Tax Chamber
First-tier Tribunal for Scotland

[2025] FTSTC 3

FTS/TC/AP/24/0008

Land and Buildings Transaction Tax – Amended Return – Refund claim – residential and non–residential tax rates – classification of property – was it mixed use? – no – appeal dismissed

DECISION NOTICE

IN THE CASE OF

Ralph Anderson and Paula Anderson

Appellants

- and -

Revenue Scotland

Respondent

TRIBUNAL: ANNE SCOTT
CHARLOTTE BARBOUR

The hearing took place in person at George House, Edinburgh on Monday 18 November 2024

David Whiscombe of David Whiscombe LLP for the Appellants

Gemma Grant, Solicitor for Revenue Scotland

DECISION

1. This is an appeal against a decision of Revenue Scotland, upheld on review, to amend the appellants' (already amended by them) Land and Buildings Transaction Tax ("LBTT") return to reflect that the transaction giving rise to the return related to residential property in terms of section 59 Land and Buildings Transaction Tax Act 2014 ("LBTTA.") That decision was communicated to the appellants by way of a Closure Notice issued under section 93 Revenue Scotland and Tax Powers Act 2014 ("RSTPA") dated 27 November 2023. The transaction in question was the purchase of a property in Cupar ("the Property").

Preliminary issue

2. The Notice of Appeal which was received by the Tribunal on 28 March 2023 was in the name of Mrs Anderson only, albeit the Review Conclusion Letter and Closure Notice were addressed to both Mrs Anderson and her husband. Whilst section 247 RSTPA provides that an appeal may be brought by any of the "buyers" of a property and the decision of the Tribunal will bind all buyers where only one appeals, we had due regard to Rules 2 and 9 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 ("the Rules") and decided to add Mr Anderson as a party.

The hearing

3. We had a Hearing bundle extending to 200 pages which included witness statements from Mrs Anderson and two officers of Revenue Scotland. The witness statements were uncontested. Accordingly, no evidence was led and we heard only legal argument. We had an Authorities bundle extending to 279 pages. We had Skeleton Arguments for both parties.

4. In advance of the hearing, the parties had lodged with the Tribunal, a Statement of Agreed Facts and Issues. Whilst we have noted the terms of the Statement of Agreed Facts and Issues, there was a measure of disagreement articulated during the hearing and there were additional facts that came to our attention. Therefore, we have identified the facts and issues that we consider to be relevant.

5. We had the benefit of a transcript for judicial use only because, following on a period of ill health, I was only working part-time. During the hearing, the parties were made aware that the decision would not be released within the usual time frame. Unfortunately further delay in issuing this decision is attributable to a subsequent extended period of sickness leave.

The issue

6. The only substantive issue in this appeal is whether the purchase of the Property was a residential or a non-residential transaction within the meaning of section 59 LBTTA.

7. As can be seen from section 24(4) LBTTA, (see paragraph 37 below) if the main subject matter of a transaction includes an interest in land that is not residential property then the whole transaction will be taxed as a non-residential property transaction. Such

properties are loosely described as being “mixed” and therefore taxed at the lower rate of LBTT.

8. In summary, the issue turns on the question of whether or not a footpath which is included in the title to the Property “is or forms part of the garden or grounds” of the Property within the meaning of section 59 LBTTA and, hence, whether it is a “residential” or “mixed use” property. Revenue Scotland argues that it does form part of the grounds and the appellants argue that it does not, not least because their primary argument was that the Property had no grounds.

The facts

9. The effective date of the transaction was the completion date for the purchase of the Property on 5 October 2022.

10. On the effective date, an LBTT return was made on behalf of the appellants and that treated the purchase of the Property as residential. The total consideration for the transaction was £497,000 with a total liability to LBTT of £42,930. The return also charged Additional Dwelling Supplement of £19,880 but, following a claim made by the appellants, that was repaid on 2 August 2023 and is not in dispute.

11. On 27 September 2023, Mrs Anderson contacted Revenue Scotland stating that she had become aware that the Property included a footpath which ran adjacent to it. She argued that the transaction was therefore not wholly residential and that non-residential rates should have been applied. She wished to make a repayment claim for £9,700 and accordingly amended the return to record the Property as non-residential. The Note in the amendment stated:- “Wayleave agreement – the land purchased included footpath adjacent to the property”.

12. There is no evidence before us of any wayleave agreement. The only evidence that we had was the copy Title Information (“Title Sheet”) and Title Plan.

13. We have annexed as an appendix a copy of the Title Plan. The area at the front with the dwelling house and double garage abutting Cupar Road is tinted pink on the plan. The rectangular area behind the garage and garden is tinted blue and the narrow strip running from Cupar Road to Drum Road is the footpath. The small indent on Cupar Road is a bus shelter that is maintained by the Local Authority.

14. The description of the Property in Section A of the Title Sheet reads:-

> “Subjects … tinted pink, blue and brown on the Title Plan. Together with a servitude right of wayleave through the remainder of the Development at Cupar Muir, Cupar, of which the subjects in this Title forms part for all necessary water supply, sewage water disposal, drainage, soil, gas and other pipes and electricity supply cables (above and below ground) serving the subjects in this Title with right of access thereto on all necessary occasions for the purpose of installation, maintenance, repair and renewal thereof but subject always to reinstatement by the proprietors of the subjects in this Title or payment of surface damages”.

15. The area of the Property tinted pink on the Title Plan forms the house and garden of the Property and the parties are agreed that those are "residential property" for the purposes of LBTT. The area tinted blue not only forms the boundary of the Property on Drum Road at the rear of the Property but is also part of a landscape belt.

16. In relation to the area of the Property tinted brown on the Title Plan ("the footpath") Section D of the Title Information under Burden 1 (First) reads:

> "(First)
>
> In respect that the area of ground tinted brown on the Title Plan has been or is to (sic) utilised to form a public footpath between Cupar Road … and Drum Road …, the feuars shall be bound to permit any person or persons wishing to use the same full pedestrian access over and across the said footpath and the said footpath shall, after completion by the Superior to the satisfaction of North East Fife District Council as planning authority, be maintained thereafter by the feuars to a similar standard;".

17. The next paragraph reads:

> "(Second)
>
> The feu shall be used solely for the purpose of erection and maintenance thereon of one private dwelling house only with a domestic garage or garages and relative offices to be erected in accordance with plans and elevations and materials previously approved of by the Superior and no additions or external alterations shall thereafter be made thereto without the prior written consent of the Superior; Declaring that all of the feu shall, so far as was not occupied by buildings as aforesaid or reserved as driveways, be used as ornamental or garden ground in front and at the sides and as such or as greens for drying clothes at the back, all in connection with the dwelling house… and for no other purpose whatsoever; And in respect that the area of ground tinted blue on the said plan has been or is to be utilised as a part of a landscape belt along the West and North boundaries of the Superior's Development…the feuars are hereby expressly prohibited from erecting any building whether temporary or permanent of whatsoever nature in the said area of ground which shall, after formation, be maintained by the feuar in all time coming as part of the said landscaped belt;…".

18. The Property includes a four-bedroomed, two storey detached house which was constructed in 1987. The internal floor area is 229 square metres. The accommodation comprises:

> Ground Floor: Entrance Vestibule and Hall, Living Room, Sitting Room, Kitchen/Living/Dining Room, Bedroom with ensuite Shower Room, Utility Room and WC.
>
> First Floor: Upper Hall/Landing, three Bedrooms (one with ensuite Shower Room) and Bathroom.

19. There is a driveway, parking and turning area and a double garage. There are garden areas to the front, side and rear. It is situated in a housing development of other houses of generally similar size and appearance.

20. The front boundary of the Property adjoins Cupar Road and the rear boundary adjoins Drum Road. Cupar Road and Drum Road are adopted roads. Some roads in the immediate vicinity are not adopted.

21. The footpath runs between those roads. The boundary with the neighbouring property adjacent to the footpath is a wooden fence.

22. The footpath, which is approximately one metre wide, provides pedestrian access from the rest of the housing development to the bus stop and bus shelter on Cupar Road. It is asphalted in the same manner as the pavement and bus shelter on Cupar Road.

23. The entrance to the footpath on Cupar Road is adjacent to the bus shelter which does not form part of the Property. Both the bus shelter and the footpath are accessed from the pavement on Cupar Road.

24. The footpath is screened from view of the rear garden of the Property by the double garage, trees and a low wall with hedging which is much higher than that wall. A wall that is the height of the lintel above the garage doors runs the rest of the length of the footpath and screens the side and front of the house. That wall continues behind, and at the side of, the bus shelter on Cupar Road at the front of the house. On Cupar Road there is a very low wall with railings that match the driveway and entrance gates.

25. The appellants can access the footpath by walking out of their front gate, or gates on their driveway, and past the bus shelter.

26. Neither the Sales Particulars nor the Home Report referred to the footpath. Indeed the Home Report states at 11a that there is no "…responsibility to contribute to the cost of anything used jointly, such as the repair of a shared drive, private road, boundary, or garden area". At 11e, it states that no neighbour has the right to walk over the Property. At 11f, in answer to the question "As far as you are aware, is there a public right of way across any part of your property? (public right of ways is a way over which the public has a right to pass, whether or not the land is privately-owned)" the answer was "no". The description of the boundaries of the Property was "brick walls, timber fencing and hedging".

27. On 4 September 2022, the appellants' solicitor confirmed to them that the title had "very standard burdens" and there was nothing unusual in the title.

28. Mrs Anderson cannot recall whether or not they had noticed the footpath when viewing the Property. They were not aware that they owned the footpath or that they had an obligation to maintain it until her father, Mr Whiscombe who has a professional interest in such matters, looked at the title deeds.

29. On 6 November 2023, Revenue Scotland opened an enquiry into the amended LBTT return, and on 27 November 2023, Revenue Scotland issued a Closure Notice rejecting the repayment claim and further amended the return to reflect the view that the transaction was residential in nature. The enquiry conclusion was that as at the effective date, the

Property was a residential property within the meaning of section 59(1) LBTTA and that the return had originally been correctly submitted on that basis. Following that amendment to the return by Revenue Scotland, reflecting their view that the transaction was residential, no further tax was due to be paid and none was due to be refunded.

30. On 18 December 2023, Dr Anderson requested a review of the decision. He attached a copy of a letter setting out detailed advice on the matter received by the appellants from the appellants' new agent, David Whiscombe LLP.

31. On 15 January 2024, Revenue Scotland provided the appellants with their View of the Matter letter which upheld the Closure Notice.

32. On 28 January 2024, Dr Anderson responded pointing out that the issue was that the footpath was included in the title (and therefore the purchase) but it did not form part of the garden or the grounds of the Property.

33. On 6 March 2024, Revenue Scotland issued their Review Conclusion letter upholding the Closure Notice.

34. Mrs Anderson appealed to the Tribunal thereafter.

The Law

35. It is common ground that the burden of proof lies with the appellants and that it is on the balance of probabilities.

The relevant legislation

36. Section 3 LBTTA reads:

> "A land transaction is the acquisition of a chargeable interest."

37. Section 24(1) LBTTA requires Scottish Ministers to specify tax bands and rates for residential and non-residential property transactions. Sections 24(3) and (4) read as follows:

> (3) A transaction is a residential property transaction if –
>
> (a) the main subject matter of the transaction consists entirely of an interest in land that is residential property …
>
> (4) A transaction is a non-residential property transaction if –
>
> (a) the main subject-matter of the transaction consists of or includes an interest in land that is not residential property …

38. So far as material, section 59 LBTTA reads:

> (1) In this Act "residential property" means –

(a) a building that is used or is suitable for use as a dwelling, or is in the process of being constructed or adapted for such use,

(b) land that is or forms part of the garden or grounds of a building within paragraph (a) (including any building or other structure on such land), or

(c) an interest in or right over land that subsists for the benefit of a building with paragraph (a) or of land within paragraph (b).

(2) Accordingly, "non-residential property" means any property that is not residential property.

39. Section 61 LBTTA reads:

"61. Meaning of 'subject-matter' and 'main subject-matter'

References in this Act to the subject-matter of a land transaction or a contract or to the chargeable interest acquired ("the main subject-matter") by virtue of the transaction or contract, together with any interest or rights pertaining to it that is acquired with it."

Interpretation of the legislation

40. There was not a meeting of minds between the parties as to how the legislation is to be interpreted. Mr Whiscombe argued that the wording in section 59 LBTTA was very clear and provided "an exhaustive definition of 'residential property'". In those circumstances a purposive approach is not required.

41. Ms Grant argued that a purposive approach should be taken and that section 59 had to be read in context and, in particular, that context included section 24(3) LBTTA.

42. The only decision of this Tribunal in relation to section 59 LBTTA and the definition of "grounds" is to be found in *Sloss v Revenue Scotland* [2021] FTSTC 1 ("Sloss"). At paragraphs 77 and 78 we stated that:

"77. As can be seen, the core issues addressed by the parties are the concepts of residential and non-residential property and therefore what constitutes "grounds". None of these phrases are defined in terms in the legislation but they are widely used in UK legislation. We say that because the Explanatory Notes to LBTTA 2013 state:-

'12. The reference to the Tax Authority's responsibility for 'collection and management' of LBTT has, by virtue of section 51(3) of the Commissioners for Revenue and Customs Act 2005 (c.11), the same meaning as references to responsibility for 'care and management' in historical UK tax statutes. This means that a jurisprudence concerning the proper bounds of the tax authority's role is imported into the devolved tax system. This jurisprudence includes not only case law from the UK jurisdictions but other English-speaking jurisdictions.'

78. The definition of residential property in section 59 LBTTA, albeit laid out slightly differently, is in almost identical terms to the definition of residential property in section 116(1) of the Finance Act 2003 ('section 116')."

43. Section 116 relates to Stamp Duty Land Tax ("SDLT").

44. Both parties referred to and relied upon the UK jurisprudence relating to SDLT. Although we have been referred to numerous authorities we do not propose to rehearse the arguments in relation to them all.

45. Ms Grant referred to *Mudan v HMRC* [2024] UKUT 307 (TCC) ("Mudan UT") where Judges Scott and Greenbank stated at paragraph 34 that any statutory wording must be construed by reference to the words used "taking into account the importance of the purpose of the legislation".

46. We agree. We pointed out that in the Supreme Court in *Balhousie Holdings Ltd v HMRC* [2012] UKSC 11 Lord Briggs, at paragraph 24, made it explicit that:

"The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

47. We agree that the statutory provisions must be interpreted in that context. Lord Hodge at paragraphs 31 and 29 respectively of *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2023] AC 255 made it clear that:-

(a) that "…involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words", and

(b) "A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections".

48. At paragraph 30 Lord Hodge said that "External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions…". Whilst Lady Arden agreed with Lord Hodge, at paragraph 64, she referred to the use of external aids quoting with approval Lord Nicholls' statement in another case that "To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool".

49. At paragraph 10 in *Hurstwood Properties (A) Limited and Others v Rossendale Borough Council and Another* 2021 UKSC 16, Lords Briggs and Leggatt stated that identifying the purpose of legislation is of "central importance" in construing it. Thereafter they went on to say that, in the context of fiscal legislation, Lord Nicholls of Birkenhead in the decision of the House of Lords in *Barclays Mercantile Business Finance Limited v Mawson* [2004] UK House of Lords 51 at paragraph 32 had identified the "essence" of that approach as being:

"to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description".

50. That has to be the approach that we adopt.

51. What then is the purpose of the legislation? Mr Whiscombe argued that *Henderson Acquisitions Limited v HMRC* [2023] UKFTT 739 (TC), on which Revenue Scotland had relied, should be distinguished because it was concerned with completely different facts. It was, but with respect, we disagree. At paragraph 36 of *Mudan UT* the Tribunal said:

> "…We endorse the description of the broad purpose of the current legislation given in *Henderson*, at [16]:
>
> > 'In our view the purpose of the SDLT provisions is to tax transactions relating to residential property at a higher rate than non-residential property, and for transactions in relation to residential property by developers and second homeowners to be taxed more highly than a dwelling in which people live as their primary home….'".

52. The Policy Note for the Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Order 2015 distinguishes between residential and non-residential transactions and makes it clear that the purpose of the LBTT legislation is similar to that for SDLT. In particular, support for first time buyers is prioritised, residential properties are taxed at a higher rate with the intention of redistributing the tax burden from lower to higher value transactions whilst the lower rates and bands for non-residential transactions are designed to attract business investment.

53. Lastly, in the context of interpretation of the legislation, bearing in mind what we have said at paragraph 47 above, sections 59 and 61 LBTTA must be considered together since they are in the same "group of sections". We also agree with Ms Grant that section 59 LBTTA does not stand to be considered in isolation and that section 24 LBTTA is a relevant wider context.

Discussion

54. We do not accept that section 59 LBTTA provides an "exhaustive definition" of residential property. Since 2003, the identical legislation for SDLT has generated a myriad of appeals to not only the First-tier Tribunal ("FTT") but also to both appellate courts.

55. One of the very recent cases is *HMRC v Suterwalla* [2024] UKUT 00188 (TCC) ("Suterwalla") where the Upper Tribunal endorsed an FTT finding in *39 Fitzjohns Avenue Limited v HMRC* [2024] UKFTT 28 (TC) ("Fitzjohns") that no less than 16 factors should be evaluated in deciding what constituted a residential property. Section 59 LBTTA is clearly not an exhaustive definition given the number of factors that need to be considered.

56. We are in no doubt that we have to consider the legislation carefully and apply a purposive approach. We have identified the purpose of the legislation at paragraphs 51 and 52 above.

57. The parties took diametrically opposed approaches in this appeal.

58. In summary, it was argued for the appellants that:

(a) the Property does not have, and is not capable of having, "grounds" as opposed to a garden as it is modest in size. It merely has a garden and the footpath forms no part of the garden;

(b) the jurisprudence is largely irrelevant since, in general, it relates to large country houses of substance with considerable acreage where one could "stroll around" the grounds or take a "shortcut" using a right of way;

(c) however, if the Property does have grounds, then the footpath does not form part of those grounds;

(d) the footpath is physically separated from the house and garden;

(e) the perception of anyone looking at the footpath would be that it had nothing to do with the Property;

(f) it is indistinguishable from the bus shelter and pavement and access by the appellants is achievable only by leaving the Property;

(g) the footpath had its own particular function which was unconnected with the house and garden, and it needed to be maintained. That function is self-standing and unrelated to the Property;

(h) the footpath served no purpose for the Property and lacks any functional connection with the house and garden.

59. By contrast, although their Skeleton Argument was lengthy and replete with references to diverse authorities, Revenue Scotland's submissions could be distilled down to the core arguments that, in summary:

(a) the purpose of the legislation is to tax the purchase of residential properties more highly than non-residential properties;

(b) the Property was, and is, a dwelling house with land attached and is therefore residential;

(c) it would subvert the purpose of the legislation if two identical homes on a housing estate were treated differently for LBTT purposes purely because the title for one included a footpath (for which the owners were responsible for maintenance) and the other did not;

(d) "Grounds" are not defined. The Upper Tribunal had decided in *Hyman & Others v HMRC* [2021] UKUT 0068 (TCC) ("Hyman UT") that the test to be applied in deciding whether land forms part of a garden or grounds is a multifactorial one. The Court of Appeal endorsed that making it explicit that there was no objective quantitative limit, such as the suggestion that the grounds must be required for the reasonable enjoyment of the dwelling;

(e) the footpath should not be looked at in isolation but rather the Tribunal should look at the "nature of the whole of the Property"; the mere presence of the footpath is insufficient to alter the "fundamental nature and character" of the Property.

60. As we have indicated, we agree with Revenue Scotland that the purpose of the legislation is to tax the purchase of residential properties more highly than non-residential properties.

61. Mr Whiscombe conceded that it was common ground that paragraph 37 of Revenue Scotland's Statement of Case was accurate and insofar as relevant, it reads:

> "…section 59(1)(b) requires an evaluative assessment of the various factors be carried out to determine whether or not land …forms part of the grounds of the dwelling on the property. The specific factors to be considered will depend on the particular facts and circumstances of the case before the tribunal…It is the position at the effective date of the transaction which is relevant to the evaluative exercise".

We agree.

62. Revenue Scotland have consistently argued that four factors are relevant to the evaluative exercise to be carried out and set those out at paragraph 38 of their Statement of Case. In his oral submissions Mr Whiscombe very properly addressed those factors. They are:

(a) title position;

(b) size and character of the Property;

(c) connection between the dwelling and the grounds;

(d) rights over the land in favour of others.

63. However, whilst these are relevant, in *Suterwalla*, the Upper Tribunal reviewed a number of the authorities and stated at paragraph 18 that:

> "…Although Judge Baldwin's formulation [in *Faiers*] is helpful, we prefer the expanded summary of the relevant factors, derived from the cases including *Hyman, Faiers* and *How Development*, by Judge McKeever in *39 Fitzjohns Avenue Ltd v HMRC* [2024] UKFTT 28 (TC) at [37]:
>
> '(1) Grounds is an ordinary English word.
>
> (2) HMRC's SDLT manual is a fair and balanced starting point (considering historic and future use, layout, proximity to the dwelling, extent, and legal factors/constraints).
>
> (3) Each case must be considered separately in the light of its own factors and the weight which should be attached to those factors in the particular case.
>
> (4) There must be a connection between the garden or grounds and the dwelling.
>
> (5) Common ownership is a necessary condition, but not a sufficient one.

(6) Contiguity is important, grounds should be adjacent to or surround the dwelling.

(7) It is not necessary that the garden or grounds be needed for 'reasonable enjoyment' of the dwelling having regard to its size and nature.

(8) Land will not form part of the 'grounds' of a dwelling if it is used or occupied for a purpose separate from and unconnected with the dwelling.

(9) Other people having rights over the land does not necessarily stop the land constituting grounds. This is so even where the rights of others impinge on the owners' enjoyment of the grounds and even where those rights impose burdensome obligations on the owner.

(10) 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. There is a spectrum of intrusion/use ranging from rights of way (still generally grounds) to the use of a large tract of land, historically in separate ownership used by a third party for agricultural purposes under legal rights to do so (not generally grounds).

(11) Accessibility is a relevant factor, but it is not necessary that the land be accessible from the dwelling. Land can be inaccessible and there is no requirement for land to be easily traversable or walkable.

(12) Privacy and security are relevant factors.

(13) The completion of the initial return by the solicitor on the basis the transaction was for residential property is irrelevant.

(14) The land may perform a passive as well as an active function and still remain grounds.

(15) A right of way may impinge an owner's enjoyment of the grounds or even impose burdensome obligations, but such rights do not make the grounds any less the grounds of that person's residence.

(16) Land does not cease to be residential property, merely because the occupier of a dwelling could do without it.'"

64. That is the approach that we have adopted and in oral submissions Ms Grant referred to, and relied upon, *Fitzjohns*. We find that Revenue Scotland's four factors are subsumed under the 16 factors in *Fitzjohns*.

65. We find that aspects of some of these factors are more straightforward than others. For example:

(a) Factor (2) is not relevant since, we heard no argument on Revenue Scotland's Guidance (which was not produced to us) and, in any event, as the Tribunal stated at paragraph 90 of *Sloss,* that Guidance sheds no light on the matter.

(b) Factor (5) is satisfied in that there is common ownership and that would be a connection with the dwelling as far as factor (4) is concerned.

(c) As far as factor (13) is concerned, it is indeed irrelevant that the solicitor completed the return on the basis that the transaction was for residential property.

(d) We have found as fact that the appellants would have had to have walked out of their driveway or garden in order to access the footpath so, as far as factor (11) is concerned, it is not directly accessible from the garden or driveway because of the walls and garage etc. It is, however, both easily accessible and traversable or walkable.

(e) It is clear that the appellants were not aware that they had purchased the footpath and therefore we accept that, in the words of factor (16) they "could do without it".

(f) As far as factor (7) is concerned, if the footpath is part of the grounds, it is indeed not necessary for the "reasonable enjoyment" of the dwelling.

(g) As far as factor (10) is concerned, Mr Whiscombe conceded that the existence of a right of way did not, in itself, equate to the footpath being non-residential property. (There was some debate about whether or not the footpath constitutes a right of way in a technical sense but we accept that it is a right of way.)

(h) Since the appellants have the obligation to maintain the footpath that would be a burdensome obligation and we also accept that the appellants would not be described as "enjoying" the footpath but factors (7), (9) and (15) mean that that does not in itself mean that the footpath could not be grounds.

(i) As can be seen from the Title Plan the footpath is adjacent to the dwelling, garage and garden so factor (6) is met.

66. One of the key factors to be considered is factor (1) and in particular whether there are in fact any "grounds". Mr Whiscombe agreed with Revenue Scotland's statement at paragraph 41 of the Statement of Case that "The term [grounds] should have a wide meaning and be reflective of the character of the property in question".

67. Mr Whiscombe's primary case was that if the Property had no grounds then the appeal must succeed since, patently, the footpath was not part of the garden.

68. He pointed out that paragraph 60 of Revenue Scotland's Skeleton Argument said:-

> "…The main subject-matter of the transaction in this case was the acquisition of the real right of ownership in the Property, which includes the footpath. However, on any common sense understanding, the main subject-matter of the transaction must be the house and garden. The footpath is a minor element of the chargeable interest acquired by the Appellant, both in terms of the scale of the footpath in proportion to the rest of the land acquired and in terms of its significance to the Appellant."

He argued that Revenue Scotland were wrong to narrow the main subject-matter to only the house and garden.

69. He also relied on the fact that at paragraph 40 of the Statement of Case, Revenue Scotland had stated that:

> "The existence of a wall separating the footpath from the rear garden of the Property means that it is not currently part of the garden. However, were the wall to be removed, the footpath may be said to form part of the garden. It is the presence of the wall that, in the Respondent's view, means that the footpath cannot be said to be part of the garden of the property."

70. Mr Whiscombe made the valid point that the Tribunal must look at the position at the effective date and therefore should not consider the possibility of a wall being removed. We agree. We also agree with him that it is crucial to identify the "main subject matter of the transaction" (sections 24 and 61 LBTTA) and that that is what was purchased in terms of the transaction, ie the areas tinted pink, blue and brown and not just the house and garden.

71. He relied upon these two paragraphs for the proposition that Revenue Scotland accepted that the footpath was not part of the garden and therefore, if they were to succeed, it must be part of the grounds. He argues that there are no grounds.

72. Those quotations are accurate. However, we observe that in a number of other paragraphs in the Skeleton Argument (a few examples include paragraphs 27, 31, 39, 45 50 and 54) Revenue Scotland argue that the footpath is part of the grounds. In particular, at paragraph 31, Revenue Scotland explain their position as follows:

> "31. The existence of a wall separating the footpath from the rear garden of the house means that it is not currently part of the garden. However, were the wall to be removed, the footpath may be said to form part of the garden. It is the presence of the wall that, in the Respondent's view, means that the footpath does not currently form part of the garden of the house. However, it is accepted that grounds and gardens may be separated from each other by hedges or fences, and this is not a relevant factor in determining whether something constitutes the grounds of a dwelling… In the present case, the wall serves the purpose of delineating the garden area from the footpath and providing privacy to the owners of the house."

In that regard Revenue Scotland relied upon paragraph 62 of *Hyman v HMRC* [2019] UK FTT 0469 (TC) ("Hyman FTT").

73. That paragraph is frequently quoted in SDLT cases and reads as follows:

> "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 (sic) not make the grounds any the less the grounds of that person's residence. Land would not constitute grounds to the extent that it is used for a separate, eg commercial purpose. It would not then be occupied with the residence, but would be the premises on which a business is conducted."

74. Mr Whiscombe argues that a house of 229 m² in a development is not a house that, in ordinary usage of the term, has "grounds". In support of that proposition he relied on amongst other cases *Hyman FTT, Sloss*, *Averdieck v HMRC* [2022] UKFTT 00374 (TC") (Averdieck), Goodfellow *v HMRC* [2019] UKFTT 0750 (TC) ("Goodfellow") and *Guerlain-Desai v HMRC* [2024] UKFTT 00515 (TC).

75. He rejected the assertion in paragraph 27 of Revenue Scotland's Skeleton Argument which said that "…a straightforward reading of the legislation is that grounds encompasses any land bought with what is clearly a dwelling house…". He argued that that must be nonsense and was indeed extraordinary because if that were the case none of the SDLT cases would have come to court. The same would apply to *Sloss.*

76. On that point we agree with him and reject Revenue Scotland's argument which cannot be right. If it were correct there would be no need for the 16 factors endorsed by the Upper Tribunal in *Suterwalla.*

77. Mr Whiscombe's primary argument was that the Property had no grounds and "grounds" was a term which can sensibly be applied to a country house or some other property of substance; those are houses of a very different character. He argued that "It would be facetious of Mr Anderson to say to his wife, I'm just going to take a stroll in the grounds before turning in for the night".

78. We accept that most of the authorities dealing with "mixed" properties involve very large homes with extensive land attached but we do not accept Mr Whiscombe's argument that a "relatively modest house" such as this one cannot have grounds.

79. Certainly, in *Hyman FTT* at paragraph 38 upon which Mr Whiscombe relied, Judge McKeever did say that:

> "The Oxford English Dictionary defines 'grounds' as 'An area of enclosed land surrounding a large house or other building'".

However, that must be read in context with the rest of that paragraph and paragraph 62. Judge McKeever went on to say in paragraph 38 that:

> "The Cambridge Dictionary's definition is 'land that surrounds a building'".

80. Of course, everything is relative and the Property is not a "mansion". However, a detached home with four bedrooms, and a double garage is not particularly small. Many would call it a large house.

81. As can be seen, in paragraph 62, Judge McKeever went on to discuss the meaning of grounds at some length. Although the point was not canvassed in that context, we note the terms of the third sentence which reads: "I use the expression 'occupied with the house' to mean that the land is available to the owners to use as they wish". Mr Whiscombe did argue that the appellants cannot use the footpath. We discuss this further in paragraphs 90-94 below.

82. We do not agree with Revenue Scotland when they repeatedly imply, and indeed seem to accept, that only the footpath forms part of the grounds and the rest of the Property comprises the dwelling house and garden.

83. The Title conditions are very clear. The appellants cannot use the area tinted blue on the Title Plan as they wish. They must maintain it in perpetuity as part of a landscaped belt and they cannot build upon it even to erect a temporary structure such as a tool shed or tree house. The area tinted blue abuts the area tinted brown, ie the footpath.

84. What has been purchased is a single plot with one house on it in a residential area. However, the plot has three areas with differing restrictions. The pink area is free of restrictions. The blue area must be maintained in perpetuity as part of the landscape belt and the brown area has a right of way over it. On that basis, we find as fact that the Property does have grounds and that both the areas tinted blue and brown are part of those grounds with the area tinted blue also being part of the garden. The footpath is a right of way and cannot be used for any separate commercial purpose. The issue of a footpath is covered at some length by Judge McKeever in the latter part of paragraph 62 of *Hyman FTT.*

85. Before leaving paragraph 62, we observe that it is a FTT decision and the Upper Tribunal in *How Development 1 Ltd v HMRC* [2023] UKUT 84 (TC) ("How"), addressed the issue of use of grounds. As we indicate at paragraph 94 below, the fact that the appellants only had a limited ability to use the footpath is simply a factor to be weighed in the balance and is not decisive.

86. In finding that the Property does have grounds, we have discussed Revenue Scotland's first two factors being title and size and character. Mr Whiscombe argued that the third, being the connection between the dwelling and the grounds, was the most important by a considerable margin. That involves a number of the factors from *Fitzjohns.* It also involves Revenue Scotland's final factor which is the right of way.

87. Mr Whiscombe's starting point was function (factor 14) and he argued that the footpath had a self-standing function rather than being, in the words of Judge Citron at paragraph 44 in *Myles-Till v HMRC* [2020] UKFTT 0127(TC), "functionally, an appendage to the dwelling".

88. We have noted that, at paragraph 46 of *How* the Upper Tribunal said that:

> "44. In *Hyman UT* at [33], the Upper Tribunal said that there 'must be a connection between the garden or grounds and the dwelling'. However, that statement was made in the context of the observation, with which we agree, that since the statutory wording requires a garden or grounds to be a garden or grounds 'of' a dwelling, that necessarily connotes some type of connection, with the relevant criteria for

determining the connection being left at large in the legislation. The Upper Tribunal was not saying that land which is physically inaccessible from a dwelling can never form part of the grounds of that dwelling."

89. We have described the accessibility at paragraph 25 above. The footpath is both traversable and walkable. The Upper Tribunal in *How* went on to say at paragraph 46 that:

> "46. Precedent, principle and practical considerations therefore support our conclusion that accessibility is a factor to be taken into account by the FTT in its evaluative exercise, but difficulty of access does not mean that the land cannot be part of the grounds of the dwelling."

90. We do not accept the argument at paragraph 19 of the appellants' Skeleton Argument that the functional use of the footpath as a route to the housing estate has no relevance to the proprietors of the Property and that there is therefore not a "functional relationship" with the Property. Of course, it has a potential benefit to them.

91. In that context, Mr Whiscombe argued that the appellants could not use the footpath to any greater extent than any member of the public.

92. Whilst we accept that they cannot build on it we do not agree.

93. Since as long ago as *Sutherland v Thornson* (1876) 3 R. 485 it has been an established principle in Scots Law that a member of the public cannot carry out any activity other than passage on a public right of way. Since the appellants own it, they are not limited simply to a right of passage and further they can traverse it in whatever manner they choose; they are not limited to walking as the public are in terms of the Title. Like for the general public, it also gives them access to the rest of the housing development.

94. It matters not whether they use the footpath, as we agree with Judge McKeever in *Hyman FTT* when she said that there was no requirement for active use.

95. Even if we are wrong in that, at paragraph 62 of *How* the Tribunal said that:

> "62. Similarly, the argument that the owners of The How could only enjoy the woodland to the same extent as a member of the public seems to us to be one more matter which the FTT was entitled to consider and weigh up as part of its evaluative assessment…".

We have. We do not find that it is a decisive factor.

96. Furthermore, Lord Justice Lewison, at paragraph 33 in *Hyman & Goodfellow v HMRC* [2022] EWCA Civ 185 ("Hyman 3"), stated that he agreed with the Upper Tribunal in *Hyman v HMRC* [2021] UKUT 0068 (TCC) ("Hyman 2") when he found that the words of section 116 are "clear and unambiguous" and that the suggested qualification of a test of "reasonable enjoyment" was "simply wrong". We find that the same is true of section 59 LBTTA.

97. We do accept that the obligation to provide and maintain a pedestrian right of access is, or could be onerous, but, objectively, the existence of the footpath seems to have been neutral given that the previous owners seemed unaware of their ownership of it. In that

sense it seems to have a passive function as far as the owners of the Property are concerned. It may be in the words of factor (14) that the appellants take the view that the footpath provides a passive function as far as they are concerned but that does not mean that it cannot be part of the grounds.

98. Undoubtedly, if the appellants did not own the footpath, that would not diminish their enjoyment of the Property and, because they would no longer have to maintain it, it could be said that it would improve their enjoyment of the Property.

99. Although Mr Whiscombe pointed out that it seemed that the sellers, their surveyor and solicitor did not appear to be aware of the footpath or the obligations attached to it, we do not consider that to be any more relevant than factor (13).

100. The simple fact is that the appellants owned the house, the garden and the footpath. That is clearly demonstrated by the Title Sheet. It was acquired in one transaction. It is part of the chargeable interest acquired. That is common ground between the parties.

101. Revenue Scotland pointed out that, as was the case in *Averdieck,* when the appellants purchased the Property the footpath was part of the "package". Like in *Fitzjohns,* where the disputed part of that property was a ventilation shaft, the Property in this instance has been in residential use for many years.

102. As we found in *Sloss* at paragraph 88, we accept that "…there must be some link with the dwelling and the grounds beyond the fact that they had been purchased together in a single transaction."

103. In that case we went on to say that "There must be a functional relationship between the dwelling and the grounds. Ms van der Westhuizen agreed with that analysis [by Mr Small]". Mr Whiscombe relied on our use of the word "must". We used the word "must" because, as can be seen, that was a matter that had been agreed between the two experienced counsel. In *Sloss* the evaluative exercise involved weighing up a situation where the property was an estate of many acres with some land in agricultural use.

104. Firstly, that paragraph should be read in the context of the previous paragraph where we had said:

> "87. However, beyond stating that in referring to the garden or grounds <u>of</u> a dwelling, that '…shows that there must be a connection between the gardens or grounds and the dwelling', the Upper Tribunal did not find it necessary to decide what the level of connection might be or what criteria should be used
> to establish that."

105. Secondly, as we have pointed out, the jurisprudence in this field has moved on since *Sloss.* At paragraph 44(7) in *Faiers, Judge Baldwin said:*

> *"*44 (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."

106. Mr Whiscombe relied on the words "commonly will be" in that paragraph to distinguish Judge Citron's earlier statement in 2020 in *Myles-Till* at paragraph 45 that:

> "….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."

That was said in the context that "grounds" must be "functionally, an appendage to the dwelling, rather than having a self-standing function".

107. Of course, the footpath does not have a commercial function. We agree with Judge McKeever at paragraph 88 *et seq* of *Fitzjohns* where she said that an unconnected function did not have to be commercial although it would commonly be so. She pointed out that:

> (a) Judge Baldwin had observed that rights of way do not necessarily prevent land being grounds, and
>
> (b) there would have to be in addition an alternative use of such land or a level of intrusion that was sufficiently "severe" in relation to the size and nature of a property as a whole to take it to "the far end of the spectrum" where it is no longer formed part of the grounds.

108. We heard no argument from the appellants about intrusion and indeed, as can be seen because of the walls, hedging etc the footpath is itself fairly private and secure as far as the dwelling is concerned and *vice versa.*

109. For all these reasons, we find that, as far as factors 8 and 12 are concerned, the footpath is not used for commercial purposes or for a purpose unconnected in any way with the dwelling. The footpath also provides a space between the dwelling and the adjacent property.

110. Factor (3) in *Fitzjohns* requires us to weigh all the facts in this case in the balance and we have done so. As both parties conceded there is no authority based on similar facts. As Lord Briggs stated (see paragraph 46 above) the ultimate question for the Tribunal is whether section 59 LBTTA, construed purposively is intended to apply to the facts in this transaction viewed realistically. The purpose of the legislation is indeed to tax residential transactions more highly than non-residential which are designed to attract business investment. The footpath does not fall into the latter category.

111. We find that the Property is a residential property with both a garden and grounds and that the area tinted brown, ie the footpath forms part of those grounds.

Decision

112. For all these reasons the appeal is dismissed and the Closure Notice is upheld. We find that the original LBTT return was accurate and that the purchase in question was that of a residential property.

113. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to Rule 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure)

Regulations 2017. In terms of Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016, any such application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

ANNE SCOTT

President

RELEASE DATE: 9 April 2025

Paul Anderson - Appendix