



TC02841

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Appeal number: TC/2012/09455

**10 CAPITAL GAINS TAX – private residence relief -whether taxpayer lived in
property as his main residence – insufficient evidence – appeal dismissed**

**FIRST-TIER TRIBUNAL
15 TAX CHAMBER**

DR AMIN EGHBAL-OMIDI

Appellant

- and -

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

Respondents

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**TRIBUNAL: JUDGE JILL GORT
SONIA GABLE**

Sitting at Bedford Square in London on 11 June 2013

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Mr M Ismail, Accountant, appeared on behalf of the Appellant

**Mr Paul O'Reilly, Presenting Officer, instructed by the General Counsel and
30 Solicitor to HM Revenue and Customs, for the Respondents**

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DECISION

1. This is an appeal against a Discovery Assessment issued under s.29 of the Taxes Management Act (“TMA”) 1970 to make good a loss of tax arising from the failure to return details of a capital gain on the disposal of a property in the year 2007/2008. The decision letter was dated 23 December 2011 and the decision was upheld on review on 24 August 2012. The chargeable gain assessed was in the sum of £234,208, the tax due was £93,683.20. The gain assessed arose out of the Appellant’s disposal of a property at 28 Favart Road, London SW6 4AJ which was sold on 21 May 2007.

2. Lengthy grounds of appeal were submitted with the notice of appeal which is dated 7 October 2012, and also in a letter dated 3 February 2013. This letter was sent from the Appellant’s accountants, Ismail & Co. In essence the appeal is on the basis that the Appellant, Dr Omid, occupied the property as his principal private residence, such occupancy being between 1 December 2006, when contracts were exchanged, and 21 May 2007 when the property was sold.

The background

203. Dr Omid purchased the property jointly with a Mr D Mafi on 19 March 2007 for £1,250,000 plus fees and stamp duty. To purchase the property Dr Omid together with Mr Mafi obtained a mortgage from NatWest Bank based on the open market value of the property of £1,500,000 and a development value of £2,205,000.

4. A planning application was made in January 2007 to add a single storey extension to the rear of the property. This application at some stage lapsed without approval.
5. Dr Omid and Mr Mafi sold the property on 21 May 2007 for £1,800,000.
6. HMRC issued Dr Omid with a tax return for 2007/2008 on 6 April 2008 with a filing date of 31 January 2009. In the absence of the completed return HMRC issued Dr Omid with a Notice of Enquiry under s.29 of the Taxes Management Act 1970 on 27 July 2009 in order to review the position with regard to 2007/2008.
7. The 2007/2008 return was submitted on 23 April 2010 but did not include details of the disposal of the property at Favart Road on the basis that it was subject to a claim for Principal Private Residence Relief.
8. In the absence of any agreement in relation to any chargeable capital gain arising on the disposal of the property or that it qualified for Principal Private Residence Relief, HMRC issued an assessment under s.29 Taxes Management Act 1970 on 23 December 2011 to bring into charge the capital gains tax due on the disposal of the property.

The legislation

9. The Taxation of Chargeable Gains Act 1992 (“The TCGA”) provides:

“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 -
 - (a) a dwelling-house or part of a dwelling-house which is, or as at any time in his period of ownership been, his only or main residence, or ...”

(1)

10. The Taxes Management Act provides:

“29. Assessment where loss of tax discovered

(1) 5person	If an officer of the Board or the Board discover, as regards any (the taxpayer) and a year of assessment -
tax, gains	(a) that any income which ought to have been assessed to income or chargeable gains which ought to have been assessed to capital tax, and not assessed, or
	...

10The officer or, as the case may be, the Board may, subject to sub-sections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his their opinion to be charged in order to make good to the Crown the loss of tax.

The issue

1511. Whether or not Dr Omidi is chargeable in respect of the capital gain arising on his half share of the disposal of a property at 28 Favart Road, London SW6 4AJ (“the Property”) which was sold on 21 May 2007.

12. Whether or not the decision by HMRC to deny the Appellant's claim for Principle Private Residence Relief in accordance with S.221(1)(a) of the TCGA is
20correct.

The evidence

13. Two bundles of documents were provided by the Respondents which included a witness statement from Mrs Christine Wallace, who was the officer who made the initial assessment. Dr Omidi did not appear before us to give evidence and did not
25provide a witness statement.

14. The facts and matters set out above are all agreed facts. The following matters appear in the documents and correspondence provided by the Respondents.

15. There is evidence that between July 1998 and February 2009 Dr Omidi lived at 7 different addresses. He was granted Principal Private Residence Relief in respect of two of those properties prior to his purchase of the property in issue in this case. Those two properties were at 47 Malt House Drive and 70 Fitzgeorge Avenue. It was claimed on his behalf by his then accountant, Mr Norman Stanley, that he had lived at Fitzgeorge Avenue until January 2007, and from January 2007 until March 2007 he had lived at 15 Broomhouse Dock. It was claimed that he had lived at the property in issue in this appeal from March 2007 until May 2007.

16. The first document in relation to the purchase of the property was the contract which is dated 1 December 2006 and shows the purchase price as £1,250,000.

17. The second relevant document is a letter from Dr Omidi's solicitors, Unsworth Rose, dated 4 December 2006, which states *inter alia* that:

15 “It is noted the property is used for lodgers and relatives of the owner on a non-self-contained basis and it is therefore probable that planning consent will need to be provided to convert the property back into a single dwelling-house (with one kitchen rather than two kitchenettes etc.)”

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18. Under a heading “Contract/Agreement” it is stated that:

25 “The document now allows you to transfer your interest in the property to another party. It will be possible to sell the property on for a larger sum prior to completion and arrange for the new party to pay the stamp duty in connection with the purchase. The Seller cannot refuse to allow a transfer of this nature.”

The document goes on to state that it is understood that the parties have proceeded to exchange for the purchase of the property without confirmation of mortgage finance.

19. By a letter dated 18 December 2006 from Dr Omidi's financial adviser, Ms Sherifa Gabbani, which, like the above letter is addressed to both Dr Omidi and Mr Mafi, provides *inter alia* as follows:

“You are considering two options; (i) refurbish and move in together as one home; or (ii) convert to two apartments in which you would each live in one, with a connecting door allowing you to treat it as one family home.”

The writer refers to an end value of £2.2 million, and that each flat is estimated to be of equal worth. She continues:

“Thus in effect you have bought yourselves a home worth overall at £2.2 million, laid out exactly as you want it, with the ability to move freely between the two units, for approximately £400,000 from your own funds.”

20. The planning application referred to above is dated 15 January 2007. It is made in the name of Dr Omidi and also of Mr Mafi. There is a letter from Unsworth Rose dated 1 March 2007 which similarly is addressed to both Dr Omidi and Mr Mafi and which refers to the mortgage offer on the property. This was followed up by a letter dated 26 March 2007 where the solicitor requires both parties to sign the mortgage.

21. The next relevant document is a Council Tax bill for 2006/2007 dated 27 February 2007 in respect of the property which is addressed to Dr Omidi at the property.

22. A design and access statement dated 2 March 2007 refers to creating “a nice single family dwelling”.

23. The completion statement is dated 19 March 2007.

24. On 21 May 2007 the property was sold for the sum of £1,800,000. There is reference to the sum of £21,150 being paid to Wellingtons Estates Agents.

25. In support of Dr Omid’s claim that the property was his principal private residence between March and May 2007 when it was sold, various documents were produced on his behalf, specifically the Council Tax bill referred to above; a bill dated 20 March 2007 from a company called Quick Home Removal which is addressed to Dr Omid at the property; an estimate dated 1 April 2007 addressed to him at the property for repairs for water damage; a quote for bathroom refurbishment dated 3 April 2007 also addressed to him there; a letter from a job applicant address to him dated 9 April 2007; an invite to him from the Syrian Embassy dated 12 May 2007; and finally a letter from the Syrian Embassy dated 18 May 2007. These 7 documents were the only documents provided by Dr Omid in support of his claim.

25. There is a Council Tax exemption form in respect of a property at 83 Fulham Park Gardens, London, which is addressed to Dr Omid at the Broomhouse Dock address. This form is dated 28 November 2007.

2011. After selling Favart Road Dr Omid bought the property at 83 Fulham Park Gardens. The date of that purchase is not in evidence. It appears from a solicitor’s

letter of 18 February 2009 that the cost of that property was £190,000. Mr Mafi contributed 20% of the purchase price, and thereafter had a 20% equitable stake in it which he held on behalf of his sister who had contributed some funds towards the purchase of Favart Road, although the size of that contribution is not known it would appear to have been 20%.

12. The Council Tax exemption documents referred to above show that the house at Fulham Park Gardens was empty between 20 August 2007 and 19 February 2008. It is unclear where Mr Mafi lived from March 2007 onwards. There is no documentary evidence that he lived at Favart Road, and it appears that it was never intended that he should live at Fulham Park Gardens. We have no evidence as to why he invested 20% in the equity of that property.

13. As noted earlier, the correspondence in respect of Favart Road was addressed to both Dr Omid and Mr Mafi jointly at Broomhouse Dock. In a letter to Dr Omid's accountants requesting information as to his private residence, on 2 March 2005 Dr Omid gave Broomhouse Dock as his address. Some evidence of Dr Omid's intentions at the time of the purchase of the property at Favart Road is contained in a letter dated 25 July 2011 which Dr Omid sent to his then accountant, Norman Stanley, who forwarded it to HMRC. That letter refers to Dr Omid and Mr Mafi (Dariush) as having been very close and that "due to cultural barriers and family issues we kept our sexual relationship away from anyone for a number of years". The letter continues:

“Following Dariush’s STD diagnosis he decided rightly that he should inform his wife about the situation, I made great deal of arrangement to help him to clear the STD permanently and successfully, understandably however his wife found it impossible to come to terms with that.

5 “In that particular year Dariush and I had both gone through very challenging times, he had to leave his matrimonial house, which lead to our decision to move and live together in 28 Favart Road, I never intended or had been the reason for the breakup of his marriage, keeping up appearances so that we would not in any way hurt the people we loved.

10 “Moving to 28 Favart was supposed to seem like splitting the house into two separate flats for appearance sake, but in reality would give us the chance and the time we desperately needed to deal with our complicated situations gradually, due to the vendor’s situation we had to exchange hurriedly in December 2006 and did not complete until March 2007.

15 “We had both thought that the time was right on both sides unaware of a number of events taking place around us, Dariush and his wife having experienced a number of personal issues and eventually started to reconcile as the effect on their two children was not (sic) unbearable on all of us, under the circumstances it was financially and emotionally impossible to carry on living
20 in that property it was sold and I moved back with my immediate family.”

14. Over the time that HMRC first looked into the issue of Dr Omid’s purchase of Favart Road, starting with a letter of 23 August 2010, HMRC regularly asked for

information about Dr Omid's wife and family and what was their address. Such information was not provided until in a letter of 10 May 2011 Norman Stanley informed HMRC that between 1998 and the present time Dr Omid was not married and had various partners. As stated above, he had given Dr Omid's address until 5 January 2007 as 70 Fitzgeorge Avenue, and from January 2007 to March 2007 as 15 Broomhouse Dock.

15. When reviewing the decision, Mr McKinley wrote on 13 July 2012 to Dr Omid's accountants, who by then were Ismail & Co., and asked a series of questions, many of which remained unanswered, including when Mr Mafi had decided to reconcile with 10 his wife and when it became impossible for Dr Omid to live in the property. He also asked whether both Mr Omid and Mr Mafi lived at the property, and to confirm that they had no other properties.

16. Ismail & Co replied on 2 August 2012. It appears from that letter that they may not have seen Dr Omid's letter of 25 July 2011, set out in part above, because the 15 reply is in terms of it being Dr Omid who was under pressure from his family, not Mr Mafi. In the reply Mr Ismail stated:

20 "The emotional issues are deeply personal and I suspect it is impossible to establish the precise date when Dr Amin decided to commit his future back with his wife and child. The initial local authority reaction to the planning application was a factor to the decision to move out from Favart Road. Another factor was the unsolicited offer to purchase the property received from a third party. The partners realised they faced a struggle with the local authority in

addition to the emotional turmoil. They then had an important financial decision to make in addition to a personal one. In other words, at a time when Dr Omidi was under pressure to reverse his decision to live with Mr Mafi, they received an offer to sell the property, not only, at a price above the true value
5 but also in the face of the local authority's initial response to the planning application."

(It is clear from further paragraphs in the letter that when Mr Ismail refers to "Dr Amin" as in the above paragraph that he is meaning Dr Omidi.)

17. Further on in the same letter Mr Ismail confirmed that Dr Omidi and Mr Mafi
10resided at Favart Road during the period of ownership, but in the following sentence stated that he is not acting for Mr Mafi and is not privy to his assets and financial circumstances. Mr Ismail confirmed in the same letter that Dr Amin "and his family" were still living at the property at Fulham Park Gardens and that Dr Omidi had yet fully to reimburse Mr Mafi his share of the proceeds.

1518. At the hearing of the appeal we were provided with two emails which Dr Omidi had sent to Mr Ismail on 10 June 2013, both of which had been forwarded to Mr O'Reilly. In one Dr Omidi refers to a rush to purchase the property, which was done without sufficient funds in place to complete the purchase. He also refers to "...the time scale to obtain planning permission to split in to two flats". In fact the planning
20application which was made was for a single dwelling, but the email continues: "...facts are that we did manage to complete and move in to the property, however it quickly became clear that we were not able to get planning to split the property in to

two flat for dariush and myself.” It continues with an account of the sale of the property to the client of a friend, but gives no dates or more precise details of the timing of the sale. The second email was evidently written by Dr Omid but is addressed 'to whom it may concern' and purports to be from his lawyer about the circumstances surrounding the purchase. Neither email is of much evidential value nor carries much credibility.

The Appellant's case

19. The Appellant's case was that Dr Omid was entitled to Principal Private Residence Relief on the basis that he had resided at the property and had intended to settle there long term. The fact that a large gain arose on the sale was irrelevant.

20. The Appellant relied on the documents submitted, in particular the Council Tax bill in respect of Favart Road which did not show any discount for being vacant. It was suggested that the Appellant would not have engaged in the work on the bathrooms and entailed costs in respect of it if there were no intention to remain there.

21. The broker evidence in respect of the financial options with its reference to Dr Omid and Mr Mafi's plans was relied on heavily as it was a contemporary document.

22. We were informed that the decision to sell had been made after the Local Planning Authority had indicated that the planning application would be denied, however no evidence was provided of this. Similarly we were not provided with any evidence as to how the sale of the property by Dr Omid came about, other than in the email of 10 June referred to above. Mr Ismail had in correspondence informed HMRC that an

estate agent friend of Dr Omid's, who was aware of Dr Omid's personal circumstances, had mentioned that he had a client who would be interested in looking at the property should they decide to sell. The sale then went ahead to the client of that friend, and a commission was paid to the estate agent. No evidence was provided to HMRC or to us as to this event, other than the evidence of the commission paid to Wellingtons, the estate agent in question.

23. It was submitted by Mr Ismail that the fact that Dr Omid had not jointly owned properties with any other person previously, and that Mr Mafi had not previously been involved in such a transaction in the past, indicated that the purchase was not for investment purposes. Again, we have no evidence of this in relation to Mr Mafi. It was suggested that there was no business reason for Dr Omid share the large profit that was made on the property. However, Mr Mafi's share appears only to have been 20%, we were told that Mr Mafi had not made a profit from the sale, and also that Dr Omid still had not fully reimbursed Mr Mafi for what it transpired was his sister's input into the initial purchase. We have no evidence of the ultimate division of the proceeds of sale.

24. It was submitted by Mr Ismail that the friends had planned to develop the property as two flats and that Dr Omid had incurred substantial costs in respect of the layout of the property. There is no evidence before us as to these costs and in any event these costs would necessarily have been incurred if the intention were that the property should be purchased as a financial investment.

The Respondents' case

25. HMRC do not believe that the available evidence shows that Dr Omid is entitled to claim Private Residence Relief in respect of the disposal of 28 Favart Road, London.

526. Mr O'Reilly points to the short period of occupation, between March and May only; the fact that the loan for the property was obtained on both an open market value and a future development value; the fact that the letter from the financial adviser states only what the options were which were being considered by Dr Omid and Mr Mafi, it does not state how they decided to proceed; the planning application proposed
10not to have the property split into two flats, but that there should be a side extension and basement development to make the property a "desirable family home"; the special conditions attached to the contract of sale allowed the property to be sold on prior to completion without the then vendor being able to object, and the fact that this letter was not provided to HMRC by those representing Dr Omid but was obtained by
15them via other enquiries. It was submitted that this last letter demonstrates that Dr Omid's intention from the outset was to sell on the property and it was never intended to be his permanent residence.

27. HMRC did not accept that the miscellaneous information provided by Dr Omid detailing correspondence sent to him at Favart Road provided actual evidence that he
20lived in the property or that any such evidence was anything other than temporary.

28. HMRC had asked for evidence of the circumstances under which the commission was paid to Wellingtons Estate Agent but no such information had been provided.

HMRC believed it must have been marketed for sale immediately the purchase had been completed.

29. HMRC also pointed to the fact that Dr Omid was an experienced buy-to-let investor with a large portfolio of properties, and was well aware of the significance of a successful claim to private residence relief.

30. To qualify for relief under s.222(1) of Taxation of Chargeable Gains Act 1992 the property must have been Dr Omid's only or main residence at some point during the period of ownership whereas the evidence submitted did not prove that Dr Omid occupied the property on a permanent basis with any occupation that did take place being at best temporary in nature.

31. We were referred to the case of *Goodwin v Curtis* (1998) STC 475 in which the Court of Appeal confirmed that residence denotes some degree of permanence, some degree of continuity or some expectation of continuity. Temporary occupation at an address does not make a man resident there.

1532. We were also referred to the case of *Favell v HMRC* (2010) TC 00642, a First-Tier decision of the Tribunal and the case of *Morgan v HMRC* (2013) TC 02596, a further decision of First-tier Tribunal in which it was submitted by Mr O'Reilly that it was held that the intention of the Appellant when purchasing the property was the deciding factor rather than the quality of the occupation.

The Appellant's Response

33. Mr Ismail distinguished the case of *Goodwin* on the basis that in that case the Appellant had moved in after the property was put up for sale. Similarly he sought to distinguish the cases of *Favell* and *Morgan*, the former on the basis that the Appellant had not known how long he would be there at the time he moved in, and in the case of *Morgan* this was case was relied on by Mr Ismail because in that case problems arose after the exchange of contracts and before Mr Morgan moved in.

Reasons for decision

34. At the hearing itself we indicated that it was unfortunate that Dr Omid had chosen 10(or been advised) not to attend to give evidence. On subsequently reviewing the considerable amount of correspondence in the file from his representatives and the other documents, it became even more apparent that not only was much of the evidence ambiguous, but it was also contradictory. This has caused great difficulty for us in establishing just what the actual circumstances were surrounding this 15purchase and its subsequent sale. As an example of the contradictions we encountered, we were told both that Dr Omid was not married (by Norman Stanley), and that he had a wife and family (by Mr Ismail). We were also given his address from July 2004 to January 2007 (Norman Stanley) as 70 Fitzgeorge Road, but it is recorded by HMRC that Dr Omid himself had telephoned them on 2 March 2005 and 20informed them that at that date he was living at Broomhouse Dock. Norman Stanley subsequently informed HMRC that Dr Omid only lived at Broomhouse between January 2007 and March 2007. However, correspondence was addressed to Dr Omid

at Broomhouse as late as November 2007, at a time when we were told by Dr Omidi (in his letter of 7 July 2011) that he had “returned to his immediate family”. We were never given any evidence (reliable or otherwise) as to ownership of Broomhouse, or as to who occupied it from March 2007 when Dr Omidi was said to be living at Favart 5Road. We note too that correspondence was addressed to both Dr Omidi and Mr Mafi at Broomhouse in the period January to March 2007.

35. We accept that the letter of 18 December 2006 from Sherifa Gabbani setting out her understanding of the parties’ requirements is relevant, but, given the subsequent events, we consider it to amount to no more than evidence of an intention at that time, 10namely December 2006. When it is considered in the light of the planning application which was made, together with the design and access statement of 2 March 2007 which refers to creating “a nice single family dwelling”, and when considered in the light of Dr Omidi’s letter of 25 July 2011, it would appear that that intention was never fulfilled. In that letter Dr Omidi refers to Mr Mafi leaving his matrimonial 15home and to that particular year, which we take to be a reference to 2006 not 2007, being very challenging and leading to the decision to live together. He states that the move was “supposed to seem like splitting the house into two separate flats for appearance sake” but he then proceeds to refer to the hurried exchange occasioned by the vendor’s situation. That the planning permission sought in March was not for two 20separate flats, but for a “single family dwelling” indicates that by the time of completion their plans had changed. Dr Omidi does refer to it being “emotionally” impossible for them to carry on living at the property, but his English is not good enough for us to draw the conclusion from this that he and Mr Mafi did actually both

occupy the property. Additionally he states that it was financially impossible for them to carry on, which is not one of the reasons put forward by Mr Ismail for the sale of the property in his letter of 2 August 2012 and where there is no reference to Mr Mafi being the one who decided to reconcile with his wife and children, rather reference is made to Dr Omid being the one wishing to reconcile with his wife.

36. On the basis of the evidence before us, whilst we accept that at some stage in 2006 and early 2007 there was an intention that Dr Omid and Mr Mafi should live together at Favart Road, we are not satisfied on the basis of such evidence as has been provided that either of them ever did live there. The evidence appears to be that Dr Omid carried on living at Broomhouse Dock whilst plans to do work at Favart Road were made, but to what end those plans were made we do not know. There is no evidence that any work was carried out, and if work were being done, why would Dr Omid live there during it rather than remain at Broomhouse Dock which was apparently still available to him? There is clear evidence that Dr Omid obtained as a special condition of the purchase that he could market the property prior to completion and it appears to us in all the circumstances that it is more likely than not that this is what in fact happened.

37. The burden of proof is on Dr Omid in this appeal to satisfy us on the balance of probabilities that he did move to Favart Road with the intention of it being his principal private residence. Mr Ismail relied on the case of *Morgan*, but the Tribunal in that case was having to consider circumstances where an Appellant had moved into the house in question but, the intention which had been formed at the time of the purchase having become incapable of fulfilment, the issue was whether or not he had

moved in with the intention of the property being his principal private residence. The case was decided entirely on its facts and in circumstances where there was credible evidence before the Tribunal, in the present case there is a lack of credible evidence. We cannot accept the assurance apparently given to Mr Ismail by Dr Omidi that both she and Mr Mafi did live together in Favart Road, given that Dr Omidi appears to have given a different account to Mr Ismail from that set out in his letter of 25 July 2011 to Norman Stanley, as well as the other inconsistencies that there are in the evidence.

38. In all the circumstances therefore this appeal is dismissed.

39. 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.

**JUDGE J C GORT
TRIBUNAL JUDGE**