[2021] UKUT 0068 (TCC)

Appeal numbers: UT/2019/0172
UT/2020/0021
UT/2020/0027

SDLT– sale of house and land – rate of SDLT applicable – whether Table A or Table B – whether the house and land included land that was not residential property – whether all of land was, or formed part of, garden or grounds of house – Finance Act 2003, ss 55, 116

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

(1) DAVID HYMAN and SALLY HYMAN
(2) PENSFOLD
(3) CRAIG GOODFELLOW and JULIE GOODFELLOW

Appellants

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL **MR JUSTICE MORGAN**
JUDGE JONATHAN CANNAN

Sitting in public by way of remote video link hearing treated as taking place in London, on 3 March 2021

Mr Patrick Cannon, counsel, instructed by Cornerstone Tax, for the Appellants

Mr James Henderson and Ms Calypso Blaj, counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

Introduction

1. This decision relates to three separate appeals which raise the same point of law as to the meaning and effect of section 116 of the Finance Act 2003 ("FA 2003"). Section 116 of FA 2003 contains a definition of "residential property" for the purposes of Part 4 of FA 2003, which deals with Stamp Duty Land Tax ("SDLT").

2. Each of the three cases concerns the sale of a house together with an area of land. The issue in each case was whether all of the land sold together with the house "[was] or form[ed] part of the garden or grounds of" the house. The rate of SDLT payable on the total consideration for each sale depended on the answer to that question. It was in the interest of the taxpayers, the purchasers in each case, to contend that some of the land sold together with the house was not, and did not form part of, the garden or grounds of the house. That question was determined by the First-tier Tribunal ("the FTT") in each case adverse to the taxpayers. The taxpayers now appeal with the permission of the Upper Tribunal. The permitted ground of appeal in each case raises essentially one issue as to the interpretation of section 116 of FA 2003. The taxpayers contend that land can only be part of "the garden or grounds of" the house if the land is "needed for the reasonable enjoyment of the [house] having regard to the size and nature of the [house]".

3. If this contention on the part of the taxpayers were correct, then some or all of these cases will need to be remitted to the FTT to evaluate the facts of the cases by reference to this requirement. HMRC say that all three of the cases will need to be remitted if the taxpayers' contention is accepted. The taxpayers say that two of the cases would need to be remitted but in the third case, where the appellant is Pensfold, it is said that the case need not be remitted and, instead, the Upper Tribunal ought to decide the case in favour of the appellant.

4. Conversely, the taxpayers accept that if their contention as to the meaning of section 116 of FA 2003 is not accepted, then that is the end of their appeals to the Upper Tribunal. There is no separate challenge as to the way in which the FTT applied its interpretation of section 116 to its findings of fact in each case.

The facts

5. Although our decision on these appeals does not turn on the detailed facts of the three cases, we will briefly refer to the facts as found by the FTT to illustrate the point of law which has been argued.

6. The appeal by Mr and Mrs Hyman relates to a property known as "The Farmhouse", near St Albans. The property comprised a house and 3.5 acres of land. Mr and Mrs Hyman bought the property on 23 October 2015 for £1,515,000 and paid SDLT of £95,550. This was the correct amount of SDLT if all of the property was residential property within section 116 of FA 2003. About two years later, Mr and Mrs Hyman's advisers claimed a repayment of £34,950 which was said to have been overpaid as SDLT. HMRC did not agree to the repayment and that led to the appeal to the FTT

which was decided in favour of HMRC. 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. It was argued on behalf of Mr and Mrs Hyman that the barn, meadow and bridleway were not part of the garden or grounds of the house.

7. The appeal to the FTT in the case of Pensfold involved other issues which it is not now necessary to describe. In relation to the point relevant on this appeal to the Upper Tribunal, the FTT did not set out its findings of fact in much detail. The property in question was known as Pensfold Farm, Bucks Green, Surrey and comprised a farmhouse and 27 acres of land. On 12 January 2017, the property was sold to a Cayman Island company known only, apparently, as "Pensfold", for £2,825,000. Pensfold submitted an SDLT return on the basis that all the land was non-residential, although before the FTT it accepted that the house and part of the land was residential property. The argument before the FTT as to whether all of the property was residential property appears to have been confined to an argument as to whether part of the land was the subject of a grazing licence in favour of a third party. The FTT held that no part of the land was the subject of a grazing licence and that the house and land was "wholly residential".

8. The appeal by Dr and Mrs Goodfellow relates to Heathermoor House, Hale Purlieu, Fordingbridge, Hampshire. The property comprised a house and 4.5 acres of land. Dr and Mrs Goodfellow bought the property on 21 March 2016 for £1,775,000 and paid SDLT of £126,750. This was the correct amount of SDLT if all of the property was residential property within section 116 of FA 2003. About one and a half years later, Dr and Mrs Goodfellow's advisers claimed a repayment of £48,500 which was said to have been overpaid as SDLT. HMRC did not agree to the repayment and that led to the appeal to the FTT, which was decided in favour of HMRC. 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.

FA 2003

9. Section 42 of FA 2003 provides that SDLT is charged on land transactions. A land transaction is defined by section 43 to be any acquisition of a chargeable interest. A chargeable interest is defined by section 48 to include an estate, interest, right or power in or over land.

10. Section 55 of FA 2003 deals with the amount of tax chargeable in relation to a chargeable transaction. In these three cases, tax was chargeable in accordance with section 55(1B). That subsection refers to two tables of rates for different parts of the total consideration for the transaction. The tables are referred to as Table A and Table B. Table A applies "if the relevant land consists entirely of residential property". Table B applies "if the relevant land consists of or includes land that is not residential

property". It is not necessary to set out the various rates in Table A and Table B. It suffices to say that the rates in Table A are higher than the rates in Table B. In these three cases, HMRC contended that the rates in Table A applied and the taxpayers contended that the rates in Table B applied. Section 55(1B) referred to "the relevant land" which is defined in section 55(3) as "the land an interest in which is the main subject-matter of the transaction"; that phrase is itself explained in section 43(6). Although there was discussion as to the operation of section 55(3) at the hearing of these appeals, it was agreed by the parties that that subsection had no relevance to the issues in these cases and, accordingly, we will not refer to it further.

11. Section 116 of FA 2003 contains a definition of "residential property". Section 116(1) 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.
>
> This is subject to the rule in subsection (7) in the case of a transaction involving six or more dwellings."

12. The remaining subsections of section 116 are not relevant to the issues in these cases.

13. As regards section 116(1)(a), it was agreed that each of the houses which were sold in these three cases was "a building" within that paragraph. It was also agreed that section 116(1)(c) was not material to the issues in these cases.

The decisions of the FTT

14. In the case of Mr and Mrs Hyman, it was argued that the barn, the meadow and the bridleway were not residential property because they were not part of the garden or grounds of the house. The neutral citation of the decision of the FTT is [2019] UKFTT 469 (TC). The FTT rejected that argument and gave these reasons:

> "61. For SDLT purposes, "residential property" means a building that is used as a dwelling and land that is or forms part of the garden or grounds of the dwelling including a building on such land.
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> 62. In my view "grounds" has, and is intended to have, a wide meaning. It is an ordinary word and its ordinary meaning is land attached to or surrounding a house which is occupied with the house and is available to the owners of the house for them to use. I use the expression "occupied with the house" to mean that the land is available to the owners to use as they wish. It does not imply a requirement for active use. "Grounds" is clearly a term which is more extensive

than "garden" which connotes some degree of cultivation. It is not a necessary feature of grounds that they are used for ornamental or recreational purposes. Grounds need not be used for any particular purpose and can, as in this case, be allowed to grow wild. I do not consider it relevant that the grounds and gardens are separated from each other by hedges or fences. This may simply be ornamental, or may serve the purpose of delineating different areas of land as being for different uses. Nor is it fatal that other people have rights over the land. The fact that there is a right of way over grounds might impinge on the owners' enjoyment of the grounds and even impose burdensome obligations on them, but such rights to not make the grounds any the less the grounds of that person's residence. Land would not constitute grounds to the extent that it is used for a separate, eg commercial purpose. It would not then be occupied with the residence, but would be the premises on which a business is conducted.

63. Applying this test to the meadow and the bridleway, I conclude that these elements of the land are part of the grounds of the Farmhouse within section 116(1)(b) and that the barn is a building or structure on that land. Accordingly, the whole of the property owned by Mr and Mrs Hyman is residential property for the purposes of SDLT and the tax was correctly paid on that basis."

15. In the case of Pensfold, in relation to the question whether all of the land was residential property, the reasoning of the FTT was confined to dealing with an issue as to whether part of the land was the subject of a grazing licence. The neutral citation of the decision of the FTT is [2020] UKFTT 116 (TC).

16. In the case of Dr and Mrs Goodfellow, the arguments related to a room above a garage, the paddocks, and stables and a stable yard. The neutral citation of the decision of the FTT is [2019] UKFTT 750 (TC). The FTT rejected the arguments for the taxpayers and gave these reasons:

"17. … it seems to us, looking at the character of the property as a whole, that the land surrounding the house is very much essential to its character, to protect its privacy, peace and sense of space, and to enable the enjoyment of typical country pursuits such horse riding. This is a country setting, in an area of outstanding natural beauty.

18. The large room above the detached garage is in fact connected to the house by a covered walkway, as the evidence such as the plans and photographs showed. The room is equipped with its own bathroom. It is plainly and obviously suitable for domestic use and capable of being furnished at will. It could readily be used as a guest suite, play room for children, or a games room for teenagers. There was no evidence that it had ever been let out or was separately rated for office use.

19. The tribunal finds that the room above the garage currently used by the First Appellant as an office is wholly residential in character. It is in principle no different from the First Appellant working from a study, spare room or even the dining room table. Home working is hardly new and it saves the First Appellant from making the long journey to his company's headquarters in Essex. No question of mixed use arises.

20. As to the paddocks, these are an adjunct to the stables. They form part of the grounds, for recreational purposes. Without the paddocks, keeping horses at the property would be inconvenient and impractical. The house would cease to be an equestrian property. There was no evidence that anything approaching a commercial arrangement was made at any material time for the use of the paddocks. The current rental arrangement of £1.00 per month is the modern equivalent of a peppercorn rental. The previous owner's arrangement for the land was similar. No doubt the presence of the horses helps keep the land in good heart and saves on mowing, as well as providing an agreeable view in keeping with the rural scene.

> 21. The fact that the paddocks have not been developed is in our view of no real relevance. There was no evidence that development of open land (or the woodland area) would be countenanced by the local authority and there was no suggestion in the particulars of sale that the paddocks or woodland had any development potential. The tribunal finds that the paddocks and woodland form part of the grounds of the property and are residential.
>
> 22. Much the same point applies to the stables and stable yard. There was no evidence that any livery business or similar had been in operation at the time of completion of the purchase, nor that they were sold subject to the rights of an existing occupier. The stables and stable yard also form part of the grounds of the house and are necessary to its enjoyment. They are residential. The tribunal so finds."

The submissions for the appellants

17. Mr Patrick Cannon appeared for the appellants in all three cases. He had not appeared in the FTT in any of these cases and his argument on the appeal to the Upper Tribunal was different from the arguments addressed to the FTT in each of these cases.

18. Mr Cannon referred to section 116(1)(b) and to the reference to land which "forms part" of the garden or grounds of a building. In the case of Mr and Mrs Hyman, he accepted that the meadow was part of the grounds of the house but he submitted that it was not a relevant part for the purposes of section 116(1)(b). He submitted that the use of the words "forms part" showed that not all of the grounds sold with a house were necessarily "residential property".

19. Mr Cannon pointed out that section 116(1) FA 2003 was derived from section 92B of the Finance Act 2001, which was inserted by the Finance Act 2002. Section 92B contained a definition of residential property for the purposes of the provisions dealing with disadvantaged areas relief in relation to stamp duty (rather than SDLT). Mr Cannon explained that HMRC had published a Statement of Practice in April 2003, 1/03, dealing with disadvantaged areas relief. Paragraph 30 of this Statement of Practice provided:

> "Section 92B(1)(b) includes within the definition of residential property "land that is or forms part of the garden or grounds of a building within paragraph (a) (including any building or structure on such land)". *The test the Inland Revenue will apply is similar to that applied for the purposes of the capital gains tax relief for main residences (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*." [emphasis added]

20. In relation to SDLT, FA 2003, as originally enacted, contained provisions which conferred disadvantaged areas relief: see section 57 and schedule 6. Those provisions distinguished between residential and non-residential property and the definition of residential property in section 116 applied for the purposes of those provisions. HMRC published a Statement of Practice, 1/04, dealing with disadvantaged areas relief for the purposes of SDLT. Paragraph 35 of this Statement of Practice was in essentially the same terms as paragraph 30 of Statement of Practice 1/03, save for the reference to the number of the relevant statutory provision.

21. HMRC also published further guidance in relation to SDLT. Mr Cannon referred to parts of the HMRC SDLT manual, namely SDLTM20070 and SDLTM30030. The

first of these related to disadvantaged areas relief and essentially repeated paragraph 35 of Statement of Practice, 1/04. The second of these related to the rate of SDLT for residential property and stated:

> " "Garden or grounds" includes land which is needed for the reasonable enjoyment of the dwelling, having regard to the size and nature of the dwelling. This will usually be a question of fact depending on the individual circumstances of each case."

22. Mr Cannon accepted that, in 2019, HMRC revised its guidance as to the operation of section 116 and the current guidance does not refer to section 222(3) of the Taxation of Chargeable Gains Act 1992 in the same way as before and does not repeat the reference to land being needed for the reasonable enjoyment of the dwelling.

23. With the assistance of the guidance provided by HMRC prior to 2019, Mr Cannon submitted that HMRC was right to conclude that, in order to come within the definition of residential property in section 116 of FA 2003, the land in question, even if it was part of the garden or grounds of the house, had in addition to satisfy the test that such land was needed for the reasonable enjoyment of the house, having regard to the size and nature of the house. He pointed out that the FTT in these three cases had not applied that test and had therefore gone wrong in law.

24. Mr Cannon then made submissions as to the meaning of this test and, in that respect, he cited *Re Newhill Compulsory Purchase Order 1937, Payne's Application* [1938] 2 All ER 163 and *Longson v Baker* [2001] STC 6.

25. Mr Cannon explained that his submission related to the true construction of section 116 of FA 2003. He accepted that if he were held to be wrong as to the true construction of the section, he could not assert on the facts of the present cases that the appellants were entitled to have their cases dealt with in accordance with the guidance in existence prior to 2019 (as distinct from the section) on the basis of a legitimate expectation to that effect.

The submissions for HMRC

26. Mr Henderson and Ms Blaj for HMRC submitted that there was no process of statutory construction which would allow a court or tribunal to hold that a garden or grounds of a house were only residential property within section 116 of FA 2002 if the garden or grounds satisfied a further requirement that they were needed for the reasonable enjoyment of the house. The section simply did not impose that requirement.

27. HMRC submitted that the appellants' submissions had misunderstood the reference to "forms part of" in section 116(1)(b).

28. HMRC adopted the approach of the FTT in the decision concerning Mr and Mrs Hyman at [62], quoted above. HMRC submitted that "garden" and "grounds" were ordinary English words and whether a particular area of land came within these words was a matter of fact in each case, taking account of a number of factors and considerations.

29. As to the Statements of Practice and other guidance from HMRC, it was submitted that they had no legal effect. It was a matter for a court or tribunal to interpret the statutory provision, applying a conventional approach as to statutory interpretation. The Statements of Practice and other guidance could not be relied upon to alter the meaning of the statutory provision. It was open to a court or a tribunal to say that the Statements of Practice or guidance were simply wrong. It was submitted that the Statements of Practice and guidance prior to 2019 were wrong both as regards the suggested relevance of section 222(3) of the Taxation of Chargeable Gains Act 1992 and the suggested test that the land must be needed for the reasonable enjoyment of the house.

Discussion and conclusions

30. We start with the statutory wording which is to be construed and applied. Section 116(1)(b) refers to "the garden or grounds of a building" and this is a reference to a building within section 116(1)(a). For present purposes, we can summarise the type of building which comes within section 116(1)(a) as a "dwelling". So section 116(1)(b) refers to the garden or grounds of a dwelling.

31. "Garden" and "grounds" are ordinary English words. In some cases, it might be helpful to refer to the dictionary definitions of "garden" or "grounds" to assist in defining the concept involved. We were not referred to any dictionaries at the hearing of these appeals because it was not suggested that there was any dictionary definition which supported the idea that a piece of land could only be the garden or the grounds of a dwelling if the piece of land was needed for the reasonable enjoyment of the dwelling.

32. In these cases, we do not need to attempt to define a "garden" or "grounds" because the issue before us is not as to the ordinary meaning of those words but, instead, whether section 116(1)(b) imposes a requirement that the land in question must be needed for the reasonable enjoyment of the dwelling. We also note what was said by Moses LJ in *Rockall v Department for Environment, Food and Rural Affairs* [2008] EWHC 2408 (Admin) at [1], albeit in relation to a different statutory provision, as to the danger of a court attempting to give a definitive definition of "garden". The same applies as to the danger of attempting to give a definitive definition of "grounds". Again, it was not submitted that any general definition of garden or grounds that one might come up with would contain a fixed requirement that a piece of land could only be the garden or grounds of a dwelling if it was needed for the reasonable enjoyment of the dwelling.

33. Section 116(1)(b) refers to a garden or grounds "of" a dwelling. The word "of" shows that there must be a connection between the garden or grounds and the dwelling. The section does not spell out what criteria are to be applied for the purpose of establishing the necessary connection. We note that FA 2003, in a separate definition of "dwelling" for a specific purpose, refers to "land occupied and enjoyed with the dwelling as its garden or grounds": see schedule 6A, paragraph 7(1) and see, also, schedule 4ZA, paragraph 18(3) and schedule 4A, paragraph 7(3), which are in slightly different terms. We were not addressed as to whether the word "of" is to be interpreted as involving the same degree of connection between the dwelling and the garden or

grounds or a different degree of connection. Again, it is not necessary for us to deal with that point to deal with the sole issue raised in these appeals.

34. Before the FTT in these three cases, the argument seemed to be that some of the land did not come within the ordinary meaning of a garden or grounds. Mr Cannon's submission on these appeals is different. For example, in relation to the appeal of Mr and Mrs Hyman, he accepted when asked that the meadow was part of the grounds of the house in that case, if one gave "grounds" its ordinary meaning. But he then went on to submit that the meadow was not part of the grounds for the purposes of section 116(1)(b) because it was not needed for the reasonable enjoyment of the house.

35. Mr Cannon emphasised the words "forms part of" in section 116(1)(b). He submitted that those words showed that it was not enough for a piece of land to come within the ordinary meaning of a garden or grounds. One had to go on to ask whether the piece of land was a part of the garden or grounds and it would only be a part of the garden or grounds, or a relevant part, if it was needed for the reasonable enjoyment of the house.

36. We are unable to accept Mr Cannon's submission as to the significance of the words "forms part of". The purpose of those words is quite clear. They deal with a case where there is land which is a garden or grounds of a dwelling but the sale relates to part only of the garden or grounds and not the whole. That could arise in two different cases. The first case is where the owner of a house and its garden or grounds sells the house and part of the garden or grounds. The second case is where the owner of a house and its garden or grounds sells only a part of the garden or grounds. In each of these cases, the part of the garden or grounds comes within the definition of residential property.

37. In any case, Mr Cannon's submission as to "forms part of" does not produce the result for which he contends. Take the example of the meadow in the case of Mr and Mrs Hyman. Mr Cannon accepts that, on the ordinary meaning of "grounds", the grounds include the meadow. Section 116(1)(b) provides that the land which is the garden or grounds of a dwelling is residential property even before one has to consider the meaning of the words "forms part of".

38. Having considered the submission as to "forms part of", it can be seen that there is no wording in section 116(1)(b) which imposes, or even hints at, a requirement that land can only be a garden or grounds of a dwelling if the land is needed for the reasonable enjoyment of the dwelling. We consider that in the absence of any wording to give effect to the limitation contended for, there is no such limitation on the operation of the provision.

39. If necessary, we could derive further support for that conclusion by considering another provision in FA 2003. Schedule 6A to FA 2003 contains provisions as to the availability of certain reliefs. These provisions include references to a "dwelling" and to "the permitted area". Paragraph 7(1) of schedule 6A to FA 2003, to which we referred earlier, states that "dwelling" includes land occupied and enjoyed with the dwelling as its garden or grounds. Paragraph 7(3) of schedule 6A defines "permitted area", in

relation to a dwelling, as meaning land occupied and enjoyed with the dwelling as its garden or grounds that does not exceed an area (inclusive of the site of the dwelling) of 0.5 of a hectare or "such larger area as is required for the reasonable enjoyment of the dwelling as a dwelling having regard to its size and character". So that definition expressly imposes the limitation advanced by Mr Cannon in this case. We consider that the absence of this limitation in section 116(1)(b) is completely clear in any case but the position becomes even more stark when one sees the limitation expressly spelt out in this other provision. The other thing which emerges from paragraph 7 of schedule 6A is that the draftsman plainly thought that one could have an area of land which was more extensive than this limitation and which could still be regarded as a garden or grounds, otherwise it would not have been necessary to introduce the express limitation.

40. Mr Cannon relied on the fact that section 116 of FA 2003 was the same as section 92B of the Finance Act 2001. Mr Henderson showed us that the two sections were not identical but we accept that they are in essentially the same terms. However, Mr Cannon's argument is not advanced simply by showing that section 92B is a predecessor of section 116. If the same point arises in relation to each provision, the same answer should be arrived at in relation to each provision. Mr Cannon does not suggest that there was any authority as to section 92B which supports his submission on this appeal.

41. Thus far, it appears to us that Mr Cannon's submission as to the existence of a limitation on the operation of section 116(1)(b) is plainly wrong. We suspect that in the absence of the Statements of Practice and the HMRC guidance, to which we will next refer, the submission would never have been made.

42. Mr Cannon submitted that the Statements of Practice and the HMRC guidance were persuasive authority as to the meaning of, first, section 92B of the Finance Act 2001 and, now, section 116 of FA 2003. The relevant guidance was non-statutory guidance. Such guidance can in some cases be persuasive when a court or tribunal is asked to construe legislation. However, it does not differ from a statement by an academic author in a text book or an article and it does not enjoy any particular legal status; there is no presumption that the guidance is correct: see *Chief Constable of Cumbria v Wright* [2007] 1 WLR 1407 at [17], per Lloyd-Jones J, referred to by Lord Hope of Craighead in *Grays Timber Products Ltd v Revenue and Customs Commissioners* [2010] 1 WLR 497 at [54]-[55]. Ultimately, the court or tribunal has to decide what the legislation means and whether the guidance is right or wrong. It is by no means unprecedented for the court or tribunal to say that the guidance is simply wrong: see the *Grays Timber Products* case and *R v Wandsworth LBC ex parte Beckwith* [1996] 1 WLR 129 at 132 as examples of that.

43. As regards the guidance in relation to section 116 itself, there are two different sets of guidance. We have referred to the first set of guidance, prior to 2019, as to the provisions of FA 2003 which deal with disadvantaged areas relief and separately with the rate of SDLT. That guidance supports the submission made by Mr Cannon. The second set of guidance dates from 2019 and provides no support for that submission. Both sets of guidance cannot be right. We have considered both and we find the first set of guidance to be wholly unpersuasive. The first set of guidance says that HMRC

will apply a similar test to that applied for capital gains tax relief for main residences and refers to section 222(3) of the Taxation of Capital Gains Tax Act 1992. Section 222 of the 1992 Act operates in a broadly similar way to paragraph 7 of schedule 6A to the FA 2003, to which we referred earlier. Under section 222 of the 1992 Act, relief is available in relation to the gain on the disposal of a dwelling-house which has been the taxpayer's main residence. The relief extends to land which the taxpayer had "for his own occupation and enjoyment with that residence as its garden or grounds *up to the permitted area*" (emphasis added). Section 222(2) provides that the permitted area is, in the first instance, an area of 0.5 of a hectare. Section 222(3) goes on to provide that where "the area required for the reasonable enjoyment of the dwelling-house 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".

44. It can be seen that section 222 of the 1992 Act is in quite different terms from section 116 of FA 2003. In section 222 of the 1992 Act, there is an express limitation to a permitted area and in section 116 of FA 2003, there is no such limitation. The reference in section 222(3) of the 1992 Act to the area required for the reasonable enjoyment of the dwelling-house is for the purpose of the express limitation which refers to the permitted area. It is clear to us that HMRC was simply wrong to suggest in their original guidance that it ought to apply, for the purposes of section 116 of FA 2003, a test similar to the express statutory test in section 222(3) of the 1992 Act. The further piece of guidance, that "garden or grounds" included land which was needed for the reasonable enjoyment of the dwelling, was plainly the result of the earlier statement that the test for section 116 of FA 2003 was similar to that for section 222(3) of the 1992 Act and was also simply wrong.

45. In his submissions in reply, Mr Cannon attempted to rely on the Statement of Practice 1/03 in a different way. He said that that Statement was published in April 2003 and FA 2003 received the Royal Assent on 10 July 2003. He submitted that Parliament should be taken to have legislated in FA 2003 against the background of that Statement as to the meaning of Section 92B of the Finance Act 2001, which was in the same terms as section 116 of FA 2003. He submitted that we should therefore interpret section 116 of FA 2003 in accordance with that Statement. We do not accept that submission. Section 116 is clear and unambiguous. It is clearly different from section 222(3) of the 1992 Act. Anyone who considered the wording of the clause in the Finance Bill which became section 116 of FA 2003 ought to have regarded Statement of Practice 1/03 as being incorrect as to the meaning of section 116.

46. Having considered the submissions as to the Statements of Practice and the guidance, we remain of the view that section 116 of FA 2003 is not subject to the limitation contended for by Mr Cannon.

47. We were invited to make some comments on the current guidance as to section 116 of FA 2003 and we shall do so. The guidance which we were shown is in the SDLT Manual at 00440, 00445, 00450, 00455, 00460, 00465, 00470, 00475 and 00480.

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

"reasonable enjoyment" and no statutory size limit that determines what "garden or grounds" means. We agree that those statements are correct as they are in accordance with our Decision in this case.

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

50. We will not comment on any other parts of the current guidance. It is not necessary to do so for the purpose of deciding these appeals. There is no appeal in any of these three cases against the evaluative exercise carried out by the FTT so we do not have to review the decisions of the FTT in that respect. No one made any submissions as to the other parts of the current guidance which we have not mentioned above. However, we are certainly not indicating that we have any concerns as to the other parts of that guidance and Mr Cannon did not identify any part of it which he would wish to challenge. The fact that we are not commenting on the other parts of the guidance is simply because it is not relevant in these appeals for us to do so.

The overall result

51. For the reasons given above, we do not accept the single ground of appeal which has been put forward. It was agreed that if we did not accept that ground of appeal, it would follow that these appeals ought to be dismissed and we will dismiss them accordingly.

Signed on Original

MR JUSTICE MORGAN

JUDGE JONATHAN CANNAN

RELEASE DATE: 18 MARCH 2021