Neutral Citation: [2023] UKUT 00084 (TCC)

Case Number: UT/2021/000065

UPPER TRIBUNAL
(Tax and Chancery Chamber)

The Royal Courts of Justice, Rolls Building,
London EC4

Stamp Duty Land Tax – whether woodland area was part of "the grounds" of a property and therefore "residential property" – whether necessary for land to be accessible from dwelling to be grounds – section 116(1)(b) Finance Act 2003 – failure to discuss oral evidence in delayed decision – whether to remit or re-make decision

Heard on: 23 January 2023
Judgment date: 30 March 2023

Before

JUDGE THOMAS SCOTT
JUDGE GUY BRANNAN

Between

THE HOW DEVELOPMENT 1 LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Patrick Boch, instructed by Cornerstone Tax

For the Respondents: James Henderson and Calypso Blaj, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against the decision of the First-tier Tribunal (the "FTT") (Judge Connell and Member Catherine Farquharson) released on 15 January 2021 (the "Decision").

2. The issue in this appeal is whether the FTT erred in law in deciding that certain woodland purchased by the Appellant together with a large residential property known as The How ("The How" or "the property") formed part of the property's "garden or grounds" for the purposes of section 116(1)(b) Finance Act 2003 ("FA 2003"). Since it was common ground that the woodland did not form part of the property's "garden", the real issue in dispute was whether the woodland formed part of the "grounds" of the property. If it did form part of the grounds, then a higher rate of Stamp Duty Land Tax ("SDLT") applied, but if it did not do so then a lower rate of SDLT was applicable. We were informed that the difference in SDLT between the two different classifications was £204,250.

3. The FTT heard the appeal on 30 January 2020 and its decision was released almost one year later on 15 January 2021. The FTT decided that the woodland did form part of The How's "grounds" and that, accordingly, the higher rate of SDLT was applicable. The Appellant now appeals the Decision.

4. Originally, the Appellant sought permission to appeal on the basis that "grounds" should be construed in accordance with the case-law and HMRC's Statements of Practice relating to capital gains tax. The Appellant applied to amend its grounds of appeal on 21 September 2021. Permission to amend the grounds of appeal was granted by this Tribunal (Judge Richards, as he then was) on 15 October 2021, but the appeal was stayed pending the decision of the Court of Appeal in a test case, *Hyman & Ors v HMRC* [2022] EWCA Civ 185 ("*Hyman*"). *Hyman* concerned the meaning of the phrase "garden or grounds" in section 116(1)(b) FA 2003 and the application of the above-mentioned Statements of Practice. The issue was determined by the Court of Appeal in favour of HMRC and, accordingly, in relation to this appeal, the issue relating to the Statements of Practice fell away, leaving only the question whether the woodland constituted part of the "grounds" of The How.

THE FACTUAL BACKGROUND

5. The How, a large country house in Cambridgeshire, was purchased by the Appellant on 2 March 2018 for £2.8 million. It comprises approximately 15.5 acres of land, which includes the main house, a lodge house, outbuildings, areas previously used as market gardens, orchards, gardens, grounds and the woodland (extending to approximately 2 acres), the boundary of which meets the River Ouse. The woodland forms part of a larger area of woodland known as "The Thicket".

6. The Appellant's solicitors submitted an SDLT return in which they classified The How as residential property. Subsequently, however, on 20 March 2018, the Appellant's tax advisers wrote to HMRC stating their view that The How should have been classified as mixed-use, on the basis that the woodland on the south side of the property was non-residential property.

7. HMRC did not accept that any of the land forming part of The How was non-residential, and on 18 July 2018 issued a closure notice to that effect.

THE LEGISLATIVE FRAMEWORK

8. SDLT is chargeable under FA 2003 on land transactions. Any acquisition of a chargeable interest is a land transaction: section 43(1). A chargeable interest is an estate, interest, right or power in or over land: section 48(1)(a). Whether a land transaction is chargeable to SDLT is

governed by section 49. It was common ground that the purchase of The How in March 2018 by the Appellant was a chargeable transaction.

9. The rate at which SDLT is charged is governed by section 55. There are two tables of charge: Table A and Table B. Table A applies where the relevant land consists entirely of residential property. Table B applies where the relevant land consists of or includes land that is not residential property.

10. Section 116, which is the key provision in this appeal, defines "residential property". It relevantly provides:

> (1) In this Part "residential property" means—
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> (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
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> (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
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> (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);
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> and "non-residential property" means any property that is not residential property.

11. The issue in this appeal concerns the meaning and application of paragraph (b) of that definition.

THE FTT'S DECISION

12. References in square brackets are to the relevant paragraphs of the Decision, unless the context otherwise requires.

13. After setting out the background to the appeal, the FTT identified the issue to be determined as follows:

> 18. The issue for the Tribunal to determine is whether the property acquired by the appellant constituted land consisting entirely of residential property. There is no dispute over the main house itself constituting a dwelling within s 116(1)(a). Additionally, there is no dispute that the lodge house, the market gardens, orchards, outbuildings and the land immediately surrounding the dwelling formed part of the property and/or subsisted for the benefit of the dwelling as per s 116(1)(b) and (c) FA 2003,
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> 19. The land in dispute is the woodland situated to the south of the property. The issues for the Tribunal to determine are therefore:
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> (a) Whether the woodland can be said to form part of the garden or grounds of the dwelling house within the context of s 116 (1)(b), FA 2003, or
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> (b) Whether the woodland can be said to subsist for the benefit of the dwellinghouse within the context of s 116 (1) (c) FA 2003.
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> 20. The woodland would have to either fall within the garden or grounds of the dwelling or subsist for the benefit of the dwelling in order to fall within s 116 FA 2003 and constitute residential property. If it does not, the whole of The How would be treated as mixed use property.

14. We did not understand the FTT's identification of the issues which it had to decide to be challenged in this appeal.

15. At [21] the FTT referred to a witness statement and oral evidence provided by Mr Tom Warren, an agricultural and rural planning consultant, who was engaged by the Appellant to

provide an opinion as to whether The How was historically and currently a mixed-use property in rural land use terms. We were informed that at the FTT hearing there was a dispute concerning the status of Mr Warren's evidence. We were told that Mr Warren's evidence was not regarded by the FTT as expert evidence but rather that his evidence was admitted on the basis that he was a witness of fact.

16. At [22] the FTT summarised Mr Warren's "written statement" following his visit to The How on 13 July 2019. The FTT's summary of extracts from his witness statement was as follows:

> i. The main residential dwelling and its curtilage is located centrally within the estate and includes The Lodge House adjacent to the A1123 Houghton Road and the start of a private driveway, extensive gardens and grounds, three orchards, two former tennis courts consumed by foliage, a terraced rear garden with patio extending to 1.5 acres, a large walled market garden and a timber-framed Orchard Cottage. There are 350 trees located within the main garden and grounds and more than 82 trees on the driveway.
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> ii. To the south of the estate there is a 2 acre mature broadleaf woodland area which extends down steep banking towards the River Ouse. There is a grassed area between the trees in the grounds and the woodland which is likely a firebreak. The woodland is not readily accessible either on foot or with vehicles from the estate itself.
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> iii. The woodland is a continuation of the ancient woodland nature reserve known as The Thicket. It is densely populated and there is little to suggest that it is either ornamental or recreational. A public footpath, which runs through The Thicket and continues through the woodland as a permissive path [sic]. It can be seen from old ash coppice stools on the northern boundary of the woodland that timber was once harvested from the site. The Thicket itself is shown on Ordnance Survey maps dating back to the 1800.
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> iv. The uses of the land and buildings on The How Estate has historically, in a bygone and labour intensive non-mechanical era, been in mixed use in agricultural and rural land use terms. Section 109 of the Agricultural Act 1947 defines agriculture as inter-alia including woodlands "where ancillary to the farming of land for other agricultural purposes". According to the Forestry Commission there is no minimum size for woodland, which can refer to woods and forests of all sizes.

17. There was no reference in the Decision to Mr Warren's oral evidence.

18. At [23] the FTT noted that the burden of proving that the property was not entirely residential for SDLT purposes lay upon the Appellant and at [24] that the standard of proof was the ordinary civil standard on the balance of probabilities.

19. So far as material to the present appeal, at [25]-[38] the FTT set out the Appellant's arguments referring to two decisions of the First-tier Tribunal. The first was *David Hyman and Sally Hyman v HMRC* [2019] UKFTT 0469 (TC) ("*Hyman FTT*"). The second decision was that in *Goodfellow v HMRC* [2019] UKFTT 0750 (TC) ("*Goodfellow FTT*"). At [68]-[74] the FTT summarised HMRC's arguments. The appeals in those cases were heard together and ultimately resulted in the decisions of the Upper Tribunal and the Court of Appeal in *Hyman*, both of which were released after the Decision in this case.

20. Finally, under the heading "Discussion" at [75]-[85] the FTT set out the reasons for its decision.

21. At [75] the FTT rejected Mr Warren's evidence to the effect that The How was both historically and presently "agricultural/mixed use land". It considered that there was no evidence of the use or exploitation of the woodland for commercial purposes, or indeed any purpose other than that of woodland which formed a natural hillside barrier between The How and the River Ouse. The FTT said that the woodland "provides privacy and security to The How and enhances its setting."

22. At [76] the FTT placed no reliance upon the terms of the conveyancing documents. It did, however, consider that it was material that the woodland fell within the title to the property stating that the woodland was "within its legal curtilage." The FTT said:

> Its location and proximity to the main dwelling should be taken into account. It is not artificial or contrived to say that because the woodland is included within the title to The How it is available to the owners to use as they wish. It may, to the casual observer, be associated with the rest of the immediately adjoining public woodland and for all intents and purposes appear to be part of The Thicket, but that is irrelevant. In our view the woodlands are ancillary to and form part of the garden and grounds.

23. As regards the legal test to be applied, the FTT at [77] agreed with *Hyman FTT* and *Goodfellow FTT* that "grounds", particularly when they surrounded a large country house, should have a wide meaning reflecting the character of the property:

> As stated by Judge McKeever in [*Hyman FTT*] 'grounds' are different from and additional to 'gardens'. The word 'grounds' connotes an area of land beyond and probably much larger than the garden and may in the case of grander properties, include an extensive wooded area. In the case of an isolated large country property such as The How, particularly where public footpaths are close by or cross the land itself, woodland provides a degree of privacy and security. The woodland can therefore also be said to subsist for the benefit of The How.

24. At [81] the FTT considered that the position and layout of the land and outbuildings was a relevant factor to consider; if the land was laid out so as to be suitable for day-to-day domestic enjoyment by the occupiers of the dwelling, that would be indicative that the land was likely to be gardens or grounds. The FTT continued:

> In geographical terms the woodland is not inordinately distant from the house. Its size and location reflect its purpose in providing privacy and security from the south. The woodland does not need to be physically accessible to be part of the grounds. A wooded area on a steep embankment would be relatively inaccessible in any event and that should not be a reason for excluding it as part of the grounds. In our view the woodland is passively integral to The How's grounds.

25. At [82] the FTT rejected the Appellant's argument that *Hyman FTT* and *Goodfellow FTT* supported the view that "grounds" excluded woodland. Instead the FTT considered that those decisions supported HMRC's argument that the word "grounds", in the case of a large country house with large gardens and grounds, would very often include some woodland, whether or not it was actively used for ornamental and amenity purposes.

26. At [83] the FTT took the view that the use of the land should be considered when ascertaining whether it formed part of the "garden or grounds". Thus, certain types of land could be expected to be garden or grounds, such as paddocks and orchards, unless actively and substantially exploited on a regular basis.

27. At [84] the FTT noted that planning law was not determinative but that if the woodland was classified as non-residential or agricultural land, planning permission would be required

should it ever be cleared and used as an extension to the immediate grounds of The How. The FTT continued:

> However, the wooded area falls within the curtilage of The How which is a property with established residential user for planning purposes, and it would be difficult to imagine that any clearance of the woodland would constitute a material change of use, as set out in s 55 of the Town and Country Planning Act 1990. There is no suggestion that the woodland could be subject to a non-domestic rateable valuation.

28. Finally, at [85] the FTT noted that the Appellant's solicitors had completed the SDLT return on the basis that the whole of the property was residential and that neither they nor their clients appeared to have queried the classification of the woodland.

29. For these reasons, at [86] the FTT decided that the whole of The How, including the woodland, was residential property within section 116(1) FA 2003, with no non-residential element. The FTT dismissed the appeal.

GROUNDS OF APPEAL

30. On 15 October 2021 Judge Richards gave permission for the following additional grounds of appeal, which formed the basis of the argument before us:

(1) **Ground 1** The FTT misinterpreted and misapplied the term "grounds" in section 116(1)(b) FA 2003 because:

(a) the FTT found that the "woodland does not need to be physically accessible to be part of the grounds" (at [81]). An area that is not physically accessible from the building referred to in section 116(1)(a) does not ordinarily form part of its "grounds";

(b) in a statutory definition, such as section 116, the defined term may itself colour the meaning of the definition. "Grounds" should be seen in this light and should not be taken to include an area of land such as woodland, which cannot be said to be "residential" in nature, being inaccessible to the owner and incapable of being used for any residential purpose;

(c) the definition in section 116 provides for a positive definition of "residential property", and then defines "non-residential property" negatively as "any property that is not residential property". This implies that there may be categories of land, other than commercial property, which are non-residential. The FTT was wrong in deciding that the woodland was residential property on the basis, *inter alia*, that there was no evidence of commercial or agricultural use (at [75]), and that such evidence would be required to render a woodland non-residential (at [83]).

(2) **Ground 2** The FTT did not apply, or misapplied, the test in the Upper Tribunal's decision in *Hyman* [2021] UKUT 68 (TCC) ("*Hyman UT*") because:

(a) it misinterpreted the issue of "use" by looking exclusively for commercial or agricultural use rather than considering whether the use was in some other way "non-residential";

(b) the FTT did not take into account, or did not attach sufficient weight to, legal factors and constraints relating to the woodland, particularly Mr Warren's unchallenged evidence that it could not be "used by the owners as they wish" ([76]) due to forming part of ancient woodland under local authority protection;

(c) the FTT misdirected itself on the issue of geographical factors, particularly on the fact that the woodland was completely inaccessible from the property and

that its location on a steep banking rendered it impossible to walk through (save on the footpath accessible to the public).

(3) **Ground 3** The FTT's judgment was vitiated by the following procedural irregularities which amount to errors of law:

(a) the reasons given for dismissing the appeal were outside the scope of the issues pleaded and argued by both parties, and the Appellant was given no opportunity to comment on those reasons before the FTT made its decision;

(b) there was a lack of evidential basis for the decision, e.g. on the FTT's notion of the woodland providing "privacy and security", and the decision was made a year after the hearing, rendering it highly unlikely that the FTT had a clear recollection of what was stated in evidence, or indeed the parties' detailed submissions;

(c) the reasons given for the decision were inadequate, particularly in so far as the reasoning is largely of a general nature, failing to provide a clear explanation as to why this particular woodland was considered to form part of the grounds.

THE AUTHORITIES

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

> [62] In my view "grounds" has, and is intended to have, a wide meaning. It is an ordinary word and its ordinary meaning is land attached to or surrounding a house which is occupied with the house and is available to the owners of the house for them to use. I use the expression "occupied with the house" to mean that the land is available to the owners to use as they wish. It does not imply a requirement for active use. "Grounds" is clearly a term which is more extensive than "garden" which connotes some degree of cultivation. It is not a necessary feature of grounds that they are used for ornamental or recreational purposes. Grounds need not be used for any particular purpose and can, as in this case, be allowed to grow wild. I do not consider it relevant that the grounds and gardens are separated from each other by hedges or fences. This may simply be ornamental, or may serve the purpose of delineating different areas of land as being for different uses. Nor is it fatal that other people have rights over the land. The fact that there is a right of way over grounds might impinge on the owners' enjoyment of the grounds and even impose burdensome obligations on them, but such rights to not make the grounds any the less the grounds of that person's residence. Land would not constitute grounds to the extent that it is used for a separate, eg commercial purpose. It would not then be occupied with the residence, but would be the premises on which a business is conducted.

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

> [48] In the guidance at 00440, the Manual states that the language of s 116 should be given its natural meaning. It also states that there is no statutory

> concept of 'reasonable enjoyment' and no statutory size limit that determines what 'garden or grounds' means. We agree that those statements are correct as they are in accordance with our Decision in this case.
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> [49] In the guidance at 00455, the Manual states that when considering whether land forms part of the garden or grounds of a building, a wide range of factors come into consideration; no single factor is likely to be determinative by itself; not all factors are of equal weight and one strong factor can outweigh several weaker contrary indicators; where a number of contrasting factors exist, it is necessary to weigh up all the factors in order to come to a balanced judgment of whether the land in question constitutes 'garden or grounds'. This part of the guidance also refers to a number of factors which are individually discussed in other parts of the Manual but states that the list of other factors will not necessarily be comprehensive and other factors which are not mentioned there might be relevant. We agree with this guidance in 00445 also. We regard this guidance as being in accordance with our own interpretation of s 116 as explained in this Decision. Given that 'garden' or 'grounds' are ordinary English words which have to be applied to different sets of facts, an approach which involves identifying the relevant factors or considerations and balancing them when they do not all point in the same direction is an entirely conventional way of carrying out the evaluation which is called for.

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

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

THE JURISDICTION OF THE UPPER TRIBUNAL

35. An appeal to the Upper Tribunal can only be made on a point of law arising from a decision made by the FTT: section 11(1) Tribunals, Courts and Enforcement Act 2007 ("TCEA").

36. Therefore, there is no appeal on questions of fact except where the well-known principles in *Edwards v Bairstow* [1956] AC 14 apply.

37. The Upper Tribunal in *HMRC v Anna Cook* [2021] UKUT 15 (TCC) summarised the position as follows:

> 18. An appeal to this tribunal lies only on a point of law: section 11(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007"). While there

> cannot be an appeal on a pure question of fact which is decided by the FTT, the FTT may arrive at a finding of fact in a way which discloses an error of law. That is clear from *Edwards v Bairstow* [1956] AC 14. In that case, Viscount Simonds referred to making a finding without any evidence or upon a view of the facts which could not be reasonably entertained, and Lord Radcliffe described as errors of law cases where there was no evidence to support a finding, or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding. Lord Diplock has described this ground of challenge as "irrationality".[1]
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> 19…[W]e have borne in mind the caveats helpfully summarised in *Ingenious Games LLP & Others v HMRC* [2019] UKUT 226 (TCC), at [54]-[69]. The bar to establishing an error of law based on challenges to findings of fact is deliberately set high, and that is particularly so where the FTT is called on to make a multi-factorial assessment. As stated by Evans LJ in *Georgiou v Customs and Excise Commissioners* [1996] STC 463, at 476:
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> > "9 …[F]or a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court.""

38. Similarly, in *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 Lewison LJ said at [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.

39. As this Tribunal recently stated in the SDLT context in *Doe v HMRC* [2022] UKUT 2 (TCC):

> 49. Further and in any event, the Appellants' criticism that the FTT "failed to give proper weight" to the historical use of the Property does not identify any error of law. Questions of weight are for the first instance decision maker (see *Runa Begum v Tower Hamlets London BC* [2003] UKHL 5 at [99], as recently summarised in *Saint-Gobain Building Distribution Limited v HMRC* [2021] UKUT 0075 (TC) at [25(4)]).

40. Finally, if a tribunal fails to take account of a relevant matter or takes into account an irrelevant matter, while that is an error of law, an appellate tribunal will only intervene if it is satisfied that the error might (not would) have produced a different result (*per* Henderson LJ at [95] in *Degorce v HMRC* [2017] EWCA Civ 1427) ("*Degorce*"). In this connection, it is clear that the categorisation of evidence as relevant to a particular legal test is a question of law and the question whether that evidence is in fact probative of that legal test is essentially a question of fact (*per* Arden LJ at [77] in *Davis & Dann Ltd v HMRC* [2016] EWCA Civ 142).

[1] *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 410F-411A.

GROUND 1

(a) Accessibility

41. We agree with the submission of Mr Henderson, appearing with Ms Blaj for HMRC in this Tribunal (but who did not appear before the FTT), that the multi-factorial evaluation endorsed by the Upper Tribunal in *Hyman* was inevitably impressionistic in nature and was not an exact science.

42. Mr Boch, who appeared for the Appellant before the FTT and before us, submitted that certain types of land were inherently incapable of being "grounds" of a dwelling. He said that a two-stage test should be applied. It was, he argued, necessary at the first stage to consider whether the land was capable of constituting "grounds", as that term is ordinarily understood. Only if the answer was in the affirmative was it necessary for a tribunal to embark on the second stage, being the multi-factorial analysis approved by the Upper Tribunal in *Hyman*. Mr Boch gave the example of a landfill or waste disposal site which, he contended, was simply incapable of falling within the ordinary meaning of the word "grounds". Similarly, he argued that land that was inaccessible from the dwelling could not form part of the grounds of the dwelling because inaccessibility was a characteristic which was inherently at odds with the term "grounds". Therefore, he said, because the woodland in the present appeal was inaccessible from The How it could not be part of its grounds.

43. We reject that argument. In the first place, we see no basis for applying the two-stage test for which Mr Boch contended. There is no reason why the multi-factorial analysis endorsed by the Upper Tribunal in *Hyman UT*, and accepted by the Court of Appeal, should not simply be applied. In rejecting the submission we endorse the Upper Tribunal's reluctance in *Hyman UT* at [32] to give a general definition of "grounds" in section 116(1)(b). Indeed, the two-stage test suggested by Mr Boch unnecessarily complicates the issue by requiring identification of the criteria which should be applied in determining whether land is "inherently" incapable of falling within the meaning of the word "grounds" of a dwelling. The example which Mr Boch gave of a landfill site would almost certainly be regarded, on any application of the multi-factorial approach approved in *Hyman*, as not constituting the "grounds" of a dwelling.

44. In *Hyman UT* at [33], the Upper Tribunal said that there "must be a connection between the garden or grounds and the dwelling". However, that statement was made in the context of the observation, with which we agree, that since the statutory wording requires a garden or grounds to be a garden or grounds "of" a dwelling, that necessarily connotes some type of connection, with the relevant criteria for determining the connection being left at large in the legislation. The Upper Tribunal was not saying that land which is physically inaccessible from a dwelling can never form part of the grounds of that dwelling. In the present case, after noting that the woodland was not inordinately distant from the dwelling and afforded privacy and security, the FTT stated at [81]:

> The woodland does not need to be physically accessible to be part of the grounds.

45. We discuss below whether the FTT erred in not giving reasons for this conclusion, but in relation to this ground we address only the question of whether the conclusion was itself an error of law. In his skeleton argument, Mr Boch argued that the need for the land to be accessible from the dwelling was implicit in the judgment of Judge McKeever in *Hyman FTT* (set out above at paragraph 31), and in the Oxford English Dictionary definition of grounds as "an area of enclosed land surrounding a large house or other building". We do not agree. Neither of those sources implies a need for accessibility. As a matter of principle, we do not consider it the right approach to lay down some sort of minimum criteria for land to be grounds; it seems to us that that would be contrary to the approach of the Upper Tribunal (endorsed by

the Court of Appeal) in *Hyman UT*. Additionally, as a practical matter such a requirement would raise difficult questions of fact and degree which are best dealt with as part of the weighing up involved in the evaluative exercise. What degree or manner of inaccessibility would prevent land from being grounds? What about land which is accessible from the dwelling by some physical means (such as a bridge) which falls into disrepair, or land which is accessible at some times but not at others?

46. Precedent, principle and practical considerations therefore support our conclusion that accessibility is a factor to be taken into account by the FTT in its evaluative exercise, but difficulty of access[2] does not mean that the land cannot be part of the grounds of the dwelling.

47. The inaccessibility of the woodland did not preclude the FTT from concluding that the woodland formed part of the "grounds". It was one factor – doubtless a countervailing factor – amongst others which the FTT took into account. The FTT was entitled to do so.

48. The appeal on this ground is dismissed.

(b) Residential in nature

49. Next, Mr Boch argued under Ground 1 that the defined term "residential property" should somehow colour the meaning of the definition of "grounds". He said that an inaccessible area of land such as the woodland could not be "residential" in nature.

50. We accept that the phrase "residential property" is part of the statutory context, and that any word or words in a statute should be construed in context. That does not, however, require that an ordinary English word, such as "grounds", should be given an extra-statutory gloss or some form of special meaning. Contrary to Mr Boch's submission, we do not consider that "grounds" must be "residential" in nature or have a "residential" purpose insofar as that is said to add anything to the requirement that they be grounds "of" a dwelling. It is not clear to us how that test should be applied and it seems to introduce an element of circularity into the definition. The submission is in some respects similar to that rejected by the Court of Appeal in *Hyman*, being an attempt to read into the plain language of the statute words of limitation which it does not contain.

51. Although it does not form part of our conclusion in this issue, we consider that in any event the provision of privacy and security for a dwelling may fairly be seen as a residential purpose, regardless of the accessibility of the land which provides it. The appeal on this ground is dismissed.

(c) Requirement for commercial or agricultural use

52. Finally, Mr Boch argued under Ground 1 that "non-residential property" did not mean the same thing as property that was used for a commercial or agricultural purpose but rather that the property in question did not fall within the definition of "residential property". The FTT was therefore wrong, in Mr Boch's submission, to base its decision (at [75]) on a lack of evidence of the use or exploitation of the woodland for commercial purposes.

53. We agree with Mr Boch that it would have been an error by the FTT if they had so based their decision, but they did not. The argument misrepresents what was said at [75], where the FTT was merely identifying the lack of any commercial or other use of the woodland as a relevant factor. The use of the woodland was one factor, amongst other factors, which the FTT properly took into account, and there is no indication that it was a determining factor. The appeal on this ground is dismissed.

[2] We were told that Mr Warren's evidence before the FTT was that the woodland was too thick to enter "save by aid of industrial machinery".

54. We therefore dismiss the appeal in relation to Ground 1.

GROUND 2

55. The first argument raised under Ground 2 is that the FTT misapplied the test in *Hyman UT* by looking exclusively for commercial or agricultural use rather than considering whether the use was in some other way "non-residential". This is the same error said to have arisen under Ground 1(c), and we reject that argument for the reasons given above.

56. In relation to Ground 2, to the extent that it does not overlap with Ground 1, Mr Boch also argued that the FTT misapplied the test in *Hyman UT* by not attaching weight to:

> (a) the fact that the woodland was so densely populated and steep that it could not be traversed, save on the footpath accessible to the public;
>
> (b) the legal restraints (e.g. tree preservation order) rendering the woodland useless to the owner, having wrongly found that the owners could use the woodland "as they wish" (at [76] and [81]), and
>
> (c) the fact that the owner could not enjoy or derive any benefit from the woodland that a member of the public could not.

57. In addition, Mr Boch argued that the FTT erred:

> (a) by attaching excessive weight to the lack of commercial or agricultural activity or purpose associated with the woodland;
>
> (b) in attaching weight to the fact that the woodland fell within the legal title to the property (at [76]);
>
> (c) in deeming irrelevant the woodland's "natural" distinctness from the main property (at [76]), and
>
> (d) in attaching weight to the fact that the Appellant had chosen to amend its SDLT return.

58. As we have noted, the authorities clearly establish that when, as in this case, a tribunal is required to carry out an evaluative assessment, the question of the weight to be attributed to various factors and considerations is a matter for the fact-finding tribunal and not for an appellate tribunal, unless the decision is one which no reasonable tribunal could have reached on the evidence. The position is different where a particular factor which the tribunal has taken into account is in law irrelevant, or the evaluation has failed to take into account *at all* a factor which is in law relevant: *WM Morrison Supermarkets PLC v HMRC* [2023] UKUT 00020 (TCC).

59. Throughout his submissions Mr Boch eschewed any challenge to the Decision on the basis of *Edwards v Bairstow*, no doubt because of the very high bar which a successful challenge would have to overcome. As the authorities establish, challenges which are to the FTT's assessment of weight in an evaluative assessment do not surmount that high bar.

60. In relation to Mr Boch's argument at paragraph 56(a) above, the FTT was perfectly well aware of the steepness of the woodland and referred to this at [22 ii], [61], [65] and [81]. Similarly, the FTT was aware that the woodland was dense and referred to this at [22 iii], [45] (when referring to the Appellant's submissions), [65] and [81]. Thus, the FTT did not ignore the question of the steepness or density of the woodland. The weight to be attached to those characteristics was a question for the FTT in carrying out its evaluative assessment.

61. As regards Mr Boch's submission at paragraph 56(b) above, we do not consider that the existence of tree preservation orders could prevent land forming part of the "grounds" of a

dwelling. Many residential properties are subject to tree preservation orders and to similar specific restrictions on use or development. Furthermore, the FTT's reference to the woodland being "available to the owners to use as they wish" at [76] must be seen in context, which was the relevant conveyancing documentation and the inclusion of the woodland in the title to the property. The full sentence is "[i]t is not artificial or contrived to say that because the woodland is included within the title to The How it is available to the owners to use as they wish". That is essentially a description of the consequences of ownership rights, and as such we do not consider that it involved any error of law.

62. Similarly, the argument that the owners of The How could only enjoy the woodland to the same extent as a member of the public seems to us to be one more matter which the FTT was entitled to consider and weigh up as part of its evaluative assessment. In any event, this assertion assumes that any privacy and security afforded by the woodland to the owners of The How, as distinct from members of the public, could not be an element of "enjoyment", which, as we have said, we do not accept.

63. Turning to the objections raised by Mr Boch as set out at paragraph 57(a) and (b) above, the weight to be afforded to the lack of commercial or agricultural activity associated with the woodland, and the inclusion of the woodland within the legal title, were once again matters for the FTT, and the tribunal's decision to afford weight to those issues was one which was reasonably open to it.

64. In relation to paragraph 57(c), we do not accept that the FTT at [76] deemed what Mr Boch termed the woodland's "natural distinctness" from the main property to be irrelevant. Instead, the FTT took into account in the weighing-up exercise the location and proximity of the woodland to the dwelling.

65. Finally, as regards paragraph 57(d), the FTT did record at [85] the fact that the Appellant's solicitors initially completed the SDLT return on the basis of the whole property being residential. As a statement of fact in setting out the context of the transaction, that was uncontroversial and unobjectionable. However, to the extent that the FTT placed any weight on it as a relevant factor in the evaluation of the question of law which it was required to determine, we agree that it was not a relevant factor to be taken into account. It is not clear whether the FTT did so from the terms of the Decision, but if it did then that was an error of law. As to the consequences of that for the disposition of this appeal, we deal with this below.

66. Accordingly, we dismiss the appeal on Ground 2, save that any reliance placed by the FTT on the initial SDLT return in deciding whether the woodland was part of the grounds at the time of the chargeable transaction was an error of law.

GROUND 3 – PROCEDURAL IRREGULARITIES

(a) Reasons given outside the scope of the issues pleaded and argued; Appellant given no opportunity to make submissions

67. Mr Boch argued that when the FTT stated at [77] and [81] that the "woodland provides a degree of privacy and security" and "[i]ts size and location reflect its purpose in providing privacy and security from the south", this was an argument which had not been pleaded by either party, and there were no submissions on these issues before the FTT.

68. We reject that argument. In the first place, the Appellant's skeleton argument prepared for the FTT (by the Appellant's adviser) quoted the decision in *Goodfellow FTT* where the FTT said at [17] (emphasis added to original):

> 17. Now putting both those matters to one side, it seems to us, looking at the character of the property as a whole, that the land surrounding the house is very much essential to its character, to protect its *privacy, peace and sense of*

> *space*, and to enable the enjoyment of typical country pursuits such [as] horse riding. This is a country setting, in an area of outstanding natural beauty.

69. The skeleton argument then continued:

> If we apply this in the context of The How, the market garden, orchards and land surrounding the dwelling can be said to be essential to the character of the property and to enable the enjoyment of it by its occupants with the garden and grounds comprising of over 400 trees with an additional 500 trees in the orchards…. Contrastingly, the woodland is not essential to the character of the house. The woodland is separated from the house by what Mr Warren assumes to be a "firebreak" and if removed from the property would not impact the character of the house or the occupants' ability to enjoy it.

70. It followed from this, as Mr Henderson submitted, that the FTT was being invited to consider the amenity of the woodland, and specifically the observations cited in *Goodfellow FTT*, and that it cannot be said that this point represented an unargued basis for the FTT's decision. The Appellant's skeleton argument had put the issue in play.

71. Moreover, we consider that the FTT's conclusions as to the privacy and security afforded by the woodland represent a reasonable inference for the FTT to draw from the evidence, which it appears to have accepted at [81], particularly that the woodland was "densely populated" (see also the FTT's summary of Mr Warren's witness statement at [22 iii]). In fact, at [77] the FTT was making a general observation about woodland surrounding a large country house when it stated:

> In the case of an isolated large country property such as The How, particularly where public footpaths are close by or cross the land itself, woodland provides a degree of privacy and security.

72. Mr Boch also argued that the FTT's statement at [81] that the woodland was "passively integral to The How's grounds" was a matter which was not pleaded or argued by either party.

73. No doubt the FTT's conclusion on this point could have been more clearly expressed, but it seems sufficiently clear that the FTT was addressing the Appellant's argument summarised at [60] that the woodland was "not required as an integral part of the garden or grounds of the dwelling". Insofar as the FTT was making the point that land may perform a passive as well as active function and still be "grounds", we agree.

74. Finally under Ground 3(a) Mr Boch pointed out that at [84] (set out at paragraph 27 above) the FTT referred to planning law, and speculated that it would be "difficult to imagine" that clearance of the woodland would constitute a material change of use for the purposes of the Town and Country Planning Act 1990, and stated that there was no suggestion that the woodland could be subject to a non-domestic rateable valuation. Mr Boch argued that neither of these points was pleaded or argued before the FTT, leading to procedural unfairness to the Appellant.

75. We suspect that these were in the nature of additional "throwaway" observations by the FTT, rather than operative reasons for its decision, but the difficulty is that there is nothing in the Decision to indicate clearly that this was the case. Since establishing the position in relation to planning consent and rateable valuation as regards the woodland could have likely required the Appellant to have produced factual evidence, there was a procedural unfairness on this issue, because the Appellant has been deprived of that right.

76. Accordingly, we allow the appeal only in relation to the issues raised regarding [84] and otherwise dismiss the appeal in respect of Ground 3(a). We deal below with the disposition of the appeal.

(b) Lack of evidential basis for decision; decision made a year after the hearing

77. Mr Boch said that when Mr Warren gave his oral evidence to the FTT he stated that the woodland did not provide any benefit to the owner of the property *qua* owner, and that youths had trespassed on the woodland. Mr Warren did not give evidence that the woodland's purpose was to provide "privacy and security." There was therefore no evidential basis for the FTT's conclusions regarding privacy and security.

78. As regards the issue of "privacy and security", we have already addressed this in relation to Ground 3(a). As regards Mr Warren's evidence that the woodland did not provide any benefit to the owner of the property *qua* owner, this again appears to us to involve an assessment of Mr Warren's evidence given as a witness of fact. As we have already indicated, it seems a fair inference for the FTT to draw from the evidence that the woodland did provide "privacy and security". To the extent that any benefit provided by land to the owner of the property is relevant to the classification of the land for SDLT purposes, the question of whether the provision of privacy and security could be such a benefit was not a question to be determined by a witness of fact but was a question of law. We consider, in agreement with the FTT, that privacy and security are clearly features which are capable of benefitting the owner of the property. Further, it was a reasonable inference in this case from the facts found that the woodland did in fact provide a measure of privacy and security for the owner of The How.

79. Mr Boch also took issue with the lack of any evidential basis for the statement at [76] that the woodland was "available to the owners to use as they wish". Mr Warren's evidence, which Mr Boch described as "unchallenged"[3], was that the owners could not, as a practical matter, do anything with the woodland. However, as we have already observed, the FTT's comment at [76] was made in the context of the legal title to the property and the FTT was not, in our view, intending to express a view of the practical uses to which the woodland could be put. Instead, as we read [76], the FTT was simply expressing a view that it was not "artificial or contrived" to say that as legal owners of the woodland the owners were free to use it.

80. It is convenient to consider Mr Boch's two remaining objections under Ground 3(b) together. These are that the Decision fails to mention or consider the oral evidence of Mr Warren, and that the Decision was heavily delayed.

81. Mr Boch pointed out that it took the FTT a year to issue its decision. It was therefore unlikely, he said, that the FTT could have remembered Mr Warren's detailed oral evidence after such a long period. Mr Boch asserted that the decision only referred briefly to Mr Warren's written evidence at [22], where an extract from his witness statement was recorded. In particular, he said, there was no detail given in the decision as to Mr Warren's oral evidence, notwithstanding the fact that he gave live evidence, and was questioned by the FTT, for half a day.

82. The hearing before the FTT took place on 30 January 2020 and the decision was issued on 15 January 2021. That is a delay of almost one year. Plainly, it is undesirable, indeed unacceptable, for a decision to be delayed for that length of time unless there are exceptional circumstances, such as the illness of a member of the tribunal panel. We note that the delay took place during the early part of the Covid pandemic, although we do not know whether that was relevant.

83. The issue of delay in producing a judicial decision was addressed by the Court of Appeal in *Natwest Markets Plc & Anor v Bilta (UK) Ltd & Ors* [2021] EWCA Civ 680. In that case the High Court judgment was handed down after a lengthy delay of 19 months after the final closing submissions at trial. In relation to the effect of delay the Court of Appeal said this:

[3] Mr Henderson did not accept this assertion.

53. In *Goose v Sandford*, Peter Gibson LJ went on to explain the approach to be taken at [113]:

> "Because of the delay in giving judgment, it has been incumbent on us to look with especial care at any finding of fact which is now challenged. In ordinary circumstances where there is a conflict of evidence a judge who has seen and heard the witnesses has an advantage, denied to an appellate court, which is likely to prove decisive on an appeal unless it can be shown that he failed to use, or misused, this advantage. We do not lose sight of the fact that the judge had transcripts of the evidence, as well as very extensive written submissions from counsel. But the very fact of the huge delay in itself weaken the judge's advantage, and this consideration had to be taken into account when we reviewed the material which was before the judge. In a case as complex as this, it is not uncommon for a judge to form an initial impression of the likely result at the end of the evidence, but when he has come to study the evidence (both oral and written) and the submissions he has received with greater care, he will then go back to consider the effect the witnesses made on him when they gave evidence about the matters that are now troubling him. At a distance of 20 months, [the trial judge] denied himself the opportunity of making this further check in any meaningful way."

54. These observations have been cited with approval in numerous subsequent authorities, including the *Bank St Petersburg* case. In that case at [80] the Chancellor also quoted what Lord Scott said in *Cobham v Frett* [2001] 1 WLR 1775 at p.1783 about what must be shown if excessive delay is to be relied on in attacking a judgment:

> "A fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant…" but
>
> "[i]t can be easily accepted that excessive delay in delivery of a judgment may require a very careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party."

55. Thus, as Lord Hodge JSC put it in *Pickle Properties Ltd v Plant (British Virgin Islands)* [2021] UKPC 6 at [28], "[t]here must be a basis for believing that there may have been a causal link between the excessive delay and the alleged errors or failings in the judgment."

84. Thus, there must be a causal link between the excessive delay and the alleged failings in the judgment which form part of the grounds of appeal.

85. In this case, Mr Boch contends that Mr Warren's oral evidence went unrecorded in the Decision and that the delay in producing the Decision meant that the FTT could or might not have had a clear recollection of Mr Warren's oral evidence.

86. We agree that, although the FTT summarised Mr Warren's written statement, the Decision does not specifically allude to Mr Warren's oral evidence. In particular, Mr Boch argues that the Decision does not reflect certain points emphasised in that oral evidence.

87. In cases such as this, where there is a conflict or uncertainty as to the evidence given before a fact-finding tribunal, it is appropriate to request the judge's notes. The authorities were

discussed in this Tribunal's decision in *Fiander and Brower v HMRC* [2021] UKUT 156 (TCC) at [30]-[38] and establish that, unless the representatives of both parties agree as to the evidence given, the judge's notes of the hearing should be obtained and any criticisms of the notes put to the judge for comment. If the judge states that the notes are correct, new evidence will not be admitted to challenge the judge's version of events.

88. The sequence of events in the present case was as follows. The Decision was issued on 15 January 2021. On 2 February 2021 the Appellant applied to the FTT for permission to appeal on the basis of the "reasonable enjoyment" argument which was rejected subsequently in *Hyman*. The FTT granted permission to appeal on this basis on 26 March 2021. The Upper Tribunal's decision in *Hyman* was released on 18 March 2021. On 21 September 2021 the Appellant applied to amend its grounds of appeal and on 15 October 2021, the Upper Tribunal granted permission to appeal on the revised grounds. On 5 December 2022 the Appellant applied to obtain a copy of the FTT's judge's notes, specifically the notes referring to the witness evidence of Mr Warren. In an email dated 19 December 2022, the Tribunal Service replied that the tribunal was unable to provide the judge's notes as the judge had since retired.[4] No application was made by the Appellant to obtain the notes of the FTT member, and the Tribunal Service did not refer to the member's notes.

89. So, in relation to the allegation made by Mr Boch, and contested by HMRC, that the decision is deficient because it fails to record or discuss Mr Warren's oral evidence, we have a situation which does not fit neatly within the guidelines set out in *Fiander*. No application was made to obtain the judge's notes at the time of the first application for permission to appeal or at the time, in September 2021, when the Appellant applied to amend its grounds of appeal when issues concerning the evidence before the FTT were first raised. Additionally, the allegation on which Mr Boch now relies was not included in any application for permission to appeal to the FTT. That is a serious deficiency, because only the FTT panel which heard the appeal was in a position properly to respond to the allegation. Since the FTT judge has now retired, we have been deprived of the benefit of his response. Finally, we still do not know whether the member's notes might have shed light on the issue. On the other hand, it is unsatisfactory, both for the parties and for this Tribunal, that we do not have any judge's notes of the hearing. Irrespective of whether a judge has retired, the hearing notes should be preserved during the period when an appeal is in progress. The absence of hearing notes in this appeal is not the fault of the Appellant.

90. We have carefully considered whether we should conclude that the Appellant has failed to establish the complaint regarding Mr Warren's oral evidence, and has as a consequence failed to establish any causal link between the one year delay and that complaint. However, we must take into account that (1) the Decision contains no discussion at all about oral evidence which took up half a day of the hearing, (2) the delay in issuing the decision was substantial, (3) the deficiency complained of relates to oral witness evidence, where the risk of unreliability in detailed recall increases with the passage of time, and (4) it is not the Appellant's fault that no judge's notes have been produced.

91. We have concluded on balance that the Appellant succeeds on this ground. We reach this conclusion with some reluctance, not least because we consider that the Appellant should have raised this issue in its application for permission to the FTT, so that the judge could have responded. However, we acknowledge that at the stage of that application, the focus of the grounds of appeal was on the arguments pre-*Hyman*. In view of the absence of any mention of Mr Warren's oral evidence in the decision, the delay in issuing the decision and the absence of

[4] Judge Connell had apparently retired on 11 October 2020.

any response to the issue from the judge, we have concluded that in the language of Lord Scott in *Cobham v Frett*, the Decision is not "safe".

92. We consider below what this means for the disposition of the appeal.

(c) Inadequate reasoning, reasoning of a general nature

93. Mr Boch submitted that the FTT's reasoning at [75]-[85] was vague, inconsistent and not properly applied to the facts of the case. We note that in granting permission to appeal on this ground, Judge Richards considered this ground to be "at the margins of arguability".

94. Mr Boch argued that at [76] the FTT stated that it did not place any reliance on the description of The How in the conveyance or the licence to occupy, but subsequently attached weight to the fact that the woodland fell within the legal title to the property.

95. We do not think that there is anything in this point. When the FTT at [76] said that it placed no reliance on the description of The How "in any of the Conveyances[5] or the Licence to Occupy", it was referring to the way in which the property was described in those documents, noting that:

> …they were drawn in a manner which reflected their purpose and there would have been no reason to distinguish between residential and/or any mixed use of the property.

96. Later at [76] the FTT considered it material that the woodland fell within the legal title to the property. As we have already said, we consider that the FTT was making a somewhat different point, namely that the woodland formed part of the same legal title as the dwelling.

97. We should mention in this context an apparent error by the FTT. We deal with it briefly because it was not relied on by Mr Boch in his grounds of appeal. The FTT stated at both [76] and [84] that the woodland fell within the "legal curtilage" of the property. This was contrary to the written evidence of Mr Warren, recorded at [22 i], but no explanation was given of why that evidence was rejected. The word "curtilage" was considered in *Methuen-Campbell v Walters* [1979] 2 QB 525, where Buckley LJ said that it meant that the land must be:

> …so intimately connected with [the building] as to lead to the conclusion that the former forms part and parcel of the latter.

98. The Court of Appeal has recently confirmed that test in *R (Hampshire County Council) v Secretary of State for Environment, Food and Rural Affairs [2022] QB 103* at [25].

99. The FTT may mistakenly have assumed that the fact that the property was comprised in the title meant that it formed part of the property's "legal curtilage". However, that assumption appears to us to have played no material part in its decision and, as we have said, it was not relied on by Mr Boch.

100. Next, Mr Boch submitted that the FTT at [77] found that "grounds" could in principle include an extensive wooded area rather than considering whether this particular woodland formed part of the grounds. We disagree. At [76] the FTT took account of the location of the woodland and its proximity to the main dwelling. At [81] the FTT considered that the woodland was not inordinately distant from the house and that the size and location afforded the dwelling privacy and security from the south. At [83] the FTT considered the use of the woodland. None of these matters related to an abstract or hypothetical woodland but to the actual woodland in question.

101. Mr Boch took issue with the FTT's statement at [81] that:

[5] This included previous conveyances of the property.

> The position and layout of the land and outbuildings is a relevant factor to consider if [sic] the land is laid out so as to be suitable for day to day domestic enjoyment by the occupiers of the dwelling, this will be indicative that the land is likely to be garden or grounds.

102. He argued that the FTT did not consider whether unsuitability for day-to-day domestic enjoyment was an indication that the land did not form part of the grounds.

103. We reject this argument. The sentence quoted was part of a paragraph in which the FTT considered the Appellant's argument that the woodland was not naturally occupied with the house and was not residential in nature. The FTT continued by considering the distance of the woodland from the house and the fact that its size and location afforded privacy and security. It is clear that the sentence quoted was not the basis for the FTT's decision that the woodland formed part of the grounds of the dwelling.

104. Mr Boch argued that it was unclear whether the FTT's decision was made primarily by reference to section 116(1)(b) or (c). He noted that HMRC advanced no case by reference to section 116(1)(c). It seems to us that this argument may not fall within the grounds for which the Appellant was given permission to appeal by Judge Richards, unless it is generously construed as asserting an inadequate reason for the decision. In any event, we are satisfied that the FTT's decision concentrated on whether the woodland form part of the "garden or grounds" of the dwelling. There was only one reference in the "Discussion" section of the Decision to the woodland being for the benefit of The How at [77], whereas there were over twenty references to "garden or grounds". Plainly, the FTT was focused on section 116(1)(b) and not section 116(1)(c) when reaching its decision.

105. Mr Boch argued that the fact that the FTT took account at [85] of the Appellant's solicitors originally completing the SDLT return on the basis that the whole of property was residential was irrelevant. While we have found above that this was an error in that it involved taking into account an irrelevant factor, we do not consider that it gave rise to any additional error under Ground 3(c).

106. Mr Boch's final argument in relation to Ground 3 (which appears to us to fall within (a) and (c) of that Ground) was that the FTT had failed to give reasons for its decision that the relative inaccessibility of the woodland did not prevent it from being "grounds". The only clue offered in the Decision for the FTT's conclusion on this issue is the comment at [81] that "a wooded area on a steep embankment would be relatively inaccessible in any event and that should not be a reason for excluding it as part of the grounds".

107. We agree with Mr Boch that the FTT did not give adequate reasons for its conclusion on this issue. However, that does not mean that this ground succeeds, because the deficiency in the FTT's decision has been cured by the opportunity given to Mr Boch in this appeal to argue why, as a matter of law, the FTT's conclusion was wrong. We have rejected that argument, for the reasons given above, in relation to Ground 1(a). In those circumstances, we consider that the position is analogous to that in the recent decision of this Tribunal (with which we agree) in *Michael and Bridget Brown v HMRC* [2022] UKUT 00298 (TCC), where the Tribunal said, at [76]:

> In terms of fairness to Mr and Mrs Brown, they have had the opportunity of arguing the merits of the proposition that there was chargeable consideration under s 45(3)(b)(ii) before us. Insofar as there may have been an error of law on the part of the FTT in deciding the case on that basis without giving Mr and Mrs Brown the opportunity of making submissions on the point, that error will in effect have been cured by the point being fully argued before this Tribunal. That is, of course, subject to there having been no prejudice to Mr

> and Mrs Brown, for example, as a result of them not having had the opportunity of adducing further evidence that would support their case.

108. In conclusion, the FTT did give sufficient reasons for its decision, those reasons were specific rather than generic, and the Appellant would have been able to understand why it had lost its appeal. The only exception is that the FTT did not adequately explain its conclusion on accessibility, but that has been cured in this appeal. The appeal under Ground 3(c) is therefore dismissed.

SUMMARY AND WHETHER TO REMIT OR RE-MAKE

109. We have identified the following errors of law in the Decision:

(1) The FTT relied on an irrelevant factor in so far as it took into account the basis of the initial SDLT return in determining whether the woodland formed part of the grounds.

(2) The FTT acted in a procedurally unfair way by referring to and apparently relying on its own views as to the likely position in relation to planning consent and rateable valuation without giving the parties any opportunity to make submissions on those issues.

(3) In all the circumstances of this case, the FTT erred in failing to consider or mention the oral evidence given by Mr Warren on behalf of the Appellant.

(4) The FTT erred in not giving reasons for its conclusion that the woodland did not need to be accessible in order to be grounds for SDLT purposes.

110. As we have explained, the error described at (4) has effectively been cured by the opportunity given to the Appellant in this appeal.

111. In relation to the first three errors, we may (but need not) set aside the decision of the FTT: section 12(2)(a) TCEA. If we do set aside the decision, we must either remit it to the FTT with directions for its reconsideration, or re-make it: section 12(2)(b).

112. Applying the approach adopted in *Degorce* (referred to at paragraph 40 above), while the first two errors can be argued to be relatively minor, we consider that the result might have been different but for the three errors taken together. We therefore conclude that the errors were material, and we set aside the FTT's decision.

113. We must then decide whether to remit the decision to the FTT or re-make it. At first blush, the nature of the error we have found in relation to Mr Warren's oral evidence would point towards a remittal (obviously to a differently constituted tribunal), with the FTT being directed to hear evidence again from Mr Warren (assuming that is practicable), which it then reconsiders and deals with in its decision. However, we do not consider that that would be a desirable or proportionate outcome, or would best further the overriding objective, given the likely delay and cost resulting from a remittal. We have therefore decided to re-make the decision, taking into account the substantive points which Mr Boch says were made by Mr Warren in oral evidence but ignored by the FTT in its written decision. By adopting that approach, effectively giving the Appellant the benefit of the doubt as to whether the disputed oral evidence was in fact given, we can avoid the disadvantages of a remittal.

DISPOSITION

114. We re-make the FTT's decision as follows.

115. In determining whether the woodland formed part of the grounds of The How, we have taken no account of the following points:

(1) The fact that the initial SDLT return was made on the basis that the land was entirely residential.

(2) The position or potential position in relation to planning consent for change of use of the woodland, or the basis of its rateable valuation.

(3) Whether or not the woodland was within the legal curtilage of The How.

(4) Whether or not the woodland fell within section 116(1)(c).

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. We have taken the following factors in particular into account in reaching our decision, all of which were taken into account by the FTT:

(1) There was no evidence of the use or exploitation of the woodland for commercial purposes. Nor was there any evidence of the use or exploitation of the woodland for any purpose other than that of woodland.

(2) The woodland provided privacy and security to The How by virtue of its location as a hillside barrier between The How and the River Ouse.

(3) The woodland fell within the legal title to the property.

(4) The position and layout of the land and outbuildings was such that the woodland was not inordinately distant from the house and its size and location increased the privacy and security of The How from the south.

(5) The woodland was densely populated and relatively inaccessible.

117. As regards accessibility, we have set out above (in relation to Ground 1(a)) the reasons for our conclusion that this is a factor to be taken into account in the evaluation but is not determinative. We have also set out above (in relation to Ground 2(b)) the reasons for our conclusion that the existence of any tree preservation orders would not prevent the woodland from being grounds.

118. In relation to Mr Warren's oral evidence, Mr Boch stated that the points made by Mr Warren were as follows:

(1) The woodland was inaccessible from the property save by aid of industrial machinery, due to it being too thick to enter, and that it would be dangerous to access it due to the steep banking.

(2) The woodland was densely populated and on a steep banking, with the only walkable area being the public footpath.

(3) When asked by the tribunal whether the woodland provided safety and security to The How, Mr Warren said that on one occasion some drunken youths had climbed to the top of the bank.

(4) The woodland was subject to a tree preservation order, so the owner of The How could not cut down the trees or otherwise exploit the woods.

(5) The woodland could not be used for any purpose by the owner which was different from how it could be used by members of the public, including in terms of access. It could not be "used by the owners as they wish" due to forming part of ancient woodland under local authority protection.

(6) The woodland could not be used for any "residential" purpose, such as walking or having a picnic, due to the steep banking.

(7) Had the woodland not belonged to The How, the owner would have been no worse off. The woodland provided no benefit to the owner *qua* owner.

119. We remind ourselves that the FTT accepted Mr Warren's evidence not as an expert but as a witness of fact. We consider the above points in turn.

120. As regards (1), as we have already said, we have taken into account in reaching our decision that the woodland was inaccessible save by aid of industrial machinery. As regards (2), insofar as this can be said to add anything to the point regarding inaccessibility, we do not consider that the physical location or density of the woodland are particularly informative in deciding whether the woodland was grounds of The How; there is nothing inherent in the concept of grounds of a residential property which requires them to be easily traversable or walkable. A pond or patch of rough terrain are not inherently less likely to be grounds. Having said that, we have taken these characteristics into account in the balancing process.

121. In relation to (3), we do not consider that Mr Warren's opinion as to whether the woodland provided safety and security to The How hinders us in inferring, as did the FTT, that the physical characteristics and location of the woodland mean that it did provide those amenities. That is a reasonable inference in light of all the evidence. It is not clear to us what Mr Boch seeks us to draw from Mr Warren's report of the episode with the drunken youths, but if anything it might suggest that the woodland did operate to provide some measure of security, at least from the south by the river.

122. It is appropriate to consider (4) and (5) together. Both of these points go to the proposition that the woodland was not grounds of The How because there were hindrances or restrictions on the ability of the owner of The How to deal with the woodland as they might wish.

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" (set out at paragraph 31 above). 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. In this appeal, the FTT found that there was no evidence of any use other than as woodland, which provided privacy and security to The How.

124. Point (6) is that the woodland could not be used for any "residential" purpose such as walking or having a picnic. We have taken this into account, but we do not think that it is a significant point in light of our conclusions at paragraphs 49 to 51 above, rejecting the argument under Ground 1(b) that land must be "residential" in nature in order to be grounds.

125. In relation to (7), being the argument that the owner of The How would have been "no worse off" without the woodland, this ignores the privacy and security provided by the woodland, so we do not accept that it paints a full picture. In any event, it seems to us that in *Hyman* the Court of Appeal effectively rejected this type of argument when it stated in contrasting section 116 with the CGT relief for an individual's main residence as follows (at [30]) (emphasis added to original):

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

Conclusion

126. Weighing up all relevant factors as we have described them, we conclude that the woodland formed part of the grounds for the purposes of section 116(1)(b). The characteristics summarised at (1) to (4) of paragraph 116 above carry greater weight than the woodland's relative inaccessibility and the points which we have assumed were made in Mr Warren's oral evidence.

127. The Appellant's appeal against HMRC's closure notice is dismissed.

JUDGE THOMAS SCOTT
JUDGE GUY BRANNAN

Release date: 30 March 2023