



Neutral Citation: [2024] UKFTT 00158 (TC)

Case Number: TC09084

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/11430

STAMP DUTY LAND TAX – Finance Act 2003, sections 43, 48, 55, 108 and 116 – acquisition of a lease – easement over a communal garden acquired as a right within the lease – identification of the main subject matter – the lease – whether the relevant land consists entirely of residential property - yes – whether one transaction or more than one linked transactions – one transaction – whether Table A or Table B applies – Table A – appeal dismissed

Heard on: 18 September 2023
Judgment date: 26 February 2024

Before

TRIBUNAL JUDGE RICHARD CHAPMAN KC

Between

**(1) KWASI ADOMAKO BONSU
(2) DIVINE ADOJA ASUO BONSU**

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Patrick Cannon of counsel.

For the Respondents: Mr Christopher Thompson-Jones, litigator of HM Revenue and Customs’ Solicitor’s Office.

DECISION

INTRODUCTION

1. This is an appeal against a closure notice dated 17 January 2022 issued against the appellants, Mr and Mrs Bonsu, in respect of stamp duty land tax (“SDLT”) relating to the purchase of a leasehold interest in Apartment 140, Oyster Wharf, 18 Lombard Road, London (“the Property”). The central question is as to whether the grant within the lease of a right to use a communal garden meant, in the circumstances of the case, that the acquisition was of mixed residential and non-residential land chargeable to SDLT at the rates applicable to non-residential or mixed land (as contended for by Mr and Mrs Bonsu) or at the rates applicable to residential land (as contended for by HMRC).

2. For completeness, I note that the Property was purchased by Mr and Mrs Bonsu in their capacity as trustees of a deed of settlement made on 1 October 2019 and named “The KB Trust 2019” (“the Trust”). There is no dispute that Mr and Mrs Bonsu are to be treated as the purchasers of the Property for SDLT purposes by virtue of sections 10 to 13 of the Finance Act 2003 (“the 2003 Act”).

FINDINGS OF FACT

3. The facts were undisputed. Mr Bonsu provided a very short witness statement, was called to give oral evidence, and was asked one supplementary question by Mr Cannon. Mr Thompson-Jones did not ask any questions in cross-examination. I therefore make the following findings of fact upon the basis of Mr Bonsu’s unchallenged evidence and the documents to which I was referred. In doing so, I bear in mind that (as rightly agreed by the parties) the burden of proof is upon Mr and Mrs Bonsu and that the standard of proof is that of the balance of probabilities.

4. The Trust purchased the remaining term of the leasehold interest in the Property (“the Lease”) pursuant to an agreement dated 28 February 2020 for the sum of £750,000. The purchase was completed by a transfer dated 10 March 2020. Mr and Mrs Bonsu live at the Property.

5. The Lease is dated 20 April 2005 and includes the following terms:

“Particulars

...

The Demised Premises. The fifth floor Dwelling known as Plot Number 108 more particularly described in the Third Schedule.

...

1. Definitions

In this Deed unless the context otherwise requires:

...

‘the Garden Areas’ means all gardens grounds and other soft landscaped areas within the Development that are from time to time made available by the Lessor for the use of the Lessee and others but excluding any such areas that are maintained at the public expense and any other areas which the Lessor from time to time shall at its absolute discretion intend to be so excluded.

...

3. Demise

In consideration of the Premium now paid by the Lessee to the Lessor (the receipt whereof is hereby acknowledged) and of the Rent hereinafter reserved and contained THE LESSOR with Full Title Guarantee HEREBY DEVISES AND CONFIRMS unto the Lessee ALL AND SINGULAR the Demised Premises TOGETHER WITH the rights set out in the Fourth Schedule to the exclusion of any implied rights pursuant to Section 62 of the Law of Property Act 1925 and SUBJECT however to the Lessee's covenants hereinafter contained ...

...

The Fourth Schedule

Rights included in the demise

...

9. The right in common with all others entitled to a similar right to use (as may have been provided) for the reasonable purpose intended (and subject to Estate Regulations) the:

9.1 refuse storage area(s)

9.2 security door entry system and

9.3 the communal television reception system

9.4 the Garden Areas

9.5 the Gym

..."

6. The Property is a two bedroomed apartment. It is within a building which contains other apartments ("the Building"). The Building includes a commercial space on the ground floor, which is used as a kitchen showroom and design centre.

7. There are communal areas within and around the Building. These communal areas include a reception, a car park, a fitness area, and a communal garden. The communal garden is the space referred to in the Lease as the "Garden Areas" (and which I will continue to call "the Garden Areas" herein). Access to the communal areas, including the Garden Areas, is by a key fob. Key fobs are only available to the owners of apartments within the Building and require payment of a service charge as provided for in the Lease. Mr Bonsu's evidence (which I accept) is that the right to use the Garden Areas and other communal areas is a consequence of living in the building, paying the service charge, and having access to a key fob. There are restrictions placed upon the hours of access to the communal areas and the noise that it is permitted. For example, the fitness area may not be used after 8.00pm. There are almost no time restrictions upon apartment owners' (and, in particular, Mr and Mrs Bonsu's) access to the Garden Areas, but it is important to keep noise in the Garden Areas to a level that is considerate of the needs of others.

8. By virtue of an SDLT return submitted on 19 March 2020, Mr and Mrs Bonsu paid SDLT in the sum of £50,000 based upon the rates applicable to a higher rate transaction that is residential property. It is common ground that the higher rates apply because the Property was an additional dwelling.

9. By a letter dated 19 March 2021, Mr and Mrs Bonsu (through their representatives) requested an amendment to the SDLT return, claiming a refund in the sum of £23,000 ("the Amended Return"). This was upon the basis that the purchase included non-residential property in the form of the right to use the Garden Areas and so the appropriate SDLT was said to be £27,000 rather than £50,000.

10. HMRC issued a notice of enquiry on 24 November 2021 and subsequently, on 17 January 2022, issued a closure notice increasing the Amended Return by £23,000 from £27,000 to £50,000. This was upon the basis that the rates applicable to residential property were to be used.

11. Mr and Mrs Bonsu appealed to HMRC against the closure notice on 21 January 2022, which resulted in HMRC confirming their decision in a letter dated 28 January 2022. Mr and Mrs Bonsu requested a review, which resulted in HMRC upholding the closure notice by a letter dated 9 March 2022. Mr and Mrs Bonsu appealed to this Tribunal by a notice of appeal dated 6 April 2022.

12. HMRC has calculated the total SDLT due as £50,000, being (using the applicable higher rates) £3,750 for the 3% band, £6,250 for the 5% band, and £40,000 for the 8% band. Mr and Mrs Bonsu have not challenged these figures if Table A is applicable (and, indeed, they match their original SDLT1) but of course challenge the use of Table A at all.

13. I note at this stage that Mr and Mrs Bonsu have not adduced any evidence as to the value of the interest in or rights over the Garden Areas or as to any apportionment of the total consideration attributable to such interest or rights. As such, I am unable to make any findings in that regard.

STATUTORY FRAMEWORK

14. The statutory framework is as follows (all legislation referred to hereafter being sections of the 2003 Act unless otherwise stated).

15. Section 43 includes a definition of “land transactions”.

“43. Land transactions

(1) In this Part a ‘land transaction’ means any acquisition of a chargeable interest.

As to the meaning of ‘chargeable interest’ see section 48.

(2) Except as otherwise provided, this Part 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.

...

(6) References in this Part to the subject-matter of a land transaction are to the chargeable interest acquired (the ‘main subject-matter’), together with any interest or right appurtenant or pertaining to it that is acquired with it.”

16. Section 48 includes a definition of “chargeable interest”.

“48 Chargeable interests

(1) In this Part ‘chargeable interest’ means –

(a) an estate, interest, right or power in or over land in England . . . or Northern Ireland, or

(b) the benefit of an obligation, restriction or condition affecting the value of any such estate, interest, right or power,

other than an exempt interest.

...

(2) The following are exempt interests –

...

(b) a licence to use or occupy land;

...”

17. Section 55 provides for the amount of tax chargeable at the relevant time.

“55 Amount of tax chargeable: general

(1) The amount of tax chargeable in respect of a chargeable transaction to which this section applies is determined in accordance with subsections (1B) and (1C).

...

(1B) If . . . the transaction is not one of a number of linked transactions, the amount of tax chargeable is determined as follows

Step 1

Apply the rates specified in the second column of the appropriate table below to the parts of the relevant consideration specified in the first column of [the appropriate table. The ‘appropriate table’ is –

(a) Table A, if the relevant land consists entirely of residential property, and

(b) Table B, if the relevant land consists of or includes land that is not residential property.

Step 2

Add together the amounts calculated at Step 1 (if there are two or more such amounts).

TABLE A: RESIDENTIAL

<i>Part of relevant consideration</i>	<i>Rate</i>
So much as does not exceed £125,000	0%
So much as exceeds £125,000 but does not exceed £250,000	2%
So much as exceeds £250,000 but does not exceed £925,000	5%
So much as exceeds £925,000 but does not exceed £1,500,000	10%
The remainder (if any)	12%

TABLE B: NON-RESIDENTIAL OR MIXED

<i>Relevant consideration</i>	
So much as does not exceed £150,000	0%
So much as exceeds £150,000 but does not exceed £250,000	2%
The remainder (if any)	5%

...

(1C) If ... the transaction is one of a number of linked transactions, the amount of tax chargeable in respect of the particular transaction under consideration is determined as follows -

Step 1

Apply the rates specified in the second column of the appropriate table in subsection (1B) to the parts of the relevant consideration specified in the first column of the appropriate table. The ‘appropriate table’ is -

- (a) Table A, if the relevant land consists entirely of residential property, and
- (b) Table B, if the relevant land consists of or includes land that is not residential property.

Step 2

Add together the amounts calculated at Step 1 (if there are two or more such amounts).

Step 3

Multiply the amount given by Step 1 or Step 2, as the case may be, by –

C/R

Where-

C is the chargeable consideration for the transaction, and

R is the relevant consideration.

(3) For the purposes of subsection (1B) –

(a) the relevant land is the land an interest in which is the main subject-matter of the transaction, and

(b) the relevant consideration is the chargeable consideration for the transaction

(4) For the purposes of subsection (1C)-

(a) the relevant land is any land an interest in which is the main subject-matter of any of the linked transactions, and

(b) the relevant consideration is the total of the chargeable consideration for all those transactions.

...”

18. Table A is modified by paragraph 1 of Schedule 4ZA to the 2003 Act in respect of additional dwellings (and, although not relevant in the present case, also for dwellings purchased by companies).

“1(1) In its application for the purpose of determining the amount of tax chargeable in respect of a chargeable transaction which is a higher rates transaction, section 55 (amount of tax chargeable: general) has effect with the modification in sub-paragraph (2).

(2) In subsection (1B) of section 55, for Table A substitute –

TABLE A: RESIDENTIAL

<i>Relevant consideration</i>	<i>Percentage</i>
So much as does not exceed £125,000	3%
So much as exceeds £125,000 but does not exceed £250,000	5%
So much as exceeds £250,000 but does not exceed £925,000	8%
So much as exceeds £925,000 but does not exceed £1,500,000	13%
The remainder (if any)	15%

...”

19. Section 108 defines “linked transactions”.

“(1) Transactions are ‘linked’ for the purposes of this Part if they form part of a single scheme, arrangement or series of transactions between the same vendor and purchaser or, in either case, persons connected with them.

...”

20. Section 116 defines “residential property”.

“116 Meaning of ‘residential property’

(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.

...”

SUBMISSIONS

Mr and Mrs Bonsu

21. In summary, Mr Cannon submitted as follows:

(1) The right to use the Garden Areas is to be treated as an easement rather than a licence and so is not an exempt interest. Mr Cannon relied upon *Re Ellenborough Park* [1956] Ch 131 and *Mulvaney v Gough* [2002] EWCA Civ 1078 in this regard.

(2) The easement is a “main subject matter” and is not to be ignored for the purposes of section 55(3)(a). As section 55(3)(a) relates to a transaction which is not one of a number of linked transactions, I take it that Mr Cannon’s primary case is that section 55(1B) applies. As the main subject matter includes a right over mixed use land, the rates in Table B apply for the purposes of Step 1(b) within section 55(1B) because the relevant land did not consist entirely of residential property.

(3) Further or alternatively, the easement is a chargeable interest in its own right. The subject matter of the land transaction was therefore the leasehold interest in the Property *and* the easement over the Garden Areas. As such, there were two land transactions within section 43(1). These were linked transactions and so section 55(1C) applies. As one of the transactions (the easement) was over mixed use land, the rates in Table B apply for the purposes of Step 1(b) within section 55(1C) because the relevant land did not consist entirely of residential property.

(4) The Garden Areas are mixed use land as they benefited both commercial and residential property and so are both residential and non-residential property. Further or alternatively, section 116(c) provides that in order to be treated as residential, the right must subsist for the benefit of a building within paragraph 116(a). As this denotes a single building, section 116(1)(c) limits residential land to interests or rights that only benefit a particular dwelling rather than having a communal benefit to more than one dwelling.

(5) Mr Cannon accepted that the First-tier Tribunal case of *Sexton v HMRC* [2023] UKFTT 73 (TC) (Judge Baldwin) (“*Sexton*”) was made on similar facts and rejected similar submissions. However, he submitted that this tribunal is not bound by *Sexton* and that *Sexton* was wrong in law. In particular, he submitted that section 43(1) treats any acquisition of a chargeable interest as a main subject matter and that, the words “together with any interest or right appurtenant or pertaining to it that is acquired with it,” constituted what he termed a sweeping up clause which was intended only to include conveyancing matters. Mr Cannon submitted that examples of such conveyancing matters included, to quote from his skeleton argument, “whether an estate in land is held in possession, in remainder or in reversion, exempt interests such as licences or security interests and rights within leases such as options to extend, renew or break, within the overall characterisation of the particular land transaction.” Further, Mr Cannon submitted that *Sexton* was wrong to subsume the interest in non-residential land within the interest in residential land, as section 55(3)(a) cannot be construed as requiring a main subject matter that includes an interest in non-residential land to be ignored. This, he said, would defeat the purpose of Step 1(b) of section 55(1C) and section 55(4)(a).

HMRC

22. In summary, Mr Thompson-Jones submitted as follows:

- (1) HMRC concede that the Lease granted an easement to use the Garden Areas.
- (2) The only acquisition of a chargeable interest was in respect of the Property itself, which was wholly residential property. Neither the transfer nor the entry in the Land Register refer to the easement.
- (3) The right to use the communal garden was acquired as a part of the acquisition of the Property and was appurtenant to or pertaining to that acquisition. The main subject matter of the land transaction was therefore the Property, which was wholly residential property. Mr Thompson-Jones relied upon *Sexton* and *Espalier Ventures Property (Lansdowne Road) Ltd* [2023] UKFTT 00725 (TC) (Judge Brown KC) (“*Espalier*”) in this regard.
- (4) Even if the easement over the Garden Areas is to be treated as the main subject matter, the easement is a right over land that subsists for the benefit of a dwelling (namely, the Property), for the purposes of section 116(1)(c) and so is itself residential property. The proper construction of section 116(1)(c), he submits, does not require the right to benefit *only* the Property. Mr Thompson-Jones again relied upon *Sexton* and *Espalier*, as well as *Khatoun v HMRC* [2021] UKFTT 104 (TC) (Judge Citron) at [42].

DISCUSSION AND DECISION

The nature of the interest in, or rights over, the Garden Areas

23. As set out above, it is common ground that Mr and Mrs Bonsu acquired an easement over the Garden Areas (which I will hereinafter refer to as “the Easement”). Indeed, this is a right granted by the Lease and is included within the demise by virtue of schedule 4 of the Lease. It is well settled that a right to use a communal garden is capable of being an easement (see *Re Ellenborough Park*, *supra*, per Sir Raymond Evershed MR at 173 to 175). It is also well settled that it is possible for an owner of one property to grant an easement to a leaseholder of another property, even if the grantor owns the freehold of both. The point is succinctly put in *Gale on Easements*, 21st Edition, 2020 at paragraph 1-47 as follows:

“1-47 An owner of two pieces of land can, of course, grant, expressly or impliedly, an easement over one to a tenant of the other. ...”

24. An easement is a proprietary right rather than a merely personal one. Lord Briggs summarised the position as follows in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [2]:

“[2] The essence of an easement is that it is 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. Although owing much to the Roman law doctrine of servitudes, easements have in English law acquired an independent jurisprudence of their own, the essentials of which have been settled for many years, even if the uses of land during the same period have not stood still. Since the question whether a particular grant of, or claim to, rights is capable of having the enduring proprietary quality of an easement is usually (as here) fact intensive, it is convenient to begin with a summary of them.”

25. It is clear in the present case that the Easement is proprietary rather than personal. The grant is contained within the Lease and paragraph 3 of the Lease and the Fourth Schedule confirm that the grant is one of the rights included within the demise. Crucially, the Lease envisages the rights passing to successors in title as the definition of the Lessee “includes the person for the time being entitled to the Term,” and paragraph 7.2 provides as follows:

“7.2. That all rights and obligations of the Lessor and the Lessee respectively under this Lease shall be incidental to and devolve with the legal reversion immediately expectant on the Term and with the leasehold interest hereby created and shall accordingly be enjoyed and performed by the persons in whom the reversion and leasehold interest respectively shall for the time being be vested.”

26. As such, the Easement granted by the Lease is not purely personal to the lessee and so is not a licence to use or occupy land. In turn, this means that the Easement is not an “exempt interest” for the purposes of section 48(2).

Section 43(6)

27. Notwithstanding Mr Cannon’s well-argued submissions, I do not accept that the Easement is the main subject matter for the purposes of section 43(6). Instead, I find that the main subject matter of the transaction is the leasehold interest in the Property. This is for the following reasons.

28. First, the natural construction of section 43(6) is that it envisages there being a single main subject matter within a transaction. Section 43(6) refers to *the* chargeable interest, *the* main subject-matter, and the interest or right appurtenant or pertaining to *it* and acquired with *it* (my italics). The use of the words “the” and “it” envisage a singular main subject matter rather than the possibility of multiple main subject matters.

29. Secondly, I do not agree that, “together with any interest or right appurtenant or pertaining to it that is acquired with it,” cannot include a chargeable interest or that this is a “sweeping up clause” covering conveyancing matters. Put simply, it does not say that. There is no exclusion of a chargeable interest. The examples given by Mr Cannon are all capable of being chargeable interests, other than those which are exempt interests. Again, however, there is no exclusion of exempt interests within section 43(6). Crucially, the words “any interest or right” are broad enough to include a chargeable interest and the proposed limitation would be inconsistent with this broad scope.

30. Thirdly, the easement is not being ignored; instead, it is being given the significance required by the legislative structure. Section 43(6) refers to the subject matter being the combination of the main subject matter and any interest or right appurtenant or pertaining to the main subject matter. However, sections 55(3) and (4) each identify the relevant land by reference to the main subject matter rather than the subject matter as a whole or any other part of the subject matter. It follows that it is the relationship between the rights and interests within the subject matter as a whole which defines whether an interest or right is treated as the main subject matter or alternatively appurtenant to the main subject matter. Once one interest or right is identified as being appurtenant or pertaining to another interest or right, it is that other right which becomes the main subject matter. For example, if an easement is the only interest or right acquired, then it will be the main subject matter. However, where the easement is appurtenant or pertaining to another interest which is acquired, then it is the other right that is the main subject matter.

31. Fourthly, the leasehold interest in the Property is clearly the main subject matter of the transaction and the Easement is clearly appurtenant to or pertaining to that leasehold interest. As explained by Lord Briggs in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*, *supra*, at [2] (set out at paragraph 24 above), the very nature of an easement is that it is appurtenant to a dominant tenement. The dominant tenement here is the Property by virtue of the Lease. Further, the Easement was granted within the Lease, was one of a package of rights contained within the Fourth Schedule, is paid for by way of service charges together with other rights and obligations relating to the Lease, and was for use in connection with the Lease. Indeed, Mr and Mrs Bonsu only acquired the Easement by virtue of the transfer of the Lease; the grant of the Easement itself was to Mr and Mrs Bonsu's predecessors in title (and, even then, was as a right granted within the Lease). It is also of note that the contract of sale and the TR1 provide for the transfer of the Lease and make no separate reference to the Easement (albeit that the easement is one of the rights contained within the Lease). Similarly, the consideration appears to be for the transfer of the Lease as a whole (including the rights within it) and there is no evidence of any apportionment to represent the easement or any evidence as to any independent value.

32. Fifthly, whilst I am not bound by the other First-tier Tribunal decisions referred to by the parties, I note that my reasoning as set out above is consistent with those decisions (see, in particular, *Sexton*, per Judge Baldwin at [31] and *Espalier*, per Judge Brown KC at [41] to [45]).

Section 55(1B)

33. Mr Cannon's primary case appears to apply section 55(1B) (as supplemented by section 55(3)). On the basis of his submission, the acquisition of the Lease and the acquisition of the Easement constitute two main subject matters.

34. My findings as to section 43(6) are fatal to this argument. For the reasons set out above, the Lease is the main subject matter of the transaction and the Easement is appurtenant to it or pertaining to it. Pursuant to section 55(3)(a) the relevant land is the Property (being the land an interest in which is main subject-matter of the transaction). Pursuant to section 116(1)(a), the Property is residential property as it is a building that is used or suitable for use as a dwelling (about which there is no dispute). Table A is therefore applied as the relevant land consists entirely of residential property.

Section 55(1C)

35. Mr Cannon's alternative case is that section 55(1C) applies (as supplemented by section 55(4)), whereby the acquisition of the Lease and the acquisition of the Easement are two land

transactions, with the Lease as the main subject matter of one and the Easement as the main subject matter of the other.

36. I do not agree that there is more than one transaction. The only contract was for the transfer of the Lease and the only transfer is the Lease itself. The right to the Easement is one of the rights that was transferred with the transfer of the Lease rather than being acquired independently. It would therefore be artificial to separate out the Lease and the Easement; it is the transfer of the rights under the Lease which transfers the Easement. Further, pursuant to section 108, linked transactions “form part of a single scheme, arrangement or series of transactions between the same vendor and purchaser.” Here, there is no such scheme, arrangement or series of transactions; again, the only transactions relate to the Lease itself. It is therefore section 55(1B) which applies, not section 55(1C).

Whether the Easement is residential property

37. It follows that whether the Easement (taken alone) is residential property is of no consequence. However, I still propose to make a determination as to this issue as it has been the subject of submissions and in case I am wrong in my analysis as set out above.

38. In my judgment, the Easement is residential property in any event. This is for the following reasons.

39. First, section 116(1)(c) includes within the definition of residential property, “an interest in or right over land that subsists for the benefit of a building within paragraph (a) ...” where paragraph (a) includes, “a building that is used or suitable for use as a dwelling ...” This does not include a requirement that the right is exclusively or solely for the use of a building within paragraph (a). I do not accept Mr Cannon’s submission that there is what he terms, “an implied limitation in the statutory language that confines section 116(1)(c) to interests or rights that solely benefit a particular dwelling.” This is not what section 116(1)(c) says and such an implication would be inconsistent with the clear wording of the section given the use of the word *a* in “benefit of a building” and the absence of any limiting words.

40. Secondly, whilst the Garden Areas are used by others within the Building (including the commercial unit), section 116(1)(c) deals with the interest in or right over land rather than the use of the land. The interest or right acquired by Mr and Mrs Bonsu is the transfer to them of the benefit of the Easement granted by the Lease. That right is included within the demise of the Property and is enforceable by the leaseholders of the Property from time to time. Although it is a right that is enjoyed in common with the leaseholders of the other properties within the Building (including the commercial property) they must obtain their rights from another source as it is not granted to them by the Lease. Although I am not bound by *Sexton*, I agree with what Judge Baldwin says at [36]:

“[36] There is nothing in section 116(1)(c) which suggests that, to fall within (c), the right or interest over land has to be an interest in or right over other residential property. The only requirement in (c) is that the interest in or right over land subsists for the benefit of a building within (a) or land within (b). If (as is the case with this Easement) a right has no independent existence other than by reference to an interest (it was created by the Lease and passes with the leasehold interest created by the Lease), it is hard to see how that right does anything other than subsist for the benefit of that interest and, if that interest falls within (a), then the right must surely fall within (c). This addresses the situation discussed above of the purchase of a cottage surrounded by farmland with a right of way over the farmland. Either the main subject matter of the transaction is the cottage alone or, if the cottage and the right of way are to be analysed separately for these purposes, the right of way will fall within (c).”

41. As such, even if Mr Cannon is right to say that the interest or right must solely benefit a particular dwelling, the Easement does solely benefit the Property as only Mr and Mrs Bonsu (as leaseholders of the Property) can enforce the particular right granted to the leaseholders of the Property by the Lease.

42. Thirdly, it is common ground that the Property was residential property. As such, the fact that the easement subsists for the benefit of the Property is sufficient to make the Easement residential property.

43. I note that Mr Thompson-Jones only relies upon section 116(1)(c) and does not argue that the Garden Areas constitute land that is or forms part of the grounds of the Property for the purposes of section 116(1)(b).

DISPOSITION

44. For the reasons set out above, I dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

**RICHARD CHAPMAN KC
TRIBUNAL JUDGE**

Release date: 26th FEBRUARY 2024