[2018] UKUT 280 (TCC)

Appeal number: UT/2017/0098

CAPITAL GAINS TAX – main residence relief – sections 222, 223 TCGA 1992 – off-plan purchase – period of ownership – whether determined by reference to date of completion or date of exchange of contracts – section 28 TCGA 1992 – appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

DESMOND HIGGINS **Respondent**

TRIBUNAL: MRS JUSTICE ROSE
JUDGE JONATHAN CANNAN

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 18 and 19 June 2018

Mr Christopher Stone of counsel instructed by HM Revenue and Customs Solicitor's Office for the Appellant

Mr Michael Thomas of counsel instructed by Fieldfisher LLP for the Respondent

DECISION

1. This is an appeal against a decision of the First-tier Tribunal (Tax Chamber) (Judge Heather Gething and Mrs Helen Myerscough) [2017] UKFTT 236 (TC) released on 16 March 2017. The FTT allowed an appeal by the Respondent ("Mr Higgins") against a closure notice dated 12 May 2016 which assessed Mr Higgins to capital gains tax of £61,383 for tax year 2011-12. The appeal raises a short point of construction concerning the availability of relief on disposal of a main residence. In particular, at issue in this case is the identification of the "period of ownership" for the purposes of that relief where a property has been purchased "off plan".

2. The facts found by the FTT are set out at [3] of its decision and may be summarised as follows:

(1) In 2004 Mr Higgins wished to purchase an apartment in a development of the former St Pancras Station Hotel in Central London. He paid a reservation deposit of £5,000 to secure Apartment 4.24 St Pancras Chambers ("the Apartment") which was a 2-bedroom apartment to be constructed in a tower.

(2) It seems that there were some issues relating to title to the site that needed to be resolved. In any event, on 2 October 2006 Mr Higgins, referred to as the Buyer, entered into a contract with Manhattan Loft St Pancras Apartments Ltd, referred to as the Seller ("the Contract"). At that time the development works had not yet commenced and the Apartment was identified on the plans but did not then exist.

(3) Clause 6 of the Contract included various terms as to how the Apartment would be constructed, including terms as to the standard and specification of the work. The Seller reserved to itself the right to vary the materials and workmanship provided such variations would not materially adversely affect the market value or floor area of the Apartment.

(4) The purchase price was £575,000 made up as follows:

Apartment Price	£575,000
Reservation Deposit	£5,000
Less 10% deposit on exchange	£52,500
Less 10% deposit on 1 March 2007	£57,500
Balance due on completion	£460,000

(5) We were referred to the Contract and whilst the FTT does not record the fact, Mr Higgins was to be granted a 125 year lease by the Seller in a form

annexed to the Contract. In a separate transaction the Seller was to be granted a 250 year headlease by London and Continental Railways Ltd.

(6) At the time of the Contract the reservation deposit had already been paid and this was treated as part of a 10% deposit payable on or before 2 October 2006. A further 10% deposit was payable on 1 March 2007. We understand those sums were paid by Mr Higgins.

(7) Clause 5 of the Contract made provision for completion to take place within 10 days of Mr Higgins being provided with satisfactory evidence that construction of the Apartment had been substantially completed. The balance of the purchase monies became due on completion.

(8) Vacant possession was to be given to Mr Higgins on completion. If completion did not occur by 30 June 2012 Mr Higgins had the right to rescind the Contract and to be repaid the deposits plus interest.

(9) It is not recorded in the FTT decision, but we were taken to clause 11.8 of the Contract which provides that once Mr Higgins had paid the two deposits he was entitled to sub-sell the Apartment.

(10) The development was delayed by the credit crunch in 2008 which caused the Seller to seek alternative finance for the development. It was not until November 2009 that work began to construct the Apartment and it was substantially physically completed in December 2009.

(11) Mr Higgins had no right to access the building until late 2009 when the Apartment was under construction. At that time he was given access to view the site which was to become the Apartment.

(12) Completion was scheduled for 5 January 2010 and took place on that date. Thereafter Mr Higgins occupied the Apartment as his main residence until it was sold. He entered into a contract for sale on 15 December 2011 which was completed on 5 January 2012. We understand that the sale price was £1,215,000. So Mr Higgins occupied the Apartment as his main residence from 5 January 2010 to 5 January 2012.

(13) Mr Higgins had sold his former residence in July 2007 and we understand that he was entitled to main residence relief in relation to the disposal of that asset. From July 2007 until January 2010 his residential arrangements varied. He stayed with his parents for some of the time, travelled for some of the time and stayed in another apartment which he owned and which had previously been occupied by a tenant. The FTT found as a fact that there was no other dwelling which Mr Higgins regarded as his main residence throughout the period July 2007 to January 2010.

The relevant statutory provisions

3. The following provisions of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992") are relevant for present purposes.

4. Sections 222 and 223 TCGA 1992 (as they were in force during the relevant period) make provision for relief from capital gains tax where the gain on a disposal is attributable to the disposal of a dwelling house which has at any time in the "period of ownership" been the taxpayer's only or main residence:

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

222(1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or an interest in-

(a) A dwelling-house or part of a dwelling-house which is, or has at any time in his period of ownership been, his only or main residence, or

(b) …

(7) In this section and sections 223 to 226, "the period of ownership" where the individual has had different interests at different times shall be taken to begin from the first acquisition taken into account in arriving at the expenditure which under Chapter III of Part II is allowable as a deduction in the computation of the gain to which this section applies, and …"

"**223 Amount of relief**

223(1) No part of a gain to which section 222 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 the period of ownership except for all or any part of the last 36 months of that period.

(2) Where subsection (1) above does not apply, a fraction of the gain shall not be chargeable gain, and that fraction shall be-

(a) the length of the part or parts of the period of ownership during which the dwelling-house or parts of the dwelling-house was the individual's only or main residence, but inclusive of the last 36 months of the period of ownership in any event, divided by

(b) the length of the period of ownership."

5. The TCGA 1992 also makes provision for identifying the time of a disposal or acquisition for capital gains tax purposes. It was common ground between the parties and noted by the FTT at [4(10)] of its decision that when capital gains tax was first introduced in the Finance Act 1965 there was academic speculation as to the date of a disposal in circumstances where the disposal involved a contract of sale. There was some doubt as to whether the date of disposal and the corresponding acquisition was the date of the contract or the date the contract was completed. Parliament subsequently introduced paragraph 10 of Schedule 10 to the Finance Act 1971 which is now section 28 TCGA 1992 and provides as follows:

"**28 Time of disposal and acquisition where asset disposed of under contract**

(1) Subject to section 22(2), and subsection (2) below, where an asset is disposed of and acquired under a contract the time at which disposal and acquisition is made is the

time the contract is made (and not, if different, the time at which the asset is conveyed or transferred).

(2) If the contract is conditional (and in particular if it is conditional on the exercise of an option) the time at which the disposal and acquisition is made is the time when the condition is satisfied."

6. Section 224 TCGA 1992 is relevant to an alternative argument which Mr Higgins seeks to raise. It provides as follows:

"**224 Amount of relief: further provisions**

(1) If the gain accrues from the disposal of a dwelling-house or part of a dwelling-house part of which is used exclusively for the purpose of a trade or business, or of a profession or vocation, the gain shall be apportioned and section 223 shall apply in relation to the part of the gain apportioned to the part which is not exclusively used for those purposes.

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

7. We were also referred to section 43 TCGA 1992 which concerns assets which have merged:

"**43 Assets derived from other assets**

If and in so far as, in a case where assets have merged……., the value of an asset is derived from any other asset in the same ownership, an appropriate proportion of the sums allowable as a deduction in the computation of a gain in respect of the other asset under paragraphs (a) and (b) of section 38 shall, both for the purposes of computation of a gain arising on the disposal of the first mentioned asset and, if the other asset remains in existence, on a disposal of the other asset, be attributed to the first mentioned asset."

The issues in the appeal

8. It is not necessary for us to set out the circumstances in which HMRC came to issue the closure notice assessing Mr Higgins to capital gains tax of £61,383. Suffice to say that we understand Mr Higgins claimed entitlement to full relief from capital gains tax on his disposal of the Apartment in 2011-12 on the basis that it was his main residence throughout his period of ownership.

9. There is no explicit definition of the period of ownership for the purposes of relief under sections 222 and 223. It is common ground that in the period prior to 5 January 2010 the Apartment was not Mr Higgins' main residence, indeed the Apartment did not exist as such. But Mr Higgins contends that the relevant period of ownership is the period starting on 5 January 2010 when he was first able to occupy the Apartment and finishing on 5 January 2012 when he completed the disposal and

ceased occupying the Apartment. The FTT found as a fact that throughout that period the Apartment was Mr Higgins' main residence. Mr Higgins therefore contends that the period of ownership is coterminous with the period when the Apartment was his main residence so that he is entitled to main residence relief on the whole of the capital gain accruing to him on the disposal in 2012.

10. HMRC contend that relief should be granted only in respect of a proportion of the capital gain accruing to Mr Higgins because the Apartment was not his main residence during the whole of his period of ownership. Relying on section 28 TCGA 1992, HMRC contend that the "period of ownership" is the period between the date of acquisition and the date of disposal. That period commenced on 2 October 2006 when Mr Higgins contracted to purchase the Apartment and ended on 15 December 2011 when he contracted to sell the Apartment. HMRC therefore contend that section 223(2) applies because only a fraction of the gain accruing on the sale is entitled to main residence relief, that fraction representing the proportion that the period 5 January 2010 to 15 December 2011 (being the period when the Apartment was his main residence) bears to the period of ownership (being the period between 2 October 2006 and 15 December 2011).

11. In the event that HMRC are right about the period of ownership, Mr Higgins seeks to raise an alternative argument in support of his case that the assessment should be set aside. He contends that there should be a just and reasonable apportionment of the relief available pursuant to section 224(2) TCGA 1992. This is not an issue that was before the FTT and a question arises as to whether Mr Higgins should be entitled to rely on this alternative argument before the Upper Tribunal.

The FTT's decision

12. The FTT's discussion and reasoning appears at [6] of their decision. The FTT considered that the term "period of ownership" in sections 222 and 223 should be given its ordinary meaning. At [6(1)] the FTT stated:

> "We consider that the ordinary meaning of "*period of ownership*" should be applied in both section 222 and 223 TCGA 1992. A period of ownership of a dwelling house will ordinarily be said to begin on the date the purchase of the dwelling house has been physically and legally completed and the purchaser has the right to occupy."

13. At [6(10)] the FTT stated as follows:

> "The period of ownership for the purpose of sections 222 and 223 began when Mr Higgins owned the legal and equitable interest in the lease of the Apartment and owned the legal right to occupy the Apartment. That was the date of legal completion of the purchase of the lease on 5 January 2010. The period of ownership ended on the 5th January 2012 when the contract for sale (entered into on 15 December 2011) was completed."

14. As a result the FTT allowed Mr Higgins' appeal. We consider below the FTT's reasoning for adopting what it considered to be the ordinary meaning of the term "period of ownership".

Discussion

15. It is common ground that we must construe the term "period of ownership" in sections 222 and 223 according to the purpose of the relevant statutory provisions. Mr Christopher Stone, who appears for the Appellant but who did not appear before the FTT, submits that the FTT misunderstood or misapplied the relevant purpose of the provisions when it held that the words should be given their ordinary meaning. He submits that the FTT ought to have construed the words taking into account that section 28 TCGA 1992 defines the date of acquisition and disposal of an asset where the disposal is made under a contract. In those circumstances, Mr Stone says that the period of ownership of a dwelling house is plainly the period between the date of acquisition and the date of disposal. The date of acquisition, according to section 28 TCGA 1992 is the date on which the contract to purchase is made and the date of disposal is the date on which the contract to sell is made.

16. Mr Michael Thomas, who appears for Mr Higgins, supports the FTT's decision on the basis that it was right to apply the ordinary meaning of the words to a realistic view of the facts. He submits that section 28 TCGA 1992 has no application here – there is nothing in sections 222 or 223 which indicates that the period of ownership referred to in those provisions is intended to be bounded by an acquisition and disposal described in section 28 and nothing in section 28 which indicates that it operates to define the period of ownership for the purpose of main residence relief. There are other contexts in which section 28 operates to determine the date of acquisition and disposal, for example when determining market value for the purposes of section 17 TCGA 1992 or when deciding in which tax year an acquisition or disposal took place. But Mr Thomas submitted that it did not affect the computation of the period of ownership for the purposes of section 222. Rather, in the straightforward purchase of a dwelling, with a period of say one month between exchange of contract and completion, in its ordinary meaning the period of ownership would commence only on completion. Only at that time does the purchaser become the full beneficial owner of the asset. In the case of an off-plan purchase he said that the submission was even stronger because when contracts are exchanged for the purchase the dwelling does not actually exist. It is not possible for it therefore to be anyone's main residence. Mr Thomas submitted that this construction accorded with reality. He referred us to the well-known dicta of Megarry J in *Sargaison v Roberts 45 TC 612* that "where the technicalities of English conveyancing and land law are brought into juxtaposition with a United Kingdom taxing Statute, I am encouraged to look at realities at the expense of the technicalities".

17. The starting point is to identify the purpose of the provisions. The purpose of main residence relief was correctly identified by the FTT at [6(2)] of its decision by reference to *Sansom v Peay* [1976] 1 WLR 1073 at p1077 B-C where Brightman J stated:

> "The general scheme of section 29 [as it then was] is to exempt from liability to capital gains tax proceeds of sale of a person's home. That was the broad conception. The justification for the exemption is that when a person sells his home he frequently needs to acquire a new home elsewhere. The evil of inflation was evident even in 1965. It must have occurred to the legislature that when a person sells his home to buy another

> one, he may well make a profit on the sale of one home and lose that profit, in effect, when he buys his new home at the new, inflated price. It would not therefore be surprising if Parliament formed the conclusion that, in such circumstances, it would be right to exempt the profit on the sale of the first home from the incidence of capital gains tax so that there is enough money to buy the new home."

18. Mr Thomas acknowledged that the legislative purpose identified in *Sansom v Peay* is not directly concerned with sections 222 and 223. However, he submitted that the policy underlies the whole code for main residence relief. He submitted that the purpose would be frustrated if off-plan purchasers such as Mr Higgins were not entitled to full relief.

19. It is clear to us that Brightman J was concerned with the broad purpose of the relief as a whole. He was not concerned with the limitation on the relief set by reference to the period of ownership. The relief does not simply exempt any gain on the disposal of a dwelling-house. Where the asset has not been the taxpayer's main residence throughout the period of ownership, relief only extends to a proportion of the gain. If a dwelling house is not occupied as a main residence throughout the period of ownership, then the relief is cut back. A proportion of the gain which is referable to a period when the asset was owned by the taxpayer but not occupied as the taxpayer's main residence does not qualify for relief. In our view the broad purpose of the restriction is to limit relief to that part of the gain on disposal of a dwelling-house which accrues whilst the dwelling house is occupied as a main residence.

20. Mr Stone submitted that the FTT erred because it focused on identifying the purpose of the relief, but then ignored the fact that the statutory provisions go on to restrict the relief in circumstances where the period of ownership is longer than the period when the dwelling is used as a main residence. The FTT, he said, wrongly considered that it was necessary to adopt a construction of the provisions which would relieve the whole gain. There is force in that submission. The FTT stated at [6(4)] of its decision:

> "When sections 222 and 223 are read together what is critical is that the period of ownership and the period of occupation of the dwelling house coincide. To say the period of ownership begins when a contract to acquire a dwelling is entered into, at which time it would be highly unusual for a purchaser to have a right to occupy, would be perverse in the context of providing relief to individuals for gains realised on the sale of a private principal residence."

21. It is not clear to us why the FTT considered that it should be "critical" for the period of ownership and the period of occupation as main residence to coincide. It may be that the FTT was simply saying that full relief is only available where the period of ownership and the period of occupation coincide. If that is the case the proposition is not controversial. However the FTT found that a period of ownership cannot begin before the taxpayer has a right of occupation. In our view there is nothing in the words or context of the provisions to justify such a narrow construction.

22. Mr Stone submitted that the FTT failed to have due regard to section 28 TCGA 1992. Before us, he did not rely on section 28 as a deeming provision to identify the period of ownership. He acknowledged that it was introduced in 1971, some 5 years after the introduction of capital gains tax and the relief for disposal of a main residence. He submitted that in context the period of ownership for capital gains tax purposes was always the period between exchange of contracts and that section 28 merely served to clarify the point or was at least consistent with that construction.

23. It appears that there was a submission to the FTT by HMRC that section 28 operated to deem the period of ownership to be the period between the date of acquisition and the date of disposal. In any event, the FTT considered that section 28 was irrelevant to the period of ownership for the following reasons:

> (1) Section 28 is concerned with identifying the dates of acquisition and disposal which at [6(4)] the FTT stated are "not directly involved in determining the meaning of *"period of ownership"* of a dwelling house in the context of the availability of the principal private residence relief". The FTT noted that on HMRC's analysis the period between contract and completion is disregarded and a proportion of the gain referable to that period would therefore be taxed. Relying on *Jerome v Kelly* [2004] 1 WLR 1409 the FTT considered that could not be right because section 28 is not concerned with the substantive liability to tax.
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> (2) Section 28 is a deeming provision. Relying on *Marshall v Kerr* [1995] 1 AC 148 the FTT considered that the deeming effect of section 28 must be confined so as to avoid injustice or absurdity.

24. In *Jerome v Kelly*, Mr and Mrs Jerome were absolutely entitled to beneficial interests in land, held by Mr Jerome and his brother on trust for sale in undivided shares. In 1987 the trustees entered into a contract to sell the land. In 1989 Mr and Mrs Jerome assigned part of their beneficial interests, subject to the contract, to the trustees of two Bermuda settlements. The trustees subsequently completed the contract of sale. The issue in the case was described by Lord Hoffmann as follows:

> "6. What liabilities to capital gains tax followed from these transactions? The scheme of the Act would appear to provide a ready answer. The assignment to the Bermuda trustees was a disposal by Mr and Mrs Jerome of their beneficial interests, giving rise to a charge to tax on the gains which had accrued up to the date of the assignments. The conveyance was also a disposal, but was deemed to be the act of the persons absolutely entitled against the trustees. They were at that time the Bermuda trustees. Were it not for the fact that they were non-resident, they would have been liable for tax on the gains which accrued between the date of the assignments and the disposals which they were treated as having made when the trustees of the land executed the conveyances.
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> 7. The Inland Revenue submit, however, that this scheme has been displaced by section 27(1) of the 1979 Act, which provides that where an asset is disposed of and acquired "under a contract", the time at which the disposal and acquisition is made is the time of the contract. So the disposal to the purchaser is deemed to have taken place in 1987 when the contract was made, which was before the assignments to the Bermudian trusts. At that time, the persons for whom the relevant beneficial interests were held

were Mr and Mrs Jerome. So the disposal to the purchaser is deemed to have been made by them and they are the ones liable to tax."

25. Section 27 of the 1979 Act was previously paragraph 10 of Schedule 10 to the Finance Act 1971 and subsequently became section 28 TCGA 1992. The House of Lords held that the provision could not operate in the way HMRC contended. Lord Hoffmann stated: (emphasis added)

> "11. …it seems to me clear that [paragraph 10] **was intended to deal only with the question of fixing the time of disposal and not with the substantive liability to tax**. It does not deem the contract to have been the disposal … For that reason, it includes no provisions dealing with what happens if the contract goes off. In such a case, there will be no disposal and nothing to deem to have happened at the time of the contract. The time of the contract is deemed to be the time of disposal only if there actually is a disposal. This assumes that the contract will not in itself count as a disposal and so deals with the academic arguments about the effect of the equitable interest which arises at the time of the contract. But the paragraph seems to assume, as a matter which goes without saying, that the person who enters into the contract will be the person who makes the disposal. It gives no guidance on what is to happen if they are (or are deemed to be) different."

26. It is clear that when Lord Hoffmann stated that what is now section 28 does not deal with the "substantive liability to tax" he was referring to HMRC's argument that it could have the effect of deeming there to have been a disposal by Mr and Mrs Jerome at the time of the contract, in the same way as several other provisions of the TCGA 1992 deem there to have been a disposal triggering a charge to tax on the happening of certain events which would not otherwise be regarded as a disposal of the asset. Lord Walker identified the distinction in these terms:

> "27. Section 27 (1) appears to be directed to a single limited issue, that is the timing of a disposal. It does not say that the contract is the disposal, but that a disposal effected by contract and later completion is to be treated, for timing purposes, as made at the date of the contract."

27. In our judgment, the FTT was wrong to say at [6(5)] that "a deeming provision must give way where it is dealing with an ancillary issue and not the substantive liability to tax". It is not a question of whether a deeming provision "gives way" as such. It is necessary to identify what is deemed to be the case and in what circumstances. *Jerome v Kelly* is authority for the proposition that section 28 is concerned solely with fixing the time of disposal by a person whose identity is to be ascertained by other means. It is the ultimate disposal of an asset which engages capital gains tax and that is why Lord Hoffmann stated that section 28 did not deal with the substantive liability to tax. We do not read that statement as meaning that section 28 can never have any substantive effect on the incidence or computation of the tax so that it cannot apply to determine the period of ownership for the purposes of section 222.

28. Mr Thomas also relied on a decision of the Court of Appeal in *Underwood v Revenue & Customs Commissioners* [2009] STC 239 which is referred to by the FTT in its summary of Mr Thomas' submissions but not in its reasoning. In that case, the

taxpayer contracted in 1993 to sell land to B Ltd for £400,000 which he had previously purchased for £1.4 million. B Ltd granted the taxpayer an option to buy back the land at the original price plus 10% of any increase in value. In 1994, before the completion date and before any conveyance the taxpayer, without exercising the option, agreed to repurchase the land for £420,000 and also agreed to sell the land to C Ltd, which he controlled, for £600,000. The land was conveyed directly from the taxpayer to C Ltd, with the taxpayer treated as owing B Ltd £20,000.

29. The taxpayer sought to establish a capital loss. The issue was whether as the taxpayer contended there had been a disposal by him to B Ltd resulting in a capital loss. The Court of Appeal held that the beneficial interest was not transferred to B Ltd and therefore there had been no disposal of the property to B Ltd. Lawrence Collins LJ gave the lead judgment of the Court of Appeal. At [37] he referred to *Jerome v Kelly* for the proposition described above and went on to consider what was a disposal for capital gains tax purposes:

> "39. … Except in certain cases where transactions are deemed to be disposals, the word "disposal" bears its "normal meaning": *Berry v Warnett* [1982] 1 WLR 698, 701, per Lord Wilberforce.
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> 40. The expression "normal meaning" is used in a rather special sense. A house owner who has contracted to sell the house might well regard himself or herself as having disposed of the house. Plainly "disposal" is used in a special sense to refer to a legal concept (just as in the familiar discussion of the meaning of "possession" or "ownership" in the traditional texts on jurisprudence), and it was common ground on this appeal that it meant disposal of the entire beneficial interest in the asset."

30. Mr Thomas submitted that there was no disposal in the present case until the entire beneficial interest was transferred to the purchaser on completion, and it was that which identified the period of ownership. He also relied on what Lawrence Collins LJ said at [43], that "…it is necessary to identify, in a practical and common sense way, what in law the parties were doing in 1994".

31. We do not consider that *Underwood* assists in relation to the present issue. It was concerned with identifying what disposals took place for capital gains tax purposes. There is no issue in the present case as to whether there was a disposal of the Apartment.

32. Mr Thomas also argued that section 28 operates like a deeming provision and it should not be interpreted as creating a statutory fiction leading to injustice or absurdity. The approach to construing a deeming provision and the effect of a deeming provision are well established. Both parties were content to adopt the description of Peter Gibson J endorsed by the House of Lords in *Marshall v Kerr* [1995] 1 AC 148 at 164E-G:

> " For my part, I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity the application of the statutory fiction should be limited to the extent needed

> to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that, because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

33. Mr Thomas relied before the FTT and before us on the judgment of Nicholls J in *Chaney v Watkis* [1986] STC 89 as an example of a situation where the court concluded that the predecessor to section 28 could not apply to define the date of disposal because it led to an absurd result. There is reference to *Chaney* in the reasoning of the FTT but it is not clear how or to what extent the FTT relied on the judgment.

34. In *Chaney* the taxpayer contracted to sell a house with vacant possession. The house was occupied by his mother-in-law as a protected tenant and the taxpayer had agreed with her that in consideration of her leaving the property he would pay her a sum of £9,400. Prior to completion of the sale, the agreement between the taxpayer and his mother-in-law was varied so that the taxpayer agreed to provide her with rent-free accommodation for life at his own home and was released from the obligation to pay her £9,400. HMRC assessed the taxpayer to capital gains tax without any allowance for the £9,400.

35. On appeal to the High Court the taxpayer contended that the date of disposal was the date the contract was made at which stage he had an obligation to pay his mother-in-law the £9,400. Section 32(1)(b) Capital Gains Tax Act 1979 made provision for a deduction of expenditure incurred wholly and exclusively on the asset which was reflected in the state or nature of the asset at the time of disposal. It was common ground that payment of a sum of money by a landlord to a protected tenant would satisfy section 32(1)(b).

36. The taxpayer initially contended that the effect of the deeming provision in what is now section 28 was that events happening after the deemed date of disposal were not material for the purposes of section 32(1)(b). HMRC contended that "the time of disposal" in section 32(1)(b) referred to the time of the conveyance.

37. Nicholls J referred to the taxpayer's submission and a subsequent retreat from that submission as follows:

> "The difficulty with this proposition is that it only has to be stated for it to be obvious at once that if this is correct, and the effect of s 32(1)(b) is to freeze the position at the date of the contract, some odd results would follow. I give only one example. A taxpayer might have incurred a liability to make payments to a builder for improvements to be carried out by him and then after a contract for sale of the property had been made and before completion the works were abandoned because they were unwanted by the purchaser, so that in the event no payment was made to the builder. That the vendor in such a case should be entitled to deduct the amount of his liability to the builder at the date of the contract would be absurd.
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> Thus it was not surprising that in the course of the argument Counsel for the taxpayer felt constrained to accept (in my view, rightly) that a construction of s 32(1)(b) which

> precluded regard being had to what happened post-contract and pre-completion in the case of a liability to make a payment existing when the contract was entered into could not be correct. This is in line with the opening words of s 32(1)(b), which contain no requirement that the expenditure must have been incurred before the contract was made. The only difficulty is that created by the words "at the time of the disposal" in the provision which stipulates that one of the attributes needing to be possessed by expenditure before it can lead to an allowable deduction is that it must be "reflected in the state or nature of the asset at the time of the disposal."...
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> In view of the measure of agreement ultimately reached between Counsel on this point, this is not an appropriate occasion to attempt a definitive exposition of the temporal ambit of s 32(1)(b). Suffice to say that in my view the context in which the phrase "at the time of the disposal" is found in s 32(1)(b) compels the conclusion that that phrase does not exclude expenditure which is first reflected in the state or nature of the property after the date of the contract but before completion."

38. Nicholls J went on to find that the obligation of the taxpayer to provide rent-free accommodation for life was capable of being valued in money terms and a deduction given under section 32(1)(b).

39. We agree with Mr Stone that section 28 did not apply in *Chaney* because the context was compelling. It would have been unfair to the taxpayer if the value of what he had agreed to provide to his mother-in-law was not taken into account. Further, it would have been absurd if expenditure that he had not, in the event, actually incurred was taken into account. We accept therefore that that was a context in which section 28 did not apply to define when the disposal referred to in section 32 took place.

40. Mr Thomas submitted that it was similarly unfair on Mr Higgins and absurd if he is denied full relief in the present case if HMRC are right that the bounds of the period of ownership are set by section 28. We do not accept that submission. In simple terms, the gain realised on a disposal is the difference between the acquisition cost and the disposal proceeds. Those figures are determined when unconditional contracts for the purchase and sale are exchanged. In the present case, the acquisition cost and the disposal proceeds were fixed on 2 October 2006 and 15 December 2011 respectively when unconditional contracts were exchanged. Those are also the dates of acquisition and disposal for capital gains tax purposes by virtue of section 28 TCGA 1992. The gain which is potentially taxable accrued over that period and Mr Higgins enjoyed the benefit of the increase in value of his asset over that period. However the asset was not Mr Higgins' main residence prior to 5 January 2010.

41. As we have said, the purpose of section 223 is to restrict the gain pro rata where the asset is not the taxpayer's main residence for the whole of the period over which the gain accrues. There is nothing absurd or unfair in a construction which restricts relief for off-plan purchases because in the period before the dwelling is constructed it is clearly not the taxpayer's main residence. The gain does not arise only in respect of a period in which it is the taxpayer's main residence but across the whole period between the date when the purchase price is fixed by the contract for acquisition and date when the sale price is fixed by the contract for disposal.

42. Mr Thomas also argued that HMRC's interpretation of section 222 in conjunction with section 28 led to absurd results which HMRC acknowledged by extra statutory concessions that would not be needed if his construction of the provision were accepted. At [6(8)] the FTT referred to Extra Statutory Concession D49 whereby HMRC permit main residence relief where there is a short delay in a taxpayer taking up residence in a dwelling house. It applies in circumstances where land is purchased and a dwelling house is then built on the land, where a dwelling house is purchased and the taxpayer arranges for alterations or redecoration and where a taxpayer completes the disposal of a previous residence before moving in. In those circumstances the period prior to use as a main residence up to 1 year will be treated as a period of main residence and a period of up to 2 years may be so treated.

43. The FTT acknowledged that the terms of an extra-statutory concession could have no bearing on the meaning of the relevant statutory provisions. However, the FTT viewed the concession as recognising that HMRC's construction of the provisions would otherwise give rise to an absurd and perverse result. We do not share that view. The circumstances in which the concession applies do not arise from a delay between exchange of contracts and completion.

44. Secondly, Mr Thomas argued that in the great majority of house purchases, there is a delay of a few weeks between exchange of contracts and completion, with the purchaser only taking up residence at the later date. He submitted that if HMRC's construction was correct, HMRC would have to shave a few weeks off the main residence relief under section 223 in almost every case when the purchaser subsequently sells the house because it will rarely have been his main residence for the whole period between exchange on purchase and exchange on sale. Mr Stone acknowledged that this difficulty was dealt with by HMRC's practice whereby they ignore a period of a few weeks' non-residence that often occurs on the purchase of a dwelling house between exchange of contracts and completion. No similar practice is required on disposal because a dwelling-house is treated as a main residence for the last 36 months of ownership pursuant to section 223(2)(a) TCGA 1992.

45. Mr Thomas submitted that if in order to make the law work sensibly, HMRC need to operate a number of significant extra statutory concessions, that suggests that their interpretation is wrong. He referred us to the well-known passage in *Vestey v Inland Revenue Commissioners* [1980] STC 10 where Lord Wilberforce stated that "A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer, and the amount of his liability is clearly defined". In the same speech Lord Wilberforce stated as follows:

> "When Parliament imposes a tax, it is the duty of the commissioners to assess and levy it upon and from those who are liable by law. Of course they may, indeed should, act with administrative common sense. To expend a large amount of taxpayer's money in collecting, or attempting to collect, small sums would be an exercise in futility: and no one is going to complain if they bring humanity to bear in hard cases."

46. It is true that there would be no necessity for HMRC's practice if the period of ownership started on completion of the purchase. However, HMRC's approach does make administrative common sense. More importantly, their construction is consistent

with the Parliamentary intention of restricting relief where a dwelling has not been a main residence throughout the period during which the gain arises.

47. We consider therefore that the FTT was wrong to find that the period of ownership could only begin when Mr Higgins had legal title to the Apartment and a legal right to occupy the Apartment. Having reached that conclusion, there are a number of subsidiary arguments raised by the parties which we must address.

48. At [6(7)] of its decision the FTT refers to HMRC's submission to the effect that the period of ownership in sections 222 and 223 must be construed as commencing on the date of acquisition pursuant to section 28 because of the terms of section 222(7). Section 222(7) quoted above provides that where the taxpayer has had different interests in a dwelling house at different times the period of ownership shall be taken to begin from the "first acquisition" taken into account in arriving at the expenditure which is allowed as a deduction in computing the gain under Chapter III Part II TCGA 1992.

49. The FTT stated that HMRC's submission in those terms went "too far" for a number of reasons. Mr Stone's submission before us was more limited and he simply relied upon section 222(7) as being consistent with his submissions as to the period of ownership. In the circumstances we do not need to consider in detail the FTT's criticism of the wider submission. However, we agree with Mr Thomas that section 222(7) does not help in defining the period of ownership generally.

50. There was an issue before the FTT which was canvassed before us as to whether Mr Higgins had an equitable interest in the Apartment following exchange of contracts on 2 October 2006. The FTT found at [6(9)] that Mr Higgins had no equitable interest in the Apartment until construction was substantially completed in December 2009 because the Apartment did not exist as such until that time. The FTT also said that any equitable interest Mr Higgins might have had before that time "was not an interest at which sections 222 and 223 is aimed". The FTT appears to have considered this was relevant because it supported a conclusion that the period of ownership of the Apartment could not begin before December 2009.

51. In fact, both parties before the FTT agreed that upon exchange of contracts and payment of the first deposit Mr Higgins did have an equitable interest. Although it is not strictly necessary for us to reach a conclusion on this point, we are satisfied that is right. That equitable interest was in the Seller's headlease and arose from the existence of a purchaser's lien (see *Chattey v Farndale* [1997] 1 EGLR 153). The FTT was right to say that there was no equitable interest in the Apartment because the Apartment did not exist as such. However, the FTT overlooked what was common ground between the parties that in October 2006 Mr Higgins obtained an interest in the headlease which later became an interest in the Apartment when it was constructed.

52. Further, from 1 March 2007 when the second deposit was paid Mr Higgins had an asset which he could dispose of by way of sub-sale. If Mr Higgins had disposed of his interest by way of sub-sale at any time prior to completion on 5 January 2010, he would have realised a chargeable gain on any increase in value since acquisition of

the interest. There would have been no question of any main residence relief in relation to that gain. That result is consistent with what we have found to be the broad purpose of the provisions restricting relief

53. Mr Stone also relied on a decision of a Special Commissioner (Mr John Clark) in *Henke v Revenue & Customs Commissioners* [2006] STC (SCD) 561 which was not referred to by the FTT in its decision. In that decision, which is not binding upon us, the taxpayers purchased land with outline planning permission for a dwelling house. In the event they did not commence building the house for another 9 years and did not take up residence in the house for another 2 years. Two further houses were then built on part of the land and on a part disposal of the two further houses the taxpayers claimed main residence relief.

54. One issue in *Henke* concerned the period of ownership. The taxpayers contended that the period of ownership did not start until the main house was completed and they had taken up residence. The taxpayers appeared in person and similar arguments to those before us were presented. The Special Commissioner found that the period of ownership commenced when the land was purchased, although it does not appear that *Jerome v Kelly*, *Underwood* or *Chaney* were cited. In the circumstances the decision does not assist us in this appeal.

55. Mr Thomas also relied on the operation of entrepreneurs' relief which is available on certain disposals of businesses where the business has ceased in the three years prior to the date of disposal. In particular, he relied upon a note produced by the Tax Faculty of the Institute of Chartered Accountants in England and Wales referring to issues where a business was continued after the date of the contract disposing of the business. The note suggested that HMRC give the provisions a "purposive construction" such that section 28 does not fix the date of disposal for the purposes of the relief. We were not referred to the provisions in detail and the status of the note was somewhat uncertain. In the circumstances we did not find the comparison to entrepreneurs' relief to be of any assistance.

56. Finally, Mr Thomas submitted that the ordinary meaning of period of ownership adopted by the FTT meant that it would sensibly apply in Scotland. However, we had no submissions as to how the relief would apply in the light of Scottish conveyancing law and practice.

The Respondent's alternative argument

57. Mr Thomas on behalf of Mr Higgins sought to rely on an alternative argument based on section 224(2) TCGA 1992 in support of the FTT's decision to allow the appeal. This argument was not raised before the FTT. On the present appeal it only arises because we have accepted that the period of ownership is the period between exchange of contracts. Section 224(2) provides as follows:

> "If at any time in the period of ownership there is a change in what is occupied as the individual's residence, whether on account of a reconstruction or conversion of a

building or for any other reason, or there have been changes as regards the use of part of the dwelling-house for the purpose of a trade or business, or of a profession or vocation, or for any other purpose, the relief given by section 223 may be adjusted in such manner as the Commissioners concerned may consider to be just and reasonable."

58. Mr Thomas' submission was simply that there had been a change in what was occupied as Mr Higgins' residence during the period of ownership. He submitted that between 2 October 2006 and 5 January 2010 Mr Higgins was not occupying any part of the Apartment, and after that date once the building work was complete he was occupying all the Apartment. In the circumstances section 224(2) was engaged and it would be just and reasonable for Mr Higgins to obtain full relief for the gain.

59. Mr Stone on behalf of HMRC objected to the alternative argument being raised. In summary, he submitted that:

(1) Mr Higgins failed to send a timely Respondent's Notice in accordance with Rule 24 of the Upper Tribunal Rules.

(2) In the absence of any reason as to why no Respondent's Notice was submitted in time, Mr Higgins should not be granted an extension of time in which to do so.

(3) In any event Mr Higgins should be refused permission to raise the alternative argument, principally because it would require further evidence not adduced before the FTT.

60. We can deal with the procedural objection and the alternative argument quite briefly. A Respondent's Notice ought to have been served by Mr Higgins within one month of being notified by the Upper Tribunal that permission to appeal had been granted, that is by 3 September 2017. On 5 December 2017 Mr Higgins' solicitors wrote to the Upper Tribunal and to HMRC to say that they intended to raise the alternative argument. HMRC objected to the matter being raised by way of correspondence and stated that Mr Higgins was now out of time to raise the alternative argument by way of Respondent's Notice.

61. By letter dated 17 January 2018 Mr Higgins' solicitors wrote to the Upper Tribunal for permission to raise the alternative argument or for an extension of time in which to serve a Respondent's Notice. At that time the hearing was some 5 months away.

62. It is unsatisfactory that a party represented by solicitors and counsel should seek informally to sidestep the procedure set out in the Upper Tribunal Rules for a Respondent's Notice, and to raise an alternative argument without any explanation as to why the argument was not raised earlier. It was only during the course of submissions that Mr Thomas told us that the alternative argument had not occurred to Mr Higgins' legal team until December 2017.

63. The factors to consider in deciding whether to permit a new argument to be raised on appeal were considered by the Upper Tribunal in *Astral Construction v Commissioners for Revenue & Customs* [2015] UKUT 0021 (TCC). We have considered the principles outlined in that case. However, the alternative argument

raises a very short issue and it is notable that the submissions in relation to the merits of the argument were in fact shorter than the submissions in relation to the procedural point as to whether Mr Higgins should be entitled to raise it. For the reasons which follow we are satisfied that there is no merit in the alternative argument.

64. We do not consider that section 224(2) is engaged on the facts of this case. Section 223(2) deals with the position where the dwelling-house has not been the taxpayer's main residence throughout the period of ownership and restricts the relief pro rata. Section 224(1) restricts the relief where part of a dwelling-house is used exclusively for business purposes. Section 224(2) restricts relief where there is a change in what is occupied as the individual's dwelling.

65. It is clear to us that section 224(2) is directed at circumstances where an individual occupies a dwelling-house but there is then a change in what is occupied. The change must follow a period of occupation. There must be a change in "what" is occupied. For example, where a taxpayer occupies a dwelling-house as his main residence. The property is then converted into apartments and the taxpayer continues to occupy one of the apartments. We accept Mr Stone's submission that what is required to engage section 224(2) is a change in the character or extent of the dwelling being occupied. In the present case there was no change in what Mr Higgins occupied because he did not occupy any part of the property until 5 January 2010.

66. In the circumstances we refuse Mr Higgins permission to raise the alternative argument.

Decision

67. For the reasons given above we allow the appeal.

MRS JUSTICE ROSE

JUDGE JONATHAN CANNAN

RELEASE DATE: 26 September 2018