



**TC02726**

**Appeal number: TC/2012/07595**

*CAPITAL GAINS TAX – only or main residence exemption – lettings relief  
– whether on facts property was occupied as taxpayer’s only or main  
residence – insufficient evidence to support taxpayer’s case – appeal  
dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**WADE LLEWELLYN**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN CLARK  
CHRISTOPHER JENKINS**

**Sitting in public at Southampton on 10 April 2013**

**Keith A Green FCA, CTA of Barter Durgan, Chartered Accountants, for the  
Appellant**

**Miss Karen M Evans, Appeals and Reviews Officer, HM Revenue and Customs,  
for the Respondents**

## DECISION

1. Mr Llewellyn appeals against a decision by the Respondents (“HMRC”), confirmed on review in July 2012, that principal private residence relief and lettings relief were not available in respect of the disposal of his property at 10, Henderson Road, Southsea in 2007-08.

### *The facts*

2. The evidence consisted of a bundle of documents. In preparation of the appeal for hearing, both parties had stated that they would not be calling witnesses. However, at the hearing Miss Evans stated that she would like to ask Mr Llewellyn some questions; as explained below, we treated this as an application, and as neither Mr Green nor Mr Llewellyn had any objections to this course, we agreed that Mr Llewellyn should give oral evidence. From the evidence we find the following background facts.

3. Mr Llewellyn lived with his partner at 10 Netley Terrace, Southsea. They had bought this property as tenants in common in 1976, and had moved in at some point during 1977.

4. At a very much later stage, Mr Llewellyn was experiencing personal difficulties with his partner. The terms on which the partners owned the property meant that neither partner could force a sale, and so prevented any form of “escape” as far as Mr Llewellyn was concerned. He thought it fortunate that, because he worked as a long-haul cabin crew member, his work took him away for long periods at a time.

5. His mother decided to make lifetime gifts to him and his sister. This enabled him to fund the deposit in order to purchase the property at 10 Henderson Road. Completion of his purchase took place on 31 October 1996.

6. After purchasing 10 Henderson Road, Mr Llewellyn moved into the property with a sleeping bag and basic necessities. (As there was a question as to the exact point at which he moved in, we consider the question of timing at a later stage below.)

7. As the house was in a poor state, it took a year to restore and furnish it. As Mr Llewellyn subsequently explained in correspondence with HMRC, his relationship with his partner was not so acrimonious that he could not return to Netley Terrace to collect mail and attend to various demands that that house, which was also in need of physical hard work, demanded.

8. By a date which Mr Llewellyn gave as being the summer of 1998, the rift in the relationship between him and his partner had healed. Mr Llewellyn stated that he moved back to Netley Terrace permanently in September 1998. (There was some concern that these dates might not have been correct; we consider this below.)

9. Subsequently he let 10 Henderson Terrace on a permanent basis. This continued until 2005, when he realised that the property had deteriorated badly after a succession of what he described as some unreliable, and occasionally destructive, tenants. As his partner now had the full onset of Alzheimer's disease, Mr Llewellyn retired early and set about putting 10 Henderson Road into a suitable condition for sale. In the winter of 2005-06, he spent over £11,000 on the property, and in the winter of 2006-07 he replaced the bathroom and a major part of the kitchen. He put the property up for sale in April 2007, and sold it on 4 May 2007.

10. Information as to Mr Llewellyn's returns of rental income for the years ended 5 April 1998, 5 April 1999 and 5 April 2000 was included in the bundle. However, no copy of Mr Llewellyn's self assessment return for the year to 5 April 2008 was included in the evidence, nor were we provided with any copies of the entries made in his return. We are therefore left to infer from later correspondence that in his 2007-08 self assessment return, Mr Llewellyn claimed only or main residence relief from capital gains tax and lettings relief from capital gains tax. The first correspondence included in the evidence was a notice from Mrs Studholme of HMRC dated 22 October 2009 and issued to Mr Llewellyn under s 9A of the Taxes Management Act 1970 ("TMA 1970"), and a copy of her letter of the same date to Mr Llewellyn's accountants enclosing a copy of that notice and requesting certain information and documents by 4 December 2009.

11. On 11 December 2009, Mrs Studholme sent an information notice to Mr Llewellyn. This required a breakdown of the renovation work undertaken as at 5 April 1998 and the improvements undertaken as at 5 April 2007, together with documentary evidence. Mrs Studholme also required details of the basis of Mr Llewellyn's claim to private residence relief.

12. In their letter to HMRC dated 3 February 2010, Mr Llewellyn's accountants Barter Durgan enclosed receipts for the improvements carried out prior to the sale of 10 Henderson Road. They also enclosed the invoice for the bathroom and kitchen installation, but as Mr Llewellyn had been unable to find the invoice for the materials, he had had to estimate their cost. The letter continued:

"Our client purchased 10 Henderson Road with the intention of the property becoming his principal private residence as he had broken up with his partner. He actually lived in the property as his main residence for a period of 16 months whilst undertaking the renovation and then decided to let the property when he reconciled with his partner. Mr Llewellyn is unable to provide evidence of his occupation or the receipts for the renovation understandably as this period was over 10 years ago."

They enclosed a revised capital gains tax computation.

13. On 8 June 2010 Mrs Studholme wrote to Mr Llewellyn, referring to her earlier letter to his accountants dated 5 March 2010. The 8 June letter was a notice requiring information and documents. In particular she required information as to his residence at 10 Henderson Road, as she held information which suggested that he had resided at

10 Netley Terrace on a permanent basis since at least March 1982. To consider the claim in respect of the renovation work, she asked for details of what had been removed from the kitchen and bathroom and what had been installed. She also asked for details of rental income for the year ended 5 April 2007.

5 14. As Mr Llewellyn had been in hospital, additional time was allowed for the response to the information notice. On 5 August 2010, Mr Llewellyn's accountants Barter Durgan wrote to HMRC; they enclosed a letter dated 4 August 2010 from Mr Llewellyn. (We have set out above certain information taken from his letter.) Barter Durgan explained that although Mr Llewellyn had not kept invoices for the period  
10 between May 1997 and starting to let the property (which they referred to as having been in October 1998), he had produced a cash book giving details of expenditure of approximately £9,735. They set out other information relating to expenditure from 1 April 2005 to 1 April 2006. In relation to letting income, they stated that the letting had ceased in March 2006.

15 15. In her reply to Barter Durgan dated 6 September 2010, Mrs Studholme indicated that she did not accept that 10 Henderson Road became Mr Llewellyn's principal private residence when he moved into it; in her view, his stay there was of a temporary nature. She raised certain questions concerning the steps which he might have taken following his move into the property; we consider these below. In relation  
20 to expenditure on the property, she did not consider that various items were allowable for capital gains purposes, although she was prepared to allow various items relating to work carried out on the garden. She enclosed a revised capital gains tax calculation, which removed the claim to private residence relief and lettings relief, and also the items of expenditure which did not qualify as capital expenditure.

25 16. In their reply dated 24 September 2010, Barter Durgan challenged various points which Mrs Studholme had made, and stated that they did not accept her decision that 10 Henderson Road did not qualify as Mr Llewellyn's principal private residence. They enclosed a revised capital gains tax computation showing a gain which was less than the annual exemption, so that no tax was due.

30 17. Due to absences and involvement in other matters, Mrs Studholme was unable to reply until 7 December 2010. She referred to information which she had obtained from the internet showing that the purchase of 10 Henderson Road had not been significantly different from other properties in the area sold at around the same time. The document showed the property as having been purchased on 31 October 1996,  
35 rather than May 1997 as Mr Llewellyn had indicated in his letter dated 4 August 2010. She also referred to dates having been changed in the cash book; we consider this below.

18. On 31 March 2011 Mrs Studholme wrote to Barter Durgan. She expressed disappointment that she had not received a reply to her letter dated 7 December 2010.  
40 She referred to confirmation which she had received from the Land Registry that Mr Llewellyn had purchased 10 Henderson Road on 31 October 1996, and not in May 1997. She enclosed a revised capital gains computation taking into account the earlier

purchase date. She indicated that she intended to issue a closure notice at the beginning of May 2011.

19. In their reply dated 11 May 2011, Barter Durgan stated that they did not accept the interpretation which Mrs Studholme had put on Mr Llewellyn's case. They referred to his purchase by means of a mortgage, and to the timing of the gift from his mother.

20. Following her reply to Barter Durgan on 13 June 2011, Mrs Studholme referred the matter to technical colleagues within HMRC. Deborah Wright and David Black agreed with the view which Mrs Studholme had taken.

21. On 6 September 2011 Mrs Studholme sent Mr Llewellyn a closure notice under s 28A(1) and (2) TMA 1970. Her conclusion after reviewing the information and documents provided was that 10 Henderson Road had never been his principal private residence. As a result, principal private residence relief and letting relief were not due in respect of his disposal of the property. Her amendment to his self assessment return meant that, whereas he had previously been due to pay tax of £477.07, it now showed that he was due to pay £16,715.38 tax, the difference being £16,238.20. On the same date, she sent a letter to Barter Durgan; this set out detailed explanations for her conclusions in her closure notice.

22. On 16 September 2011 Barter Durgan appealed to HMRC against the decision to withdraw private residence relief, and requested postponement of the full amount of the tax due. They indicated that they would be providing information from Mr Llewellyn's lender in support of his claim.

23. On 3 January 2012, Mrs Studholme wrote to Barter Durgan to express disappointment that they had still not provided the information which they believed supported Mr Llewellyn's claim to principal private residence relief.

24. On 3 May 2012, as Mrs Studholme had heard nothing further from Barter Durgan, she wrote direct to Mr Llewellyn to offer him a review. She set out a brief overview of how HMRC had arrived at their decision.

25. Barter Durgan replied on 22 May 2012. They stated that they were still unable to accept HMRC's conclusion that 10 Henderson Road had never been Mr Llewellyn's principal private residence. They set out their comments, and said that if HMRC were still unable to accept Barter Durgan's findings, the case would have to go to the tribunal. They enclosed a revised capital gains tax computation showing a capital gain after annual exemption of £1,726, on which the tax was £345.20.

26. By a letter faxed to HMRC on 31 May 2010, Barter Durgan requested a review.

27. On 25 July 2012, Mrs C Warner of HMRC's Appeals and Reviews division wrote to Mr Llewellyn with the results of her review. Her conclusion was that the decision in the letter dated 3 May 2012 should be upheld. (As her conclusions and her reasons concerned matters covered in the course of Mr Llewellyn's appeal, considered below, we do not set them out in this decision.)

28. By Notice of Appeal accepted by HM Courts and Tribunals Service as dated 1 August 2012, Barter Durgan notified Mr Llewellyn’s appeal to the Tribunal.

*The law*

29. The relevant part of s 222 of the Taxation of Chargeable Gains Act 1992 (“TCGA 1992”) is:

**“222 Relief on disposal of private residence**

(1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in—

10 (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  
...”

*Discussion and conclusions*

30. There was no dispute between the parties as to the law; as the differences in their submissions were purely of fact, we set out those differences at the appropriate points below.

31. Mr Llewellyn’s claim to principal private residence relief relates to a limited period of his ownership of 10 Henderson Road. In terms of the legislation, the question which his appeal requires us to consider is whether for a period he occupied 10 Henderson Road as his “only or main residence”. If he did, an element of his gain on the disposal of the property in 2007-08 will be exempt from capital gains tax, and in addition lettings relief will be due. If he did not, the whole of his gain will be liable to capital gains tax. (We are not required to consider any potential effect of Mr Llewellyn’s claim on the exemption of 10 Netley Terrace.)

32. The timing of Mr Llewellyn’s move to 10 Henderson Road is important in determining whether the principal private residence exemption applies. In his letter dated 4 August 2010 Mr Llewellyn stated that he had received the money from his mother after her death in early 1997 and had used that money to fund the deposit for the purchase of the property in June, and then moved into the property in July 1997. The information subsequently obtained by HMRC from the Land Registry showed that his recollections concerning the timing had not been accurate, and that the purchase had been completed on 31 October 1996.

33. At the hearing Miss Evans asked Mr Llewellyn when he had moved into the property. His answer was that he thought that this had been within about three weeks of the property becoming his. As Deborah Wright of HMRC pointed out in a memorandum to Mrs Studholme dated 18 July 2011, there would have been a marked difference between conditions in the property in November 2006 and those which Mr Llewellyn would have encountered if his original assumption relating to the date of the purchase had been correct and his move had been in July 1997.

34. In his letter dated 4 August 2010, Mr Llewellyn stated:

“Initially I was granted a reduction on Council Tax for Henderson Road because it was virtually empty. That reduction ceased as I put my home together.”

5 35. This suggests that conditions in the property were initially very spartan, and might cast doubt on the time at which he could claim to have resided there. However, the precise reason for the reduction was not clear, and the local authority may not have viewed the property as unoccupied. Further, it is unclear whether Mr Llewellyn would have been granted any reduction in Council Tax by reason of single occupancy. As the reason for the reduction cannot be clearly established from the evidence before  
10 us, we do not draw any conclusions from that reduction.

15 36. On balance we are prepared to accept Mr Llewellyn’s evidence that he took his chair, sleeping bag and kettle to 10 Henderson Road in November 1996. On its own, this is not sufficient to show that he had moved into that property as his only or main residence. It is therefore necessary to examine what other steps he did or did not take in connection with his move.

20 37. In his letter dated 4 August 2010 Mr Llewellyn explained that he was still responsible for half the bills relating to 10 Netley Terrace, and that for the purposes of his employer, banks and other authorities retained his stake in that property. We interpret that statement as meaning that he did not inform any of those persons or institutions of his change of address to 10 Henderson Road. We have already referred to his comments concerning visits to Netley Terrace to collect his mail and to deal with the physical demands of work on that house.

25 38. Another respect in which Mr Llewellyn did not inform the authorities about his move was that he continued to be registered to vote from 10 Netley Terrace. Mrs Studholme referred to this in her letter dated 9 September 2010, and also questioned why, if he intended 10 Henderson Road to be his principal private residence, ie his home where he would be expected to be contacted or found, he continued to have his mail addressed to Netley Terrace. She also asked why he had not informed his employer, his bank or other financial institutions of his change of residence.

30 39. Mrs Studholme understood that he had a 50 per cent interest in Netley Terrace, but did not consider that to be a valid reason to stop him from notifying all the various parties of his change of residence. In her view, this lack of action in respect of the change of address was due to him regarding Netley Terrace as his principal private residence, his home, 10 Henderson Road being merely a temporary arrangement  
35 during a difficult time in his private life.

40 40. Miss Evans asked him at the hearing why he had used the Netley Terrace address in 1996 when he had applied for a credit card. He replied that this was for the same reasons as stated in his letter dated 4 August 2010. His further comment in reply is considered below.

40 41. Although in his letter dated 4 August 2010 Mr Llewellyn gave the date of his return to live with his partner at Netley Terrace as having been summer 1998, it appears from other evidence that this may not have been the correct year. In his self

5 assessment return for the year to 5 April 1998, Mr Llewellyn showed receipt of gross rental (ie before deductions) of £3,200. As gross rental income for the years to 5 April 1999 and 5 April 2000 was £6,000, we agree with the conclusion of Deborah Wright of HMRC that the property must have been let from approximately October 1997 onwards.

10 42. With their letter to Mrs Studholme dated 5 August 2010, Barter Durgan sent a cash book prepared by Mr Llewellyn. The years listed in that book had been amended, respectively, from 1996 to 1997 and from 1997 to 1998. It appears, both from subsequent correspondence and from Mr Llewellyn's reply to Miss Evans' question to him at the hearing concerning the dates, that those amendments were not correct. We find that Mr Llewellyn's occupation of 10 Henderson Road was from November 1996 to August (or at latest, September) 1997. However, the precise dates can only be material if Mr Llewellyn can show that for the relevant period he occupied 10 Henderson Road as his only or main residence.

15 43. The burden of proof in an appeal against a self-assessment determined by a closure notice is on the taxpayer bringing the appeal. For us to be persuaded that Mr Llewellyn's self-assessment in respect of his capital gains tax liability is excessive, we have to be satisfied on the balance of probabilities that Mr Llewellyn's claims to only or main residence relief and lettings relief meet the statutory conditions for those  
20 reliefs.

44. We have set out above the text of s 222(1)(a) TCGA 1992. The question raised in Mr Llewellyn's case is whether 10 Henderson Road was, at any time in his period of ownership, his "only or main residence". Mr Llewellyn's case is that he did live for a period in 10 Henderson Road, and that for such period it was his only or main  
25 residence.

45. In *Goodwin v Curtis* [1998] STC 475 at 481, Schiemann LJ said:

30 "I accept, as did the commissioners, the Crown's contention that in order to qualify for the relief a taxpayer must provide some evidence that his residence in the property showed some degree of permanence, some degree of continuity or some expectation of continuity."

46. In his leading judgment, Millett LJ commented:

35 "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 [ie, since April 2009, the Tribunal] to decide."

47. This makes it clear that the question of the nature of the occupation is a question of fact for the Tribunal. As a result, examining the facts of other cases is unlikely to provide significant assistance, unless a case amounts to an illustration of the relevant principles to be taken into account.

40 48. We have accepted that Mr Llewellyn occupied the property for a period beginning three weeks after the purchase on 31 October 1996. We are satisfied that

such occupation came to an end by, at the latest, September 1997. However, that does not determine whether such occupation of 10 Henderson Road was as Mr Llewellyn's only or main residence. In *Goodwin v Curtis*, Millet LJ referred to the position of Mr Goodwin, the taxpayer:

5                               “The taxpayer was undoubtedly in occupation of the farmhouse. He undoubtedly occupies it as a dwelling house. The question is: did his occupation amount to residence?”

49. In order to show that occupation in any particular case amounts to residence with the requisite degree of permanence, some degree of continuity or some  
10 expectation of continuity, it must be expected that the taxpayer in question should have taken some steps to demonstrate to the “wider world” his ties with the property which he is claiming has become his only or main residence. Any individual factor such as notifying change of address, registering to vote from the new address or basing applications for credit cards at that address is not necessarily a pre-requisite for  
15 this purpose, but the overall picture must be consistent with the proposition that the taxpayer has moved his base from where he has previously been living and established it at that new address.

50. In Mr Llewellyn's case, there is no evidence of him having established his base at 10 Henderson Road, as he chose to keep all “official” records concerning his  
20 contact details as being at 10 Netley Terrace. Apart from the statements made by him and his accountants in support of the contention that 10 Henderson Road was his only or main residence, which amounted to unsupported assertions rather than evidence, there was no independent evidence to show that his occupation of the property amounted to residence there with some degree of permanence, some degree of  
25 continuity or some expectation of continuity.

51. The further part of Mr Llewellyn's answer to Miss Evans' question concerning the credit card application was also inconsistent with residence of such character. He said that he was basically “camping out” in Henderson Road, and hoping for reconciliation with his partner. His time at Henderson Road continued, and he saw his  
30 partner every day or every other day; he felt his home was Netley Terrace.

52. Mr Green asked him whether, when he had bought Henderson Road, this had been with the intention of it being his home. Mr Llewellyn replied that it had; the bitterness between his partner and him had been too uncomfortable. He had not initially believed that reconciliation was likely. At the back of his mind there had  
35 always been the hope that things would improve. His partner was less harassed when at work. Mr Llewellyn stated that he had fully intended Henderson Road to be his home.

53. Despite Mr Llewellyn's response to Mr Green's question, we find that his earlier reply to Miss Evans casts doubt on the argument that his occupation of 10  
40 Henderson Road had the requisite degree of permanence or continuity or some expectation of continuity. His decision not to notify changes of address could be viewed as indicating his hope for resolution of the differences between him and his partner and resumption of his previous life at Netley Terrace.

54. Our conclusion is that the evidence provided by Mr Llewellyn is not sufficient to satisfy us on the balance of probabilities that he occupied 10 Henderson Road as his only or main residence for the period from November 1996 until August or early September 1998. As a result, relief is not available under s 222 TCGA 1992, and lettings relief is also unavailable.

55. Mr Green's submissions appeared to be based on the request for a degree of leniency in applying the legislation to Mr Llewellyn. We would emphasise that the Tribunal's function is to determine whether, on the particular facts of the case, the taxpayer does or does not qualify for the capital gains tax exemptions which he has claimed. In the absence of sufficient evidence, it is not open to the Tribunal to operate some form of discretion to grant exemptions where the case for those exemptions has not been proved to the requisite standard.

56. In relation to the quantum of the capital gains tax assessed on Mr Llewellyn, we have seen no evidence to suggest that the amount assessed should be varied in any way, and we therefore confirm Mr Llewellyn's 2007-08 self assessment as amended by Mrs Studholme's closure notice dated 6 September 2011. In arriving at our conclusion on this issue, we note that in her revised computation attached to her letter dated 31 March 2011, she increased the "Allowable Enhancement Expenditure" from £3,637 as shown in her earlier computation to £8,637. That figure formed the basis for her closure notice. In their revised computation enclosed with their letter dated 27 May 2012, Barter Durgan used the same figure for enhancement expenditure, so did not seek to vary it. We leave the amount of tax in the closure notice unchanged.

57. We need to comment on a procedural matter. As already mentioned, both parties had confirmed in correspondence with the Tribunal administrative office that no witnesses were being called, yet Miss Evans asked to be allowed to put questions to Mr Llewellyn. If a party wishes to hear evidence from any particular individual, that party should request in advance that such individual should give evidence. This permits witness statements to be prepared where appropriate, and enables both parties to prepare to put questions to the witness concerned. It would have been open to Mr Llewellyn and his adviser to maintain that he should refuse to answer questions, and in such event it would have been left to us to determine whether HMRC's application to question Mr Llewellyn should or should not be granted. Had we decided not to grant it, there would have been no opportunity for Miss Evans to question him. We do not regard it as a fair approach to wait until the hearing to "spring upon" an individual a request to give evidence where that individual has been led to expect, as a result of correspondence, that he or she will not be required to give evidence. Whether or not it was appropriate for Mr Green to have decided in advance of the hearing not to call Mr Llewellyn as a witness in support of his own case is not a matter on which we feel that we should comment.

58. The result of our conclusions on the evidence is that Mr Llewellyn's appeal must be dismissed.

*Right to apply for permission to appeal*

59. 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.

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**JOHN CLARK  
TRIBUNAL JUDGE**

**RELEASE DATE: 29 May 2013**

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