Neutral Citation Number: [2019] EWCA Civ 1860

Case No: A3/2018/3031

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mrs Justice Rose and Judge Jonathan Cannan
[2018] UKUT 280 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2019

Before:

LORD JUSTICE PATTEN
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE NEWEY

- -

Between:

DESMOND HIGGINS	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Miss Nicola Shaw QC and Mr Samuel Brodsky (instructed by **Fieldfisher LLP**) for the **Appellant**
Mr Christopher Stone and Mr Nicholas Macklam (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing date: 15 October 2019

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Approved Judgment

Lord Justice Newey:

1. This case concerns principal private residence relief from capital gains tax ("CGT"). Following his sale of a property which had been his home, HM Revenue and Customs ("HMRC") assessed the appellant, Mr Desmond Higgins, to CGT of £61,383.48 on the basis that the property had not been his only or main residence for all of his "period of ownership". Mr Higgins successfully appealed to the First-tier Tribunal ("the FTT") (Judge Heather Gething and Mrs Helen Myerscough), but the Upper Tribunal ("the UT") (Rose J and Judge Jonathan Cannan) reversed the FTT. Mr Higgins now challenges the UT's decision.

The facts

2. On 2 October 2006, Mr Higgins entered into a contract to take a 125-year lease of an apartment ("the Apartment") from Manhattan Loft St Pancras Apartments Limited ("Manhattan"). The Apartment was to be in the former St Pancras Station Hotel, which Manhattan was converting. At the date of the contract, the area which was to become the Apartment was, in the FTT's words, "a space in a tower".

3. The purchase price was £575,000. Mr Higgins had already made a payment of £5,000 as a reservation deposit and he paid a further £52,500 by way of deposit on exchange of contracts. Another deposit, of £57,500, was due on 1 March 2007 and the balance of £460,000 on completion.

4. The contract provided for Manhattan to "complete the refurbishment and/or construction of the Apartment in a good and workmanlike manner" in accordance with, among other things, the terms of the relevant planning permission and listed building consent and an "Interior Specification Sheet".

5. By clause 5, the contract was to be completed within 10 working days of Mr Higgins being notified that the Apartment had been substantially completed.

6. The development was delayed by the 2008 credit crunch, which led Manhattan to seek alternative finance. It was not until November 2009 that work began to construct the Apartment and it was substantially completed physically the following month.

7. On 18 December 2009, Mr Higgins was informed by Manhattan that the purchase was to be completed on 5 January 2010, and it in fact was. Mr Higgins had no right to occupy the Apartment before that latter date.

8. Mr Higgins occupied the Apartment as his main residence from 5 January 2010 until 5 January 2012. He had contracted to sell the Apartment on 15 December 2011 and the sale was completed on 5 January 2012.

9. Mr Higgins had sold his former residence in July 2007. Between then and January 2010, his residential arrangements varied. He stayed with his parents for some of the time, travelled for some of the time and stayed in another apartment which he owned and which had previously been occupied by a tenant. The FTT found as a fact that there was no other dwelling which Mr Higgins regarded as his main residence in the period from July 2007 to January 2010.

The statutory framework

10. Principal private residence relief is provided for by sections 222 and 223 of the Taxation of Chargeable Gains Act 1992 ("the TCGA"). Section 222(1) explains that the section applies to:

> "a gain accruing to an individual so far as attributable to the disposal of, or of an interest in—
>
> (a) a dwelling-house or part of a dwelling-house which is, or has at any time in his period of ownership been, his only or main residence … ".

The extent to which a gain to which section 222 is applicable is relieved of liability is prescribed by section 223. So far as relevant, that was in these terms at the material time:

> "(1) No part of a gain to which section 222 applies shall be a chargeable gain if the dwelling-house or part of a dwelling-house has been the individual's only or main residence throughout the period of ownership, or throughout the period of ownership except for all or any part of the last 36 months of that period.
>
> (2) Where subsection (1) above does not apply, a fraction of the gain shall not be a chargeable gain, and that fraction shall be—
>
> (a) the length of the part or parts of the period of ownership during which the dwelling-house or the part of the dwelling-house was the individual's only or main residence, but inclusive of the last 36 months of the period of ownership in any event, divided by
>
> (b) the length of the period of ownership."

11. We were also taken to subsections (5), (6) and (7) of section 222, which during the relevant period provided as follows:

> "(5) So far as it is necessary for the purposes of this section to determine which of 2 or more residences is an individual's main residence for any period—
>
> (a) the individual may conclude that question by notice to an officer of the Board given within 2 years from the beginning of that period but subject to a right to vary that notice by a further notice to an officer of the Board as respects any period beginning not earlier than 2 years before the giving of the further notice ….
>
> (6) In the case of an individual living with his spouse or civil partner —

> (a) there can only be one residence or main residence for both, so long as living together and, where a notice under subsection (5)(a) above affects both the individual and his spouse or civil partner, it must be given by both ….
>
> (7) In this section and sections 223 to 226, '*the period of ownership*' where the individual has had different interests at different times shall be taken to begin from the first acquisition taken into account in arriving at the expenditure which under Chapter III of Part II is allowable as a deduction in the computation of the gain to which this section applies, and in the case of an individual living with his spouse or civil partner —
>
> (a) if the one disposes of, or of his or her interest in, the dwelling-house or part of a dwelling-house which is their only or main residence to the other, and in particular if it passes on death to the other as legatee, the other's period of ownership shall begin with the beginning of the period of ownership of the one making the disposal, and
>
> (b) if paragraph (a) above applies, but the dwelling-house or part of a dwelling-house was not the only or main residence of both throughout the period of ownership of the one making the disposal, account shall be taken of any part of that period during which it was his only or main residence as if it was also that of the other."

12. Section 28 featured prominently in argument as well. It states:

> "(1) Subject to section 22(2), and subsection (2) below, where an asset is disposed of and acquired under a contract the time at which the disposal and acquisition is made is the time the contract is made (and not, if different, the time at which the asset is conveyed or transferred).
>
> (2) If the contract is conditional (and in particular if it is conditional on the exercise of an option) the time at which the disposal and acquisition is made is the time when the condition is satisfied."

The decisions below

13. The FTT concluded that principal private residence relief relieved Mr Higgins from any liability to CGT on his sale of the Apartment. In the FTT's view (see paragraph 6(10) of its decision):

> "The period of ownership for the purpose of sections 222 and 223 began when Mr Higgins owned the legal and equitable interest in the lease of the Apartment and owned the legal right to occupy the Apartment. That was the date of legal completion of the purchase of the lease on 5 January 2010. The period of

> ownership ended on the 5th January 2012 when the contract for sale (entered into on 15 December 2011) was completed."

14. The UT disagreed. The UT considered that the FTT had been "wrong to find that the period of ownership could only begin when Mr Higgins had legal title to the Apartment and a legal right to occupy the Apartment" (see paragraph 47 of its decision). As the UT saw things, the relevant "period of ownership" had begun on the exchange of contracts in 2006. It explained as follows in paragraph 40:

> "In simple terms, the gain realised on a disposal is the difference between the acquisition cost and the disposal proceeds. Those figures are determined when unconditional contracts for the purchase and sale are exchanged. In the present case, the acquisition cost and the disposal proceeds were fixed on 2 October 2006 and 15 December 2011 respectively when unconditional contracts were exchanged. Those are also the dates of acquisition and disposal for capital gains tax purposes by virtue of section 28 TCGA 1992. The gain which is potentially taxable accrued over that period and Mr Higgins enjoyed the benefit of the increase in value of his asset over that period. However the asset was not Mr Higgins' main residence prior to 5 January 2010."

The UT further observed that "upon exchange of contracts and payment of the first deposit Mr Higgins did have an equitable interest" (paragraph 51), that "in October 2006 Mr Higgins obtained an interest in the headlease which later became an interest in the Apartment when it was constructed" (paragraph 51) and that "from 1 March 2007 when the second deposit was paid Mr Higgins had an asset which he could dispose of by way of sub-sale" (paragraph 52).

Discussion

15. The central question on this appeal is as to the meaning of the words "period of ownership" in section 223 of the TCGA. If in Mr Higgins' case that period did not begin until 5 January 2010, then the Apartment was his main residence "throughout the period of ownership" and no CGT can be payable. If, on the other hand, Mr Higgins' "period of ownership" began when contracts for the purchase were exchanged, section 223(2) will be in point and he will enjoy relief from CGT as to only part of the gain he made on the Apartment.

16. Mr Christopher Stone, who appeared for HMRC with Mr Nicholas Macklam, argued that the words "period of ownership", on their ordinary meaning, refer to the period between acquisition and disposal. For CGT purposes, section 28 of the TCGA confirms that, where an asset is disposed of and acquired under a contract, the time at which the disposal and acquisition is made is the time the contract is made. That means that, in the present case, the date of acquisition was 2 October 2006, when contracts were exchanged, not 5 January 2010, when completion took place. There is nothing anomalous about calculating the "period of ownership" from the date of the contract since a purchaser will have a proprietary claim from that point. Sums paid by the purchaser will be protected by an equitable lien and, provided that the contract is specifically enforceable, the purchaser will become the property's owner in equity.

Here, specific performance was available from the start. True it may be that the Apartment did not yet exist, but it "has now become settled that the court will order specific performance of an agreement to build" if "the building work is sufficiently defined by the contract", "the claimant has a substantial interest in the performance of the contract of such a nature that damages would not compensate him for the defendant's failure to build" and "the defendant is in possession of the land" (to quote from Snell's Equity, 33rd ed., at 17-017). Those conditions were satisfied and, moreover, Manhattan's obligations as regards the construction of the Apartment and the grant of the 125-year lease cannot be separated. There was a single contract, not two. The nature of Mr Higgins' interest in the Apartment will of course have altered over time, but that does not matter. There is no requirement that "ownership" should be legal rather than equitable, nor that the person with "ownership" should have an immediate right to occupy the property. Further, section 222(7) shows that, where an individual has had different interests over time, the "period of ownership" is to be taken to begin from "the first acquisition taken into account in arriving at the expenditure which under Chapter III of Part II is allowable as a deduction in the computation of the gain". On top of that, the FTT's approach would mean that, contrary to the evident intention of the legislation, someone could enjoy relief in respect of gains made on more than one property at the same time. That could happen if, say, someone sold his existing main residence and moved to a new one that he had just bought pursuant to a contract made five years earlier, by reference to the prices current then.

17. It is a striking fact that, were Mr Stone's submissions well-founded, few people buying a new home would be within the scope of section 223(1) of the TCGA and so fully relieved of any possible CGT liability. Exchange and completion do not usually take place on the same day. On HMRC's case, therefore, a purchaser would normally be treated as having acquired "ownership" on a date before completion and before there could have been any question of going into residence. Where such a purchaser re-sold at a profit in a rising market, he would necessarily be entitled to relief in respect of only a "fraction of the gain" even where the property had been his home ever since his purchase had been completed. Parliament would thus have failed to confer complete relief from CGT in what it surely will have considered the paradigm case.

18. Mr Stone sought to answer this point in a number of ways. He submitted that "Computations made using 'months' rather than 'weeks' or 'days' are acceptable to HMRC and may result in there being no difference between the period of ownership and period of residence", that "Often the proportion of the gain that would in theory not fall to be relieved is so small as to make no practical difference", that "The value of the part of the gain which would not fall to be relieved … will often fall within an individual's annual exempt amount … for CGT" and that "Where … a delay between exchange and completion does still create a small liability to tax … , the practice of HMRC not to select cases for enquiry on the basis of this aspect of self-assessments … is an exercise in what Lord Wilberforce described in *Vestey v IRC (Nos 1 and 2)* … as '*administrative commonsense*'". Mr Stone referred, too, to Extra-Statutory Concession D49, which states that, where an individual acquires land on which he has a house built which he then uses as his only or main residence, or arranges for an existing house to be altered or redecorated before using it as his only or main

residence, he will be treated as having used the property as his only or main residence from the beginning if the delay is no longer than one year (or sometimes two).

19. I do not myself see these matters as disposing of the issue. There is nothing in the legislation to indicate that a short gap between contract and completion can be ignored, but it is in any event by no means uncommon for the interval between contract and completion to exceed a month. Nor, of course, does the TCGA state that taxpayers are excused from relatively small liabilities. Further, the home-owner who has sold his property at a profit may already have exhausted some or all of his annual CGT exemption and Extra-Statutory Concession D49 will be irrelevant in the great majority of cases. So far as the "the practice of HMRC not to select cases for enquiry on the basis of this aspect of self-assessments" is concerned, the basis for any such practice is far from clear but it could not in any case detract from the inherent implausibility of Parliament having intended the principal private residence relief provisions to have a meaning that does not afford complete relief from CGT in the typical case of an individual or couple buying and occupying a property as their only home. In the course of submissions, Mr Stone accepted that, on HMRC's case, Parliament would have failed to provide full CGT relief in the type of case that it might be expected to have had at the front of its mind.

20. In my view, the fact that the construction of the provisions that HMRC favour would rarely entitle ordinary home-owners to full relief from CGT strongly suggests that the construction is incorrect. The FTT said at paragraph 6(4) of its decision, "To say the period of ownership begins when a contract to acquire a dwelling is entered into, at which time it would be highly unusual for a purchaser to have a right to occupy, would be perverse in the context of providing relief to individuals for gains realised on the sale of a private principal residence." I agree.

21. HMRC's case also, as it seems to me, runs counter to the ordinary meaning of the words "period of ownership". The expression would not naturally, I think, be taken to extend to the interval between contract and completion. A purchaser would, as a matter of ordinary language, be described as "owner" only once the purchase had been completed. It is true that a vendor who has entered into a specifically enforceable contract can be described as "trustee" for the purchaser, but he is "a trustee in a qualified sense only" (Cotton LJ in *Rayner v Preston* (1881) 18 Ch D 1, at 6) and he will usually be "entitled to keep and retain for his own benefit the rents and profits of the land" (Nicholls V-C in *Heronsgate Enterprises Ltd v Harman (Chesham) Ltd*, unreported, 21 January 1993). Lord Walker said this on the subject in *Jerome v Kelly* [2004] UKHL 25, [2004] 1 WLR 1409, at paragraph 32:

> "It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, such as rescission of

> the contract (either under a contractual term or on 1420 breach). If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full."

The mere fact that someone has contracted to buy a property will not give him "ownership" such as could allow him to possess, occupy or even use the property, let alone to make it his "only or main residence".

22. It would anyway be hard to see how Mr Higgins' "period of ownership" of the Apartment could have begun before late 2009. When contracts were exchanged in 2006, the Apartment was just a "space in the tower". The present case is thus distinguishable from one in which someone contracts to buy a plot of land on which a house is to be built. The plot of land will, of course, already exist. In contrast, the Apartment did not come into existence until November/December 2009.

23. As already mentioned, Mr Stone argued that section 28 of the TCGA confirms that the "period of ownership" of a dwelling-house runs from the date of the contract for its purchase. As, however, was pointed out by Miss Nicola Shaw QC, who appeared for Mr Higgins with Mr Samuel Brodsky, sections 222 and 223 do not refer to section 28. We were taken, moreover, to a number of cases in which the Courts have limited the application of what is now section 28. It is sufficient to refer to two of these, *Chaney v Watkis* [1986] STC 89 and *Jerome v Kelly*. The former case concerned section 32(1)(b) of the Capital Gains Tax Act 1979, which provided for "the sums allowable as a deduction from the consideration in the computation … of the gain accruing to a person on the disposal of an asset" to be restricted to "expenditure reflected in the state or nature of the asset at the time of the disposal". Taking that provision in conjunction with what was then section 27 of the 1979 Act (now section 28 of the TCGA), it was argued that events happening after a contract for the sale of a property had been concluded were not material for section 32(1)(b) purposes because the date of the contract was to be taken as the time of disposal (see 93). Nicholls J, however, concluded at 94 that "the context in which the phrase 'at the time of the disposal' is found in s 32(1)(b) compels the conclusion that that phrase does not exclude expenditure which is first reflected in the state or nature of the property after the date of the contract but before completion".

24. Turning to *Jerome v Kelly*, it was there held that, under section 27 of the 1979 Act, the "time of the contract is deemed to be the time of disposal only if there actually is a disposal" (per Lord Hoffmann at paragraph 11). Lord Walker explained at paragraph 27:

> "Section 27(1) appears to be directed to a single limited issue, that is the timing of a disposal. It does not say that the contract is the disposal, but that a disposal effected by contract and later completion is to be treated, for timing purposes, as made at the date of the contract. Its language is not so clear and compelling as to lead to the conclusion that Parliament must have intended to introduce a further statutory fiction as to the parties to a disposal."

Later in his speech, at paragraph 43, Lord Walker said:

> "In reaching this conclusion I am not treating the deeming provision in section 27(1) as having any general power to trump that in section 46(1). But I am, I think, following the general guidance as to the application of deeming provisions given by Peter Gibson LJ in *Marshall v Kerr* [1993] STC 360, 365–366, approved by this House on appeal [1995] AC 148, 164 (although the appeal was allowed on other grounds)."

The relevant passage from Peter Gibson LJ's judgment in *Marshall v Kerr* reads:

> "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

25. In the circumstances, section 28 of the TCGA does not, in my view, dictate the conclusion that the "period of ownership" of a dwelling-house for the purposes of sections 222 and 223 must run from the date of the contract under which it was bought. There is no necessity to measure "period of ownership" by the times of acquisition and disposal for which section 28 provides when (a) sections 222 and 223 do not state that "period of ownership" is to be so determined or mention section 28, (b) neither does section 28 contain a cross-reference to sections 222 and 223, (c) section 28 can aptly be described as a "deeming provision" (as Lord Walker did) the applicability of which must be assessed in the specific context and (d) the fact that using section 28 to fix a "period of ownership" for the purposes of sections 222 and 223 would neither afford total CGT relief in the paradigm case nor sit comfortably with the ordinary meaning of the words "period of ownership" indicates that the provision should not be applied in that context.

26. So far as section 222(7) of the TCGA is concerned, the UT considered that this "does not help in defining the period of ownership generally" (paragraph 49 of its decision). I agree. The subsection is directed at a situation in which a person acquires successive interests: first, say, a lease and later the freehold. If the acquisition of an earlier interest is to be taken into account when calculating deductible expenditure, the "period of ownership" must likewise encompass that in which the earlier interest was held: a taxpayer cannot have it both ways. Section 222(7) does not purport to deal with whether someone who has done no more than contract to purchase a property has relevant "ownership" or stipulate that section 28 (which is to be found in chapter II of part II, not chapter III) applies when determining "period of ownership".

27. With regard to Mr Stone's submission that it would be contrary to the evident intention of the legislation for someone to be able to enjoy relief in respect of gains made on more than one property at the same time, what is in fact plain is that a person cannot claim to have more than one main residence at any one time. An individual with two or more residences can choose which is to be treated as his main residence by giving notice under section 222(5) of the TCGA, but he cannot have multiple main residences. There is no question, however, of Mr Higgins ever having had more than a single main residence simultaneously. By the time the Apartment became his main residence in January 2010, he had long since sold his previous residence.

28. Mr Stone warned that the approach adopted by the FTT could lead to abuse. He postulated a case in which a person (A) wishing to acquire a second home asks a friend (B) to make the purchase and then contracts to buy the property from B but does not complete until 10 years later when he has arranged to sell the property on to a third party. It would, Mr Stone said, be wrong if A could claim that the property had been his main residence throughout his "period of ownership" just because that had been the case in the fleeting interval between completion of the purchase from B and the sale on. I agree. However, it seems to me that on the hypothetical facts A's "period of ownership" could be said to have begun when B acquired the property. B would presumably have held the property on bare trust for A, not merely as trustee "in a qualified sense only" on the basis of the contract to sell to A. That, I think, should suffice to trigger A's "period of ownership". There is no requirement that "ownership" be legal rather than equitable.

29. In all the circumstances, I agree with Miss Shaw QC that the FTT was right about how the legislation should be interpreted and, hence, that Mr Higgins' "period of ownership" of the Apartment for the purpose of section 223 of the TCGA did not begin until his purchase was completed.

Conclusion

30. I respectfully take a different view from the UT. I would allow the appeal.

Lord Justice David Richards:

31. I agree.

Lord Justice Patten:

32. I also agree.