



RUDGE REVENUE REVIEW

ISSUE XXIX

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3rd May 2022

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ORIGINAL DIFFICULTIES

COMPLETION CONTRACTS

- 1.1 Contracts for the sale of interests in land commonly provide for the contract to be completed (the 'Completion'¹), on a date (the 'Completion Date'²) falling after the contract is made, by the payment (the 'Completion Payment'³) by the Purchaser of the outstanding balance of the consideration to the Vendor⁴ and the transfer (the 'Completion Transfer'⁵) by the Vendor of the subject matter of the contract (the 'Land Interest'⁶) to the Purchaser. We call such a contract a 'Completion Contract'.⁷ Commonly, Completion Contracts provide for one or more advance payments (the 'Deposit'⁸), forming part of the consideration given by the Purchaser, to be made by the Purchaser to the Vendor when, or shortly after, the contract is made which the Vendor may keep if the contract fails to complete due to the fault of the Purchaser.
- 1.2 Where the Land Interest is to be developed under the Completion Contract so that the land which is the subject of the interest is undeveloped when the contract

¹ See Appendix I

² See Appendix I

³ See Appendix I

⁴ Whether or not a Completion Contract is completed, we call the party who would purchase the Land Interest if the contract were to be completed, the 'Purchaser' and the party who would sell the Land Interest if the contract were to be completed, the 'Vendor'. We call the rights of the Purchaser under the Completion Contract, the 'Purchaser's Rights' and the rights of the Vendor under the Completion Contract, the 'Vendor's Rights'. See Appendix I

⁵ See Appendix I

⁶ See Appendix I

⁷ See Appendix I

⁸ See Appendix I

is made and the contract imposes an obligation on the Vendor (which is usually a company) to transfer fully developed land on Completion, the Vendor is sometimes unable to fulfil its duty to finish the development before Completion and the transaction aborts. In such circumstances, the Vendor has a contractual duty to repay the deposit but it is commonly the case that the Vendor is unable to fulfil that obligation because it has become insolvent and the Purchaser is unable to recover his Deposit. We call such transactions 'Insolvent Vendor Transactions'.⁹

1.3 Sometimes such contracts do not complete because, at the Completion Date, the Purchaser has insufficient funds to meet the Completion Payment and as a result his deposit is forfeited. We call such transactions 'Forfeited Deposit Transactions'.¹⁰

1.4 We call transactions which are either Insolvent Vendor Transactions or Forfeited Deposit Transactions, 'Lost Deposit Transactions'.¹¹

THE THREE CASES

2.1 What are the CGT¹² consequences of such transactions for the Purchaser who has lost the moneys he has paid as a deposit and for the Vendor who has received those moneys without having transferred any interest in land in

⁹ See Appendix I

¹⁰ See Appendix I

¹¹ See Appendix I

¹² In this article we refer to the provisions imposing Capital Gains Tax and Corporation Tax on chargeable gains as 'CGT'. See Appendix I

exchange for them? Lost Deposit Transactions have been considered in three decided cases (the 'Three Cases'¹³).

2.2 An Insolvent Vendor Transaction was considered in the case of *Lloyd-Webber and another v. HMRC*¹⁴ ('*Lloyd-Webber*'¹⁵). Forfeited Deposit Transactions have been considered in two decided cases, in *Hardy v. HMRC*¹⁶ ('*Hardy*'¹⁷) and in *Christopher Drake v. HMRC*¹⁸ ('*Drake*'¹⁹).

2.3 All of the Three Cases were concerned with whether an allowable CGT loss arose to Purchasers by reason of their losing the moneys they paid as a Deposit. None were directly concerned with the CGT treatment of the Vendors but all are relevant to that treatment.

2.4 In *Hardy*, the Upper Tribunal organised its decision by considering in turn three propositions put forward by HMRC's Counsel. They were:

- (1) The Purchaser did not acquire an asset on the making of the Contract (the 'First Issue'²⁰).
- (2) Even if he had acquired such an asset, he did not dispose of that asset (the 'Second Issue'²¹).

¹³ See Appendix I

¹⁴ *Lloyd-Webber and another v. HMRC* [2019] UKFTT 717 (TC)

¹⁵ See Appendix I

¹⁶ *Hardy v. HMRC* [2016] UKUT 0332 (TCC)

¹⁷ See Appendix I

¹⁸ *Christopher Drake v. HMRC* [2022] UKFTT 25 (TC) TC08377/V

¹⁹ See Appendix I

²⁰ See Appendix I

²¹ See Appendix I

(3) Even if he did acquire such an asset and did make a disposal of it, an allowable loss did not arise on that disposal (the ‘Third Issue’²²).²³

2.5 This structure, with some elision of the three issues, was also applied in *Lloyd-Webber* and in *Drake*. We use these questions expressed in a neutral form to structure of our analysis in this article.

THE FIRST ISSUE: DID THE PUTATIVE PURCHASER ACQUIRE AN ASSET ON THE MAKING OF THE CONTRACT?

Hardy

3.1 The Upper Tribunal in *Hardy*, in considering the First Issue, accepted that the word ‘assets’ is widely defined for the purposes of CGT²⁴ and that contractual rights are capable of being assets for CGT purposes if they may be turned to account even if they cannot be transferred or assigned to another.²⁵ It went on, however, to adopt HMRC’s reference to a comment of Warner J in *Zim Properties Ltd v. Proctor* in which Warner J said:

‘... not every right to a payment is an “asset” within the meaning of that term in the capital gains tax legislation. Perhaps the most obvious example of one that is not is the right of a seller of property to payment of its price. The relevant asset, then, is the property itself. What that shows, however, to my mind, is no more than that the interpretation of the capital gains tax

²² See Appendix I

²³ See *Hardy* at para. 26

²⁴ See *Hardy* at para. 31

²⁵ See *Hardy* at para. 31

*legislation requires, as does the interpretation of any legislation, the exercise of common sense, rather than just the brute application of verbal formulae.*²⁶

3.2 In *Hardy*, the Upper Tribunal then went on to say that:

*'What Mr Hardy acquired was primarily the right, subject to compliance with his own obligations, to compel performance of the Seller's obligations under the Contract, and in particular to obtain specific performance of the Seller's obligation to convey legal title to the Property to him. (Strictly speaking, specific performance is a discretionary remedy, but the discretion is to be exercised according to well-settled principles, and a purchaser who has complied, or is ready to comply, with his own obligations will obtain specific performance in the absence of some exceptional circumstance.) We have no difficulty in accepting that this was a valuable right, but it does not necessarily follow that it was an asset for the purposes of the legislation.'*²⁷

3.3 This is a rather loose formulation. The putative purchaser's primary right under the Completion Contract was for the subject-matter of the Contract to be transferred to him on the completion having been made. Specific performance is a remedy for the breach of that right and, as the Upper Tribunal concedes, a remedy to which the wronged party does not have a right but one which is at the discretion of the Court. The fact that the Court will normally grant specific performance does not convert it from a discretionary, to a mandatory, remedy.

²⁶ See *Hardy* at para. 32. See *Zim Properties Ltd v. Proctor* [1985] STC 90 at p108

²⁷ See *Hardy* at para. 33

What is more the Upper Tribunal ignored the primary remedy for the breach of a contract, damages, which is not subject to the Court's discretion.

3.4 The Upper Tribunal's concentration on what it called the [*Purchaser's right*] ... to obtain specific performance of the Seller's obligation to convey legal title to the Property' allowed it to pose the following rhetorical question:

*'How then do the contractual rights upon which Mr Hardy now relies differ from his beneficial ownership of the Property?'*²⁸

3.5 And to answer the question by saying:

*'When we pressed counsel for Mr Hardy on this question during the course of argument, we understood him ultimately to accept that there was no real distinction, because they are two sides to the same coin.'*²⁹

3.6 That Mr Hardy's Counsel was unable to answer the Tribunal's question is surprising because the answer is clear. Contractual rights are rights *in personam*. They cannot confer '*beneficial ownership of property*'. Indeed, Mr Hardy never acquired such beneficial ownership. The only equitable interest which he acquired in the property was the very limited interest which arose to him under the Doctrine of the Estate Contract.³⁰

²⁸ See *Hardy* at para. 34

²⁹ See *Hardy* at para. 34

³⁰ See *Jerome v. Kelly* [2004] UK HL 25 at para. 30 (*'Jerome'*) citing *Lysaght v. Edwards* (1870) 2 ChD 499 at p506. See Appendix I

3.7 The Upper Tribunal went on³¹ to support its decision on the First Issue by reference to comments of Lord Hoffman in *Jerome*.³² *Jerome*, however, was primarily concerned with the question of who was to be treated for CGT purposes as the person making the disposal of the interest in land which was the subject of the contract in the case. It was not concerned with the question of whether there was a disposal of the contractual rights arising to the purchaser on the contract being made and Lord Hoffman did not unambiguously say that there is no disposal by the putative purchaser where, as Lord Hoffman put it, a 'contract' goes off. Even if he had done so, his comments would have been *obiter*. Lord Hoffman's comments in *Jerome*, therefore, give little support to the Upper Tribunal's conclusion on the First Issue.

3.8 The Upper Tribunal's acceptance of HMRC's argument that the Purchaser's Rights under a Completion Contract are not assets for CGT purposes is also difficult to reconcile with HMRC's position on the CGT consequences of an assignment of contractual rights for consideration. In its Capital Gains Tax Manual HMRC says:

*'A capital sum received by a person because the terms of a contract to which he was a party have been modified, varied, waived, assigned, terminated, rescinded, relinquished or surrendered will normally fall to be treated as having been derived from the recipient's contractual rights.'*³³

3.9 This passage clearly has TCGA 1992³⁴ s.22 in mind which applies only where a capital sum is derived from assets. If a party's rights under a contract are not an

³¹ See *Hardy* at paras. 36 - 39

³² See Appendix I

³³ See HMRC Capital Gains Manual para. CG13000

³⁴ See Taxation of Chargeable Gains Act 1992. See Appendix I

asset it is difficult to see how a sum received for their assignment can be derived from an asset consisting of those rights.³⁵

Lloyd-Webber

3.10 There are therefore many difficulties with the Upper Tribunal's decision in *Hardy* on the First Issue. To what extent did the subsequent cases clarify the matter?

3.11 *Lloyd-Webber* was decided in favour of the taxpayer³⁶ and concerned a Completion Contract for the acquisition of land in Barbados by Lord and Lady Lloyd-Webber who contracted to acquire land which had not been developed at the time of the contract but on which the Vendor was to build luxury villas before completion. The Contract provided for various advance payments, together with the Deposit, to be made by the Purchasers. Lord and Lady Lloyd-Webber had paid a sum of \$11,293,117 in aggregate to the Vendor before it became obvious that the Vendor was unable to meet its obligations under the contract.³⁷

3.12 In *Lloyd-Webber* it was common ground between the parties and accepted by the Tribunal Judge that in respect of the First Issue *Underwood*³⁸ is authority for the proposition that an asset consisting of the rights under the contract concerned, is acquired by the Purchaser when a Completion Contract is made.³⁹ It was common ground, therefore, that on this issue the decision in *Hardy* was *per*

³⁵ One should never make the mistake of assuming that HMRC's statements of the law are necessarily correct. It may well be that if the point had been put to the Upper Tribunal in *Hardy* it would simply have said that HMRC was wrong on this point

³⁶ See *Lloyd-Webber* at para. 3

³⁷ See *Lloyd-Webber* at para. 3

³⁸ *Underwood v. HMRC* [2008] EWCA Civ 1423. See Appendix I

³⁹ See *Lloyd-Webber* at paras. 11 & 12

incuriam and was not binding on the FtT⁴⁰ and, because *Hardy* was decided upon the First Issue, that the decision in *Hardy* on the First and Second Issues were *obiter dicta* and also did not bind the FtT.

Drake

3.13 In *Drake* the FtT's decision, which was in favour of HMRC, was primarily based on its conclusion that the decision in *Hardy* was not made *per incuriam* and that the Tribunal was bound by its authority.⁴¹ It seems to the Authors that the FtT was clearly correct in finding that the statements in *Underwood* which might be thought to be inconsistent with the decision in *Hardy* were *obiter* and expressed only in a very tentative fashion⁴² and, therefore, that the decision in *Hardy* was not made *per incuriam*.

3.14 Although *Drake* was primarily decided upon the authority of *Hardy*, the FtT did go on to consider what decision it would have made had it thought that it was not bound by *Hardy* (the 'Alternative Drake Conclusions').⁴³ In respect of the First Issue Judge Citron said that his decision would have been that he was:

'... not persuaded that Hardy was correct to say, as regards "issue 1", that rights under a contract to acquire land are not assets for capital gains tax purposes;'

⁴⁰ See *Lloyd-Webber* at para. 11

⁴¹ See *Drake* at paras. 42 - 55

⁴² See *Drake* at paras. 46 – 51. See Appendix I

⁴³ See *Drake* para. 56

3.15 To make this negative statement⁴⁴ is not to say positively that '*rights under a contract to acquire land*' are assets for CGT purposes.

3.16 It is clear that there are contractual rights which might fall within the inclusive definition in TCGA 1992 s.21(1) on a literal reading which, on a purposive reading, would clearly not be assets for CGT purposes because, if they were, the scheme of CGT would simply not work. An example, is the right of a seller of property to payment of its price which was referred to by Warner J in the passage reproduced above⁴⁵ from *Zim Properties*.

Difficulties of regarding the making of a Completion Contract as involving an acquisition of the Purchaser's Rights

3.17 The difficult question is where the line must be drawn. It is likely to be drawn by reference to the coherence of the scheme of CGT. Regarding the Completion Contract as involving an acquisition of the Purchaser's Rights by the Purchaser for CGT purposes certainly poses challenges to the coherence of the CGT regime applying to such contracts. These difficulties are considered only obliquely in the Three Cases.

3.18 If the Purchaser both acquires an asset, being the Purchaser's Rights under the Completion Contract, on its being made and also acquires an asset on completion, being the Land Interest, how is the consideration given by the Purchaser under the contract to be dealt with?

⁴⁴ Set out in para. 3.14 above

⁴⁵ See para. 3.1 above

3.19 To be deductible in calculating the gain or loss arising on the disposal of either asset the expenditure must have been:

*' ... given by ... [the putative purchaser] ... or on his behalf wholly and exclusively for the acquisition of the asset ...'*⁴⁶

3.20 As was noted in *Hardy*,⁴⁷ although expenditure with a dual purpose may be allowable, it is allowable only if its main purpose is allowable and any other purpose is clearly incidental or ancillary. If the consideration given by the Purchaser under the Completion Contract is given both to acquire the Purchaser's Rights and to acquire the Land Interest it would seem to have a dual purpose neither of which could be said to be merely incidental or ancillary.

3.21 So the consideration given by the Purchaser under a Completion Contract would only be allowable if it could be allocated in some way between the Purchaser's Rights and the acquisition of the Land Interest.

3.22 Yet allocating the expenditure under the Completion Contract partially to the acquisition of the Purchaser's Rights and partially to the acquisition of the Land Interest would be a most unrealistic exercise for, plainly, the Purchaser enters into the contract in order to acquire the Purchaser's Rights which in due course will result in his acquiring the Land Interest. It is not true to say, as we have seen⁴⁸ that the Upper Tribunal did say in *Hardy*, that there is '*no real distinction*' between the Purchaser's Rights and the Land Interest but it is equally unrealistic

⁴⁶ TCGA 1992 s.38(1)(a)

⁴⁷ See *Hardy* at para. 52

⁴⁸ See para. 3.5 above

to treat the acquisitions of the two assets as being entirely discrete and separate from one another.

3.23 Counsel for the taxpayer in *Lloyd-Webber* attempted to deal with this difficulty by reference to the provisions of TCGA 1992 s.43⁴⁹ which provides:

'If and so far as, in a case where assets have been merged or divided or have changed their nature or rights or interests in or over assets have been created or extinguished, the value of an asset is derived from any other asset in the same ownership, an appropriate proportion of the sums allowable as a deduction in the computation of a gain in respect of the other asset under paragraphs (a) and (b) of section 38(1) shall, both for the purpose of the computation of a gain accruing on the disposal of the first-mentioned asset and, if the other asset remains in existence, on a disposal of that other asset, be attributed to the first-mentioned asset.'

3.24 He argued that the conditions of s.43 were satisfied in respect of the Purchaser's Rights and the Land Interest which were the subject of the case because the consideration under the Completion Contract was given for the Purchaser's Rights alone and, when the Purchaser's Rights terminated on Completion, the Contractual Rights either changed their nature or merged (one presumes with the Land Interest) with the result that, one presumes that Counsel for the taxpayer argued, the Land Interest derived its value from the Purchaser's Rights.⁵⁰

⁴⁹ See *Lloyd-Webber* at paras. 27 & 28

⁵⁰ See *Lloyd-Webber* at para. 27

3.25 The difficulty with that argument is that in Completion Contracts the Land Interest will normally have existed before the Purchaser's Rights came into existence. The Purchaser acquires the Purchaser's Rights before he acquires the Land Interest which are their subject and when that interest is acquired the Purchaser's Rights cease to exist. The value of the Land Interest cannot, therefore, be a result of the acquisition of the Land Interest by the Purchaser for the interest is unchanged by that acquisition. That being the case how can it be that *'the value of' the Land Interest 'is derived from' the Purchaser's Rights*. If anything, it is more realistic to say that the value of the Purchaser's Rights derives from the Land Interest.

3.26 In accepting the arguments of Counsel for the taxpayer on this matter, Judge Brooks in *Lloyd-Webber* seemed simply to ignore these difficulties:

*'However, I agree with Mr Grodzinski that, on the completion of a contract, s 43 does allow expenditure initially incurred on obtaining contractual rights to be treated as expenditure on land as, in such circumstances there has been either a "merger" or "change in nature" of those contractual rights and, as it is the payment for those contractual rights that entitle a person to have the land conveyed to him on completion (and therefore be in the same ownership) the value of the land, "an asset", is "derived from" another "asset in the same ownership", namely, the contractual rights.'*⁵¹

⁵¹ See *Lloyd-Webber* at para. 29

3.27 It is odd that Judge Brooks did not explain his reasoning in agreeing with the taxpayers' Counsel on this issue because it is plain that Counsel for HMRC had put forward an argument similar to that set out in para. 3.25 above that s.43 could not apply to allow expenditure on the Purchaser's Rights to be deductible in calculating a gain, or loss, arising on a later disposal by the Purchaser of the Land Interest because the Land Interest could not derive its value from the Purchaser's Rights:

'... Mr Vallat contends that the land did not derive its value from the contract. He says that this is because the value of the land is the same throughout and it is the ownership of the land that changes on completion, not its value. The most that can be said is that as a result of the contractual rights a right or interest would have been created in or over the land with the result that the land would be the original asset and the contractual rights the new asset. In addition, he relies on the contractual rights not being "in the same ownership" as the land at the moment of creation and therefore the second requirement for the application of s 43 cannot be met as it is not enough that the owner of the contractual rights later comes to own the land.'

3.28 Judge Citron's judgment in *Drake*, although it reproduces the relevant passages on this point from *Lloyd-Webber*, does not reach a conclusion on it. This was because, as we have seen,⁵² the case was primarily decided on the authority of *Underwood* and because under the Alternative Drake Conclusions⁵³ Judge Citron decided that TCGA 1992 s.144(7) prevented the forfeiture of a deposit from being

⁵² See para. 3.13 above

⁵³ See *Drake* at para. 56

a disposal for CGT purposes and so did not need to decide whether Mr Drake acquired an asset consisting of the Purchaser's Rights or realised a loss on a disposal which, according to his view, s.144(7) treated as not having taken place.⁵⁴

What conclusion can be drawn in the First Issue?

3.29 The Three Cases do not provide clear authority on the First Issue. On balance, the difficulties which would be posed to the coherence of CGT if the Purchaser did acquire an asset for CGT purposes consisting of the Purchaser's Rights on a Completion Contract being made suggest that a Purchaser under a Completion Contract does not do so.

3.30 Capital Gains Tax was introduced some fifty six years ago. One might expect, therefore, that the nature of its basic concepts would, by now, be absolutely clear. In fact neither the Three Cases nor any case law which preceded them provide clear authority on the First Issue.

3.31 In *Jerome* the House of Lords, and in *Underwood* the Court of Appeal, failed to take the opportunity to clarify, so far as it was possible to do so, the law on this fundamental question. It is to be hoped that, failing statutory amendment,⁵⁵ the Supreme Court will take the opportunity to do so in an appropriate future case.

⁵⁴ See *Drake* para. 56(2). See paras. 4.6 – 4.15 & 4.17 below

⁵⁵ See para. 6.3 below

The First Issue and the Vendor

3.32 If we turn to the position of the Vendor, a matter which is not dealt with in the Three Cases, it seems clear that the scheme of CGT could not operate coherently if it were the case that the Vendor acquires an asset for CGT purposes consisting of the Vendor's Rights when he enters into the Completion Contract. When the contract is made the Vendor is placed under an obligation to transfer the Land Interest⁵⁶ and receives the Vendor's Rights which are principally to the right to receive the consideration to be paid by the Purchaser under the contract. That right is not significantly different from any other right to payment under a contract for sale.⁵⁷

3.33 If it were true that the Vendor acquired a CGT asset on the contract being made he would also make a disposal of that asset when the right to payment ceased to exist when the Completion Payment was made. There is no authority for the proposition that there is a disposal for CGT purposes on such an occasion and in practice neither HMRC nor professional tax agents act on the basis that there is.

3.34 If, therefore, the Purchaser does acquire a CGT asset when the contract is made there will be a lack of symmetry with the position of the Vendor. That the CGT regime is asymmetrical in this respect does not in itself decide the question of whether the Purchaser does indeed acquire a CGT asset consisting of the Purchaser's Rights because there are several other asymmetric treatments in our

⁵⁶ And in development cases to develop the land in which the Land Interest subsists

⁵⁷ See the passage from *Zim Properties* reproduced at para. 3.1 above

tax system but it does provide further support for the proposition that the Purchaser does not acquire such an asset.

**THE SECOND ISSUE: ASSUMING THAT THE PURCHASER DOES ACQUIRE
SUCH AN ASSET DOES HE MAKE A DISPOSAL OF IT?**

TCGA 1992 s.144

Forfeited Deposit Transactions

4.1 If one assumes that the Purchaser's Rights are an asset for CGT purposes, it is clear that when, under a Forfeited Deposit Transaction, those rights cease to exist because they are forfeited, unless a specific statutory provision prevents there being so, there could be a disposal of the asset under TCGA 1992 s.24, which treats the *'entire loss, destruction, dissipation or extinction of an asset'* as a disposal of it.

4.2 TCGA 1992 s.144 provides that:

'(1) Without prejudice to section 21 [Assets and Disposals], the grant of an option, and in particular—

(a) the grant of an option in a case where the grantor binds himself to sell what he does not own, and because the option is abandoned, never has occasion to own, and

(b) the grant of an option in a case where the grantor binds himself to buy what, because the option is abandoned, he does not acquire,

is the disposal of an asset (namely of the option), but subject to the following provisions of this section as to treating the grant of an option as part of a larger transaction.

(2) If an option is exercised, the grant of the option and the transaction entered into by the grantor in fulfilment of his obligations

under the option shall be treated as a single transaction and accordingly—

(a) if the option binds the grantor to sell, the consideration for the option is part of the consideration for the sale, and

(b) if the option binds the grantor to buy, the consideration for the option shall be deducted from the cost of acquisition incurred by the grantor in buying in pursuance of his obligations under the option.

(3) The exercise of an option by the person for the time being entitled to exercise it shall not constitute the disposal of an asset by that person, but, if an option is exercised then the acquisition of the option (whether directly from the grantor or not) and the transaction entered into by the person exercising the option in exercise of his rights under the option shall be treated as a single transaction and accordingly—

(a) if the option binds the grantor to sell, the cost of acquiring the option shall be part of the cost of acquiring what is sold, and

(b) if the option binds the grantor to buy, the cost of the option shall be treated as a cost incidental to the disposal of what is bought by the grantor of the option.

(4) The abandonment of—

(a) a quoted option to subscribe for shares in a company, or

(b) a traded option or financial option, or

(c) an option to acquire assets exercisable by a person intending to use them, if acquired, for the purpose of a trade carried on by him,

shall constitute the disposal of an asset (namely of the option); but the abandonment of any other option by the person for the time being entitled to exercise it shall not constitute the disposal of an asset by that person.

...

(7) This section shall apply in relation to a forfeited deposit of purchase money or other consideration money for a prospective purchase or other transaction which is abandoned as it applies in relation to the consideration for an option which binds the grantor to sell and which is not exercised.'

4.3 If the Purchaser acquires, on the Completion Contract being made, an asset for CGT purposes which consists of the Purchaser's Rights and it is correct to say that under a Forfeited Deposit Transaction the Purchaser abandons those rights then, on the face of it, s.144 has the result that when, under a Forfeited Deposit Transaction, the Purchaser's right to the Deposit is terminated, s.144(7) prevents there being a disposal of the Purchaser's Rights which there would otherwise be by virtue of s.24.

4.4 That is because s.147(7) has the result that s.144 will apply to the Forfeited Deposit Transaction as if it were a call option which was not exercised. A call option which is not exercised, other than one which falls within the descriptions (a), (b) and (c) in s.147(4),⁵⁸ is prevented from being a disposal by that subsection.⁵⁹

Insolvent Vendor Transactions

4.5 In Insolvent Vendor's Transactions the Purchaser's Rights under the Completion Contract will, in most circumstances, come to have a negligible value and so, if they are assets for CGT purposes, the Purchaser may make a claim under TCGA 1992 s.24 ('disposals where assets lost or destroyed, or become of negligible value') for them be treated as the subject of a disposal. Section 147(7) will not, on the face of it, apply to Insolvent Vendor Transactions which do not involve a forfeited Deposit and so will not prevent there being a disposal under s.24.

⁵⁸ Which a Forfeited Deposit Transaction does not

⁵⁹ See para. 4.2 above

Hardy

4.6 In *Hardy*, Mr Hardy's Counsel argued that Mr Hardy's transaction did not fall within s.144(7).

4.7 The Upper Tribunal explained that his first:

*'... argument depended on reading the words "which is abandoned" in section 144(7) as qualifying the words "a forfeited deposit of purchase money" as well as the words "other consideration money for a prospective purchase or other transaction".'*⁶⁰

4.8 In respect of this argument the Upper Tribunal simply said:

*'We do not accept this interpretation of section 144(7).'*⁶¹

4.9 So we do not know why the Upper Tribunal rejected this argument but it was surely correct in doing so. How could the words *'which is abandoned'* qualify the words *'a forfeited deposit of purchase money'*?⁶² If a deposit had been forfeited how can it be further abandoned? It is arguable that a *'deposit'* may be abandoned by being forfeited but a *'forfeited deposit'* certainly can not be.

4.10 Mr Hardy's second argument in respect of s.144(7) was that:

*'... 144(7) was concerned with the receipt by the seller, which was chargeable in the same way that consideration for the grant of an option was chargeable, and not with the payment by the buyer.'*⁶³

⁶⁰ See *Hardy* at para. 46

⁶¹ See *Hardy* at para. 46

⁶² See para. 4.7 above

⁶³ See *Hardy* at para. 47

4.11 The judgment does not record Mr Hardy's Counsel's detailed argument on this point and it is difficult to reconstruct it from this brief description. Section 147(7) contains no words expressly limiting its effect to the Vendor's retention of the Deposit⁶⁴ after its forfeiture and, in the absence of any such words, must surely apply both to the Purchaser and the Vendor.

4.12 On this issue the Upper Tribunal said:

*'We do not accept this. In our view section 144(7) is concerned with the forfeited deposit itself, and hence it applies to the deposit both when considered from the perspective of the seller and when considered from the perspective of the buyer.'*⁶⁵

4.13 The Upper Tribunal was again surely correct in rejecting the argument of Mr Hardy's Counsel on this issue.

4.14 Finally:

*'Counsel for Mr Hardy submitted that Mr Hardy's forfeiture of the deposit could not be described as the abandonment of an option to purchase the Property, because Mr Hardy had striven to prevent the forfeiture occurring.'*⁶⁶

⁶⁴ See para. 4.2 above

⁶⁵ See *Hardy* at para. 47

⁶⁶ See *Hardy* at para. 48

4.15 Plainly this was an argument in the alternative to Mr Hardy's Counsel's first argument on the matter⁶⁷ and one which the Upper Tribunal thought had some force even though it found against Mr Hardy on the matter:

*'We accept that Mr Hardy tried to avoid the deposit being forfeited. We also accept that "abandonment" is perhaps not the most natural way to describe the loss of the right to enforce performance of the Contract in such circumstances. Reading section 144(4) together with section 144(7), however, we consider that it equates "abandonment" of an option with the option being "not exercised". We see no difficulty in regarding Mr Hardy's right to enforce performance of the Contract as having not been exercised, albeit involuntarily, because he did not comply with his own obligations. Moreover, we consider that this interpretation is supported by the reasoning of Slade LJ, with whom Ralph Gibson LJ agreed, in Welbeck Securities Ltd v Powlson [1987] STC 468 at 477-478, and in particular his apparent agreement that a failure to exercise an option in due time constituted an abandonment within what is now section 144(4).'*⁶⁸

Lloyd-Webber

4.16 *Lloyd-Webber* concerned Insolvent Vendor Transactions, and so s.144(7) was only considered in it for the light it sheds on the construction of s.43.⁶⁹

⁶⁷ See para. 4.7 above

⁶⁸ See *Hardy* at para. 49. *Welbeck Securities Ltd v. Powlson* concerned a company which had received £2m on the settlement of an action to enforce an option agreement under which the company agreed to 'release and abandon' the option. There was no contention in the case that the rights of the company under the option did not constitute an asset for CGT purposes

⁶⁹ See *Lloyd-Webber* at paras. 30 - 32

Drake

4.17 In *Drake*, even in the Alternative Drake Conclusions, Judge Citron simply adopted the conclusions of the Upper Tribunal in *Hardy* saying:

‘ ... it is clear that a forfeited deposit of purchase money does not constitute the disposal of a capital gains asset: see s144(7) read together with s144(4). This was the analysis of ‘issue 2’ in Hardy, and I respectfully agree with it. Indeed, the FTT in Lloyd-Webber was also in agreement that losses resulting from a forfeited deposit were excluded from relief as capital losses by these provisions (which did not apply on the facts before it, as Lloyd-Webber was not about a forfeited deposit) (see at [31] of Lloyd-Webber).

I would thus have dismissed the appeal, even on this alternative basis.⁷⁰

What conclusion can be drawn on the Second Issue?

4.18 It seems clear to the Authors that the Upper Tribunal in *Hardy* and the FtT in *Drake* were correct in deciding that, even if the Purchaser’s Rights are an asset for CGT purposes, s.144 prevents a forfeiture of the right to repayment of a Deposit in respect of a Forfeited Deposit Transaction from being a disposal. Equally, we consider that the FtT was correct to accept in *Lloyd-Webber* that s.144 has no application to Insolvent Vendor Transactions and so does not prevent there being a disposal of a Purchaser’s Contractual Rights in such transactions if those contractual rights are an asset of the Purchaser for the purposes of CGT.

⁷⁰ See *Drake* at para. 56

The Second Issue and the Vendor

4.19 We have seen⁷¹ that s.144(7) does not apply to Insolvent Vendor Transactions.

Nor will it have any effect in relation to the Vendor coming to have a right to retain a forfeited Deposit under a Forfeited Deposit Transaction. That is because s.144(4), which is applied to Forfeited Deposit Transactions by s.144(7), applies only to prevent the abandonment, by the person who holds the right to the repayment of the Deposit, of that right from being a disposal by that person. Thus in a Forfeited Deposit Transaction, s.144(7) applies to the Purchaser but not to the Vendor.

4.20 What is the result in respect of Forfeited Deposit Transactions⁷² of the Vendor becoming absolutely entitled to the moneys paid by way of Deposit when the right to the Deposit is forfeited under the terms of the Completion Contract? HMRC seems to take the view that it is a capital sum derived from the Vendor's Rights giving rise to a deemed disposal of those rights under TCGA 1992 s.22 (disposal where capital sum derive from assets).⁷³

4.21 That could only be the case if the Vendor's Rights were an asset for CGT purposes. We have seen,⁷⁴ however, that in *Underwood* and *Drake* HMRC argued that was not the case and that it is likely that HMRC was correct on this point. In the Authors' view the capital sum is actually derived from the Land

⁷¹ See para. 4.5 above

⁷² Under an Insolvent Vendor Transaction the right to the moneys paid by way of Deposit nor does the Vendor becomes absolutely entitled to them. It is merely that the Purchaser cannot recover them from the Vendor by reason of the Vendor's insolvency. There can be no question, therefore, of the Vendor having received a sum derived from an asset in respect of the Deposit

⁷³ See HMRC Capital Gains Manual para. CG12340

⁷⁴ See para. 3.32 above

Interest so that in calculating any gain arising on the disposal, one will be able to deduct a portion of the Vendor's costs of acquisition of that interest.⁷⁵

4.22 In any event there is an obvious asymmetry in the treatment of Forfeited Deposit Transactions. The Purchaser does not make a disposal of the Purchaser's Rights and therefore receives no relief for his economic loss on the transaction whereas the Vendor is subject to CGT in respect of his receipt.

**THE THIRD ISSUE: IF THE PURCHASER DOES ACQUIRE AN ASSET
CONSISTING OF THE CONTRACTUAL RIGHTS AND DOES MAKE A DISPOSAL
OF IT, DOES AN ALLOWABLE LOSS ARISE ON THAT DISPOSAL?**

Hardy

5.1 In *Hardy*, the Upper Tribunal agreed with HMRC that:

*'...the deposit was not an allowable loss since it was not "wholly and exclusively" incurred in acquiring the asset as required by section 38(1) TCGA92.'*⁷⁶

5.2 The judgment does not record the argument of Mr Hardy's Counsel on this point at all and of HMRC's argument it only says:

'It is common ground that expenditure with a dual purpose may be allowable, but only if the main purpose is allowable and the other purpose is purely

⁷⁵ Under TCGA 1992 s.42

⁷⁶ See *Hardy* at paras. 51 & 54

incidental or ancillary: see Cleveleys Investment Trust Co v Inland Revenue Commissioners [1975] STC 457 at 467 (Lord Emslie).

Counsel for HMRC submitted that the deposit had not been paid wholly or even mainly by Mr Hardy for the acquisition of contractual rights under the Contract, but as a part-payment of the purchase price of the Property. The acquisition of the right to enforce performance of the Contract was incidental. We agree with this.⁷⁷

Lloyd-Webber

5.3 Judge Brooks in *Lloyd-Webber* started his consideration of the matter by citing comments on the approach to be taken in deciding questions of the construction of CGT legislation in the cases *Aberdeen Construction*,⁷⁸ *WT Ramsay*⁷⁹ and *HMRC v. Blackwell*.⁸⁰ The force of his quotations from *Aberdeen Construction* and *WT Ramsay* is that the construction of CGT provisions is to be approached realistically and of the quotation from *Blackwell* that the fact that the result of a CGT computational provision might be surprising to the ordinary businessman should not lead one to adopt a construction which is contrary to the ‘*clear language of [the] statutory provisions*’.

5.4 Judge Brooks then considered the argument of HMRC’s Counsel that s.38 is concerned with the subjective intention of the person who has acquired the asset

⁷⁷ See *Hardy* at paras. 52 & 53

⁷⁸ *Aberdeen Construction Group Ltd v. IRC* [1978] STC 127 at 131

⁷⁹ *WT Ramsay Ltd v. IRC* [1981] STC 174 at 182

⁸⁰ *HMRC v. Blackwell* [2017] EWCA Civ 232

subject to the disposal and concluded that s.38 does not look at the subjective intention of the acquirer but rather:

*'... , for the purposes of s 38 it is necessary, taking an objective approach, to consider what the payments made by ... [the taxpayers] ... under the 2007 Contracts were, in reality, for.'*⁸¹

5.5 There then followed Judge Brook's consideration of the application of s.43 which we have summarised above.⁸²

5.6 In deciding that s.43 did allow the expenditure initially incurred on acquiring the Purchaser's Rights to be treated as expenditure on land, Judge Brooks agreed with Lord and Lady Lloyd-Webber's Counsel that the consideration under the contract given by the Purchaser was given for the Purchaser's Rights and subsequently merged with the Land Interest.⁸³

5.7 We have already noted⁸⁴ the difficulties which that view poses.

Drake

5.8 In *Drake*, as we have seen,⁸⁵ Judge Citron followed the authority of *Underwood* in deciding for HMRC on all three issues. In the Alternative Drake Conclusions he did not express an opinion on the Third Issue having already decided for HMRC on the Second Issue.⁸⁶

⁸¹ See *Lloyd-Webber* at para. 24

⁸² See para. 3.23 – 3.27 above

⁸³ See *Lloyd-Webber* at para. 29

⁸⁴ See para. 3.23 - 3.27 above

⁸⁵ See para. 3.13 above

⁸⁶ See *Drake* para. 56

What conclusion can be drawn on the Third Issue?

5.9 It is clear that the First and Third Issues are interdependent. The difficulties which arise under the Third Issue in respect of the deductibility of the consideration given by the Purchaser under a Completion Contract and of allocating that consideration between the acquisition of the Purchaser's Rights and the acquisition of the Land Interest provide support for a conclusion under the First Issue that the Purchaser does not make an acquisition of an asset for CGT purposes consisting of the Purchaser's Rights on the Completion Contract being made.⁸⁷

5.10 It follows that in our view, therefore a consideration of the coherence of the CGT system results in the conclusion that, because the Purchaser does not acquire an asset for CGT purposes consisting of the Purchaser's Rights on a Completion Contract being made, no gain can arise on the termination of those rights under a Forfeited Deposit Transaction or on their becoming of negligible value under an Insolvent Vendor Transaction. That conclusion is consistent with the decision in *Hardy* which, however inadequate its analysis of the First Issue, was not made *per incuriam*. The decision in *Lloyd-Webber*, being based on the decision in *Hardy* having been made *per incuriam*, was itself made *per incuriam*.

⁸⁷ See paras. 3.23 – 3.29 above. That is why we have dealt with the issues in respect of s.43, in considering the First Issue in some detail (see paras. 3.17 – 3.28 above) and have only referred to those issues in dealing with the Third Issue (see paras. 5.5 – 5.7 above)

The Third Issue and the Vendor

5.11 Whatever view one takes of the Third Issue it is clear that in respect of Forfeited Deposit Transactions the Vendor receives a capital sum which gives rise to a deemed disposal under TCGA 1992 s.22. That capital sum is derived from the Land Interest and so, by virtue of TCGA 1992 s.42, a proportion of the acquisition expenditure given by the Vendor for the Land Interest will be deductible in calculating any gain or loss arising on that disposal.⁸⁸

A NEED FOR LEGISLATIVE CHANGE?

An asymmetrical system

6.1 It follows from the above analysis that, on the basis of the construction of the relevant provisions which the Authors consider most likely to be correct, the application of CGT to Forfeited Deposit Transactions is asymmetrical. As the Purchaser does not acquire an asset for CGT purposes consisting of the Purchaser's Rights on the Completion Contract being made there will be no relief for the real economic losses suffered by the Purchasers under Lost Deposit Transactions. Even if the Purchaser did acquire an asset for CGT purposes on a Completion Contract being made. S.144 would apply to treat the forfeiture of the Purchaser's rights in respect of the Deposit as not being a disposal of that asset. In contrast, on the Vendor becoming absolutely entitled to the moneys paid by way of Deposit in respect of a Forfeited Deposit Transaction the Vendor will be treated as making a disposal under s.22 and will be charged to CGT on any resulting gain. In respect of a Forfeited Deposit Transaction, therefore, the

⁸⁸ See para. 4.21 above

economic profit of the Vendor will be charged to CGT and the economic loss to the Purchaser will not be relieved from CGT.

Necessary legislative changes

6.2 Plainly, the provisions of CGT in respect of Forfeited Deposit Transactions do not reflect economic reality and ought to be amended. What is required is a specific statutory provision to deem a Purchaser under a Completion Contract to have acquired an asset for CGT purposes being the Purchaser's Rights, amendments to s.43 to treat the consideration given under the Completion Contract as having been given for the Purchaser's Rights and as having derived from the Land Interest and amendments to s.144 to prevent its treating the termination of the Purchaser's Rights under a Forfeited Deposit Transaction as not being a disposal of those rights.

Wishing for the moon?

6.3 More fundamentally, we need exhaustive and comprehensive statutory rules to determine, for CGT purposes, what is an asset and the circumstances in which an asset is acquired. Fifty seven years after the introduction of CGT that still feels like wishing for the moon.

APPENDIX I

GLOSSARY OF WORDS AND PHRASES

In this Review we use various words and phrases in special senses which we define in this Appendix. This Appendix lists those words and phrases and gives their definitions and the paragraphs in which they are first used.

DEFINED WORD OR PHRASE	DEFINITION	PARAGRAPH OF THE PAPER IN WHICH THE DEFINED WORD OR PHRASE IS FIRST USED
Alternative Drake Conclusions	The conclusions made on the assumption that <i>Hardy</i> was not an authority binding the FtT stated at para. 56 of <i>Drake</i>	3.14
CGT	The provisions imposing UK Capital Gains Tax and of UK Corporation Tax on chargeable gains	2.1
Completion	The fulfilment of the obligations of the Purchaser and Vendor under a Completion Contract	1.1
Completion Contract	A contract under which a Purchaser contracts to purchase a Land Interest from a Vendor which is to be completed at a date after it is made	1.1
Completion Date	The date that a Completion Contract is completed	1.1
Completion Payment	The payment to the Vendor by the Purchaser on Completion of the outstanding balance of the consideration to be given by the Purchaser under the Completion Contract	1.1
Completion Transfer	The transfer by the Vendor on completion of a Completion Contract of a Land Interest to the Purchaser under the contract	1.1
Deposit	A payment or payments to be made under a Completion Contract by the Purchaser to the Vendor at some time or times before the Completion Date which if the contract is completed form part of the consideration given by the Vendor	1.1

<i>Drake</i>	<i>Christopher Drake v. HMRC</i> [2022] UKFTT 25 (TC) TC08377/V	2.2
First Issue	Whether a purchaser under a Completion Contract acquires an asset for CGT purposes, consisting of the Purchaser's Rights, on the contract being made	2.4
Forfeited Deposit Transaction	Transactions in respect of a Completion Contract which is not completed because the Purchaser is unable to perform his obligations under the contract with the result that the Deposit may be retained by the Vendor under the contract's terms	1.3
<i>Hardy</i>	<i>Hardy v. HMRC</i> [2016] UKUT 0332 (TCC)	2.2
Insolvent Vendor Transaction	Transactions in respect of a Completion Contract which is not completed because the Vendor is unable to perform his obligations under the contract due to the Vendor's insolvency	1.2
<i>Jerome</i>	<i>Jerome v. Kelly</i> [2004] UK HL 25	3.7
Land Interest	An interest in land which is the subject of a Completion Contract which under the contract is to be transferred on completion by the Vendor to the Purchaser	1.1
<i>Lloyd-Webber</i>	<i>Lloyd-Webber and another v. HMRC</i> [2019] UKFTT 717 (TC)	2.2
Lost Deposit Transaction	Transactions which are either Insolvent Vendor Transactions or Forfeited Deposit Transactions	1.4
Purchaser	A party to a Completion Contract to whom, under the contract, a Land Interest is to be transferred by the Vendor on Completion	1.1
Purchaser's Rights	The rights of the Purchaser under a Completion Contract	1.1
Second Issue	Whether the Purchaser makes a disposal of the Purchaser's Rights when either the Purchaser's right to recover the Deposit terminates in a Forfeited Deposit Transaction or becomes of negligible value in an Insolvent Vendor Transaction	2.4

TCGA 1992	Taxation of Chargeable Gains Act 1992	3.9
Third Issue	Whether in Lost Deposit Transactions a Purchaser makes a loss on a disposal of the Purchaser's Rights	2.4
Three Cases	The cases of <i>Hardy</i> , <i>Lloyd-Webber</i> and <i>Drake</i>	2.1
<i>Underwood</i>	<i>Underwood v. HMRC</i> [2008] EWCA Civ 1423	3.12
Vendor	A party to a Completion Contract, who, under the Contract, is to transfer a Land Interest to the Purchaser	1.1
Vendor's Rights	The rights of the Vendor under a Completion Contract	1.1