



TC03565

Appeal numbers: TC/2011/05257 & TC/2011/05261

Capital Gains Tax. Private residence relief. Section 222 Taxation of Chargeable Gains Act 1992. Whether 25 days' occupation was "residence". Held: no, on the facts. Goodwin v Curtis [1998] BTC 176, CA applied.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DR SUSAN ILES & DR DIMITRIS KALTSAS

Appellants

- and -

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

Respondents

**TRIBUNAL: JUDGE RACHEL PEREZ
MS ELIZABETH BRIDGE**

Sitting in public at 45 Bedford Square, London on 10 September 2012

Dr Dimitris Kaltsas appeared in person and for Dr Susan Iles

Mr Paul Shea of HMRC for the respondents

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DECISION

Introduction

1. The question in these two appeals was whether the appellants' occupation of a property was "residence" for the purposes of sections 222 and 223 of the Taxation of Chargeable Gains Act 1992 (c.12, "TCGA").

2. We dismissed the appeals by summary decision. We now give our full decision at the appellants' request.

3. The appellants are a married couple. Their appeals are against HMRC's amendment to each appellant's self assessment return for the year ended 5 April 2009. The amendment disallowed private residence relief claimed under sections 222 and 223 TCGA for the property Flat 202 Pierpoint Buildings, 16 Westferry Road, London E14 8NQ ("the flat").

4. Section 223 gave tax relief in respect of a gain to which section 222 applied. Section 222 provided, so far as relevant, that—

“(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 been, his only or main residence,”.

5. It was common ground that the appellants occupied the flat from 1 July to 25 July 2008, the last 25 days of their ownership of it. HMRC accepted that the appellants did not reside in any other property in that period. Nevertheless, HMRC decided that those 25 days' occupation did not amount to residence of the flat for the purposes of sections 222 and 223.

The issue

6. The only issue on the appeals was whether the appellants' occupation of the flat for their last 25 days' ownership of it amounted to "residence" for the purposes of sections 222 and 223 TCGA.

7. We decided not, for the following reasons.

Facts not in dispute

8. These facts were not in dispute and we therefore find as follows—

(1) The appellants bought the flat on 30 April 1999 for £260,500 as an investment. They let it to tenants at around that time.

(2) At the time the appellants bought the flat, they were living at 74 High Road, Chigwell, Essex.

(3) 74 High Road was a detached house with five bedrooms, three bathrooms and four reception rooms.

(4) The appellants first advertised the flat for sale on 3 December 2007.

(5) The appellants accepted an offer for the sale of the flat in January 2008.

5 (6) At the time that the appellants accepted the offer on the flat, the flat was occupied by tenants.

(7) Contracts were exchanged for the sale of 74 High Road on 31 March 2008.

10 (8) The tenants ceased to occupy the flat on 28 or 29 June 2008. (In evidence, Dr Kaltsas referred to the tenant in the singular in relation to the end of the tenancy; this appears to be because the flat was occupied by a couple who then split up, leaving only the female tenant in actual occupation at the time the tenancy ended.)

(9) The appellants continued to live at 74 High Road until completion of its sale on 1 July 2008.

15 (10) Before moving into the flat and while still living at 74 High Road, the appellants viewed the rental property 41 Woodside Road, Woodford Green.

(11) The appellants moved into the flat on 1 July 2008.

(12) The flat had two bedrooms. It was in Docklands, around 12 miles away from Dr Iles' GP practice.

20 (13) At the time that the appellants moved into the flat, they had an 18-year old daughter due to start at Oxford University, a 20-year old daughter part way through her degree at Exeter University, and a 14-year old son.

(14) Contracts were exchanged on 9 July 2008 for the appellants to sell the flat.

25 (15) The sale of the flat by the appellants was completed on 25 July 2008. The appellants moved out of it on that date.

(16) The appellants moved from the flat to 41 Woodside Road, Woodford Green. This was the property they had viewed before moving into the flat. It was "still available" when they moved out of the flat.

30 (17) 41 Woodside Road was a four-bedroomed, detached house. It was about one mile away from Dr Iles' GP practice.

(18) The appellants subsequently moved to 17 Monkams Drive, Woodford Green.

(19) 17 Monkams Drive is a five-bedroomed, detached house. It is about one mile away from Dr Iles' GP practice.

35 **The meaning of "residence"**

9. "Residence" is not defined for the purposes of section 222. Mr Shea cited several cases to us in which the meaning of "residence" was considered. The most relevant was *Goodwin v Curtis* [1998] BTC 176, CA ("*Goodwin*").

10. In *Goodwin*, the taxpayer completed his purchase of a nine-bedroomed farmhouse on 1 April 1985. He had been buying it with a view to making it a home for himself and his family. At the same time as completing that purchase, he separated from his wife and took up temporary occupation of the farmhouse. The farmhouse was advertised for sale on 11 April. A purchaser was soon found and simultaneous exchange and completion took place on 3 May 1985. On 3 April 1985, two days after moving into the farmhouse, the taxpayer completed the purchase of another property, Ayton, which he had contracted to purchase some time earlier. When the farmhouse was sold on 3 May 1985, the taxpayer moved into Ayton as he had nowhere else to live.

11. The Court of Appeal held that–

“the word ‘reside’ is an ordinary word of the English language and is eminently suitable for a lay tribunal such as the general commissioners to apply” (page 180)

and

“When they referred to permanent residence in para. (ii) and para. (iii) of their decision, [the commissioners] must be taken to have accepted the Revenue’s submission that 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...I can detect no error of law in the commissioners’ approach.” (page 179).

12. The Court of Appeal found that there was ample evidence to support the conclusion that the taxpayer was in temporary occupation of the farmhouse and not in residence of it. Lord Justice Millett said (page 180)–

“The taxpayer had just separated from his wife and family. He had nowhere else to live. The farmhouse had nine bedrooms and was hardly a suitable home for a single man. It had already been placed on the market. The taxpayer’s occupation was manifestly a stop gap measure pending the completion of his purchase of somewhere else to live. As soon as the farmhouse was sold the taxpayer moved into Ayton.

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 farmhouse did not make his occupation qualify as residence. This conclusion was, in my judgment, clearly open to them.”.

Appellants’ case

Prior to appealing

13. In the agent’s letter of 26 October 2010, the appellants’ agent (George & Co) told HMRC that “the move to the flat was a result of the main residence being sold”.

14. In the agent’s letter of 20 December 2010, the agent told HMRC–

“...our clients, as a family, have only ever had one dwelling house/main residence at any time and Pierpoint Building was their home/main residence therefore qualifying for Principal Private Residence Relief.

5 The offer to buy the flat was accepted by our clients in January 2008 but due to continued problems encountered with the buyer there were constant delays and contracts were not finally exchanged until 9 July 2008 with completion set for 25 July 2008.

10 Contracts were exchanged for the sale of 74 High Road on 31 March 2008 and due to the persistent problems with the purchaser of Pierpoint Building and possibility that at any time the sale of the flat could fall through our clients took the decision to move to the property at Pierpoint until a new property could be found. HMRC were notified of the change of address in a telephone call from our office 23 April 2008 [sic] in anticipation of the move which, then, was not expected to be delayed.

15 Unfortunately the tenants of the flat at the time although given notice to vacate the property were unhappy to do so and eventually did not leave until June 2008. Our clients therefore were unable to complete the sale of 74 High Road and relocate to Pierpoint Building until 1 July 2008.

20 As you will see from the information supplied it was our clients’ intention and expectation to use the flat as their main residence for the time it took them to acquire a new home following the sale of 74 High Road. It was of no fault of our clients the various problems encountered and the short time of occupation of the property at Pierpoint.”.

Notices of appeal

15. In their notices of appeal, the appellants said–

25 “an agreement to sell the property at Pierpoint Buildings had been reached some 6 months prior to our occupation but due to the constant problems encountered with the purchaser of the property when contracts of sale were exchanged on our residence at 74 High Road Chigwell in March 2008 we decided to make the property at Pierpoint Buildings the family home. Due to further problems in removing the tenant from Pierpoint Buildings the completion of sale of High Road Chigwell was not achieved until 30 June 2008 and we moved into Pierpoint Buildings. After only 9 days residing in Pierpoint Buildings we surprisingly received a completion date for the sale of the property.

35 It is our contention that 3 months prior to and on occupation of the property at Pierpoint Buildings it was our intention that this would be our main residence. As we were aware of the consistent problems being experienced by the proposed purchaser of Pierpoint Buildings since agreement of sale in January 2008 we moved into the property on the expectation that we would live there indefinitely and see what the future held. Notice of exchange of contracts and a completion date forced our hand and we sought out a rental property, not purchasing another residence until July 2010. It is our argument and belief 40 that based on the facts of our case although our residence at Pierpoint Building was short there is the degree of permanence and expectation of continuity in respect of our occupation of Pierpoint Buildings as required by law.”.

The hearing

16. At the hearing, Dr Dimitris Kaltsas represented himself and his wife, who was not present. Their daughter Caterina was present, helping her father. Caterina gave small amounts of evidence herself at various points.

5 17. Dr Kaltsas told us the following.

18. He said that he and his wife had bought their main residence, 74 High Road, in 1998. At the time, he was working as a consultant orthopaedic surgeon at a local hospital. He also had a large private practice. His wife was a general practitioner.

10 19. To buy 74 High Road, Dr Kaltsas and his wife took out a large mortgage, of about £800,000. They could afford the repayments when they took it out because of Dr Kaltsas' private practice.

15 20. In 1999, the appellants bought the flat. They rented it to tenants for £2,000 per calendar month. They bought the flat with a mortgage. The £2,000 rent covered part of the mortgage, leaving a shortfall of about £500 or £600 per calendar month. The appellants bought the flat for their children's future; they planned to sell it and the money from the sale would go to their three children.

21. At the time that the appellants bought the flat, it was easy to obtain a mortgage. Dr Kaltsas said he thought they took a 95% mortgage on the flat (which they bought for £260,500).

20 22. So, the appellants owned two mortgaged properties. They could afford the payments, said Dr Kaltsas, while he had the income from his private practice.

25 23. Then in 2000, around January, Dr Kaltsas was suspended from his NHS post pending an investigation of allegations made towards his practice. The NHS trust in question told him that his suspension would be for six months. But what Dr Kaltsas had not realised was that the suspension could be renewed. A few months after the start of the suspension by the NHS trust, the General Medical Council ("GMC") also suspended Dr Kaltsas, in parallel. But unlike the NHS trust's suspension, the GMC suspension had no time limit.

30 24. The GMC's investigations took until around the end of November 2003 or the beginning of 2004. Dr Kaltsas returned to work two or three weeks after the investigations ended. He was fully exonerated. But during those four years, Dr Kaltsas had received only his NHS salary. He was not permitted to practise privately during the time of his GMC suspension. But also, on the advice of his barrister, he did not practise privately for the few months from the start of his NHS suspension to
35 the start of his GMC suspension.

25. Although Dr Kaltsas was fully exonerated, the suspension caused the appellants huge financial problems. They could not continue to pay the mortgage on their residence 74 High Road. They were granted a mortgage payment holiday for the maximum six months allowed. The appellants hoped that Dr Kaltsas' private practice

would recover, but it never did. After the mortgage payment holiday, the appellants reverted to full mortgage payments on 74 High Road for a short period. But in 2005 or 2006, the appellants changed to interest-only payments on 74 High Road.

5 26. During all that time, the appellants continued to pay their contractual mortgage payments on the flat, because they had only a £500 or £600 shortfall to make up.

27. Eventually, it became evident that the bank would repossess 74 High Road. So, at the beginning of 2007, the appellants put 74 High Road on the market. It was not in negative equity.

10 28. Dr Kaltsas said that their intention was to move to the flat and to use the money from the sale of 74 High Road to clear the debt on 74 High Road.

29. The appellants put 74 High Road on the market at the start of 2007 for £2.5million. But the housing market was very quiet; there were only four or five viewings during the whole of 2007, and not one offer.

15 30. The appellants completed their sale of 74 High Road on 1 July 2008 for the reduced price of £2.1million. They then repaid the mortgage of £850,000 or £900,000 on that property and repaid all their other debts.

31. During the same period however, in December 2007, the appellants had put the flat on the market.

20 32. The appellants' intention was that the sale proceeds from the flat would stave off the bank for 74 High Road, allowing them to save their home, 74 High Road.

33. In January 2008, the appellants were introduced to a cash buyer for the flat. It transpired however that the buyer was not a cash buyer and would need a mortgage. In February 2008, the appellants reduced the price of the flat.

25 34. In March 2008, the appellants received the only offer on 74 High Road. It was lower than the asking price, but the appellants accepted it in the hope of selling the house, paying off the bank and keeping the flat.

35. So, said Dr Kaltsas, in March 2008, the appellants gave one month's notice to the tenants to leave the flat, and made plans to move to the flat due to continued pressure from the bank who were about to repossess 74 High Road.

30 36. The supposed purchaser for the flat disappeared, said Dr Kaltsas.

37. But, he told us, the tenant of the flat became very obstructive and refused to move out of the flat. Later in the hearing, Dr Kaltsas told us that the buyer "had gone quiet while he arranged a mortgage".

35 38. Dr Kaltsas explained how his family of five were going to live in a two-bedroomed flat. He said that he and his wife would have one bedroom and the three children would have the second bedroom. The second bedroom had bunk beds and a

single bed. Dr Kaltsas said that he had one daughter at university and that she would be at home only for short periods. His other daughter was about to start at Oxford University. So there would be only his son at home with them in university term time. The family were also due to go on holiday for three weeks in August, reducing the expected time of congestion in the flat. His daughter added, and we were sorry to hear, that her grandmother died so they actually stayed away longer than expected.

39. Dr Kaltsas described where the flat was in relation to their work and schools. He said that their son, Theo, was at school in Woodford and that Dr Iles was working as a general practitioner in Woodford. His daughter explained that Theo's school and her mother's place of work are on the same road in Woodford. Dr Kaltsas told us that, while they were living in the flat, he was working at King George Hospital, Ilford. He said this was a half-hour commute from the flat by tube.

40. Dr Kaltsas told us that the appellants could not risk taking the flat off the market due to the fragility of the market and that they could not be sure that the house sale would be completed.

41. Eventually, the tenant moved out. Dr Kaltsas initially told us that the tenant moved out on 1 July 2008. Later in the hearing, he accepted that it must have been 28 or 29 June, in view of the date on the council tax bill (although Mr Shea took no point as to this difference in dates).

42. But, said Dr Kaltsas, the appellants' intention was to move into the flat in "March / April".

43. He told us that the appellants arranged to put most of their possessions into storage at the end of June or beginning of July 2008. The storage cost was £250 to £300 per month. The appellants had no further viewings or offers on the flat at all, he said.

44. The appellants did not, said Dr Kaltsas, expect the buyer of the flat to come back with finance.

45. The appellants moved into the flat as soon as the sale of 74 High Road completed.

46. Dr Kaltsas told us "Our plan was always to stay in the flat. But [74 High Road] sold for lower than expected. But that plus the offer on the flat, we reluctantly accepted this to stabilise our financial situation and we moved out of the flat into 41 Woodside Road. It is a small house, three bedrooms, very tiny ones, can't turn around. And we stayed there for three years." (the property information at page 59 said that it had four bedrooms, but Mr Shea took no point as to this).

47. Dr Kaltsas' daughter told us that everything that had gone into storage when they sold 74 High Road stayed in storage until they eventually bought their new house in June 2011.

48. Dr Kaltsas told us that the appellants sold the flat for £460,000 and paid off the mortgage on it. This left the appellants with £120,000 or £130,000 capital. He told us that they also “made a very small profit” of about £1.1million or £1.2million on 74 High Road. About £220,000 of that went to repay other debts, leaving the appellants with a profit of £880,000 to £900,000 after paying off the mortgage on 74 High Road.

49. That plus the profit on the flat took the total profit on the flat and 74 High Road, said Dr Kaltsas, to about £1million after repaying mortgages and paying off other debts and school fees.

50. Dr Kaltsas told us “Although our intentions were always to stay in the flat, we were forced by events and not by choice to move out of the flat. Things moved in a very odd way”.

51. Dr Kaltsas was asked about the usual questionnaires and other documents that have to be completed before exchange can take place. He was asked when those documents were done for the flat. He replied “In July, it was a very short period of time. For the house, it was in March. But for the flat, June 2008 I would say”.

52. He was asked “Does that mean that you knew in June 2008 that the flat was to sell?”. Dr Kaltsas replied “Not necessarily. Because so much time had passed that we thought it was an exercise on paper.”.

53. Dr Kaltsas was asked how the appellants found the rented house (41 Woodside Road) to move into from the flat. Dr Kaltsas replied “We had to look around in case things went wrong”. He was asked when they had looked round. His daughter replied “When the tenant refused to move out”. The appellant said “41 Woodside Road we had already looked at previously and it was still available”.

54. Dr Kaltsas told us that the appellants’ tenancy agreement for 41 Woodside Road ran from “July 2008”. When asked “What date?”, he replied “When we had solid confirmation that the sale of the flat would go through”. He was asked “When was that?”. He replied again “July 2008”. On being asked whether it was before the house sale completed (and so before moving into the flat), Dr Kaltsas did not reply, despite being given a long pause in which to do so.

55. Dr Kaltsas was asked “Do you know the date you exchanged for the flat?”. Dr Kaltsas replied “9 July 2008”. It was suggested to him that it is normal for solicitors to warn the seller of the exchange date. Dr Kaltsas told us “But all the work was done in February. We had no information”. He was asked “But did you have warning of the exchange date?”. Dr Kaltsas replied “From February until about four days before exchange, it was completely quiet from the solicitors on the flat sale. We were already in the flat when we were told that we were going to exchange contracts”.

56. He was asked “What was your reaction on being told [that you were going to exchange contracts]?”. Dr Kaltsas replied “First of all, very surprised. ‘Cause we had never thought that that one purchaser would come back. We were very reluctant to move out of the flat”. He was asked “So why did you?”. Dr Kaltsas replied “We sold the house for a lot less than we had thought. We thought moving on with the sale of

the flat would help to stabilise us financially. The housing market was dead at that time”.

57. Dr Kaltsas was asked “What happened to tell you a few days before 9 July 2008 that you would exchange?”. Dr Kaltsas replied “I can’t remember whether it was the estate agents or our solicitors were contacted by the buyer’s solicitors”. He was asked “But the solicitors will have wanted to refresh the questionnaires before exchange?”. Dr Kaltsas replied “I don’t know”. He was asked “Were you asked if you had paid the maintenance [the service charge on the flat] up to date?”. Dr Kaltsas replied “If at all, we would have been asked at the beginning of July”. He was asked “If you were asked about the maintenance at the beginning of July, did it not make you think ‘we had better not move in’?”. Dr Kaltsas replied “It must have been the third, fourth or fifth of July, if at all”.

58. We asked “We are trying to understand the complete silence from February until after the first of July....Were you not asked if you still wanted to sell?”. Dr Kaltsas replied “Of course. But we sold the flat very reluctantly. We did not expect to sell the flat. For five or six months, no ‘phone call or letter”. Dr Kaltsas was asked “Did your solicitor ask you ‘you’ve moved into the flat, do you still want to sell?’?”. Dr Kaltsas replied “We were not one hundred per cent that we were going to sell. It cost us twice to move house”.

59. Speaking further about removal costs, Dr Kaltsas told us “we had no reason to pay the removal company twice, given our financial difficulties”.

60. His evidence was that both sets of removal costs, that is, into the flat and back out of the flat, came together to approximately £3,600 to £4,000 (£1,800 to £2,000 for each move). Mr Shea told us that the amount of tax in issue for each appellant is around £12,000, so £24,000 in total.

61. Dr Kaltsas told us “There are things I remember very well, for example when I stopped work. But the date when the solicitors told me we were selling the flat, I can’t remember so well”.

62. In response to HMRC’s point that the flat was not the kind of property that the appellants would like to make their residence, Dr Kaltsas said “No, I don’t dispute we would have liked to live in a bigger house. But we had no choice. The flat was the only place we could stay. I accept that every sale has its ups and downs, but how long were we expected to wait? We did intend to stay there”.

63. Regarding HMRC’s point that the flat was much further away from Dr Iles’ place of work, than were 74 High Road and 41 Woodside Road, Dr Kaltsas told us that Docklands (where the flat was) was not far from the hospital for him, or from his wife’s GP practice.

64. In cross-examination, Dr Kaltsas said that the appellants did not withdraw the flat from sale at any point, even when the buyer was in a position to proceed, “because we were acutely aware of the fragility of the housing market. So I could not afford to do that”.

65. He told us that the appellants knew about the middle of June that the tenant would move out, but that he could not remember the exact date.

66. Dr Kaltsas told us that the appellants notified their workplaces of the change of address to the flat, but that they did not notify other institutions.

5 67. He told us that he could not remember when the discussion took place with his solicitor in which he agreed that completion of the sale of 74 High Road would take place on 1 July. He said “For us to move out of 74 High Road, we needed somewhere to go. But the tenant was difficult to move out. So I think this discussion mostly likely took place mid-June. But I cannot be precise”.

10 68. Dr Kaltsas summed up by submitting that the appellants’ case was different from the authorities cited by HMRC. He told us “Our expectation was to stay in the flat. We could easily have stayed in the flat and paid no rent”. He was asked “Why didn’t you then?”. He replied “We decided reluctantly that we have to move on”. He did not tell us why they decided reluctantly that they had to move on.

15 69. We accept the appellants’ evidence mentioned above at paragraphs 18 to 27, 29 to 34, 37 to 39, 41, 43, 45, 47 to 49, 53, 60, 63, 65 and 66. Their other evidence is addressed in our discussion later in this decision.

HMRC’s case

20 70. Mr Shea accepted that the appellants did in fact occupy the flat for the period 1 July to 25 July 2008, even though the council tax bill for that period showed the flat as empty.

71. Mr Shea invited us to reject the appellants’ evidence that the appellants did not know, when they moved into the flat, that exchange of contracts for its sale was imminent.

25 72. But HMRC’s position was that the test in *Goodwin* was, in any event, satisfied by the facts admitted by the appellants that, when the appellants moved into it, the flat was for sale and was subject to an accepted offer. HMRC submitted that “If the appellants had intended to occupy the flat until such time as they located a further suitable home to buy, it is reasonable to assume they would have withdrawn the flat
30 from sale before the move”.

73. Mr Shea argued that, even if the appellants had intended their move to the flat to take place in March 2008, that did not alter the fundamental facts that the flat was still subject to an accepted offer and that the appellants’ intention to sell the flat still existed.

35 74. Mr Shea showed us on a map that 41 Woodside Road and 74 High Road were each about 12 to 13 miles away from the flat. He showed us also that 41 Woodside Road, Woodford Green was about one mile from the school and from Dr Iles’ GP practice. Dr Kaltsas did not dispute these approximate distances. Mr Shea submitted that the fact the appellants moved into 41 Woodside Road and then into 17

Monkham's Drive, both in Woodford Green and near the school and GP practice, suggested that Woodford Green was where they wanted to live. Dr Kaltsas did not dispute this.

5 75. But we asked Mr Shea what difference that alleged wish made given Dr Kaltsas' evidence that the appellants were forced to live in the flat. Mr Shea submitted that the appellants were not forced to live in the flat. They could, he said, have moved to Woodside Road on 1 July straight from 74 High Road. The evidence for that, he said, was that Dr Kaltsas had told us that the appellants had already identified 41 Woodside Road before 1 July. Mr Shea submitted, based on the nature and locations of the
10 properties that the appellants occupied before and after they occupied the flat, that the appellants never intended to use the flat as a permanent residence because it was unsuitable in size and location.

15 76. Mr Shea also submitted that the fact that the appellants did not purchase a property straight after the flat was not relevant. It did not alter, he submitted, their intention to sell the flat.

77. He submitted that it was more likely than not that the appellants knew, when they moved into the flat, that its sale was proceeding.

Discussion

78. There were a number of inconsistencies in the appellants' account.

20 79. Those inconsistencies, taken with the evidence as a whole, led us to conclude that—

- (1) financial difficulty was not a reason the appellants moved into the flat;
- (2) having nowhere to go was not a reason the appellants moved into the flat;
- (3) preventing the flat sitting empty was not a reason the appellants moved into
25 it;
- (4) suitability to the family's needs was not a reason for them to move to the flat (which Dr Kaltsas accepted);
- (5) the appellants did know, before moving into the flat and at the time of moving into it, that its sale was proceeding;
- (6) even if conclusions (1) to (4) above are wrong, the appellants knew that
30 their occupation of the flat would be temporary.

80. Our reasons for each of the above conclusions are as follows.

(1) Conclusion that financial difficulty was not a reason the appellants moved into the flat

35 81. We find that the appellants did not, at the time of moving into the flat, need or believe they needed to move into it due to financial difficulty.

82. Dr Kaltsas told us that the appellants were able to clear all their debts as a result of the sale of 74 High Road. He said that they even made a profit of £880,000 to £900,000 from its sale after repaying the mortgage on it and other debts. Even if it had been the appellants' intention, before exchanging contracts for the sale of High Road, to move into the flat due to financial difficulty, we find that financial difficulty ceased to be the appellants' motivation after exchanging on High Road. This is because, on exchanging on High Road in March 2008, they knew what price they would definitely get for High Road. So they knew, on exchange in March 2008, that they would be able to clear all their debts as a result of the sale of High Road. So in our judgment the appellants had no reason, once they had exchanged on High Road, to move into the flat due to financial difficulty.

83. This is supported by the fact that their statement of case makes no mention of financial difficulties. We accept that adding new elements to one's account as time goes on does not necessarily mean that those new elements are invented; they can be newly remembered. But financial difficulty was the first and main reason for moving into the flat that Dr Kaltsas advanced at the hearing. We find it unlikely that the appellants merely forgot to mention this key point in their statement of case.

84. There were other inconsistencies in the appellants' account:

85. First, Dr Kaltsas told us that "We did not take the flat off the market until we had concluded the safe sale of the house". We find that statement to be untrue. On the appellants' other evidence, they did not take the flat off the market at all. And the flat was self-evidently not off the market at the time the appellants exchanged contracts to sell it.

86. Second, the appellants' statement of case contained an internal inconsistency. This was that paragraph 12 of the statement of case said–

"Although delayed on occupation of the property, it was still the appellants' intention that the flat was to be the main residence until the sale of the flat forced a move or another rented residence became available". [appellants' emphasis]

whereas the concluding paragraph of the same statement of case said–

"It had always been the intention and expectation to use Pierpoint Building [the flat] as the family residence until a new property could be found and purchased and, as detailed above, this did not happen until July 2010." [our emphasis].

87. Third, the statement of case was also inconsistent with the appellants' other evidence. On Dr Kaltsas' other evidence, another rented residence was already available; he had told us that they had looked at 41 Woodside Road before moving into the flat and that it was "still available" when they moved into it out of the flat.

88. Those inconsistencies, taken with what we say at paragraphs 82 and 83 above, further led us to doubt the accuracy of the appellants' evidence.

89. For all of these reasons, we do not accept that financial difficulty was a reason why the appellants moved into the flat.

(2) Conclusion that having nowhere else to go was not a reason the appellants moved into the flat

5 90. Dr Kaltsas attempted to explain away the acknowledged fact that the flat was unsuitable in size and location: “I don’t dispute that we would have liked to live in a bigger house. But we had no choice. The flat was the only place we could stay”.

91. We do not accept that the appellants moved into the flat because they had nowhere else to go because we find that they did have somewhere else to go. Dr
10 Kaltsas told us that the appellants had looked at 41 Woodside Road before moving into the flat and that 41 Woodside Road was “still available” when they moved out of the flat. His daughter added that it was “when the tenant refused to move out” that the appellants viewed 41 Woodside Road. Dr Kaltsas’ evidence that 41 Woodside Road was “still” available suggests, and we find, that it was available on 1 July when they
15 moved into the flat. We find therefore that they could have moved into 41 Woodside Road on 1 July straight from 74 High Road, but chose not to.

92. There were other inconsistencies in the appellants’ account, see paragraphs 85 to 87 above. Those inconsistencies led us further to doubt the accuracy of the appellant’s evidence.

20 93. We conclude therefore that the appellants did have somewhere else to go and that having nowhere else to go was not a reason why they moved into the flat.

(3) Conclusion that preventing the flat sitting empty was not a reason the appellants moved into it

25 94. It was not clear whether the appellants were also asserting that, having sold the house and paid off their debts, they considered it prudent to occupy the flat rather than pay rent on another property and have the flat sitting empty.

95. We find that preventing the flat sitting empty was not a reason why the appellants moved into it, for two reasons.

30 96. First, they said in their statement of case that they occupied the flat pending another rented property becoming available. This suggests that the trigger for moving out would not be that they had found a tenant but would be that they had found another rented property, regardless of whether or not they had a tenant in the flat.

35 97. The second reason for our conclusion that preventing the flat sitting empty was not a reason the appellants moved into it was that the flat would not have sat empty. On the appellants’ own evidence, the tenant left only because the appellants required her to.

(4) Conclusion that suitability to the family's needs was not a reason for them to move to the flat

5 98. Dr Kaltsas did not attempt to argue that the flat was of a size suitable for the family's needs. He told us, and we find, that it had two bedrooms and that the second bedroom had bunk beds and a single bed. He did tell us, and we accept, that the expected times of congestion in the flat were reduced by the fact that, in university term-time, his two eldest children would be away. His daughter further told us, and we accept, that the youngest child, the 14-year-old son, was away over the summer of 2008 due to the death of his grandparent.

10 99. However, that does not alter the fact that, on Dr Kaltsas' account, all three children would potentially be at home during university holidays. A bedroom containing bunk beds and another bed is not suitable accommodation for two young women and a teenaged boy.

15 100. In addition, Dr Kaltsas did not dispute the evidence from Mr Shea as to the distance from the flat to their son's school and to his wife's GP practice. Both school and GP practice were in Woodford, some 12 or 13 miles from the flat.

101. So, we find that the flat was unsuitable in size to the family's needs outside university term time, and that it was unsuitable in location for the son's school and wife's place of work.

20 102. In addition, the properties that the family occupied before and after they occupied the flat were bigger, and nearer to the GP practice and the school, than the flat. This suggests that, even with their daughters away at university, the flat was out of character compared with accommodation that the appellants otherwise chose to occupy.

25 103. The factors at paragraphs 98 to 102 above would not have swayed us had we accepted that the appellants did move into the flat due to financial difficulties. But we found above that, even if financial difficulty had been their motivation in 2007, it was no longer their motivation when, following exchange for the sale of High Road, they made the decision to move into the flat.

30 104. Dr Kaltsas had explained to us (paragraph 38 above) how his family of five would manage to live in the flat. We accept that that is how they intended to manage for the short period that they planned to live in the flat. But we do not accept that they intended to manage in that way for more than that short period.

35 (5) Conclusion that the appellants did know, before moving into the flat and at the time of moving into it, that its sale was proceeding

105. We concluded that the appellants did know, before moving into the flat and at the time of moving into it, that its sale was proceeding, in view of the following.

106. First, Dr Kaltsas had told us that "From February until about four days before exchange, it was completely quiet from the solicitors on the flat sale" (paragraph 55

above). But when we asked him whether he knew in June 2008 that the flat was to sell, Dr Kaltsas replied “Not necessarily. Because so much time had passed that we thought it was an exercise on paper”. We find, from the context of our question, set out at paragraphs 51 and 52 above, that the “exercise” to which Dr Kaltsas was referring here was that of dealing with the usual pre-exchange documents. This suggests that he accepted that the appellants did deal with those documents in June 2008, that is, before moving into the flat. We find therefore that the appellants did deal with the pre-exchange documents for the flat sale before moving into the flat.

107. Second, we do not accept that the appellants believed this to be “an exercise on paper”. Dr Kaltsas did not explain why the fact that, on his account, “so much time had passed” meant that it was merely an exercise on paper. Nor can we discern any objective reason why the passage of time prior to the exercise would render it an exercise on paper at the time of doing it.

108. Third, why would the appellants make the tenant move out when the appellants had already found other, more suitable rental accommodation (that is, Woodside Road)? In view of our finding at paragraph 91 above that the appellants did have somewhere to go, we find that the appellants did not need to make the tenant move out so that the appellants had somewhere to live. So why did they make her move out, especially when she did not want to? The most likely answer is, and we find, that it was because the appellants knew that the sale of the flat was about to go through.

109. Fourth, it is in any event unlikely in our judgment that the appellants would exchange contracts on 9 July but only find out as late as 5 July that exchange was going to happen at all. It is not common for no warning at all to have been given by such a late stage. Even if it is true that the appellants did not know until 5 July that the exact date of exchange would be the ninth, we find that they did know, by 1 July, that exchange on the flat was imminent.

110. When asked whether he had “solid confirmation” before the house sale completed that the sale of the flat would go through, Dr Kaltsas did not answer (paragraphs 54 and 55 above). We find that his initial lack of answer suggests, on the most generous interpretation, that Dr Kaltsas was not himself sure what the truth was.

111. Other inconsistencies in the appellants’ account (paragraphs 85 to 87 above) further led us to doubt the accuracy of their evidence.

112. We conclude therefore that the appellants did know, before moving into the flat and at the time of moving into it, that its sale was going through.

35 (6) Conclusion that appellants knew that occupation of the flat would be temporary

113. We found above that financial difficulty, having nowhere to go, preventing the flat sitting empty and suitability to the family’s needs were not reasons why the appellants moved into the flat. But even if we are wrong on those points, we find that the appellants knew that their occupation of the flat would be temporary, in view of what we say under heading (5) above.

114. We do not find that the appellants necessarily knew, when they moved in on 1 July, that they would complete the sale of the flat on 25 July. But in view of our findings above, in particular that they dealt with “pre-exchange documentation” before moving into the flat, we find that by 1 July they knew they were about to exchange contracts on the flat.

115. The contract will usually contain an agreed completion date; there was no suggestion that the contract in the present case did not. We find therefore that the contracts exchanged on 9 July either stated that completion would be on 25 July or stated that completion would take place 16 days after exchange. We found above that the appellants did deal with the pre-exchange documents for the flat sale before moving into the flat. In the course of dealing with those documents, it would be normal for solicitors to ask their client to agree a completion date for insertion into the contract. There was no suggestion that the solicitors did not ask that here. We find that the solicitors did ask that here, and that the appellants knew and agreed to a completion date that would take place 16 days after exchange of contracts. Even if they did not know, when they moved in, that exchange would take place on 9 July, we find that they must have known it would take place within two or three weeks, given that they had dealt with the pre-exchange documentation before moving in.

116. We find therefore that, when they moved into the flat, the appellants knew that they would not stay there longer than about five weeks and that their stay there might actually be shorter than five weeks (as in fact happened).

Overall conclusion in light of *Goodwin*

117. We find, in view of all of the above, that the quality of the appellants’ occupation of the flat did not have a sufficient degree of permanence, continuity or expectation of continuity to justify describing that occupation as “residence”.

118. As in *Goodwin*, the flat was unsuited to the appellants’ needs. As in *Goodwin*, the flat was already on the market when the appellants moved into it. (The citation of facts earlier in the judgment suggests that the farmhouse was put on the market after the taxpayer moved in. But the fact that it was already on the market was part of Lord Justice Millett’s reasoning, and applies equally here.)

119. Indeed, we find that the quality of occupation in the appellants’ case had even less permanence, continuity or expectation of continuity than in *Goodwin*. In *Goodwin*, the taxpayer used the farmhouse as a stop-gap. In the present case, the appellants did not use the flat as a stop-gap; they had already found a suitable house, 41 Woodside Road, to occupy on the sale of High Road. In addition, the flat was not only unsuited to the appellants’ needs, but also unsuited to their wishes, as evidenced by the properties they occupied before and after the flat. In any event, we have found that they knew, at the time of moving in, that they would be moving out within five weeks of moving in. This presents an even more temporary picture than in *Goodwin*. In *Goodwin*, the taxpayer was found to have used the house as a stop-gap, but it does not appear that he knew, on moving in, how short his occupation would be.

120. We find therefore that the appellants did not reside in the flat within the meaning of sections 222 and 223 TCGA and of *Goodwin*.

121. The appeal is dismissed.

Appealing against this decision

5 122. 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
10 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”
which accompanies and forms part of this decision notice.

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**RACHEL PEREZ
TRIBUNAL JUDGE**

RELEASE DATE: 6 May 2014