



Neutral Citation: [2024] UKFTT 00845 (TC)

Case Number: TC09294

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[Location/By remote video hearing]

Appeal reference: TC/2023/09126

SDLT: Section 116 of and Schedule 55 to Finance Act 2003, whether all land acquired was (a) residential property or (b) residential and non-residential property. Yes to (b). Appeal allowed.

Heard on: 3 July 2024

Judgment date: 20 September 2024

Before

**TRIBUNAL JUDGE HEATHER GETHING
MEMBER IAN SHEARER**

Between

Mr Christopher Brzezicki

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Brzezicki and Mr Bugden of Grosvenor Tax

For the Respondents: Ms Man and Mr Jones litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This case concerns whether

(1) The property acquired by Mr Brzezicki on 3 July 2020 comprised residential property only or a mixture of residential and non-residential property as defined in section 116(1) Finance Act 2003, and therefore,

(2) whether the rate of stamp duty that should be paid by Mr Brzezicki should be the higher rate specified in Table A (residential property) of section 55 of Finance Act 2003 or the lower rate specified in table B (residential and non-residential property).

All references to a section or paragraph in a schedule below are references to sections of and paragraphs in schedules to the Finance Act 2003.

2. It is common ground that part of the property acquired by Mr Brzezicki from the road up to the “carrier stream” and including a six-bedroom house is residential property. The dispute concerns the nature of the property from the carrier stream to the western boundary.

THE LAW

3. Section 42 charges Stamp Duty Land Tax (SDLT) on “*land transactions*” which term is defined in section 43 as, “*any acquisition of a chargeable Interest*”.

4. Section 43(6) provides that “*references in this part to the subject matter of a land transaction are to the chargeable interest acquired (“the main subject matter”), together with any interest or right appurtenant or pertaining to it that is acquired with it.*”

5. Section 48 defines “*chargeable interest*” as an “*estate, interest, right or power in or over land in England...*”

6. Section 55 contains two tables of rates of SDLT. Table A applies to the consideration paid for a chargeable interest that comprises only residential property. Table B applies to the consideration for a chargeable interest that comprises residential and non-residential property.

7. Section 116 provides as follows:

“(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 the land within paragraph (b);*

and “non-residential property” means any property that is not residential property.”

8. It is accepted by the parties that to determine whether property is residential or non-residential, a multi-factorial test must be applied.

9. The burden of proof is on Mr Brzezicki to show that HMRC’s SDLT assessment on the basis that all the property purchased was residential property, was incorrect. The standard of proof is the balance of probabilities.

10. We heard oral evidence from Mr Brzezicki. He was not cross-examined by HMRC. We found him to be an honest man and very knowledgeable about brown trout fishing, the life

cycle of the brown trout and the features and function of manmade carrier streams. As his oral evidence was not challenged by HMRC, I accept his evidence.

THE FACTS

We find the following facts as proved. Tribunal Member Shearer has made a dissenting decision and where he disagrees with the facts set out below he has so indicated in his dissenting decision:

11. On 3 July 2020 Mr Brzezicki completed the purchase of the property described at [13] below comprising over 6 acres forming part only of title number HP551862.

12. The vendors of the property were the children of the former owners who had occupied the property for 40 years. The property was not occupied by the vendors after the death of their parents. The vendors retained a small piece of land comprised in the title near the road.

13. The “*property*” comprised:

(1) A dwelling house named Long Meadow House in the northeastern corner of the plot nearest the road. The dwelling is a two storey L shaped building and had been converted from stables in the 1980s, and planning permission was obtained.

(2) A large garden laid mostly to lawn surrounding the dwelling house.

(3) An area of approximately 2 acres on the western boundary of the plot which is bounded by the River Meon on the western side and by a “carrier stream” on its eastern boundary. The River Meon is a chalk stream, and natural habitat of brown river trout. The carrier stream is a manmade stream which is around six feet wide and is connected to the River Meon at both ends. At the upstream end there is a sluice (and the plans show it is part of the island) which controls the flow of water from the River Meon into the carrier stream. At the other lower end there is a feature which enables a grille to be lowered to prevent fish from escaping or others entering. There is a waterfall at the upper end near the sluice which ensures the water flowing through the carrier stream is highly oxygenated, a shallow section with a gravel bed to allow spawning fish to create nests and then there is a deeper section which would capture any surplus water to run off and be captured to prevent damage to nests and the newly laid eggs. The shallow bed is 12 inches higher than the lower section. The sluice is opened in the winter to maintain the flow of water during the breeding season and closed in the summer. In the well of the waterfall and in the stream itself there is a large area of ranunculi plants which facilitates the production of water insects to enable the young fish to feed before being released into the River Meon. I accept Mr Brzezicki’s explanation that the sluice is not a flood defence but is a feature to secure flow of water in the carrier stream in the breeding season.

(4) The area of land between the river and the carrier stream covers two acres. It is effectively an island cut off from the rest of the land comprised in the title by water on all sides. There are two small footbridges connecting the two pieces of land. We refer to this area of land as the island.

(5) There is a fisherman’s cabin on the island at the far end away from the house. It had running water, an electricity supply (in need of upgrade) and two beds but was in a rundown state at the effective date of the transaction. Mr Brzezicki said that the hut had been used as a fishing hut previously, but he did not know if the former owners had let out the hut.

(6) The plans show a barn situated on the land close to the carrier stream but some distance from the house. The barn is not on the island. The photographs in the agent’s particulars do not show the barn. There is no SDLT issue pertaining to the barn.

14. As a matter of land law, there is a presumption that the owner of land abutting a riverbank of a non-navigable section of a river owns the riverbed to the midpoint of the river and has rights to fish in that part of the river. The plan attached to the transfer document TP1 shows the red boundary line of the property running through the centre of the River Meon. There was no evidence produced by HMRC of these rights having been conveyed to a third party to rebut the presumption in this case.

15. Mature brown trout fish return to their place of birth to spawn. Spawning occurs in November each year. The eggs hatch within 2 or 3 months depending on the temperature. For successful reproduction of trout fish, the following conditions must be satisfied:

(1) The eggs must be laid and fertilised in shallow nests below a thin layer of gravel.

(2) The water must be highly oxygenated to prevent the eggs from dying.

(3) The newly hatched fish are called alevin have a foodsac to enable them to survive for 2 months. They are small and must be protected from mature trout fish who are cannibalistic by nature. The protection in this location is provided by the sluice gates at the top end of the carrier stream and by a grille at the lower end. There are very few natural spawning grounds in chalk streams that can provide this protection.

(4) Between two and four months of age the alevin feed on the insects living on the ranunculi plants. When the alevin are four months old, they are about two inches long and can be released into the chalk stream where they will not be prey to predator trout fish.

16. We had the benefit of a short, signed statement from Mr Jack Martin whose family have run a fly-fishing business for 50 years on the River Meon at Manor Farm one kilometre upstream from the property acquired by Mr Brzezicki. Mr Martin notes that the spawning ground on the carrier stream at Long Meadow House is the nearest spawning ground to his farm and he believes that the fish spawned in that carrier stream have supplied his family business throughout. Mr Jack Martin was not available to be questioned. HMRC wished no weight to be attached to his evidence in consequence. We saw no reason to doubt the signed statement. Given the life cycle of trout and their habit of returning to their place of birth to spawn, it would be strange if the fish spawning in the carrier stream did not find their way kilometre upstream. Trout have a life span of 20-25 years.

17. It seems to us that the carrier stream is a manmade arrangement specifically designed to facilitate the breeding of wild brown trout fish. As Mr Brzezicki bought the land in July the recently hatched alevin would have provided some new trout stock to the River Meon.

18. Mr Brzezicki has been obsessed with trout fishing since he was a boy. He wished to own a property from which he could offer fly-fishing to paying customers and run other commercial activities. He and his partner prepared a business plan and set about looking for an appropriate property. They visited many properties before alighting on the property in question. Mr Brzezicki would not have bought this property if it had not been adjacent to the river Meon and had a carrier stream.

19. The property had been offered for sale by various estate agents, each of whom had highlighted various attributes of the assets on the site. The motivation of the agents is to sell the property and they highlight the features which they think will sell the property. The particulars of each differ. Savills' particulars state the property comprises 3.7 acres, Penyard's say it comprises over 6 acres. Given Mr Brzezicki stated that the land forming the island is 2 acres and having regard to the relative size of the pieces of land on either side of the carrier stream as shown in plans (roughly one 1:2) we are inclined to accept that the Penyard's particulars to be correct in this respect. We note HMRC accept that the property in the title extended to 6 acres.

20. The photographs of the property in the particulars show that the grass had been cut on both the island and the rest of the property. Savilles' and Penyard's particulars show photographs of a large lawn with a children's climbing frame etc and on the island two park-bench style seats are shown near the carrier stream facing the house. The Rightmove photos show a gazebo on the north part of the island near the house but no park style benches. Mr Brzezicki said that the property had been "*done up*" to sell. I accept that the grass had been closely mown and the chairs and gazebo seem to have been included in photos or installed for sale. The vendors of the property were the children of the former occupants who had lived at the property for 40 years.

21. The property had originally been part of a farm. There is no evidence that planning permission had been applied for to create the carrier stream and sluice system. We deduce that the absence of planning permission was likely because the carrier stream was built when the property was still part of the farm. Mr Brzezicki believed that the carrier stream was created over 40 years ago.

22. Mr Brzezicki bought the property with the assistance of a mortgage. The mortgage offer did include a term to the effect the property was not to be used for commercial purposes. Mr Brzezicki was unaware of this. It was not mentioned in the solicitor's report on title.

23. The form TP1 (which is the document the parties sign to convey property from one to the other) signed by the parties does not impose any restriction on the use of the property for piscatorial or agricultural purposes. The vendors to Mr Brzezicki were retaining a piece of land in the northeast corner of the plot and an earlier draft of the TP1 had included restrictions on use of the land to Mr Brzezicki, but they were not accepted by Mr Brzezicki. The absence of such restrictions is not surprising as Mr Brzezicki and his partner bought the property with the intention to operate a wild brown trout fly-fishing business and other businesses from there.

24. As the fly-fishing season ends at the end of September, immediately after completion of the purchase Mr Brzezicki removed some poisonous weeds from the area around the carrier stream, did some work on the bridges to the island to make them safe and promoted the fly-fishing business by inviting people to fly-fish on the island without payment to generate goodwill. He set up his website promoting fly-fishing and use by fee-paying fly-fishing customers began in earnest, in March 2021.

25. Mr Brzezicki's business plan comprised four elements:

- (1) Fly-fishing for wild brown trout,
- (2) Offering accommodation to fly-fishers in the fisherman's cabin that needed some renovation,
- (3) Farming rainbow trout in tanks for local businesses that offer fishing in still water environments that need to be restocked, and
- (4) Farming brown trout for sale as there is a demand for local grown products.

26. Mr Brzezicki owned a property in London in 2020 that he wished to sell but was unable to do so before the purchase of the property in question because of the viewing restrictions imposed during the Covid pandemic. This caused the rate of Stamp Duty Land Tax on the purchase of the property to be at a higher rate for additional dwellings.

27. Mr Baker, Mr Brzezicki's solicitor, filed the SDLT return on 7 July 2020 declaring that the property was purchased for £1,450,000 and that it was residential. SDLT of £132,250 was paid.

28. After the effective date, in October 2020, Mr Brzezicki set up a company Meon Meadows Ltd and transferred to it the business and assets he had acquired. Since then, Mr Brzezicki has undertaken a full refurbishment of the fisherman's hut to enable it to meet current health and safety regulations and the very high expectations of accommodation for overnight stays.

29. Mr Brzezicki applied for planning permission to introduce stock into the river Meon. We accept that as the property had not been occupied for a period, the sluice gate and grills may not have been operated properly and the cannibalistic mature trout would have depleted the stock in the river below optimum levels.

30. An amended SDLT return was filed by Mr Baker on 4 December 2020 stating that the land comprised residential and non-residential land, that the duty should be £62,000 and sought a reclaim of £70,250.

31. Mr Brzezicki was enabled to sell his former home within the statutory time frame for reclaiming the additional duty on residential property but has not been able to reclaim the additional rate of duty because he had amended his SDLT return to claim the reduced rate applicable to non-residential property. Mr Brzezicki asks the Tribunal to assist him in his attempt to reclaim the additional rate tax he had paid.

32. An enquiry was opened on 26 August 2021, and HMRC assessed the property as residential and Mr Brzezicki appealed against the assessment on 26 July 2023. Mr Brzezicki feels the matter has not been handled efficiently by HMRC because of multiple changes in personnel and missed deadlines and he has been out of pocket as a result.

HMRC's case

33. A list of sixteen factors that have been considered in previous SDLT cases was listed in the decision of *Fitzjohns Avenue Limited v HMRC* [2024] TC 09021 at [36] – [37]. But other relevant factors may be considered. HMRC indicated that this was helpful but cautioned that not all factors should be allocated equal weight. It is a balancing act, and the relevant factors are those at the time of completion following *Thomas Kozlowski v HMRC* [2023] UKFTT 00711 (TC) at [56] and [57] (“*Thomas Kozlowski*”) and *Harjono & Anor v HMRC* [2024] UKFTT 228 (TC) at [56] (“*Harjono*”). HMRC considered issues under the following headings which are derived from HMRC's SDLT manual, although we were not taken to it and the relevant passages of the manual were not in the bundle. The headings are:

(1) **Historical Use:** HMRC assert:

(a) The form TP1 shows the land was bought as a single title and shows the grounds and the main house were in common ownership.

(b) The marketing materials produced by various sales agents mention various attributes of the property including the plot being over 6 acres, the 232m of single bank fishing on the River Meon, but do not mention any business, commercial or farm related business having been run from the property.

(c) HMRC also refer to Para [62] of Judge McKeever's decision in *Hyman v HMRC* 2019] UKFTT 469 (TC) (“*Hyman*”) where she sets out what she considers is meant by the term “grounds” i.e. that it is wider than the term “garden” and can include areas fenced off for the purpose of identifying different characteristics of the land is pertinent. HMRC highlight the following “*Land would not constitute grounds to the extent that it is used for a separate, eg commercial purpose. It would not then be occupied with the residence, but would be the premises on which a business is conducted.*” HMRC say there is no evidence of commercial activity and put the Appellant to proof. HMRC challenged the statement made by Mr Jack

Martin on the ground it did not meet the standards of a formal witness statement. HMRC wanted proof that the land had been used as a trout farm. There is no planning permission for change of use by either Winchester City Council or South Downs National Park predating the effective date of the transaction. HMRC say there is no evidence of any non-residential use or exploitation either at the effective date of the transaction or historically for both the dwelling or the outbuildings which the title comprises.

(2) **Proximity to the dwelling, layout of the land and outbuildings.** HMRC assert that:

(a) The location and proximity of the grounds is directly connected to the main house and is ancillary to and forms part of the grounds. There is no separation of the grounds from the dwelling.

(b) The fisherman's cabin is sufficiently close to the dwelling as to serve the property.

(c) A selling feature of the property was the 232 metres of single bank fishing. That and the cabin provide extra leisure facilities of the dwelling.

(d) The land was essential to the character of the house to protect its privacy, peace and sense of space and to enable enjoyment of typical country pursuits per *Goodfellow v HMRC* [2019] UKFTT 0750 (TC) at [17].

(3) **Geographical factors and the size of the land.** HMRC assert:

(a) The property acquired by Mr Brzezicki is described in sales particulars as a large, detached property with extensive grounds and other attributes include that it is "secluded" and has "rural views".

(b) It is a 6-bedroom house and surrounding land of 6 acres.

(c) There is no limitation in section 116(1)(b) as to the size of grounds.

(d) At the time of completion, the fisherman's cabin and the riverbank formed part of the grounds of the property. There is no separate title and the property acquired was marketed as one property.

(e) HMRC contest whether the sluice was purchased with the land.

(f) Even if the sluice was part of the land, HMRC say it does not indicate that the property had an existing business at the time of completion.

(4) **Legal factors, constraints and future use.** HMRC assert:

(a) Use after the effective date is irrelevant following *Ladson Preston Ltd AKA Developments Greenview Ltd v HMRC* [2022] UKUT 301 (TCC) ("**Ladson Preston**") which was endorsed by the Court of Appeal. HMRC say this should mean the appeal is dismissed.

(b) The commercial activity carried on by the Appellant commenced after the effective date.

(c) HMRC denied the existence of fishing rights and put the Appellant to proof.

(d) The following is proof that the fisherman's cabin and fishing bank was not used for a commercial purpose but were mere domestic features:

(i) The Appellant's assertion of his intention to set up a fishing business.

(ii) The company Meon Meadows Limited was incorporated on 13 October, 3 months after the effective date of the transaction.

(iii) There was no physical feature or commercial equipment on the land to demonstrate separate use at completion.

(iv) There was no active and substantial exploitation of the fisherman's cabin at the Effective Date of the transaction. Work was required to make it habitable. It was undertaken 12 months after completion.

(v) A letter to Mr Brzezicki's solicitor from the mortgage company instructing the solicitor to act for that company contained a reference to mortgage offer being for domestic use only.

(vi) The Gantt Chart in the Appellant's business plan shows a long lead time to commencement of the business initiatives.

(vii) The decision of Judge Popplewell in *Harjono* concerning whether the use of the term commercial is of assistance. In particular, :

a. the use to which land is put is just one factor in determining whether land comprises grounds [68].

b. The weight given to use is determined by ultimate use and not intermediate use of the land [71].

c. "*Commercial*" is not a slam dunk point so letting part of a property would not transform a property into commercial land [67] and [80].

d. Of greater significance is the use to which the land is ultimately put and whether that use is inconsistent with use as a dwelling [83].

(viii) Post effective date activities are irrelevant to the use at the Effective Date. Even if the Tribunal consider there is a separate use it is just one factor to be weighed.

(ix) The Appellant's intention to use the property for commercial purposes is irrelevant.

(5) **Multiple dwellings relief- the fisherman's cabin as a second residential building.** HMRC assert:

(a) No claim for multiple dwellings relief was made by the Appellant in the original or amended return. This is a pre-requisite per *Candy v HMRC* [2022] EWCA Civ 1447 at [59] to [62] ("*Candy*").

(b) The absence of such a claim is indicative it was not a separate dwelling.

(c) The timeframe for such a claim has lapsed.

(6) **Nature of the land at Completion** HMRC referred us to the case of *HMRC v Mr and Mrs Suterwalla* [2024] UKUT 00188 TC ("*Suterwalla*"), in particular [48] and [49] which effectively state that the issue is what was the nature of the property acquired, that existed at completion. The principle applies whether the Tribunal is considering multiple dwellings relief or whether land is a mixture of residential and non-residential property.

(7) **Land covered by water.** HMRC also rely on section 121 Finance Act 2003 which states that land covered with water is still land. By implication they say that the carrier stream cannot be regarded as a barrier which separates the island from the dwelling house and grounds.

34. **HMRC's Conclusion**

(1) HMRC state that Br Brzezicki's focus on the stream separating the island is wrong. It was land in a single title and section 121 mentioned above indicates the land covered by the stream is still land.

(2) HMRC acknowledge Mr Brzezicki was carrying on a trade but not from the property at the effective date and the first paying customer of the business was in July 2021. HMRC say the fishing stocks in the carrier stream were not trading stock of that trade.

- (3) The fisherman's cabin was a structure on the land capable of benefiting the house. The carrier stream was within walking distance of the house.
- (4) The island is in walking distance of the house and is part of the grounds of the house. There is no requirement that the grounds should be for the reasonable or better enjoyment of the property.
- (5) That covenants were removed from the draft TP1 does not show that a business was being conducted at completion.
- (6) The function of the sluice was probably to ease flooding.

Mr Brzezicki's case

35. The carrier stream separates the non-residential property from the residential property in its entirety. There is a six-foot wide stream of water that separates the non-residential land from the entire residential grounds. The island is not therefore contiguous with the residential land.
36. The Meon River is a chalk stream where wild freshwater trout thrive. It is a natural chalk stream. The porous nature of the chalk acts as a filter for pollutants and absorbs surplus water thereby avoiding flooding. It is a natural phenomenon and one of the few such streams in the world.
37. The carrier stream, located as it is, and connected at each end as it is to the Meon River (a chalk stream), is the necessary plant to breed freshwater brown trout to be released into the river. The carrier structure is a manmade structure providing all the necessary elements to ensure the survival of the eggs after fertilisation, the alevin after hatching and the young fish until they are large enough to be released into the river and not to be eaten by predatory mature trout.
38. The necessary features are:
 - (1) The sluice to enable sufficient water to flow into the carrier stream in the winter spawning months. The grill to prevent cannibalistic mature trout from eating the alevin. The grille was on the top of the sluice at the Effective Date.
 - (2) The waterfall to ensure the water flowing through the stream is oxygenated to keep the eggs, alevin, and small fish alive while retained in the stream,
 - (3) The ranunculi plants in the well of the waterfall and elsewhere to provide the insect life to enable the alevin and small fish to feed and the deeper lower area to deal with heavy rainfall run off and prevent the eggs from being washed away.
39. The habitual return of trout to their place of birth to lay their own eggs has ensured that the facility has been in use as a breeding facility for trout since it was established.
40. As the land was part of the Meon Farm no planning permission would have been required for the structure to have been built. The land was separated from the farm in 1981. It is therefore not surprising that there is no reference to any planning permission in the local council records or the Local National Park records which was established in the last 10 years.
41. Mr Brzezicki's business plan includes four elements. The first element was to exploit the fishing rights which were made viable with the carrier stream equipment.
42. Buying the land with the innate fishing rights and the plant was like buying a skiing resort in summer.
43. Immediately after the Effective Date Mr Brzezicki removed some poisonous weeds and repaired the bridges and invited potential customers to fish free of charge on the river Meon

before the season closed at the end of September. The website was set up to facilitate customers for the following season. When the company was incorporated, he transferred all of the business assets to that business. His pre-incorporation trading expenditure was allowed as an expense of the trade.

44. The fisherman's cabin is on the island for use by fishermen. It was furnished with two beds when the property was acquired but had to be substantially upgraded to let commercially in today's market. It was not itself capable of being used as a dwelling.

45. Following the decision in *Faiers v HMRC* 2023 TC 08768 ("*Faiers*"), as the land used for trout breeding was separated from the land surrounding the main dwelling house by the carrier stream it cannot form part of the grounds attached to the dwelling and is not therefore residential.

46. Mr Brzezicki was unaware of any restriction on the use of the land in the mortgage offer. Such restriction was not drawn to his attention in the solicitor's report. HMRC's reference to a letter HMRC mentioned suggesting there was a restriction on commercial use in the mortgage offer was in a letter sent to the solicitor and not Mr Brzezicki.

47. The sales particulars were generated by agents highlighting what they thought would enable a quick sale and appeal to the greatest number of people. That there is no reference in the sales particulars to the carrier stream and its attributes for trout breeding, is not material to its physical attributes.

48. The breeding facility is essential to a wild fishing business and all wild fishing businesses on the Meon River. The fish swimming in the stream now were born 18 months earlier. Fish are vital for a wild fishing business.

49. HMRC's assertion that the fishing rights provide a leisure activity for residents of the house is inaccurate. The carrier stream is more than just the fishing rights. It's the source of production of the wild fish to fish in the stream.

50. The island is not necessary to provide privacy for the dwelling. The lack of privacy would be from the road at the other side of the land.

51. The character of the house and its setting are unaffected by the island and its function as a breeding facility.

52. The fisherman's cabin was not a residential dwelling or capable of being so. The island was non-residential property at the effective date and it has been used as non-residential property since completion.

53. Planning permission to introduce small brown trout into the River Meon was applied for and granted to increase the stock.

54. Mr Brzezicki asked for assistance in recovering the additional 3% SDLT he had to pay because he was unable to ensure the sale of his former home was coterminous with the purchase of property. The delay in dealing with the appeal has exacerbated the recovery.

Discussion and decision

55. We fear that there may be a tendency to misuse authorities in cases such as these. As was pointed out by Sir Nicholas Browne-Wilkinson VC in *Marson v Morton* [1986] 59 TC 381 (a case concerning what amounted to a trade), the purpose of authority is to identify legal principles and not to seek analogy on the facts. Looking at other cases to see what facts were relevant is a misuse of the principle. Each case concerning residential and non-residential property must be determined by considering all relevant factors in each case.

56. It is important to consider the statutory requirements of what is and is not residential property.

57. The first issue to consider is, per section 116(1), whether at completion of the sale:

“(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*”

58. It is accepted by the parties that the building that comprised the former stables that were converted in 1980s into a six-bedroom house, is a dwelling.

59. We find as a fact that the fisherman’s cabin was not used or suitable for use as a dwelling at completion and nor was it in the process of construction as a residential dwelling at completion. Its size and limited facilities means, in our view, it was not capable of becoming a dwelling.

60. Neither side argued that the barn was being used as a dwelling or in the process of being used or adapted for such use.

61. The second issue is, per section 116(1), whether at completion of the purchase there was:

“(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)*” (our emphasis added).

62. This is a multifactorial test. HMRC divided the factors to be taken into account into categories using the following terms: (1) historical use, (2) proximity to the dwelling, layout of land and buildings, (3) geographical factors and the size of land, (4) legal factors, constraints and future use, and (5) nature of the land at completion. These are the headings used in HMRC’s SDLT Manual. We consider the factors in this case not in that order but in the order dictated by the land and buildings in question and their attributes.

63. But the starting point is the meaning of “*forms part of garden and grounds*”. The words garden and grounds are not defined terms. They are to be given their ordinary meaning. Judge McKeever noted this in *Hyman* at [62] where she said that the term “*Grounds has, and is intended to have, a wide meaning. It is an ordinary word, **and its ordinary meaning is land attached to or surrounding a house which is occupied with the house and is available to the owners for them to use***” (our emphasis).

64. For land to “*form part of a garden or grounds*” of a dwelling the land **must** be adjacent to and contiguous with that item. Contiguous as defined in the Oxford English Dictionary as “*very closely connected **without a break***”. (Our emphasis)

65. The Upper Tribunal was invited to comment on specific paragraphs in the SDLT Manual on what amounts to forming part of the grounds and garden in the joint appeal in the cases of *Hyman and Goodfellow* [2021] UKUT 68 (TCC) at [47] to [50]. The UT confirmed that there was no requirement that the land was reasonably required for the enjoyment of the dwelling. In determining the issue of what forms part of the grounds and garden, a wide number of factors must be considered. Not all factors will be of equal weight. Some factors not mentioned in the Manual may be relevant. The necessary approach is first to identify relevant factors or considerations, and balance them when they do not point in the same direction.

66. It is crucial that the nature of the land be determined at completion of the land transaction and not at a later time or date, following *Thomas Kozlowski* at [56] and *Harjono* at [56].

67. The land to the east of the carrier stream surrounds and is contiguous with the dwelling house.

68. 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.

69. I do not consider that section 121 Finance Act 2003 which says that land covered by water is still land means that a stream would not separate the island from the dwelling house and grounds. The carrier stream forms a barrier as a matter of fact. Section 121 merely confirms that land covered in water is still land and SDLT is payable at the appropriate rate on that land covered by water. The position is not altered by the fact that access was possible at two points by two small bridges that required repair at completion. I accept that the bridges provide access but do not accept that these two crossing points cause the island to be contiguous with the rest of the property. Section 121 does not make land that is not as a matter of fact contiguous, contiguous.

70. The carrier stream, including the upstream sluice, waterfall, shallow breeding ground, ranunculi plantations, lower deeper section and facility to install a grille at the downstream end, formed at completion a piece of plant for the breeding of wild brown trout.

71. The construction of the carrier stream was a serious project. I accept that the lack of planning permissions suggests the carrier stream was constructed while the land was still part of the farm over 40 years ago. I accept Mr Jack Martin's statement, whose family has conducted a flyfishing business a kilometre away on the River Meon, that the carrier stream in question has been providing wild brown trout stock to Meon River for 50 years.

72. We do not accept HMRC's suggestion that the carrier stream and sluice were flood defences. That makes no sense given the very particular features of the stream, and although flooding can occur in chalk regions, the porous nature of the ground means it has enormous capacity to absorb water before flooding occurs.

73. The carrier stream was not created to provide a beautiful garden and grounds. It was constructed to provide a breeding ground for wild trout. The carrier stream is the equivalent of a factory but one which is easy on the eye. Some repair was needed at completion to reinstate the downstream grille and the removal of some poisonous weeds, but the carrier stream was nonetheless still a piece of plant.

74. The carrier stream's location by the chalk stream that is the River Meon enables the carrier stream to function as an effective breeding ground or farm for wild brown trout.

75. The fishing rights attaching to land adjacent to a non-navigable river could be regarded as an attribute of a dwelling on the river. In this case however, the rights attach to the land that is the island and naturally facilitate the conduct of a business of wild brown trout fishing by the owner of the land bordered by the river and the carrier stream. The plant was in place at completion but was not being run on a commercial basis. It is not necessary for the commercial activity to be conducted at completion for the land to be non-residential land at completion.

76. Six acres of land were acquired by Mr Brzezicki, two of which are occupied by the island.

77. The character of the dwelling house, being a former stable block, is not grand. The ceiling height of the ground floor rooms is low, as can be seen in photographs of the sales particulars prepared by each of the estate agents, and the upper storey that houses the

bedrooms comprises the attics above the old stables. The dwelling is not imposing on its surroundings. It is a country house and is well accommodated in four acres of garden and other grounds. Views from the house are unaffected by the carrier stream and its commercial function. The fact that the carrier stream is a manmade structure facilitating the commercial production of wild trout does not affect the house and its views of the countryside. The island is not essential to the character of the house, or its sense of space.

78. Trout fishing occurs along the River Meon. The owners of the land on the opposite side of the river have the right to fish the river. The privacy of the house is unaffected by the functioning of the carrier stream as a trout production facility and nor would its privacy be affected by anglers fishing on the island. It is a quiet occupation requiring focus and silence. The fisherman's hut is at the far end of the island well away from the house. The island is not essential to the character of the house for its sense of peace or its access to country pursuits.

79. The carrier stream was functioning as a carrier stream at completion. I accept that what occurs after completion does not determine the nature of the land at completion. It is not however surprising that Mr Brzezicki exploited the carrier stream immediately after completion after undertaking repairs by inviting non-paying guests to generate goodwill for his business.

80. The nature of the land at completion is unaffected by how Mr Brzezicki went about finding a location for his trout fishing business, or when he incorporated a company and when he transferred the assets and liabilities of the business to the company. Nor is the nature of the land at completion affected by when he implemented the other strands of his business, including acquiring fresh stock to augment the natural stock which would have been depleted because the grille at the south side of the carrier stream was missing at completion and may not have been in place during the spawning season.

81. The terms of the mortgage do not affect the nature of the land acquired by Mr Brzezicki. Even if he had been in breach of the terms of the loan (as to which we make no finding) that is a different matter.

82. The photographs in the marketing materials helped us to understand the land acquired. But I do not accept that the estate agents' descriptions are definitive of the nature of the land. There is no mention in any of the particulars of the nature of the carrier stream. We noticed that the photos of two of the agents showed two lone park benches on the island just by the carrier stream facing the house and the grass having been mowed very short and the third agent's particulars showed a gazebo on the island that was not in the photos of the other two sets of particulars. I accept Mr Brzezicki's view that these items are likely to have been placed there to sell the property. I do not consider the particulars and their descriptions to be particularly helpful in determining whether the land is part of the garden or grounds of a property for SDLT purposes. The agent's job is to sell the property, and the agent will emphasise certain features and disregard others to sell it. I note there is no photo of the very large barn which is shown in the plans which is indicative of the estate agents picking and choosing what they emphasise.

83. I do not consider the fact that the land comprised a single title to be determinant of the nature of the land at completion. It is not surprising it was in a single title given that the land all formed part of a farm over 40 years ago.

84. I do not consider the fact that the island is in walking distance from the dwelling house to be material in this case.

85. I do not consider the lack of planning permission for the construction of the carrier stream to be material given that the land formed part of a farm and that the carrier stream was likely constructed over 40 years ago.

86. There were no restrictions on use of the land for piscatorial, agricultural or commercial purposes in the agreed form TP1. That there were such restrictions in an earlier draft is not indicative of the nature of the land at completion. It is indicative of a desire on the part of the vendors who were retaining a piece of land in the title to try to prevent future use.

87. Weighing all the above factors within the meaning of section 116, I consider that on the facts of this case at the Effective date:

(1) the land to the west of the carrier stream, did not as a matter of fact form part of the garden and grounds of the property, and

(2) the carrier stream is a factory to produce brown trout to be fly-fished in the river Meon and in consequence the carrier stream and island bounded by the carrier stream and the river Meon, is non-residential land.

88. The third issue is whether the fishing rights comprise

“(c) An interest in or right over land that subsists for the benefit of a building within paragraph (a) or the land within paragraph (b)”

89. I consider that the fishing rights did not at completion comprise a right in or over land that subsisted for the benefit of the six-bedroom dwelling house. The fishing rights attached to the land forming part of the island which was separated from the dwelling by the carrier stream. The fishing rights subsisted for the benefit of the land forming the island.

90. I allow the appeal.

91. Mr Brzezicki asked for assistance is reclaiming the additional rate of SDLT he had paid because he had not been able to sell his former home due to covid restrictions on viewings before he bought Meon House even although he had sold his former home before the necessary statutory limitation expired. He had been prevented from making the claim because he had modified the SDLT 1 once to claim the lower rate for non-residential land and was unable to make another in time amendment. This is a barrier to collecting the correct amount of SDLT due where two or more reliefs may be available. If a claim for one relief is denied the other is not available unless made in the original time frame. We were informed by officer Jones that this problem has not been alleviated by recent legislation or practice. Regrettably we do not have the power to direct HMRC to give effect to the claim for repayment of the additional rate even if to do so would result in the right amount of SDLT being collected but would hope HMRC exercises its wide discretion to administer the tax system appropriately.

Member Shearer’s dissenting decision

92. Weighing up the various factors and the evidence, I consider that, at completion of purchase, the carrier stream and land to the west of it formed part of the garden or grounds of the house, within the terms of Section 116(1)(b), and were residential property; and that the purchase did not include any non-residential property. I am therefore obliged to record this dissenting opinion, and set out below the reasons.

DECISION

91. The legislative framework has been set out by Judge Gething. A concise and useful summary of relevant case law has also been provided by the Upper Tribunal in the recent case of *Suterwalla*, at paragraphs [12] - [18].

92. The words “garden” and “grounds” are not defined terms and are to be given their ordinary meaning. In the First-Tier Tribunal decision in *Hyman*, at [62], Judge McKeever said: “*In my view ‘grounds’ has, and is intended to have, a wide meaning. It is an ordinary word and its ordinary meaning is land attached to or surrounding a house which is occupied with the house and is available to the owners of the house for them to use. I use the expression ‘occupied with the house’ to mean that the land is available to the owners to use as they wish. It does not imply a requirement for active use. ‘Grounds’ is clearly a term which is more extensive than ‘garden’ which connotes some degree of cultivation*”.

93. We saw various photographs of the land to the west of the house, including the land beyond the carrier stream, as well as diagrams of the plot. Some of the photographs and diagrams were in the sales brochures which advertised the property prior to Mr Brzezicki’s purchase. As a non-legal member of the Tribunal, I start from the belief that few people, including prospective purchasers, if shown the same illustrations, would say otherwise than that the land beyond the carrier stream, with its neatly-mown grass and (in some photographs) garden furniture such as benches and a gazebo, looked very much like part of the grounds (and, indeed, probably also of the garden) of the house – within the ordinary meaning of those terms.

94. I likewise think that most potential purchasers of this, or similar, properties – in other words the majority of those in the market for this type of property, and to whom the estate agents tailored their sales descriptions – would have accepted the residential status, and have anticipated that SDLT at the full residential rate would have applied. Given the property’s circumstances at the time of sale, I have some doubt that it would have occurred to many that any non-residential component then existed. Mr Brzezicki himself initially paid the full rate.

95. However, as both case law and Judge Gething in her decision make clear, such straightforward views are not determinative. The appropriate and more objective test is a multi-factorial one, in which various features and circumstances of the property at the time of completion, and the full range of evidence before the Tribunal, are to be carefully balanced and weighed up. I set out below the main influencing factors on which I have reached a different view from Judge Gething.

Degree of contiguity

96. The land beyond the carrier stream has been described as an island.

97. It was not originally an island: the carrier stream was man-made, therefore the land between the house (formerly stable-block) and River Meon would once have been continuous.

98. Judge Gething has stated that this area is not contiguous with, and is separated from, the rest of the property, and that these are significant factors which prevent it from being regarded as part of the grounds/garden of the house. These questions are, in my view, open to debate. Furthermore, I am not persuaded that separation to this extent would be as significant a factor within the overall assessment of whether that area forms part of the grounds of the house.

99. Judge Gething has noted the legal point land covered by water is still land, but finds that the stream separates the two pieces of land as a matter of fact. This may therefore present a difficult apparent contradiction – the land is in fact separated, but in law is all connected.

100. Judge Gething cites the dictionary definition of contiguity as “*very closely connected without a break*” and points out that the stream does constitute a physical break between the two pieces of land.

101. However, in some previous cases, this criterion has also been described in terms of “adjacency” as well as, or instead of, “contiguity”. The Oxford English Dictionary defines “adjacent” as “*next to or very near something else; neighbouring; bordering, contiguous; adjoining*”. It seems to me that the land beyond the stream could be described as adjacent – in

the sense of next to, or very near – despite the separation, or break, along the course of the stream.

102. Such reliance on definitions may obscure a broader overall assessment of whether the land beyond the stream is in fact part of the grounds of the house. In Judge McKeever’s extract quoted above from *Hyman*, she did not use either of the words “contiguous” or “adjacent”, but described land which is “*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*”. Again, it seems to me that there are senses in which the ‘island’ attaches to the house. The shape delineated by the island fits within the overall shape of the single plot which came with the house at the point of sale, and would certainly be understood to be available to the purchasers for a wide range of possible uses. It is relatively close to, attractively visible from, and easily accessible from, the house. I do not consider that the fact that it lies on the other side of a stream necessarily detracts from it still being capable of being accurately described as part of the grounds of the house.

103. More pertinently, perhaps, there will be many residential properties which have some of their grounds separated from the main area by some physical feature. This might be by a body of water such as a ditch, stream, river, canal, lake or even seawater; by a fence, wall or hedges; by something such as a road or railway – with or without any connecting access bridge or tunnel; or possibly by another strip of land in different ownership. It may be added that many gardens have streams of various sizes, whether natural or man-made, running through them. In short, I do not consider the level of separation due to the stream to be so unusual or significant.

104. Judge McKeever may have recognised some of this in the checklist summary of different factors to be considered, which she set out in the later, recent case of *Fitzjohns Avenue Limited*. Factor number (6) in her list was as follows: “*Contiguity is important, grounds should be adjacent to or surround the dwelling*”. By use of the word “important”, it could be inferred that the grounds of a house would normally be expected to be contiguous, but that this is not always a necessary condition and that there may be exceptions.

Commercial use

105. In the present case, the nature and use of the carrier stream and the land beyond it have also been crucial factors in the debate between the parties and in the decision. Essentially, Mr Brzezicki has argued that at the time of purchase, they had a non-residential nature and/or use, namely for the breeding and/or non-residential fishing of trout, and that this means that the purchase included land that is not residential property.

106. In this argument, the non-residential aspect meant a commercial dimension. Broadly speaking, we were being invited to find that the purchase included an element of commercial land. Mr Brzezicki told us at the outset that he would focus on commercial activity before, at, and after completion of the purchase.

107. For this to succeed, either the carrier stream, or the land beyond it, or both of them, would have to be found to be non-residential property at completion. I consider each in turn.

(a) Carrier stream

108. The carrier stream was said to have been designed and made about 40 years ago specifically for the mass breeding of trout. Mr Brzezicki was knowledgeable, engaging and passionate about the life-cycle of trout, about the right conditions for them to breed and thrive, and about trout fishing. I have no strong reason to doubt his assessment that the stream must have been made for the purpose he stated, and merely note that when asked if the carrier stream might have been put there for aesthetic reasons, he accepted that it might just have “evolved” into the state of having the perfect conditions for trout breeding, but that the discovery after purchase of grilles lying on top of the sluice was highly indicative that the stream must have been built and used as a fish nursery. He said it was his “assumption” that this was the original purpose. There also appears to be a related assumption that the sluice

was made at the same time as the stream; and/or that trout breeding was specifically in mind when the sluice was built as an addition to the stream. There was unfortunately no contemporaneous evidence dating from the time when the stream and sluice were made, about their exact design and purpose.

109. If the stream and sluice were made to facilitate trout breeding, this does not necessarily demonstrate that the purpose was commercial, or that any commercial activity ensued prior to, or at, completion. It may be that whoever made them was an amateur trout enthusiast. No clear evidence was given of any commercial activity or exploitation prior to Mr Brzezicki's business operation, except possibly Mr Martin's statement, which I discuss below.

110. Judge Gething has described the stream, including the sluice, as "a piece of plant", and as "the equivalent of a factory", accepting or at least implying its inherent commercial nature.

111. Even if so accepted, it cannot be sufficient for a purchaser to show that the land purchased includes items or areas which were originally made as commercial plant. If that were so, then any houseowner whose property included commercial land or plant which was no longer in active use or exploitation might be able to claim the lower rate of SDLT. Historic use has been recognised to be a factor for consideration, but it is the examination of the use at the time of completion which is crucial.

112. In *Suterwalla*, at [48] – [49], commenting on *Ladson Preston*, the Upper Tribunal has confirmed that "*whether a particular SDLT relief or treatment applies requires an analysis of the nature of the chargeable interest acquired at completion*".

113. With regard to the carrier stream, was there commercial use or activity at the time of completion?

114. Mr Brzezicki did not seek to rely on any use or activity by the previous owners. The vendors did not occupy the property. There was no evidence that they exploited the carrier stream commercially or undertook any business activity relating to the fish said to breed there. None of the sale documents or other evidence in the bundle dating from prior to the sale, including the estate agents' sales brochures, made any reference to any such commercial use or activity.

115. Mr Brzezicki instead relied on two other categories of commercial users/actors: (i) other nearby commercial fisheries; and (ii) his own business exploiting at a later date the fish which he said were already living in the stream, at a younger stage in their lifecycle, at the time when he bought the property.

116. For the first category (i), he relied on the short statement of Mr Martin, representing one other nearby fishery business – a family-owned and managed trout fishing beat for nearly 60 years. The statement had been provided to Mr Bugden in an email dated 27 September 2022. The key sentences of this were: "*The levels of fish have remained relatively constant over the past decade or so and one of the contributors to that is the conservation of the spawning grounds 1 km south of our beat. Having lived on the river for most of my life you get to know all key sections as they all play a factor in the fish stocks and therefore the quality of fishing and success of our business. It is well known that the carrier stream that runs off the Meon on the grounds... through Long Meadow House is one of those spawning hotspots and there's no doubt that a good quantity of those fish hatched and raised on the stream are caught by paying customers on my beat. Both the gravel bed and the seclusion from predators on the main river make it an ideal location for trout spawning and early stage growth before they make their way into the Meon river*".

117. It is fair to ask what weight to attach to this statement, especially since Mr Martin was not called to attend the hearing and so could not be questioned. Any commercial exploitation by Mr Martin's business of fish which spawned in the carrier stream appears to be indirect, and slightly tenuous. It does not sound as if Mr Martin had any regular physical presence,

involvement or control at the carrier stream itself, nor any written agreements or rights. Mr Martin refers to the stream as “*one of those spawning hotspots*”, implying that there are others. It is not clear whether there may also be multiple other spawning grounds either further upstream or further downstream, although Mr Brzezicki himself does add that “*To our knowledge, there are no other suitable areas in the near vicinity where trout breed and grow on the River Meon*”. There is little detail on Mr Martin’s business activities specifically at the time of completion (which was, incidentally, during the COVID-19 pandemic), or on the question of to what degree of certainty it can be known that specific fish catches at 1km up the river did or did not originate from the carrier stream, and in what quantities.

118. For the second category (ii), Mr Brzezicki’s position is that the business which he was himself developing depended to some extent on the fish already thriving in the stream at the time of purchase. In his statement of case he explained: “*Also included in the purchase were hundreds if not thousands of small par brown trout (fingerlings) contained within the carrier stream which stock fisheries up and down the river. These also stock the section of river where we offer trout fishing and are generating revenues to this date. The carrier stream provided the perfect breeding and growing conditions for brown trout which have been breeding there for the last 40 years. Adult brown trout breed at the place where they were born and as the conditions are correct then the amount of trout breeding at that site will increase. So we also purchased this goodwill of the land as well as the fishing stock which included past, present and future fishing stock. This is the trading stock of my business.*”

119. Given the burden of proof which Mr Brzezicki’s own statement of case also accepted, it can be asked if the evidence presented on this point is sufficient. One drawback with both Mr Martin’s statement and Mr Brzezicki’s account of the vitality of the carrier stream is that they both date from at least two years after completion. The photographic, documentary and witness evidence would have been stronger if they had demonstrated more clearly the health and fish population of the stream around completion. Mr Martin’s statement does not refer to going to or inspecting the carrier stream at close quarters at any point, including at any time near to the sale date. None of the contemporaneous sale documents to which we were referred, including the estate agents’ brochures, made any mention of the fish stocks in the carrier stream and its particular suitability for breeding trout.

120. It seems possible that the carrier stream might not have been in the ideal pristine condition prior to the sale date. Mr Bugden mentioned during the hearing that many hundreds of trout stock had been purchased after completion, and added to the stream. We were referred to a Gantt chart showing the planned business development timeline following completion. One line of this is labelled ‘*Clear Carrier Stream*’ – a task which is shown for the end of 2020 and beginning of 2021. Another line is ‘*Buy in Juvenile Trout*’, shown as planned for the spring of 2021 – perhaps the purchase of additional fish stock to which Mr Bugden alluded.

121. Also within the bundle was a letter dated 18 October 2021 from Mr Brzezicki to HMRC, in response to the opening of the enquiry. HMRC referred us to this letter in the context of the cabin (discussed later in my opinion), but it also elaborated generally on the actual timeline of post-completion business activity, and included the following entries: “*July to September 2020 – built hatchery unit; ... 29th July [2021] – submission of SP1 application to allow stocking of live fish into the carrier stream; ... September to October 2021 – digging out of the carrier stream to allow water to flow through the length of the property, building both banks to create an additional 75m of fishing banks*”. This tends to suggest that the fish stocks and flow rate were boosted after purchase to support the business.

122. The vendors did not live at the property. It was not clear whether the sluice was being used during their ownership to regulate the seasonal flow of water to optimise the conditions for trout breeding in the way which Mr Brzezicki said it was intended to do. He specifically said during the hearing that the grilles which he believed were to control fish getting in and

out of the carrier stream were found after purchase to be lying on top of the sluice, and that they were not operational when the property was bought.

123 There are other obstacles in the way of Mr Brzezicki's reliance on his own commercial exploitation of the carrier stream and its fish. Not least, at the time of completion, the substantive part of this business activity was in the future. It has generally been held that future use is not relevant (for example, *Fitzjohns Avenue* at [45]: "...the status of the Property for SDLT purposes must be established at the time of completion"). Mr Brzezicki sought to distinguish his situation on the basis that the young trout were already living assets – the nascent stock to be adopted into his already emerging commercial operation.

124. I am not convinced that this line of argument can work, any differently from any other purchaser who later exploits some aspect of their property for business use – whether a fixed feature or other forms of 'living' asset (trees, for example).

125. First, Section 55 applies the reduced rate of SDLT if the property includes "*land that is not residential property*" (my emphasis). Fish are not land. The question is whether the stream itself is not residential property, and the main statutory test for that is whether it forms part of the garden or grounds of the house – discussed further below. The creatures on the land do not seem to enter into that primary equation.

126. Secondly, identification of any commercial use at the time of completion entails the identification of a co-existent user. I cannot identify such a user at that point in time, whereas I find that residential use prior to sale, by the vendors and their parents, is more substantially apparent. Also, other potential purchasers of the property, who did not have Mr Brzezicki's commercial intentions, would have seen it to be purely residential, and would have continued the residential use, with the stream and any fish breeding in it being an added bonus to their domestic enjoyment. Mr Brzezicki stresses that his commercial enterprise was already developing and active, with a well-formed plan, around the time of purchase. However, he was not the user until after acquisition. His interest did not attach beforehand to the land which was transferred, over which he had no prior locus or involvement.

127. I make a closing point to this section. Mr Brzezicki and Mr Bugden portrayed the argument on commercial use of the carrier stream and its fish almost as if this were a trump card towards the proof of non-residential property. Again, I query this, even if their evidence were accepted. There has been much reference to another sentence of Judge McKeever at [62] of *Hyman* (the same paragraph quoted earlier), where she said: "*Land would not constitute grounds to the extent that it is used for a separate, eg commercial purpose*". Picking up on this very sentence in the 2023 case of *Kozłowski* at [69], she further explained: "*The use of a particular part of a property is crucial in determining whether that part is residential or not. If that part has a separate non-residential (usually commercial) use, then it is not part of the garden or grounds of the property and it is non-residential property for the purposes of section 116(1)(b)*." However, she then immediately qualifies this in the next sentence: "*Conversely if, despite the use of that part, it is still considered to form part of the garden or grounds of the property, then the actual use to which it is put is irrelevant: that part is residential property by virtue of section 116(1)(b)*".

128. The wording of Section 116(1)(b) does not refer to use. Its primary question is whether the land forms part of the garden or grounds of the dwelling. If it does, it comes within residential property. Non-residential property is also not primarily defined in this section by reference to use – instead it means "*any property that is not residential property*".

129. Judge Popplewell has also commented on this. In the recent decision of *Harjono* at [70], he says: "*Recent cases (including those cited in this decision but there are others) show that taxpayers and their representatives are increasingly equating commercial use with mixed use. And that one needs to go no further than finding some form of commercial use of land to take it outside the entirely residential criterion. We think this is misconceived*".

130. Judge Popplewell goes on at [73] to adopt the language of a ‘spectrum’, explaining that the purpose of the multi-factorial test is to assess whether any of the specific factors in any case (with use being only one factor to be considered), take land sufficiently far towards the end of a spectrum by which it can no longer be considered to be part of the grounds of a dwelling.

131. Even if Mr Brzezicki’s evidence and submissions were at their strongest, I am not persuaded that the carrier stream falls sufficiently far along that spectrum that it should be ruled to be not part of the grounds of his house.

(b) The land to the west of the carrier stream

132. I now come on to consider more briefly the land beyond the stream, and whether, at the time of completion, that was not part of the grounds.

133. Many of the same points apply to this land as those which I have covered for the carrier stream. In particular, there was no evidence of commercial activity relating to this land by the vendors or anyone else (and it was never suggested that Mr Martin, for example, was a commercial user of this land).

134. When asked whether the previous owners invited people on a commercial basis for fishing breaks along the river banks, Mr Brzezicki said that they did not, but may have had occasional visitors.

135. Mr Brzezicki’s case relied more upon his arguments about the inherent commercial nature of the ‘island’, its exploitation for fishing, and his company’s future use for such commercial fishing activities, which he saw merely as a continuation of its existing characteristics.

136. There was considerable focus on the ‘fisherman’s cabin’ located in this area.

137. The Savills brochure described the area as follows: “*To the south of the property an area known as the island provides a perfect sanctuary and a wonderful playground for children*”. It did not mention the cabin in the text, but included a small diagram of it among floorplans, annotating it as “*Log cabin*”.

138. The relevant paragraph of the Penyards brochure includes: “*Externally the grounds are of particular note situated predominantly to the west and south of the property offering a sunny aspect during the day and attractive sunsets in the evening. Rolling lawns extend down to the River Meon which provides 295 yards of single bank fishing. An additional tributary meanders through the gardens and orchard which include a variety of fruit trees including apple and plum. The copse area with timber cabin has been an adventure playground for many a child over the years*”.

139. I would note the following from this Penyards description: (i) The “*rolling lawns*” are presented as extending all the way to the river – covering the north part of the ‘island’ as well as the other garden area nearer to the house; (ii) The stream “*meanders through the gardens*” – these agents therefore painted a picture of both sides of the stream as ‘gardens’; and (iii) The copse with timber cabin was stated to have been an adventure playground for children for several years.

140. The Penyards brochure also included a diagram in the floorplans, annotating it as ‘*Outbuilding 4*’ and ‘*Cabin*’.

141. Neither brochure described the outbuilding as a ‘fisherman’s cabin’, and both referred to children’s play, with Penyards saying that the part of the island which included the cabin had been an adventure playground for many children over the years. I infer that this was information provided by the vendors, that both the island and the cabin had come within residential use of the land prior to the purchase by Mr Brzezicki. In addition, Mr Brzezicki’s letter of 18 October 2021 described the cabin as old and “*dilapidated*”, and stated that it was “*converted... into a fishing hut*” in 2021. He told us that “*dilapidated*” had been an exaggeration: he meant that it was not in a suitable condition for being rented out. He was not

sure if it had ever been rented out previously, but it had been used for accommodation as it contained two beds and a sink.

142. I can see no clear evidence of the land beyond the stream being non-residential at completion. Its future use was not relevant.

143. For the reasons set out for both the carrier stream and the land beyond it, I find that neither of them constitutes non-residential property, and would dismiss the appeal.

Decision

I allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

93. 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.

**HEATHER GETHING
TRIBUNAL JUDGE**

Release date: 20th SEPTEMBER 2024