Neutral Citation: **[2023] UKUT 00242 (TCC)**

Case Number: UT/2022/000109
UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

CAPITAL GAINS TAX – Private Residence Relief – taxpayers bought land demolished existing house and build new dwelling house which they lived in as main residence then sold for gain – meaning of "period of ownership" used in apportionment relief – held - ownership referred to that of new house as opposed to land as HMRC argued – HMRC's appeal against FTT decision dismissed

Heard on: 4 July 2023
Judgment date: 29 September 2023

Before

JUDGE SWAMI RAGHAVAN
JUDGE NICHOLAS ALEKSANDER

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Appellants

and

(1) GERALD LEE
(2) SARAH LEE

Respondents

Representation:

For the Appellants: Simon Pritchard, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondents: Laurent Sykes KC, instructed by Haines Watts

DECISION

INTRODUCTION

1. Mr and Mrs Lee bought a plot of land on 26 October 2010, demolishing the existing house, and building a new house which they then lived in from 19 March 2013. They claimed Private Residence Relief ("**PRR**") on the gain which arose when they later sold the plot on 22 May 2014 under s223(1) Taxation of the Chargeable Gains Act 1992 ("**TCGA 1992**"). That provided that no gain was chargeable "if the dwelling-house…has been the individual's only or main residence throughout the period of ownership…". They thus considered all of the gain accruing from 26 October 2010 to 22 May 2014 was eligible for PRR.

2. HMRC's position, however, was PRR was only available for a proportion of the gain. Under the apportionment provisions of s223(2) TCGA 1992, that proportion was derived by the fraction calculated by dividing the length of the period of ownership during which the new house was the Lees' main residence (March 2013 to 22 May 2014) by the (in this case longer) "period of ownership" of the land (26 October 2010 to 22 May 2014). In its decision published as *Gerald Lee and Sarah Lee v HMRC* [2022] UKFTT 175 (TC) ("**the FTT Decision**"), the FTT allowed the Lee's appeal against HMRC's closure notices (which had amended the Lees' self-assessments to show a chargeable gain of £541,821). With the permission of the FTT on some grounds, and the UT on the remainder, HMRC now appeal against the FTT Decision.

LAW

3. Although HMRC put their appeal on the basis of eight grounds, the central question at issue is a short one of statutory interpretation and it is convenient to start with the legislation. The PRR provisions concern capital gains tax. Under s1 TCGA, tax is charged on capital gain "accruing to a person on the disposal of assets". Section 15(2) TCGA provides that "[e]very gain shall, except as otherwise expressly provided, be a chargeable gain".

4. Section 222(1) provides:

> "(1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in
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> (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
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> (b) land which he has for his own occupation and enjoyment with that residence as its garden or grounds up to the permitted area."

5. Section 223 provides:

> "(1) No part of a gain to which section 222 applies shall be a chargeable gain if the dwelling-house or part of a dwelling-house has been the individual's only or main residence throughout the period of ownership, or throughout the period of ownership except for all or any part of the last 18 months of that period.
>
> (2) Where subsection (1) above does not apply, a fraction of the gain shall not be a chargeable gain, and that fraction shall be
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> (a) the length of the part or parts of the period of ownership during which the dwelling-house or the part of the dwelling-house was the individual's only or

> main residence, but inclusive of the last 18 months of the period of ownership in any event, divided by
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> (b) the length of the period of ownership."

6. There is no dispute here that s222(1) is engaged by the fact the new house was the Lees' main residence. The dispute revolves around the length of the "period of ownership" in the apportionment provision in s223(2)(b); does the denominator in the fraction which is used for apportionment, refer to the length of ownership of the new dwelling house the Lees built (as the taxpayers, the Lees argue, and the FTT held) or to length of ownership of the plot of land on which had once stood the old house which was demolished (as HMRC argue).

7. The parties' submissions also refer to the following further subsections of s222 for the purposes of interpreting the phrase "period of ownership". These elaborate on the interpretation of "period of ownership" in certain circumstances, but do not apply on the facts here.

8. Section 222(7) deals with the situation where a person has successive interests; for instance a leasehold and then a freehold and also where disposals between spouses and civil partners take place. It provides:

> "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 in the case of [an individual living with his spouse or civil partner] —
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> (a) if the one disposes of, or of his or her interest in, the dwelling-house or part of a dwelling-house which is their only or main residence to the other, and in particular if it passes on death to the other as legatee, the other's period of ownership shall begin with the beginning of the period of ownership of the one making the disposal, and
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> (b) if paragraph (a) above applies, but the dwelling-house or part of a dwelling-house was not the only or main residence of both throughout the period of ownership of the one making the disposal, account shall be taken of any part of that period during which it was his only or main residence as if it was also that of the other."

9. Section 222(8) deals with the situation where a person has to live away from their main residence in employment related accommodation but nevertheless intends to come back to that main residence. It provides:

> "If at any time during an individual's period of ownership of a dwelling-house or part of a dwelling-house he—
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> (a) resides in living accommodation which is for him job-related, and
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> (b) intends in due course to occupy the dwelling-house or part of a dwelling-house as his only or main residence,
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> this section and sections 223 to 226 shall apply as if the dwelling-house or part of a dwelling-house were at that time occupied by him as a residence."

FTT DECISION AND BACKGROUND FACTS

10. The FTT's findings of fact were not in dispute and were straightforward. The Lees bought a freehold interest in land with registered title in Surrey on 26 October 2010. They

demolished the existing house and built a new house which was completed on 15 March 2013, and in which they took up residence from 19 March 2013. The land (the new house and its gardens and grounds), which was held under the same registered title number as that which was purchased above, was sold on 22 May 2014. The FTT agreed with the taxpayers' analysis that they were entitled to PRR for all of the capital gain because "period of ownership" in s223 TCGA referred to "period of ownership" of the new house.

GROUNDS OF APPEAL AND PARTIES' SUBMISSIONS

11. HMRC's case on appeal is that the FTT, for a number of reasons, erred in deciding the "period of ownership" referred to ownership of the new house as opposed to the plot of land. The taxpayers submit the FTT was correct to decide as it did for the reasons it gave and for the further reasons Mr Sykes KC set out in the taxpayers' response to HMRC's appeal.

12. As Mr Pritchard, who appeared for HMRC, helpfully acknowledged in his written and oral submissions, the eight grounds HMRC raise are essentially sub-grounds of the central question of statutory interpretation, and we address them in the course of dealing with HMRC's fundamental case that the FTT erred in deciding the "period of ownership".

13. HMRC acknowledge the term "period of ownership" is not defined but submit that its clear natural meaning, in its statutory context, concerns the ownership of the asset whose sale gives rise to the gain (s223 says "no part of **a gain** to which…"). Here, the asset was the freehold interest in land – the dwelling house simply qualified or partly qualified the land asset being disposed of for relief. That, so HMRC argue, conforms to the purpose of the legislation which is to avoid double relief (so that someone should not have PRR more than once over the same period) and to avoid PRR accruing in relation to a period of gain which preceded the building of the house that was lived in. The focus on the asset also conforms to how the term "period of ownership" is used in other TCGA provisions. In those other provisions it is clear either explicitly or implicitly that the ownership referred to is that of the asset giving rise to the gain.

14. The taxpayers' submission is that the language of the statute supports their case, and there is no justification in terms of the purpose or scheme of the legislation, the case law, or subsequent legislation, to justify departing from what they maintain is the clear and natural language of the statute.

DISCUSSION

15. The core remit of PRR and its apportionment provisions is clear. It is directed to the classic case where someone buys a house, lives it in as their main residence, and then sells it at a gain. Brightman J's articulation of the purpose in *Sansom v Peay* [1976] 1 WLR 1073 (to which HMRC's submissions and the FTT Decision both refer) noted that "the justification for the exemption is that when a person sells [their] home [they] frequently need to acquire a new home elsewhere…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."

16. The apportionment provisions will, on the interpretation of both parties, operate so as to relieve only part of the gain where a person does not use the house as their only or main residence, for instance because they live somewhere else.

17. The facts of this case, where land is bought and a dwelling house constructed later, or the existing dwelling house demolished and a new one built, are not so obviously catered for.

Nevertheless, the question remains: how do the words of the legislation, construed in accordance with the established principles of statutory construction, apply to the given facts?

18. "Period of ownership" is not defined in the legislation. HMRC highlight that the phrase is silent in particular as to what asset is referred to. HMRC acknowledge that it is possible to see how one might read the words as referring to the dwelling house. However, they argue that the taxpayers' construction is plainly incorrect, once the context of the words and how they sit in the wider statutory scheme are, as they must be, taken into account.

19. HMRC referred to the well-known extract from *R (Quintaville) v Secretary of State for Health* [2003] 2 AC 687 pf Lord Millett (at [38]).

> "The question is one of statutory construction. In construing a statute the task of the court is to ascertain the intention of Parliament as expressed in the words it has chosen. The Parliamentary intention is to be derived from the terms of the Act as a whole read in its context. Once it has been ascertained, the court must give effect to it so far as the legislative text permits."

Interpretation of words "period of ownership" in their statutory context

20. By way of opening observations, we note the term "period of ownership" in 223(2)(b) is used elsewhere in s222 and s223. Neither party suggests the meaning is different in those other contexts. The dispute is over the extent and content of that relevant context.

21. As a matter of straightforward textual interpretation, we see considerable force in the taxpayers' interpretation over that of HMRC. Mr Pritchard emphasised the statute was silent as to the asset which was owned. But sometimes drafting is silent for the simple reason that its meaning is considered obvious. Having regard to the immediate surrounding context we consider it plain that the "period of ownership" can only refer to the ownership of the dwelling house. It is true the drafter has not specified the asset, but that simply reflects that the natural reading of the provision refers the period of ownership back to the preceding reference of "dwelling house", and that as a matter of language use terms are not repeated on or elaborated where their intended sense is clear. There is not a concept of ownership of anything else referred to in the section. It is also notable that s222(1) sets the scope of the provision by reference to the gain "so far as attributable to…an interest in…a dwelling house". That is the interest to which the "period of ownership" is most obviously concerned (the focus of the attribution we consider being on the physical scope of dwelling house, and its grounds rather than an attribution of time provision). There is also no immediate difficulty with the taxpayers' interpretation. It captures the mainstream case where the dwelling house bought is not the taxpayer's main residence for all the time it is owned, and does so sensibly. So where for example a house which is owned for 10 years, but only lived in as a main residence for the last 5 years, the taxpayer gets 50% relief on the gain, rather than 100%.

22. The fundamental difficulty with HMRC's interpretation, and their reliance on statutory context, is that there is no reference at all in the immediate context to any asset other than the dwelling house. The term "period of ownership" already requires reading in words. HMRC's interpretation requires not only reading in words, but reading in words which are not to be found in the section, nor indeed relevantly in any of the other provisions relating to PRR. In contrast, as mentioned, the whole focus of the provision is on there being a dwelling house. In fact, when the term "land" is mentioned, it refers specifically to land for the person's occupation and enjoyment of the dwelling house.

23. So, on a straightforward textual analysis the answer is clear: the taxpayers' interpretation, with which the FTT agreed, is the correct one. The question we need to consider is whether there is anything to suggest the provision ought to be read differently. Mr Pritchard made a number of arguments to persuade us it should, which we now address.

24. HMRC make much of the proposition that a dwelling house is not capable of ownership separately from the ground on which it stands. We do not agree, not least because the term "dwelling house" must be construed to include flats as well as houses – and the title to an individual flat will rarely include the ground on which the block of flats stands.

25. From the perspective of English land law, the dwelling house is itself "land". But the notion of a separate interest in the building, as distinct from the ground on which it stands, is not, we think, what the provision envisages, nor what the taxpayers' interpretation entails. The interest in the dwelling house here means (at least as regards a house) not only the building but also the ground on which it stands. That reflects that in the mainstream case of a house intended to be captured by the relief, the building and the ground upon which it is situated are envisaged to be, and will be, one and the same dwelling house. The crucial and straightforward feature which distinguishes an ownership interest in a dwelling house in this context from an ownership interest in real property more generally (which will cover ownership of any building on it), is that an ownership interest in a dwelling house requires that a dwelling house exists.

26. HMRC also highlight the specific use of the words "period of ownership of a dwelling house" in s222(8) (covering periods away from the main residence in employment related accommodation - see [9] above) submitting that if Parliament had intended that "period of ownership" in s223(1) to similarly refer to a dwelling house it would have said so. In Mr Pritchard's submission, there is good reason for a reference to ownership of the dwelling house there, because otherwise the provision would deem there to have been ownership of a main residence for a period, for example, where the taxpayer just had a bare plot and was yet to build a house. We do not think that can be right, as s228(b) would not be satisfied as there would not be a dwelling house in relation to which the taxpayer could have the requisite intention. Moreover, we do not see the reference to "period of ownership of a dwelling house" as seeking to introduce a new concept in contradistinction to a different period of ownership elsewhere – rather it serves as a reminder that the period of ownership in question is that of the dwelling house. If it was meant to be used in contradistinction, we would have expected to see the preceding references to "period of ownership" to state the relevant asset to which the ownership referred. The reference in s222(8) to "period of ownership of a dwelling house" also illustrates that there is no difficulty in a dwelling house being "owned", as this is specifically contemplated by the legislation. Similarly, it is implicit in the reference to an interest in a dwelling house being acquired in s224(3) (see [57] below) that a dwelling house can be "owned" – if something is capable of being acquired, it follows that it must be capable of being owned.

27. HMRC also argue that if the taxpayers' and FTT's interpretation were correct, the "period of ownership" could only begin when the house was completed, thus conflicting with the terms of s222(7). According to HMRC the provision operates as follows: if a person buys a leasehold interest in bare land, then later buys the freehold and then builds and moves into the house, the "period of ownership" starts with the leasehold purchase - whereas on the taxpayers' interpretation it would only start with the completion of the house.

28. We disagree. We find that the taxpayers' interpretation does not give rise to any conflict or difficulty of interpretation. As Mr Sykes argues, the acquisition referred to is that of an interest in the dwelling house. The conflict HMRC rely on only arises if it is assumed that the relevant acquisition is of different interests in real property, as opposed to different interests in the dwelling house (being interests in land on which a dwelling house stands). But whether that is the case (i.e., whether for the purposes of PRR, acquisition of the thing owned captures bare land, or is concerned with acquisition of the land interest which encompasses a dwelling house) is the very point in issue.

29. The taxpayers go further however to suggest that subsections 222(7) and (8) indicate HMRC's interpretation is wrong. They argue that to allow a transfer of bare land from one spouse or civil partner to the other, would, if HMRC were right, "restart the ownership clock" under s222(7)(a) which would go against the purpose of the provision, removing the possibility of abuse or irregularity deriving from spousal transfers. They also submit that if HMRC's interpretation were correct, the availability of PRR would differ between a taxpayer living in job-related accommodation prior to the construction of a dwelling on land already owned (where no relief would be available), and where the dwelling had already been constructed (where relief would be available in full).

30. However, there is nothing to suggest that a relief targeted at those who own property as a main residence would necessarily be concerned with transfers of bare land before the construction of the dwelling house. In our view, even on HMRC's construction, there is nothing especially odd in that omission. There would also be nothing especially odd in a taxpayer not getting such relief under s222(8) where they were in employment related accommodation yet there was no house that had at that point been built. In our view, beyond the points already mentioned above regarding the specific mention of period of ownership of a dwelling house in subsection (8), both subsections (7) and (8) are essentially neutral in terms of their support of the parties' competing interpretations.

31. HMRC also seek to bridge the lack of a specific mention of the land as an asset to which the "period of ownership" relates by reference to the structure of other provisions in TCGA where the phrase is used. They argue that separating the statutory phrase "period of ownership" from the period of owning the asset/interest being disposed of runs contrary to other provisions in the TCGA that use the same, or similar phrases to describe the asset being sold.

32. Mr Pritchard's skeleton included a number of examples: for instance, the exemption for wasting assets in s14F TCGA, cash basis disposals in s47A, and roll-over relief in s152 TCGA. He took us to s152 TCGA in oral submissions, subsection (1) of which provides:

> "If the consideration which a person carrying on a trade obtains for the disposal of, or of his interest in, assets ("the old assets") used, and used only, for the purposes of the trade throughout the period of ownership is applied by him in acquiring other assets, or an interest in other assets ("the new assets") which on the acquisition are taken into use, and used only, for the purposes of the trade, and the old assets and new assets are within the classes of assets listed in section 155, then the person carrying on the trade shall, on making a claim as respects the consideration which has been so applied, be treated for the purposes of this Act—"

33. Mr Pritchard then highlighted the references in s152(6) and (7) to "period of ownership" which, he submitted, clearly referred to the ownership of the asset that was being sold. That is obviously correct, but it simply tells us that, in the context of that particular

relief (as in the others which he relies on), the period of ownership relates to the asset because of the words used. What these examples do not demonstrate is that there is, absent context specific to the provision, a structural assumption that the period of ownership will relate to the asset being sold. In fact, the other provisions that he references in his skeleton serve to reinforce that where the particular asset disposed of is meant to be referred to, then this is made clear. Thus, if it were intended that the ownership in the PRR relief was to refer to the asset, as distinct from the ownership of the dwelling house, then we consider this would have been spelled out.

34. In a similar vein, HMRC also say the FTT erred in treating the "reliefs" part of TCGA separately to the "gain calculation" parts. The FTT, in effect, rejected a submission that the generic function of the provisions informed their interpretation; the words fell to be interpreted on their own terms. The FTT also noted that it was conceptually possible, and possible in practice, for legislation to give relief over the whole of the gain on an asset, even if the period of ownership of the asset was longer than the period of time for which the conditions had to have been satisfied - giving the example of entrepreneur's relief and substantial shareholder exemption. HMRC do not take issue with that as a proposition, but say the FTT erred in placing reliance on those reliefs, given their very different conditions and purposes as compared to PRR. However, we do not consider the FTT was placing reliance on these provisions; it was simply explaining that reliefs fall to be interpreted according to their terms, and there was no structural bar to the PRR provision operating in the way the taxpayers suggested.

Consequences that cannot have been intended if taxpayers' interpretation were correct.

35. HMRC's other arguments focus on consequences that, they submit, cannot have been intended if the taxpayers' interpretation were correct. In particular, they argue that the taxpayers' approach results in incentives disconnected to the purpose of PRR (as to which see the extract from Brightman J's decision above at [15]). It cannot be right, HMRC argue, that the mere act of building a house gives relief for the entirety of the gain.

36. HMRC submit that the taxpayers' interpretation leads to double relief, in other words the ability to recover PRR twice, contrary to the intention that PRR relief should – for any period – only apply to a single main residence. This, say HMRC, is illustrated by the following example. In year 1 a person buys blackacre and whiteacre. The person lives in the house on blackacre, and simultaneously demolishes and builds a new house on whiteacre. In year 5 the person sells blackacre and moves into the new house on whiteacre. Whiteacre is sold in year 10. The person gets 100% PRR on years 1 to 5 in respect of blackacre and (on the taxpayers' interpretation) 100% relief on whiteacre for years 1 to 10. The "double" relief arises in respect of years 1 to 5.

37. HMRC say that the taxpayers' interpretation favours "demolishers" over "renovators". If the person bought whiteacre but chose not to live in it for years 1 to 5 whilst it was being renovated (meanwhile living in blackacre, which was sold in year 5), and moved into whiteacre in years 5 to 10, they would get 100% PRR on blackacre, but only 50% on whiteacre - i.e. in respect of the 5 years the house was their primary residence. The "demolisher" in the earlier example would however get 100% PRR covering years 1 to 10. Parliament, it is argued cannot have intended to favour persons demolishing existing houses rather than renovating them.

38. In our view these points push past the limits of a purposive interpretation. The legislative purpose is discerned by the words used. HMRC's submissions in relation to double relief make assumptions about the nature of the relief which are not reflected in the operation of the legislation. The relief is on a gain which arises on a disposal – a single event. The legislation is not interested in what gains accrue at different points, but looks at the gain that arises on disposal, albeit apportioning the amount by reference to the period of time the property is the person's main residence. In that sense it is misconceived to think of a "pre-build gain" that is being double relieved. In any case the concept of a "double-relief" is already embedded within the legislative scheme because of the rule in s223 that the last 18 months of ownership are included within the term of main residence (see [5] above). That represents a period where a taxpayer may be able to benefit from two dwellings in respect of the same period of ownership. Its presence suggests there is not a structural flaw with the taxpayers' and the FTT's interpretation which HMRC suggest.

39. We find that there is no reason to suppose, from the scheme of the legislation and the words it uses, that they disclose any particular intention on the part of Parliament as to the differing circumstances of renovators and demolishers. There is certainly nothing to suggest a legislative preference for relieving cases of renovation over demolition. The legislation's focus is on the typical situation, mentioned in Brightman J's dicta, of a disposal of a property where the dwelling existed throughout. If there is any disparity in treatment, that is simply the effect of the words chosen when applied to fact patterns which Parliament did not necessarily have in mind when legislating.

40. On a related point, HMRC also submit that the FTT was wrong to accept the taxpayers' argument that HMRC's interpretation resulted in unfairness. That argument hypothesised a situation where there had been no appreciation in the value of the land prior to the dwelling being constructed, but where only part of the subsequent gain on the house would (unfairly the taxpayers argued) be denied because the gain on disposal was treated as accruing evenly over the period the land was owned, rather than being allocated solely to the period after the dwelling was constructed. HMRC point out this result was simply a feature of the way the time apportionment worked and there could be situations where (if for instance the gain occurred on the land before building the house but not afterwards) where the apportionment would work in the taxpayers' favour. We reject HMRC's argument. It is not right to say the FTT accepted the taxpayers' unfairness argument as HMRC suggest. Rather the FTT clearly recognised (at [65]) in response to the taxpayers' argument that the so-called anomaly was a function of the legislation "apportioning based on time rather than valuations at specific points in time".

41. HMRC also argue that the taxpayers' interpretation makes the calculation of the amount of PRR uncertain in cases where the garden/grounds of the dwelling house, or part of the dwelling house is sold. They submit the "period of ownership" of the dwelling house will be unknown because the ownership of the dwelling house or the retained part continues. However, we find that no uncertainty arises. The legislation does not specify the end of the ownership period, because it is implicit that the period ends at the point of the relevant disposal.

42. HMRC submit that the taxpayers' interpretation would have the effect of making s38 TCGA redundant. HMRC submit that s38 enables builder/occupiers such as the taxpayers to make a deduction from any gain in respect of the house's construction costs. But on the taxpayers' interpretation (and full PRR is available), then the construction cost deductions would be redundant. However, as Mr Sykes points out, s38 is a generic provision. It is not

restricted to the costs of constructing a primary residence dwelling or even to construction costs or a real property context. Even in a real property context the section is not redundant, as the provision clearly has a role, for example, in the deduction of construction costs for an investment property.

Inconsistency with case-law

43. HMRC also argue the taxpayers' interpretation is inconsistent with case law, in particular that the FTT misconstrued the Court of Appeal's decision in *Higgins v HMRC* [2019] EWCA Civ 1860**.** There the taxpayer bought, off-plan, a leasehold apartment in the tower of the former St Pancras Station Hotel in London. There was no right of occupancy when contracts were exchanged in 2006; at that point the area which was to become the apartment was, in the words of the FTT's decision, "a space in a tower". Completion, and the taxpayer's right of occupancy took place some three years later. The issue was whether the "period of ownership" ran from exchange of contracts or completion. The Court of Appeal held it ran from completion, noting that it would be striking if the position were otherwise as few people buying a new home (given that exchange and completion usually do not occur simultaneously) would be fully relieved of CGT on their gain ([17]). HMRC's case there also ran counter to the ordinary meaning of "period of ownership":

> "…The mere fact that someone has contracted to buy a property will not give him ownership such as could allow him to possess, occupy or even use the property, let alone to make it his "only or main residence".

44. Newey LJ, with whom the other agreed, continued at [22]:

> "It would anyway be hard to see how Mr Higgins' "period of ownership" of the apartment could have begun before late 2009. When contracts were exchanged in 2006, the apartment was just a "space in the tower". The present case is thus distinguishable from one in which someone contracts to buy a plot of land on which a house is to be built. The plot of land will, of course, already exist. In contrast, the Apartment did not come into existence until November/December 2009."

45. The FTT (at [56) recognised the "exchange vs completion" issue in *Higgins* was different to that in the current case but considered the case:

> "[lent] credence to the view advanced by the appellant that 'period of ownership' [was] unlikely to start before the asset in question exists, notwithstanding the differentiation here between land and 'space in a tower'".

46. HMRC emphasise the distinction the Court drew between the construction of such an apartment and a person who bought land on which to later build a house. That was the taxpayer's situation here, and the Court of Appeal reasoning specifically envisaged the ownership for the purposes of the term "period of ownership" would start from when the plot of land was bought. The FTT accordingly misconstrued *Higgins*.

47. We acknowledge the distinction the Court of Appeal drew does indicate an assumption on their part that the period of ownership would start with the purchase of the plot of the land. But that question was not before the court and, as Mr Pritchard correctly recognised in his oral submissions, the view expressed was obiter. Nevertheless, Mr Pritchard argues the point was highly persuasive. However, as Mr Sykes points out, the point was not one that was

argued before the Court of Appeal. Given those circumstances we agree the FTT did not err in law by not addressing the distinction Newey LJ had drawn at [22].

48. HMRC also say the FTT was wrong not to follow *Henke v HMRC* [2006] STC (SCD) 561, a Special Commissioner decision of persuasive value, which included analysis on a very similar issue where land was first bought, and a dwelling house built subsequently and where the Special Commissioner expressly confirmed HMRC's approach to the words "period of ownership". The FTT had briefly described the decision's reasoning but had simply noted the decision was not binding on it.

49. The Special Commissioner's reasoning was that "a purposive construction of the legislation was necessary to avoid an absurd result" ([67]). The Commissioner noted buildings cannot normally be owned separately from the land on which they are situated and that nothing was specifically provided for in the Act that an individual could be regarded as having a period of ownership of a dwelling house separate from their ownership of the land. HMRC's case of "anomalies and absurdities" that would otherwise arrive was accepted. The clear intention behind the legislation was there was "only one period of ownership of the single asset consisting of the land and any buildings which may be erected on it during that period". It would be odd if the taxpayers could have continued to qualify for private residence relief in respect of their two previous owner-occupied properties while benefiting at the same time from the same relief in respect of their unbuilt plot.

50. The essence of the reasoning was thus that buildings cannot be owned separately from the land and a concern over a double relief. The Special Commissioner had also noted HMRC's argument that if the taxpayer were correct, a Revenue Extra Statutory Concession would have been redundant, and that the interpretation would give rise to "absurd" results: in s222(7) cases where there was first a leasehold interest in bare land and then when a freehold interest was purchased and a house built, the period of ownership only began when the house was completed and also that the PRR would cover the "pre-build gain".

51. As already explained above, we find that none of these points results in absurdity or requires an interpretation that does not accord with the ordinary meaning of the words to be taken. Ownership of the dwelling house will normally include the ground upon which the dwelling is built – there is no need to conceive of it as somehow only referring to the dwelling house and excluding the ground. The concern over a double relief is overstated: the Special Commissioner in fact recognised there was not a "blanket" rule against an individual having only one main residence at any given point in time because of the provision equivalent to the 18 month rule (the legislation applicable in *Henke* specified 3 years). An argument based on the redundancy of an ESC is just another way of saying that HMRC's view of the law should be viewed as correct, given that HMRC drafts ESCs on the assumption that their own interpretation of the law is correct. There is nothing necessarily absurd about a period of ownership for PRR purposes hanging off the completion of the dwelling house which is resided in and the extent if any of any pre-build gain would depend on the market. As already discussed, the provisions do not seek to apportion according to the actual gains occurring over time which might vary, but simply accrue any gain evenly over the period of main residence.

52. We were also not persuaded by Mr Pritchard's submissions that the Court of Appeal's decision in *Higgins* must be regarded as endorsing *Henke.* While *Henke* was listed among those referred to in the skeleton arguments, it was not listed as having been cited in argument. It was not referred to in Newey LJ's judgment, and moreover there is nothing in the

substance of the Court of Appeal's reasoning which requires the reasoning in *Henke* to be similarly accepted. It follows therefore that we disagree with the interpretation adopted by the Special Commissioner in *Henke*, preferring the taxpayers' interpretation (which we note the Special Commissioner had acknowledged was correct at "first blush"). Accordingly, although the FTT did not in terms address the analysis in *Henke*, it is clear enough from the FTT's reasoning that it departed (as it was able to) from *Henke*. In our view it was correct to do so.

53. We accordingly reject HMRC's submission that the FTT erred in its treatment of the case law.

Complexities arising from determining when ownership of dwelling house begins.

54. HMRC submit that the taxpayer's interpretation leads to difficulties, because, in situations such as the present one, it is necessary to identify the precise date the taxpayer "owned" the dwelling house. The FTT considered that the house was owned when it was completed but that, HMRC argues, gives rise to complex and subjective questions. At what point is the building completed: when the external build is completed, when the utilities are put in, when it is habitable, (a subjective concept)? So too, HMRC argue, difficulties arise in relation to the question of when a property is being renovated. There, the renovator might be incentivised by the taxpayers' interpretation to argue the renovations were so extensive that they amounted to a new house being built, so as to defer the beginning of the period of ownership clock. These difficulties, HMRC submit, suggest the taxpayers' interpretation is not the one contemplated by the legislation.

55. Under the taxpayers' interpretation we note that the legislative question which must be answered is to determine the time at which the dwelling house was owned. It is true no guidance is given in the legislation on that topic. However, that is true of many legislative terms and the application of a term to a particular set of facts is a task courts and tribunal are well versed in dealing with. We do not think any potential definitional difficulties ought in these circumstances to favour a particular interpretation, particularly where to do so would displace the natural reading of the provision. That is all the more the case when the core circumstances to which the legislation apply – a person disposing of a main residence house that was already built on land when they bought it– generally gives rise to no special interpretative difficulty. Here the land was already owned, and the question then became one of when the dwelling house existed, so that it could then be said the dwelling house was owned. We note the FTT had no difficulty in reaching a view on this. It took 15 March 2013 as the relevant date. It appears that was the date when the builders issued a certificate of practical completion.

Abuse of provisions

56. Another concern raised by the taxpayers' interpretation, argue HMRC, is that it is open to abuse which it is said falls outside the anti-avoidance provision in s224(3). In particular HMRC posit the situation where a gain on land was "masked" by building a property on it – perhaps a cheap shack- in order to access the PRR over all of the land gain that has accrued.

57. Section 224(3) provides that s223:

> "…shall not apply in relation to a gain if the acquisition of, or of the interest in, the dwelling-house or the part of a dwelling-house was made wholly or partly for the purpose of realising a gain from the disposal of it, and shall not apply in relation to a gain so far as attributable to any expenditure which was

> incurred after the beginning of the period of ownership and was incurred wholly or partly for the purpose of realising a gain from the disposal."

58. HMRC's (rather unusual) fear that an anti-avoidance provision did not apply arose, they say, because the person building the residence to live in to mask the gain could not be said to be "acquiring" a dwelling house or interest in it. Acquisition, they submit, bears a particular meaning in CGT which is distinct from enhancement and does not capture the construction of a house. In any case even if construction amounted to acquisition, it is maintained that the purpose in this masking scenario would not be to realise a gain from the disposal of it (i.e., the house) but to mask the gain on the land. The second limb of 224(3) also would not apply as it only applies to the gain attributable to expenditure incurred after the "period of ownership" clock started (of which there was none on the taxpayers' interpretation).

59. We do not consider this concern is one that should influence the interpretation of the words "period of ownership". As a general proposition it cannot be ruled out that correct interpretation of one part of some provisions means there is a gap in the anti-avoidance provision. There is not a particular reason to strain the interpretation so as to avoid the abuse when the other possibilities, that the anti-avoidance provision might be read more broadly, or if it cannot, that it must be accepted there is a gap in the anti-avoidance legislation which it is for Parliament to plug, might equally be true. It must also be recognised that if HMRC are right that a construction of the dwelling house would not be regarded as an "acquisition", then s224(3) would similarly not apply so as to prevent a partial, as opposed to a wholesale relief of the land gain under the PRR provisions where the taxpayer lived in the property for a period of time. The issue of abuse thus exists already albeit, if HMRC are right in the fear, the taxpayers' interpretation would increase the degree of it. Mr Sykes was more optimistic about the reach of s224(3) arguing that it was perfectly consistent with the ordinary meaning of "acquiring" to say that a new house that had been constructed had been acquired for the purposes of s224(3). We do not however express any concluded view on whether HMRC are correct in their fears that s224(3) would not apply, but will leave consideration of how those provisions would apply to a case where the issue arises. For present purposes it is sufficient to note that the fear of abuse does not suggest the taxpayers' interpretation of s224(3), which as we have noted, reflects the natural reading of the provisions, is wrong.

s223ZA would be redundant.

60. Finally, as a fallback argument, HMRC submit that subsequently enacted legislation, namely s223ZA, would be redundant on the taxpayers' construction. This, HMRC submits indicates that Parliament did not intend "period of ownership" to refer to the ownership of the dwelling house.

61. That provision provides as follows:

> **223ZA Amount of relief: individual's residency delayed by certain events**
>
> (1) Subsection (4) below applies where—
>
> (a) a gain to which section 222 applies accrues to an individual on the disposal of, or of an interest in, a dwelling-house or part of a dwelling-house,
>
> (b) the time at which the dwelling-house or the part of the dwelling-house first became the individual's only or main residence ("the moving-in time") was within the first 24 months of the individual's period of ownership,

> (c) at no time during the period beginning with the individual's period of ownership and ending with the moving-in time was the dwelling-house or the part of the dwelling-house another person's residence, and
>
> (d) during the period beginning with the individual's period of ownership and ending with the moving-in time a qualifying event occurred.
>
> (2) The following are qualifying events—
>
> (a) the completion of the construction, renovation, redecoration or alteration of the dwelling-house or the part of the dwelling-house mentioned in subsection (1);
>
> (b) the disposal by the individual of, or of an interest in, any other dwelling-house or part of a dwelling-house that immediately before the disposal was the individual's only or main residence.
>
> (3) In determining whether and, if so, when a qualifying event within subsection (2)(b) occurred, ignore section 28 (time of disposal where asset disposed of under contract).
>
> (4) For the purposes of subsections (1) and (2) of section 223, as they have effect in relation to the gain, the dwelling-house or the part of the dwelling-house mentioned in subsection (1) above is to be treated as having been the individual's only or main residence from the beginning of the individual's period of ownership until the moving-in time.

62. HMRC submit that if the taxpayers and the FTT are correct in their interpretation that the "period of ownership" only commenced upon completion of the dwelling house, the qualifying event (the completion of the construction) could never occur as contemplated by s223ZA(1)(d) during the period beginning with the individual's period of ownership. If the taxpayers' interpretation were correct there would, HMRC argue, have been no need for s223ZA (at least for builder/occupiers in the position of the taxpayers) to be enacted.

63. HMRC correctly identify, relying on the House of Lords decision of *Ormond Investment v Betts* [1928] AC 143 where Lord Buckmaster explained by reference to a judgment in passage from *Attorney General v Clarkson* [1900] 1 QB 156, that "subsequent legislation on the same subject may be looked to in order to see the proper construction to be put upon an earlier Act where that earlier Act is ambiguous". Lord Buckmaster went on to explain that "any ambiguity" meant "a phrase fairly and equally open to divers meanings…". But we find that a textual analysis of the words does not result in ambiguity; in our judgment HMRC's interpretation plainly is not "equally open" as the taxpayers'.

64. Even if we were wrong, the enactment of s223ZA does not have the effect of preferring HMRC's interpretation. It is, as Mr Sykes pointed out, possible to envisage circumstances where the provision is not redundant on the taxpayers' interpretation. For instance, the dwelling house could be capable of being completed to a degree that it made sense to talk of it being owned (so as to start the period of ownership) yet some element of the construction could still be outstanding - for instance of an annex - so as to constitute a qualifying event which happened, as envisaged during the period of ownership.

DECISION

65. For the reasons above, HMRC's appeal is dismissed.

JUDGE SWAMI RAGHAVAN
JUDGE NICHOLAS ALEKSANDER

Release date: 29 September 2023