Neutral Citation: [2022] UKFTT 00271 (TC)

Case Number: TC08563

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/01029

Land Transaction Tax – whether higher rate applicable – yes – whether closure notice properly notified – yes – whether liable to inaccuracy penalty – yes – whether penalty properly calculated – no.

Heard on: 13 June 2022
Judgment date: 11 August 2022

Before

TRIBUNAL JUDGE BEDENHAM

Between

CARL JAMES

Appellant

and

THE WELSH REVENUE AUTHORITY

Respondent

Representation:

For the Appellant: In person

For the Respondents: Sarah Black of counsel.

DECISION

INTRODUCTION

1. This is an appeal against:

   (1) a closure notice, issued under s 50 of the Tax Collection and Management (Wales) Act 2016 ("TCMA 2016), dated 25 August 2020 by which the Respondent ("the WRA") amended the Appellant's tax return so that it recorded £2400 of Land Transaction Tax ("LTT") as being due; and

   (2) a penalty in the sum of £468 issued under ss 129 and 141 of TCMA 2016.

2. With the consent of the parties, the hearing was conducted remotely using the Tribunal's video hearing system. The documents to which I was referred were those contained in a hearing bundle running to 210 pages and those provided by the Appellant as attachments to an email of 9 June 2022 (including various Land Registry documents). I was also provided with an authorities bundle running to 189 pages, various sections of the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 ("LTTA 2017"), the Explanatory Notes for the LTTA, and various guidance issued by the WRA. It is obviously much preferable if all documents that the parties wish to rely on are contained in a single electronic bundle rather than, as here, some documents being sent to the Tribunal simply as attachments to emails. I also note that this was yet another case in which the pagination in the electronic bundle did not match the PDF page number. This was because the index at the beginning of the bundle had not been paginated, and various pages had been paginated by reference to numbers and letters (e.g. there was not only page 58 but also pages 58A, 58B etc). It is much easier to navigate and cross-reference the bundle during the hearing if the pagination matches the PDF page number. Again, I ask those responsible for preparation of electronic bundles to bear this in mind.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

BACKGROUND

4. The following background was not in dispute:

5. Mr and Mrs James were the owners and occupiers of an end-of-terrace property known as Danderi Flat. Danderi Flat was their main residence.

6. The neighbouring property within the terrace, Danderi House, was, at all material times until 25 October 2019, owned by Ms. Laura Ashley. Danderi Flat and Danderi House shared a partition wall and part of Danderi Flat extended above Danderi House (referred to as being a "Flying Freehold"). Chimney cavities for Danderi House were located on top of the roof covering Danderi Flat.

7. A third property, Danderi Cottage, was also part of the terrace. Danderi Cottage shared a partition wall with Danderi House.

8. At some point in the past the properties had been a single dwelling. However, for many years they had been partitioned (with access between the properties having been bricked up) and each had separate titles.

9. On 25 October 2019, Mr and Mrs James purchased Danderi House from Ms Ashley for £80,000 (with exchange and completion taking place on the same day). Mr and Mrs James immediately set about removing the partition between Danderi Flat and Danderi House so that there would be a single property to be referred to simply as "Danderi".

10. The present dispute relates to whether higher rate LTT was payable in relation to the purchase of Danderi House.

11. On 19 August 2019, Mr James submitted an online enquiry to the WRA "seeking guidance" as to whether he (Mr James) was correct in his understanding that higher rate LTT was not due because the same main residence exception applied. In this enquiry, Mr James explained the circumstances surrounding the purchase in some detail.

12. On 20 August 2019, the WRA replied to Mr James stating that, on the basis of the information he had provided, the WRA's view was that higher rate LTT applied to the purchase. The WRA set out its reasons for forming this view.

13. On 16 September 2019, a solicitor acting on behalf of Mr and Mrs James wrote to the WRA asking the WRA to reconsider its position and set out the steps that Mr and Mrs James intended to take in relation to the combined property.

14. On 19 September 2019, the WRA replied to the 16 September 2019 correspondence. The WRA noted the intention to:

> (1) reopen blocked doorways so that the property was once again a single dwelling;
>
> (2) contact the local authority to arrange for the property to be classed as one dwelling for council tax purposes;
>
> (3) notify all service providers that the property is a single dwelling; and
>
> (4) arrange the house insurance on the basis that the property is a single dwelling

However, the WRA went on to observe:

> "it is evident that this will all take place after the purchase. Therefore, despite your client's intentions, if the fact remains that the property is a separate dwelling to the main residence at the time of purchase then it is our view that higher rates will likely apply to the transaction.

> The transaction must be assessed according to the position as at the effective date and is not based on intention. If there are two separate dwellings in existence at the effective date then that is what the transaction tax liability must be based on."

15. On 25 October 2019, the sale of the property was completed. That was the effective date of the transaction for the purposes of LTT.

16. On 29 October 2019, Mr James sent to the WRA a document headed "LTT Exemption Query/Appeal" and supporting documents. Mr James again explained the circumstances surrounding the purchase in some detail and explained his rationale for forming the view that higher rate LTT was not chargeable on the purchase. Mr James also submitted a request for a tax opinion (although the WRA's website stated that a reply to a request for a tax opinion will usually be within 25 working days). The LTT exemption/appeal document and the request for a tax opinion were submitted by way of an online enquiry form. The last box of the form stated "please provide details for your preferred method of contact…By providing your email address you are consenting for the WRA to correspond with you via email". Mr James entered his email address into that box.

17. On 8 November 2019, Mr James submitted an online enquiry with the WRA asking them to "clarify the position regarding the KTT/fines/penalties". Again, the last box of the form stated "please provide details for your preferred method of contact…By providing your email address you are consenting for the WRA to correspond with you via email". Mr James again entered his email address into that box.

18. On 8 November 2019, the LTT return for the purchase was filed. The return stated that the transaction was a higher rate transaction but that the amount due by way of LTT was £0. In a letter of the same date, a solicitor acting for Mr and Mr James stated:

> "…in line with your the Welsh Revenue Authority's opinion in this matter we have stated that the property is a higher rates residential property. We have however in the 'about the calculation' section advised that our clients do not agree with the tax calculated and that the self-assessed tax due is zero".

19. On 22 November 2019, the WRA wrote to Mr James in response to his letter of 29 October 2019. The WRA explained that it could not provide a tax opinion because the relevant return had already been filed. The WRA further stated that it was unable to accept any appeal because the guidance previously provided (in relation to whether the purchase attracted higher rate LTT) was not an appealable decision.

20. On 22 November 2019, the WRA wrote to Mr and Mrs James notifying them that an enquiry was being opened into the LTT return pursuant to s43 TCMA 2016.

21. On 27 November 2019, Mr James submitted an online enquiry with the WRA informing it "I do not have an advisor with reference to the current ongoing enquiry". Again, the last box of the form again stated

"please provide details for your preferred method of contact…By providing your email address you are consenting for the WRA to correspond with you via email". Mr James again entered his email address into that box.

22. On 20 December 2019, the WRA wrote to Mr and Mrs James notifying them that the WRA's "findings so far" were that the higher rate of LTT applied to the purchase. The WRA set out its reasoning and gave Mr and Mrs James an opportunity to respond.

23. On 5 January 2020, Mr James replied to the WRA repeating his view that higher rate LTT was not payable (and repeating the reasons why he held that view).

24. On 24 January 2020, the WRA wrote to Mr James (following a telephone call that took place earlier that day) asking a number of questions. Mr James responded on 30 January 2020. The pertinent questions and answers were as follows:

(1) Q: "Did your agent advise you of the rates that applied to the transaction? If so, what advice did they give you?"

A: "Our Agents initially advised us that the fees were £2,400 however after I explained the situation, they attempted to seek further guidance from the WRA via a forum where your representatives were present as they also believed that the LTT was unjust given my circumstances. I was concerned about the costs implications of our Agents taking on this matter and therefore advised them that due to this, I would take this matter forward personally."

(2) Q: "Did you or your agent seek further guidance in the tax position before filing the return, and if so, from whom and what did this advice consist of?"

A:"Not as far as I'm aware"

(3) Q: "I note that your return has been filed showing that the correct rate of tax is the higher rate", but the automatic calculation of £2,400 has been overridden (you have chosen to disagree with the tax calculated) and replaced with £0. Did you instruct your agent to file the return in this way?"

A: "Our Agent and I were concerned about the filing deadline and I was still awaiting a response from the WRA to my enquiry regarding this matter. I also contacted you on several occasions to try to clarify the correct course of action regarding this and did not particularly feel that I was given clear guidance in respect of this matter as one agent advised that penalties were on hold due to an appeal being considered even though I later received a letter stating that I hadn't officially appealed at that stage. Eventually when filing our agent did tell us that they could file this as a higher rate LTT by [sic] with an option stating that we did not agree as we believed that we qualified for the interest in the same main residence relief. At this point we had already had an open case with the WRA."

(4) Q: Did you understand the purpose of the rules as I've set them out above? Were you aware that your interpretation was not in line with ours?"

A: "I believed that I understood the rules and I did not know that your interpretation was different from mine".

25. On 20 April 2020, the WRA wrote to Mr and Mrs James stating that, due to the pandemic, the enquiry into the LTT return was being put temporarily on hold.

26. On 15 July 2020, the WRA wrote to Mr James only stating that the enquiry had now been "taken off hold". On the same day, the WRA wrote to Mr James only notifying him of an intended penalty (in the amount of £468).

27. On 16 July 2020, Mr James emailed the WRA to express his surprise and disappointment at the decision to issue a penalty to him. Mr James again set out his view as to why higher rate LTT was not due on the purchase and why, in his view, he had not acted carelessly. Mr James then made a freedom of information request before stating "I will accept all documentation via email" (and provided an email address).

28. In July and August, the WRA sent to Mr James responses to his freedom of information request.

29. On 25 August 2020, the WRA sent to Mr James (by email) the closure notice and the penalty. These documents were not sent to Mrs James.

30. Mr James requested that the WRA conduct a review of the decision.

31. The WRA did not notify Mrs James of the review request.

32. On 26 February 2021, the WRA issued to Mr and Mrs James a Review Conclusion Notice. By that Notice, the WRA confirmed their view that the acquisition of Danderi House was subject to higher rate LTT because:

> "The dwelling you purchased was not your dwelling until the day of the purchase; it was the vendor's dwelling. Had the dwelling already been yours, there would have been no need for a land transaction to take place at all. So, "immediately before" the effective date, you did not:
>
> (a) have a major interest in that dwelling; or
>
> (b) occupy that dwelling as your main residence.
>
> both of which are necessary to qualify for the exception in question, under Para 7(b) Sch 5 [LTTA 2017]."

In relation to the penalty, the WRA stated its view that:

> "…a full and detailed response regarding the tax position had been issued to you via email on 20 August 2018. This response was some 3 months before the return in question was filed. It is therefore our view that you were in possession of information that would have allowed you to file a complete and accurate return at that time. It therefore remains our

> view that the careless penalty issued on this occasion was correct."

33. On 28 March 2021, Mr James appealed to the Tribunal.

34. On 25 February 2022, the WRA notified Mrs James of Mr James' appeal and sent to her the closure notice, the penalty notice and a copy of Mr James' notice of appeal.

THE CORE ISSUES

35. This appeal requires the following core issues to be determined:

Closure Notice

(1) Was the Closure Notice properly issued to Mr James given it was sent to him by email?

(2) Is the validity of the Closure Notice issued to Mr James compromised by any failings by the WRA in relation to Mrs James?

(3) Was higher rate LTT due on the purchase of Danderi House, in particular:

(a) Does the interest in the same main residence exception (paragraph 7 LTTA 2017) apply?

(b) Does the replacement of main residence exception (paragraph 8 LTTA 2017) apply?

The penalty

(4) Was the Penalty Notice properly issued to Mr James given it was sent to him by email?

(5) Is the validity of the Penalty Notice issued to Mr James compromised by any failings by the WRA in relation to Mrs James?

(6) Was there an inaccuracy in the LTT return?

(7) Was the inaccuracy careless on the part of the Appellant?

(8) Was the amount of the penalty correctly calculated including properly taking into account reduction for disclosure?

THE LAW

LTT

36. Pursuant to LTTA 2017, from 1 April 2018, LTT replaced Stamp Duty Land Tax in Wales.

37. By s 17 LTTA 2017, a land transaction is chargeable to LTT unless an exemption applies.

38. There was no dispute that the purchase of Danderi House was a land transaction chargeable to LTT. The issue in dispute is whether higher rate LTT applies.

39. Section 24 LTTA 2017 requires the Welsh Ministers to specify the tax bands and rates in the case of the following types of chargeable transactions:

(1) residential property transactions;

(2) higher rate residential property transactions;

(3) non-residential property transactions.

40. Section 24(6) LTTA 2017 provides:

> "(6) A chargeable transaction is a residential property transaction if—
>
> (a) the main subject-matter of the transaction consists entirely of an interest in land that is residential property, or
>
> (b) where the transaction is one of a number of linked transactions, the main subject-matter of each transaction consists entirely of such an interest."

41. Section 24(6) is, however, subject to s 24(4) which provides:

> "But if Schedule 5 applies to a chargeable transaction it is a higher rates residential property transaction."

42. By s 72(1) a building is "residential property" if it is used or suitable for use as one or more dwellings, or is in the process of being constructed or adapted for such use."

43. Paragraph 3 of Schedule 5 to LTTA 2017 provides in material part:

> "(1) A chargeable transaction is a higher rates residential property transaction if—
>
> (a) it falls within sub-paragraph (2), and
>
> (b) paragraph 5 applies.
>
> (2) A transaction falls within this sub-paragraph if—
>
> (a) the buyer is an individual,
>
> (b) the main subject-matter of the transaction consists of a major interest in a dwelling ("the purchased dwelling"), and
>
> (c) the chargeable consideration for the transaction is £40,000 or more.
>
> …
>
> (5) This paragraph applies subject to the exceptions provided for in—
>
> (a) paragraph 7 (interest in same main residence exception), and
>
> (b) paragraph 8 (replacement of main residence exception).
>
> (6) In this Part of this Schedule 'purchased dwelling' has the meaning given by sub-paragraph (2)(b)."

44. Paragraph 5 of Schedule 5 to LTTA 2017 provides in material part:

> "(1) This paragraph applies in relation to a transaction if, at the end of the day that is the effective date of the transaction—
>
> (a) the buyer has a major interest in a dwelling other than the purchased dwelling, and
>
> (b) that interest has a market value of £40,000 or more."

45. Paragraph 6 of Schedule 5 to LTTA 2017 provides that where there are two or more buyers who are individuals in a transaction, the transaction is a higher rates residential property transaction if paragraph 3 applies in relation to any one of the buyers.

46. Paragraph 7 of Schedule 5 to LTTA 2017 provides:

> "A transaction is not a higher rates residential property transaction under paragraph 3 if the main subject-matter of the transaction is a major interest in a dwelling—
>
> (a) in which, immediately before the effective date of the transaction, the buyer or the buyer's spouse or civil partner had another major interest, and
>
> (b) which, immediately before and after the effective date of the transaction, is the buyer's only or main residence."

47. Paragraph 8 of Schedule 5 to LTTA 2017 provides in relevant part:

> "(1) A transaction is not a higher rates residential property transaction under paragraph 3 if the purchased dwelling is a replacement for the buyer's only or main residence.
>
> (2) For the purposes of this paragraph, the purchased dwelling is a replacement for the buyer's only or main residence if—
>
> (a) on the effective date of the transaction ("the transaction concerned") the buyer intends the purchased dwelling to be the buyer's only or main residence,
>
> (b) in another land transaction ("the previous transaction"), the effective date of which was during the period of 3 years ending with the effective date of the transaction concerned, the buyer or the buyer's spouse or civil partner at the time disposed of a major interest in another dwelling ("the sold dwelling"),
>
> (c) immediately after the effective date of the previous transaction, neither the buyer nor the buyer's spouse or civil partner had a major interest in the sold dwelling,
>
> (d) at any time during the period of 3 years referred to in paragraph (b) the sold dwelling was the buyer's only or main residence, and
>
> (e) at no time during the period beginning with the effective date of the previous transaction and ending with the effective date of the transaction concerned has the buyer or the buyer's spouse or civil partner acquired a major interest in

any other dwelling with the intention of it being the buyer's only or main residence.

…

(4) For the purposes of this paragraph, the purchased dwelling may become a replacement for the buyer's only or main residence if—

(a) on the effective date of the transaction ("the transaction concerned") the buyer intended the purchased dwelling to be the buyer's only or main residence,

(b) in another land transaction the effective date of which is during the period of 3 years beginning with the day after the effective date of the transaction concerned, the buyer or the buyer's spouse, former spouse, civil partner or former civil partner disposes of a major interest in another dwelling ("the sold dwelling"),

(c) immediately after the effective date of that other land transaction, neither the buyer nor the buyer's spouse or civil partner has a major interest in the sold dwelling, and

(d) at any time during the period of 3 years ending with the effective date of the transaction concerned the sold dwelling was the buyer's only or main residence.

…"

48. Paragraph 36 of Schedule 5 sets out the rules for determining when a building will be a "dwelling", these include that a building or part of a building counts as a dwelling if it is used or suitable for use as a dwelling, or it is in the process of being constructed or adapted for such use.

49. Sections 37-40 LTTA 2017 apply to a land transaction where there are two or more buyers who are or will be jointly entitled to the interest acquired.

50. Section 37(2) sets out the "general rules" which include that "anything required or authorised to be done in relation to the buyer must be done in relation to all of them".

51. Section 39 LTTA 2017 provides in relevant part:

"(1) If WRA issues a notice of enquiry under section 43 of TCMA into a return—

(a) the notice must be issued to each of the buyers whose identity is known to WRA;

…

(c) any closure notice under section 50 of TCMA must be issued to each of the buyers whose identity is known to WRA;

…

(2) A WRA determination under section 52 of TCMA relating to the transaction must be made against all the buyers and is not effective against any of them unless notice of it is issued under that section to each of them whose identity is known to WRA.

(3) A WRA assessment under section 54 or 55 of TCMA relating to the transaction must be made in respect of all the buyers and is not effective in respect of any of them unless notice of it is issued under section 61 of TCMA to each of them whose identity is known to WRA."

52. Section 40 LTTA 2017 provides in relevant part:

"…

(3) Where WRA undertakes a review of an appealable decision relating to the transaction following such a request made by some (but not all) of the buyers—

(a) notice of the review must be issued by WRA to each of the other buyers whose identity is known to WRA;

(b) any of the other buyers may be a party to the review if they notify WRA in writing;

(c) notice of WRA's conclusions under section 176(5), (6) or (7) of TCMA must be issued to each of the buyers whose identity is known to WRA;

(d) section 177 of TCMA (effect of conclusions of review) applies in relation to all of the buyers.

(4) In the case of an appeal under Part 8 of TCMA relating to the transaction—

(a) the appeal may be brought by any of the buyers;

(b) notice of the appeal must be issued by WRA to each of the buyers who are not bringing the appeal and whose identity is known to WRA;

(c) any of the buyers are entitled to be parties to the appeal;

(d) the tribunal's determination under section 181 of TCMA binds all the buyers."

53. Section 190 TCMA 2016 sets out further requirements in relation to the issuing of notices by the WRA including:

"(2) The notice may be issued to the person –

(a) by being delivered personally to the person,

(b) by leaving it at the person's proper address.

(c) by being sent by post to the person's proper address, or

(d) where subsection (3) applies, by sending it electronically to an address provided for that purpose.

(3) This subsection applies where the person to whom the notice is to be issued has agreed in writing that it may be sent electronically."

The penalty

54. Section 129(1) TCMA 2016 provides that a person is liable to a penalty where that person gives WRA a document and conditions 1 and 2 are satisfied.

55. Section 129(2) TCMA 2016 provides that condition 1 is that the document contains an inaccuracy which amounts to or leads to, *inter alia*, "an understatement of a liability to a devolved tax".

56. Section 129(3) TCMA 2016 provides that condition 2 is that the inaccuracy was deliberate or careless on the person's part.

57. Section 129(4) TCMA 2016 explains that an "inaccuracy is careless on a person's part if it is due to the person's failure to take reasonable care".

58. By s130 TCMA 2016, the maximum penalty for a deliberate inaccuracy is 100% of the potential lost revenue, and for a careless inaccuracy 20% of the potential lost revenue.

59. Section 139 TCMA 2016 provides for the reduction of a penalty where a person makes a qualifying disclosure. The amount of the reduction depends on whether the disclosure is prompted or unprompted and the quality of the disclosure.

60. Section 140 TCM 2016 permits the reduction of a penalty where there are "special circumstances".

61. Section 141 provides that where a person becomes liable to a penalty, WRA must assess the penalty and issue a notice to the person of the penalty assessed (which notice must set out the period and the transaction in relation to which the penalty has been assessed). An assessment of a penalty must be made before the end of the period of 12 months running from the date calculated in accordance with s141(3).

BURDEN AND STANDARD OF PROOF

62. In relation to the closure notice, the WRA submitted that it has to prove that the closure notice was properly issued but, thereafter, the burden shifts to the Appellant to prove that an incorrect amount of tax has been assessed.

63. In relation to the penalty, the WRA submitted that bears the burden of proof throughout.

64. The Appellant did not make any submissions in relation to the burden of proof.

65. I agree with the WRA's submissions in relation to the burden of proof. The standard of proof is the ordinary civil standard.

THE WRA'S CASE

66. In relation to whether the Closure Notice was properly issued to Mr James by being sent to him by email on 25 August 2020, the WRA submitted:

(1) Mr James had, by providing an email address when completing the contact form in relation to the enquiry, consented to receiving the closure notice by email. He has also on 16 July 2020, agreed to receive "all documentation" by email.

(2) In any event, the WRA is not limited to issuing notices in the ways set out in s 190 TCMA 2016, noting in particular the language used in that section - "may be issued". The WRA referred to *R (OAO Spring Salmon Seafood Ltd) v* IRC [2004] BTC 8 at paragraph 33 and *Astar Services Ltd v* HMRC [2018] UKFTT 463 (TC) at paragraph 51 (both of which cases related to different albeit similar legislative provisions). However, the WRA acknowledged that where the methods of notification in s 190 are not followed, it may be necessary to adduce evidence that the notice was actually received.

(3) Further and in any event, the Appellant *did* receive the closure notice by email. The Appellant acknowledged as much and, consistent with the principles summarised in paragraphs 55-59 of *Haworth v HMRC* [2018] EWHC 1271 (Admin), an error in the manner of service ought not to lead to the closure notice being invalidated.

67. In relation to whether the validity of the Closure Notice issued to Mr James was compromised by any failings by the WRA in relation to Mrs James, the WRA acknowledged:

(1) that s 39(1)(c) states that a closure notice must be issued to each of the buyers whose identity is known;

(2) the closure notice was not sent to Mrs James until February 2022 (when Mrs James was notified of Mr James' appeal)

but submitted:

(1) whereas s39(2) and s39(3) LTTA 2017 specify that unless certain action is taken against all buyers, that action will not be effective against any of the buyers, s39(1)(c) does not specify any such consequence. This must have been a deliberate choice by the Senedd;

(2) on any event, Mrs James was sent the closure notice in February 2022; and

(3) therefore, any failings in relation to Mrs James have no consequence for the action taken in relation to Mr James. Again, reference was made to the principles summarised in *Haworth.*

68. In relation to higher rate LTT, the WRA submitted that the purchase of Danderi House satisfied the criteria in paragraphs 3 and 5 of Schedule 5, namely:

(a) the purchasers were individuals (being Mr and Mrs James);

(b) the main subject matter of the transaction consisted of a major interest in a dwelling (being the purchase of Danderi House);

(c) the chargeable consideration was £40,000 or more (the consideration paid for Danderi House being £80,000); and

(d) at the end of the day on the effective date of the transaction (i.e., at end of 25 October 2019), Mr and Mrs James had a major interest in a dwelling other than the purchased dwelling (this other dwelling being Danderi Flat) with a market value of £40,000 or more.

such that higher rate LTT was due on that purchase unless an exception applied.

69. To the extent Mr James sought to argue that Danderi House was not a "dwelling", this was without merit. With or without a kitchen, Danderi House was used or suitable for use as a dwelling and therefore fell within the definition of a dwelling set out in s37 LTTA 2017.

70. In relation to the application of the same main residence exception (paragraph 7 LTTA 2017), the WRA submitted:

(1) Paragraph 7(a) requires that:

(a) the buyer or their spouse/civil partner have a major interest in the purchased dwelling (i.e. Danderi House) immediately before the effective date of the transaction; and

(b) immediately before and after the effective date of the transaction, the purchased dwelling (i.e. Danderi House) is the buyer's only or main residence.

(2) Mr and Mrs James did not have a major interest in Danderi House immediately before the effective date of the transaction; and

(3) immediately before the effective date, Danderi House was not the main or only residence of either Mr or Mrs James.

71. In relation to the application of the replacement of main residence exception (paragraph 8 LTTA 2017), the WRA submitted:

(1) paragraph 8(2)(a) is not satisfied because on the effective date of the purchase of Danderi House, Mr and Mrs James did not intend to Danderi House to be their only or main residence. Rather, they intended for a yet to be created amalgamated dwelling to be their main residence – reference was made to *Moaref and Mozhdeh v HMRC* [2020] UKFTT 0396 (TC);

(2) paragraph 8(2)(b) is not satisfied because Mr and Mrs James had not disposed of a major interest in another dwelling (i.e. they did not dispose of their interest in Danderi Flat). Discharging the mortgage and obtaining a loan secured over the (to be) amalgamated properties does not amount to a disposal of a major interest; and

(3) paragraph 8(2)(c) is not satisfied because immediately after the effective date of the purchase of Danderi House, Mr and Mrs James continued to have a major interest in Danderi Flat. The amalgamation of the titles of Danderi Flat and Danderi House did not take place until 25 February 2020, and documents submitted in evidence by the Appellant supported that the Appellant did not know in advance that the Land Registry would agree to amalgamation.

72. In relation to whether the validity of the Penalty Notice issued to Mr James was compromised by any failings by the WRA in relation to Mrs James, the WRA submitted it was not. The WRA was perfectly entitled to assess Mr James only to a penalty. Even if there was a failing (which was not accepted), that should not lead to invalidity of the penalty as against Mr James. The WRA again relied on the principles summarised in *Haworth.*

73. In relation to whether there was an inaccuracy in the LTT return, the WRA submitted there was. The LTT due was £2400 whereas it had been declared as £0.

74. In relation to whether the inaccuracy was careless on the part of Mr James, the WRA submitted that it was given that Mr James knew that the WRA disagreed with his approach (because they had told him as much) and he had no proper basis upon which to form the view that he did nor is there any evidence that he received professional advice supporting the position he adopted.

75. As to the amount of the penalty, the WRA:

(1) Initially submitted that this was a "prompted" case because Mr James had, on the LTT return, declared this as a higher rates transaction but had reduced the amount payable to zero without further explanation in the "free text" box. The WRA later acknowledged that at the time that Mr James filed the return there was no free text box. Ultimately, given Mr James' solicitor wrote to the WRA on the same say as the return was filed, the WRA accepted that this was an unprompted case.

(2) A 70% reduction was applied for disclosure. The reduction was not given because there were occasions on which the WRA had to chase Mr James up for answers in relation to some of its questions and because Mr James has not "conceded that [the] return is incorrect".

(3) There are no "special circumstances" justifying a further reduction.

THE APPELLANT'S CASE

76. In his grounds of appeal, the Appellant set out the following:

> "[Purchasing] Danderi House…was our only means of extending our existing main residence and to provide an adequate sized family home and this particular land transaction was completed on Friday 25th October 2019…
>
> Danderi House is an extension of our only main residence at the point of completion (effective date) with regards to the property as there was already a concealed internal doorway between the two properties that was exposed on the effective date…I feel the need to reiterate that there was no conversion of the properties required apart from opening up the one concealed internal doorway mentioned above.

…we sought a mortgage lender who was willing to partially finance the purchase price of Danderi House but with specific conditions attached the proposed mortgage offer including the amalgamation and valuation of one combined property (i.e. Danderi Flat & Danderi House) as a whole and the arrangement of home insurance covering the one combined dwelling which was in place before the two properties became one single dwelling on 25th October 2019…In addition to this I must point out that a repayment of our existing mortgage balance should be taken as an effective 'deemed sale' by ourselves to ourselves via a 'real world' security interest transaction with regards to our previous residence Danderi Flat. We had agreed a new residential mortgage on the combined properties which required the repayment of our previous residential mortgage relating to Danderi Flat in which we also incurred adverse early repayment exit fees due with only six months left on the mortgage term. This was necessary to ensure the funds were released to pay for the newly acquired property via a new mortgage agreement by our new lender Swansea Building Society. An application to amalgamate the two properties was made at the earliest opportunity to and accepted and finalised on the 12th February 2020 by Land Registry after the property sale had been completed."

77. The Appellant then raised the following grounds of appeal:

"**Interest main residence exception - para 7 (a&b) of Sch 5 [LTTA 2017]:**

…

The major interest in a dwelling is the combined dwelling that existed on the effective date comprising our existing interest in Danderi Flat and the newly acquired interest for Danderi House which is our only main residence.

We satisfy the "another major interest" requirement (7a) by means of our interest in Danderi Flat contained within the grounds of the external walls of the combined single dwelling at the 25/10.19. There is no specific exclusion of the major interest being a separate dwelling prior to the purchase of another dwelling that is to be combined to one single dwelling as in my case but rather the emphasis here is on meeting the only main residence criteria.

In satisfying the criteria (7a) above then we clearly satisfy the requirements (7b) as Danderi Flat has only ever been our one and only main residence.

Furthermore, the WRA guidance relating to LTTA/8150 emphasise the importance of the main residence through this technical guidance and explicitly states in paragraph four… 'The rules will not cover cases where a person acquires a different or additional interest in a dwelling <u>that is not a main residence'.</u> The facts in this case clearly show that this does not apply in our case as there is overwhelming evidence to prove beyond reasonable doubt that Danderi House was to be

classed as our intended or actual main residence at all times during this process.

…"

"Replacement of main residence under Para 8 (2a-2e) [LTTA 2017]:

"I also believe that we have potentially met all the requirements of Para 8 (2a-2e) Sch 5 [LTTA 2017] provide that 2b us satisfied by the repayment of the mortgage for the single property Danderi Flat taken as a deemed 'land transaction' disposal. This is a realworld interest of a "security interest" disposal that should satisfy this requirement given the unique circumstances in relation to this case and the inability to actually dispose of Danderi Flat due to the eventual amalgamation…

..I also wish to refer you to the WRA guidance below regarding LTT/8100 and wish to state that we also meet all of the reasons with reference to Frost v Feltham (1981) 1 W.L.R. 452 shown in your guidance to indicate that Danderi (formerly Danderi Flat & Danderi House) was our main residence on the 25th October 2019 (i.e. effective date for LTT liability) and clearly evidenced by various transactions such as the residential mortgage now in placed that was also agreed before the effective/completion date.

…"

78. In his grounds of appeal, the Appellant also referred to "discrimination against my human rights to provide an adequate sized family home". At the hearing, the Appellant confirmed he did not wish to pursue that argument.

79. Mr James also stated during the hearing that he relied on WRA guidance as supporting that Danderi House was not a dwelling as it had no kitchen at the time of purchase. I note at this stage, that this was not a point raised in the grounds of appeal and was not consistent with the fact that an LTT return has been filed by which the purchase was declared as a higher rate transaction (albeit with £0 LTT due).

80. At the hearing, Mr James submitted that the purchase of Danderi House was nothing more than an "extension of our main residence". He further submitted that at the point of completion (25 October 2019) Danderi Flat and Danderi House ceased to exist and there was just one property - Danderi - and that he already had an interest in that property because it was "under the same walls, the same roof".

81. In relation to the paragraph 8 exception, Mr James submitted that on 25 October 2019, the mortgage on Danderi Flat was paid off in full using the funds secured against the combined property (Danderi). There was a disposal of an interest in Danderi Flat – the mortgage was redeemed and Danderi Flat ceased to exist.

82. In relation to whether the WRA had properly notified him of the closure notice and the penalty, the Appellant's position was:

(1) to the best of his knowledge he did not give permission in writing for the WRA to communicate by email;

(2) he had difficulty on several occasions in accessing WRA emails due to the encryption and security settings used; and

(3) he did receive an email on 25th August 2020 in relation to the closure notice and penalty.

83. In relation to the penalty, the Appellant submitted that he was not careless and had fully cooperated with the WRA at every stage.

84. Mrs James was not a party to this appeal. However, the WRA confirmed that they will not seek to enforce the LTT debt against her or seek to pursue her for any penalty in relation to LTT return.

EVIDENCE AND FINDINGS OF FACT

85. The background facts set out at paragraphs 4-34 above were apparent from the documentation that I was provided with and were not in dispute as between the parties.

86. Mr James gave evidence before me. He told me:

(1) He is now a qualified accountant (he was finalising his qualification at the time of the purchase).

(2) Mrs James has been living in Danderi Flat for some 25 years. He has lived there since 2009.

(3) Danderi Flat cannot be extended "outwards" as there is no available land.

(4) In 2017, he asked Laura Ashely whether he could have "first refusals" on buying Danderi House.

(5) Ms Ashley having indicated she would be willing to sell Danderi House, he took steps to arrange finance for the purchase.

(6) He managed to obtain a mortgage that was drawn down on completion day (25 October 2019). This was secured against the entirety of the property (that is the combined property made up of Danderi Flat and Danderi House).

(7) Insurance was also in place over the combined property (to be known as "Danderi"). This policy was arranged on 18 October 2019 but the policy was effective only from 25 October 2019.

(8) It was very easy to combine the properties back into a single dwelling. It simply required the original doorway and small section of wall around the doorway to be opened up. It took about 4 hours. The "knock through" was all done on 25 October 2019 and was "made good" the following day.

(9) No planning permission was required to (re)combine the properties as the necessary work was all internal.

(10) Before the LTT return was filed, he understood from the correspondence he had with the WRA that the WRA's position was that LTT was due at the higher rate but thought the WRA had misunderstood the factual position.

(11) With hindsight he would have sought a formal tax opinion from the WRA earlier so that it could be considered before the return was filed.

(12) His solicitors' view was that the purchase attracted higher rate LTT but he thought they had misunderstood the factual position and did not appreciate how easy it was to (re)combine the two properties, and the solicitors didn't appear completely sure.

(13) He was willing to and did engage with the WRA and provided it with as much information as he could.

(14) He thought he was correct on the underlying tax issue which is why he did not engage with the WRA in as much detail in relation to the penalty. He thought that the penalty should fall away along with the LTT liability.

87. I accept Mr James' factual evidence as summarised at paragraph 86 above.

88. Ms Laura Ashley gave evidence before me. She told me:

(1) She purchased Danderi House in 2004 as a holiday home.

(2) In late 2017 she began to discuss with Mt an Mr James the potential for them to buy Danderi House from her,

(3) In June 2019, she arranged for the kitchen to be removed from the property. This was because her cousin needed a kitchen, and Mr James confirmed he was happy for it to be removed as he already had a kitchen.

(4) She had given permission to Mr James to undertake work to (re)combine the properties from the point of exchange of contracts but, ultimately, exchange and completion all occurred on the same day (25 October 2019).

(5) She visited the property on 25 October 2019 and saw that the access between the two properties had been opened up.

89. I accept Ms Ashley's factual evidence as summarised at paragraph 88 above.

90. In the Hearing Bundle was a letter from the owners of Danderi Cottage who stated that on 25 October 2015 they had visited Danderi House and the doorway between Danderi House and Danderi Cottage had been opened. The authors of this letter were not called to give evidence. Nonetheless, I accept the contents of the letter as accurate as they are consistent with the evidence of Mr James and Ms Ashley.

DISCUSSION AND DECISION

91. I set out below the core issues and my decision and reasons in relation to each of them.

Were the Closure Notice and Penalty Notice properly issued to Mr James by being sent to him by email?

92. Yes.

93. By completing the WRA contact forms on 29 October 2019, 8 November 2019 and 27 November 2019, Mr James provided his written consent to being contacted by email in the context of the open enquiry. Section 190(2)(d) was therefore satisfied.

94. In any event, I accept the WRA's submission that s190 does not mean that other means of notification (e.g. email even where no written consent has been provided) are impermissible. I reach this view because the language used in s190 is permissive ("*may* be issued").

95. Even if I am wrong on the above, applying the principles summarised in *Haworth*, I do not consider that in circumstances where Mr James actually received the notices by email, a failure to obtain his express permission to correspond by email would invalidate service of those notices. This was not an egregious and damaging failure, rather it could properly be described as relatively minor and inconsequential.

Is the validity of the Closure Notice and/or Penalty Notice issued to Mr James compromised by any failings by the WRA in relation to Mrs James?

96. No.

97. Section 39(1)(c) states that a closure notice must be issued to each of the buyers whose identity is known. However, unlike ss 39(2) and 39(3) LTTA 2017 which specify that unless certain action is taken against all buyers, that action will not be effective against any of the buyers, s39(1)(c) does not specify any such consequence. I agree with the WRA that the Senedd appears to have made a deliberate distinction here.

98. In relation to the penalty, there is nothing in TCMA 2017 to supports that all buyers must be assessed to a penalty (and notified of the same) for a penalty to be effective against any other buyer. That position would be non-sensical given that the buyers may be in different positions (e.g. one having acted carelessly and the other not).

99. In any event, Mrs James was sent the Closure Notice and the Penalty Notice in February 2022, so any breach was rectified (albeit somewhat belatedly). Further, applying the principles summarised in *Haworth*, I do not consider that in circumstances where Mr James actually received the notices, a failure to timeously send the notices to Mrs James should invalidate the notices as against Mr James. Again, this was not an egregious and damaging failure rather it could properly be described as relatively minor and inconsequential.

Subject to any applicable exception, was the purchase subject to higher rate LTT?

100. Yes.

101. The purchase of Danderi House satisfied the criteria in paragraphs 3 and 5 of Schedule 5, in that

> (a) The purchasers, Mr and Mrs James, were individuals;
>
> (b) The main subject matter of the transaction consisted of a major interest in a dwelling, Danderi House;
>
> (c) The chargeable consideration was £40,000 or more being £80,000; and
>
> (d) At the end of the day on the effective date of the transaction (i.e. at end of 25 October 2019), Mr and Mrs James had a major interest in a dwelling other than the purchased dwelling (that other dwelling being Danderi Flat) with a market value of £40,000 or more.

102. To the extent that Mr James submitted that as at the end of 25 October 2019, Danderi Flat no longer existed so he no longer had a major interest in it, I reject that submission. Danderi Flat did still exist albeit an access point had been opened up between it and Danderi House. In my view, the very earliest that it could be said that Danderi Flat (and Danderi House) "no longer existed" would be when the Land Registry agreed to amalgamation of the titles in February 2020.

103. To the extent Mr James sought to argue that Danderi House was not a "dwelling", I agree with the WRA this was without merit. I agree that with or without a kitchen, Danderi House was used or suitable for use as a dwelling and therefore fell within the definition of a dwelling set out in s37 LTTA 2017. Mr James' reference to the WRA's guidance take the matter no further. That guidance does not have force of law and in any event does not support that removal of a kitchen turns a dwelling into a non-dwelling.

Does the interest in the same main residence exception (paragraph 7 of Schedule 5 LTTA 2017) apply?

104. No.

105. I accept the WRA's submissions that Paragraph 7(a) of Schedule 5 requires that:

> (a) the buyer or their spouse/civil partner have a major interest in the purchased dwelling (i.e. Danderi House) immediately before the effective date of the transaction; and
>
> (b) immediately before and after the effective date of the transaction, the purchased dwelling (i.e. Danderi House) is the buyer's only or main residence.

106. I also accept the WRA's submissions that:

> (1) Mr and Mrs James did not have a major interest in Danderi House immediately before the effective date of the transaction. It was owned by Ms Ashley. Mr and Mrs James had no interest in it whatsoever; and

(2) immediately before the effective date, Danderi House was not the main or only residence of either Mr or Mrs James. They lived in Danderi Flat.

107. To the extent Mr James argued that at, at the point of completion (25 October 2019), Danderi Flat and Danderi House ceased to exist, I reject that submission. As I have set out above, I do not consider that Danderi Flat and Danderi House "ceased to exist" on 25 October 2019. In any event, even if they did "cease to exist" on that date, that does not assist Mr James in establishing that he had a major interest in Danderi House immediately before that date and that Danderi House was his only or main residence before that date.

Does the replacement of main residence exception (paragraph 8 of Schedule 5 LTTA 2017) apply?

108. No.

109. I accept the WRA's submission that paragraph 8(2)(b) is not satisfied because Mr and Mrs James had not disposed of a major interest in another dwelling (i.e. they did not dispose of their interest in Danderi Flat) – rather they continued to own it. I do not accept that discharging the mortgage and obtaining a loan secured over the combined properties constitutes a disposal of a major interest in Danderi Flat.

110. I also accept the WRA's submission that paragraph 8(2)(c) is not satisfied because immediately after the effective date of the purchase of Danderi House, Mr and Mrs James continued to have a major interest in Danderi Flat in that they continued to own that property.

Was there an inaccuracy in the LTT return?

111. Yes.

112. In circumstances where I have found that higher rate LTT applied to the purchase, the return was inaccurate because it declared the amount due as £0 when in fact the amount due was £2400.

Was the inaccuracy careless on the part of the Appellant?

113. Yes.

114. There was no reasonable basis for the Appellant adopting the approach that he did. In those circumstances, and given he had been told both by the WRA and by his solicitors that LTT was payable at the higher rate, declaring the liability at £0 was careless. That Mr James thought both the WRA and his solicitor must have misunderstood the factual position does not assist him. They had stated their views and yet, despite having no reasonable basis for it, Mr James decided to take his own course.

Was the amount of the penalty correctly calculated including properly taking into account reduction for disclosure?

115. No.

116. The penalty was calculated on the "prompted" basis. The WRA accepted during the hearing that this is properly an "unprompted" case.

117. Further, Mr James was not given the full reduction for disclosure. This was said to be because (1) he had not conceded that the return was incorrect and (2) the WRA had to follow up with him to obtain certain information.

118. In relation to Mr James not conceding that the position he had adopted was incorrect. On the facts of this case, I do not consider this to be a proper basis on which to reduce the level of reduction for disclosure. Mr James was open and forthcoming with the WRA. That he did not concede his position does not alter the quality of the disclosure he provided.

119. In relation to the WRA having to "follow up" with Mr James in relation to certain information. There was significant correspondence between the parties during the enquiry (albeit this was interrupted for a period by the pandemic). As I have said, Mr James was open and forthcoming with the WRA. That the WRA felt it necessary to "follow up" certain matters with Mr James, does not in my view reduce the quality of the disclosure that he provided to the WRA which, in my view, ought to have led to the maximum reduction for disclosure.

120. In those circumstances:

(1) the appeal against the closure notice is dismissed; and

(2) the appeal against the penalty is allowed to the extent that the penalty should have been on an unprompted basis and the full reduction for disclosure should have been given. The penalty should now be amended accordingly.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

121. 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.

DAVID BEDENHAM
TRIBUNAL JUDGE

Release date: 11 AUGUST 2022