[2021] UKFTT 0351 (TC)

TC08285

Capital Gains Tax – Property in Scotland – Legal title in taxpayer's sole name – Property sold to cohabitant – Whether part of dwelling-house that was sole of main residence of taxpayer – Whether cohabitant held beneficial interest in the property – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06021

BETWEEN

ROGER CRIPPIN **Appellant**

-and-

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

TRIBUNAL: JUDGE JOHN BROOKS
ELIZABETH BRIDGE

Sitting in public at Bristol Magistrate's Court on 10 September 2021

The Appellant, Roger Crippin, in person

Miles Matthews, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Section 222 of the Taxation of Chargeable Gains Act 1992 ("TCGA") applies to a gain accruing to an individual so far as attributable to the disposal of 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 (s 222(1)(a) TCGA). Section s 223 TCGA provides that "no part of a gain to which s 222 TCGA applies shall be a chargeable gain", ie subject to capital gains tax ("CGT"), if the "dwelling-house or part of a dwelling-house has been the individual's only or main residence throughout the period of ownership or throughout the period of ownership except for all or any part of the last 36 months of that period."

2. On 24 January 2013 the appellant Mr Roger Crippin sold a property, the legal title of which was in his sole name, to his partner, Ms Ruth McKean, for £200,000. As he considered the property, known as "Benko", to be an ancillary part of the dwelling-house in which he and Ms McKean lived with their four children as their only or main residence, Mr Crippin did not record the sale or include a CGT page in his 2012-13 self-assessment tax return (the "Return") which he filed on 31 January 2014.

3. On 27 October 2014 HM Revenue and Customs ("HMRC") opened an enquiry into the Return. Having come to the conclusion that Benko had not at any time been a part of a dwelling-house that had been Mr Crippin's only or main residence, HMRC issued a closure notice on 27 April 2017. The closure notice (which was upheld on 24 November 2017 following a review) amended the Return to include a CGT liability of £26,978 arising on the sale of Benko.

4. Mr Crippin contends that he is not liable to CGT on the grounds that Benko was an ancillary part of a dwelling-house that had been his only or main residence and that, as a result of her contributions and their relationship, Ms McKean had a beneficial interest in Benko. He also complains about the conduct of HMRC, which he described as having been "unprofessional, discourteous and disrespectful". However, as explained at the hearing, this Tribunal, the Tax Chamber of the First-tier Tribunal, does not have jurisdiction to consider such matters. This was made clear by the decision of the Tax and Chancery Chamber of the Upper Tribunal in *HMRC v Hok Ltd* [2013] STC 225 at [56].

5. Accordingly, we have restricted our consideration to those matters on which the Tribunal does have jurisdiction, namely:

   (1) whether Mr Crippin is entitled to relief from CGT under s 233 TCGA because Benko was a part of a dwelling-house that was his only or main residence; and

   (2) whether Ms McKean had a beneficial interest in Benko and, if so, the effect of this (if any) on Mr Crippin's liability to CGT.

However, before doing so it is necessary to refer to the evidence and record our findings of fact.

EVIDENCE

6. In addition to a bundle of documents consisting of approximately 450 pages which included correspondence between the parties, planning applications and valuation reports we heard from Mr Crippin and Ms Mckean.

7. We found both to be credible and honest witnesses who clearly sought to assist the Tribunal. However, given the events with which the appeal was concerned took place some years before the hearing they were, completely understandably, not able to recall all of the details surrounding the transactions and only able to describe what happened in very general terms.

8. We were also provided with a brief witness statement from Mr Trevor Crippin, Mr Crippin's father, who did not attend the hearing. However, his witness statement, which described how he and his late wife resided at Benko on "numerous occasions" between June 2011 and January 2012 whilst visiting Mr Crippin and the grandchildren, was admitted in evidence on the same (unopposed) basis applied by the Tribunal in *Rockall and Another v HMRC* [2014] UKFTT 643 (TC) at [6] where the appellant:

> "… was unable to attend the hearing for health reasons. In the circumstances HMRC did not object to her evidence or seek to exclude its admission. In any event rule 15(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that the Tribunal may "admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom". We therefore admitted Mrs Rockall's witness statement as hearsay evidence (ie a statement made otherwise than by a person while giving oral evidence in proceedings, which is tendered as evidence of the matters stated) but attach less weight to it than would have been the case had she given oral evidence under oath or affirmation which could have been tested under cross-examination."

FACTS

9. On 12 July 2006 Mr Crippin purchased, in his sole name, a property in Peebles, Scotland comprising a dwelling-house ("Loaningdale") and an adjacent annex ("Bothy") for £575,000 as a family home. Mr Crippin and Ms McKean have four children who were born between 2007 and 2011.

10. On 7 May 2009 Mr Crippin submitted a planning application to Scottish Borders Council (the "Council") for a double garage to be attached to Bothy and for the construction of what became known as "Benko", containing a playroom, office and toilet, over the double garage and Bothy as ancillary accommodation for the use of Mr Crippin, Ms McKean and their immediate and wider family. The Council granted this application on 6 July 2009.

11. On 20 July 2010 Mr Crippin made an application for a "Non-Material Variation" to the planning consent under which Benko was to become a three bedroom flat with a kitchen/living area and bathroom. Mr Crippin explained that it had been decided that it was not practical to proceed with the playroom at Benko and that the third bedroom was, due to its small size, used as a home office. This application was granted by the Council on 9 August 2010.

12. Construction of Benko began in autumn 2010 and was completed by July 2011. Access to Benko was either through a separate independent entrance or via a first floor balcony shared with Loaningdale. Ms Mckean described Benko and Loaningdale as being "very close together", in fact so close that it was possible "to see right into the sitting room" of Benko from Loaningdale. Mr Crippin and Ms McKean both confirmed that all utilities were taken from Loaningdale as Benko did not have independent gas, electrical, water or drainage supplies.

13. Initially Benko was used as extra storage space by the family but, as Mr Crippin explained, it may also have been used occasionally by "the kids" to stay in "as an adventure for the weekend."

14. From around October 2011 Benko was occupied by friends of Ms McKean (she described them as "friends of friends") who stayed there for about a year making financial contributions to what Ms McKean described as "family accommodation overheads". Mr Crippin, who confirmed that there was no formal tenancy agreement in place, referred, in evidence, to the final "rent" having been paid into Ms McKean's bank account in August 2012.

15. Ms Mckean explained that although her friends were staying there, she and Mr Crippin had unrestricted access to Benko and "still had their stuff" there. Also, that they had used it

themselves "a couple of times" during this period and that Mr Crippin's parents had stayed there when her friends were away.

16. In October 2011, shortly after Ms McKean's friends began staying at Benko, Mr Crippin and Ms McKean were visited by a Council enforcement officer. He considered that Benko was being privately let, contrary to the planning permission under which it could only be used as ancillary to Loaningdale. Mr Crippin and Ms McKean, who believe that enforcement officer's visit was the result of a complaint to the Council by a neighbour with whom they were in dispute, did not challenge the enforcement officer's view but, on the advice of a planning consultant, made a retrospective planning application in May 2012 for the conversion of Benko to "independent flatted accommodation".

17. A "Planning Supporting Statement" (the "Statement") prepared by planning consultants on behalf of Mr Crippin, sets out the planning history, an analysis against planning policy and refers to an appeal concerning *Tantah House Annexe* in which the Council's refusal of an application for the erection of a detached accommodation annexe without complying with a condition requiring its use as ancillary domestic accommodation related to Tantah House only and not sold separately from Tantah House was overturned by a Scottish Government Reporter.

18. Under planning history the Statement refers to the consent that was granted in July 2010 and the subsequent non-material variation stating, at paragraph 3.3:

> "No planning conditions stating that the use of the first floor accommodation must be ancillary to Loaningdale House, or restricting the occupancy of the first floor accommodation, were attached to the approval."

The commentary, in the analysis section of the Statement, at paragraph 4.3.14, explains that:

> "This application is for the retrospective conversion of accommodation which is considered to be ancillary by the Council. There is no creation of new living space and there will be no additional burden on the access road. The accommodation, due to its independent nature, could quite reasonably be occupied by persons with their own private transport, even were it being used as 'ancillary to Loaningdale' and in full accordance with the approved drawings (for example if elderly relatives were to live in the accommodation who had their own car). The approved drawings show accommodation which is capable of being used as self-contained accommodation. …"

With regard to the *Tantah House Annexe* appeal it is stated, at paragraph 5.4, that:

> "The Reporter also noted that the annexe's '*design for independent living distinguishes this accommodation from the typical "granny flat" or other types of ancillary accommodation that are commonly dependent on the main house for essential services*'. It should be noted that the first floor accommodation which is the subject of this application [ie Benko] is factually wholly independent of Loaningdale House (fully in accordance with the consented drawings) and the same statement thus applies."

19. On 22 August 2012 the Principal Planning Officer recommended that the retrospective application be approved although it was not formally granted by the Council until 31 January 2014, apparently due to an outstanding development contribution pursuant to an agreement under either s 69 of the Local Government (Scotland) Act 1973 or s 75 of the Town & Country Planning (Scotland) Act 1997.

20. In October 2012 HSBC requested the repayment of a loan from a company of which Mr Crippin was the director. In order to raise the necessary funds it was agreed that Ms McKean would purchase Benko from Mr Crippin.

21. Benko was subsequently valued at £200,000 by Colleys, the valuation and surveying service of Bank of Scotland plc, which inspected the property on 18 October 2012. Colleys Valuation Report describes Benko as a first floor flat comprising "living room/kitchen, hall, three bedrooms and a bathroom with WC" and notes that there "are two allocated parking spaces with the property". The Report also states, contrary to the evidence of Mr Crippin and Ms McKean, that "all mains services [are] connected."

22. On 24 January 2013 Benko was sold in its entirety by Mr Crippin to Ms McKean for £200,000.

23. During the 115 day period between October 2012, when Ms McKean's friends had left the property, and its sale to Ms McKean, Benko was advertised as available for furnished holiday lets and rented out as such to third parties for 31 of those days. When not used as holiday accommodation Mr Crippin and Ms McKean used Benko for personal and family purposes.

DISCUSSION AND CONCLUSIONS

24. It is accepted in the present case, as it was in *Lewis (Inspector of Taxes) v Rook* [1992] STC 171 that a dwelling-house might consist of more than one building even if the other building itself constituted a separate dwelling-house. Therefore, the issue before us is whether Benko, which is "appurtenant" to, and "within the curtilage" of Loaningdale, was a part of a dwelling-house that had been Mr Crippin's only or main residence at any time during the period in which he owned it.

25. Mr Miles Matthews, for HMRC, contends that it was not. Benko, he says, was at all times from its completion a separate dwelling-house. He points to the Statement, which he says must have been "signed off" by Mr Crippin, which states that there were no planning restrictions requiring it to be ancillary to Loaningdale House. He also relies on the evidence contained in the Statement and Colleys valuation that all mains services were connected to Benko which was therefore independent of Loaningdale House. However, he accepts that this is disputed and, correctly in our view, not determinative.

26. Mr Matthews submits that, because of the occupation by Ms McKean's friends which commenced almost as soon as the construction of Benko had been completed and subsequent holiday lets, Benko cannot have been Mr Crippin's only or main residence throughout the period in which he owned it.

27. Mr Crippin maintains that Benko was a part of a dwelling-house, ancillary to Loaningdale, which was his only or main residence until it was sold.

28. We agree with Mr Matthews that Benko is a dwelling-house in its own right and separate from Loaningdale. However, that in itself, as is clear from *Lewis v Rook*, does not prevent it from being regarded as part of an entity which constituted Mr Crippin's residence for the purposes of the private residence exemption in s 222 TCGA.

29. Having carefully considered the evidence, particularly the lack of any formal arrangement under which Ms McKean's friends were allowed to stay at Benko, that Mr Crippin's and Ms McKean's "stuff" remained there, their unfettered access to the property and use of it during this period, eg family members staying there, we consider that Benko was, from the time of its construction until the departure of Ms McKean's friends in around October 2012, Mr Crippin's only or main residence.

30. However, subsequent to that and once it was marketed as being available for holiday lets it could not, in our judgment, be regarded as such even though it was not let continuously and there was some personal/family use of the property during this period.

31. As such, we find that Benko was a part of a dwelling-house that had been Mr Crippin's only or main residence throughout the period of ownership except for the period between October 2012 and its sale on 23 January 2013. As this was part of the last 36 months of that period of ownership Mr Crippin is entitled to relief under s 223 TCGA.

32. Having reached such a conclusion it is not necessary to address the question raised by Mr Crippin in relation to Ms McKean's beneficial interest (if any) in Benko. However, for completeness we shall briefly do so.

33. Mr Crippin relies on a decision of this Tribunal, *Lawson v HMRC* [2011] UKFTT 346 (TC), in which a taxpayer successfully contended that, although the legal title to a property was in her sole name, the beneficial interest in it was, in fact, divided equally between herself and her husband. However, the property in that case was situated in Northampton, England, whereas Benko is in Peebles in Scotland.

34. Although *Stack v Dowden* [2007] 2 AC 432 concerned the property rights of a cohabiting couple in a house in England which they occupied together as their home until the breakdown of their relationship, Lord Hope considered what the position would have been had the cohabiting couple purchased the dwelling in Scotland. Having noted, at [6] that, "The law of property in Scotland is, of course, different [from that of England and Wales]" and, at [7], that Scots family law did not provide the answer he continued, (with emphasis added)

> "7. … the solution in their case must, in the first instance, be found in Scots property law. Except in cases where it can be shown that a title was held in trust although it is ex facie absolute, **Scots property law does not distinguish between the legal and the beneficial interests in heritable property**."

35. It is not disputed in the present case that Benko, which is in Scotland and therefore subject to Scots property law, is in the sole name of Mr Crippin and that there has been no formal declaration of trust. As Scots law does not distinguish between the legal and beneficial interests in heritable property it must follow that Ms McKean, who did not hold legal title to Benko could not have held any beneficial interest in it.

DECISION

36. For the reasons above the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 28 SEPTEMBER 2021