was acquired by MGD for £3,160,000 with the amount of tax chargeable in respect of a residential property calculated using "Table A" at Section 55, FA 2003, substituted for the Higher Rates at Schedule 4ZA, FA 2003.

72. HMRC contend that at the effective date of transaction, which was the time of acquisition, the Property consisted entirely of residential property within the meaning of Section 116 of FA 2003:

> "(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."

73. Section 55(4A), FA 2003 states that Schedule 4ZA modifies that section as it applies for the purpose of determining the amount of tax chargeable in respect of higher rate transactions involving major interests in dwellings. Accordingly, schedule 4ZA FA 2003 applies.

74. Paragraph 18, Schedule 4ZA sets out the "rules for determining what counts as a dwelling" for the purposes of the Schedule (broadly similar to Section 116 FA 2003):

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

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

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

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

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

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

75. There is no dispute that Section 116(1)(a) and Paragraph 18(2)(a) are satisfied in respect of the dwelling house, 'Durford House' which is a building suitable for use as a dwelling.

76. In addition, there is no dispute that the private garden is gardens and grounds satisfying Section 116(1)(b) FA 2003.

77. It is disputed whether the woods, within title WSX182425, form part of the 'garden or grounds' of the dwelling house as per Section 116(1)(b).

Woodland as part of the gardens and grounds

78. The definition of 'garden or grounds' was considered by the First-tier Tribunal in *Hyman & Goodfellow* which was subsequently heard at both the Upper Tribunal (*Hyman & Goodfellow UT* and *Hyman and Goodfellow EWCA).*

79. It was considered that 'garden' and 'grounds' are ordinary English words. The First-tier Tribunal made the following comment about the meaning of 'grounds' at [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."

80. Further, as outlined in HMRC's guidance, when considering whether the property is wholly residential HMRC submit that all relevant factors must be considered and weighed against each other; no single factor is likely to be determinative by itself (as supported by the Upper Tribunal in *Hyman & Goodfellow UT* at [49]). However, not all factors are of equal weight either and one strong factor could outweigh several weaker or contrary indicators.

81. HMRC contend that this balancing exercise must be based on the relevant factors at the time of completion as per *Ladson Preston* at [62].

82. The cases, including *Hyman,* and *How UT* set out a number of factors which should be considered, as helpfully summarised in the First-tier Tribunal case of *Fitzjohn's* at [36] and [37].

83. These are summarised as:

(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.

84. HMRC consider each of the relevant factors, as outlined in their guidance at SDLTM00440 to SDLTM00480, as part of a multi-factorial assessment:

Historical use of the land

85. The Property is a residential family home that embraces the rural character of Durford Wood. The purchase of the dwelling house and the woods as a single parcel of land demonstrates there was a relationship between the dwelling house and the woods which is wholly residential:

a. HM Land Registry – property register (WSX182425)

b. HM Land Registry - title plan (WSX182425)

c. Contract for sale.

86. The woods have not been used or occupied for a purpose that was separate and unconnected to the dwelling house. HMRC say that the woods are not used for any particular purpose, it could be allowed to grow wild, be inaccessible and that this would still constitute residential property.

87. HMRC refer to At Home in Durford and to subheadings 2 and 3 and say that the woods have been historically, a key selling point for the property and essential to its overall character and are contained in the same title number.

88. There is no evidence of an "active" use of the woods but notwithstanding that the land can be passive and still remain grounds.

Proximity to the dwelling, layout of land and outbuildings

89. The woods surrounding the Property are physically adjoined to the dwelling house and in *How* and *How UT* both the FTT and the UT concluded that such a woodland formed part of the grounds of the dwelling. The UT in *How* made the following useful points:

(a) Accessibility is a factor to be taken into account, but there is no need for accessibility for land to form part of the grounds. The question is one of fact and degree as part of the evaluative exercise (at [44] to [47]).

(b) The provision of privacy and security can be fairly seen as a residential purpose (at [51] & later at [78]).

(c) The use of the woodland is a factor to be considered and it was confirmed there was no identified commercial or other use of the woodland (at [52] & [53]).

(d) Land can perform a passive function as well as an active function (at [73]).

(e) The Upper Tribunal remade the First-Tier Tribunal's decision and determined the woodland formed part of the grounds for the purposes of Section 116(1)(b) (at [126]).

90. The woods enhance the rural character of the Property, providing views of local woods and providing a degree of privacy and security from users of nearby public footpaths. The combination of physical closeness, accessibility and the lack of any features which would separate the land are factors to demonstrate the grounds are an appendage to the dwelling house.

91. The layout of the land suggests that the woods are easily accessible for enjoyment by the occupiers. Grounds do not only need to be for ornamental or recreational purposes, and they can be allowed to grow wild, such as with the woods.

92. The woods are connected directly with the rest of the grounds of the Property and are contiguous to the private garden. The location and proximity of the woods demonstrates that they are ancillary to and form part of the grounds. The private gardens lead to the woods, which provide a treasured view to the dwelling house and, therefore, benefit both the dwelling house itself and the private garden. The woods constitute an integral part of the Property.

93. The woods subsist for the benefit of the Property, adding to its exclusivity and rural appeal. Furthermore, the KF brochure refers to the property enjoying:

> "a secluded location, tucked away from the main road, within the exclusive Durford Wood Estate that was initially established in the late 1920s and consists of individually built country houses in extensive and mature woodlands and grounds."

94. The woods are, therefore, a key selling point for the property and essential to its overall character demonstrating a connection between the grounds and the dwelling house.

Geographical factors: size of land

95. Durford House consists of a six-bedroom property, set in 16.6 acres of land, a detached garage, outbuildings, the private garden and the woods.

96. The size of the land, 16.6 acres, while extensive, is appropriate for a dwelling house of this nature, and the legislation does not set a quantitative limit on the size of the land nor is there a 'reasonable enjoyment' limitation in the legislation as per *Hyman & Goodfellow EWCA* at [30].The woodland forms part of the grounds and there is no upper limit on what may constitute such grounds.

97. The case of *Withers* can be distinguished on its facts, with 20 acres of grazing land, a formal grazing agreement in place and 8.5 acres of woodland developed by the Woodland Trust for ecological purposes. Judge Gemmell at [135] to [140] stated that:

> "135. The Tribunal also considered that the Woodland Trust land does not function as an appendage but has a self-standing function".
>
> 136. The Tribunal does not accept that because there is a contribution to the cost of maintenance rather than a monetary consideration payable this fails to meet the test of a commercial purpose. Even if it does, the Tribunal consider that it has a self-standing function and accordingly should not be classified as residential property. This self-standing function and separate use is improving the environment and rewilding under strict and controlled conditions and obligations.

> 137. The agreement with the Woodland Trust requires the trust to pay no more than 50% of the cost of agreed works and 50% of the cost of their maintenance work. The Trust commits itself to make payment of no more than £2700 plus VAT for their contribution to the works. GW at no time receives any cash payment from the trust.
>
> 138. Similar to GW's arrangement with the farmer in relation to the grazing land, he receives a commercial benefit to the extent that he does not need to pay 100% of the costs of maintenance.
>
> 139. The aim of the agreement is to ensure that at least 80% of the trees planted are established well within usual forestry standards. GW is required to allow unfettered access to the site by workmen, agents and invitees of the trust and he is specifically prohibited from carrying out any activities which would lead to loss of or damage to the works.
>
> 140. GW is required to control rabbits and other pests and not to allow any grazing of stock."

98. In the case of the dwelling house, Durford House, the woods surrounding the Property clearly exists for the benefit of the Property. The idea of the Durford Wood Estate was conceived in 1923 when the Legge family decided to develop 300 acres of woodland, building a road and water supply system to serve 30 houses. Each property had their own service cottage and was situated in and average of 10 acres to enjoy the benefits of a secluded and peaceful country life in surroundings of great natural beauty. The woodland is essential to the character of the property.

99. In 1959 the residents decided to secure additional long-term protection for the Estate by purchasing some 30 acres of woodland between the Upper and Lower Woods. Both the woods and the additional woodland exist exclusively for the benefit of the Property and have no other purpose.

Legal factors and constraints

100. At Home in Durford Wood at subheading 7, 'The Durford Wood Landowners' Scheme' states:

> "Buyers of property in Durford Wood are required to sign the Durford Wood Landowners Limited Scheme document at the same time as the purchase document".

101. The Scheme creates a Charge on the property concerned as security for contributions payable under the terms of the Scheme. The Charge stands behind any mortgage taken in connection with the purchase, operating as a second charge.

102. Should a resident change their mortgage arrangements after purchase, it is necessary for the DWLL's solicitors to ensure that any new mortgage ranks in priority to the Scheme Charge.

103. Some of the terms and covenants of the Scheme are found in the specific document relating to Durford House, entitled 'SCHEME' formulated by DWLL for maintenance of Roads on the Durford Wood Estate in the Parish of Rogate, Sussex', and signed by MGD.

104. HMRC submit that the SCHEME document, created by DWLL, supports the view that the woods constitute an intrinsic and integral part of the Property.

105. This assertion is further illustrated by the HM Land Registry TR1 form and title which demonstrate that the Property was purchased under one title, indicating that the woods form part of the grounds of the dwelling house.

106. In addition to this, the woods are not used or occupied for a purpose separate from or unconnected to the rest of the grounds. There is no evidence of a non-residential purpose, use or exploitation of any part of the land comprising the Property, or of any such similar use by a third party.

107. HMRC submit that, even if evidence of a non-residential purpose had been provided, the case of *Harjono* at [68] to [71] states:

> "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."

108. KF's brochure, at subheading 8 'Restrictive covenants', states that there are restrictive covenants in place on the usage of properties for business purposes and any intention to change the use of the land would not be relevant to the matters under appeal since the factors to be considered are those present at the time of acquisition of the Property, as at the effective date of transaction.

109. KF's subheading 5, 'General information and guidance, Trees and felling", states that a licence must be obtained from Forestry England if the residents wish to carry out any felling or lopping of a significant nature.

110. This would indicate that minor lopping and felling is acceptable and any restrictions on significant works does not render the woods any less part of the grounds of the Property as regular maintenance of hedges and trees is a common occurrence in residential property.

111. Whilst these obligations or restrictions may be said to inconvenience the homeowner, HMRC contend that they are commonplace with such areas of land, and do not prevent the woods from being the gardens and grounds of the property and nor do they transform the character of the Property.

112. MGD has, in any event, failed to provide evidence to demonstrate (1) the extent of work that requires a licence and (2) how those licencing requirements would impact the characterisation of the property.

113. HMRC submit that any such similar permissions, which must be sought in order to perform certain actions in respect of the land, would not change the character of the land from residential to non-residential property.

114. For the reasons listed above, HMRC contend that the woods surrounding the private garden form part of the grounds of the dwelling house and the additional woodland, the woods, purchased by the Estate is there for the additional benefit of the Property and its occupiers. Accordingly, the Property was entirely residential.

Conclusion

115. HMRC request that the Tribunal dismiss MGD's appeal and make the following findings:

> a. The Closure Notice was correct. The acquisition of the Property was wholly residential and the residential property rates at Table A in Section 55, FA 2003 apply, suitably modified by the Higher Rates at Schedule 4ZA of FA 2003.
>
> b. The dwelling house was a building used or suitable for use as a dwelling satisfying Section 116(1)(a) FA 2003.
>
> c. The woods form part of the garden and grounds of the Property, satisfying Section 116(1)(b) FA 2003.
>
> d. Physical accessibility does not preclude the woods from forming part of garden and grounds of the Property. It can be passively integral to the grounds providing exclusivity, a rural character, privacy and security.
>
> e. MGD has provided no reason why the woods are not residential.
>
> g. MGD has not elaborated how the case law related to the matter and has not applied case law to the facts of the case.

MGD's SUBMISSIONS

116. MGD's grounds for claiming mixed use are that the woods of approximately 12 acres of the 16.6 acre Property, are not part of the garden or grounds of the dwelling house and perform no function in relation to that dwelling and so cannot be said to form a part of the grounds of the dwelling within section 116(1)(b), FA 2003.

Relevant legal principles

117. Section 116(1), FA 2003 provides as follows (with emphasis):

> "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.

This is subject to the rule in subsection (7) in the case of a transaction involving six or more dwellings."

118. The correct application of the highlighted wording is encapsulated in the following case decisions. In *Hyman and Goodfellow EWCA,* the Court of Appeal declined to place an objective limit on the meaning of "grounds" for SDLT purposes in section 116(1)(b) FA 2003 and said that this was a matter of policy with which the Court was not concerned.

119. The Court did however acknowledge that "there will be cases in which there is room for reasonable disagreement" at [11] and [12]. The Court, therefore, declined to place any flesh on the bare bones of the definition of 'grounds of a building" for SDLT purposes, leaving it to the FTT to work out the meaning based on an evaluation of the circumstances of each case while acknowledging that there will be cases in which there will be room for reasonable disagreement.

120. In this regard, the Upper Tribunal in *How UT* said at [116] :

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

121. In *Kozlowski,* Judge McKeever said this about the relevant principles to be adopted at [73]:

> "The principles on the identification of "garden or grounds" to be derived from the cases are helpfully set out in the recent case of *Faiers,* the Tribunal said, at [44]:
>
> "44. The pointers I take from these cases are as follows:
>
> (1) "Grounds" is an ordinary (albeit a little archaic, at least in the view of some of my fellow judges) English word which has to be applied to different sets of facts. So, in deciding whether a particular piece of land comprises all or part of the "grounds" of a dwelling, it is necessary to adopt an approach which involves identifying the factors relevant in that case and balancing them when they do not all point in the same direction.
>
> (2) The discussion in HMRC's SDLT Manual is a fair and balanced starting point for this exercise, but each case needs to be considered separately in the light of its own factors and the weight to be attached to them. Listing them briefly, the factors addressed in the SDLT Manual are: historic and future use; layout; proximity to the dwelling; extent; legal factors/constraints.
>
> (3) Section 116(1)(b) refers to a garden or grounds "of" a dwelling. The word "of" shows that there must be a connection between the garden or grounds and the dwelling.
>
> (4) Common ownership is a necessary condition for adjacent land to become part of the grounds of the dwelling, but it is clearly not a sufficient one.
>
> (5) Contiguity is important; grounds should be adjacent to or surround the dwelling; *Hyman.*
>
> (6) One requirement (in addition to common ownership) might be thought to be that the use or function of the adjoining land must be to support the use of the building concerned as a dwelling (*Myles-Till*). That may be putting the test too high to the extent it suggests that unused land cannot form part of the "grounds" of a

dwelling (cp *Hyman* in the FTT at [62]). Such a requirement must also contend with the decision of the Court of Appeal in Hyman and *Goodfellow* that it is not necessary, in order for garden or grounds to count as residential property, they must be needed for the reasonable enjoyment of the dwelling having regard to its size and nature.

(7) In that light, the "functionality" requirement might perhaps be put the other way round: adjoining land in common ownership will not form part of the "grounds" of a dwelling if it is used (Hyman in the FTT at [62]) or occupied (*Withers* at [158]) for a purpose separate from and unconnected with the dwelling. That purpose need not be (although it commonly will be) commercial (*Withers*). This is subject to the points discussed in (8) and (9) below.

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

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

122. In *Sloss*, Judge Anne Scott, president of the Tax Chamber of the First-tier Tribunal for Scotland, and who also regularly sits in the UK FTT, found that in relation to the definition of residential property in section 59 LBTTA 20131 (which is in all material respects the same as section 116 FA 2003 (but in relation to Land and Buildings Transaction Tax ("LBTT")), certain parts of the property purchased did not fall within the 'garden or grounds' of the dwelling. In particular the FTT said [with emphasis]:

> "88. We therefore agree with Mr Small [counsel for Mr and Mrs Sloss] that there must be some link with the dwelling and the grounds beyond the fact that they had been purchased together in a single transaction. *There must be a functional relationship between the dwelling and the grounds*. Ms van der Westhuizen [counsel for HMRC] agreed with that analysis."
>
> "106. Even if we are wrong in saying that the grazing was, and is commercial, nevertheless we find that with the exception of field 7 and the paddock, *the other fields have very little functional purpose for a house of this size and type. It is not a stately home. It is an attractive house that, with an adequate curtilage, is of a style and size that is available, for example, in Edinburgh*."
>
> "107. In summary, looking at all of the evidence, we find that the Appellants have discharged the burden of proof and established that at least part of the pasture land was non-residential. Accordingly, too much LBTT has been paid."

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

> "123. This Tribunal adopts the reasoning of Judge Citron in Myles- Till as follows: at [44]:
>
> "what indicates that a piece of adjoining land has become part of the "grounds" of a dwelling building? Technically, fact that a dwelling building is sold together with adjoining land, as a single chargeable transaction for SDLT purposes, does not make that adjoining land, necessarily, part of the grounds of the dwelling building: section 55 clearly envisages the possibility that the subject matter of a single chargeable transaction will include both residential and non residential land. Common ownership is a necessary condition for the adjacent land to become part of the grounds of the dwelling building – but not, in my view, a sufficient one."
>
> 124. In respect of HMRC's submissions relating to the "use of land" the Tribunal does not accept their submission that it is sufficient that the adjacent land is available to the GW to use as he wishes. The Grazing agreement does contain restrictions on his use of the land as set out in his submissions.
>
> 145. HMRC's manual, SDLT 00470 - extent of land and geographic factors states that the extent/size of land in question will also be relevant in relation to a building and that *the test is not simply whether the land comprises garden or grounds but whether it comprises the gardens or grounds of the dwelling.*
>
> 147. GW stated that if the grazing lands and the Woodland Trust land where [sic] disposed of, then the property would have a perfectly adequate garden and grounds. The property would, however, require the driveway through the grazing lands in order to obtain access.
>
> 148. The Tribunal considered that the extent of land the grazing land and Woodland Trust land do not form part of the garden or grounds of the dwelling.
>
> 153. The Tribunal again adopts the approach of Judge Citron in Myles-Till that "the words "of" and "use" indicate that *the use or function of adjoining land itself must*

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

124. MGD commend the emphasised text to the Tribunal in this case.

125. MGD distinguishes the recent decision of the FTT in *Modha* which held that land claimed to have been non-residential was part of the grounds of the dwelling, on the basis that the extent of the land in question in this appeal is more extensive at 12 acres than the area of land in these recent decisions.

126. *Modha*, was an appeal about mixed residential and non-residential property and whether an 8-acre field that sloped away at the bottom end of a large garden and paddock was a part of the "grounds" of the dwelling and as such, liable to SDLT.

127. The FTT held that because the field was contiguous; that 8 acres was not an unusual size of land for this house in this location; that there was nothing to prevent the field from being used for residential purposes at the time of completion; and that the field had no commercial use, it was available for use with the dwelling and so attracted the rates of tax in Table A.

128. In particular, the FTT said at [21] that:

> "(2) Firs Farm is registered at the land registry under title number LT189247. It comprises a five-bedroomed property with landscaped gardens, two double garages, a manege, a paddock and an eight-acre field. The total plot is approximately ten acres. Given the size of the dwelling this is an appreciable plot but unlike some of the other cases is not so large that the size of the field, in and of itself, is sufficient to indicate that it is not residential in nature. (3) The plot including the garden, paddock and field is contiguous. The photographs available in the Connells particulars of sale show that there is gated access between the rear of the garden and the field. The paddock and manege are also fenced off from the garden. (4) From the photographs and Ms Modha's unchallenged description of the plot it is plain that the garden, paddock and manege are relatively flat (though there are steps up to the garden from the patio outside the house). The field runs across the back of the paddock, garden and manege and across the back of properties to the west of Firs Farm. The field the falls away steeply from then end of the garden/manege/paddock to the far boundary. The vertical drop is 16m across the approx. 160m length of the field with the greater drop being closest to the garden. As a consequence of this topography the field is not visible from the house itself. The full extent of the field is, however, visible from the end of the garden and, at least, the far end of the manege (visibility being more likely from closer to the house from the saddle of a horse) and thus it is visible from the dwelling in section 116 FA03 terms (which the Appellant accepts includes the garden, paddock and manege). One of the very attractive amenities of Firs Farm as a whole is the sweeping views from the rear."

129. From this decision it can be seen that the "sweeping views to the rear" across the 8 acre field seems to have been a relevant distinguishing feature which is not the case with the 12 acre woodland.

130. MGD also distinguish the recent decision in *Mr & Mrs Michael v HMRC* TC/2022/12710, which was an appeal involving a claim by the taxpayers that the property they had purchased was

of mixed residential and non-residential land for stamp duty purposes due to the presence of a woodland of 3.5 acres at the back of their dwelling and its garden of half an acre. The FTT did not accept the taxpayers' evidence that the woodland did not provide any privacy or security for the half-acre garden and dwelling and so was not a part of the grounds of the dwelling and it applied the nine principles derived from various SDLT cases on "grounds" as articulated by Judge Baldwin in *Faiers* at [44] to decide that the entire property was residential and so subject to the rates of tax in Table A.

131. The basis of the decision seems to have been that (1) the size of the woodland was appropriate to a dwelling of this size in a semi-rural location; and (2) the woodland provided a degree of security and privacy to the dwelling and its garden and was not used or occupied for a purpose separate from and unconnected with the garden.

132. In the present appeal the size of the woods at 12 acres (instead of 3.5 acres) is much more extensive than is appropriate to a dwelling house of this size in a semi-rural location and the woods are more in the nature of a public space enjoyed by local residents and which is not regarded as the grounds of the dwelling house, as MGD's confirmed in her evidence.

The Evidence

133. The evidence including that from MGD during examination shows that the woods were not part of the grounds of the dwelling house and perform no function in relation to the dwelling and the size and extent of the woods means that they should not be regarded as falling within the grounds "of" the dwelling.

Result Sought

134. Accordingly, and based on the above criteria as applied to the facts, the Tribunal is invited to decide that MGD's acquisition of the Property was of a mixed-use property, confirm the land transaction return amendment to show SDLT due of £147,500 so that a refund of £372,750 - £147,500 = £225,250 was due to her and determine this appeal accordingly.

TRIBUNAL DECISION

135. Counsel for HMRC and MGD referred the tribunal to a wide range of decisions and to the summaries of the different factors the tribunal might consider, bearing in mind that not all factors are of equal weight and that one strong factor could outweigh several weaker or contrary indicators, when considering all the facts and circumstances and undertaking an evaluative exercise.

136. MGD was a credible witness and provided evidence with reference to a number of photographs and to the KF brochure which also included photographs of views from the dwelling house.

137. HMRC confirmed they had not visited the Property and made statements such as the local wood could be "viewed from the dwelling house, Durford House"; "the lack of any features which would separate the land"; "provide a treasured view to the dwelling" and "provided a degree of privacy and security from users of nearby public footpaths".

138. These statements were in complete contradiction to the evidence of MGD, who lived at the Property and who referred to the photographs in the KF brochure, and given the relative perspectives leading to this evidence, the tribunal treated HMRC's submissions on these matters with caution.

139. The tribunal considered that there was common ownership of the components of the Property, the dwelling house, the private garden, and the woods. The woods were contiguous with the private garden which in turn surrounded the dwelling house.

140. There was no formal use or occupation of the woods separate from and unconnected with the dwelling house other than the fact it had become a wooded area with public access.

141. As a consequence of the public access, other people had rights over the land and MGD had obligations of maintenance on the property.

142. There was a considerable level of intrusion onto the woods and the evidence was that this was considerably in excess of what appear to be stated in At Home in Durford.

143. The Property was situated in an unusual area of land. It formed part of the Durnford Wood Estate, conceived in 1923 which comprised, KF said, a development of 300 acres and then in 1959 an additional 30 acres 'given over to communal use'.

144. The Property did not have a service cottage and although the KF brochure described a 'detached' triple garage, the plan in the same document showed it was connected to the house.

145. The creation of Durford Wood Estate was prior to the Countryside Act 1949 and then in 2002, The Countryside and Rights of Way Act, which gave increasing land access to the public.

146. In 1959, the residents on or near the estate, purchased 30 acres of woodland part of which, 12 acres, comprise the woods.

147. The woods were not fenced off or gated in a way which prohibited or might deter the public at large from having access to them.

148. The private garden, in contrast, was fenced off in order to provide privacy and, more than that, over what would have been a lengthy period of time the owners of the Property had established the now mature privacy screen of bushes and trees.

149. This provided privacy as regards visibility but not as regards noise. This also means that there was not a view, let alone a treasured view, of the dwelling house from the woods (other than from the top of some trees there).

150. Despite At Home at Durford referring to private paths for the owners' friends and neighbours, the reality is that the woods are treated as public woodland with unrestricted access to the public, including dog walkers and cyclists. In MGD's view, the woods had evolved into common land, although that was not the strict legal position.

151. MGD did have access to the woods, as did her neighbouring proprietors who were obligated to maintain in total the whole 30 acres and abide by the decisions of the management company DWLL, as did the public at large.

152. The woods bounded with woodlands belonging to the National Trust.

153. The tribunal considered that the woods did not provide security nor privacy to the dwelling house as this was provided by the effective enclosure of the private garden by the privacy screen.

154. The tribunal considered that whereas some level of intrusion or rights of way may impinge on the owner's enjoyment of the grounds or even impose burdensome obligations, it was clear from MGD's evidence that this did not impinge upon her enjoyment of the woods nor impose any

burdensome obligations that she did not have to accept as a condition of buying the dwelling house and private garden. One came with the other and there was no choice.

155. In these circumstances, the tribunal were not persuaded the woods were a key selling point nor essential to the dwelling house and private garden's character so as to demonstrate a connection between the woods and the dwelling.

156. The tribunal considered, as a consequence, that the woods did not form a positive function to the dwelling house and to the extent that they did provide a passive function it was no more in terms of usage or exploitation than was available to a third party, in this case the public at large, which in turn was unconnected with the dwelling.

157. The use of the woods by the public at large was considerable and the woods were not passively integral to the grounds of the dwelling house providing exclusivity, privacy and security.

158. The tribunal agree with Judge Anne Scott in *Sloss* that there must be some link with the dwelling and the woods beyond the fact that they were purchased together in a single transaction and that the woods must have a functional purpose for a house of the size of the dwelling house, Durford House.

159. It is six bedroom house which including the triple garage and plant room which, the KF plan shows are attached to the house, comprises of 709.2 square meters and is surround by a private garden of approximately 4 acres or 16,187 square metres.

160. The tribunal did not consider that the woods have, in these terms, a functional purpose for, or a use that supports, the dwelling.

161. Taking into account and evaluating all the facts and circumstances, the tribunal considers that the woods do not comprise the gardens and grounds of the dwelling in terms of the legislation.

162. In relation to the persuasive decisions referred to, the tribunal considered that they were distinguished on the facts and in particular on the issues of evidence, the exceptional type of land involved being the creation of the Durford Wood Estate and the 1959 land purchase and its untypical ownership and management arrangements, the size of the dwelling house and, relative thereto, the sizes of the private garden and the woods; and the intended use of the woods, as anticipated in 1923 and 1959, against its actual use.

163. The appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

164. 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.

WILLIAM RUTHVEN GEMMELL WS
TRIBUNAL JUDGE

Release date: 14 JUNE 2024