[2020] UKFTT 0381 (TC)

TC07859

CAPITAL GAINS TAX – relief on disposal of private residence – extent of permitted area – whether the permitted area exceeded 0.5 of a hectare – s.222(3) Taxation of Chargeable Gains Act 1992

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/02465
TC/2019/03910

BETWEEN

LESLIE PHILLIPS
CATHERINE PHILLIPS **Appellants**

-and-

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

TRIBUNAL: JUDGE ROBIN VOS
MR MOHAMMED FAROOQ

The hearing took place on 21 September 2020. Due to ongoing social distancing restrictions as a result of Coronavirus, the hearing took place remotely by video using the Tribunal Video Platform.

Mr Ian Johnson of Claritas Tax, accountants/tax advisers for the Appellants.

Ms Harry Jones, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents.

DECISION

INTRODUCTION

1. The Appellants, Mr and Mrs Phillips purchased a property in Bentley Heath, near Solihull in 1997. Together with the gardens the property extended to 0.94 of a hectare. They sold the property to a developer, Crest Nicholson in 2014.

2. As they considered that the entire gain qualified for main residence relief (sometimes known as Principal Private Residence Relief – "PPR"), they did not report the gain on their tax returns.

3. HMRC found out about the disposal from stamp duty land tax records in March 2017. In their view, the property was not of a size and character which required gardens/grounds of more than the normal statutory maximum of 0.5 of a hectare. The Appellants could not persuade them to the contrary and so in October 2018 HMRC issued discovery assessments to each of the Appellants for £162,820 representing capital gains tax on the part of the purchase price attributable to the balance of 0.44 of a hectare.

4. Mr and Mrs Phillips now appeal against those assessments on the basis that the whole of the area of 0.94 of a hectare is, having regard to the size and character of the property, required for the reasonable enjoyment of the property and therefore forms part of the "permitted area" to which PPR relief applies.

LATE APPEAL

5. In their notices of appeal, Mr & Mrs Phillips have applied for permission to notify their appeal to the Tribunal outside the statutory time limit. HMRC do not object to the late appeal.

6. However, it does not appear that the appeal has in fact been notified to the Tribunal out of time. HRMC's assessments were made on 30 November 2018. The Appellants' representative wrote to HMRC on 21 December 2018 stating that they wished to appeal against the assessments and also saying that they were going to appeal direct to the First-tier Tribunal. On 3 January 2019, HMRC acknowledged receipt of the appeals and noted that Mr & Mrs Phillip's would be appealing to the First-tier Tribunal. Mr & Mrs Phillips did not request a review of HMRC's decision; nor did HMRC offer a review.

7. In these circumstances, there is no time limit in s.49D Taxes Management Act 1970 (TMA) for notifying the appeal to the Tribunal. The appeals were not therefore made late.

8. If, contrary to the above, the notices of appeal to the Tribunal were late, we gave permission for the appeals to be notified out of time given the circumstances described by Mr Johnson, the fact there is no prejudice to HMRC and the fact that HMRC do not object to the late appeals.

DISCOVERY ASSESSMENTS

9. Ms Jones accepts that the burden is on HMRC to show that the discovery assessments have been properly issued in accordance with the relevant legislation in s.29 TMA. The Appellants do not seek to argue that any of the relevant requirements have not been satisfied.

10. Having reviewed the submissions contained in Ms Jones' skeleton argument and the evidence contained in the witness statement of Ms Helen Drinkall, the HMRC officer responsible for the investigation, we are satisfied that the discovery assessments have been properly made in accordance with s.29 TMA.

THE LEGAL PRINCIPALS TO BE APPLIED

11. PPR relief applies to a gain accruing to an individual on the disposal of a dwelling-house which is (or has been) their main residence together with any land which they have for their own occupation and enjoyment with that residence as its garden or grounds up to the permitted area (s.222(1) Taxation of Chargeable Gains Act 1992 (TCGA)).

12. The permitted area automatically includes an area (inclusive of the site of the house) of 0.5 of a hectare (s.222(2) TCGA).

13. The key provision in relation to this appeal is (s.222(3) TCGA 1992) which reads as follows:

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

14. The test as to whether an area larger than 0.5 of a hectare is required for the reasonable enjoyment of the property is an objective test. Both parties referred to the decision of Evans-Lombe J in the High Court in *Longson v Baker* [2001] STC 6 where the judge stated [at page 10] that:

> "I am not permitted to take into account the particular requirements of the owner of the dwelling-house; it is the house to which I must look and not the wishes, desires or intentions of any particular owner of the house."

15. As to whether an area larger than 0.5 of a hectare is "required", both parties referred to the comments of Du Parcq J in R*e Newhill Compulsory Purchase Order 1937, Payne's Application* [1938] 2 All ER 163 who provided [at page 167C] the following guidance:-

> ""Required," I think, in this section does not mean merely that the occupiers of the house would like to have it, or that they would miss it if they lost it, or that anyone proposing to buy the house would think less of the house without it than he would if it was preserved to it. "Required" means, I suppose, that without it there will be such a substantial deprivation of amenities or convenience that a real injury would be done to the property owner"

16. Although this comment was made in the context of compulsory purchase legislation, Evans-Lombe J accepted in *Longson* that it was equally applicable to the interpretation of the word "required" in Section 222(3) TCGA.

17. Both Mr Johnson, representing Mr and Mrs Phillips and Ms Jones, representing HMRC submitted that the question as to whether an area larger than 0.5 of a hectare was required for the reasonable enjoyment of the property is to be assessed at the date of the relevant disposal (in this case, June 2014). In support of their submissions, they both referred to the decision of Brightman J in the High Court in *Varty v Lynes* [1976] 3 All ER 447. He concluded [at pages 451-452] that:-

> "The difficulty of relating the expression "land which he has for his own occupation and enjoyment with that residence as its garden and grounds" to any moment except the actual time of disposal is that para (a) is clearly looking both to the present and the past – "a dwelling-house or part of a dwelling-house which is, or has at any time in its period of ownership been, his only or main residence" – while by contrast para (b) , as a matter of language, is looking only to the present, namely "land which he has for his own occupation and enjoyment with that residence as its garden". In the face of that comparative wording, it does not seem to me possible, without

> doing violence to the language of para (b), to read it in the manner desired by the taxpayer."

18. This approach was followed by the Special Commissioner in *Henke v HMRC* [2006] UKSPC SPC 00550 (02 May 2006) [at 109]. However, the only question in *Varty v Lynes* was whether a disposal of part of the garden and grounds after the sale of the main house could qualify for PPR relief. The answer was that it could not as, the date of the disposal, it was no longer being enjoyed as part of the garden and grounds of the house.

19. In this case, the whole of the garden grounds clearly were being enjoyed together with the house at the date of the disposal. The question is whether an area of more than 0.5 of a hectare was required for the reasonable enjoyment of the house. Whilst we would accept that the question must be answered as of the date of the disposal, it may well be that the answer to the question will depend on an assessment of the facts over the whole of the period of ownership rather than looking at a snapshot at the date of the disposal.

20. The next question which arises is how, on an objective basis, is it possible to determine whether an area of more than 0.5 of a hectare is required for the reasonable enjoyment of a property. In *Henke*, the Special Commissioner accepted [at 110] HMRC's submission [at 62] that the most meaningful comparables were those relating to similar properties in the immediate vicinity of the property in question. Both parties agreed that this is the correct approach.

21. We agree that this may well provide the most compelling evidence given the difficulty of deciding on an objective basis what area of land is required for the reasonable enjoyment of the property. However, in our view, it is necessary to take into account all of the relevant facts and evidence which may include factors other than comparable properties, as long as those facts do not relate to the subjective preferences of the owners of the property in question.

22. One important point to make is that, in determining what area of land is required for the reasonable enjoyment of the house, s222 (3) requires regard to be had to the size and character of the house.

RELEVANT FACTS

23. The facts that are relevant to this appeal are relatively straightforward and are not in dispute.

24. Mr & Mrs Phillips purchased a property in Bentley Heath in 1997 for £450,000. The property included the main house which had three reception rooms and five bedrooms, a garage for three cars, a one bedroom cottage, a swimming pool and substantial gardens. The entire property covered 0.94 of a hectare. The property was adjoined by allotments on one side and fields on another two sides with the road running along the fourth side.

25. The property was originally marketed with three quarters of an acre (approximately 0.3 of a hectare) of grounds. This represented only part of the garden. The vendor wished to retain the remainder of the garden as well as an adjoining paddock for development purposes. Indeed he had entered into an option agreement with a developer in respect of all of this land.

26. However, none of the potential purchasers would go ahead without being able to buy the whole of the garden. On the advice of Mr John Shepherd (the agent who had been engaged by the vendor to sell the property and Mr & Mrs Phillips' expert witness in these proceedings) the vendor agreed to sell the whole of the garden to Mr & Mrs Phillips along with the rest of the property. The option expired in 2001 without having been exercised.

27. Mr & Mrs Phillips carried out significant renovation to the property but did not make any fundamental changes. One change however was to convert a bedroom into a bathroom so that the property then had four bedrooms and four bathrooms.

28. Mr & Mrs Phillips were approached by developers on a regular basis wanting to purchase the property but they refused to sell.

29. In 2006 there was change to the local planning rules which enabled the development of the land around the property owned by Mr & Mrs Phillips. In due course the owner of the field to the north of their property entered into an agreement with Crest Nicholson and the owner of the field to the south (being the individual from whom they had purchased the property) entered into an agreement with another developer. With the prospect of new houses being built all around them, Mr & Mrs Phillips reluctantly decided to sell their property to Crest Nicholson. The disposal took place in June 2014.

30. Crest Nicholson decided to keep the main house (but not the cottage, the garage block or the swimming pool). They later sold the main house together with a new (but smaller) garage block which they had built. The total area of the property which was sold, including the garden was 0.1 of a hectare.

THE EXPERT EVIDENCE

31. Expert evidence was given by Mr John Shepherd on behalf of the Appellants and by Mr Timothy Swallow on behalf of the Respondents.

32. Mr Shepherd is a chartered surveyor who has been active in the high value residential property market in Solihull and the surrounding area for close to 50 years. There are times when his firm has dealt with over 70% of the transactions in such properties. As mentioned above, he was involved in the sale of the property to Mr and Mrs Phillips. He was also involved in the 1980's when the person who sold the property to Mr and Mrs Phillips originally purchased it.

33. Mr Swallow is also a chartered surveyor. He has worked for HMRC's valuation office for over 35 years. The area he covers includes the West Midlands, the South West and Wales. He has substantial experience of dealing with disputes in relation to the permitted area although his only involvement in the purchase and sale of residential properties is when he occasionally represents public bodies which are selling residential properties.

34. Mr Swallow explained that HMRC have a five step approach to dealing with cases where a taxpayer argues that the "permitted area" for the purposes of s.222 TCGA is more than 0.5 of a hectare. It is only the first three stages which are relevant in this case.

35. The first stage is to identify the "dwelling-house". HMRC refer to this as the "entity of the dwelling-house". The reason for this is that anything which forms part of a dwelling-house is automatically exempt under the terms of s.222(1)(a) TCGA. In this case, it is accepted that the main house, the cottage, the garage block and the swimming pool together comprise the "dwelling-house".

36. The second step is to determine the extent of the "garden or grounds" which are enjoyed with the dwelling-house as it is only land which forms part of the garden or grounds which can be comprised in the "permitted area". In this case, it is agreed that the whole of the 0.94 of a hectare qualifies as "garden or grounds". In fact, the evidence is that it is all either part of the dwelling-house or part of the garden.

37. The third step is to determine what part of the garden or grounds, taking into account the size and character of the dwelling-house, is required for the reasonable enjoyment of the dwelling-house. It is of course this third stage with which we are now concerned.

38. Mr Shepherd agrees that this is the right approach to adopt.

39. The focus of the expert evidence was on comparator properties close to the property owned by Mr and Mrs Phillips. Mr Shepherd put forward four properties which he said were comparable. They are all within half a mile of Mr and Mrs Phillips's property. Indeed two of them are much closer. As is the case with property owned by Mr and Mrs Phillips, they are all in a semi-rural location in the sense that they all have a significant amount of open land around them.

40. Although the houses are all larger than the house owned by Mr and Mrs Phillips, Mr Shepherd makes the point that the amount of garden/grounds which each of them has is also larger than the amount owned by Mr and Mrs Phillips (ranging from 1.12 hectares to 2.02 hectares). He therefore says that, in proportionate terms, the size of the house compared to the size of the garden/grounds is broadly in line with the property owned by Mr and Mrs Phillips.

41. Mr Swallow objects to these comparisons on the basis that there is no evidence in relation to stages 1 and 2 of HMRC's approach to the analysis of the "permitted area" as described above. This means there has been no analysis as to exactly which parts of each property comprised the "dwelling-house" and the extent to which any part of each property actually comprises garden or grounds.

42. Mr Swallow himself puts forward three properties which he says are comparable. It is apparent from the maps provided by Mr Swallow that the properties which he has identified, although close to the property owned by Mr and Mrs Phillips, are in rather more built up locations. The properties are also rather smaller than that which was owned by Mr and Mrs Phillips (having a gross external area of between 160m2 – 242 m2 compared to 353 m2 for the property owned by Mr and Mrs Phillips). The area of the grounds of each of these three properties is however significantly smaller than Mr & Mrs Phillips' property, ranging from 0.09 of a hectare to 0.3 of a hectare.

43. In Mr Swallow's opinion, what this shows is that the purchaser of an "executive property" would be perfectly happy with garden and grounds which extend to less than 0.5 of a hectare, even accepting that Mr and Mrs Phillips's property was somewhat larger than the properties which he has identified. Whilst a purchaser might prefer to have larger grounds, in his view, these properties demonstrate that this is not something which would be "required" by a purchaser.

44. Mr Shepherd's response to this was that the three properties identified by Mr Swallow were completely different in their character to the property owned by Mr and Mrs Phillips. He suggested it was like comparing apples and pears. The properties identified by Mr Swallow were smaller, less expensive and in more built up areas.

45. Mr Shepherd explained that the road on which these three properties are located (which is also the road on which Mr and Mrs Phillips's property was located) changes its nature. Parts of it are quite built up whereas others are much more rural. In his opinion, the sort of person who might be looking to purchase one of the three properties identified by Mr Swallow would be completely different from the sort of person who might be willing to purchase Mr and Mrs Phillips's property or one of the comparator properties which Mr Shepherd himself has identified. His evidence is that such a purchaser would be looking for space which they can enjoy as well for privacy and protection.

46. Mr Swallow suggested that the Tribunal should be looking at the reasonable expectations of a reasonable person looking to purchase a property in the locality – this being his understanding of the legal test to be applied. He accepted however in cross examination

that the character of a potential purchaser would be representative of the character of the property which they are looking to purchase.

47. A key part of Mr Swallow's evidence related to the subsequent sale of Mr and Mrs Phillips's house following the redevelopment by Crest Nicholson. The main house itself was largely unchanged. However it no longer had the three car garage block, the cottage or the swimming pool. Instead, it had a new, smaller, two car garage block with a games room above. The property was sold, enclosed by a wall in a plot of approximately 0.1 of a hectare.

48. In Mr Swallow's opinion, as the house had basically remained the same as when it was sold by Mr and Mrs Phillips, this clearly demonstrates that the garden and grounds of 0.94 of a hectare were not required for the reasonable enjoyment of the property. He accepts that some allowance should be made for the fact that the cottage and the swimming pool were no longer included but is of the opinion that this would not extend the area required for the reasonable enjoyment of the property beyond the 0.5 of a hectare area which is automatically within the relief.

49. This is not accepted by Mr Shepherd. In his view, the character of the property had been fundamentally changed, not only by the removal of the cottage and the swimming pool but also by the fact that it was now surrounded, not by fields but by the other houses built by Crest Nicholson. It had changed from being in a semi-rural setting to being in a suburban setting and, in terms of comparison, therefore suffered from the same defect as the other three properties put forward by Mr Swallow.

50. It is worth recording that there was some debate as to the meaning of the word "curtilage". It is fair to say that Mr Shepherd and Mr Swallow have a different view as to the meaning of this word. Mr Swallow appears to consider that any part of a property which falls within the curtilage of a house would automatically qualify for PPR relief as a result of s222(1)(a) as it would be treated as being part of the "dwelling-house". In his view, a garden is not necessarily part of the curtilage of a house. Mr Shepherd on the other hand, effectively "curtilage" and "garden and grounds" as synonyms. We express no view on this as the legislation does not refer to the term "curtilage" and so it is not necessary for us to do so in reaching our decision.

THE PARTIES SUBMISSIONS

51. The submissions from Mr Johnson and Ms Jones were relatively brief as both relied primarily on the opinions of the experts summarised above.

52. Mr Johnson drew attention to the fact that Mr Shepherd is an acknowledged local expert who has visited each of the properties put forward by both parties as comparators and has been involved in selling many of them. He is someone who has spent his life dealing with the buyers and sellers of such properties and therefore knows what their expectations are.

53. Mr Johnson argues that context is everything. At one extreme, it could be said that nobody requires a garden at all. An expensive property in Chelsea might have a very small garden whilst a stately home may require extensive gardens and grounds. He submits that Mr Shepherd has given evidence of the proper context for Mr and Mrs Phillips's property and that this clearly shows that the extent of Mr and Mrs Phillips's garden is in line with what a purchaser of such a property would expect.

54. In closing, Mr Johnson referred to the meaning of the "required" in *Newhill* (see paragraph [15] above). He submits that looking at the photographs of Mr and Mrs Phillips' property surrounded by fields before the sale to Crest Nicholson and the photographs of the property hemmed in by other houses after the development, the reduction in the size of the

grounds to 0.1 of a hectare clearly constituted a real injury to the property owner and thus demonstrated that the previous garden was required for the reasonable enjoyment of the property.

55. Ms Jones stressed that the test is what is required or needed (see *Longson* [at 163]) for the reasonable enjoyment of the property not what a purchaser would prefer. It may not be unreasonable for a purchaser to want more land but that is not the test. She submits that Mr Swallow's evidence clearly shows that comparable properties have smaller grounds which in turn demonstrates that the dwelling-house in this case could be enjoyed perfectly well with no more than 0.5 of a hectare of grounds.

56. Looking at the terms of the statute itself, Ms Jones makes the point that allowing a permitted area of more than 0.5 of a hectare is an exception to the default rule. We infer from this that Ms Jones invites the Tribunal to stick to the default rule unless there is a strong justification departing from it.

DECISION

57. Having carefully weighed up all of the relevant evidence, we are satisfied that the whole of the 0.94 of a hectare comprising the property disposed of by Mr and Mrs Phillips was required for the reasonable enjoyment of their dwelling-house and so qualifies for PPR relief in accordance with s.222(3) TCGA.

58. It is important in our view to bear in mind that the question as to the area of land which is required for the reasonable enjoyment of a dwelling-house must be approached having regard to the size and character of the dwelling-house in question (s.222(3) TCGA).

59. As Mr Johnson submits, context is everything. This includes the location of the property. It may very well be the case that the purchaser of a property in a suburban location would not expect a garden or grounds which are anything like the size of that which might be expected by the purchaser of a property in a more rural location. As Mr Swallow acknowledges in his report, the assessment which must be carried out involves:-

> "an appreciation of the requirements of occupiers of residential property, and a knowledge of the residential property market."

60. In our view, the properties identified by Mr Shepherd provide a better comparison to the property owned by Mr and Mrs Phillips than the three properties put forward by Mr Swallow. The reason for this is that the houses which form part of the properties referred to by Mr Swallow are significantly smaller than Mr and Mrs Phillips's house. They are also in more suburban locations, being much closer to higher densities of other properties. As such, we accept Mr Shepherd's opinion that they would appeal to a completely different category of purchaser than somebody who was looking for a larger house and more space along the lines of the property owned by Mr and Mrs Phillips and the comparator properties described by Mr Shepherd.

61. We accept that the comparator properties identified by Mr Shepherd are rather lager than the property owned by MR & Mrs Phillips. However, looking at the ratio of the size of the house compared to the size of the garden/grounds, in the case of Mr and Mrs Phillips' property this is 1:26.6. The four properties identified by Mr Shepherd have ratios which range from 1:17.5 to 1:27.3. The average of the four properties is 1:21.7. Whilst Mr and Mrs Phillips' property is at the other end of the range and is higher than the average, it is not so far out of line with those properties that we think it is appropriate to limit the amount of the grounds which form part of the permitted area and which therefore qualifies for relief.

62. In support of this, we note from the photographs of Mr and Mrs Phillips' property that there is a natural border formed by trees around the perimeter of their property. Mr Swallow

referred to the existence of a natural border as being one of the factors which might justify a permitted area in excess of 0.5 of a hectare.

63. We also take into account Mr Shepherd's evidence that, when Mr and Mrs Phillips bought the property in 1997, all of the prospective purchasers insisted on buying the whole of the garden and nobody was willing to purchase the property with only part of the garden. In the words of Mr Swallow (see paragraph [43] above), this was a requirement of the purchasers. It was certainly more than a preference.

64. As far as the subsequent sale of the property with 0.1 of a hectare of land is concerned, it is quite clear from the photographs that, although the house remains broadly the same, the property is of a completely different character to the one which was sold by Mr and Mrs Phillips in 2014. It is now surrounded by about 30 houses which have been built in what was previously its garden.

65. Even though it was known in 2014 that the fields to the north and south would be developed, there is no evidence as to how this would have affected the requirements of a potential purchaser. Mr Swallow speculated that this might have meant that a purchaser would require a smaller area of land around the house but it seems to us just as likely that a purchaser would be all the more insistent that the full amount of the existing gardens were required to maintain privacy and to ensure that no further development took place.

66. Once it is accepted that one of the key elements in assessing the area of land required for the reasonable enjoyment of a property is a review of the comparable properties it is not in our view legitimate to discount those properties (as Mr Swallow sought to do) on the basis that they have not themselves been subjected to a similar assessment. It would of course be impossible for a taxpayer to know whether there had been any discussions with HMRC in relation to the "permitted area" in respect of any potential comparator property, let alone what the outcome of those discussions might be.

67. Similarly, it would be very difficult for any expert acting on behalf of the taxpayer to be able to assess exactly what parts of the property were comprised in the "dwelling-house" and the precise extent of any "garden or grounds". Mr Shepherd has however provided fairly detailed information about the relevant properties (including sales particulars in relation to three of them). We accept that the information which has been provided is sufficient to enable a broad comparison to be carried out.

CONCLUSION

68. For the reasons set out above, we accept that the whole of the area of 0.94 of a hectare comprising the garden and grounds of Mr and Mrs Phillips's property was required for the reasonable enjoyment of the dwelling-house and so falls within the permitted area qualifying for PPR relief.

69. The assessments made by HMRC on 30 November 2018 in respect of both Mr and Mrs Phillips in the amount of £162,820 are therefore reduced to nil.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 30 SEPTEMBER 2020