[2021] UKFTT 248 (TC)

TC08194

Appeal number: **TC/2019/00525**

Stamp Duty Land Tax - residential or mixed use - woodland within curtilage of country house - whether 'garden or grounds of residence' - yes - whether mixed use - no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE HOW DEVELOPMENT 1 LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER CATHERINE FARQUHARSON

Sitting in public at Taylor House, Rosebery Avenue, London on 30 January 2020

Mr Patrick Boch, Counsel for the appellant

Ms Michelle Beveridge, litigation Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by The How Development 1 Limited ('the appellant') against a Closure Notice issued by the Respondents ('HMRC') on 18 July 2018 under Paragraph 23, Schedule 10 of the Finance Act 2003, refusing the appellant's claim for a refund of Stamp Duty Land Tax ('SDLT') in the sum of £204,250.

Background Facts

2. By a deed of transfer dated 2 March 2018 the appellant, which is a company engaged in property development, purchased 'The How' at the price of £2,800,000. The How comprises 15.7 acres of land or thereabouts, including the main house, the lodge house, outbuildings, areas formerly used as market gardens, orchards, gardens, large grounds and a wooded area to the south comprising approximately 2 acres, the boundary of which meets the River Ouse.

3. The deed of transfer described the property transferred as:

> "property known as The How, Houghton Road, St Ives Cambridgeshire PE27 6RP more particularly described in a Conveyance dated 1 October 1976 made between (1) Horace Victor Haigh and Herbert Buckingham Baker and (2) Kathleen Anne Wadsworth".

4. The conveyance dated 1 October 1976 described the property, insofar as relevant, as:

> "All those pieces of Freehold land situated in the parish of St Ives Huntingdon Cambridgeshire adjoining each other.. Together with the dwelling house, garage, Lodge and other buildings erected on the said land .. bounded on part of the south by The Thicket footpath....all which property is known as "The How" and contains in the whole 15 acres, two roods 27 poles or thereabouts and is more particular described in the Schedule and delineated on the plan contained in the Conveyance dated 29 November 1940 and made between Edith Jane Milburn (1) and Cyril Maples Haigh (2) and coloured pink."

5. The conveyance of 29 November 1940 contained a similar description and also included the schedule which set out the acreages of the several parcels of land included in the conveyance, which together totalled 15.7 acres. The hand-drawn plan annexed to the conveyance showed the land coloured pink and abutting on the south-western side of the southernmost part of the land, and partly on the south-eastern side, a wooded area known as 'St Ives Thicket'. The Thicket itself did not appear to extend into The How's grounds.

6. On the same date as the deed of transfer, the parties entered into a Licence to Occupy Agreement ("Licence") which allowed the seller Mrs Kathleen Anne Wadsworth to remain in occupation for a period of two months. The Licence described the 'permitted use' as 'residential dwelling'. The property is described in the agreement as "the land and buildings at The How, Houghton Road, St Ives, Cambridgeshire PE27 6RP, which shall include all fixtures and fittings and plant and machinery thereon".

7. Following completion, the appellant's solicitors completed and submitted the Stamp Duty Land Tax Return ('SDLT1') and selected '01' which classifies the purchase property as residential. The tax payable was £333,750.

8. On 20 March 2018, the appellant's tax advisors Cornerstone Tax wrote to HMRC advising that they had been instructed by the appellant and that in the SDLT1, The How had been misclassified as 'residential', whereas they were of the view that the property should in fact have been classified as 'mixed use', because The How included woodland to the south of the property "that does not subsist for the benefit of the property" under s 116 of the Finance Act 2003. Because of the misclassification, tax of £333,750 had been paid whereas the correct amount of tax due, using the rates in force for mixed use property at that date, would have been £129,500. They accordingly asserted that a refund of £204,250 plus interest was due to the appellant.

9. Section 116 Finance Act 2003 defines 'residential property' as:

"116(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 rates of SDLT chargeable are set out in s 55 FA 2003. Table A lists the residential rate and Table B the non-residential or mixed rate. Table A (the higher rates) applies only if the property is wholly residential, whereas if any of the property is non-residential, the whole of the property is treated as mixed use and the lower mixed rate of Table B applies.

11. HMRC replied that they would check the repayment claim under paragraph 12 Schedule 10 of the Finance Act 2003.

12. On 18 July 2018 HMRC issued a Closure Notice to the appellant and Cornerstone informing them that they had completed their check into the refund claim but had concluded that the woodland formed 'part of the garden or grounds' of the dwelling within s 116(1)(b) FA 2003 and therefore was classified as residential property. Furthermore, the woodland subsisted for the benefit of the dwelling by being a readily accessible amenity under s 116 (1)(c) FA 2003.

13. On 17 August 2018, Cornerstone appealed the Closure Notice pursuant to Paragraphs 35 (1) (b) and 36 (3) of Schedule 10 Finance Act 2003. The basis of the appeal was that HMRC's interpretation of the term 'garden and grounds' in s116(1) FA2003 was incorrect.

14. Cornerstone contended that the term was not defined in the statute and neither has its meaning been determined by case law. They referred to HMRC's Capital Gains Tax

Manuals relating to the principal private residence relief which provide guidance on the meaning of ‘garden and grounds’ as referred to in s 222 TCGA 1992: as below:

S222 Relief on disposal of private residence

1. This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in—

(a) a dwelling-house or part of a dwelling-house which is, or has at any time in his period of ownership been, his only or main residence, or
(b) land which he has for his own occupation and enjoyment with that residence as its garden or grounds up to the permitted area.

2. In this section “the permitted area” means, subject to subsections (3) and (4) below, an area (inclusive of the site of the dwelling-house) of 0.5 of a hectare.

3. In any particular case the permitted area shall be such area, larger than 0.5 of a hectare, as the Commissioners concerned may determine if satisfied that, regard being had to the size and character of the dwelling-house, that larger area is required for the reasonable enjoyment of it (or of the part in question) as a residence.

HMRC’s guidance is that ‘garden and grounds’ must take their everyday meaning:

> “*..woodland should not be defined by whether or not it has another identifiable use (i.e. if the owner decides to use the land for commercial activities or not). It is a question of whether the owner is permitted to use the woodland privately for ornamental or recreational purposes….*”

15. Cornerstone said that the woodland at The How is not used as part of the residence and is not within ‘the grounds’ of the property. They therefore argued that the woodland met the definition of ‘non-residential property’ under s 116 FA 2003 and The How should therefore be classed as ‘mixed use’.

16. HMRC replied that since the woodland was sold with the dwelling and was not used for any other identifiable purpose, it was considered to be part of the grounds of the property. Furthermore, any interpretation of the phrase for Capital Gains Tax should not necessarily be applied for SDLT purposes.

17. On 18 January 2019, following a review by HMRC upholding their decision and an extensive exchange of correspondence, the appellant lodged an appeal with the Tribunal.

Issue to be determined

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,

19. The land in dispute is the woodland situated to the south of the property. The issues for the Tribunal to determine are therefore:

(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

(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.

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.

Evidence

21. The joint document bundles of which there were three, included, copy correspondence between the parties, copies of the title deeds to The How, copy plans and maps showing the location of the wooded area, photographs, relevant legislation and case law authorities. A witness statement and oral evidence was 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 has historically and as it currently stands, been a mixed use property in rural land use terms.

Mr Warren's evidence

22. Mr Warren in his written statement says that he visited The How on 13 July 2019 to independently verify the site and its current and historic uses. The following are summarised extracts from his statement.

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.

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.

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. 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.

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".

Burden of proof

23. The burden of proof is on the appellant to prove that the property was not entirely residential for SDLT purposes. To do this the appellant must demonstrate that portions of the property are non-residential under s 116 FA 2003.

24. The standard of proof is the ordinary civil standard on the balance of probabilities.

Appellant's contentions

A. Does the woodland form part of the garden and grounds of the dwelling?

25. The appellant's case is that the woodland is agricultural land and does not form part of the garden and grounds of the dwelling within s 116 (1)(b) FA 2003.

26. Whilst s 116 provides a definition of 'residential property', there is no definition of garden and grounds within the SDLT statute. Therefore, alongside the statute itself, one must look to other sources in order to ascertain the scope of the expression. A definition can be determined by looking to recent SDLT case law, HMRC guidance and established Capital Gains Tax ('CGT') case law which provides discussion as to what constitutes 'garden and grounds'.

Wording of and background to s 116 FA 2003

27. The wording of sub-section 116(1)(b) FA 2003 is by definition at odds to the approach that has been taken by HMRC in this case, in that the sub-section concedes the possibility that not all the land sold with a dwelling might form part of its garden or grounds, and so might not be residential property. This is evident from the words 'is or forms part of'. If the intention had been to include all land sold with the dwelling, the section would have been worded as such.

28. The statutory definition in s 116 FA 2003 was derived from the provision which introduced residential property to the stamp duty regime (s 92B FA 2001). A definition of 'residential property' was introduced when the £150,000 limit for the exemption on land in disadvantaged areas was removed from non-residential land but retained for residential land from 10 April 2003. When land in a disadvantaged area was sold and some of it comprised of a dwelling, for the exemption it was necessary to apportion consideration, so that attributable to the dwelling and its garden and grounds was subject to the £150,000 cap and the consideration for the rest of the land was uncapped.

29. The definition was therefore written to allow for the possibility that there might be sales of dwellings with land where some may be classified as residential and some may not.

30. The Inland Revenue published guidance at that time in SP 1/03 was as follows:

> “30. Section 92 B (1)(b) includes within the definition of residential property “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)”. The test the Inland Revenue will apply is similar to that applied for the purposes of the capital gains tax relief for main residences (TCGA 1992, s222 (3)). The land will include that which is needed for the reasonable enjoyment of the dwelling having regard to the size and nature of the dwelling. “

31. The appellant therefore says that adopting HMRC’s guidance, the wording and intention of s 116(1)(b) FA 2003 supports their submission that the woodland readily falls outside of this provision.

SDLT Case Law

Hyman v HMRC

32. The recent case of *David Hyman and Sally Hyman v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKFTT 0469 (TC) confirmed that ‘garden or grounds’ is to be given its ordinary meaning. This is a First-tier Tribunal decision and therefore does not set a binding precedent; the decision is also currently under appeal. The Tribunal stated as follows:

> “It is common ground if I may use that word, that the hedged-in cultivated garden and the additional fenced and mown area are ‘garden or grounds’. ‘Grounds’ must be something different from, and additional to, ‘gardens’. "[Paragraph 37]
>
> The Oxford English Dictionary defines ‘grounds’ as ‘An area of enclosed land surrounding a large house or other building’. The Cambridge Dictionary’s definition is ‘land that surrounds a building’. [Paragraph 38]
>
> 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 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.” [Paragraph 6]

33. Applying the above definition in the context of The How, grounds could be said to include the market garden, the orchards and the large area of land and trees surrounding the dwelling. Whilst the orchard and the land surrounding the dwelling could be said to constitute agricultural land, they can be occupied with the house by those who own it and are naturally affiliated with the dwelling as a part of its grounds.

34. The same cannot be said to apply to the area of thick woodland to the south of the property running along the River Ouse. This is associated with the rest of The Thicket to the south-west of the property as opposed to the dwelling and cannot be ‘occupied with the dwelling’ as it is inaccessible from The How. The only way in which the owners of the house can occupy or enjoy the area of woodland is via the ‘permissive path’ which runs through the woodland and links the footpath used by the public when walking through The Thicket. The appellant is therefore only able to occupy or use this part of the property in the same way as members of the public and not with the dwelling as a part of its grounds.

35. On the basis of the definition of ‘grounds’ established in *Hyman*, the woodland cannot be said to form part of the grounds of The How.

Goodfellow v HMRC

36. The most recent case in this area is *Goodfellow v HMRC* (2019) UKFTT0750(TC) Whilst this case considered slightly different circumstances, the following commentary is useful in the instant case:

> "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."[Paragraph 17]

37. 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 describes as a 'fire break' and if removed from the property would not impact the character of the house or the occupants' ability to enjoy it.

38. The appellant therefore submits that in applying the commentary on grounds discussed in *Goodfellow*, the woodland cannot be said to form part of the grounds of The How.

SDLT HMRC Guidance

39. Whilst it is in no way suggested that HMRC's guidance is binding or elevated to be given the same force as the statute, in an area such as this, where there is very limited case law authority to assist in interpreting the width of the statutory provision it is extremely useful to consider.

40. As SDLT is a self-assessment tax, the taxpayer has only the guidance to rely on in order to determine what may or may not constitute residential land when filing and submitting an SDLT return.

41. HMRC's guidance (in line with the *Hyman* decision) indicates that 'garden or grounds' should be given its natural meaning.

> "land that is, or is to be, occupied or enjoyed *with* a dwelling as a garden or grounds (including any building or structure on that land) is taken to be part of that dwelling." (SDLTM00440).

It can be inferred that the woodland's lack of proximity to and relationship with the dwelling are therefore relevant factors when looking to whether the woodland forms part of its 'grounds' using the ordinary definition of the word.

42. Further guidance provides more clarity on how the use of the land should be construed when looking to whether it forms part of the garden or grounds (SDLTM00450):

a. "The aim of the legislation is to capture the real or true relationship of the land to the building at the time of the land transaction.

b. We should seek to establish the traditional or habitual use of the land to establish its true relationship to the building.

c. Use that is ephemeral or appears to be part of an artificial/contrived arrangement will not be indicative of the true relationship."

43. The true relationship of the woodland to The How is that it forms part of The Thicket and it is artificial and/or contrived to take the view that, simply because part of the woodland is included within the legal title, then it must necessarily form part of the natural grounds of the dwelling.

44. When looking at the use of the land, the guidance at SDLTMOO460 also states:

> "Certain types of land can be expected to be garden or grounds or be expected to be commercial land unless otherwise established. So paddocks and orchards will usually be residential, unless actively and substantially exploited on a regular basis."

45. A clear distinction can therefore be drawn between the aspects of the property which could be agricultural land but are occupied with the dwelling and therefore form part of its grounds and land which is not residential in nature without any form of residential use. In the instant case, the orchards consist of land which naturally falls within the garden and grounds of the dwelling. Had they been exploited for commercial use they would not have fallen within s 116(1)(b) FA 2003. Contrastingly, the densely populated woodland is not naturally used with the house and is not residential in nature. It therefore falls outside of s 116(1)(b) FA 2003.

46. The guidance provides that a balanced judgement must be formed, taking a wide range of factors into consideration and no single factor is likely to be determinative by itself (SDLTMOO455). Therefore, HMRC are incorrect to conclude that because the woodland was purchased with the property that it necessarily forms part of the grounds of the dwelling, without considering the other more relevant factors.

47. The guidance further indicates that the layout of the land and outbuildings is a relevant factor to consider (SDLTM004165):

> "if 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."

48. The woodland is not laid out as part of the garden and grounds of the dwelling for any form of domestic enjoyment. It forms part of a greater expanse of ancient woodland which is inaccessible from the dwelling itself without the assistance of forestry machinery.

49. Finally, the guidance provides a number of geographical factors to be taken into account (SDLTM00470):

a. Where the land is physically close to the dwelling and easily accessible from it or separated by a feature which can be easily crossed such as a small road or river, or even other land owned by third parties, this is suggestive of 'garden and grounds'.

b. However, the less accessible the land is from the dwelling and the greater the degree of separation, the less the land is likely to be 'garden and grounds'.

c. The extent/size of the land in question will also be relevant in relation to the building. A small country cottage is unlikely to command dozens of acres of grounds but a stately home may do.

d. Large tracts of fells/moorland etc. (even if purchased with a dwelling) are unlikely to be residential in nature. The test is not simply whether the land comprises of garden and grounds, but whether it comprises of the garden and grounds of a dwelling.

50. When applying these geographical factors to The How, the woodland clearly falls outside of its 'garden and grounds' because:

a. The land cannot easily be accessed from the dwelling;

b. The property already has garden and grounds commensurate with the nature and size of the dwelling consisting of over 400 trees in the garden and grounds with an additional 500 trees in the orchards. The section of the woodland included within the title is separate from and additional to this;

c. HMRC assert that it forms part of the grounds because it was purchased with the dwelling, yet the guidance specifically states that land which is not residential in nature, such as fells/moorland, does not become such simply because it has been purchased with a dwelling;

d. The woodland must comprise of the grounds of the dwelling in question, not just be capable of being the grounds of any dwelling. The How has extensive gardens and grounds of its own to which it is naturally affiliated. The woodland is ancillary to this.

51. In applying the various pieces of HMRC SDLT guidance to the facts in this case, it is clear that the woodland falls outside of HMRC's definition of grounds. This therefore supports the appellant's contention that the woodland falls outside of s 116(1)(b) FA 2003 in that HMRC's reasoning to the contrary departs from their own guidance on this area of law.

Should CGT case law be considered for the purposes of SDLT?

52. Whilst the definition of 'garden and grounds' for Capital Gains Tax purposes relates to Principal Private Residence Relief ('PPR Relief') rather than to determining a rate of tax, the lack of definitive case law in this area obliges the Tribunal to seek assistance from other sources

a. As SDLT and CGT taxes concern each end of a property transfer, the symmetry of taxation and relief from taxation should be considered collectively;

b. As the cases put forward signify some of the only tax case law which seeks to determine the extent of land which should fall within a relevant rate or relief, they should be considered with the appropriate weight attached without fixation on the obvious differences between the taxes.

53. It is clearly preferable that land is classified in a similar manner on a purchase and sale for taxation purposes. There is no evident reasoning why the contrary would be desirable. Whilst one relates originally to the stamping of legal paperwork to confirm ownership and the other taxes the gain accrued during the ownership, this is reflected

in the relevant rates and nuances of the taxes. The underlying status of the land (i.e. residential, commercial or mixed) should be consistent as this is usually a question of fact. The statutory language used in each provision is very similar, with s 222(1) TCGA 1992 including "land which he has, for his own occupation and enjoyment with that residence as its garden and grounds up to the permitted area".

54. The SDLT legislation is worded in the same way by including 'land which forms part of the garden or grounds' of a dwelling as residential property. The fact that very similar wording is used in each statute relating to the separate taxes also signifies an implied fluidity of meaning between the provisions.

CGT case law relating to garden and grounds

55. The CGT legislation (s 222(3) TCGA 1992) requires consideration of the 'size and character of the dwelling house' and whether a 'larger area is required for the reasonable enjoyment of it'. These are both questions which the SDLT guidance (SDLTM00470) requires us to consider when looking at s 116 FA 2003.

56. Therefore, whilst the cases primarily relate to ascertaining the amount of PPR relief available, consideration of similar factors such as the size and nature of the dwelling, the degree of separation from and proximity to the dwelling is similarly required.

57. In the case of *Longson v Baker* (2000) 73 TC 415, consideration was given to the size and character of the residence when looking to the amount of land required for the reasonable enjoyment of that residence. The test was whether the land was necessarily required for its enjoyment, not whether it was desirable or convenient:

> "The statute requires me to look at the dwelling house and determine the area of land which is 'required for the reasonable enjoyment' of the dwelling house as a residence, having regard to 'the size and character of the dwelling house'. Accordingly, I am not permitted to take into account the particular requirements of the owner of the dwelling house: it is the house to which I must look and not the wishes, desires or intentions of any particular owner of the house. [p248 c-d]
>
> I have come to the conclusion that it may have been desirable or convenient for the taxpayer to have a total area of 7.56 hectares to enjoy with the farm, but such an area is not in my judgement required for the reasonable enjoyment of the farm as a residence having regard to its size and character." [p249 j]

58. Whilst HMRC confirmed in (SDLTM00480) [2019] that the 0.5 hectare restriction for PPR does not apply for SDLT purposes, this does not prevent consideration of the discussion on the CGT case law of the specific issue of what constitutes garden or grounds and what factors should be taken into account.

59. The use of 0.5 hectares to determine the land accompanying a residential property is a theme in both SDLT and CGT. For example, Sch 6A FA 2003 which relates to relief for a property-building company acquiring the current dwelling of individuals purchasing a new property from them. Sch 6A FA2003 para. 7(3) and (4) provide a definition of 'permitted area' which is in line with the CGT definition in TCGA 1992, ss 222(1)-(4), namely 0.5 of a hectare with a facility for a larger area to be determined where required for the reasonable enjoyment of the house. Therefore, whilst there is no strict rule relating to 0.5 of a hectare in the context of SDLT, this is clearly a relevant

consideration when looking to what might fall within the garden and/or grounds of a dwelling.

60. In applying the findings of the CGT case law to the facts of the present case, it is clear that the woodland is not required as an integral part of the garden or grounds of the dwelling. HMRC contend in their Review Conclusion Letter that:

> "it is a reasonable judgement that the woodland forms part of the grounds of the dwellings, as it is reasonable to expect a large amount of grounds and gardens to come with this dwelling."

61. However HMRC's view is not supported by Mr Warren evidence:

> "extends some 6.3 hectares (15.52 acres), of which two acres of mature broadleaf woodland is located at the southern boundary, beyond the curtilage of the natural boundary of the garden and grounds, and beyond some steep banking between the estate and the River Ouse."

The How therefore has a substantial amount of land (comprising of both garden and grounds) surrounding it. It is not therefore necessary to include the woodland within the definition of the 'grounds' of The How in order to attribute sufficient land to the dwelling as required for its reasonable enjoyment.

Additional submissions made by the Respondents

62. The only factor which ties the woodland to the dwelling is the fact that it was purchased with it on the same legal title. This is the main reasoning quoted by HMRC in their decision. However, this should in no way be a determinative factor when considering the relationship between the land and the dwelling.

63. The only other reason cited by HMRC is that the Licence Agreement states the permitted use of the land and buildings on the property to be 'residential' as opposed, to mixed or commercial use. HMRC then use this to reach the conclusion that, as there is no mention of 'other use' the land must therefore be wholly residential.

64. This appears to be entirely at odds with both the statutory test in s 116(1) FA 2003 and the extensive HMRC guidance in this area. The statute includes no requirement for alternative *use* but instead focuses on the relationship between the land and the dwelling (i.e. whether it forms part of its garden or grounds or subsists for the benefit of the dwelling). Similarly, the guidance, whilst citing use as a relevant factor, in no way suggests that the absence of any alternative use automatically causes the land to be classified as residential regardless of the underlying nature of the land itself. There is therefore no authority to support HMRC taking such an approach.

B. Does the woodland subsist for the benefit of the dwelling?

65. The woodland does not subsist for the benefit or the dwelling. In Mr Warren's opinion:

a. The land is agricultural in nature and cannot be accessed without 'suitable forestry machinery' due to the fact that it is planted on a steep bank;

b. The land is a continuation of the ancient woodland and nature reserve known as 'The Thicket' which constitutes densely populated woodland, accessible only via the permissive footpath running through it for public use;

c. The woodland serves members of the public recreationally along the permissive footpath. If the occupants of The How wished to enjoy the land recreationally, they would need to exit their property and access it via the Thicket footpath which can be accessed to the south-west of the property via Thicket Road;

66. There is therefore no aspect of the woodland which can be said to subsist for the benefit of The How any more than The Thicket to the south-west of the property can be said to provide benefit to the occupants of the dwelling.

67. On the basis that the woodland does not subsist for the benefit of the dwelling and does not fall within the natural 'grounds' of The How, the property can be correctly classified as 'mixed use' as there are aspects of it which fall outside of s 116(1) FA 2003.

HMRC's case

68. The transfer deed dated 2 March 2018 describes The How by reference to earlier conveyances, a plan and a schedule. The property contains 15.7 acres which clearly include the wooded area. The entirety of the land described in the conveyance are the grounds of the dwelling and is therefore residential property. The woodland exists predominantly for the recreation and amenity of the dwelling's owners and occupants. It cannot be used for anything else. The actual use or non-use to which the land is put, is not relevant.

69. The appellant relies on the Capital Gains Tax Manuals relating to PPR relief for assistance in determining the definition of garden and grounds. However, the CGT guidance does not carry across to SDLT. The underlying legislation is fundamentally different. CGT looks to restrict a relief for principal private residence, so limits the extent to which gardens and grounds can come within that relief, whilst SDLT looks purely to what are the garden and grounds of a particular dwelling and there is no restriction on the size. The SDLT legislation does not refer to CGT definitions.

70. The appellant argues that the wooded area 'is not defined by whether or not it has another identifiable use (i.e. if owner decides to use the land for commercial activities or not) but it is a question of whether the owner is permitted to use the woodland privately for ornamental or recreational purposes'. The use of the land for ornamental or recreational purposes is not the statutory test and is therefore irrelevant. As long as the wooded area remains an accessible amenity available to the dwelling's owners and occupants to use recreationally or ornamentally, that is sufficient.

71. It is not HMRC's position that the use to which any land is put to by proprietors is determinative in deciding whether it is residential in line with the Legislation. However, if there is evidence of the land being used for commercial purposes then it is a factor that would suggest possible non-residential/mixed use. This is a question of fact in each case and there is no such evidence in relation to the wooded area to support the mixed use classification proposed.

72. The grounds of The How, including the woodland were all part of the property. Thus the Lodge House, outbuildings, areas formerly used as market gardens, former tennis courts, orchards and the wooded area to the south were all part of The How and commensurate in nature and size with the type of house. The How is clearly a country house and would be expected to have large gardens and grounds, some of which may be woodland.

73. At the time of the purchase of The How by the appellant both parties were very clear and accepted that the property was residential. This is borne out in the transfer deed dated 2 March 2018 and the Licence of even date which permitted the seller to occupy the property after the sale. Both define the permitted use of the property as 'residential dwelling'.

74. The appellant was represented at the time of the transfer by solicitors and when the SDLT1 form was completed. They must have been advised as to the correct classification. No cogent evidence has been produced, to support the suggestion of mis-classification.

Discussion

75. Mr Warren's evidence indicated that The How is both historically and presently "agricultural/mixed use land". We do not accept this. There is no evidence of the use or exploitation of the woodland for commercial purposes or indeed any purpose other than that of woodland which forms a natural hillside barrier between The How and the River Ouse. It provides privacy and security to The How and enhances its setting. The woodland's use would not fall within the commonly accepted meaning of 'agriculture' or fall within the definition of 'agriculture' under section 109 of the Agriculture Act 1947.

76. We do not place any reliance on the description of The How in any of the Conveyances or the Licence to Occupy. Those documents 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. It is however material that the woodland falls within the title to the property. It is within its legal curtilage. 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.

77. The SDLT legislation does not define the expression "garden or grounds" so the expression must be given it its ordinary meaning, in the context of the legislation under interpretation. We agree with the Tribunal's conclusions in *Hyman* and *Goodfellow* that 'grounds', particularly when they surround a large country house should have a wide meaning reflecting the character of the property. As stated by Judge McKeever in *Hyman* '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.

78. We do not agree that it is necessary to look to other sources in order to ascertain the scope of the expression 'garden or grounds'. We accept that for certain purposes the expression must be limited. Mr Boch referred us to HMRC's guidance and that for the purposes of capital gains tax relief for main residences 'garden or grounds' includes land which is needed for the reasonable enjoyment of the dwelling, having regard to the size and nature of the dwelling (TCGA 1992, s 222 (3)), and that we should follow that approach in classifying the woodland as non-residential.

79. The fact that very similar wording is used in legislation relating to other taxes may signify some fluidity of meaning between the provisions, but legislation must be interpreted purposively. By definition, CGT tax concessions must have limitations but it does not necessarily follow that SDLT legislation should be applied in the same way. Although a principal private residence is not a chargeable asset for CGT purposes, a CGT liability may arise when a property is disposed of which has been used partly as a residence and partly for other purposes. It is therefore necessary that there are limitations on what 'garden and grounds' can include, otherwise PPR relief would be open to abuse. The PPR exemption is limited to the residence itself together with grounds and gardens of up to half a hectare in area. However larger areas may be included in the exemption if they are warranted by the size and type of residence.

80. We agree that the legislation relating to SDLT and CGT does have some fluidity of meaning and can be 'read together'. The area of land included in PPR relief may be influenced by the size and nature of the dwelling and for SDLT purposes the grounds of a dwelling should share a similarly wide interpretation.

81. The position and layout of the land and outbuildings is a relevant factor to consider if 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. The appellant argues that because the densely populated woodland is not naturally occupied with the house and is not residential in nature, it therefore falls outside of s 116(1)(b) FA 2003. 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.

82. Both parties agree, as does the Tribunal, that 'garden and grounds' should take their ordinary every day meaning which reflects HMRC's guidance. Although the appellant cites the *Hyman and Goodfellow* cases as supporting it interpretation of the word 'grounds' as excluding the woodland, we do not share that interpretation. It our view *Hyman and Goodfellow* both support HMRC's case that the word 'grounds' would in the case of a large country house with large gardens and grounds very often include some woodland whether or not it is actively used for ornamental and amenity purposes.

83. The use of the land should be considered when ascertaining whether it forms part of the garden or grounds. Certain types of land can be expected to be garden or grounds, so paddocks and orchards will usually be residential, unless actively and substantially

exploited on a regular basis. That logic applies equally to woodland. There is no suggestion of any previous commercial activity in the recent past and whatever may happen in the future has no relevance in determining the current status of the woodland for the purposes of SDLT.

84. Although planning law is in itself not determinative, 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. 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.

85. The appellant's solicitors who acted on the purchase completed the SDLT return on the basis that the whole of the property was residential, i.e., the garden, grounds, orchards and woodland were all part of The How. Neither they nor their clients appear to have queried the woodlands classification.

CONCLUSION

86. For the reasons set out above the Tribunal finds that the whole of The How including the woodland is residential within s116(1) FA2003 with no non-residential element. It follows that the appeal must be dismissed. Accordingly, SDLT has been correctly charged and paid and no refund is due.

87. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 15 JANUARY 2021