Neutral Citation: [2023] UKFTT 00725 (TC)

Case Number: TC08914

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House

Appeal reference: TC/2022/01081

STANP DUTY LAND TAX – whether property mixed use such that table B of Finance Act 2003 determines rate for SDLT purposes – garages under separate ownership – residential – shared gardens – residential – appeal dismissed

Heard on: 27 June 2023
Judgment date: 23 August 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

ESPALIER VENTURES PROPERTY (LANSDOWNE ROAD) LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Julian Hickey of Counsel instructed by Fladgate LLP

For the Respondents: Caitlin McDonald litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This matter concerns an appeal bought by Espalier Ventures Property (Lansdowne Road) Ltd (**Appellant**) against a decision of HM Revenue & Customs (**HMRC**) against a decision dated 19 November 2020 that £716,250 was due by way of stamp duty land tax (**SDLT**) in connection with the acquisition by the Appellant of a parcel of land interests on Lansdowne Road in London. The Appellant had paid SDLT in the sum of £257,000 on the purchase considering SDLT to be due at the rate provided in Table B of section 55 Finance Act 2003 (**FA03**) on the basis that the property in question was for mixed use. HMRC determined that the applicable rate for SDLT was to be determined under Table A as varied by Schedule 4ZA FA03 as the property in question was wholly residential.

2. For the reasons set out below I have determined that SDLT is due at the rates prescribed in Table A as varied and that the appeal should be dismissed.

THE LAW

3. Section 42 FA03 charges SDLT on "land transactions" as defined in section 43 FA03 as being the acquisition of a chargeable interest. The chargeable interest acquired is the "main subject-matter", together with any interest or right appurtenant or pertaining to it that is acquired with it (section 43(6)). It is to be noted that section 43(2) provides that the charge applies "however the acquisition is effected, whether by act of the parties, by order of a court or other authority, by or under any statutory provision or by operation of law."

4. Section 48 defines a chargeable interest as "an estate, interest, right or power over any land in England."

5. The rate at which SDLT is charged in respect of any particular land transaction depends on whether the interest acquired is an interest in residential property or not. Section 116 FA03 provides the definition of residential property. The definition of residential property under section 116(1) is:

> "(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)

6. Section 55(1B) FA03 provides that the rates of SDLT applicable to a transaction consisting entirely of residential property shall be taxed at the rates specified in "Table A" and if the transaction "consists of or includes land that is not residential property" that the rates in Table B shall apply. For these purposes it is the main subject matter of the transaction which determines which Table applies.

7. Pursuant to paragraph 4 Schedule 4ZA FA03 higher rates of SDLT are payable in respect of transactions the consideration for which exceeds £40,000 and involve major interests in a single dwelling where the purchaser is a company.

8. For the purposes of paragraph 4 paragraph 18 Schedule 4ZA (**Para 18**) provides that a dwelling is:

> "(2) A building or part of a building … a) … used or suitable for use as a single dwelling or b) … in the process of being constructed or adapted for such use.

> (3) Land that is, or is to be occupied or enjoyed with a dwelling as garden or grounds (including any building or structure on that land) …
>
> (4) Land that subsists, or is to subsist, for the benefit of a dwelling …"

9. It is important to note that the provisions of Para 18 and section 116(1) FA03 are similar but not identical.

10. Where the higher rate applies Table A is modified and the rate of SDLT is:

On consideration up to £125,000	3%
Over £125,000 - £250,000	5%
Over £250,000 - £925,000	8%
Over £925,000 - £1,500,000	13%
The remainder	15%

EVIDENCE AND FACTUAL FINDINGS

11. I was provided with a principal and a supplementary bundle of documents. There were also two witness statements from Mr Christopher Bodker who gave evidence which was subject to cross examination. Despite that cross examination there was little dispute as to the relevant facts of the case.

12. On the basis of the evidence available to me I find the following facts relevant to the determination of the appeal:

(1) The Appellant carries on a real estate business and was established specifically to purchase the properties which are the subject of the present appeal for development and onward sale.

(2) The Appellant purchased three separate property interests registered with the Land Registry for an aggregate consideration of £5,350,000 from Mr Bodker on 14 January 2019:

(a) the freehold title number LN195435 comprising three lock-up garages on the south side of Lansdowne Rise (**Garages**);

(b) the long leasehold title number BGL67546 comprising the basement and ground floor flat at 43 Lansdowne Road (**Flat**);

(c) a share of the freehold in the property known as 43 Lansdowne Road title number 272345 (**Freehold Share**).

(3) The Garages are physically detached from the living accommodation at 43 Lansdowne Road. The distance between the ground floor flat and the Garages is approx. 3m. The Garages were accessible only from Lansdowne Rise.

(4) The title had been separated from the freehold for 43 Lansdowne Road on 10 June 1960. It is apparent from the title documents for the Garages that as at that date the Garages were only accessible from Lansdowne Rise. The title documents also show a right for the owner of the Garages to enter onto a strip of land, which was within the garden of 43 Lansdowne Road for maintenance, to maintain a water tank for collection of surface water from the roof of the Garages and other easements. The accessible strip of land is approximately 3m deep.

(5) There is no restriction in the title to the Garages which requires them to be in common ownership with the Flat.

(6) The Flat and the Garages were capable of separate valuation and separate disposition. However, the price agreed by the Appellant for their purchase as a single sum, £5,350,000.

(7) The Garages had been in common ownership with the Flat throughout the period from 10 June 1960 to the date of sale. There is no evidence as to how the Garages had been used for the majority of the period post 1960. From the photos and plans available to me it appears that in front of the Garages the curb has been lowered which would have facilitated and permitted vehicular access. However, given the dimensions of them, as car size increased they would have become of more limited use as garages in a traditional sense (i.e. off street and protected parking for vehicles).

(8) By reference to the evidence of Mr Bodker for an indeterminate period starting no later than 2011, he was permitted, on an informal basis, to use space in the Garages for storage by the then owner of them (and the Flat). The only documentary evidence that payments were made in respect of such use was in the form of a "note to self" sent by and to Mr Bodker. That note stated that £50 per week was paid on one garage for the period 7 March 2011 to 6 June 2011 (£600) and, likely in relation to a second garage for 1 May 2011 to 26 June 2011 (£400). I accept that Mr Bodker did have use of some of the space in the Garages in that period. I make no finding as to whether he rented or simply used the garages for any other period but, and in any event, he had ceased using them in 2016 following a dispute with the estate of the previous owner. I do not consider that the use made by Mr Bodker represented commercial use by the previous owner, it was informal, and payments made were limited.

(9) Mr Bodker also believed (and I accept that he so believed) but had no corroborating evidence, that a third party was also permitted to use one of the Garages for storage; however, such use had certainly ceased no later than 2 April 2015 at which time it was stated that the estate was not generating any income from the Garages. I do not consider there is sufficient evidence regarding this other party to conclude whether there was such use and certainly not that it represented commercial use.

(10) A series of planning permission applications were submitted from 9 December 2016 pursuant to which it was proposed that the Flat and the upstairs property were to be converted into a single dwelling with associated restoration works. The Garages were proposed to be demolished to reinstate the original boundary in a planning application granted on 12 October 2017.

(11) The land registry title for the Flat shows that the property had "the benefit of the full and free use and perpetual and uninterrupted right of enjoyment (in common with other persons having a like right) of the garden and pleasure ground" which was then marked on the plan as being a garden running down the rear of 20 – 43 Lansdowne Road, and 44 – 58 Clarendon Road (**Communal Gardens**).

(12) The terms of the leasehold interest provide for the demise of the Flat together with the rights set out at schedule 2 which includes the right "to use for the purpose of recreation … those parts of the gardens and common grounds".

(13) Title to the Communal Garden is registered under separate title NGL654035. The title register for the Communal Gardens shows: "it is hereby agreed and declared between and by the parties to these presents that the said piece or parcel or pleasure ground or documental enclosure are so respectively hereby conveyed unto the Trustees Upon Trust

and to the intent and purpose that the said piece of pleasure ground may … be maintained and preserved as a pleasure garden in proper ornamental cultivation order and condition for the exclusive use and benefit of the several owners and occupiers for the time being of the said sixteen dwellinghouses and the respective families and servants of such owners and occupiers and their respective friends in their company such owners and occupiers respectively nevertheless conforming to and observing such rule and regulations as may from time to time be made and promulgated by the Managing Committee of the Residents for the time being of the said messuages or dwellinghouses for the maintenance due cultivation and preservation of the said garden and the fences thereof and for regulating the free and proper use thereof and preventing any nuisance or annoyance by any person having access thereto."

(14) On 12 February 2019 the SDLT1 return was filed in respect of the Garages and the Flat showing SDLT due of £257,000. Relief was claimed on the basis of Code 35 on the basis that the purchase was of a mixed-use property.

(15) On 31 July 2019 HMRC opened an enquiry into the SDLT return and on 19 November 2020 issued a closure notice increasing the Appellant's SDLT self-assessment by £459,250 to a total of £716,250 on the basis that the acquisition was of a wholly residential property.

THE ISSUE

13. The issue I have to determine is whether the consideration of £5,350,000 paid by the Appellant is for an interest in a single dwelling such that the higher rate of stamp duty applies.

14. I must first determine, in accordance with section 43 FA03 what the "main subject matter" of the transaction is. If the Garages and the interest in the Communal Garden do not represent a main subject matter independent of the leasehold interest in the Flat (and Freehold Share) the higher rate will apply. Those interests will not be independent "main subject matter"[s] if they are interests or rights appurtenant or pertaining to the Flat.

15. If either the Garages or the interest in the Communal Gardens represent an independent main subject matter then I must determine whether either is:

(1) land occupied or enjoyed with the Flat; and/or

(2) subsists or is to subsist for the benefit of the Flat.

SUBMISSIONS OF THE PARTIES

Appellant's submissions

16. In accordance with the judgment of the Court of Appeal in *Fanning v HMC* [2023] EWCA Civ 263 the Appellant invited me to apply a purposive interpretation to the relevant provisions FA03. In so doing I am to determine the nature of the transaction to which the legislation was intended to apply and then determine whether the land interests purchased in consideration for the payment of £5,350,000 answers the statutory description. In so doing I must seek to avoid an absurd result thereby ensuring that the intention of Parliament in enacting the provisions is met. The exercise I am to undertake in this regard should, the Appellant submitted, take the context of the statute as a whole and interpret it in its historical context.

17. The Appellant contended, by reference to the language of section 43 FA03, that neither the Garages nor the interest in the Communal Gardens represented an interest or right appurtenant or pertaining to the Flat but represented of themselves independent "subject matter[s]" that did not meet the definition of dwelling. Accordingly, unless the requirements of section 116(1)(b) or (c) were met the appropriate Table for SDLT purposes was Table B.

The Appellant's submissions appeared to assume that the provisions of section 116 and Para 18 FA03 were the same. However, they are not.

18. By reference to the explanation provided in Halsbury's Volume 87 the Appellant submitted that in order for the freehold interest in the Garages and the right to use and enjoy the Communal Gardens to be appurtenant to the interest in the Flat the respective interests needed to be "validly annexed to" and inseparable from the leasehold interest in the Flat and/or the Freehold Share.

19. It was contended that the freehold interest in the Garages could not represent an interest appurtenant or pertaining to the Flat on the basis that the interests were entirely independent. The leasehold interest in the Flat made no reference to the Garages and vice versa.

20. The submissions as to the nature of the interest in the Communal Garden were that:

(1) It was not in the nature of an easement. Reference was made to the judgment of the Supreme Court in *Regency Villas Title Ltd and others v Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 (***Regency***) in which the Court determined that a right granted to occupiers of timeshare facilities to use sporting and recreational facilities in adjoining parkland was an easement. Lord Briggs introduced his judgment by providing a definition of an easement:

> "… a species of property right appurtenant to land, which confers rights over neighbouring land. The two parcels of land are traditionally, and helpfully, called the dominant tenement and the servient tenement. The effect of the rights being proprietary in nature is that they 'run with the land' both for the benefit of the successive owners of the dominant tenement, and by way of burden upon the successive owners of the servient tenement. By contrast merely personal rights do not generally have those characteristics."

(2) The occupier of the Flat's right to use the Communal Gardens is derived under Town Gardens Protection Act 1863 (**TGPA**) and thereby not a right appurtenant or pertaining to the leasehold interest. So far as relevant that act provides:

> **1 Gardens in certain squares, &c. may be freed from neglect, encroachments, &c., and vested in the Metropolitan Board of Works or other corporate authority; or vested in a committee of rated inhabitants**.
>
> Where in any city or borough any enclosed garden or ornamental ground has been set part otherwise than by the revocable permission of the owner thereof in any public square, crescent, circus, street, or other public place, for the use or enjoyment of the inhabitants thereof, and where the trustees, commissioners, or other body appointed for the care of the same have neglected to keep it in proper order, or where such garden or ground has not been vested in or placed under the management of any trustees, commissioners, or other body for the care of the same, and from the want of such care, or from any other cause, has been neglected, . . . the corporate authorities in any . . . city or borough, shall take charge of the same, putting up a notice or notices to that effect in such garden or ornamental ground, and, if after due inquiry the person entitled to any estate of freehold in the same cannot be found, or if it shall be vested in any person by whom it is held, subject to any condition or reservation for keeping the same as and for a garden or pleasure ground, or that the same shall not be built upon, but not otherwise, shall cause any buildings or other encroachment made therein within the period of twenty years before the passing of this Act to be removed, and (if requested by a majority of two-thirds of the owners and of the occupiers of the houses surrounding the same) shall vest such garden or ornamental ground in a committee consisting of not more than nine nor fewer than three

> of the taxable inhabitants of such houses chosen annually by such inhabitants in order that the same may be kept as a garden or ornamental ground for the use of such inhabitants; and the vestry or board of any and every parish or district within which the same or any part thereof is situate shall from time to time cause to be raised the sums required by such committee for defraying the expenses of the maintenance and management of such enclosed garden or ornamental ground, or of such part thereof as is situate within their parish or district . . .; or if the said owners and occupiers shall not agree as aforesaid to undertake the charge of such garden or ornamental ground, the . . . corporate authority aforesaid shall, within six months after the notice herein-before mentioned shall have been put up within the same, or within such further time as the said . . . authority may think it expedient to allow for such agreement to be come to, vest the same in such vestries or boards, who shall thenceforth take charge of and maintain the same as an open place or street in such manner as shall appear to them most advantageous to the public, subject to the approval of the . . . corporate authority, . . . ; saving and always reserving to every person and persons, his and their heirs, executors, administrators, and assigns, all such estate, right, title, and interest as he, she, or they would or ought to have had and enjoyed of, in, to, from, or out of the gardens and grounds aforesaid in case this Act had not passed.
>
> (2) In this section "taxable inhabitants", in relation to the houses surrounding a garden or ornamental ground, means those persons who, in accordance with Part I of the Local Government Finance Act 1992, are liable to pay council tax in respect of any of those houses which are chargeable dwellings for the purpose of that Part."

21. On the basis that neither interest was one which was appurtenant to the interest in the Flat it was contended that none of the gateways represented in section 116 FA03 were met and that accordingly there was a mixed use transaction:

(1) Section 116(1)(a) – "dwelling". By reference to *Uratemp Ventures Ltd v Collins* [2001] UKHL 43 and *Carson Contractors Ltd v HMRC* [2015] UKFTT 530 (TC) absent a statutory definition of "dwelling" the word should be given its ordinary meaning as a place of habitation which thereby requires that it provides somewhere to sleep, facilities for personal hygiene, storage of personal belongings and a place to eat (but not necessarily cook). As neither the Garages nor the interest in the Communal Gardens met the definition in section 116(1)(a) FA03 this was not a basis for concluding that the higher rate for Table A applied

(2) Section 116(1)(b) – "garden or grounds of the dwelling". In accordance with the conclusion of the Court of Appeal in *Hyman and another v HMRC* [2022] EWCA Civ 185 (***Hyman***) and the underlying analysis in the Upper Tribunal in that case [2021] UKUT 68 (TCC), section 116(1)(b) FA03 did not bring within the definition of residential property land (including buildings) which were used separately from the dwelling particularly in the context of commercial use. Further, to meet the section 116(1)(b) definition a functional relationship between the dwelling and the grounds/buildings within those grounds had to be established. It was contended, on the basis of section 116(1)(b) FA03 the Communal Gardens were not "of" the Flat. There was no functional relationship between the Garages and the Flat as demonstrated by the commercial use of the Garages.

(3) Section 116(1)(c) – "interest for the benefit of the dwelling". The interest in Garages did not subsist for the benefit of the Flat they were simply in co-ownership (which is not enough). As the interest in the Communal Gardens was derived from TGPA

it was a right which was separate and distinct from any legal and/or beneficial interest acquired by way of the leasehold interest in the Flat and/or the Freehold Share.

HMRC's submissions

22. No substantive case was advanced by HMRC that the Garages were not a separate and main subject matter of the transaction. Their case was predicated on the Garages being included within the definition of dwelling either under Para 18(3) or (4).

23. By reference to *Hyman* they contended that grounds and gardens (for the purposes of Para 18(3)) carried their ordinary meaning and included the land surrounding the dwelling and occupied with it. HMRC referenced the FTT decision in *Brandbros Ltd v HMRC* [2021] UKFTT 157 (TC) as confirming that the point at which the requirements of Para 18(3) are met is to be determined at the effective date of transfer. As at that date I must determine whether the Garages were buildings within the grounds of the dwelling.

24. The answer to the question is, in HMRC's submission, a multifactorial exercise undertaken by reference to a number of factors as identified in *Faiers v HMRC* [2023] UKFTT 212 and include common ownership (a necessary but not sufficient condition) historic and future use, layout, proximity, extent, legal constraints, etc.

25. HMRC contended that when the evidence of these factors is considered it is clear that the Garages formed part of the grounds, in particular by reference to the proximity and layout of the properties. To the extent it was necessary to consider the use of the Garages HMRC contended that in the period from construction to 2007 the Garages had been in common ownership and had been constructed as garages for use by the occupants of 43 Lansdowne Road, latterly the Flat. Between 2007 and 2015 HMRC contended that there had been no commercial use of the Garages as they had been used as storage (a conventional use of garage space). Any income derived from the Garages (even were that commercial in nature) had, in any event, ceased several years prior to the effective date of transaction. From 2016 the intended use of the Garages had become plain – they were to be demolished as part of the proposed conversion of the Flat and the upstairs property into a single and substantial dwelling with the site of the Garages becoming a garden room.

26. HMRC also contended the interest in the Garages subsisted for the benefit of the Flat as they were space available for domestic use by the owner of the Flat falling within Para 18(4).

27. HMRC contend in accordance with the judgments in *Ellenborough Park Re Davies (deceased) and others v Maddison and another* [1956] Ch 131 (***Ellenborough***) and *Regency* the terms of the lease and noted rights on the title meant that the right to use and enjoy Communal Garden represents an easement appurtenant to the Flat with the consequence that the main subject matter of the transaction for the Flat included the appurtenant Communal Garden which was wholly residential.

28. HMRC relied on the FTT judgment in *Sexton and another v HMRC* [2023] UKFTT 73 (TC) which concerned the purchase of a flat and the right to use a communal garden. This garden was not one under TGPA. The lease for the flat in question provided that upon payment of the garden rent (as defined in the lease) the tenant had the right to walk and sit in the garden and to be provided with a key to gain access to it. Reliant on the judgment of the Court of Appeal in *Ellenborough* and the seminal text Megarry and Wade (setting out the requirements of an easement discussed above by reference to *Regency*), the Tribunal considered that the terms of the lease relating to the garden represented an easement and included within the main subject matter of the flat lease and thereby residential.

29. Were the Tribunal to conclude that the Communal Gardens represented a separate (and main) subject matter of the transaction HMRC contended that it met the terms of both Para

18(3) and (4) on the basis that the Communal Gardens were to be occupied and enjoyed with the Flat and the interest subsists for the benefit of the Flat.

30. HMRC contended that there was nothing in the statutory language that precluded such a conclusion by reference to the fact that the Communal Gardens would then represent part of a number of dwellings and that the Tribunal in *Hyman* recognised that it was not fatal that other people may also have rights over the land constituting part of a dwelling.

31. HMRC pointed to the title to the Flat and the manner in which it had been held out for sale in 2018 as confirming that the rights in connection with the Communal Garden benefitted the dwelling. They relied on *Nael Khatoun v HMRC* [2021] UKFTT 104 (TC) in this regard. In that case Mr Khatoun purchased a freehold property and acquired rights to enter and use communal gardens from an independent third party. The taxpayer contended that the right to use the communal garden was not a personal right but a proprietary interest forming part of the transaction but not one which met the terms of section 116(1) FA03. The Tribunal determined that the interest was a licence to use land which was exempted and therefore not a chargeable interest with the consequence that the whole of the consideration payable by the taxpayer was in respect of a residential property interest. However, the Tribunal expressed the view that had it not already rejected the taxpayer's appeal it would have concluded that the interest was one which met the terms of section 116(1)(c) FA03.

32. Reliance was also placed on *Sexton* in which the Tribunal considered that the interest to use the gardens was squarely within section 116(1)(c) FA03 on the basis that the interest was not a personal interest but one for the benefit of the property under the lease. The taxpayer's argument that the interest must be for the benefit of the dwelling in question and not a communal benefit was rejected in the context both of whether it was an easement and in connection with 116(1)(c) FA03. The Tribunal considered that the right that benefited the flat in question was the same as rights granted to other property owners but subsisted only for this flat.

DISCUSSION

33. I approach the issues to be determined in this case adopting a purposive interpretation to the relevant statutory provisions. By reference to the language used, the context and the purpose of the provisions I consider that it is plain that parliament intended to tax the sale of land interests to a company at the higher rate where those interests which were together to become a single dwelling as defined i.e. including garden, grounds and subsisting rights which are enjoyed together.

Garages

34. HMRC accepted that the Garages formed part of the main subject matter of the transaction but contended that they fell within Para 18.

35. Whether it was formally conceded or not I take the view that as the legal titles to the Flat and the Garages were separated and at least theoretically could have been under separate ownership any concession on this point was well made. The Appellant did intend to purchase the Garages and the Flat and those formed the "main subject matter".

36. Accordingly, I have to consider whether the provisions of Para 18 apply.

37. Considering paragraph 18(3) first. HMRC's case was predominantly put on the basis that the Garages formed part of the grounds. There is no question that for the purposes of section 116(1)(b) that must be the focus of attention as in order to come within those provisions the land in question must be the grounds or garden "of" the dwelling.

38. However, Para 18(3) is not in precisely the same terms and the scope of dwelling is extended to include "land that is, or is to be occupied or enjoyed with, a dwelling … (including any building or structure on that land)". The similar extension to the definition of a residential property under section 116(1)(b) FA03 is "land that is or forms part of the garden or grounds of a [dwelling]". In my view the focus of Para 18(3) is somewhat different to that of section 116(1)(b). There appears to be a clear foundation for concluding that any structure on the land which is the subject of the land transaction in question in respect of which it is proposed that the land will be occupied or enjoyed "with" the dwelling is to be taken to be part of the dwelling.

39. Under section 116(1)(b) FA03 I would have considered factors such as: 1) the historic use – in this case by reference to the facts found, use as domestic garages with some informal permitted use by others (in my view falling short of commercial use); 2) proximity – the Garages were physically proximate and had formed part of the garden area and grounds prior to severance of the title; 3) common ownership – the Garages had throughout been in common ownership; 3) there was no legal restriction precluding use by the owners of the dwelling. I would likely, on the basis of those factors, have considered that the Garages were buildings within the grounds of the Flat and within section 116(1)(b) FA03.

40. However, the relevant provision for me to apply is Para 18(3). There was a plain intention at the point of purchase by the Appellant to develop the property, including the Garages into a substantial single dwelling incorporating the Garages into the fabric of the living space; this was entirely consistent with the approved planning applications. That was the purpose for which the Appellant was established and for the purchase of the three land interests. In my view there can be no question at all that the Garages were land which was capable of representing independently a main subject matter but as the intention was for the Garages "to be… occupied with the dwelling" and were so occupied they such that the land transaction relating to the Garages is to be taken to be part of the land transaction concerning the Flat and of a dwelling pursuant to paragraph 18(3).

Communal Gardens

41. As set out above the Appellant contends that the interest in the Communal Gardens is not an easement appurtenant to the leasehold interest in the Flat or the Freehold Share. In substance, that is because the interest is one which arises under the provisions of s1 TGPA.

42. I start by noting section 43(6) FA03 provides that an interest arising under a statutory provision is a relevant interest for the purposes of the relevant part of FA03 which charges a relevant interest to SDLT. That does not, however, determine the rate at which SDLT should be charged.

43. I read with careful interest the judgment in *Regency Villas*. I was taken by the Appellant only to the opening paragraphs of Lord Briggs speech, but the remainder of the judgment and the conclusions reached demonstrate that the interest in the Communal Garden is an easement appurtenant to the leasehold interest in the Flat. *Regency* concerned what was known as a "facilities grant" i.e. the grant of use rights over the sports and recreational facilities to the timeshare owners with no maintenance or funding obligation. As indicated the Court concluded that the rights so granted were property rights and not personal rights. This was on the basis that the rights granted were for the benefit of not only the original transferees but also successors in title and were as to a comprehensive right to use the facilities as a whole then constructed or to be constructed. Four essential characteristics of an easement were identified: 1) there had to be a dominant and servient tenement, 2) the easement had to accommodate the dominant tenement, 3) the dominant and servient owners had to be different persons and 4) a right over land could not amount to an easement unless it was capable of forming the subject

matter of the grant. The second and fourth features were in issue in that appeal. As regards the second it was identified that a right to use facilities to be enjoyed for their own sake could nevertheless represent an easement if the rights granted by the servient tenement accommodated the dominant tenement. On the facts of that case the right to use the facilities was "of service, utility and benefit" to the timeshare apartments (the dominant tenement). The fourth feature required that the rights be clear, not precarious in the sense of taken away at the "whim" of the servient owner and not so extensive or invasive as to oust the servient owner from the enjoyment or control of the servient tenement or for the servient tenement to be anything other than passive.

44. Applying those principles in the present case:

(1) The Flat together with the Freehold Share is, in each case, the dominant tenement and the freehold interest held on trust in the Communal Gardens is the servient tenement;

(2) The dominant tenements have the benefit of "full and free use and perpetual and uninterrupted right of enjoyment (in common with other persons having like right) of the [Communal Gardens]". The servient tenement provides for the Communal Gardens to be "maintained and preserved … for the exclusive use and benefit of the several owners and occupiers" of the surrounding houses. The charges against the subservient tenement identifying only the rights identified in the conveyance. The right to use and enjoy thereby accommodates the Flat, Freehold Share and other interests as it is of service, utility and benefit to the Flat (or at least the owners and occupiers of it);

(3) The dominant and servient owners are different parties;

(4) The right to use and enjoy the Communal Gardens is clear, not precarious in the sense of taken away at the "whim" of the servient owner and not so extensive or invasive as to oust the servient owner from the enjoyment or control of the servient tenement (particularly as it is a Trust whose sole purpose is to maintain the interest for all the owners and occupiers). The servient tenement is passive.

45. It is my view that the interest in the Communal Garden meets this definition of an easement which is appurtenant to the principal interests in the Flat and the Freehold Share and is not capable of being considered separately from them, they do not represent an independent main subject matter and form an ancillary part of the main subject matter being that of the Flat which is accepted as a dwelling.

46. This is so despite the valiant arguments of Mr Hickey asserting otherwise by reference to section 1 TGPA. My attention was drawn to Halsbury's Laws of England vol 78 concerning Town Gardens which indicates that the act applies to enclosed gardens or ornamental grounds set aside (other than by the revocable permission of the owner) in which the inhabitants have a legal right to use and enjoy. The narrative goes on to explain, in essence, that an inhabitant with rights to use and enjoy a garden or ground covered by the TGPA may require the local authority to protect the right and that the authority in question must take charge of any neglected garden or ground. The authority must (if requested by the owners and occupiers with rights to use and enjoy the garden or ground) vest it in a committee of the inhabitants in order to keep it for use of those inhabitants and if those inhabitants do not wish to take charge the local authority must maintain it but for the benefit of the public.

47. That narrative reflects my interpretation of the provision and does not, in my view, assist the Appellant in any way in its argument. The right derived under section 1 TGPA by the occupier of the Flat (i.e. the person liable to pay council tax) is simply that in the event that the Communal Gardens become neglected such that the Royal Borough of Kensington and Chelsea take charge of it, such inhabitant (together with two thirds of the other inhabitants) may require

the Royal Borough of Kensington and Chelsea to vest the Communal Gardens in a committee of them (and for the benefit of them) or to take charge of them for the benefit of the public. However, in order for the occupier to have such a right the owner (and where different the occupier) must have a legal right to use and enjoy the gardens. Section 1 TGPA is not, in my view, the source of the rights associated with the use of the Communal Garden.

48. I was also referred to the website of the Royal Borough of Kensington and Chelsea which provides the answers to frequently asked questions concerning communal gardens. The response to the first question gives the impression that the right of an occupier of a surrounding house to use and enjoy communal gardens is derived from TGPA. I consider that impression to be an inaccurate reflection of the law. Certainly in the case of this Communal Garden it is my view that the right to use and enjoy is a legal right bestowed upon the owner and where occupied by someone other than the owner, the occupier of the Flat under the leasehold title and as noted on the registered title. Accordingly, the Appellant acquired that interest as part and parcel of its acquisition of the Flat.

49. I note, though it is not necessary for me to decide, that section 43 FA03 includes interests appurtenant or pertaining to the main subject matter. The Appellant made no submission on the meaning of pertaining but on the basis that pertaining to is something different from appurtenant to (because parliament chose to include both) I would have concluded that even if not appurtenant, giving "pertaining" its ordinary meaning "belong to something as a part, appendage, or accessory" the interest in the Communal Gardens is pertaining to the leasehold interest in the Flat.

50. As a result of that conclusion the Appellant's case regarding the Communal Gardens fails.

51. Had I not reached that view I would have then needed to have considered the provisions of Para 18(3) and (4). I noted above that the Appellant argued its case on the basis of section 116(1)(b) and (c). HMRC correctly argued the case on the basis of Para 18 but indicated that there was no material difference to the two sets of provisions when applied to the facts of the case. It appears to me that there is a material difference in the provisions which, in light of the analysis provided in *Sexton* would appear to make a material difference, or at least in the context of paragraph 18(3).

52. As noted above section 116(1)(b) FA03 requires that the gardens be "of" the residential property. In *Sexton* Judge Baldwin considered that it would seem strange to conclude that a garden which does not adjoin the dwelling nevertheless formed part of the grounds or gardens "of" the dwelling. A view with which I would agree. However, Para 18(3) only requires that the land be enjoyed with the dwelling as a garden or grounds. In my view the Communal Gardens were quite plainly intended to be "enjoyed with the dwelling as a garden" and would thereby have qualified within the definition of dwelling. For the reasons stated by Judge Baldwin I would also consider they meet the terms of paragraph 18(4) Schedule Z4A which are identical to section 116(1)(c).

CONCLUSION

53. On the basis that the Garages to be taken to be part of the dwelling by virtue of Para 18(3) and the right to use and enjoy the Communal Gardens are appurtenant to the Flat the Appellants paid £5,350,000 in consideration for a single dwelling for the purposes of Schedule 4ZA with the consequences that for the purposes of section 55 FA03 Table A as adjusted applies and SDLT is payable at the higher rate.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

54. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 23rd AUGUST 2023