Neutral Citation: [2022] UKFTT 145 (TC)

Case Number: TC08476

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2016/06554

STAMP DUTY LAND TAX-Multiple Dwellings Relief-identification of dwellings-attribution of consideration to the dwellings on a "just and reasonable" basis

Heard on: 12 April 2022
Judgment date: 03 MAY 2022

Before

TRIBUNAL JUDGE MARILYN MCKEEVER

Between

MARCUS AND MARCUS LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Patrick Cannon of counsel, instructed by Cornerstone Tax Advisors

For the Respondents: Ms Christine Cowan, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The form of the hearing was V (video). All parties attended remotely and the hearing was held on the Tribunal's VHS platform. A face to face hearing was not held because of the ongoing pandemic and it was considered to be in the interests of justice for the case to be heard remotely. The documents to which I was referred are a Hearing Bundle of 244 pages, an Authorities Bundle of 112 pages and the Skeleton Arguments of the Appellant and the Respondents. On application by the Appellant (at my request), documents concerning the council tax payable on relevant properties were also admitted.

2. In addition to the documentary evidence, I heard witness evidence from Mr Edward Marcus, the managing director of the Appellant and from Ms Deborah Smith, a G7 SDLT technical advisor at HMRC who assists colleagues working on complex cases across HMRC. Ms Smith had been consulted at various stages in the management of the present case and had consulted with the District Valuer, Mr Drane, on the correct apportionment.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

4. This appeal concerns the correct Stamp Duty Land Tax (SDLT) to be charged on the Appellant's acquisition of Clay Hill Lodge, Clay Hill, Enfield, London (the Property). This turns on what buildings are comprised in each of the "dwellings" making up the Property and the way in which the purchase consideration is to be apportioned between the various "dwellings" for the purposes of Multiple Dwellings Relief (MDR). The legislation requires such apportionment to be on a "just and reasonable" basis and the question is what is just and reasonable in the present case.

5. The Appellant originally appealed to the Tribunal on other grounds, but these have been abandoned and the only issue now before me is the correct application of MDR to the Property.

6. All statutory references are to Finance Act 2003 unless otherwise specified.

THE FACTS

7. The Appellant's business is the provision of supported living and other support and care services for adults with autism and/or a learning difficulty.

8. The Appellant purchased the Property from a third party seller on 4 February 2015 for a consideration of £875,000. The sellers occupied the "Main House" referred to below and had used other buildings at the Property for the purpose of a children's nursery.

9. The mortgage valuation described the Property as:

> "…built in the mid nineteenth century and is a Grade II listed four bedroom detached lodge house. The subject property has substantial outbuildings and has grounds extending to just less than one acre."

10. I refer to the lodge itself as the "Main House".

11. The "substantial outbuildings" comprised the following.

(1) "The Annexe". This was divided into two separate buildings by a wall. One part of the Annexe was laid out as a flat with a kitchen, bathroom, living area and bedroom and a Jacuzzi attached. The other had a kitchen and bathroom and a large space which was subsequently converted into a living area and bedroom. At the time of purchase, the walls of the large space were adorned with children's paintings and drawings and I infer that,

as Mr Marcus suggested, it was an activity/care area for the nursery. A Laundry Room was physically attached to this part of the Annexe.

(2) A square, brick building with a pitched roof, which at the time Mr Marcus viewed it, contained office furniture and filing cabinets and appeared to be an office for the nursery business. I will call this the "Office". It was also referred to as the "music room" or "multi-sensory room" as this was the purpose to which it was put by the Appellant.

(3) A building described by Mr Marcus as "a solid, timber constructed cabin" which I will refer to as the "Summerhouse". This is also referred to as the "shed" and the Appellant used it to provide a quiet relaxation room for its clients.

12. There were two plans of the Property in the Hearing Bundle. One was drawn up by the surveyor, Mr Hill, of J Raymond Welch Surveyors Ltd, who was instructed by the Appellant. The second plan was prepared by Mr Drane, the District Valuer, who undertook a site visit on 5 December 2018. Mr Marcus stated that Mr Drane's plan was a more accurate "drone view" as regards the relative positions of the respective buildings, although it was not to scale.

13. There was only one photograph in the bundle, contained in the mortgage valuer's report. This showed the Main House, Clay Hill Lodge, but from the angle it was taken, it is possible to see parts of two other buildings behind it, which appear to be fairly close to the house.

14. Mr Drane's plan indicates that if one stands at the entrance to the Main House, facing the house, the Summerhouse, the Office and the Annexe are more or less in a line behind the house, the Summerhouse and Office being directly behind the house and the Annexe further to the right. On the plan, the Office looks nearer to the Main House than the Annexe. Mr Marcus' evidence was that, in reality, the Office was more or less equidistant from the Main House and the Annexe, if not closer to the Annexe, as one could park two cars between the Main House and the Office but it would be more difficult to park two cars between the Annexe and the Office. In any event, it seems that all the buildings were fairly close to each other.

15. Mr Marcus' evidence, which I accept, was that when he viewed the property, the Main House was being used as an ordinary family home and the Annexe and the Office appeared to have been used for the nursery business owned by the owners of the Property. The nursery business had ceased at the time of the purchase. Mr Marcus could not recall what had been in the Summerhouse at the time and whether there was any indication that it belonged to the Main House or the nursery business.

16. There were three bells on the main gate, for the Main House, the Annexe and the Office, respectively.

17. The Main House and the Annexe were separately rated for Council Tax. I was provided with printouts from the Gov.UK website showing that Clay Hill Lodge was in Council Band G and "annexe at Clay Hill Lodge" was in Council Band C (indicating a lower value). It is not clear which buildings on the site were included with each property although the annexe was described as **not** being mixed use which supports Mr Marcus' suggestion that it related only to the section of the Annexe consisting of the flat. I do not place any great weight on these documents. They simply indicate that there were two properties within the Property which had different values but we do not know what those properties were.

18. The Appellant was looking for suitable accommodation to house two young adult clients, James and Michael, who had autism and severe learning disabilities. As a result of their challenging behaviour, a number of previous placements had failed. Each of them needed ground floor accommodation as their behaviour made it unsafe for them to be on an upper floor. The accommodation also had to be self-contained and separate from others as it was not possible for either of them to share accommodation.

19. When Mr Marcus viewed the property, he was particularly struck by the Annexe which would provide ideal segregated accommodation for James and Michael. He also saw great potential for the rest of the Property; the Main House as accommodation for other clients and the Office and Summerhouse for other business purposes. Properties with this sort of configuration, which was ideal for the business, were rare. Mr Marcus offered the asking price on the day he viewed the property and this was accepted. The purchase was completed on 4 February 2015 at the price of £875,000.

20. The Appellant turned the nursery part of the Annexe into a bedroom and living room so as to form a self-contained flat. The Main House was used to accommodate four clients with less challenging needs than James and Michael. The Office became a music room and the Summerhouse, a quiet relaxation room. The Office and Summerhouse could be used by any of the clients who lived at the Property and also any of the 106 non-residential clients for whom the Appellant provided support and care services.

21. So far as the business is concerned, the Annexe is equal in value to the Main House; the fees paid by the local authority in respect of the four occupants of the Main House is more or less the same as the fees paid for James and Michael in the Annexe.

22. The Appellant submitted an SDLT return stating that the amount of SDLT was £33,750 and it paid this amount. At the time, the Appellant, being a company, would have been subject to SDLT at the rate of 15%. Its advisors at the time had stated that it was entitled to relief on the basis that the Property was acquired for the purposes of a qualifying property rental business.

23. HMRC opened an in time enquiry into the SDLT return on 30 November 2015 and issued a closure notice on 23 May 2016, stating that SDLT was due at the rate of 15%, the total due being £131,250.

24. The Appellant appealed to HMRC and requested a statutory review. The review conclusion letter of 27 October 2016 upheld HMRC's original decision and the Appellant appealed to the Tribunal on 22 November 2016.

25. The Appellant subsequently changed its grounds of appeal and in an effort to settle the matter, a meeting was held on 12 February 2018. The meeting was attended by Ms Smith, the Appellant and their current representative, Cornerstone Tax Advisors (Cornerstone). At this meeting, Ms Smith suggested that HMRC might be prepared to accept a late claim for Multiple Dwellings Relief on the basis that the Annexe contained two "dwellings", separate from the Main House. This would involve apportioning the consideration between the three dwellings on a "just and reasonable" basis. If the value apportioned to the Main House was more than £500,000, on the law as it stood at the time of purchase, the rate of SDLT on it would be 15% but the two Annexe dwellings could benefit from MDR. If the value apportioned to the Main House was £500,000 or less, MDR would be available in respect of all three dwellings.

26. Part of the reason for this suggestion was that, by this time, the law had changed and the 15% charge no longer applied owing to the nature of the Appellant's business. Ms Smith made the offer in an attempt to be fair and reasonable.

27. The Appellant duly made a late claim for MDR which HMRC accepted.

28. Both parties agree that the consideration must be apportioned on a just and reasonable basis. The problem is that they do not agree what is just and reasonable in the present circumstance.

29. The parties agreed at the meeting that the apportionment would be based on the floor area of the various buildings comprised in the Property with each square metre having an equal value. It was not based on market value or any other value.

30. There was extensive dialogue and negotiations between the parties following this agreement as to the principles to be applied. The parties' positions evolved, during the process, but I will focus on the final positions as presented to the Tribunal.

31. After various consultations with the District Valuer, Mr Drane, HMRC's final position was set out in a letter of 4 February 2019. Mr Drane's measurements were as follows:

(1)	Main House	164.39 sqm
(2)	Office	34.14 sqm
(3)	Summerhouse	15.76 sqm
(4)	Annexe 1	59,37 sqm
(5)	Jacuzzi	22.76 sqm
(6)	Annexe 2	47.32 sqm
(7)	Laundry Room	7.54 sqm.

32. In making the apportionment he assumed a commensurate proportion of the associated grounds (i.e. the non-built up parts of the site including the garden, driveway, access, car parking etc.) to be equal to the proportion of size attributable to the buildings on the same ratio.

33. Mr Drane had aggregated the Office and Summerhouse with the Main House to constitute one dwelling, on which basis, the amount of the consideration attributed to the Main House would be 61.44% i.e. £537,600. This is over the £500,000 threshold and so SDLT would be payable at 15% amounting to £80,640. MDR would be available in relation to the two dwellings comprised in the Annexe, resulting in SDLT of a further £1,748, a total of £82,388.

34. Cornerstone replied on 6 March 2019. They took the view that, at the date of purchase, the music room [Office] was used for the former nursery business and the multi-sensory room [Summerhouse] was an activity room for the former nursery. As mentioned above, there is no evidence for the latter statement.

35. Cornerstone therefore included those buildings with the Annexe and treated the Main House as a stand-alone dwelling. This results in the main house being 46.27% of the total floor area, so that the apportioned value is £404,867. They then carried out the MDR calculation on the basis that there were two dwellings, which resulted in a total SDLT liability of £23,750.

36. HMRC formally set out their final position, which was the same as in the 4 February 2019 letter, in a further letter of 25 March 2019.

37. Cornerstone replied on 24 April 2019, restating their view as above.

38. The Appellant subsequently obtained its own opinion as to the apportionment from its surveyor, Mr Hill. Mr Hill's report was dated 8 December 2020. He had been requested to "provide our opinion of the breakdown of floor area of the above property as a result of a

property taxation dispute". Mr Marcus stated that he did not give Mr Hill any specific instructions as to how the apportionment should be carried out.

39. Mr Hill disregarded the Summerhouse altogether "as this would not be considered a permanent structure". He therefore apportioned the floor space of the Main House, the Annexe and the Office only. He took his areas from a measured survey prepared by Paul Sampson Chartered Surveyors. These figures were the same as those arrived at by Mr Drane (although they had been rounded) except that Mr Hill's figure for the Annexe was 122 sqm compared to Mr Drane's measurement of 136.99 sqm. It is unclear how this discrepancy arises.

40. Mr Hill's view was as follows:

> "We understand that at the time of the purchase, the Annex and the office were used as a children's day nursery and were used as a single entity, with a house occupied separately. [In fact, the nursery business had ceased before the date of the purchase.] Therefore, it is our opinion that it would be considered reasonable to group these 2 buildings together to be known as "The Annex". Therefore, the combined floor area of the Annex, including office, amounts to 160 sqm. This represents 49% of the total floor area against the 20% calculated by the surveyor acting on behalf on H M Revenue & Customs."

41. On this basis, Mr Hill apportioned 49% of the Property to the Annex and 51% to the house, which produces a value for the Main House of £446,600. Mr Hill used the same assumptions as HMRC including the pro rata allocation of the garden and grounds.

THE LAW

42. Paragraph 4 of Schedule 4 provides that consideration attributable to two or more land transactions is to be apportioned on a "just and reasonable basis".

43. Schedule 4A provides for an SDLT rate of 15% to apply to transaction involving a "higher threshold interest". Paragraph 1(2) of Schedule 4A provides that:

> "(2) An interest in a single dwelling is a higher threshold interest for the purposes of this Schedule if chargeable consideration of more than [£500,000] is attributable to that interest."

44. Paragraph 3 of Schedule 4A provides that the 15% rate applies where a company enters into the transaction to acquire a higher threshold interest.

45. Paragraph 9 of Schedule 4A defines "attributable" to mean "attributable on a just and reasonable basis".

46. Schedule 6B provides for MDR. Paragraph 2(2)(a) of Schedule 6B states that the relief applies where the main subject of the transaction consists of an interest in at least two dwellings. A transaction which would otherwise qualify is excluded if "paragraph 3 of Schedule 4A applies to it" (paragraph 4(2)(aa)). Paragraph 3 of Schedule 4A **would** apply to the Appellant's purchase if the consideration attributable to the dwelling being, or including, the Main House was, on a just and reasonable basis, more than £500,000, in which case, it could not be included in the MDR calculation.

47. Paragraph 3 of Schedule 6B defines a "relevant transaction" as a chargeable transaction to which the Schedule applies.

48. Paragraph 4 of Schedule 6B provides, so far as material, for the relief as follows:

> "4 (1) If relief under this Schedule is claimed for a relevant transaction, the amount of tax chargeable in respect of the transaction is the sum of—
>
> (a) the tax related to the consideration attributable to dwellings (see paragraph 5(1) and (2)), and

(b) the tax related to the remaining consideration (if any) (see paragraph 5(7)).]

(2) "The consideration attributable to dwellings" is—

(a) …

(b) for a multiple dwelling transaction, so much of the chargeable consideration for the transaction as is attributable to the dwellings in total.

(3) "The remaining consideration" is the chargeable consideration for the transaction less the consideration attributable to dwellings.

(4) …

(5) …

(6) "Attributable" means attributable on a just and reasonable basis."

49. Putting all this together, the position is this:

(1) If the amount of the consideration attributable to the dwelling which is or includes the Main House, on a just and reasonable basis, is more than £500,000, the Main House is excluded from the MDR calculation and 15% SDLT is payable on the basis that it is a higher threshold interest. MDR can then apply to the two dwellings comprised in the Annexe.

(2) If the consideration attributable to the Main House dwelling, on a just and reasonable basis, is £500,000 or less, HMRC accept that MDR can apply to all three dwellings and Mr Cannon calculates the correct SDLT on that basis as £13,749.

50. There are two questions:

(1) What constitutes each of the "dwellings"?

(2) Having established what is comprised in each dwelling, what is a just and reasonable apportionment of the consideration between them?

51. Paragraph 7 of Schedule 6B sets out "What counts as a dwelling":

"7 (1) This paragraph sets out rules for determining what counts as a dwelling for the purposes of this Schedule.

(2) A building or part of a building counts as a dwelling if—

(a) it is used or suitable for use as a single dwelling, or

(b) it is in the process of being constructed or adapted for such use.

(3) Land that is, or is to be, occupied or enjoyed with a dwelling as a garden or grounds (including any building or structure on such land) is taken to be part of that dwelling.

(4) Land that subsists, or is to subsist, for the benefit of a dwelling is taken to be part of that dwelling.

…" [Emphasis added]

DISCUSSION

52. Before I can consider the question of what constitutes a just and reasonable apportionment of the consideration, I need to establish the identity of the dwellings to which the apportionment is to be applied.

53. It is not disputed that, at the time of purchase, the Main House, the flat in the Annexe and the nursery area in the other part of the Annexe were all "suitable for use as a dwelling".

The dispute between the parties is how paragraph 7(3) of schedule 6B (paragraph 7(3)) is to apply to the Property, and in particular, what land (including any building or structure on it) is enjoyed with each dwelling as a garden or grounds. In short, how are the Office and the Summerhouse to be allocated between the three dwellings?

54. The relevant time for considering that is at the time of purchase.

55. Having determined what constitutes the dwellings one must then attribute the consideration between the dwellings thus identified on a just and reasonable basis. This was the approach Ms Smith said she took.

56. The Appellant's position is that the Annexe, the Office and the Summerhouse form a coherent whole, that the Office and Summerhouse were buildings on land enjoyed with the Annexe as part of the previous nursery business and those buildings were not enjoyed as part of the garden or grounds of the Main House.

57. HMRC's position is that the Office and Summerhouse were enjoyed with the Main House as part of its garden or grounds. Ms Smith dealt with how the allocation was made in her witness statement and this was further explained at the hearing. Ms Smith discussed with Mr Drane which parts of the grounds and outbuildings should be regarded as part of each element of the transaction. Ms Smith states in her witness statement that "we decided the fairest way was to look at the location and a simple split of the land".

58. At the hearing Ms Smith expanded on this. In discussion with the District Valuer and on the basis of his knowledge of the site, they drew a line on the plan to split the grounds as if the Main House and Annexe were to be sold separately. The starting point was that they "drew the line where they felt the line should be" looking at the location of the various buildings and what they considered a fair split to be. So the line came first, and this put the Office and the Summerhouse in the grounds of the Main House and the Annexe on the other side of the line. Ms Smith allocated the buildings guided by the District Valuer and having determined what was comprised in the dwellings, the consideration was apportioned on the basis of floor space as agreed. The line was not adjusted, but once the percentages applicable to each group of dwellings and buildings had been ascertained, the grounds were allocated in the same percentages.

59. Mr Cannon pointed out that the line drawn was hypothetical and speculative. The plot might reasonably have been divided in a number of different ways which would allocate different buildings to the respective dwellings.

60. HMRC appear to have divided the land on the basis of the proximity of certain buildings to other buildings rather than, as required by paragraph 7(3), by asking what land was occupied or enjoyed with each dwelling. It seems to me a corollary of the rule that land occupied or enjoyed with a dwelling includes the buildings on the land is that if buildings are occupied or enjoyed with the dwelling, the land on which they stand should be regarded a occupied or enjoyed with the dwelling.

61. The correct starting point is not to divide the plot based just on the position of the buildings but to ask what land and buildings are actually occupied or enjoyed with a particular dwelling as required by paragraph 7(3). On the basis of the written and oral evidence, it seems clear to me that the Office was not occupied or enjoyed with the Main House. Although the nursery business had ceased at the time of purchase, the Office was part of the complex which included the Annexe and I regard it as occupied and enjoyed with the dwellings comprised in the Annexe.

62. Despite Cornerstone's assertion that the Summerhouse was an activity area for the nursery, there is no evidence to that effect. Mr Marcus could not recall what was in the

Summerhouse. Given its name, and in the absence of any other evidence, I find that the Summerhouse was occupied or enjoyed with the Main House.

63. I therefore find that the Main House dwelling, for the purposes of paragraph 7(3) of Schedule 6B consists of the Main House and the Summerhouse. The Office is part of the dwellings in the Annexe.

64. I have already found that all the buildings were relatively close to each other. Looking at Mr Drane's plan, it is possible to draw a line, albeit not a straight one, but one with a right angle, which divides the grounds at the Property in a reasonable way based on this allocation of the buildings.

65. I now turn to the attribution of the consideration.

66. The meaning of a "just and reasonable" apportionment or attribution is not defined in the legislation and given how frequently the phrase crops up in many different contexts in the Taxes Acts, it is surprising that there is so little case law on the question. Mr Cannon took me to only two cases.

67. The first is a decision of the First Tier Tribunal, *Gill Orsman v HMRC* [2012] UKFTT 227 (TC). This case concerned SDLT at a time when it worked on a "slab" basis, so that if the consideration for the purchase exceeded a threshold by any amount, the higher rate of SDLT would apply to the whole consideration. If the consideration was not more than £250,000 the tax rate was 1%. If it was more than this, the rate was 3%. Miss Orsman bought a house and some chattels for £258,000. £8,000 of the purchase price was attributed by the parties to the chattels. HMRC considered that some of the chattels were in fact fixtures and their value should be attributed to the "land" i.e. the house. In particular, some fitted units with worktops in the garage were found to be part of the land. The parties had agreed a round £8,000 for the chattels without itemising values. HMRC asked for the values of all the items and Miss Orsman attributed £800 to the fitted units which was adopted by the Tribunal.

68. Schedule 4 required the Tribunal to apportion the consideration between the land and the chattels on a "just and reasonable basis".

69. At [12] and [13], the Tribunal said:

> "12. In approaching this apportionment any attribution or apportionment adopted by the parties, or by one party, may be relevant but is not determinative. Our job in an appeal where apportionment is relevant is to determine what apportionment is just and reasonable.
>
> 13. The apportionment required is a just and reasonable one. This may well produce a result in which the consideration attributed to the various elements **is different from their market value**: since it may be that the actual consideration exceeds or falls short of the sum of the market values of the elements sold. **Nor need it be the case that the only just and reasonable way to apportion actual consideration is in proportion to market value: the parties may well have had differing views on valuation or desirability and importance; those factors could affect what attribution is just and reasonable."** [Mr Cannon's emphasis]

70. Mr Cannon's point is that a just and reasonable apportionment does not necessarily reflect the market values of the different elements in the purchase. Also that the parties' views as to what is important is relevant.

71. The second case applied the concept in a very different context; that of capital gains tax where the gains made by the trustees of a non-UK settlement had to be:

> "apportioned in such manner as is just and reasonable between persons having interests in the settled property…and so that the chargeable gain is apportioned, as near as may be, according to the respective values of those interests…".

72. *Leedale v Lewis* [1982] STC 835 was decided by the House of Lords. The Settlement was a discretionary settlement under which the settlor's children, grandchildren and remoter issue were potential beneficiaries, but none of them had any fixed share in the trust fund. The existing beneficiaries were the children and five minor grandchildren of the settlor. At the time she made the settlement, the settlor wrote a "letter of wishes" to the trustees expressing the wish that they would regard the settlor's grandchildren as the primary beneficiaries. She wanted them to benefit in equal shares and included further wishes as to the times when they should receive income and capital.

73. The House of Lords held that the discretionary beneficiaries had "interests" in the settlement. The difficulty was to attribute a value to the interests, given that the beneficiaries had no right to receive anything and had not received anything as yet.

74. Lord Wilberforce said at page 834:

> "2. The apportionment to be made under the subsection is mandatory. The amount of the gains—ie the whole amount—must be apportioned in the relevant year of assessment. This can only be done if discretionary objects (who may be the only 'beneficiaries' in that year) can be the objects of apportionment.
>
> 3. The words, in sub-s (2), 'in such manner as is just and reasonable' and 'as near as may be, according to the respective values of those interests' suggest a broad rather than an actuarial approach in which all relevant considerations may be taken into account. They permit (inter alia) consideration of the settlor's letter of intent which shows, at least, that the settlement was to be regarded as for the benefit of the grandchildren, not of the settlor's two children."

75. Lord Scarman took a similarly broad view in relation to apportionment. At page 847, he said:

> "Against this general background I turn to consider the formula for apportionment to be found in s 42(2). The apportionment is to be carried out on a 'just and reasonable' basis so that 'the chargeable gain is apportioned, as near as may be, according to the respective values of those interests'. The governing words are 'just and reasonable': they confer on the inspector and the commissioners a wide latitude in judgment. The task is to apportion the chargeable gain, as near as may be, according to respective values. **The language is apt to cover a valuation of interests where factors other than the market value of a property interest have to be considered.** …
>
> When one turns to the provision for valuation, the formula, with its emphasis on what is just and reasonable and its direction to apportion 'as near as may be' according to the respective values of the interests in the settled property, is carefully drafted so as to admit into the valuation interests other than fixed property interests and to require, where appropriate, a valuation not tied to market values. It is a formula apt for the valuation of the interest of an object of discretionary trusts under a settlement where the expectation of future benefit is real, although the discretion to make a payment has not yet been exercised. For the purpose of valuation, the intention of the settlor, as evidenced by the deed and its recitals, is a significant factor to which value is to be attached to the extent that is just and reasonable and in a manner which,

> as near as may be, reflects the respective interests under the settlement. Further, the letter of intent, though not by itself of great weight, is admissible as supporting the intention manifested in the settlement itself. Accordingly, I reach the view that sub-s (2) is apt to cover the interests of the grandchildren and to require a valuation in the manner I have described so that the capital gain may be apportioned between them." [Mr Cannon's emphasis]

76. Mr Cannon argues that this shows factors other than market valuations of the interests are relevant in considering a just and reasonable apportionment. Further that the intentions of the parties are relevant.

77. The parties in the present case agreed that the apportionment would be made on the basis of the size of the floor areas of the respective buildings and giving equal value to each square metre. This suggestion came from the Appellant after Mr Marcus had spoken to a surveyor friend and was agreed by HMRC. It appears that Mr Drane was less than happy with this approach. In an email to Ms Smith and others of 31 January 2019, he states:

> "As discussed with Debbie [Ms Smith], apportioning purely on the basis of size and giving equal value to each square metre, is really pushing the envelope in terms of trying to reach an amicable settlement to your case which is particularly favourable to the TP but given the quality/character of the constituent parts I would be inclined to suggest that a truer apportionment on actual value would probably see a value of the house a fair amount north of £600,000."

78. I accept that market value is not necessarily the only way to determine a "just and reasonable" apportionment, but that does not take us much further. *Leedale v Lewis* suggests that a very broad approach is permissible, but I am mindful of the need to be cautious of applying statements made in the context of one tax to a completely different tax and context, and *Leedale v Lewis* concerned a situation where the relevant interests did not really have an ascertainable market value at all.

79. In the present case, an apportionment could be made on a number of bases: market value, size, value to the Appellant on the basis of intended use or value to a hypothetical purchaser such as a developer, among others. What is "just and reasonable" in a particular case will depend on the facts and circumstances of that case, including the parties' views, in the context of the applicable law.

80. It was suggested that the approach to a just and reasonable apportionment was to ask what an ordinary, reasonable person would regard as fair and reasonable. While that might not be a controversial statement, it does not take us much further. Both parties consider they have taken a fair and reasonable view.

81. Ms Smith, in particular, has gone out of her way to be helpful and fair to the Appellant. She raised the prospect of a claim for MDR in the first place and agreed the Appellant's suggestion of apportioning by reference to floor area. She stuck to this despite Mr Drane's remarks about value. Indeed, one interpretation of paragraph 7(3) is that all of the buildings, including the Annexe were buildings in the grounds of the Main House so that there was only one dwelling and the 15% rate applied to the whole consideration.

82. As Ms Smith said, the question of a just and reasonable attribution has to be looked at within the framework of the legislation, so one has to identify the dwellings and then apportion the consideration between them on a just and reasonable basis.

83. As noted, there are a number of possible ways of attributing the consideration which could be considered just and reasonable. The method agreed by the parties was an

apportionment according to the floor area of the different buildings giving each square metre an equal value. Neither side has argued for a different method, despite Mr Drane's reservations.

84. In the present case I consider that it is reasonable to make the attribution in that way. From the outset, the Appellant intended to use all the buildings. It regarded the Annexe as at least as important as the Main House given that the rare configuration of the Annexe made it ideal for use as accommodation for two particularly challenging clients. The fact that the fee income for the clients in the Main House is approximately the same as the fees for the clients in the Annexe is not, perhaps, strictly relevant, as I have to consider the apportionment at the date of purchase, but it does support the value attributed by the Appellant to the Annexe in the context of its business.

85. The Office and the Summerhouse were also important in expanding the services and facilities that the Appellant could offer to its residential and non-residential clients.

86. It is relevant that all the components of the Property were of equal importance to the Appellant for its business and, if anything, the Annexe was even more important than the Main House.

87. Having considered all the facts and circumstances of the present case in its statutory context, I find that the attribution of the consideration to the dwellings on the basis of floor space, giving an equal value to each square metre and attributing the remainder of the grounds pro rata constitutes a just and reasonable attribution for the purposes of Schedule 6B.

88. Using Mr Drane's measurements, this means that the area of the Main House (including the Summerhouse) is 180.15 sqm. This represents 50.71% of the total area of 355.28 sqm. The amount of the consideration to be attributed to the Main House is therefore 50.71% of £875,000 which is £443,713.

89. As the attributed value is less than £500,000, the Appellant's interest in the Main House is not a higher threshold interest and it is not excluded from the MDR calculation.

90. Accordingly, there are three dwellings to which MDR applies, and assuming that Mr Cannon's computation is correct, the SDLT due is £13,749 so that the Appellant is due a refund of £20,001.

DECISION

91. For the reasons set out above, I have decided that the dwelling constituting the Main House includes the Summerhouse but not the Office and that it is just and reasonable, in the present case, to apportion the consideration for the Property between the dwellings identified on the basis of floor space. This results in the amount of consideration attributed to the Main House being less than £500,000 so that MDR is available on the basis the Appellant acquired three dwellings.

92. I therefore allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

93. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MARILYN MCKEEVER
TRIBUNAL JUDGE

Release date: 03 MAY 2022