[2018] UKFTT 605 (TC)

# TC06767

**Appeal number: TC/2015/03466**

***CAPITAL GAINS TAX – Section 222 TCGA 1992 – whether the Appellant was entitled to principal private residence relief on disposal of property – whether the property was the Appellant's residence – no***

***DISCOVERY ASSESSMENT – whether the discovery was sufficiently new for the assessment to be raised – yes – whether HMRC was required to show that the Appellant's conduct was negligent in order to raise assessment – yes – whether HMRC bore the burden of establishing that the Appellant was not entitled to relief under Section 222 TCGA 1992 in order to establish competence of assessment – no – appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**KATIE LO** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JANE BAILEY**
**MR TERENCE BAYLISS**

**Sitting in public at Centre City Tower, Birmingham on 12 July and 14 September 2017**

**Ms Lynne Haddon, the Appellant's mother, for the Appellant**

**Ms Karen Powell, HMRC presenting officer, for the Respondents**

DECISION

## Introduction

1. This appeal is made against a discovery assessment to capital gains tax in the sum of £105,293.86, raised under Sections 29 and 36 Taxes Management Act 1970 ("TMA 1970"), and against a penalty in the sum of £21,058 raised under Section 7(8) TMA 1970 for failure to notify liability. The dispute between the parties was whether the Appellant was entitled to principal private residence relief from capital gains tax in respect of her disposal of a dwelling-house in 2007.

2. There were a large number of issues argued in this appeal. Given the possibility of an onward appeal on any one of these issues, we have endeavoured to set out below our reasoning in respect of each of these issues. We apologise to the parties that this has resulted in a much longer (and later) decision than either might have desired. Given the length of this decision, we also state at the outset that this appeal is dismissed. The discovery assessment and the penalty are both confirmed.

## The hearing before us

3. At the outset of the hearing, Ms Haddon, for the Appellant, told us that she wished to put HMRC to proof of a number of the documents in the bundle. The Appellant accepted that the documents produced were true copies of the documents that they purported to be but explained that she did not accept that the contents of the certain documents were accurate. In particular the Appellant:

- did not accept that what HMRC described as "[voters list]" evidence was in fact derived from the electoral roll or was a reliable indicator of what was on the electoral roll,
- did not accept that documents in the bundle which had been supplied by the Appellant's former estate agent were a complete set of documents or gave the true picture, and
- did not accept that P14s upon which HMRC relied bore the construction which they had been given.

4. The Appellant supplied additional documents to try to alleviate what she saw as these deficiencies in the bundle. HMRC did not object to the late provision of this material and we admitted these documents in evidence. We also admitted in evidence the documents to which the Appellant had objected. We comment where necessary upon these in our findings of fact below.

## Summary of issues raised and the burden of proof

5. As noted above, the appeal is against an assessment to capital gains tax for the year 2007/2008. This assessment is a discovery assessment and is made under the

extra time limit (or "ETL") provisions contained in the TMA 1970. There were a number of procedural issues in addition to the substantive dispute.

6. Looking first at the procedural issues, the Appellant challenges the raising of the discovery assessment, on the basis of both competence and time, arguing that HMRC have not satisfied the provisions of Section 29 TMA 1970 and that the discovery had become stale by the time the assessment was raised. The Appellant also argues that HMRC have relied upon the incorrect legislation and that the correct legislation requires HMRC to demonstrate that she was negligent in failing to notify chargeability, and she denies that this was the case.

7. The Appellant also appeals against the substance of the assessment on the basis that the dwelling-house disposed of was her main residence and so she was entitled to principal private residence relief. In relation to this aspect of the appeal, the Appellant disputed that she bore the burden of proving entitlement to private residence relief, arguing that HMRC bore the burden of disproving entitlement.

8. The Appellant also appeals against the imposition of a penalty imposed for failure to notify chargeability, arguing that she was not chargeable and so had no obligation to notify chargeability.

**The onus and standard of proof**

9. The parties were agreed that HMRC bear the burden of establishing that they have satisfied the provisions of Section 29 TMA 1970; however, there was some disagreement over what that entailed.

10. We understood HMRC's position to be that it was for the Appellant to establish that she is entitled to any relief once they had demonstrated their discovery of a capital gain; we understood the Appellant's position to be that it was for HMRC to disprove an entitlement to relief as part and parcel of making their case in respect of the discovery assessment. We consider this aspect below when considering the substantive dispute.

11. The parties were agreed that the onus was upon HMRC to establish that the penalty had been raised in accordance with the relevant legislation.

12. The parties were agreed that in both cases the standard was the civil standard, the balance of probabilities.

13. We set out below our conclusions as to where the onus lies. At the hearing before us, given that the burden was initially upon HMRC in respect of the discovery assessment and the penalty, we asked Ms Powell to set out HMRC's case first.

**The parties' submissions**

14. Given the number of issues, we have found it easier to set out the parties' submissions in relation to each issue as that issue is considered below.

**Witnesses**

15. On behalf of HMRC, we heard evidence from Mr Richard Lindley, an HMRC officer. Mr Lindley had not been involved with the original investigation into the Appellant's tax affairs but was a colleague of the original investigating officer, Mr Michael Judson, who had retired in May 2017. We found Mr Lindley to be a truthful witness. On the Tribunal file was an unsigned written statement from Mr Judson, the original investigating officer. Mr Judson did not attend before us to be cross-examined, and so we give limited weight to Mr Judson's statement.

16. The Appellant gave evidence on her own behalf. We considered the Appellant to be an intelligent and likeable woman. We noted that there were a number of aspects of her affairs about which the Appellant had no or only very limited recall, whereas the Appellant was able to recall other aspects with much more clarity. While the lack of recollection was in part due to the very long passage of time since the events in question, we formed the impression that the differences in quality of recollection were also due to the Appellant having had limited involvement in some aspects of her affairs. We reached the conclusion that the Appellant's mother had managed or taken care of a number of issues which were said to have been undertaken by the Appellant. There were a couple of occasions where the Appellant's mother, who was presenting the Appellant's case, interrupted the cross-examination of the Appellant with her own response or comment upon the question. We formed the impression that even at the hearing, when she was in her late twenties, the Appellant was not entirely independent of her mother.

17. We also heard evidence from the Appellant's sister, Ms Rachel Lo, and the Appellant's uncle, Mr David Webb, both giving evidence on behalf of the Appellant. Unsurprisingly, due to both the number of years which had elapsed and their limited involvement in events, Ms Rachel Lo and Mr David Webb were also unable to recall a number of aspects. Ms Rachel Lo was only 13 years old during the period about which she was giving evidence, and some of what we are concerned with now would not have been relevant, memorable, or possibly even within the understanding of a 13 year old child.

18. We were also shown witness statements from Ms Carole Webb, the Appellant's grandmother, and a joint statement from a Mr and Ms Hall who owned a property in the Isle of Wight which had been rented by the Appellant's mother. These three witnesses did not attend the hearing. At the first day of the hearing we explained to both parties that we could give limited weight to the statement of a witness who did not appear to make themselves available for cross-examination. The hearing over-ran its original listing and the second day of the hearing did not take place until some two months later, and was fixed after taking into account the parties' availability. The listing of a second day enabled Ms Rachel Lo to give evidence in person but none of Ms Webb, Mr Hall or Ms Hall attend. Therefore, we give little weight to the evidence contained in the three statements of these three witnesses.

19. Shortly before the conclusion of the hearing on the second day it became clear that the Appellant had relevant documents in her possession which had not been

disclosed to HMRC in these proceedings or made available to the Tribunal. We drew Ms Haddon's attention to the Directions which had been issued in 2015, and to the obligation (noted in *Fisher v HMRC* [2012] UKFTT 335 and elsewhere) that "… a party will be expected to disclose all relevant documents unless they can show withholding them is appropriate".

20. We accept that this withholding was not deliberate but was due to the Appellant not fully understanding her obligations. It was particularly surprising in this case as it appeared to us that the documents which Ms Haddon described could potentially support the Appellant's case and were highly unlikely to damage it. We formed the opinion that we could not properly consider this matter without sight of these documents, given their potential relevance. Therefore, although it would cause further delay, we directed that these documents be disclosed following the conclusion of the hearing, with HMRC being given the opportunity to provide written comments. These documents and HMRC's comments were delivered to us at the end of November 2017.

## Our approach to the evidence

21. Before setting out the facts we have found, it will be useful to note our approach to the evidence. In accordance with the guidance in *Piper v Hales* [2013] All ER (D) 257 (Jan), we consider our approach to the evidence should be to establish what is common ground and the facts which are incontrovertible (such as those set out in contemporaneous documents, written before either party understood that there was likely to be a subsequent dispute). In then assessing the witnesses' accounts of what happened, the factors we take into account are contemporaneity, consistency, probability and motive.

22. We also bear in mind that the Appellant was the only party to the substantive events which have occurred and that HMRC are challenging the credibility of the Appellant's account without having been present. For the background to the raising of the discovery assessments, the position is reversed. Throughout, where an account is given for the first time a long time after the event, or it changes over time without good reason, or it is inherently unlikely, then we consider that account to be less reliable and we treat it accordingly.

## Findings of fact

23. On the basis of the oral evidence and the documents before us, we find the following facts:

Background

24. For a number of decades prior to the events with which we are concerned, a Ms Taylor had owned Nos. 200 and 206, Victorian houses in a street in East Dulwich, London. No. 206 was a four bedroomed terraced house; No. 200 was a five bedroomed end of terrace house (although one of the bedrooms was used as an upstairs kitchen). No. 200 also had the benefit of a large garden. This garden consisted of two strips of land at right angles to each other – one strip was at the back

of No. 200 and the other strip ran along the rear of Nos 200-206, backing on to the plots of buildings sited in a parallel street. This garden was large enough – potentially – to build another four bedroomed house, accessed from a strip of land which ran along the edge of No. 200.

25. By 2004, Ms Taylor, by then an elderly lady, did not live at either of her houses in London but instead lived in Norfolk. There were tenants in both No. 200 and No. 206.

26. The tenant at No. 200 was a Mr Runeckles. By 2004, Mr Runeckles had lived at No. 200 for more than 30 years, and Mr Runeckles' mother had lived at No. 200 before him. Mr Runeckles and Ms Taylor had agreed that Mr Runeckles would take care of No. 200 in return for paying a low rent. Mr Runeckles had security of tenure and could not be obliged to leave No. 200 if he did not wish to go.

27. In March 2004 there was a fire in a room at the back of No. 200, caused by Mr Runeckles' electric blanket. It is unclear when Mr Runeckles told Ms Taylor about the fire but she was aware of it by early 2005. Mrs Taylor appears to have made an insurance claim, or informed her insurers, in respect of this fire although a note from her, apparently to her insurer, about the fire concludes:

> Please note we cannot tell by the 2 photographs, how badly the floor or ceiling have been damaged.

28. At some point either in late 2004 or very early in 2005, Ms Taylor decided to sell No. 200 and so asked an estate agent to visit for the purpose of valuing the property. The estate agent appears to have reported back to Ms Taylor that Mr Runeckles lived in squalor at No. 200. Ms Taylor apparently wrote to Mr Runeckles about this. We do not have a copy of Ms Taylor's letter but we were shown Mr Runeckles' reply of 17 February 2005. In that letter Mr Runeckles refers to the estate agent's visit and denies living in squalor, but he accepts that the front garden has become overgrown and he states that he will take care of it. We were shown a photograph of No. 200, taken on 28 August 2006, showing the front of No. 200 entirely covered with ivy and an overgrown hedge reaching about to the height of the first floor of the house. We find that Mr Runeckles had not attended to the front garden. In his letter Mr Runeckles continued:

> With regards the fire, I didn't tell you because you were in hospital at the time and didn't want to worry you. It was caused by my electric blanket and the only damage was to my own property.
>
> So you have decided to sell the house which is what I suggested in the first place. Although I have no right to be involved in your business I can't help but worry as to my future. When I first suggested that you sell 200 and buy a smaller property where I might live and pay rent, which as I said before would have given a lump sum and regular income, didn't seem acceptable to you.

29. The Appellant told us that Ms Taylor originally intended to sell No. 206 but was undecided about also selling No. 200 as she had greater emotional ties to No. 200. It

is clear from Mr Runeckles' letter that Ms Taylor had made the decision to sell No. 200 by February 2005, and that at this date Mr Runeckles was concerned for his own future and where he might live. Mr Runeckles did not suggest to Ms Taylor, in his February 2005 letter, that he would look for accommodation of his own.

30. We were not informed whether either No. 200 or No. 206 were formally marketed in 2005 or 2006, and we were not shown sales particulars for either house in 2005 or 2006. In her witness statement the Appellant stated that Ms Taylor wanted a quick sale in order to have funds to pay for her nursing care, and had decided against taking action herself with regard to Mr Runeckles. If Ms Taylor had decided to sell by February 2005 then by the beginning of 2006 she must have been very keen indeed to sell her properties.

Events in 2006

31. In February 2006 the Appellant celebrated her 18th birthday. At this time, she, her mother and her younger siblings lived in a rented house on the Isle of Wight. The Appellant was at school, preparing to take her "A" levels. She had applied to a number of universities to read modern languages. The Appellant's first choice was Southampton University where she would be able to read French, Spanish and Mandarin.

32. At around the time of her 18th birthday, the Appellant and her mother were introduced to Ms Taylor by a friend of a friend of the Appellant's mother. The Appellant's mother was interested in buying No. 206. The Appellant told us that she became interested in buying No. 200 from Ms Taylor, to make it her first home and to get a step on the property ladder. We consider this statement in our decision below.

33. In about March 2006 the Appellant and her mother visited Mr Runeckles at No. 200. The Appellant told us, and we accept, it was clear to her that Mr Runeckles was ready to leave No. 200 and that he would be willing to leave if he could find a place in sheltered housing nearby so that he did not have to leave that part of London. We accept that Mr Runeckles was looking for a suitable place in sheltered accommodation, and that the Appellant did not have concerns about Mr Runeckles wanting to stay at No. 200 for any period of time.

34. The Appellant also told us, and we accept, that No. 200 contained 30 years' worth of material hoarded by Mr Runeckles, principally magazines and other papers. The photographs in our bundles (which, with one exception, were taken by the Appellant on 28 August 2006) showed paper debris and books completely covering the floor and available furniture in some rooms, and with large bags and boxes full of hoarded material in other rooms. The hoarded materials reached to about knee height from the floor in the photographs we were shown. One room was clear of hoarded material, at least in one corner, but showed mould on the walls and holes in the floor where the rotting floorboards had disintegrated. Despite Mr Runeckles' obligation to take care of the property it was clear from these photographs that no internal repairs or refurbishment had taken place at No. 200 for a considerable number of years.

35. The Appellant told us that this state of neglect and disrepair did not put her off purchasing the property. Under cross examination the Appellant said that she knew No. 200 was "a good deal" and that the value of the house would increase. We find that the Appellant was aware that the value of No. 200 would increase considerably on the day that Mr Runeckles moved out and No. 200 could be sold on, free of a sitting tenant.

36. In April 2006 the Appellant and her mother visited Ms Taylor in Norfolk and they agreed to buy No. 200 and No. 206 respectively. The Appellant told us that Ms Taylor had a bundle of papers concerning the properties, including the letter from Mr Runeckles concerning the fire (quoted above) and, on the basis that there was "nothing alarming" in Ms Taylor's papers, the Appellant did not seek her own survey or valuation of No. 200. We find that the Appellant was aware, from her own visit to No. 200, that Mr Runeckles was not keeping the house in a good state of repair and that he had not taken care of the garden. The Appellant must have known that the information Mr Runeckles had given to Ms Taylor, shown in Ms Taylor's papers, was not reliable.

37. On 24 April 2006, the Appellant exchanged contracts with Ms Taylor, agreeing to purchase No. 200 for £190,000. The Appellant paid a deposit of £19,000. On the same day the Appellant's mother also exchanged contracts with Ms Taylor agreeing to purchase No. 206 for £180,000.

The funding of the Appellant's purchase of No. 200

38. The Appellant did not have substantial monies of her own with which to fund her purchase of No. 200, having savings of about £5,000 at that time. The Appellant told us, and we accept, that she intended to fund the purchase by a loan from her mother in the first instance. It appears that the Appellant's mother had, or was expecting to have, funds from the sale of a property in France at about that time.

39. The Appellant also told us that in the period April to June 2006 she had made tentative enquiries of various banks as to the possibility of obtaining a loan. Although she was still at school at that time, and was intending to go to university rather than begin employment after her "A" levels, we accept that the Appellant was told that a short term loan might be possible upon certain conditions. The Appellant did not make a formal application for a loan at this stage. (In her submissions Ms Haddon had suggested that the Appellant did not have enough time to obtain a mortgage and that was why she applied for a one year loan. We reject that submission as being inconsistent with the Appellant's evidence.)

40. During June, July and August 2006, after she had finished her "A" levels, the Appellant remained in her family home on the Isle of Wight and undertook some bar work in a local public house. Completion on both No. 200 and No. 206 took place on 14 July 2006. The completion statement shows that the Appellant paid both her and Ms Taylor's legal expenses, and that completion was 60 days later than first agreed. The total amount paid by the Appellant, including the deposit paid in April, stamp duty, costs and late completion interest, was £196,684.07.

Removal of the tenant at No. 206

41. At some point (either before or after the purchase of No. 206) the Appellant's mother had discovered that the tenant of No. 206 had converted that house into two flats and was subletting without permission. It appears that this put the tenant of No. 206 in breach of his tenancy agreement with Ms Taylor. In her witness statement the Appellant explains that her mother:

> … was hoping to evict him [the tenant] and move into her house [No. 206] when my brother and sister had completed their GCSE A levels and O levels.

42. Ms Rachel Lo was not due to complete her GCSEs until 2009. However, it appears that quite soon after the Appellant's mother had completed on No. 206 in July 2006, she began to take steps to remove the tenant from No. 206. By the end of March 2007, this tenant had left No. 206.

Removal of the tenant at No. 200

43. At No. 200, Mr Runeckles did not move out upon completion on 14 July 2006 because there was a delay in the availability of the sheltered housing he had found. It was not until 28 August 2006 that Mr Runeckles vacated No. 200. The Appellant gave Mr Runeckles £6,000 to go (lent to her by her mother for the purpose) and also paid him £2,000 for various items of furniture which he left in the house. We were shown a receipt apparently signed by Mr Runeckles which lists the items left. These include a fridge-freezer, a cooker, a sofa, a bed and a Calor gas heater with bottle. Under cross examination the Appellant described the mattress left by Mr Runeckles as "disgusting"; she told us, and we accept, that she disposed of this item.

44. The Appellant met the £2,000 cost of the furniture from her savings. We find that the total amount the Appellant owed to her mother at that stage was approximately £203,000.

45. Under cross examination the Appellant agreed that she had not been to No. 200 between her first visit to Mr Runeckles, in March 2006, and taking possession on 28 August 2006. When asked why she had not visited No. 200 again before 28 August 2006, the Appellant told us:

> I can't say I was in any rush to get in.

46. On 28 August 2006, the Appellant went to No. 200. The Appellant was accompanied by her mother, three younger siblings and her then boyfriend, Mr Peres.

Mr Pedro Peres

47. Between 1999 and 2003 (when the Appellant was aged 11 to 15) the Appellant had lived with her family in France. During this period the Appellant met Mr Pedro Peres, a Portuguese national a few years older than her, whose family had been based in France at that time.

48. At the beginning of 2006, Mr Peres was a languages student at Lisbon University but he was due to spend a year work placement in London working at an insurance company as part of his degree course. Mr Peres was due to graduate from Lisbon University in 2007. We were not told the precise date on which Mr Peres came to London for his placement but on the balance of probabilities, we find that Mr Peres came to London in about July 2006, at the end of the preceding academic year. Mr Peres began living with friends of his in a student house, in a part of London close to No. 200. The Appellant told us that during the 2006/07 academic year Mr Peres worked two days each week on his work placement, or possibly three or four, as he also had university commitments and she assumed he was doing his dissertation.

49. The first time that Mr Peres visited No. 200 was on 28 August 2006. The Appellant told us that Mr Peres had previously seen photographs of the house. Although the Appellant did not mention taking photographs when she visited Mr Runeckles in March 2006, any photographs which Mr Peres saw must have been taken during that March visit and no longer be available, as the photographs which we were shown were all taken on (or in one case after) 28 August 2006.

50. The Appellant told us that she hoped she would be able to apply for a joint mortgage with Mr Peres, based on his income, once he had graduated (in about July 2007) and had started employment. In her witness statement the Appellant stated:

> I was confident we would be able to obtain a joint mortgage with my mother as guarantor and meet repayments of around £1,100 on an interest only 30 year mortgage with the additional income from some student lodgers.

51. We take judicial knowledge of the fact that in April 2006 the Bank of England base rate was 4.5%. Assuming a mortgage rate of about 5.5% this would mean the Appellant anticipated borrowing approximately £250,000 with Mr Peres.

28 August 2006

52. As noted above, on 28 August 2006 the Appellant and Mr Peres visited No. 200. Shortly before this, the Appellant had learned that she had passed her "A" levels and she had confirmed her acceptance of a place on her first choice of course at Southampton University.

53. In her witness statement the Appellant stated:

> The house and garden were in a far worse state [on 28 August] that I recalled on my previous visits – completely full of years of junk and rubbish. In many rooms it was like one of those TV shows where serial hoarders had narrow corridors in the junk in which to move about.

54. The Appellant told us that she had shown Mr Peres photographs of No. 200 (which, as we noted above, must have been taken on the visit to Mr Runeckles in March 2006 as the Appellant agreed that was the only occasion on which she had visited No. 200 prior to 28 August 2006). Given the reference to years of hoarding,

we find that the condition of No. 200 had not deteriorated materially between March and August 2006, and that it was substantially the same.

55. In the Appellant's witness statement, there is no explicit mention of Mr Peres moving to or living at No. 200 though it is implied that he helped with the clearance work. The references to the time the Appellant spent at No. 200 in the first month are predominantly in the singular (as shown in the example below). These imply that the Appellant was alone in the house, although there is also a reference to Mr Peres having more daily contact with residents of the neighbouring houses than the contact enjoyed by the Appellant. The Appellant's Notice of Appeal refers to Mr Peres living near to No. 200. However, in her oral evidence, the Appellant told us that on 28 August 2006, Mr Peres gave notice on his student house and he moved into No. 200.

56. We have considered this very carefully but we do not find it credible that, only a few weeks after he had moved to London, Mr Peres would wish to leave a house he shared with friends, in order to live alone in a badly maintained house which contained 30 years of the hoardings of an elderly man. There is no evidence that Mr Peres had lived in the UK prior to coming to London in 2006 or that he was familiar with the city. Mr Peres was in his final year of study and needed to concentrate both on his work placement and on his dissertation. We do not accept that Mr Peres would be willing to disrupt these in order to better undertake house clearance work. We also do not accept that the Appellant would want Mr Peres's studies or work disrupted given that Mr Peres would be unable to obtain a mortgage if he did not obtain employment in London as soon as he graduated. It seems particularly unlikely that Mr Peres would make any decision about moving to No. 200 on the first day that he saw the house given the Appellant's description of No. 200 (set out above). On the balance of probabilities, we find that Mr Peres visited and stayed at No. 200 occasionally, predominantly when the Appellant was also there, and that Mr Peres helped the Appellant with the clearance work. We find that Mr Peres did not live at No. 200.

57. We were told, and we accept, that on 28 August 2006 the Appellant (assisted by her mother and Mr Peres) cleared some space in one of the cleaner rooms. We accept Ms Rachel Lo's evidence that she took her two younger siblings to a nearby park to play to keep them out of the way of events at No. 200.

58. The Appellant told us that she moved a clean double mattress into a room at No. 200 in which some space had been cleared, and that this mattress had been brought from the Isle of Wight in her mother's car. There was a surprising amount of debate before us concerning this, with the Respondents making clear their scepticism about the likelihood that the Appellant had travelled from the Isle of Wight to London, in a vehicle (described by the Appellant as an estate car and by Ms Rachel Lo as a van style people carrier) which contained two adults (the Appellant and her mother), a teenager (Ms Rachel Lo), two children aged 4 and 6 (the Appellant's younger siblings), some personal items and a double mattress. Both the Appellant and Ms Rachel Lo were certain that the Appellant had moved a mattress into No. 200 on 28 August 2006. Ms Rachel Lo told us that she did not recall the mattress being in the car or the logistics of the journey but that the mattress had previously been at her

family home so, when she saw it propped up against a wall at No. 200, she knew it must have been moved.

59. We find that the Appellant intended to stay overnight at No. 200 on some occasions. We accept that the Appellant did not care to use the mattress left by Mr Runeckles. On the balance of probabilities, we find that the Appellant did move a mattress into No. 200 on 28 August 2006.

Early autumn 2006

60. In mid-September 2006, the Appellant was offered a room in a student hall of residence in Southampton. The Appellant accepted this offer and was allocated a room number. Thereafter the Appellant began using her halls of residence address as her postal address. The Appellant told us that she used her halls of residence address for post because (once she had moved to Southampton) it was not convenient to wait until the weekend to deal with her post. The Appellant did not use No. 200 as her postal address prior to moving to Southampton, or at any subsequent time.

61. In her witness statement the Appellant stated:

> I spent the first month or so clearing the house of piles of rubbish and every night would go to various of the recycling banks to get rid of paper glass and clothes. …. The rest of the rubbish we put in the 6 or so extra-large skips that I had delivered over a period of several months. ….
>
> Gradually I managed to clear a room next to my bedroom which I used as a dining/sitting room where I could also study and friends and family could stay over. I didn't do a great deal of work elsewhere as there were far more pressing work needed including the installation of a damp course, replacement of much of the plaster on many walls and ceilings, new floor joist and lots of other work in order that I could obtain a mortgage, none of which was as it turned out ever carried out.

62. We find that the Appellant stayed overnight at No. 200 on some (but not all) nights in September 2006 and (with some assistance from Mr Peres) spent the time that she was at No. 200 clearing the room in which she slept, and the room next to it, and in cleaning parts of the house. Mr Webb visited the Appellant at some point in September 2006 and delivered a bed base.

63. The Appellant's witness statement continues:

> The garden also needed to be cleared as it was completely overgrown and had damaged the gutters and roof causing leaks inside the house. A roofer, Jeff Meader, who lived a few doors up replaced some guttering and made some repairs to the roof.

64. In the documents provided after the hearing there is an invoice, dated 11 September 2006, from a G Meader and addressed to the Appellant. The invoice is to replace broken and missing slates around the main chimney area, to replace missing

slates and repair the rear gully, and to erect new guttering to the front of the house. The price of this work was £500. (Mr Meader's address, shown on the invoice is No. 206; we presume he was either the tenant or sub-tenant evicted by the Appellant's mother in due course.) We find that minor roof repairs were carried out in September 2006.

65. At the bottom of the 11 September invoice from Mr Meader is a note: "Katie all done, see you Friday call my mobile". 11 September 2006 was a Monday. The reference to seeing the Appellant on Friday is consistent with the Appellant not being at No. 200 on weekdays during term time (see below). As this invoice predates the start of term, we find that there were some weekdays during September 2006 when the Appellant was not present at No. 200. Such absences would have allowed her to collect her post (which would have been sent to her family home) and prepare to start university.

66. The late additional documents also include an invoice dated 6 September 2006, addressed to the Appellant at No. 200, for a valve for a Wolseley boiler. Although there is no invoice for labour, we are satisfied that the Appellant arranged for the repair of the boiler in September 2006. We find that no other repairs were carried out inside No. 200 and that the Appellant's efforts inside No. 200 were focussed on cleaning and on clearing No. 200 of items left by Mr Runeckles.

67. The Appellant told us that it had taken until November 2006 to clear all the material in No. 200 but that the material cleared in the first month had been disposed of with the assistance of friends. The Appellant was unsure as to the date on which the first of the six skips had arrived but thought that it would have been October 2006. The Appellant was unable to recall whether she had sought permission from Southwark Council for a succession of extra-large skips to be placed outside No. 200 but told us she assumed that she must have done. Despite her limited funds at this stage, the Appellant was also unable to recall whether she had paid the skip rental costs out of her savings or by borrowing further sums from her mother. We have considered this aspect carefully. We have borne in mind that the events in question took place a decade earlier, that no one could be expected to recall every aspect of their life, and that more mundane matters would usually be less memorable. Balanced against this is the fact that hiring skips and obtaining council permission to have them on the street is an infrequent event, and that the first or only occasion an activity is undertaken is usually more memorable than successive undertakings. On the balance of probabilities, we find that six skips were hired but that the administration was handled by the Appellant's mother (who had been in contact with Southwark Council with regard to No. 200 – see below in relation to council tax). We make no finding as to who paid the rental cost of the skips.

68. On 5 October 2006, the Appellant moved into her room in her hall of residence in Southampton. The Appellant told us that while she was in Southampton, Mr Peres remained at No. 200. We have found that Mr Peres did not live at No. 200 but continued to live at his student house nearby with occasional visits to No. 200. As a consequence, we find that No. 200 was predominantly empty when the Appellant was not there. This is consistent with the Appellant's statement (in her Grounds of

Appeal) that No. 200 was not a secure address for post, and the references in her witness statement to leaving a key with neighbours.

69. The Appellant told us that she stayed in her hall for five nights each week and travelled from Southampton to London on "most" Friday nights (though sometimes this could be on Thursday night) during term time, returning to Southampton on Sunday nights. This was challenged by the Respondents, who pointed to the attractions of remaining on campus at weekend, the commitments of student life and the cost of travelling between Southampton and London each weekend. The Appellant told us that the travel between Southampton and London was inexpensive, as little as £1 or £2 by coach. Although it seemed (from other parts of the Appellant's oral evidence, the descriptions of the journey time in her witness statement and the provision of a train timetable in the documents bundle) that the Appellant's travel between Southampton and London was predominantly by train, we were shown the Appellant's bank statements from late February onwards and the first of these statements shows the Appellant bought a £2 National Express ticket on about 3 April 2007. This is consistent with the Appellant travelling by coach from London to the Isle of Wight in the second half of her Easter vacation.

70. On the balance of probabilities, we find that the Appellant did not travel to London every weekend during her first and second university terms, but that she did spend the majority of weekends during those two terms in London, and that these London weekends were spent at No. 200.

The electoral roll

71. In order to improve her credit rating and increase the likelihood of being granted a bank loan, the Appellant made an application to go on the electoral roll. The Appellant applied in respect of her new student address in Southampton although (unbeknown to her at the time) she had already been added to the electoral roll in Southampton as part of a block student registration (possible at that time) which had made by her university. The Appellant told us, and we accept, that she had made her application in Southampton as it was more convenient for her given that her hall of residence address was also the address she used for her bank account and her mobile phone, and that she was registered at that address with a GP in Southampton.

72. The Appellant also told us that when she had received the annual household enquiry form at No. 200 (sent out by Southwark Council each year in order to update its list of registered voters), she had removed Mr Runeckles's name and added her own name. The Appellant told us that she had not added Mr Peres's name to the list of eligible voters because he was Portuguese. We do not find this explanation convincing because, as an EU national, Mr Peres was an eligible voter. We find that Mr Peres's name was not added to the household enquiry form because he did not live at No. 200.

73. The Appellant told us on the first day of the hearing (in July 2017) that she had written to Southwark Council to ask about whether she appeared on the electoral roll at No. 200 but she had not yet had a reply. (In the absence of an update to the

contrary, we assume that this remained the case by the second day of the hearing, in September 2017.)

74. There was considerable dispute between the parties about the reliance to be placed upon a report produced as a result of an electronic search the Respondents had undertaken of various registers, including a version of the electoral roll. The Respondents' search apparently indicated that the Appellant was not on the electoral roll at No. 200. Ms Hadden argued on behalf of the Appellant that the Respondents' report was not conclusive and contained a number of errors. In his oral evidence Mr Lindley explained the searches which HMRC officers could undertake in respect of a person's presence at a property. Mr Lindley accepted that the relevant HMRC search looked at a number of different registers, both commercial and public. We agree with Ms Haddon that the registers which the Respondents searched may not be accurate or complete, and that the search process itself may be deficient. We further agree that the report is not conclusive – it does not mean that the Appellant was not on the electoral roll for No. 200 just because she does not appear in the Respondents' report.

75. However, looking at the documents and oral evidence as a whole, there is no evidence that the Appellant was on the electoral roll at No. 200 and there is also no evidence that the Appellant had applied to be added to the electoral roll at No. 200. The Appellant told us that she had completed the household enquiry form for No. 200 but completion of the household enquiry form does not constitute an application to go on to the electoral roll. Although she must have been aware of what was required (given her application to be added to the roll in Southampton), the Appellant made no mention of taking the further step of applying to be added to the electoral roll at No. 200. The Appellant also told us that it was more convenient to be added to the roll at Southampton, which suggests that she had chosen to be registered at only her Southampton address rather than apply at both. In the absence of any evidence to suggest that the Appellant was on the electoral roll, or had applied to be added to the electoral roll, for No. 200, we find that the Appellant was not on the electoral roll at No. 200.

The bank loan

76. In late September or early October 2006, the Appellant made a formal application to the NatWest bank for a bank loan. (The Appellant's previous agent stated that this application was made on 29 September 2006.)

77. We do not have any documents setting out the details of the application made by the Appellant but it appears from a letter from the NatWest bank (dated 12 June 2006 but which the internal references demonstrate must have been sent no earlier than 24 October 2006) that by late October 2006 the NatWest bank was prepared to give the Appellant a 12 month business loan of £125,000 plus costs of £1,390. This was to be secured by way of a first charge against No. 200. There were six preconditions to the granting of this loan, including the submission of detailed costings with estimates or tenders for the work to be carried out, the provision of a survey and valuation report in respect of No. 200 bringing out a minimum valuation

of £400,000 and also that a solicitor confirm the tenancy arrangements to the bank's satisfaction. The bank also required a guarantee and both fixed and floating charges.

78. These six preconditions were apparently satisfied in late October or early November. On the basis of the Appellant's evidence that her mother intended to provide a guarantee for a mortgage, we find that the guarantee for the business loan was provided by the Appellant's mother. The Appellant told us that she subsequently discovered that the bank undertook a drive-by valuation of No. 200 and did not enter the house to value it. We consider it would have been apparent to the Appellant at the time that no valuer had entered No. 200 given that the bank would have required her to provide them with access to No. 200 if they wished to undertake an internal inspection. We find the Appellant was aware at the time that the valuation did not include an internal inspection of No. 200.

79. We did not see the detailed costings of the planned works which was required for the Appellant to satisfy the bank's second precondition, and we had no evidence as to who drew up these costings, or what was contained in them. Mr Webb told us that he did not draw up costings for the Appellant and that he had not seen them. We also had no evidence as to why a fixed charge and a floating charge were required, or what the bank, in October 2006, anticipated a floating charge could cover in relation to No. 200. We find that the bank provided with £125,000 to enable her to carry out the planned works which had been described to them.

80. The Appellant had no recollection at all of how she, or her solicitor, had explained the tenancy arrangements to the bank. When asked during cross-examination whose tenancy it was that concerned the bank, the Appellant told us:

> There was a tenant when I purchased the project.

81. As Mr Runeckles had left No. 200 about a month before the Appellant's loan application, we make no findings about who was the tenant who concerned the bank.

82. In November 2006, the Appellant accepted the bank's offer of a 12 month business loan of £125,000 with interest at 6.5% p.a. Towards the end of November 2006, the full amount of the loan was drawn down.

Late autumn 2006

83. Meanwhile, the Appellant had begun clearing the overgrown garden at the rear of No. 200, assisted by Mr Peres. In her witness statement the Appellant stated:

> Around November 2006 we made a start on clearing some of the extremely overgrown garden which had almost completely covered the rear of the property.
>
> Upon clearing the rear external face of the house it became apparent that the only thing holding the rotten window frames in place was a vine several inches thick and on the removal of which, the entire rear gable wall looked like it was in danger of falling down! The upstairs rear bedroom was locked when I moved

in as the tenant had informed me that he'd lost the key but claimed there was nothing in the room. I hadn't got round to trying to access the room assuming that it was empty so when the vine was removed and it was possible to see in the rear bedroom we discovered that this was the room to which the tenant had referred in his letter to Miss Taylor when he had claimed that the only damage caused by the fire in March 2004 had been to his personal possessions. This was clearly not true as the entire room was seriously fire damaged and it looked as though after the fire having been put out by the fire brigade the room had simply been locked up and left, exposed to the elements.

84. We find that the Appellant had not tried to go into the upstairs rear bedroom of No. 200 until November 2006.

85. In his witness statement Mr Webb described the work required as follows:

> As they removed the years of growth from the rear outside wall of this bedroom it looked as though the entire rear wall was in imminent danger of collapsing. I advised her that I thought the entire rear section of foundations would need underpinning, the rear outside wall of the back bedroom needed completely rebuilding and with the cost of a new window, replacement plaster, replacing floorboard and joists I estimated the work would cost somewhere in the region of £35,000.

86. Under cross-examination the Appellant told us that the damage to the gable wall did not mean that it was unsafe for people to stay in No. 200, and that her main concern about this gable wall had been the additional, unplanned, cost of this work and not that it might fall down.

87. Mr Webb told us that it was the rear wall, and not the gable wall (the gable being at the side of the building), which required underpinning and that the worst part was at the top. Mr Webb told us that back wall was not in a good condition but that it was not unsafe for the Appellant or Ms Rachel Lo to stay in the property.

88. We find that it was the rear wall and not the gable wall which was affected. We consider that there was a difference in emphasis between the written evidence and oral evidence of both the Appellant and Mr Webb as to the state of this wall. Although the written account is the earlier, and there is no reason why either witness should have revised their evidence on this point, we have reached the conclusion that the oral evidence is to be preferred in this regard. We find that there was damage to the back wall but that it would be an exaggeration to suggest that the entire back wall might fall down at any moment. We reach this conclusion because it is inherently unlikely either that the Appellant would stay overnight in a property where the back wall might collapse imminently, or that Ms Haddon would have permitted Ms Rachel Lo to visit No. 200 if there was any risk of significant injury.

89. We find that there was damage to the rear wall of No. 200, and that it was significant. We accept that the likely cost of repairing that damage was £35,000 as estimated by Mr Webb.

Use of the business loan funds

90. We have found that the Appellant's business loan was drawn down towards the end of November. We have already found that the purpose of the business loan was to enable the Appellant to carry out repairs to No. 200. We find that the loan was drawn down after the Appellant had become aware of the damage to the rear wall of No. 200 and of the likely cost of the repair work required.

91. The Appellant told us that she had to use £90,000 of the loan funds to repay her mother part of the sum she had borrowed from her. The only explanation that the Appellant provided to us of why it was necessary to repay her mother at the end of 2006, was that that was what had been agreed. Under cross examination the Appellant was adamant that she could not delay repaying her mother, and could not repay her mother a smaller amount in the short term. We find that £90,000 of the business loan was paid to the Appellant's mother in late November or early December 2006, in part repayment of the sum the Appellant had borrowed. We find that the amount the Appellant owed her mother at this stage was £113,000.

92. We find that after repaying her mother in part, the Appellant was left with £35,000. The Appellant told us that this amount was earmarked for clearing out rubbish, hiring skips (discussed above) and carrying out basic repairs to No. 200. In her witness statement the Appellant described the work she had intended to do inside No. 200 as the installation of a damp course, plastering of walls and ceilings, and the replacement of a floor joist. We find that none of this internal work was carried out by the Appellant. The Appellant told us she could not use the £35,000 for the repair of the rear wall in preference to other work she had planned.

93. In around October 2006, the Appellant's father had visited the Appellant and seen No. 200. The Appellant told us that an uncle on her father's side, who lived in Hong Kong, was prepared to buy part of the plot of No. 200 if he could obtain planning permission to build a house upon the strip of land which ran along the back of the houses. In November 2006, architects instructed on behalf of the Appellant's uncle, drew up plans for the construction of a single storey four bedroomed house with a basement and dormer roof in the large strip of land which ran from the back of No. 200 to No. 206. Mr Webb confirmed that he had looked over the draft plans before they were submitted.

94. From November 2006, a number of firms were engaged by the Appellant to clear the garden area of No. 200 and to erect a fence around the plot. In her witness statement the Appellant states:

> We dismantled the dilapidated old pre-fab garage to the right of the house in order to make it easier to remove much of the garden waste from the rear of the property and shortly before Christmas had a wooden garden fence was (sic) erected around the boundaries.

95. The late additional documents show five invoices from a local groundwork contractor. The main invoice, dated 15 December 2006, is addressed to the Appellant at No. 200. The work to be undertaken, for £1,970, was as follows:

> 1. Demolish garage to right of main house. Note: roof is asbestos, client is responsible for arranging removal to Southwark Council hazardous waste Collection Centre.
>
> 2. To clear rear garden area of fallen trees, removed stumps and overgrowth.
>
> 3. To prepare garden perimeter for levels and excavate up to 80 (max) fence/gate posts as instructed.
>
> 4. To remove all brick, rubble/concrete and garden waste – volume tbc and invoiced separately in accordance with number of loads required.
>
> 5. To level rear garden area and redistribute soil on completion of new fence to be erected P.S. Pedro tell Jason I'll do this.
>
> 6. To make good side driveway and front garden area.

96. Although that invoice is dated 15 December 2006, there are four earlier invoices relating to the clearance work (item 4 on the main invoice). These show the removal of eight cube sacks of rubble and garden waste on each of 24, 27 and 30 November, and 5 December 2006. Each removal costs £400 and was paid for in cash. Three of the invoices are signed by Mr Peres, the other (dated 30 November 2006, a Thursday) was signed by the Appellant.

97. In her witness statement the Appellant does not refer to the asbestos and it was not raised in oral evidence (due to the late appearance of the invoices). We make no findings as to who arranged for the removal of the asbestos from the garage roof, the cost of removing this asbestos or who paid for the removal.

98. The late additional documents also include three invoices from Wolseley which show the delivery of six bulk bags of 20mm ballast to No. 200 in December 2006. The first delivery (of four bulk bags) was due on 8 December 2006. Two further bulk bags were due to be delivered on 19 and 20 December 2006. The two invoices show further indecipherable items, which we presume are materials to be used with the 20mm ballast.

99. There are further invoices relating to this external work. The next invoice is dated 20 December 2006 and is for the labour required to fit 122 fence panels, 3 gates and the appropriate number of posts. Fixing material and concrete were to be provided by the Appellant. The four foot panels were provided by one supplier, who invoiced the Appellant on 12 December 2006, and the six foot panels, posts and fixings were provided by another supplier, who invoiced the Appellant in an undated invoice. At the bottom of that undated invoice is a note which reads "Kango and cement mixer booked Monday arrive 8.30 – 9.30". This handwritten endorsement matches the final invoice, which is for the hire of a mixer and breaker. On this final

invoice, dated 8 December 2006 and addressed to the Appellant at No. 200, there is a start date of 8:00 on 11 December 2006 and a note requesting delivery to the Appellant between 8:30 and 9:30 on Monday 11 December 2006. A deposit of £200 has been paid for this hire, the eventual cost is unknown.

100. The total cost of the work and materials shown on these invoices is £6,870.77. When the hire costs are also included, this amounts to about £7,000. This excludes the cost of the asbestos removal.

101. The Appellant's university Christmas vacation ran from Saturday 16 December 2006 to Sunday 7 January 2007. The clearance work took place in November, and the levelling and the erection of the garden fence began in the final week of the Appellant's term. We make no finding as to supervised this external work at No. 200 while the Appellant was in Southampton.

Christmas vacation

102. Ms Rachel Lo gave evidence that she stayed with the Appellant at No. 200 for two nights during her school Christmas holiday. Ms Lo told us, and we accept, that she shared a room with the Appellant as the sofa, in the next room, was too small for her to sleep upon. Ms Rachel Lo told us that the parts of the house in which she had spent time (the room with a bed, the study next to it, the upstairs kitchen and the bathroom) had been warm and comfortable. Given the references in the written statements of Mr Webb and Ms Webb to visits to No. 200 shortly before Christmas 2006 when there was no gas fire, to the gas fire having been condemned and to the need for central heating to be installed, we find that the warmth described by Ms Rachel Lo was achieved by the Calor gas heater which the Appellant had purchased from Mr Runeckles.

103. Ms Rachel Lo also told us that Mr Peres had stayed at No. 200 while she was there, and that he had slept on the sofa in the next room. When challenged in cross examination, Ms Lo told us that she was not sure about that aspect and that Mr Peres may have slept on a roll mat or a blow-up bed. Given that the sofa was too small for a 13 year old girl to sleep upon, on the balance of probabilities we find that Mr Peres did not sleep on the sofa but instead slept at his own home, spending the daytime with the Appellant and her sister during Ms Lo's visit. Ms Lo told us that she was not worried about the possible collapse of the rear wall. This reinforces our conclusion that the likelihood of the rear wall collapsing at any moment were over-emphasised in the written statements of the Appellant and Mr Webb.

Late December 2006

104. On 20 December 2006, an application for planning permission to build a four bedroomed house was submitted by the Appellant's father on behalf of the Appellant's uncle.

105. In her witness statement the Appellant stated that the money from the sale of part of the garden would enable her to pay for the "essential structural repairs to the property necessary to obtain a mortgage". As at 20 December 2006, the Appellant

had approximately £28,000 remaining of the money borrowed from the bank. The Appellant required £35,000 to undertake the remedial work required to the back wall, and another £7,000 (to add to her retained £28,000, to give her the £35,000 she had earmarked) for the internal work.

106. Although the Appellant had told us that £35,000 of her bank loan was earmarked for the internal work she had planned, after £7,000 of this amount was spent on external clearance, levelling and fencing (as set out above), there was no evidence before us that any further work was carried out at No. 200. We find that, as the Appellant stated, none of the internal repairs identified by the Appellant in her witness statement were ever carried out. We find that no work was carried out on No. 200 between 20 December 2006 and 26 March 2007.

Council tax

107. As a student the Appellant was exempt from paying council tax. In late December 2006 or early January 2007, a council tax bill arrived at No. 200 addressed to the Appellant's mother. We were not told why Southwark Council should know the name of the Appellant's mother or have it in connection with No. 200. On the balance of probabilities, we find that the Appellant's mother had conducted one or more conversations (potentially concerning permission for skips – see above) regarding No. 200 with Southwark Council prior to early January 2007.

108. In her witness statement the Appellant states:

> On 22/01/07 I received a Council Tax Bill issued in the wrong name and telephoned Southwark Council to advise them of my correct name and that I was a full time student at Southampton University and intended to commence extensive remedial works on the property over the next few months. I was informed that I had to put it in writing and did so the same day.

109. On 22 January 2007, the Appellant wrote to Southwark Council in reply to the council tax bill. We were not shown a copy of that letter but we were shown the Council's response to the Appellant, dated 27 January 2007. This response was sent to the Appellant at her hall of residence. A Council Tax Officer wrote:

> I can confirm that I removed your Mothers name from the Council Tax account you are now the liable party.
>
> I am aware that building works are being carried out on your property. I am pleased to advise you that I have applied an exemption on your property from 28 August 2006 based on the fact that the property is empty and unfurnished. This exemption will last for a maximum of six months.
>
> However, you may be entitled to apply for an exemption if it is judged that your property is uninhabitable. This exemption can be applied for a maximum of 12 months. If the works are to last more than 6 months you may apply for this exemption.

To enable me to apply an exemption based on the property being uninhabitable, it must be judged that major structural alterations or major repair work have been/ are being carried out on your property. This does not include new bathrooms or kitchens, replacement windows, central heating installation or redecorating. If you wish to apply for this exemption, please provide me with a schedule of works to prove the extent of the refurbishment and the date works commenced and are expected to end.

A contact number should also be provided so that an inspection can be carried out on your property, if appropriate. I would suggest you only apply for this exemption if your property is to be empty and subject to works for more than 6 months.

110. We conclude that Southwark Council could only have understood that No. 200 was empty and unfurnished on the basis of information supplied by the Appellant or her mother. We find that either the Appellant or her mother informed Southwark Council that No. 200 was empty and unfurnished, and that this had been the case from 28 August 2006.

111. The Appellant's witness statement continued:

On 27/01/07 I was delighted to learn that Southwark Council had applied a backdated "empty" exemption on the property from 28/8/06 – 27/02/07.

I did not apply for this nor did I inform Southwark Council that the property was empty or unfit for habitation. I simply wrote informing them of my situation and they applied a backdated exemption. I didn't really concern myself with the details of the exemptions as being a full-time student I was exempt from council tax and I was just pleased that there was nothing to pay. It was not until late February 2007 that I submitted a schedule of works that I intended to carry out at the property and the second exemption "major works being carried out" on the property was granted. I thought being a student this was a formality.

112. The Appellant sent a schedule of works to the Council in late February 2007. Mr Webb had not drawn up this schedule, and he did not know who had done. We make no findings as to whether this schedule was also the costings document which was sent to the NatWest bank in late 2006 for the Appellant to comply with the preconditions for the business loan.

113. The Appellant told us that she had sent this schedule of works to the Council because she understood that it was a formality with which she must comply but that she had not understood that she was applying for an exemption based upon major repair works being carried out at No. 200. Although the Appellant was only 18 at this time, given the Appellant's level of education and the plain terms of the letter (set out above) we do not find this explanation convincing: there could be no reason for the council tax department to want to see a schedule of works other than that it provided evidence of eligibility for an exemption from council tax based on those works. We

find that the Appellant sent a schedule of works to Southwark Council in order to apply for the further exemption from council tax. As a result of the Appellant sending the schedule of works, Southwark Council granted the Appellant an exemption from council tax from 28 February to 6 June 2007 on the basis that No. 200 was empty and uninhabitable, due to works being carried out.

114. In the additional late documents supplied to us by the Appellant include a fax regarding council tax sent by her to Southwark Council on 21 April 2008. This was apparently sent in response to a request for payment. In that fax the Appellant informs the council that No. 200 was sold in July 2007 and also refers to having sent Southwark Council a letter from Southampton University in February 2007, which the Appellant stated confirmed that she was a student from 5 October 2006. We find that this university letter was not received by the Council in February 2007. We have considered whether the university letter was sent by the Appellant to the Council and, on the balance of probabilities, find that it was not – it would have been inconsistent for the Appellant to have sent a schedule of works to demonstrate that No. 200 was empty and uninhabitable due to works being carried out, and simultaneously to have applied for exemption from council tax on the basis that she was living at No. 200 but in full time education.

115. The lack of reference to Mr Peres in any of the correspondence we have seen concerning council tax reinforces our earlier finding that he was not living at No. 200.

Easter vacation

116. The University of Southampton spring term ended on Saturday 17 March 2007. In her witness statement the Appellant stated that her relationship with Mr Peres had ended during the university Easter vacation but in her oral evidence she said that the split had occurred at the beginning of March 2007, which would be just before the end of term. We prefer the Appellant's oral evidence and find that the break-up occurred before the end of term. Ms Haddon suggested that the Appellant visited her on the Isle of Wight as it was Mothering Sunday at the beginning of the Easter vacation. We find that at the end of the spring university term, the Appellant went to stay with her mother on the Isle of Wight.

117. We were shown the Appellant's bank statements for 23 February 2007 onwards, and these show various purchases, funded from the Appellant's account, at vendors on the Isle of Wight on 19, 21, 26, 27 and 30 March, and on 5 April 2007. The bank statements also show one online purchase of a ferry ticket, on 26 March 2007. Ms Haddon submitted that it was possible for the Appellant to have visited the Isle of Wight at the beginning of the Easter vacation, travelled to London on 26 March (using the ferry ticket shown in the statements), travelled back to the Isle of Wight for 27 or 28 March (using a ferry ticket bought with cash) and then returned to London on 30 March (again using a ferry ticket bought with cash). That repeated travel is possible but unlikely. On the balance of probabilities, we find that the Appellant was on the Isle of Wight from 17 to 30 March 2007, following the breakdown of her relationship, and that she travelled to London on 30 March 2007 using the ferry ticket which she had purchased on 26 March 2007. We find that the Appellant then returned

to the Isle of Wight on or around 3 April 2007 using the National Express coach ticket purchased on that day. The Appellant travelled from the Isle of Wight to Southampton in time for the beginning of term on 13 April 2007.

118. On 26 March 2007, the Appellant's uncle's application for planning permission was refused by Southwark Council. The Appellant's uncle decided not to appeal against this decision. With the rejection of his planning application, the Appellant's uncle lost interest in buying part of the plot of No. 200 from the Appellant.

119. In her examination in chief the Appellant told us that once her uncle in Hong Kong was no longer interested in buying part of the plot then she had no other source of funds to undertake the work which was necessary to No. 200 but, if her uncle's planning application had been successful, she would have sold him the garden plot and would not have sold No. 200. We consider this statement in our decision below.

120. We find that once the planning application was refused on 26 March 2007, the Appellant immediately made plans to sell No. 200. The Appellant told us, and we accept, that she began to contact estate agents either the same day or the next day. In her witness statement the Appellant described contacting several estate agents, and we find that the Appellant contacted (at least) two estate agents on or after 26 March 2007.

121. On 28 March 2007, the Appellant sent the following fax from her mother's home on the Isle of Wight to Spencer Kennedy estate agents:

> I understand from Janet Daw that she has a potential cash buyer interested in both houses but needs approval from both of us for Spencer Kennedy to act on our behalf. I have already arranged with another agent to value my house but I am happy to appoint Spencer Kennedy for [No. 200] providing your valuation is at least the same as that provided by the other agent.

122. It is unclear whether the Appellant had already received the valuation from the other agent or was waiting to receive both valuations before deciding which agent to instruct. In her witness statement the Appellant stated:

> Given the value of my home, my mother immediately decided to place her house on the market also with Spencer Kennedy as Janet Maw had indicated that the developer she had in mind would be interested in both houses.

123. It is clear from the Appellant's fax that by 28 March 2007, the Appellant's mother had already decided to sell her house. On the same day the Appellant's mother had faxed Spencer Kennedy from the Isle of Wight with her own instructions. In her faxed letter of 28 March 2007, stated to be from herself and her husband, the Appellant's mother wrote:

> Please accept his letter as confirmation that we wish to instruct you to act on our behalves in respect of the sales of the above two named properties.

> I have attached copies of the ordinance surveys for both properties. For your information No. 200 is owned in the name of our daughter, Katie Lo, and 206 is owned in our own name.

124. The Appellant's mother then explained to Spencer Kennedy that the keys to No. 206 could be picked up from "Tony at DVR". If the valuation of No. 200 was the motivation for the Appellant's mother to sell, then there must have been a telephone conversation between the Appellant and Janet Daw in which the valuation of No. 200 was discussed, and this telephone call must have taken place before the Appellant's mother sent her fax on 28 March 2007.

125. In her witness statement the Appellant described her response to receiving the valuation of No. 200 from Spencer Kennedy:

> I remember being very surprised and extremely relieved when someone from Spencer Kennedy telephoned me advising that it was worth somewhere in the region of £450,000.

126. We have found that it was a precondition of obtaining the bank loan that the valuation of No. 200 was at least £400,000, and the Appellant was aware that she had satisfied that precondition in November 2006. We find that the Appellant was also aware that developers would be interested in buying No. 200. In her witness statement the Appellant referred to:

> … many developers who had from the time I moved into [No. 200] continually written to me and left cards asking me to contact them if I was interested in selling the property as it was…

127. Three examples of this contact were provided in the bundle of documents provided by the Appellant. Given that the Appellant knew the minimum valuation in November 2006, and knew there was considerable interest in No. 200, we consider it unlikely that the Appellant would be very surprised if, in March 2007, she was given a valuation (by an estate agent competing for business) which exceeded by only 12.5% the minimum valuation achieved four months earlier. The sales particulars (described in more detail below) show an asking price of £650,000 for No. 200. We find that it was this figure of £650,000 which so surprised the Appellant.

128. The Appellant's fax of 28 March 2007 to Spencer Kennedy continued:

> I am currently visiting my mother on the Isle of Wight but will be back in London on Friday [30 March] so I'd appreciate if you could send the sales agreement out for my signature asap and if possible arrange any viewings before I return to Southampton on 13/04/07 – Janet has all my contact details. During term time I generally only return to London at weekends so it would be easier if you would liaise with my mother Lynne Webb.
>
> I mentioned to Janet that I have recently broken up with my boyfriend and have not informed him as yet of my intention to place the property on the market so I would appreciate if you would **NOT** send anyone round to take measurements

and internal photographs or to view the property until you have spoken to me first.

129. In his witness statement Mr Webb stated that he visited the Appellant in London after planning permission had been refused, and that the Appellant was "thinking about selling the house". Mr Webb stated that he advised the Appellant to have the property valued by local estate agents if she intended to sell. We have found that the Appellant was in the Isle of Wight on 26 March 2007 (the date on which planning permission was refused), and so this visit by Mr Webb could not have taken place until 30 March (when the Appellant returned to London). By 30 March 2007, the Appellant (and her mother) had already instructed estate agents. When asked about the Appellant's response to his advice that she obtain valuations, Mr Webb told us only that the Appellant had been tearful. The Appellant apparently did not tell Mr Webb that she and her mother had already faxed instructions to an agent to sell both No. 200 and No. 206.

130. On 7 April 2007, the Appellant formally instructed Spencer Kennedy to sell No. 200 on her behalf. The Appellant told us that Spencer Kennedy sent the instructions form to the wrong address. We find the estate agent initially sent out two letters of instruction in respect of No. 200: the documents before us include a letter of instruction for No. 200, sent by Spencer Kennedy on 2 April 2007 to the Appellant at her mother's address on the Isle of Wight. This letter was signed by the Appellant and is dated 7 April 2007. However, we also have a letter of instruction for No. 200, signed by the Appellant's mother, also on 7 April 2007. A letter of instruction in respect of No. 206 was sent by Spencer Kennedy on 9 April 2007, but addressed to the Appellant at No. 200. There is a handwritten note on this copy: "telephoned Janet who will re-issue to Mum at [the Appellant's mother address on the Isle of Wight]".

131. The sales particulars we were shown (obtained from Spencer Kennedy by the Respondents) set an asking price of £650,000 for No. 200, and an asking price of £500,000 for No. 206. This gave a combined asking price of £1,150,000. Both properties were described as in need of renovation. Given that No. 200 was an end of terrace house, rather than a mid-terrace house, and that it had a much larger plot than No. 206, it is logical that No. 200 should command a higher price despite the state of the back wall. The Appellant told us that she had not seen or approved these particulars prior to the sale of her property. As the particulars are not marked "draft", we find that they were approved by someone acting on behalf of the Appellant.

132. On an unknown date the Appellant and her mother were offered £1,050,000 for both properties. By 26 April 2007, this offer had been negotiated upwards to £1,075,000. On 7 June 2007, the Appellant exchanged contracts with the purchaser for the sale of No. 200 at a price of £495,000. On the same day the Appellant's mother exchanged contracts with the same purchaser, selling No. 206 at a price of £580,000. We were not provided with an explanation for this attribution of the combined purchase price or why No. 206 had achieved a higher price than No. 200.

133. Friday, 22 June 2007 was the last day of the summer term at Southampton University. On Monday 25 June 2007, the Appellant started a part time job at

Starbucks. This continued until 6 April 2008. The P14 forms filed by Starbucks on 12 August 2008 and 14 May 2009 gave the Appellant's address as one in Cowes where the Appellant's mother moved at the end of July 2007 (the "Cowes address").

134. On 12 July 2007, both the Appellant and her mother completed on the sale of No. 200 and No. 206. The completion statement showed that, of the £495,000 proceeds of sale, the Appellant paid £132,452.27 in redemption of the bank loan, £5,816.25 to Spencer Kennedy as their fee, and £1,013.63 to her solicitors for their conveyancing fees. The Appellant was left with £355,717.85. The Appellant had owed at least £113,000 to her mother and so following repayment of that debt, the Appellant was left with about £242,700. None of this sum appears to have been deposited in the Appellant's bank account for which were shown statements, and we were not told what the Appellant did with this sum. The bank statements we had for the Appellant showed that in the months before completion the Appellant's mother had made occasional payments into the Appellant's bank account, presumably to help her with the costs of living as a student; these payments increased in size and became more frequent in the months after completion on the sale of Nos. 200 and 206.

Utility usage

135. During the Appellant's period of ownership of No. 200, some utility bills were incurred. We were shown a water bill dated 15 January 2008, which was stated to be the Appellant's final bill for No. 200. That bill showed water services between 26 March and 30 May 2007 costing £20.89. This was in respect of six cubic metres water, and six cubic metres wastewater. A meter reading taken on 31 May 2007 was described as being a final reading. There was also an overdue amount of £105.84, giving a total amount due for water of £126.73. Using a very approximate estimation, this bill suggests that (at least) 36 cubic metres of water were used over the period when the Appellant owned No. 200. However, as we do not know the period to which the arrears related, it is impossible to know whether the total water used between August 2006 and March 2007 was greater than 36 cubic metres. In the unsigned statement of Mr Judson, it is suggested that low annual consumption by a single person is 45 cubic metres each year. We understand that estimate would include use of appliances such as a washing machine and dishwasher, neither of which appear to have been present at No. 200 (the Appellant does not refer to their installation and they do not appear on the list of furniture purchased from Mr Runeckles). We conclude that water consumption of 36 (or more) cubic metres is not inconsistent with the Appellant staying overnight at No. 200 at some weekends during the autumn and spring university terms, and over part of the Christmas and Easter university vacations.

136. We were also shown an estimated gas bill dated 19 June 2007 which covered the period 10 May to 12 June 2007. That showed that the previous bill was £102.08 and that the previous bill had been paid. The estimated bill suggested gas to the value of £71.40 was used at No. 200 between 10 May and 12 June 2007. The Appellant told us, and we accept, that she spent only limited time at No. 200 during this period. We recall from the written statements of Mr Webb and Ms Webb that the heating of No. 200 was achieved by a Calor gas heater as the gas fire had been condemned.

Even allowing for an old and inefficient boiler, the estimated bill seems a very high estimate for a month during which there was apparently no one in occupation of No. 200.

137. Under cross-examination the Appellant told us that Mr Peres had paid the utility bills for No. 200 while they were together but that she paid the bills after their relationship ended. The Appellant initially suggested that she had paid these later bills in cash but, when Ms Powell suggested to her, during cross-examination, that they could together add up the amounts of cash shown on her bank statements to see if there was enough to cover the bills, the Appellant told us that she could not recall how she paid these later bills. The Appellant's bank statements do not show any utility payments or any cash withdrawals large enough by themselves to meet any of the utility bills we were shown. While the cash withdrawals in total would be sufficient to meet the bills if the Appellant saved all the cash she had withdrawn over a period of several weeks and made no other payments in cash, it is inherently unlikely that this occurred. On the balance of probabilities, we find that all the utility bills for No. 200, for both before and after March 2007, were paid by someone other than the Appellant.

Events following the sale of No. 200

138. After the sale of No. 200, the Appellant continued with her studies at Southampton University, graduating in 2010. The Appellant undertook some part time employment during this period.

139. The Appellant did not register for self assessment or complete a tax return for 2007/08. The Appellant did not file a tax return for the tax year 2007/08.

140. When asked why she had not notified the Respondents about the sale of No. 200, the Appellant told us her view was that she had sold her home and that she did not think she had done anything wrong. When asked, the Appellant told us, and we accept, that she had not sought advice from anyone about whether she should declare the gain which she had made.

HMRC's investigation

141. It is unclear when or how HMRC became aware of the Appellant's purchase and sale of No. 200 but their interest in her appears to originate in an interest that they took in the Appellant's mother's tax affairs. There is no evidence of any contact between HMRC and the Appellant for almost five years following completion of the sale of No. 200.

142. On 2 May 2012, an HMRC officer from the Portsmouth office wrote to the Appellant at her mother's original address on the Isle of Wight. HMRC sought answers to a number of questions concerning the Appellant's purchase and disposal of No. 200.

143. On 29 June 2012, this letter was re-issued to the Appellant at the Cowes address. This was the address shown on the P14s and was the address to which the

Appellant's mother had moved in July 2007 but had moved from in January 2010. On 13 August 2012, HMRC issued a formal notice to the Appellant at the Cowes address, requiring the Appellant provide the information requested by 24 September 2012.

144. On 12 October 2012, the Appellant's then accountant replied to HMRC. This reply acknowledged receipt of the first letter (of 2 May 2012), gave brief answers to the questions asked and provided a number of documents. These documents included the Appellant's bank statements for the period 6 April 2007 to 5 April 2008. It is clear that other material was provided but, as it was not specified, we do not know precisely which material was provided to HMRC at that date.

145. At some point between 12 October 2012 and 22 July 2013, HMRC reallocated their files in respect of the Appellant from the local office to their Fraud Investigation office. Officer Judson was given responsibility for this investigation. On 21 June 2013, a HMRC officer printed a copy of the SDLT form which had been filed by the purchaser of No. 200. On the balance of probabilities, we find that this was printed by Officer Judson.

146. On 22 July 2013 Office Judson apparently wrote to the Appellant at another address on the Isle of Wight but we were not shown a copy of that letter. On 11 November 2013, Officer Judson wrote again to the Appellant, this time at the London address where the Appellant was living at the time she appealed to this Tribunal. This letter noted that the letter of 22 July 2013 had been returned to HMRC as undelivered. In this 11 November 2013 letter, Officer Judson notified the Appellant that HMRC had opened a formal Code of Practice 9 ("COP9") investigation into her tax affairs.

147. On 21 December 2013, the Appellant replied to HMRC, informing them that she had instructed an accountant, Cashmore & Co. to assist her. Cashmore & Co. wrote to HMRC on 23 December 2013 explaining that the Appellant wished to co-operate fully but that they would require more time to provide a written disclosure. This letter was followed by a telephone call on 3 January 2014. On 7 January 2014, HMRC agreed an extension of time for the Appellant to respond to the COP9 enquiry letter.

148. The Appellant's former accountant also wrote to HMRC on 3 January 2014, stating that he had not heard from HMRC since replying to the enquiry letter dated 29 June 2013 (the first letter sent to the Cowes address) and that HMRC had had no reason since then to consider them no longer acting for the Appellant.

149. On 19 February 2014, Cashmore & Co. wrote to HMRC setting out some background details relating to the Appellant's purchase and sale of No. 200, and making it clear that they considered No. 200 was the Appellant's principal private residence throughout her period of ownership. Cashmore & Co. provided utility bills and some bank statements, and explained that some records had been destroyed due to the passage of time.

150. On 26 February 2014, Officer Judson wrote to inform Cashmore & Co. that, as the Appellant's response to the COP9 enquiry had not included either an acceptance

or denial letter, HMRC would proceed to investigate what they considered to be tax fraud which they suspected the Appellant had committed. Officer Judson considered the material provided and (on 11 March 2014) made enquiries of Southwark Council.

151. On 1 April 2014, HMRC wrote again to Cashmore & Co. That letter began:

> I have now completed my examination of all documents available to me and given full consideration to the information contained in your letter of 19 February.
>
> I take the view that [No. 200] was not your client's Principle (sic) Private Residence. Rather than contending that a liability to Capital Gains Tax arises on the disposal I believe that there are sufficient grounds to continue my investigation on the basis that Miss Lo failed to notify chargeability; that this, apparently "one-off" transaction was in the nature of a trade.

152. Officer Judson then referred to a number of the factual matters which led him to this conclusion and explained that he would be seeking an information notice to obtain documents from the bank which made the business loan to the Appellant. Officer Judson concluded his letter:

> In order to protect HMRC from any potential loss of tax, I have made a Discovery Assessment for 2007/08 under the provisions of Section 29 Taxes Management Act 1970.

153. HMRC wrote to the Appellant on the same day, in similar terms to the letter to Cashmore & Co., seeking the Appellant's consent to HMRC approaching the bank. In that letter Officer Judson stated:

> I now have to ensure that any tax you should have paid as a result of the sale of [No. 200] is not time barred for recovery action.
>
> Under Section 29 Taxes Management Act 1970, the time limit under which HMRC may raise an assessment to collect tax lost due to the careless behaviour of a taxpayer is extended to 6 years following the end of the tax year to which that tax relates. This means that on 5 April 2014 the time limit for raising an assessment for 2007/08 will expire. To protect HMRC's position an estimated assessment has now been made. I attach the notice of my assessment.
>
> My issue of the assessment in no way commits HMRC to any particular course of action and does not mean that HMRC has taken a view on your behaviour, which has resulted in the estimated tax lost.

154. On 24 April 2014, Cashmore & Co. gave the Appellant's consent to the loan documents being sought from the bank. In a letter sent the following day Cashmore & Co. challenged some of HMRC's conclusions about the Appellant trading, sought copies of documents which HMRC had, and appealed against the discovery assessment.

155. On 13 June 2014, HMRC wrote again to the Appellant, this time notifying her that they wished to seek certain documents from Spencer Kennedy. On 20 June 2014 Cashmore & Co write to HMRC giving the Appellant's consent and correcting an error Officer Judson had made in the name of the estate agents.

156. On 8 September 2014, Officer Judson wrote to the Appellant with HMRC's further conclusions about the purchase and sale of No. 200. Officer Judson accepted that the Appellant was not trading, but concluded that No. 200 was not the Appellant's principal private residence. As a consequence, the original discovery assessment would be discharged and a further discovery assessment raised. Officer Judson stated that this would not be raised until the Appellant had had the opportunity to provide her calculation of the chargeable gain.

157. On 7 October 2014, Cashmore & Co responded, disputing HMRC's conclusion that No. 200 was not the Appellant's principal private residence but stating that they would nevertheless prepare a calculation. The difficulties in doing this given the time which had elapsed were noted. This letter was acknowledged by HMRC.

158. On 13 January 2015, HMRC wrote again to Cashmore & Co. Officer Judson explained that he was arranging for an assessment to be raised, and set out his views on the appropriate abatement to a penalty.

159. On 26 January 2015, HMRC issued a discovery assessment in the sum of £105,293.86, and a penalty in the sum of £21,058. These were sent to the Appellant under cover of a letter dated 26 January 2015. On 25 February 2015, Cashmore & Co. appealed on behalf of the Appellant.

160. On 27 February 2015, Officer Judson set out his view of the matter, and on 25 March 2015 the Appellant requested a review. On 1 May 2015, the Respondents issued a review conclusion letter, upholding their decision to issue a discovery assessment and penalty. This conclusion letter was amended on 5 May 2015.

161. On 29 May 2015, the Appellant appealed to this Tribunal.

**Discussion and decision**

162. As we noted above, there are a number of issues in dispute. In making this decision we have found it convenient to start with the issues concerning the discovery assessment: to consider what HMRC is required to establish and whether they have done this. This requires us to consider the issue of residence, including who has the burden of proof, in order to determine whether there is a "loss of tax". Having determined these issues, we return to discovery and state our conclusions on that area of dispute, before finally considering the penalty.

**Discovery assessment**

163. HMRC bear the burden of establishing that they have satisfied the provisions of Section 29 TMA 1970, and in particular that they made a discovery which enables

them to take advantage of the extended time limits set out in Section 36 TMA 1970. The standard is the balance of probabilities.

164. Each aspect of Section 29 must be established by the Respondents, unless an Appellant has accepted that a particular aspect has been satisfied (see *Burgess and Brimheath Developments Limited v HMRC* [2015] UKUT 578 (TCC)). In this case it was abundantly clear to us that the Appellant was putting the Respondents to proof of every aspect of their case, and that no concessions had been made or would be made.

165. So, we consider what elements the Respondents must establish if they are to satisfy the provisions of Sections 29 and 36 TMA 1970 in relation to an assessment raised on 26 January 2015 in respect of the tax year 2007/08. Having set out those elements we will go on to consider each in more detail.

166. At the date on which the assessment was raised, Section 29 TMA 1970 provided as follows:

> **29 Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment–
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed 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 or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

167. It is accepted, and we have found, that the Appellant had not filed a tax return (and therefore not self-assessed) for 2007/08. However, there are time limits which the Respondents must meet in order to raise a discovery assessment. The usual time limits for the Respondents to raise an assessment under Section 29 TMA 1970 are set out in Section 34 TMA 1970. Section 34 (as it applied on 26 January 2015) provides:

> **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 income tax or 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.

168. By January 2015, the Respondents were clearly too late to raise an assessment under Section 29(1)(a) within the ordinary time limits set out in Section 34. However, if they were able to meet the additional requirements set out in Section 36 TMA 1970, then the Respondents were still within time to raise an ETL assessment upon the Appellant.

169. Section 36 TMA 1970 has been amended over the years and it is necessary to trace some of those changes to establish what was in force on 26 January 2015. We start with the position in the tax year 2007/08. From 6 April 2007 until 31 March 2010, Section 36(1) TMA 1970 provided as follows:

> **36 Fraudulent or negligent conduct**
>
> (1) An assessment on any person (in this section referred to as "the person in default") for the purpose of making good to the Crown a loss of income tax or capital gains tax attributable to his fraudulent or negligent conduct or the fraudulent or negligent conduct of a person acting on his behalf may be made at any time not later than 20 years after the 31st January next following the year of assessment to which it relates.

170. So, if an officer of HMRC wished to raise an ETL assessment in January 2010, he/she would have needed to show that there was a loss of tax which was due to the fraudulent or negligent conduct either of the person to be assessed or of his/her agent.

171. Changes to that position were set out in Section 118 of the Finance Act 2008 ("FA08"). Section 118 introduced Schedule 39 of FA08, which contained changes to the ETL assessing provisions. For our purposes, the relevant paragraph of Schedule 39 is paragraph 9. That provided as follows:

> **TMA 1970**
>
> 9(1) Section 36 (fraudulent or negligent conduct) is amended as follows.
>
> (2) For subsection (1) substitute—
>
> "(1) An assessment on a person in a case involving a loss of income tax or 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 subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
>
> (1A) An assessment on a person in a case involving a loss of income tax or capital gains tax —
>
> (a) brought about deliberately by the person,
>
> (b) attributable to a failure by the person to comply with an obligation under section 7, or
>
> (c) attributable to arrangements in respect of which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance

schemes to provide information to Her Majesty's Revenue and Customs),

may be made at any time not more than 20 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 subsections (1) and (1A) 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."

…

(6) Accordingly, for the heading substitute "**Loss of tax brought about carelessly or deliberately etc**".

172. Section 118 FA08 provided that these changes should be brought into effect by further Order. The relevant order is the Finance Act 2008, Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009 (SI 2009/403), which provides that the appointed day for paragraph 9 of Schedule 39 to the Finance Act 2008 to come into force is 1 April 2010.

173. Therefore, at first sight, it appears that from 1 April 2010, it was possible for an officer of HMRC to raise an ETL assessment on a person who had failed to notify chargeability under Section 7 TMA 1970 without needing to show either fraudulent or negligent conduct on the part of the person to be assessed. This was the position for which the Respondents contended in their opening submissions.

174. However, in her submissions Ms Haddon drew our attention to provisions in SI 2009/403 which partially preserve the earlier position for certain tax years. In particular, Article 7 of SI 2009/403 provides as follows:

**7.** Section 36(1A)(b) and (c) of TMA 1970 (fraudulent and negligent conduct) shall not apply where the year of assessment is 2008-09 or earlier, except where the assessment on the person ("P") is for the purposes of making good to the Crown a loss of tax attributable to P's negligent conduct or the negligent conduct of a person acting on P's behalf.

175. We agree with Ms Haddon that for the Respondents to satisfy Section 29 TMA 1970 here, they must demonstrate not only that there is a loss of tax attributable to the Appellant's failure to notify chargeability, but they must also show that the Appellant's conduct, in failing to notify chargeability, was negligent.

176. Therefore, we conclude that for the Respondents to show that the assessment under appeal was validly raised upon the Appellant, they must demonstrate that:

(a) they "discovered" that chargeable gains had not been assessed, in order to raise an assessment under section 29 TMA 1970,

(b) the raising of the assessment was attributable to a failure on the part of the Appellant to comply with an obligation under Section 7 TMA 1970, and

(c) the Appellant's failure to comply with an obligation under Section 7 TMA 1970 was not merely careless but negligent.

Was there a valid discovery that chargeable gains had not been assessed?

177. We consider first whether the Respondents have satisfied us that they made a discovery in accordance with Section 29(1). In paragraph 37 of *HMRC v Charlton* [2012] UKUT 770 the Upper Tribunal explained what constituted a discovery:

> In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself.

178. So, in determining whether there has been a discovery, we should consider whether there is a point at which an officer has newly reached an awareness that capital gains tax has not been assessed.

179. Ms Haddon argued that HMRC must act upon their discovery within a reasonable time frame if the discovery is not to be considered as becoming "stale". "Staleness" is the concept that a discovery, although fresh when made, may have been made too long ago for HMRC to raise a discovery assessment in reliance upon it. The argument that HMRC must act promptly, in addition to meeting the statutory assessing time limits, arose out of Upper Tribunal's reference in *Charlton* (in the passage set out above) to the "requirement for newness". Although the reference to "newness" had previously been understood to refer to the discovery being one which had not previously been made, and so it was a new awareness, Ms Haddon referred us to the Upper Tribunal decision of *Pattullo v HMRC* [2016] UKUT 270. In *Pattullo*, Lord Glennie concluded that the reference to newness meant not only that the discovery must not have been made before, but also that it must still be fresh at the time that an assessment based upon it was raised – so the discovery must be new in the sense of being original, and also new in the sense of being recent.

180. Since the hearing we have also had the benefit of the Upper Tribunal's decision in *HMRC v Tooth* [2018] UKUT 38. In paragraph 79 of that decision, the Upper Tribunal commented further upon newness:

> (3) We entirely agree with the Upper Tribunal in *Charlton* that on making a discovery, HMRC must act expeditiously in issuing an assessment. If, to use the words of *Charlton*, an officer has made a discovery, then any assessment must be issued whilst the discovery is "new".
>
> (4) It follows from this that the same officer (or officers) cannot make the same discovery twice. We see no reason, however, why the same officer cannot, for different reasons, discover that one of the situations set out in section 29(1)(a), (b) or (c) pertains a second time. Suppose an officer discovers that an assessment to tax has become insufficient for a certain reason, but HMRC

decides not to issue an assessment because the point is controversial and the amount small. Suppose that officer then - for different reasons - discovers that the assessment has become insufficient. We consider that this, second, discovery could justify the making of an assessment.

(5) The position is, obviously, *a fortiori* where two different officers are independently involved. Again, provided the basis for the discovery is different, there is a statutory basis under section 29(1) for issuing two assessments.

(6) What, however, if two different officers independently make the same discovery? In our judgment, as a matter of ordinary English, a discovery can only be made once. We accept that section 29(1) TMA 1970 is framed by reference to the subjective state of mind of an officer or the board, but what is a "discovery" is an objective term. It seems to us that in this case, the first officer makes the discovery; the second officer simply finds out something that is new to him. In particular if one officer is made aware of, and accepts, the conclusion of another officer it cannot be said that the first officer made a discovery.

181. In *Pattullo* Lord Glennie made it clear that:

> … it would only be in the most exceptional of cases that inaction on the part of HMRC would result in the discovery losing its required newness by the time that an assessment was made.

182. Part of the reason for Lord Glennie's comment is due to the possibility, as indicated in *Tooth*, that there may be more than one discovery. So, in looking at discovery, we must consider whether there was a discovery and (if there was more than one) we must decide which was the relevant discovery. We must also ascertain when that relevant discovery was made, in order to decide whether that discovery was new (original) and new (recently made) when the assessment was raised.

183. In this case the parties were apparently in agreement that there had been a discovery but in dispute about when that discovery was and who made it. The Respondents' case was that Officer Judson originally concluded that the funds which the Appellant received from the sale of No. 200 constituted a trading profit but that the relevant discovery was made in September 2014, when Officer Judson concluded that the Appellant had made a capital gain. Ms Haddon argued that the Respondents had made a discovery in 2012 and that this discovery had become stale through inaction as it was not until April 2014 that Officer Judson first decided to raise an assessment, and not until January 2015 that the assessment under appeal was raised. The Appellant's submission that a discovery was made in 2012 was based upon two sentences in the unsigned witness statement of Mr Judson:

> HMRC Portsmouth Office made an enquiry of [the Appellant] in May 2012 and it was concluded that [the Appellant] had failed to notify chargeability. The papers were referred to Local Compliance Fraud.

184. Although this statement is unsigned and Mr Judson did not appear (so we place limited weight upon it when relied upon by the Respondents), we consider it unfair

not to take this paragraph at face value when it is the Appellant – who has not had the benefit of being able to cross examine Mr Judson – who seeks to rely upon these two sentences.

185. After considerable reflection, we have decided that a conclusion that the Appellant had failed to notify chargeability is not sufficient by itself to constitute a discovery. Section 29 requires an officer to discover that there was income which ought to have been assessed, or that there were capital gains which ought to have been assessed – the officer must have an awareness of the tax which is in dispute if an assessment is to be raised. We consider that a conclusion that there are more questions to be asked and that an unspecified tax may be due is not, without more, a discovery upon which an assessment may be based. We have concluded that a Section 29 discovery was not made in late 2012 by an officer in the Portsmouth HMRC office. We are reinforced in this conclusion by asking ourselves, if a discovery was made in 2012, what was discovered? Which tax did the local officer become aware had not been assessed? No satisfactory answer can be gleaned to that question, either from Officer Judson's statement or from the correspondence.

186. We conclude that the first discovery was Officer Judson's discovery in April 2014 that the sale of No. 200 was in the nature of trade and that trading income had not been assessed. We conclude that the second, relevant, discovery was made when Officer Judson formed the view that the Appellant had made chargeable gains which had not been assessed. This discovery was set out in Officer Judson's letter of 8 September 2014. This second discovery was new in the sense of being original as it differed from Officer Judson's previous discovery. As the assessment under appeal was raised on 26 January 2015, we consider that on that date the relevant discovery was still new in the sense of being recent.

187. Before we leave this issue, we should also deal with an additional argument made by Ms Haddon who argued that the Appellant had been prejudiced by the Respondents' delay. This prejudice was said to arise from various third parties having destroyed relevant documents by 2014, seven years after the relevant tax year, with the result that the Appellant was no longer able to seek copies. The categories of document said to be affected were the documents held by the bank relating to the Appellant's business loan, the documents held by Southwark Council relating to the council tax exemptions sought, and the documents held by the estate agents.

188. As a general point, we agree completely with the Appellant that delay in investigating a person's tax affairs is to be avoided whenever possible. There are difficulties in securing copy documents, and there are difficulties for witnesses in giving evidence several years after the event. These difficulties affect both parties but it is the party who bears the burden of proof, usually the appellant, who suffers the consequences. In this appeal, the bank and estate agent documents which we have seen are incomplete although there was no evidence that more material would have been available in 2012 if the Respondents had sought documents at that date. There was also no evidence that Southwark Council kept records of the exemptions for which a council tax payer had applied. However, it was clear that there were a number of points which were no longer within the recollection of the witnesses.

189. However, given our conclusion in this case that the relevant discovery was made in September 2014 and that it was still sufficiently recent to form the basis of the assessment raised in January 2015 then, provided the statutory conditions for raising an assessment are also met, this Tribunal does not have the power to inhibit HMRC from raising an assessment or to cancel an assessment on the basis of either the time it took for the Appellant's sale of No. 200 to come to HMRC's attention, or the time taken by HMRC to conduct their investigation. The only protection available to an appellant is that HMRC must meet the statutory requirements (which grow more onerous as the years pass) in order to raise an assessment, and that any discovery which forms the basis of that assessment must not have grown old. Even if we were shown evidence that a third party had held relevant material in 2012 but that material had been destroyed by 2014, that could only be relevant to this appeal if the Tribunal had judicial review powers, and the Upper Tribunal has made it clear that this is not the case – see *HMRC v Noor* [2013] UKUT 071.

Was the loss of tax attributable to a failure to comply with a Section 7 obligation?

190. At the date that the Appellant completed on No. 200 (and until July 2012), the relevant parts of Section 7 TMA 1970 provided as follows:

> **7 Notice of liability to income tax and capital gains tax**
>
> (1) Every person who—
>
> (a) is chargeable to income tax or capital gains tax for any year of assessment, and
>
> (b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains,
>
> shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable.
>
> …
>
> (3) A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year his total income consists of income from sources falling within subsections (4) to (7) below and he has no chargeable gains.

191. If the Appellant was chargeable to capital gains tax then she was obliged to notify HMRC that she was chargeable, and the deadline for her to do so was 5 October 2008.

192. Officer Judson must have reached an understanding that the Appellant was chargeable to capital gains tax for him to have made a discovery in September 2014. However, we will only be able to determine whether the Appellant was, in fact, chargeable to capital gains tax once we have determined the substantive issue of whether the Appellant was entitled to principal private residence relief. Therefore, we will return to the obligation to notify, and the related issue of negligence, after we have set out our opinion on the substantive issue.

**Main or only residence**

193. Before we can consider the substantive issues in dispute here, we must decide whether it is for the Respondents to demonstrate that the Appellant was not entitled to relief, or for the Appellant to demonstrate that she was entitled to relief. The authorities are clear that the Respondents must meet the burden of proving that a discovery assessment is competent but there are limited discussions as to how far this extends.

194. The Respondents' position was that it was for the Appellant to satisfy us that the property she sold was her main or only residence. Ms Haddon argued that the burden was upon the Respondents to establish that No. 200 was not the Appellant's main or only residence, because if they did not do so then they would not have established that there was a loss of tax, and this was an essential aspect of the discovery assessment. Ms Hadden referred to *Munford v HMRC* [2017] UKFTT 019, a decision of this Tribunal, in support of her position.

195. *Munford* concerned a dispute about whether Mr Munford was entitled to principal private residence relief. As here, HMRC had raised a discovery assessment. HMRC had accepted that they bore the burden of proof in respect of the competence of the discovery assessment but argued that Mr Munford had the burden of showing that he was entitled to the relief. Judge John Clark held:

> Although s. 36(1A)(a) imposes the "gateway condition" to the making of a discovery assessment outside the normal time limit, there is arguably an earlier step in the logic. In putting HMRC's case, Mr Linneker acknowledged that the initial burden of proof rested on HMRC to show that the conditions of ss29 and 36 TMA 1970 had been met. I have already referred to the need for HMRC to show for the purposes of both these sections that there has been a loss of capital gains tax. If they do not succeed in demonstrating that there has been any such loss, the assessment cannot stand.
>
> In order to show that there has been a loss of capital gains tax, the burden of proof falls upon HMRC. This requires them to show that Mr Munford was not entitled to private residence relief on the Halsey Street property. I emphasise that this involves a significant difference between Mr Munford's case and many of the authorities normally relied on in determining whether such relief is available. Those other authorities do not generally involve the burden of proof falling on HMRC; in such cases, that burden falls upon the taxpayer. Where the burden rests on HMRC, any doubts which there might be as to the taxpayer's basis for arguing that relief is available must be put to one side; HMRC must show on the balance of probabilities that the taxpayer does not qualify for the relief.

196. In those two paragraphs the Judge was drawing a distinction between discovery assessments, and the other procedural routes by which an appeal (involving a dispute over entitlement to private residence relief) might reach the Tribunal. The Judge made this distinction on the basis that a discovery assessment, raised under Section 29

TMA 1970, required HMRC to establish that there was a "loss of tax". As the Judge explained in preceding paragraphs in his decision, the phrase "loss of tax" appears in Section 36, and it corresponds to the insufficiency of tax described in Section 29(1) TMA 1970.

197. Although the Judge did not set out those other procedural routes, these are: an appeal against HMRC's determination raised under Section 28C TMA 1970 in the absence of a return having been filed, an appeal against HMRC's amendment under Section 9C TMA 1970 of a self assessment contained in a return during the course of an enquiry, and an appeal against an amendment made by a closure notice under Section 28A TMA 1970 at the completion of an enquiry.

198. Following the reasoning in *Munford*, we would expect to see a distinction between what HMRC need to establish to raise an assessment under Section 29 and what is needed for HMRC to follow these other routes. However, when we looked at these other routes (looking at the legislation as it applied in 2010/11, the last year in which HMRC could have raised a determination on the Appellant), we do not see such a distinction.

199. An amendment under Section 9C amendment requires an officer to form:

> … the opinion-
>
> (a) that the amount stated in the self-assessment contained in the return as the amount of tax payable is insufficient, and
>
> (b) that unless the assessment is immediately amended there is likely to be a loss of tax to the Crown.

200. Section 28A requires an officer to issue a closure notice which "states his conclusions" and makes "the amendments of the return necessary to give effect to his conclusions". Section 28C empowers an officer to make a determination "to the best of his information and belief" of "the amounts in which the person who should have made the return is chargeable to income tax and chargeable gains tax for the year of assessment".

201. We have set out above the well-known passage in the Upper Tribunal's decision in *Charlton* that what is required for a Section 29(1) discovery is that an officer, acting honestly and reasonably, reaches an awareness that there is an insufficiency of tax. We do not consider that there is a relevant distinction between Section 29(1) and Sections 9C, 28A or 28C: all four enactments require an officer to reach a state of awareness (an opinion, a conclusion or a discovery) that in the relevant year the taxpayer has income and/or capital gains which have not been assessed and which are chargeable.

202. However, although we do not consider that there is the distinction suggested in *Munford*, that does not mean that the burden does not lie upon HMRC, as the Appellant argues.

203. We consider that the answer to this point lies in the wording of Section 29. Once an officer has made a discovery of an amount which ought to have been charged to capital gains tax, he may make an assessment in the amount "which ought in his or her opinion be charged in order to make good to the Crown the loss of tax". So, if an officer, acting honestly and reasonably, believes an amount of tax has been lost, then he may raise an assessment in that amount.

204. So, the "loss of tax" which the assessment is raised to recover, is not the amount of tax ultimately determined to be due, rather it is the amount of tax which the officer believes to be due. This interpretation is supported by the decision of the Court of Appeal in *HMRC v Lansdowne Partners Limited Partnership* [2011] EWCA Civ 1578, where one of the issues was whether HMRC were prevented from raising a discovery assessment on the basis that the information provided in the return was sufficient for the hypothetical officer to have been aware of the alleged insufficiency of tax. The Court of Appeal found against HMRC, with the Chancellor concluding (at paragraph 56):

> I do not suggest that the hypothetical inspector is required to resolve points of law. Nor need he forecast and discount what the response of the taxpayer may be. It is enough that the information made available to him justifies the amendment to the tax return he then seeks to make. Any disputes of fact or law can then be resolved by the usual processes.

205. Moses LJ also considered this point, holding that relevant information had been provided several months before the deadline for HMRC to open an enquiry. He continued (at paragraph 69):

> … As the Chancellor points out, awareness of an insufficiency does not require resolution of any potential dispute. After all, once an amendment is made, it may turn out after complex debate in a succession of appeals as to the facts or law, that the profits stated were not insufficient. …

206. Section 50 TMA 1970 provides that on an appeal an assessment shall stand good unless the Tribunal is satisfied that it should be increased or reduced. If, in reaching his awareness of insufficiency, an officer is not required to forecast the response of the taxpayer, and the raising of the assessment does not require the resolution of a potential dispute, then once that assessment has been raised and is considered on appeal, we do not consider it can be the case that HMRC must bear the burden of disproving the Appellant's entitlement to a relief as an inherent part of satisfying the Tribunal that the discovery assessment was competent.

207. In considering this point we have looked at how other appeals involving a dispute over entitlement to private residence relief have proceeded. The Respondents' bundle of authorities included *Metcalfe v HMRC* [2010] UKFTT 495 and *Moore v HMRC* [2010] UKFTT 445. The Appellant's bundle also included *Regan v HMRC* [2012] UKFTT 570. *Metcalfe* and *Regan* both concerned a discovery assessment but it was not clear that this was the case in *Moore*. In both *Metcalfe* and *Regan* the Tribunal appears to have proceeded on the basis that the onus was on the taxpayer.

Of the more recent reported decisions relating to principal private residence relief where there has been a discovery assessment, only in *Munford* does HMRC appear to bear the burden of disproving the relief. Where the burden is explicitly mentioned, for example *Favell v HMRC* [2010] UKFTT 360 and *Springthorpe v HMRC* [2010] UKFTT 582, the Tribunal has considered it to be upon the Appellant.

208. We conclude that the Respondents do not bear the burden of disproving the Appellant's entitlement to principal private residence relief (or any other relief from capital gains tax) in order to establish that the assessment is competent because there is a "loss of tax". The Respondents must also satisfy the timing point but the burden upon the Respondents in respect of competence, is to demonstrate that an officer discovered that capital gains had not been assessed to capital gains tax, that the situation which resulted in the officer's discovery came about as a result of negligent conduct on the part of the Appellant, and that an assessment was raised in the amount which, in that officer's opinion, made good to the Crown the loss of capital gains tax.

209. It follows that we consider the burden is upon the Appellant to demonstrate her entitlement to relief from being taxed upon the capital gain produced when No. 200 was sold.

Taxation of Chargeable Gains Act 1992 ("TCGA 1992")

210. The legislation relating to private residence relief is contained in Sections 222 to 224 TCGA 1992. The parts which are relevant to this appeal provide as follows:

> **Relief on disposal of private residence**
>
> 222 (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.
>
> …
>
> **Amount of relief**
>
> 223 (1) No part of a gain to which section 222 applies shall be a chargeable gain if the dwelling-house or part of a dwelling-house has been the individual's only or main residence throughout the period of ownership, or throughout the period of ownership except for all or any part of the last 36 months of that period.

211. It is common ground that No. 200 was a dwelling-house and that it was disposed of by the Appellant. Section 222 requires us to consider whether No. 200 was the Appellant's only or main residence at any time over her period of ownership. We are required to consider this question over the whole period of ownership but, as

the Appellant owned No. 200 for fewer than 36 months, the Appellant is not prevented from claiming relief if she is able to establish that No. 200 was her only or main residence for any part of her period of ownership.

212. The Appellant's case was that No. 200 was her residence, and she merely stayed overnight at her room in the hall of residence. HMRC argued that the overall picture demonstrated that the Appellant occupied No. 200 for short periods but that she was not resident. Given that dispute we must first decide whether the Appellant resided at No. 200 for any period of time. If we decide that the Appellant was resident at No. 200 for any period, and that the Appellant also resided elsewhere, then we must decide whether No. 200 was her main residence.

213. In deciding whether No. 200 was a place where the Appellant resided, we start with the ordinary meaning of residence as being a place occupied as a usual or settled abode, a place which is occupied with a degree of permanence, continuity or expectation of continuity. Whether a dwelling-house is a person's residence is a matter of fact and degree bearing in mind the length, nature, quality and circumstances of the occupation. We have found that the Appellant stayed at No. 200 but we must decide whether any of those periods of occupation were residence. As is clear from *Goodwin v Curtis (HMIT)* [1998] BTC 176, it is possible for a person to live in a house, without anywhere else to live, and yet that house still not be his residence if his occupation did not have a sufficient degree of permanence and expectation of continuity. Conversely, a period of residence can be as short as one day if a taxpayer moves into a property with the intention that it will be his permanent home – see the discussion in *Morgan v HMRC* [2013] UKFTT 181.

214. The period over which the Appellant owned No. 200 ran from 14 July 2006 to 12 July 2007. The Appellant did not gain entry to No. 200 until 28 August 2006. The Appellant accepts that she had decided to sell No. 200 by 28 March 2007. We conclude that No. 200 was not the Appellant's residence before 28 August 2006, nor after 28 March 2007. In the first of those periods the Appellant did not occupy No. 200 and residence requires some degree of occupation; in the second of those periods there could be no expectation of continuing to occupy No. 200 given that the Appellant had decided to sell.

215. In considering whether No. 200 was the Appellant's residence we look at the period from 28 August 2006 to 28 March 2007. We have found that the Appellant stayed at No. 200 for part of the period from 28 August to 5 October 2006, on most weekends during her autumn and spring terms and for part of her Christmas and Easter vacations. We focus on the quality of the Appellant's periods of occupation, rather than the length of time of each occupation, and on the Appellant's intentions for No. 200. We ask ourselves whether there was an expectation of continuity or permanence in the Appellant's occupation of No. 200 at any point during this time.

216. The Appellant told us that it was her intention to make No. 200 her permanent home. However, there are number of aspects to what the Appellant told us which do not fit comfortably with that contention. Some of these aspects taken alone are minor but, cumulatively, the picture painted by the Appellant does not ring true.

217. We start by looking at the financing of the Appellant's purchase of No. 200. The Appellant borrowed £203,000 from her mother in the first instance to meet the purchase costs and the payment to Mr Runeckles, and then borrowed £125,000 from the bank as a one year loan. The Appellant intended to repay her mother £90,000 out of the bank loan funds, so she knew that she would have only £35,000 from the bank for all the work necessary to bring No. 200 to a standard where lodgers could be taken and a mortgage obtained. This was a strict budget and so the Appellant knew she could not afford any expensive surprises. Yet, before she agreed to buy the house, the Appellant did not consider it necessary to instruct a surveyor to report on No. 200, or even ask her uncle to look at No. 200. This is despite the Appellant having seen that Mr Runeckles was clearly in breach of his good repair obligations, and so knowing that the papers Ms Taylor had given her could not be relied upon.

218. When the Appellant entered No. 200 on 28 August 2006, she could only have expected it to be her long term home if she had a credible plan for how, in November 2007, she would repay her business loan and repay her mother. Unless the Appellant had a realistic refinancing plan, the Appellant must have known on 28 August 2006 that her ownership of No. 200 could not extend beyond November 2007 (at the latest) and so had no degree of permanence.

219. In order to repay both the business loan (with charges and accrued interest) and the remainder of the sum owed to her mother, the Appellant required at least £245,000 (£132,000, the amount repaid to the bank in July 2007, plus £113,000, the amount owed to her mother). The Appellant told us that her refinancing plan was to obtain a joint mortgage with Mr Peres once he graduated, supplemented by the income from student lodgers. We consider first the Appellant's intention to take in student lodgers.

220. We have reached the conclusion that the Appellant's actions are inconsistent with her stated intention to take in lodgers. If the Appellant had intended to take lodgers then we would have expected her to have inspected every room in the house as a matter of priority in order to assess the work required in order to bring sufficient bedrooms up to a standard where they could be let. We would then expect the Appellant to focus her funds and energy on the internal work to No. 200 which was necessary to achieve this standard, with the hope of having lodgers in place before making a mortgage application (which itself would need to be achieved before the bank loan was due for repayment in November 2007). However, there are two aspects of the Appellant's behaviour which are inconsistent with an intention to take lodgers. Firstly, the Appellant told us that she had not got around to accessing the fire-damaged back bedroom until November 2006. For the Appellant not to wish to see inside every room denotes an astonishing level of disinterest in the property. We do not consider it credible that the Appellant would leave a bedroom locked up if she intended to take in lodgers, and that she would not find time to access that room between August and November 2006. Secondly, the Appellant's work on No. 200 once she had drawn down funds, is inconsistent with an intention to take in lodgers. The Appellant focussed upon external clearance, levelling the garden plot and erecting a fence in preference to the repair and renovation of the house itself. This external work would not help further the aims of obtaining a mortgage and making No. 200 suitable for lodgers.

221. Without lodgers, the refinancing of No. 200 would be based upon the graduate salary of Mr Peres, supported by a guarantee by the Appellant's mother. We do not consider it credible, even in August 2006 when she was considering her options, that the Appellant could have expected a new graduate to be able to earn enough on a first salary either to be able to borrow £245,000 or to meet mortgage instalments of £1,100 each month.

222. We have concluded that the Appellant could not realistically have expected to occupy No. 200 beyond November 2007, because she had no credible plan for refinancing. Therefore, when she agreed to buy No. 200, and when she entered No. 200 on 28 August 2006, she knew that she would have to sell No. 200 in good time to repay the business loan in November 2007 and to repay her mother. Without a credible plan for how she would finance her occupation of No. 200 after November 2007, the Appellant cannot have had an expectation that she would occupy No. 200 with any degree of permanence. The Appellant must have entered No. 200 knowing that her occupation could only be temporary.

223. Although we have concluded that the Appellant could not have realistically considered No. 200 would be her permanent home when she entered it on 28 August 2006, once her father had submitted a planning application, there was the possibility of additional funds from the sale of part of the plot to her uncle. It would have been possible for the Appellant to have changed her plans and to have decided to make her occupation of No. 200 permanent; we consider whether that was what happened from 20 December 2006.

224. If the Appellant had changed her plans from 20 December 2006, and thereafter intended to make No. 200 her permanent home, the Appellant would have known that she needed to repair the rear wall and undertake the internal work (such as the plastering and installation of a damp course) which was required. Given the limited time available to bring the house into a state where it could be mortgaged and made suitable for lodgers, there was no reason for the Appellant to delay starting this work, even if she did not know whether she would be able to complete it. The Appellant had £28,000 available. However, no work was carried out at No. 200 after December 2006. As the Appellant knew that the repairs would need to be completed before she could obtain a mortgage, and that she needed a mortgage in place by November 2007, we conclude that (at best) the Appellant had not made any decision about her future at No. 200 pending the planning application outcome. We do not consider that this is sufficient to conclude that the Appellant's intentions had changed so that, from 20 December 2006, she realistically intended to make No. 200 her permanent home.

225. Other aspects of the Appellant's behaviour were also not consistent with what she told us were her intentions. The Appellant told us that No. 200 was intended to be her first home with Mr Peres and that by buying it she was fulfilling her dream of living in London. However, the Appellant also told us that she was not particularly excited about getting into No. 200 once she had completed in July 2006, that she had not visited No. 200 between March and 28 August 2006, and that she had not taken Mr Peres to No. 200 to show him the house before 28 August 2006, despite him living nearby. We consider it odd that the Appellant did not wish to show Mr Peres No. 200

if she intended that it would become their first home together, particularly given that he was said to be an essential part of her plan for financing their future at the house and given the very large financial commitment which obtaining a mortgage immediately after graduation would entail for Mr Peres.

226. The Appellant was aware of the damage to the rear wall before she drew down the loan, yet she continued to draw down the full £125,000 despite knowing it would be insufficient. We would have expected the Appellant either to apply to borrow more (on the basis of the additional work), or not to have drawn down any amount until she knew how she was going to make up the difference.

227. The Appellant told us that she decided to sell on or shortly after 26 March 2007, once planning permission had been refused. The Appellant told us that if she had had access to further funds at that stage then she would not have sold No. 200. However, once the Appellant and her mother both understood the large increase in value of both houses, on 28 March 2007, and her mother had decided to sell No. 206, there is no obvious reason why the Appellant could not have borrowed more money from her mother (out of the £580,000 proceeds of sale of No. 206) to enable her to stay at No. 200. At the very least we would have expected this option to be explored if the Appellant had intended No. 200 to be her permanent home.

228. Although much was made of the electoral roll, we do not consider the Appellant's absence from the roll for No. 200 gives an indication of the Appellant's intentions for No. 200. The lack of electoral roll registration, and the fact that the Appellant used her hall of residence address in preference to No. 200 as a postal address do not, either separately or together, prevent the Appellant from having considered No. 200 to be where she would make her home. We consider that the Appellant's claim for an exemption from council tax on the basis that No. 200 was empty and uninhabitable tells us more about the condition of No. 200 than the Appellant's long term intentions. We consider it more relevant that in applying for the empty and uninhabitable exemption, the Appellant appreciated that No. 200 was (by many people's standards) uninhabitable but she did not direct any significant funds towards remedying the obvious dereliction of the house so that a mortgage could be obtained.

229. We conclude that there was no time between 14 July 2006 and 12 July 2007 when the Appellant realistically intended to make No. 200 her permanent home. We conclude that the Appellant purchased No. 200 knowing that "it was a good deal" and knowing that it would increase in value once Mr Runeckles left. We conclude that the Appellant also knew that No. 200 would be even more valuable if planning permission could be obtained for the long strip of land at the end of the garden and, in due course, the Appellant's father submitted a planning application. The Appellant cleared No. 200 sufficiently of rubbish, cleaned four rooms and repaired the boiler so she could stay overnight at weekends and enjoy spending time in London with Mr Peres. The remainder of the work undertaken at No. 200 was external and (save for the minor roof repair) focussed upon clearing and levelling the garden plot. This external clearance might have been useful if a further dwelling-house was going to be built but it did not improve the condition of No. 200 and would not have made it more

likely that the Appellant would obtain a mortgage or attract lodgers. Once planning permission was refused, the Appellant instructed agents to sell No. 200. No. 200 was sold in good time to repay the bank loan.

230. We conclude that No. 200 was not the Appellant's main residence because she did not at any time occupy the house with the intention that it would be her permanent home. We conclude that the Appellant is not entitled to private residence relief under Section 222 TCGA 1992.

231. In reaching this conclusion we have considered the burden of proof to be upon the Appellant. However, the inconsistencies we have noted are such that we would have reached the same overall conclusion on residence even if we had considered the burden to be on HMRC.

Did the Appellant fail to comply with a Section 7 obligation?

232. Having concluded that the Appellant was not entitled to relief from capital gains tax, we return to the discovery assessment issues, and the question of whether the Appellant had failed to comply with an obligation under Section 7 TMA 1970.

233. The parties were agreed that the Appellant did not notify chargeability. Given our conclusion on the substantive issue, it follows we consider the Appellant was chargeable to capital gains tax and obliged to notify chargeability. We conclude that the Appellant failed to comply with an obligation under Section 7 TMA 1970.

Was the Appellant's failure to notify chargeability negligent?

234. As we set out above, the Respondents must establish not only that the Appellant did not meet her obligations under Section 7 TMA 1970 but that she was negligent in not meeting those obligations. If the Respondents cannot show this then they will not have satisfied the statutory criteria for raising the ETL assessment.

235. For the Appellant, Ms Haddon made the argument that there must be a distinction between negligence and carelessness, or it would not have been necessary for the legislation to be changed, and that the Appellant's behaviour here was not negligent. The Respondents addressed us upon negligence only in their reply, and then only to submit that the Appellant's failure to notify chargeability was negligent. Perhaps understandably, neither party offered a definition of negligence or proposed the test against which we should consider the Appellant's conduct.

236. We agree with Ms Haddon that negligence and carelessness are not the same, but that does not mean that there is a clear line between them or that there is no overlap. We consider some conduct could be both careless and negligent. This was the conclusion reached by the Tribunal in *Anderson v HMRC* [2009] UKFTT 258 which concerned an appeal against a discovery assessment raised after an error was discovered in Miss Anderson's tax return. The Tribunal stated:

> The making of an innocent error, and negligent conduct, are not mutually exclusive. There was clearly an error in the return, and this is accepted on behalf

of the Appellant. I do not accept Mr Shetley's argument that the error merely consisted of an item being included in the wrong section of the return; the gain on the CMG bond was wrongly included in the section referable to onshore bonds, but in addition a tax credit was wrongly claimed in respect of that gain. There was no allegation of fraud, so it can be concluded that the error was an innocent one. But the question is whether that innocent error has been brought about as a result of negligent conduct on the part of the Appellant or a person acting on her behalf. The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.

237. The test proposed in *Anderson* was quoted with approval by the Upper Tribunal in *Moore v HMRC* [2011] UKUT 239. Mr Moore had also entered incorrect figures in his tax return but had submitted a note with his return which showed his calculation of his figures. HMRC subsequently raised an assessment based upon their discovery of the errors in the return. Mr Moore's submission was that, although he had been incorrect in his understanding of the principles to apply, he had taken considerable care to complete his return and so he could not be negligent. In considering the appropriate test for negligence, the Upper Tribunal held:

> Michael Jones, counsel appearing before me for HMRC, argued that a determination of negligence required a two-stage approach. First, one must consider whether a person whose conduct is under scrutiny had a duty of care and, if so, the nature of the duty. That, he said, was a question of law. Once a duty of care has been identified, it is necessary to go on to decide whether the person has satisfied the duty. That, he said, is a question of fact. I agree with that analysis, which is consistent with authority, particularly *Qualcast (Wolverhampton) Ltd. v Haynes* [1959] AC 743, a decision of the House of Lords. At p 757 Lord Somervell observed that
>
> > "Whether a duty of reasonable care is owed by A to B is a question of law. … When negligence cases were tried with juries the judge would direct them as to the law as above. The question whether on the facts in that particular case there was or was not a failure to take reasonable care was a question for the jury."
>
> 14. At p 759 Lord Denning added
>
> > "In the present case the only proposition of law that was relevant was the well-known proposition—with its threefold sub-division—that it is the duty of a master to take reasonable care for the safety of his workmen. No question arose on that proposition. The question that did arise was this: What did reasonable care demand of the employers in this particular case? That is not a question of law at all but a question of fact. To solve it the tribunal of fact—be it judge or jury—can take into account any proposition of good sense that is relevant in the circumstances, but it must beware not to treat it as a proposition of law."

> 15. There can, I think, be no doubt that any taxpayer completing a self-assessment return has a duty to take care when doing so: the obligation upon him is plainly to submit an accurate return. Mr Moore did not suggest otherwise; his argument was that he endeavoured to do so, and that, taken together, the return and the added sheet discharged the obligation. The First-tier Tribunal evidently did not accept that proposition, preferring the view that the duty of care required Mr Moore to enter accurate figures in the boxes.

238. Therefore, in order to determine whether the Appellant was negligent, we must first identify the obligation, then consider what a reasonable taxpayer in the circumstances of the Appellant would have done, and finally measure the Appellant's behaviour against that reasonable taxpayer.

239. We consider that the obligation upon the Appellant was to notify HMRC that she was chargeable to capital gains tax.

240. The next stage is to ask ourselves what a reasonable taxpayer, in the circumstances of the Appellant, would have done. We consider that a reasonable person would have formed the view that he or she could not know whether s/he might be liable to tax and, without any prior experience of selling a property to inform him or her, s/he would have taken advice about whether it was necessary to notify chargeability, and subsequently followed that advice.

241. Ms Haddon addressed us on the complications of the HMRC guidance available and the difficulties the Appellant would have faced in knowing what to do if she had tried to consult HMRC guidance. However, the Appellant did not tell us that she had looked at guidance; her evidence was that she had not sought any advice. Given that the Appellant did not try to find out the position by looking at HMRC guidance, its clarity (or lack of clarity) cannot be relevant here.

242. We conclude that the Appellant did not meet the standard of a hypothetical reasonable person, and that her failure to notify chargeability was negligent.

243. The result of this conclusion is that we consider the Respondents have met all the criteria for raising an assessment under Section 29 TMA 1970 upon the Appellant.

**Carelessness penalty**

244. Finally, we come to consider the penalty which has been imposed upon the Appellant under Section 7(8) TMA 1970 for her failure to notify chargeability. HMRC bear the burden of satisfying us that they have raised the penalty in accordance with the legislation. The standard is again the balance of probabilities.

245. The deadline for the Appellant to notify chargeability was 5 October 2008. It was not until this date had passed that she had failed to notify chargeability. As at 6 October 2008, Section 7(8) TMA 1970 provided as follows:

> (8) If any person, for any year of assessment, fails to comply with subsection (1) above, he shall be liable to a penalty not exceeding the amount of the tax—

(a) in which he is assessed under section 9 or 29 of this Act in respect of that year, and

(b) which is not paid on or before the 31st January next following that year.

246. (Although subsection (8) was repealed by Paragraph 25(a)(i) of Schedule 41 to FA08, Schedule 41 only had effect in respect of obligations arising on or after 1 April 2010.)

247. We are satisfied that the Appellant did fail to notify chargeability and so HMRC have met the requirements of Section 7(8) TMA 1970. In raising the penalty, Officer Judson gave the Appellant the maximum abatement for disclosure and co-operation, and half of the possible abatement for seriousness. This resulted in a penalty of 20% of the tax due.

248. Section 118(2) TMA 1970 provides:

(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

249. The onus of proof is upon the Appellant to establish that she had a reasonable excuse for her failure to notify chargeability. The Appellant told us that she did not think she was doing anything wrong in not notifying HMRC. We accept that the Appellant did not deliberately fail to notify HMRC. However, while her lack of understanding that she was liable to capital gains tax might explain why the Appellant failed to notify chargeability, that lack of understanding cannot provide the Appellant with a reasonable excuse for her failure to notify. In all the circumstances of this case, we conclude that the Appellant does not have a reasonable excuse for her failure to notify her chargeability to capital gains.

**Conclusions**

250. For the reasons set out above, this appeal is dismissed. We confirm the assessment in the sum of £105, 293.86. We confirm the penalty in the sum of £21,058.

251. 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.

**JANE BAILEY**
**TRIBUNAL JUDGE**

**RELEASE DATE: 15 October 2018**