Neutral Citation: **[2024] UKUT 00188 (TCC)**

Case Number: UT/2023/000083

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
London EC4A 1NL

Stamp Duty Land Tax — whether mixed residential and non-residential use - Edwards v Bairstow challenge - appeal dismissed

Heard on: 22 April 2024
Judgment date: 01 July 2024

Before

JUDGE GREG SINFIELD

JUDGE ASHLEY GREENBANK

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Appellants

and

MR TAHER SUTERWALLA (1)
MRS ZAHRA SUTERWALLA (2)

Respondents

Representation:

For the Appellants: Marika Lemos and Colm Kelly, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondents: Patrick Cannon, counsel, instructed by Cornerstone

DECISION

INTRODUCTION

1. This appeal concerns Stamp Duty Land Tax ('SDLT'). On 11 December 2020, the Respondents ('Mr and Mrs Suterwalla') purchased a property outside Henley on Thames. The property was a seven bedroom family house with indoor swimming pool, gardens which included a pavilion and a tennis court, and a paddock (together, 'the Property'). Mr and Mrs Suterwalla filed an SDLT return on 14 December 2020 which declared that the property they had acquired was a residential and non-residential mixed-use property. The consequence of that declaration was that SDLT was chargeable on the transaction at a lower rate than if the Property had been purely residential. The Appellants ('HMRC') opened an enquiry into the return on 19 August 2021 and, after an exchange of correspondence, issued a closure notice to Mr and Mrs Suterwalla under paragraph 23 of Schedule 10 to the Finance Act 2003 ('FA 2003') on 8 November 2021. The effect of the closure notice was to increase the SDLT due in respect of the acquisition of the Property from £169,500 to £330,750 on the ground that the Property was not mixed-use but entirely residential.

2. After further correspondence and a review, which upheld HMRC's decision, Mr and Mrs Suterwalla appealed to the First-tier Tribunal (Tax Chamber) ('FTT') on 8 February 2022. The only issue at the hearing of the appeal in May 2023 was whether the Property acquired by Mr and Mrs Suterwalla constituted land consisting entirely of residential property or whether it also included land that was non-residential. Mr and Mrs Suterwalla contended that the paddock, in respect of which they had granted a grazing lease on the day of completion of the purchase, was a non-residential part of the Property. In a decision released on 23 May 2023 with neutral citation [2023] UKFTT 450 (TC) ('the Decision'), the FTT allowed Mr and Mrs Suterwalla's appeal.

3. With the permission of the FTT, HMRC now appeal to the Upper Tribunal ('UT') on three grounds, namely that the FTT erred:

> (1) in [57] of the Decision, when it declined to apply the UT's decision in *Ladson Preston Ltd v HMRC* [2022] UKUT 301 (TCC) ('*Ladson Preston*') in determining whether the relevant land consisted entirely of residential property;
>
> (2) in [58] of the Decision, in treating the grazing lease as relevant to the question whether the land transaction was for the acquisition of land consisting entirely of residential property; and
>
> (3) in any event, the FTT erred in [59] and [60] of the Decision, in concluding that Mr and Mrs Suterwalla had established that the relevant land did not consist entirely of residential property which was not a finding open to it on the facts.

4. At the hearing before us, HMRC were represented by Ms Marika Lemos with Mr Colm Kelly. They had not appeared before the FTT. As he had done in the FTT below, Mr Patrick Cannon acted for Mr and Mrs Suterwalla. We are grateful to counsel for their submissions both written and oral on behalf of the parties. We were very much assisted by the submissions but, although we considered all of them, we have not found it necessary, for reasons which will become apparent, to refer to each and every argument advanced, all of the authorities cited or all of the evidence before us in reaching our decision.

5. We set out the FTT's findings of fact at [19] below and the reasons given for its decision at [20] – [26] before discussing whether they entitled the FTT to find that that the paddock was not part of the grounds of the house at [29] to [44] below but, before we do so, it is convenient to set out the relevant legislation and some case law on the meaning of grounds for the purposes of SDLT.

LEGISLATIVE FRAMEWORK

6. All references to legislation in this decision are to provisions of the Finance Act 2003.

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

8. Section 49 provides that a land transaction is a chargeable transaction if it is not a transaction that is exempt from charge. There is no exemption that might be applicable in this case.

9. Section 55 sets out the amount of tax chargeable on the relevant consideration given for a chargeable transaction, ie the chargeable consideration for the transaction. There are differing rates for residential properties and for properties that are wholly or partly non-residential. The section contains two tables and Table A applies "if the relevant land consists entirely of residential property". Table B applies "if the relevant land consists of or includes land that is not residential property." Section 55(3)(a) defines the relevant land as "the land an interest in which is the main subject-matter of the transaction".

10. Section 43(6) provides that:

> "References in this Part to the subject-matter of a land transaction are to the chargeable interest acquired (the 'main subject matter'), together with any interest or right appurtenant or pertaining to it that is acquired with it."

11. Section 116(1) provides as follows:

> "116 Meaning of 'residential property'
>
> (1) In this Part 'residential property' means—
>
> (a) a building that is used or suitable for use as a dwelling, or is in the process of being constructed or adapted for such use, and
>
> (b) land that is or forms part of the garden or grounds of a building within paragraph (a) (including any building or structure on such land), or
>
> (c) an interest in or right over land that subsists for the benefit of a building within paragraph (a) or of land within paragraph (b);
>
> and 'non-residential property' means any property that is not residential property."

CASE LAW ON THE MEANING OF GROUNDS

12. In the Decision, the FTT cited and relied on a number of decisions of other tribunals and courts on the issue of mixed residential and non-residential properties. It is not necessary to reproduce all of the authorities mentioned in the Decision, but it is useful to set out here some of the passages cited and relied on by the FTT.

13. The UT in *Hyman & Ors v HMRC* [2021] UKUT 68 (TCC) ('*Hyman UT*') observed at [33]:

> "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. The section does not spell out what criteria are to be applied for the purpose of establishing the necessary connection."

14. The UT held at [38] that:

> "… there is no wording in section 116(1)(b) which imposes, or even hints at, a requirement that land can only be a garden or grounds of a dwelling if the land is needed for the reasonable enjoyment of the dwelling. We consider that

> in the absence of any wording to give effect to the limitation contended for, there is no such limitation on the operation of the provision."

15. At [49], the UT provided the following guidance:

> "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."

16. The Court of Appeal endorsed the views of the UT in *Hyman and Goodfellow v HMRC* [2022] EWCA Civ 185 ('*Hyman CA*') at [33].

17. The UT in *The How Development 1 Ltd v HMRC* [2023] UKUT 84 (TCC) ('*How Development*') held, in [46] – [47] that accessibility is a factor to be taken into account by the FTT in its evaluative exercise, but difficulty of access or inability to access an area does not mean that the land cannot be part of the grounds of the dwelling. The UT said, at [116], that they had adopted the approach suggested in *Hyman UT* and endorsed by the Court of Appeal in *Hyman CA* of weighing up all material factors, based on the FTT's relevant findings of fact in that case. Having set out the different factors, the UT set out some guidance in [123]:

> "In considering this question, it is important not to divorce from its context the reference by Judge McKeever in *Hyman FTT* to land 'being available to the owners to use as they wish' … The judge was there explaining what she meant by grounds being land which is 'occupied by the house', and formed part of her statement, with which we agree, that use need not be active, and nor was it necessary for grounds to be used for ornamental or recreational purposes. Importantly, in that passage Judge McKeever went on to state that it was not fatal that other people might have rights over the land and that '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'. Again, we endorse that statement. This approach is in our view consistent with the conclusion in *Hyman* that it is not necessary for garden or grounds to be needed for the reasonable enjoyment of a dwelling. Since binding authority now establishes that 'grounds' are not confined to land necessary for the reasonable enjoyment of a dwelling, it is in our view consistent that third parties may have rights over the grounds or use the grounds, for example under planning or environmental law, without them ceasing to be grounds of the dwelling. Whether or not the land is used for a commercial purpose, which is clearly a relevant factor, is a separate question."

18. As will be seen below, the FTT adopted the nine 'pointers' listed by Judge Baldwin in *James Faiers v HMRC* [2023] UKFTT 00297 (TC) ('*Faiers*') to be considered when considering whether land forms part of the grounds of a building. Although Judge Baldwin's formulation is helpful, we prefer the expanded summary of the relevant factors, derived from the cases including *Hyman*, *Faiers* and *How Development*, by Judge McKeever in *39 Fitzjohns Avenue Ltd v HMRC* [2024] UKFTT 28 (TC) at [37]:

> "(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."

FTT'S FINDINGS OF FACT

19. The FTT recorded Mr Suterwalla's evidence at [34] – [38] of the Decision. Although it does not expressly say so in the Decision, which is regrettable, Mr Suterwalla's evidence does not appear to have been challenged by HMRC and the FTT seems to have accepted it. The FTT made findings of fact in relation to the purchase of the Property and the grazing lease at [39], [48] and [55]. From those paragraphs, the material facts may be summarised as follows:

(1) The Property consisted of two registered titles at the Land Registry: one for the dwelling house, gardens and tennis court; and a separate title for the paddock.

(2) The sales brochure for the Property did not use the word "equestrian" or mention any stables or other suitable accommodation for housing horses. The only references to the paddock in the sales brochure appeared to be almost an afterthought. One paragraph was headed "Garden, grounds and paddock" but did not mention the paddock. Another paragraph was as follows:

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

(3) The paddock was separated from the tennis court by a hedge with only a small gate giving access to the paddock from the house and gardens. It was not possible to see the paddock from the house.

(4) Mr Suterwalla (and, we infer, Mrs Suterwalla) had never used the paddock. Mr Suterwalla would not have purchased the paddock if it had been possible to buy the house and gardens without the paddock.

(5) On the same day as they purchased the Property, Mr and Mrs Suterwalla granted a grazing lease of the paddock for one year to a neighbour, Ms Pragnell, for an annual rent of £1,000.

(6) The grazing lease described the "Permitted Use" as "use for grazing up to 2 horses for [Ms Pragnell's] private purpose only." Under clause 3 of the grazing lease, Ms Pragnell had "the right to pass and repass over [Mr and Mrs Suterwalla's] adjoining land (using a route designated by [Mr and Mrs Suterwalla] from time to time) with or without vehicles and horses to obtain access to and egress from the [paddock]."

(7) Mr Suterwalla never designated a route as required by clause 3 of the grazing lease and Ms Pragnell never requested such a designation. Ms Pragnell never exercised her right to pass and repass over Mr and Mrs Suterwalla's land to enter and leave the paddock because she had direct access to it over some common land from a bridle path. If Ms Pragnell had exercised her right under the lease, it would have meant her horses having to walk over Mr and Mrs Suterwalla's lawns. It would not have been possible to access the paddock with vehicles as provided by clause 3.

(8) Mr Suterwalla considered that the grazing lease was a commercial one as, although the rent of £1000 per annum was relatively modest, the grazing by Ms Pragnell's horses meant that he did not have to worry about cutting the grass in the paddock.

FTT'S REASONS FOR ALLOWING THE APPEAL

20. The FTT set out its reasons for allowing Mr and Mrs Suterwalla's appeal at [57] – [60]. The FTT's primary reason for allowing the appeal is in [57] of the Decision:

> "57. I consider I am not obliged to follow the Upper Tribunal decision in *Ladsdon* [sic] *Preston* as that appeal concerned multiple dwellings [relief and not non-residential property][1]. The First-tier decision in *Brandbros* is only persuasive and I prefer to follow the dicta of Lord Oliver in *Abbey National* and Lord Hoffman in *Ingram*. However, if I am wrong on this point, there are sufficient other reasons to allow this appeal."

21. The FTT's reasoning in [57] is very compressed. The first sentence is a rejection of HMRC's argument, recorded at [52], that the FTT should apply the approach taken by the UT in *Ladson Preston* at [62] and ignore the grazing lease as it was not in place at the time of completion. HMRC submitted that Mr and Mrs Suterwalla could not grant the grazing lease until after completion and therefore, at completion, the Property was wholly residential. We discuss *Ladson Preston* at [47] - [49] below.

22. The second sentence of [57] of the Decision is an acceptance of Mr Cannon's submission in [44] that the FTT should not follow the decision of another FTT in *Brandbros Ltd v HMRC* [2021] UKFTT 157 (TC) ('*Brandbros*'). In *Brandbros*, which pre-dated *Ladson Preston*, the FTT decided that the grant of a commercial lease over a garage on the same date as completion

[1] Wording amended by the FTT in the decision granting permission to appeal.

of the purchase was a separate transaction and did not affect the treatment of the prior purchase of the dwelling earlier on the same day even though section 119 refers to the date of completion and not the time of completion as the effective date of a land transaction for SDLT purposes. Mr Cannon had submitted that the Property should be regarded as mixed-use because section 119 refers to the effective date not the time and the Property became subject to the grazing lease on the date of completion (11 December 2020) albeit after the completion had occurred. In [45], the FTT records that Mr Cannon contended that HMRC were relying on a 'scintilla temporis' between the completion of the purchase of the Property and the grant of the grazing lease. Mr Cannon relied on statements by Lord Oliver in *Abbey National v Cann* [1990] 1 All ER 1085 and Lord Hoffman in *Ingram v HMRC* [2001] 1 AC 303 to the effect that 'scintilla temporis' is a legal artifice and not based on reality.

23. In [57], the FTT gave no reasons for disagreeing with decision of the FTT in *Brandbros*, a case in which Mr Cannon had appeared for the taxpayer and deployed the same argument based on scintilla temporis, but where the panel reached the opposite conclusion to the FTT in this case. Of course, the decision of one FTT is strictly not binding on another FTT as a matter of precedent, but the principle of judicial comity, or horizontal stare decisis, requires that a FTT should follow the decision of a previous tribunal of co-ordinate jurisdiction unless 'convinced' or 'satisfied' (there is no practical difference between the two) that the earlier decision was wrong (see *Gilchrist v HMRC* [2014] UKUT 169 (TCC) at [91] to [94]). There are good reasons for this practice: it promotes consistency in judicial decisions and predictability of outcomes thereby avoiding re-litigation of identical legal issues, and it builds public confidence in the appeals process by ensuring that similar cases are treated similarly over time. If a later FTT considers that a previous decision of the FTT on materially identical facts and/or law was wrong, then it should set out why. It need not do so at great length but simply stating, as the FTT did in this case, that other decisions not on the same point are preferred leaves the reader in the dark. We consider that, where a FTT decides not to follow the decision of another FTT on the same or a materially similar point, it should explain why it has taken a contrary view.

24. The third sentence of [57] was the subject of some debate at the hearing. Ms Lemos said that the FTT was saying that, even if it was wrong about everything it said in the first two sentences of [57], there were other reasons why the paddock was not part of the grounds of the house. Mr Cannon submitted that the first sentence of [57] should be read as a self-contained section and when the FTT said in the third sentence "However, if I am wrong on this point ...", that was only referring to *Brandbros* and not to the comments about not being obliged to follow *Ladson Preston*. Mr Cannon contended that, on that interpretation, it was not wrong for the FTT to take the grazing lease into account in considering the pointers in [59].

25. We do not accept Mr Cannon's reading of [57] as there seems no justification for applying the last sentence of the paragraph to the second sentence only and not the first. The cases of *Ladson Preston* in the first sentence and *Brandbros* in the second both went to the same point in the appeal, namely whether the grant of the grazing lease after completion of the purchase affected the character of the interest acquired or should be ignored. In the last sentence of [57], the FTT was saying that even if it was wrong to take account of the grazing lease in determining whether the paddock was part of the grounds of the house, there were other reasons for allowing the appeal.

26. The FTT sets out its reasons for reaching its conclusion at [58] – [60] which are as follows:

> "58. The grazing lease was of commercial benefit to the Appellants. Although the rent was not large, it was more than a peppercorn and the advantage of Ms

Pragnell's horses keeping the grass in order was of considerable financial benefit to the Appellants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

27. The only issue in the appeal before the FTT was whether the paddock acquired by Mr and Mrs Suterwalla as part of their purchase of the Property on 11 December 2020 was part of the grounds of the house (it not being argued that the paddock was a garden or part of one or that the purchase of the paddock was a separate transaction). If so then the relevant land consisted entirely of residential property and the transaction was chargeable to SDLT at the higher rate, and HMRC's appeal must be allowed. If the paddock was not part of part of the grounds of the house, then the transaction includes land that is not residential property and is chargeable at a lower rate of SDLT.

28. As Ms Lemos accepted at the hearing, Grounds 1 and 2 are, in essence, making the same point, namely that the FTT erred in taking the grazing lease into account when considering whether the paddock was part of the grounds of the house. In Ground 3, HMRC contend that, even if the grazing lease is taken into account, the FTT erred in deciding that the paddock was not part of the grounds of the house.

29. It seems to us that, in a case such as this one, it is appropriate to consider first whether, in light of the facts found, the FTT was entitled to find that the paddock was not part of the grounds even if the grazing lease is disregarded. The FTT held in [57] of the Decision that if it were wrong to have regard to the grazing lease, there were still sufficient other reasons to allow the appeal, ie to find that the paddock was not part of the grounds. The FTT restated its position on the decision granting HMRC permission to appeal where it said there was no error of law in the Decision "even if the relevance or otherwise of the grazing lease is ignored."

30. The "other reasons" are included in the list of reasons set out in [58] – [60]. If we conclude that the FTT was entitled to find that the paddock, without the grazing lease, was not part of the grounds then we do not need to go further. However, if we conclude that the FTT was not entitled so to find then we must consider whether the existence of the grazing lease makes any difference to the characterisation of the paddock and, if so, whether the FTT was entitled to take it into account.

31. We begin by considering whether, disregarding the grazing lease, the facts found and the other reasons support a conclusion that the paddock was not part of the grounds of the house. The FTT's reasons in [58] – [60] contain references to the grazing lease in [58], [59(7)], [59(8)], [59(9)], [60(3)] and [60(4)] which must be excluded if the grazing lease is to be disregarded. Excluding those references leaves the following reasons for concluding that the paddock was not part of the grounds of the house:

> "59. …
>
> (1) 'Grounds of a dwelling' in this appeal clearly refers to the garden and tennis court;
>
> (2) The discussion in HMRC's SDLT Manual refers to historic and future use; layout; proximity to the dwelling. The paddock, although lying alongside the end of the garden and tennis court is not close to the dwelling house and is not visible from it;
>
> (3) There is only one small gate between the gardens and the paddock;
>
> (4) There is common ownership between the dwellinghouse, gardens, tennis court and the paddock;
>
> (5) Although adjacent to the gardens and tennis court the paddock does not form an integral part of the property;
>
> (6) The paddock does not support the dwellinghouse nor the garden nor the tennis court;'
>
> …
>
> 60. …
>
> (1) The paddock is not visible from the dwelling house nor from the gardens;
>
> (2) There is only one small gate access from the gardens to the paddock;
>
> …
>
> (5) The title to the dwelling house, gardens and tennis court is distinct from the title to the paddock.

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

32. Ms Lemos acknowledged that the citation of [116] of *How Development* in [32] showed that the FTT had correctly identified that it was required to undertake a multi-factorial evaluation in determining the issue. She contended that nevertheless the FTT erred in the approach it took to carrying out the evaluative judgment. HMRC's case was that, if the FTT had had regard to, and given due weight to, the relevant facts, the only possible conclusion that it could have reached was that the Property was a residential property. Ms Lemos submitted that the errors were of such a nature that they crossed the threshold that permits the UT to interfere with the findings made by the FTT.

33. Ms Lemos submitted that the FTT erred in taking the following irrelevant factors into account:

(1) the fact that Mr and Mrs Suterwalla would not have bought the paddock if it had been possible to exclude it from the purchase; and

(2) the fact that Ms Pragnell's horses would keep the grass in the paddock in order was of considerable financial benefit to Mr and Mrs Suterwalla.

34. We can deal with these two points briefly. In relation to the first, Mr Cannon submitted that the fact that Mr and Mrs Suterwalla would rather not have acquired the paddock as part of the Property was relevant to whether the paddock formed part of the garden and grounds. We do not accept that submission. We agree with Ms Lemos that whether or not Mr and Mrs Suterwalla would have preferred to buy the Property without the paddock has no bearing on the SDLT liability of the chargeable interest that they did in fact acquire. We acknowledge that the view of the purchasers might be capable of being evidence of whether a typical buyer might regard the paddock as part of the grounds of the house. Such a view must necessarily be highly subjective but the FTT would be entitled to take it into account. However, in this case, Mr Suterwalla's evidence, recorded in [38], that he "would not have purchased the paddock if it had been possible not to do so" says nothing about whether he regarded the paddock as forming part of the grounds of the house. Mr Suterwalla's view might equally support the conclusion that he simply preferred to purchase a house with smaller grounds which required less upkeep.

35. As to the second point, we do not have to decide whether the fact that the horses would remove the need for Mr Suterwalla to cut the grass in the paddock as that is predicated on there being a grazing lease and we are now considering whether the FTT was entitled to find that the paddock was not part of the grounds of the house even if there was no grazing lease.

36. Ms Lemos also contended that the FTT failed to have regard to material factors which contradicted its finding of separate use, namely that:

(1) it was possible to access the paddock from the rest of the Property;

(2) the paddock and the remainder of the Property were marketed and sold as a single property;

(3) there was no evidence of any historic separate use of the paddock;

(4) the paddock was contiguous with the remainder of the Property; and

(5) the paddock could form part of the grounds of the dwelling even if not used.

37. We do not accept that the FTT failed to have regard to these factors.

(1) The FTT specifically referred to the fact that it was possible to access the paddock from the rest of the Property in [37], [59(3)] and [60(2)]. Given the FTT referred

specifically to the access to the paddock from the gardens in its reasons for concluding that the paddock was not part of the gardens, it cannot be said that the FTT did not have regard to the possibility of access. It may be argued that the FTT did not give the existence of the small gate between the gardens and the paddock sufficient weight but deciding what weight to give individual factors is part of the evaluative exercise.

(2) In [37], the FTT referred to "the sales brochure from Knight Frank and Savills and in particular the view on the back page which clearly showed the paddock beyond the tennis court with a hedge dividing the two pieces of land and only a small gate giving access to the paddock from Woodlands House". The brochure is mentioned again in [38], [50], [55] and [56]. We were shown the same brochure and there could have been no doubt about how the Property was marketed and it is clear from the many references in the Decision that the FTT had that in mind.

(3) The FTT clearly understood that historic use is a relevant factor because it is mentioned in pointer 2 in *Faiers* which was quoted and adopted by the FTT and referred to again in [59(2)]. The FTT records, in [49], HMRC's submission that the fact that "the Appellants were not aware of any commercial agreements in place for the use of the paddock prior to completion indicated that the entire Property was, prior to the grazing lease, considered as domestic" shows that the FTT had regard to the absence of any evidence of separate use of the paddock previously. Again, it might be argued that the FTT should have given more weight to the absence of evidence about historic use but that was a matter for evaluation.

(4) The fact that the paddock was contiguous with the remainder of the Property is abundantly clear from the description of the Property in the sales brochure and the description of it in [37]. The FTT dealt with the issue of contiguity, pointer 5 in *Faiers*, at [59(5)] when it said "[a]lthough adjacent to the gardens and tennis court the paddock does not form an integral part of the property". Ms Lemos criticises the use of the word "integral" as an erroneous rephrasing of the test. We do not agree that the FTT substituted a new test. It had already stated that the paddock was "adjacent" to the gardens which is the word used in pointer 5 in *Faiers*. The comment about integral part seems to us to be a separate point in response to the submissions of Mr Cannon recorded at [41] and by HMRC in [46].

(5) The subject of use is discussed by Judge McKeever in [62] of *Hyman v HMRC* [2019] UKFTT 469 (TC) and by Judge Baldwin in pointers 6 and 7 in *Faiers*. Both passages are quoted by the FTT in the Decision. The FTT deals with use at [59(6)] and [59(7)] but the latter paragraph assumes that the grazing lease has been granted so we disregard it. HMRC may disagree with the FTT's comments on use in [59(6)] but it cannot be said that the FTT did not have regard to the issue of use or lack of use.

38. Ms Lemos also submitted that the FTT erred in giving undue weight to the fact that the paddock was not visible from the house. She accepted that it could be a relevant factor which might support a finding that there was some separate use. Ms Lemos contended that, on its own, a finding that the paddock was not visible from the house could not be determinative of whether a piece of contiguous land was not grounds. We agree with that statement but, in our view, the FTT did not treat the fact that the paddock was not visible from the house as determinative of the issue. It was one of the reasons given by the FTT in addressing the *Faiers* pointers in [59] and concluding that additional SDLT was not payable in [60].

39. Mr Cannon said that, in this ground, HMRC were making an *Edwards v Bairstow*[2] challenge. He submitted that we should be slow to interfere with the FTT's multifactorial evaluation and referred to the comments by Lewison LJ in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5 at [114] and [115]:

> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. … The reasons for this approach are many. They include:
>
> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.
>
> 115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations …"

40. Mr Cannon also referred to *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor* [2024] EWCA Civ 262 in which Arnold LJ set out the test on appeal at [110]:

> "It is common ground that, in so far as the appeals challenge findings of fact made by the judge, this Court is only entitled to intervene if those findings are rationally insupportable … Equally, it is common ground that, in so far as the appeals challenge multi-factorial evaluations by the judge, this Court is only entitled to intervene if the judge erred in law or principle …"

41. Mr Cannon submitted that HMRC's challenges in this ground were 'island hopping' against which Lewison LJ warned in *Fage*. He accepted that it was perfectly possible that, another FTT in another case with similar facts might have reached a different conclusion to that reached by the FTT in this case. He maintained that the test was not whether it was possible to come to a different view to the FTT but whether the FTT's decision was so irrational in the judicial sense that no rational judge or tribunal could have reached that conclusion. Mr Cannon

[2] *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14

contended that the FTT found the necessary facts, drew appropriate inferences from them, gave reasons in sufficient detail and reached a conclusion that it was entitled to reach. The facts found by the FTT were rationally supported by the evidence and the FTT did not make any error of law in its evaluation of those facts or the conclusions that it reached. In short, the FTT was entitled to decide the case as it did whether or not a different FTT may have decided things differently and we should not interfere with that decision.

42. We accept Mr Cannon's submissions on this point. In our view, the FTT identified the correct approach and found that the paddock was not part of the grounds of the house for reasons other than the grant of the grazing lease which the FTT set out in [59] and [60]. Although we agree that the FTT erred in [60(6)] in ascribing any weight to the fact that Mr Suterwalla would have preferred to buy the house without the paddock if it had been possible to exclude it from the purchase, that does not necessarily mean that the FTT's conclusion is not supported by its other findings which are either unchallenged or, if challenged, we have upheld. The relevant findings are that:

(1) the paddock and the house (with gardens and tennis court) have separate titles at the Land Registry;

(2) the paddock is not close to the house and is not visible from the house or gardens;

(3) the paddock is only accessed from the gardens by a single small gate;

(4) the paddock does not support the dwellinghouse, garden or the tennis court; and

(5) the paddock does not form an integral part of the Property.

43. We have also considered whether, although not referred to in [59] or [60], any of the other facts found by the FTT, disregarding facts relating to the grazing lease, support a finding that the paddock was part of the grounds of the house. The FTT recorded that the house, gardens and tennis court were purchased as part of a single transaction but also that the paddock was a separate title. Ms Lemos pointed out that there was no evidence of any commercial agreements in place for the use of the paddock prior to completion. In our view, the lack of evidence about use of the paddock by previous owners of the Property does not take matters any further.

44. In our view, it cannot be said that the FTT's conclusion in the Decision is "rationally insupportable" and we are not persuaded that we are compelled to interfere with the FTT's findings and evaluation. Accordingly, we decline to do so.

45. In view of our decision that the FTT was entitled to conclude that the paddock, without the grazing lease, was not part of the grounds of the house, we do not need to consider HMRC's other grounds as their appeal must be dismissed. However, as we heard argument on the other grounds, it may be useful if we indicate briefly what our views would have been.

46. In the first and second grounds of appeal, HMRC contend that the FTT erred in declining to apply the reasoning in *Ladson Preston* and having regard to the grazing lease in determining whether the Property consisted entirely of residential property. The FTT stated that it was not required to follow *Ladson Preston* on the ground that it concerned multiple dwellings relief and not non-residential property. It is correct that the UT in *Ladson Preston* did not consider the question of whether land was residential or non-residential and, for that reason, we agree that the FTT was not bound by *Ladson Preston*. However, that does not mean that the analysis in *Ladson Preston* should not be applied to cases which concern mixed residential and non-residential property cases.

47. In [61] and [62] of *Ladson Preston*, which was quoted by the FTT in [52] of the Decision, the UT stated:

> "61. We agree with HMRC, however, that paragraph 2 of Schedule 6B, the provision that confers MDR, does not refer to the effective date of a transaction at all, with the result that debates about whether the definition of "effective date" in s119 specifies the entirety of a day, or a point in time, have no bearing on the availability or otherwise of MDR in the circumstances of these appeals.
>
> 62. Rather, as we have noted, paragraph 2 asks a question about the nature of the chargeable interest that AKA acquired. Moreover, in the circumstances of these appeals, the effective date of the transactions was the date on which the relevant land transactions completed (as there is no question of s44 of FA 2003 operating so as to treat the date of substantial performance as being the effective date). The chargeable interest that AKA acquired was the chargeable interest as it stood at the very time of completion. That conclusion depends, not on any definition of 'effective date' but on an analysis of the nature of the chargeable interest acquired which is required by paragraph 2(2) of Schedule 6B."

48. In our view, the relevant points to be taken from [61] and [62] of *Ladson Preston* are as follows:

(1) Debates about whether the definition of effective date in section 119 specifies the entirety of a day or a particular point in time have no bearing on the availability or otherwise of a particular SDLT relief or treatment, which turns on the nature of the subject matter of the chargeable transaction.

(2) In such a case, the availability or otherwise of a relief or treatment depends on the nature of the chargeable interest acquired (see section 43(6)).

(3) Where, as in this case, the chargeable interest is acquired at completion of the relevant land transaction, the chargeable interest acquired is the chargeable interest that exists at the time of completion.

(4) Whether a particular SDLT relief or treatment applies requires an analysis of the nature of the chargeable interest acquired at completion.

49. We consider that the approach described by the UT in *Ladson Preston* and encapsulated in the points above is not restricted to cases where the issue is whether the subject matter of a transaction consists of multiple dwellings. It is relevant whenever the particular SDLT treatment or relief turns on the nature of the subject matter of a chargeable transaction.

50. We consider that the FTT should have applied that approach when considering whether the paddock was part of the grounds of the house and that, in not doing so, it erred. In considering whether the Property acquired by Mr and Mrs Suterwalla included land that was non-residential, the FTT should have focused its assessment on whether the paddock was part of the grounds of the house at the completion of the purchase of the Property. As the grazing lease in this case did not exist at the time of completion, it follows that it should not have formed part of the analysis of the nature of the chargeable interest acquired at that time.

51. Our conclusion does not mean that a grant of a grazing lease (or other interest) after completion can never be taken into account. The subsequent use of land may be evidence of its nature or character at the time of completion. For example, the grant of grazing lease by new owners after completion may formalise an informal arrangement between the previous owner and a neighbour which allowed horses to be kept and grazed on the land or be a reinstatement of historic commercial use. As discussed above, however, there was no evidence in this case of any previous use of the paddock to show that it was not part of the grounds. To put it another way, the evidence and the FTT's findings of fact were consistent with the grazing

lease being an entirely new use of the paddock which only commenced after Mr and Mrs Suterwalla had already acquired the chargeable interest on completion.

DISPOSITION

52. For the reasons given above, HMRC's appeal is dismissed.

COSTS

53. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Judge Greg Sinfield
Judge Ashley Greenbank
Upper Tribunal Judges

Release date: 01 July 2024