



145TACD2022

Between:

[REDACTED]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

[REDACTED]

Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter the “Commission”) as an appeal against the decision of the Respondent dated 25 June 2020 to clawback 100% of the Help to Buy relief which the Appellant had previously been approved for and received pursuant to section 477C of the Taxes Consolidation Act 1997 (hereinafter the “TCA1997”).
2. The oral hearing of the within appeal took place on 1 September 2022.
3. The total amount of tax under appeal is €7,200.00.

Background

4. [REDACTED] (hereinafter the “Appellant”) is jointly assessed to tax with his wife [REDACTED] and both are PAYE taxpayers.
5. On 20 May 2016 the Appellant and his wife entered into a Memorandum of Agreement with [REDACTED] (hereinafter the “Vendor”) for the purchase and sale of the

following property which was specified in the "Particulars and Tenure" section of the Memorandum of Agreement:

"ALL THAT AND THOSE the plot of ground or airspace and known or intended to be known as Dwellinghouse [REDACTED] in the City of Dublin (hereinafter called "the Site") forming part of the estate known or intended to be known as [REDACTED] described in Part II of the First Schedule to the specimen Deed of Transfer (hereinafter called "the Estate") and more particularly delineated on the map or plan annexed hereto and thereon coloured red for identification purposes only."

6. On 29 September 2016 the Vendor's solicitor wrote to the Appellant's solicitor as follows:

"We refer to the above matter and to previous correspondence.

We are enclosing herewith:

- 1. Copy Property Registration Authority approved scheme map bearing record number [REDACTED]; and*
- 2. Revised Draft scheme map outlining the property in sale.*

Recently it has come to light that the approved Property Registration Authority Scheme map contains errors affecting [REDACTED].

Specifically please note:

- 1. The numbering of the houses in [REDACTED] should be increasing in line with the remainder of the [REDACTED]
[REDACTED]
[REDACTED]*
- 2. The PRA approved Scheme map has the houses numbered in [REDACTED] as containing odd numbers whereas they should have contained even numbers.*

In practice what this means is that the unit number your clients believed they were purchasing is not what they have contracted to buy with reference to the map annexed to the Contract for Sale. The address of the property is the same but its location on the ground is not.[sic] Its location on the ground is as per the Draft Scheme map included in this letter.

Our client deeply regrets what has occurred. The revised scheme map, as per the document enclosed, has been submitted to the Property Registration Authority for approval.

We would be obliged if you would review the within and forward same to your clients for instructions."

7. The revised scheme map identified the property known as [REDACTED] in the City of Dublin as being a property which was 5 doors away from the property which had been outlined in the original scheme map which was attached to the Memorandum of Agreement dated 20 May 2016.
8. By way of email dated 30 September 2016 the Appellant and his wife confirmed that they were satisfied to proceed with the purchase of the property identified as [REDACTED] in the City of Dublin on the revised scheme map which had been enclosed in the Vendor's solicitor's letter of 29 September 2016.
9. On 21 December 2016 the ownership of [REDACTED] in the City of Dublin *hereinafter the "Property") was transferred into the names of the Appellant and his wife.
10. On 10 March 2017 the Appellant and his wife made a retrospective application to the Respondent for relief pursuant to section 477C of the TCA1997, more commonly known as Help to Buy relief, in respect of the Property 4 which said application was approved in principle for maximum tax available for relief of €19,464.
11. On 21 March 2017 the Appellant and his wife initiated a claim for Help to Buy relief in relation to the Property in the amount of €12,000 which represented an amount equating to 5% of the purchase price paid for the Property.
12. On 25 May 2017, having received verification of the claim from the Vendor, the Respondent issued payment of €12,000 to the Appellant and his wife.
13. On 25 April 2020 the Appellant and his wife sold the Property and on 29 April 2020 the Appellant contacted the Respondent informing them of the sale of the Property. This correspondence set out that it was the Appellant's belief that as he and his wife had sold the Property and were no longer living there they were required to repay the sum of €4,800 to the Respondent, that being 40% of the Help to Buy relief which they had received.
14. On 11 May 2020 the respondent commenced a review of the said Help to Buy claim and on 25 June 2020 finalised the review and informed the Appellant and his wife that as they had entered into a contract for the purchase of the Property outside of the qualifying period

specified in section 477C of the TCA1997 the Help to Buy relief was not correctly due. As a result the Respondent informed the Appellant and his wife that the full amount of relief received by them, €12,000, would have to be repaid pursuant to section 477C of the TCA1997.

15. A period of interaction and discussion was entered into between the Parties during which time further information was requested by the Respondent which the Appellant submitted. During this time the Appellant informed the Respondent of the issue which had arisen in relation to the revised scheme map and that the Property which had been purchased was not the property which was contained in the Memorandum of Agreement dated 20 May 2016. In addition the matter was referred by the Respondent's Compliance Branch to the Respondent's Personal Taxes and Legislation Division for further review.
16. On completion of the review on 24 June 2021 the Respondent concluded that the relief claimed by the Appellant and his wife was not correctly due and upheld the decision of 25 June 2020. This decision was communicated to the Appellant and his wife on 1 July 2021.
17. By way of Notice of Appeal dated 12 August 2021 the Appellant appealed the decision of the Respondent.

Legislation and Guidelines

18. The legislation relevant to the within appeal is as set out below. The entirety of section 477C of the TCA1997 is contained in Appendix 1 hereto.

Section 477C of the TCA1997 – Help to Buy

“(1) *In this section—*

...

“first-time purchaser” means an individual who, at the time of a claim under subsection (3) has not, either individually or jointly with any other person, previously purchased or previously built, directly or indirectly, on his or her own behalf a dwelling;

...

“qualifying contractor” has the meaning assigned to it by subsection (2);

...

“qualifying period” means the period commencing on 19 July 2016 and ending on 31 December 2019;

“qualifying residence” means –

(a) a new building which was not, at any time, used, or suitable for use as a dwelling, or

(b) a building which was not, at any time, in whole or in part, used, or suitable for use, as a dwelling and which has been converted for use as a dwelling,

and-

(i) which is occupied as the sole or main residence of a first time purchaser,

(ii) in respect of which the construction work is subject to the rate of tax specified in section 46(1)© of the Value Added Tax Consolidation Act 2010, and

(iii) where the purchase value is not greater than –

(I) where in the period commencing on 19 July 2016 and ending on 31 December 2016, a contract referred to in subsection 3(a) is entered into between a claimant and a qualifying contractor or the first tranche of a qualifying loan referred to in subsection (3) (b) is drawn down by a claimant, €600,000 or

(II) in all other cases €500,000.

...

(3) Where an individual has, in the qualifying period, either—

(a) entered into a contract with a qualifying contractor for the purchase by that individual of a qualifying residence, that is not a self-build qualifying residence, or

(b) drawn down the first tranche of a qualifying loan in respect of that individual's self-build qualifying residence,

that individual may make a claim for an appropriate payment.

...

(17) (a) On its completion, a qualifying residence or a self-build qualifying residence shall be occupied by the claimant as his or her only or main residence.

(b)(i) Where an appropriate payment is made on foot of a claim under this section, and the qualifying residence or self-build qualifying residence ceases to be occupied—

(I)by the claimant, or

(II)where more than one individual is a party to the claim, by all of those individuals,

within 5 years from occupation of the residence, the claimant shall notify the Revenue Commissioners and, in accordance with subparagraph (ii), pay to the Revenue Commissioners an amount equal to the amount of the appropriate payment, or the lesser percentage there specified of the amount of the appropriate payment.

(ii) Where the residence ceases to be occupied as mentioned in subparagraph (i)—

...

(IV)within the fourth year from occupation, the claimant shall, within 3 months from the residence ceasing to be so occupied, pay to the Revenue Commissioners an amount equal to 40 per cent of the amount of the appropriate payment...

...

(21) An individual aggrieved by a decision by the Revenue Commissioners to refuse a claim under this section may appeal the decision to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days of the notice of that decision."

Submissions

Appellant's Submissions

19. The Appellant submitted that although he and his wife had entered into a Memorandum of Agreement in relation to a property on 20 May 2016 this Memorandum of Agreement did relate to the Property which they ultimately purchased. The Appellant submitted that the change in property which was brought about in the correspondence from the Vendor's solicitor on 29 September 2016 meant that the Property which he and his wife purchased:

- i. was not the same property as that which was identified in the map which was annexed to the Memorandum of Agreement which they had entered into on 20 May 2016;
- ii. was in a different location from the property which was identified in the map which was annexed to the Memorandum of Agreement which they had entered into on 20 May 2016; and
- iii. had a different layout from the property which they had physically toured prior to entering in the Memorandum of Agreement which they had entered into on 20 May 2016.

20. The Appellant submitted that because of this he believes that the correct date of entering into contract for the purchase of the Property was 30 September 2016 and that as a result he and his wife were entitled to claim and receive Help to Buy relief pursuant to section 477C of the TCA1997.

21. The Appellant accepts that because the Property was sold in 2020 and amount of €4,800 is due to be repaid pursuant to section 477C(17)(b)(ii)(IV) of the TCA1997 as he and his wife were in their fourth year of occupation of the Property in 2020 when it was sold.

Respondent's Submissions

22. The Respondent submits that they are satisfied that the Appellant and his wife qualified in all respects for Help to Buy relief pursuant to section 477C of the TCA1997 save and except that they did not meet the criteria as set out in section 477C(3) of the TCA1997 in that they had not entered into a contract with a qualifying contractor for the purchase of a qualifying residence during the qualifying period of 19 July 2016 to 31 December 2019.

23. The Respondent submits that they are satisfied that the Memorandum of Agreement dated 20 May 2016 is the contract for the purchase of the property pursuant to section 477C(3) of the TCA1997 and that because the signature of that Memorandum of Agreement occurred before 19 July 2019 the Appellant and his wife were not entitled to claim and receive Help to Buy relief pursuant to section 477C of the TCA1997.

Material Facts

24. The following material facts are not at issue between the Parties:

- i. The Appellant and his wife entered into a contract with a qualifying contractor for the purchase of a qualifying residence that was not a self-build qualifying residence prior to making the application and claim for Help to Buy relief in March 2017.

25. The following material fact is at issue between the Parties:

- i. The Appellant and his wife entered into a contract for the purchase of the Property during the qualifying period set out in section 477C(1) of the TCA 1997.
- 26. The qualifying period relevant to the within appeal was set out in section 477C(1) of the TCA1997 and is 19 July 2016 to 31 December 2019.
- 27. Section 477C(3) of the TCA1997 provides that where an individual has, in the qualifying period, entered into a contract with a qualifying contractor for the purchase by that individual of a qualifying residence, that is not a self-build qualifying residence they may make a claim for an appropriate payment under the Help to Buy scheme.
- 28. The Parties are in agreement that the Appellant and his wife entered into a contract with a qualifying contractor for the purchase of a qualifying residence that was not a self-build qualifying residence prior to making and application and claim for Help to Buy relief in March 2017. The Parties however are not in agreement as to the date of the entering into of the contract.
- 29. On the one hand the Appellant asserts that the date on which he and his wife entered into the contract for the purchase of the Property was 30 September 2016. This is on the basis that 30 September 2016 was the date on which they confirmed in writing that they were willing to purchase a property which:
 - i. was not the same property as that which was identified in the map which was annexed to the Memorandum of Agreement which they had entered into on 20 May 2016;
 - ii. was in a different location from the property which was identified in the map which was annexed to the Memorandum of Agreement which they had entered into on 20 May 2016; and
 - iii. had a different layout from the property which they had physically toured prior to entering in the Memorandum of Agreement which they had entered into on 20 May 2016.
- 30. On the other hand the Respondent submits that the Memorandum of Agreement entered into by the Appellant and his wife on 20 May 2016 was the date of the contract for the purchase of the Property for the purposes of claiming Help to Buy relief pursuant to section 477C of the TCA1997 and that because the signature of that Memorandum of Agreement occurred before 19 July 2019 the Appellant and his wife were not entitled to claim and receive Help to Buy relief pursuant to section 477C of the TCA1997.

31. It has long been established that in order for an agreement for the sale and purchase of property to be enforceable it must be evidenced in writing. This must take the form of a signed contract, a memorandum or note of the agreement in writing. This has been placed on a legislative footing by way of section 51 of the Land and Conveyancing Reform Act 2009.
32. It has also long been settled that the written evidence of an agreement for the sale and purchase of property may take the form of a number of documents and must contain all of the essential or material terms of the parties' agreement and in particular must identify the parties, the property, the price and other essential provisions.¹
33. The Memorandum of Agreement which the Appellant and his wife entered into on 20 May 2016 identified a property by way of a map which was attached thereto and which marked the property which the Appellant and his wife thought they were buying. This property was identified in the body of the Memorandum of Agreement as being "*ALL THAT AND THOSE the plot of ground or airspace and known or intended to be known as [REDACTED] in the City of Dublin...*".
34. The correspondence from the Vendor's solicitor of 29 September 2016 set out that there had been an error in the mapping of the housing development in which the Property was located and states that: "*In practice what this means is that the unit number your clients believed they were purchasing is not what they have contracted to buy with reference to the map annexed to the Contract for Sale. The address of the property is the same but its location on the ground is not.[sic] Its location on the ground is as per the Draft Scheme map included in this letter.*"
35. The Appellant's uncontested submission to the Commissioner at the oral hearing was that this property was an entirely different property, in a different location and with a different layout than the property which had been identified in the Memorandum of Agreement of 20 May 2016. The Commissioner accepts this submission.
36. The Appellant and his wife responded in writing on 30 September 2016 confirming that they were willing to accept the property which, once the Draft Scheme map contained in the Vendor's correspondence of 29 September 2016, would subsequently be [REDACTED] [REDACTED] in the City of Dublin.
37. The Commissioner finds that as a result of the error in the map contained in the Memorandum of Agreement of 20 May 2016, that Memorandum of Agreement did not

¹ See *Carrigy v Brock* (1871) IR 5 CL 501 at 504; see also *Crane v Naughten* [1912] 2 IR 318 at 324

identify the property which the Appellant and his wife purchased from the Vendor and did not identify the property which the Vendor sold to the Appellant and his wife.

38. The Commissioner finds that the correspondence of 29 September 2016 and 30 September 2016 form part of the agreement in writing for the purchase and sale of the Property and therefore the Commissioner finds that, for the purposes of section 477C(3) of the TCA1997, the date of the contract entered into by the Appellant and his wife for the purchase of the Property was 30 September 2016.

39. Therefore, the Commissioner finds that the Appellant and his wife entered into a contract for the purchase of the Property during the qualifying period set out in section 477C(1) of the TCA 1997. Therefore, this material fact is accepted.

Analysis

40. The burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, is on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:-

“This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the tax is not payable.”

41. Section 477C(3) of the TCA1997 provides that:

“Where an individual has, in the qualifying period, either—

(a) entered into a contract with a qualifying contractor for the purchase by that individual of a qualifying residence, that is not a self-build qualifying residence, or

(b) drawn down the first tranche of a qualifying loan in respect of that individual's self-build qualifying residence,

that individual may make a claim for an appropriate payment.”

42. The Commissioner has already found as a material fact that the date of the contract entered into by the Appellant and his wife for the purchase of the Property was 30 September 2016 and that the Appellant and his wife therefore entered into a contract for the purchase of the Property during the qualifying period set out in section 477C(1) of the TCA 1997.

43. Therefore, it follows that the Appellant and his wife were entitled to claim and receive Help to Buy relief from the Respondent pursuant to section 477C of the TCA1997. The Respondent was correct in its initial decision in May 2017 to allow the claim for Help to Buy relief pursuant to section 477C of the TCA1997 by the Appellant and his wife and to make a payment of €12,000.00 in relation to same.
44. Section 477C(17)(b)(ii) of the TCA1997 provides for a “clawback” situation whereby if a recipient of Help to Buy relief ceases to occupy the property within 5 years of the purchase of the property a sliding scale of clawback from 100% to 20% applies. Because the Appellant and his wife ceased to occupy the Property during the fourth year following its purchase the relevant percentage for clawback which applies is 40% as set out in section 477C(17)(b)(ii)(IV) of the TCA1997. Therefore, it follows that the Appellant must repay the amount of €4,800.00 to the Respondent that being 40% of the €12,000.00 in Help to Buy relief which was paid by the Respondent to the Appellant and his wife.

Determination

45. This is a highly unusual set of circumstances and the Commissioner emphasises that this determination relates only to the precise circumstances of the purchase of the Property the subject matter of the within appeal by the Appellant and his wife.
46. The Commissioner appreciates and acknowledges the helpful and courteous manner in which both the Appellant and Respondent conducted this appeal.
47. Having considered the facts and circumstances of this appeal, together with the evaluation of the documentary and oral evidence as well as the submissions from both Parties, the Commissioner determines that the Appellant has succeeded in establishing that he was entitled to receive relief in the amount of €12,000.00 from the Respondent pursuant to section 477C of the TCA1997.
48. The Commissioner determines that the Appellant should repay the amount of €4,800.00 to the Respondent that being 40% of the €12,000.00 in Help to Buy relief which was paid by the Respondent to the Appellant and his wife.
49. This appeal is determined in accordance with Part 40A TCA 1997 and in particular, section 949 thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.



Clare O'Driscoll
Appeal Commissioner
8 September 2022