



Stamp Duty Land Tax 3% surcharge

20 Case Studies

20 January 2020

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INTRODUCTION

These case studies all concern the higher rates of stamp duty land tax (SDLT) for additional dwellings. HMRC call it HRAD; many refer to it as the 3% surcharge. The examples are mostly adapted from real life situations from clients or posted on a [Zoopla forum](#). In many cases they are not covered by HMRC guidance, see their Manual from the index page [SDLM09730](#) and their [brief guidance on a .gov.uk page](#).

The examples assume unless otherwise stated that:

- All properties are being bought for £40,000 or more and (where already owned) are worth £40,000 or more.
- Properties (whether freehold or leasehold) are not subject to a lease with an unexpired term of more than 21 years.
- No other property interests "count against" a person, for example by being held in a trust where the person has a right to the income or being held for a minor child of the person.
- Properties acquired are in England.
- Acquisitions take place after 26 November 2018 (the end date of some transitional provisions relevant to the replacement exception).
- Individuals are not married or in a civil partnership.
- That spouses or civil partners are living together still.
- That Finance Act 2003 s75A (anti - avoidance) would not apply.

The provisions for the higher rates have many double negatives, particularly around Condition D (the exception from the surcharge for the replacement of an only or main residence) which features in many of the examples. So far as practical I have tried to iron out the double negatives. For example, I refer to failing Condition D as coming within the "replacement exception" to the surcharge.

References to paragraph numbers in legislation are to those in Finance Act 2003/Sch4ZA as added by FA2016/s128 and as amended in 2017 and 2018.

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This article is intended for general information purposes only and does not constitute legal or professional advice. Some of the examples are not covered by HMRC guidance and the official view of HMRC on the correct analysis is not known. Advice should be sought before proceeding with any transaction.

EXAMPLE 1: “IT IS GOOD TO SHARE”

Facts:

Adam and Angela are buying a property together having lived with their parents. For each of them it will be their first property as an owner/occupier. The only other properties they own are a house which is rented out in Spain worth £70,000 and a holiday home in Croatia worth £65,000.

Scenario A

Adam owns the Spanish property and Angela owns the Croatian one.

Scenario B

The Spanish and Croatian properties are owned equally so that the share of each of Adam and Angela in each property is worth less than £40,000.

Analysis:

Scenario A

The higher rates of SDLT are due. All of Conditions A – D¹ in para 3 are met for each of Adam and Angela. That includes Condition C, about other property interests “counting against” a person. It is clear that Condition C can include a property owned anywhere in the world².

Para 3 is the charging provision for individuals buying a single dwelling. To paraphrase the conditions:

- Condition A: Chargeable consideration is £40K+
- Condition B: 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.

Where there are two or more purchasers we must apply the tests to them separately as if each was buying alone³. If for any of them the higher rates would be due, then the higher rates are due for the transaction as a whole.

In Scenario A each of Adam and Angela have an interest worth £40,000 or more in another dwelling, so Condition C is satisfied, as are Conditions A, B and D.

Scenario B

The higher rates are not due. Condition C is failed for each of Adam and Angela⁴. Neither Adam nor Angela has a share worth £40,000 or more in any one dwelling. HMRC guidance at [SDLTM09780](#) and

¹ Para 3. For a summary of conditions A – D see the box below and for HMRC guidance on it see [SDLTM09765](#).

² Para 17. HMRC confirm the point at [SDLTM09780](#) which is about Condition C generally.

³ Para 2(3). For HMRC guidance on how the rules apply to joint buyers see [SDLTM09764](#).

[SDLTM09785](#) confirms that we have to look at the value of the share, not the value of the dwelling⁵. The surcharge tests have to be applied separately to each of Adam and Angela individually as explained above.

Even if Adam and Angela are spouses, there is no rule aggregating their interests, they are not treated as a unit. We should ignore HMRC indications to that effect⁶. We should rely instead on the legislation and what it provides for spouses⁷.

⁴ Para 3(4), in particular 3(4)(a) and (b) looking at the major interest each individual has in each dwelling.

⁵ Although the legislation is rather ambiguous on this point.

⁶ As in the original consultation document of 2015 and unhelpful wording in the brief updated guidance of 24 March 2017 (since replaced) "You may be viewed as the owner of a property if it's owned by your spouse or civil partner". Perhaps there is some confusion because of the different rules in Scotland; see the note at the end of Example 6.

⁷ Para 9 for spouses purchasing alone. There is guidance from HMRC in [SDLTM09820](#) under the heading "Purchasers with a spouse or civil partner".

EXAMPLE 2: "BUYING FIRST PROPERTY WITH PARENTS' HELP"

Facts:

Ben is buying his first property but needs some financial help from his parents. Ben has a 10% deposit and can borrow 60% of the value from a commercial lender. Ben's parents (who own their own home worth £80K or more) are able to help with cash for the other 30%. There are various borrowing / owning structures available from commercial lenders through a mortgage broker.

Scenario A

Ben's parents take a 30% share in the property.

Scenario B

Ben's parents gift or lend Ben the money without having a beneficial interest in the property.

Analysis:

Scenario A

The higher rates of SDLT are due as all of Conditions A – D in para 3 are met for Ben's parents. Ben's parents are treated as purchasers as they take a share in the property⁸ (even if it is bought in the name of Ben alone with him holding on trust for the three of them⁹).

Where there are two or more purchasers we must apply the tests to them separately as if each were buying alone¹⁰. If for any of them the higher rates would be due, then they are due for the transaction as a whole. So we have to apply the tests to the parents as well as to Ben. Because Ben's parents already have a property, the higher rates are due on the purchase.

Scenario B

The higher rates are not due. Condition C¹¹ is failed. Ben does not have another property counting against him. Under para 2(2) there is only one "purchaser". The parents are gifting or lending money, not taking a share in the property.

Note: The analysis would be the same in Scenario B if the property becomes registered in the names of Ben and his parents, but holding on trust for Ben outright¹².

There has been some confusion around the use of "joint borrower sole proprietor" mortgages. Suggestions have been made in the press that it can be enough to escape the higher rates for the property to be "in the name of" one of the owners even though a declaration of trust confirms that both

⁸ [SDLTM09835](#), although headed "purchases by companies and other non-individuals" deals with purchases in the name of a bare trustee and confirms that "for the purposes of determining whether a purchase is subject to the higher rates, the absolute beneficiary or beneficiaries are treated as the purchaser(s)".

⁹ For the 3% surcharge rules about "bare trustees" buying property for see paras 10(2) (3) and (4) if the purchase completes by the grant of a new lease, otherwise see Finance Act 2003/Sch16/para3.

¹⁰ Para 2(3). For HMRC guidance on how the rules apply to joint buyers see [SDLTM09764](#).

¹¹ Para 3(4). See [SDLTM09780](#) about Condition C generally.

¹² FA03/Sch16/para3. Also see [SDLTM09835](#) which covers purchases by bare trustees.

have an underlying share in the property! See my [article in the Tax Adviser](#) and this [piece on the Bank of Mum and Dad](#).

EXAMPLE 3: “DO NOT GET TO THE CHURCH ON TIME”

Facts:

Chris and Charlotte are an engaged couple, Chris owns Property A, Charlotte does not own a property. Charlotte is now to buy Property B, it is to belong to her alone.

Scenario A

They marry before Charlotte completes the purchase of Property B.

Scenario B

They marry after Charlotte completes the purchase of Property B.

Analysis:

Scenario A

The higher rates of SDLT are due as all of Conditions A – D are met for Chris. Because Chris and Charlotte are married, the transaction is treated as a higher rates transaction if it would have been a higher rates transaction if the spouse was also a purchaser¹³. We have to apply the tests to each of Chris and Charlotte; if for either of them the higher rates would be due, then they are due for the transaction as a whole¹⁴.

Applying the tests to Chris alone the higher rates would be due, though applying them to Charlotte alone they would not have been due (because Condition C would be failed – she has no other property interests counting against her).

Scenario B

The higher rates are not due. The purchase is treated as made by Charlotte alone and Charlotte does not own any other property, so Condition C is failed¹⁵.

¹³ Para 9(2). There is guidance from HMRC in [SDLTM09820](#) under the heading “Purchasers with a spouse or civil partner”.

¹⁴ Para 2(3). For HMRC guidance on how the rules apply to joint buyers see [SDLTM09764](#).

¹⁵ Para 3(4). See [SDLTM09780](#) about Condition C generally.

EXAMPLE 4: “UNDERSTANDING THE FOREIGN LAW”

Facts:

Dennis is buying the only property he will own in the UK. Dennis explains that he is in the process of buying an apartment overseas that is still being built. He says agreements for purchase and sale are in place and much of the money paid, but not the full price and the "strata title" has yet to be issued, although a lender has advanced money towards the sums paid so far.

Scenario A

Under the law of the country the interest held by Dennis in the apartment at the date of the completion of the UK purchase is equivalent to a "major interest", despite him not having paid the price in full¹⁶.

Scenario B

Under the law of the country the interest held by Dennis in the apartment at the date of the completion of the UK purchase is not equivalent to a "major interest".

Analysis:

Scenario A

The higher rates of SDLT are due as all of Conditions A – D in para 3 are met. A building in the process of being constructed counts as a "dwelling"¹⁷.

Scenario B

The higher rates are not due. Condition C is failed as Dennis does not have another property counting against him¹⁸.

¹⁶ Para 17(2)(a) provides for major interests in overseas dwellings.

¹⁷ Para 18(2)(b) on the definition of "dwelling".

¹⁸ Para 3(4). See [SDLTM09780](#) about Condition C generally.

EXAMPLE 5: “LIVING TOGETHER 200 MILES APART”

Facts:

Emma and Elsa are a married couple with an unusual domestic set up. They each have school age children from a previous relationship and are based respectively in Basingstoke and Manchester, 200 miles apart. Emma works in Basingstoke, Elsa works in Manchester. Their children are well settled at the respective local schools.

Emma and Elsa see each other most weekends, sometimes at the home of one or other of them, but more often they stay with Emma’s parents who have a large house about half way between the two, near Birmingham.

Emma needs a larger house in Basingstoke as the children are getting older and so plans to sell her existing home and buy another. Elsa will remain based in Manchester.

Scenario A

Elsa owns her home in Manchester.

Scenario B

Elsa rents a home in Manchester and does not own a property.

Analysis:

Scenario A

The higher rates of SDLT are due on Emma’s purchase of a replacement home as all of Conditions A – D are met for Elsa. The transaction is treated as a higher rates transaction if it would have been a higher rates transaction if Elsa (a spouse) was also a purchaser¹⁹.

The tests of "living together"²⁰ are less about living under the same roof than about whether the relationship has ended. We have to apply the tests to each of Emma and Elsa; if for either of them the higher rates would be due, then they are due for the transaction as a whole²¹.

- Applying them to Emma alone, she would have escaped because of failing Condition C (as she owns no other property²²) and failing Condition D (because the replacement exception²³ applies).
- We have to apply them to Elsa as well. She has another property and cannot take advantage of the replacement exception as she does not intend to live in the new property. So because she would have been liable to the higher rates, Emma’s acquisition is liable to the higher rates.

¹⁹ Para 9(2). There is guidance from HMRC in [SDLTM09820](#) under the heading “Purchasers with a spouse or civil partner”.

²⁰ Para 9(3).

²¹ Para 2(3). For HMRC guidance on how the rules apply to joint buyers see [SDLTM09764](#). This includes spouses who are “deemed joint buyers”.

²² Para 3(4). See [SDLTM09780](#) about Condition C generally.

²³ Para 3(5) and 3(6). See [SDLTM09800](#) about Condition D generally. See Example 6 below where the conditions for the replacement exception are set out in a box.

Scenario B

The higher rates are not due. Although, as for Scenario A, the tests have to be applied to each of Emma and Elsa, this time Elsa has no other property counting against her. Whilst Emma escapes the surcharge as before by failing Conditions C and D, Elsa also now escapes by failing Condition C²⁴.

Note: The rules in this situation in Scotland for Land and Buildings Transaction Tax and the Additional Dwellings Supplement are different and much tougher. See my [Case Notes](#) for 30 December 2019 for some decided cases turning around the different structure in Scotland where spouses (and civil partners and even cohabitants) are treated as owning any property belonging to the other. That is not how the rules are structured for SDLT.

²⁴ Para 3(4). See [SDLTM09780](#) about Condition C generally.

EXAMPLE 6: “GENERATIONAL DIVIDE”

Facts:

Francis recently inherited a house he has never lived in, it is let out and Francis intends to retain it. He has been living in rented property for the last two years. Francis is now buying a property to live in.

Scenario A

This will be the first property Francis has both owned and lived in.

Scenario B

Francis has previously lived in a property he owned and lived in up until two years ago when he sold it.

Analysis:

Scenario A

The higher rates of SDLT are due as all of Conditions A – D in para 3 are met.

This is the case even though Francis' only residence has been the house he pays a rent for. He cannot make use of giving up that tenancy and moving out of that house to engage the replacement exception as he has not had a "major interest" to dispose of in that property²⁵. Nor can Francis rely on the rules for recently inherited interests under para 16 as Francis has inherited the whole house rather than a share not exceeding 50%.

Scenario B

The higher rates are not due. Condition D²⁶ is failed and the exception from the higher rates for the replacement of an only or main residence applies. Francis can make use of his last sale of a property he used to live in, as it was within three years ago that he lived in that property and it was sold.

There are five²⁷ ingredients in para 3(6) for Condition D to be failed by coming within the exception from the surcharge for the replacement of an only or main residence. To get within the exception to the surcharge for a purchase completing after 26 November 2018 the five conditions to be met can be summarised as below. It avoids some ambiguity to refer to the buyer of the new property as “P”.

²⁵ Para 2(4) provides that a lease granted for seven years or less does not count as a “major interest”. Para 3(6)(b) requires that a major interest must be disposed of for the replacement exception to apply. See [SDLTM09800](#) for the requirements to be met for the replacement exception to apply, the final paragraphs confirm that giving up a tenancy does not count unless the tenancy was granted for a term of more than seven years.

²⁶ Para 3(5) and 3(6).

²⁷ Arguably there is a sixth condition, that the “paragraph 8 trap” does not apply. This is explained in Example 17 below.

3(6)(a): P must intend to live in the new property as his / her only or main residence.

3(6)(b): P (or P's spouse or civil partner²⁸) must previously have sold (or at least disposed of a major interest) in another property ("the sold dwelling") within the three years leading up to the purchase of the new property.

3(6)(ba) After that disposal P must not retain any share in the sold nor dwelling nor (if P has a spouse or civil partner who P is living with) must that spouse / civil partner have a share in the sold dwelling.

3(6)(c): P must have lived in the sold dwelling as his / her only or main home within the three years leading up to the purchase of the new property.

3(6)(d): Since selling the sold dwelling P has not acquired another property intending to live in it as his / her only or main residence (nor for completeness has P's spouse or civil partner²⁹ acquired another property since the sale of the sold dwelling with the intention that it be the only or main residence of P).

This summary is worded to try to overcome the common confusion between "dwelling" and "residence" as used in the legislation and guidance.

Francis meets all of these ingredients, so the replacement exception applies and Condition D is not met.

²⁸ ~~There is no requirement that the spouse or civil partner was living together with P at the time. It is necessary though that the person was the spouse or civil partner at the time of the sale or other disposal.~~

²⁹ Again, there is no requirement that the spouse or civil partner was living together with P at the time. It is not made clear at what date the person would need to be a spouse / civil partner for the rule to apply.

EXAMPLE 7: “PROPER ORDER”

Facts:

The one property Glen owns is his only residence (i.e. where he lives) which he is selling. With the money he is going to buy two properties. He is to live in Property 1 as his only residence and Property 2 is to be an investment which he will rent out.

Scenario A

Glen completes the purchase of Property 1 first, then Property 2.

Scenario B

Glen completes the purchase of Property 2 first, then Property 1 on a later date, but within three years of selling his previous home.

Analysis:

Scenario A:

- The higher rates are not due for Property 1. Neither of Conditions C³⁰ and D³¹ are met. There are no other property interests counting against Glen and the replacement exception applies.
- The higher rates of SDLT are due on Property 2 as all of Conditions A – D are met.

Scenario B:

- The higher rates are not due for Property 2. Condition C is failed (on the date of its acquisition it is the only property that Glen owns).
- The higher rates are not due for Property 1. Condition D is failed (the exception from the higher rates for the replacement of an only or main residence applies). The ingredients for the replacement exception to apply are set out in the box in Example 6 above. All of them are met. It is not a problem that Glen acquired Property 2 between selling his main home and buying Property 1 as when he acquired Property 2 it was not with the intention of living in it as his only or main residence.

Note: For transactions in Wales subject to Land Transaction Tax there are new rules which catch "intermediate transactions" in situations like the purchase of Property 1 in Scenario B. There would under the LTT rules be a delayed charge on Property 1 (it is were in Wales) when Property 2 is later acquired.

³⁰ Para 3(4). See [SDLTM09780](#) about Condition C generally.

³¹ Para 3(5) and 3(6). See [SDLTM09800](#) about Condition D generally.

EXAMPLE 8: “PROPERTY OWNING HISTORY, BRIDGING SAVES THE DAY”

Facts:

This example is set in July 2018 (so before the transitional provisions ended on 26 November 2018³² and within three years of the 3% surcharge coming into effect on 1 April 2016). The note at the end explains the position for a transaction completing now.

Hanan’s property owning history is as follows:

- He had previously owned and lived in Property 1 and had sold that (the date of the sale differs for Scenarios A and B).
- He had bought Property 2 in 2014 (before the 3% surcharge was introduced on 1 April 2016) and he had lived in it for the four years from its purchase until the time in question (July 2018).
- In July 2018 he is buying Property 3 to live in as his only residence, intending to keep and rent out Property 2.

Scenario A

The sale of Property 1 had completed in 2014 on the same day that he acquired Property 2.

Scenario B

The sale of Property 1 had completed shortly after he acquired Property 2 (so he “bridged”, owning both Property 1 and Property 2 for a while).

Analysis:

Scenario A

The higher rates are due on the purchase of Property 3 in July 2018 as all of Conditions A – D are met. In particular Condition D is met because of the rule that for the replacement exception to get Hanan out of the surcharge he must not have acquired another property to live in at any time starting with the date of the previous sale of Property 1³³. The purchase of Property 2 completed on the same day as the sale of Property 1 completed, so the sale of Property 1 is no longer available to help him get within the replacement exception.

Scenario B

The higher rates are not due on the purchase of Property 3 given the key dates here. In particular:

(a) The purchase of Property 3 completes before 26 November 2018 so the “three year rules”³⁴ do not apply. It is no objection to the “replacement exception” applying that it was over three years ago that Hanan lived in and sold Property 1.

³² See my paper on the [expiry of the three year rules on 26 November 2018](#).

³³ Para 3(6)(d). The ingredients for the replacement exception to apply are summarised in Example 6 above.

³⁴ See my paper on the [expiry of the three year rules on 26 November 2018](#).

(b) The purchase of Property 2 did not suffer the 3% surcharge, being before it was introduced. So it is impossible for the “paragraph 8 trap” (explained in Example 17 below) to apply. The sale of Property 1 cannot have entitled Hanan to recover the extra 3% on the purchase of Property 2 as it was not due in the first place.

Condition D is failed³⁵ and the exception from the higher rates for the replacement of an only or main residence applies. Hanan can make use of the sale of Property 1 as that completed after he bought Property 2.

Note: Scenario B would work out differently for many similar purchases after 26 November 2018. That is because of a combination of:

(a) The expiry of the transitional provisions which do not apply for purchases after 26 November 2018. From that date the three year rules³⁶ apply.

(b) The “paragraph 8 trap”³⁷ which means that if a sale of a previous home gives an entitlement to a refund of the 3% surcharge on an earlier purchase, the same sale cannot be used towards fulfilling the conditions for the replacement exception for a later purchase.

³⁵ Para 3(5) and 3(6). See [SDLTM09800](#) about Condition D generally.

³⁶ See my paper about [the three year rules](#).

³⁷ The second example at [SDLTM09805](#) is an illustration of the para 8 trap. See too Example 17 in this paper with a fuller explanation of the trap in a box.

EXAMPLE 9: “EQUITY SALE COULD BEAT BORROWING”

Facts:

This example is set before 22 November 2017, though the note at the end explains the position for a transaction completing now.

Ibrahim wishes to keep Property A where he has lived for several years and buy Property B to live in, letting out Property A (which is mortgage free). His parents are willing to provide the £30,000 he needs to make up the price of Property B.

Scenario A

Ibrahim retains full ownership of Property A, borrowing £30,000 from his parents to buy Property B (the purchase completing before 22 November 2017).

Scenario B

Ibrahim’s parents acquire an undivided share in Property A from Ibrahim for £30,000; Ibrahim can use that money to buy Property B (the purchase completing before 22 November 2017).

Analysis:

Scenario A

The higher rates of SDLT are due on Ibrahim's purchase as all of Conditions A – D in para 3 are met.

Scenario B

- The higher rates are not due on Ibrahim’s purchase if it completes by 22 November 2017. At the time it was enough that a “major interest” in the old home was disposed of³⁸. Condition D is failed and the exception from the higher rates for the replacement of an only or main residence applies.
- Ibrahim’s parents will not pay SDLT on their acquisition. Condition A³⁹ is failed as the chargeable consideration for their acquisition is below £40,000.

Note: If Ibrahim proceeds as per Scenario B and completes the purchase of Property B on or after 22 November 2017 he is caught out by the Autumn Budget 2017 changes. This requires all of the interest in Property A to be disposed of; a new condition (ba) was added to the replacement exception⁴⁰.

³⁸ Para 3(5) and 3(6) as they were before the addition of para (3(6)(ba)). This is confirmed in [SDLTM09800](#) under the heading “Purchases before 22 November 2017”. See Example 15 below where similar issues arise.

³⁹ Para 3(2). See [SDLTM09770](#) for Condition A generally.

⁴⁰ For the ingredients of the replacement exception as they now see the box in Example 6 above.

EXAMPLE 10: “APPROPRIATE INHERITED PROPERTY”

Facts:

Jonathan owns a holiday home and is now buying a house to live in as his only residence. He had lived in the family home with his mother up until two years ago when he moved out into rented accommodation. His mother has since died leaving the family home to him. The family home was sold last year and Jonathan is using the money from the sale towards the purchase of his new home.

Scenario A

The sale of the old family home was an executors’ sale during the course of administration of the estate without an assent to Jonathan or an interest in the home having been appropriated to him.

Scenario B

The sale of the old family home was a sale by Jonathan, the property having been first assented to him.

Analysis:

Scenario A

The higher rates of SDLT are due as all of Conditions A – D are met. Condition C is met because of Jonathan owning the holiday home. Jonathan did not have a "major interest" in the family home, so its sale does not give Jonathan the benefit of the exception from the surcharge for the replacement of an only or main residence. Jonathan only had a set of rights enabling him to enforce the administration of the estate⁴¹.

Scenario B

The higher rates are not due. Condition D⁴² is failed and the exception from the higher rates for the replacement of an only or main residence applies. In particular note that the requirement to have lived in the sold dwelling does not require that to have been at a time when the person owned the property.

⁴¹ The principles are set out in [SDLTM09795](#) although in a different context. In SDLTM09795 the date at which a person becomes entitled to a major interest in a property is considered in the context of establishing the start of the three year grace period for an inherited share not exceeding 50%.

⁴² Para 3(5) and 3(6). See [SDLTM09800](#) about Condition D generally. For the ingredients of the replacement exception as they now see the box in Example 6 above.

EXAMPLE 11: “CORPORATE SHENANIGANS”

Facts:

Kezia owns a flat where she lives (it is the only property she ever had as an owner/occupier) worth £200,000 and owns a number of let properties. Kezia has come into a large sum of money and is to buy a fancy house to live in for £5M but does not want to sell the flat or other properties.

Scenario A

Kezia retains the flat to rent out and buys the fancy house.

Scenario B

Kezia transfers the flat to a UK limited company which will rent it out and then she buys the fancy house.

Analysis:

Scenario A

The higher rates of SDLT are due on the purchase by Kezia of the fancy house; that is £150,000 extra (3% of £5M) making a total SDLT bill of £663,750, as all of Conditions A – D are met.

Scenario B

- The higher rates are not due on Kezia’s purchase. Condition D⁴³ is failed and the exception from the higher rates for the replacement of an only or main residence applies. It does not matter that Kezia’s company now owns the flat; Kezia has disposed of it⁴⁴.
- But the company pays SDLT (at the higher rates) on the £200,000 flat, so pays £7,500⁴⁵.

⁴³ Para 3(5) and 3(6). See [SDLTM09800](#) about Condition D generally. For the ingredients of the replacement exception as they now see the box in Example 6 above.

⁴⁴ A similar point is confirmed in my [Case Notes](#) for 15 November 2019.

⁴⁵ See [SDLTM09835](#) for purchases by companies.

EXAMPLE 12: “SELL BEFORE, NOT AFTER”

Facts:

This example is set on or before 26 November 2018, though the note at the end explains the position for a transaction completing now.

Leon owns several flats he rents out and a house where he used to live before he went abroad four years ago. For the last four years Leon has lived abroad in accommodation provided by his employer but is now returning and plans to buy another property to live in completing by 26 November 2018. Leon intends to sell the old house, but could finance the purchase of the new property before selling the old house.

Scenario A

Leon completes the sale of the old house after completing the purchase of the new property.

Scenario B

Leon completes the sale of the old house before completing the purchase of the new property.

Analysis:

Scenario A

The higher rates of SDLT are due as all of Conditions A – D are met. The later sale of the old house will not enable a refund of the 3% surcharge because it was more than three years before the purchase of the new property that Leon used to live in the old house⁴⁶.

Scenario B

The higher rates are not due if completion of the purchase is by 26 November 2018⁴⁷. Condition D is failed and the exception from the higher rates for the replacement of an only or main residence applies.

Notes: Scenario B would work out differently for a purchase completing after 26 November 2018⁴⁸. That is because of the three year rules⁴⁹ where completion of the purchase is after 26 November 2018 meaning that the replacement exception does not apply.

At the time of writing there are proposals that non-UK residents be subject to a new 3% surcharge. This is discussed in the entry dated 25 November 2019 of my [Case Notes](#) and see the [press release](#) of 22 November 2019.

⁴⁶ Para 3(7)(c). The transitional provisions in FA2016/s128(8) and (9) do not apply where the purchase is before the sale.

⁴⁷ Para 3(5) and 3(6) and the transitional provisions in FA2016 s128(8) and (9) which mean the three year time limit do not apply where the sale is before the purchase. See [SDLTM09800](#) and the heading “exception to the three year rule”.

⁴⁸ See my paper on the [expiry of the three year rules on 26 November 2018](#).

⁴⁹ See my paper about [the three year rules](#).

EXAMPLE 13: “SAVED BY THE BELLS”

Facts:

Martin and Marilyn are an engaged couple, they each own their own property, acquired in each case before they met and originally used as their respective homes. They have lived in Martin’s house for four years as their only residence. Marilyn’s house has been let out for four years, Marilyn used to live in it, but Martin never has.

They are planning to sell Martin’s house, move out and buy another together as their only residence with Marilyn retaining her let property.

Scenario A

They plan to sell Martin’s house before they marry.

Scenario B

They plan to sell Martin’s house after they marry.

Analysis:

Scenario A

The higher rates of SDLT are due as all of Conditions A – D are met for Marilyn (though not for Martin). We have to apply the tests to each of Martin and Marilyn as if buying alone. If for either of them the higher rates would be due, then they are due for the transaction as a whole⁵⁰.

Scenario B

The higher rates are not due. A person (so long as they have lived in the property personally) can rely on a sale by a spouse⁵¹. So Marilyn can rely on the sale by Martin, as Marilyn has lived in Martin’s house and Martin was Marilyn’s spouse when he sold it. Condition D is failed and the exception from the higher rates for the replacement of an only or main residence applies.

⁵⁰ Para 2(3). For HMRC guidance on how the rules apply to joint buyers see [SDLTM09764](#).

⁵¹ Para 3(5) and 3(6) especially para 3(6)(b) which says that a disposal by a person who was a spouse at the time of the sale can meet one of the ingredients for the replacement exception to apply. See [SDLTM09800](#) about Condition D and the replacement exception. There was some confusion in the guidance about whether spouses need to be living together to take advantage of the rule. The position is that they do not need to be living together.

EXAMPLE 14: “MAKING MARRIAGE WORK”

Facts:

Nick and Noah are a married couple, they each already own their own property, acquired in each case before they met and originally used as their respective homes. They have lived in Nick’s house for two years as their only residence. Noah’s house has been let out for the last two years, Noah used to live in it until two years ago, but Nick never has.

They are planning to sell one of the two houses and buy another to live in as their only residence with the other property retained to be let out.

Scenario A

Noah's house (which Nick had never lived in) will be sold and Nick’s house will be retained and will be let out.

Scenario B

Nick’s house (where they have been living) will be sold and Noah’s house will be retained and will remain let out.

Analysis:

Scenario A

The higher rates of SDLT are due as all of Conditions A – D are met for Nick who never lived in Noah’s house which is sold. We have to apply the tests to each of Nick and Noah as if buying alone. If for either of them the higher rates would be due, then they are due for the transaction as a whole⁵². This would be the case even if Noah alone acquired the new property⁵³.

Scenario B

The higher rates are not due. We have to apply the tests to each of Nick and Noah as if buying alone.

- Conditions C and D are failed for Nick, so looking at him alone, he would have escaped the higher rates.
- One party (so long as they have lived in the property personally) can rely on a sale by a spouse⁵⁴. So Noah can rely on the sale by Nick, as Noah has lived in Nick’s house and Nick was Noah’s spouse when Nick sold it. Condition D is failed for Noah and the exception from the higher rates for the replacement of an only or main residence applies⁵⁵.

⁵² Para 2(3). For HMRC guidance on how the rules apply to joint buyers see [SDLTM09764](#).

⁵³ Para 9 (the rule about spouses). There is guidance from HMRC in [SDLTM09820](#) under the heading “Purchasers with a spouse or civil partner”.

⁵⁴ Para 3(5) and 3(6) especially para 3(6)(b).

⁵⁵ See [SDLTM09800](#) about Condition D and the replacement exception.

EXAMPLE 15: “IT WAS TOO GOOD TO LAST”

Facts:

This example is set on or before 26 November 2018, though the note at the end explains the position for a transaction completing now.

Omar and Onika are a married couple buying a new home together for them both to live in as their only residence. Omar 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 rent out. They each have another property which they will retain.

Scenario A

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

Scenario B

The lender requires Omar 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:

Scenario A

The higher rates of SDLT are due on the purchase as all of Conditions A – D are met for Omar and for Onika. We have to apply the tests to each of Omar and Onika as if they were buying alone. If for either of them the higher rates would be due, then they are due for the transaction as a whole⁵⁶. They each have other property “counting against them” for Condition C and the replacement exception will not apply (so Condition D is met).

Scenario B

The higher rates would not be due on the purchase completing before 22 November 2017. The surcharge tests have to be applied to both parties.

- If Omar bought alone, then as he has disposed of a share in his home, Condition D is failed and the exception from the higher rates for the replacement of an only or main residence applies to Omar.
- We must then turn to Onika. One party (so long as they have lived in the property personally) can rely on a sale by a spouse⁵⁷. So Onika can rely on the disposal by Omar, as Onika has lived in Omar’s house and Onika’s spouse has disposed of a major interest in it, even though the disposal was to Onika! Condition D is failed for Onika and the exception from the higher rates for the replacement of an only or main residence applies. Condition (ba) was only

⁵⁶ Para 2(3). For HMRC guidance on how the rules apply to joint buyers see [SDLTM09764](#). Because of para 9 (the rule about spouses) even if only one of them bought the new property the surcharge tests would be applied as if they were both buying the new property. There is guidance from HMRC in [SDLTM09820](#) under the heading “Purchasers with a spouse or civil partner”.

⁵⁷ Para 3(5) and 3(6) especially para 3(6)(b).

brought in with effect for purchases completing from 22 November 2017. At the time it was enough that a “major interest” in the old home was disposed of⁵⁸. Condition D is failed and the exception from the higher rates for the replacement of an only or main residence applies.

Thought should be given as to whether SDLT is due on the acquisition by Onika of a share in Omar’s house. It might well be if there is a substantial mortgage on Omar’s house.

Notes: If Omar and Onika proceed as per Scenario B and completed the purchase of the new home on or after 22 November 2017 they are caught out by the Autumn Budget 2017 changes. This requires all of the interest in the old home to be disposed of; there is a new condition (ba) added to the replacement exception⁵⁹. Condition D cannot now be met if the person concerned, or their spouse / civil partner who they live together with, retains a share in the old property.

Another change from 22 November 2017 could be of marginal help as regards SDLT on the acquisition by Onika of a share in Omar’s house. As they are a married couple living together, then if that acquisition is after 22 November 2017 the higher rates will not apply because of the new rule for “*Spouses and civil partners purchasing from one another*”⁶⁰.

⁵⁸ Para 3(5) and 3(6) as they were before the addition of para 3(6)(ba). This is confirmed in [SDLTM09800](#) under the heading “Purchases before 22 November 2017”. See Example 9 above where similar issues arise.

⁵⁹ The ingredients for the replacement exception are summarised in Example 6 above.

⁶⁰ See [SDLTM09820](#) under the heading “From the 22 November 2017 - transfers of interests between spouses and civil partners”.

EXAMPLE 16: “BREAKING UP IS HARD TO DO: RETAINED FAMILY HOME”

Facts:

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

Scenario A

Patrick agrees to allow Paula to continue living in the matrimonial home, but there is no court order formalising this.

Scenario B

There was a consent order providing for a number of matters, including a “property adjustment order” for the benefit of Paula and the children providing for the interests in the former matrimonial home to remain held equally, but for Paula and the children to be entitled to live in it until the children complete higher education.

Analysis:

Scenario A

The higher rates of SDLT are due as all of Conditions A – D are met for Patrick. There is no need to apply the tests to Paula. Although they are spouses, they are separated in circumstances likely to prove permanent⁶¹.

Scenario B

A change made by the Autumn Budget of 2017 saves Patrick. This is the new exception for "*Property adjustment on divorce, dissolution of civil partnership etc*"⁶². The share retained in the former matrimonial home should not "count against" Patrick for the purposes of Condition C if an order has been made in matrimonial proceedings for the benefit of Paula and / or the children and they live in the former matrimonial home but Patrick does not.

⁶¹ Para 9(1)(b) and 9(3). This is referred to in [SDLTM09820](#) and detail is given in [SDLTM09800](#) under the heading “Definitions living together”.

⁶² Para 9B. There is more about this in section 5 of my [detailed paper](#) with examples of the effect of Budget changes. See also [SDLTM09797](#) about divorce and civil partnership dissolution.

EXAMPLE 17: “BREAKING UP IS HARD TO DO: A NASTY TRAP”

Facts:

Rasheed and Rita were a couple but have recently split up⁶³. Their jointly owned former home is to be sold, with each of them buying their own property to live in. They each have other property interests.

Scenario A

Rasheed buys his new home before the sale of the former joint home, Rita buys hers after the sale.

Scenario B

Rasheed and Rita both buy their new home on the same day as, or after, the sale of the former joint home.

Analysis:

Scenario A

- Rasheed initially has to pay the higher rates on the purchase of his new home (because the former joint home is still owned), but can obtain a refund for the extra 3% SDLT when the former joint home is sold⁶⁴. Condition D will then be failed and the exception from the higher rates for the replacement of an only or main residence will then apply to the acquisition of the new home.
- The higher rates of SDLT are due on Rita’s purchase as all of Conditions A – D are met. She is caught by the nasty trap in para 8. This applies because Rasheed has been entitled to recover SDLT⁶⁵ using the sale of the former joint home. It means that the sale of the former joint home cannot be taken into account for Rita⁶⁶ so Condition D is met and the exception for the replacement of an only or main residence does not apply to her.

The paragraph 8 trap

The “paragraph 8 trap”⁶⁷ is that if a sale of a previous home gives an entitlement to a refund of the 3% surcharge on an earlier purchase, the same sale cannot be used towards meeting the ingredients⁶⁸ for the replacement exception for a later purchase. Note:

- It is enough for the trap to spring that there was an entitlement to recover the 3% on an earlier purchase because of the later sale, even if the money has not been recovered or because it is now too late to do so.
- The trap is arbitrary as is demonstrated by this example. The trap does not spring if joint owners (or spouses / civil partners) each buy separate properties after the sale of the joint home. It does spring though if one buys before the sale and one after the sale.

⁶³ This example is equally applicable whether or not Rasheed and Rita are married / civil partners, so long as at the date of the purchase they are not “living together”.

⁶⁴ Para 3(5) and (7). See [SDLTM09800](#) under the heading “The second situation”. See too [SDLTM09809](#) about claiming a refund. There is a [.gov.uk website](#) with a Form SDLT16 to fill in for a repayment application.

⁶⁵ By virtue of para 3(7).

⁶⁶ For the purposes of para 3(6).

⁶⁷ Para 8. See too Example 8 in this paper where this trap is mentioned.

⁶⁸ The five ingredients are set out in Example 6 above.

The second example at [SDLTM09805](#) is an illustration of the para 8 trap:

“An individual sells an old property 3 months after buying a new property so that Condition D is no longer met [the `second situation` referred to in SDLTM9800,] and a refund of the higher rates paid becomes claimable. The sale of the old property cannot be used again to count against the purchase of a different new property.”

Scenario B

The higher rates are not due for either party on Scenario B⁶⁹, Condition D is failed and the exception from the higher rates for the replacement of an only or main residence applies.

The nasty trap in para 8 does not apply as neither party is entitled to recover 3% already paid as a result of the sale of the former joint home.

⁶⁹ Para 3(5) and 3(6). See [SDLTM09800](#).

EXAMPLE 18: “ENFRANCHISEMENT LOTTERY”

Facts:

Simon has lived for two years in a leasehold flat he owns, but he also owns a freehold property which he rents out. The lease term was down to 35 years so Simon is acquiring a lease extension for £200,000. The extension will operate as a surrender and regrant of the lease in the usual way.

Scenario A

The flat was the first property Simon ever had as an owner/occupier.

Scenario B

The flat replaced a previous property that Simon had lived in and sold within the last three years.

Analysis:

Scenario A

The higher rates of SDLT are due as all of Conditions A – D are met. A major interest in a dwelling is acquired⁷⁰; it does not help Simon to say that he already has a lease of the flat.

A quick reminder about Conditions A – D:

- Condition A: Chargeable consideration is £40K+
- Condition B: 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 B⁷¹ 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.

Condition D⁷² 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. For the replacement exception to apply, the disposal must be of a major interest in **another** dwelling⁷³. In the context of the legislation it is clear that the "sold dwelling" referred to relates to the bricks and mortar dwelling, not the legal interest in a dwelling (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 So para 3(1) is engaged. There is no general exception by virtue of already owning an interest in the property, although see the note below about cases where the property has been lived in throughout the previous three years.

⁷¹ See the guidance on Condition B generally at [SDLTM09775](#).

⁷² See [SDLTM09800](#). The ingredients to be met are set out in the box in Example 6 above. It is requirement (b) which is of particular concern.

⁷³ Para 3(6)(b).

Scenario B

The higher rates are not due. Condition D is failed, the exception from the higher rates for the replacement of an only or main residence applies.

There is nothing in the legislation to stop successive acquisitions of interests in the same dwelling benefitting from the replacement exception. There is a rule in 3(6)(d) which prevents the replacement exception working where a major interest has already been acquired since the sale. But that only causes a problem where the interest is acquired in "any **other** dwelling"⁷⁴. Here Simon acquires a further interest in the **same** dwelling and still intends it to be his only or main residence.

Note: The new "*Exception where purchaser has prior interest in purchased dwelling*" for purchases completing on or after 22 November 2017⁷⁵ would help only if Simon has lived in the leasehold flat throughout the three year period leading up to the acquisition of the extended lease.

⁷⁴ Though there could be an argument that the "other dwelling" is referring to any dwelling other than the sold dwelling. The better reading is that it refers to any dwelling other than both the sold dwelling and the purchased dwelling.

⁷⁵ See [SDLTM09814](#) for adding to existing interests. There is more about this in section 3 of my [detailed paper](#) with examples of the effect of Budget changes.

EXAMPLE 19: “LIVE IN THE BIG ONE!”

Facts:

Tanya buys a house with a cottage in the grounds. The house is worth over 2/3 of the total value. Tanya owns other properties, but has just sold a flat that she used to live in.

Scenario A

Tanya intends to live in the cottage and let out the house.

Scenario B

Tanya intends to live in the house and let out the cottage.

Analysis:

Scenario A

The higher rates of SDLT are due. As there are two dwellings, the charging provisions in para 5 or 6 potentially apply. Para 5 does not apply as one of the two dwellings is "subsidiary" to the other⁷⁶. Para 6 does however apply as all of the conditions in para 6(1) are met. In particular Tanya does not escape by virtue of the replacement exception in para 6(1)(d) as set out in para 6(3). That is because under 6(1)(d) it has to be the main (not the subsidiary) dwelling which is a replacement of the purchaser's only or main residence.

Scenario B

The higher rates are not due. As in Scenario A, para 5 does not apply as one of the dwellings is "subsidiary" to the other. Nor does para 6 apply because of the replacement exception built in at 6(1)(d). This time the replacement exception does work as Tanya intends to live in the main dwelling, not the subsidiary dwelling.

Notes: Tanya could reduce her SDLT in either case by claiming multiple dwellings relief. In Scenario B claiming MDR should not in itself trigger the surcharge⁷⁷.

These issues are discussed in detail in [my granny flats paper](#).

⁷⁶ Para 5(1)(c) and 5(4). See [SDLTM09755](#) for the subsidiary dwellings test and [SDLTM09766](#) on individuals purchasing two or more dwellings.

⁷⁷ This was confirmed by HMRC in their [“Talking Points”](#) of 23 July 2019.

EXAMPLE 20: “SMALLER DWELLING NOT SUBSIDIARY”

Facts:

Victoria is buying a house with a cottage further down the street, several houses away. The property is advertised in lots, the seller is happy to sell the two properties together or separately. The house is worth over 2/3 of the total value. Victoria owns other properties, but has just sold a flat that she used to live in. Victoria will live in the house.

Scenario A

Victoria buys the two dwellings in one transaction (so a single contract and a single transfer at completion).

Scenario B

Victoria buys the two dwellings in two transactions; there are two contracts and two transfers.

Analysis:

Scenario A

The higher rates of SDLT are due on the single transaction for both properties as all of the conditions in para 5(1) are met. It is clear that for a single transaction either the standard rates or the higher rates apply, never a combination⁷⁸. The cottage does not count as "subsidiary" to the house within para 5(5) as it is several doors away from the house so it is not within the grounds of the house. There is no replacement exception built into para 5. Multiple dwellings relief could be claimed⁷⁹.

Scenario B

- The two transactions have to be looked at separately to see if the higher rates apply to either or both of them⁸⁰.
- The higher rates are not due on the purchase of the house⁸¹. Condition D is failed, the exception from the higher rates for the replacement of an only or main residence applies.
- The higher rates are due on the purchase of the cottage as Conditions A – D are all met.
- If the two transactions are linked, then the calculation of SDLT is not straightforward. See Example 7 in my article at <https://www.blakemorgan.co.uk/news-events/blog/additional-3-stamp-duty-land-tax-surcharge-granny/> which brings in a claim for multiple dwellings relief.

⁷⁸ Confirmed by HMRC in the first paragraph of [SDLTM09766](#).

⁷⁹ Confirmed by HMRC at the end of [SDLTM09755](#) and dealt with in some detail in [my granny flats paper](#).

⁸⁰ Para 2(1).

⁸¹ Para 3(5) and 3(6).



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