Tax Chamber
First-tier Tribunal for Scotland

[2021] FTSTC 1

Ref: FTS/TC/AP/19/0021

Land and Buildings Transaction Tax **– refund claim – residential and non-residential tax rates – classification of property – residential or mixed use – definition of grounds – RSTPA s 113 - Appeal allowed**

DECISION NOTICE

IN THE CASE OF

Mr Robert and Mrs Maxine Sloss

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: ANNE SCOTT
CHARLOTTE BARBOUR

The hearing took place on Monday 10 and Tuesday 11 May 2021. With the consent of the parties, the form of the hearing was by WEBEX on the Tribunal video platform.

Having heard David Small, Counsel, for the Appellant

Laura-Anne van der Westhuizen, Counsel, for the Respondent

DECISION

Introduction

1. This is an appeal against a decision dated 2 August 2019 by the Respondent to refuse a claim for repayment of Land and Buildings Transaction Tax ("LBTT") in terms of section 107 of the Revenue Scotland and Tax Powers Act 2014 ("RSTPA"). The transaction in question was the purchase of the land and buildings known as Glenburn Hall ("the Estate").

The hearing

2. We had an electronic bundle extending to 750 pages and that included a promotional video produced by Knight Frank for the sale. We had witness statements from Sharon Yeaman of Revenue Scotland and for the Appellants, Mr Jeffrey Brewis, the estate manager, and the Appellants themselves. Only Mr Sloss gave oral evidence as the other witness statements were not challenged in any way.

3. We had Skeleton Arguments dated 27 October 2020 and 31 March 2021 from Mr Small for the Appellants and a revised Skeleton Argument dated 18 December 2020 from Ms van der Westhuizen for Revenue Scotland.

4. In the case of an appeal of an appealable decision, and this is an appealable decision, Section 244(2) RSTPA provides that:

> "The tribunal is to determine the matter in question and may conclude that Revenue Scotland's view of the matter in question is to be-
> (a) upheld
> (b) varied, or
> (c) cancelled."

At the outset of the hearing, Ms van der Westhuizen, on being asked by the Tribunal, confirmed that Revenue Scotland had departed from their reasoning in the refusal decision (see paragraphs 12 to 21 below), and therefore any decision of the Tribunal should reflect that. Mr Small confirmed that the Appellants had long been aware of that change in stance and offered no objection.

Background

5. The Appellants instructed solicitors to act for them in the purchase of the Estate and missives were concluded on 25 November 2016. The disposition in their favour was dated 29 March 2017 and the Appellants were granted entry and vacant possession on 31 March 2017.

6. The solicitors prepared and lodged the LBTT return which shows LBTT due of £162,350 (not including Additional Dwelling Supplement ("ADS")). That sum was calculated by treating the purchase of the Estate as a residential property transaction within the meaning of section 24(3) Land and Buildings Transaction Tax (Scotland) Act 2013 ("LBTTA") and applying to the chargeable consideration of £1.7 million the rates of tax

shown in Table A to the Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Order 2015[1] ("the Order").

7. The tax calculation also shows ADS payable of £51,000 (which is 3% x £1.7million) calculated on the Estate being residential.

8. The total tax (LBTT plus ADS) payable in terms of the LBTT return was thus £213,350 and that sum was timeously paid by the solicitors, having been put in funds by the Appellants.

9. On 1 September 2018, the Appellants sold Glenburn Lodge, the stables and most of the land on the Estate, (not including the Hall and its gardens) to Granton Investments Limited ("Granton") for £350,000. Mr Sloss controls that company and is a director and shareholder. The sale was for commercial reasons to allow Granton to develop the stable block into residential units. The same solicitors acted in that transaction. On their advice, LBTT amounting to £18,850 was paid at residential rates.

Claim for repayment of LBTT

10. On 15 October 2018, the Appellants claimed relief for overpaid tax under section 107 RSTPA on the basis that the LBTT return had not been completed correctly because the purchase incorporated both residential and non-residential property and the transaction should therefore have been assessed under Table B of the Order rather than Table A. The total claim for repayment was in the sum of £98,600 plus interest.

11. Correspondence ensued.

Revenue Scotland's changes in position

12. On 9 May 2019, Revenue Scotland rejected the claim on the basis that the Appellants had had sufficient information at the time of the purchase to determine how the transaction should have been notified and therefore section 113 RSTPA ("section 113") applied.

13. Ms Yeaman did not specify which sub-section of section 113 applied notwithstanding the fact that in her earlier letter of 2 April 2019, she had relied on both Case C (ie sub-section (4)) and Case G (ie sub-section (9)).

14. The Appellants requested a review on 31 May 2019 stating that they had already explained why neither Case C nor Case G applied.

15. On 21 June 2019, the review officer responded making it explicit that the rejection of the section 107 claim was based on section 113(9), being Case G, set out an argument on that basis and requested further information (see paragraph 18 below).

16. The Appellants' agent responded on 26 June 2019, pointing out that Case G could not apply as section 113(9)(b) had not been met.

[1] SSI 2015/126

17. Revenue Scotland carried out the review and on 2 August 2019 they concluded that the original decision to refuse the claim should be upheld. In that letter, Revenue Scotland relied on section 113(9), namely Case G, whereas they now rely on section 113(4), namely Case C (see paragraph 35 below).

18. Given the confusion caused by Revenue Scotland's differing approaches in this matter, it is appropriate to quote the basis of that review decision, namely:

> "As I previously stated in my view of the matter Case G(b) applies as Revenue Scotland's Guidance and Legislation on 'mixed property' was available and correct at the effective date of the transaction. The information was available to you in order to determine the correct tax treatment on the basis of the prevailing practice at the time, however a mistake was made when submitting the original return by applying the residential rates".

19. On 28 August 2019, the Appellants applied to the Tribunal. The Grounds of Appeal stated that Revenue Scotland were in agreement that the transaction was "mixed". They correctly identified the fact that the original Decision Notice did not explicitly cite the specific Case in terms of section 113 which applied but that the review decision relied on Case G and they then addressed that.

20. The Appellants argued that if Revenue Scotland relied on Case G they must have accepted that there had been a mistake, ie the transaction was "mixed". That was therefore common ground. However, the provision in section 113(9)(b) had not been met because in a mixed transaction, as Revenue Scotland's guidance made clear, the generally prevailing practice was to apply the lower rate and that had not happened.

21. In the Statement of Case lodged by Revenue Scotland with the Tribunal on 1 November 2019, they confirmed that they did not accept that the transaction is "mixed". They quoted both Case C and Case G but in argument they relied solely on section 113(4), namely Case C.

The issues

22. The first issue in this appeal is whether the purchase by the Appellants of the Estate was a residential or a non-residential transaction within the meaning of section 59 LBTTA. Shortly put, it is not in dispute that if any element is non-residential then the whole transaction is treated as non-residential and as "mixed" and therefore taxed at the lower rate.

23. The second issue is section 113(4) RSTPA and arises if the Tribunal finds that the purchase was a non-residential transaction. In that event, the question is whether the Appellants knew or ought reasonably to have known, on or before 30 April 2018 – 12 months after the filing date for their original LBTT return - that they could make or amend their return on the basis that the transaction was a non-residential one.

Overview of the Appellants' arguments

24. The Appellants do not dispute that much of the Estate was residential property within the meaning of section 59 LBTTA. However, they submit that there were significant areas

of land included in the purchase which did not fall within those sub-sections and which fall within the definition of non-residential property in section 59(2). In particular, the Appellants argue that fields 1 to 7 were not the "grounds of" any dwelling, and also that fields 1 and 2 could never have been described as residential.

25. They instructed solicitors, took advice and did everything "by the book". It was only when it came to their notice through a friend that they might have paid too much tax that they realised that they might have a claim for a refund (see paragraph 69 below).

Overview of Revenue Scotland's arguments

26. As noted above, Revenue Scotland had changes of position before this appeal came to the Tribunal. There seemed to be a limited understanding of the legal principles involved and that inevitably led to what we consider to be flawed decision making at both the initial stage and at review. Both the decisions, and the reviewing officer's initial letter present as confused.

27. At the hearing, and in Ms van der Westhuizen's Skeleton Argument, Revenue Scotland's view was that the transaction was definitively residential. They argue that it is necessary to look at the character of the property as a whole and whether the land is essential to its character to protect its privacy, peace and sense of space. The sheep added to the amenity and the serenity and they had contributed to the reason that the purchase was made.

28. The Appellants and their solicitors had always been aware of the grazings so if they thought that that part of the Estate was non-residential then they should have made the return on that basis or amended the return within one year.

29. In any event section 113 applied because:

(a) Mr Sloss should have been aware of differential rates for different properties,
(b) he could have challenged his lawyers,
(c) he could have asked for independent accountancy advice,
(d) since it is a self-assessment return, it was incumbent upon him to ensure that it was correct,
(e) and even if he did not know the correct position, in Revenue Scotland's view, his solicitors should have known and the Appellants "should bear the consequences of any failings on the part of the solicitor."

30. So, Revenue Scotland's current position is that, it was always a residential transaction and the fields added to the amenity, location and peace. The Appellants should always have known that it was residential and, given that there was no new disclosure, nothing had changed.

The Law

31. Section 24(1) LBTTA requires Scottish Ministers to specify tax bands and rates for residential and non-residential property transactions. Section 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 …

32. So far as material, section 59 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 within paragraph (a) or of land within paragraph (b).

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

33. Section 61 LBTTA defines "the main subject-matter" of a land transaction as the chargeable interest acquired by virtue of the transaction. "Chargeable interest" is defined in section 4 as (*inter alia*) a real right in or over land in Scotland.

34. Section 107 RSTPA provides that a person may make a claim to Revenue Scotland for repayment where they have paid an amount of tax but believe it was not chargeable. Where section 107 applies, Revenue Scotland is not liable to give relief, except as provided by any provision of RSTPA.

35. Section 113 makes provision for cases where Revenue Scotland need <u>not</u> give effect to a claim under section 107. Section 113(4) reads:-

"(4) Case C is where the claimant—

(a) could have sought relief by taking such steps within a period that is now expired, and
(b) knew or ought reasonably to have known, before the end of that period, that such relief was available."

Section 113(9) reads:-

"(9) Case G is where—

(a) the amount paid, or liable to be paid, is excessive by reason of a mistake in calculating the claimant's liability to tax, and
(b) liability was calculated in accordance with the practice generally prevailing at the time."

36. Section 83 RSTPA provides that a person who has made a tax return may amend the return by notice to Revenue Scotland, provided the amendment is made within 12 months of the filing date. The "filing date" is the date by which a return requires to be made (section 82 RSTPA). An LBTT return requires to be made before the end of the period of 30 days beginning with the date after the date of completion (sections 29 and 63(1)(a) LBTTA).

37. The burden of proof lies on the Appellants to show that they are entitled to a refund of LBTT because of the mixed use for which they contend. The standard of proof is the normal civil standard, which is to say on the balance of probabilities.

The Facts

38. As we indicated above, we heard only from Mr Sloss who was a straightforward, clear and entirely credible witness. His occupation is as a company director and he currently holds at least 15 directorships, although only three are core businesses for him in this context. Those three businesses all deal with property development and/or investment companies dealing with residential and commercial property with offices in England and Scotland. His role is primarily strategic and business development. He holds an MBA and BSc in Valuation and Estate Management. He has been working in that field for in excess of 25 years.

39. Insofar as he is involved at any level with residential property, it is largely urban high-density properties delivered primarily for financial institutions. Many are brownfield sites. To the best of his knowledge, none of the companies have been involved in residential property in Scotland. The majority of the activity is in the rest of the United Kingdom.

40. We accepted that his knowledge of real estate is broad based, and we would expect that, given that his role is at a strategic level; so, appropriately the detail is left to others.

41. Whilst he is aware of the existence of LBTT and Stamp Duty Land Tax ("SDLT"), he is aware that tax regimes change and therefore he, and the companies with which he is involved, take professional advice.

42. Neither personally nor professionally has he ever been involved in the acquisition of a mixture of residential and agricultural property, such as an estate, before this transaction.

43. The Appellants had wished to purchase a peaceful country property close to Edinburgh.

44. In 2016, he had been shown the sales particulars for the Estate by a friend who is also a friend of the family of the then owners (see paragraph 51 below).

45. In Mr Sloss' words, he had not had a strategy in relation to the purchase but on seeing it he just "fell in love with it" not least due to its position. He is a very keen gardener and the gardens were very important to him. Fishing is his other primary hobby.

46. The Knight Frank sales particulars set out the principal features, namely:

(a) The Hall itself is a Schedule A listed country house which has four reception rooms, six bedrooms, four bathrooms and other accommodation and facilities.

(b) The Hall is on four floors, and the floor plan giving the internal dimensions suggests a total square footage of approximately 5000 square feet. It shows that the primary accommodation includes the kitchen and dining room in the basement, a sitting room and a drawing room and two studies on the ground floor, two bedrooms, two bathrooms, a shower room and dressing room on the first floor and four bedrooms and a bathroom in the attic. There are no en-suite bathrooms.

(c) To the south or south east of the Hall is a substantial walled garden which includes various outbuildings.

(d) To the west of the Hall a private road leads to a Georgian stable block for which planning had been obtained for conversion.

(e) Formal lawns immediately surround the Hall.

(f) Behind the Hall to the south west, beyond the lawn, is an area of ground known as “the paddock”.

(g) At the entrance to the Estate there is a two bedroom Lodge Cottage, occupied by a Mr and Mrs Brewis. Although he is now the estate manager, in the missives, he was described as “Estate Worker and Gardener” and his wife as “part-time Housekeeper”.

(h) The total area of the Estate is approximately 68.53 acres. This is made up of buildings, gardens, areas of grass including seven fields and the paddock and ancient woodland. Of the 68.53 acres, 43.66 are pasture, 18.24 acres are woodland and 6.63 acres are buildings and gardens.

(i) The pasture is registered with the Scottish Government as agricultural land for IACS (Integrated Administration and Control System) and was stated to be let to a local farmer annually under a grazing agreement.

(j) The Estate abuts Jedburgh and it is possible to walk from the Hall to Jedburgh through the Estate.

47. The particulars included a plan which has subsequently been numbered for the Tribunal and a copy is annexed at Appendix 1. The pasture areas are numbered 1 to 8. They can be described as follows:-

(1) Large field with a gentle slope, used for sheep grazing. It extends to 10.11 acres.
(2) Large field with a gentle slope, used for sheep grazing. It extends to 14.65 acres.
(3) Marshy flat low lying pasture, left wild, and has never been farmed.
(4) Rough pasture with a steep slope, which historically was grazed but at the time

of acquisition was not grazed. It has recently been enclosed and is grazed.
(5) Sloping rough pasture, which historically was grazed but at the time of acquisition was not grazed. It has recently been enclosed and is grazed.
(6) Not a field, just a gap in the woods. Left wild and not farmed.
(7) Sloping field extending to 7.29 acres, in sight of the Hall and used for sheep grazing. It is fenced off.
(8) Flat paddock near the hall which is occasionally grazed. It is visible from the Hall.

48. It is very clear that because of the topography of the Estate the views from the Hall do not include any of the fields other than a limited part of field 7 and the paddock. Woodlands exclude the rest. Mr Sloss fairly conceded that although fields 1-6 are usually out of sight of the Hall, glimpses can sometimes be seen through the trees in winter.

49. He instructed the major international firm of solicitors who had handled some of his business activities to act in this matter. Two of those solicitors visited the Estate prior to the purchase. There were sheep in field 7, and possibly elsewhere, but when at the Hall on that day, the sheep in that field were definitely noted as they had a distinctive aroma.

50. The engagement letter with the firm of solicitors dated 15 November 2016 was produced. Although paragraph 4 stated that they were not responsible for taxation matters, nevertheless in accordance with common practice, as the conveyancing solicitors, they did deal with LBTT. They considered it part of their remit and billed for it stating in their invoice that it included "… dealing with all LBTT and land registration requirements".

51. In relation to the seller of the estate, Revenue Scotland placed stress on the fact that the missives were in the name of one off-shore company and the disposition in the name of another, but it was clear to us that at all relevant times wherever the title to the property lay, the *de facto* owner and certainly the guiding mind of any company, was Mr Ward.

52. In his witness statement Mr Brewis stated that he had been working for Mr and Mrs Ward for approximately 14 years. The missives make it explicit that he and his wife were employees of Mr Ward.

53. Mr Sloss conducted all negotiations with the solicitors and with Mr Ward himself.

54. As far as the purchase of the Estate was concerned, matters were handled very straightforwardly. Although the date of entry was 31 March 2017, the missives were dated 25 November 2016 and comprised a very detailed offer and an extremely short acceptance. It was evident that all relevant negotiations and enquiries, and indeed the relevant legal work had been completed by that stage. That is evident from the facts that:

(a) The draft disposition in favour of the Appellants was annexed as a schedule to the offer.
(b) An opinion relating to the offshore companies dated 24 November 2016 was also enclosed as a schedule.

55. It is clear to us from a review of the missives that preparation for marketing the Estate was certainly well in hand by June and July 2016 since the sellers had obtained:

(a) a Scottish Water test report dated 17 June 2016,
(b) there were exchanges of emails with the Forestry Commission and others in July 2016,
(c) there were property enquiry certificates dated July and August 2016, and
(d) there were letters from SEPA, the latest of which was dated 12 July 2016.

56. We record this because, also noted as referenced in the schedules to the missives, was what was described as a copy of the 2016 Grazing Let.

57. We take the view that that was a curious document.

58. We accept Mr Brewis' evidence that since at least 1997, fields 1, 2, 7 and 8 had been used for sheep grazing and that until 2016 the sheep belonged to one David Kerr. Mr Kerr emigrated to New Zealand at some date in 2016. Certainly Mr Turnbull from the neighbouring farm took over the sheep at some date during 2016.

59. On 24 January 2019, he wrote an email confirming that he "… informally took over the license from David Kerr for the 44 acres at Glenburn Hall during 2016 and have continued to use the land ever since".

60. It is apparent to us that, on the balance of probabilities, the 2016 Grazing Let signed by Mr Kerr was mere "window dressing" for any prospective purchaser to show that there was no security of tenure in relation to the agricultural land.

61. That purported grazing lease was signed on 14 July 2016.

62. Mr Sloss made it clear that, prior to purchase, he had known that Mr Turnbull had taken over the grazings and that Mr Ward had recommended him to him as being "very good".

63. In his witness statement Mr Sloss stated, and he confirmed orally, that he had told his lawyers to confirm that Mr Turnbull should continue to graze the land. We accept that.

64. Undoubtedly there is no mention of grazings in the missives proper but, in our view, that is because by that time Mr Turnbull was already in occupation with the consent of Mr Ward and the consent of Mr Sloss for the period going forward.

65. Mr Sloss was clear that as far as he was concerned he had acquired the property in November 2016 when the missives were concluded rather than on the date of entry. We can understand why he would have thought that given that almost all of the legal work had been completed by then.

66. In summary, the written grazing lease is not relevant. Nor is the purported draft grazing lease allegedly drafted by Mr Sloss' solicitors. Although Mr Sloss was patently surprised to note that it was addressed to Mr Kerr when it was produced to him in court, we were not surprised since it is simply a copy and paste of the 6 July 2016 lease with only the removal of one date. No lease has ever been signed with Mr Turnbull.

67. We accepted Mr Sloss' argument that at the point at which he purchased the Estate, he knew nothing about farming beyond the fact that "a field was a field" and that the stock

would be rotated. It transpired that the grazing land was dilapidated as it had not been ploughed for some 50 years.

68. Both Mr Sloss and Mr Turnbull have invested time and money in improving the grazing. It has been an iterative purpose and all the parties accept that it commenced after the effective date for this transaction so it is not directly relevant to this matter. However, it is relevant when one considers, as we do, that Mr Turnbull had reason to believe from 2016 that he would have security going forward and that there were possibilities available, as has indeed transpired to be the case. We accept Mr Sloss' statement that at no stage has he received rent for any of the grazing.

69. In May 2018, one of Mr Sloss' friends with whom he fishes but whose profession is as a rural residential property finder/adviser, suggested that there was a possibility that he might have paid too much LBTT.

70. That friend wrote to Mr Sloss' current adviser, Landstar Accountancy Limited ("Landstar") on 22 May 2018 stating that a very good friend of his had bought the Estate, although he had not acted for him, and that he had "… just found out he paid full SDLT plus surcharge … I am guessing he could have got mixed use/multiple dwelling relief but am not aware if this is different in Scotland?".

71. Of course it is LBTT and not SDLT. The friend asked if Landstar could help and, if so, what their charges might be.

72. In June 2018, Mr Sloss engaged Landstar to provide formal advice, which they did and that culminated in the claim for repayment dated 15 October 2018.

73. The sale to Granton was after the purchase of the Estate and had not been envisaged at the outset. The stable block had been used for storage and was apparently listed as "vulnerable" by the planners. The only investment in that to date has been preventative measures to prevent further deterioration.

74. Mr Sloss used the same firm of solicitors for the sale to Granton in September 2018 and took their advice to pay LBTT at the residential rate because:

(a) they said Revenue Scotland would not accept that it was "mixed",
(b) only a small amount of money was involved, and
(c) the repayment claim had not yet been lodged and he was waiting for formal advice from Landstar; it was early days.

Residential and non-residential use

75. As can be seen from section 24(4) LBTTA, if the subject matter of a transaction includes any interest in land that is not residential property then the whole transaction will be taxed as a non-residential property transaction. Such property is loosely described as being "mixed".

76. Incidentally that is not the case for ADS where the legislation provides for an apportionment as between residential and non-residential property. Quite why there

should be such a large distinction between the primary LBTT provisions and the ADS provisions is a mystery and was not addressed by the parties.

Case law and guidance

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").

79. In their Skeleton Arguments both parties relied on four UKFTT decisions on the meaning of section 116(1). Those were:-

(a) *Hyman v HMRC*[2] ("Hyman")
(b) Pensfold v HMRC[3] ("Pensfold")
(c) Goodfellow v HMRC[4] ("Goodfellow"); and
(d) Myles-Till v HMRC[5] ("MT").

80. In their Skeleton Argument, Revenue Scotland relied on these cases and on HMRC Guidance in the SDLT Manual, namely 00450, 00455, 00460, 00465 and 00470.

81. Mr Small referenced all of those, with the exception of 00455, by reference to quotations from those cases. In addition he referred to 00440, again by reference to a case, namely *MT*.

82. Whilst the first three cases were appealed*, MT* has never been appealed. We did not find the four cases particularly helpful as they all turned on their own particular facts which are very different to the facts in this case.

83. On 18 March 2021, the Upper Tribunal released its decision in *Hyman, Pensfold & Goodfellow v HMRC*[6] ("the UT Decision"). The three separate appeals had raised the same point of law as to the meaning and effect of section 116 for the purposes of SDLT. The taxpayers all contended that land can only be part of "the garden or grounds of" the

[2] [2019] UKFTT 0469 (TC)
[3] [2020] UKFTT 0116 (TC)
[4] [2019] UKFTT 0750 (TC)
[5] [2020] UKFTT 0127 (TC)
[6] [2021] UKUT 0068 (TCC)

house if the land is “needed for the reasonable enjoyment of the [house] having regard to the size and nature of the [house]”.

84. The Upper Tribunal made it clear that their decision did not turn on the detailed facts of the three cases.

85. Paragraph 32 of the UT Decision, stated that it did not need to attempt to define a “garden” or “grounds” because the issue was whether the section imposed a requirement that the land must be needed for the reasonable enjoyment of a dwelling. At paragraph 33, having stressed that section 116 refers to garden or grounds of a dwelling, they noted that in the Finance Act 2003, in a separate definition of “dwelling” for a specific purpose there was reference to “land occupied and enjoyed with the dwelling as its garden or grounds”.

86. The same position obtains in regard to LBTT where the same definition of dwelling is given at paragraph 18 of Schedule 4 LBTTA. There are variations on the theme for both sets of legislation.

87. However, beyond stating that in referring to the garden or grounds of 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.

88. We therefore agree with Mr Small 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. There must be a functional relationship between the dwelling and the grounds. Ms van der Westhuizen agreed with that analysis.

89. What we also find helpful in the UT Decision is what the Tribunal states at paragraphs 47-50 which read:

> “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.”
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> 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."

90. We agree with the Upper Tribunal that it is incumbent upon us to carry out an evaluative exercise. For the avoidance of doubt, when carrying out this evaluative exercise at all times we are, as we must, contemplating the position as at the effective date, being 31 March 2017.

91. We have had regard to the SDLT Guidance, which was all updated on 25 June 2019, given that the Revenue Scotland Guidance is of extremely limited assistance.

92. Revenue Scotland have produced to us only LBTT 4012 – Meaning of non-residential property and treatment of "mixed" property. It sheds no light on the matter beyond stating that a landed estate might be non-residential if there is a mixture of residential and commercial interests; but there are many types of landed estates.

Discussion

93. We agree with the UT Decision that there is no statutory size limit that determines what "garden or grounds" means. We also agree with the Tribunal in *Hyman* that grounds is "something different from, and additional to 'gardens'" and it has a wide meaning.

94. We accept Revenue Scotland's contention that grounds do not have to be ornamental in order to have a function. They also argued that we must look at the character of the Estate as a whole and whether the land surrounding the house is essential to its character, to protect its privacy, peace and sense of space.

95. We agree with Revenue Scotland that the fact that all of the fields were registered as agricultural land need not be inconsistent with the fields being residential as agricultural land can form part of the grounds. It is simply a factor.

96. Although the sales particulars described the Hall in glowing terms, the building itself whilst elegant is not exceptional. At any given time there are quite a number of bigger and better appointed houses for sale in Edinburgh. They all have what would be described as

gardens or grounds but those gardens or grounds are more on the scale of the formal gardens on the Estate excluding the woodlands and fields.

97. The sales particulars stated, incorrectly, that "from the house there are interrupted views over the parkland …". It is obvious from the pictures in the sales particulars that there are views of the woodland and, apart from the formal gardens, there is a view only of part of field 7 and of none of the other pasture land.

98. In oral argument Ms van der Westhuizen argued that "context is everything" and that this is a substantial Estate and that the fields provided amenity so it did not really matter that they were screened from view. We disagree. As Mr Small pointed out, it is not the case that it is those fields that provide an attractive backdrop, feeling of isolation in a rural environment and general tranquility. That is in very large part provided by the open countryside beyond the north, west and part of the southern boundaries of the Estate.

99. The fields and woodlands have been sold to Granton and although that is a company that is connected with the Appellants, that is not really relevant. The development and improvement of the fields, is being, and can continue to be, managed quite separately from the Hall. The sale has not changed the amenity of the Hall. Only part of field 7 enhances the view and provides an agreeable setting. It is the woodland that gives privacy.

100. Although we heard no argument on the point, on perusing the grazing let and the missives, it seems to us that it is only latterly that the Estate has been its present size. The fact that the grazing lease to Mr Kerr was granted by a different company to that which granted the disposition suggests that the pasture was held on a different title to the Estate. We also observe, along the same lines, that the disposition in favour of the Appellants was granted by a company which had merged with another company and that other company had acquired the Estate in two tranches from two different previous owners in 1997 and 2000.

101. Revenue Scotland argued that the fact that the Appellants could walk their dogs in the fields when there were no sheep in the fields was a relevant factor. It is undoubtedly a factor but it carries extremely little weight. In Scotland, the public enjoy a general right of responsible access to much of Scotland's land and inland waters for activities including walking, horse riding, cycling and wild camping. This "right to roam" is a statutory right, introduced by the Land Reform (Scotland) Act 2003. The Appellants' ability to walk their dogs in their fields is not conferred upon them by ownership.

102. Revenue Scotland repeatedly focused on the fact that they allege that there was no commercial use of the fields and they relied on paragraph 20 of *Goodfellow* for the proposition that it is necessary to produce evidence of a commercial arrangement. Firstly, we are not bound by that case and it turned on its own unique facts. Secondly, in this case, fields 1, 2 and 7 (and to an extent 8) have been grazed for many years and fields 4 and 5 have also been grazed historically.

103. It is our understanding that it is common practice in Scotland to have the situation that obtained here where a landowner allows a neighbouring farmer to graze the land for no financial return. Both parties benefit. The land is maintained – particularly important here since it was dilapidated – saving the landowner cost and the sheep are fed saving the farmer cost. In our view this constitutes a commercial arrangement.

104. We observe that Mr Turnbull stated that he took over 44 acres from Mr Kerr in 2016 (see paragraph 60 above) and that is greater than the total acreage in all four of the SDLT cases combined (3.5, 27, 4.5 and 3 acres respectively). We find that in the particular circumstances of this case where the acreage of pasture is very extensive, it was a commercial operation prior to and as at the effective date.

105. The fact that both Mr Turnbull and the Appellants expended time and effort on the land after 2018 does not alter that. The expenditure on ploughing, fertilizing and planting is for the purpose of improving the quality of the land, the grazing and therefore the sheep.

106. Even if we are wrong in saying that the grazing was, and is commercial, nevertheless we find that with the exception of field 7 and the paddock, the other fields have very little functional purpose for a house of this size and type. It is not a stately home. It is an attractive house that, with an adequate curtilage, is of a style and size that is available, for example, in Edinburgh.

107. In summary, looking at all of the evidence, we find that the Appellants have discharged the burden of proof and established that at least part of the pasture land was non-residential. Accordingly too much LBTT has been paid.

Section 113

108. We do not accept Revenue Scotland's argument that it was incumbent upon the Appellants to have checked the detail of the LBTT position and to have challenged their solicitors' advice.

109. Although relating to the filing obligations in the Construction Industry Scheme ("CIS"), which is a radically different tax situation, we agree with Judge Berner in *Barrett v HMRC*[7] where he rejected HMRC's argument that a taxpayer with an awareness of CIS should himself have made enquiries notwithstanding the fact that he had employed an accountant. He stated at paragraphs 160 and 161:

> "160. I do not agree that Mr Barrett's actions were unreasonable. In my view, the steps taken by Mr Barrett to employ an accountant who evidently held himself out as able to provide a comprehensive service, both as regards accounting and tax … and in providing all relevant documentation…were the actions of a reasonable taxpayer in the position of Mr Barrett. Whilst Mr Barrett did not undertake any research in to Mr Aspros' capabilities before appointing him, he was reasonably entitled to assume, from Mr Aspros' acceptance of the appointment, that Mr Aspros would be competent to deal with both the accounting and tax aspects of his business. I do not accept that such a reasonable taxpayer would necessarily have taken separate steps to inform himself, independently of his accountant, of his obligations to make returns under the CIS, whether by seeking a second opinion, or by consulting HMRC, or HMRC's published guidance, himself.
>
> 161. The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done

[7] [2015] UKFTT 329 (TC)

> does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different."

110. The Appellants did what they should have done which was to instruct a very well-known firm of solicitors who held themselves out as being competent. Solicitors routinely advise on LBTT as part of the conveyancing work. It was entirely reasonable of the Appellants to accept those solicitors' advice that they should treat the transaction as residential and to file the return on that basis. The fact that Mr Sloss could not remember when or if he had discussed LBTT with the solicitors is irrelevant. Given that the solicitors still take the view that it was a residential transaction, any discussion would have been limited to telling the Appellants the amount of tax and being put in funds to pay timeously.

111. We do not accept that the Appellants should have sought accountancy advice. They were already being advised and accepted the advice of their solicitors. In any event, we would consider it very unusual to seek accountancy advice on LBTT.

112. We accept Mr Sloss' evidence that he only became aware that he might have paid too much tax when the matter came up in conversation with his friend and that that was in May 2018. That was too late for him to make an amendment to the LBTT return so the condition in section 113(4)(a) is met.

113. The issue is therefore whether he, and his wife, knew or ought reasonably to have known that there was an overpayment of tax. We have already found that we would not have expected him to have doubted his solicitors.

114. We reject Revenue Scotland's contention that because of his occupation Mr Sloss should have been aware that it was a mixed transaction. There has been a distinct lack of clarity on this, including on Revenue Scotland's part.

115. Revenue Scotland rely on *HMRC v Katib*[8] and *Ryan v HMRC*[9] for the proposition that, the Appellants "…should bear the consequences of any failings on the part of their solicitor". That is certainly the case for looking at the concept of a reasonable excuse in the context of penalty cases. That is not what we are dealing with here.

116. We do not take the view that the solicitors in question were negligent. The fact that there have only been four cases on SDLT regarding mixed property and three of those were appealed to the Upper Tribunal, reflects the situation that neither SDLT, nor the newer LBTT, tax regimes are models of clarity. Given the absence of definitions and, indeed, as we have pointed out at paragraphs 86 and 87 above, there are differences in the wording in different parts of the legislation both north and south of the border, it is difficult to accuse the solicitors of negligence.

117. That is also reinforced in Revenue Scotland's changes in stance.

[8] [2019] UKUT 189 (TCC)
[9] [2012] UKUT 9

118. In summary, we find that the Appellants have overpaid tax and Section 113(4) applies.

119. Therefore the LBTT payable (excluding ADS) should be reduced from £162,350 to £66,750.

120. We DIRECT that the parties negotiate the level of ADS but if agreement cannot be reached then the parties should revert to the Tribunal on that aspect alone.

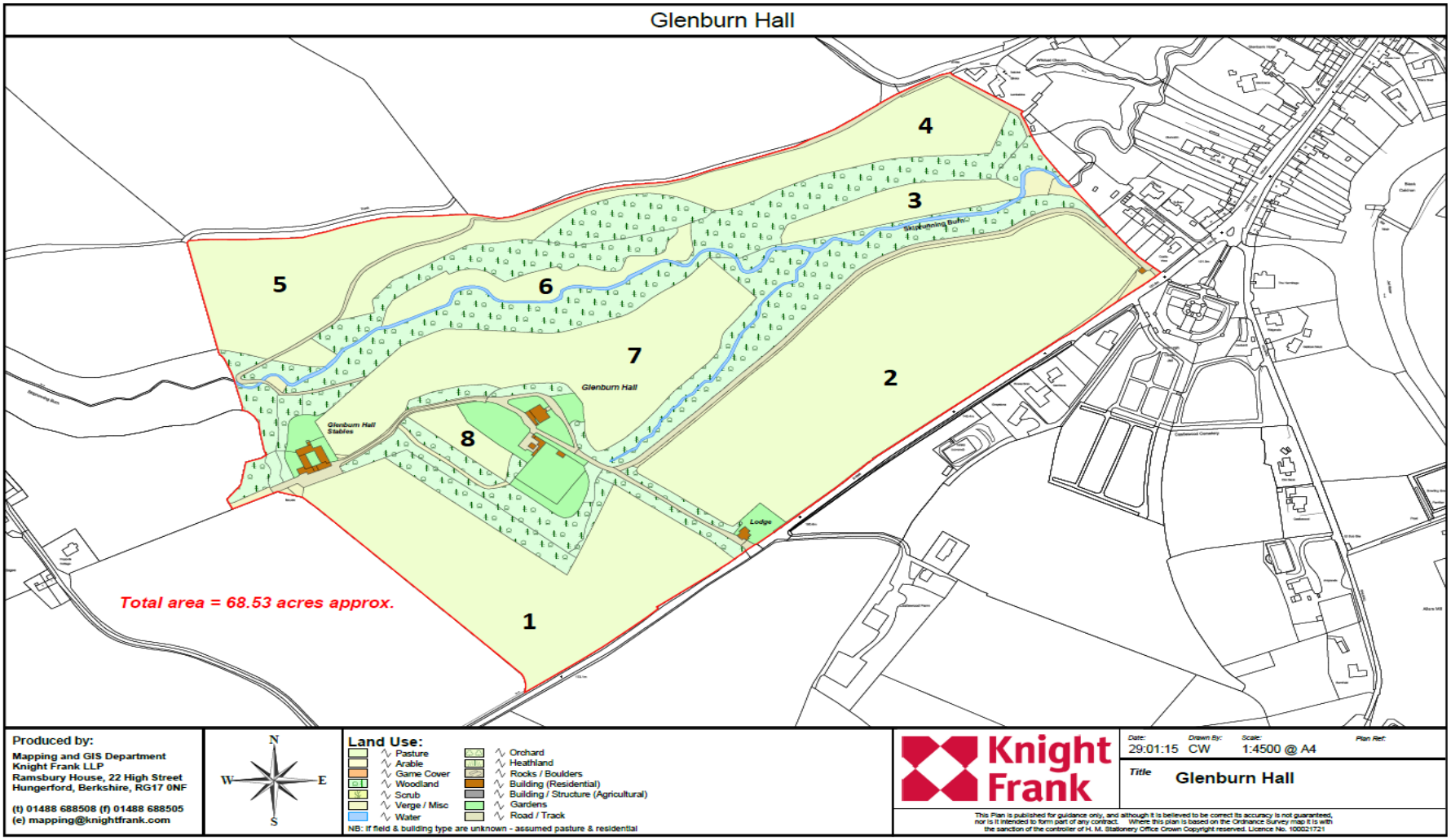
121. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to Rule 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017. In terms of 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: 28 May 2021

Appendix 1


Glenburn Hall
4
3
5
6
7
2
8
1
Glenburn Hall
Glenburn Hall Stables
Lodge
Total area = 68.53 acres approx.
Produced by:
Mapping and GIS Department
Knight Frank LLP
Ramsbury House, 22 High Street
Hungerford, Berkshire, RG17 0NF
(t) 01488 688508 (f) 01488 688505
(e) mapping@knightfrank.com
N
W
E
S
Land Use:
Pasture
Arable
Game Cover
Woodland
Scrub
Verge / Misc
Water
Orchard
Heathland
Rocks / Boulders
Building (Residential)
Building / Structure (Agricultural)
Gardens
Road / Track
NB: If field & building type are unknown - assumed pasture & residential
Knight Frank
Date: 29:01:15
Drawn By: CW
Scale: 1:4500 @ A4
Plan Ref:
Title
Glenburn Hall
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