Neutral Citation: [2023] UKFTT 00968 (TC)

Case Number: TC08989

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

Taylor House, London

Appeal reference: TC/2018/04184

*Closure notices referring to omitted "property developing income" – whether the "matter in question" (sections 49D(3) and 49I TMA 1970) also included an alternative capital gains tax (CGT) liability – yes –whether profits derived from three similar transactions of purchase, redevelopment and sale of dwelling houses constitute trading profits – no – whether profits exempt from CGT as gains arising on disposals of individual's sole or main residence (section 222 TCGA 1992) - yes*

**Heard on:** 15-17 February 2023
**Judgment date:** 13 November 2023

**Before**

**TRIBUNAL JUDGE MARK BALDWIN**
**MR JULIAN STAFFORD**

**Between**

**GARY IVES**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Michael Avient, of counsel, instructed by inTAX Ltd.

For the Respondents: Mr Daniel Hickey-Baird, litigator of HM Revenue and Customs' Solicitor's Office

# DECISION

## INTRODUCTION

1. This is an appeal by Mr Gary Ives ("Mr Ives") against four discovery assessments under section 29 of the Taxes Management Act 1970 ("TMA") and related penalty determinations under section 95 TMA for the tax years 2003/4 to 2006/7 and three closure notices, one each for the tax years 2010/11, 2011/12 and 2013/14, and related penalty assessments for deliberate inaccuracies under Schedule 24 to the Finance Act 2007 ("FA 2007"). The total amount of tax and penalties in issue is just under £1 million.

2. The discovery assessments relate to rental income totalling £8,436 over the four years in question, which HMRC say Mr Ives received from letting out a flat he owned in Hamilton House, Putney.

3. The closure notices are much more significant. They each relate to the profit derived by Mr Ives from transactions in relation to the following three properties:

(1) 27 Ringmer Avenue, Fulham ("Ringmer"). This property was purchased by Mr Ives in November 2008 as two flats for £760,000 and sold as a single dwelling in August 2010 for £1.775 million.

(2) 69 Wandsworth Bridge Road ("Wandsworth"). Mr Ives owned this property from 1 October 2010 to 16 January 2012. He bought it for £750,000 and sold it for £1.5 million.

(3) 24 Crondace Road, Fulham ("Crondace"). Mr Ives owned this property from 4 July 2012 to 20 December 2013. He bought it for £1.731 million and sold it for £3.25 million.

In the case of all three properties, Mr Ives carried out a significant amount of work during his period of ownership. HMRC say that the profits derived by Mr Ives from these properties are trading profits subject to income tax. Mr Ives, on the other hand, says that the profit arising from each of these transactions is a capital gain arising from the disposal of his sole or main residence and accordingly exempt from capital gains tax ("CGT") as a result of "principal private residence" ("PPR") relief under section 222 et seq of the Taxation of Chargeable Gains Act 1992 ("TCGA").

4. In addition the 2010/11 closure notice includes rental income of £2,950 HMRC say Mr Ives received from his son's girlfriend who was living at 27 Fullbrooks Avenue ("Fullbrooks"), a property owned by Mr Ives and his wife.

5. We will deal with the trading and CGT/PPR issues first, having initially addressed a question on the scope of the matter before us, and then go on to deal with the rental income and related penalty issues.

## PRELIMINARY MATTERS

6. Before turning to the substance of the issues before us, there are two preliminary points we need to address. Firstly, at the beginning of the hearing Mr Avient criticised the hearing bundle prepared by HMRC, which he said was inadequately and rather carelessly assembled. Just to pick an example at random, the closure notices referred to Officer De Sio's calculations of Mr Ives' alleged liability, but the schedules to the closure notices showing her calculations were not in the hearing bundle. At times this made navigating the hearing bundle less than straightforward and clearly we do not have complete copies of all documents. HMRC's inadequate marshalling of evidence had been pointed out to the officer dealing with the case at the time in April 2022, when the scheduled hearing was cancelled by Judge Fairpo. HMRC have had a long time to put this in order, but have not done so. In

fairness to Mr Hickey-Baird, who has clearly not had conduct of this case throughout (certainly not before the scheduled April 2022 hearing), he readily acknowledged the shortcomings of HMRC's efforts and apologised to the tribunal and Mr Avient for them.

7. We asked Mr Avient and Mr Hickey-Baird whether a further postponement would be desirable to enable the hearing bundle and other materials to be put into better shape. Both were anxious that the hearing proceed. We agreed to proceed on the basis that Mr Avient would draw our attention to anything which caused him difficulty as the hearing progressed, and we would try to find a way to alleviate his difficulty. In the event, although the bundle's shortcomings became apparent, we were able to cope with them and there was nothing which appeared to cause Mr Avient a serious (certainly not an insurmountable) problem.

8. In a case where the total amount in dispute is nearly £1 million, we would expect HMRC to take more care in preparing the hearing bundle and making sure that it contains all relevant material properly arranged, particularly so when their failings had already been pointed out to them some months previously by a judge of this Tribunal.

9. Secondly, we indicated that (to the extent this was relevant) we would give our decision on the issues before us in principle and not at this stage confirm any amounts. Not least because of the failings in the hearing bundle, we were not confident that we could be sure of the relevant figures.

**THE SCOPE OF THE MATTER IN QUESTION IN THIS APPEAL**

10. Before we turn to the assessments and closure notices, there is one more issue we need to address, and this is one on which we asked for written submissions from the parties after the hearing.

11. Leaving aside the "rent a room" income in 2010/11, the three closure notices simply say that "property developing income has been omitted" and explain how Officer De Sio (the HMRC officer responsible for the investigation of Mr Ives) has amended Mr Ives' returns in line with that decision.

12. HMRC's skeleton argument assumes that, if these are not trading transactions, an alternative analysis would be that Mr Ives has derived capital gains from the three property transactions which are not exempt because of PPR and so are subject to CGT. We asked Mr Avient and Mr Hickey-Baird whether a closure notice which refers only to income tax can raise CGT as an alternative liability and whether the tribunal has jurisdiction to do anything more than just consider the appeal against the income tax liabilities raised in the closure notices.

13. The jurisdiction of the Tribunal, where a taxpayer notifies an appeal, is "to determine the matter in question"; section 49G(4) TMA. That begs the question whether the "matter in question" here is whether HMRC are right that Mr Ives has omitted trading income from his self-assessment return and nothing more or whether it goes wider.

14. Where, as here, HMRC have enquired into a taxpayer's return under section 9A TMA, the enquiry is completed when an officer informs the taxpayer of this by a closure notice. Section 28A(2) TMA provides that a closure notice must state the officer's conclusions and either state that no amendment of the return is required or make the amendments required to give effect to the officer's conclusion.

15. Section 50 TMA sets out what the tribunal can do when determining an appeal. In particular, the tribunal has power to reduce the amount of an assessment (including a self-assessment) if it considers that an appellant is overcharged or increase it if it considers the taxpayer is undercharged. The breadth of section 50 reflects what is often referred to as the "venerable principle of tax law to the general effect that there is a public interest in taxpayers

paying the correct amount of tax, and it is one of the duties of the [FTT] in exercise of their statutory functions to have regard to that public interest"; Henderson J in *Tower MCashback LLP 1 and another v HMRC*, [2008] EWHC 2387 (Ch). In the world before self-assessment, everything covered by an assessment was within the scope of an appeal and the assessment could be increased on account of something not in contemplation at the time it was made. One very important question raised by the introduction of self-assessment is the extent to which the closure notice issued at the end of an enquiry limits the jurisdiction of the tribunal. That is exactly the question which we are faced with.

16. In *Tower MCashback LLP 1 and another v HMRC,* [2011] UKSC 19, HMRC had rejected a claim for a capital allowance in respect of the taxpayer's purchases of software under section 45 of the Capital Allowances Act 2001. Subsection 45(4) precluded such an allowance if the expenditure was incurred with a view to granting another person the right to use the software. During the course of an enquiry, HMRC argued that the allowance was precluded by subsection 45(4). The taxpayer pressed HMRC to close the enquiry. The subsequent closure notice stated simply that the claim for relief under section 45 CAA was excessive and amended the partnership return substituting a nil capital allowance and a nil allowable loss. The covering letter sent with the closure notice stated that the allowance was disallowed by section 45(4). When the taxpayer appealed, HMRC abandoned their reliance on subsection 45(4) and argued instead that the expenditure had not been "incurred" within the meaning of section 45.

17. In the Court of Appeal ([2010] EWCA Civ 32) Moses LJ held that, by retaining section 50 TMA, Parliament had indicated that it did not intend to change the jurisdiction of the Special Commissioners "in as dramatic a fashion as the introduction of a system of self-assessment might have suggested". However, section 50 must be read in the context of the new provisions - it all depends on what one means by the "subject matter". He went on:

> "37. Parliament has not chosen to identify some legal principle defining the limitations on the scope and subject-matter of an enquiry and consequently an appeal. In those circumstances, I think it would be wrong for the court to attempt to do so. Any statement of principle is likely to condemn both taxpayer and the Revenue to too rigid a straitjacket. It might prevent a taxpayer from advancing a legitimate factual or legal argument which had hitherto escaped him or deprive, on the other hand, the public of the tax to which it is entitled.
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> 38. With those nebulous observations, I would leave it to the Commissioners and now the First-Tier Tribunal to identify the subject-matter of the enquiry and thus the subject-matter of the conclusions. In doing so, the First-Tier Tribunal will have to balance the need to preserve the statutory protection for the taxpayer afforded by notification that the Inspector has completed his enquiries and the need to ensure that the public are not wrongly deprived of contributions to the fisc."

18. Moses LJ concluded that the issue that had arisen under section 45(4) was not the subject matter of the enquiry nor the conclusion stated in the closure notice. The subject matter of the appeal, as identified by the Special Commissioner, was whether the claim under section 45 was excessive. In the Supreme Court Lord Walker of Gestingthorpe gave the lead judgment and he endorsed Moses LJ's approach.

19. In *Fidex Ltd. v HMRC,* [2016] EWCA Civ 385, Kitchin LJ (with whom Arden LJ and Sir Stephen Richards agreed) reviewed the decisions in *Tower MCashback* and summarised the propositions to be derived from that case as follows (at [45]):

> "i) The scope and subject matter of an appeal are defined by the conclusions stated in the closure notice and by the amendments required to give effect to those conclusions.
>
> ii) What matters are the conclusions set out in the closure notice, not the process of reasoning by which HMRC reached those conclusions.
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> iii) The closure notice must be read in context in order properly to understand its meaning.
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> iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT to support the conclusions set out in the closure notice."

20. These cases are concerned with HMRC's ability to raise new arguments in support of their conclusion in a closure notice. They indicate that it is the conclusion, as derived from the closure notice read in context, which matters and HMRC can always advance new arguments to support that conclusion, subject to the requirements of fairness and proper case management. Neither of these cases, however, is directly in point. We are not looking at a situation where HMRC have found a new argument to support an old conclusion; they appear to have found a new conclusion, albeit as an alternative to and not necessarily to the exclusion of the old one.

21. This leads us to the decision of the Court of Appeal in *Investec Asset Finance PLC v HMRC*, [2020] EWCA Civ 579. The issue here was whether HMRC can put forward alternative adjustments to the figures; including one adjustment in the closure notice itself and then also alerting the taxpayer to HMRC's possible future reliance on an alternative construction of the law, which would lead to a figure being included in the taxpayer's return which is different both from the figure that the taxpayer included when it lodged the tax return and from the adjustment figure that HMRC included in the closure notice. The adjustment in question derived instead from a scenario set out in the covering letter sent to the taxpayers with the closure notices. In that context, HMRC observed:

> "As you will be aware from correspondence, there are other arguments as to the possible tax consequences. These are not properly part of the closure notice as these are not our conclusion, but we thought it proper to note that the legal issues involved may go down these routes depending on the arguments you raise and depending on the direction taken by the Tribunal."

22. The taxpayers argued that, on the proper construction of the statutory provisions governing the issue of closure notices and the jurisdiction of the FTT on an appeal challenging a closure notice, it is not open to HMRC to argue for a different adjustment from the one made by the closure notice. Having reviewed *Tower MCashback* and *Fidex*, Rose LJ commented as follows:

> 72. The possibility of HMRC putting forward a case on appeal seeking a greater tax liability than that set out in the closure notice does not create an unfair imbalance between the interests of the Revenue and the taxpayer. *Tower MCashback* and *D'Arcy* show that despite the major change to tax law when the self-assessment regime was introduced and the importance of the finality of the self-assessment, the statutory provisions are not intended dramatically to narrow the scope of appeals. There are other checks and balances in the scheme here designed to protect the taxpayer. Those protections are the time limit imposed on HMRC in opening an enquiry, the fact that only one enquiry can be opened into any one tax return and the ability of the taxpayer to seek a direction for the issue of a closure notice. A narrow confinement of the subject matter of the appeal is not intended to be one of the protections conferred on the taxpayer. The "venerable principle"

> is also an important underlying factor in any tax matter. I accept HMRC's submission that proceedings before the FTT are not simply a dispute between two private parties and the venerable principle has a role to play here as the courts have found in the three cases which were cited to us.
>
> 73. I would conclude that the description of the scope of the matter in question in para. 117 of the FTT's decision is a useful and practical one. It is for the First-tier Tribunal to decide what the subject matter of the closure notice is within the bounds I have described. They are best placed to determine whether the context of the closure notice and the surrounding circumstances demonstrate that the subject matter is broader than the particular conclusion and adjustments addressed in the closure notice. If that is the case, it should be open to HMRC to put forward arguments in any appeal even if they result in a larger amount of tax being due, provided that the different arguments all deal with the same matters in question identified in the closure notice. Although it is accepted that this case goes beyond the point decided in Tower MCashback and Fidex, I do not regard those cases as requiring a bright line to be drawn. I would therefore dismiss the Appellants' appeal on Issue 3.

23. The passage from the FTT decision she referred to reads as follows:

> "117 The alternative is that it is for the First-tier Tribunal to decide what the subject matter of the closure notice happens to be; that the circumstances may demonstrate that the subject matter is slightly broader than the particular conclusion and adjustments addressed in the closure notice and that it is open to HMRC to mount different arguments in any appeal, even for instance occasioning greater adjustments to the taxable profits, provided of course that the different arguments all deal with the same identified or obvious subject matter."

24. Mr Hickey-Baird drew our attention to a letter from Officer De Sio to Mr Ives' advisers dated 2 May 2017. This is a very long letter in which Officer De Sio reviews all the factors she has considered in reaching her conclusion about Mr Ives' dealings with the properties. She stresses that her view is that the transactions are trading, but her letter contains the following passages:

> "The quality of occupation would only be of issue if the property disposals were to be accepted as capital investments. My view, considering that there are indicators of badges of trade present, is that the property disposals should be treated as trading ventures, therefore even if Mr Ives, did move into any of the properties in question, that particular residence would be incidental because of the trading position.
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> Should it be found by the Tax Tribunal that the properties were purchased as capital investments, HM Revenue and Customs will be putting forward arguments based on the information held that on the balance of probabilities, the properties were either not lived in, or that any residence should be viewed as temporary occupation. It should also be noted that TCGA 1992 s224 (3) denies principle private residence relief where a dwelling is acquired wholly or partly for the purposes of realising a gain on its disposal.
>
> I have noted the tax cases presented by inTax, which are in support of Mr Ives' intentions, quality of residence and lack of importance of formally notifying ones change of address when another property is owned.
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> HMRC accepts each case should be considered on its individual merit and facts surrounding the particular situation. However in the case of Mr Ives, it is difficult to see how the properties could have been intended as his main

> residence when he actively sought council tax deductions on each property, on the grounds that they were either uninhabitable, or, simply declared as unoccupied. Yet in stark contrast, despite not living at 27 Fullbrooks, Mr Ives refrained from seeking any discounts at that property."

25. This letter looks forward to the closure notices, which were issued shortly afterwards, on 10 May 2017. Mr Hickey-Baird concedes that the conclusions set out in the closure notices only refer to Mr Ives omitting 'property developing income'. However, he says that, looking at the context of the case, it is clear that HMRC were considering assessing the exact same profits arising from the same sets of facts to CGT. Essentially, he describes the conclusions in the closure notice read with that letter, and so the scope and subject matter of the appeal, as being that there has been an underassessment to tax in relation to the disposal of property which was not Mr Ives' main residence.

26. Mr Avient describes the closure notices as narrowly drawn. He says that it is the terseness of the conclusion stated in the closure notices which prevents HMRC from relying on their context and from drawing on the brief statements in the preceding letter to support their contention that the enquiry permits the scope to include the assessment of investment (CGT) profits derived from the properties. The conclusions in the closure notices are unequivocal, stating the sale proceeds of the properties constituted "property developing income". Therefore, the properties were trading stock and not investment properties. The meaning of the closure notices is, he says, crystal clear.

27. Mr Avient acknowledges that *Investec* might appear to give HMRC grounds for stating it can add conclusions not included in the closure notices. However, he says that what distinguishes *Investec* was that the closure notices "…were served under the cover of a covering letter" (his emphasis) which stated the alternative conclusion. As the two documents (letter and closure notice) were served together, they should be read together and this made it clear that, if HMRC were unsuccessful in the conclusions raised in the actual closure notices, reliance would be placed on the alternative analysis set out in the covering letter. The position here, he says, is very different. The letter to Mr Ives' advisers was sent 8 days before the closure notices. The temporal proximity seen in *Investec* is lacking here.

28. The point we are concerned with is, as far as we can tell from our researches and the submissions of Mr Avient and Mr Hickey-Baird, a novel one. We do not have alternative arguments to support a conclusion in a closure notice, instead we have an alternative adjustment to the one in the closure notice which imposes a liability to an alternative tax. It is that last feature which particularly exercised us.

*29.* *Investec* tells us that "the matter in question" may include an issue other than one which was referred to in the closure notice itself and which informed the adjustments the officer made. In principle, it is that adjustment which is the "matter in question". As Rose LJ put it in Investec at [70]:

> According to para, 34(3) of Schedule 18 FA 1998, an appeal may be brought against an amendment of a company's return. It seems to me that "the matter to which the appeal relates" for the purposes of section 49I(1)(a) must be that amendment and the amendment is therefore the "matter in question" which the tribunal is required to determine by section 49G(4) TMA. That then restricts the ambit of the appeal at the conclusion of which the tribunal may decide that there has been an overcharge or an undercharge and so make a reduction or an increase in the assessment pursuant to section 50(6) or (7) as appropriate. There is a limit on the jurisdiction of the FTT which is not simply a matter of ensuring procedural fairness. Any purported exercise by

> the FTT of a broader power to consider matters beyond that would be an error of law.

30. She went on to observe (at [71]) that " The authorities do not support a narrow construction of those key phrases in sections 49I and 49G and they establish that the FTT is the appropriate stage at which the scope of the matter in question in the appeal is to be determined."

31. If an alternative adjustment (based on a different analysis, albeit relating to the same tax) can fall within the scope of the "matter in question", it seems to us that there is no reason in principle why an alternative adjustment leading to a liability to a different tax from the one to which the adjustment in the closure notice relates cannot form part of the "matter in question" at least "provided that the different arguments all deal with the same matters in question identified in the closure notice" (*Investec* at [73]).

32. The closure notice must be read in context and that context will clearly include covering letters from HMRC. Officer De Sio's letter made it clear that she would be issuing closure notices, which she did very shortly afterwards. There is nothing in *Investec* that confines the context of a closure notice, where we are looking at alternative adjustments, to covering letters, although clearly there must be something which links the closure notice to the alternative argument. At the very least, a taxpayer must be able to identify the scope of the matters covered by the closure notice. Officer De Sio's letter is clearly linked to the closure notices by the words she used and was written shortly before the closure notices (which reflected the views in her letter) were issued. They make it clear that, even though the adjustment she made related to income tax, the "matter in question" was the correct tax liability (if any) arising from these transactions.

33. For these reasons we consider that the "matter in question" extends, if we find the transactions (or any of them) are not trading transactions, to whether the profit that arose to Mr Ives is liable to CGT or benefits from PPR.

**TRADING: THE LAW**

34. The main issue in this case is whether the profits that arose to Mr Ives on the disposal of the three properties (or any of them) are subject to income tax as trading profits. Section 5 of the Income Tax (Trading and Other Income) At 2005 ("ITTOIA") provides that income tax is charged on the profits of a trade. ITTOIA provides no further guidance on what amounts to a trade, and section 989 of the Income Tax Act 2007 ("ITA") merely provides that trade "includes any venture in the nature of trade".

35. Although the statute gives little guidance on the meaning of trade, the concept has been explored in several cases. The judgment of Sir Nicholas Browne-Wilkinson V-C in *Marson v Morton*, [1986] STC 463, contains what is generally regarded as the classical discussion of the factors which may help to determine whether an activity amounts to a trade. He said this (at p470):

> "It is clear that the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case. The most that I have been able to detect from the reading of the authorities is that there are certain features or badges which may point to one conclusion rather than another. In relation to transactions such as this, that is to say a one-off deal with a view to making a capital profit, there do seem to be certain things which the authorities show have been looked at. For convenience I will refer to them in a moment. But I would emphasise that the factors I am going to refer to are in no sense a comprehensive list of all relevant matters, nor is any one of them so far as I

can see decisive in all cases. The most they can do is provide common sense guidance to the conclusion which is appropriate.

The matters which are apparently treated as a badge of trading are as follows:

(1) That the transaction in question was a one-off transaction. Although a one off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else.

(2) Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on? For example, a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel.

(3) The nature of the subject matter may be a valuable pointer. Was the transaction in a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realisation, such as referred to in the passage that the chairman quoted from Reinhold? For example, a large bulk of whisky or toilet paper is essentially a subject matter of trade, not of enjoyment.

(4) In some cases attention has been paid to the way in which the transaction was carried through: was it carried through in a way typical of the trade in a commodity of that nature?

(5) What was the source of finance of the transaction? If the money was borrowed that is some pointer towards an intention to buy the item with a view to its resale in the short term; a fair pointer towards trade.

(6) Was the item which was purchased resold as it stood or was work done on it or relating to it for the purposes of resale? For example, the purchase of second-hand machinery which was repaired or improved before resale. If there was such work done, that is again a pointer towards the transaction being in the nature of trade.

(7) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots? If it was broken down it is again some indication that it was a trading transaction, the purchase being with a view to resale at profit by doing something in relation to the object bought.

(8) What were the purchasers' intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a trading deal. On the other hand, if before the contract of purchase is made a contract for resale is already in place, that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of investment rather than by way of a deal. However, as far as I can see, this is in no sense decisive by itself.

(9) Did the item purchased either provide enjoyment for the purchaser (for example, a picture) or pride of possession or produce income pending resale? If it did, then that may indicate an intention to buy either for personal satisfaction or to invest for income yield, rather than do a deal purely for the purpose of making a profit on the turn. I will consider in a moment the question whether, if there is no income produced or pride of purchase pending resale, that is a strong pointer in favour of it being a trade rather than an investment.

> I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question (and for this purpose it is no bad thing to go back to the words of the statute) was this an adventure in the nature of trade? In some cases perhaps more homely language might be appropriate by asking the question, was the taxpayer investing the money or was he doing a deal?"

36. In terms of their approach, Mr Avient criticises HMRC for having used the "badges of trade" as a mechanical checklist. He stresses the need to stand back and look at what went on in the round. Most importantly, he says that the properties were purchased as family homes and occupied as such and so, standing back, there cannot have been an adventure in the nature of a trade. Certain badges of trade were met, as would be the case for many families moving up the property ladder. Mr Hickey-Baird regards the badges of trade as a good, relevant guide but agrees that they should not be used uncritically as a checklist of points to be scored for or against the existence of a trade.

37. We need to put a framework around our analysis of whether Mr Ives' activities amounted to a trade. In doing this, the "badges of trade" are a useful starting point, but they should be applied critically in a manner appropriate to the context. As Mr Avient observed, some badges of trade might appear to be met by people moving up the property ladder. Most obviously, many people borrow large amounts of money in order to be able to afford a home and, in that context, a high level of debt finance cannot sensibly be seen as an indication of a trade. Some of the badges of trade may be more relevant than others. Some may not be relevant at all. There may be other relevant factors to consider. We propose to look at Mr Ives' activities using the badges of trade to frame our discussion, but, having made of the badges of trade and any other relevant factors we can identify such use as we can, we will then "stand back … and look at the whole picture".

38. It is possible that Mr Ives could be said to have been carrying on a venture in the nature of a trade in relation to one or more but not all of these properties. This case was argued on the basis that his activities have the same characteristics for all three properties and either all his profits from all three properties are trading or none of them are. We can see no real differences between his dealings in relation to any of the three properties and so we have approached our decision on that basis.

**CGT: PRINCIPAL PRIVATE RESIDENCE ("PPR") RELIEF**

39. Section 223 TCGA provides that no part of a gain to which section 222 of that Act applies shall be a chargeable gain if the dwelling-house has been the individual's only or main residence throughout the period of ownership, or throughout that period except for all or part of the last 9 months. There are rules for allowing partial relief where the property has been an individual's sole or main residence only for a part of that period. Section 222 applies to a gain accruing to an individual on the disposal of a dwelling-house which is, or at any time in their period of ownership has been, their only or main residence. Section 224 provides that section 223 does not apply to a gain arising on disposal of a dwelling that was acquired wholly or partly for the purpose of realising a gain from its disposal.

40. Mr Ives was in occupation of the properties, but the question for us is whether that occupation, in the light of the other factors we will discuss, amounted to him being in residence, as PPR is only available in respect of a property which was his sole or main residence for at least part of his period of ownership. To assist our analysis, we turn to two cases where this question has been addressed.

41. In *Goodwin v Curtis*, [1988] STC 475, the Court of Appeal had to decide whether a gain arising on disposal of a property occupied by an individual between 1 April 1985 and 3 May 1985 and which he had put on the market before completing his acquisition benefited from PPR. It was common ground that the individual occupied the property, but the question was whether that occupation amounted to residence. The taxpayer's counsel had argued that the General Commissioners had fallen into the error of thinking that a taxpayer cannot obtain PPR unless he has occupied the dwelling as his residence. The Court of Appeal decided that the error was on the part of the taxpayer's counsel. Millett LJ said this (at p480):

> "The classic exposition of the meaning of 'residence' is to be found in the speech of Viscount Cave LC in *Levene v IRC* [1928] AC 217–223, where he said:
>
> > 'My Lords, the word "reside" is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word "reside." In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure. Thus, a master mariner who had his home at Glasgow where his wife and family lived, and to which he returned during the intervals between his sea voyages, was held to reside there, although he actually spent the greater part of the year at sea (*Re Young*, 1875, 1 Tax Cases 57; *Rogers v Inland Revenue*, 1879, 1 Tax Cases 225). Similarly a person who has his home abroad and visits the United Kingdom from time to time for temporary purposes without setting up an establishment in this country is not considered to be resident here ...'
>
> Mr Ewart submitted that the test for income tax is not appropriate to the capital gains tax legislation.
>
> I am not sure that I agree with him on this. What I derive from Viscount Cave's speech is that the word 'reside' is an ordinary word of the English language and is eminently suitable for a lay tribunal such as the General Commissioners to apply.
>
> The question was whether, during the five weeks or so when the taxpayer occupied the farmhouse, he occupied it as temporary accommodation or as his settled abode, as his 'residence'. The commissioners found that he occupied it as temporary accommodation. They used the expression 'temporary residence' when narrating the facts. It was suggested that this was a contradiction. But, of course, they were not using the word 'residence' in the sense in which it is used in the 1979 Act, but as a synonym for occupation. The farmhouse was where he lived; it was the only place where he lived. For the first two or three days he had nowhere else to live. He was undoubtedly in occupation. But they came to the conclusion that he was in temporary occupation and not in residence.
>
> In my judgment there was ample evidence to support this conclusion. The taxpayer had just separated from his wife and family. He had nowhere else to live. The farmhouse had nine bedrooms and was hardly a suitable home

> for a single man. It had already been placed on the market. The taxpayer's occupation was manifestly a stop-gap measure pending the completion of his purchase of somewhere else to live. As soon as the farmhouse was sold the taxpayer moved into Ayton.
>
> Temporary occupation at an address does not make a man resident there. The question whether the occupation is sufficient to make him resident is one of fact and degree for the commissioners to decide.
>
> The substance of the commissioners' finding taken as a whole, in my judgment, is that the nature, quality, length and circumstances of the taxpayer's occupation of the farmhouse did not make his occupation qualify as residence. This conclusion was, in my judgment, clearly open to them.
>
> I do not regard it as helpful to substitute other words as glosses on statutory language by asking whether the farmhouse was his home or whether he lived there."

42. In *Patricia Lam v HMRC*, [2018] UKFTT 0310 (TC), the FTT had to consider a PPR claim by an individual who bought a property in August 2011 and sold it following substantial renovation in April 2013. The individual contended that she purchased the house with the intention that it would become her main residence and argued that she and her husband actually spent time at the property before certain events persuaded her to resell it. HMRC accepted that she and her husband stayed at the property for part of the week before internal damage to the property made the property uninhabitable, but argued that the nature and extent of her occupation until then was insufficient to make the property her primary residence. The Tribunal made the following helpful observations (at [54]-[57]):

> "54. The Court of Appeal case of *Goodwin v Curtis* and later cases have established that to determine whether a property qualifies as a principal private residence, the following factors must be considered.
>
> • Whether the property was actually occupied as a residence.
>
> • The nature, quality, length and circumstances of a taxpayer's occupation of the property.
>
> • Whether the occupation was intended to be permanent or merely temporary.
>
> • Whether there was a degree of continuity or some expectation of continuity to turn mere occupation into residence. The need for permanence or continuity should not be overstated as it is only one of the factors to be taken into account in weighing up all of the evidence.
>
> 55. The question of when occupation becomes residence is one of fact and degree for the Tribunal to decide and the word 'reside' and 'residence' are ordinary words of the English language to be interpreted as such. Residence is usually defined as 'the dwelling in which a person habitually lives; in other words, his or her home.' The test of residence is considered to be one of quality rather than quantity.
>
> 56. Periods of occupation during, or in readiness for renovation are distinguishable from periods of living in a property, as the former would lack the necessary quality to turn mere occupation into residence, in the absence of a lack of a firm and settled intention to do so.
>
> 57. There must be sufficient documentary or other evidence to support a claim that the property was occupied as the taxpayer's only or main residence."

43. The Tribunal found that the property was not the individual's only or main residence. Key factors here included that the Tribunal had not been provided with evidence of the number of days Mr and Mrs Lam actually lived at the property. No evidence had been provided in support of their claim that they lived at the property five days a week between its purchase in August 2011 and December 2011, when it became uninhabitable. Mr and Mrs Lam did not move any of their furniture into the Property. No evidence was provided of a change of address, for example bank statements, credit card statements, home insurance, benefit claims (given Mr Lam's infirmity) or other official documentation, television licence, changes to their registered doctor or dentist.

44. *Lam* tells us that the factors which are relevant when deciding whether a property qualifies as a person's sole or main residence are:

(1) Whether the property was actually occupied as a residence;

(2) The nature, quality, length and circumstances of the occupation of the property;

(3) Whether the occupation was intended to be permanent or merely temporary; and

(4) Whether there was a degree of continuity or some expectation of continuity to turn mere occupation into residence. The need for permanence or continuity should not be overstated as it is only one of the factors to be considered in weighing up all of the evidence.

**THE EVIDENCE**

45. We heard evidence from Mr Ives and a number of his friends or relations. They all submitted witness statements and were cross-examined by Mr Hickey-Baird. Officer De Sio, the HMRC officer who investigated Mr Ives, also gave evidence. She was cross-examined (quite forcefully) by Mr Avient. Most of her evidence went to how she had reached the conclusions which led to her raising the various assessments and closure notices we are concerned with. As such, her evidence, whilst giving us her perspective on the issues before us, is more in the nature of a submission and does not help us to reach the independent conclusions we are required to. It is in this sense (and meaning no disrespect to her) that we say that we did not find her testimony helpful, and accordingly we do not describe her evidence as fully as that of some of the other witnesses. A number of documents were produced and examined in the course of the witnesses giving evidence; we discuss these at appropriate points as we go through the witness evidence.

***Mr Ives***

46. As would be expected, Mr Ives was the principal witness. What follows is his testimony (taken from his witness statement and oral examination and cross-examination) about the various property transactions we are concerned with.

47. Before we turn to Mr Ives' property transactions, we should look at the evidence around his occupation. HMRC made a great deal of the fact that Mr Ives is a "builder" and described himself as such on his tax returns. Mr Ives explained that he trained as a plasterer, but (particularly after the 2008 financial crash, when work became harder to get) he would take on whatever work he could get. As a rule, he would take on relatively small scale projects, like kitchen and bathroom refurbishments, and bring in other tradesmen to help as he needed them. In one case (a job for his daughter's father-in-law) the project was too large for him and his role was mainly one of introducing tradespeople who would actually do the work.

48. Mr Ives said he would "tailor" his bills to reflect what he was doing. He exhibited a bill which referred to "Gary Ives Building and Decorating" and another bill which had no

description of his business. Mr Ives said this was similar to how people might adapt a CV if they were looking for a job. In response to HMRC's suggestion that he was a builder, Mr Ives commented that most of his jobs involved no building work; if they did, it was very much at the small projects end of the spectrum. He agrees that his skills helped with some of the work that needed doing on the various properties we are concerned with, but the scale of some of the work "dwarfed" what he could do on his own and he had to bring contractors in.

*The sale of 98 Inglethorpe Street ("Inglethorpe")*

49. Mr Ives explained that he was born in Fulham in 1954, and spent his whole childhood there. His wife was also from Fulham and that is where they met. They bought their first house at 28 Ringmer Avenue, Fulham in the 1980s and then moved in December 1991 to 98 lnglethorpe Street, Fulham.

50. Mr Ives said that his family lived happily at Inglethorpe until 2004. By that time the children were getting older, one of their daughters had gone travelling, and Mr and Mrs Ives decided to move out of Fulham to Worcester Park in Surrey. At that time, they thought it would be a good idea to downsize and lnglethorpe would sell for a price which would allow them to purchase a suitable house mortgage free.

51. lnglethorpe was sold for approximately £695,000 and Mr and Mrs Ives purchased 27 Fullbrooks Avenue, Worcester Park ("Fullbrooks") in May 2004. It was bought for £450,000 mortgage free.

52. Mr Ives said that, like many decisions in life, the move to Surrey, although seeming the correct one at the time, proved to be premature. They had not properly considered the fact that they both had ageing parents and young adult children who wanted to live in central London where they had grown up.

53. In 2008, Mrs Ives' uncle died, and this greatly affected her mother. Her other brother also died shortly afterwards. Mrs Ives' mother's health deteriorated. Mrs Ives wanted to spend time with her mother and the return journey from Surrey to Fulham could easily take between an hour and a half and two hours. At the same time, the children were spending most of their time in Fulham, often sleeping over, sofa surfing, staying with friends and family. So, although they had been happy living at Fullbrooks, they concluded that they had simply made the move too soon and decided to move back to Fulham.

*27 Ringmer Avenue ("Ringmer")*

54. Mr Ives thought that he was very fortunate in that Ringmer was for sale. He and Mrs Ives knew this road very well, as this is where they had bought their first home and Mrs Ives' mother only lived a short walk away. However, prices had increased significantly since they left Fulham and the house needed modernising and expanding. They thought that the money from the sale of Fullbrooks and a mortgage on Ringmer would be enough to undertake the work needed to make Ringmer a family home, as they wanted enough room so that the children could live with them if they wanted to. They also thought that, as Mr Ives' mother got older, they could make sufficient room for her to move in.

55. When they went to see the house, it was set up as separate ground floor and first floor flats. They wanted the whole house to be their home and a very large amount of work would be required. It would be some months before it was properly habitable. The work would require a proper building contractor to undertake the major building and structural work. However, it was in the right location, and they therefore put in an offer. To be able to afford Ringmer and the building work needed, they took out mortgages on Fullbrooks and Ringmer. They also had savings from the sale of Inglethorpe and £105k of finance from relatives.

56. The loan on Fullbrooks was for £412,500 from Santander. The interest rate was fixed at a low rate for the first two years, which suited the Ives because they only needed it until Fullbrooks was sold. Fullbrooks was to be put on the market early in 2009 and the idea was that, by the time it was sold and Mrs Ives had to move out, Ringmer would be fit to live in. For Ringmer their broker arranged a mortgage from the Harpenden Building Society ("Harpenden) for £520,000. This was a twenty-year, interest only mortgage described as a "Residential Investment" mortgage product. The Ives purchased Ringmer for £760,000.

57. Buildings insurance of Ringmer was a requirement of the mortgage with Harpenden, so they took out buildings insurance in October 2008. They did not need contents insurance, because it would be some time before they moved furniture in. The purchase of Ringmer completed on 21 November 2008 and Mr Ives moved in with his son Billy very soon after completion so they could start work on the property.

58. Almost as soon as they acquired Ringmer, they applied for planning permission for a substantial extension and to dig out a basement. They used a consultant (Barry Lawson) to help with this.

59. The Ives used a company called Creating Space Below Ltd ("Creating Space") which specialised in this type of building work. They could also do all the other structural work required. Mr Ives remembers them being surprised that he and Billy were intending to live in the property while the work was undertaken, but they confirmed this was possible and that they had done similar work whilst other properties were occupied. Mr Ives exhibited a letter dated 5 January 2009 from Creating Space in which they noted that Mr Ives intended to live in the property with his family, observed that this would slow works down and (although Mr Ives would only be on the first floor) he might find mains services cut off. Although the writer thought that this was not ideal, he concluded that "I am sure that between us we will complete the works to yours and my company's satisfaction".

60. Fullbrooks was put on the market in January 2009 for £495,000 in the hope that it would sell by the time Ringmer was ready to be properly occupied. Mrs Ives continued to live at Fullbrooks with the Ives' daughter Laraine and her fiancé. When another daughter was not at Bournemouth University, she would also stay at Fullbrooks. The Ives were aware that the property market was not good and wanted a low-key sale so that, if it took some time to sell, it was not obvious how long the house had been on the market. There were viewings and the Ives did receive some offers, but they were well below the asking price and therefore they did not accept them.

61. It took roughly three months for Creating Space to do the basement excavation. While that was being done, Mr Ives was working on the less specialist work such as attaching skirting boards, or (his specialism) plastering. He called in other tradesmen as and when he needed them. Between November 2008 and February 2009, Mr Ives and Billy lived on the first floor of the property. Mr Ives said that conditions were very basic, but they were able to get by because they could eat out and shower at The Parson's Green Sports and Social Club, which was only about a 15-minute walk away. They also managed to rig up some heating and an electricity supply. In February 2009 they found some tenants who were willing to put up with the building work and rent the upstairs flat. So, Mr Ives and Billy moved from the first floor to the ground floor, where a room was made habitable. Having tenants helped with the cash flow until they were ready to remove the upstairs flat.

62. HMRC obtained some council tax information from the local authority (the London Borough of Hammersmith & Fulham ("LBHF")). LBHF told HMRC that certain exemptions from Council Tax had been claimed on Ringmer. These included Class C and Class A exemptions. A Class A exemption is for a dwelling which is and has been unoccupied for a

period of 6 weeks or more and substantially unfurnished for a period of less than 6 months since the date on which the valuation list was altered as a result of works being carried out. Class C is an exemption for a dwelling which is unoccupied and has been for less than 6 months and is substantially unfurnished. These exemptions were contained in The Council Tax (Exempt Dwellings) Order 1992 (SI 1992/558). We have found the whole question of Mr Ives' entitlement to council tax exemption on the various properties difficult to follow, not least because Class A and Class C exemptions appear to be limited to 6 month periods and yet Mr Ives seems to have claimed exemptions for far longer periods.

63. LBHF said that the exemptions were granted following visits by an inspector. No forms were submitted by Mr Ives. It was put to Mr Ives that his claims for council tax exemption were inconsistent with his statement that he and Billy were living at Ringmer. His reply was that the officer (a Mr Lafaurio) came round, saw that there was no functioning kitchen or bathroom and said they were entitled to do this. He had not prepared any documents. Mr Ives simply got in touch with LBHF once he realised he needed to. They paid full council tax once Mrs Ives moved in. A letter from LBHF to Mr Ives was exhibited in which LBHF ask Mr Ives to pay council tax for the period 21 May 2009 to 31 March 2010.

64. Mr Ives exhibited a letter from the Electoral Registration Officer at LBHF dated 24 December 2008 in which the author says that he "understand[s] from council records … that you have recently moved to 27 Ringmer Avenue" and encloses a voter registration form.. He also exhibited a letter dated 18 November 2016 in which LBHF state that, when a Building Regulations completion inspection of Ringmer was carried out on 30 June 2010, "it was our understanding that Mr Gary Ives was resident at this property".

65. In March 2009, although far from complete, it was possible to move into the house as a home. They had a temporary kitchen containing a sink and washing machine. The bedrooms only needed decorating.

66. This left them with the issue of what to do with Fullbrooks as it was still on the market but not selling. They therefore decided that in March 2009 Mrs Ives would move to Ringmer and their daughter Loraine, who was working for Hamptons in the City, would live at Fullbrooks, keep it clean and give it a lived-in feel. She contributed to the bills on Fullbrooks, which helped with finances.

67. In March 2009, when Mrs Ives moved to Ringmer, almost all their furniture was moved there too. They left very basic furniture at Fullbrooks, and the furniture not moved to Ringmer was put in storage. Mr and Mrs Ives never stayed at Fullbrooks again after March 2009. They did not take contents insurance out for Ringmer just as they had not taken any out at Fullbrooks either.

68. By the summer of 2009 most of the work on the basement and the ground floor had been completed and the final stage of work on the first floor and the roof extension could start. The tenants moved out in July 2009.

69. The work on Ringmer had taken considerably more money than Mr Ives had expected, and money was very tight by the end of the summer. He said that on at least on one occasion they missed a mortgage payment, and this was very worrying.

70. Work continued on the property, and it was mostly finished by April 2010; at that point they were finalising the kitchen fitting, decoration and flooring. An additional £50,000 loan from Harpenden enabled them to finish the work, and they expected to pay the mortgage back once Fullbrooks was sold. The house was now presentable, and they had friends and family round for social gatherings and really enjoyed having the space to entertain. The children,

with the exception of Laraine, who was still with her fiancé at Fullbrooks, had moved back in and the house was occupied and enjoyed as a family home.

71. Mr Ives was shown a letter from Harpenden dated 12 April 2010, which referred to their application for the additional £50,000 loan. The letter indicated that the loan was being made to enable the refurbishment to be completed and then Ringmer would be let out on an Assured Shorthold Tenancy or sold. Mr Ives said he had never had any intention of doing either of these things.

72. Although Fullbrooks was still on the market, their son Gary Jr. and future daughter in law Becky Lewis moved into Fullbrooks in December 2009 whilst they were looking to buy their own home. During this time, Becky Lewis paid £600 per month by way of contribution to outgoings. Mr Ives said that this was very helpful as finances were very stretched.

73. Mrs Ives' mother's health had got worse and Mrs Ives was spending a lot of time with her and growing worried that she did not seem to be improving. The Ives had given some thought to her moving in with them, and decided to make the basement suitable for her to move into. They had sought advice from a specialist firm in March 2009 about how they could make the basement suitable for her.

74. One of the letters in the hearing bundle is one dated November 2016 from a business called Scootermart in Bracknell. They wrote to Mrs Ives to give some details of a visit they had made to Ringmer in March 2009. They referred to some items which "were considered essential in providing a safe and connected living space from ground to lower ground floor". They also say that they discussed a vertical lift from the ground to lower ground floors because of the difficulties that would be encountered if a straight stairlift (as previously estimated) was fitted.

75. In February 2010, the Ives needed to seek retrospective planning permission as they discovered the basement as built did not quite meet the permission they had received. The modification had been made during building to ensure that the basement could be used as a flat for Mrs Ives' mother. The approval took some time but approval was granted in May 2010.

76. In the meantime, Mrs Ives' mother decided she wanted to remain in her own home. As they were nearby, Mrs Ives could visit daily and also stay late, looking after her mother and keeping her company, and the children were also able to help out with care. However, Mr Ives said that they were no longer going to receive the money (carer allowances) they had hoped to get as a result of Mrs Ives' mother living with them. Gary Jr. and Becky had also found a new home and were due to move in July 2010; that would mean Mr and Mrs Ives would lose the amount they were paying.

77. By early summer 2010, with Fullbrooks not having sold, the Ives' financial position had become very difficult. However, they needed to stay in the area because Mrs Ives needed to be near her mother. They were very worried they would not be able to afford both mortgages, and knew that the interest rate on Fullbrooks was due to increase.

78. Mr Ives recalled discussing his money worries with Scott Goddard who was working for his father Peter and doing some painting for them. They had not thought of selling, but Mr Goddard introduced Mr Ives to David Cleary who worked for Winkworth, a firm of estate agents. Mr Cleary said he could sell Ringmer, but the Ives were very sceptical. With the market the way it was the Ives did not think they would get enough to be able to sell, but Mr Cleary asked whether, if he could get £2m, they would consider selling. After some discussion the Ives agreed that, if he could get that price, they would give it serious thought.

79. Mr Ives said that they did not want the house formally on the market and had little hope of a sale in light of their experience with Fullbrooks, but they agreed that Mr Cleary could mention the house to buyers who were willing to offer around £2m and were ready to proceed. In fact, Mr Cleary very quickly found a buyer who was willing to pay close to £1,775,000. Although this was not the £2m he had said he would get, the Ives thought this was a good offer and they would be silly not to accept it.

80. Mr Ives exhibited a letter written by Mr Cleary in January 2015, in which Mr Cleary confirms that he was introduced to Mr Ives by Mr Goddard and goes on to say:

> "When I met Gary he was complaining his mortgage had gone up and how financially pushed this was going to cause him to be. I told him I was an estate agent and suggested that I would be able to find him a buyer easily for his house in Ringmer Avenue. Gary did not want to market the house as he was planning to live there but admitted it was going to financially stretch him.
>
> I said to Gary if I could introduce someone who will pay close to £2 million would he consider selling it and Gary said he thought he would have to. I took a buyer round to the house who I thought would be interested in it and a sale was agreed. We did not market the house openly. It was I who suggested selling it in the first place and it wasn't until we managed to find a buyer who made an offer that Gary could not refuse that the sale was agreed. I do not believe it was ever Gary's intention to sell the house."

81. When asked by Mr Hickey-Baird why Mr Cleary had written this letter Mr Ives said that he had asked Mr Cleary to write the letter to explain how he met Mr Ives and that the property had never been formally exposed to the market. Mr Ives says that Mr Cleary's letter accurately reflects the position, which is as he explained in his witness statement.

82. Mr Ives said he was aware that the HMRC officer dealing with the enquiry has said that they put Ringmer up for sale on 6 February 2009. (Officer De Sio's witness statement records him telling her that he had tried to sell Fullbrooks in 2009.) He says this is simply not true. In February 2009, the property was not properly habitable on the ground floor and tenants had just moved into the first floor. They had absolutely no intention of selling it and Mr Ives has no idea where this idea has come from. Even if they had wanted to do that, the property was simply in no condition to be sold and, if they had tried to sell it, they would never have got what they paid for it. He says he tried to contact Sullivan Thomas, the agents who are said to have marketed the property at the time (the same agents who were involved in his acquisition of the property), but their records do not go back far enough to show whether they were involved or not. Mr Ives exhibited an email dated 31 July 2015 from Mr Wayland Ward-Smith (of Carter Jonas Sullivan Thomas) confirming that he had tried to find out whether Sullivan Thomas marketed the property in February 2009 (even going as far as trying to contact a former staff member) but he had been unable to.

83. As they had not intended to sell, there were a few jobs which needed completing, and which could not be done until the decorating had been finished, for example adding in the shaver point and smoke alarm. They later found out that, as the whole house had been rewired, they needed to get an electricity certificate before it could be sold. They checked they had all the relevant warranties and guarantees for the work undertaken, as these were needed by the purchaser. Where they did not already have them, they obtained them. Mr Ives says that he had been in no rush to get the electrical certificate and so the date of the certificate does not reflect when the rewiring work was done, which was back in 2009.

84. The sale went through relatively quickly and the Ives moved out on 5 August 2010. As they had nowhere to move to at that time, because the sale had not been planned and had proceeded so quickly, they arranged for their furniture from Ringmer to be put into storage.

85. Mr Hickey-Baird showed Mr Ives a water bill from Thames Water for "27A Ringmer Avenue" over the period 11 May to 4 August 2010. This shows a total amount payable of £37.27. He suggested to Mr Ives that the water usage here is far too low for a fully occupied house. Mr Ives was not sure whether this was a residual bill, he having paid most of the amounts due already. It was also not clear whether there were two meters at Ringmer (the property originally having been two flats). Mr Ives could not really remember the water meters at the property, although he does think that there was only one main. He said that he had received much larger bills for Ringmer from Thames Water.

86. Mr Ives himself exhibited a statement from Thames Water dated 29 July 2010. This showed payments for water and waste water at "27 Ringmer Avenue". The numbers on the statement give a balance carried forward of £37.27. This is for the period from 11 May 2010 to 4 August 2010 (86 days) and is significantly lower than the charges shown on the statement for the preceding periods. As far as the time when he and Billy were working at the property was concerned, Mr Ives observed that this figure would also be too low as they would be using a lot of water in their work.

87. We pause here to observe that we are not inclined to put much (if any) weight on the water bill. No one in the hearing seemed to know what an appropriate level of use/charge would be (in a letter in the hearing bundle Mr Ives advisers had suggested to HMRC that the annualised water consumption even from the £37.72 bill would be quite normal), nor was it clear whether Ringmer had one meter or two (and how the addresses on the bill and statement reconcile, if indeed they do) or whether this was a full bill for a period or a "rounding up" as the Ives left. Given all this uncertainty, we consider that it would be dangerous to try to derive anything in particular from the water bill.

88. As Mrs Ives' mother's health had got worse, Mrs Ives was adamant that they should stay in the area. Mr Ives thought that, as Fullbrooks had not sold it would be easier to move back in there, but he agreed that they should look for another property in the area

89. As Mrs Ives needed to be close to her mother, she moved in with her mother while they were looking for a new home, but there was no room for Mr Ives. He did not want to move back to Fullbrooks and wanted to be near Mrs Ives, so he moved in with his mother. Mr Ives says that this was a very difficult time for them as a couple, Mrs Ives was becoming increasingly worried about her mother, she was becoming very stressed, and their marriage was suffering.

*69 Wandsworth Bridge Road ("Wandsworth")*

90. Having sold Ringmer, in September 2010 Mr Ives approached Winkworth to see if they had anything in the area that was affordable. They were told about Wandsworth. Considerable work had already been undertaken on the property, with a basement already having been dug. However, the work had not been completed. Mr Ives understood from Winkworth that this had been a development project for a builder that had become insolvent. At the time Mr Ives saw this as an opportunity to take over a part completed project and therefore get the home they wanted for less money. The state of the building did not scare him because they had already used Barry Lawson and Creating Space to undertake similar work and Mr Ives knew it could be completed.

91. Mr Ives said that the Wandsworth property was a compromise. It was further away from Mrs Ives' mother than she wished and was on the busy A217. The property was

purchased for £750,000 on 1 October 2010. The proceeds of Ringmer were used to purchase Wandsworth, and Mr Ives also borrowed money from his father to help with the work, still hoping that Fullbrooks would sell. They did not take a mortgage out.

92. The Ives used the same building consultant to apply for planning permission and this was submitted towards the end of 2010, with permission being granted at the beginning of March 2011. The planning permission was to enlarge the basement already put in by the previous owner and extend the ground floor. They used Creating Space to complete the structural work that had already been started by the previous occupant.

93. The property had effectively been gutted. The basement had been dug out and the first floor had been removed at the front. Mr Ives said that the previous owner seemed to work downwards and therefore the loft extension had been largely completed. In order to make sure it was safe, Creating Space put in temporary supporting for the walls and floors. The Ives rigged up a temporary bathroom. Mr Ives and Billy moved in straight away, despite the risk from the lack of underpinning, and Mrs Ives moved in as soon as the building was safe. Most of the work was completed by October 2011 and Mr Ives borrowed a friend's van to move their furniture in. When pressed by Mr Hickey-Baird, Mr Ives said that, clearly, they had some furniture in before October 2011.

94. Mr Ives said that, as a home, Wandsworth turned out to be a disaster. Parking was almost impossible and it was also impossible to stop outside the house to unload. In addition, the A217 (Wandsworth Bridge Road) was extremely busy. They had known it would be busy during the day, but at night emergency vehicles used the road regularly and the Ives would be constantly woken up by the sound of their sirens. They did everything they could, even putting in specialist noise reduction glass. However, because they were in a conservation area, they had to keep the wooden sash windows and so the double glazing they were allowed to put in had limited effect. After a relatively short time living there, they realised they had made a horrible mistake and put the house back on the market in around November 2011.

95. Looking at the Zoopla screenshot exhibited by Officer De Sio (see [165] below), Mr Ives says that he never saw how the property was marketed and cannot explain why the estate agent said that it had been refurbished by a "well-known local developer", unless he was referring to the previous owner, who was a developer. The estate agent did, however, want to market it as recently refurbished, and therefore he asked the Ives to remove most of their furniture so photographs could be taken without any furniture or personal items in view. They were desperate to sell and so they followed his advice and put some furniture into storage and other items were stored in Mr Ives' mother's garage. That is why the kitchen looks empty in the Zoopla picture. When pressed by Mr Hickey-Baird on this point, Mr Ives also said that he does not know how the Zoopla screenshot seems to suggest that the property was marketed before November.

96. Towards the end of November 2011 they received an offer of £1,500,000 which they accepted. In order to sell the property, they needed a completion statement for the building work, and this was issued on 8 December 2011.

97. Again HMRC contacted LBHF and learned that there was a council tax exemption on Wandsworth from 6 October 2010 to 6 October 2011. This time Mr Ives completed a form claiming council tax exemption. He explained that he purchased the property in September 2010 and it was already being developed. He claimed that the property was unoccupied and that works started in November 2010 and were expected to continue until June 2011. When this was put to Mr Ives, he said that he had been told by the council officer who visited Ringmer that he could claim exemption because there were no facilities at the property. The officer told him to claim exemption this way where a property was effectively

"unoccupiable", even though he was actually in occupation. Effectively, he was doing the same as he had for Ringmer but this time he filled a form in and no council officer visited Wandsworth.

98. As a result, the Ives again found themselves with no home in Fulham but needing to be there. Mr Ives' father was suffering from cancer and so Mr Ives moved in with his parents to be with them. Mrs Ives' mother was suffering from extreme agoraphobia and anxiety and would not leave the house. Mrs Ives therefore moved back in with her.

99. In March and April 2011, they suffered two family losses. In March Mrs Ives lost her younger sister to a heart attack. This had a devastating effect on her mother and her mental decline accelerated. In April, Mr Ives' father died. Mr Ives said that living in different properties was putting great stress on their relationship and things were getting very difficult between them. Mr Ives' sister then decided to move back in with his parents, and so Mr and Mrs Ives needed a home close to Mrs Ives' mother.

*24 Crondace Road ("Crondace")*

100. Mr Ives approached Winkworth to see whether there were any properties on the market. 24 Crondace Road ("Crondace") was on the market and the Ives decided to purchase it. Although not as close as Ringmer, the property was still close to Mrs Ives' mother. This house too was in need of renovation and enlargement to make it suitable for the family. The Ives discussed extending the basement with Creating Space in April and the same consultant they had used before drew up plans in May.

101. On 4 July 2012 they purchased Crondace for £1,731,000. Mr Ives says that this was an incredibly large amount of money, but that was the amount they needed to spend to get a property of the size they needed and to be close to Mrs Ives' mother. The purchase was funded from the sale proceeds of Wandsworth and a mortgage from Birmingham Midshires for £750,000. In August 2013 the Ives borrowed £950,000 from Harpenden, which was used to repay the Birmingham Midshires loan. This was an interest only mortgage with a term of 3 years. The loan type is described in Harpenden's offer letter as "Interest Only; Re-mortgage; Residential investment", although the terms of the offer prohibit letting without Harpenden's consent. A three-year interest-only mortgage seems a rather curious product for the Ives to have used for what was meant to be their home, but we only noticed this for ourselves when reading the hearing bundle and nothing was made of this before us.

102. As soon as they bought the property their consultant applied for planning permission and full planning permission was granted by mid-July.

103. As far as council tax and Crondace is concerned, LBHF again confirmed to HMRC that there was a council tax exemption granted on the property from 4 July 2012 to 1 January 2013. This was a Class A exemption and was granted on 25 October 2012 following a telephone request.

104. Mrs Ives mother's health continued to deteriorate. The family decided sometime in 2012 that one of her grand daughters should move in with her and care for her. This relieved some of the pressure on Mrs Ives, but she still spent weekends with her mother to give the grand daughter a break.

105. Mr Ives said that his family's focus was changing again. The children who had been so keen to be back in Fulham were now having their own children. They wanted more space for their families, and house prices in Fulham were still rising, so that it was impossible for them to buy a house. Their friends were moving away for the same reasons. The family could now see why Mr and Mrs Ives had originally moved to the Worcester Park area.

106. Mr Ives commented that he had spent the previous 5 years trying to build a family home in Fulham and now found the reasons for doing so had gone. Mrs Ives no longer needed to be with her mother every day. The children were also looking to move away. They now wanted to be close to their grandchildren. At the time Mrs Ives was going back and forth to Tolworth to take grandchildren to nursery. Mrs Ives was effectively doing the reverse of what she was doing in 2008. This time she was heading back and forth to Tolworth and they found themselves with a home in the wrong place.

107. Mrs Ives had also realised that her mother was not going to improve and that she was never going to move in with them. Mrs Ives began looking for care homes in the Worcester Park area. As a result, they decided to put Crondace on the market in October/November 2013. They received an offer of £3,250,000. Contracts were exchanged and the sale completed on 20 December 2013. Mr Hickey-Baird raised with Mr Ives the Zoopla screenshot Officer De Sio had found relating to Crondace (see [170]). This described the property as "Previously listed for sale on 27th Jul 2013" and as having been marketed by Winkworth. The date on which Crondace was described as having been previously listed for sale in this screenshot is some months earlier than when Mr Ives said the property was put up for sale. Mr Hickey-Baird raised this with Mr Ives, who said the property was never put on the market in the Summer. Mr Ives says that the picture shows the kitchen he put in and the estate agent may have had a picture and used that.

108. The furniture they wished to keep was stored at Mr Ives mother's house. Some was given to the children and some to charity.

109. Fullbrooks had been on the market all this time. In October 2012 the estate agents advised the Ives that the market had picked up and that they would begin to push the house more and use the new computer portals. They even told them that the asking price could be increased to £575,000. Mr Ives exhibited a letter dated 3 July 2018 from a Mr Antony Perez (the Sales Manager at Browns Residential in Worcester Park). He confirmed that Mr and Mrs Ives had asked Browns to conduct low-key marketing of Fullbrooks in January 2009. Because of the credit crunch no acceptable offers were received. In October 2012, as the market improved, they agree a new direction, the price was increased and the property "was fully exposed to the market with listings on the key portals and full details produced". This led to the sale for £575k which completed in February 2013.

110. Mr Ives said that he is aware that HMRC have said that the sales particulars for Fullbrooks show a fully furnished house, but these were the photographs taken around the time when Mrs Ives was still living in the property. In November 2012, they received an offer at full price, and the sale completed on 7 February 2013.

111. Once Crondace was sold Mr Ives moved in with his mother and Mrs Ives moved in with her mother while they looked for a home close to the children. They put an offer in on 2 St Mary's Road ("St Mary's"), Worcester Park, Surrey, bought it for £975,000 on 29 May 2014 and moved in immediately. Mrs Ives continued to visit her mother two or three times a week, but considerable pressure had been removed from her as her mother's care was now being shared amongst the wider family. In August 2015 Mrs Ives' mother moved to a residential home in Worcester Park, which was only a mile from the Ives' house and close to where the children lived. Mrs Ives' mother died in 2016. The Ives continue to live at St Mary's.

112. Mr Ives commented that, looking back at the 5-year period, it was a very difficult time for him and his wife. They found themselves in 2008 in the wrong place with elderly parents in Fulham and Chiswick and young adult children enjoying the excitement of being in Central London. They found themselves priced out of the market; the type of large family

home they wanted was either out of their price range or did not exist. So, they set out to create the family home they wanted. They stretched themselves financially at a time when the future was uncertain, and they found they had overstretched themselves. If Fullbrooks had sold and Mrs Ives' mother had moved in, they would have stayed in Ringmer and then most likely moved back to Worcester Park in 2014. As far as Wandsworth was concerned, they chose the wrong house in the wrong location for a home. However, financially it worked out very well, giving them the funds to buy Crondace. If the children had decided to stay in Fulham, Mr Ives is sure they would still be there. If his father had lived and Mrs Ives' mother had not deteriorated so quickly, again they might still be there. As he put it, that was not to be and their children's lives and those of their families moved on and they chose to follow them.

*PPR: Post and related matters*

113. Mr Ives said that originally there was no need to have post delivered to Ringmer. Mrs Ives was still living at Fulbrooks until March 2009 and therefore post still went there. After Mrs Ives moved to Ringmer, the intention was to sell Fullbrooks. If that had happened, they would have arranged for a redirection of post and notified banks and other bodies. However, Fullbrooks did not sell. Mr Ives' daughter Laraine lived at the property. She had always helped him with his books and finance and so it made sense for official post to go to where she was living so that she could help Mr Ives deal with it. It also made sense because a hoarding had been placed around Ringmer and therefore there was a danger of post addressed to Ringmer going missing.

114. As Mr Ives explained, there was a lot going on in his family's life and their attention was not focused on notifying people when there was no need to. Things just drifted and it caused no problems, because he simply picked up the post when he visited.

115. It was the same when they lived in Wandsworth and Crondace. There were periods of extensive building work when they first lived in the properties. As the arrangement they had in place caused no problems, they just saved themselves the time and difficulty of writing to banks and other bodies. Mr Ives said that the need to do this never really crossed their minds.

116. As regards personal matters he took a different approach. He corresponded with the Royal British Legion and his golf club from the address he was living in at the time. Because these are personal to him and something he enjoyed, he dealt with these bodies personally and Laraine did not.

117. Because Crondace was more recent, Mr Ives has found correspondence addressed there including from his dentist, parking fines, DVLA, Sainsbury's Finance pet insurance, an 02 agreement, car insurance, car payments, a bank statement, insurance documents, an MOT Test, GP and breast screening appointments and a hospital appointment.

118. During the period in question Mr Ives said he was in good health and did not think to change his GP.

119. He came off the electoral roll in Fullbrooks in 2010, because he had told the council he was no longer living there and they said he was no longer eligible to vote.

***Mr Ives' Friends and Relations***

120. A number of Mr Ives' friends and relations gave evidence, principally in support of Mr Ives' evidence that he had lived in the various properties.

121. We will summarise what each of these witnesses had to say, but first we will make some preliminary comments. Firstly, their evidence in their witness statements was prefaced by the observation that "I understand Gary says …" followed by a series of propositions (set out in the course of summarising Mrs Palmieri's evidence, below) to which they responded,

although they did more than just agree with these propositions and added comments of their own. Mr Avient regards these propositions as helping to jog the witnesses' minds rather than leading them. When cross-examined by Mr Hickey-Baird, the witnesses all stated that their evidence reflected their understanding and was not just what Mr Ives had told them to say. Secondly, Mr Hickey-Baird put it to the witnesses that their comments about Mr Ives living in the properties were inconsistent with what he had told LBHF. The witnesses all said that they were not aware of Mr Ives' dealings with LBHF and so could not comment.

122. Mr Hickey-Baird did not object to any of this evidence on the basis that the witnesses were being led (or at least pointed in the direction of what it was hoped they would say), nor did Mr Hickey-Baird suggest that the witnesses were not telling the truth. He did, of course, point out that their evidence was not consistent with what Mr Ives told LBHF.

*Mrs Rossie Palmieri*

123. Mrs Palmieri is Mrs Ives' sister.

124. Mrs Palmieri said that, although some considerable time has passed and she cannot be certain of the exact dates or details, a summary provided by Mr Ives in relation to Ringmer "sounds correct and fits in with my general recollection". The points Mrs Palmieri understands Mr Ives to say in relation to Ringmer are:

(1) He moved into Ringmer in November 2008 with his son Billy to undertake renovation work.

(2) In February 2009 tenants were able to move into the first floor of the property.

(3) Mrs Ives was able to move in in March 2009.

(4) At the same time, they moved their furniture into the house and were using it as their home.

(5) Most of the works in relation to Ringmer were completed by the summer of 2009 and the tenants moved out in July 2009.

(6) Mr and Mrs Ives have given some thought to Mrs Ives' mother living at the property.

(7) When the property was sold, they moved in with their parents. During the period they owned the property, Fullbrooks was occupied by one or more of their children.

125. Mrs Palmieri confirmed that she visited the property many times, often several times a week and it was fully furnished. She recalled them "having a lovely Christmas dinner there one year with our mother".

126. Mrs Palmieri agreed with Mr Ives' statements in relation to Wandsworth, which are:

(1) He and Mrs Ives moved into the partly completed renovation (the loft extension built by the previous owner) soon after their purchase in October/November 2010.

(2) Most of the renovation work was completed by October 2011 when they moved their furniture in.

(3) Parking was almost impossible at the property and the noise during the day and especially at night, was unbearable. That is why Mr and Mrs Ives decided to move on.

(4) Again, during the period they owned Wandsworth, Fullbrooks was occupied by one or more of their children.

(5) When they sold Wandsworth, the Ives moved in with their respective parents.

127. Mrs Palmieri said that she visited the property several times a week. Her daughter worked in Fulham so she would often stay overnight with Mr and Mrs Ives. She recalls the property being fully furnished. Mr and Mrs Ives were initially very excited about the property and what they could make it into, but it was in the wrong area and the road noise was a huge problem.

128. As far as Crondace is concerned, Mrs Palmieri again says that she agrees with Mr Ives' statements that

(1) The property was purchased because it was close to Mrs Ives' mother and not too far from his elderly parents.

(2) Mr and Mrs Ives moved in soon after the property was purchased. Their daughter Joanna and their son Billy were also living in the property with them.

(3) They decided to sell as their other children and grandchildren were based in Worcester Park.

129. Again, Mrs Palmieri recalls visiting the property roughly once a week and that it was fully furnished. She recalls that Mr and Mrs Ives gave her a "fantastic" 65th birthday party at the home.

130. When, in relation to later witnesses, we refer to the statements Mr Ives made about Ringmer, Wandsworth and Crondace, these are the statements set out in [124], [126] and [128] (as the case may be).

*Mr Jamie Walsh*

131. Mr Walsh has known Mr Ives for around 20 years and the two of them ran a junior football team together. Their relationship is a social one and they would meet up most weekends. Mr Walsh has picked up Mr Ives from his home before and they would sometimes meet for a drink locally as well.

132. Again, Mr Walsh said that Mr Ives' statements about Ringmer and Wandsworth fitted in with his general recollection.

133. Mr Walsh added, so far as Ringmer is concerned, that he visited the property every other weekend and sometimes for training midweek. He recalls there being sofas, tables, chairs and similar furniture there. Mrs Ives would make refreshments and he would have a cup of tea sometimes whilst he waited for Mr Ives. He also recalls there being a washing machine.

134. So far as Wandsworth is concerned again, he recalls visiting the property many times, that it was fully furnished (he described it as a "lovely property") and that Mrs Ives was there and would offer him a cup of tea. He recalls Mr Ives being frustrated at the amount of traffic and the lack of parking around the property.

*Mr Marc Shehan*

135. Mr Shehan has known Mr Ives for about 10 years. His friend Stuart recommended him to help move and store some furniture for Mr Ives, which is how they met. Since helping Mr Ives to move, they have played golf together a few times and socialised at the golf club.

136. Mr Shehan has visited Wandsworth and Crondace. Because he only visited the properties to help Mr and Mrs Ives move, he cannot confirm the breadth of Mr Ives' statements in the way that Mrs Palmieri could. However, he does recall removing large furniture as well as smaller items such as lamps, plants and ornaments when he was helping Mr and Mrs Ives move out of Wandsworth. He helped Mr and Mrs Ives move into Crondace. He can recall moving large furniture as well as smaller items into the property.

*Mr Tony Lynch*

137. Mr Lynch has known Mr Ives for about forty years; they both served in the Parachute Regiment. He has visited Mr Ives' homes at Fullbrook, Ringmer, Wandsworth and Crondace. He was shown Mr Ives' statements about Ringmer, Wandsworth and Crondace and, although again considerable time has passed and he cannot be sure of the details, he said that the statements fit in with his general recollection.

138. As far as Ringmer is concerned, he confirmed that he visited the property more than five times, that it was fully furnished and that he collected Mr Ives from this property to attend a reunion at the Royal British Legion in Fulham.

139. As far as Wandsworth is concerned, again he recalls visiting the property a few times (but not as often as Ringmer) as it was difficult to park nearby. He recalls having to wait for Mr Ives in the car when he picked him up once as he was unable to park nearby.

140. As far as Crondace is concerned, he again remembers visiting the property more often than the previous property (as it was now much easier to park). The property was fully furnished and he recalls sleeping over in one of the bedrooms. He thought that the property was "great" but thinks that it came at the wrong time for Mr and Mrs Ives. Their children were moving away and they were starting to get grandchildren. Mr and Mrs Ives wanted to be near them.

*Mr Alan Hopkins*

141. Mr Hopkins has known Mr Ives for over 50 years. They met at school and became close friends growing up together. Their relationship is mainly a social one, but they have worked together in the past. Throughout the period Mr Hopkins has known Mr Ives, they would meet regularly, at least once a month. Because their relationship is so close, their families have grown up together, they have been on holiday together and regularly visit each other's homes for celebrations.

142. Mr Hopkins again confirms that Mr Ives' statements about Ringmer, Wandsworth and Crondace fit in with his recollection. In addition, so far as Ringmer is concerned, Mr Hopkins recalls visiting the property many times (as he put it, "far too many to put a number on"), the property was fully furnished, and they would go round for dinner parties which Mr and Mrs Ives would host.

143. As far as Wandsworth is concerned, they visited that property between 10 and 15 times. The property had all the usual furniture to be expected in a family house. They stayed overnight after at least one dinner party, but they do remember Mr and Mrs Ives being frustrated by the traffic on the road.

144. Mr Hopkins described Crondace as a beautiful family home which Mr and Mrs Ives were very proud of. It was furnished. He recalls Mr and Mrs Ives having a joint birthday celebration at the property one year and they spent a lot of time socialising there as it was "a great home for hosting events". However, as much as the property was such a good venue, Mr and Mrs Ives wanted to move closer to their family and friends. Mr Hopkins and his wife live in New Malden, which is close to Worcester Park.

*Mr Michael O'Leary*

145. Mr O'Leary has known Mr Ives all of his life. Mr Ives is Mr O'Leary's nephew. They meet up together, have gone on holiday together and socialise regularly.

146. Again, in relation to Ringmer, Wandsworth and Crondace, Mr O'Leary says that his recollection of events is in line with the statements Mr Ives made.

147. Mr O'Leary elaborated further by saying that, he visited Ringmer many times and it was fully furnished. The same was true of Wandsworth and Crondace. He recalls a big birthday party in September/October at Crondace and also that he and his wife attended a birthday dinner for Mr Ives in January. He recalls Mr and Mrs Ives missing living near their friends whilst they were in the property.

*Mr David Hinton*

148. Mr Hinton has known Mr Ives for roughly 15/20 years. They met in Mr Hinton's pub in Fulham. Their relationship has been a purely social one. He has only visited Wandsworth. Again, he says that his recollection of that property is in line with the statements Mr Ives made. In addition, he said he visited Wandsworth for a drink in March 2011, when the property was fully furnished.

*Mr Harry Clark*

149. Mr Clark has known Mr Ives for 32 years or more. Mr and Mrs Ives moved into Inglethorpe Street and Mr and Mrs Clark live on the same road. Mr Ives' daughter Laraine married Mr Clark's son. They would meet roughly every weekend and socialise in each other's home.

150. Mr Clark is familiar with Ringmer, Wandsworth and Crondace. Again, he confirmed that his recollection is in line with the statements that Mr Ives made.

151. By way of elaboration, he confirmed that during the period Mr and Mrs Ives owned Wandsworth, Fullbrooks was occupied by one or more of their children and that Mr and Mrs Ives moved in with their parents after the property was sold.

152. He visited Ringmer several times and the property was fully furnished.

153. He visited Crondace lots of times and the property was fully furnished. Again, he recalls a big birthday party there. Mr Clark said that he and his wife moved home to be closer to Laraine and his son and he believes that Mr and Mrs Ives wanted to do the same, which is why they sold the property.

*Mr Roger Wyborn*

154. Mr Wyborn has known Mr Ives for over 32 years. They become friends when Mr and Mrs Ives moved into Inglethorpe with their family as they lived on that street too. Mr Ives joined the same golf club and they played together regularly. Their relationship is a social one.

155. Mr Wyborn is familiar with the Ives' homes at Fullbrooks, Ringmer, Wandsworth and Crondace. Again, he indicated that the statements Mr Ives had made in relation to Ringmer, Wandsworth and Crondace were in line with his recollection.

156. He added, so far as Ringmer was concerned, that he visited the property many times, it was fully furnished and that Mr and Mrs Ives were very hospitable and would host dinner parties there.

157. As far as Wandsworth is concerned, again he visited the property many times and would often collect Mr Ives to go and play golf. The property was fully furnished. He recalls that parking near the property was an issue and that Mr and Mrs Ives said that the road outside the property was noisy. Mr Wyborn had seen this for himself.

158. As far as Crondace is concerned, he visited the property more than ten times and it was fully furnished. He recalls Mrs Ives hosting a big birthday party for her sister there and Mr and Mrs Ives would host dinner parties which they attended. He recalls Mr and Mrs Ives

wanting to be closer to their children. He had also moved to Worcester Park by then and so it made sense for them to follow him.

***Written Evidence***

159. In addition to the witnesses he called, Mr Avient put in letters from a number of people or businesses. Some of these have been discussed in the course of our summary of the witness evidence above.

160. In a letter (not reflected in her witness statement) Mrs Palmieri said that they had house sat for Mr and Mrs Ives whenever they went away on holiday. They would feed and exercise Frankie (Mr and Mrs Ives' dog) and let the builders onto the property if they did not have a key. She referred to their properties at Ringmer, Wandsworth and Crondace and said she knew Mr and Mrs Ives lived there even when building work was being carried out.

161. Mr Mark Pierson confirmed that his company (Putney Glass) installed whisper acoustic glazing in the form of double glazed units at Wandsworth in October 2011. He commented that he was sure that Mr and Mrs Ives were living at the house at the time.

162. Mr Gareth Morgan, a director of Morgan's Dairy, wrote and confirmed that Mr and Mrs Ives had been regular customers of his business for many years. It delivered milk for them at Inglethorpe until 2004. Mr and Mrs Ives then resumed milk deliveries in winter 2008 until 2010 at Ringmer and again in July 2012 until their last delivery in December 2013 at Crondace.

163. All these letters clearly create an impression of Mr and Mrs Ives living in the various properties. They are, however, unspecific so far as the periods to which they relate. As letters, they are of course not accompanied by statements of truth and the authors were not available for cross examination.

164. At the conclusion of the hearing we asked the parties to produce for us a single agreed schedule showing Mr Ives' financial obligations in relation to the properties and how he funded them and his overall financial position. They did this and we have reviewed it. The figures in that schedule are consistent with those set out elsewhere in this decision.

***Officer De Sio***

165. Officer De Sio is the HMRC officer in charge of the enquiry into Mr Ives. She submitted a witness statement and was cross examined at some length by Mr Avient.

166. Most of Officer De Sio's evidence went to how she had reached her decisions in relation to Mr Ives activities and how she had come to raise the assessments that she had. Mr Avient attempted, in his forceful cross examination, to demonstrate that Officer De Sio is not a particularly reliable witness, nor a particularly rigorous HMRC officer. We would take this opportunity to say that we do not regard Officer De Sio as displaying either of these characteristics. She was diligent in looking for evidence and testing Mr Ives' assertions. She was straightforward in her answers to Mr Avient. He criticised her for not accepting what he regards as an overwhelming tide of evidence in support of Mr Ives' assertions, but (as we have noted) that evidence has significant limitations. For reasons which (as we explain below) do not reflect ill on her at all, we do not put a lot of weight on Officer De Sio's evidence (which is more in the nature of submission), but we should say that we regard her as straightforward, honest, cautious in accepting what she is told, thorough and persistent. We reject Mr Avient's criticisms of her as a witness and an officer.

167. To a large extent, Officer De Sio's views as to whether Mr Ives is carrying on a trade or where he was living are irrelevant. It is for this tribunal to rule on those matters. We set out below matters raised by Officer De Sio which have not been addressed elsewhere and which

we consider to be evidentially relevant. We do not consider that it would otherwise be particularly helpful to spend a lot of time summarising Officer De Sio's evidence.

168. The hearing bundle contained what purports to be a screenshot from Zoopla, although it is undated and unsourced. There is a red mark like a stamp or seal at the top of the page which reads "ARCHIVED – Zoopla Online Archives". We have discussed this to some extent already. It is headed "Property history of 69 Wandsworth Bridge Road, London SW6 2TB, 27th Sep 2011" and beneath that is a picture of an empty kitchen headed "Previously listed for sale on 27th Sep 2011". The text indicates that the property in question was "previously marketed by" Winkworth and that the property is a "larger than normal family house [which] has been totally renovated and extended by a well-known local developer who has created a wonderful property with fantastic reception space, 5/6 bedrooms, 5 bathrooms, a full length basement and good sized landscaped garden". In the picture the kitchen appears to be completely empty.

169. Mr Avient queried the description that Mr Ives is a well-known local developer. He said that, if we accept that this screenshot relates to Wandsworth, by then (taking the evidence at its highest) he had bought and sold Ringmer and then purchased and renovated Wandsworth. Describing Mr Ives in these terms seems rather flattering as he only had history of one prior development. Officer De Sio agreed that she took this to be a statement that Mr Ives was well-known in the area as working in the building trade, but agreed that she had not investigated it any further.

170. Officer De Sio's witness statement exhibited a similar screenshot (also undated and unsourced) headed "Property history of 24 Crondace Road, London SW6 4BS, 27th Jul 2013". There is a similar red mark at the top of the page which reads "ARCHIVED – Zoopla Online Archives". We discussed this screenshot at [107] above.

171. Mr Avient objected to HMRC referring to these two screenshots as (beyond the red mark) their source was not identified. Officer De Sio says that she found them from archived material on Zoopla, but their exact source is not clear.

172. There was some extensive discussion with Officer De Sio about Mr Ives claiming council tax exemptions. She agreed that it is not impossible that someone could occupy a property whilst incorrectly claiming a council tax exemption. Although Officer De Sio agreed that someone could make a mistake in relation to council tax, she said that it is not a mistake to say that you are not living in a property when you are.

173. Officer De Sio did agree that Mr Ives' activities as a builder are quite different in scope from the work required for projects such as Ringmer, which is why (Mr Avient put it to her) he engaged Creating Space for fees in excess of £105,000 plus VAT. Mr Avient suggested that, if we compare Mr Ives' fees for the work that he did, this is in a completely different ball park to the sort of work and fees that Creating Space charged. This again, he said, is something that Officer De Sio appears to have ignored.

174. Mr Avient put it to Officer De Sio that all of the letters referred to at [159]-[163] and the evidence of the witnesses indicate that the Ives were living in the various properties. He asked Officer De Sio whether she believed these witnesses and her short answer was "No". Mr Ives put it to her that this meant that there must be a conspiracy of nearly 20 people all willing to put in untrue evidence. Officer De Sio said that she came to her conclusion that the Ives had not been in occupation and, in answer to Mr Avient's question, she indicated that she was not willing to change her view in the light of all the evidence she had heard.

**MR IVES' SUBMISSIONS**

175. Dealing first with the question whether these transactions are trading, Mr Avient stresses the importance, even if we frame our analysis around the badges of trade, of standing back and looking at all the circumstances. Particularly in the context of residential property, we need to remember that properties are commonly bought with loans (often very large ones), most people will want to do work when they move into a property and people do move house and sell dwellings at a profit within a relatively short order.

176. Mr Avient accepts that, if a person carrying on a trade does something similar to his "core" trading activity, it is reasonable to at least start with the inference that this activity is part of that person's trade. However, that is not the case here. Mr Ives may have described himself as a "builder" on his tax return, but that is a very broad, generic term. If we look at the invoices Mr Ives delivers and his description of his business, it is very different from one of property developing/dealing or large-scale renovation work.

177. In terms of an established pattern of dealing, Ringmer was the first property Mr Ives acquired, developed and then sold. Before that, there was no similar course of activity.

178. Even in cases where an inference can be drawn that a builder is trading in relation to activities in the building/real estate sphere, an activity will not be part of the builder's trade if in fact a property was the individual's principal residence. Mr Avient criticises HMRC for, as he put it, putting the cart before the horse, starting with the proposition that Mr Ives is a builder and developing everything out from there, ignoring the fact that the properties in question were intended to be his principal residence.

179. In terms of evidence, Mr Avient points to the fact that Mr Ives (and members of his family) occupied all three properties as a home and, he says, with the intention that that should remain the case.

180. Mr Avient regards the question of PPR relief and trading as effectively two sides of the same coin. If, which he says is the case, all of these properties were occupied by Mr Ives as his residence, with the intention that that should continue to be the case, then they cannot be trading transactions and PPR is available.

181. Mr Avient points to the many witnesses who identified Mr Ives living in the property, carrying on ordinary social activities there and the properties being furnished.

182. Mr Ives has always given the same explanation to HMRC from the very beginning in relation to all three properties. Mr Avient describes Mr Ives' explanation as reasonable and credible.

183. When HMRC sought to test what he said, he attempted to get evidence to back him up. Why would he do that if what he was saying was not true and this exercise would show him up?

184. Mr Ives explained why and how he lived in the properties. In relation to Ringmer, in particular, Mr Ives' living conditions are perhaps not those people would generally want to endure (showering at the sports club for example), but that is not to suggest that Mr Ives was not prepared to endure these conditions for a period. The letter from Creating Space suggested that they would have preferred Mr Ives not to live in Ringmer whilst they were carrying out their work, but they were prepared to work with him and Billy in the property.

185. As far as council tax is concerned, Mr Avient stresses that this hearing is not about council tax. We are not here to decide whether the exemptions Mr Ives claimed were correctly claimed. The question for us is whether he occupied the houses in question as a home. He claimed the council tax exemptions not because he was not living in the property

(although on his face that is what the claims say), but because he had been told by a council officer at the outset (in relation to Ringmer) that, where a property was in the condition that Ringmer was at the time, a council tax exemption could validly be claimed.

186. As far as the evidence from Mr Ives' friends and relations is concerned, Mr Avient said that HMRC had not suggested to any of those witnesses that they were not telling the truth. It had simply been put to them that their evidence was inconsistent with what Mr Ives had told LBHF (which on its face it was), but that was not something on which the witnesses could comment and it is something for which Mr Ives has a full explanation.

187. In addition, there are lots of letters from people who did not give evidence, all of which are consistent with the evidence from the individuals who appeared in the Tribunal and with Mr Ives' narrative.

188. Given the unchallenged evidence of the witnesses, Mr Avient says that it is not open to this Tribunal to find that Mr Ives did not occupy the various properties. Nor is it open to us to question the quality of that occupation, that the properties were (at least for some of the time) fully furnished and that Mr and Mrs Ives were carrying on ordinary domestic/social activities.

189. Mr Avient says that on balance this shows that Mr Ives was physically occupying the properties as his residence.

190. As far as Officer De Sio is concerned, Mr Avient says that we should approach her evidence (to the extent it is relevant) with some degree of caution. His basic summary of Officer De Sio's approach is that she made up her mind at an early stage (based on the fact that Mr Ives is a builder) and has effectively closed her mind to all the evidence given to her since then. For example, faced with evidence (including an invoice) of Mr Ives' furniture being moved into a property, she simply said that she didn't accept it. In effect, her "take" on all of the individuals who gave evidence and those who wrote letters in support of Mr Ives is that there is an enormous conspiracy in Fulham to give untrue evidence in support of Mr Ives.

191. Mr Avient does not place much weight on the water bill. There are two addresses (27 and 27A Ringmer). The water statement (as opposed to the bill) shows a constant and higher level of usage. Even that level of usage is odd if a lot of work was being carried on at the property. One would expect the level of usage to decline as work ceased and people moved into occupation.

192. The Zoopla material Officer De Sio found is also nothing to which a great deal of weigh can be given. She did not validate the website material she found with the agents.

193. As far as financing is concerned, Mr Ives has given an explanation of the position. He needed to sell one of Ringmer or Fullbrooks, particularly when the mortgage costs on Fullbrooks were about to double, and was driven to selling Ringmer.

194. Mr Avient accepts that Mr Ives has sold three properties in relatively short order, but he has also owned two other properties (Fullbrook and St. Mary's) for a very long time. Mr Ives has explained how he came to acquire and dispose of those three properties.

**HMRC'S SUBMISSIONS**

195. Mr Hickey-Baird starts with the badges of trade identified in *Marson v Morton*.

196. He asserts that Mr Ives is a builder; he labelled himself as such in his tax return.

197. None of these properties were in Mr Hickey-Baird's submission ever intended to be Mr Ives' home and they were not occupied by him as such.

198. As far as the council tax exemption claims were concerned, these covered nearly all of the time Mr Ives owned Ringmer, one year of the fifteen months he owned Wandsworth and the larger part of his period of ownership of Crondace.

199. Mr Hickey-Baird says that it is a bold claim that a LBHF officer encouraged Mr Ives to go outside the law and make a council tax exemption claim he was not entitled to. Mr Ives has no notes of any advice given to him by the council officer and the council officer has not been called to give evidence.

200. Mr Hickey-Baird says that we should put little weight on the evidence of the witnesses other than Mr Ives. Their evidence was effectively provided to them. Of the people who wrote letters but did not give evidence in person, even less weight should be put on their evidence. Their evidence is not particularly specific and little can be gleaned from it.

201. As far as the water bill for Ringmer is concerned, Mr Hickey-Baird says that the usage in the water bill and the water statement are low for four people and that would suggest to him that the Ives family were not actually in occupation.

202. Similarly, Mr Hickey-Baird suggests that the tenants of Ringmer seemed to be paying quite a high rent and that also might suggest that Mr Ives was not actually living there at all.

203. Mr Ives had buildings, but not contents, insurance at Ringmer, which is odd if he was in full occupation.

204. As far as Ringmer is concerned, it was not clear when Mr Cleary did the marketing.

205. There were planning applications and lots of work done on the property.

206. Turning to Wandsworth, Mr Hickey-Baird makes the same points. There were significant council tax exemption claims. A significant amount of work was done to the property, it was marketed and sold at a large profit.

207. Mr Hickey-Baird asks, if the property was listed in September 2011 for double its price, is it really likely that Mr Ives moved his furniture in during October, as he suggests? (Mr Ives, of course, says that the property was not marketed until November 2011). Why would he move furniture into a property he was already selling?

208. With Crondace again, we have a large profit made over a short period. Mr Ives made planning applications before he bought the property and again he was making claims for council tax exemption.

209. Looking at the badges of trade we have:

(1) Repetition – Mr Ives made a "quick profit" on three properties in relatively short succession.

(2) Whilst Mr Ives may not be a property developer, building work is related to his core trade.

(3) The pattern of the activities is like a property developer. Planning applications are put in before the property is acquired, significant amount of work is done on the property and then it is sold.

(4) As far as finance is concerned, significant amounts of debt were needed for these projects and (in the case of Ringmer) additional borrowings had to be taken out to complete the work.

(5) Mr Ives never really lived in the properties or enjoyed them as a home and his intention was always to sell the properties as soon as he could.

210. Looking at all the factors in the round, it is clear from the way that Mr Ives conducted himself that these were not ordinary residential property transactions. We can draw inferences from the other evidence that suggest that Mr Ives' intention was always to make a short-term profit from these activities, whatever he says the position is.

211. As far as PPR is concerned, Mr Hickey-Baird approaches this separately. He accepts that Mr Ives lived at Crondace for a period, but he says that this was incidental and Mr Ives always intended to sell the property. As far as Ringmer and Wandsworth are concerned, Mr Hickey-Baird says that Fullbrooks was always Mr Ives' main residence and Mr Ives never really lived there at all.

**DISCUSSION**

212. We have found this a very difficult case to decide. We can see why HMRC formed the view that these transactions are trading in nature. We have a series of three transactions, all of which involve the acquisition and disposal of residential property within a short period of time. In each of those cases, substantial work has been carried out at the property in question and the property has been realised at what appears to be a large profit over acquisition cost[1].

213. However, Mr Ives' tax liabilities cannot be determined based on first impressions alone. As we said we would, we will frame our analysis of these transactions around the badges of trade identified in *Marson v Morton* (as set out at paragraph [34] above).

214. Before we go on to examine the evidence and draw conclusions from it, we should pause and note the point made by Mr Avient that, as HMRC had not suggested to any of Mr Ives' witnesses (including Mr Ives) that they were not telling the truth, the Tribunal must accept their evidence. This point is neatly summarised in Phipson on Evidence (20th Ed) at paragraph 12-12, as follows:

> "In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases as it does in criminal. In general the CPR does not alter that position.
>
> This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected. Thus where, during trial, a witness has not been challenged as inaccurate, it was not appropriate for that evidence to then be challenged in closing speeches."

215. The point is elaborated on by Morgan J in one of the cases cited in Phipson (*Rahme v Smith & Williamson Trust Corporation Limited*, [2009] EWHC 911 (Ch)), where he said:

> "90. My third comment concerns the extent to which my freedom to make findings of fact is inhibited by the way in which Mr Rahme's witnesses were, or were not cross-examined. Every counsel should know the general rule that it is not open to counsel to invite the court to reject the evidence of a witness as deliberately untrue when the witness was not challenged in that way. It was not suggested to Mr Haddad in cross-examination that he was giving evidence which was deliberately untrue but yet I was invited by counsel to reject his evidence on that basis. The need for cross-examination which specifically challenges the truthfulness of the witness' account is clearly established and is described in Phipson on Evidence, 16th ed., at para. 12-12

[1] Just taking into account the costs of buying and selling and the invoices from Creating Space, Mr Ives would seem to have made a loss of around £80k on Ringmer, a profit of £480k on Wandsworth and a profit of £1.187m on Crondace.

> and is the subject of a very helpful consideration in the judgment of the Court of Appeal (delivered by Jacob LJ) in *Markem Corp v Zipher Ltd* [2005] RPC 761 at [50] – [61], discussing the decision of the *House of Lords in Browne v Dunn (1894) 6 R 67* and the Australian case of *Allied Pastoral Holdings v Federal Commissioner of Taxation* (1983) 44 ALR 607 . Whilst this approach may be open to some very limited exceptions, there is no possible exception relevant in the present case. In view of the failure to put to Mr Haddad that his evidence was a concoction, it is not open to me to consider that possibility. It would be completely unfair to Mr Haddad to make such a finding against him. Similarly, it would be completely unfair to him even to hint at what I might have thought if my hands had not been tied in this respect by the failure to challenge his evidence in this respect. I will therefore proceed on the basis that Mr Haddad's evidence was honestly given. If it was honestly given, then so far as Mr Haddad's own observations of events are concerned, there is no room for me to hold that he was mistaken although, as I have earlier pointed out, it does not necessarily follow that I am obliged to accept all the matters of detail spoken to by Mr Haddad, on which he might not have been reliable. Nor am I obliged to accept the truth of what Mr Rahme told Mr Haddad in view of my concerns about Mr Rahme's truthfulness."

216. Questions of fact in this case fall into two categories. The first might be described as straightforward matters, such as the dates on which and the prices at which properties were bought and sold, or the amounts of debt taken on by Mr Ives. The second, much more difficult, category comprises more subjective matters, such as the reasons why particular transactions were entered into and why particular decisions were taken or changed. The evidence on many of these questions comes primarily, if not entirely, from Mr Ives himself. He has provided a very detailed narrative (which we have set out above) and exhibited some supporting material. Similarly, some of his friends and relations gave supporting evidence, albeit at quite a high level and lacking in detail. These witnesses were all cross-examined by Mr Hickey-Baird, but it was not suggested to any of them that their evidence was (to use Morgan J's word) a "concoction" or that they were otherwise not telling the truth. Their cross-examination can be contrasted with Mr Avient's vigorous cross-examination of Officer De Sio, which was designed to show that she was unreliable and ineffective, even though the relevance and value of her evidence was much less than that of the other witnesses (Mr Ives in particular).

217. Mr Hickey-Baird did not put an alternative narrative to Mr Ives, suggest that his narrative was a "concoction" or put to him that any of his evidence was untrue. When reading through the hearing bundle we noticed the following passage in Officer De Sio's account of her meeting with Mr Ives on 18 July 2014:

> "With regards to the property disposals, De Sio explained that she was still considering whether the property disposal should be treated as trading venture, if that would be the case then the fact he lived at the properties had no relevance. Mr Ives was confused with this comment and he informed De Sio that as far as he was aware if he lived in the property then it was his residence and not a business, Mr Ives believed it was unfair to tax him on profits made on the sale of his own home when all he was trying to do was better himself."

The whole of this passage (but particularly the last sentence) is quite interesting. Mr Ives could be taken as suggesting that he was trying to "better himself" through a series of transactions in properties he lived in so as to secure tax exemption for his profits. That, of course, would be completely at odds with the narrative he has adopted before us (and, in

fairness to him, has maintained consistently for some years), but this was not put to Mr Ives and instead we were invited by Mr Hickey-Baird to draw inferences from other pieces of evidence; see [210] above.

218. Mr Hickey-Baird identified particular issues, such as the level of water usage at Ringmer, the date Mr Ives moved his furniture into Wandsworth, exactly when Wandsworth and Crondace were put on the market and the way Mr Ives claimed council tax exemptions, but he did not suggest to Mr Ives that these matters (or anything else) suggested that overall Mr Ives was an untruthful witness or that the true narrative (which, as we have observed, would be wholly at odds with Mr Ives' evidence) was that Mr Ives was engaged on a programme of residential property development transactions designed to produce ostensibly tax-free profits enabling Mr Ives to "better himself", or anything else for that matter. We do not consider that we can draw inferences from isolated issues (in relation to all of which Mr Ives had an answer) to conclude that Mr Ives is not telling the truth and there is an alternative overarching narrative. If that is HMRC's case, it should have been put to Mr Ives in terms, so that he had an opportunity to answer it. For these reasons, like Morgan J in *Rahme*, we do not consider that it is open to us to consider the possibility that Mr Ives' overall narrative is a "concoction" or to suggest what we might have thought if our hands had not been tied in this respect.

***The trading profits issue***

219. As we said we would, we will use the badges of trade to frame our discussion of the question whether any one or more or all of these transactions is trading.

*Repetition*

220. First of all, as we have already noted, these transactions form a series, in the sense that there are three very similar transactions. However, Mr Ives has an explanation for each of these acquisitions and disposals. In essence, his explanation is that he was trying to establish a family home, but forces of circumstance threw that plan off the rails. In the case of Ringmer, it was the pressing financial need to sell one property and that had to be Ringmer, given that Fullbrooks had not sold. When Ringmer was put on the market, it was at the suggestion of the agent and it proved easier to sell than Fullbrooks. We note Mr Hickey-Baird's point that, albeit some years later, Fullbrooks seemed to sell quite smoothly when it was put back on the market and the price increased, which suggested to him that it might have been easier to sell Fullbrooks than Mr Ives suggested, but he did not put this point to Mr Ives. In the case of Wandsworth, it was the parking and noise issues and in the case of Crondace it was the change in family circumstances (in particular Mrs Ives no longer needing to looking after her mother and the focus of the family moving to Surrey as the younger members of the family found themselves priced out of Fulham). In relation to Wandsworth, in particular, it was put to Mr Ives by Mr Hickey-Baird that surely, given that he had lived in this area all his life, he would know the parking and noise issues Wandsworth Bridge Road presents. His answer to that was a ready acceptance that he knew that there were these issues, but he had not realised how significant they were and what a difference they made until they were living there.

*Relationship with Mr Ives' existing trade*

221. The next question is the relationship between these activities and what might be described as Mr Ives' "day job". Mr Ives clearly described himself as a builder in his tax return, but we agree that "builder" is a broad term which does not tell one a great deal about an individual's activities. What we do know is that, at least before these activities started, Mr Ives's business was more in the nature of a plasterer or odd job man (someone carrying out relatively small projects), rather than someone who carried on large scale renovations or

developments. On at least one occasion, however, he does seem to have acted as a kind of project manager (for his daughter's father-in-law, where he said his role was to introduce tradesman who would carry out the required work). Nevertheless, there is no prior history of Mr Ives acting as a property developer, certainly not taking financial risk on his own account, and of the five properties Mr Ives was involved with, two of them (Fullbrooks and St Mary's) have been owned for a long period. It must be accepted that Mr Ives is familiar with the workings of the building trade, but we would not go so far as to say that these transactions are a natural extension of his ordinary business.

*Subject Matter*

222. We find the nature of the subject matter to be equivocal. Real estate (and certainly residential property) can be bought as a long-term home/investment or bought with a view to being developed and sold on in quick order for a profit. If an individual acquires residential properties that are wholly unsuitable for them and then sells them on at a profit, that might suggest that the individual is trading, but it was not put to Mr Ives or otherwise suggested that these properties were unsuitable as a home for the Ives family, for example that they were far larger than anything they might need.

223. Mr Avient regards the trading and PPR issues as effectively two sides of the same coin. He submitted that, if a property was acquired to be the Ives' sole home, it cannot have been acquired as part of a venture in the nature of trade and, if it were so occupied, it must be their sole or main residence (so PPR is available). We do not accept the proposition that the mere fact that a person lives in a property means that it cannot be trading stock. The first point to make here is that the CGT/PPR question only arises in relation to a profit which is not a trading profit; section 37(1) TCGA. The trading/income tax question must be answered first and without regard to the CGT/PPR question. In any event, it does not seem to us that there is a great deal of tension here. The cases on the meaning of "residence" make it clear that there is a qualitative aspect to the question whether a person is occupying a property as a residence. This would lead us to conclude that a person who sets out to live in a property only whilst working on and subsequently selling it, and who has no real intention of making the property their settled home, is almost certainly not occupying the property as a residence. In any event section 224(3) TCGA makes it clear that PPR is not available where a property is acquired with a view to making a profit from its disposal. If PPR is not available because section 224(3) is in point or because the taxpayer's occupation has the characteristics described above, the property may very well be trading stock of a venture in the nature of trade carried on by the individual in question.

*Do the transactions resemble a trading activity?*

224. At least superficially, these transactions do resemble a typical property development/trading activity. A property is purchased, with a significant amount of debt, a significant amount of work is carried out and then the property is disposed of in relatively short order. Planning permission was obtained without delay, rather than after the family had spent some time living in the property to help them decide what they wanted, but in the case of Ringmer and Wandsworth, at least, the state of the property did not give the family this luxury. We have already identified this basic pattern in all of these three transactions, but (as we have identified and discussed above) Mr Ives has an explanation for how these transactions panned out.

*Finance*

225. A significant amount of debt was used to finance these transactions, but Mr Ives has explained how that finance did not (or at least was not expected at the outset to) drive a quick realisation of the properties. As far as Ringmer is concerned, the expectation was that

Fullbrooks would be sold and this would reduce the total debt to a more manageable level. Ringmer had to be sold when Fullbrooks could not be sold and the debt still needed to be repaid. It was not, however, the case that at the outset the properties were financed in a way which would drive a short-term disposal. Wandsworth could be purchased without taking on further debt. Additional debt (initially from Birmingham Midshires, but later refinanced with Harpenden) was taken out to fund Crondace. We have noted the seemingly unusual terms (3 year term, interest only) of the Harpenden debt as well as the significant amount of the borrowing. Officer De Sio's witness statement makes it clear that she was concerned by the level of debt Mr Ives had taken on and wondered how he was going to manage it. But there was no interrogation before us of how that debt was intended to be managed and HMRC did not submit to us, or suggest to Mr Ives in cross-examination, that its size would put pressure on Mr Ives to sell Crondace.

*Resale in a different condition from acquisition*

226. The properties were not sold in the condition in which they were purchased. In all three cases, significant amounts of work were done on them.

*Motive/intentions*

227. We then come to the questions of Mr Ives' intentions at the time of acquisition and whether the properties were purchased to provide enjoyment for him and his family. As we have already discussed at some length, Mr Ives' evidence in relation to all three properties is that they were purchased to be retained as a family home, but in none of these cases was that ultimately possible. The properties needed to be sold in relatively short order. Nevertheless, in all three cases, at least for some time, the evidence suggests that the Ives family moved into these properties, they were fully furnished and enjoyed as homes.

*Weighing everything in the round*

228. Standing back and looking at things in the round, we can see that there are factors which point towards trading (the number of transactions, the short timeframe, the scale of the work carried out and the large amount of debt finance involved with Crondace in particular). However, all of these factors can be explained by Mr Ives' narrative. There were three transactions because his family plans were knocked off course. That was why the transactions took place in relatively short order. The work done on each property is explained by the need to make it into a family home. The Ives family started to use the properties as a family home in all cases, but were not able to do so for very long and changes in circumstances forced them to move on. It was not suggested that the amount of debt finance or its terms would put pressure on the Ives to sell in the short-term.

229. No evidence was led to suggest that Mr Ives intended to resell the properties at the time of purchase. His evidence is that he acquired the properties to hold for the long term, but that intention was thwarted.

230. As the individual factors (badges of trade) are consistent with a trading analysis, but are equally capable of being explained by Mr Ives' narrative (which points away from that conclusion), the answer to this case lies in the answer to the question whether we accept Mr Ives' evidence. As we have already noted, HMRC did not submit to us that Mr Ives was not a witness of truth, nor did they put to him (or any of the other witnesses) that their evidence was untrue. Mr Ives can explain his intentions at the time of each purchase and reconcile that narrative with what actually happened. As we have seen, there are some inconsistent features in what Mr Ives said, but there are not a lot of these instances and Mr Ives has commented on them all. Most importantly, it was not suggested to Mr Ives that overall his narrative was untrue (a "concoction") and the alternative (trading) analysis was not put to him in relation either to either any of the individual properties or to the whole sequence of transactions we

are concerned with. So, for the reasons discussed in [214]-[215] above, we do not consider that it is open to us to take the isolated points of inconsistency and use them to justify our not accepting Mr Ives' narrative.

231. For all these reasons, we have concluded (on the balance of probabilities, that is to say that it is more likely than not) that these properties were not purchased with a view to disposal at a profit in short order (after significant work had been carried out), but they were each purchased to be a family home for the Ives family and realised when circumstances changed. It follows that the transactions were not trading in nature.

***CGT/PPR***

232. We now turn to the question whether PPR is available in relation to the capital gains which, given our finding on the trading point, arise to Mr Ives on the disposal of these properties. We have already found that the properties were not acquired with a view to making a gain on disposal and that deals with the section 224(3) point.

233. The question which remains is whether these properties were Mr Ives' sole or main residence. On Mr Ives' evidence, he moved into all of these properties as they were acquired. There is a clear inconsistency between these statements and the statements that he made to LBHF in relation to the council tax exemption claims. Nevertheless, Mr Ives has an explanation for this. Although he was undoubtedly in occupation, it was his understanding (based on what he had been told by a council officer) that, if a property required a significant amount of work done to it (and in particular if it did not have ordinary functioning kitchens and bathrooms), this council tax exemption could be claimed.

234. Like Officer De Sio, we were troubled by the fact that Mr Ives made these claims (at least in relation to Wandsworth and Crondace) on a form on which he made untrue statements to LBHF. His explanation, however, is that he simply believed that that was something he was entitled to do based on his prior experience. What matters for us, of course, is not whether Mr Ives' council tax exemption claims were properly made (either in terms of the law or how the rules were applied by LBHF), but whether he was actually in occupation of the properties. On his evidence he was. His evidence is that in the case of all three properties he moved in immediately on acquisition and lived there, albeit initially in a state of some privation (at least as far as Ringmer is concerned). Mrs Ives and other family members followed as soon as that was possible.

235. Mr Ives moved into the properties on his evidence with a view to making them his home in the long term. We have already dealt with the suggestion that the properties were acquired with a view to short term disposal or as part of a trading activity. On his evidence (and that of the other witnesses who appeared in the Tribunal) furniture was moved into the properties as soon as this could be done and the properties were then enjoyed as homes, albeit not for a very long period.

236. The evidence of the witnesses about when furniture was moved into the various houses and when they were enjoyed as homes is not specific as to dates, but a number of witnesses do (in addition to endorsing Mr Ives' various propositions) speak of going to the properties for social purposes and finding them furnished.

237. As far as post and dealings with statutory authorities are concerned, Mr Ives' explanation for post continuing to go to Fullbrooks for a long time is that he drew a distinction between personal matters (the Royal British Legion and the golf club), which he dealt with from the property he was living in, and formal correspondence, which continued to go to Fullbrooks. In part this was so that Laraine could deal with business correspondence

and the other reason was simply that the properties were undergoing some work at least for a period and it was safer for the correspondence to go to Fullbrooks.

238. Applying the test of "residence" in the cases we discussed above, we find that all three properties were actively occupied by Mr Ives as his residence. At least once the significant work had been completed, the properties were furnished and enjoyed socially in the way one would expect an ordinary family home to be occupied. Mr Ives intended that occupation to be permanent. His occupation of these properties was not intended to be fleeting or transitory. It turned out to be relatively short term, but that was because of the way his family circumstances changed.

239. For all these reasons, which overlap with some of the reasons that led us to conclude that the transactions are not trading in nature, we find that these properties were occupied by Mr Ives as his residence and therefore PPR is available in relation to the gains which arise on their disposal.

**RENTAL INCOME**

*Hamilton House*

240. Mr Ives has owned Hamilton House since 1998. HMRC say that he only admitted receiving rental income when HMRC told him that they had information to this effect. This led them to raise assessments on Mt Ives under section 29 TMA for £335.28 in the tax year 2003/4, £421.08 for the tax year 2004/5, £592.68 for the year 2005/6 and £506.88 for the year 2006/7. There are also assessments under section 95 TMA on the basis that Mr Ives' behaviour was negligent or fraudulent.

241. It is not disputed that Officer De Sio discovered a loss of tax, so that the condition in section 29(1) TMA is satisfied, but the assessments were made in May 2017 and so HMRC must show that the loss of tax was brought about deliberately in order for these assessments to be made in time; section 36(1A) TMA.

242. Mr Ives completed his relevant tax returns showing no rental income. In April 2014 HMRC told him that they had information suggesting that he had received rent in respect of Hamilton House. HMRC say that on three occasions during the enquiry into his affairs, Mr Ives supplied incorrect information in respect of the rental income: his agent's letter of 4 March 2014 in which it was denied any rental income was received; his agent's letter of 14 May 2014 in which the period over which rent was received was understated; and Mr Ives' statement at a meeting on 18 July 2014 that he had not received any rental income before 2006. It was only after HMRC were able to set out the names of tenants and the dates of the letting, as a result of obtaining information from a third party, that Mr Ives finally conceded that he had received the income. Although this occurred after the returns had been submitted, HMRC submit that it implies that Mr Ives was acting in bad faith throughout. HMRC submit that, if the omission of rental income had been an honest or inadvertent mistake, then Mr Ives would have put things right as soon as he was challenged.

243. The letter of 4 March 2014 confirms that Hamilton House has been owned by Mr Ives for many years and that "The flat has been occupied by his children at various times but our client has not received any rental income." Mr Ives' explanation of this is that he thought the letter was just discussing the position at the time it was written. He did not realise that (in her letter of 23 January 2014 in which she first raised this issue) Officer De Sio was looking as far back in time; she simply referred to having information suggesting that "your client has been in receipt of rental payments". He does not dispute that rent was received in the years 2003/4 to 2006/7 but says the position for those years is as explained in the letter of 14 May 2014, which says that "no profits were made as expenditure exceeded income". Officer De Sio's note of the meeting in July 2014 records that she "asked for confirmation as to whether

the rental of the flat commenced before 2006, Mr Ives was certain it had not." This would seem a slightly odd point for Officer De Sio to have asked about and Mr Ives to have made, given that his advisers had already conceded that he had rental income (although no rental profits) in earlier years, and we are not inclined to put a great deal of store by this exchange. Questioned by Mr Avient, Mr Ives said that maintenance costs (including a new boiler) absorbed rental income. He had never made a profit out of letting the property and just thought there was nothing to return as he thought he only had to return profits from rental income and he had not made any.

244. What amounts to "deliberate" behaviour was discussed by the FTT in *Auxilium Project Management Limited v HMRC*, [2016] UKFTT 249 (TC). At [63] the FTT observed:

> "In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

245. In *Anthony Clynes v HMRC*, [2016] UKFTT 369 (TC), the FTT came to a similar conclusion (at [82]), "that for there to be a deliberate inaccuracy on a person's part, the person must to some extent have acted consciously, with full intention or set purpose or in a considered way" but considered that the concept of deliberate behaviour was wider and included "blind eye" knowledge. The FTT observed (at [86]):

> "However, we consider that the term "deliberate inaccuracy on a person's part" can extend beyond this. Our view is that, depending on the precise circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person knew that he should do so. A person 15 cannot simply escape liability by claiming complete ignorance where the person clearly knew that he should have taken steps to ascertain the position. We view the case where a person makes such a conscious choice not to take such steps with the result that an inaccuracy occurs, as no less of a "deliberate inaccuracy" on that person's part than making the inaccuracy with full knowledge of the inaccuracy."

246. It is accepted that the burden of proof is on HMRC to show that Mr Ives' behaviour was deliberate. In this context we should bear in mind the FTT's comment in *Palminder Singh Sanghera v HMRC*, [2020] UKFTT 225 (TC), at [87] that:

> "We emphasise two points made in the foregoing extracts. Firstly the test is a subjective one. It is for HMRC to establish, on the balance of probabilities, that these appellants submitted their tax returns to HMRC for the year of enquiry (and for the previous years under assessment) knowing them to be incorrect and intending HMRC to rely on them as being correct; and secondly the finding of deliberate behaviour is tantamount to finding that the appellants have behaved fraudulently, i.e. dishonestly. Although, therefore, the standard of proof is the balance of probabilities, we will require extremely cogent evidence if we are to find that the appellants have acted dishonestly. It is for HMRC to provide that evidence. And they have not been able to cross examine the appellants on their behaviour by dint of the fact that they opposed the application by the appellants that they should be allowed to adduce oral evidence, and we have dismissed that application."

247. There is no contemporaneous evidence of Mr Ives' behaviour when he filled in the relevant tax returns. His evidence is that he thought that deductible expenditure always covered rental income in the years he had some income and so he had nothing to return. He accepts that this was not always the case, that he did not check the figures rigorously or take professional advice on the question and as a result a loss of tax has arisen. HMRC point to some inconsistent answers in Mr Ives' dealings with Officer De Sio as indicating a predisposition towards untruthfulness in this area. We are not persuaded that those dealings (as we have set them out a [242] and [243] above) are cogent evidence of Mr Ives seeking to conceal taxable income from Officer De Sio, which should lead us to conclude that he deliberately submitted a tax return omitting rental income knowing that the return was wrong. There was clearly an error and a loss of tax. It was definitely careless, because Mr Ives did not check the correct tax position and just assumed (without always checking the numbers) that he had nothing to return, but there is no cogent evidence that it was deliberate, in the sense either that Mr Ives knew he had something to return or that he consciously or intentionally chose not to find out the correct position, in circumstances where he knew that he should do so.

248. It is common ground that, if HMRC are out of time to assess Mr Ives because his behaviour was not deliberate, the penalties under section 95 TMA fall away.

*Fullbrooks*

249. HMRC contend that Mr Ives received rental income of £2,950 in respect of Fullbrooks in the tax year ending 5 April 2011. His agent informed HMRC that his son's girlfriend was living at Fullbrooks and that she was paying rent directly to him.

250. On the basis that Mr Ives' sole or main residence was no longer Fullbrooks, rent-a-room relief (Chapter 1, Part 7, Income Tax Act 2007) cannot be available; section 784(1) TMA,

251. Fullbrooks was jointly owned by Mr and Mrs Ives. So, only Mr Ives' share of this income is taxable on him, as profits of a UK property business within Part 3 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") (noting that business includes transactions entered into to derive income from land otherwise than in the course of a business – section 264(b) ITTOIA). It is only the profit of that activity which is taxable, so we decide this issue in principle and leave it to HMRC and Mr Ives to decide the amount taxable on him.

**DISPOSITION**

252. For the reasons set out above, we have determined the issues before us as follows:

(1) The "matter in question" (that is to say, the issues we are required to decide) so far as the profits from Ringmer, Wandsworth and Crondace are concerned is the tax liability (income tax or CGT) arising as a result of Mr Ives' dealings with those properties;

(2) The profits arising as a result of Mr Ives' dealings with Ringmer, Wandsworth and Crondace were not trading profits; they were investment gains which attract PPR;

(3) The loss of tax as a result of the under-declaration of income in Mr Ives' self-assessment tax returns for the tax years 2003/4, 2004/5, 2005/6 and 2006/7 was not brought about deliberately by Mr Ives within the meaning of section 36(1A)(a) TMA;

(4) Mr Ives is taxable on any profit he derived from the income paid by his son's girlfriend in respect of Fullbrooks in the tax year 2010/11.

253. Save for any income tax (and penalty) liability of Mr Ives in respect of our determination at [252](4), this appeal is allowed. If HMRC and Mr Ives cannot agree the amounts, there is liberty to apply to the Tribunal.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

254. 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.

**MARK BALDWIN**
**TRIBUNAL JUDGE**

**Release date: 13th NOVEMBER 2023**