Neutral Citation Number: [2022] EWCA Civ 185

Case No: CA-21-000603
(Formerly A3/2021/0919)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr Justice Morgan, Judge Jonathan Cannan
UT/2019/0172_UT/2020/0021_UT/2020/0027

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 February 2022

Before :

LORD JUSTICE LEWISON
LADY JUSTICE SIMLER
and
LORD JUSTICE SNOWDEN

- -

Between :

(1) DAVID HYMAN AND SALLY HYMAN **(2) CRAIG GOODFELLOW AND JULIE GOODFELLOW**	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -
- -

PATRICK CANNON (instructed by Cornerstone Tax Limited) for the **Appellants**
JAMES HENDERSON & CALYPSO BLAJ (instructed by **HMRC Solicitor's Office**) for the **Respondent**

Hearing date : 8 February 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 2pm on Thursday 17 February 2022.

Lord Justice Lewison:

Introduction

1. The acquisition of an interest in land may attract stamp duty land tax ("SDLT"). SDLT is charged at a different rate depending on whether the relevant land consists entirely of residential property on the one hand; or consists of or includes property that is not residential property on the other. The former rate is higher than the latter. The definition of "residential property" includes "land that is or forms part of the garden or grounds" of a dwelling. The issue on this appeal is whether there is an objective quantitative limit on the extent of the garden or grounds that fall within the definition.

2. The UT (Morgan J and Judge Cannan) held that there was not. The taxpayers in these cases were therefore liable to pay SDLT at the higher rate. Their decision is at [2021] UKUT 68 (TCC), [2021] STC 740. The taxpayers appeal.

The legislative framework

3. SDLT is chargeable under the Finance Act 2003 on land transactions. Any acquisition of a chargeable interest is a land transaction: section 43 (1). A chargeable interest is an estate, interest, right or power in or over land: section 48 (1) (a). Whether a land transaction is chargeable to SDLT is governed by section 49. The transactions in the current appeals are all chargeable transactions.

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

5. Section 116, which is the key provision in these appeals, defines residential property. It relevantly provides:

> "(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."

6. The question we have to decide is the meaning of paragraph (b) of that definition.

The facts

7. The relevant facts can be briefly stated.

8. Mr and Mrs Hyman own a property known as "The Farmhouse", near St Albans. The property comprised a house and 3.5 acres of land. They bought the property on 23 October 2015. The house and land formed a roughly rectangular piece of land. The house was situated within a rectangular cultivated garden. Outside this garden was a large barn in a bad state of repair. There was a further garden referred to as a "secondary garden". Most of the rest of the property was a meadow. On one side of the property was a bridleway which was separated from the garden and the meadow by hedges.

9. Dr and Mrs Goodfellow own a house at Heathermoor House, Hale Purlieu, Fordingbridge, Hampshire. The property consists of a house and 4.5 acres of land. They bought the property on 21 March 2016. The land comprised gardens, a swimming pool, garaging, a stable yard and paddocks. It was argued on behalf of Dr and Mrs Goodfellow that a room above a garage had been used by the vendor as an office and was not residential property. It was further argued that the stable yard and paddocks were not residential property.

10. In each case the FTT found that the entirety of the land fell within section 116 (1) (b). Those decisions were based on the FTT's characterisation of the land in question, simply as a question of fact. The decisions of the FTT were upheld by the UT.

Difficulties in interpretation

11. Mr Cannon, on behalf of the taxpayers, stressed the brevity of the statutory language. He gave us a number of examples, drawn from his own experience, of cases where the taxpayer and HMRC had been in dispute about whether a particular parcel of land did or did not fall within the definition of "residential property" in section 116. I do not doubt that there will be cases in which there is room for reasonable disagreement. In view of the difficulties, Mr Cannon pressed upon us the desirability of a workmanlike and coherent test. His suggestion was that a test of whether land was required for the reasonable enjoyment of the dwelling was such a test.

12. Whether a more prescriptive test would be desirable is, at bottom, a question of policy. We are not concerned with such questions. The only question for us is whether that is what section 116, as enacted, actually means. It is not uncommon for Parliament, even in a taxation context, to use coarse-grained words whose outer limits are left to the courts and tribunals to work out: "plant", "emoluments" and "resident" are but three examples.

The argument

13. In essence, the argument for the taxpayers is that in order for garden or grounds to count as residential property, they must be needed for the reasonable enjoyment of the dwelling having regard to its size and nature. In each case it was argued that the extent of the garden or grounds exceeded what was needed for the reasonable enjoyment of the relevant dwelling with the consequence that each of the taxpayers was only liable to pay SDLT at the lower of the two rates. The difference in Mr and Mrs Hyman's case is £34,950; and in Dr and Mrs Goodfellow's case it is £48,500.

14. If this legal argument is wrong, and it is simply a question of fact whether the land in question forms part of the garden or grounds of the relevant dwelling, it is not suggested that the FTT (which found the relevant facts) was wrong. It is important to emphasise that the argument is not about what is meant by the phrase "garden or grounds." The argument is that, whatever that phrase means, there is an objective external limiting factor which precludes "garden or grounds" from being residential property. That limiting factor is that the garden or grounds must be required for the reasonable enjoyment of the dwelling.

15. Mr Cannon does not suggest that the proposed limitation is in the express words of section 116 (1) (b) itself. But, he says, HMRC (then the Commissioners for Inland Revenue) had published guidance on analogous legislation which was extant at the time that what became the Finance Act 2003 was making its way through Parliament. In enacting section 116 in the way that it did, Parliament should be taken to have had that guidance in mind and to have intended it to be equally applicable to section 116.

16. In support of this argument, he relies on passages in Bennion, Bailey and Norbury on Statutory Interpretation (8th ed) ("Bennion"). At paragraph 24.10 the editors say:

> "While views expressed by officials are not generally admissible they may be relevant if expressed in public before an Act is passed. For example, the drafter of a consolidation Bill will give public evidence to Parliament and there seems to be no reason why this kind of material should not be referred to on the basis that it forms part of the material that was in the contemplation of Parliament at the time at which the Act was passed"

17. In *R v Wandsworth London Borough Council, ex p Beckwith* [1996] 1 WLR 60 the House of Lords rejected an argument that counsel sought to support by relying on guidance issued by the Department of Health. Lord Hoffmann said:

> "'The opinion of the department is entitled to respect, particularly since I assume that the Act was drafted upon its instructions. But in my view this statement is simply wrong."

18. Commenting on that decision in paragraph 24.17 the editors of Bennion say:

> "There may, of course, be cases where guidance was available in draft during the passage of a Bill through the legislature. In that case it forms part of the relevant contextual material to be borne in mind when construing the resulting Act."

19. Based on these passages, Mr Cannon argues that HMRC statements of practice in relation to analogous legislation should be taken into account in interpreting section 116 (1) (b). The particular statement on which he relies was concerned with section 92B of the Finance Act 2001, which was introduced as an amendment made by the Finance Act 2002. That section concerned stamp duty relief in disadvantaged areas. The definition of residential property in that section included:

> "… 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)."

20. There is, of course, a strong verbal similarity between that definition and section 116 (1) (b). HMRC's guidance in relation to the definition in section 92B, contained in SP 1/03 Stamp Duty Disadvantaged Areas Relief (April 2003), was this:

> "The test the Inland Revenue will apply is similar to that applied for the purposes of the capital gains tax relief for main residences (section 222(3) of the Taxation of Chargeable Gains Act 1992). 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."

21. Since the words of section 92B and section 116 (1) (b) are closely aligned, Mr Cannon argues that section 116 (1)(b) should be given the same meaning as section 92B. In support of that submission, Mr Cannon sought to rely on a statement in Parliament by the Financial Secretary to the Treasury (Dawn Primarolo MP) as the bill which became the Finance Act 2002 was passing through its committee stage in the House of Commons. In response to a proposed amendment to the bill, she said that HMRC would produce a statement of practice to deal with what kind of building would count as residential property. I assume that that is the origin of SP 1/03. The statement itself was not in existence at that time; but it came into existence at or shortly before section 92B was brought into effect by regulations. It follows that that guidance was not available (even in draft) during the passage of the bill through Parliament. It therefore falls outside the principle as stated in Bennion.

22. Before the UT, Mr Cannon also relied on guidance given by HMRC after the Finance Act 2003 had passed into law. That guidance was in similar terms to that I have quoted, and related specifically to section 116; although it was altered in 2019 (after the relevant transactions in these appeals). But Mr Cannon no longer relies on that guidance. His submission is confined to the guidance that he says Parliament must be taken to have had in mind when considering the Bill that became the Finance Act 2003.

The role of external materials

23. Our task is made much easier by the very recent authoritative restatement by the Supreme Court of the role of external materials in statutory interpretation. In *R (on the application of O) v Secretary of State for the Home Department* [2022] UKSC 3 Lord Hodge, writing for the majority, said by reference to *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, that the object of statutory interpretation is to identify the meaning borne by the words of an Act of Parliament, in its statutory context; and that citizens should be able to rely on what they read in Acts of Parliament. He went on to say this at [30]:

> "External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and

> Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury* on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."

24. At [32] he said:

> "In their written case the appellants sought to support their contention that a child's acquisition of substantial ties with the UK by spending time in the UK in the first ten years of his or her life created a complete entitlement to citizenship by referring to statements by a Government minister, Timothy Raison, to the Standing Committee which considered an amendment which became section 1(4) to the 1981 Act. Such references are not a legitimate aid to statutory interpretation unless the three conditions set out by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, 640 are met. The three conditions are (i) that the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity; (ii) that the material must be or include one or more statements by a minister or other promoter of the Bill; and (iii) the statement must be clear and unequivocal on the point of interpretation which the court is considering."

25. Of these conditions, only the second is arguably satisfied in the present case in relation to the statement made by the Financial Secretary. I do not consider that these criteria can be used to create an ambiguity where none would otherwise exist; and I consider that it is unarguable that the third of the conditions is satisfied where the Minister in question did not purport to express a view about what the draft legislation actually meant. Nor did the proposed amendment she was addressing concern itself with the quantity of land that could count as "garden or grounds". It was concerned with a different question: namely what kinds of use might qualify as residential property. In my judgment the statement by the Financial Secretary to the Treasury is inadmissible.

26. There is another principle of statutory interpretation (usually referred to as the *Barras* principle). This principle is that where words in an Act of Parliament have been given a clear and authoritative *judicial* interpretation, and Parliament uses the same words in a subsequent Act in a similar context, those words will be taken to have been used in the same way as the courts had previously interpreted them: *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402. But since we are concerned with guidance given by HMRC rather than with court rulings, that principle is not in play.

27. Although the guidance on which Mr Cannon relies was in existence as the bill which became the Finance Act 2003 passed through Parliament, it was given in the context of stamp duty; not SDLT. As the Upper Tribunal pointed out in *Pollen Estate Trustees v HMRC* [2012] UKUT 277 (TCC), [2012] STC 2443 at [19]:

> "SDLT is an entirely new tax invented to replace stamp duty because of the unsatisfactory nature of that tax [i.e. stamp duty]. It is clearly not the case that the new tax carried with it any of the intellectual or other baggage of the old tax."

28. That observation was approved in this court: [2013] EWCA Civ 753, [2013] 1 WLR 3785. There is no reason, therefore, why Parliament should have intended that the guidance given in relation to stamp duty should apply to SDLT. Second, the guidance given by HMRC did not, even in its own terms, purport to be an *interpretation* of section 92B. At best it amounted to guidance on how HMRC would, in practice, apply a test. Third, HMRC did not explain why they decided to apply a test derived from the express wording of section 222(3) of the Taxation of Chargeable Gains Act 1992 to section 92B. Section 222 was in very different terms. It relevantly provided:

> "(1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in—
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> (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) Where the area required for the reasonable enjoyment of the dwelling-house (or of the part in question) as a residence, having regard to the size and character of the dwelling house, is larger than 0.5 of a hectare, that larger area shall be the permitted area."

29. Thus section 222 (2) contained a bright line limit on the amount of garden or grounds that would automatically qualify for relief from CGT, whether or not it was required for the reasonable enjoyment of the dwelling-house; but that limit could be extended under sub-section (3). Neither section 92B nor (now) section 116 contains either that limitation or the possibility of relaxation. The relationship between section 222 and section 92B is not explained in HMRC's guidance.

30. Moreover, section 222 of the Taxation of Chargeable Gains Act and section 116 of the Finance Act perform entirely different functions. Section 222 is concerned with the extent of relief from CGT on a disposal of an individual's only or main residence. It is not concerned with characterising the nature of the property concerned; merely with imposing an objective spatial or quantitative limit on the amount of such land that

qualifies for tax relief. What I mean is this. Suppose that a dwelling house has garden or grounds extending to, say, 3 hectares. Suppose that it can be shown that grounds extending to 2 hectares can be justified as required for the reasonable enjoyment of that dwelling-house. The remaining hectare will still form part of the garden or grounds of the dwelling-house: it will just not attract relief from CGT. By contrast, section 116 is concerned with characterising property either as residential property on the one hand, or non-residential property on the other. That characterisation of property applies generally for the purposes of SDLT; not merely to the availability of one form of relief against tax. Land does not cease to be residential property merely because the occupier of a dwelling house could do without it.

31. As Bennion says at the start of paragraph 24.17, guidance by a public authority may be persuasive authority "depending on the quality of the reasoning". Where, as here, there is neither reasoning nor explanation, SP1/03 cannot be given any significant weight. In my judgment, HMRC's interpretation of section 92B (if that is what it was) was simply wrong.

Result

32. The ambitious exercise on which Mr Cannon has embarked is, in effect, to imply into an Act of Parliament a limitation which is not there. In my judgment that is not an exercise which enables the court to interpret the words of section 116 of the Finance Act 2003 in the way that he suggests. As Lord Salmon put it in *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 160:

> "For a court to construe a statute is one thing but to graft a provision on to it on the ground that the court thinks it is reasonable to do so would bring the law into chaos … For the courts to graft a provision on to a statute or a contract is a practice which is entirely foreign to our jurisprudence and, as far as I know, to any other.

33. In agreement with the UT, I consider that the words of section 116 are clear and unambiguous; and do not produce absurdity. The suggested qualification is not there. I would dismiss the appeals.

Lady Justice Simler:

34. I agree.

Lord Justice Snowden:

35. I also agree.