Neutral Citation: [2023] UKFTT 00297 (TC)

Case Number: TC08768

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/02112

Stamp duty land tax – commercial electricity distribution network on land acquired with and adjoining a dwelling - whether preventing all of that land being the "grounds" of the dwelling – no – whether property acquired entirely "residential property" within section 116(1) Finance Act 2003 – yes – appeal dismissed

Heard on: 19 January 2023
Judgment date: 14 March 2023

Before

TRIBUNAL JUDGE MARK BALDWIN

Between

JAMES FAIERS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Patrick Cannon, of counsel instructed by Sherwill Drake Forbes, Cirencester

For the Respondents: Mr Aidan Knowlson, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. On 23 August 2019 the Appellant ("Mr Faiers") purchased Agester Lodge, Denton, Canterbury ("the Property"). He paid stamp duty land tax ("SDLT") on that acquisition on the basis that the subject matter of that transaction was entirely residential property. On 10 March 2020 he amended his SDLT self-assessment on the basis that the Property had been misclassified and should have been classified as mixed/non-residential. The reason given for this was that there was a commercial electricity distribution network operated by Eastern Power Networks ("EPN") on the Property. The Respondents ("HMRC") opened an enquiry into Mr Faiers' amended self-assessment and issued a closure notice on 26 January 2021, concluding that the acquisition of the Property did not qualify as a mixed-use transaction. Mr Faiers appeals against that closure notice and the question for me is whether the Property should be classified as mixed/non-residential or solely residential for the purposes of SDLT.

THE LAW

2. Section 42 of the Finance Act 2003[1] charges SDLT on "land transactions", which is defined in section 43 as "any acquisition of a chargeable interest". Section 43(6) provides that:

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

3. In turn, section 48 defines "chargeable interest" (so far as relevant) as "an estate, interest, right or power in or over land in England".

4. The rate at which SDLT is charged on a particular land transaction depends on whether the transaction is residential or not. More precisely, section 55(1B) provides that, if the transaction is not one of a number of linked transactions, the rates to be used to calculate the amount of SDLT chargeable are those in Table A "if the relevant land consists entirely of residential property" and those in Table B "if the relevant land consists of or includes land that is not residential property". Section 55(3) provides that "the relevant land is the land an interest in which is the main subject-matter of the transaction".

5. Section 116 defines "residential property". So far as relevant for us, it provides:

> "(1) In this Part "residential property" means
>
> (a) a building that is used or suitable for use as a dwelling, or is in the process of being constructed or adapted for such use, and
>
> (b) land that is or forms part of the garden or grounds of a building within paragraph (a) (including any building or structure on such land),
>
> ….
>
> and "non-residential property" means any property that is not residential property."

6. The question for this tribunal, therefore, is whether Mr Faiers' acquisition of the Property was (as he originally thought it was) an acquisition of residential property only, so that the rates to be used to calculate the SDLT on that acquisition are those in Table A, or whether (as he now thinks) he acquired land that was not solely residential property, so that Table B is the correct table to use. It is not disputed that Agester Lodge itself (the house of that name) is a dwelling within section 116(1)(a), and it is common ground that the answer to

[1] In this decision notice all statutory references are to provisions of the Finance Act 2003

the question of Mr Faiers' SDLT liability on this acquisition lies in deciding whether the all the land surrounding that dwelling and acquired by Mr Faiers with Agester Lodge falls within section 116(1)(b), i.e. whether it "is or forms part of the garden or grounds of [Agester Lodge] (including any building or structure on such land)". The particular issue in this case is whether the presence of the power network means that at least some of this land is not comprised within the grounds of the dwelling.

THE EVIDENCE

7. Mr Faiers gave evidence to the tribunal and was cross-examined by HMRC. I found Mr Faiers to be a measured and credible witness, who did not seek to exaggerate the difficulty presented by the power network. We also reviewed a number of documents relating to the impact of power networks on owners and users of land, which were exhibited to Mr Faiers' witness statement together with some photographs and plans. These are described below.

8. The power network is a reference to a pole which supports two 11kV electricity cables which cross the Property. If one imagines the Property as a rectangle approximately 230m in length on the bottom side, 200m long on the top side with a long (left hand) side of around 150m and a short (right hand) side of 100m, the cables enter the Property on the bottom boundary about 17m from the right hand edge and leave the Property on the right hand side boundary 11m up from the bottom boundary (so, a small incursion at this point). The cables turn on a pole situated on a neighbour's land, re-entering the Property close to where they left, crossing it in a diagonal straight line (of approximately 144m) leaving the Property at a point along the top boundary approximately 90m from the right hand edge. Agester Lodge itself is about 80m to the left of the cables. The grounds contain stables (on the bottom boundary approximately 50m from where the cables first enter the Property) and Mr Faiers is constructing a substantial leisure building above Agester Lodge and closer to the cables than the main dwelling.

9. Mr Faiers purchased the Property subject to a wayleave agreement between the seller of the Property and EPN. Strictly (Mr Cannon explained) the power network was on the Property by virtue of a wayleave agreement signed by the seller and Mr Faiers was not bound by it. However, under the electricity legislation there is a presumed continuance of this wayleave and the legislation makes provision for wayleaves of necessity. The reality is that it would be highly unlikely that Mr Faiers, having purchased the Property with the power network on it, could get to a position where he could require EPN to remove the power network. HMRC did not dispute this summary of the position. In due course in January 2022 Mr Faiers entered into a wayleave of his own with EPN. In this agreement Mr Faiers allows EPN to run an overhead electric line in the current position and erect one pole to support the line and covenants not to do anything which is likely to cause damage or interference to the power network.

10. For rating purposes, the power network is part of a separate hereditament ("The electricity distribution hereditament described in Part 8 of the Schedule to the Central Rating Lists (England) Regulations 2005"). EPN is the designated person for this hereditament, which had a rateable value of £69,520,000 in April 2017.

11. Turning to Mr Faiers' evidence, in his witness statement he said:

> "I have two young children aged 4 and 7 and the presence/danger of the electricity lines is always on my mind when they are playing outside. I cannot allow them to do any of the following when they are outside:
>
> a. fly a kite

b. use water pistols

c. have a trampoline or bouncy castle (near the electricity lines)

d. camp (near the electricity lines)

e. Play tennis or badminton (near the electricity lines)

Neither can I burn garden rubbish or erect a tent or marquee

I would have liked to extend the planting including trees in the area to screen the neighbouring property but cannot do this

Being on top of a hill, I would have liked to plant trees as a windbreak but cannot do this I would also have liked to build a greenhouse in the area but cannot do this

I have rare breed highland cattle and would have liked to build a barn to house feed, tractors and attachments but again, this is not possible in the vicinity of the overhead lines

Equipment limits the extent that I can improve the grounds I cannot have sprinklers anywhere near the lines I am always concerned about danger of lines. ln effect, this means that a significant part of my land cannot be used and enjoyed as garden. Furthermore, if I wish to carry out any tree cutting or arboriculture work in the vicinity of the lines, I have been advised that this is a complex, high-risk activity and I should not undertake this myself because of the presence of the electricity lines."

12. Before the tribunal Mr Faiers explained that he had purchased a trampoline and fastened it down securely. However, the wind blew it into the cables which arcd out. Ever since then he has been worried about his children playing near the cables and restricts their activities (no high-power water pistols, bouncy castles or ball games) in that area. He keeps Highland cattle but cannot let them go near the pole as it looks worse for wear and they like to rub their bottoms against poles and such like, so it just would not be safe. There is a children's play structure (a sophisticated wooden fort-like structure) not far (about 7.2m) from the power lines. Mr Faiers explained that it is there because it is the only place he could locate it, as it needs to be firmly anchored into the ground and there are cables and pipes that would get in the way in other parts of the grounds. Mr Faiers accepts that his children use that structure and the area around it on a day-to-day basis.

13. Mr Faiers referred in his witness statement to (and exhibited) a number of publications relating to overhead power lines, namely:

(1) HSE Guidance Note GS6 (Fourth edition): Avoiding danger from overhead power lines

(2) "Avoidance of Danger from Electricity Overhead Lines and Underground Cables" issued by Western Power Distribution. The final paragraph states, "FlNALLY... Please, always remember that electricity cables and overhead lines can be very dangerous - the general rule is STAY AWAY and stay safe";

(3) "Look Out - Look Up: A Guide to the Safe Use of Mechanical Plant in the Vicinity of Electricity Overhead Lines" issued by Western Power Distribution;

(4) "Avoidance of Danger from Electricity Overhead Lines during Leisure Activities" issued by Western Power Distribution;

(5) "Think. Stay safe around electricity" - general safety leaflet issued by UK Power Networks ("UKPN")

Mr Faiers' summary of the message of these publications was that "one should stay away from electricity lines to stay safe".

14. Mr Knowlson took Mr Faiers to photographs in the hearing bundle. In one, the photographer had clearly gone underneath the cables to take the picture. Mr Faiers agreed that there is no need for a physical barrier around the cables and that it is safe to go underneath them. Mr Knowlson showed Mr Faiers another picture which showed the grass under the cables, which had clearly been mown and (Mr Knowlson observed) was "more or less a garden". Mr Faiers agreed but commented that all he could do with the area was cut the grass under the cables.

15. Mr Knowlson took Mr Faiers to a passage in the UKPN leaflet (entitled "Think. Stay safe around electricity") which states that "Overhead electric lines, underground cables and other electrical equipment are SAFE in normal conditions." Similarly, he drew attention to the final page of "Avoidance of Danger from Electricity Overhead Lines during Leisure Activities" which states that "Our equipment has been designed so that it is not dangerous in normal circumstances" and advises people to look around and be careful in what they do near overhead lines (in particular, avoid long objects coming close to them). Mr Faiers said that this is harder with young children than adults and he needs to stop their activities and explain the position to them.

16. It is agreed that the cables here are 11kV conductors. Mr Knowlson took Mr Faiers to the document "Look Out. Look Up", which explains that people using mechanical equipment must observe an exclusion zone of 3m around the cables and transformer (which is an area above ground – the minimum height of a pylon of this type is 5.2m so there is an area of at least 2.2m between the bottom of the exclusion zone and the ground) and also not go within 60cm of any part of the poles. Mr Faiers countered that a kite could get out of control and be a danger even if flown at a low level. He referred to the incident with the trampoline in the wind. He said maybe small children could kick a football under the cables, but asked, what do you do when they grow up and can kick higher?

17. Mr Knowlson took Mr Faiers to an aerial photograph which showed the wires continuing across the neighbouring property where sheep can be seen grazing under the cables. Other aerial photographs produced show the children's fort 7m away from the cables and some young trees approximately 8m from the cables on the other side from the fort.

18. In re-examination Mr Faiers repeated that he follows the HSE and other guidance. He has three children (and a fourth on the way), which makes it hard work, but he tries to live with the restrictions on recreational activities and knows there are restrictions on the work that can be done near the cables. If he wanted to do any work near the cables, he would need to tell UKPN and make sure it is properly overseen. He regards the cumulative effect of all these restrictions and guidance as imposing significant restrictions on his use of the Property.

MR FAIERS' SUBMISSIONS

19. For Mr Faiers, Mr Cannon says that there is not a great deal of authority on what constitutes garden or grounds for these purposes. In *Hyman and Goodfellow v HMRC*, [2022] EWCA Civ 185, the Court of Appeal held that the statutory words are clear and unambiguous and were not restricted to land that was needed for the reasonable enjoyment of the dwelling. The Court also declined to offer any further guidance on the actual meaning of "garden or grounds". There are no decided cases involving the presence of electrical apparatus on land that would otherwise be considered residential property for SDLT purposes, and so this appeal acts as an informal lead appeal for other similar appeals that have been stayed pending the outcome of this appeal. Mr Cannon said that during the Court of Appeal hearing he put to the Court various situations where taxpayers and HMRC were

wrestling with whether the land affected was within the meaning of "garden and grounds". One such example given was where an electricity sub-station belonging to a utility company was present within the grounds of a dwelling and in relation to that example Snowden LJ replied that "We all know the answer to that", which indicated (Mr Cannon said) that he considered that the land affected would not be part of the "garden or grounds".

20. Mr Cannon said that "in common-sense terms" all the land in question here formed part of the grounds of Agester Lodge; it formed a coherent whole with no physical separation of parts. But, he said, once part of the land was used for a commercial purpose, it could not as a matter of law form part of the garden or grounds of a dwelling within section 116(1)(b). There is no difference between the farmer's use of the grazing land in *Withers* and EPN's use of part of the land around Agester Lodge.

21. Mr Cannon took support from two points (the text in bold below) from this passage in the decision of Judge McKeever in *Hyman v HMRC,* [2019] UKFTT 0469 (TC). At [62] she observed that

> "In my view 'grounds' has, and is intended to have, a wide meaning. It is an ordinary word and its ordinary meaning is land attached to or surrounding a house which is occupied with the house and is available to the owners of the house for them to use. **I use the expression 'occupied with the house' to mean that the land is available to the owners to use as they wish. … Land would not constitute grounds to the extent that it is used for a separate, eg commercial purpose. It would not then be occupied with the residence, but would be the premises on which a business is conducted**."

22. The area of land affected is significant (about 10% of the land is in the safety zone around the cables) and constitutes a material impediment to the use and enjoyment of the garden or grounds as residential property, as explained by Mr Faiers in his evidence. As such, the land affected cannot be regarded as falling within the plain meaning of the words "garden or grounds" of the dwelling. HMRC's argument that the presence of the cables is similar in their effect to the presence of a river, marshland or breeding ground for protected wildlife species is a specious analogy. A river, marshland or breeding ground can provide many benefits to a property as a residential property not only in terms of visual amenity, privacy and setting but also in terms of use such as fishing, boating and swimming and these benefits more than outweigh any associated restrictions. The overhead cables in contrast, not only provide no benefits to the Property at all, but carry the material restrictions on use and the health and safety concerns detailed in the evidence given by Mr Faiers. As such, the land affected is not available to the occupants of the dwelling to "use as they wish" to quote from the passage of Judge McKeever's decision in *Hyman*.

23. Indeed, the apparatus forms part of the commercial business of EPN and Mr Faiers received a commercial payment for the use of the land by EPN. Judge McKeever's comments in *Hyman* quoted above about land not constituting "grounds" to the extent that it was used for a commercial purpose are therefore apposite and persuasive.

24. Mr Cannon also placed significant weight on the decision in *Gary Withers v HMRC*, [2022] UKFTT 00433 (TC). In that case the land in question was used for a self-standing function (by a farmer for agricultural purposes) and impacted what the landowner could do with his land. The farmer was using the land for his commercial purposes, but a commercial purpose is not necessary (the Woodland Trust land was not being used for commercial purposes). What matters is the impact on the landowner's use and enjoyment of his land.

HMRC'S SUBMISSIONS

25. HMRC say that the power network does not prevent all the land comprising the garden or grounds of Agester Lodge. In their view, all the land is clearly part of the garden of Agester Lodge and the Property is wholly residential. If the tribunal were not to find it "immediately clear" that all the land falls within section 116(1)(b), they consider that the guidance in the SDLT Manual (starting at SDLTM00455) should be followed. They say this approach was endorsed by the Upper Tribunal in *Hyman & Ors v HMRC*, [2021] UKUT 0068 (TCC) at [47]

26. As far as use is concerned, SDLTM00460 observes that

> "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."

Here, HMRC say that, even though operating a power network is a commercial activity, it does not prevent the whole of the Property being residential for the purposes of SDLT. The land is also being used as part of the garden of the Property and, as can be seen from various images, has been maintained for this purpose. The land's main use is for residential purposes. Unlike Withers, there are no delineated areas here. The grazing and Woodland Trust areas in that case were separate areas used for "self-standing" commercial purposes. Here the commercial use is secondary to the role of the land in question as garden or grounds.

27. SDLTM00465 considers the layout of land and buildings when considering what is garden or grounds. HMRC accept that the pole and power cables cross the land, but contend that from satellite images of the area it would appear the grounds are well maintained. They say that the land is suitable for day-to-day domestic enjoyment. They also contend that it is clear from images provided by Mr Faiers that a children's garden structure has been erected in proximity to the wires and pole and therefore that the existence of the wires and pole does not constrict the layout of the land to a considerable degree.

28. SDLTM00470 considers the geographical factors that affect whether land is chargeable. HMRC submit that it is evident, from the satellite image of the Property, that the land where the pole and cables are situated are in proximity, with no real evidence of separation from the buildings. This type of physical proximity would be a strong indicator to an objective observer that the land in question was grounds of the property. Furthermore, the satellite image also shows that the affected area runs approximately through the middle of the land. Mr Faiers is not saying that the land that immediately proceeds and follows the restricted area is not grounds. Therefore, it would be impractical to consider the extended area underneath the cable to be anything other than grounds of the Property.

29. SDLTM00475 considers the legal factors and constraints that would affect whether the land is chargeable. This passage expressly states that "hindrances" such as rights of way and pylons will not usually prevent land constituting garden or grounds. Not surprisingly, Mr Knowlson endorses that position. HMRC accept that the wayleave and HSE and other requirements and guidance constrain how Mr Faiers can use and enjoy the land but this does not stop it being part of the garden and grounds of the Property. There are many features that could be part of the garden or grounds of a property, such as a pond or a section of rough terrain, that would have associated constraints and this does not mean that the land cannot be part of the garden or grounds of a property, even if how they are used or enjoyed is restricted.

30. SDLTM00480 considers the interaction of SDLT with Capital Gains Tax for the purposes of what land is chargeable. The guidance indicates that land can still be 'garden or grounds' for SDLT even if it is of such a size that for CGT it would be said not to be required for the reasonable enjoyment of the dwelling. This approach was endorsed by the Court of Appeal in *Hyman and Goodfellow v HMRC*, [2022] EWCA Civ 185 at [30]. Accordingly, this tribunal should approach the question before it solely on the basis of the SDLT legislation. In fairness to Mr Cannon, there has been no suggestion that we should take CGT concepts or authorities into account in determining this matter.

31. HMRC also consider that SDLTM00450 is helpful. It indicates that (in HMRC's view),

> "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) of the 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"

32. HMRC accept that the power network may restrict user in the affected area but say there appears to be no physical separation of the demarcated areas from the rest of the land and people can walk freely underneath the electricity lines. As far as *Withers* is concerned, Mr Knowlson stressed that the two areas of land in question (that used by the farmer and the Woodland Trust land) were substantial, clearly delineated areas. They do not accept that the power network makes the Property 'non-residential' or 'mixed residential'. They take further support from the comments of Judge McKeever in *Hyman v HMRC*, [2019] UKFTT 0469, at [62] and [63]:

> "Nor is it fatal that other people have rights over the land. The fact that there is a right of way over grounds might impinge on the owners' enjoyment of the grounds and even impose burdensome obligations on them, but such rights do not make the grounds any less the grounds of that person's residence. Land would not constitute grounds that it is used for a separate, eg commercial purpose. It would not then be occupied with the residence but would be the premises on which a business is conducted.
>
> Applying this test to the meadow and the bridleway, I conclude that these elements of the land are part of the grounds of the Farmhouse within section 116(1)(b) and that the barn is a building or structure on that land. Accordingly, the whole of the property owned by Mr and Mrs Hyman is residential property for the purposes of SDLT and the tax was correctly paid on that basis"

DISCUSSION

33. It may be helpful as a starting point to run through the cases on "grounds" discussed before me.

34. The starting point is *Hyman v HMRC.* This involved the acquisition of a property near St Albans called "The Farmhouse". It comprised the house and 3.5 acres of land. The house was situated within a cultivated garden. Outside this garden was a large barn in a poor state of repair and there was a further garden referred to as a "secondary garden". Most of the remainder of the property was a meadow. On one side of the property was a bridleway which was separated from the garden and the meadow by hedges. The taxpayers claimed that the barn, meadow and bridleway were not part of the garden or grounds of the house. The FTT ([2019] UKFTT 0469 (TC)) found that the barn, meadow and bridleway were all "grounds"

of the dwelling as they were "all occupied with the house". In the course of her decision, (at [62] and [63]) Judge McKeever commented on the concept of "grounds" as follows:

> "[62] In my view "grounds" has, and is intended to have, a wide meaning. It is an ordinary word and its ordinary meaning is land attached to or surrounding a house which is occupied with the house and is available to the owners of the house for them to use. I use the expression "occupied with the house" to mean that the land is available to the owners to use as they wish. It does not imply a requirement for active use. "Grounds" is clearly a term which is more extensive than "garden" which connotes some degree of cultivation. It is not a necessary feature of grounds that they are used for ornamental or recreational purposes. Grounds need not be used for any particular purpose and can, as in this case, be allowed to grow wild. I do not consider it relevant that the grounds and gardens are separated from each other by hedges or fences. This may simply be ornamental, or may serve the purpose of delineating different areas of land as being for different uses. Nor is it fatal that other people have rights over the land. The fact that there is a right of way over grounds might impinge on the owners' enjoyment of the grounds and even impose burdensome obligations on them, but such rights to not make the grounds any the less the grounds of that person's residence. Land would not constitute grounds to the extent that it is used for a separate, e.g. commercial purpose. It would not then be occupied with the residence, but would be the premises on which a business is conducted.
>
> [63] Applying this test to the meadow and the bridleway, I conclude that these elements of the land are part of the grounds of the Farmhouse within section 116(1)(b) and that the barn is a building or structure on that land."

35. *Goodfellow v HMRC,* [2019] UKFTT 750, involved the acquisition of Heather Moore House in Hampshire, which comprised a house in 4.5 acres. The land comprised gardens, a swimming pool, garages, a stable yard and paddocks. The taxpayers contended the home office above the garage, the stable yard and paddocks were not residential property. The FTT adopted the analysis in *Hyman* and dismissed the appeal finding the paddocks and stables were used for recreational (not commercial) activity. As far as the room above the garage was concerned, the tribunal observed (at [19]):

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

36. The decisions in *Hyman* and *Goodfellow* (along with a third case, *Pensfold v HMRC*, which was not discussed before me and which it is unnecessary to dwell on) were appealed to the Upper Tribunal. Its decision is at [2021] UKUT 0068 (TCC). The permitted ground of appeal in each case was whether land can only be part of "the garden or grounds of" the house if the land is "needed for the reasonable enjoyment of the [house] having regard to the size and nature of the [house]". The Upper Tribunal did not accept the single ground of appeal and in consequence all three appeals were dismissed . For that reason the Upper Tribunal did not need to (and did not try to) define a "garden" or "grounds". However, in the course of their decision they made some comments on the meaning of "grounds", which we should bear in mind. The first (at [33] and [34]) was that

> "[33] Section 116(1)(b) refers to a garden or grounds "of" a dwelling. The word "of" shows that there must be a connection between the garden or grounds and the dwelling. The section does not spell out what criteria are to

> be applied for the purpose of establishing the necessary connection. …. We were not addressed as to whether the word "of" is to be interpreted as involving the same degree of connection between the dwelling and the garden or grounds or a different degree of connection. Again, it is not necessary for us to deal with that point to deal with the sole issue raised in these appeals.
>
> [34] Before the FTT in these three cases, the argument seemed to be that some of the land did not come within the ordinary meaning of a garden or grounds. Mr Cannon's submission on these appeals is different. For example, in relation to the appeal of Mr and Mrs Hyman, he accepted when asked that the meadow was part of the grounds of the house in that case, if one gave "grounds" its ordinary meaning. But he then went on to submit that the meadow was not part of the grounds for the purposes of section 116(1)(b) because it was not needed for the reasonable enjoyment of the house."

37. Later in their decision, the Upper Tribunal commented on the HMRC guidance which Mr Knowlson took this tribunal through. This is what the Upper Tribunal had to say about the HMRC guidance:

> "[47] We were invited to make some comments on the current guidance as to section 116 of FA 2003 and we shall do so. The guidance which we were shown is in the SDLT Manual at 00440, 00445, 00450, 00455, 00460, 00465, 00470, 00475 and 00480.
>
> [48] In the guidance at 00440, the Manual states that the language of section 116 should be given its natural meaning. It also states that there is no statutory concept of "reasonable enjoyment" and no statutory size limit that determines what "garden or grounds" means. We agree that those statements are correct as they are in accordance with our Decision in this case.
>
> [49] In the guidance at 00455, the Manual states that when considering whether land forms part of the garden or grounds of a building, a wide range of factors come into consideration; no single factor is likely to be determinative by itself; not all factors are of equal weight and one strong factor can outweigh several weaker contrary indicators; where a number of contrasting factors exist, it is necessary to weigh up all the factors in order to come to a balanced judgment of whether the land in question constitutes "garden or grounds". This part of the guidance also refers to a number of factors which are individually discussed in other parts of the Manual but states that the list of other factors will not necessarily be comprehensive and other factors which are not mentioned there might be relevant. We agree with this guidance in 00445 also. We regard this guidance as being in accordance with our own interpretation of section 116 as explained in this Decision. Given that"garden" or "grounds" are ordinary English words which have to be applied to different sets of facts, an approach which involves identifying the relevant factors or considerations and balancing them when they do not all point in the same direction is an entirely conventional way of carrying out the evaluation which is called for.
>
> [50] We will not comment on any other parts of the current guidance. It is not necessary to do so for the purpose of deciding these appeals. There is no appeal in any of these three cases against the evaluative exercise carried out by the FTT so we do not have to review the decisions of the FTT in that respect. No one made any submissions as to the other parts of the current guidance which we have not mentioned above. However, we are certainly not indicating that we have any concerns as to the other parts of that guidance and Mr Cannon did not identify any part of it which he would wish

> to challenge. The fact that we are not commenting on the other parts of the guidance is simply because it is not relevant in these appeals for us to do so."

38. *Hyman* and *Goodfellow* (but not *Pensfold*) were appealed to the Court of Appeal. Its decision is at [2022] EWCA Civ 185. Again, the sole ground of appeal was whether there is an objective quantitative limit on the extent of the garden or grounds that fall within the definition and the Court of Appeal held that there is not. Mr Cannon had pressed on the Court of Appeal the desirability of "a workmanlike and coherent test". It is, presumably, at this point that Mr Cannon raised the problem of sub-stations, which prompted Snowden LJ's observation that "We all know the answer to that". However, the Court declined his invitation to devise such a test. At [12] Lewison LJ, with whose judgment Simler and Snowden LJJ agreed, observed:

> "Whether a more prescriptive test would be desirable is, at bottom, a question of policy. We are not concerned with such questions. The only question for us is whether that is what section 116, as enacted, actually means. It is not uncommon for Parliament, even in a taxation context, to use coarse-grained words whose outer limits are left to the courts and tribunals to work out: "plant", "emoluments" and "resident" are but three examples."

39. At this point we need to go back in time a little to *Lynda Myles-Till v HMRC*, [2020] UKFTT 0127 (TC), a decision of Judge Citron, to which Mr Cannon made brief reference. 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 SDLT. He held that it was not, and in coming to that conclusion made these comments about "grounds":

> [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."

40. Judge Citron regarded the discussion in HMRC's SDLT Manual (SDLTM00440-SDLTM00470) as a "generally, helpful and balanced discussion of the factors indicating whether the adjoining land functions as an appendage to the dwelling or is self-standing".

41. Function played an important part in the decision of the FTT (Judge Ruhven Gemmell) in *Gary Withers v HMRC*, [2022] UKFTT 0433, a decision on which Mr Cannon placed significant weight. The question here was whether the purchase of Lake Farm by Mr Withers was a purchase of wholly residential property. The property consisted of a dwelling-house surrounded by approximately 39 acres of gardens, fields, and woodlands. The historic grounds of the dwelling were the driveway, the land around the dwelling and the land to the south extending to 10 -12 acres. The remaining acres to the north of the dwelling were separated by stock proof fencing and had been acquired in 3 transactions in 1994, 2004 and 2007. It was all agricultural land when purchased and had remained in agricultural usage by a local farmer ever since. This land had never been used for residential purposes.

42. Approximately 8.5 acres of woodland had been developed by the Woodland Trust under an agreement allowing it to use part of the land surrounding Lake Farm to "create a new woodland...comprising of native trees for the benefit of people, wildlife and landscape". The agreement with the Woodland Trust required it to pay no more than 50% of the cost of agreed works and 50% of the cost of their maintenance work. The Trust committed itself to make payment of no more than £2,700 plus VAT for their contribution to the works. The landowner at no time receives any cash payment from the trust. The aim of the agreement was to ensure that at least 80% of the trees planted are established well within usual forestry standards. The landowner is required to allow unfettered access to the site by workmen, agents and invitees of the trust and he is specifically prohibited from carrying out any activities which would lead to loss of or damage to the woods. The tribunal's conclusion (at [158]-[159]) was as follows:

> "[158] The Tribunal, in following a balanced assessment of all the facts, considers that the land surrounding Lake Farm to the extent that it is occupied for grazing and by the Woodland Trust does not constitute garden or grounds as defined in section 116 of the Finance Act 2003 and, therefore, should not be treated as residential property for the purposes of SDLT.
>
> [159] There were, importantly, grazing and Woodland Trust agreements in place at the time purchase and the Tribunal consider that the relevant areas of land were used for a separate purposes and self standing functions and failed to meet the tests as residential property. Their use or function does not support the use of the dwelling/building concerned as a dwelling."

43. The final case to touch on is *James and Charlotte Averdieck v HMRC*, [2022] UKFTT 00374 (TC), which is a case I raised with Mr Cannon and Mr Knowlson. It would be fair to say that Mr Cannon (who also appeared in that case for the taxpayer) is not enamoured of this decision. He says that he has asked Judge Scott for permission to appeal her decision and, if she refuses, he will ask the Upper Tribunal for permission. The taxpayers in that case purchased a "stunning contemporary house" in 14 acres of land. One boundary was formed by a road (which was part of the property). The taxpayers argued that the land over which the road passed was used for a separate commercial purpose, namely the access to the farm. They also said that the extent of the interruption was sufficiently material for the land affected to fall within what Mr Cannon described as the exception identified by Judge McKeever in the penultimate sentence in paragraph [62] of *Hyman*. In addition, Mr Cannon argued that the land was subject to restrictions and obligations and that prevented the land from being used or enjoyed as residential property. On that basis, Mr and Mrs Averdieck claimed that their acquisition was not of entirely residential property. Judge Scott held that it

was. She agreed with Judge McKeever when she said in *Hyman* that the existence of burdensome obligations does not make the grounds any the less the grounds of the residence. She also held that the road was not being used for a commercial purpose (despite being used for access by a local farmer and for deliveries to houses at the end of the lane (which was not a throughfare)). As she put it (at [38]):

> "Whilst I accept that the farmer's business is a commercial operation, it is conducted on his farm. It is no more conducted in the Lane than it is on the main road. … . The Amazon drivers making deliveries do so in the course of Amazon's business but Amazon's premises do not include the Lane."

44. The pointers I take from these cases are as follows:

(1) "Grounds" is an ordinary (albeit a little archaic, at least in the view of some of my fellow judges) English word which has to be applied to different sets of facts. So, in deciding whether a particular piece of land comprises all or part of the "grounds" of a dwelling, it is necessary to adopt an approach which involves identifying the factors relevant in that case and balancing them when they do not all point in the same direction.

(2) The discussion in HMRC's SDLT Manual is a fair and balanced starting point for this exercise, but each case needs to be considered separately in the light of its own factors and the weight to be attached to them. Listing them briefly, the factors addressed in the SDLT Manual are: historic and future use; layout; proximity to the dwelling; extent; legal factors/constraints.

(3) Section 116(1)(b) refers to a garden or grounds "of" a dwelling. The word "of" shows that there must be a connection between the garden or grounds and the dwelling.

(4) Common ownership is a necessary condition for adjacent land to become part of the grounds of the dwelling, but it is clearly not a sufficient one.

(5) Contiguity is important; grounds should be adjacent to or surround the dwelling; *Hyman*.

(6) One requirement (in addition to common ownership) might be thought to be that the use or function of the adjoining land must be to support the use of the building concerned as a dwelling (*Myles-Till*). That may be putting the test too high to the extent it suggests that unused land cannot form part of the "grounds" of a dwelling (cp *Hyman* in the FTT at [62]). Such a requirement must also contend with the decision of the Court of Appeal in *Hyam and Goodfellow* that it is not necessary, in order for garden or grounds to count as residential property, they must be needed for the reasonable enjoyment of the dwelling having regard to its size and nature.

(7) In that light, the "functionality" requirement might perhaps be put the other way round: adjoining land in common ownership will not form part of the "grounds" of a dwelling if it is used (*Hyman* in the FTT at [62]) or occupied (*Withers* at [158]) for a purpose separate from and unconnected with the dwelling. That purpose need not be (although it commonly will be) commercial (*Withers*). This is subject to the points discussed in (8) and (9) below.

(8) Other people having rights over the land does not necessarily stop the land constituting grounds. For example, the fact that there is a right of way over grounds might impinge on the owners' enjoyment of the grounds and even impose burdensome obligations on them, but such rights do not make the grounds any the less the grounds of that person's residence. As the recent decision of the Supreme Court in *Fearn and others v Board of Trustees of the Tate Gallery*, [2023] UKSC 4, indicates, other people

may have a range of rights that can impact on a landowner's use and enjoyment of their land and statute law intervenes in a range of fields (planning and environmental law being obvious examples). Indeed, once one accepts (as we are bound by authority to accept) that "grounds" extends beyond the land needed for the reasonable enjoyment of a dwelling, it seems almost inevitable, particularly in a rural context, that third parties (not the landowner) may have rights over or use parts of the "grounds" without that affecting the status of the land for these purposes. All of that together must mean that, whatever else "available to the owners to use as they wish" (*Hyman* at [62]) may mean, it cannot mean (and Judge McKeever, who herself referred to others' rights, clearly did not intend it to refer to) untrammelled dominion unaffected by the presence or rights of others.

(9) Some level of intrusion onto (or alternative use of) an area of land will be tolerated before the land in question no longer forms part of the grounds of a dwelling. At one end of the spectrum, rights of way will generally not have this effect, even when the right is used for a commercial purpose and the existence and exercise of those rights is unconnected with the dwelling. At the other end of the spectrum, the use of a large, defined tract of land (which had historically been in separate ownership) for agricultural purposes by a third party who has rights enabling them to use that land in that way will result in that area of land not forming part of the grounds of a dwelling (*Withers*).

45. Turning now to the facts of this case. The land in question adjoins and surrounds the dwelling. No part of it is separated by a road or similar physical feature. There is no suggestion that the land is more extensive than might seem appropriate. There is no suggestion that the land has been used otherwise for its present purpose. The only relevant factor which, it is suggested, would point away from all this land constituting the "grounds" of Agester Lodge is the presence of the electricity distribution network (the single pole and cables). The pole and cables are clearly used for a separate, non-residential purpose; they carry electricity for EPN, which is a commercial operation and the pole and cables are on the land for a commercial purpose.

46. As I have indicated, I found Mr Faiers to be a reliable witness. I accept entirely that the presence of the pole and cables on his land limits what he can do, in terms of activities (putting up a marquee or a trampoline) and development (planting trees close to the cables, building a greenhouse), and in particular and entirely understandably in what he feels he can safely allow his children to do. They may also make certain future works more expensive. On the other hand, they do not stop him mowing beneath the equipment and, from the exhibited photographs, there is no difference in quality or appearance between the ground underneath the cables and the rest of the ground in that part of Mr Faiers' land. Sheep can safely graze under the equipment. There are new trees and a large play fort reasonably close to (although clearly not very close to or underneath) the equipment. Whilst the cables put limits on what Mr Faiers can do in that part of his domain, they do not prevent that part of his land looking like, or being used for ordinary day-to day purposes in a similar way to, the surrounding area.

47. As far as extent of occupation is concerned, the single pole clearly occupies the ground it is dug into. There is no other occupation at ground level. The cables occupy the small amount of airspace they travel through and their presence creates an larger aerial "safety zone" around them. Mr Cannon said that the "safety zone" takes up 10% of Mr Faiers' land. HMRC did not challenge that figure. But it is important to remember that the "safety zone" is not a "no go" area, where nothing can happen and no one can enter. It is an area in the air which at its lowest is over 2m above the ground and close to which care needs to be taken.

The grazing sheep in the neighbour's land and Mr Faiers' ability to tend the land under the cables on his land make it quite clear that there are a number of activities which can be carried on at ground/low level beneath the cables.

48. Fundamentally, Mr Cannon's position is that, once part of the land is used for a commercial purpose, it cannot as a matter of law form part of the garden or grounds of a dwelling within section 116(1)(b). In the vast majority of cases it will follow from part of the land acquired being used or occupied for a commercial purpose (or some other purpose separate from the use of the dwelling), certainly where a meaningful part of the land is occupied for that purpose to the permanent (or at least non-transitory) exclusion of the landowner (as was the case in *Gary Withers*, the only case of all those discussed before me where the taxpayer was successful), that the whole of the land acquired will not constitute the "grounds" of the dwelling, but, as I have already indicated, I do not consider that any alternative user of any part of the land will automatically have that result; see the discussion at [44] (8) and (9) above and [49] below. Mr Cannon did not cite any authority binding on me to suggest that there is a such a rule.

49. At the risk of repeating myself, it is clear that one person having rights over another's land will not of itself prevent that land constituting the grounds of the second person's dwelling, if it otherwise would. A right of way (even one which is burdensome) was the example given in *Hyman.* There is no suggestion in Judge McKeever's comments that she was only considering rights for non-commercial purposes. *Averdieck* (although I am conscious of Mr Cannon's views on that decision) would clearly indicate that there is no difference between commercial and non-commercial user so far as this point is concerned. I can see no reason to make such a distinction. The statutory question is whether the whole of the land in question comprises the "grounds" of a dwelling (here Agester Lodge), not whether part of it is used for a particular purpose. The answer to the second question may impact on the answer to the first, but the first question is the only one the statute poses. According to the Upper Tribunal in *Hyam, Goodfellow and Pensfold,* the question the law poses is to be answered with an open mind, considering the full range of factors relevant to the case in point, and that is what I propose to do.

50. Having considered all the materials before me, I have come to the view that the electricity distribution network does not prevent all of the land adjoining Agester Lodge constituting the grounds of that dwelling. I have come to this conclusion because:

(1) The land in question is contiguous with and surrounds the dwelling. No part of it is separated by a road or similar physical feature. There is no suggestion that the land is more extensive than might be appropriate. There is no suggestion that the land has been used otherwise for its present purpose.

(2) I accept that the electricity distribution network is part of a commercial operation carried on by a third party, but I have already held that this factor in itself is not determinative.

(3) The level of physical intrusion (one pole and some overhead cables) is not extensive. The wires and pole do not affect the layout/appearance of the land to any material extent and do not physically "break up" the land. The appearance of the land is of a coherent whole over which the cables pass.

(4) The safety issues which the transmission of electricity generate restrict the activities which can be carried on close to the cables, but they do not prevent the landowner doing anything at all under the cables. Grass can be mown, so that the land under and around the cables is indistinguishable from the rest of the land. Low-level activities (such as cultivation or sheep grazing) can be carried on safely under the

cables. The photographic evidence shows that the relevant land is well maintained, and the children's play fort has been erected in proximity to the wires and pole.

51. In terms of its place on the spectrum which runs between rights of way at one end and the type and scale of "alternative" (non-dwelling related) use seen in *Withers* at the other, I consider that the electricity distribution network and EPN's rights in relation to it are far removed from the type of use and intrusion seen in *Withers* and can fairly be described as akin to a right of way, something which impinges on the owner's enjoyment of the grounds but does not in any realistic way make the affected land any less part of the grounds of the dwelling.

52. As I mentioned at [20], Mr Cannon said at the start of his argument that "in common-sense terms" all the land in question here formed part of the grounds of Agester Lodge; it formed a coherent whole with no physical separation of parts. I am pleased to have reached a conclusion which accords with Mr Cannon's (and my) conception of common sense.

53. In concluding I should acknowledge Mr Cannon's references to the "problem of sub-stations" and his report of Snowden LJ's comments in the Court of Appeal hearing in *Hyman and Goodfellow*; see [38] above. This was a point to which we returned a number of times. I did attempt to ascertain Mr Knowlson's views on sub-stations, but he was too sensible to be drawn into that discussion. I must admit that the answer to the problem of sub-stations (whether the presence of one on land means in every case that the space it occupies cannot be part of the grounds of a dwelling) is not immediately obvious to me; perhaps more precisely, it is not obvious to me that there is a universal answer to this question which means that the position of a sub-station does not need to be considered separately as part of the overall balancing exercise in each case. However, given that sub-stations are buildings which occupy a defined area of land and (for obvious reasons) do represent a "no go" area, I do not consider that there is any necessary tension between the conclusion I have reached in this case and the position (assuming this is a correct statement of the law) that the presence of a sub-station on land acquired with a dwelling means, automatically in every case, that the land does not entirely fall within section 116(1)(b).

DISPOSITION

54. For the reasons I have set out, I have determined that Mr Faiers' acquisition of the Property on 23 August 2019 was an acquisition solely of residential property within the meaning of section 116(1), Finance Act 2003, and in consequence the rates to be used to calculate the amount of SDLT chargeable on that acquisition are those in Table A in section 55 of that Act.

55. It follows that HMRC's decision set out in the closure notice issued on 26 January 2021 was correct and this appeal must be, and is, dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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.

MARK BALDWIN

TRIBUNAL JUDGE

Release date: 14th MARCH 2023