Stamp Duty Land Tax

Higher rates for additional properties

Changes made by the Budgets

20 June 2019

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1 INTRODUCTION

The eye catching stamp duty land tax (SDLT) announcement in the 2017 Autumn Budget was first time buyers' relief[1], introduced with effect from Budget Day: 22 November 2017. That Budget also made a number of changes to the rules for the higher rates of SDLT for the purchase of additional properties[2]. HMRC refer to this as HRAD, others call it the 3% surcharge. Its effect is to add another 3% of the price to the SDLT due.

There is a complex interaction between first time buyers' relief and the higher rates. Even if first time buyers' relief would otherwise be available, it is overridden if the higher rates apply. This might, for instance, be because of the circumstances of a spouse of the buyer. It could be because of interests held in trust for the buyer, or interests held for minor children of the buyer. The relief and the interaction are explained in an article on first time buyers' relief with examples.

The 22 November 2017 changes were enacted[3] by amending Schedule 4ZA to the Finance Act 2003. The changes had come into effect immediately by virtue of Budget Resolutions passed on 28 November 2017. All of the changes to the higher rates came into effect for transactions with an effective date (usually the date of completion) on or after 22 November 2017. One of the changes was to close what HMRC saw as a potential loophole[4]. The other changes were to provide escape routes from the higher rates in some very specific circumstances.

- Where the purchaser has a prior interest of at least 25% in the purchased dwelling[5].
- For spouses and civil partners acquiring from one another[6].
- Where there is a property adjustment order binding a person into a property[7].
- For purchases on behalf of children through deputies appointed by the Court of Protection and for properties held for such children[8].

The 2018 Budget on 29 October 2018 made fewer changes[9].

- There was a change to the definition of "major interest" for purchases completing on or after Budget Day. This is to make it clear that a share in a property[10] counts as a major interest for the purposes of the higher rates[11].
- The timescales for claiming back the extra 3% were extended[12].
- To widen first time buyers' relief in respect of shared ownership leases[13].

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[1] See the HMRC guidance note for first time buyers' relief and the policy papers.
[2] See the policy paper and draft clauses for the other changes.
[3] By Schedule 11 of the Finance Act 2018 introduced by section 40.
[4] See section 2 of this article.
[5] See section 3 of this article.
[6] See section 4 of this article
[7] See section 5 of this article
[8] See section 6 of this article
[9] See section 1.48 in the 2018 Budget publication giving an overview of tax legislation and rates and the 2018 Policy Paper.
[10] The word "property" is often used in this article in place of "residential property" or "dwelling" which sound rather stilted.
[11] See section 7 of this article.
[12] See section 8 of this article.
[13] The article on first time buyers' relief has been updated to cover this.

- It announced that the Government will publish a consultation in January 2019 on a SDLT surcharge of 1% for non-residents buying residential property in England and Northern Ireland.

The existing higher rates are intended to apply to purchases of additional residential properties, such as second homes[14] and buy to let properties. The design of the higher rates is however more complicated than it needed to be.

The 2018 Budget changes came into force by virtue of Budget Resolutions passed on 2 November 2018 and were then enacted by the Finance Act 2019[15].

To paraphrase the conditions for the higher rates to apply to individuals buying a single dwelling[16] (all of which have to be met) are as follows:

- Condition A: The chargeable consideration for the property being bought is £40,000 or more.
- Condition B: The property being bought (whether freehold or leasehold) is not subject to a long lease.
- Condition C: There are other property interests counting against the buyer.
- Condition D: The replacement exception does not apply.

In all of the examples which follow, unless stated otherwise, it is assumed that properties are in England, that the persons involved are single and intend to live in the property as their only or main residence[17]. Similarly it is assumed, unless otherwise stated, that they hold no other property interests, whether shares in properties or interests in trusts[18] holding properties. It is also assumed that they do not have minor children with interests in properties.

[14] The word "home" is generally used to describe not just a dwelling, but a dwelling in which the person concerned lives as his or her residence.
[15] Royal Assent on 12 February 2019.
[16] The word "dwelling" is used in the legislation to catch houses, flats and other properties which someone might live in. Unlike "home" or "residence" it does not signify that the person concerned intends to live in it as their residence.
[17] The word "residence" indicates that the person concerned not only occupies the property, but dwells in it as their home. There has to be the necessary degree of permanence and expectation of continuity. See SDLTM09812.
[18] Trusts under which the person concerned has a right to live in the property for life or a right to the income.

2 CLOSING A LOOPHOLE INVOLVING THE REPLACEMENT EXCEPTION

2.1 The loophole described

There is an exception from liability for the higher rates for transactions which involve the replacement of the buyer's only or main residence, referred to above as Condition D. The conditions for the replacement exception require a disposal of a "major interest" in a property that the person used to live in as their main or only home. This exception can save buyers paying the higher rates in some situations where they have another property, or even a portfolio of other properties. I often refer to it as the "replacement exception".

The problem was that the rules appeared to allow someone to take advantage of the replacement exception by transferring ownership of a small proportion[19] of a previous home or by granting a lease[20] of it[21]. The Explanatory Note issued with the Finance Bill 2018 said that the new provision "will counteract abuse"[22].

It seemed that a disposal of a share in a former home, even a small share, might have been enough to meet this condition. Bizarrely, even a disposal to a spouse who had also lived in the property seemed to be enough[23]!

2.2 Action taken at the 2017 Autumn Budget

An extra condition was added so that a person has to dispose of all of their interest in their old home to qualify for the replacement exception. Also a spouse or civil partner[24] cannot retain any share in that property. Although the changes apply generally to transactions[25] completing on or after 22 November 2017, there are some fairly standard provisions excepting some transactions completing pursuant to contracts entered into before that date[26].

For example, someone who used to have a 30% share in their former home might be able to benefit from the replacement exception if they dispose of their entire 30% share. However they cannot now (for a purchase following the 2017 Autumn Budget changes) rely on the replacement exception if they only dispose of part of their share, nor if they dispose of their

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[19] HMRC took the view that the definition of "major interest" included any share in a freehold or leasehold property, however small the share was. That has been confirmed by legislation with effect for transactions completing on and after 29 October 2018.

[20] A lease granted for a term of over seven years.

[21] Or even by transferring the bare legal estate in the property as Paul Clark pointed out.

[22] The Policy Paper of 22 November 2017 refers to a change which "closes down an avoidance route" and says the measure "counteracts abuse of relief when someone who changes main residence retains an interest in their former main residence". The 2017 Autumn Budget overview of tax legislation and rates at 1.42 says: "The government will also introduce a new rule to prevent abuse of relief for replacement of a purchaser's only or main residence, by requiring the purchaser to dispose of the whole of their interest in their former main residence and to do so to someone who is not their spouse."

[23] On a literal reading of the legislation in FA03/Sch4ZA/para3(6). See the article in the Telegraph by Sam Meadows of 17 September 2017 which might well have been the trigger for the changes being made.

[24] A spouse or civil partner who is "living together" with the person concerned at the relevant time. There is more about what is the relevant time in Examples 2.6.3 and 2.6.4 below.

[25] The "transaction" taken is the purchase of the new home. So it does not help a taxpayer that the earlier disposal of an interest in an old home was before 22 November 2017.

[26] Finance Act 2018/Sch11/para16.

share to a spouse or civil partner[27]. Nor does the replacement exception now work if the spouse or civil partner retains a share in the property.

There follow summaries of the conditions for the replacement exception as they now apply with the extra condition (ba) added. The exception works differently depending on whether the old home is sold after or is sold before the new home is bought.

2.3 Recovery of higher rates where the old property is sold **after** the new one is bought

We are looking here at a case where someone sells their old home (a former only or main residence) **after** buying a new home, intending the new home to be their only or main residence. The buyer might also own other properties.

Whether or not the buyer owns other properties "at the end of the day of the transaction" on which the new home is bought, the buyer will own two or more dwellings (at least the old home and the new home). So the higher rates are due on the purchase of the new home[28]. The question is whether the extra 3% can be reclaimed if the old home is later sold.

The amended statutory conditions[29] for having a right to reclaim the higher rates for purchases completing on and after 22 November 2017 can be summarised as:

(a)	On the completion of the purchase of the new home the buyer intended to live in the new home as the buyer's only or main residence.
(b)	Within the next three years, the buyer or their spouse or civil partner sells or otherwise disposes of the old home (or at least a major interest in it).
(ba)	**Immediately after that disposal, neither the buyer nor their spouse / civil partner[30] retains any major interest[31] in the old home.**
(c)	At any time within the three years leading up to the purchase of the new home, the buyer had lived in the old home as the buyer's only or main residence.

The old home could be anywhere in the world, so long as it was owned on the basis of a freehold or a lease for over seven years, or an equivalent in the local jurisdiction.

2.4 Where the old home is sold at the same time or **before** the new home

We are looking here at a case where someone sells their old home at the same time as, or has sold their old home **before**, buying their new home, but has interests in other properties that would mean that the higher rates would otherwise be due.

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[27] If the two of them are living together.

[28] Assuming that there is not another property which the person used to live in but which was disposed of only after the current home was acquired and which can be used to meet the replacement exception. Assuming also that properties are worth £40,000 or more.

[29] In FA03/Sch4ZA/para3(7).

[30] A new para 3(8) in Sch4ZA provides that para (ba) does not apply to a spouse or civil partner if not living together with the buyer on the date of the disposal of the old home by the buyer. See Example 2.6.4.

[31] Such as a share of the freehold or leasehold. The 2018 Budget confirmed (for purchases completing on and after 29 October 2018) that the meaning of major interest extends to shares in freehold and leasehold properties.

For purchases completing after 26 November 2018[32], there are two distinct three year tests, similar to the ones in place from the start for the recovery of the extra 3% described above. A buyer would escape the higher rates for a purchase completing after 26 November 2018 if the following conditions (paraphrasing the wording of the legislation as now amended including the new condition (ba) for purchases on and after 22 November 2017) are met:

(a)	On completion of the purchase of the new home the buyer intends to live in the new home as the buyer's only or main residence.
(b)	In a transaction on the same date as, or within the three years before, the purchase of the new home the buyer (or the buyer's spouse or civil partner at the time) disposed of a major interest in another dwelling ("the sold dwelling").
(ba)	**Immediately after that disposal, neither the buyer nor their spouse / civil partner[33] retained a major interest[34] in the sold home.**
(c)	At any time within the three year period before completion of the purchase of the new home the buyer had lived in the sold dwelling as the buyer's only or main residence.
(d)	At no time on or after the disposal of the sold dwelling has the buyer (or the buyer's spouse or civil partner) acquired a major interest in any dwelling with the intention of the buyer living in it as the buyer's only or main residence.

As before, the sold dwelling could be anywhere in the world.

2.5 The registration gap

When a registered title in a property is transferred, full "beneficial ownership"[35] usually passes at completion. The legal estate[36] however remains vested in the transferor until the legal disposition has been registered at the Land Registry[37]. This leaves a "registration gap" when certain actions, such as serving statutory notices or break notices, should be carried out by the registered proprietor as holder of the legal estate, rather than by the transferee as beneficial owner.

The new requirement for the replacement exception for purchases completing on or after 22 November 2017 is that neither the buyer nor their spouse / civil partner retained a major interest in the property immediately after the disposal. This requirement cannot be failed simply by virtue of the fact that the bare legal ownership does not pass until the transfer is

[32] The three year tests did not apply to this kind of purchase completing by 26 November 2018.
[33] A new para 3(6A) in Sch4ZA provides that para (ba) does not apply to a spouse or civil partner if not living together with the buyer on the date of the purchase of the new home by the buyer. See Example 2.6.3.
[34] Such as a share of the freehold or leasehold. The 2018 Budget confirmed (for purchases completing on and after 29 October 2018) that the meaning of major interest extends to shares in freehold and leasehold properties.
[35] Also referred to as the equitable ownership or underlying ownership. Whoever has the beneficial ownership of the property is entitled to the income from the property and the value of the property even though the property might be "in the name of" someone else who acts as a trustee and becomes the registered proprietor.
[36] Someone who has just the legal estate "in their name" but without any beneficial ownership is referred to as a "bare trustee" or "nominee" or sometimes as a "paper owner". Whilst their signature is likely to be required to dispose of the property, that person has no underlying ownership of the property.
[37] Land Registration Act 2002 section 27.

registered. SDLT "looks through" to the beneficial ownership in bare trust cases[38]. So if a property is sold in the usual way, then for these purposes the seller should be treated as not retaining a major interest, even though it will be some time before the legal title ceases to be held by the seller.

2.6 Examples of the effect of the closing of the loophole

The first example involves someone who for good practical reasons disposes of a part share only in the former home.

Example 2.6.1

Arya wishes to keep Property A where she has lived for several years and buy Property B to live in, letting out Property A (which is mortgage free). Her parents are willing to provide the £30,000 she needs to make up the price of Property B. Arya's parents acquire an undivided share in Property A from Arya for £30,000; Arya can use that money to buy Property B.

Analysis for purchase of Property B completing before the 2017 Autumn Budget:

The higher rates are not due on Arya's purchase, Condition D is failed as the exception from the higher rates for the replacement of an only or main residence applies. Arya can rely on her disposal of a share in a property which used to be her home.

Analysis for purchase of Property B completing after the 2017 Autumn Budget:

For a purchase of Property B completing on or after 22 November 2017[39], the replacement exception from the higher rates does not apply because of new condition (ba). Arya retains a share in Property A and so does not meet the necessary conditions for the replacement exception. Therefore the higher rates are due.

Arya had not set out to avoid the higher rates, but the effect of tightening the conditions to prevent abuse by others is to make Arya liable for more SDLT.

The following example highlights the odd way the rules used to work where the former home was transferred in whole or in part between spouses and how this has been blocked with effect[40] from 22 November 2017.

[38] FA03/Sch16/para3 strictly applies to acquisitions by bare trustees, but it seems should be given a wider meaning to cover cases where a property interest is held by a bare trustee for a beneficiary. This appears to be assumed in the wording of FA03/Sch4ZA/para11 as to property interests held by bare trusts and settlements (such as life interest settlements) being treated for higher rates purposes as belonging to the beneficiary. The wording of para 11(2) picks up expressly interests under a bare trust where a lease was granted to the bare trustee. The legislation saw no need to cover the position where the bare trust holds freehold property. HMRC appear to take this view as well, see SDLTM09815 and the paragraph headed "Bare Trusts".

[39] Unless perhaps pursuant to a contract entered before that date.

[40] That is with effect for purchases completing on and after 22 November 2017. It would not help someone that the transfer of the property or the share in the former home had occurred before 22 November 2017 if the purchase of the new home was on or after 22 November 2017.

Example 2.6.2

Bran and Catelyn are a married couple together buying a new home for them both to live in as their only residence. Bran is the sole owner of the house where they have both lived as their only residence for several years. They plan to keep it to let it out. They each have another property which they will retain.

Scenario A: They proceed to buy the new property, with Bran retaining sole ownership of the house they had been living in.

Scenario B: The lender requires Bran to put the house they have been living in into joint ownership before lending them the funds they need to buy the new home.

Analysis for purchase of new home completing before the 2017 Autumn Budget:

Scenario A: The higher rates are due on the purchase as all of Conditions A – D[41] are met for Bran and for Catelyn. We have to apply the tests to each of Bran and Catelyn as if buying alone. If for either of them the higher rates would be due, then they are due for the transaction as a whole. They each retain properties and so the higher rates apply as they cannot rely on the replacement exception.

Scenario B: The higher rates are not due on the purchase. The higher rates tests have to be applied to both parties. If Bran alone bought, then as he has disposed of a share in his old home, Condition D is failed and the exception from the higher rates for the replacement of an only or main residence applies to Bran. We must then turn to Catelyn. See Schedule 4ZA para 3(5) and (6) especially para 3(6)(b) which means that one party (so long as they have lived in the property personally) can rely on a sale by a spouse[42]. So Catelyn can rely on the disposal by Bran, as Catelyn has lived in Bran's house and Catelyn's spouse has disposed of a major interest in it, even though the disposal was to Catelyn! Condition D is failed for Catelyn and the exception from the higher rates for the replacement of an only or main residence applies.

Analysis for purchase of new home completing after the 2017 Autumn Budget:

For a purchase of Property B completing on or after 22 November 2017, the replacement exception from the higher rates does not apply in Scenario B because of the new condition (ba). Bran and Catelyn each retain a share in Property A and so neither Bran nor Catelyn meet the necessary conditions for the replacement exception. So the higher rates of SDLT are due for Scenario B as well as for Scenario A.

The next two examples deal with property interests held by spouses / civil partners who are no longer living together and the requirements as to the timing of the purchase of the new property and the disposal of the interest in the old property. The first example[43] deals with the case of where the purchase of the new home is **after** the disposal of a share, the second example where it is the other way around.

[41] In FA03/Sch4ZA/para3.
[42] Or a civil partner. For this disposal test, despite what it says in SDLTM09800, there is no requirement that the spouses/civil partners are living together.
[43] FA03/Sch4ZA/para3(6A) and para3(8) added with effect from 22 November 2017.

In this first example, the spouses were living together at the date of the transfer of an interest in the old dwelling but are separated[44] by the time one of them later buys.

Example 2.6.3

Davos and Ellaria are married and used to own the matrimonial home in equal shares. Ellaria also owns a let property worth £40,000 or more which she retains. Ellaria transferred her entire interest in the matrimonial home to Davos[45] two years ago whilst they were still living together. Since then they have separated and Ellaria alone[46] is now buying a home to live in[47].

If Ellaria is to escape the higher rates, she needs to be able to rely on the replacement exception because she retains her interest in the let property. On its face, condition (ba) to the replacement exception as added on 22 November 2017 would cause Ellaria a problem because her spouse retains an interest in the matrimonial home.

But a special provision, added as para 3(6A) to Schedule 4ZA, saves the day. It provides that condition (ba) does not apply at all in relation to a spouse or civil partner of a purchaser if the two of them are not living together at the date of the purchase by Ellaria.

So it does not matter that Davos and Ellaria were living together when Ellaria transferred her share in the former matrimonial home to Davos, so long as they are separated[48] by the time Ellaria acquires her new home and Ellaria retains no share in the former matrimonial home.

The legislation also has to deal with cases where the spouses were living together at the date of the purchase of the new home but are separated by the time of the disposal of a share in former home. The rules here will only rarely "save the day". That is because, by virtue of the spouses living together at the date of the purchase, the purchase has to be judged for higher rates purposes as if each of them were buying. If for either of them the higher rates would remain due, then they remain due for the transaction as a whole.

Example 2.6.4

Frey and Gilly are married and Frey alone[49] owned their matrimonial home. Whilst they were still living together they[50] completed the purchase of a new home for them both to live

[44] Separated in circumstances likely to prove permanent.
[45] The higher rates would still be escaped if Ellaria transferred her share to someone else but Davos retained his share.
[46] Because they are separated by the time of Ellaria's purchase the provisions of FA03/Sch4ZA/para9 (which normally judge a purchase for higher rates as if a spouse was also a purchaser) do not apply.
[47] So we are considering in this example a FA03/Sch4ZA/para3(6) case where the disposal of the former home was before the purchase of the new home.
[48] Or more strictly, separated in circumstances likely to prove permanent.
[49] The answer would be unfavourable if Gilly has a share worth £40,000 or more in any property as she also then would be forced to rely on the replacement exception and this will not work for her because of the new condition (ba) to the replacement exception. Sch4ZA/para 3(8) only disregards (ba) for the separated spouse / civil partner, not for the purchaser under consideration.
[50] The result would be the same if it is just Frey buying. Given that Frey and Gilly are living together at this point then the higher rates tests have to be applied as if Gilly was also a buyer.

in[51]. The higher rates were initially due on the purchase because of the matrimonial home being retained by Frey.

The move to the new home caused matrimonial tensions; Frey and Gilly have since separated with Gilly returning[52] to the former matrimonial home to live there.

Frey now proposes to transfer his entire[53] interest in the former matrimonial home to Gilly and asks, as this is within three years of the purchase of the new home, can this disposal to his spouse bring him within the replacement exception, so they can reclaim the extra 3% they have paid.

It is not a difficulty that only Frey makes a disposal of a share in the former matrimonial home in this case as Gilly does not need to rely on the replacement exception. Gilly does not meet Condition C as she did not have another property "counting against her" on the date of the purchase[54].

On the face of it, the new para (ba) added to Sch4ZA para 3(7) will block Frey from coming within the replacement exception. His spouse will have an interest in the former matrimonial home immediately after his disposal.

A special provision, added as para 3(8) to Schedule 4ZA, saves the day in this case. It provides that condition (ba) does not apply in relation to a spouse or civil partner of a purchaser if the two of them are not living together at the date of the later land transaction by which the purchaser disposed of an interest in the earlier property.

So Frey and Gilly will be able to recover the 3% extra paid on the new home. That is because for each of them the higher rates are not due: Frey because he later comes within the replacement exception by virtue of his disposal of all of his interest in the old home; Gilly because at the date of the purchase of the new home she had no property interests counting against her.

The facts of the example are carefully chosen to provide a favourable result. The result would be different if at the time of the completion of the purchase of the new home Gilly had a share worth £40,000 or more in the former matrimonial home, or any other property[55].

The requirement that no major interest is retained in the sold dwelling can cause problems where the sold dwelling is a flat and the owner has the freehold, or a share in it, which it is difficult to dispose of in time, perhaps because of the right of first refusal provisions of the Landlord and Tenant Act 1987.

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[51] The same result would apply if only Frey intended to live in the property. The replacement exception will not be available to Gilly anyway because when the higher rates rules are applied to Gilly, she will have an interest in the former matrimonial home which will mean she would not meet the new condition (ba) to the replacement exception.

[52] The result would be the same if Gilly went to live elsewhere.

[53] A part disposal by Frey would not work. That is because Sch4ZA/para3(8) only disapplies the new Sch4ZA/para3(7)(ba) in relation to the spouse or civil partner of the purchaser under consideration.

[54] The Condition C test is applied as at the date of the purchase of the new property. It does not matter that Gilly acquires an interest in another property subsequently.

[55] Gilly would not be able to rely on the replacement exception taking advantage of her spouse's disposal as she is caught out by the new condition (ba) to Sch4ZA/para3(7) and is not saved by the new Sch4ZA/para3(8).

Example 2.6.5

Hodor has a flat he has lived in for many years, it is in a building comprising two flats and Hodor also personally owns the freehold of the building[56]. The other flat is subject to a long lease in favour of Hodor's neighbour. Hodor also owns a holiday home worth £40,000 or more.

Hodor is buying a house to live in and is simultaneously selling the flat. But although he can sell the leasehold in the flat, he is to be left with the freehold of the building (not a share in a company). It appears that, as amended with effect from 22 November 2017, the replacement exception does not work until the share in the freehold can also be transferred[57]. This is the case even though the freehold is subject to the long leases of the flats and has a very low value, well below £40,000[58].

Sometimes it can be difficult to transfer a freehold promptly, especially if it is subject to rights of first refusal. It seems that, if the freehold of the building is transferred after the new house is bought, that disposal of the freehold can count as a disposal of a major interest entitling Hodor to recover the extra 3% paid on the purchase of the flat for having failed the new (ba) condition[59].

The rule changes brought in on 22 November 2017 are for purchases completing on and after that date. So where does that leave purchases which completed before 22 November 2017, where the 3% extra has been paid?

Let us take a case where the buyer owns (or has a share in) a former home which had been lived in as the buyer's only or main residence at some point within the three years leading up

[56] There would not have been a higher rates problem if the freehold was held beneficially by a company and Hodor just had shares in the company. There is no "look through" to count assets belonging to a company as if belonging to an individual. If a company holds a property as a nominee however (as can happen in cases of collective enfranchisement) then there is a "look through" as for SDLT it is the beneficial owner who is treated as owning the property. Thank you, Gerald Moran for pointing out that practice is variable, but sometimes the freehold is vested in a company limited by guarantee. There might be provisions in the company constitution for membership to automatically end on a person ceasing to own a leasehold flat with the new owner being entitled or required to apply to become a member instead. His experience is generally that on collective enfranchisement by nominated companies (whether limited by shares or by guarantee) the standard documentation generally has no specific declaration of bare trust and normally goes ahead as if the flat owners have shares or voting rights in the company but no direct beneficial ownership of the freehold. Sometimes the Articles say that the company will hold the property as an investment, sometimes adding "for the benefit of the Flat Owners" which is vague. Persons managing such companies understand that the company, represented by directors, owns the freehold.

[57] Though I have heard on social media of someone reporting that they had asked HMRC this very question and HMRC had said that in that case they would treat new condition (ba) as met even though the freehold had not been transferred. HMRC rulings can only be relied on in the cases to which they relate and have no precedent value.

[58] The definition used for the new condition (ba) of "major interest" does not have carve outs for interests of low value nor for interests subject to long leases. There are such carve outs built into Conditions A, B and C, but they are not integral to the definition of "major interest".

[59] Though I came across someone in a "perfect storm". He was buying a house between the new rules coming in on 22 November 2017 (requiring a full disposal) and the three year rules for the replacement exception coming fully into force after 26 November 2018. His problem was that he had not lived in the flat at all during the three years leading up to the house purchase (though he had previously lived in it as his only residence). That meant he could only take advantage of the replacement exception if he disposed of all of his interest in the flat before or on the same day as the house purchase (not afterwards) and he needed to complete the purchase by 26 November 2018. The three year rules were not then in force for sales before a purchase, but did apply for sales after a purchase. The solution for him appeared to be to transfer the freehold (which had very low value) to a sibling under the "safe haven" provisions of LTA1987/section4(2)(e).

to the purchase of the new home. There is the possibility of the 3% being reclaimed if there is a disposal of a major interest in the former home. But there is nothing in such a case to say that the disposal of the major interest in the former home needs to be of the entire interest.

Example 2.6.6

Irri decided to keep Property A where she had lived for several years and to buy Property B to live in, letting out Property A (which is mortgage free). Her parents were willing to provide the £30,000 she needed to make up the price of Property B. They were unable to do so straight away, so Irri made use of bridging finance to buy Property B which she completed before 22 November 2017 when the rules changed.

After Irri's purchase when her parents have the money available, Irri's parents acquire an undivided share in Property A from Irri for £30,000; Irri can use that money to pay off the bridging finance taken when buying Property B.

The higher rates were due on Irri's purchase because at that time she retained Property A entirely and could not rely on the replacement exception.

But once Irri disposes of a share in Property A to her parents, then Condition D is failed (the exception from the higher rates for the replacement of an only or main residence applies). It appears that there is nothing to stop Irri relying on her disposal of a share in a property which used to be her home in order to recover the extra 3% paid.

The new condition (ba) to Sch4ZA/para3(7) only applies where the purchase completes on or after 22 November 2017. Here the purchase completed before that date, even though the disposal of the interest in the old home completes after that date.

3 EXCEPTION WHERE PURCHASER HAS PRIOR INTEREST IN PURCHASED DWELLING

3.1 Introduction

There is a new exception[60] from the higher rates for some cases where the buyer already had a previous interest in the same property of at least 25%[61]. This can be relevant where there is some other property "counting against" the buyer[62]. It applies to some purchases completing on and after 22 November 2017. There is guidance on this in the Manual, updated between April and August 2018 at SDLTM09814.

To benefit from the new exception, there is a requirement that the buyer has lived in the property as their only or main residence throughout the period of three years leading up to the date of the purchase of the further interest. Here we look at lease extensions, increasing an undivided share in a property and at staircasing transactions.

3.2 Lease Extensions

The new exception will exclude some lease extensions from the higher rates of SDLT. There are a number of requirements that can catch people out:

- The new provisions do not work if the remaining term on the lease held is less than 21 years as of the date of the acquisition of the new interest in the same property[63].
- There is the requirement that the buyer has lived in the property as their only or main residence throughout the whole of the three years leading up to completion of the lease extension. The choice of three years seems slightly odd when a lessee is often able to extend a lease after having owned the lease for two years.
- If there is a spouse or civil partner living with the buyer then, even though not a joint buyer, the higher rates tests are applied to that person as if a buyer. If for any one (or more) of the joint buyers the higher rates would be due, then they are due for the transaction as a whole[64].

The example below looks at a typical lease extension when the leaseholder owns another property. It also addresses the complexities added where there is a spouse with different property circumstances.

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[60] Introduced by Finance Act 2018 adding a new para 7A to FA03/Sch4ZA.
[61] At least a 25% interest immediately before the new acquisition: Sch4ZA/para7A(4).
[62] It does not "count against" the buyer of a property interest that the buyer already has an interest in that same property.
[63] FA03/Sch4ZA/para7A(2)
[64] There are no provisions enabling one spouse to take advantage of three years' residence by the other, each needs to qualify alone. But neither are there provisions deeming one spouse to be the owner of a property the other owns.

Example 3.2.1

Jorah lives in a leasehold flat he owns, but also owns a freehold property he lets out. The lease term was down to 35 years[65] so Jorah is a acquiring a lease extension for £200,000. The extension will operate as a surrender and regrant of the lease in the usual way[66]. The flat was the first property Jorah both lived in and owned[67].

Analysis for lease extension completing before the 2017 Autumn Budget:

The higher rates are due as all of Conditions A – D in Sch4ZA/para 3 are met. A major interest in a dwelling is acquired; it does not help Jorah to say that he already has a lease of the flat.

A quick reminder about Conditions A – D:

- Condition A: The chargeable consideration for the property being bought is £40k or more.
- Condition B: The property being bought (whether freehold or leasehold) is not subject to a long lease.
- Condition C: There are other property interests counting against the buyer.
- Condition D: The replacement exception does not apply.

Condition B is met. The interest acquired is itself a leasehold, rather than being subject to a long lease. The extension is dealt with here (as is usually the case) by a surrender and regrant, rather than the grant of a new lease subject to the existing lease[68].

Condition D is met (the replacement exception is not available). This is because although the surrender of the old lease is a disposal of a major interest, it is in the same dwelling. This does not help, see Sch4ZA/para3(6)(b). This provides that for the replacement exception to apply, the disposal must be of a major interest in another dwelling. In the context of the legislation it is clear that the "sold dwelling" referred to in

[65] Importantly it meets the 21 years or more unexpired test for the new exception to apply.

[66] If it were possible for Jorah to buy the lease extension subject to and with the benefit of his existing lease then the purchase would fail Condition B so the higher rates would be escaped. This would be the case whether the transaction completed before or after the 2017 changes. Thank you Paul Clark for reminding me of this.

[67] So there is no prospect of Jorah escaping from the higher rates based on the replacement exception in Condition D.

[68] It can be possible to escape the higher rates where the existing lease has 21 years or more to run by structuring the transaction as the grant of the new lease in reversion and subject to the existing lease. This is not always possible and if the lease extension is pursuant to statutory rights the landlord can insist on it being effected by way of surrender and regrant. The landlord might insist on using the statutory mechanism of surrender and regrant so that the landlord is able to take advantage of the rollover provisions in TCGA1992/section247 so that any gain on the payment of a premium can be rolled into any new land acquired by the landlord (see CG61940).

Sch4ZA/para3(6)(d) relates to the bricks and mortar dwelling, not the legal interest in a dwelling[69].

Analysis for lease extension completing after the 2017 Autumn Budget:

Provided that Jorah has lived in the flat as his only or main residence throughout the last three years, the new rule will save him from the higher rates if he completes the lease extension on or after 22 November 2017. It does not matter how many other property interests Jorah might have which "count against" him.

Position after the 2017 Autumn Budget with a spouse:

But what if Jorah has a spouse[70] who has either:

(a) Not had a share of at least 25% in the flat or

(b) Not lived in the leasehold flat throughout the last three years?

The higher rates tests have to be applied to the spouse as if the spouse is acquiring the extended lease[71]. If the higher rates would apply to the spouse then they apply to the whole transaction. The spouse who has either not had at least a 25% share in the flat or who has not lived in the flat for the whole of the three years will not be saved by the new rule. But if the spouse does not have any other property interests counting against her then she escapes the higher rates anyway. So we would need to find out if the spouse has any of these:

- A share worth £40K or more in the property Jorah rents out.
- Another property (or share in one) worth £40K or more anywhere in the world.
- An interest under a trust giving a right to live in the property for life or a right to the income.
- An interest counting against her held by a minor child.

Even then Jorah's spouse could potentially escape the higher rates based on the replacement exception if she had disposed of a major interest in another property she lived in as her only or main residence and meets the other conditions for the replacement exception.

[69] So it is not correct to argue that 3(6)(b) works by saying the old short lease is replaced by the new long lease.
[70] Who he is living with. It could equally be a civil partner.
[71] FA03/Sch4ZA/para9.

3.3 Increasing an undivided share

If a buyer increases an undivided share in a property, then the exception is only available if the person has at least a one quarter share immediately before the completion of the acquisition[72].

The 25% threshold appears rather arbitrary. HMRC said the intention was to prevent abuse that could otherwise occur if someone acquired a trivial interest and then another more substantial interest, with the later transaction escaping the higher rates. But the three years' residence test itself seems to offer sufficient safeguards.

Example 3.3.1

Khal and Lancel are an unmarried couple and have lived together in a home which they have owned in equal shares for the last four years, both of them living in it as their only residence. Khal also owns a let property. They are splitting up and it is agreed that Khal will buy Lancel's 50% share for £200,000.

That will result in Khal acquiring an interest in an additional property and not being able to benefit from the replacement exception. But if Khal is acquiring on or after 22 November 2017 the new exception means that the higher rates of SDLT will not be due and Khal will just have to pay SDLT at standard rates. Khal meets the requirement of having at least a 25% share in the property and has lived in the property for the last three years.

The two tests (25%+ share and three years' residence) are independent[73], so it would not have mattered if Khal had originally had no share in the property but had recently acquired the 50% share.

Complications arise if the buyer has a spouse or civil partner who the buyer is living with. This was illustrated for a lease extension in example 3.2.1 when Jorah has a spouse. Here are two further examples illustrating the issues arising.

Example 3.3.2

Melisandra and Ned are siblings and jointly own a property where they have both lived for over three years, but Melisandra has recently moved out. Ned still lives there and Osha, Ned's spouse has recently moved in. Ned is buying Melisandra's share. Ned and Osha own a let property worth over £80,000.

If the purchase occurs after 22 November 2017, then if we looked at Ned alone he would escape the higher rates based on the new exception. He meets Condition C (because of

[72] FA03/Sch4ZA/para7A(4). It actually says "immediately before the effective date of the transaction". So if five siblings held a property in equal shares and one sibling (P) who has been living in the property for the last three years but who owns another property, wanted to buy the others out, the analysis might depend on how the purchase is structured. If P, starting with 20%, buys the remaining 80% in one go, the higher rates could apply to the whole transaction. But if P buys the first 20% on one day that could suffer the higher rates, but would get P to 40% so the other transactions on a later day could escape the higher rates. In the context of Condition B and the requirement that the interest acquired is not "on the effective date" subject to a lease, HMRC have informally confirmed that this is meant to refer to the moment of completion. Perhaps the same meaning should be given to the "effective date of the transaction" in para 7A(4).

[73] Sch4ZA/para7A(1).

the let property) but he has had a share of 25% or more and has lived in the property for the last three years.

But the transaction gets caught because of Osha. She has a share in the let property (so she meets Condition C) and does not benefit from the new rule. She has neither lived in the property throughout the last three years, nor does she have a share in it.

It would be worth checking Osha's property owning history in case she can be saved by Condition D. If she has disposed of a property she has lived in at some point in the last three years she might benefit from the replacement exception.

Example 3.3.3

Petyr and an unrelated business partner Qhono equally own the family home where Petyr and his civil partner Ramsay have lived for the last four years. Petyr and Qhono are to transfer the family home to Ramsay for a payment of £200,000. Petyr also owns a holiday home worth £40,000 or more, but Ramsay does not own a property and there are no other property interests counting against Ramsay.

Because Petyr and Ramsay are civil partners living together, then even though Ramsay is a sole purchaser, for higher rates purposes we have to apply the tests as if Petyr was buying. If the higher rates would be due for either of them, then the higher rates are due for the transaction as a whole.

Applying the tests to Ramsay, Ramsay fails Condition C. There is no other property "counting against" Ramsay. There is nothing to attribute to Ramsay the property interests of Petyr (who owns the holiday home).

Applying the tests to Petyr (even though he is selling, we must treat him as if he were buying the whole property for the purposes of seeing if the higher rates apply) we see he meets Condition C (because of the holiday home). The new exception for increasing an interest applies to Petyr. He has lived in the property throughout the last three years. He also passes the 25% or more interest test. That is because the legislation requires the test to be applied immediately before the completion of the transaction in question. At that stage he has a 50% interest. It does not matter that as a result of the transaction he entirely sells it.

The facts of this example are similar to Example 4.2.1 which demonstrate that another exception, for transfers between spouses, does not apply in a case like this where other parties, besides the spouses / civil partners, are involved.

If we changed the facts of this example slightly, so that Petyr and Ramsay each owned the holiday home (with each share being worth £40,000 or more) then the higher rates would be due. When we apply the higher rates tests to Ramsay, Condition C would be met (because of the holiday home). Ramsay cannot come within the exception for increasing a share as he does not have any share before the transaction and there is nothing that treats the property of one spouse / civil partner as belonging to the other here.

3.4 Shared ownership leases and staircasing

It would be relatively unusual, though not unheard of, for someone with a shared ownership lease who is "staircasing" to own another property. However, as explained by the following example, the higher rates of SDLT should not apply to staircasing transactions which are short of acquiring the freehold[74].

Although it is normal for someone holding a shared ownership lease from a social landlord to think of themselves as owning a "share" of the property, the way shared ownership works legally is more nuanced.

Example 3.4.1

If Sansa acquires from a housing association a shared ownership lease of a flat, paying for a 25% share, what she actually acquires is 100% ownership of a lease under which she has to pay rent on the remaining 75% "equity" of the landlord. The effect of staircasing transactions is to reduce the rent. For example if Sansa acquires another 60% share, what she is actually doing is paying for a reduction of rent, so the rent goes down to 15%[75] of the notional whole rent[76].

So Sansa is acquiring a "chargeable interest" on staircasing which might be liable to standard rate SDLT as she is going over 80%, but she is not acquiring a "major interest". So the higher rates should not apply, they can only apply to acquisitions of major interests. It makes no difference whether or not Sansa has lived in the property throughout the last three years.

[74] If the lessee acquires the reversion (usually the freehold) when staircasing to 100%, then that would be the acquisition of a major interest and so could potentially be liable to the higher rates of SDLT.
[75] 100% less the initial 25% bought when the lease was granted less a further 60% on staircasing.
[76] The rent is often initially assessed as 3% of the capital value of the landlord's equity with annual reviews linked to the retail prices index. The lease would normally record a "Gross Rent" based on the initial value of the property, with the actual rent (the "Specified Rent") being the "Unacquired Percentage" of the Gross Rent.

4 EXCEPTION FOR SPOUSES AND CIVIL PARTNERS PURCHASING FROM ONE ANOTHER

4.1 Introduction

There is a new exception[77] from the higher rates where spouses or civil partners who are living together acquire interests from each other (such as where a mortgaged property is put into joint ownership). HMRC give some guidance on it in the Manual at SDLTM09820 which they updated to deal with this between April and August 2018.

> Example 4.1.1
>
> Tyrion owns a mortgaged let property; Tyrion and his wife Unella own their own home where they both live. Unella is giving up work and in order for her to have some income of her own, Tyrion is to transfer Unella a share in the let property.
>
> If the mortgage is £200,000 and a half share is being transferred to Unella, with the mortgage company's requirements being met, then the chargeable consideration is £100,000.
>
> If Tyrion and Unella were not married, the higher rates of SDLT would apply. With the 2017 Budget changes, the higher rates will not apply if the transfer completes on or after 22 November 2017 as Tyrion and Unella are legally married and are living together. That means no SDLT is due (the chargeable consideration does not exceed £125,000), though a land transaction return is still needed[78].

4.2 Third parties involvement

HMRC say in their Manual at SDLTM09820 that the exception does not allow for transfers involving third parties as well. They say: "*If, before or after the transaction takes place someone other than the spouses or civil partners has an interest in the property, the transaction will still count as a higher rates transaction. For example, a transaction would not be disregarded where an interest owned by a wife and her otherwise unrelated business partner is transferred to her husband.*"

This is true to a certain extent as the following example shows.

> Example 4.2.1
>
> Varys and an unrelated business partner Walder own a family home where Varys and his wife Ygritte have lived for the last two years[79]. Varys and Walder are to transfer the family home to Ygritte for a payment of £200,000. Ygritte also owns a holiday home worth £40,000 or more.
>
> The new exception will not apply as the "vendor" here is both Varys and Walder. The transaction is therefore not one between spouses. Ygritte owns another property, so

[77] Brought in by Finance Act 2018 by adding a new para 9A to FA03/Sch4ZA.
[78] The chargeable consideration is over £40,000.
[79] If Ygritte had lived there throughout the last three years and started off with a share of at least 25%, then the new exception dealt with at section 3 of this article might have saved Ygritte from the higher rates, see Example 3.3.3.

Condition C is met. SDLT will be due from Ygritte on the whole £200,000 at the higher rates[80].

There is an issue in analysing what is being transferred when a part share moves. For example, when X transfers a 50% share in his property to Y, retaining the other 50% beneficial interest in the property, the transaction could be analysed in two ways:

- Analysis A: The transfer of a 50% interest in the land from X, to Y or
- Analysis B: The transfer of 100% of the land from X, to X and Y.

Examples elsewhere in the HMRC Guidance on the 3% higher rates make it clear that HMRC sometimes apply Analysis A, see their Examples 6 and 7 at SDLTM09810 .

The Explanatory Note issued with the 2017 Autumn Budget does not cast any light on the issue[81].

Example 4.2.2

Zanrush and an unrelated business partner Addam own a house where Zanrush and his wife Brienne have lived for the last two years. Zanrush and Brienne have a holiday home. Zanrush is to transfer his share in the property to Brienne for £100,000 so that it will be owned by Addam and Brienne.

According to what HMRC say in their Manual at SDLTM09820, the new exception cannot apply. But who is the vendor and who is the purchaser? It seems the better view is that Zanrush is the vendor and Brienne is the purchaser[82]. They are married and are living together, so on Analysis A the new exception applies.

So only standard rates of SDLT are due on the £100,000. At this level of consideration a return is needed, but no SDLT is due.

4.3 Changing shares

It is understood that some wording was added to the new para9A as the new para 9A(2) and (3) at the last minute ahead of the 2017 Autumn Budget[83]. Whilst it appears to have been

[80] Unless perhaps the replacement exception can apply. It would be worth checking if Ygritte had disposed of a previous home in the last three years.
[81] Oddly it says that the provision "means that HRAD will not apply to exchanges of interests between spouses or civil partners". They are clearly not using the word "exchanges" in a technical sense!
[82] Ideally this would be documented by means of an assignment of the beneficial interest between Zanrush and Brienne and a separate transfer (form TR1) from Zanrush and Addam to Addam and Brienne for no consideration by way of a change of trustee. Thank you, Paul Clark for making this point. Marc Selby suggests to make the position even clearer, if there is no objection to Zanrush staying on the title, there could just be an assignment by Zanrush of his beneficial interest to Brienne.
[83] Para 9A(2) applies on a transaction from A, to A and B so that just for para 9A(1) we take this as an A to B transaction. Likewise para 9A(3) applies on a transaction from A and B, to B, so that just for para 9A(1) we take this as an A to B transaction.

intended to have the effect of dealing with the consequences of Analysis B[84], it is rather peculiar.

As Leigh Sayliss pointed out to me, in the case of a transaction where A and B each start with an interest in the property and each finish with an interest (as in the example below), then neither of them are treated as being a "purchaser" and neither of them are treated as being a "vendor"!

Example 4.3.1

Craster and Daenerys own a let property in equal shares and also own their own home. Craster is to transfer a 40% share in the let property to Daenerys so they own it 90:10. There is a mortgage of £200,000 on the let property and the chargeable consideration will be £80,000 because Craster and Daenerys agree that Daenerys is now to meet 90% of the mortgage payments.

If one took Analysis B as correct, then on a literal reading of the provisions (as noted above) neither Craster nor Daenerys is either purchaser nor vendor!

Analysis A gives a much more satisfactory result: the interest being transferred is a 40% share; Craster is the vendor and Daenerys the purchaser. As they are married and are living together the higher rates do not apply by virtue of the new para 9A. At this level of chargeable consideration there is no SDLT to pay, though a return is needed.

[84] Pointed out to them before the final version of the legislation was published.

5 PROPERTY ADJUSTMENT ON DIVORCE, DISSOLUTION OF CIVIL PARTNERSHIP ETC

5.1 Introduction

An existing property might not now (for purchases of a further property completing on and after 22 November 2017) "count against"[85] a person who is "locked into" ownership as a result of a property adjustment order on divorce or dissolution of a marriage or civil partnership. The change was explained[86] by saying that the new rule grants relief where "a court order issued on a divorce or dissolution of a civil partnership prevents someone from disposing of their interest in a main residence".

Previously, a property being retained, for example under a Martin[87] or Mesher[88] order could count against the party who had left the property and was buying a property[89].

The new legislation[90] refers to a person "A" who has a property interest where a "property adjustment order" has been made for the benefit of another person "B". Where the new rule applies, if A buys a further property, then A is not treated as having an interest in the property subject to the order. Guidance has been added to the Manual to explain the rules, see SDLTM09797.

Usually, the property concerned will be the former matrimonial home, but it does not have to be. It could be a different property acquired by A, or by A and B jointly, before or after the breakdown of the marriage /civil partnership.

5.2 The conditions

There are conditions to the new exception for the existing property not to "count against" a person A when buying a further property:

- The right kind of court order must have been made in respect of the existing property for the benefit of another person, B. That person will usually be the spouse / civil partner (or former spouse / civil partner) of A, but does not necessarily have to be. It could for instance be made for the benefit of a child of A and B.
- That other person B must live in the property as their only or main residence.
- A must not live in the property as their only or main residence.

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[85] Or to put it more correctly, Condition C might not now be met as a result of a person owning such a property.
[86] See para 1.42 of the 22 November 2017 overview of tax legislation and rates.
[87] A Martin order provides for the postponement of the sale of the family home and is sometimes used when the parties in question have no children under the age of 18. With this type of order, the "trigger event" for the sale of the house can be the occupying party's re-marriage or cohabitation with a new partner. However, in some instances, the occupying party could be entitled to remain in the house for the rest of his or her life.
[88] A Mesher order provides for a postponement of the sale of a property for a specified period of time. These orders allow one spouse and the children to remain living in the family home. Despite the occupation by one party, the property will remain in both parties' names throughout this period. It will usually end either when the former couple's youngest child turns 18 or they complete their secondary education, whichever is later.
[89] Although sometimes there might have been an argument that the order created a "settlement" under which someone else was entitled to occupy the property for life. If that was the case then the property should not have counted against the other owner: FA03/Sch4ZA/para11.
[90] FA2018 added a new para 9A to FA03/Sch4ZA.

There is a list of "property adjustment orders" which count; they can be found in the Manual at SDLTM09797. They include property adjustment orders under UK and overseas divorce legislation and under the Civil Partnership Act 2004.

There is no need for the order to require a transfer of the property or a share in it in favour of the other party[91]. It can be for their benefit if it preserves existing ownership shares, but allows the other party to live in the property.

Example 5.2.1

Eddard and Frances married and had equally owned a matrimonial home. They separated four years ago and the former matrimonial home has been kept to provide a home for Frances and the children. Given the ages of the children, it is likely to be kept for at least another three years. Eddard has been living in rented accommodation for four years and finally is able to buy a property to live in. Eddard and Frances have no other property interests. They are separated, but not divorced[92].

Eddard retains his full half share of the former matrimonial share. There is a consent order providing for a number of matters, including that Frances should be permitted to carry on living in the former matrimonial home.

In analysing whether Eddard has to pay the higher rates, we would not (even before the changes) need to consider Frances' property owning position[93]. But the half share owned by Eddard in the former matrimonial home would probably[94] have counted against him and so would have meant that the higher rates apply.

If Eddard is completing his purchase after 22 November 2017, his share in the former matrimonial home does not now "count against" him because of the new rule. He therefore escapes the higher rates.

5.3 Where the changes do not help

The changes do not help in some circumstances. For example they do not help:

- Those with family arrangements involving neither a marriage nor a civil partnership.
- People who have retained ownership by agreement without there being the right kind of court order.
- In cases where the order provides for a sale of the previous property, but the sale has not gone through[95].

[91] For example the Explanatory Note to the legislation says in respect of FA18/Sch11/para5 (which adds the new para 9B into Sch4ZA) that it "changes the way that interests **retained** by a former spouse or former civil partner upon divorce or dissolution of a civil partnership are treated".
[92] The new exception would also apply if they were divorced.
[93] Although she and Eddard are still married, they are separated in circumstances likely to be permanent.
[94] Reasons why it might not "count against" Eddard are if his share was worth under £40,000 at the date of completion of the purchase of the new property, or if there was a "settlement" created of the old property under which Frances had a right to occupy the property for life.
[95] Unless the order could still be said to be for the benefit of the other party who is living in the property.

- Where the other person is not living in the property, perhaps it is let out to provide an income.
- Where the other person is living in the property, but not as their only or main residence, but perhaps just as a convenient base when working during the week.
- Where the person who is buying a new property has not been able to move out of the old one and still lives in it as their only or main residence.

Example 5.3.1

Gregor and Helaena jointly owned their home but never married. They lived there with their children. Their relationship broke down and Gregor has left the home, but agreed that Helaena and the children can carry on living in the property.

Gregor is now buying a home to live in. Gregor is likely to meet Condition C because of his retained share in the jointly owned home and so is likely to have to pay the extra 3% SDLT.

The 2017 Autumn Budget changes do not help Gregor as there is no court order in proceedings for divorce or the dissolution of a civil partnership.

Example 5.3.2

Iyanna and Joffrey married and had equally owned a let property worth well over £80,000. But four years ago they separated and the let property has been kept to provide an income for Joffrey pursuant to a consent order made in divorce proceedings. Iyanna is able to buy a property to live in. Iyanna has no other property interests and has not previously owned her own home.

The new rules do not help Iyanna. Even though Iyanna is "locked into" ownership of the let property by the property adjustment order, Joffrey does not live in it, so Iyanna does not meet the conditions.

Perhaps Iyanna can argue that the consent order creates a "settlement" under which Joffrey is entitled to the income. If that is correct, as a matter of interpretation of the order, then perhaps the property does not "count against" Iyanna anyway[96].

[96] FA03/Sch4ZA/para11.

5.4 A fiction we should not extend too far

Oddly, the way the legislation[97] is worded is to say that person A is to be treated generally for SDLT purposes[98] as **not having** the interest in the dwelling where there is a property adjustment order and the other conditions are met.

So consider a case where A and B own the former matrimonial home and a property adjustment order has been made so B alone can live in the property. A (who owns a let property) comes to buy another property to live in within three years of having lived in the former matrimonial home. One would expect A, by disposing entirely of A's interest in the former matrimonial home, to be able to come within the replacement exception and so escape the higher rates on his purchase of the new home (even though he retains the let property).

Does the rule that A is to be treated as not having the interest in the former matrimonial home mean that A cannot take advantage of his disposal of his share in the former matrimonial home to come within the replacement exception? It seems this would be a wrong interpretation of the legislation which is a relieving provision. The fiction of A not "having" the interest is for the purpose of helping A fall outside Condition C. The fiction should not be extended further than that to prevent A relying on a disposal of the interest to come within the replacement exception and so fall outside Condition D[99].

[97] FA03/Sch4ZA/para9B(2).
[98] Rather than limiting it to the purposes of Condition C.
[99] If we were to apply the fiction too widely we would get odd results, such as someone buying A's interest escaping SDLT on the basis that A had not had the interest!

6 DEPUTIES APPOINTED UNDER MENTAL CAPACITY ACT 2005 TO MAKE DECISIONS FOR A CHILD

6.1 Introduction

The Policy Paper with the 2017 Autumn Budget, explains that the changes[100] were made "so that a property held by a child's parents is disregarded when a property is purchased by a child's trustee pursuant to power conferred on the trustee by a relevant court appointment, for example such an appointment made by the Court of Protection". A child is defined as a person under the age of 18[101].

For example, children who have been the victim of an accident or medical negligence, sometimes have a deputy under the Mental Capacity Act 2005 making decisions for them. The effect of the amendment is broadly to treat the child as a separate adult for the purposes of the SDLT higher rates rules (rather than their transactions and property being treated in a similar way to transactions and property interests of their parents as before).

6.2 Purchase for the child

Example 6.2.1

Child A is awarded a large sum in damages following an accident that means her parents are likely to have to give her intensive care with outside support. The deputy appointed uses some of the money to buy a property for the child as an investment to produce an income to help pay for the support. The parents adapt their own house so that it is suitable for them and carers to give Child A the help needed.

Without the Autumn 2017 Budget changes, the purchase for Child A through the deputy would have been liable to the higher rates as it would have been treated as a purchase by her parents[102]. The effect of the change is that the child is treated as the purchaser, not the parents. This means that the property held by parents does not "count against" the child. The higher rates are therefore not due on the purchase by the deputy for Child A.

This is the case whether the property is bought:

(a) On a bare trust for the child.

(b) On a trust that gives the child the right to occupy the property for life or the right to the income from it.

The extent of the higher rates was wider than indicated in the wording from the Policy Paper quoted above. Property owned by a spouse or civil partner of the child's parent[103] could also have meant that the higher rates would have applied to a purchase for the child. The change made is wide enough to save a purchase on behalf of the child in this situation too.

[100] Finance Act 2018 brought in new paragraphs 12(1A) and 12(1B) to FA03/Sch4ZA.
[101] FA03/Sch4ZA/para12(5).
[102] FA03/Sch4ZA/para12. It also treats a purchase by a child as if made by any spouse or civil partner living with a parent.
[103] So relevant if the child's parents had split up and one of them is living with a new spouse or civil partner.

6.3 Purchase by the parents when the deputy bought a property for a child

The issue highlighted in the Policy Paper is the higher rates problem where a property is bought for the child. There was also a problem if a property was already held for a child and it is the parents[104] who are buying a property. Before the changes, the property held by the child could "count against" the parents on the purchase. This issue is not mentioned in the guidance in the Manual at SDLTM09815[105] which is very brief. The effect of the changes can be to help the parents of a child with a deputy (and the spouse / civil parents of such a parent).

Example 6.3.1

Child B was also awarded a large sum in damages following an accident. His parents who had always lived in rented accommodation were not married and have now split up. Child B lives with his mother Kyra. Child B's father Lyonel has since married a new partner Margaery.

The deputy appointed for Child B bought a property for child B and Kyra to live in which is more suited for the care of child B than the rented home.

Margaery is buying a property to live in with Lyonel[106]. It will be the first property Margaery has owned. Before the 2017 Budget changes, Margaery would have had to pay the higher rates on her purchase because of the property held on behalf of her spouse's child. But the changes mean that the property held for the child is no longer treated as being held by Margaery. So the purchase by Margaery should escape the higher rates[107].

6.4 Other points on deputies for children

Here are some other points:

- The changes are in effect for purchases completing on and after 22 November 2017[108] (whether on behalf of a child or made by parents).
- The legislation refers to a "relevant court appointment" and defines this[109]. It includes orders made under section 16 of the Mental Capacity Act 2005 and equivalent appointments in other jurisdictions.
- There is no condition that the child is to live in the property acquired. It could be bought as an investment.
- A second property bought for the child by the deputy would be liable to the higher rates[110].

[104] Or a spouse / civil partner of a parent.
[105] It was updated between April and August 2018 to deal with purchases for children under the Mental Capacity legislation.
[106] The analysis for higher rates purposes would be the same if she was living in rented accommodation with Lyonel and was buying a property to rent out.
[107] It might also qualify for first time buyers' relief if the conditions are met.
[108] Finance Act 2018 Schedule 11 para 16(1).
[109] The new Sch4ZA/para12(1B).

- If the child is beneficially entitled to another property, not acquired in the exercise of the powers under a relevant court appointment, then that other property would not be treated as belonging to the child[111], so a property acquired by the deputy for the child could still escape the higher rates.

- If the child is beneficially entitled to another property, not acquired in the exercise of the powers under a relevant court appointment, then that other property would count against the parents on a purchase by them.

- If a property held for a child acquired in the exercise of the powers under a relevant court appointment is lived in by the child and family and is subsequently sold and another property bought, there is a tweak to the way the replacement exception works. This is relevant if there is other property "counting against" family members. The disposal is treated as made by the child, not by the child's parents[112].

[110] It seems the best reading of the commencement provisions in FA18/Sch11/para /16(1) is that one should, for purchases completing on or after 22 November 2017, look at properties bought by a deputy for a child as belonging to the child, even if bought before 22 November 2017.
[111] It should still be treated as belonging to the child's parents and any spouse / civil partner living with a parent.
[112] FA03/Sch4ZA/para12(1A)(c).

7 DEFINITION OF "MAJOR INTEREST" TO INCLUDE SHARE IN PROPERTY

7.1 Introduction

Since the higher rates of SDLT for "additional properties" were brought in from 1 April 2016, there has been a difficulty in interpreting what is meant by "major interest", and whether it includes a share in a property. This is particularly important because:

- Only the purchase of a "major interest" can be liable to the higher rates[113]. What if a buyer only bought a share in a property?
- Only holding a "major interest" in another property "counts against" a person when buying a property[114]. What if the buyer only had a share in another property?
- Only disposing of a "major interest" in a previous residence helps a person come within the replacement exception[115]. What if they only disposed of a share in a previous property?

HMRC always took the view[116] that, as originally drawn, the higher rates legislation had to be interpreted to include a share in land within the meaning of "major interest". There were difficulties, in that case law[117] suggested an undivided share was not a major interest and there are inconsistencies with other parts of the legislation which are drawn on the basis that an undivided share is not a major interest. The HMRC view seemed consistent with a purposive construction of the higher rates legislation, given that otherwise many arbitrary results would follow.

7.2 Change in 2018 Budget

The 2018 Budget (at last) put the matter beyond doubt by amending the definition of "major interest" for purchases completing on or after 29 October 2018 to include an undivided share in land. The information explaining the change says:

- It is to "clarify the meaning of major interest in land for the general purposes of HRAD".
- "The measure will also provide more certainty for purchasers of residential property by making it clear, that for HRAD, a "major interest" includes an "undivided share in land"."
- "The term `major interest` is used to ensure that HRAD applies to only meaningful purchases of residential property and does not apply to `minor interests`, for example a right of way or a right to light."
- "Some external stakeholders have suggested that it is unclear whether the legal definition of `major interest` includes an `undivided share in land` and,

[113] FA03/Sch4ZA/para3(1).
[114] FA03/Sch4ZA/para3(4) setting out Condition C.
[115] By failing to meet Condition D within Sch4ZA/para3(5).
[116] As evidenced by their Guidance Note originally published on 16 March 2016 and since updated and then moved into the Manual beginning at SDLTM09730.
[117] The Court of Appeal in the Pollen and Kings College combined appeal at [2013] EWCA Civ 753.

consequently, whether transfers involving an `undivided share in land` are within the scope of HRAD."

- "While HMRC's view is that the HRAD legislation as it stands enables us to tax all purchases of undivided shares in land, paragraph 2 of the main Schedule will be amended to put the position beyond doubt, and make clearer that a major interest in a dwelling includes an undivided share in a dwelling for the purpose of HRAD."

So HMRC are sticking to their original view of the meaning of "major interest" for the purposes of the higher rates.

This closes off the argument that those who buy a share in a property never have to pay the higher rates of SDLT. As SDLT is a self-assessed tax, it is thought that some have taken the view, supported by comments of the Court of Appeal in the Pollen and Kings College combined appeal[118] to the effect that a share in a property is not a major interest and have filed returns on the basis that the higher rates do not apply to a purchase of a share only.

Example 7.2.1

Nymeria, who is single, currently owns two residential properties – her main residence and a 25% share in a second property that she owns jointly with 3 friends, each having a 25% share in the property. It is rented out. Nymeria now wishes to purchase one of her friend's 25% share in the jointly owned property.

These facts are based closely on Example 6 given by HMRC in their Manual at SDLT09810 where they say that "the higher rates will apply, as [Nymeria] will be purchasing a major interest in a property, is not replacing her main residence and owns an interest in another property."

If the purchase completes on or after 29 October 2018, any argument that Nymeria only buys an undivided share in a property (particularly if the purchase is structured as an assignment of a beneficial share without the registered proprietors changing) can no longer be made[119].

7.3 Staircasing and major interests

Staircasing transactions, for shared ownership leases, although sometimes described as buying a further share in a property, operate in a different way. The payments to staircase are buying a rent reduction. These transactions do not involve the acquisition of a major interest and cannot be liable to the higher rates[120]: see Example 3.4.1.

[118] [2013] EWCA Civ 753

[119] Nor can she rely on the exception (new from 22 November 2017) for those increasing their shares. That is because she has not been living in the property.

[120] Unless the reversionary interest, usually the freehold, is acquired on staircasing to 100%.

8 CHANGE TO TIME LIMIT FOR RECLAIMING THE EXTRA 3%

8.1 Introduction

The background to this further change made by the 2018 Budget[121] is the need to pay SDLT at the higher rates on buying a new home without selling an old home and being able to reclaim the extra 3% when the old home is sold. This affects people who buy their new home before they sell their old one. It is well known that they have three years to sell their old home in order to be able to claim back the 3% extra paid on the new one[122].

8.2 Original time limits

What was less well known, was the time limit for making the reclaim[123]. Some people missed it and were denied a refund of the 3% extra they had already paid. The time limit was set as the later of:

(a) Within three months of the completion of the sale of the old home and

(b) Within twelve months of the "filing date" of the purchase of the new home.

As the filing period was at the time 30 days (though reduced to 30 days on 1 March 2019) this meant that if the sale of the new home was more than about 10 months after the purchase of the new home, the buyer only had three months to get the application in to HMRC. There have been a number of cases where this was missed and HMRC refused a repayment.

8.3 Changes made in 2018

The amendment, made effective straight away where the sale of the old home completes on or after 29 October 2018, is to change the first time limit (see (a) above) to 12 months from the completion of the sale of the old home.

Example 8.3.1

Oberyn completed the purchase of a new home on 1 June 2017 and had to pay the higher rates because he retained his old home. Oberyn was advised that he needs to complete the sale of his old home within three years of 1 June 2017 in order to be able to recover the 3% extra paid. Oberyn also needs to apply for the refund in time, once he has sold the old home. The time limits depend on when Oberyn completes the sale of the old home. These scenarios will help explain the limits.

(a) <u>If he completed the sale of the old home on 1 September 2017 (3 months after the purchase)</u>

The old rules applied, so Oberyn had until the later of:

- Three months from the sale of the old home: 1 December 2017 and

[121] See the 2018 Policy Paper and draft clauses here.
[122] FA03/Sch4ZA/para3(7).
[123] FA03/Sch4ZA/para8(3).

- Twelve months and 30 days from the purchase of the new home, so **1 July 2018**

(b) If he completed the sale of the old home on 1 May 2018 (11 months after the purchase)

The old rules applied, so Oberyn had until the later of:

- Three months from the sale of the old home: **1 August 2018**
- Twelve months and 30 days from the purchase of the new home, so 1 July 2018

So that is only three months, it was easily overlooked!

(c) If he completed the sale of the old home on 1 July 2018 (13 months after the purchase)

The old rules applied, so Oberyn had until the later of:

- Three months from the sale of the old home: **1 October 2018**
- Twelve months and 30 days from the purchase of the new home, so 1 July 2018

So that is only three months, it was easily overlooked!

(d) If he completed the sale of the old home on 1 September 2018 (15 months after the purchase)

The old rules applied, so Oberyn had until the later of:

- Three months from the sale of the old home: **1 December 2018**
- Twelve months and 30 days from the purchase of the new home, so 1 July 2018

So that is only three months, it was easily overlooked!

(e) If he completed the sale of the old home on 1 December 2018 (18 months after the purchase)

The sale completed on or after the 29 October 2018 changes come into effect, the new rules apply, so Oberyn has until the later of:

- Twelve months from the sale of the old home: **1 December 2019**
- Twelve months and 30 days from the purchase of the new home, so 30 September 2018

That gives him a whole year, so the time extension is much less likely to be overlooked on the new rules.

Written by John Shallcross and published in January 2019. It was updated on 20 June 2019. This article is intended for general information purposes only and does not constitute legal or professional advice. Most of the examples are not covered by HMRC guidance and often the official view of HMRC on the correct analysis is not known. Advice should be sought before proceeding with any transaction.

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