Tax Chamber
First-tier Tribunal for Scotland

[2024] FTSTC 1

Ref: FTS/TC/AP/23/0012

Land and Buildings Transaction Tax – Additional Dwelling Supplement ("ADS") – no – as not lived in property as only or main residence in relevant period – appeal dismissed

DECISION NOTICE

IN THE CASE OF

Mr Peter Crawley

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: LOUISE CARLIN
ANNE SCOTT

For the appellant: **Mr Peter Crawley**

For Revenue Scotland: **Mr Kevin Graham**

An in-person hearing took place at George House, 126 George Street, Edinburgh on 19 October 2023.

The Tribunal determined the appeal having heard the oral submissions of parties at the hearing on 19 October 2023 and read the written submissions of Revenue Scotland dated 1 November 2023 and the written submissions of the Appellant dated 15 November 2023.

DECISION

1. This is an appeal against the decision of Revenue Scotland to amend Mr and Mrs Crawley's Land and Buildings Transaction Tax ("LBTT") return to state Additional Dwelling Supplement ("ADS") due in the sum of £19,440.

2. ADS had been charged under section 26A and Schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013 ("the Act").

3. The amendment to Mr and Mrs Crawley's LBTT return was made by a Closure Notice issued under section 93 of the Revenue Scotland and Tax Powers Act 2014 ("RSTPA").

Factual background

4. The underlying facts are not in dispute.

5. From 2002 until 1 December 2014 when Mr Crawley started to work abroad and became non-resident in the UK, Mr and Mrs Crawley lived in Aberdeenshire and that property was sold in September 2015.

6. On 4 June 2020, Mr Crawley and his wife returned to the UK from overseas where Mr Crawley had been working.

7. On their return to the UK, Mr and Mrs Crawley lived with their daughter at her home in Edinburgh ("the First Property").

8. Mr and Mrs Crawley jointly purchased a residential property in Fife ("the Second Property") with an effective date of 4 September 2020.

9. As at 4 September 2020, Mr and Mrs Crawley also owned a residential property in London ("the Third Property") which was rented to a tenant whilst Mr Crawley worked abroad. It had been purchased on 12 May 2017. Mrs Crawley stayed in the property for approximately six weeks in order to furnish the property and prepare it for potential letting.

10. As a result of Covid 19, Mr and Mrs Crawley had to return to the UK on extremely short notice in June 2020. They spent one night in the Third Property to oversee remedial work. At that time, although the lease was still in force, the tenant was not living in the property.

11. On 18 September 2020, the agent of Mr and Mrs Crawley submitted to Revenue Scotland an electronic LBTT return ("the LBTT return") for the purchase of the Second Property.

12. The LBTT return stated that the buyers were not replacing their main residence and that ADS in the sum of £19,440 was due ("the ADS"). That sum was paid.

13. On 28 June 2021, Mr and Mrs Crawley sold the Third Property.

14. On 17 September 2021, the agent amended the LBTT return in order to seek a repayment of the ADS. The amended LBTT return stated that the previous main residence of Mr and Mrs Crawley, which had been sold, was the Third Property.

15. On 20 September 2021, the ADS was repaid to Mr and Mrs Crawley by Revenue Scotland, together with interest of £98.

16. On 24 November 2021, Revenue Scotland requested information from the agent including "documentary evidence that all buyers lived in [the Third Property] as their main residence at some point during the 18 month period prior to buying your new dwelling (i.e. copy of utility or other bill addressed to your clients at this property address)."

17. On 1 March 2022, Revenue Scotland sent a reminder to the agent for the information requested.

18. On 17 August 2022, Revenue Scotland sent a letter to Mr and Mrs Crawley, with a copy to their agent, headed "Notice of enquiry under section 85 of the Revenue Scotland and Tax Powers Act 2014" to inform them that an enquiry into the LBTT return was being opened. In that letter, Mr and Mrs Crawley were asked to provide evidence to show that they resided at the Third Property at any time in the period of 18 months prior to the effective date of the purchase of the Second Property.

19. On 21 August 2022, Mr and Mrs Crawley sent further information to Revenue Scotland including a summary timeline which stated; "4th June 2020 Returned to UK during pandemic. Our flat [the Third Property] had a tenant in it and we couldn't move them out when the country was in lock down."

20. On 24 August 2022, Revenue Scotland sent an email to Mrs Crawley requesting information including "Evidence that both Peter Crawley and yourself reside in the previous main residence. As I mentioned within my enquiry letter, this needs to be an official document and during any date between 04 March 2019 – 04 September 2020."

21. In that email, Mrs Crawley's attention was drawn to Revenue Scotland's guidance, as follows:-

> "It is highly unlikely a property can be viewed as your only or main residence if you have spent no time there in the 18-month period or if the property was rented out and not available to you during this period."

22. On 22 September 2022, Revenue Scotland sent an email to Mrs Crawley as "a reminder that further evidence/information is required to ensure the ADS repayment conditions have been met".

23. Correspondence ensued.

24. On 1 February 2023, Revenue Scotland sent a letter to Mr and Mrs Crawley headed "Closure Notice of enquiry under section 93 of the Revenue Scotland and Tax Powers Act 2014 (RSTPA 2014)" which stated that "Unfortunately, you (Peter & Victoria Crawley) have not met the repayment conditions. Therefore, the repayment of ADS made to you was not due." The letter further stated that "You must pay the total of

£20,539 (£19,440 tax plus £98 interest which was overpaid and additional interest of £1,001) within 30 days of this notice."

25. On 1 February 2023, Mr Crawley sent an email to Revenue Scotland as "notice to appeal the decision" set out in the letter of that date.

26. On 2 February 2023, Revenue Scotland sent a letter to Mr Crawley headed "Revenue Scotland: Notice of Review acknowledgement" asking for submission of further information. Mr Crawley responded stating that he would not be in the UK so an extension of time was granted.

27. On 4 April 2023, Mr Crawley sent Revenue Scotland his detailed submissions on the law and the guidance; the facts were not in dispute. In summary, he argued that the Third Property was their only home, and therefore residence, in the UK. Revenue Scotland's guidance uses the words "is usually" where it refers to the tests for determining what might be a main residence so there are other possibilities. The guidance indicated that it was possible that one might spend less time in the only or main residence "if you live away for work…during the week" and that that would be taken into account when determining what was an "only or main residence". The guidance also said that "It is highly unlikely" that a property would be an only or main residence if one spent no time there in the 18 month period or if it was rented out and not available. He argued that it did not say "impossible". Lastly, he advanced a number of interesting arguments on statutory interpretation arguing that the purpose of the legislation was to protect first time buyers in Scotland and Revenue Scotland's interpretation of the legislation did not do so for a number of reasons; the clear purpose was not to tax people in their position.

28. On 12 April 2023, Revenue Scotland sent letters headed "Revenue Scotland's view of the matter" to both Mr and Mrs Crawley which stated "the decision to reject your Additional Dwelling Supplement repayment claim, should be **upheld**. Payment of the amount of £20,539 should be made to Revenue Scotland."

29. On 25 May 2023, Revenue Scotland sent a letter to Mrs Crawley setting out its review conclusion stating that "Revenue Scotland's Conclusion decision is that the enquiry decision to reject the ADS repayment claim and request the amount of £20,539 (£19,440 tax plus £98 interest which was overpaid and additional interest of £1,001), should be **upheld**."

30. On 19 June 2023, Mr Crawley appealed to the Tribunal.

Discussion

31. The Tribunal was created by an Act of the Scottish Parliament and is, therefore, a creature of statute. Its powers are only those which are given to it expressly by statute.

32. In the case of an appeal of an appealable decision, section 244(2) of RSTPA provides that:-

> "The tribunal is to determine the matter in question and may conclude that Revenue Scotland's view of the matter in question is to be:-

(a) upheld,
(b) varied, or
(c) cancelled."

33. In determining the matter in question, the Tribunal must apply the law.

34. In this case, that includes paragraph 8(1) of Schedule 2A to the Act, the material parts of which read:-

"*Repayment of additional amount in certain cases*

8(1) Sub-paragraph (2) applies in relation to a chargeable transaction to which this schedule applies by virtue of paragraph 2 if—

(a) within the period of 18 months beginning with the day after the effective date of the transaction, the buyer disposes of the ownership of a dwelling (other than one that was or formed part of the subject-matter of the chargeable transaction),
(b) that dwelling was the buyer's **only or main residence at any time** during the period of 18 months ending with the effective date of the transaction, and
(c) the dwelling that was or formed part of the subject-matter of the transaction has been occupied as the buyer's only or main residence.

(2) Where this sub-paragraph applies—

(a) the chargeable transaction is to be treated as having been exempt from the additional amount, and

(b) if the buyer has made a land transaction return in respect of the transaction, the buyer may take one of the steps mentioned in sub-paragraph (3).

(3) The steps are—

(a) within the period allowed for amendment of the land transaction return, **amend the return accordingly**, or

(b) after the end of that period (if the land transaction return is not so amended), make a claim to the Tax Authority under section 107 of the Revenue Scotland and Tax Powers Act 2014 for repayment of the amount overpaid."

35. Paragraph 8A of Schedule 2A to the Act goes on to provide:-

"*Repayment of additional amount: spouses, civil partners and co-habitants replacing main residence*

8A(1) Sub-paragraph (2) applies in relation to a chargeable transaction to which this schedule applies by virtue of paragraph 2 if—

(a) there are only two buyers, and

(b) the buyers—

(i) are (in relation to each other) spouses, civil partners or cohabitants, and

(ii) are or will be jointly entitled to ownership of the dwelling that is or forms part of the subject-matter of the transaction.

(2) Paragraph 8 has effect in relation to the transaction as if—

(a) the reference in sub-paragraph (1)(a) of that paragraph to the buyer were a reference to either or both of the buyers, and

(b) the references in sub-paragraph (1)(b) and (c) of that paragraph to the buyer were references to **both of the buyers together.**

(3) For the purposes of sub-paragraph (1)(b)(i), two buyers are cohabitants if they live together as though married to one another."

36. We have highlighted in bold the key words.

37. This appeal concerns the condition, in paragraph 8(1)(b) of Schedule 2A, for the repayment of ADS.

38. The question is whether the Third Property was the only or main residence of both Mr and Mrs Crawley at any time during the period of 18 months ending with the effective date of the transaction to purchase the Second Property.

39. The burden of proof rests on Mr and Mrs Crawley and the standard of proof is the ordinary civil standard, which is the balance of probabilities.

40. Firstly, while the correspondence of Revenue Scotland dated 1 February 2023, 12 April 2023 and 25 May 2023 refers to a "claim", Mr and Mrs Crawley obtained a repayment of the ADS by virtue of an amendment to the LBTT return in terms of paragraph 8(3)(a) of Schedule 2A to the Act and section 83 of RSTPA and not by way of a "claim" in terms of paragraph 8(3)(b) Schedule 2A of the Act and section 107 of RSTPA.

41. Mr Crawley has correctly identified the key issue in his appeal as Revenue Scotland's interpretation of paragraph 8(1)(b) of Schedule 2A to the Act as set out in the Closure Notice, as follows:-

> "**Repayment Condition (b) – The property which is sold must have been occupied as your (Peter & Victoria Crawley) only or main residence in the 18 months (04 March 2019 – 03 September 2020) prior to the effective date of the new property transaction**".

42. Mr Crawley argued that the Third Property was the "only residence" of himself and Mrs Crawley and that there is no requirement in the Act for actual occupation of an "only residence".

43. He referred to the guidance of Revenue Scotland in support of his argument, including the following extract, submitting that the wording allows for situations in which

occupation of an only or main residence is not possible due to, for example, a global pandemic and emergency legislation:-

> "It is highly unlikely a property can be viewed as your only or main residence if you have spent no time there in the 18 month period or if the property was rented out and not available to you during this period."[1]

44. Revenue Scotland properly acknowledges that its guidance does not have the force of law. Nor does HMRCs' guidance to which we were also referred. Revenue Scotland does not seek to rely on the terms of the guidance in this appeal, although it was submitted at the hearing that its wording was "flexible and useful". As the Upper Tribunal pointed out in *HMRC v Sippchoice* [2020] UKUT 149 (TCC) statements in a Revenue Authority's (in that case HMRC) guidance is merely their interpretation of the law and no more. It is for the Tribunal to determine what the law means.

45. The starting point in this case is the fact that Mr and Mrs Crawley stayed in the Third Property for only one night in the period of 18 months ending with the effective date of their purchase of the Second Property.

46. The question for the Tribunal is whether that period of occupation qualifies as residence for the purpose of meeting the condition, at paragraph 8(1)(b) of Schedule 2A, for the repayment of ADS.

47. We agree with Mr Crawley that there is no express stipulation in paragraph 8(1)(b) of Schedule 2A for the occupation of an only or main residence.

48. However, that is not the end of the matter and we must look at what residence means.

49. The term "only or main residence" is not defined in the Act and there is no case law on this point beyond that of the First-tier Tribunal for Scotland; LBTT being a comparatively new tax.

50. There is, however, extensive UK jurisprudence in relation to this well-known term which is used in many UK taxes.

51. Relevant UK case law is applicable in determining the issue in this appeal in accordance with the Explanatory Notes to RSTPA which read:-

> "The effect of [the legislation] is that the jurisprudence concerning the proper bounds of the tax authority's role is imported into the devolved tax system. This jurisprudence includes not only case law from the UK jurisdictions but other English-speaking jurisdictions."

52. In *Simpson v HMRC* [2019] UKFTT 704 (TC) ("Simpson"), Judge Sinfield reviewed the relevant case law on residence as follows:-

[1] ADS legislation key terms | Revenue Scotland

"CASE LAW ON RESIDENCE

9. In *Fox v Stirk, Ricketts v Registration Officer for the City of Cambridge* [1970] 2 QB 463, the Court of Appeal considered whether students should be resident in the constituency of the University that they attended. In his judgment, Lord Denning MR cited a passage from the speech of Viscount Cave LC in *Levene v Inland Revenue Commissioners* [1928] AC 217:

> "… the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place'."

10. Lord Denning went on to say:

> "I derive three principles. The first is that a man can have two residences. He can have a flat in London and a house in the country. He is resident in both. The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. A short stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence. If he happens to be away for a holiday or away for the weekend or in hospital, he does not lose his residence on that account."

11. Further to this Lord Widgery commented:

> "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. In the words of the Oxford English Dictionary, it is concerned with something which will go on for a considerable time. 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.".

12. These comments are regarded as equally applicable to PPR [Principal Private Residence] relief and were relied on by the Court of Appeal in *Goodwin v Curtis* (1998) 70 TC 478. In that case, the taxpayer moved into the property in question as a stop-gap measure pending finding somewhere else to live. Millett LJ held in his judgment at 510:

> "Temporary occupation at an address does not make a man resident there. The question whether the occupation is sufficient to make him resident is one of fact and degree for the Commissioners to decide.
>
> The substance of the Commissioners' finding taken as a whole, in my judgment, is that the nature, quality, length and circumstances of the taxpayer's occupation of the [property] did not make his occupation qualify as residence."

13. In the same case, Lord Justice Schiemann said at 510:

> "… in order to qualify for the Relief a taxpayer must provide some evidence that his residence in the property showed some degree of

> permanence, some degree of continuity or some expectation of continuity."

53. Revenue Scotland argued that Mr Crawley cannot discharge the burden of proof as he must both prove occupation of the Third Property and demonstrate that that occupation was sufficient (in terms of duration, nature and quality) to take on a degree of permanence and continuity.

54. They argued that the occupation of the Third Property, for one night, cannot satisfy the general test set out by Lord Justice Schiemann [at 510] in *Goodwin v Curtis* ("Goodwin") (referred to in *Simpson*) of "some degree of permanence, some degree of continuity or some expectation of continuity".

55. Mr Crawley argued that the test set out by Lord Justice Schiemann was not applicable to this appeal which is concerned with an "only residence", not the determination of a "main residence" from more than one option.

56. We do not agree. The principles set out by the Court of Appeal in *Goodwin* apply in determining whether the occupation of a property qualifies as residence. As such, they are relevant to the determination of this appeal.

57. Mr Crawley nevertheless argued that, in any event, he had satisfied all elements of the test set out in *Goodwin*.

58. In particular he argued that, as the Third Property was purchased as a home for himself and Mrs Crawley and they had no other home, this was very strongly indicative of permanence.

59. We must, however, look at the statutory language and those words are not interchangeable with other words such as "home" in line with the principle elaborated by Lord Justice Millett [at 510] in *Goodwin,* as follows:

> "I do not regard it as helpful to substitute other words as glosses on statutory language by asking whether the [property] was his home or whether he lived there since he had nowhere else to live. He manifestly did live there but I do not consider that the Commissioners can be faulted for having reached the conclusion that he did not at any stage reside there…. The taxpayer's occupation was manifestly a stop gap measure pending the completion of his purchase of somewhere else to live."

60. Mr Crawley also argued that their intention to return to the Third Property, once his one-year contract was no longer renewed, was evidence of an expectation of continuity and the fact that they were able to spend a night there during lockdown was a strong indication of the continuity of their previous occupation as their only residence.

61. In *Yechiel v HMRC* [2018] UKFTT 683 (TC) the Tribunal observed [at 37] that, since the judgment of the Court of Appeal in *Goodwin*:-

"… cases have paid a significant amount of attention to the intentions of the taxpayer when they moved into the property. There have been a number of cases where short periods of residence (shorter than in this case) have, by virtue of the 'quality' of the residence, been held to have qualified the property as an 'only or main residence'."

(emphasis added)

62. The question of intention arose in *Cohen v HMRC* [2023] UKFTT 00090 (TC) ("Cohen"), on which Revenue Scotland relied, and in which the Tribunal considered a short period of occupation of 10 days.

63. The Tribunal found [at 29 and 31] that the key deciding factors were that:

(a) Mr Cohen had purchased the property with the intention that it should be his only or main residence, and

(b) by the time that he had moved into the property he knew that his occupation would only be temporary because he had decided to purchase another property.

64. The Tribunal also found [at 30] that the very short period of time that Mr Cohen had lived in the property was, in all the circumstances, indicative that his occupation was temporary.

65. Mr Crawley sought to distinguish *Cohen* on the facts, instead relying on *Morgan v HMRC* [2013] TC 02596 ("Morgan"), and the observation by the Tribunal [at 26] 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."

66. In *Morgan*, the Tribunal found the case to be finely balanced but decided that Mr Morgan had intended to make the property his residence, despite his actual occupation being for only a short period.

67. We find that the very short period of one night which Mr and Mrs Crawley occupied the Third Property on their return to the UK, for the purpose of overseeing work while their tenant was absent, does not demonstrate an intention to live there with some degree of permanence, some degree of continuity or some expectation of continuity.

68. Rather their intention on returning to the UK was, as communicated to the Immigration Authorities by Mr and Mrs Crawley, to live in the First Property. Indeed, that is what transpired and Mr and Mrs Crawley did not return to live in the Third Property at any time prior to the completion of their purchase of the Second Property.

69. In accordance with the judgment of the Court of Appeal in *Goodwin*, while occupation alone will not necessarily establish residence, there requires to be occupation, the nature, quality, length and circumstances of which are relevant factors in determining whether such occupation qualifies as residence. That is a question of fact and degree.

70. We find that the nature, quality, length and circumstances of Mr and Mrs Crawley's occupation of the Third Property did not amount to it being their only, or main, residence at any time during the requisite period of 18 months.

71. Therefore, the condition in paragraph 8(1)(b) of Schedule 2A to the Act for the repayment of ADS has not been met.

72. We find that the ADS has been properly charged under section 26A of, and Schedule 2A to, the Act.

73. We did consider Mr Crawley's various arguments about statutory interpretation. However, we find the wording of the legislation, when referring to an "only or main residence", to be clear and unambiguous. Lord Tyre and Judge Dean in *HMRC v Dundas Heritable Limited* [2019] UKUT 208 (TCC) having found that the wording in the legislation in that case was clear and unambiguous said at paragraph 18 that:

> 18. That being so, we consider that the observations of the House of Lords in *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 are in point. At page 235, Viscount Dilhorne stated:
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> "The existence of anomalies, if they exist, cannot limit the meaning to be attached to clear language in a statute".
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> At page 237, Lord Simon of Glaisdale observed:
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> "…In a society living under the rule of law citizens are entitled to regulate their conduct according to what a statute has said, rather than by what it was meant to say or by what it would have otherwise said if a newly considered situation had been envisaged".
>
> To the same effect, Lord Scarman stated (page 239):
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> "[Counsel] for the appellants sought to give the words a meaning other than their plain meaning by drawing attention to what he called the 'anomalies' which would result from giving effect to the words used by Parliament. If the words used be plain, this is, I think, an illegitimate method of statutory interpretation unless it can be demonstrated that the anomalies are such that they produce an absurdity which Parliament could not have intended, or destroy the remedy established by Parliament to deal with the mischief which the Act is designed to combat."
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> In *R v J* [2005] 1 AC 562, Lord Bingham of Cornhill (at page 15) similarly emphasised that even if a statute was regarded as having deficiencies, the court was not absolved from its duty to give effect to clear and unambiguous provisions."

74. Although we accept that when they purchased the Third Property Mr and Mrs Crawley intended to live in it when Mr Crawley returned to live in the UK, their one night of occupation while it was leased to a third party did not amount to residence. Whilst they owned the property they had no right to live in it at that time.

75. We find that the intention of the Scottish Parliament in respect of the repayment of ADS is clear from the words of the Act; that ADS is only repayable in the limited circumstances set out in paragraph 8(1) of Schedule 2A to the Act.

76. As this Tribunal said [at paragraph 38] in *Crawford v Revenue Scotland* [2022] FTSTC 3, a case upon which Revenue Scotland rely:-

> "We accept that had Dr Crawford sold the first property the day after the effective date or if the parties had cohabited the ADS would have been repaid. That is because the provisions are indeed tightly drawn and the exemption and repayment possibilities limited. That does not make them absurd, illogical or unreasonable."

77. Unfortunately for Mr and Mrs Crawley they simply do not fall within the limited circumstances within which the Scottish Parliament intended to permit the repayment of ADS.

78. The legislation contains no provisions giving Revenue Scotland, or the Tribunal, the power to extend those circumstances.

79. This Tribunal has no discretion and must apply the law as it has been enacted by the the Scottish Parliament.

80. We can understand why Mr and Mrs Crawley might consider the law to be unfair.

81. However, in its Statement of Case, Revenue Scotland is correct to quote *Dr Goudie and Dr Sheldon v Revenue Scotland* [2018] FTTSC 3 in which, having quoted from the Upper Tribunal in *HMRC v Hok* [2012] UKUT 363 (TCC), it is stated [at 67] "This Tribunal does not have jurisdiction to consider…fairness."

82. It does not.

Decision

83. For all these reasons the appeal is dismissed and the decision of Revenue Scotland is upheld.

84. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to Rule 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017. In terms of Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016, any such application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

LOUISE CARLIN
Legal Member

RELEASE DATE: 18 January 2024