TC01951

Appeal numbers: TC/2011/05657
TC/2011/06155

CAPITAL GAINS TAX – Private residence relief – meaning of "residence" – Section 222 Taxation of Chargeable Gains Act 1992 – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL J HARTE **Appellant**
BRENDA A HARTE

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR J MIDGLEY

Sitting in public in London on 6 March 2012

Mr M Finch for the Appellant

Mr P Shea for the Respondents

DECISION

Introduction

1. These are joined appeals by the two Appellants who are a married couple. Each of the Appellants appeals against a closure notice, amending their 2007/08 self-assessment tax return under s.28A(1) and (2) of the Taxes Management Act 1970. The Appellants had in their tax returns claimed capital gains private residence relief ("PRR") in respect of the disposal during that year of a residential property which is referred to below as "Alder Grove". The HMRC position, as reflected in the closure notices, is that PRR was not available to the Appellants in relation to the disposal of that property, and that they are therefore liable to capital gains tax on it.

2. The documents before the Tribunal included a list of facts not in dispute, as follows.

3. The Appellants bought a property, referred to below as "Crofts Road", before May 2007 and still own it. At all times it has been a private residence of theirs. This property is approximately 6 miles from Alder Grove. Mr Harte (referred to below as the "first Appellant") inherited Alder Grove on the death of his father on 24 May 1992. It was occupied by the first Appellant's step mother Frances Harte until her death on 20 May 2007. On 21 June 2007, ownership of the property was transferred from the first Appellant to joint ownership of the two Appellants.

4. During the Summer of 2007, the owner of the property neighbouring Alder Grove expressed interest in purchasing Alder Grove. Hoopers (Estate Agents) wrote to the first Appellant on 23 August 2007 to confirm that they had taken instructions to proceed with the sale of Alder Grove to the neighbour. Alder Grove was sold to him on 19 October 2007. The first Appellant's step mother's furniture remained in the property until it was sold.

5. The Thames Water bill for the period 18 May 2007 to 31 March 2008 is dated 28 August 2007 and was addressed to "The Occupier". The British Gas bill for the period 31 May 2007 to 3 September 2007 is dated 5 September 2007 and was also sent to Alder Grove addressed to "The Occupier". The final council tax bill, prepared on 21 December 2007 for the period 20 May 2007 to 18 May 2007 did not include any discounts for periods of non-occupation.

6. The Appellants made an election under s.222(5) of the Taxation of Chargeable Gains Act 1992 ("TCGA") on 25 August 2008 to treat Alder Grove as their main residence for the period 11 October 2007 to 19 October 2007. At all other times, Crofts Road was the Appellants' main residence for capital gains tax purposes. There is no record of the dates that the Appellants actually occupied each property.

Applicable legislation

7. Section 222 of the TCGA relevantly provides:

(1) This 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, or …

(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, …

8. It was common ground between the parties that the significance of the ability to make an election under s.222(5) TCGA is that it entitles the person making the election to 3 years of PRR even though the election need only be for a short period.

9. It was also common ground between the parties that for purposes of this appeal, if there was a valid election under s.222(5) TCGA, the Appellants were entitled to PRR in respect of the sale of Alder Grove. The HMRC case is that any occupation of Alder Grove by the Appellants lacked the degree of permanence, continuity or expectation of continuity sufficient to justify its description as "residence" for PRR purposes, and that therefore it is not possible for the Appellants to make an election under s.222(5) TCGA for it to be treated as their main residence for any period. HMRC accepts that if Alder Grove was a "residence" of the Appellants, then the election was valid. Thus, this appeal turns on the narrow issue of whether Alder Grove was ever a "residence" of the Appellants within the meaning of s.222(5) TCGA.

The hearing of the appeal

10. The Appellants were represented by Mr Finch. HMRC were represented by Mr Shea. The Tribunal had before it the case file, a documents bundle, an authorities bundle, a skeleton argument for HMRC, and a statement by the first Appellant on behalf of both Appellants. The first Appellant gave evidence and was cross-examined by Mr Shea and the Tribunal asked him some questions. The Tribunal heard submissions on behalf of both parties. Mr Shea referred to a number of First-tier Tribunal (Tax Chamber) cases, of which Mr Finch said he had been given notice for the first time at the hearing. The Tribunal directed that Mr Finch could within 14 days of the hearing file any additional written submissions on the cases referred to in oral argument by the representative of HMRC. Pursuant to that direction, Mr Finch filed two pages of further written submissions dated 16 February 2012.

11. In his written statement, the first Appellant said as follows. He inherited Alder Grove in 1992, and from that time until his step mother died on 20 May 2007, it was occupied by her as a private residence. On her death, the first Appellant was in the

fortunate position of owning two houses with no financial pressure to sell either. The Appellants decided at that time to retain both properties and use both as private residences. Both properties were fully furnished and personal belongings were left at both properties as most weeks the Appellants spent time in each property. Unfortunately no records were kept as to when they stayed at each property as they never dreamt that they would be required. During the Summer of 2007 when talking to neighbours at Alder Grove, their immediate neighbour expressed an interest in purchasing Alder Grove at a good price so that he could redevelop both properties. The Appellants decided that it was worthwhile talking to the agents which led to the property's eventual sale. During the period right up to the sale the Appellants used this property as a private residence.

12. In cross-examination, the first Appellant said as follows.

13. He purchased Crofts Road in 1968 or 1969, and he is still living there. Crofts Road is a 3 bedroom house, at the end of a terrace of 6 houses. The Appellants have never lived anywhere other than Crofts Road since Alder Grove was sold. Most of the first Appellant's stepmother's family were in Ireland. The first Appellant knew nothing about the executors or beneficiaries of her will. No one came to collect her clothes from Alder Grove, and they remained there until they were cleared out just prior to the neighbour taking over. It was in the first Appellant's father's will that his stepmother could remain in Alder Grove as long as she wished, but after her death, the first Appellant needed no permission from the executors to move into Alder Grove as he owned the house.

14. On 21 June 2007 he changed the title to Alder Grove to joint names with his wife, as it was natural for him that it should be jointly owned. He did not do so earlier because it was only after his step mother died that this became a question. This was not done in contemplation of selling Alder Grove and he had no intention of selling it until the neighbour expressed an interest in buying it. Originally the Appellants intended to make Alder Grove their main residence, as it was a better property than Crofts Road. There was no particular pattern to the division of the Appellants' time between Crofts Road and Alder Grove, and it was weather dependent. The longest continuous period spent at Alder Grove was approximately 3 weeks. It was wasteful to keep two houses, and the original idea was to sell Crofts Road, but the Appellants were open to all thoughts. They did not start the process of marketing Crofts Road.

15. The Appellants did not need to "move in" to Alder Grove as it was already fully furnished. They only needed to take personal items when going to Alder Grove and then eventually did not need to take anything as they had everything at each of the houses. There was a television at Alder Grove. The first Appellant presumes that his step mother had a television licence, but he never took one out for Alder Grove. He had no computer or internet at Alder Grove. He did not take pictures, paintings or ornaments to Alder Grove. The only work he did on Alder Grove was to fix one leaking gutter. He did not entertain any family or friends at Alder Grove, and none came to stay there. He did not have household insurance for Alder Grove. He did not inform the insurers of Crofts Road that he was no longer living there on a permanent basis and was unaware that he was supposed to do this.

16. The first Appellant does not know why bills for Alder Grove were in the name of "The Occupier", but it might be that his stepmother put the bills in the name of "The Occupier" after his father died, as this was the sort of thing she would do. There were no formal meter readings after his stepmother died. Anything that she had not paid, the first Appellant would have just paid.

17. The neighbour expressed interest in buying the property in the Summer of 2007. There was no valuation of the property. The first Appellant did his own research into the value of the property and achieved the price that he thought it was worth in negotiation with the buyer. All that the agent did in effect was to put him in touch with the purchaser.

18. In re-examination, the first Appellant said as follows. The property that he took to Alder Grove he left there. He paid full council tax for Alder Grove on the basis that both Appellants were living there, even though he could have got a discount if the property was unused or if there was only a single user. There were no funds in his stepmother's estate from which he could have claimed payment of bills.

19. On behalf of HMRC, Mr Shea submitted as follows.

20. Under s.50(6) of the Taxes Management Act 1970, the onus of proof is on the Appellants to demonstrate on the balance of probabilities that they have been overcharged to capital gains tax by the assessments appealed against.

21. The Appellants are not contending that they occupied Alder Grove on its own for all of this period, or even for a protracted part of it. They contend that they occupied Crofts Road and Alder Grove simultaneously, such that Alder Grove became one of their residences.

22. Section 222(5) TCGA makes clear that for PRR to apply, the property must have been occupied by the individual as his residence at some point during the ownership. A "residence" is not defined in the Act and therefore takes its ordinary meaning. The ordinary meaning is the dwelling in which a person habitually lives, in other words, his or her home. The term "residence" has been considered in numerous cases. Whether a period of occupation constitutes residence is a question of fact and a test of quality over quantity. In *Sansom v Peay* (1976) 52 TC 1, Brightman J said that "The general scheme of s.29 [of the Finance Act 1965] is to exempt from liability to capital gains tax the proceeds of sale of a person's home". In *Frost v Feltham* (1980) 55 TC 10, Nourse J said that "A residence is a place where somebody lives". Reference was made also to *Fox v Stirk* [1970] 3 All ER 7 and *Goodwin v Curtis* [1996] BTC 501 (High Court), [1998] BTC 176 (Court of Appeal). PRR recognises that that increases in property values are offset by inflation, and is intended to ensure that individuals are not disadvantaged when trying to move home. It is an important relief for residences, and is not available for holiday homes or investment properties.

23. Occupation of a property, or merely staying in a property, is not sufficient on its own to make the property a residence for PRR purposes. It must be occupied in such a manner that it becomes a person's home. The authorities give prominence to certain

factors, such that the occupation must exhibit a degree of permanence, continuity or expectation of continuity, that temporary occupation of a property does not make it a residence, that the test is of quality of occupation over quantity. On the facts of this case, these factors were not present. The fact that the property title was changed to joint names on 21 June 2007 despite the fact that the first Appellant had already owned it for 15 years suggests that the transfer of title was in contemplation of sale, to enable both Appellants to benefit from PRR. It is improbable that a person would maintain two residences so similar in nature and so close to each other.

24. Crofts Road has been the Appellants' residence for many years and remains so to this day. Alder Grove was available to the Appellants as a potential residence between 20 May 2007 and 19 October 2007. The two properties are 6 miles apart. Both are three bedroom properties in residential suburban locations. Any occupation of Alder Grove was in the manner of temporary stays and the property was not being occupied as a residence. Bills were not put in the names of the Appellants and the property was under offer of sale within 3 months of the first Appellant's step mother's death. Once the decision to sell had been taken, any occupation after that date could not be said to possess any degree of permanence, continuity or expectation of continuity. HMRC accepts that the short period of occupation, as nominated, is not in itself a bar to making Alder Grove a residence, but in the circumstances of this case, it was not.

25. Mr Shea also referred to *Springthorpe v Revenue & Customs* [2010] UKFTT 582 (TC) ("*Springthorpe*"); *Moore v Revenue & Customs* [2010] UKFTT 445 (TC) ("*Moore*"); *Metcalfe v Revenue & Customs* [2010] UKFTT 495 (TC) ("*Metcalfe*") and *Clarke v Revenue & Customs* [2011] UKFTT 619 (TC) ("*Clarke*").

26. In reply, the following was stated on behalf of the Appellants. The Appellants were not close to the first Appellant's stepmother. Prior to her death, the first Appellant never felt that he owned the property. Thereafter, he began using it, and that is why he then put it in joint names. The decision to sell it came only later. Alder Grove was not like a hotel room. The Appellants had a lot of personal property there. Alder Grove was the better property, and the Appellants might still be there today if the opportunity to sell had not arisen. There was a period of uncertainty in which the Appellants decided which property to retain.

27. The further written submissions on behalf of the Appellants stated amongst other matters as follows. *Metcalfe* is distinguishable, because in that case the appellant had never lived in the property. *Springthorpe* is distinguishable because in that case the property was under renovation and uninhabitable and exempt from council tax for that reason. *Moore* involved a very short period of residence while renovations were undertaken, and again no council tax was paid for this period. *Clarke* is the more relevant case. In this case, the Appellants considered at the time that Alder Grove was a private residence and the Appellants intended to retain it as such.

The Tribunal's findings

28. It is for the Appellants to satisfy the Tribunal on the balance of probabilities that they occupied Alder Grove as a residence.

29. In *Springthorpe*, the Tribunal said at [79]:

> It is clear from the authorities, in particular the decision of the Court of Appeal in *Goodwin v Curtis (HM Inspector of Taxes)*, that the occupation of a property must have some degree of permanence, some degree of continuity or expectation of continuity in order for that occupation to qualify as residence (see, in particular, the comments of Schiemann LJ cited in paragraph 74 above). It is clear that the test is a qualitative test rather than one which looks predominantly at the period during which a property was actually occupied. As Millett J said in *Moore v Thompson (HM Inspector of Taxes)* (at page 24 cited in paragraph 70 above) even short or occasional residence in a property can make that place the taxpayer's residence. However, Millett LJ in *Goodwin v Curtis (HM Inspector of Taxes)* himself contrasts short or occasional residence with temporary occupation, which latter, he says, does not make a person resident at a particular address. The factor which the learned judge clearly had in mind was the quality of occupation -- the degree of permanence, the degree of continuity, or the expectation of continuity -- which is a question of fact and degree to be determined by this Tribunal.

30. On the facts and evidence of that particular case, the Tribunal said at [81]:

> Putting the case at its highest from the Appellant's viewpoint, the evidence produced to us seemed to indicate the he had not definitely made up his mind, when doing the renovation work, whether to sell, let or live in the house when it was completed. We have concluded that, to the extent that the Appellant did occupy the Property, he did so for the purpose of renovating the property rather than occupying it as his home which he expected to occupy with some degree of continuity. Thus the quality of his occupation and his intentions in respect of his occupation of the Property do not satisfy the test in section 222 TCGA.

31. In *Metcalfe* at [9], the Tribunal concluded on the basis of the evidence in that case that:

> Even if the Tribunal was satisfied that the Appellant had, for a time, occupied the apartment at Westgate as his dwelling house, the question for determination is whether such occupation amounted to residence. The Tribunal did not accept that the Appellant had provided any evidence to show that the occupation of Westgate had any degree of permanence. The Tribunal found that the evidence pointed to the contrary in particular the facts that the Appellant had not notified his change of address to either his bank or Council and within either days or weeks of acquiring the property the Appellant had obtained a valuation with a view to selling. On those facts the Tribunal found that there was no degree of permanence and no expectation of continuity.

> The Tribunal therefore found that, at best, the Appellant had temporary occupation of Westgate, which was insufficient to amount to residence.

32. On the evidence in the present case, the Tribunal finds that the quality of occupation -- the degree of permanence, the degree of continuity, or the expectation of continuity – was not such as amount to "residence" within the meaning of s.222(5) TCGA.

33. It is clear that the Appellants' established residence was Crofts Road. After the first Appellant's step mother's death, he found himself, as he put it, in the fortunate position of owning two houses and being under no financial pressure to sell either. However, he admits that he considered it wasteful to own two houses in this way, and that the intention was to sell one. His evidence is that until his neighbour expressed interest in buying Alder Grove, the Appellants were not certain which of the two houses to retain. He said that the original idea was to sell Crofts Road, but that the Appellants "were open to all thoughts". He conceded that the Appellants did not start the process of marketing Crofts Road.

34. If the Tribunal accepts that evidence, that would establish that for a period of 3 months or less between the first Appellant's step mother's death and the decision to sell Alder Grove, the Appellants at least contemplated that they might make Alder Grove their permanent residence. However, the evidence does not establish that they ever did make it their residence. They never put any of the bills into their own name. They never entertained or had friends or family to stay there. Until the property was sold, the furniture and personal effects of the first Appellant's step mother remained in the house, as they were, notwithstanding that the Appellants say that they were not close to her. The Appellants did not move in any of their own furniture, pictures, or ornaments. They undertook no work on the property other than to repair one drain. The first Appellant said in evidence that the longest continuous period spent at Alder Grove was approximately 3 weeks. In the absence of any other evidence of what periods were spent at Alder Grove, the Tribunal is not persuaded that this information is necessarily reliable. However, even if the Appellants did spend several periods at Alder Grove, the longest being 3 weeks, the Tribunal is not persuaded that in all the circumstances such periods have the quality of "residence" within the meaning of s.222(5) TCGA.

35. To adopt the language of *Springthorpe* quoted above, putting the case at its highest from the Appellants' viewpoint, the evidence indicates that in the period between the first Appellant's stepmother's death until the decision was taken to sell the Alder Grove, the Appellants had not made up their mind whether to sell it or whether to live in it. They may have spent short periods there, perhaps to see what it would be like if they were to make it their residence. However, the quality of the occupation and the intentions in respect of the occupation of the property were on the evidence not such as to satisfy the test of "residence" in section 222 TCGA.

36. It follows that this appeal is dismissed.

37. 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.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE

RELEASE DATE: 18 April 2012