TC02596

Appeal number: TC/2012/03802

Capital Gains Tax – Private residence relief – taxpayer bought property to be marital home – prior to moving in wedding called off - three months after moving in house rented out – whether property was taxpayer's residence – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR DAVID MORGAN **Appellant**

- and -

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

TRIBUNAL: JUDGE JILL C GORT
DR CHRISTINA HILL WILLIAMS DL

Sitting in public Reading on 29 January 2013

Mr S Arthur, Accountant, appeared for the Appellant

Mr P Shea, Senior Officer appeared on behalf of the Respondents

DECISION

1. This is an Appeal by Mr Morgan against a Decision of the Commissioners on 9 February 2012 to make an assessment to Capital Gains Tax in the sum of £12,811.48 in respect of the gains realised by Mr Morgan's disposal of a property at 58 Coneybury, Redhill, Surrey, RH1 4PS ("the property").

2. The grounds of appeal are stated to be:

> "The correct decision would be to remove the tax levied at me for capital gains as I have met the criteria to receive Principal Private Residence relief".

The background

3. Mr Morgan made arrangements to buy the property in the early part of 2001 at a time when he was engaged to be married to a Miss Paula Varley. A mortgage was arranged in Mr Morgan's name but with a note on the Deeds under heading "Special Conditions – Non-Borrowing Occupiers" stating: "We believe that the persons(s) named below may live at the property….. Miss Paula Emma Lucy Varley".

4. Mr Morgan signed the exchange documents in relation to the property but shortly before completion on or about 1 June 2001 Miss Varley ended the engagement. Mr Morgan completed the purchase on 15 June 2001 and moved into the property. He left the property on 30 August 2001 having rented out the property in full.

5. The issue for the Tribunal is whether Mr Morgan is entitled to claim Private Residence Relief ("PRR") in respect of that period of occupation.

The Legislation

6. The Taxes Management Act ("TMA") provides:-

> (1) – (5) …..
>
> (6) If, on an Appeal notified to the Tribunal, the Tribunal decides: –
>
> ….
>
> (c) That the Appellant is overcharged by an assessment other than a self-assessment, the assessment or amounts shall be reduced accordingly, but otherwise the assessment….. shall stand good."

7. The Taxation of Chargeable Gains Act 1992 ("the TCGA") provides:-

> "Section 222 (1), this Section applies to a gain accruing to an individual so far as attributable to the disposal of, or of 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 being, his only or main residence….."

The Evidence

8. We were provided with two bundles of documents and a skeleton argument by the Commissioners. Mr Morgan was the only witness.

The Facts

9. In 2001, Mr Morgan was working for Safeways at a salary of £1,191.69 per month and had his own one-bedroom flat in Feltham which was subject to a mortgage. He was part of an area team which involved him in a lot of travelling. Then a position came up in the Safeway office near Reigate. Miss Varley worked as a supervisor in Safeways in Reigate. Mr Morgan and Miss Varley had been together for some five years and in early 2001 were engaged and formed the intention of purchasing a property to be their future marital home. Miss Varley herself found the property which was near to Reigate in Redhill. An offer was put in and accepted.

10. To fund the purchase Mr Morgan sold his flat and arranged the transfer of the mortgage with Bradford & Bingley to the property. The cost of the property itself was £132,000. The mortgage at that time was a standard residential product which included a fixed rate deal with early repayment penalties running until April 2004. It was in the amount of £81,100 for a period of 22 years with initial monthly payments of £575.70. Both the mortgage and the property were in Mr Morgan's sole name (but see paragraph 3 above). Miss Varley however had agreed to contribute £5,000 to the cost of purchase. Mr Morgan had wanted the property to be held in joint names, however the bank required Miss Varley to sign a disclaimer of any rights, but the parties did not agree to this. It was suggested that once they had both moved in and their names were on the electoral register, then it might be possible to add Miss Varley's name. In anticipation of the move Miss Varley had ordered various white goods and pieces of furniture, and both parties had been acquiring items for the property. At some stage in the relationship Mr Morgan had bought Miss Varley a car.

11. After selling his own flat (we are not certain of the date on which this occurred) Mr Morgan had moved to Miss Varley's mother's house in Reigate where Miss Varley was living at the time, and where Mr Morgan himself had stayed from time to time over the previous two years. Some two weeks before the purchase of the property (see paragraph 4 above) Mr Morgan returned to the house in Reigate to find the house unoccupied and all his belongings piled up on a bed with a note from Miss Varley ending the engagement, but giving no explanation as to why. Mr Morgan removed his belongings to his parents' house where he remained from about 1 June until 15 June. After learning of the broken engagement Mr Morgan had taken the following day off work in order to talk to Miss Varley, but she gave him no explanation as to why she had broken off the engagement.

12. Miss Varley was only 23-24 years old at that time and had never lived away from home. Mr Morgan thought, quite naturally in our view, that she might have

developed cold feet and needed time to think things over. His parents also advised him that he should give her time. In his evidence Mr Morgan said that at the time he believed Miss Varley would come back, and we accept his evidence as to this. Mr Morgan nonetheless went ahead with the purchase of the property, completing on 15 June, on which date he moved into it. After he had moved in, Mr Morgan again went to see Miss Varley at her mother's house. In his words "I thought we would work it out, go through it", but he "got nothing from her as to why". However, again in Mr Morgan's words: "Just after the split she did offer still to pay (a contribution of £5,000 from her savings) but I said I am still going but if you are not part of this I won't take your money." It was only later that Mr Morgan learned that Miss Varley had been seeing another man. Asked about why he had moved in, Mr Morgan said: "I had mixed emotions. It was a really nice property. I was waiting for Miss Varley to come back…. it was to be our family home."

13. In order to complete the purchase Mr Morgan had borrowed £2,000 from his parents, who had also bought the necessary white goods which were installed in the property. When moving in Mr Morgan did not hire a van but took his possessions over from his parents' place by car. On 25 June, some 10 days after moving in, Mr Morgan telephoned Bradford & Bingley and requested a tenancy pack. To us he said at the time that he was "still raw" and "trying to work out the options". He did not at the time "put anything into practice," which we take to mean that he did not take any positive steps to rent out the property. Although he could cover the outgoings on the property, the arrangement with Miss Varley had been that she would buy the groceries and "things like that", but without her contribution Mr Morgan decided that financially he would be in difficulties and his social life would be restricted, also he believed that there would be too many bad memories in the property.

14. On 22 August 2001, Mr Morgan obtained permission from Bradford & Bingley to let the property. The mortgage was only later, in April 2004, changed to a "buy to let" one. The property was let from 31 August 2001 to 15 March 2006 when Mr Morgan moved back in with a view to selling it, and it was sold on 28 July 2006 for £188,000. Between 31 August 2001 and 4 September 2004, Mr Morgan lived at his parents' house. The Commissioners contacted Mr Morgan in or about January 2011 asking about the rental arrangements for the property and on 25 January 2011 Mr Morgan gave them the following information, inter alia: "The property was originally purchased for me and my fiancée to live in but the relationship fell apart just before we moved in, unfortunately with the amount of money owed (she was going to lend me part of the deposit which I then had to borrow off family) it was not financially beneficial to sell straight away so I moved in to get the place ready to rent out and then moved back in with my parents."

15. In response to further questions from the Commissioners, in a letter dated 4 March 2011, Mr Morgan wrote: "I took the mortgage out on a repayment type as I never intended to rent out the property and so never purchased as an investment."

16. The Commissioners subsequently served an assessment on Mr Morgan which included a sum in respect of the letting of the property and a sum in respect of Capital

Gains Tax. By a letter dated 31 March 2011 Mr Morgan queried the Capital Gains Tax charge on the basis of his two periods of occupation. The Commissioners informed him that those periods were regarded as temporary and did not qualify for relief. By a letter dated 18 April 2011 Mr Morgan stated: "After purchasing the property we went ahead and bought everything to move in and did so, however after a short period of time she decided to move out with someone else and I remained there, however due to the cost to remain it became quite clear I could not sustain this, and also the emotional hurt at this point was also a factor so I began to get the place ready to rent out in the short term as selling the property at this point would end up costing me." However this was then corrected by a letter dated 18 June 2011 in which Mr Morgan wrote: "Let me firstly say that my ex-Fiancée didn't move into the property with me, in fact I think from memory things broke down before we got the keys so it was very much a last minute decision. I however, still moved in as I suppose I thought it was just cold feet and she needed time not realising that she had gone off with somebody else." In a letter of 14 August 2011 in response to the Commissioners pointing out the inconsistency in the two letters, Mr Morgan wrote: "As I explained before when I realised that there would be tax implications to my original statement I felt it was best to clarify the situation in more detail which I did, yes I did panic with timings but quickly rectified that."

17. In correspondence the Commissioners referred to the fact that no bank statements for 2001 give Mr Morgan's address as the address of the property. They also referred to the gas bill being low and therefore inconsistent with it being Mr Morgan's main residence, and say "especially during cold months". In fact Mr Morgan was not there in a cold period, quite the contrary, he was there between June and August. Water and sewerage bills had been produced to us which are made out in Mr Morgan's name, yet the Commissioners had pointed only to the gas bill being made out to "the occupier" as evidence of Mr Morgan not being in occupation. Mr Morgan produced to the Commissioners two letters, one dated 22 August 2001 from Bradford & Bingley and one dated 23 August 2001 from his solicitors, both addressed to him at the property. The Commissioners also made an issue about the lack of evidence of furniture being transported to the property. We note that the property had fitted cupboards, that Mr Morgan had previously had a flat of his own and that his evidence was that what he had was at his parents' house and he was able to move by car. The Commissioners did not give any weight to the fact that the contents insurance covered the period from 5 June 2001 to 5 June 2002, and that the mortgage required two types of insurance to secure the fixed rate element. They therefore concluded that the insurance was not in their words "conclusive" evidence that Mr Morgan lived in the property as his only or main residence during this period. The Commissioners case is that any occupation of the property by Mr Morgan during the period 15 June to 30 August 2001 lacked the degree of permanence, continuity, or expectation of continuity sufficient to justify its description as a residence for PRR purposes.

The Commissioners Case

18. It was accepted by Mr Shea that Mr Morgan did stay in the property, but on the basis of the conflicting accounts given in Mr Morgan's correspondence with the

Commissioners as to whether or not Mr Varley moved in with him, and the fact that Mr Morgan had contacted his solicitor shortly after moving in and also requested a "tenancy pack" from Bradford & Bingley as early as 25 June 2001, concluded that any time Mr Morgan spent in the property between 15 and 25 June 2001 was no more than temporary occupation whilst he decided what to do. Mr Shea also submitted that the minimal furnishing in the property, the fact that no removal company was used to move in or out of the property the fact that Mr Morgan lived at his parents' home both immediately before and after the period he was in the property and continued to live with his parents until September 2004, all pointed towards a temporary stay in the property.

19. We were referred to the case of *Fox v Stirk, Ricketts v Reg. Officer for the City of Cambridge* [1970] 3 ER 7 which was not a tax case but a case in which the meaning of the word 'resident' was considered in the context of the Representation of the People Act 1949. In that case in the Court of Appeal, Lord Widgery stated: "This conception of residence is of a place where a man is based or where he continues to live, the place where he sleeps and shelters and has his home. It is imperative to remember in this context that 'residence' implies a degree of permanence…. Consequently a person is not entitled to claim to be a resident at a given town merely because he pays a short, temporary visit. Some assumption of permanence, some degree of continuity, some expectation of continuity is a vital factor which turns simple occupation into residence."

20. We were referred to the case of *Goodwin v Curtis* [1998] BTC 176 in the Court of Appeal and we were also referred to it in the High Court, and we consider the case below.

The Appellant's case

21. Mr Morgan relied on the evidence he gave to the Tribunal as showing that when he moved in to the property he intended that it should be his home, and the fact that some weeks later he decided to rent it out did not mean that he was not entitled to Private Residence Relief.

Reasons for Decision

22. We find this case to be extremely finely balanced. We are faced with having to decide what was in Mr Morgan's mind when he moved into the property in June 2001. It is not disputed by the Commissioners that he had purchased the property with the intention of living there permanently. Unfortunately for Mr Morgan shortly before he moved in, his fiancée broke off the engagement and the property could no longer fulfil its intended purpose of being their matrimonial home. We listened to Mr Morgan's evidence with great care and, we found him to be a credible witness, despite his contradictory and self serving statement to the Commissioners early on in his correspondence with them. We find it understandable that Mr Morgan, when asked 10 years afterwards to recall not just the events of what must have been an extremely difficult and emotional time, but also what was in his mind at the time, might be confused. Whilst it is the case that when asked for details of Miss Varley's

whereabouts that Mr Morgan changed his statement, it is to his credit that he did not continue to mislead the Commissioners as to the true position, and that this was at a time when he was not having any legal advice, it was not until October of 2011 that representatives started acting for him.

23. In the statutory review letter of 9 December 2012 the Reviewing Officer, Mr Michael Burlison, referred to Mr Morgan occupying the property 'with limited furniture'. We do not consider that this is a factor which should properly be weighed against Mr Morgan, given that the Commissioners accepted that he did live in the property. As stated above, Mr Morgan had previously owned a property and therefore we conclude he would have had at least some relevant contents, his parents had bought the white goods for the property and there were fitted cupboards there, we also think it is only reasonable to conclude that he had sufficient furniture for his needs at the time, given that he did live there as was accepted by Mr Shea and in particular bearing in mind that he was a young and single man. We do not think the quantity or quality of the furnishing has more than a minimal bearing on the intention of Mr Morgan at the time he moved in.

24. In the review letter Mr Burlison referred us to the case of *Goodwin* in the Court of Appeal (supra) and stated: "The Court of Appeal ruled that temporary occupation at an address does not make a man resident there". This is not an accurate representation of the judgment in that case. Mr Shea had also apparently similarly misunderstood the nature of that case. The facts of that case were that the Appellant, Mr Goodwin, the taxpayer had claimed private residence relief in respect of a farmhouse. He had previously set up a company, Sandloan Ltd and the company decided to purchase a property, Hazleton Farm, in order to develop the yard and sell the farmhouse itself to the taxpayer and two adjacent barns to a Mr Sharp, a colleague of the taxpayer. Sandloan completed its purchase of the whole property on 7 March 1985. During March 1985 the taxpayer instructed agents to sell the farmhouse alone and it was advertised for sale. It was only on 1 April 1985 that the taxpayer completed his purchase of the farmhouse and took up temporary residence there. The farmhouse was then sold on 3 March 1985. It can be seen that that case could be distinguished on its facts alone from the present case because there the taxpayer had put the place on the market before moving. Mr Goodwin appealed the decision of the Revenue to refuse private residence relief, and his appeal was to the General Commissioners. The General Commissioners did not allow the appeal and Mr Goodwin appealed to the Chancery Division of the High Court. The High Court dismissed his appeal and he appealed again to the Court of Appeal.

25. In his skeleton argument Mr Shea cited Sir John Vinelott saying: "Amongst the factors to be weighed by the Commissioners are the degree of permanence, continuity and expectation of continuity." And again he cited from the Court of Appeal the judgment of Merrit LJ where he said: "The quality of the taxpayer's occupation of the farmhouse did not have a sufficient degree of permanence, continuity or expectation of continuity to justify its description as residence…. temporary occupation at an address does not make a man resident there. The question whether the occupation is sufficient to make him resident is one of fact and degree for the Commissioners to decide."

26. Mr Shea appears to have understood that the reference in the quote to 'the Commissioners' was a reference to the Commissioners of the Inland Revenue, and not to the General Commissioners, as was in fact the case. What both the High Court and the Court of Appeal were concerned with was whether or not the General Commissioners had made a decision which they were entitled to make. It was only in circumstances where the Commissioners had arrived at a decision which they were not entitled to arrive that either the High Court or the Court of Appeal would interfere as the Appeal was by way of case stated. The concluding words of Sir John Vinelott's judgment in the High Court are: "In my view, the Commissioners were fully entitled to take the view that the farmhouse could not be said to have been occupied by the taxpayer as his home. In my judgment, therefore, this Appeal fails." Similarly, Lord Justice Millett towards the end of his judgment in the Court of Appeal states: "The substance of the Commissioners' finding taken as a whole, in my judgment, is that the nature, quality, length and circumstances of the taxpayer's occupation of the farmhouse did not make his occupation qualify as residence. This conclusion was, in my judgment, clearly open to them." We do not dispute that those matters are ones which the Commissioners (in the sense of the Respondents in the present case) are entitled to take into account, but, particularly given the Commissioner's acceptance that Mr Morgan need only have intended to have made the property his home for a very short period of time, we find the emphasis on the words 'permanence' and 'temporary' surprising. It is our view that Mr Morgan need only show that at the time when he moved into the property, it was his intention to make it his permanent residence, even if he changed his mind about that the following day.

27. Mr Burlison in his review letter gave his conclusions as follows. He states: "HMRC accepts that you occupied the property, albeit briefly. It is the quality of that occupation that matters." In our view it is not the 'quality' of the occupation as such, it is the intention of the occupier that matters. Even if Mr Morgan had moved into the property fully furnished, and all the bills had been addressed to him personally, if, as in the case of Mr Goodwin, he had moved in at a time when he had already formed the intention to sell the property, or, as the Commissioners contend here, he had already intended to let the property, then the quality of his occupation would be irrelevant. Mr Burlison came to the conclusion that by the time Mr Morgan moved into the property he had formed the intention of letting it, and he arrived at this conclusion because of his statement in his letter of 25 January 2011 when he said: "it was financially beneficial to sell straight away so I moved in to get the place ready to rent out and then move back in with my parents." We accept that if Mr Morgan had prior to moving in concluded that he was going to rent out the place straight away then that would conclude the matter. However, Mr Morgan's evidence to us was that when he moved in he was still hoping for Miss Varley to return. We accept this evidence on the basis that Miss Varley had never left home, in particular she had been in a relationship with Mr Morgan for some five years at the time and was comparatively young, and therefore it was not unreasonable to think that she might change her mind. In addition Mr Morgan had been advised by his parents to give her time, and that is what he did. He had lived in the property for some two weeks prior to contacting Bradford & Bingley to enquire about the possibility of letting, had it been his intention from the outset to let the property, surely a man such as Mr

Morgan, who to us appears to be competent and quite well organised, would straight away set in train those enquiries. The fact that he did not persuades us that he had not formed an intention to let the property. It would quite clearly not have been financially sensible to sell the property, given the Early Repayment Charge clause in the mortgage. Mr Morgan gave evidence of the humiliation he would have felt in moving in with his parents which in his words would "show failure", which was why he did not immediately do this. We further accept his evidence that it was when he found the cost of living on his own was too steep that he took the decision to rent out the property.

28. In all the circumstances, and for all the above reasons therefore we allow Mr Morgan's appeal and conclude that his occupation at the property does qualify it as a residence for the purposes of Private Residence Relief.

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

JUDGE J C GORT
TRIBUNAL JUDGE

RELEASE DATE: 7 March 2013