



5 *Capital gains tax – allowable loss – forfeited deposit on rescinded purchase contract  
– whether disposal of a chargeable asset – whether allowable loss on disposal –  
TCGA 1992 ss16, 21 & 28 – appeal dismissed*

Appeal number: TC/2014/04713

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**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ANTHONY HARDY**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY’S    Respondents  
REVENUE & CUSTOMS**

**TRIBUNAL:    Judge Malachy Cornwell-Kelly  
                  Mr Duncan McBride**

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**Sitting in public at Fox Court, Gray’s Inn Road, London on 5 May 2015**

20 **The taxpayer in person**

**Mrs Rosalind Oliver of HMRC for the Crown**

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## DECISION

1 This an appeal by Mr Anthony Hardy against a closure notice issued under section  
28A(1)&(2) of the Taxes Management Act 1970 made on 31 October 2013,  
5 disallowing a claim to losses for capital gains tax in respect of deposits on the  
purchase of real property forfeited upon the rescission of the contracts therefor, for  
failure to complete them. The effect of the closure notice was to increase the  
taxpayer's liability for 2009-10 by £23,040.00.

### 10 *Facts*

2 The facts are not in dispute and are as follows.

3 There were two properties, in the prospective purchase of which the taxpayer was  
concerned where contracts were exchanged on 30 April and 7 May 2008. The first  
15 was plot 185 Roehampton Lane, London, the buyer being stated to be one  
Mieczyslaw Rudski (Mr Rudski), who was the natural father of Mr Hardy's stepson  
Jakub Alexander Rudzki; the second was plot 187 Roehampton Lane, the buyers  
being stated to be Mr Hardy and his wife Grazyna Chont-Rudska.

20 4 In each case, the purchase contracts were with developers, who contracted not only  
to sell the land but to construct houses on it, and in that sense the contracts were  
regarded as conditional upon the construction being undertaken and architects'  
certificates of practical completion being issued. When those certificates were issued,  
25 as they were in April 2009, a timetable was set in motion for the completion of the  
purchase contracts by the buyers. On exchange of contracts, 10% deposits of the  
purchase price were paid to the seller's solicitors as agent for the sellers. The deposits  
were £56,000 and £72,000 respectively.

30 5 The deposits were funded by Mr and Mrs Hardy in so far as their own purchase was  
concerned, and by a gift of the money to Mr Rudski by Mr Hardy. The completed  
house emerging from plot 185 was, Mr Hardy told us, ultimately intended for the use  
of his stepson Jakub, but it appears that it had been thought best not to vest the title in  
him at that stage since he was then in his early 20s.

35 6 In the event, funds were unfortunately not immediately available to complete either  
purchase on what became the contractual completion dates, nor by the dates specified  
in Notices to Complete issued on 27 May 2009. On 12 June 2009, the sellers  
rescinded both contracts and retained the deposits paid by the buyers, the sellers  
refusing to wait while the buyers raised the necessary funds to complete. It is not  
40 disputed that the sellers were entitled under the contracts to take that action. In the  
course of seeking to raise funds Mr Hardy and his wife realised capital gains on two  
other properties, against which Mr Hardy sought to offset the loss of the two deposits.

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*Legislation*

7 The Taxation of Chargeable Gains Act 1992 provides as follows:

*The charge to tax*

5 1(1) Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets.

*Computation of losses*

10 16(1) Subject to sections 261B, 261D and 263ZA and except as otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed.

15 (2) Except as otherwise expressly provided, all the provisions of this Act which distinguish gains which are chargeable gains from those which are not, or which make part of a gain a chargeable gain, and part not, shall apply also to distinguish losses which are allowable losses from those which are not, and to make part of a loss an allowable loss, and part not; and references in this Act to an allowable loss shall be construed accordingly.

*Assets and disposals*

20 21(1) All forms of property shall be assets for the purposes of this Act, whether situated in the United Kingdom or not, including—

- (a) options, debts and incorporeal property generally, and
- (b) currency, with the exception (subject to express provision to the contrary) of sterling, and
- (c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired.

25 (2) For the purposes of this Act—

- (a) references to a disposal of an asset include, except where the context otherwise requires, references to a part disposal of an asset, and
- (b) there is a part disposal of an asset where an interest or right in or over the asset is created by the disposal, as well as where it subsists before the disposal, and generally, there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of.

*Time of disposal and acquisition where asset disposed of under contract*

35 28(1) Subject to section 22(2), and subsection (2) below, where an asset is disposed of and acquired under a contract the time at which the disposal and acquisition is made is the time the contract is made (and not, if different, the time at which the asset is conveyed or transferred).

40 (2) If the contract is conditional (and in particular if it is conditional on the exercise of an option) the time at which the disposal and acquisition is made is the time when the condition is satisfied.

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### *Submissions*

8 Mr Hardy submits that he became the beneficial owner of both properties following exchange of contracts on the basis of the doctrine in *Lysaght v Edwards* (1876) 2 Ch D 499, that a purchaser of property acquires an equitable interest in it from the point  
5 of contract onwards and becomes the beneficial owner of it, the seller holding the legal title as trustee for the buyer. Section 28(1) recognises this situation in requiring the time of acquisition or disposal of an asset to be the date of the contract providing for it.

10 9 Accordingly, Mr Hardy says that he acquired the beneficial ownership of the properties on 30 April and 7 May 2008 and disposed of the ownership (involuntarily) on 12 June 2009 when the contracts were rescinded. On the disposal, he incurred losses equal to the value of the lost deposits, a loss which he ought to be able set  
15 against chargeable gains for the same year, which moreover had been made for the same overall business purpose.

10 In the case of plot 185, Mr Hardy argued that since he had paid the deposit he was, as he put it, “the transferor of the contract and the property”; if that contract had been completed, Mr Hardy would he said have been treated as making a lifetime transfer of  
20 the deposit money to his stepson (for whose ultimate benefit it had been paid), which would in principle have been chargeable to inheritance tax. We inferred that it had been the intention that Mr Rudski should hold the legal estate in plot 185 as trustee for his son, but it was not argued that Mr Hardy was in any fiduciary relationship to his stepson.

25 11 Alternatively, Mr Hardy argued, that since the contracts had been conditional on the construction of the houses to the point of practical completion, the relevant point of acquisition of the assets provided for by section 28(2) was in April 2009, when the certificates of practical completion had been issued. The result was the same: the  
30 involuntary disposals of 12 June 2009 involved the same losses, namely the value of the deposits. Indeed, the unwanted disposals of the beneficial interest had according to Mr Hardy become an occasion of charge for the purposes of capital gains tax.

35 12 Under section 1(1) of the 1992 Act, capital gains tax is charged on gains accruing on the disposal of assets, in this case the beneficial ownership of two properties. If section 28 deemed the acquisition of the equitable title to property to have occurred on exchange of contracts, then it must follow that that asset was disposed of upon rescission of the contracts when the beneficial ownership reverted to the seller. On  
40 that disposal, a loss had materialised in the form of the lost deposits.

45 13 For the commissioners, Mrs Oliver submitted that while section 28 dealt with the timing of an acquisition or disposal for which there had been a prior contract, it was the disposal itself which was the occasion of charge, and in this case there had been no acquisitions and therefore no disposals. Here, the acquisition of the properties would have occurred on completion of the contacts, albeit that the time of it would have related back to the date either of the contracts or of the fulfilment of the condition to which they were subject.

14 Mrs Oliver cited in support the decision of the House of Lords in *Jerome v Kelly*  
[2004] STC 887 which, she said, explained and developed the principle referred to in  
5 *Lysaght* relating to beneficial ownership and exchange of contracts in the context of  
capital gains tax. We refer to the passages from this decision which are material to  
this case in our conclusions below.

15 Very regrettably, no notice to Mr Hardy had been given that this authority was to  
10 be cited, and Mrs Oliver apologised that this had not been done. It is quite improper  
for either party to be taken by surprise at the hearing of an appeal in relation to a  
significant argument, and it is of particular concern when such a situation occurs with  
a taxpayer who is unrepresented. In this case, Mr Hardy however twice declined the  
tribunal's invitation to him to apply for an adjournment so that he could at least read  
15 this complicated decision being relied upon.

16 In regard to plot 185, Mrs Oliver submitted that there was no evidence that Mr  
Hardy had, or even claimed to have had, any beneficial interest in the property. It was  
a case, on Mr Hardy's admission, of a gift by Mr Hardy of the deposit money being  
20 made for the benefit of his stepson for which – in the event of Mr Hardy's decease –  
he would in principle be treated as having made a lifetime transfer of an asset. In  
relation to plot 187, Mrs Oliver submitted that, on any view of the matter, Mr Hardy  
would only be entitled to offset 50% of the loss against his capital gains liability,  
notwithstanding that he and his wife entered the contracts as joint tenants beneficially.

25  
*Conclusions*

17 The substance of the appeal is indeed covered by the observations of their  
Lordships in *Jerome v Kelly*. That case, which had passed through every stage of  
hearing from the Special Commissioner to the House of Lords, concerned a  
30 complicated series of facts which it is not necessary to rehearse here. The factual  
matrix of the present case is, by comparison, simplicity itself, but the principles  
enunciated in the speeches of Lord Hoffmann and Lord Walker make clear how  
capital gains tax works in the context of cases where there is a progression from  
an equitable interest in an asset being established to the acquisition of a legal title.

35  
18 Thus, Lord Hoffmann, tracing the history of what is now section 28, commented at  
[11] on paragraph 10 of Schedule 10 to the Finance Act 1971:

40 . . . it seems to me clear that the paragraph was intended to deal only with  
the question of fixing the time of disposal and not with the substantive  
liability to tax. It does not deem the contract to have been the disposal as the  
1962 Act had done. For that reason, it includes no provisions dealing with  
what happens if the contract goes off. In such a case, there will be no  
disposal and nothing to deem to have happened at the time of the contract.  
45 The time of the contract is deemed to be the time of disposal only if there  
actually is a disposal. This assumes that the contract will not in itself count  
as a disposal and so deals with the academic arguments about the effect of  
the equitable interest which arises at the time of the contract.

19 And he continued with reference to section 27 of the Capital Gains Tax Act 1979, the predecessor of section 28 of the 1992 Act:

5 [12] . . . In my opinion s 27(1) of the 1979 Act was concerned solely with fixing the time of disposal by a person whose identity is to be ascertained by other means.

20 Lord Walker likewise addressed in terms the significance of a purchase contract creating an equitable interest in an asset:

10 [30] These are the matters which the Court of Appeal had in mind when referring to the general law. But Mr Venables QC for the appellant taxpayer has criticised the Court of Appeal's exposition of the general law. Jessel MR did indeed refer, in *Lysaght v Edwards* (1876) 2 Ch D 499 at 506 (a case about the equitable doctrine of conversion) to what had been settled doctrine since the time of Lord Hardwicke:

15 'What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.'

20 But he went on to explain that the trusteeship is not an ordinary trusteeship, and that point has been made in many other well-known cases. In *Shaw v Foster* (1872) LR 5 HL 321 at 338, Lord Cairns said—

25 'that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it.'

Similarly in *Rayner v Preston* (1881) 18 Ch D 1 at 6, Cotton LJ said:

30 'An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser ...'

35 [32] It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, such as rescission of the contract (either under a contractual term or on breach). If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full.

21 The consequence for the present appeal is clear: neither the exchange of contracts,  
nor the satisfaction of the condition as to construction of the houses, marked the  
acquisition of assets by Mr Hardy, or anybody else, because the transactions intended  
never took place; and, accordingly, the rescission of the contracts did not mark a  
5 disposal of assets on which either a gain or a loss could be realised. On any view of  
the matter therefore, the loss of the deposits cannot have been a loss capable of being  
allowed against chargeable gains in the same year.

22 It is perhaps unnecessary to add that, as the deposits were paid to the seller's  
10 solicitors as agents for the seller, the moment at which they left Mr Hardy's  
ownership and became the property of the seller was the moment of exchange of  
contracts. And that indeed takes no account of the fact that Mr Hardy's ownership of  
the money for the deposit on plot 185 ceased when it was passed to, or to the order of,  
Mr Rudski fractionally before the exchange took place. For the sake of clarity, we  
15 will add that it is clear that Mr Hardy never acquired any beneficial interest in plot  
185.

23 Lord Walker, in *Jerome*, reminds us that the presence of conditions in a contract  
does not itself make the contract a conditional contract:

20 [26] . . . A contract is not conditional merely because it contains obligations  
which may be termed promissory conditions: see *Eastham (Inspector of  
Taxes) v Leigh London and Provincial Properties Ltd* [1971] Ch 871, 46 TC  
687.

25 It is unnecessary however to enter a debate about whether the contracts in this case  
were or were not conditional contracts, because the result is the same on any analysis  
of the matter: we heard no argument on the issue and we express no opinion on it.

24 In the event, the Revenue's amendments to Mr Hardy's self-assessment returns  
30 must stand good and the disallowance of his claims to loss relief must be upheld.

#### *Appeal rights*

25 This document contains the full findings of fact and reasons for the decision. Any  
party dissatisfied with this decision has a right to apply in writing for permission to  
35 appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal)  
(Tax Chamber) Rules 2009. The application for permission to appeal must be  
received by the tribunal no later than 56 days after full written findings and reasons  
are sent to that party. The parties are referred to "Guidance to accompany a Decision  
from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this  
40 decision notice.

**MALACHY CORNWELL-KELLY**  
**TRIBUNAL JUDGE**

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**RELEASE DATE: 3 JUNE 2015**