FIELD COURT TAX CHAMBERS

What is a main residence?[1]

Varied case law can lead to unrealistic expectations

Everybody is familiar with the capital gains tax private residence exemption in TCGA 1992 s 222. However there remains considerable uncertainty about what represents a main residence.

A fundamental condition is that the property must first be a *residence*.

The starting point in all the authorities on this matter is always the judgment of Lord Widgery in *Fox v Stirk* [1970] 3 All ER 7 who said that 'a residence' means:

- the place where a man is based or continues to live;
- where he sleeps, shelters and has his home;
- something other than temporary accommodation; and
- there is some expectation of continuity with a degree of permanence.

The subject has recently been considered by the FTT in the case of *B Cohen v HMRC* [2023] UKFTT 90 (TC) (see *Tax Journal*, 17 February 2023), although not for the purposes of capital gains tax. It was in respect of the relief from the 3% SDLT surcharge which does not apply where the property purchased is a replacement for the purchaser's only or main residence.

The trouble is that the decisions of the courts on the meaning of a main residence are so variable that it gives people confidence that their hopeless arguments might succeed. Some of them do.

In the case of Cohen, Mr Cohen moved into a house for ten days. He claimed that it was his only or main residence and was therefore not liable to the 3% SDLT surcharge on the purchase of another property. However, before he moved in he had already decided that he was not going to live there and was in the process of purchasing another property where he did intend to live.

It is difficult to see how he could possibly have thought that he satisfied the above tests – or perhaps any of them – for the house to be his only or main residence, or indeed a residence at all. However, he would no doubt have been encouraged by the case of *Morgan v HMRC* [2013] UKFTT 181 (TC).

Mr Morgan was getting married. He was in the process of purchasing a property which would be the matrimonial home. He was living with his fiancée's family but unfortunately two weeks before the purchase of the intended matrimonial home, the relationship ended. So he went to live with his parents. Nevertheless, he carried on with the purchase of the property and moved in for two weeks specifically to prepare the house for renting and then moved back to live with his parents. The property was let and then sold. He claimed the exemption – to which many

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might have thought: you cannot be serious! However, the tribunal decided that Mr Morgan had lived in the property for two weeks and this was enough to qualify it as a residence.

Mr Cohen might also have known about *Core v HMRC* [202] UKFTT 440 (TC). Mr and Mrs Core bought a property and after they moved in they were soon approached by somebody who made an offer for the property. They rejected the offer – and did so again when the offer was repeated. However, about a month later, the purchaser made a higher offer which they accepted. They had occupied the property for six weeks and the tribunal found that this was enough to represent a residence.

Mr Cohen may have been aware that there are lots of other cases where the taxpayer has lived in a property for a fairly long period as their only home, but the tribunals have said that it still did not qualify as a residence. But even though his case may seem to be completely hopeless you can hardly blame Mr Cohen for giving it a try.

However, I think he should be grateful that he lost. If he had won and HMRC had appealed to the Upper Tribunal, he would have been at very serious risk of liability for costs.

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