Additional properties

Indirect Tax



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John Shallcross considers issues for couples buying a property using 'Joint Borrower Sole Proprietor' mortgages

Key Points

What is the issue?

Joint borrower sole proprietor mortgages are sometimes put forward as part of a solution to a stamp duty land tax problem where one of a couple has a property and

the other does not. But often they do not achieve the saving intended.

What does it mean to me?

A full understanding of the intended beneficial ownership is needed when advising in this kind of case as clients and other advisers often misunderstand the effect of a property being ‘in the name of’ a person.

What can I take away?

A better understanding of the limited type of case where a joint borrower sole proprietor mortgage might be appropriate and what steps the parties might need to take to protect their position.

The 1% surcharge for non-residents might be coming!

Stamp Duty Land Tax (SDLT) on residential property has become very complicated, especially concerning the extra 3% due where someone buys an ‘additional property’ (the higher rates). It is set to get even more complicated with a further 1% surcharge to be introduced for non-resident buyers.

A consultation paper on that proposal is due out in January 2019. Representations have been made that the consultation paper should include an option to radically simplify the 3% surcharge and integrate the extra charge into it; but do not hold your breath!

A trap for couples buying a home together

There is a particularly nasty 3% surcharge trap for couples buying a home to live in together where one already has a property. Consider Anna and Bertie buying together. Anna owns no properties but Bertie has a holiday home. If either of Anna and Bertie buying alone would be liable to the surcharge, then the whole transaction is liable.

Even if Bertie is only taking a 10% interest in the new property, his interest in another property could result in the whole purchase price of the new property being liable to the extra 3% SDLT.

No married bliss

The rules are particularly tough for married couples/civil partners who are living together. Carol and Doreen are married, Carol owns no properties, but Doreen has a let property.

Even if the new property is bought by Carol alone, for the purposes of the higher rates of SDLT we have to apply the rules as if Doreen was buying as well. It is possible that Doreen is treated as ‘replacing’ a main residence so the higher rates would not apply anyway. But if Doreen does not have a disposal of a home to rely on then the higher rates would apply to Doreen, so the higher rates apply to the transaction. So, Carol would have to pay the 3% extra.

An escape for those who have not tied the knot?

The same rule does not apply to an unmarried couple. There can be the potential for one of the couple alone to buy the new property so that the purchase is not ‘tainted’ by the property belonging to the other person. For example, Edward does not own a property, but Fiona does and is not selling it.

It might be practical for Edward alone to buy the new property where all of the capital is put in by Edward if Fiona does not mind that she has no share in the ownership of the new property. Most people however need a mortgage and affordability sometimes dictates that both Edward and Fiona are liable on the mortgage.

Most lenders would require both individuals to be owners of the property. Some however offer ‘Joint Borrower Sole Proprietor’ mortgages. Some refer to this type of mortgage as a ‘camouflage mortgage’! This would mean that both Edward and Fiona are liable on the mortgage, but only Edward owns the property. This can work from a lender’s point of view where Fiona is genuinely joining in for affordability, but with no interest in the proceeds of sale (similar to the old style guarantor mortgages).

‘In the name of’ and a declaration of trust

Suggestions have been made in the popular press that if the new property is put ‘in the name of’ Edward then the interests of Fiona (particularly where she is putting in capital) can be protected by a Declaration of Trust giving Fiona an underlying

interest in the property without being on the title. This is to misunderstand the SDLT rules.

The ‘purchaser’ for the purposes of SDLT is usually the new underlying owner of the property transferred; that is those for whom the property is held. So the device (of having the property in the sole name of Edward but with a declaration of trust in favour of Fiona) does not work for SDLT. For the purposes of the higher rates of SDLT one always ‘looks through’ to the beneficial owners. So they would both be purchasers and the other property held by Fiona might well mean that the higher rates are due.

In summary: if both Edward and Fiona are to have underlying shares in the new property then it does not save SDLT to have a Joint Borrower Sole Proprietor mortgage with the new property ‘in the sole name’ of Edward.

If Fiona has capital to put in then it might not be possible to come up with a satisfactory solution that saves SDLT. One possibility is for Fiona to lend Edward the money so that (even if she cannot have a share in the property) at least she can expect her money back when it is sold.

Lenders are likely to say that such a loan affects affordability and they might only be prepared to lend the money if Fiona signs a confirmation that her money is an outright gift to him. If Fiona is well advised she is most unlikely to do that.

It can work sometimes!

Sometimes we see occasions when this type of mortgage can work to help save SDLT. Let us say that Fiona is not putting in capital, but her income is needed in order for the Bank to lend Edward and Fiona the money to buy the property.

She is content not to have a share in the property and indeed is willing to pay a share of the household expenses, including the mortgage, whilst the relationship lasts and they are living together. They might benefit from having a ‘living together agreement’ to protect her to some extent (also called a cohabitation contract).

First time buyers’ relief

The same issues can arise in connection with first time buyers’ relief. Gerald and Hattie are a couple buying their first home together. Gerald has never acquired a

dwelling before. Hattie used to have a 5% share in a holiday home abroad she was gifted by her grandfather. Gerald counts as a first time buyer, Hattie does not (however low the value of her share in the holiday home is).

If Gerald and Hattie buy jointly then, however small the share Hattie has in the new property, the joint purchase cannot benefit from first time buyers' relief. Again one 'looks through' to the beneficial ownership, so the joint borrower sole proprietor mortgage structure will not work.

But bizarrely there is an exception from these principles for first time buyers' relief. Due apparently to an oversight in drafting (why did this happen when the point is picked up for the 3% surcharge rules?) it is different if the purchase is affected by the grant of a new lease!

So if Gerald and Hattie were buying a new flat from a developer and take a new lease in the name of Gerald holding on trust for Gerald and Hattie then oddly Gerald alone is treated as the purchaser for the purposes of establishing if first time buyers' relief is due. So strangely the joint borrower sole proprietor mortgage structure can sometimes work in this limited scenario if the lender is comfortable with a declaration of trust.

To add further intrigue, Gerald and Hattie would be treated as the buyers for the purposes of determining whether the 3% surcharge applies, but Gerald alone should be named as the purchaser on the land transaction return. A peculiar system has grown up in a patchwork manner!

A living together agreement

Let us now go back to Edward and Fiona. They are to buy a property belonging entirely to Edward (beneficially as well as legally) but Fiona is to be jointly liable on the mortgage. She takes the risk of continuing liability on a mortgage of a property in which she has no share long after the relationship has ended. As well as the risk of the Bank claiming the mortgage debt from her, the debt would be taken into account should she seek to borrow in the future. A living together agreement could include things like the following:

While their relationship lasts:

- She is entitled to live in the house by virtue of the agreement, even though she has no share in the house.
- How household expenses, including the mortgage repayments and insurance, are to be met between them.
- Any mortgage overpayments should be funded entirely by him.
- Any improvements to the property should be funded entirely by him.

If the relationship ends:

- He is obliged to meet all of the ongoing mortgage repayments.
- He is to indemnify her from all liability under the mortgage.
- On her request he is to use his best endeavours to remortgage the property or procure her release from the mortgage within a set period.
- On her request he is to use all reasonable endeavours to sell the property and to discharge the mortgage, he being entitled to all of the net sale proceeds, including an increase in value.
- What will happen to other assets, whether owned jointly or by one of the parties.