[2020] UKFTT 0127 (TC)

TC07633

STAMP DUTY LAND TAX – different rates for residential and non-residential property – grassy field adjoining countryside house and garden – part of the grounds of the house? – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/07633

BETWEEN

LYNDA HELEN MYLES-TILL **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ZACHARY CITRON

Sitting in public at Taylor House, London EC1 on 15 January 2020

Mr P Cannon of counsel for the Appellant

Mr P McDougall-Moore of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This case concerned whether a grass-covered field acquired with, and adjoining, a house and garden in the countryside was part of the house's "grounds" for the purposes of stamp duty land tax ("SDLT").

2. The appellant was not present at the hearing. Her counsel, Mr Cannon, explained that this was because she was in hospital; and that she was content for the hearing to proceed in her absence. Given this, and the facts that she was given notice of the hearing and had legal representation, I decided that it was in the interests of justice to proceed with the hearing in her absence.

BACKGROUND TO THE APPEAL

3. On 30 May 2018 HMRC wrote to the appellant saying that they wanted to check her amendment to her SDLT return for the acquisition of a property known as Shepherd's Cottage, near Henley in Oxfordshire (the "property"), on 23 January 2017.

4. On 5 July 2018 HMRC wrote to the appellant saying that they had completed their check, that the letter was a closure notice under paragraph 23 Schedule 10 Finance Act 2003, that they considered that the "paddock" to the rear of the property was (like the rest of the property) "residential property", and that they had amended her SDLT return to reflect this. The letter stated that the amount now due was SDLT of £20,875 and interest (to 16 July 2018) of £832.85.

5. The appellant's representatives wrote to HMRC on 27 July 2018 stating that the letter was an appeal under paragraph 35(1)(b) Schedule 10 Finance Act 2003.

6. The appellant's requested a statutory review of HMRC's decision; this was given by HMRC on 19 October 2018, upholding their original decision.

7. On 14 November 2018 the appellant's representatives notified the appeal to the Tribunal.

EVIDENCE

8. I had documents and an authorities bundles from each of the parties, in similar form. As well as correspondence between the parties, the documents bundle included estate agent particulars for the property from around the time of the sale to the appellant.

9. I also had a witness statement and report from Mr Tom Warren, an agricultural and rural planning consultant. This evidence was first sent to HMRC and the Tribunal on 9 September 2019, over three months after the date set by the Tribunal in directions for exchange of witness statements. HMRC did not notify the Tribunal of their objection to admitting this evidence until 20 December 2019. Having heard submissions of the parties (and in particular Mr McDougall-Moore's acknowledgement that HMRC would not be prejudiced by admitting this evidence, as they had had several months to consider it), and balancing the importance of compliance with the Tribunal's directions with the overriding objective of dealing with cases fairly and justly, I decided to admit the evidence as to fact, but to exclude the opinion evidence (since the lateness of the application and admission meant that the Tribunal's procedures had not been followed to ensure fair and just treatment of expert evidence).

10. Mr Warren gave oral evidence and was cross examined by Mr McDougall-Moore. Mr Warren's evidence was chiefly an "agricultural/mixed use statement" produced following his visit to the property on 30 August 2019.

FINDINGS OF FACT

11. The appellant acquired the property on 23 January 2017 for £1,332,500. Its total area was about three acres and comprised:

(1) A three bedroom house

(2) A detached double garage

(3) A garden to the rear of the house

(4) A grass-covered field known as the "paddock"

12. The property had three land registration numbers and was described in Form TR1 as follows:

(1) Shepherds Cottage Greys Green Rotherfield Greys Henley-on-Thames RG9 4QL

(2) land adjoining the east side of Shepherds Cottage Greys Green Rotherfield Greys Henley-on-Thames RG9 4QL

(3) land adjoining Shepherds Cottage Greys Green Rotherfield Greys Henley-on-Thames RG9 4QG

13. The paddock was mentioned a few times in the estate agent particulars thus:

(1) The main sub-heading: "IDYLLIC HOME WITH RURAL VIEWS AND A PADDOCK".

(2) As part of a description of the house: "The master garden overlooks the garden and paddock beyond …"

(3) Under the heading "Outside":

> "The property is approached via a gravel driveway providing off street parking for several vehicles and leads to a detached double garage. The rear, south facing garden is a particular feature of Shepherds Cottage and has a number of flower beds, stocked with a variety of plants and shrubs. The remainder of the garden is laid to lawn with a paved patio area and a pond.
>
> The garden looks back on to a paddock enclosed by mature hedging and post and rail fencing. The total plot measures just over 3 acres."

14. The paddock was a grass-covered field of about 1.1 acres, situated behind the rear garden, enclosed by hedging and post and rail fencing. In 1983, the paddock formed part of a neighbouring farm. For many years, up to and including January 2017, the paddock had been covered in grass and therefore potentially usable for pasture i.e. grazing animals. This potential use of the paddock for pasture/grazing caused Mr Warren to describe it in his report as "agricultural land".

15. Mr Warren performed a "desk review" of properties within a 25 mile radius of the property and identified eight properties of the same size or larger, none of which included "agricultural land".

RELEVANT LAW

16. SDLT law is largely set out in Finance Act 2003 (and references to sections in what follows are to sections of that Act). SDLT is a tax on "chargeable transactions" – under s49, these are "land transactions" which are not exempt. Under s43, "land transaction" means the acquisition of a "chargeable interest". Under s48, "chargeable interest" is (in this context) an estate or interest in or over land.

17. Section 55 deals with the amount of SDLT chargeable in respect of certain chargeable transactions. For transactions like the appellant's acquisition of the property, it sets out two tables of rates to be applied to layers of consideration. Table A applies where "the relevant land consists entirely of residential property" (s55(1B) Step 1 (a)). "Relevant land" means the land an interest in which is the main subject-matter of the transaction (s55(3)(a)). Table B applies "if the relevant land consists of or includes land that is not residential property" (Step 1 (b)).

18. The difference between Table A and Table B is that the former imposes higher rates for consideration between £125,000 and £150,000 and also for consideration exceeding £925,000.

19. "Residential property" is defined in s116(1) as:

> (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.

BURDEN AND STANDARD OF PROOF

20. The burden of proof was on the appellant to show, on the balance of probabilities, that the SDLT return as amended by HMRC (and treaty the property as residential property) was incorrect.

APPELLANT'S SUBMISSIONS

21. In their skeleton argument the Appellant's representatives submitted that the paddock was "agricultural land" that did not form part of the garden or grounds of the dwelling because:

(1) It was an additional piece of land adjacent to the property

(2) The estate agent property particulars consistently referred to the paddock separately to the garden and grounds of house

(3) The paddock was historically used as agricultural land as part of the neighbouring farm

(4) The paddock was overgrown agricultural land at date of completion; it had not been adapted to other use

(5) The size of the paddock, as "agricultural land," was far larger than would usually come within garden and grounds of a dwelling of the size and character of Shepherds Cottage. Excluding the paddock, Shepherds Cottage had a garden and grounds commensurate with the size of the dwelling.

22. At the hearing, Mr Cannon submitted that, due to the absence of a definition of "grounds" in s116, it was instructive to look at relevant case law – and, in his submission, the capital gains tax cases on the principal private residence exemption, reviewed but found not to be of assistance in *Hyman and Hyman v HMRC* [2019] UKFTT 469, were relevant. For similar reasons, he submitted that HMRC statements of practice and manual instructions could be helpful in this matter of interpretation (whilst acknowledging that these publications had no legal authority as such, and that the Tribunal had no administrative law jurisdiction in this appeal). Overall, Mr Cannon said, it would be far too blunt to regard any land sold together with a dwelling house as part of the house's "grounds".

23. Based on his reading of case law where judges had addressed the meaning of "garden" and "grounds", albeit in quite different statutory contexts, Mr Cannon submitted that an appropriate test for the Tribunal to apply here would be: could the adjoining land (here, the paddock) be detached without substantial deprivation to the reasonable enjoyment of dwelling? If so, then it was not part of the grounds. He derived this formulation in part from the judgement in *Re Newhill Compulsory Purchase Order 1937* [1938] 2 AER 163 (and also cited in *Longson v Baker* [2001] STC 6), where, in construing the statutory phrase "land … required for the amenity or convenience of any house", the judge said:

> "Required" means, I suppose, that without it there will be such a substantial deprivation of amenities or convenience that a real injury will be done to the property owner, and a question like that is obviously a question of fact.

24. Citing *Hyman* at [62] – "Land would not constitute grounds to the extent that it is used for a separate, e.g. commercial purpose. It would not then be occupied with the residence, but would be the premises on which a business is conducted" – Mr Cannon submitted that, here, the paddock was historically, and remained, "agricultural land" – and thereby fell into this exclusion from "grounds".

25. Mr Cannon agreed with the statement in the HMRC manuals, introduced on 25 June 2019, that the traditional or habitual use of the land was significant (the relevant paragraphs are quoted in the discussion below). In this case, he submitted, the paddock had been used as part of a farm in 1983, and had been classified as "agricultural land" ever since.

26. Mr Cannon did not accept Mr McDougall-Moore's assertion that the paddock was a major selling point of Shepherds Cottage; and in any case, did not consider this to be relevant to whether the paddock was part of Shepherd Cottage's grounds.

HMRC'S SUBMISSIONS

27. HMRC's skeleton arguments, as elaborated by Mr McDougall-Moore in the hearing, included the following:

> (1) The paddock was "residential property" as it was a key selling point of the property. It matters not, to the question of whether the paddock was part of the "grounds", that the appellant may not have been extensively "using" the paddock. What mattered was that there was nothing restricting the proprietors of the property from using and enjoying the paddock as part of the grounds of the dwelling.
>
> (2) HMRC agreed with the statement by the appellant's advisers in correspondence that residential vs non-residential status determination is helped by "whether the owner is permitted to use the additional land privately for ornamental or recreational purposes". Here, there was no evidence that the appellant was not permitted to use the paddock at her leisure.
>
> (3) The use to which any land is put by proprietors is not determinative in deciding whether it is residential for these purposes. Each case must be considered on its own facts.
>
> (4) Capital gains is a distinct issue and capital gains principles are not persuasive in analysis of SDLT issues. Section 222(1)(b) Taxation of Chargeable Gains Act ("TCGA") 1992 uses the expression "garden or grounds" but then restricts it by reference to a maximum "permitted area". The section does not actually provide any definition of "grounds" itself; and the case law is concerned with the meaning of "permitted area" as elaborated in s222(2) and (3) TCGA 1992 – which is not relevant to s116(1).

(5) "Grounds" should bear its natural meaning, for which the dictionary definition – enclosed land surrounding a large house or building – is instructive. Parliament intentionally adopted a word of broad meaning. The paddock answers to this description.

(6) The fact that the paddock was part of a farm in 1983 is of little or no relevance to the determination of whether it was part of the grounds of Shepherds Cottage in January 2017.

DISCUSSION

28. The relevant land here, for the purposes of s55, is the property as a whole. The question to be decided is whether the property includes any land that is not residential property as defined in s116(1). It was common ground that Shepherds Cottage itself and its garden were residential property, and that s116(1)(c) was not in point here; and so the sole issue was whether the paddock was part of the "grounds" of the Shepherds Cottage for the purposes of s116(1)(b).

29. I observe that a source of difficulty here is the draftsman's choice of a word that is not only legally imprecise but also somewhat archaic: the "grounds" of a dwelling building. Few people nowadays would describe the land surrounding their homes as the "grounds" – the word "grounds" was not used in the estate agents particulars here - yet the statute here requires a line to be drawn between the "grounds" of a dwelling building and any other land acquired as part of the same transaction – and provides no definitional assistance.

30. I begin by reviewing various authorities, legal and non-legal, for the meaning of "grounds", before turning back to the facts of this case.

2003 Inland Revenue statement of practice

31. Mr Cannon said that the definition of residential property in s116 had entered the statutory code as an amendment to the old stamp duty exemption for land in disadvantaged areas, introduced by Finance Act 2002 as s92B of Finance Act 2001; it was then incorporated into SDLT and became the distinguishing factor between the Table A and Table B rates of SDLT in s55.

32. Mr Cannon suggested that Inland Revenue statement of practice 01/03, introduced the year after this wording was first enacted in Finance Act 2002 as "s92B", might shed some light on Parliament's intentions. That statement of practice said (at paragraph 30):

> 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.

33. I am not persuaded that this Inland Revenue statement of practice sheds any light on Parliament's intentions in Finance Act 2002. Even if it did, I do not think it supports the appellant's argument that the extent of "grounds" should be restricted to that needed for the reasonable enjoyment of the dwelling having regard to the size and nature of the dwelling (which is the addition to the 0.5 hectare of "permitted area" allowed by s222(3) TCGA 1992 in the context of the principal private residence exemption from capital gains tax) – the statement of practice merely said that "grounds" should include such land. I note that the same sort of "includes" wording, picking up the wording from s222(3) TCGA 1992, was carried into HMRC's SDLT manual wording on the disadvantaged areas relief (SDLTM20070 – now

withdrawn) and the introduction of 5% rate for residential property in 2011 (SDLTM30030 – now withdrawn).

Case law

34. I agree with Mr Cannon that in the absence of a statutory definition one instinctively looks to case law for guidance. However, I was not persuaded that either of the two capital gains cases in the appellant's authorities bundle was of assistance. In *Lewis v Rook* [1992] STC 171 the Court of Appeal were concerned the meaning and extent of the term "dwelling house" as found now at s222(1)(a) TCGA 1992 – this does not assist as regards the meaning and extent of "grounds" (a term found in s222(1)(b) but not in s222(1)(a)). *Longson v Baker*, a High Court decision, is concerned with the statutory limitation ("permitted area") on the extent of the garden or grounds of a residence for capital gains purposes found in s222(2) and (3) TGCA 1992. The case does not look at the meaning of "grounds" itself – and as the "permitted area" restriction does not appear in s116, the judgement is not relevant to the issue to be decided here. My analysis here is on all fours with that in *Hyman* at [47] and [50].

35. In *McInerney v Portland Port Ltd* [2001] 1 PLR 104 and *Rockall v Department for Environment, Food and Rural Affairs* [2008] EWHC 2408, the higher courts (High Court and Court of Appeal respectively) had to decide whether land on which certain trees that had been felled was a "garden" (as this gave a defence to the offence of felling without a licence). Whilst the subject matter of these cases (gardens) is clearly different from the issue here (grounds), Mr Cannon submitted (and I agree) that some assistance can be derived by understanding how the higher courts approach deciding whether land fits certain categories which are not statutorily defined.

36. In *McInerney*, the land in question, whilst previously used as a garden, had become overgrown and neglected; but the magistrates found that there had been no change in use and concluded that the land remained a garden. Reversing that decision, the High Court held that "what needs to be considered is the history of the land in question, but, more important, its state at the time the question in relation to its description is asked". The judge said that the magistrates had fallen into the error by using a test of whether there was any change in use. Even accepting that that was not intended simply to be a reference to the planning status of the land, this approach clouded their appreciation of their task, which was to look at the status of the land at the relevant time.

37. In *Rockall*, a landowner acquired adjoining land which, historically, had been used as a garden but over the course of 30 years had become heavily wooded and fallen into disuse. The landowner then felled some trees with the intention of reinstating the adjoining land as a garden. At first instance and in the High Court, it was found that the land was not a "garden". The Court of Appeal emphasised the importance, in deciding whether a piece of land was a "garden", of looking at how the particular occupier in question used the land. On the facts before it – owners who lived abroad or who lacked resources to keep up the garden - the court was not persuaded that the land had ceased to be a garden; and this, combined with the present landowner's genuine intention to re-plant the garden to its original design, was enough to distinguish the case from *McInerney*, such that the land was still a garden at the time of the tree-felling.

38. There are two recent decisions of this Tribunal on the application of s116(1)(b), which, though not binding, are of persuasive authority: *Hyman* (already referred to) and *Goodfellow and Goodfellow* [2019] UKFTT 750. In *Hyman*, the taxpayers bought a property with over 3.5 acres of land for just over £1.5m; in addition to the main dwelling building, there was a large non-residential barn, a meadow and a public bridleway, all of which, it was argued by the taxpayers, were "non-residential property". (The meadow, in particular, was used for walking the family dog and for keeping hens on a non-commercial basis.) The Tribunal dismissed the

appeal, finding that barn, meadow and bridleway were all "grounds" of the dwelling building (or buildings on those grounds). The Tribunal found that what made the surrounding land "grounds" was that it was "occupied with the house" – meaning it was available to the owners of the dwelling building to use as they wish, but not used for a separate (e.g. commercial) purpose.

39. In *Goodfellow*, the taxpayers bought a family home set in about 4.5 acres for nearly £1.8m. There was a stable yard and paddocks on the property which the taxpayers argued was non-residential property (as a third party grazed horses on the paddock). The Tribunal adopted the analysis in *Hyman* and dismissed the appeal, finding the paddocks and stables were used for recreational (and not commercial) activity.

HMRC manuals

40. The appellant's case referred to a number of pieces of HMRC manual guidance (notably, HMRC's case did not), several of which were introduced on 25 June 2019. It was common ground that such material was relevant only to the extent that it reflected the views of body with considerable expertise in tax – it had no binding authority in law.

41. I set out below extracts from those articles which I consider may be relevant and assist in the resolution of the issue in this appeal.

> (1) SDLTM 00440 (referring to s116(1)(b)): "The language of the statute should be given its natural meaning, so dictionary definitions can be helpful. However, there are many different dictionary definitions of 'garden' and 'grounds'. These may be useful indicators when applied to the land, but none are determinative."
>
> (2) SDLTM 00450 (under the sub-heading, "Historic use can be relevant"): "The status of the land in question must be assessed at the effective date of the transaction but that does not mean that only the use on that day will be considered. The aim of the legislation is to capture the real or true relationship of the land to the building at the time of the land transaction. So provided the building still falls within section 116 (1) (a) FA 2003 at the effective date, the history of use of the land is relevant in considering the nature/status of the land at the effective day.
>
> "We should seek to establish the traditional or habitual use of the land to establish its true relationship to the building. This can be difficult but you will be looking for customary, continued or regular use. Use that is ephemeral or appears to be part of an artificial/contrived arrangement will not be indicative of the true relationship of the land to the building."
>
> (3) SDLTM 00460 (under the heading, "Use"): "Although all factors must be taken into account and weighed against each other, the use of the land is potentially the most significant indicator of whether the land is 'garden or grounds'. The aim of the legislation is to distinguish between residential and non-residential status, so it is logical that where land is in use for a commercial rather than purely domestic purpose, the commercial use would be a strong indicator that the land is not the 'garden or grounds' of the relevant building. It would be expected that the land had been actively and substantively exploited on a regular basis for this to be the case.
>
> "A large number of activities taking place on land may have a domestic or commercial character depending on the individual facts, so it is likely that HM Revenue and Customs (HMRC) would expect to see evidence of commercial use.
>
> "For example beekeeping, grazing and equestrian activities are all activities which could be purely for leisure or could be performed on a commercial basis.

"Parkland which, whilst grazed by livestock, primarily provides an appealing setting for a dwelling and on which the livestock are not kept on a commercial basis is likely to remain the 'garden or grounds' of the relevant building. In contrast the same land grazed by livestock under a genuine commercial arrangement would be far less likely to be the 'garden or grounds' of the building.

…

"Certain types of land can be expected to be 'garden or grounds' or be expected to be commercial land unless otherwise established. So paddocks and orchards will usually be residential, unless actively and substantively exploited on a regular basis. However, where a field usually exploited for an arable agricultural purpose is sitting fallow this is not an indicator that it has become 'garden or grounds'. Fallow periods are an integral part of commercial management of farmland. Such land may have been exploited using agricultural machinery over a period of time, and so is unlikely to have the nature of 'gardens or grounds'."

(4) SDLTM00465 (under the heading, "Layout of land and outbuildings"): "The layout of the land and outbuildings will be significant.

"If the land is laid out so as to be suitable for day to day domestic enjoyment by the occupiers of the dwelling, this will be indicative that the land is likely to be 'garden or grounds'.

"The presence of:

- domestic outbuildings;
- areas laid out for leisure use or carrying out hobbies;
- small orchards; or
- stables and paddocks suitable for leisure use

would all indicate that the land is 'garden or grounds'.

"If the land is laid out so as to be suitable for use for a business on a commercial basis, this will be indicative that the land is unlikely to be 'garden or grounds'.

"The presence of:

- commercial farming/horticulture;
- commercial woodland;
- commercial equestrian use; or
- some other commercial use

would all indicate that the land may not be 'garden or grounds'."

(5) SDLTM 00470: (under the heading, "Geographical factors"): "Proximity to the dwelling: Physical proximity of the land to the dwelling will be an indicator that it is more likely to be 'garden or grounds', however land which is separated from the dwelling may still fall within this category.

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

"Simply fencing off a section of land does not by itself make this "separated" from the dwelling. However, the less accessible the land is from the dwelling and the greater the degree of separation, the less the land is likely to be 'garden or grounds'.

"A paddock located a substantial distance from the dwelling, especially if separated by non-residential or unconnected land, would not usually be the grounds of the dwelling. On the other hand land may be separated from the dwelling in circumstances which would normally indicate that it is not 'garden or grounds', but there may be a strong historical association whereby the use of the land is ancillary to the dwelling. If so then this will be an indicator in favour of 'garden or grounds'.

"Extent of the land: The extent/size of the land in question will also be relevant in relation the building. A small country cottage is unlikely to command dozens of acres of grounds but a stately home may do. Large tracts of fells/moorland etc. (even if purchased with a dwelling) are unlikely to be residential in nature. The test is not simply whether the land comprises gardens and grounds, but whether it comprises the gardens and grounds of a dwelling."

OED

42. The Oxford English Dictionary defines grounds as an enclosed portion of land of considerable extent surrounding or attached to a dwelling house or other building, serving chiefly for ornament or decoration.

Application and conclusion

43. This case is about whether the grounds of Shepherds Cottage, a dwelling building, included an adjacent grass-covered field known as the paddock. The paddock was clearly not part of the grounds of Shepherds Cottage originally – we know that, some 35 years before the land transaction at issue here, in 1983, the paddock was part of a neighbouring farm under separate ownership. But by the date in question, in January 2017, the paddock and Shepherds Cottage had come under common ownership.

44. What indicates that a piece of adjoining land has become part of the "grounds" of a dwelling building? Technically, fact that a dwelling building is sold together with adjoining land, as a single chargeable transaction for SDLT purposes, does not make that adjoining land, necessarily, part of the grounds of the dwelling building: s55 clearly envisages the possibility that the subject matter of a single chargeable transaction will include both residential and non-residential land. Common ownership is a necessary condition for the adjacent land to become part of the grounds of the dwelling building – but not, in my view, a sufficient one. To that extent I cannot accept HMRC's submission that it is sufficient that the adjacent land is available to the owners to use as they wish. One must, in addition, look at the use or function of the adjoining land to decide if its character answers to the statutory wording in s116(1) – in particular, is the land grounds "of" a building whose defining characteristic is its "use" as a dwelling? The emphasised words indicate that that the use or function of adjoining land itself must support the use of the building concerned as a dwelling. For the commonly owned adjoining land to be "grounds", it must be, functionally, an appendage to the dwelling, rather than having a self-standing function.

45. This formulation is, I believe, consistent with the analysis in *Hyman* at [92], provided one reads that paragraph to the end. I accept that the third sentence of [92], read in isolation, looks much like HMRC's submission in this case about the sufficiency of common ownership, which I have not accepted; but later in the same paragraph the Tribunal stated that land – which

I read as land under common ownership and control with the dwelling building – "would not constitute grounds to the extent it is used for a separate e.g. commercial purpose". I read this as a very similar understanding of the meaning of "grounds" to mine here, in that use for a "commercial" purpose is a good and (perhaps the only) practical example of commonly owned adjoining land that does not function as an appendage but has a self-standing function.

46. My emphasis on the use or function of the adjoining land, viewed realistically and at the relevant point of time, is supported by the "tree-felling" cases of *McInerney* and *Rockall*: it was the use or function of the land that determined whether it was a garden. Quite how the commonly held adjoining land "supports" the dwelling building (in my formulation) will be a matter of fact and degree – ranging from pure ornamentation (simply improving the view from the house) to on-site leisure activities (a horse-riding paddock and stables for use by the house-dwellers). I see the HMRC manuals quoted above as, generally, helpful and balanced discussion of the factors indicating whether the adjoining land functions as an appendage to the dwelling or is self-standing.

47. It will be clear from the foregoing that I have not accepted Mr Cannon's proposition that the test for whether adjoining land are "grounds" be whether the land could be detached without substantial deprivation to the reasonable enjoyment of dwelling. This is too narrow and specific a test; the authority for it is a case (*Newhill*) considering a different (and much narrower) statutory formulation ("land … required for the amenity or convenience of any house") than the one before us here.

48. Given the above and where the burden of proof lies, this appeal turns on whether sufficient evidence has been adduced to prove that, as of January 2017, the paddock had a self-standing function as opposed to being a functional appendage of Shepherds Cottage.

49. The estate agents particulars indicate no function or use for the paddock apart from enhancing the view from the house and garden – in the words of the dictionary definition, an "ornament". This is consistent with the basic physical facts that the paddock is adjacent to the house and garden and there are no material physical barriers between them.

50. Mr Warren's evidence indicated that the paddock, both historically and up to the time of his site visit in 2019, was "agricultural land". But I have found that this phrase means no more than that it was a grass-covered field, potentially usable for pasture or grazing. There was no evidence of actual use of the paddock for pasture on a commercial basis since it was last part of the neighbouring farm in 1983.

51. I agree with the tenor of the discussion in the HMRC manuals quoted above that

> (1) a grassy field, or a paddock, might or might not be part of the grounds, depending (typically) on whether there was actual commercial use (of which there was no evidence here); and
>
> (2) historical use – including traditional or habitual use, establishing the land's true relationship to the dwelling building - can be relevant (though not, of course, determinative) – but in my view the actual use at the relevant time is critical (and I read *McInerney* as a reminder to look beyond a formal label of "use", the error made by the magistrates in that case).

52. Mr Warren's evidence stated that he had identified eight properties in the area of a similar size to, or larger than, Shepherds Cottage, which did not have any "agricultural land". The suggestion was that the size of the paddock might be such that it could not form part of the grounds of Shepherds Cottage. I again agree with the tenor of the discussion in the HMRC manuals quoted above that there may be circumstances where land surrounding a dwelling building is so extensive relative to the dwelling, that it ceases to the grounds of that dwelling;

here, however, it was not in my view proven by Mr Warren's evidence regarding eight other properties, that the paddock was so large that it could not be part of the "grounds". On the contrary – the fact that the property as a whole was (only) three acres in area suggests that sheer size was not a barrier to the paddock functioning as an appendage to Shepherd Cottage.

53. I therefore find the evidence before the Tribunal insufficient to prove, on the balance of probabilities, that the paddock was not, at the time of the land transaction, part of the grounds of Shepherds Cottage.

54. Accordingly the property was residential property for the purposes of s55 at that time; and so the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

55. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 11 MARCH 2020