



AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH  
TAX APPEALS COMMISSION

Between

100TACD2024

[REDACTED]

**Appellant**

and

**THE REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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## Introduction

1. This is an appeal to the Tax Appeals Commission (hereinafter the "Commission") brought by [REDACTED] (hereinafter the "Appellant") against a decision of the Revenue Commissioners (hereinafter the "Respondent") refusing a claim by the Appellant for the refund of stamp duty paid pursuant to the provisions of section 83D of the Stamp Duties Consolidation Act 1999 (hereinafter the "SDCA 1999").
2. The net question in this appeal is whether a right of way is "land" for the purposes of a refund of stamp duty as provided for in section 83D of the SDCA 1999.
3. The amount of tax in dispute in this appeal is €55,000.00.

## Background

4. The Appellant is a limited company engaged in the business of property development which, on 29 October 2021, entered into transactions relating to lands at [REDACTED]:
  - 4.1. The first transaction was between [REDACTED] as Vendor and the Appellant as Purchaser of the lands contained in Folio [REDACTED] (hereinafter the "Lands") for the total purchase amount of €11,308,370 (hereinafter "Transaction 1").
  - 4.2. The second transaction was a Deed of Release in which [REDACTED] as Dominant Owner released a right of way which [REDACTED] held over the lands contained in Folio [REDACTED] (hereinafter the "Right of Way") to the Appellant as Servient Owner in consideration of the payment by the Appellant to [REDACTED] of €1,000,000 (hereinafter "Transaction 2").
5. The Lands were purchased by the Appellant with the benefit of full planning permission for the construction of [REDACTED] residential units along with [REDACTED]. The development for which planning permission was granted is designed as a [REDACTED] block development interlinked by a ground floor reception area [REDACTED].
6. The Right of Way traverses the depth of the Lands from the entrance point at the public roadway to the boundary of the Lands at the back of the site. The Right of Way also traverses the ground floor reception area which interlinks the [REDACTED] blocks of residential units.

7. On 1 November 2021 the Appellant returned and paid the requisite stamp duty of 7.5% on Transaction 1 in the amount of €848,127 to the Respondent on the Respondent's online system.
8. On 2 November 2021 the Appellant returned and paid the requisite stamp duty of 7.5% on Transaction 2 in the amount of €75,000 to the Respondent on the Respondent's online system.
9. A Commencement Notice was issued by the Appellant in respect of the Lands on 30 March 2023.
10. The Appellant submitted a claim for the repayment of the stamp duty paid on Transaction 1 pursuant to the provisions of section 83D of the SDCA 1999 which is entitled "*Repayment of stamp duty where land used for residential development*". A repayment of stamp duty in the amount of €621,959.20 in relation to Transaction 1 was made to the Appellant by the Respondent on 23 June 2023.
11. The Appellant submitted a claim for the repayment of the stamp duty paid on Transaction 2 pursuant to the provisions of section 83D of the SDCA 1999. The amount claimed was €55,000. On 5 September 2023 the Respondent refused the repayment claim for the following reasons:
  - 11.1. A right of way does not fall within the definition of "land" for the purposes of a repayment under section 83D of the SDCA 1999 on the basis that a right of way is not measurable in physical terms; and
  - 11.2. The conveyances by two vendors to a single purchaser are distinct matters and are separately and distinctly charged in separate instruments.
12. On 28 September 2023 the Appellant submitted a Notice of Appeal to the Commissioner appealing the Respondent's decision of 5 September 2023 to refuse the claim for repayment of stamp duty on Transaction 2.

### **Legislation and Guidelines**

13. The following legislation is relevant to this appeal:

Section 83D of the SDCA 1999 (as in force from 19 December 2020 to 14 December 2022)

*"(1)(a) In this section -*

*"appropriate part", in relation to land, means the whole or, as the case may be, the part of the land to which the relevant residential development, the subject of a claim for repayment under this section, relates;*

*"building control authority" has the meaning given to it by section 2 of the Building Control Act 1990;*

*"completion certificate" means a Certificate of Compliance (within the meaning of article 5 of the Regulations of 1997) -*

*(a) submitted on completion to a building control authority, and*

*(b) the particulars of which are entered by that authority on the register maintained under Part IV of the Regulations of 1997,*

*in accordance with article 20F of those Regulations;*

*"commencement notice" means -*

*(a) a commencement notice within the meaning of article 8, or*

*(b) a 7 day notice (within the meaning of article 5 of the Regulations of 1997) required under article 20A of the Regulations of 1997,*

*that is acknowledged by a building control authority in accordance with article 10(2) or 20A(3), as the case may be, of those Regulations;*

*"construction operations", in relation to a residential development or relevant residential development, means the construction of buildings or structures including the preparatory operations of site clearance, drainage, earth-moving, excavation, laying of foundations and the provision of roadways and other access works;*

*"dwelling unit" means -*

*(a) a building or part of a building used or suitable for use as a dwelling, and*

*(b) the curtilage of the dwelling, up to an area (exclusive of the site of the dwelling unit) of 0.4047 hectares;*

*"gross floor space" in relation to a dwelling unit means the area ascertained by the internal measurement of the floor space on each floor of a building, including internal walls and partitions;*

*"land", where used without qualification, means the land that is conveyed or transferred by an instrument;*

*"planning permission" has the meaning given to it by section 2 of the Planning and Development Act 2000;*

*"Regulations of 1997" means the Building Control Regulations 1997 (S.I. No. 496 of 1997);*

*"residential development" means the construction of one or more dwelling units and references to "relevant residential development" shall be construed in accordance with paragraph (b).*

*(b)References in this section to "relevant residential development" shall be construed*

*-*

*(i) in a case in which a claim for a repayment under subsection (8) is, pursuant to subsection (7)(b), made in respect of such of the construction operations as for the time being are being carried out pursuant to a particular commencement notice, as references to the residential development that comprises those construction operations, or*

*(ii) in either -*

*(I)a case in which, as mentioned in subsection (7)(b), the making of a claim for repayment under subsection (8) is deferred until completion of the residential development concerned, or*

*(II)a case in which the residential development concerned is not carried out in a phased manner,*

*as references to the entire of the residential development concerned.*

*(c)Without prejudice to subsection (4)(i), for the purposes of this section relevant residential development shall be regarded as completed if there exists in respect of the development a completion certificate.*

*(2)In this section a reference to an instrument is a reference to an instrument executed on or after 11 October 2017 that has been stamped in accordance with paragraph (4) of the heading in Schedule 1 titled "CONVEYANCE or TRANSFER on sale of any property other than stocks or marketable securities or a policy of insurance or a policy of life insurance." where -*

*(a) the instrument was chargeable to stamp duty at a rate of 7.5 per cent,*

*and*

*(b) the property so conveyed or transferred was land.*

*(3)(a) Subject to subsection (18) and the other provisions of this section, stamp duty paid on an instrument may be repaid in accordance with this section in relation to the land if construction operations on the land commence pursuant to a commencement notice within the period of 30 months following the date of execution of the instrument.*

*(b) If the residential development concerned is carried out in a phased manner such that there are 2 or more commencement notices in respect of the construction operations on the land, the reference in paragraph (a) to a commencement notice is a reference to the first of those commencement notices.*

*(c) Notwithstanding paragraph (a), the stamp duty repaid under this section shall be liable to the clawback provided for in subsection (12) if -*

*(i) the relevant residential development specified in a commencement notice is not completed within the period of 30 months after the date of the sending by a building control authority, in accordance with article 10(2) or 20A(3)(b), as the case may be, of the Regulations of 1997, of an acknowledgment in relation to that notice, or*

*(ii) when completed, the relevant residential development on the land, being the land to which that relevant residential development relates, is not such that -*

*(I) at least 75 per cent of the total surface area of that land is occupied by dwelling units, or*

*(II) the gross floor space of dwelling units amounts to at least 75 per cent of the total surface area of that land,*

*and subparagraphs (i) and (ii) are subsequently referred to in this section as the conditions for the avoidance of a clawback under this paragraph.*

*(4) Where the land is acquired for the purpose of constructing a single dwelling unit -*

*(a) subsection (3)(c)(ii) shall not apply, and*

*(b) where a declaration of intention to opt out of statutory certification has been submitted in accordance with article 9(5) of the Regulations of 1997 and included on the public register in accordance with paragraph (10) of article 20F*

*of those Regulations, the dwelling unit specified in a commencement notice shall, for the purposes of this section, be treated as completed when a completion certificate is issued under subsection (13) or (14) of section 9D of the Electricity Regulation Act 1999 not later than 30 months after the date of sending by a building control authority, in accordance with article 10(2) or 20A(3)(b), as the case may be, of the Regulations of 1997, of an acknowledgment in relation to that commencement notice.*

*(5)(a) Where the satisfaction of any of the following -*

*(i) the condition specified in paragraph (a) of subsection (3),*

*(ii) the conditions for the avoidance of a clawback under paragraph (c) of that subsection, or*

*(iii) the condition specified in subsection (4)(i),*

*is prevented by -*

*(I) an appeal made under section 7 of the Building Control Act 1990, or*

*(II) an order made by a court requiring that construction operations cease to be carried out,*

*the period commencing on the making of the appeal or the making of the order by the court and ending on the determination of the appeal or the discharge of the order shall not be reckoned for the purpose of computing the period of 30 months specified in subsection (3)(a) or the period of 30 months specified in subsection (3)(c)(i) or (4)(i).*

*(b) Subsection (18) shall apply notwithstanding the effect provided for by paragraph (a) in relation to the periods referred to in that paragraph.*

*(6)(a) The amount to be repaid in accordance with this section shall be determined by the formula -*

$$A \times B \times 11/15$$

*where -*

*A is the amount of stamp duty paid, at the rate of 7.5 per cent, on the instrument, and*

*B is the proportion of the area of the land represented by the appropriate part, expressed as a fraction.*



*(b) In relation to the construction of a single dwelling unit -*

*(i) a claim for a repayment under this section shall not include any stamp duty attributable to any part of the land not occupied by the dwelling unit, and*

*(ii) for the purposes of the formula in paragraph (a), B is the proportion of the land occupied by the dwelling unit.*

*(7) (a) A claim for a repayment under this section shall be made in accordance with subsection (8).*

*(b) If the residential development concerned is carried out in a phased manner such that there are 2 or more commencement notices in respect of the construction operations on the land, subsection (8) shall, without prejudice to the accountable person's right to defer making a claim until completion of the residential development concerned, be construed as enabling a claim to be made in respect of such of the construction operations as for the time being are being carried out pursuant to a particular commencement notice.*

*(8) A claim for a repayment under this section shall -*

*(a) be made by an accountable person,*

*(b) without prejudice to paragraph (d), be made in a form and manner specified by the Commissioners,*

*(c) include a statutory declaration, in such form as the Commissioners specify, stating -*

*(i) that the condition specified in subsection (3)(a) has been satisfied, and*

*(ii) where a claim relates to a part of the stamp duty paid on the stamping of an instrument, the proportion of the area of the land represented by the appropriate part, or as the case may be, the proportion of the land occupied by the single dwelling unit,*

*(d) be made by electronic means and through such electronic systems as the Commissioners may make available for the time being for any such purpose, and the relevant provisions of Chapter 6 of Part 38 of the Taxes Consolidation Act 1997 shall apply,*

*(e) not be made until such time as construction operations have commenced pursuant to a commencement notice.*

*(9) For the purposes of satisfying themselves that either the conditions for the making of a repayment under this section or the conditions for the avoidance of a clawback under paragraph (c) of subsection (3) are satisfied, the Commissioners may specify documents and particulars to be submitted by an accountable person, including the following:*

*(a) a copy of any commencement notice;*

*(b) a copy of any acknowledgement sent by a building control authority in accordance with article 10(2) or 20A(3)(b), as the case may be, of the Regulations of 1997;*

*(c) a copy of any planning permission;*

*(d) the number and gross floor space of dwelling units constructed; and*

*(e) the area of the land expressed in hectares.*

*(10) Subject to the requirements of this section, a repayment of stamp duty under this section shall -*

*(a) be made by the Commissioners pursuant to a claim made in accordance with subsection (8),*

*(b) not carry interest, and*

*(c) not be made after the expiry of 4 years following, in relation to the relevant residential development, the date of acknowledgement by a building control authority in accordance with article 10(2) or 20A(3) (b), as the case may be, of the Regulations of 1997 and this paragraph applies notwithstanding anything in subsection (7)(b).*

*(11)(a) Where the Commissioners are of the opinion that the requirements of this section have not been met in relation to a claim for repayment, they shall decide to refuse the claim and shall notify the claimant in writing of the decision and the reasons for it.*

*(b) An accountable person aggrieved by a decision to refuse a claim for repayment, may appeal to the Appeal Commissioners against the decision in accordance with section 949I of the Taxes Consolidation Act 1997, within the period of 30 days after the date of the notification of the decision.*

*(12) (a) In either a case in which any of the requirements of this section in relation to an accountable person's eligibility for a repayment of stamp duty are not met or the*

*conditions specified in paragraph (c) of subsection (3) for the avoidance of a clawback under that paragraph are not satisfied, an accountable person shall be liable to pay to the Commissioners the stamp duty that had been repaid under subsection (10) to the accountable person (and that stamp duty to which the foregoing liability attaches is referred to in this section as a "clawback").*

*(b) Interest shall be payable on the clawback calculated in accordance with section 159D from the date on which the repayment was made to the date of payment of the clawback to the Commissioners.*

*(13)(a) Where an accountable person fails to pay the clawback, the Commissioners may make an assessment of the amount of the stamp duty concerned as if the failure to pay were a failure to deliver a return under section 20(2).*

*(b) Where there is more than one accountable person in relation to an instrument and a clawback, they shall be liable jointly and severally whether or not an assessment is made.*

*(14) For the purposes of this section, section 128A shall apply as if the period of 6 years referred to in subsection (4) of that section commenced on the date of acknowledgement, in relation to the residential development concerned, by a building control authority in accordance with article 10(2) or 20A(3)(b), as the case may be, of the Regulations of 1997.*

*(15) The submission to the Commissioners of an incorrect statement, document or particulars under this section shall be deemed to constitute the delivery of an incorrect statement for the purposes of section 1078(2) of the Taxes Consolidation Act 1997.*

*(16)(a) Where a repayment has been made under this section and it is subsequently found that a declaration made in accordance with subsection (8) -*

*(i) was untrue in any material particular that would have resulted in a repayment, or part of a repayment, allowed by this section not being made, and*

*(ii) was made knowing same to be untrue or in reckless disregard as to whether or not it was true,*

*then the person who made such a declaration shall be liable to pay to the Commissioners as a penalty an amount equal to 125 per cent of the stamp duty that would not have been repaid had all the facts been truthfully declared, together with interest charged on that amount as may so become payable,*

*calculated in accordance with section 159D, from the date on which the repayment was made to the date the penalty is paid.*

*(b) A person shall not be liable to a clawback under subsection (12), or a penalty under paragraph (a), as the case may be, if and to the extent that such person has paid -*

*(i) a penalty under paragraph (a), or*

*(ii) a clawback under subsection (12).*

*(17)(a) Notwithstanding any enactment or rule of law, the Commissioners may, by notice in writing, request a building control authority to provide them with such information as is in the possession or control of the building control authority as the Commissioners may reasonably require for the purposes of verifying -*

*(i) that a thing referred to in the definition of "commencement notice" in subsection (1)(a) exists or has been done,*

*(ii) the commencement of construction operations,*

*(iii) the completion of residential development, or*

*(iv) the proportion of the land occupied by dwelling units.*

*(b) Where the Commissioners make a request under paragraph (a), the building control authority concerned shall provide such information as may be specified in the notice within the period specified in the notice which period, in any case, shall not be less than 30 days.*

*(c) Taxpayer information within the meaning of section 851A(1) of the Taxes Consolidation Act 1997 may be disclosed by an officer of the Revenue Commissioners to a building control authority for the purposes of enabling the building control authority to comply with a request made under paragraph (a).*

*(18) This section shall not apply to construction operations comprising relevant residential development commenced, pursuant to a commencement notice, after 31 December 2022."*

Section 20 of the Interpretation Act 2005 (as in force from 1 January 2006 onwards)

*"(1) Where an enactment contains a definition or other interpretation provision, the provision shall be read as being applicable except in so far as the contrary intention appears in -*

*(a) the enactment itself, or*

*(b)the Act under which the enactment is made.*

*(2)Where an enactment defines or otherwise interprets a word or expression, other parts of speech and grammatical forms of the word or expression have a corresponding meaning.”*

Section 21 of the Interpretation Act 2005 (as in force from 1 January 2006 onwards)

*“(1)In an enactment, a word or expression to which a particular meaning, construction or effect is assigned in Part 1 of the Schedule has the meaning, construction or effect so assigned to it.*

*(2)In an enactment which comes into operation after the commencement of this Act, a word or expression to which a particular meaning, construction or effect is assigned in Part 2 of the Schedule has the meaning, construction or effect so assigned to it.”*

Schedule, Part 1 of the Interpretation Act 2005 (as in force from 1 January 2006 onwards)

*“ "land" includes tenements, hereditaments, houses and buildings, land covered by water and any estate, right or interest in or over land;”*

Section 3 of the Land and Conveyancing Law Reform Act 2009 (as in force from 1 January 2009 onwards)

*“ ...*

*"land" includes -*

*(a)any estate or interest in or over land, whether corporeal or incorporeal,*

*(b)mines, minerals and other substances in the substratum below the surface, whether or not owned in horizontal, vertical or other layers apart from the surface of the land,*

*(c)land covered by water,*

*(d)buildings or structures of any kind on land and any part of them, whether the division is made horizontally, vertically or in any other way,*

*(e)the airspace above the surface of land or above any building or structure on land which is capable of being or was previously occupied by a building or structure and any part of such airspace, whether the division is made horizontally, vertically or in any other way,*

*(f)any part of land;*

...

Section 11(4) of the Land and Conveyancing Law Reform Act 2009 (as in force from 1 January 2009 onwards)

*“The only legal interests in land which may be created or disposed of are -*

*(a) an easement,*

*(b) a freehold covenant,*

*(c) an incumbrance,*

*(d) a rent payable under a tenancy,*

*(e) a possibility of reverter,*

*(f) a profit à prendre, including a mining right,*

*(g) a public or customary right,*

*(h) a rentcharge,*

*(i) a right of entry or of re-entry attached to a legal estate,*

*(j) a wayleave or other right to lay cables, pipes, wires or other conduits,*

*(k) any other legal interest created by any statutory provision.”*

#### **Witness evidence**

Witness 1 – [REDACTED]

14. The Commissioner heard evidence from [REDACTED] (hereinafter “Witness 1”) who is a director of the Appellant.

15. Witness 1 stated that, following a bidding process, the Appellant purchased the Lands in October 2021 which had the benefit of full planning permission for the construction of [REDACTED] residential units [REDACTED].

16. He stated that the Right of Way, which was used as access to neighbouring land, existed over the Lands and that it was necessary to purchase the Right of Way to ensure that the development for which planning permission was granted could be completed.

17. [REDACTED]  
[REDACTED].

Witness 2 – [REDACTED]

18. The Commissioner heard evidence from [REDACTED] (hereinafter “Witness 2”) who is the solicitor who acted for the Appellant in relation to the completion of the purchase of the Lands and the Right of Way.
19. Witness 2 stated that the transfer of the Lands and the release of the Right of Way were separate, but interlinked from a legal perspective, transactions and that the provisions of the contracts were such that one transaction could not complete without the other.
20. He stated that, in land transactions, any interests in the land such as easements will be investigated and in the case of rights of way it is usual that such rights would be acquired from a third party other than the owner of the lands. This, he stated, is in circumstances where the owner of land cannot be the beneficiary of a right of way over the land which they own.
21. Witness 2 stated that, in the case of the Lands the subject matter of this appeal, it would not have been possible to proceed with the development project on the Lands without acquiring the Right of Way. [REDACTED]  
[REDACTED]  
[REDACTED].

Witness 3 – [REDACTED]

22. The Commissioner heard evidence from [REDACTED] (hereinafter “Witness 3”) who is an architect who was engaged by the Appellant to act in relation to the development.
23. He stated that the development for which planning permission was granted was comprised of a [REDACTED] block development interlinked by a ground floor reception area [REDACTED]  
[REDACTED]. The Right of Way, he stated, split the site of the Lands with the ground floor reception area traversing the Right of Way.
24. He stated that three commencement notices had issued in relation to the development on the Lands as follows:
  - 24.1. The first, dated 30 March 2023, for the excavation works on the site, a copy of which was submitted to the Commissioner;
  - 24.2. The second for the building works on the totality of the site, a copy of which was not submitted to the Commissioner; and

24.3. The third in relation to a redesigned substation, a copy of which was submitted to the Commissioner.

25. Witness 3 stated that the Lands have a total area of 12,000 square metres and that the gross total floor area of the development of 19,000 square metres which, he stated, equates to approximately 160% of the total land area. He stated that the site of the Lands was very restricted. The nature of the development for which planning permission has been granted means that the [REDACTED] residential blocks along with [REDACTED] must be fully completed prior to the construction of the ground floor reception area as, once the ground floor reception area has been constructed, it will not be possible for machinery to access the back of the site.

### **Submissions**

#### *Appellant's submissions*

26. The Appellant submitted that the provisions of the Interpretation Act 2005 are applicable to the SDCA 1999. It was submitted that the definition of "land" as contained in Part 1 of the Schedule to the Interpretation Act 2005 is as follows:

*"land" includes tenements, hereditaments, houses and buildings, land covered by water and any estate, right or interest in or over land"*

27. In addition, it was submitted that section 11(4) of the Land and Conveyancing Reform Act 2009 provides that:

*"The only legal interests in land which may be created or disposed of are—*

*(a) an easement,*

*(b) a freehold covenant,*

*(c) an incumbrance,*

*(d) a rent payable under a tenancy,*

*(e) a possibility of reverter,*

*(f) a profit à prendre, including a mining right,*

*(g) a public or customary right,*

*(h) a rentcharge,*

*(i) a right of entry or of re-entry attached to a legal estate,*



*(j) a wayleave or other right to lay cables, pipes, wires or other conduits,*

*(k) any other legal interest created by any statutory provision.”*

28. The Appellant submitted that a right of way is an easement and/or a right or interest in or over land and therefore, taking in to account the definition of land as contained in the Interpretation Act 2005 and provisions of section 11(4) of the Land and Conveyancing Act 2009, the Right of Way the subject matter of this appeal is “land” for the purposes of the SDCA 1999.
29. The Appellant submitted that the Deed of Release of the Right of Way is an “instrument” for the purposes of section 83D(2) of the SDCA 1999 in that:
  - 29.1. The Deed of Release was executed after 11 October 2017;
  - 29.2. The Deed of Release was stamped;
  - 29.3. The Deed of Release was chargeable to stamp duty at a rate of 7.5%; and
  - 29.4. The property conveyed under the Deed of Release was land.
30. The Appellant submitted, and accepted, that the Deed of Release in Transaction 2 is a separate instrument to the Deed of Transfer in Transaction 1.
31. It was submitted that the necessary steps were taken for the making of a claim for the repayment of stamp duty in relation to Transaction 2.
32. It was submitted that, in compliance with section 83D(3)(a) of the SDCA 1999, as the purchase of the Lands and the Right of Way completed on 29 October 2021 and the first commencement notice in relation to the development was dated 30 March 2023, the construction on the Lands commenced pursuant to a commencement notice within the period of 30 months following the date of execution of the instrument.

#### *Respondent’s submissions*

33. The Respondent submitted that it is satisfied that the Appellant was entitled to a refund of stamp duty pursuant to the provisions of section 83D of the SDCA 1999 on Transaction 1 in relation to the Lands. The refund claim submitted by the Appellant was accepted and a repayment of €621,959.80 was made by the Respondent to the Appellant on 23 June 2023.
34. The Respondent submitted that the Appellant is not entitled to a refund of stamp duty in relation to Transaction 2, the Right of Way, as:

- 34.1. A right of way does not fall within the definition of “land” for the purposes of a repayment under section 83D of the SDCA 1999 on the basis that a right of way is not measurable in physical terms; and
- 34.2. The conveyances by two vendors to a single purchaser are distinct matters and are separately and distinctly charged in separate instruments.
35. The Respondent submitted that, if the definition of land contained in Schedule Part 1 of the Interpretation Act 2005 is applied to section 83D of the SDCA 1999 then, rights of way do fall within the definition of “land” in section 83D of the SDCA 1999.
36. However, the Respondent submitted that the definition of land which should be applied to section 83D of the SDCA 1999 needs to be considered in the context of the relief available. In particular, the Respondent submitted that section 83D(6) contains a formula for the calculation of the amount of stamp duty to be repaid as being
- 36.1.  $A \times B \times 11/15$ ; where
- 36.2. “A” is the amount of stamp duty paid at a rate of 7.5% on the instrument; and
- 36.3. “B” is the proportion of the area of the land represented by the appropriate part, expressed as a fraction.
37. The Respondent submitted that it is difficult to discern how the portion of land represented by the Right of Way would satisfy the qualifying condition of development of 75% of the land as set out in section 83D(3)(c) of the SDCA 1999.

### **Material Facts**

38. There is no dispute between the parties in relation to the material facts of this appeal and the Commissioner makes the following findings of material fact:
- 38.1. The Appellant is a limited company engaged in the business of property development which, on 29 October 2021, entered into transactions relating to lands at [REDACTED]:
- 38.1.1. The first transaction was between [REDACTED] as Vendor and the Appellant as Purchaser of the lands contained in Folio [REDACTED] [REDACTED] for the total purchase amount of €11,308,370 [REDACTED].
- 38.1.2. The second transaction was a Deed of Release in which [REDACTED] [REDACTED] as Dominant Owner released a right of way which [REDACTED] held over the

lands contained in Folio [REDACTED] to the Appellant as Servient Owner in consideration of the payment by the Appellant to [REDACTED] of €1,000,000 [REDACTED]

- 38.2. The Lands were purchased by the Appellant with the benefit of full planning permission for the construction of [REDACTED] residential units along with [REDACTED].
- 38.3. The development for which planning permission is granted is designed as a [REDACTED] block development interlinked by a ground floor reception area [REDACTED].
- 38.4. The Right of Way traverses the depth of the Lands from the entrance point at the public roadway to the boundary of the Lands at the back of the site.
- 38.5. The Right of Way also traverses the ground floor reception area which interlinks the [REDACTED] blocks of residential units.
- 38.6. On 1 November 2021 the Appellant returned and paid the requisite stamp duty of 7.5% on Transaction 1 in the amount of €848,127 to the Respondent on the Respondent's online system.
- 38.7. On 2 November 2021 the Appellant returned and paid the requisite stamp duty of 7.5% on Transaction 2 in the amount of €75,000 to the Respondent on the Respondent's online system.
- 38.8. A Commencement Notice was issued by the Appellant in respect of the Lands on 30 March 2023.
- 38.9. Development commenced on the Lands within 30 months of the date of the purchase of the Lands in Transaction 1 and the Deed of Release in Transaction 2.
- 38.10. The Appellant submitted a claim for the repayment of the stamp duty paid on Transaction 1 pursuant to the provisions of section 83D of the SDCA 1999 which is entitled "*Repayment of stamp duty where land used for residential development*". A repayment of stamp duty in the amount of €621,959.20 in relation to Transaction 1 was made to the Appellant by the Respondent on 23 June 2023.
- 38.11. The Appellant submitted a claim for the repayment of the stamp duty paid on Transaction 2 pursuant to the provisions of section 83D of the SDCA 1999. The

amount claimed was €55,000. On 5 September 2023 the Respondent refused the repayment claim for the following reasons:

38.11.1. A right of way does not fall within the definition of “land” for the purposes of a repayment under section 83D of the SDCA 1999 on the basis that a right of way is not measurable in physical terms; and

38.11.2. The conveyances by two vendors to a single purchaser are distinct matters and are separately and distinctly charged in separate instruments.

38.12. On 28 September 2023 the Appellant submitted a Notice of Appeal to the Commission appealing the Respondent’s decision of 5 September 2023 to refuse the claim for repayment of stamp duty on Transaction 2.

### **Analysis**

39. There is no dispute between the parties that Appellant’s purchase, and subsequent development, of the Lands were such that a claim for repayment of the stamp duty levied on the purchase of the lands, that is to say Transaction 1, was accepted by the Respondent and a repayment of €621,959.20 in relation to that transaction was made to the Appellant by the Respondent on 23 June 2023 in accordance with the provisions of section 83D of the SDCA 1999.

40. The refusal by the Respondent of the claim for repayment of stamp duty paid on the Deed of Release for the Right of Way, that is to say Transaction 2, was made on the basis that:

40.1. A right of way does not fall within the definition of “land” for the purposes of a repayment under section 83D of the SDCA 1999 on the basis that a right of way is not measurable in physical terms; and

40.2. The conveyances by two vendors to a single purchaser are distinct matters and are separately and distinctly charged in separate instruments.

41. There is no dispute between the parties, and the Appellant has accepted, that the conveyances under Transaction 1 and Transaction 2 were separately and distinctly charged to stamp duty in separate instruments.

42. The parties to this appeal agree that the issue which the Commissioner must consider is whether a right of way falls within the definition of land for the purposes of section 83D of the SDCA 1999 and the repayment of stamp duty contained therein. Neither party opened case law to the Commissioner.

43. In the judgment of the High Court in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 (hereinafter “*Perrigo*”), McDonald J, reviewed the most up to date jurisprudence and summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

*“The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*

*(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*

*(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: “... context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that”;*

*(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;*

*(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.*

*(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;*

*(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.*

*(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation*

statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in *Revenue Commissioners v. Doorley* [1933] I.R. 750 where Kennedy C.J. said at p. 766:

*“Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible”.*

44. These principles have been confirmed in the more recent decision of the Supreme Court in its decision in *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43 (hereinafter “*Heather Hill*”), where Murray J stated at paragraph 113:

*“‘legislative intent’ as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer into minds of parliamentarians when they enacted legislation”.*

45. Murray J further stated at paragraph 114 of *Heather Hill* that the exercise of statutory interpretation involves the application of a set of rules and presumptions “...to ascertain the legal effect attributed to the legislation.”

46. At paragraph 115 of *Heather Hill*, Murray J stated that:

*“...the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members’ objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning*

*is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it.”*

47. As further noted in *Heather Hill*, Murray J stated at paragraph 116:

*“...at the same time, the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown. However-and in resolving this appeal this is the key and critical point -the ‘context’ that is deployed to that end and ‘purpose’ so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language.”*

48. Finally, in the recent judgment of the Court of Appeal in *Hanrahan v Revenue Commissioners* [2024] IECA 113, which was delivered after this appeal was heard, the court reaffirmed the principles enunciated in *Heather Hill*, and stated at paragraph 81 that:

*“Murray J. went on to discuss s. 5 of the [Interpretation Act 2005] and noted that it had not featured in many of the recent judgments, possibly because those were concerned with provisions that were arguably penal in nature and thus excluded from the scheme. In this appeal, we are concerned with a penal provision and s. 5 does not apply to its interpretation. Nonetheless, as Murray J. noted, the decisions in Dunnes Stores, Bookfinders and Brown suggest that even when construing penal provisions all the contextual material can be consulted in construing such statutes.”*

49. Section 83D of the SDCA 1999 was inserted into the SDCA 1999 by the commencement of section 61 of the Finance Act 2017 on 1 January 2018 and is entitled “*Repayment of stamp duty where land used for residential development*”. The context of section 83D of the SDCA 1999 is that, where land which is conveyed and charged to stamp duty at a rate of 7.5% is subsequently used for residential development and that residential development commences within 30 months of the date of conveyance, an amount of stamp duty is repayable to the purchaser.

50. In considering this appeal, the Commissioner must first look to the definition and meaning of land in section 83D of the SDCA 1999. Section 83D(1) contains a definition of “land” which states:

*“‘land’, where used without qualification, means the land that is conveyed or transferred by an instrument;”*

51. The definition of land as contained in section 83D(1) of the SDCA 1999 does not assist the Commissioner in establishing whether a right of way falls within the definition of land for the purposes of section 83D of the SDCA 1999 and the repayment of stamp duty contained therein.

52. As a result, the Commissioner must look to other legislative provisions and in particular notes that section 21 of the Interpretation Act 2005 as in force from 1 January 2006 onwards provides that:

*“(1)In an enactment, a word or expression to which a particular meaning, construction or effect is assigned in Part 1 of the Schedule has the meaning, construction or effect so assigned to it.”*

53. Schedule, Part 1 of the Interpretation Act 2005 as in force from 1 January 2006 onwards defines land as including:

*“...tenements, hereditaments, houses and buildings, land covered by water and any estate, right or interest in or over land;”*

54. The Commissioner further notes that section 11(4) of the Land and Conveyancing Law Reform Act 2009 as in force from 1 January 2009 onwards provides:

*(4)The only legal interests in land which may be created or disposed of are -*

*(a)an easement,*

*(b)a freehold covenant,*

*(c)an incumbrance,*

*(d)a rent payable under a tenancy,*

*(e)a possibility of reverter,*

*(f)a profit à prendre, including a mining right,*

*(g)a public or customary right,*

*(h)a rentcharge,*

*(i)a right of entry or of re-entry attached to a legal estate,*

*(j)a wayleave or other right to lay cables, pipes, wires or other conduits,*



*(k) any other legal interest created by any statutory provision.”*

55. In addition, the Commissioner notes that *Wylie on Irish Land Law* states at paragraph 6.05:

*“Easements and profits à prendre (to give them their full title) are now, perhaps, the most common of incorporeal hereditaments”<sup>1</sup>*

56. The Commissioner further notes that *Wylie on Irish Land Law* states at paragraph 6.06:

*“An easement is a right which a landowner has, by virtue of his ownership of his land, over the land of his neighbour, eg, rights of way, light, support and water.”<sup>2</sup>*

57. It therefore follows, and the Commissioner finds, that a right of way is an easement, an incorporeal hereditament and an interest over land.

58. As a result of a right of way being an easement, an incorporeal hereditament and an interest over land, it must then follow, the Commissioner finds, that a right of way is land as defined in Schedule Part 1 of the Interpretation Act 2005. The Commissioner must, as a consequence, find that a right of way is land for the purposes of section 83D of the SDCA 1999.

59. Section 83D(2) of the SDCA states that an instrument:

*“...is a reference to an instrument executed on or after 11 October 2017 that has been stamped in accordance with paragraph (4) of the heading in Schedule 1 titled ‘CONVEYANCE or TRANSFER on sale of any property other than stocks or marketable securities or a policy of insurance or a policy of life insurance.’ where—*

*(a) the instrument was chargeable to stamp duty at a rate of 7.5 per cent, and*

*(b) the property so conveyed or transferred was land.”*

60. Section 83D(3)(a) sets out that *“...stamp duty paid on an instrument may be repaid in accordance with this section in relation to the land if construction operations on the land commence pursuant to a commencement notice within the period of 30 months following the date of execution of the instrument.”*

61. There is no dispute between the parties that, in compliance with section 83D(2) and 83D(3) of the SDCA 1999:

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<sup>1</sup> *Wylie, Wylie on Irish Land Law*, 6<sup>th</sup> ed.

<sup>2</sup> *ibid*

- 61.1. The Deed of Release of the Right of Way was executed after 11 October 2017 on 29 October 2021;
- 61.2. The Deed of Release of the Right of Way was stamped;
- 61.3. The Deed of Release of the Right of Way was chargeable to stamp duty at a rate of 7.5%;
- 61.4. A Commencement Notice was issued by the Appellant in respect of the Lands on 30 March 2023.
- 61.5. Development commenced on the Lands within 30 months of the date of the purchase of the Lands in Transaction 1 and the Deed of Release in Transaction 2.
62. As the Commissioner has found that a right of way is land for the purposes of section 83D of the SDCA 1999, it therefore follows that the Deed of Release executed on 29 October 2021 between [REDACTED] and the Appellant falls within the provisions for the repayment of stamp duty where land is used for residential development as contained in section 83D of the SDCA 1999.
63. The Commissioner notes that both parties urged her to consider the provisions of section 83D(3)(c) in this appeal as it may affect the claim for the repayment of stamp duty by the Appellant.
64. Section 83D(3)(c) of the SDCA 1999 relates to the clawback by the Respondent of stamp duty repaid and provides that:

*“(c)Notwithstanding paragraph (a), the stamp duty repaid under this section shall be liable to the clawback provided for in subsection (12) if -*

*(i)the relevant residential development specified in a commencement notice is not completed within the period of 30 months after the date of the sending by a building control authority, in accordance with article 10(2) or 20A(3)(b), as the case may be, of the Regulations of 1997, of an acknowledgment in relation to that notice, or*

*(ii)when completed, the relevant residential development on the land, being the land to which that relevant residential development relates, is not such that -*

*(I)at least 75 per cent of the total surface area of that land is occupied by dwelling units, or*

*(II) the gross floor space of dwelling units amounts to at least 75 per cent of the total surface area of that land,*

*and subparagraphs (i) and (ii) are subsequently referred to in this section as the conditions for the avoidance of a clawback under this paragraph.”*

65. The matter under appeal in this determination is the decision of the Respondent on 5 September 2023 to refuse the Appellant’s claim for the repayment of the stamp duty paid on the Deed of Release in Transaction 2 pursuant to the provisions of section 83D of the SDCA 1999.

66. The scope of the jurisdiction of an Appeal Commissioner has been set out in a number of cases decided by the Courts, namely; *Lee v Revenue Commissioners* 2021 [IECA] 18 (hereinafter “*Lee*”), *Stanley v The Revenue Commissioners* [2017] IECA 279, *The State (Whelan) v Smidic* [1938] I.R. 626, *Menolly Homes Ltd. v The Appeal Commissioners* [2010] IEHC 49 and *the State (Calcul International Ltd.) v The Appeal Commissioners* III ITR 577.

67. Most recently Murray J. in *Lee* held at paragraph 64 as follows:

*“From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and the powers vested in them to obtain their statutory objective, their jurisdiction is focussed on the assessment and the charge. The ‘incidental questions’ which the case law acknowledges as falling within the Commissioners’ jurisdiction are questions that are ‘incidental’ to the determination of whether the assessment properly reflects the statutory charge to tax having regard to the relevant provisions of the TCA, not to the distinct issue of whether as a matter of public law or private law there are additional facts and/or other legal principles which preclude enforcement of that assessment.”*

68. Therefore, in this determination the Commissioner must focus on the decision of the Respondent on 5 September 2023 to refuse the Appellant’s claim for the repayment of the stamp duty paid on the Deed of Release in Transaction 2 pursuant to the provisions of section 83D of the SDCA 1999. As no decision relating to the clawback of stamp duty repaid under section 83D(3) of the SDCA 1999 has been made by the Respondent or been appealed by the Appellant, the Commissioner has no jurisdiction to consider the provisions of section 83D(3)(c) in this appeal as it may affect the claim for the repayment of stamp duty by the Appellant.

## Determination

69. As a result of the above, the Commissioner determines that the Appellant has succeeded in its appeal and is entitled to a repayment of the stamp duty paid on the Deed of Release over the right of way on the lands contained in Folio [REDACTED] executed on 29 October 2021 pursuant to the provisions of section 83D of the SDCA 1999.
70. The Commissioner therefore determines that the decision of the Respondent on 5 September 2023 to refuse the Appellant's claim for the repayment of the stamp duty paid on the Deed of Release over the right of way on the lands contained in Folio [REDACTED] executed on 29 October 2021 pursuant to the provisions of section 83D of the SDCA 1999 shall be varied and the Appellant shall be entitled to a repayment of the stamp duty paid on the Deed of Release over the right of way on the lands contained in Folio [REDACTED] executed on 29 October 2021 pursuant to the provisions of section 83D of the SDCA 1999.
71. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular 949AL thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

## Notification

72. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

## Appeal

73. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.



Clare O'Driscoll  
Appeal Commissioner  
11 June 2024