



Neutral Citation: [2026] UKUT 00125 (TCC)

Case Number: UT/2025/000008

**UPPER TRIBUNAL
(Tax and Chancery Chamber)**

Rolls Building, London

Stamp Duty Land Tax — whether FTT erred in holding land acquired was not “grounds” such that property was not entirely “residential property” under s116(1) Finance Act 2003 – yes – appeal allowed – FTT decision remade so as to dismiss taxpayer’s SDLT assessment appeal

Heard on: 1 December 2025
Judgment date: 18 March 2026

Before

**JUDGE SWAMI RAGHAVAN
JUDGE MARK BALDWIN**

Between

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Appellants
and

CHRISTOPHER BRZEZICKI
Respondent

Representation:

For the Appellants: Charles Bradley, Counsel, instructed by the General Counsel and Solicitor to His Majesty’s Revenue and Customs

For the Respondent: Mr Brzezicki appeared in person assisted by Mr Bugden of Grosvenor Tax

DECISION

INTRODUCTION

1. This is an appeal against a decision of the First-tier Tribunal (Tax Chamber) (“FTT”) in *Christopher Brzezicki v HMRC* [2024] UKFTT 00845 (TC) (“FTT Decision”). References in the remainder of this decision to numbers in square brackets are to paragraphs of the FTT Decision unless the context indicates otherwise.

2. The FTT Decision concerned Stamp Duty Land Tax (“SDLT”) and the issue of whether, on completion of a sale and purchase transaction on 3 July 2020, certain land (“the Property”) acquired by Mr Brzezicki, comprised only residential property, or a mixture of residential and non-residential property, for the purposes of section 116 of the Finance Act 2003 (“FA 2003”). The point matters because of the difference in tax rates that apply as between residential property or mixed-use property.

3. The Property is more fully described at [15] below, but in essence it is a six-acre holding in Hampshire comprising a six bedroom dwelling and gardens to the east of a man made “carrier stream”, roughly six foot wide, with an approximately two acre parcel of land to the west of the carrier stream, bounded on its other side by the River Meon. The carrier stream is engineered with a sluice, gravel bed and waterfall and designed to function as a spawning ground for wild brown trout. The stream is spanned by two small footbridges. These connect the two-acre parcel with the large garden which surrounds the dwelling.

4. The FTT, sitting as a panel of two, was divided with the judge exercising a casting vote. The judge’s view was that the carrier stream and the two-acre parcel to its west were not part of the garden or grounds of the dwelling, and so the Property was a mixture of residential and non-residential property. The member’s view was that the carrier stream and land to the west of it formed part of the garden or grounds of the house and so the purchase did not include any non-residential property. Because the judge’s view prevailed, Mr Brzezicki’s appeal against HMRC’s SDLT assessment (which reflected their view that the Property was entirely residential property) was allowed.

5. With permission of the Upper Tribunal, HMRC now appeal against the FTT Decision. Their grounds are: first, that the FTT took into account irrelevant factors when applying the multifactorial test for what constitutes ‘grounds’ within section 116(1)(b) FA 2003; second, that the FTT erred in law by treating contiguity as a necessary condition for land to form part of the garden or grounds; third, that the FTT erred in its approach to section 116(1)(c) FA 2003 with regard to the transfer of certain fishing rights.

6. We are grateful for both parties’ submissions, and appreciate the efforts of Mr Brzezicki and his adviser in responding to an appeal that was brought on points of law.

LAW

7. SDLT is charged under FA 2003. Section 42 FA 2003 applies SDLT to “land transactions”; defined in section 43 as: “any acquisition of a chargeable interest”. A “chargeable interest” is defined in section 48 as “an estate, interest, right or power in or over land in England”. Section 121 FA 2003 confirms that “land” includes land covered by water.

8. There are two tables of rates of SDLT contained in section 55 FA 2003. Table A applies if the relevant land comprises only residential property. Table B applies where the relevant land comprises non-residential or mixed property.

9. The definition of ‘residential property’ is contained in section 116 FA 2003. The section 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.”

10. The question of what constitutes “grounds” as referred to in s116(1)(b), has been the subject of a growing body of case-law. For present purposes it is sufficient to note that the word “grounds”, bears its ordinary meaning which 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” (*Hyman v HMRC* [2019] UKFTT 469 (“*Hyman FTT*”) (at [62]), approved subsequently, in *Hyman v HMRC*, [2021] UKUT 68 (“*Hyman UT*”), which in turn was upheld by the Court of Appeal in *Hyman v HMRC* [2022] EWCA Civ 185 (“*Hyman CA*”)).

11. As confirmed in *Hyman UT*, the test for whether the relevant land is “grounds” is multifactorial. At [49] the UT approved HMRC’s SDLTM00455 guidance 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.... 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’.

12. In *How Development 1 Ltd v HMRC*, [2023] UKUT 84, (“*How*”) the Upper Tribunal held (at [34]) having considered *Hyman UT* and *Hyman CA*:

“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.”

13. The Upper Tribunal also went on at [123] to agree with *Hyman FTT* that it was not necessary for grounds to be used for ornamental or recreational purposes.

BACKGROUND AND FTT DECISION

Background Facts

14. The FTT made various findings of fact from documentary and witness evidence including transfer forms, plans, estate agent photos, Mr Brzezicki’s evidence and a short statement from a family-owned trout fishery located about one kilometre upstream from Mr Brzezicki’s land. While there is some dispute about the interpretation and inferences drawn from certain of those facts, the facts that were found were not themselves subject to challenge.

15. Mr Brzezicki completed the purchase of the Property on 3 July 2020 (this was the effective date for SDLT purposes). The Property included a six-bedroom dwelling, formerly a stable block converted in the 1980s, positioned in the north-eastern corner close to the access road and surrounded by a substantial lawned garden ([13(1)–(2)]). To the west of this garden lay an additional two-acre parcel of land, bordered to the west by the River Meon and to the east by a man-made carrier stream that rejoined the river at both ends ([13(3)]). Two small

footbridges crossed the stream and provided access to the two-acre parcel of land, which the FTT described as “the island” ([13(4)]).

16. The carrier stream contained several engineered features, including an upstream sluice regulating inflow, a waterfall to oxygenate the water, a shallow gravel bed suitable for spawning, significant appropriate plant growth (ranunculi) providing food for juvenile trout, and downstream structures enabling a grille to be lowered to prevent young fish escaping or predators entering ([13(3)], [15], [70], [74]). The FTT accepted evidence that brown trout habitually return to their place of birth to spawn, that spawning occurred each November, and that the combination of gravel, oxygenated water, and physical barriers protected the newly hatched fish ([15]). It accepted a signed statement from a local fishery operator, Mr Martin, indicating that trout raised in the stream had for many years contributed to upstream stock levels ([16]).

17. At completion, the FTT found, the carrier stream was “not being run on a commercial basis” but was nonetheless operating biologically to produce brown trout ([75], [79]). Some repair was needed, including reinstating a missing grille and removal of poisonous weeds ([73]). Shortly after completion, Mr Brzezicki repaired the footbridges, cleared the weeds and began promoting his proposed fly-fishing business. Free fishing was offered initially to generate goodwill, with paying customers arriving in the following season ([24], [28], [79]).

18. The FTT gave limited weight to estate-agent descriptions, noting that photographs of benches, a gazebo and very closely mown grass might reflect staging to assist a sale and did not reliably indicate the character of the land at completion ([19] - [21], [82]). The TP1 transfer contained no restriction on fishing or agricultural use, and a mortgage condition referring to domestic use was not drawn to Mr Brzezicki’s attention; neither document influenced the statutory analysis ([22]–[23], [81]). The FTT also found that the house was “not grand”, that views from the house were not affected by the carrier stream and that the island was not “essential to the character of the house or its sense of space” and that its privacy, outlook and enjoyment did not depend on the island ([76]–[77]).

Majority’s Reasoning

19. The judge, whose decision represented the majority decision given the judge’s casting vote, set out the ordinary meaning and multifactorial test in relation to “grounds” in section 116 FA 2003, relying on the FTT analysis in *Hyman* ([63], [65]). The judge held that, for land to form part of the garden or grounds of a dwelling, the land “must” be both adjacent to and contiguous with the dwelling ([64]). (As will be seen, the extent to which this proposition became central to the majority’s approach is a matter of dispute.)

20. The judge considered that the carrier stream created a break between the eastern garden and the island. Although two footbridges permitted access, the judge regarded the stream itself as a barrier which rendered the island “not contiguous” with the dwelling ([68]–[69]). The judge rejected reliance on section 121 FA 2003 (that land includes land covered by water), concluding that the statutory definition did not prevent a stream from creating a physical separation for the purposes of contiguity ([69]). Lack of contiguity was described as a significant factor preventing the island from forming part of the garden or grounds of the dwelling.

21. The judge further found that the carrier stream was a “piece of plant” and the “equivalent of a factory” for breeding wild brown trout (albeit that the “factory” was “easy on the eye”([70], [73], [74])). The judge considered that the stream had not been constructed to serve the domestic amenity of the dwelling, but had been engineered with a functional commercial or semi-commercial purpose related to trout production. The judge accepted Mr Martin’s statement that fish from the stream had long supplied his fly-fishing business, though she

accepted that the stream was not being exploited commercially at the effective date ([71], [75], [79]).

22. The judge also observed that the dwelling was modest and that the island did not contribute to its privacy, setting or reasonable enjoyment ([76]–[78]). Marketing descriptions were treated cautiously and afforded little weight ([82]). Weighing all relevant factors, the FTT concluded that the island did not form part of the garden or grounds, and therefore that both the carrier stream and the island constituted non-residential land for the purposes of section 116(1)(b) ([87]). The judge also held that the associated fishing rights (described at [14]) Mr Brzezicki had acquired in conjunction with the Property did not subsist for the benefit of the dwelling or its grounds (for the purposes of section 116(1)(c)) but instead subsisted for the benefit of the island, which the judge had found to be non-residential ([88]–[89]).

Tribunal Member’s Dissent

23. The Tribunal Member wrote a comprehensive and considered dissent. The following is an outline summary of his reasoning. The Tribunal Member considered that the Property, including the island and the carrier stream, formed part of the garden or grounds at completion ([92]–[103]). Beginning from the perspective that an ordinary purchaser, viewing the photographs and plans, would treat the whole of the Property, including the land beyond the stream, as part of the domestic setting ([93]–[94]), the Member did not accept that physical separation by a narrow man-made stream rendered the island non-contiguous in any meaningful sense, noting that many domestic properties contain features such as streams, ditches, fences or paths dividing land which are nevertheless treated as forming part of a single residential whole ([96]–[104]).

24. The Tribunal Member also considered that there was no clear evidence of any commercial activity prior to completion. While the engineered features of the stream might suggest a purpose related to trout management, they did not establish commercial exploitation or any use inconsistent with residential classification ([108]–[129]). The estate-agent materials were referenced, suggesting residential recreational use, including statements that the island had long been used as an “adventure playground” for children, and a rudimentary cabin on the island was not shown to have been used commercially ([137]–[142]).

25. The Tribunal Member concluded that, taking all factors together, the carrier stream and the island were part of the residential grounds and that no non-residential land was included in the transaction.

GROUND OF APPEAL

26. HMRC’s appeal raises the following three grounds summarised below which we will consider and discuss in turn:

(1) **Ground 1:** The FTT erred in law in its approach to the multifactorial test for what constitutes “grounds” within section 116(1)(b) by taking into account irrelevant factors:

(a) Considering that the carrier stream could be described as a “factory” or piece of plant. It wrongly treated the characterisation of the carrier stream as “plant” and the “equivalent of a factory” as telling against classification as grounds, although there was no commercial operation at completion and no clear evidence of historic commercial exploitation. HMRC say the FTT can only have been assessing future suitability, a factor they submit is not relevant at the effective date.

(b) Taking into account that the carrier stream provided an incidental benefit to an unconnected business located elsewhere. HMRC say the FTT incorrectly relied on an incidental benefit said to accrue to an unrelated fishery. Incidental benefit to

a third party is not a recognised factor that changes the character of land, and it adds nothing material to the analysis under section 116(1)(b).

(c) Taking into account that the island was separated from the rest of the Property by the carrier stream. HMRC say the FTT treated separation by the stream as significant in itself, which is not a relevant factor where ownership is unbroken and access is available. They say the FTT misunderstood the concept of contiguity which speaks to adjacent land in common ownership rather than physical separation.

(2) **Ground 2:** Further or alternatively, the FTT erred in law by holding that land cannot be ‘*garden or grounds*’ unless it is contiguous. The FTT was wrong to hold that contiguity (the concept of which it had any event misinterpreted - Ground 1(c)) above) was determinative when it was established that the consideration of what constituted grounds required a multi-factorial analysis.

(3) **Ground 3:** The FTT erred in law in holding that the fishing rights (FTT[89]) were not within section 116(1)(c). (It was noted that this ground was based on the same error as the third irrelevant factor and Ground 2 namely that the island was not “grounds”.)

27. Mr Brzezicki submits that the FTT did not rely on future suitability but on the carrier stream’s *nature*, including its engineering features and the fact that it was “operating to produce brown trout” at completion. He says the FTT did not treat Mr Martin’s business benefit as a factor, but relied on the statement as evidencing the carrier stream’s long-standing operation of trout production. As to contiguity, he says the FTT did not misinterpret this and only used it as one significant factor alongside others in a multifactorial assessment.

DISCUSSION

Ground 1 – incorrect application of multifactorial test

28. As discussed in *WM Morrison Supermarkets v HMRC* [2023] UKUT 20 (at [58]) taking into account an irrelevant factor can constitute an error of law.

29. The route HMRC take to their proposition that the FTT could only have been considering future suitability (which they submit is irrelevant) when describing the carrier stream and other features as “plant” or a “factory”, is by explaining why those terms could not be taken to refer to usage that was historic or current as at the effective date.

First irrelevant factor

30. We agree with HMRC that there was no finding by the FTT of historic commercial usage or commercial usage at the effective date.

31. As regards current usage, Mr Brzezicki submitted the FTT rightly treated the stream as “plant” or a “factory”, “a man made trout rearing facility”, that the “plant was in operation before completion” and that the stream “was operating to produce brown trout” at the effective date.

32. That submission overlooks the FTT’s express finding that no commercial use was being carried on at completion. No challenge has been brought against that finding (nor, in the light of any evidence of current commercial usage, would there have been any prospect of such challenge being successful).

33. The FTT specifically found (at [75]) that what it regarded as “plant” (the carrier stream including the upstream sluice, waterfall, shallow breeding ground, ranunculi plantations, lower deeper section and facility to install a grille at lower end, as explained at [70]) was in place at completion but was not being run on a commercial basis, before going on to explain that it was

not necessary for the commercial activity to be conducted at completion for the land to be non-residential land at completion.

34. As to the argument regarding the stream continuing to operate to produce brown trout, Mr Brzezicki further contended that the fish present at the effective date were “stock”, and that Mr Brzezicki therefore “purchased the ‘factory’ as well as the live stock.” The fish were “business trading stock” already *in situ* at completion. The FTT had found at [79] that “the carrier stream was functioning as a carrier stream at completion” (having found at [70] that carrier stream and other features formed “a piece of plant for the breeding of wild brown trout”) observing that it was “not surprising that Mr Brzezicki exploited the carrier stream immediately after completion...”.

35. That characterisation is not accepted. Section 116(1)(b) requires a classification of the land at completion. The FTT did not find any commercial exploitation at that date. The FTT found (at [79]) that the stream was “operating to produce brown trout” at completion. Given its finding (at [75]) that the “plant” was not being run on a commercial basis at completion, that finding cannot be read as a finding of commercial exploitation. It describes a function of biology and the spawning habits of trout returning to where they had spawned rather than anything commercial in nature.

36. To the extent reliance was placed on the carrier stream and other features being plant or a factory, then that terminology was inapposite to the extent that this presupposed current commercial activity, as the FTT found there was no such activity at the time of completion.

37. The only coherent reading of “plant” in this context is that the stream could function as such, reflecting what Mr Brzezicki could *subsequently* do with it, not what was *done* at completion. We agree with Mr Bradley, that reading between the lines, the factor taken account of by the judge was in essence the future suitability of the land for commercial activity, in other words the fact that Mr Brzezicki was, post-completion, able to use the carrier stream in his commercial activity of operating a fishing business.

Is future suitability irrelevant?

38. The concept of suitability was not referred to as such by the judge but we consider it fairly encapsulates the basis on which the FTT reasoned. In support of his case before the FTT, Mr Brzezicki was advancing a use that was in opposition to residential use. The question of the land’s *suitability* for that proposed use might well inform how realistic it was to say the land would in fact be able to be used in that way.

39. As the Upper Tribunal explained in *Suterwalla* the focus is on the character of the land at the effective date. In this case there is no dispute that the relevant point in time to characterise the land is the effective date. The FTT correctly acknowledged this.

40. *Suterwalla* went on to explain that post-completion use is relevant only insofar as it evidences the character of the land at the effective date. The case concerned a grazing lease over the contested land which was granted by the purchasers of the land after the effective date. At [49] the UT considered the FTT had erred by considering a grazing lease which did not exist at the time of completion. Explaining that the focus should have been on whether the paddock was part of the grounds at the time of completion, the UT continued:

“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."

41. In this case the FTT's reasoning, in effect, treated the land's subsequent use as informing its characterisation on the effective date in circumstances where the only evidence of commercial use arose from activity after the effective date. The FTT's consideration here was not at all like the situation the UT considered in *Suterwalla* might be relevant (where a post completion agreement reflected an earlier activity). The FTT had specifically found (at [75]) that there was no commercial activity at completion).

42. We agree therefore with HMRC that, in taking account of the suitability of the land for future commercial use, the FTT took account of an irrelevant factor and so erred in law.

Is commercial use sufficient?

43. Even if there were some commercial use on the effective date, cases such as *Harjono v HMRC* ("*Harjono*"), [2024] UKFTT 228, (which concerned a grazing agreement in relation to a paddock) and *Faiers v HMRC*, [2023] UKUT 00020, (where a pole supporting an electricity cable, used for the commercial purposes of a third party energy supplier, crossed the property) illustrate well how commercial activity can take place on land without that activity being inconsistent with the land being considered grounds of a dwelling.

44. In *Harjono*, the FTT referred to the requirement in *How UT*, that all the facts and circumstances must be considered and that this is an evaluative exercise, and then explained (at [68]) that the "use to which the land is put is simply one factor which must be weighed up when considering whether that land comprises grounds." We agree with that view. The ultimate question is whether the land in question is grounds of the dwelling. As a matter of principle, there is no reason to suppose that commercial activity on the land, in circumstances where that does not detract from the land's characterisation as grounds, should somehow change the characterisation of the land for SDLT purposes. Consideration of whether land constitutes grounds will depend on the particular facts and circumstances. On the facts of a particular case, the presence of a commercial activity may be wholly at odds with the land constituting grounds, with the result the relevant land would not be characterised as grounds. But we entirely agree with the FTT in *Faiers*, when it said (at [44](8)) that "Some level of intrusion onto (or alternative use of) an area of land will be tolerated before the land in question no longer forms part of the grounds of a dwelling" and (at [48]) that "I do not consider that any alternative user of any part of the land will automatically have [the] result [that the land cannot be grounds]", and in *Harjono*, when it said (at [70]) that it is "misconceived" to think that simply finding some form of commercial use of land will take it outside the entirely residential criterion and (at [69]) that "The fact that a piece of land might be used "commercially" is not decisive, and merely something that needs to be weighed in the balance".

45. Mr Brzezicki submitted orally that the carrier stream was constructed and operated as a fish-rearing installation while the land was still farmed, pointing to the sluice, gravel beds, waterfall, and grille housings, and contending that the capital cost and the need for constant maintenance showed there had been a commercial purpose. He also contended that multiple fishing jetties and the existence of fishing rights "support historical commercial usage", adding that "you would not have multiple fishing jetties unless you had multiple fishermen." His oral submissions emphasised the rights and jetties as indicators of business capability at completion

In the light of our agreement with the point in *Harjono*, however, even if it were established that there had been some historical (or even current) commercial use, that would not force a conclusion that the land could not be grounds. The FTT did not make any finding on historic usage, but, even if it had, its analysis would have been incomplete without further consideration of whether such usage was inconsistent, weighing everything together, with the relevant land being grounds.

Second irrelevant factor

46. This factor concerns the relevance (or not) of any incidental benefit to the neighbouring fishery business from trout breeding in the carrier stream making their way into the river. We can deal with this point briefly because it was raised by HMRC only to the extent that it is correct that the FTT did take account of the incidental benefit to the neighbouring fishery business as factor.

47. Reading the FTT Decision, and also noting the judge's refusal of permission decision (which had stated that the benefit to the third-party fishery business was not a factor in the decision), we consider that this was clearly not regarded as an independent factor. To the extent it was of any relevance, it was not so much that such benefit was relevant in its own right but rather as corroboration for the FTT's view that trout continued to breed in the carrier stream.

48. We agree with HMRC that the fact a third-party benefits from an activity carried out on the land is irrelevant to the characterisation of land as grounds. While it is possible that a third party receiving an incidental benefit from the way the land is used might throw light on the nature of that use, on the facts of this case it would be a non-sequitur to say that, because the fishery business benefitted from trout breeding in the carrier stream, there must have been a commercial activity of trout-breeding. However, the difficulty with the FTT's analysis lay not in the use of the benefit as corroboration but as to what it was the benefit was corroborating. The error it made was in equating the fact that trout continued to breed in the carrier stream with there being an activity on the land that was inconsistent with its being grounds. Thus the incidental benefit point is not a separate irrelevant factor but a feature of the first irrelevant factor which we have already discussed.

Third irrelevant factor

49. Under this limb of Ground 1, HMRC argue that the FTT misunderstood what was meant by contiguity of the land and thereby erred in taking account of the gap between the garden and island created by the carrier stream. The FTT described the island as "not contiguous" and regarded the carrier stream as a barrier. HMRC's case is that contiguity is concerned with whether the adjacent land was under common ownership. Physical separations such as hedges, fences, or, as here, a stream do not mean the land on the other side of the separation was not contiguous. The point was material as the FTT then treated lack of contiguity as significant in preventing the island from being regarded as part of the garden and grounds, the judge finding at [68] that:

"The land to the west of the carrier stream forms an island separated from the rest of the land by the carrier stream and is not contiguous with the rest of the land comprised in the title. I consider this to be a significant factor which prevents the island being regarded as part of the garden and grounds *of* the house."

50. In *Sutterwalla* (at [18]) the Upper Tribunal set out a summary of relevant factors derived from *Hyman FTT*, *Faiers*, *How* and *39 Fitzjohns Avenue Ltd v HMRC* [2024] UKFTT (TC) at [37], including (at (6) of the sixteen point list) that "Contiguity is important, grounds should be adjacent to or surround the dwelling". That was immediately preceded by the factor at (5) that "Common ownership is a necessary condition, but not a sufficient one." HMRC's submission,

that contiguity concerns something other than physical separation over land which is in common ownership, is reflected in the approach taken in various FTT decisions. In *Hyman FTT* (at [62]) the judge did not consider it relevant that the grounds and gardens were separated from each other by hedges or fences. In *Harjono* the paddock was considered contiguous with the house and garden. The fact the paddock was fenced off did not change that (see [92]). HMRC also rightly point out that by virtue of section 121 FA 2003 the carrier stream is just as much land as the garden and island bordering it.

51. We agree with HMRC that the question of contiguity speaks to the contested land being adjacent to other land under common ownership. So, if there was other land dividing the two which was owed by someone else, the requirement might not be met. It would also be an odd result if physical separations on a plot of commonly owned land (which might just be cosmetic or transient) would automatically change the characterisation of the land.

52. In the circumstances here, where the land, including that over which the six feet wide carrier stream ran, was under common ownership, we consider the judge fell into error in regarding the “island” as non-contiguous with the remainder of the land simply by virtue of the carrier stream.

53. In conclusion, we therefore uphold Ground 1. The FTT took into account two factors (firstly future suitability and/or a mistaken view of what could constitute commercial usage at the time of completion and secondly a physical separation wrongly equated with non-contiguity) that were irrelevant to the statutory question before it. These errors were, whether taken individually or together, plainly material to the FTT’s conclusion that the stream and island were not grounds.

Ground 2 – Contiguity treated as necessary condition

54. Under this ground HMRC say that the FTT misdirected itself by regarding contiguity as a necessary condition. when it was one factor to be considered amongst others in a multifactorial analysis. It may be relevant or important, but it is not essential.

55. HMRC point to the FTT’s statement at [64] that:

“For land to “form part of the garden or grounds” of a dwelling the land **must** be adjacent to and contiguous with that item” (emphasis in original).

56. We agree that this statement is not supported by the authorities; see [11] and [12] above, and the fact that contiguity appeared amongst a raft of other factors that were detailed in the Upper Tribunal’s consideration of the case-law in *Sutterwalla* - see [50] above.

57. That contiguity is not determinative must also be right as a matter of principle. It is easily possible to envisage situations where the relevant land is separated from the dwelling or other parts of its grounds by (for instance) a public path or lane which belongs to someone else or is in public ownership which renders the relevant land non-contiguous yet where the separated land may still fairly be described as grounds of the dwelling.

58. Mr Brzezicki does not seek to say that we should depart from Upper Tribunal decisions that the test for grounds is multifactorial (indeed as mentioned below he relies on that approach elsewhere to argue the FTT did not make any error of law). Rather he submits that the FTT did not use contiguity in isolation but treated it as significant on these facts within a multifactorial analysis that included the stream’s “nature”. (He relies on the judge’s later explanation in the judge’s refusal of permission decision that it was the “nature” of the stream that led to the conclusion that the stream and island were non-residential).

59. We accept that the judge elsewhere (at [68]) described contiguity as a “significant” factor and referred to the stream’s “nature”. However, considering the essence of her reasoning, an

overwhelming part of her analysis reflected the factual separation the stream gave rise to. That, together with the fact that, when setting out the relevant legal principles, she used the word “must” leads us to consider that the separation the stream created was regarded by the FTT as having a determinative effect.

Ground 3 – fishing rights

60. This ground relates to the FTT finding at [89] that fishing rights did not fall within s116(1)(c) because:

“The fishing rights attached to the land forming part of the island [and] The fishing rights subsisted for the benefit of the land forming the island.”

61. HMRC submit that the FTT’s conclusion on fishing rights under section 116(1)(c) depended upon its conclusion that the island was not grounds, and that if the FTT erred on that question the conclusion on fishing rights cannot stand.

62. We can deal with this ground briefly as we agree with HMRC that the FTT’s conclusion on section 116(1)(c) rights depended on the premise that the island was not part of the grounds. As that premise cannot stand once Grounds 1 and 2 are upheld, Ground 3 succeeds for the reasons already given. (While Mr Brzezicki argues in his written submissions that there was no error of law here because the FTT did not consider the presence of fishing rights to be material in its decision, that is beside the point because it relates to section 116(1)(b). The issue raised here is the different question of whether the FTT erred by considering the fishing rights that were also transferred fell within section 116(1)(c)).

SET-ASIDE OF FTT DECISION AND WHETHER DECISION SHOULD BE REMITTED TO FTT OR REMADE IN UT

63. We find that the FTT made the errors of law in its approach to section 116(1)(b) and section 116(1)(c) set out above and HMRC therefore succeed on all their Grounds.

64. Those errors were plainly material to the result in that if they were not made the FTT might have arrived at a different result. Here that is well-illustrated by the Tribunal Member’s dissent, which reached the opposite result when the carrier stream and ongoing (natural) trout-breeding were not treated in the way the judge had.

65. We therefore set aside the FTT Decision. We exercise our discretion to remake the decision rather than remit it to the FTT. There is no dispute as to the FTT’s primary underlying findings of fact (as distinct from the FTT’s evaluation of those facts). Those factual findings, which we gratefully adopt, are sufficiently detailed to permit the Upper Tribunal to re-determine the statutory question under section 116. We have also had the benefit of essentially the same materials the FTT had.

REMAKING OF UPPER TRIBUNAL DECISION

66. We summarise the key findings as follows.

67. Mr Brzezicki acquired, on 3 July 2020, a six-acre property comprising a six-bedroom dwelling in the north-eastern corner, surrounded by a substantial lawned area which the FTT described as “a large garden” ([13(1)–(2)]). The land to the west of the carrier stream (the “island”) was approximately two acres in extent and was accessible by two small footbridges ([13(4)]). The stream contained engineered features intended to facilitate the breeding of brown trout, including a sluice, waterfall, gravel spawning bed and grille-housing ([13(3)], [15], [70], [74]). It also found that, although trout bred naturally within the stream, the stream was “not being run on a commercial basis” at the effective date [75], and that Mr Brzezicki’s later commercial activities only commenced months after completion ([24], [28], [79]). The fisherman’s cabin on the island was in a dilapidated condition and not suitable for use as a dwelling ([13(5)], [59]).

68. Applying the established multifactorial test, the question is whether, at completion, the island and the carrier stream “formed part of the garden or grounds” of the dwelling.

69. We approach this by reference to the ordinary meaning of those terms, namely land attached to or surrounding a house which is occupied with the house and available to the owners for their use. That inquiry in broad terms requires consideration of physical layout, access and title, the nature and use of the land, and the character of the property as a whole.

70. The FTT found that the island was reached by two footbridges ([13(4)]), that there was unbroken title ([14]), and that the island was visible, proximate and in practical terms connected to the residential part of the property ([19]–[21]). On those facts, the presence of a narrow watercourse does not operate to exclude the island from forming part of the garden or grounds. Many residential properties contain natural or man-made divides, including streams, ponds, ditches or footpaths. The proper question is not whether water lies between two parts of land, but whether, viewed sensibly, the island forms part of the grounds of the dwelling. In our judgment the factual findings point clearly to that conclusion.

71. Mr Brzezicki’s emphasis on the stream being “impassable for 295 of the 300m” without the bridges does not advance the analysis. As the Upper Tribunal in *The How*, which concerned inaccessible woodland, indicated (see [46]), even difficult access would not preclude a conclusion that the land constituted grounds.

72. Next, we consider the character and use of the land at completion. The FTT expressly found no commercial use of the carrier stream or island at the effective date ([75], [79]). The biological functioning of a watercourse, even one with engineered features, does not itself constitute commercial activity. The pre-existing condition of the stream, which required repairs and reinstatement of a grille, does not detract from its capacity to serve as part of the dwelling’s grounds. Similarly, the cabin, though basic, had been used historically as part of the residential enjoyment of the land and had not been exploited commercially by the vendors ([13(5)]).

73. As to the carrier stream itself, the FTT’s finding that the stream was designed to support trout spawning ([13(3)], [15], [70]) does not establish that it formed non-residential land. Even to the extent there is commercial exploitation the character of that activity (a trout spawning carrier stream and the charging of recreational fishers for access to fishing) is not inconsistent with the carrier stream and island being considered grounds.

74. Mr Brzezicki made various points directed towards the historic use of the carrier stream as having a commercial character. He suggested that it would have taken some not insignificant work and capital outlay to dig out the channel for the carrier stream. He also highlighted the multiple fishing jetties and the cabin. It would not make sense to have these unless multiple anglers were envisaged.

75. He also referred to historical covenants at the time in 1978 when the former farmland was split. The Schedule of Restrictive Covenants in that conveyance required, among other things, that the sluice and water levels be kept in working order and that a stock fence be erected and maintained. He argued these obligations showed that, at inception, the carrier stream and the island were working assets with an agricultural or commercial function. He linked that to the planning chronology, submitting that when the farm was divided there was no dwelling, and that the planning application for conversion followed later (he cited March 1980), which in his submission reinforced that the stream and its associated obligations were installed for a productive purpose rather than for residential amenity. On that footing, he invited us to treat his current acquisition as including both the “factory” (his label for the stream infrastructure) and the “stock” (fish present in the stream), with the covenants evidencing an ongoing operational requirement to manage water levels for trout rearing rather than a merely aesthetic watercourse. The factual backdrop noted by the FTT, that the stream likely predated the

dwelling and was built when the land still formed part of a farm, was said to be consistent with his depiction of the history ([21]).

76. HMRC rightly point out the above points rely on inference and there is no evidence as such on what activity was previously carried out. Mr Brzezicki fairly accepted he had no evidence on what the farmer did with the trout. In any event the importance of historic usage should not be overstated. Historic usage is only useful in so far as it throws light on the character as at the effective date. There is nothing to suggest that, whatever the purpose for which the carrier stream was deployed by previous landowners, it would be inconsistent with the carrier stream and island being part of the grounds as at the effective date.

77. To the extent trout rearing, in and of itself, was advanced as some kind of different use, commercial or otherwise, then that suffers from same difficulty. Any such activity would not automatically prevent the land being considered grounds. The line of argument proceeds on the same flawed assumption that, if a plot of land has any commercial, or indeed any not purely dwelling-related use, it is incapable of being considered as grounds.

78. Crucially, there is nothing in the facts to indicate that any part of the island or carrier stream was being used in a way which was inconsistent with their being considered grounds.

79. In his comments on the draft version of this decision that was sent to the parties in advance of publication, Mr Brzezicki took issue with any suggestion that the carrier stream was redundant at the time of purchase, explaining how he set out in his evidence before the FTT the years he had spent searching for the correct property and assets to run his business. He highlighted how he had bought the carrier stream with the trout in it as a trout breeding and rearing facility, much as say a farmer might buy a field with livestock in it to add to a farm. We recognise the FTT made findings regarding Mr Brzezicki's efforts to find the right property, his plans for its use ([18]), and, given the life cycle of trout, that when Mr Brzezicki bought the Property in July 2020 the recently hatched fish would have provided trout stock to the River Meon ([17]). However none of these points detract from the wider difficulty that any such actual use of the land in this way, commercial or otherwise, would not, in the particular circumstances of this case, be inconsistent with the island or carrier stream being considered grounds.

80. As regards the character of the Property as a whole, the FTT found that the dwelling was "not grand" noting it was previously a stable block, that the views from the house were unaffected by the carrier stream and that the island was "not essential to the character of the house or its sense of space" ([76–78]). Noting that there is no requirement that all parts of grounds be necessary to the enjoyment of the dwelling (as established in *Hyman CA*), we do not consider any of these matters assist in showing that the stream and island were not grounds. If anything, the fact the stream did not affect the views from the house supports the case that, even if the stream had a commercial or other function, then that was not inconsistent with it being part of the grounds.

81. Having regard to factors and propositions listed in *Sutterwalla* which we consider are relevant to the facts of this case, our analysis may be summarised as follows.

- (1) The factors which either tend to support the island and stream constituting grounds or are not inconsistent with that conclusion are:
 - (a) The layout, proximity and extent of the land in contention are all consistent with land being grounds.
 - (b) As regards historic and future use, insofar as these throw light on use at completion, there is no evidence as regards that use which suggests that the land was being used in a way that could detract from the land being regarded as grounds.

There are no legal constraints inconsistent with the stream and island being part of the grounds.

(c) The carrier stream and island are sufficiently connected with the dwelling. They are under common ownership and are contiguous to the dwelling (being land which is adjacent to land which surrounds the dwelling).

(d) There was no usage at the effective date which was inconsistent with the carrier stream and island being grounds.

(e) The island is accessible via two footbridges, the carrier stream is accessible from the garden bank.

(2) The only factor which is more consistent with the carrier stream and island not being grounds is, having regard to the relative size (2 acres out of 6) and layout of the land, that the dwelling's privacy and views did not depend on the stream and island.

82. We should also not overlook the importance of the overall impression gained by photographs and plans. We have had the benefit of looking at the photos and plans ourselves (disregarding "staging" which may have been placed for property marketing purposes). To us, the island and stream look very much like part of the grounds. Visually the stream does not appear as a barrier or delineation; the land on the island side looks very much like an extension of the land which is accepted as being grounds on the garden side.

83. Taking the FTT's findings in the round and applying the correct multifactorial approach, there are significantly more factors pointing towards, or at least which are consistent with, the carrier stream and island being part of the grounds and only one quite minor factor pointing in the other direction. Standing back from the individual factors, a conclusion that the carrier stream and island are part of the grounds of the dwelling would be very much in line with the overall impression we take from the visual materials. Our overall evaluation is that the carrier stream and island are undoubtedly part of the grounds. Accordingly, the land that was transferred on the effective date was entirely "residential property" for SDLT purposes and so the SDLT rates in Table A applied, as HMRC argued, rather than those for mixed use property as Mr Brzezicki's case entailed.

84. For completeness, any argument regarding the fishing rights not falling within section 116(1)(c) fails because those rights benefit land within section 116(1)(b).

85. Our remade decision in relation to Mr Brzezicki's appeal against HMRC's assessment is accordingly that his appeal is dismissed.

CONCLUSION

86. HMRC's appeal against the FTT Decision is allowed.

87. We set aside the FTT Decision. Our remaking of that decision dismisses Mr Brzezicki's appeal against HMRC's SDLT assessment.

**JUDGE SWAMI RAGHAVAN
JUDGE MARK BALDWIN**

Release date: 18 March 2026

