[2017] UKFTT 449 (TC)

TC05911

Appeal number: TC/2015/05049
TC/2015/05047

CAPITAL GAINS TAX – ss 222 to 224 TCGA private residence relief – whether and to what extent grounds exceeding 0.5ha required for enjoyment of house – location of excess area - whether ownership period included period of over 7 years before occupation – whether HMRC entitled to raise assessments on basis of discovery of tax loss - whether conduct careless – whether HMRC evidence should be excluded - appeals allowed in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

WILLIAM RITCHIE & HAZEL RITCHIE **Appellants**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
CELINE CORRIGAN

Sitting in public at Royal Courts of Justice, Belfast, on 21 to 23 March 2017

Keith Gordon, instructed by Rodgers Weir & Co, Chartered Accountants, for the Appellant

Simon Foxwell, advocate HMRC Solicitor's Office, for the Respondents

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DECISION

1. This was an appeal by Mr William Ritchie and Mrs Hazel Ritchie (together "the appellants" or "the Ritchies") against two assessments made on each of them to capital gains tax ("CGT") by an officer of the Commissioners for Her Majesty's Revenue & Customs ("HMRC"). Where we refer to one of the appellants only we refer to "Hazel" or "Billy", the latter being the name by which Mr Ritchie is universally known. We mean no disrespect in referring to them by their first names or nicknames: it is less confusing to a reader than saying Mr Ritchie and Mrs Ritchie.

2. There is no dispute that the appeals of each of Hazel and Billy stand or fall together and, if they stand, they stand in the same sums, at least of gains if not of tax. This is on the basis that each had a 50% interest in the land with which the appeal is concerned: even in Billy's shed, about which much of the argument in the case turned.

The issues

3. There is a substantive issue and a procedural issue.

4. The substantive issue is whether Hazel and Billy each made a chargeable gain (ie a gain subject to CGT) on the sale of their house, other buildings and land at 28 Station Road, Moneymore, Co. Londonderry in January 2007. Whether they each did or not turns on the application of certain of the provisions of ss 222 to 226 Taxation of Chargeable Gains Act 1992 ("TCGA") to the facts of the case, these provisions containing the conditions for a relief from CGT commonly known as "principal private residence" or "PPR" relief.

5. In particular the main disputed question was whether the "permitted area", the area of the gardens and grounds that were required for the Ritchies occupation and enjoyment of the dwelling house on the land, was greater than 0.5 hectares (abbreviated to "ha" in the rest of this decision).

6. The procedural issue is whether HMRC were entitled to assess each of Hazel and Billy to recover the CGT said to be due. This issue arises because assessments were made in March 2013, more than four but less than six years from the end of the year of assessment 2006-07 in which the gains accrued. Resolution of the issue turns on the application to the facts of ss 29 and 36 Taxes Management Act 1970 ("TMA") relating to "discovery assessments" and time limits for assessing.

7. The procedural issue is of course a threshold issue. If HMRC fail to show that the assessments were validly made (the burden of proof indisputably being on them), the appeals would succeed without consideration of the substantive issue. It is however necessary for the substantive issue to be considered to some extent to make sense of the procedural dispute – the "loss of tax" that HMRC have to show as one of the procedural hurdles is a loss of CGT on the sale of the land. And if we were to find that the appellants succeeded on the procedural hurdle, but our decision was held to be wrong, the substantive issue would still need to be decided.

8. For that reason we propose not to be too rigid in compartmentalising evidence between the two issues, and we have considered the submissions on the substantive issue first.

Evidence

Evidence: general

9. We had folders which included:

(1) correspondence between HMRC and the Ritchies and their advisers

(2) documents supplied to HMRC in the course of that correspondence

(3) HMRC internal memoranda and notes

(4) memoranda and notes relating to referrals by HMRC to the District Valuer and reports by him

(5) notes of meetings between HMRC (and the District Valuer) and the Ritchies and their advisers.

(6) various miscellaneous documents.

10. For HMRC we had a witness statement from Mrs Susanne McIvor, an Inspector of Taxes (and therefore an officer of HMRC) who had conduct of the investigation into the Ritchies' CGT liability from an early date. She was not the original officer in the case, but she was the one who made the decisions to assess.

11. We also had evidence for HMRC from Mr Gerard O'Neill BSc MRICS, a Valuer in the Land and Property Services Directorate ("LPS") of the Department of Finance & Personnel in Northern Ireland. Although this means that, contrary to the position in England, Wales & Scotland, Mr O'Neill is not part of the Valuation Office Agency, an agency of HMRC, we refer to him in this decision as the "District Valuer" or "DV" as that is the title used by all the parties to the case and is a familiar one.

12. We should mention here that Mr Gordon made an application to us to direct that Mr O'Neill should leave the hearing while Mrs McIvor gave her evidence and was cross-examined. We noted that Rule 32(5) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273 (L. 1) ("FTT Rules") provides that "[t]he Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence" but otherwise the FTT Rules are silent on exclusion of witnesses. This is not what Mr Gordon was applying for, as he was content for Mr O'Neill to be present until Mrs McIvor gave her evidence. As HMRC did not object we agreed his application using our general case management powers in Rule 5 of the FTT Rules.

13. For the appellants we had evidence in the form of witness statements from Billy and Hazel. We also had a witness statement from Mr Victor Weir, the accountant for the Ritchies' business and who submitted the Ritchies' tax returns for 2006-07.

14. We also had a witness statement from Mr Clive Russell. Mr Russell was a "tax specialist" to whom Mr Weir referred tax issues which he felt unable to handle himself. Mr Russell was a former Inspector of Taxes (Grade III – now a Higher Officer) who had set up as a tax consultant in Northern Ireland. Mr Weir had referred Billy Ritchie to Mr Russell for tax advice on the sale of the land.

15. In addition we were supplied with a report by Savills who were commissioned by the appellants in 2015 to report on a number of issues including their opinion of the "permitted area" on alternative bases. This was not however adduced as expert evidence.

16. We give our views on the witnesses below where we describe their evidence.

Exclusion of evidence given in ADR

17. We must mention one other matter. The parties attempted to reach an agreement over the appeals by using HMRC's Alternative Dispute Resolution ("ADR") procedures. This was unsuccessful. Following this attempt at ADR HMRC issued its Statement of Case ("SoC") for the hearing of the appeals. The appellants objected strongly to the inclusion in that SoC of something said during the ADR process (the "prejudicial material").

18. The appellants made three applications to this Tribunal which were heard on 20 June 2016 by Judge Robin Vos, whose decision bears the neutral citation [2016] UKFTT 509 (TC). The first was to debar HMRC from the hearing of the appeals (something which would inevitably result in the appeals succeeding) or to require them to withdraw their SoC and issue a new one without the prejudicial material. The second was to require the appellants' fourth ground of appeal to be heard after the other three. At the hearing the appellant also applied for their costs.

19. Judge Vos refused to debar HMRC from participating in the appeals but ordered them to provide a revised SoC excluding the prejudicial material. In his consideration of the debarring application he said at [65]:

> "Although Mr Gordon did not press the point at the hearing, he also referred in his skeleton argument to the possibility that any Tribunal which hears the substantive appeal may, consciously or otherwise, be influenced by the offending comments and that, as a result, the Tribunal cannot deal with the proceedings fairly and justly."

20. Although we told the parties at the hearing that we had not tried to find out what the prejudicial material amounted to, and did not know what it consisted of, the judge in this hearing, Judge Thomas, must put on record that in the course of drafting this decision he inadvertently read the prejudicial material, having been previously unaware that it was included in the papers in the Tribunal's file on the case that were sent to him. But we note that Judge Vos said at [85]:

> "There are of course many situations in which a judge will become aware of evidence which is not admissible for one reason or another and I would expect that a Tribunal in this case would be perfectly

> capable of making a fair decision even if it became aware of the offending comments."

That is the case here.

21. Judge Vos also refused the appellants' application to postpone the arguments on the permitted area until after the Tribunal had decided on the extent of the dwelling house. Accordingly in our hearing we considered all the issues together.

The undisputed and background facts

The land

22. We set out first an account of the dealings in the land and the background to the Ritchies' purchase and sale of the land. This is taken from documents (including photographs and maps) exhibited by several witnesses, from the witness statements of the Ritchies, elaborated in oral evidence, and from Mr Gordon's skeleton argument. The statements we record were not challenged in any way by either party and we find as fact the matters set out. Our own explanatory comments are italicised and included in square brackets.

23. In the 1980s the Ritchies operated a fish and chip shop in the centre of town in Moneymore, Co. Londonderry. They lived above the shop, a three storey building, and Billy used covered garage space to the rear for the children's slides and swings, work tools, bulky household items and ploughs. The Ritchies had become anxious to move out of town in view of what would now be called anti-social behaviour, and because of Hazel's health problems.

24. They put the business (and their house) up for sale and soon had a taker. This forced them to look for new living accommodation. They had looked for sites out of town and Billy found that land was for sale which was part of a dismantled railway line and the station on it and other railway land and he bought it for £11,000 in July 1987. At the time the only buildings on the land were a large shed which stood on what had been the western platform of the station which Billy was keen to use for the items previously kept in the garage (see §23) and a small building which was referred to as the "potting shed". Any reference from now on to a "shed" with no modifier is to the large shed on the old platform, which we understand had been used for agricultural purposes after closure of the line and before the purchase by the Ritchies, hence reference to its being an "agricultural shed" in some documents.

25. The total area of site was between 0.65 and 0.7 hectare. [*We add here that there was a dispute over the exact size and as the exact size is significant for CGT purposes we record no finding of fact about it here. We do so later in our discussion of the chargeable gain and any CGT liability*]

26. To begin with the Ritchies rented a small house on neighbouring land as their place of residence, 22 Station Rd. Billy used the shed on his land for storing their children's toys, the family car, various tools such as compressors and jacks used by Billy, firewood and vegetables and also the ploughs which Billy used in competitions.

27. The Ritchies applied for planning permission in 1991 to build a three storey house on the land. Billy began construction of the house in 1992. The house when constructed was a sizeable one. Because the ground sloped there were two stories visible from the front but three from the rear, the lower storey consisting of a number of rooms used for a variety of purposes.

28. Billy also created front and back gardens and an alternative driveway to the shed and he planted trees and bushes. The total cost was approximately £180,000.

29. In the course of applying for planning permission it had come to light that there was an area of land to the north east of the site which the Ritchies thought they had acquired but which in fact they did not own. This area was contiguous with the land they had acquired. It was owned by the Department of Transport ("DoT") who had acquired it when a road was created on the old railway line. After negotiation title to the land was acquired in 2002 when DoT formally abandoned it. No cost was involved (other than legal costs).

30. The family first occupied the house constructed by Billy in January 1995. The period of some 7½ years between July 1987 when the land was purchased and January 1995 when the Ritchies first occupied is referred to from now on as the pre-occupation period".

31. In June 2006 the Ritchies were at home one evening when two men knocked at the door. They explained that they were property developers and wished to build an estate on the land behind the Ritchies' land, and needed their land for access. They were prepared to offer £2,000,000 for the whole of the land.

32. The Ritchies accepted the offer and on 19 January 2007 the transaction was completed and the money paid into the Ritchies' business bank account, the only bank account they had.

The investigation

33. We set out here an account of the investigation by HMRC into the Ritchies' returns for 2006-07. This is taken primarily from the evidence of Mrs McIvor and Mr O'Neill. We do not understand any part of what we say below to be in dispute, although the legal consequences of some of HMRC's actions described are very much in dispute. We therefore find what is set out below as fact, stressing however that what we are finding is what happened, what was said or done, and we make no finding about whether any statements of opinion or other assertions referred to are correct.

34. The individual tax returns for the year of assessment 2006-07 (SA 100) were filed by each of the Ritchies in January 2007. They were filed in paper form by Mr Weir after the Ritchies had signed them.

35. A partnership return for 2006-07 was also filed.

36. No enquiry under s 9A Taxes Management Act 1970 ("TMA") was started into the individual returns of Billy and Hazel for 2006-07 nor was an enquiry begun under s 12AC TMA into the partnership returns (had it been that would have caused an automatic enquiry unto the personal returns – s 12AC(6)).

37. On 25 May 2010 Mr Uel Magill, an officer of HMRC, started an enquiry into the 2006-07 partnership returns of Billy and Hazel in partnership now operating a takeaway in Magherafelt, a larger town not far from Moneymore. The opening of this enquiry took the form of a "discovery letter" which is not a statutory notice. The only significant matter arising was the source of the introduction of capital into the business of just over £2 million.

38. On 28 July 2010 Mr Seamus O'Neill (operating as Weir & Co in succession to Mr Victor Weir) informed HMRC that £2,000,000 of the capital was from the sale of the Ritchies' house at 28 Station Road, Moneymore. Because there are two O'Neills in this case (the other being the DV), anything done by Mr Seamus O'Neill in his capacity as principal of Weir & Co is simply attributed to Weir & Co.

39. Weir & Co informed HMRC on 20 September 2011 that the land was acquired in July 1987, planning permission acquired in 1991, construction commenced in 1992 and occupation as a residence by Billy and Hazel was in 1995. They added that there was an old agricultural shed on the site which was used by the Ritchies during the period of ownership.

40. On 14 October 2011 Mrs McIvor sought the assistance of the District Valuer. The helpse sought was the DV's informal opinion of the permitted area for the purposes of s 222 TCGA.

41. On 30 March 2012 Mr Gerard O'Neill, the DV, informed Mrs McIvor that is his view not all of the land would qualify as being inside the permitted area.

42. As the Ritchies did not agree, Mrs McIvor referred the matter back to the DV to see if an agreed valuation could be reached, and for this purpose the Ritchies engaged a tax specialist, Mr Clifford Rogers of Rodgers, Weir & Co Chartered Accountants in Belfast. We were told that the "Weir" in the name had no connection with Mr Victor Weir or Weir & Co.

43. On 22 January 2013 Mrs McIvor issued "discovery letters" to each of the Ritchies in relation to their personal income tax returns for 2006-07. The letters stated that Mrs McIvor believed that there was a potential chargeable gain made by each on the sale of 28 Station Rd, Moneymore, the gain arising from the land in excess of the DV's view of the permitted area. The letter pointed out that no mention of any gain had been made in the returns.

44. On 7 March 2013 a "closure notice" (Mrs McIvor's words) was issued in relation to the partnership enquiry. The notice said that no amendment was sought to the partnership return.

45. On 12 March 2013 "discovery" assessments made under s 29 TMA (ie assessments which are not self-assessments) on each of the Ritchies in the sum of £100,000 being Mrs McIvor's estimate of the amount of a chargeable gain said to have accrued to the Ritchies. This was also expressly said to be based on the DV's view of the permitted area and was being made to "protect" HMRC's position in view of the impending end of a 6 year time limit for making assessments under certain conditions.

46. On 27 March 2013 Mrs McIvor issued additional discovery assessments to CGT on each of the Ritchies on gains of £342,640 (this was in addition to the £100,000). The gain assessed by these assessments was stated to have arisen as a result of a review of the papers which brought to Mrs McIvor's attention the long pre-occupation period. This period meant according to HMRC that any part of the gain that was otherwise to be treated as exempt from CGT because the land concerned was within the permitted area had to be time apportioned by virtue of s 223 TCGA. The assessments were based, Mrs McIvor said, on a best estimate of the apportionment needed.

47. Appeals were made by Weir & Co on 27 March 2013 against the 12 March 2013 assessments (the "first discovery assessments") and on 23 April 2013 against the 28 March assessments (the "second discovery assessments").

48. The letter from Weir & Co of 27 March appealing against the first discovery assessments also asked for an independent review. On 9 April 2013 Mrs McIvor noted the request but said it was "premature" as the assessment was merely protective.

49. On 27 June 2013 a Mr Mackinnon, also an Inspector of Taxes, assumed the role of reviewing officer, presumably in response to Weir & Co's letter of 27 March, although Mr Mackinnon's letter referred to Weir & Co's letters of 23 April and 24 May which did not seek such a review.

50. Mr Mackinnon's review merely considered whether Mrs McIvor had referred the question of the permitted area prematurely to the DV, and concluded that she had and apologised.

51. Correspondence between Mrs McIvor and Weir & Co ensued, and following a meeting with the DV, on 31 October 2013 Mrs McIvor gave to Weir & Co HMRC's view that the permitted area was 0.5ha and that this figure applied whether or not the shed was part of the dwelling house, although in HMRC's view it was not.

52. On 14 January 2014 a meeting was held between Mrs McIvor and Weir & Co together with Clifford Rodgers. Mr O'Neill and a senior Valuer in LPS, Stephen Halliday, were present for part of the meeting. No agreement was reached on the permitted area or the dwelling house, and the apportionment issue was briefly discussed.

53. Following an unsuccessful attempt at ADR, letters were issued by HMRC on 11 June 2015 to each of the Ritchies setting out HMRC's "view of the matter" with updated computations of the gains said to arise as a result of more information about

costs. As a result the total chargeable gain said to have accrued to each of the Ritchies was £301,740.

54. On 20 August 2015 the Hazel and Billy notified their appeals against the two discovery assessments on each of them to the Tribunal.

Evidence of HMRC witnesses and further findings of fact: Mrs McIvor

55. Mrs McIvor's witness statement stood as her evidence in chief. For the most part it related the facts of her (and Mr Magill's) investigation into the partnership and the Ritchies' individual returns, as set out at §§33 to 53. It also included her reasons for thinking that the Ritchies had been careless in omitting any mention of the gains on the house from their returns, reasons which she maintained justified her making assessments on the Ritchies in March 2013, nearly 6 years after the year of assessment in which the gains accrued.

56. She was cross-examined by Mr Gordon on, among others, the following matters.

Mr Magill's investigation of the partnership

57. She agreed that answers to Mr Magill's letter of 25 May 2010 enquiring about the source of capital of c £2m introduced into the partnership were not enforceable.

The area of the land

58. She was asked about Mr O'Neill's figure of 0.665ha in his report. She accepted she had not measured the land: she had used the figure of 0.699ha given by the Ritchies throughout her investigation and calculations.

59. She said that the Ritchies' accountants' letter of 20 May 2011 was the first indication she had of size, and that referred to two parcels of 0.615ha and 0.084 ha, thus totalling 0.699ha.

The Schedule 36 letter and notice

60. Mrs McIvor agreed that a Schedule 36 notice (to provide information on pain of a penalty) issued by her on 13 April 2011 did not refer to the need for careless conduct to be established in accordance with Condition B in paragraph 21 of the Schedule. She did not think that that was unfair.

Discovery

61. She was asked what discovery she had made. Her reply was that she had made two discoveries: first, that the area was greater than 0.5ha but there were no entries on the returns, and second that there had been a long period between purchase of the land and occupation of the house. This explained the two separate assessments.

Careless conduct

62. Mr Gordon asked her what the careless conduct of the Ritchies was that justified her in raising the discovery assessments. She considered that this was not a standard residential sale as evidenced by the need to refer to specialists yet there was no consideration given to the HMRC Helpsheet on private residences.

63. She maintained that both Ritchies were careless as Hazel was aware of the same facts as her husband, she but accepted that they (Billy acting for Hazel as well as in his own right) had gone to their accountant to seek advice and that she would expect a tax specialist to understand the private residence rules.

64. She added that whether there was carelessness in relation to the tax advice from Mr Russell depended on what facts were given and how the advice was acted on.

65. Asked what more the Ritchies should have done, she referred to Mr Russell's advice as set out in his witness statement as being that the Ritchies may get relief, and were not told definitely that relief would apply, so there should have been a white space entry on the returns.

The assessments

66. Mrs McIvor said she was aware of the need to "show" carelessness (she did not accept Mr Gordon's suggestion that she needed to have proved it). She agreed that she had not informed the Ritchies that she needed to show carelessness in order to justify the assessments or that the Ritchies had a right of appeal against the assessment on that specific ground. That was unintentional, she said.

The reference to a senior officer

67. Mr Gordon queried Mrs McIvor's memo to her senior officer, Mr Pat Quinn, accompany a request for approval to make ETL assessments, ie ones made after the normal 4 year time limit. In that memo she said that the Ritchies had been "at least careless". She agreed with Mr Gordon that there was no evidence of deliberate behaviour and that the HMRC Charter required her to treat a taxpayer as honest.

Other matters

68. Mr Gordon devoted a lot of time in his cross-examination to what he regarded as errors or misunderstandings on Mrs McIvor's part. He referred in particular to a complaint by Clifford Rogers that Mrs McIvor had referred the case prematurely to the DV. He also referred to a letter Mrs McIvor wrote in which she agreed that the shed was part of the dwelling house. She explained that she had been mistaken and was referring to the potting shed which she accepted as part of the dwelling house, and not the shed on the old station platform[1].

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[1] Some readers of a certain age will know why Judge Thomas (and Mr Gordon) were irresistibly reminded at this stage of a Monty Python sketch involving a Mr Arthur "Two Sheds" Jackson.

Our view of Mrs McIvor's evidence and findings of fact

69. We have no doubt that Mrs McIvor was doing her best to assist the Tribunal and that she was an honest and credible witness. She was quite prepared to admit to errors (although we do not intend to make any findings on the matter, and do not need to, we are of the tentative view that she may have admitted more errors or misunderstandings than in fact she needed to).

70. From her evidence we find as fact that on the balance of probabilities:

(1) she had an honest belief that she had made two discoveries in relation to each of the Ritchies, in relation to the permitted area and the "pre-occupation" point.

(2) she had an honest belief that the Ritchies' conduct was careless in that they should have at least made a white space entry on their returns about the circumstances of the sale of 28 Station Rd.

Evidence of HMRC witnesses and further findings of fact: Mr O'Neill

Mr O'Neill's credentials

71. Mr O'Neill's evidence was the expert evidence of a chartered surveyor on the question of the "permitted area", the appropriate area of grounds and garden for the dwelling house built on the land at Station Rd.

72. Mr O'Neill's report contained a statement of truth and declarations. We understand that District Valuers have been provided in their guidance manuals with extensive material on the form and content of an expert witness report and that these declarations were taken from that guidance. No objection was taken to Mr O'Neill's qualifications, expertise or independence.

Mr O'Neill's Expert Report

73. Mr O'Neill's report described at Part 3 the "Size Character and Environment of the Property":

(1) the property was situated at the northern edge of Moneymore approximately 0.5 miles from the centre of the "village".

(2) it is in a "semi rural" location, and is surrounded by undeveloped land but is opposite an area which has been developed for housing

(3) it comprises a modern detached split level chalet style house of traditional construction

(4) rating records show that the Gross External Area ("GEA") is 222m^2 and that an additional 91m^2 of ancillary accommodation is at the lower ground floor level. The property was first entered on the valuation list in November 1994

(5) the property is on a roughly rectangular site c 170 m along the north/south axis and c 50m along the east/west axis. The front wall of the house is c 50m from the front boundary (on the northern side) and main entrance

(6) there are two entrances and driveways on the northern boundary separated by shrubbery. One, to the east of the other, provided the main entrance to the front garden and house. The other was less well maintained and shielded from the house by the shrubbery. The two driveways merge just before the front of the house.

(7) immediately to the front and rear of the house are maintained gardens. To the rear (south) of the back garden there is a less well maintained area ("the rear area")

(8) in the rear area, and c 70m from the house is a shed. This was formerly railway property and is situated on the western platform of the old Moneymore station. The shed was not valued with the house in the rating assessment.

74. Section 5 of the Report described the planning history of the property.

75. Section 6 is headed "The Entity of the Dwelling". This section merely says that the inspector [*ie Mrs McIvor*] had decided that "the shed does not form part of the entity dwelling house and therefore does not have to be included in the permitted area."

76. Section 7 is headed "Definition of Permitted Area" and at section 7.1 sets out a definition from the Valuation Office Guidance section 98.1 which mirrors that in s 222 TCGA. The paragraph adds that the definition "should be strictly interpreted" that is that it is not enough that a house might be more pleasantly enjoyed with more than with 0.5ha and that relief for areas in excess of 0.5ha should be exceptional, and must "be justified as "required" for the "reasonable enjoyment" of the house as a residence … by general standards prevailing at the date of disposal."

77. Section 7.2 sets out the Valuation Office Guidance on the meaning of "required" in s 222 referring *[it appears, as something seems to have gone awry at this point*] to an extract from an unnamed decision of du Parcq J.

78. Section 7.3 is Mr O'Neill's opinion on the permitted area. It is:

> "I am of the opinion that a permitted area of greater than 0.5 hectares is not required and is not necessary for the reasonable enjoyment of the dwelling as a residence having regard to its size and character …."

79. Section 8 sets out Mr O'Neill's reasoning. He says that he must be satisfied by objective tests [*and here he puts quotation marks*] "that a substantial proportion of those likely to be in the market for the dwelling house as a residence would require a certain minimum area of garden/grounds exceeding 0.5 of hectare to be included with the residence and that any smaller area would substantially inhibit the reasonable enjoyment of the house as a residence". [*The source of this quotation is not given*]

80. The objective judgment, says Mr O'Neill, must be made of the likely requirements of the typical person who would normally wish to live in a house of this size and character. No weight should be given to the special or individual requirements of the actual occupier. He then quotes an extract from an unnamed decision of Mr Justice Evans-Lombe confirming the objective nature of the test and that the most obvious evidence is the extent of the gardens and grounds of similar properties in the area, bearing in mind that there is a tendency towards smaller gardens and that houses in urban areas have smaller gardens/grounds than those in rural areas. These "similar properties in the area" are called "comparables" in the report.

81. The rest of Section 8 lists the comparables that Mr O'Neill considered with his remarks on them. He explained that the GEA of the comparables is taken from LPS records as is the capital value for rating purposes (the capital value of 28 Station Road is £200,000). The garden and grounds were measured using the LPS mapping tool.

82. The first 9 comparables were nearby and in the immediate neighbourhood of 28 Station Rd. They were bought at roughly the same time as 28 Station Road and none of them have a garden and grounds in excess of 0.14ha.

83. Comparables 10 to 15 are within a 1 mile radius. They are said to be broadly similar in size to 28 Station Rd and none have garden and grounds of more than 0.4ha. Comparables 10, 11 & 14 are closest in age and character and none has more than 0.336ha. Comparable 12 is a much larger dwelling but still with only 0.25ha.

84. Within a 2 mile radius Mr O'Neill lists comparables, all slightly larger and in a more rural setting. The largest garden and grounds area is .38ha.

85. Within a 3 mile radius Mr O'Neill identifies 6 comparables. Nos 23 and 24 were similar in age, size and character to 28 Station Rd but both have less than 0.3ha. Others are more modern and substantially larger and more rural and have 0.3ha and 0.25ha respectively.

86. Comparable 25 is 3.2 miles rom 28 Station Rd. It is a modern chalet house of similar size to the subject and has garden and grounds of 0.273ha.

87. In summary Mr O'Neill's opinion based on the comparables is that 28 Station Rd fails to meet the objective test for a permitted area of more than 0.5ha.

88. Section 9 deals with the location of the permitted area, and takes as its starting point s 222(4) TCGA. Having regard to the Valuation Office Guidance at paragraph 8.52, Mr O'Neill was of the view that any odd parcels of land falling outside the permitted area would be usable in conjunction with the larger site and would not become landlocked or unusable.

89. On the basis that the shed does not form part of the dwelling house and there is no requirement to include it in the permitted area, Mr O'Neill's opinion was that the most suitable location of the permitted area is the land nearest the dwelling, and the excluded land is thus to the rear [*southern end*] of the site.

90. Section 10 summarises the opinions previously expressed. There are also a number of Appendices, consisting of a location map (ie of Moneymore and its surroundings), a site map, photographs of the site and shed, an aerial photograph of the site before disposal, details of each comparable with photographs and maps, an aerial photograph showing the permitted area (in Mr O'Neill's opinion) and the same aerial photograph showing lands outside that area.

91. The last two appendices, the maps of the land within the permitted area and the land outside it show that Mr O'Neill has drawn a line running roughly west-east and being a short distance south of a row of trees or shrubs forming the end of the rear garden of the house. The shed and an area in front of the shed and part of the driveway to the shed as well as land to the sides and rear of the shed fall outside the permitted area.

92. Annotations to the aerial photographs indicate that the permitted area is 4,967.58m^2 and the rest is 1,625.75m^2. This adds up to 0.6593ha.

Oral examination in chief of Mr O'Neill

93. Mr Foxwell asked what Mr O'Neill meant by "ancillary" (see §73(4)). He agreed this was the bottom floor, that it was in residential use and that the figure of 311m^2 should have been used in his comparables.

94. He was asked whether he had ever agreed in any case that more than 0.5ha was permitted. He had once in relation to Augher Castle.

95. He could not say whether the acquirers of the land could have developed the site they wished to without the Ritchies' land. He was of the view that a developer would make no distinction between parts of a site when setting the price they would pay and so there was no reason to specifically value the non-permitted area. An area apportionment was the only appropriate way.

96. When he was asked why he said 0.665ha in his report when Mrs McIvor had used 0.699ha he said it was an error and that it should be 0.699. He could not be exactly sure of the boundary which was complicated.

97. He did not agree with Savills' figure of 359m^2 for the GEA. Nor did he agree with the Savills report about the permitted area.

98. Mr O'Neill said that the Ritchies' current house in Moneymore had 0.4ha and a large shed.

Cross-examination of Mr O'Neill

99. In reply to Mr Gordon's questions Mr O'Neill agreed that:

(1) in rural locations houses are more widely spaced out

(2) he followed the Valuation Office Guidance. He did not believe it was for the taxpayer to show the permitted area: he was persuaded by the comparables that his initial view was correct

(3) he had only visited the site first in 2013, 5 years after the Ritchies moved out, although he had peered over the fence in 2012

(4) the figure of $91m^2$ for the basement should have been used in his comparables, making the total $311m^2$

5 (5) properties around the $300m^2$ mark were more appropriate comparables

(6) comparables 1 to 5 were suburban not rural properties.

100. He did not agree that:

(1) terrain, in particular the undulating character of the land in question, was relevant for comparables

10 (2) that the shed was required for reasonable enjoyment of the house

(3) properties built after 2006 should be disregarded as there had been no change in tastes about the size of gardens and grounds since then.

Re-examination

(4) Mr O'Neill was of the opinion that comparables 17 and 24 were the most 15 appropriate comparisons. They showed an area of 0.38ha and 0.29ha respectively.

Our view of Mr O'Neill's expert evidence and findings of fact

101. We consider Mr O'Neill was an honest, careful and credible witness. He accepted that the GEA should have been increased by $91m^2$ to account for the 20 basement once it was established that it had been used for residential purposes – he had relied on rating evidence rather than first hand knowledge which he could not have had when compiling his report. He accepted that this increase made many of his comparables less helpful.

102. Those points apart we accept his evidence in full. To the extent that his report 25 was of fact we find those parts as fact. As to his expert opinion, his was the only expert opinion evidence we had. In fact it was the only admitted evidence on the permitted area question as, although he was questioned on the Savills report, that report had not been tendered as evidence by the appellants. In the absence of any opportunity for HMRC to cross-examine anyone on the Savills report, we give far 30 more weight to Mr O'Neill's view and in particular to the more relevant of his comparables. We accept his opinion evidence with this caveat: it was based on the assumption that the shed was not part of the dwelling house as an entity.

Evidence of the appellants and further findings of fact: the Ritchies

Mr Billy Ritchie's evidence

35 103. Billy made a witness statement which contained factual details of his and Hazel's acquisition of the land at what became 28 Station Road and the reasons for it, and these are set out in §§22 to 32. He also told the Tribunal that throughout the period of ownership, ie both before and after the house was built, he made extensive

use of the shed for his passions in life, in particular ploughing. He told us that he travelled all over Ireland and Great Britain and indeed Europe in ploughing competitions. Before the house was built the shed was also used for storage as the cottage they occupied was too small for their belongings. Before the house at No 28 was constructed he laid a heavy duty electrical supply to the shed from No 22 and installed a loft area in the shed and a telephone line. This line was not needed after occupation of the new house as the shed was visible from the house.

104. In relation to his tax returns Billy said that the receipt of £2 million was a life changing event. They only had one bank account which was the business bank account and it was into this account that the £2 million was paid.

105. He had used Victor Weir to produce the business accounts and file tax returns for many years and so naturally he would seek his advice about the tax consequences of the sale, which Billy recognised as out of the ordinary. He said that he was prepared to pay as much as it cost for the best advice.

106. Victor Weir had told him that he was not an expert in this type of tax issue and suggested that he go to see Clive Russell. He told us that he did not know what to ask but answered all of Clive Russell's questions. Russell told him that "it would be very unlikely that a tax charge would arise on the disposal of the property given the extensive use we had made of the site" [*the words in Billy's witness statement*]. He got nothing in writing from Mr Russell.

107. When the enquiries from HMRC started it had a deleterious effect on his health and well being. He had to give up competitive ploughing because he could not concentrate enough to keep the furrows straight.

108. In cross-examination Mr Foxwell asked Billy to confirm that he saw Mr Russell on his own and that his advice was oral and that he was happy with an oral opinion. Billy confirmed these points.

109. Mr Russell had asked the questions and Billy had answered them.

110. Mr Foxwell pointed to his witness statement where he said it was very unlikely there would be a taxable gain. Billy was adamant he had said "no tax".

111. Did Billy expect HMRC to query that no tax was due? Billy said he did not know what he expected.

112. Billy agreed he was aware there was more than 0.6ha and that there was 7½ years between acquiring the land and occupying the house. On the latter point Billy said he would have told Mr Russell if he had been asked.

113. On the question of photos mentioned in Mr Russell's statement Billy said he was told to bring photos and maps and he took them.

114. He had no discussion with Mr Weir about CGT.

Mrs Hazel Ritchie's evidence

115. Hazel confirmed what Billy had said about his use of the shed. She said that Billy had three priorities in life: number 1, the shed; number 2, her and number 3, their children.

116. She said that when Billy had come back from seeing Mr Russell he had told her "We'll be fine".

Our view of the Ritchies' evidence and findings of fact

117. Both Hazel and Billy had clearly been emotionally affected by the tax investigation and other events when giving evidence, and the strength of that emotion was obvious. We have no doubt that they were telling the truth as best they could remember from so long ago. Billy in particular would readily admit that he could not be sure about certain matters that took place over 10 years ago.

118. We accept their evidence, with one caveat. At §110 we refer to an exchange between Billy and Mr Foxwell. What is said in Billy's witness statement about Mr Russell's advice is more nuanced that his answer to Mr Foxwell. We find from that what is said in the witness statement is Billy's recollection of what Mr Russell actually said and that his answer is the interpretation of it he gave to Mr Weir.

119. As a result we find as fact that:

(1) Billy had taken steps to find out if he had a tax problem from the sale of land

(2) he had approached the only person it was reasonable for him to approach in the first instance, Mr Weir

(3) he was prepared to pay what it cost for advice

(4) he had not volunteered any information he was not asked for by Mr Russell

(5) he had told Mr Weir that there was no problem about tax and this was his honest interpretation of what Mr Russell had told him

(6) he had taken no other steps to verify what Mr Russell had told him.

Evidence of appellants' witnesses and further findings of fact: Mr Weir

Mr Weir's credentials

120. Mr Weir had made a witness statement in which he said that he ran a general accountancy practice in mid Ulster from October 1974 to April 2008, that during this time the Ritchies were personal and business clients and that he had numerous dealings with the Ritchies on personal and business matters.

Mr Weir's evidence

121. He had been told in mid-2006 by Billy that he had received a sizable offer for the sale of his personal property.

122. He said he was aware from his knowledge of the holding at 28 Station Rd that they had a peculiar site which may give rise to CGT, so he referred Billy to Mr Russell, who he described as an independent tax specialist who he had always used for tax advice as he was excellent and gave sound advice.

123. When he prepared the Ritchies' tax returns for 2006-07 he relied on the advice Mr Ritchie had received from Clive Russell that the property would be exempt from CGT.

Cross-examination of Mr Weir

124. In cross examination Mr Foxwell asked Mr Weir what he meant about 28 Station Rd being a "peculiar site". Mr Weir said he meant the amount of money, not the site as such.

125. He agreed that he had nothing in writing from Mr Russell and that he interpreted Mr Russell's advice (as relayed by Billy, so second hand evidence) as being that the gain was exempt.

126. When he completed the Ritchies' tax returns for the year he had followed his normal practice. He had probably gone through the CGT pages with them. He added that he did not have a business computer at the time so did not have access to online material from HMRC. He had not looked at the IR 283 Helpsheet.

Our view of Mr Weir's evidence and findings of fact

127. We have no doubt that Mr Weir was doing his best to assist the Tribunal and that he was an honest and credible witness.

128. From his evidence we find as fact that on the balance of probabilities:

(1) he took no steps to corroborate with Mr Russell either by talking to him or seeking a written opinion from him as to what precisely his advice to Billy had been.

(2) he accepted Billy's account of Mr Russell's advice without any further research on his part

(3) He would have known from his lengthy history of dealings with the Ritchies since the 1970s about the 7½ year gap between the purchase and the occupation of the house that Billy built

(4) He was aware of and saw page 2 of the SA100 and would have had the Tax Return Guide ("TRG") with him when he completed the returns for the Ritchies, but did not at that time have the IR 283 Helpsheet.

Evidence of appellants' witnesses and further findings of fact: Mr Russell

Mr Russell's credentials

129. Mr Russell had made a witness statement. He said in that that he was a former Tax Inspector but said nothing more about his expertise. The letter head showed him in business as Clive Russell Associates "Tax Accountants & Consultants" and he showed himself as "BA, Cert Dip AF".

130. He says that the statement is made from facts and matters within his knowledge, from information held by him and from his personal recollection.

Mr Russell's evidence

131. The advice he gave to Mr Ritchie in May 2007 was based on his training and experience as a former Tax Inspector with the Inland Revenue and was the following effect.

132. The relief under s 222 TCGA permitted exemption from CGT for the whole area of a principal private residence where it occupied "less than half a hectare and was "enjoyed" with the building as part of the overall curtilage".

133. Beyond half a hectare relief was still possible provided the larger area was not separately enclosed, like a paddock, or used for business or some non-domestic purpose but was considered necessary for the reasonable enjoyment of the house taking its size and character into account.

134. In Mr Ritchie's case the total area was some 0.7ha and included the shed. "I advised him that in my opinion he had a good case for claiming the extension to the permitted half hectare area but it was important to take plenty of photographs showing him and his family enjoying the use of the whole of the premises as part of his PPR."

135. He added that if any part of the premises was not considered eligible for PPR relief a valuation would be required of the separate parts to be applied to the sales proceeds and to cost or 1982 value.

Cross-examination of Mr Russell

136. In cross examination Mr Foxwell asked him about his experience in cases where more than half a hectare was involved in a PPR claim. He said he had a few such cases.

137. He was asked how the Ritchies would establish their entitlement to the exemption. He said it could be in the tax return but that was not compulsory.

138. Asked about his reference to a 1982 valuation he said that this was a stock phrase – cost and 1982 valuation go together.

139. Mr Russell explained that his contemporary notes had been shredded in 2015 in accordance with normal policy.

140. He agreed that he didn't say there was no CGT: he said that if it meets the tests it is exempt.

5 ### *Questions of Mr Russell from the Tribunal*

141. In response to questions from the Tribunal Mr Russell said that the documentation he would have had was all about the permitted area. He was not aware of any possible issue concerning the pre-occupation period. In re-examination he put it as that he could not remember being told about that period.

10 142. He also confirmed that he had not worked in HMRC as a specialist on CGT.

Our view of Mr Russell's evidence and findings of fact

143. We have no doubt that Mr Russell was doing his best to assist the Tribunal and that he was an honest and credible witness. But he was clearly hampered by the fact that he was giving evidence of a conversation he had had with Billy Ritchie nearly 10
15 years previously, and that his statement was made without the benefit of such written notes and other materials which he had kept.

144. There is in such circumstances an understandable temptation, even if unconscious, to "remember" things that ought or should have been said at a meeting. We cannot know if Mr Russell had fallen prey to such a temptation, but it means that
20 the weight we can give his evidence in support of the Ritchies' position must be less than it would be had there been contemporary material for him to rely on.

145. From his evidence we find as fact that on the balance of probabilities:

(1) He would before the meeting have consulted that part of the HMRC Capital Gains Tax Manual dealing with PPR relief

25 (2) he did not assure Billy that the gain *would* be exempt or tell him that nothing need be put on the tax return

(3) he advised Billy to get together [*the reference in his witness statement to his advice to "take plenty of photographs" (in the present tense) must have been a slip, as in May 2007 the Ritchies were no longer in occupation*] evidence of
30 use of the shed as material that might be needed to demonstrate to HMRC that the gain was exempt. Billy's evidence was that he was asked to take photos to Mr Russell. We do not think that this means that what Mr Russell said here was not true. Billy's photos may not have been relevant to this request

(4) he was not made aware by Billy of the pre-occupation period and he did
35 not ask about it.

Law

146. The law in 2006-07 relating to the relief from CGT on private residences is found in ss 222 to 226 TCGA, and the parts relevant to this case are:

5
10
15
20
25
30
35
40

"**222 Relief on disposal of private residence**

(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

(b) land which he has for his own occupation and enjoyment with that residence as its garden or grounds up to the permitted area.

(2) In this section "the permitted area" means, subject to subsections (3) and (4) below, an area (inclusive of the site of the dwelling-house) of 0.5 of a hectare.

(3) Where the area required for the reasonable enjoyment of the dwelling-house (or of the part in question) as a residence, having regard to the size and character of the dwelling-house, is larger than 0.5 of a hectare, that larger area shall be the permitted area.

(4) Where part of the land occupied with a residence is and part is not within subsection (1) above, then (up to the permitted area) that part shall be taken to be within subsection (1) above which, if the remainder were separately occupied, would be the most suitable for occupation and enjoyment with the residence.

…

(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, …

…

(10) Apportionments of consideration shall be made wherever required by this section or sections 223 to 226 and, in particular, where a person disposes of a dwelling-house only part of which is his only or main residence.

223 Amount of relief

(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 …

(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…, divided by

(b) the length of the period of ownership.

288 Interpretation

"land" includes messuages, tenements, and hereditaments, houses and buildings of any tenure"

147. We add an Extra-statutory Concession here because it was potentially relevant to this case:

5 "**ESC D49--Private residence relief: short delay by owner-occupier in taking up residence.**

This concession applies--

- where an individual acquires land on which he has a house built, which he then uses as his only or main residence,

10 - where an individual purchases an existing house and, before using it as his only or main residence, arranges for alterations or redecorations or completes the necessary steps for disposing of his previous residence.

In these circumstances, the period before the individual uses the house
15 as his only or main residence will be treated as a period in which he so used it for the purposes of TCGA 1992 s 223(1), (2)(a), provided that this period is not more than one year. If there are good reasons for this period exceeding one year, which are outside the individual's control, it will be extended up to a maximum of two years.

20 Where the individual does not use the house as his only or main residence within the period allowed, no relief will be given for the period before it is so used. Where relief is given under this concession it will not affect any relief due on another qualifying property in respect of the same period."

25 148. We also set out in this part the requirements of HMRC in relation to CGT in a tax return to be made and delivered by an individual under s 8(1) TMA:

"**8 Personal return**

(1) For the purpose of establishing the amounts in which a person is chargeable to … capital gains tax for a year of assessment …, he may
30 be required by a notice given to him by an officer of Revenue and Customs—

(a) to make and deliver to the officer … a return containing such information as may reasonably be required in pursuance of the notice, and

35 (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required."

149. In the year of assessment 2006-07 a tax return SA100 Page 2 contains questions to be answered by the person making the return. Question 8 is:

40 "Capital gains - read the guidance on page 7 of the Tax Return Guide.

- If you have disposed of your only or main residence do you need the Capital Gains Pages?

• …"

150. Page 7 third column of the TRG for 2006-07 says (relevantly):

> "Fill in the Capital Gains Pages if:
>
> • you disposed of chargeable assets worth more than £35,200, **or**
>
> • …
>
> In working out **if the assets you disposed of were worth more than £35,200**, if you gave an asset away or sold it for less than its full value, use its market value rather than any sum you received.
>
> Include all assets disposed of wherever in the world they are situated but exclude exempt assets such as cars, *and also your home if the whole gain from its disposal is exempt. It will be exempt if it has been your only residence throughout the period you owned it (ignoring the last three years) and the area of its garden and grounds disposed of with it did not exceed half a hectare.* You may also be entitled to relief in other circumstances. Ask the Orderline for Helpsheet IR283*:* Private Residence Relief. Also exclude assets disposed of to your spouse or civil partner if you were living together at some time in the year.
>
> …" [Tribunal's emphasis by italicisation: the emboldening is in the original]

151. Helpsheet IR 283 says relevantly (all emphasis is in the original):

> "**HOW THE RELIEF WORKS**
>
> If you dispose of:
>
> - a dwelling-house (which can include a house, flat, houseboat or fixed caravan) which is your home, or
> - part of a dwelling-house which is your home, or
> - part of the garden attached to your home
>
> you would normally have to pay Capital Gains Tax on any gain you make. **However, you will be entitled to full relief where all the following conditions are met:**
>
> - the *dwelling-house* has been your *only or main residence* throughout your *period of ownership*, **and**
> - you have not been absent, other than for an allowed *period of absence* from your home during your period of ownership or through living in *job-related accommodation*, **and**
> - the *garden or grounds* including the buildings on them are not greater than the *permitted area*, **and**
> - no part of your home has been used exclusively for business purposes during your period of ownership.
>
> The terms in *italics* are explained aside. If you meet all these conditions, you will not have to pay Capital Gains Tax on the disposal. You will not

need to complete the Capital Gains Pages of your Tax Return if you have made no other disposals or chargeable gains and do not wish to make any Capital Gains claims or elections. (See page CGN2 in the Notes on Capital Gains.) If not all of the conditions are met, you may still get partial relief under certain circumstances and you will need to complete the Capital Gains Pages of your Tax Return. This Helpsheet describes the circumstances when you may get relief and explains how much relief you can deduct from any gain to calculate the chargeable gain.

…

DEFINITION OF TERMS

Dwelling-house

Your dwelling-house may be a single building, for example, a detached house. It may be more than one building, for example, a house with a detached garage. Or it may be part of a building, for example, a flat. If your home includes more than one building, for example, if it has several outbuildings, any relief available for your dwelling-house might not extend to all of the outbuildings.

Example 1

Your home consists of a house, a detached garage and granny flat near the house, half an acre of garden and a summer house at the end of the garden. Your dwelling-house is the house together with the garage and the granny flat, but excluding the summer house.

Deciding which buildings make up your dwelling-house is only important if your home has a garden or grounds larger than the permitted area, see page 3.

…

Period of absence

Some periods when you were not using the house as your only or main residence will still qualify for relief. These should be treated as periods of actual occupation when you are calculating the fraction of any gain that qualifies for relief.

If you do not occupy your new home when you acquire it because you are not able to sell your old home, or you need to carry out refurbishment, you can treat the first 12 months as if the house had been your only or main residence in that period. In exceptional circumstances we may allow you to treat a longer period (up to a total of two years) in the same way. The same treatment applies when you buy land to build a house on it.

…

Garden or grounds

You are entitled to relief if you dispose of land that you occupy as your garden or grounds, up to the permitted area, at the time of your disposal. The garden or grounds includes the buildings standing on that land. So a building that is not part of your dwelling-house can still qualify for relief if it is within the permitted area of garden or grounds. The garden or grounds will include any enclosed land surrounding or attached to your dwelling-house and serving chiefly for ornament or

recreation. However, not all land you hold with your dwelling-house is treated as the garden or grounds of that residence. …

Permitted area

If your garden and grounds do not exceed half a hectare (which is a little over 1 acre), you are entitled to relief for all of it. Look again at Example 1. The summer house was not part of the dwelling-house. But the grounds do not exceed half a hectare and so the summer house, which stands in the grounds, will still attract relief.

If your garden and grounds exceed half a hectare, you may not be entitled to relief for all of it. The area for which you are entitled to relief is called the permitted area. It consists of the area that is required for the reasonable enjoyment of your dwelling-house as a home. The size and character of your dwelling-house must be taken into account.

If your garden and grounds exceed half a hectare, and you have disposed of all or part of the garden and grounds, you should:

• enter details of the disposal and gain on Pages CG2 and CG3, and

• explain in the 'Additional information' box on Page CG7 of the Capital Gains Pages why you think, if appropriate, all or part is exempt from Capital Gains Tax.

We may ask for further details in these cases and the District Valuer will be asked to determine the size and location of the permitted area.

HOW TO CLAIM RELIEF

Write 'Private residence relief' in column G on page CG2 of the Capital Gains Pages next to the relevant disposal(s) and enter the amount of relief claimed."

152. The Tribunal felt that it had to be a little cautious in expressing any views on some matters. It appeared from the Savills' report that there might in some circumstances need to be a valuation of both the permitted area and the rest in order to arrive at an appropriate apportionment. We pointed out to the parties that valuation matters were reserved to another Tribunal by s 46D TMA:

"(1) In so far as the question in dispute on an appeal to which this section applies—

(a) is a question of the value of any land or of a lease of land, and

(b) arises in relation to the chargeable gains (whether under capital gains tax or corporation tax) or in relation to a claim under the 1992 Act,

the question shall be determined by the relevant tribunal.

(2) This section applies to—

…

(d) an appeal against an assessment to tax which is not a self-assessment;

…

(3) In this section "the relevant tribunal" means—

…

(c) in relation to land in Northern Ireland, the Lands Tribunal for Northern Ireland."

5 153. We agreed with the parties that if we were required to make an apportionment and we were satisfied on the evidence that it was appropriate to make that apportionment on an area only basis, we would not need to refer anything to the Lands Tribunal.

154. The law relating to discovery assessments and assessments made more than four 10 years but less than six after the end of the relevant year of assessment is as follows.

"**29 Assessment where loss of tax discovered**

(1) If an officer of Revenue and Customs … discover[s] … as regards any person (the taxpayer) and a year of assessment—

(a) that any ... chargeable gains which ought to have been assessed 15 to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer … may, subject to subsection[ ] … (3) below, make an assessment in the amount, or the further amount, which ought in his … 20 opinion to be charged in order to make good to the Crown the loss of tax.

(3) Where the taxpayer has made and delivered a return under section 8 … of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

25 (a) in respect of the year of assessment mentioned in that subsection; and

(b) ... in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

30 (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

35 (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 … of this Act in respect of the relevant year of assessment;

…

the officer could not have been reasonably expected, on the basis of the 40 information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer … if—

(a) it is contained in the taxpayer's return under section 8 … of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of Revenue and Customs, are produced or furnished by the taxpayer to the officer ... ; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of Revenue and Customs from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 … of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.

34 Ordinary time limit of 4 years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to … capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

36 Loss of tax brought about carelessly or deliberately etc

(1) An assessment on a person in a case involving a loss of … capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to … any … provision of the Taxes Acts allowing a longer period).

…

(1B) In subsection[ ] 1 …, references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

118 Interpretation

(5) For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation."

Outline submissions of the parties

HMRC's submissions

155. For HMRC Mr Foxwell submitted on the substantive issue that:

(1) the dwelling house did not include the shed

(2) the District Valuer's opinion on the permitted area (on the basis of that view of the dwelling house) was that the permitted area was not more than 0.5ha and this should be accepted by the Tribunal

(3) in any event the gain made by the Ritchies on the whole of the land must be time apportioned to reflect the period of non-occupation as a private residence before and during construction

(4) the assessments should be confirmed in the amended figures produced by Mrs McIvor on 10 June 2015.

156. In support of these propositions Mr Foxwell cited *Lewis (HM Inspector of Taxes) v Rook* ("*Lady Rook*") 64 TC 567 as to the approach to the permitted area, *Methuen-Campbell v Walters* [1979] 1 QB 525 ("*Methuen-Campbell*") on the meaning of "curtilage" (a test established in *Lady Rook*), *Markey (HM Inspector of Taxes) v Sanders* 60 TC 245 (on the question of proximity of an ancillary dwelling

house to the main house) and *Henke v HMRC* [2006] SpC 550 ("*Henke*") on time apportionment before occupation.

157. On the procedural issues he submitted:

(1) Mrs McIvor had discovered a loss of tax by both Billy and Hazel Ritchie, in that a chargeable gain from the disposal of 28 Station Road had been omitted from their returns. The loss of tax arose from the permitted area being less than the total area and from the occupation as a residence being more than 7 years after the land was acquired.

(2) The loss of tax was brought about by the careless conduct of the Ritchies or their advisers acting on their behalf.

(3) Accordingly the assessments raised by Mrs McIvor were made within the time allowed by s 36(1) TMA.

(4) The assessments should be confirmed in the amounts put forward by Mrs McIvor in her letters of 10 June 2015.

The appellants' submissions

158. For the appellants Mr Gordon submitted on the substantive issue that:

(1) the shed was part of the dwelling house

(2) it followed that all the land acquired by the Ritchies in 1987 was required for the enjoyment of the dwelling house as a residence

(3) in the period before occupation of 28 Station Rd, the shed was part of a dwelling house

(4) in the absence of any evidence from HMRC as to the position if (1) is right, the appellants' approach must be accepted

(5) the area of land was 0.65ha, of which 0.05ha was not in the permitted area, and this was the land acquired in 2002 from the DOT (§29).

159. In support of (1) Mr Gordon cited *Batey (HM Inspector of Taxes) v Wakefield* 55 TC 550 ("*Wakefield*") and distinguished *Lady Rook*. In support of (4) he cited a passage from *Henke*.

160. On the procedural issue, Mr Gordon submitted that:

(1) the conduct of the Ritchies was not careless

(2) the conduct of Mr Weir and Mr Russell was not careless

(3) but even if (2) was wrong, HMRC had not pleaded that careless conduct of a person acting on behalf of a taxpayer was involved and so could not support the assessments on that basis

(4) the condition in s 29(4) TMA for raising the discovery assessments was not met

(5) and accordingly the assessments were out of time and should be discharged.

161. In relation to (3) Mr Gordon cited *AB (a firm) v HMRC* [2007] STC (SCD) 99 ("*AB*") and *Bayliss v HMRC* [2016] UKFTT 0500 (TC) ("*Bayliss*"). In this connection he also referred during the hearing to *Atherton v HMRC* [2017] UKFTT 831 ("*Atherton*") and produced a report of that case. Mr Gordon was himself counsel for the appellant in that case and he said that this decision did not support his case on agent's conduct but he thought it proper to bring it to our attention. He disagreed with it.

Discussion: introductory

162. We start with some observations about the bundle of sections in TCGA about PPR relief and in particular s 222.

163. The concept of PPR relief was first contained in s 29 FA 1965, and so was in at the start of CGT. Unlike some exemptions and reliefs from a charge to CGT it was not obviously included to prevent loss claims (as for example the exemption for cars, gambling winnings or qualifying corporate bonds). The obvious purpose is to encourage or at least not to discourage property ownership and liquidity in the housing market[2]. A relief for a PPR is a feature of many common law countries' tax systems that do actually tax capital gains.

164. The rationale for any rule that PPR relief does not apply to pre-occupation ownership is also relatively obvious. To allow relief in that situation could lead to double relief (although not in this case as the Ritchies rented during the period before occupation). ESC D49 does sully the purity of this policy rationale to a limited extent.

165. The rationale for the permitted area rule is less easy to see, given that land forming part of the garden and grounds which is in fact used for business or non-domestic purposes cannot qualify. If it is to discourage sales of part of the garden and grounds most remote from the dwelling house or to ensure their taxation then a rule that operates only when the dwelling house itself is not sold would make more sense.

166. The artificiality of the rule in certain circumstances also stands out. In this case it was Mr O'Neill's informal opinion that the "true" permitted area, as defined in s 222(1)(b) TCGA, was some 0.35ha, being land which formed a natural lot (and was also in HMRC's view the extent of the curtilage). If this was right, then it is an artificial exercise to draw the 0.5ha line so as to include land outside this natural lot, rather than to determine the real permitted area or to limit the relief to the curtilage.

[2] For a more cynical view see Prof. John Tiley: "the exemption … could be viewed as further encouragement for individuals to invest their wealth into that privileged asset, the family home." Tiley & Loutzenheiser "Revenue Law" (7th edn) at 32.3.5.

167. That the 0.5ha rule is an artificial construct can be seen from the fact that it was originally 1 acre. 0.5ha is about 1.25 acres so the limit increased when we were told by Mr O'Neill, and we accept, that the tendency is for smaller gardens and grounds.[3]

168. These oddities make it difficult to determine quite what the purpose of the permitted area rule is, so we have to take the words of the statute as we find them, though obviously in its statutory context, not in isolation, and in the light of authoritative decisions of the Courts, and bearing in mind that it is for they who seek a relief from tax to show that they qualify. We turn now to the issues raised.

Discussion: the actual area under consideration

169. As we said at §25 this was not an easy question to decide. A figure for the area is mentioned many times.

(1) The first indication of the area of the land at 28 Station Rd as sold in January 2007 for £2 million was given by Weir & Co to Mrs McIvor on 20 May 2011 where it is said that there are two areas of 0.615ha and 0.084ha (ie a total of 0.699ha).

(2) Mrs McIvor repeated the total figure of 0.699ha in letters of 29 and 30 June 2011 to Weir & Co without response or challenge, and she used this figure in her initial report to the DV on 14 October 2011.

(3) Mr Gerard O'Neill's report to Mrs McIvor of 30 March 2012 shows his calculation of the permitted area as 0.35ha and the non-permitted area as 0.34ha (ie 0.699ha).

(4) Weir & Co used 0.699ha in a letter to Mrs McIvor of 23 April 2013.

(5) Mrs McIvor wrote to Mr and Mrs Ritchie on 9 October 2014 with her "view of the matters" showing 0.699ha.

(6) In a letter of 10 June 2015 from Mrs McIvor to Weir & Co she used a figure of 0.669ha, said to have come from the DV. [*Our emphasis*] This figure was also used by her in a letter of the same day to each of the Ritchies but that letter included a computation of the gain which referred to the non-permitted area as 0.199ha (and so with the 0.5ha permitted area that makes the total 0.699ha).

(7) Mrs McIvor's witness statement made on 11 August 2016 refers to 0.699ha

(8) Mr O'Neill's Expert Report dated 18 August 2016 refers at section 3.2 to 0.655ha. The aerial photos at Appendices F and G show the extent of the two parts of the land, with the areas of each, using the LPS Mapping Tool, being 4967.58 m^2 and 1625.75m^2, totalling 0.659342ha.

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[3] Ironically the otherwise metrically minded Irish Republic still uses 1 acre as the limit as originally enacted (see s 604(2)(b) Taxes Consolidation Act 1997 [Acts of the Oireachtas No 39 of 1977]). Australia with its wide open spaces uses 2 hectares as the limit (Section 118-255 Income Tax Assessment Act 1997), though Canada, with its even wider and more open spaces, has 0.5ha (paragraph (e) of the definition of "principal residence" in s 54 Income Tax Act 1985).

(9) Savills' report dated 26 August 2016 shows an area of 0.650ha based on their understanding of the boundaries as shown on the Spatial NI map.

(10) A "Statement of Facts" which was we understand drafted by Mr Gordon for the purposes of the ADR shows the property as being 0.669ha.

(11) HMRC's (revised) statement of case drafted by Mr Hone (the HMRC presenting officer in the hearing before Judge Vos) dated 4 August 2016 shows 0.669ha.

(12) HMRC's skeleton argument drafted by Mr Foxwell on 6 March 2017 shows 0.699ha.

170. From all this we can see that the candidates are 0.699ha, 0.669ha, 0.659ha, 0.655ha and 0.65ha. We find on the balance of probabilities that the figure is 0.699ha. We say this for the following reasons.

171. The figure of 0.699ha was put forward by Weir & Co as the total of two other figures. This reflects that there were two separate parcels of land and the figures must we find have come from the Ritchies or professionals employed by them (solicitors etc).

172. The Ritchies and their advisers did not challenge the figure when used by Mrs McIvor.

173. Mrs McIvor's use of 0.669ha seems to be an obvious typo for 0.699.

174. We do not have any evidence to show how the figures used by Mr O'Neill and Savills were generated from the computer mapping programs they used. It seems to us that Mr O'Neill's figure of 0.659342ha is a case of spurious accuracy[4]. The program has produced a figure said to be accurate to the nearest $10cm^2$ or, to those of us who grew up with Imperial measures, a square 4in by 4in.

175. That this is unlikely to be accurate to that degree can be seen from the aerial photos in the Appendices to Mr O'Neill's report. We can measure that the width of the boundary line drawn onto the photo is approximately $1/100^{th}$ of the longest axis of the area. That says the report is c. 170m. $1/100^{th}$ of 170m is 170cm or 1.7m.

176. Mr O'Neill accepted that he could not guarantee the boundary line he used was accurate in view of the peculiarity of the site and he recanted from these figures in his report and adopted 0.699ha (see §96).

177. The Savills' report seems to use the same boundary yet arrives at a different area and a different perimeter.

178. We had no evidence on how the boundary line was created on the screens, what levels of accuracy could be assured or whether the area measured includes the boundary line or the area within it.

[4] The phenomenon often found in newspapers and other media when they refer to something, for example, being "about a foot (30.48 cm) long".

Discussion: the shed as part of the dwelling house

The appellants' submission in more detail

179. Mr Gordon's relied on *Wakefield*, and in particular on the judgment in the Chancery Division of Browne-Wilkinson J (as he then was) which was approved by the Court of Appeal. In the High Court the judge held that:

> "In my judgment the Commissioners were right in saying that what one has to look at and discover is: What was the residence of the taxpayer? For that purpose, you have to identify the dwelling-house which is his residence. **That dwelling-house may or may not be comprised in one physical building; it may comprise a number of different buildings. His dwelling-house and residence consists of all those buildings which are part and parcel of the whole, each part being appurtenant to and occupied for the purposes of the residence.** The Crown do not go so far as to maintain that a building separate from the main house can never be part of the dwelling-house. If that be so, then it seems to me that the Commissioners directed themselves rightly in seeing whether the lodge was itself appurtenant to and occupied for the purposes of the building occupied by the taxpayer." [Mr Gordon's emphasis]

180. Before that passage the judge had said:

> "**In the ordinary use of the *words, if one looks at a man's residence* it includes not only the physical main building in which the living rooms, bedrooms and bathroom are contained, but also the appurtenant buildings, such as the garage and buildings of that kind.** One is looking at the group of buildings which together constitute the residence. It is true, as the Crown say in this case, that s 29 draws a distinction between a dwelling-house, which is dealt with by subs (1)(a), and the land occupied and enjoyed with the residence as its garden or grounds, which is separately dealt with by subs (1)(b). Therefore the dwelling-house referred to in subs (1(a) does not include the whole of its curtilage. **But in my judgment subs 1(a) is including in the dwelling-house some other buildings which are appurtenant thereto; for example, the garage, the potting shed and the summer-house, which otherwise would not come within s 29 at all.** The Crown argue that these other buildings cannot include another dwelling-house. This argument on the strict wording is a powerful one. It is clear that only "a" dwelling-house qualifies. But the strict literal interpretation seems to me to force one to unacceptable conclusions." [Mr Gordon's emphasis]

181. In the Court of Appeal Fox LJ noted:

> "In approaching these matters, there are two propositions which seem to me to be correct. First, it seems to me that in the ordinary use of English, a dwelling-house, or a residence, can comprise several buildings which are not physically joined at all. **For example, one would normally regard a dwelling-house as including a separate garage; similarly it would, I think, include a separate building,**

> **such as a studio, which was built and *used for the owner's enjoyment*.**" [Mr Gordon's emphasis]

182. *Wakefield* shows, says Mr Gordon, that the Courts recognised that a dwelling house can consist of different buildings which might both individually represent people's homes (eg a workman's cottage and the "main house"). Here the position was more modest: a single family's dwelling consisting of more than one building.

183. As to *Lady Rook*, a later case of the Court of Appeal, Mr Gordon argued that the Court expressly endorsed the previous cases including *Wakefield*. He highlighted a passage in the judgment of Balcombe LJ in *Lady Rook*:

> "In these circumstances it is necessary to go back to the words of the statute. What has first to be determined is what in the particular case constitutes the "dwelling-house". This is an ordinary English word of which the definition in the Shorter Oxford English Dictionary is "a house occupied as a place of residence". **That dwelling-house can**, following the decision of this court in *Batey v Wakefield*, **consist of more than one building and that even if the other building itself constitutes a separate dwelling-house.**" [Mr Gordon's emphasis]

184. HMRC rely on *Lady Rook* for the proposition that for a building to be part of the dwelling-house it has to be within the curtilage of the "main house". That reliance, he said, is misplaced because the remarks about curtilage in *Lady Rook* are addressed to those cases where there is a "main house", by which we take Mr Gordon to mean cases where there is more than one building used as accommodation, one of which is the principal (eg the mansion house) and one a subservient building.

185. Curtilage cannot be the sole test as it would exclude from the exemption large numbers of properties, particularly flats, where a garage is physically separated and is sold.

186. The evidence of the Ritchies, oral, written and photographic, showed that they extensively used and regularly accessed the shed as a garage, workshop and kitchen overflow and for the storage of sports equipment, that it was connected to the mains with permanent cabling and was an intrinsic part of the family's residence. The evidence showed that it was visible from at least the ground floor of the house.

187. Accordingly the shed was, says Mr Gordon (though he uses only the word "garage" in his skeleton) necessarily part of the Ritchies' dwelling house.

HMRC's submission in more detail

188. HMRC rely on *Lady Rook* for the proposition that no building can form part of a dwelling house which consists of a main house unless that building is appurtenant, to and within the curtilage of, the main house. It is, they say, a question of fact whether one building forms "part and parcel" of another and depends closely on the geographical relationship between them.

189. "Curtilage" was defined in *Methuen-Campbell* using the OED definition that it is a "small court, yard or piece of ground attached to a dwelling house and forming one enclosure with it".

190. The shed is 85 metres from the main house and is not part of the entity of the house and does not form an integral whole with the main house. HMRC rely on the expert opinion of the DV in reaching that decision.

191. Use of the shed is not sufficient by itself without meeting the tests of curtilage and appurtenance. It does not amount to the garage for the main house.

Our conclusion

192. All the cases which were cited to us or which were discussed in *Lady Rook* are ones where the issue was the sale of a building which was in separate occupation as sleeping and eating accommodation. The table below illustrates the issues in each case (in chronological order):

CASE	Nature of disputed building	Distance etc from principal house	Remarks
Wakefield	Bungalow occupied by caretaker and housekeeper, with own garage and access	Width of tennis court. Separated by yew hedge, but signalling possible	General Commissioners (GCs), High Ct (HC) and Court of Appeal (CA) found for taxpayer.
Green v CIR 56 TC 10	Two wings of mansion house connected to that house by corridor and wall with own entrances. One wing occupied by caretaker.	Not clear, but from Google Maps appears to be <10 m.	Court of Session reluctantly agreed that it was question for GCs who found that wings not part of the dwelling house.
Markey v Sanders	3 bedroom bungalow occupied by employees	130 m Separated by paddock.	GCs decision for taxpayer overturned by HC following *Wakefield*.
Williams (HM Inspector of Taxes) v Merrylees 60 TC 296	Lodge occupied by gardener/caretaker and domestic help	200 m	Decision of GCs for taxpayer upheld by HC on facts, though Vinelott J disagreed.

Lady Rook	Cottage occupied by gardener	175 m	GCs and HC found for taxpayer TP, CA found for Crown.

193. In this table we have not said anything about the use or application of the terms "curtilage" or "appurtenant" as that it seems to us is what we must consider carefully in the light of the submission of the parties. It is we think necessary to quote a large part of the judgment of Balcombe LJ (with which Ralph Gibson and Stuart-Smith LJJ 5 agreed) in *Lady Rook*, a part which follows on from the passage cited by Mr Gordon (§183):

> "… I agree with what Vinelott J. said in *Williams v Merrylees* …
>
> > 'What one is looking for is an entity which can be sensibly described as a dwelling-house though split up into different 10 buildings performing different functions.'
>
> How, then, can that entity be identified in any given case? First, attention must be focused on the dwelling-house which is said to constitute the entity. To seek to identify the taxpayer's residence may lead to confusion because where, as here, the dwelling-house forms 15 part of a small estate, it is all too easy to consider the estate as his residence and from that to conclude that all the buildings on the estate are part of his residence. In so far as some of the statements made in *Batey v Wakefield* suggest that one must first identify the residence they must, in my judgment, be considered to have been made *per* 20 *incuriam*.
>
> In all the cases to which I have referred there has been an identifiable main house. Where it is contended that some one or more separate buildings are to be treated as part of an entity which, together with the main house, comprises a dwelling-house, Mr. Warren submitted that 25 no building can form part of a dwelling-house which includes a main house, unless that building is appurtenant to, and within the curtilage of, the main house.
>
> At first I was inclined to the view that this introduced an unnecessary complication into the test, even though this was the way in which 30 Browne-Wilkinson J. approached the problem in *Batey v Wakefield* (*supra*). Upon reflection I have come to the conclusion that this is a helpful approach, since it involves the application of well-recognised legal concepts and may avoid the somewhat surprising findings of fact which were reached in *Markey v Sanders*, *Williams v Merrylees* and, 35 indeed, in the present case. In *Methuen-Campbell v Walters* … Buckley L.J. said…:
>
> > 'In my judgment, for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth 40 forms part and parcel of the latter. There can be very few houses

> indeed that do not have associated with them at least some few square yards of land, constituting a yard or a basement area or passageway or something of the kind, owned and enjoyed with the house, which on a reasonable view could only be regarded as part of the messuage and such small pieces of land would be held to fall within the curtilage of the messuage. This may extend to ancillary buildings, structures or areas such as outhouses, a garage, a driveway, a garden and so forth. How far it is appropriate to regard this identity as parts of one messuage or parcel of land as extending must depend on the character and the circumstances of the items under consideration.'

That passage was cited with approval by all the members of this Court in *Dyer v Dorset County Council* …, all of whom emphasised the smallness of the area comprised in the curtilage. This coincides with the close proximity test to which the other cases refer: 'very closely adjacent' per Browne-Wilkinson J. in *Batey v Wakefield*, approved in the same case by Fox L.J., and adopted by Walton J. in *Markey v Sanders*.

This approach also avoids the difficulty to which Walton J. referred in the final passage cited from his judgment in *Markey v Sanders*. Since under subss (2) and (3) of s 101 the 'permitted area' of garden and grounds which is exempt from capital gains tax is limited to one acre or such larger area as the Commissioners may determine as required for the reasonable enjoyment of the dwelling-house as a residence, it does seem to me to be remarkable that a separate lodge or cottage which by any reasonable measurement must be outside the permitted area can nevertheless be part of the entity of the dwelling-house.

If the Commissioners in the present case had applied what in my judgment was the right test: 'Was the cottage within the curtilage of, and appurtenant to, Newlands, so as to be a part of the entity which, together with Newlands, constituted the dwelling-house occupied by the taxpayer as her residence?' I do not see how they could have reached the decision which they did. The fact that the cottage was 175 metres from Newlands, that Newlands was on the northern boundary and the cottage on the southern boundary of the 10.5 acre estate, and that they were separated by a large garden with no intervening buildings other than the greenhouses and tool-shed (as is apparent from the Commissioners' findings and the plans and photographs which were before us as they were before the Commissioners) leads me to the inescapable conclusion that the cottage was not within the curtilage of, and appurtenant to, Newlands, and so was not part of the entity which, together with Newlands, constituted the taxpayer's dwelling-house.

In my judgment, Mervyn Davies J. also adopted an incorrect test when he referred to 'the entity constituting the taxpayer's residence', as Mr. Milne Q.C. for the taxpayer conceded. However, for present purposes, it is sufficient to say that, if the Commissioners had properly directed themselves, they could not have reached the conclusion that the cottage and Newlands together formed one dwelling-house which was the taxpayer's residence."

194. The reference to statements made *per incuriam* must be to the statement of Browne-Wilkinson J to the effect quoted, with which Fox LJ expressed his agreement.

195. It is clear from this quotation that the Court of Appeal has held that "the right test" is to consider whether a building in dispute was within the curtilage of, and
5 appurtenant to, the "main house" (the "curtilage/appurtenant test"). This is despite the fact that earlier Balcombe LJ appears merely to be saying that it is simply a helpful approach. But he also equated the curtilage/appurtenant test with the "very closely adjacent" test which Walton J preferred in *Markey v Sanders*.

196. On the face of it what we have set out from Balcombe LJ's judgment would
10 probably lead us to think that the shed is not part of the dwelling house. But we accept Mr Gordon's point that, as Balcombe LJ says, all the cases to which he refers are ones where there is an "identifiable main house". That must mean main house as opposed to another building which contains living accommodation, and probably though not certainly, occupied by an employee or similar. In the case of 28 Station
15 Road the concept of an identifiable main house is simply not appropriate – what other house could there be than the house that Billy constructed?

197. *Lady Rook* then, while obviously binding on us, is we think strictly irrelevant as it is considering a fact pattern that we do not have here. *Wakefield* is also binding on us and so we look there. In our view the second passage cited by Mr Gordon (§180)
20 from the High Court decision of Browne-Wilkinson J (the first passage may be infected in part by the "*per incuriam*" accusation) and the passage from Fox LJ in the Court of Appeal (§181) are very relevant and telling. Those judges do not refer to a curtilage test, and so far as "very closely adjacent" is concerned, Browne-Wilkinson J says that the fact that the two buildings were in that proximity to each other was a
25 factor which properly led the General Commissioners to find as they did. They do however refer to the "other" building being appurtenant to the "physical main building".

198. In our view the shed was appurtenant to the house at 28 Station Road and falls within the ambit of the passages from *Wakefield* and *Lady Rook* that Mr Gordon cites.
30 We note in particular Balcombe LJ's reference to the fact that a "dwelling-house can, following the decision of this court in *Batey v Wakefield*, consist of more than one building and that *even if* the other building itself constitutes a separate dwelling-house." [*Our emphasis this time*]

199. We add that even if the curtilage/appurtenant test was the proper one for our
35 factual situation we rather doubt that *Methuen-Campbell* is the last word on the subject (even though Mr Gordon refers in his skeleton to a passage from that case that does seem to support him).

200. In *Secretary of State for the Environment, Transport & the Regions & Anor v Skerritts of Nottingham Ltd* [2000] EWCA Civ 60 ("*Skerritts*"), Robert Walker LJ (as
40 he then was) considered a question under s 1(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990. The issue was whether a stable block in the grounds of Grimsdyke, a Grade II* listed building, formed part of its curtilage. The stable

block was 200 metres from Grimsdyke. The appeal was on the grounds that "whether the Secretary of State, in accepting the Inspector's advice and reasoning, erred in law by overlooking the principle (if there is such a principle) that the curtilage of a listed building is confined to a small area around the building …".

201. At [22] to [24] Robert Walker LJ says:

> 22. But in my respectful view this court [in *Dyer v Dorset County Council*] went further than it was necessary to go in expressing the view that the curtilage of a building must always be small, or that the notion of smallness is inherent in the expression. No piece of land can ever be within the curtilage of more than one building, and if houses are built to a density of twenty or more to an acre the curtilage of each will obviously be extremely restricted. But Nourse LJ recognised that in the case of what the now-moribund Settled Land Act 1925 refers to as a 'principal mansion house' - which is what Grimsdyke was built as - the stables and other outbuildings are likely to be included within its curtilage.
>
> 23. I also respectfully doubt whether the expression 'curtilage' can usefully be called a term of art. That phrase describes an expression which is used by persons skilled in some particular profession, art or science, and which the practitioners clearly understand even if the uninitiated do not. This case demonstrates that not even lawyers can have a precise idea of what 'curtilage' means. It is, as this court said in *Dyer*, a question of fact and degree.
>
> 24. In my judgment the deputy judge was mistaken in treating *Dyer* as having such clear force as he thought it had. Not only was it concerned with dispropriatory legislation, but *Calderdale* and *Debenhams* were not cited, and the court's observations about smallness were not, on the facts of *Dyer*, necessary to the decision. In the context of what is now Part I of the Act, the curtilage of a substantial listed building is likely to extend to what are or have been, in terms of ownership and function, ancillary buildings. Of course, as Stephenson LJ noted in *Calderdale* (at p.407) physical 'layout' comes into the matter as well. In the nature of things the curtilage within which a mansion's satellite buildings are found is bound to be relatively limited. But the concept of smallness is in this context so completely relative as to be almost meaningless, and unhelpful as a criterion."

202. He also noted that *Methuen-Campbell*, on which HMRC rely, also involved dispropriatory legislation.

203. *Skerritts* was not cited to us, but is referred to in the Valuation Office Guidance on Rating (Part 11B at section 4.8). We do not need to find in this case that the shed was within the curtilage of the house at 28 Station Road, but on the basis of *Skerritts* we incline, relatively strongly, to the view that it would be (without deciding in view of the fact it was not argued). We add that our decision on this point is consistent with the passage in Walton J's judgment in *Markey v Sanders* where he says, with characteristic vividness:

> "for what would be 'very closely adjacent' were one dealing with the sale of No. 7 Paradise Avenue, Hoxton, might very well be quite different from what those words would mean if one were considering the sale of Blenheim Palace." [60 TC @ 255]

5 We therefore agree with Mr Gordon that the shed is part of the dwelling house.

Discussion: the permitted area

The appellants' submission in more detail

204. Mr Gordon points out that HMRC offer no evidence of what the permitted area is except that based on the proposition that the shed is not part of the dwelling house.

10 205. The appellants say in the light of the report they commissioned from Savills that the permitted area, on the basis that the shed is part of the dwelling house, extends to all the land except the land situated on the north-east corner of the site and acquired by the Ritchies from the DoT in 2002, which has an area of 0.05ha.

HMRC's submission in more detail

15 206. Mr Foxwell argued that we should accept the DV's expert report. The report was just as valid on the basis that the GEA was 311m^2 and Savills figure of 358m^2 was incorrect. None of the comparables, even those of over 300m^2 had anything like 0.5ha, let alone 0.7. The Ritchies new home in Loup Rd had 0.4ha.

207. In relation to the question of the permitted area if the shed is part of the
20 dwelling house, he argued that the test is objective and purchasers would find the shed potentially useful but not necessary. It cannot be assumed that a purchaser would be a competition plougher.

Our conclusion

208. We accept that the test for what area of land is required for the reasonable
25 enjoyment of the dwelling house as a residence is objective. Although Mr O'Neill's report did not identify the cases he referred to passages from in his report, we can see (from the Valuation Office Manual from which Mr O'Neill was quoting) that they are *Re Newhill Compulsory Purchase Order 1937, Payne's Application* [1938] 2 All ER 163, a decision of du Parcq J and *Longson v Baker (HM Inspector of Taxes)* a
30 decision of Evans-Lombe J.

209. It is clear from these cases that "required" is to be equated with necessary, not just desirable. The question for our decision is then: what amount of the garden and grounds is necessary for the enjoyment of the dwelling house (including the shed)? As a hearing of a tax appeal is not pendulum arbitration (see eg *Tower MCashback*
35 *LLP1 & anor v HMRC* [2008] EWHC 2387 (Ch) per Henderson J (as he then was) at [113]) we are not bound to choose between the parties' arguments for a specific area, or even bound to find for the one party that has produced a figure for the specific finding we have made on the constitution of the dwelling house. And in relation to the latter point we had evidence that it was Mr O'Neill's opinion that the permitted
40 area was 0.5ha even if the shed was part of the dwelling house.

210. We have considered the evidence we have heard and looked at the maps and photographs. We have considered Mr O'Neill's comparables and we accept that they demonstrate that purchasers of a house of the size and character of 28 Station Rd and in the same area did not require 0.7ha of land or even 0.5ha. We discount Savills' comparables because Savills' report was not put in evidence and there was no one to speak to it or be cross-examined on it. But in the end the decision is not made by the experts but by us, informed and guided by the expert evidence. What we have to decide is the area of land that is required for the use and enjoyment of this dwelling house, which includes the shed.

211. While we have accepted that the test for what land is required for the use and enjoyment of the dwelling house is an objective test, we must have regard to the size and character of what is found to be the dwelling house in this case. Including the shed probably adds about 150m^2 to the GEA. Given the quality of that area compared with that in the house we do not think that of itself devalues Mr O'Neill's comparables to any great extent, but it does tend us towards increasing the permitted area beyond Mr O'Neill's opinion of it.

212. More important we think is the question of character. This dwelling house's character includes the fact that the shed is part of it. It would we think be unrealistic to suggest that access to the shed was not part of the land required for the use and enjoyment of that part of the dwelling house that is the shed. We note that Mr O'Neill's report refers to the need to avoid islands.

213. We have started our search for the permitted area at the south side of the line drawn by Mr O'Neill as the delineation of his view of the excess. He has drawn a line approximately east-west starting immediately beyond the trees and shrubs at the end of the back garden. He chose the area to the south he said because the land is not as well cared for as the garden.

214. We also note from the evidence that the land immediately to the east of the shed is on a lower elevation than the driveway to the shed. This is because that land to the east is part of the trackbed of the old railway whereas the shed stands on the western platform of the old Moneymore Station.

215. If the shed is, as we have held, part of the dwelling house then we find that the whole of the approach path south of Mr O'Neill's line is required for the enjoyment of the dwelling house. That would include what appears to be a bisection of the approach path to form a narrow loop, and the island of land within the loop. We think it would also be unrealistic to exclude the land to the west of the western side of the loop up to the western boundary.

216. But we consider that all of the land to the east (including the land to the north of the shed up to the tree/shrub line) and the land south of the shed is not required (or necessary) for the use or enjoyment of the shed. Nor is the land to the west of the shed that lies south of a line extending from the front of the shed to the western boundary of the land.

217. To help the parties to make sense of what we have said we attach as an appendix an aerial photograph on which we have marked in dark blue (hatched inside) the (rough) outlines of the excess land over the permitted area that we have described. Any discrepancy between the map and the description should be resolved in favour of the description.

218. Using the largest scale aerial photograph of the site to which we were referred during the hearing and measuring the area we have found with a ruler that area appears to be approximately 0.11ha. To allow for errors by amateur measurers we reduce the area to 0.1ha.

219. We have in coming to our decision ignored the appellants' contention that 0.5ha in the north east of the site was not required for the enjoyment of the dwelling house.

220. As we have found that the total area is 0.699 ha, the excess over the permitted area is, for all intents and purposes, one-seventh of the total.

Discussion: the apportionment of the gain between the permitted and unpermitted areas

The appellant's submissions in more detail

221. Mr Gordon put forward the Savills report as providing an appropriate way of splitting the gain into the exempt part and the taxable part on the assumption, also given by that report, that the only land in excess of the permitted area is 0.05ha being the north-east land acquired from the DoT. However they say that this land is not of the same quality or value as the rest of the land and does not inhibit access to the development.

222. If the permitted area is 0.6 ha, as their report suggests, the value of the non-permitted area is nil. If the permitted area is 0.5 as HMRC contended, the value of the non-permitted area is £60,000.

HMRC's submissions in more detail

223. Mr O'Neill's report did not cover this aspect. In his evidence to the Tribunal he expressed the opinion that all of the land was of equal value to the developer, as what the developer wanted was access to the land beyond and to clear the site for redevelopment. The figure of £2 million was what a cleared site was worth to the developer, and bore no relationship to the value of the buildings or between the different parts of the land.

Our conclusions

224. We prefer Mr O'Neill's view on this issue.

225. First, he was at the Tribunal and was available for cross-examination, in which he expressed his disagreement with Savills' methodology, whereas there was no one to speak to the Savills' report or be cross-examined on it.

226. Secondly, it anyway seems to us that a figure of £2 million for the land was not based on any view of the developer as to what constituent parts of the land were worth or where the access might be.

227. Had we agreed with the appellants we would have needed to refer the matter to the Lands Tribunal for Northern Ireland unless the parties could have reached agreement.

228. As it is we determine that the CGT calculation is to be made on the basis that one-seventh of the sale proceeds of £2 million less allowable costs falls to be treated as the consideration in computing the chargeable gain.

Discussion: the apportionment of the gain to the period before occupation

The appellant's submissions in more detail

229. Mr Gordon's skeleton said that if the garage forms part of the dwelling house, as we have found, then HMRC accept that "this is the case throughout the period of ownership", because it formed part of one combination of buildings for one period and a part of another for another period.

HMRC's submissions in more detail

230. HMRC argue that as the house only became the Ritchies' residence from January 2007, the period from the acquisition of the land to then was not covered by any relief. 28 Station Rd was not their residence in that period.

231. They cite *Henke*, a decision of Special Commissioner John Clark, for the proposition that apportionment is required as the asset was changed substantially by the construction of the house.

232. The use made of the shed during the period when the Ritchies were occupying 22 Station Rd as tenants is irrelevant.

Our conclusions: establishing the appellant's arguments

233. We found Mr Gordon's argument as presented in his skeleton too Delphic, so we considered what had been said on this issue in the investigation and the run up to the hearing.

234. The difficulty we have is that the first mention of any argument covering the time of occupation of 22 Station Rd is said to be in a letter of Weir & Co to Mrs McIvor of 10 October 2014. That letter is not in the bundle, and it may be that this is because it was created for the ADR negotiations. In view of the proceedings before Judge Vos we tread somewhat carefully here, but we can see that on 12 January 2015 Mrs McIvor sought further information from Weir & Co on what was to her a new point.

235. There was then an ADR meeting on 14 May 2015 and a statement of facts submitted on 29 May 2015, drafted we believe by Mr Gordon. The final part of a letter from Mrs McIvor to Weir & Co of 10 June 2015 (which referred to these earlier matters) then gives HMRC's response to the arguments. This is that HMRC do not agree that there is a dwelling house consisting of the house at 22 Station Rd and the shed on the land that became 28 Station Rd.

236. On 24 July 2015 Mrs McIvor wrote to Weir & Co with further technical arguments which had been supplied by an HMRC technical specialist, Mr Mike Galvin. This said that HMRC's position is that the physical building at 22 Station Rd is the entity that is to be regarded as the dwelling house. The shed was not in the curtilage of, or appurtenant to, that physical building occupied by the Ritchies as their residence.

237. There is in our bundle, although it was not referred to by any witness or by the advocates, a document called "Overview of the Case" at Tab 9 (Miscellaneous) starting at p 17. The index however says that it is meant to be a colour coded Statement of Facts. In any event it appears this document may have been prepared for the ADR. At the risk of seeing something we shouldn't we have looked at it. Paragraphs 32(b), 34 and 36 to 38 cover this issue.

238. Paragraph 34 refers to a suggestion by HMRC that they would argue that it was not possible to "transfer" the garage [=shed] from one dwelling house to another, and the appellants wished to know if the point was being advanced by HMRC.

239. Paragraph 36 refers to a view expressed at the ADR by HMRC. As it is not any form of admission by HMRC we do not think we are transgressing by saying that it was HMRC's view, expressed at the ADR, that the shed could not be part of the Ritchies' dwelling house at 22 Station Rd, because they had to cross another person's land to access it.

240. The appellants reject that argument in paragraph 37 on the grounds that in many cases, for example flats, the occupier of a flat will have to cross another's land to reach their garage. Paragraph 38 makes it clear that contrary to what HMRC may have thought, the land Billy had to cross to reach the shed was his landlord's and on which Billy had laid a path.

Our conclusions: apportionment

241. The question of what is the period of ownership where a house is built on land and occupied some time after acquisition of the land was covered in *Henke* at [119] to [124]. The argument which Special Commissioner Clark (later Judge Clark) considered at [119] and [120] are not relevant to this case. At [121] Mr Clark records Mr Henke's argument that "ownership" in s 222(1)(a) TCGA must convey a meaning of controllership in the use of the dwelling house.

242. In dealing with this argument Mr Clark points to the difficulties caused by it. Buildings cannot in normal circumstances be owned separately from the land on which they stand, and s 288(1) TCGA shows that land includes buildings. Thus there

is only one asset, the land and buildings, which had been owned by Mr Henke since before house construction, and that asset changed with the construction of the house.

243. After some discussion Mr Clark said at [123]:

> " … In my view the Parliamentary intention behind the legislation is clear; there is to be only one period of ownership, of the single asset consisting of the land and any buildings which may be erected on it during that period. It follows that an apportionment is required where land is held for a period and subsequently a house is built on it and occupied as the individual's only or main residence."

244. He added at [124]:

> "My conclusion is that as Mr and Mrs Henke did not occupy Old Oak House until 1993, but had owned the land at Houghton (as legal owners and beneficial joint tenants of the freehold) since 1982, an apportionment is required under s 223(2) because they do not meet the 'throughout the period of ownership' condition in s 223(1). I would have regarded it as particularly odd if Mr and Mrs Henke could have continued to qualify for private residence relief in respect of their two previous owner-occupied properties while benefiting at the same time from the same relief in respect of their unbuilt plot at Houghton."

245. All of this supports HMRC's submission that an apportionment is required (as does ESC D49 or it would not have been thought necessary). But *Henke* does not deal with the argument that we think is being advanced here. It is suggested that the shed could be regarded as part of the dwelling house at 22 Station Rd. Possibly it might be under the tests in *Wakefield* and *Lady Rook* though the factual situations in those cases and the cases they discussed was very different. None of them involved part of the land being in different ownership from the other.

246. But the question we ask is: so what? The Ritchies had no interest in the asset, the house and land at 22 Station Rd, as that was owned by a Mr Hegarty. They were merely tenants on terms we were not told about.

247. When they sold 28 Station Rd along with the shed, then s 223(1) TCGA requires it to be asked if throughout the period of ownership (of the land – *Henke*) the dwelling house or part of the dwelling house had been the Ritchies only or main residence. In the period 1987 to 2007 the house at 28 Station Rd together with the shed had not been their only or main residence and could not have been as the house did not exist in a form in which it could be used as a residence until 1995, and the shed was not used as a residence on its own before 1995. A residence is not the same as a dwelling house as *Lady Rook* shows, and as many cases on what is a residence for PPR relief show.

248. But even supposing (which we do not accept) that the shed was the residence (part of the one that was sold in 2007) in 1987 to 1995, it was then not the Ritchies' only residence (as 22 Station Rd was also their residence), and we saw no evidence that they gave notice under s 222(5) to notify the shed as their main residence.

249. The argument would also, if right, lead to the same potential anomalies as in *Henke*. If the Ritchies had owned 22 Station Rd rather than renting it, they would have made an exempt gain on sale in say 1995, and they would also have been exempt on any gain on 28 Station Rd starting from 1987.

250. We therefore reject the argument that none of the gain on 28 Station Rd is, subject to the permitted area point, not a chargeable gain.

251. We have to say, though, that we are uneasy about the consequences of our decision if it is right, as *Henke* show at [123] that it is, that we have to apply a time apportionment. In rough terms the Ritchies made an overall gain on 28 Station Rd of £1.8 million. Time apportionment makes about 35% of the gain taxable. By no yardstick did the land increase in value by £630,000 between 1987 and 1995. If anything it increased in value from £11,000 to £200,000 (the rateable value after construction), but any gain on a disposal at that time would be very small, about £10,000, given the costs of construction which would be deductible in a CGT computation.

252. Time apportionment under s 223(2) is not the only apportionment provision in ss 222 to 226 TCGA. Section 222(10) says that:

> "(10) Apportionments of consideration shall be made wherever required by this section or sections 223 to 226 and, in particular, where a person disposes of a dwelling-house only part of which is his only or main residence."

253. It is not easy to see that an apportionment of consideration in this situation is *required* by any of the sections there mentioned (nor is it easy to see how an apportionment of the *consideration* would help).

254. But s 224(2) says:

> "(2) If at any time in the period of ownership there is a change in what is occupied as the individual's residence, whether on account of a reconstruction or conversion of a building or for any other reason, or there have been changes as regards the use of part of the dwelling-house for the purpose of a trade or business, or of a profession or vocation, or for any other purpose, the relief given by section 223 may be adjusted in a manner which is just and reasonable."

255. Clearly s 224(2) is, where it refers to a specific reason, aimed at a case where a building is already occupied to some degree and then the degree of occupation changes, eg a single house is turned into flats and one is let and the other remains occupied as a residence by the owner of the house. In this case there is no <u>re</u>construction or a conversion of a building, but the construction. But, in our view, this is a case covered by "any other reason".

256. It is not stretching language too far we think to say that here there was in 1995 a change in what is occupied as the Ritchies' residence because the residence changed

from 22 Station Rd to 28 Station Rd, and the reason for the change is the completion of construction of the house at 28 Station Rd allowing it to be occupied as a residence.

257. There is no restriction on the "any other reason", and even if there were an implicit *eiusdem generis* rule at work here, this situation is of a very similar type to 5 the specific reasons given.

258. It remains a fact that s 223(2) also applies if considered merely by reference to the words. But we would say that s 224(2) is the more specific provision and is aimed at circumstances where there is a change of residence. Applying it rather than s 223(2) would not deprive that subsection of utility. In fact it would continue to 10 apply in nearly all the cases in which it is called on to apply, where there are periods of absence during the total period of occupation of a property. But if s 223(2) is not ousted on the basis of being the more general, we would say that it should be interpreted in the context of sections 223 and 224 taken together as not applying to this set of facts.

15 259. We acknowledge that we are disagreeing with Special Commissioner Clark in *Henke*. But *Henke* is not binding on us as it is a case from an equivalent level jurisdiction, and we do not know the full circumstances there. But we think it very unlikely that our factual matrix which involve a consideration which vastly exceeds market value and a 7 year plus period before occupation is likely to be anything other 20 than a very rare one.

260. We therefore hold that (before taking into account the permitted area issue) there is a chargeable gain of £9,100 arising from the sale of 28 Station Rd, £4,550 to each appellant. We have applied s 224(2) so that the gains reflect the value of 28 Station Rd in early 1995 (£200,000) from which is deducted the agreed cost of 25 construction deductible under s 38 TCGA 1992 of £179,900 and the cost of the land of £11,000.

Discovery & careless conduct: submissions

Introductory

261. We mention again here that this is a threshold issue, so that the discussion and 30 our conclusion that a chargeable gain arises from the disposal of 28 Station Rd will be irrelevant if we accept the appellants' arguments in this section. But we think that our findings and conclusions on the substantive issue may have helped to illuminate the discussion of the threshold issue.

Burden of proof

35 262. HMRC accepts that the burden of proof is on them to show that all the conditions for making a discovery assessment are met and that the conditions for making an out of time assessment are met. In this case the main condition is the same, that the appellants or persons acting on their behalf brought about a loss of tax carelessly.

263. We observe that there seems to us no doubt that the condition in s 29(5) TMA was met, but that avails HMRC nothing if it cannot raise an ETL assessment, and meeting the condition in s 29(4) is the only one that will enable them to do that.

HMRC submissions

264. For HMRC, Mr Foxwell's arguments on the threshold procedural issues are as follows.

265. Mrs McIvor made a discovery that there was a loss of tax in that she found that there was nothing on any part of the Ritchies' tax returns about capital gains, so they had not self-assessed any gains.

266. The gains which ought to have been assessed were the gains arising from the fact that the permitted area was less than 0.7ha and that there was a period of 7½ years when the Ritchies did not occupy the house as a residence.

267. Mrs McIvor was therefore justified in raising assessments on each of the Ritchies to recover the tax loss in accordance with s 29(1) TMA.

268. The loss of tax had been brought about carelessly by the Ritchies. The evidence for this was:

(1) the size of the sum received, several times the market value of the dwelling house and land which had cost less than £200,000

(2) the deal was with a property developer

(3) the Ritchies had lived elsewhere than in a dwelling house on the land for seven years.

(4) the total site exceeded the 0.5ha permitted area

(5) the house was numbered 28 Station Rd, although the next house was number 22 because they thought they could fit two more houses on the plot.

269. Despite the information available in the TRG and the IR 283 Helpsheet, no capital gains pages were submitted and no white space entries were made about the disposal.

270. It is not taking reasonable care to assume that advice given by a former tax inspector would negate the need to alert HMRC to this substantial sale or consider it more closely.

271. It is not reasonable to assume that because the shed was used as a garage or for hobbies that the whole site would automatically qualify for exemption, or that HMRC would taken be unlikely to take a different view.

272. HMRC do not accept that any individual or their adviser, taking reasonable care would have concluded that there was no chargeable gain nor any requirement to enter details on the tax return.

273. The discovery assessments were therefore valid as falling within the condition in s 29(4) and in time in accordance with s 36(1) TMA.

Appellants' submissions

274. Mr Gordon for the appellants made the following arguments on the threshold procedural issues in his skeleton. He had reserved the right to make further submissions when he had heard HMRC's.

275. The appellants make no concessions as to discovery and so HMRC are required to prove each condition required for a discovery assessment to be met, but they accept that if the condition in s 36(1) TMA as to careless conduct is met, so is the condition in 29(4).

276. Carelessness does not exist in isolation. It must be conduct which makes the self-assessment deficient, but no loss of tax has been shown.

277. The appellants took reasonable care when dealing with their disposal, as evidenced by the fact that they sought expert advice from a former Inspector of Taxes whose advice was not obviously wrong (as to which see *AB*).

278. Billy showed Mr Russell photos and maps and answered his questions candidly.

279. Billy was given guidance specific to his case so that the guidance was definitive, to the effect that full relief could be claimed. To Billy that was reasonably characterised as no tax to pay.

280. As to Mr Weir HMRC have not pleaded his conduct as careless. To the extent that *Atherton* says that was not necessary it was a very long way from the facts here.

281. He did what someone in his position should have done, refer his client to a specialist. The essence of that advice was not obviously wrong. He cited *Bayliss* to show there was no need for a second opinion.

282. If however Mr Weir was careless that conduct did not lead to a loss of tax.

283. The Ritchies had not made any disclosure of any gains or the facts relating to the sale of the house, but that was not relevant.

284. HMRC have not discharged the burden on them and the assessments should be cancelled.

285. As a back up Mr Gordon argued that Rule 15(2)(b)(iii) of the FTT Rules should apply. This says:

> "(2) The Tribunal may—
>
> …
>
> (b) exclude evidence that would otherwise be admissible where—
>
> …

(iii) it would otherwise be unfair to admit the evidence."

286. The evidence in question here was any obtained by HMRC in circumstances where they were not entitled to the information or had failed to include a statement of the right of the person asked to withhold it or to appeal on the specific ground of carelessness.

Discovery & careless conduct: discussion of Rule 15(2)(b)(iii) argument

287. We consider this first, as we assume that Mr Gordon intends it as a knockout blow so as to exclude all or most of Mrs McIvor's evidence, with the result that the appeals must succeed.

288. We do not accept his application.

Reasons for dismissing the application

289. First, it is made too late. The appellants were served with Mrs McIvor's witness statement and the HMRC bundle of documents well before the hearing, and of course apart from internal HMRC papers, the documents would have been available to the appellants from the time they were created. We would have expected an application to exclude them to be made as a preliminary matter given the apparent importance, or at the start of the hearing or even, possibly, after the end of Mrs McIvor's evidence. But it was not made until closing arguments. It was not in Mr Gordon's skeleton.

290. Second we would have expected such an important application to refer in specific terms to the evidence impugned and to what Mrs McIvor's (or others') conduct was that made it unfair for us to take each impugned item into account after it had been given in evidence.

291. Third, we were cited no case law on the subject nor were we told whether there is any. In fact this Tribunal (and others) have considered the relevant part of the Rule on several occasions.

292. These facts lead us to think that Mr Gordon was not expecting it to succeed. But he was making what is in effect an allegation that HMRC's conduct had been so improper as to render the hearing unfair on his clients and to in effect debar HMRC from the proceedings.

293. A substantial part of Mr Gordon's cross-examination of Mrs McIvor was devoted to cataloguing her supposed failures and seeking her agreement that she (or others, principally her predecessor Mr Magill) had erred or been incompetent. We therefore consider the points he made to see if individually or cumulatively they could have led us to consider whether Rule 15(2)(b)(iii) could have applied.

The first impugned matter: the opening partnership letter

294. The first document with which Mr Gordon took issue was the initial letter of 25 May 2010 from Mr Magill opening an enquiry into the partnership. This letter started "It appears that your client's Partnership Tax return for the above year is inaccurate"

and that the main force of the enquiry was on the capital of just over £2 million introduced into the partnership. A Schedule of the information that Mr Magill wished to see to help him with his investigation was attached, and it asked for the source of the £2m+ with evidence of the matters including bank statements of the partnership.

295. The information that £2 million of the amount came from the sale of 28 Station Road was provided by Weir & Co on 28 July 2010.

296. Mr Gordon referred to this exchange in his skeleton where at [14] he said (uncontroversially) that "HMRC are required to demonstrate that the condition in TMA, section 36(1) is met." There is a footnote after "met" which says:

> "For background, the Tribunal is notified that this was a case where initially HMRC had no reason to challenge the appellants' 2006/07 self assessments. A late question concerning an entry on their partnership accounts (which the Appellants were under no obligation to answer) then led to a series of further questions concerning the source of the capital introduced to the partnership which then led to further questions concerning the disposal of the Appellants' former home and eventually, assertions that their returns were potentially incorrect. Had the appellants chosen not to co-operate with HMRC (as they were fully entitled to do), they could have been spared seven years of worry and expense."

297. Mr Gordon asked Mrs McIvor whether a letter such as Mr Magill's of 25 May 2010 requires there to be a suspicion of inaccuracy, and she agreed. She also agreed that the response from Weir & Co did not give rise to any suspicion of underassessment.

298. Mr Gordon also characterised the letter of Mr Magill as a "fishing expedition".

299. We do not agree with Mrs McIvor that Mr Magill should have referred to an inaccuracy. There is no reason why HMRC should not ask questions of a taxpayer at any time after the end of a s 9A TMA enquiry period without any suspicion of inaccuracy. So we do not know what Mr Gordon means by saying that the enquiry was "late". We agree with him that the appellants were under no obligation to answer a question from HMRC. If they do not they cannot of course complain if HMRC resort to tactics such as using statutory powers which they can always appeal against on grounds of relevance to their tax position. No doubt that is why Weir & Co answered the questions, and continued to answer Mrs McIvor's questions.

300. Nor do we think that the request by Mr Magill (or for that matter any of those subsequently made by Mrs McIvor) can possibly be characterised as a "fishing expedition" if by that is meant an enquiry which is not relevant to anyone's tax position. If HMRC had *not* enquired into the introduction of £2 million as capital of a partnership of two people in the circumstances of the Ritchies, operating a take away in a small town in mid Ulster, then the officer responsible would in our view be open to criticism.

301. Nor is it remotely likely that a failure by the Ritchies to answer Mr Magill's questions would have caused HMRC to go away. It is more likely that after a refusal to reply the case would have been referred to a specialist investigation branch of HMRC, with one eye at least on the possibility of money laundering.

5 302. Nothing in this correspondence gives a glimmer of a reason for excluding this evidence.

The second impugned matter: the Schedule 36 notice

303. Mr Gordon next took issue with Mrs McIvor's issue to the Ritchies as individuals of a notice under Schedule 36 Finance Act 2008. This was issued on 13
10 April 2011 in the absence of a reply to a request for information made on 21 January 2011 by Mrs McIvor.

304. What Mr Gordon criticised was that Mrs McIvor issued the notice more than 4 years after the year of assessment in which the gains were made without telling the Ritchies that HMRC could only act on the information if they, ie Mrs McIvor, could
15 show the Ritchies were careless and she did not mention that or that the Ritchies could appeal against the notice on the grounds that they were not careless, nor did she mention paragraph 21 of Schedule 36 FA 2008 which Mr Gordon maintained restricted her ability to issue the notice.

305. Mrs McIvor agreed she did not do any of those things. As to paragraph 21
20 Schedule 36, the only relevant part is condition B in sub-paragraph (6). That prevents a notice being given where a return has been delivered unless:

> "an officer of Revenue and Customs has reason to suspect that, as regards the person,
>
> (a) an amount that ought to have been assessed to relevant tax for
> 25 the chargeable period may not have been assessed,"

306. It is clear that at the time of issue of the notice Mrs McIvor had not been specifically told that the area of the land was over 0.5ha.

307. But in our view it was reasonable for Mrs McIvor to suspect that the land registered at folio LY86333 in the Land Registry was a ransom strip and as she knew
30 that the land had been sold to developers for far more than its market value, it was reasonable to suppose that a possible liability to tax "*may* not have been assessed" as one might arise by virtue of s 224(3) TCGA or s 776 Income and Corporation Taxes Act 1988.

308. In addition we know from the bundle that on 4 August 2010 Mr Magill had
35 received a letter from Weir & Co which enclosed solicitor's correspondence about the sale of the land, and that on 13 August 2012 Mr Magill asked for a copy of the map he said was included in the contract of sale which he must have had.

309. On 20 September Weir & Co provided the map (Tab 2 page 7 in the bundle) of the land. On 19 October 2010 Mr Magill asked for "confirmation of the actual size of
40 the area of land".

310. No response was received to that enquiry by the time Mrs McIvor took over the investigation and she repeated the request in a letter of 21 January 2011. It was the failure to provide this information which led Mrs McIvor to issue the Schedule 36 notice in response to which Weir & Co gave the precise area as 0.699ha.

311. We have no doubt that from the map it would have been reasonable for Mrs McIvor to suspect that the area *may* be over 0.5ha, although later correspondence suggests she did not know that the land *was* over 0.5ha.

312. In the light of both of these matters we think that Mrs McIvor was justified in issuing the notice.

313. Does it matter that Mrs McIvor did not mention paragraph 21(6)(b) nor that she did not refer to careless conduct needing to be shown nor to a right of appeal on that particular ground?

314. While it might have been prudent to explain why HMRC could issue a Schedule 36 notice when a return had been delivered and no enquiry started, the absence of a reference to the paragraph cannot invalidate the notice or make it unfair. This is because Parliament has provided a mechanism for contesting the applicability of paragraph 21(1) and that is an appeal under paragraph 29.

315. We do not think that the question of carelessness is relevant here. There is no reference to carelessness in Schedule 36, or for that matter to deliberate conduct, except in relation to penalties (paragraph 40).

316. The notice was admittedly issued more than four years after the end of the relevant year of assessment (in fact 8 days after). Four years happens to be the time limit for making an assessment without HMRC having to show careless or deliberate conduct, but the only relevant time limit (paragraph 22 contains a limit where the taxpayer has died) in Schedule 36 is that in paragraph 20 which applies where a document being requested is more than 6 years old and requires an authorised officer to give, or agree to the giving of, the notice. In this case the relevant request was for information (the size of the land sold) not a document and in any case the document containing the map was not created more than 6 years before the notice.

317. Even if carelessness was a relevant consideration in any decision to issue the notice, we would say, by analogy with *R v Special Commissioners of Income Tax (ex parte Rogers)* [1972] 48 TC 46 ("*ex parte Rogers*") that no mention need be made specifically of the need for HMRC to show carelessness, or for that matter that a condition in paragraph 21 Schedule 36 was in issue.

318. *Rogers* was one of many cases on this area of tax law where the appellant was represented by Mr Marcus Jones. Mr Gordon seems to be assuming his mantle.

319. Mr Gordon also said that Mrs McIvor should have informed the appellants specifically of their right to appeal on the grounds that she had not met any condition in paragraph 21 or of her obligation to show careless conduct. As she had no such obligation for the purposes of a Schedule 36 notice we do not accept the latter point.

As to the paragraph 21 point we simply say that the letter and the Helpsheet CC/FS2 that accompanied it gives information about a recipient's right of appeal against the notice. The notice does not purport to spell out the grounds on which an appeal may be made and we do not think it needs to. There is certainly nothing in Schedule 36 suggesting that it does.

320. We do not think Mr Gordon has demonstrated any convincing reason for excluding the response to this notice (or anything else) from the evidence on the grounds that it was obtained using a Schedule 36 notice unfairly. We do not need to go on to consider whether the exclusion of that evidence would have made any difference to our decision. That would depend on precisely what further evidence in the case, if any, Mr Gordon thought should be excluded as a consequence of the primary exclusion of the answer to the Schedule 36 notice or whether the information in that answer could have been properly before us in some other way.

The third impugned matter: the appellant's rights of appeal against the discovery assessments

321. Mrs McIvor accepted that in the letters accompanying or constituting the notices of assessment she had not set out that there was a specific right of appeal on the ground that the appellants were not careless. She also accepted that she had not told the appellants that she needed to provide carelessness: she did respond to a question put in terms of "proof" to the effect that she only needed to "show" carelessness to justify the assessments – in this she was correct.

322. Mrs McIvor's response to Mr Gordon's somewhat patronising invitation to her to agree that "you don't enable if you don't tell them their rights" was to say that any omission was unintentional and she referred to the need to make protective assessments in a short space of time.

323. HMRC Guidance about this situation is in Enquiry Manual paragraph 3347 which says that when an officer makes an assessment "for the purposes of making good a loss of tax" an explanation letter must be sent, and the reader is directed to HMRC's Appeals, Reviews and Tribunals Guide paragraph 2190. That paragraph however merely says that "it is good practice to send the customer a separate explanation letter."

324. EM 3347 goes on to say that in relation to the explanation letter issued under that paragraph:

> "If you are making an extended time limits assessment, your explanation letter must also include your explanation of why you consider that you can use extended time limits"

325. There was no explanation letter for the first set of assessments. For the second set there was an explanation letter but while it referred to the tax loss that Mrs McIvor was making the assessment to recover, it did not explain why she considered that she could use the extended time limits.

326. In not doing this Mrs McIvor was not following HMRC guidance. The assessment was not unlawful because of that. As we have mentioned, the case of *ex parte Rogers* makes it clear that there need be no reference to carelessness in the assessment material.

327. But all the assessment letters contained information about "what to do if you disagree" including the right to a review and a right to ask a Tribunal to decide the matter. They directed the recipient to factsheet HMRC 1. She also sent copies of the letters to Weir & Co. The assessments were appealed by Weir & Co.

328. Sections 29(8) and 36(1B) TMA make it clear that an appeal can be made against an otherwise out of time assessment on the grounds that the conduct was not careless or that HMRC had not met the burden of showing that it was. Weir & Co or Mr Rodgers were clearly in a position to advise the appellants on these matters. The appellants did put this as one of their grounds of appeal in the Notice to Appeal when notifying their appeals to the Tribunal.

329. We consider that the absence of the explanation is regrettable, but no more. We do not find it unfair that carelessness was not mentioned, and certainly not so unfair as justify excluding any evidence (though we do not know what evidence Mr Gordon had in mind here).

A possible fourth impugned matter: Mrs McIvor and the DV

330. We mentioned at §12 Mr Gordon's application to have Mr O'Neill absent when Mrs McIver was giving evidence. We have to say that following the lengthy cross-examination of both witnesses we were not clear about what it was that caused Mr Gordon to make his application. It seems to have been a possible conflict of evidence about exactly when Mrs McIvor realised that what she thought was the "shed" was another smaller structure. Mr Gordon made nothing of it in closing and so we say no more.

331. Mr Gordon did raise in cross-examination of Mrs McIvor criticism that had been made of her by a senior officer, Mr Mackinnon, in a letter from him to Weir & Co. It does not seem that this episode was included in Mr Gordon's reasons why we should exclude any evidence, so we say no more about it other than that we cannot on both first and second glances see why the memo was premature, especially given the time limits in play.

The impugned matters taken together

332. Even if we were to regard all the impugned matters as a course of conduct, we do not think that would make any difference. The only matter which amounts to any form of error on HMRC's part is the failure to follow the guidance on explanatory letters to accompany extended time limit assessments. We have held that of itself it did not cause any unfairness, so coupled with a lack of any other unfair actions or omissions it cannot make any difference to our overall conclusion which is that there is nothing in the application.

Discovery & careless conduct: discussion of the validity of the assessments

333. Our conclusion on the substantive issue is that there is a chargeable gain accruing to each of the Ritchies (see §260).

334. There is therefore a tax loss in objective terms.

335. In our view Mrs McIvor was fully justified, given her state of knowledge in early March 2013, in raising the discovery assessments. She had discovered that the Ritchies had not self-assessed themselves to CGT and that as a result she was entitled to make the assessments in amounts to the best of her judgement. We deal with the question of best judgment later.

336. The reference in s 29(1) to her being subject to subsection (3) does not mean that she was required to establish at that stage that there had been careless conduct (see *Hankinson v HMRC* [2010] UKUT 361 at [23]).

337. But on appeal HMRC have to show that one or other of the conditions mentioned in s 29(3) is met. As we have said there seems to us no doubt that the condition in s 29(5) is met, but meeting that condition does not help HMRC in a case where the assessments were made more than four years after the end of the year of assessment in which the gains arose (s 34(1) TMA).

338. In order to raise an assessment at all after four years, but before the end of six years, s 36(1) requires that there must have been careless conduct which brought about a loss of tax. It is agreed by the appellants that if there is such careless conduct then not only is HMRC entitled to make an assessment, the condition in s 29(4) is also met.

339. HMRC's success in these appeals depends then entirely on whether they can show, on the balance of probabilities, that each of the Ritchies failed to take reasonable care to avoid bringing about the tax loss in question (s 36(1) and s 118(5) TMA) or that a person acting on their behalf did so (s 36(1B) TMA).

340. We were not specifically addressed on the position of Hazel Ritchie. In our view Billy was acting on her behalf as was Mr Russell at one remove. So what we determine in relation to Billy will also apply to Hazel, with this caveat. In completing and filing her return Mr Weir was acting on behalf of Hazel directly.

Was Billy Ritchie careless?

341. So did Billy fail to take reasonable care himself to avoid bringing about the tax loss? In our view he did not. He trusted Mr Weir to complete his accounts and returns, he recognised that the sale was unusual and he did what a person in his circumstances, a person in a relatively small way of business who gets a huge windfall, should do, seek professional advice. He did that by going to Mr Weir and he followed Mr Weir's advice to see Mr Russell.

342. Was it unreasonable of him not to volunteer information about the pre-occupation period to Mr Russell? We do not think it was – he did take photographs and maps and he was not in a position to know about s 223(2) TCGA or *Henke*.

343. Was it unreasonable of him to characterise what Mr Russell had said to him as meaning there was no tax to pay. We do not think it was. It may not have been what Mr Russell did in fact say, so that it was probably more what Billy had hoped to hear.

344. Should Billy have said something to Mr Weir when the returns were signed and posted? In the circumstances we do not think so.

345. We therefore hold that Billy, and therefore Hazel, did not themselves fail to take reasonable care to avoid bringing about the tax loss.

"on a person's behalf"

346. The assessments on Billy and Hazel can therefore only be justified if another person acting on their behalf failed to take such reasonable care. Before we consider this issue we deal with Mr Gordon's submissions on this "agency" point.

347. We do not accept that HMRC did not adequately plead this issue. Contrary to what Mr Gordon says, the point was raised in HMRC's Statement of Case at paragraph 39 and their skeleton at paragraph 83, and s 36(1B) TMA was cited. What is more it was only in cross-examination that the full facts about the actions and omissions of the relevant parties became known to HMRC.

348. We also consider that paragraph 30 of *Atherton* is exactly in point here. HMRC do not have specifically to plead carelessness (and there is also support for that proposition in *Ingenious Games LLP and ors v HMRC* [2015] UKUT 105 (TCC)) at [40] and [62] where Henderson J (as he then was) distinguished between dishonesty which had to be properly pleaded and less serious misconduct which did not, carelessness clearly being a less serious form of behaviour in his eyes (and ours).

349. We therefore think that we are entitled to consider the evidence of Mr Russell and Mr Weir (the only candidates for agency) and to decide if they were careless and, if so established, that their carelessness brought about the tax loss.

Was Mr Russell careless?

350. Mr Russell was offering his services on the basis of his professional knowledge gained in the Inland Revenue as a Grade III Inspector and a tax consultant but not a CGT specialist. He had experience he said of advising on PPR cases. We consider that on the balance of probabilities Mr Russell had available to him and was familiar with the legislation in ss 222 to 226 TCGA and the HMRC Capital Gains Manual at least.

351. While we do not accept him as quite the expert that Mr Gordon painted him as being and while we found that some of his advice as reported in his witness statement was rather confused (especially point 1) we do not read him as saying that there would be no tax to pay. His suggestion that photographs be collected (not "taken"

which was as we say a slip) when he had already seen the photos Billy had brought to the meeting is consistent with that advice. Photographs would only need to be shown to HMRC if there was an enquiry into the returns as a result of an entry in the returns.

352. But one answer Mr Russell gave in cross-examination did perturb us. He said that returning the details of the gains was not compulsory. We do not think that anyone familiar with the SA 100 tax return, the TRG and IR 283 Helpsheet (as they applied for 2006-07), as he should have been, could make that statement when he knew that the area of the land was over 0.5ha. The most charitable reading of that answer is that he was making it clear that it was up to Mr Ritchie and Mr Weir to decide whether to include details in the return if the tests for relief were met.

353. We are also perturbed by his failure to ask Billy about the pre-occupation period. As someone offering tax advice on the subject of PPR, an area with which he was familiar, and whose expertise was lauded by Mr Gordon, he should have known of the decision in *Henke* (whether or not it had been reflected in the Capital Gains Manual).

354. We find that HMRC have shown on the balance of probabilities that Mr Russell was careless.

Was Mr Weir careless?

355. We say the same of Mr Weir, rather more emphatically.

356. In our view he was careless in not accompanying Mr Ritchie to the meeting with Mr Russell or not taking any steps to brief Mr Ritchie for the meeting to ensure, in particular but not solely, that the pre-occupation period was mentioned.

357. In our view he was careless in not corroborating in any respect what Billy told him after the meeting. A simple phone call between people who knew each other well professionally would probably have sufficed to show that Mr Russell's advice on the permitted area point was more nuanced than that which Billy had told him and may not have been based on complete information.

358. In our view he was also careless in not doing any research himself into the question, not having corroborated what Billy told him with Mr Russell. He was aware of the size of the land and of the pre-occupation period. We know he did not have a computer but we cannot imagine that someone who, in his profession, prepared tax returns and accounts for delivery to HMRC was not familiar with the tax return and the TRG. He must have been in a position to read what they said about PPR relief (ie on page 2 of the SA 100 and page 7 column 3 of the TRG) but he failed to read them or refresh his understanding before advising Billy and Hazel that neither an entry on the CGT pages nor white space entries were required. The same goes for the IR 283 Helpsheet. It may be at the time that for those without a computer it was only available by order from HMRC, but if he did not have it he should have got hold of it.

359. Had he read either document he could not have reasonably submitted the returns he did. At §§149 to 151 we have set out the text of the relevant parts of the SA 100

tax return, the TRG and the IR 283 Helpsheet. It is impossible in our view to read these and to conclude from that reading that information about the 28 Station Rd transaction should not be given.

360. We do not need to decide whether failure to do what the TRG and Helpsheet say means that the returns were incorrect. We note merely that s 8(1) TMA requires that in aiming a return an individual must give:

> "(a) … such information as may reasonably be required in pursuance of the notice"

and that this may, and probably does, encompass the information which the TRG and Helpsheet refer to.

361. Not to give any clue of what happened in the light of what Mr Weir knew and had been told is at the very least careless. It is not necessary to say more.

362. Mr Gordon seems to have recognised that we might well find Mr Weir to have been careless, thus requiring him to have a fall back position We do not accept that position, that any carelessness of Mr Weir's did not bring about a loss of tax. Of course it did.

The cases on "behalf"

363. We must though address the two cases which Mr Gordon referred to. In *AB* the passage relied on by the appellants is at [105]:

> "We also accept that a taxpayer who takes proper and appropriate professional advice with a view to ensuring that his tax return is correct, and acts in accordance with that advice (if it is not obviously wrong), would not have engaged in negligent conduct."

364. Despite this statement the Special Commissioners ("SCs") held (at [114]) that the representative partner of AB was negligent (we equate negligence with carelessness in this context). In [106] the SCs said:

> "The Appellant firm's answer to the allegation of negligent conduct was based on Mr A's evidence that he had sought advice on the deductibility of the payment for costs from the Chartered Accountant on 14 February 1997 and that he had acted on that advice. We have already stated our finding that we are not satisfied that such advice was sought but that, even if it was, the relevant facts were not told to the Chartered Accountant and the wrong question was asked."

365. At [53] in making findings of fact the SCs said:

> "In the light of the evidence before us we are not satisfied that the Chartered Accountant did give tax advice to Mr A on the telephone on 14 February 1997. However, even if he did we are not satisfied that he was given all the relevant facts nor was he asked the right question."

366. This is strongly reminiscent of our findings in this case. And while we would say that some of Mr Russell's advice is not obviously wrong about the law, it is

necessarily incomplete as he did not know of the pre-occupation period, or if he did know he didn't deal with it, so we cannot say that it was appropriate professional advice if it was incomplete in a major particular.

367. And we consider that if Mr Weir advised the Ritchies that no mention need be made of the transaction that was obviously wrong.

368. Mr Gordon also mentioned *Bayliss* in the hearing (*AB* was in his skeleton). *Bayliss* concerned a tax avoidance scheme which failed. Somewhat unusually HMRC argued that in making an entry in the CGT pages of his tax return Mr Bayliss was fraudulent, or if not fraudulent, at least negligent. At [59] referring to the appellant's submissions, the Tribunal said:

> "Mr Sykes argued that there may be a range of responses to any scenario by a reasonable person, and that HMRC needed to show that no reasonable person would have acted in the relevant way, referring by analogy to *Barker v Baxendale Walker* [2016] EWHC 664 at [126] to [128] (a case on solicitors' duties). He also referred to *Gedir v HMRC* [2016] UKFTT 188 (TC), which considered the test to apply where a taxpayer relies on an agent to complete his return. Following the earlier case of *Hanson v HMRC* [2012] UKFTT 314, the Tribunal found that reasonable care is taken where the adviser consulted is reasonably believed to be competent *and is provided with the relevant information, the adviser's work is checked to the extent possible, and the advice is implemented* (see [115]). This did not mean that the taxpayer should be expected to identify an error in respect of complex legal points, as opposed to a case where there was an obvious error or the position being taken was obviously untenable." [Our emphasis]

369. In our view, while Mr Russell and Mr Weir may have reasonably been believed by Billy to be competent, we do not agree that Mr Russell was provided with the relevant information or that any check at all was performed on the adviser's work by the person, Mr Weir (acting for Billy and Hazel) who was in a position to do that.

370. We consider that neither *AB* nor *Bayliss* assists the appellants.

Our conclusion

371. Our conclusion then is that Mr Weir's, and to a lesser extent Mr Russell's, careless conduct brought about a tax loss and it follows that the assessments on both Billy and Hazel (as Mr Weir was acting for Hazel when he completed her tax return) were made within the time allowed by s 36(1) TMA, and that the condition in s 29(4) TMA is met.

Two sets of assessments

372. We have recorded at §§45 and 46 that Mrs McIvor raised an assessment on each of the Ritchies on 12 March 2013 and again on 28 March 2013.

373. The first discovery assessment on Billy Ritchie charged an additional £35,164.40, entirely made up of CGT due on gains of £100,000.

374. The first discovery assessment on Hazel Ritchie charged an additional £37,490.60, entirely made up of CGT due on gains of £100,000.

375. The difference in the tax figure is explained by the fact that these assessments were additional to the tax shown on each of their self-assessments, which was £906.23 for Billy and £5,967.90 for Hazel.

376. The second discovery assessment on Billy Ritchie charged an additional £137,056.00, entirely made up of CGT due on gains of £342,640.

377. The second discovery assessment on Hazel Ritchie charged an additional £137,056.00, entirely made up of CGT due on gains of £342,640.

378. Mrs McIvor explained the amount of the first discovery assessments in the Notices of Assessment, where she said "I am sending this further assessment to you because we have found that there is additional tax due that was not included in the previous assessment. This further assessment allows us to collect the tax." Nothing was said in this or in any previous letter to explain how the figure of £100,000 was arrived at.

379. Mrs McIvor explained the amount of the second discovery assessments in a letter to Weir & Co of 28 March 2013. She said that the second assessment was required because a review of the papers had brought to light the pre-occupation issue and so a time apportionment was required. Her calculation showed an apportionment fraction of 145/230 which was applied to a gain of £1,800,000 to give an assessable gain of £665,280 divided equally, making the gain £332,640. It was acknowledged that these later assessments took no account of any PPR relief, which was still under enquiry with the District Valuer.

380. This makes us wonder what basis HMRC have for saying that the first discovery assessment was made to the best of Mrs McIvor's judgment about the suspected tax loss. If the £100,000 is not to account for the time apportionment of the gain (and Mrs McIvor's letter of 28 March says it isn't), it must be to account for the dispute over the permitted area. Given an overall gain of £1.8 million and HMRC's view throughout that the permitted area is 0.5ha and not the total area of 0.7ha, then the gain on the non-permitted areas must be c £515,000 (two-sevenths of £1.8 million), not £200,000.

381. £200,000 makes no sense on any measure of the gain, and given Mrs McIvor's state of knowledge of Mr O'Neill's opinion about the permitted area, she had more than just suspicion on which to exercise her judgment. The round sum nature of the amount assessed suggests it was a figure plucked from the air simply to "protect" HMRC's position. There is nothing special about "protective" assessments: they must be made in accordance with the same statutory conditions as any other assessments.

382. In our view these first discovery assessments were not made to make good the loss of tax arising from the non-assessment of tax that ought to have been assessed.

383. Where does that leave the second discovery assessments? In our view they were made to make good a loss of tax that had not been assessed. There is no bar to more than one discovery assessment being made (see *Cansick (Murphy's Executor) v Hochstrasser (H M Inspector of Taxes)* 40 TC 151) so they stand as validly made (and as we have held, in time).

384. Nor do we think the fact that the second discovery assessments were apparently only made to bring the tax on the pre-occupation period gain into charge any bar to our dealing with them so as to include the non-permitted area gain. Our view on this was reinforced, but not created, by our reading *Gareth Clark v HMRC* [2017] UKFTT 392 (TCC) (Judge Roger Berner and Ms Gill Hunter) shortly before the release of this decision. We have not sought the views of the parties on this decision because it is to us quite clear and we agree entirely with it.

385. The amount of these second discovery assessments is £342,640 which is £10,000 more than the figure in Mrs McIvor's letter (and we take this discrepancy to be an innocent slip).

386. In a letter of 11 June 2015 Mrs McIvor attached a revised computation, to take into account certain cost figures which had been supplied.

387. These computations show a gain for the non-permitted area (0.199ha) of £561,839, found by apportioning consideration of £1,999,999 pro rata to the total area making £569,384 and then deducting a share of the cost of land, £2,000 and sale costs of £5,545[5].

388. After deduction of indexation of the land of £1,074 the gain on the non-permitted area becomes £560,315 which is tapered to £364,204.

389. For the permitted area (0.5ha) the computations show a gain of £1,055,130. This starts with the pro rata share of the consideration, £1,430,615. From this is deducted the value of Folio LY86333 of £171,673 because, Mrs McIvor says, it falls within the permitted area. We do not understand why it is deducted from the consideration in calculating the gain on the permitted area or why if it should be it is not added to the non-permitted area.

390. The revised consideration as a result of this mysterious deduction is therefore £1,258,942 from which are then deducted costs of £9,000 (land), £179,900 (house construction), £13,862 (sale costs) and £1,050 (legal costs for the DoE land) leaving a gain of £1,055,130.

391. After indexation of £28,040 and taper relief the gain becomes £667,608. This is then time apportioned using a fraction 81/226 to give a gain of £239,276. Added to this is the gain from the non-permitted area of £364,204 to give a total divisible between the Ritchies of £603,480 or for each £301,740.

[5] We do not understand why the land costs are allocated to the non-permitted area in the ratio 2:9 (ie not the ration of HMRC's view of permitted to non-permitted area) but the legal costs of sale are line the consideration allocated 2:5. Perhaps it is the mysterious deduction for LY86333 in play again.

392. We accept that all the costs shown in this computation are deductible by virtue of s 38 TCGA. We also accept HMRC's figures for indexation of the costs and that the correct taper under s 2A TCGA 1992 is to 65% on the basis that the whole number of years involved is 8+1 (s 2A(8)(b)).

393. But the figures used in Mrs McIvor's computation cannot stand in the light of our conclusions. So we have to start again from scratch, following the whole of TCGA and applying ss 222 to 224.

394. Section 1 TCGA charges capital gains to CGT. Capital gains means chargeable gains computed in accordance with the that act.

395. By s 15 TCGA gains on the disposal of assets are computed in accordance with Part 2 TCGA, and, except as expressly provided, all gains are chargeable gains.

396. The gain on the disposal of the asset which was 28 Station Rd, Moneymore is found by taking the consideration of £2,000,000 and deducting from it those costs which are deductible by virtue of s 38 TCGA. They amount to £211,357[6] so as to give a gain of £1,788,643. That is the chargeable gain subject to anything in ss 222 to 224 TCGA. We have not made any deduction (or addition) for the mysterious £171,673 said to relate to Folio LY86333.

397. Section 222 applies to a gain accruing to an individual from the disposal of an interest in a dwelling house which has been their only residence or[7] land occupied for their own occupation and enjoyment as garden or grounds, but in the latter case up to the permitted area, which in this case we have determined to be 0.6ha.

398. Since that area is less than the total area of the garden or grounds, s 222(10) mandates an apportionment of the consideration. Therefore six-sevenths only of the consideration is treated as appropriate to the dwelling house and the permitted area of garden and grounds, we having decided that an area apportionment is the most appropriate one.

399. Accordingly by s 223(1) it is necessary to the calculate the gain which s 222 treats as not being a chargeable gain. The consideration for that gain is £1,428,571[8] (s 222(10)). Because it is in fact necessary by s 222(4) to specifically identify the part of the land which is not in the permitted area and that part which is, it follows that the gain that is not taken into account should be calculated by referring to it the costs which are specifically relevant to that part of the land.

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[6] This figure is found by adding £179,900 construction costs, land acquisition of £11,000, legal costs on sale of £19,407 and the legal costs of the DoT strip of £1,050.

[7] The "or" here struck the authors of Wheatcroft & Whiteman on Capital Gains Tax (1st edn.) as odd. We (and Mr Gordon) think that the context shows that it is being used in the sense of "(a) or (b) or both" or "and/or". The current (August 2015) Drafting Guidance from the Office of Parliamentary Counsel confirms that whether "or" is to be interpreted in this inclusive way or in an exclusive way ("(a) or (b) but not both") in a statute drafted by them (as TCGA was) depends on the context.

[8] £2,000,000 x .714285

400. Part 2 TCGA applies to the computation of gains, not chargeable gains, so it applies to the exempt part of the gain as well as the taxable part. We therefore follow the HMRC calculations as to what costs are included but must recalculate the apportionment of those costs which are common to both areas (no other split being mandated).

401. That means that of the land costs of £11,000, £1,571 (one-seventh) is allocated to the non-permitted area and £9,429 to the permitted area. And of the sale costs of £19,407, £2,772 (one-seventh) is allocated to the non-permitted area and £16,635 to the permitted area. All of the house construction costs of £179,900 are allocated to the permitted area as is the cost of the DOT strip of £1,050.

402. That make the gain on the permitted area £1,428,571 less £9429, £16,635, £1,050 and £179,900 which makes £1,221,557 and that is the relief given by s 223 TCGA.

403. We then adjust the relief in accordance with s 224(2) TCGA to become £1,212,457 making the chargeable gain on the permitted area £9,100 (see §260). This falls to be reduced by indexation on the land only which is £9,429 x 0.408 (the indexation from 1987 to 1995) so making the gain £5,582.

404. As for the non-permitted area the chargeable gain is the consideration of £285,714 less £1,571 (land) and £2,772 (costs on sale) making the gain £281,371 less indexation of £843 making £280,528.

405. Add to that the £5,582 (pre-occupation period gain on the permitted area) and the total chargeable gain is £286,110 which divided by 2 is £143,055 to each of the Ritchies.

406. That gain then falls to be tapered to become 65% of the calculated gain which is £92,985 to each of the Ritchies.

407. We now calculate the tax due on each of the Ritchies on the basis of the figure of gains we have determined.

408. For Hazel Ritchie, we first deduct the annual exempt amount of £8,800 (see the Capital Gains Tax (Annual Exempt Amount) Order, SI 2006/871). This is something HMRC appeared to have forgotten to do. The gain charged at the relevant rates of tax is therefore £84,185.

409. Using HMRC's tax calculation (and having regard to s 4 TCGA) £12,547 of the gain is taxed at 20% making £2509.40. The balance of £71,638 is taxed at 40%, £28,655.20. The total is therefore £31,164.60.

410. For Billy Ritchie, we also deduct the annual exempt amount of £8,800. The gain charged at the relevant rates of tax is therefore £84,185.

411. Using HMRC's tax calculation (and having regard to s 4 TCGA) £24,178 of the gain is taxed at 20% making £4,835.60. The balance of £60,007 is taxed at 40%, £24,002.80. The total is therefore £28,838.40.

Decision – Billy Ritchie

412. In accordance with s 50(6) TMA we reduce the assessment for 2006-07 dated 12 March 2013 to nil.

413. In accordance with s 50(6) TMA we reduce the assessment for 2006-07 dated 28 March 2013 to an amount of chargeable gains of £84,185 and reduce the tax charged to £28,838.40.

Decision – Hazel Ritchie

414. In accordance with s 50(6) TMA we reduce the assessment for 2006-07 dated 12 March 2013 to nil.

415. In accordance with s 50(6) TMA we reduce the assessment for 2006-07 dated 28 March 2013 to an amount of chargeable gains of £84,185 and reduce the tax charged to £31,164.60.

416. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 24 MAY 2017

SHED