

# A Guide to the new Document Duty Law in Guernsey

On 15 November 2017, The Document Duty (Guernsey) Law 2017 came into force. This new law remedies certain deficiencies in the previous legislation and is designed to achieve greater clarity and simplicity for buyers and sellers.

## 1. Application of law

The new law affects the island of Guernsey only, not any of the other islands in the Bailiwick.

Document duty will continue to be collected in Alderney under the old legislation. Congé will also continue to be payable in Alderney.

## 2. Chargeable transactions and liability to pay document duty

Document duty is payable on "chargeable transactions".

A "chargeable transaction" is:

The acquisition by any person of an interest in real property, or

The creation of a charge against real property by the registration of a bond.

It is worth noting the following points:

A chargeable transaction would include a conveyance

It would also include the creation and transfer of rights of life enjoyment over property. This would include the sale of a property by a parent to a child where the parent retains a right to live in part of the property for the rest of his or her life

Grants and assignments of leases will continue to be exempt

There is no special treatment for conveyances by way of exchange. Duty will be payable on the value of both properties exchanged

Exchanges of very small areas of land (for example, boundary adjustments) receive no special treatment under the new law. The market value of the land in question must be declared and there is no provision for any minimum value

Delaisances and partages are chargeable to document duty unless exempt as a family transaction, if made between co-heirs or qualifying for exemption in any other way (see below)

## 3. Registration of document and liability to pay duty

The document recording a chargeable transaction cannot be registered at the Greffe unless document duty is paid or unless the transaction is an exempt transaction.

The person liable to pay the document duty is the person wishing to register the document – normally the purchaser or the person taking the benefit of the charge. (This will not prevent the usual practice of a lender requiring its borrower to reimburse document duty and other costs.)

## 4. Exempt transactions

Various transactions are exempt transactions, comprising:

- "Family transactions." These comprise transactions where all the parties to it are associated with each in any of the following ways:
  - They are spouses or civil partners of each other. It also includes former spouses and civil partners and people who are engaged to be married
  - They are cohabitants or former cohabitants
  - A party to the transaction is the following type of relation:

- parent or stepparent
- child or stepchild
- grandparent or grandchild
- great-grandparent or great-grandchild
- sibling (including half-siblings)
- uncle or aunt (including through half-siblings)
- nephew or niece (including through half-siblings)
- first cousin
- of the other party or of the other party's spouse, civil partner or cohabitant.

Even conveyances for full market value between the classes of relation above will be exempt from duty.

- The sale of a property by an administrator appointed under Part II of The Law Reform (Inheritance and Miscellaneous Provisions) Law, 2006 is a family transaction if it would have been a family transaction without the appointment of the administrator (i.e. if the heirs had sold the property)
- The transfer of real property or giving of a charge to:
  - A Guernsey registered charity. (Conveyances to charities registered elsewhere are not exempt under this category)
  - A friendly society incorporated under the Friendly Societies Act 1974 or the Friendly Societies Act 1992
  - A housing provider within the meaning of the Real Property (Housing Schemes, Leasholds and Miscellaneous Provisions) (Guernsey) Law, 2004. This would include the States of Guernsey and the Guernsey Housing Association LBG
  - The States of Guernsey
- The transfer of an interest in real property:
  - By a settlor to a person who will hold the property as trustee
  - By a trustee to a person for whose benefit the property was held under the relevant trust
  - By a former trustee to new or continuing trustees (where there is no change in the beneficial ownership)

Interestingly, this type of transaction is not exempt under The Document Duty (Anti-Avoidance) (Guernsey) Law, 2017 and so the question arises whether duty would be payable under that law.

- The transfer of an interest in real property by a company to:
  - The beneficial owner of all the shares in the company
  - Another company in the same beneficial ownership as the transferor company
  - Another company which is a wholly-owned subsidiary of the transferor company, or of which the transferor company is a wholly-owned subsidiary
  - Another company where both the transferor company and transferee company are wholly-owned subsidiaries of the same holding company

Interestingly, a conveyance from a natural person to a company wholly owned by him or her is not exempt.

- Where the document effecting the transfer is a will
- A partage or delaisance between co-heirs. A partage or delaisance not between co-heirs will not be exempt unless it is exempt under another category of exemption (eg a family transaction). For example:
  - a partage or delaisance between spouses will not be exempt under this category but will be exempt as a family transaction
  - a partage or delaisance between former business partners will not be exempt under this category and might not be exempt under any other category
- The creation, variation or discharge of a servitude, wayleave or covenant. This would include an agreement between neighbouring landowners
- Where the interest in the real property is acquired by court order, including:
  - A divorce or judicial separation order
  - An administration order made under Part II of The Law Reform (Inheritance and Miscellaneous Provisions) Law, 2006
  - An order made under Part II (provision for family and dependants) of the Inheritance (Guernsey) Law, 2011
  - A vesting order made pursuant to saisie proceedings
  - Any other type of transaction prescribed by Ordinance

## 5. Declaration by parties

The parties to a chargeable transaction must make certain declarations to HM Greffier. They must full and frank disclosure of all facts which may be material.

There are criminal penalties for making false declarations and for withholding material information.

The declarations required are as follows:

- Where the transaction is made at arm's length – stating the total consideration paid and stating the grounds on which it is claimed that the transaction is made at arm's length. (A transaction "at arm's length" is a transaction between unrelated parties where the purchaser is paying the full value of the property to the vendor)

Guidance received from HM Greffier is that it will suffice to state in the conveyance that section 5(4) of the law applies but

if there are other facts that need to be brought to HM Greffier's attention these should be disclosed on the prescribed form produced by HM Greffier. Examples would be where there is a connection between vendor and purchaser, or if the consideration is less than might be expected

- Where the transaction is not made at arm's length – stating the market value of the real property transferred. The form prescribed by HM Greffier should be used to explain why the transaction is not an arm's length and to declare the market value of the real property. Although the guidance does not deal with this, it would be prudent for the market value of the property to be stated in the conveyance as well
- Where a transaction is exempt – stating the grounds on which it is claimed that the transaction is exempt

Guidance from HM Greffier is that in obvious cases the conveyance can contain a simple declaration that the transaction is an exempt transaction under the relevant section of the law. In less obvious cases, the prescribed form will need to be used

- Where the consideration is paid in "money's worth" – stating the value of the money's worth. An example of this would be a property exchange

The law sets out no timescale for the submission of these declarations, nor does it require any of these declarations to be made in advance of the transaction itself.

However, bearing in mind the powers of HM Greffier to request further information and to serve a notice stating his opinion of what duty should be payable, any failure to satisfy him on the correct of duty payable will result in registration of the transaction being delayed. It is therefore prudent in non-straightforward cases to submit declarations well in advance of the intended date of the transaction.

## 6. Amount of duty

The amount of document duty is calculated as follows:

- Where the transaction is at arm's length – as a percentage of the total consideration or the sum secured
- Where the transaction is not at arm's length – as a percentage of the market value of the real property transferred or the sum secured

The percentage figure charged is set out in The Document Duty (Rates) Ordinance 2017 and are (for the time being) the same as the rate chargeable under the old law.

The rates are:

- 2.25% of the consideration or market value up to £250,000
- 3.5% - of the part of the consideration or market value between £250,000 and £400,000
- 4% - between £400,000 and £750,000
- 4.25% - between £1,000,000 and £2,000,000
- 5.5% - any part of the consideration or market value above £2,000,000

In relation to bonds the rate is now 0.0% of the amount secured.

If HM Greffier believes that the amount of the consideration is inadequate, the transaction can be treated as it is not at arm's length with the result that duty will be calculated on the market value of the real property.

## 7. Valuation of contents

Document duty is payable on the consideration or market value of real property.

On the sales of many properties, certain contents are included in the sale. Where these contents comprise personal property, no document duty is payable on the price agreed for them.

The basic test of whether an item comprises real property or personal property is whether it can be moved from one place to another.

Examples of contents which would normally be considered as personal property include:

- carpets
- curtains and blinds
- free standing furniture
- kitchen white goods
- electric and gas fires (provided that they can be removed by disconnection from the power supply without causing damage to the property)
- light shades and fittings (unless recessed)

On the other hand, the following items would normally be regarded as real property:

- fitted kitchen units, cupboards and sinks
- gas and wall mounted ovens
- fitted bathroom sanitary ware

- central heating systems
- intruder alarm systems
- any plants, shrubs or trees growing in the soil which forms part of the land

It is important that the parties to a transaction satisfy themselves that the valuation agreed for any personal property is a reasonable valuation, as HM Greffier has the power to request information and can impose a higher amount of document duty where he believes that the effect of transaction is to reduce the amount of duty payable (see below). So, where HM Greffier believes that the apportionment of a sale price to personal property is excessive, he can adjust the amount of document duty to a more appropriate level.

Interestingly, the standard form declaration produced by HM Greffier does not request information about the value of personal property included in the sale. However, bearing in mind the parties' duty to make full and frank disclosure of all facts which may be material and to demonstrate utmost good faith in their dealings with HM Greffier, it would be wise to disclose an excessive or unusual apportionment in the declaration.

In certain cases, it may be necessary to obtain a professional valuation of personal property to minimise the chances of any challenge to the agreed price after completion of the sale.

Up to now, a "permitted deduction" of 5% of the sale price has been regarded as acceptable. However, guidance has been issued by HM Procureur that a "basic default deduction" of 2.5% of the total consideration should operate for transactions completed after 1st January 2018. If the parties wish to apportion greater value to personal property, they should apply to HM Greffier with supporting documentation. In many cases, a professional valuation might be required but this is not clear from the guidance.

Even where the parties rely on the basic default deduction of 2.5%, they should still take care to satisfy themselves that this figure represents a reasonable value for the contents. In some cases (eg the sale of a dilapidated property or sale of a completely stripped out property), the parties should apportion a lower value to contents. If in any doubt, prior clearance be sought from HM Greffier.

## 8. Objections by HM Greffier

HM Greffier can require the parties to a transaction to provide further information and documents.

If HM Greffier believes that information contained declarations submitted to him is not accurate, he can serve a notice on the parties. The notice will set out the amount of duty which he believes is property payable and the information and assumptions on which the duty has been assessed.

In these circumstances, the parties have the choice of simply paying the duty set out in HM Greffier's notice or appealing to the Royal Court. There is a 28 day period in which to appeal. To do this, document duty (at the amount which HM Greffier believes is payable) must be lodged at the Greffe and notice of appeal must be served.

When hearing an appeal, if the Royal Court believes that the amount of duty lodged at the Greffe is too low, it can require a higher amount to be lodged.

## 9. Anti-avoidance

HM Greffier can adjust the amount of document duty payable in cases where the effect of a transaction (or series of transactions) is the avoidance, reduction or deferral of a person's liability to document duty. The adjustment would be one which HM Greffier considers appropriate to counteract the avoidance, reduction or deferral of liability.

It is worth noting that:

The term "transaction" includes a wide range of activities

It is irrelevant whether the avoidance, reduction or deferral of duty was intended or not. The test is whether it was an effect of the relevant transaction.

## 10. Relationship with The Document Duty (Anti-Avoidance) (Guernsey) Law 2017

On the same date as The Document Duty (Guernsey) Law 2017 came into force, its sister law, The Document Duty (Anti-Avoidance) (Guernsey) Law 2017 also came into force.

A detailed explanation of that law is beyond the scope of this article. However a few points are worth noting about it.

The Document Duty (Anti-Avoidance) (Guernsey) Law, 2017 (the "Anti-Avoidance Law") introduces a new regime parallel to document duty regime explained above.

The Anti-Avoidance Law imposes a duty on transactions which have a similar effect to the transfer of an interest in real property but which do not involve a conveyance or other registrable document.

The general principle of the Law is that the duty is payable on "relevant transactions". These are transactions:

- for value
- which have the effect of conferring on a person a "significant benefit" in real property (i.e. the right to enjoy the benefits of the ownership without actually owning the property directly)
- on which duty is not payable under the Document Duty (Guernsey) Law, 2017

The main example of a transaction covered by the Anti-Avoidance Law is the sale of shares in a company which owns Guernsey real property.

The Anti-Avoidance Law, however, does contain a number of exceptions to that general principle as well as providing for exemptions in certain defined circumstances.

Interestingly, the Anti-Avoidance Law appears to cover transactions which are stated to be exempt under The Document Duty (Guernsey) Law, 2017, but which are not exempt under the Anti-Avoidance Law. Examples of this would be:

- Conveyances from settlors to trustees, from trustees to beneficiaries and from retiring trustees to new and continuing trustees
- Delaisances and partages between co-heirs (where not exempt as family transactions)

Document duty is payable at the rates set out in The Document Duty (Anti-Avoidance) (Rates) Ordinance, 2017, and those rates are the same as the ones set out above under The Document Duty (Guernsey) Law, 2017.

Duty is assessed on the market value of the interest transferred. There is no provision for duty to be assessed on the consideration paid.

The parties to the transaction are jointly and severally liable to pay the duty. This means that care needs to be taken when preparing the transaction documents to make it clear which party (normally the purchaser) should actually pay the duty.

All parties are responsible for submitting a self-assessment form to H M Greffier. H M Greffier will administer the scheme but has the ability to refer cases to the Director of Income Tax. The Director of Income Tax is responsible for enforcement and has powers to make formal assessments and impose penalties in cases where the requirements have not been fulfilled.

*The information and expressions of opinion contained in this guide are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.*

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