

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE BRIGGS
CH/2007/0415

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2008

Before :

LORD NEUBERGER OF ABBOTSBURY
LORD JUSTICE LAWRENCE COLLINS
and
LORD JUSTICE GOLDRING

Between :

PHILIP JOHN UNDERWOOD

Appellant

- and -

**COMMISSIONERS FOR HER MAJESTY'S REVENUE
& CUSTOMS**

Respondent

Mr Patrick C Soares and Ms Hui Ling McCarthy for the Appellant

Mr Christopher Tidmarsh QC (instructed by **the Solicitor for HMRC**) for the Respondent

Hearing date: November 19, 2008

Judgment

Lord Justice Lawrence Collins :

I Introduction

1. A bought land in 1990 for £1.4 million. When the value of the land fell, A contracted in 1993 to sell the land to B Ltd for £400,000, and B Ltd granted A an option to buy back the land at the original contract price plus 10% of any increase in value. In 1994, before the revised contractual completion date, and before any conveyance of the land, A (without formally exercising the option) entered into an agreement to repurchase the property from B Ltd for £420,000, and also agreed to sell the land to C Ltd (a company controlled by A) for £600,000.
2. The £420,000 price in the 1994 contract was the 1993 contract price plus 10% of the difference between the 1993 contract price and the increased 1994 value of £600,000.
3. The solicitor acting for both A and B Ltd prepared a transfer of the land from A to C Ltd without any intervening documentation to reflect the position as between A and B Ltd. A was treated as owing to B Ltd £20,000, which represented the difference between the sale price in the 1993 contract (£400,000) and the sale price in the 1994 contract (£420,000). A sought to establish a loss for capital gains tax purposes on the disposal to B Ltd.
4. The entry into the 1993 contract for the sale of the land was not itself a disposal for capital gains tax purposes. Section 28(1) of the Taxation of Chargeable Gains Act 1992 (“the 1992 Act”) deems the disposal and acquisition (once they have occurred) to take place at the time of the contract. It deals only with the question of fixing the time of disposal and not with the substantive liability to tax. The time of the contract is deemed to be the time of the disposal only if there actually is a disposal: *Jerome v. Kelly* [2004] UKHL 25, [2004] 1 WLR 1409, at [11].
5. The Revenue’s position was that the only disposal by A was to C Ltd (and because C Ltd was connected with A, his right to set off the loss was restricted), and that there had been no disposal to B Ltd. The issue therefore was whether (as the taxpayer contended) in 1994 there was a disposal of the asset (the land) to B Ltd; or whether (as the Special Commissioners decided) there was simply a performance of the 1993 contract for sale and the 1994 contract for repurchase by set-off; or whether (as the judge decided) the parties had abandoned any intention to proceed to completion of either contract, and the parties had simply agreed to substitute a payment of £20,000.
6. This is an appeal from the judgment of Briggs J [2008] EWHC 108 (Ch), [2008] STC 1138, in which he dismissed an appeal from a decision of the Special Commissioners (Mr T Wallace and Dr A N Brice) dismissing an appeal by the taxpayer, Mr P J Underwood, against estimated assessments to capital gains tax for the years ending April 5, 1993 and April 5, 1995.
7. The appeal does not raise any issue of principle, but concerns the (by no means easy) task of characterising, as a matter of law, what the parties did or must be taken to have done when the tripartite transaction was effected in 1994.

II The facts in detail

8. Mr Underwood acquired land in Thetford, Norfolk (“the Property”) on July 16, 1990 for £1.4 million, with the assistance of a loan of £1 million from the Royal Bank of Canada (“the Bank”). The market for property of that type went into serious decline, and by March 1993 it was professionally valued as having an open market value of £400,000 and a forced sale value of £290,000.

1993 contract of sale and option agreement

9. By a contract (“the 1993 Contract”) dated April 2, 1993 Mr Underwood agreed to sell the Property to Paul Rackham Ltd (“Rackham Ltd”, a company owned by Mr Paul Rackham) for £400,000, with a contractual completion date of December 31, 1993. In his tax return for the year ending April 5, 1993 Mr Underwood claimed a loss in relation to the Property of about £1.174 million.
10. On the same day as the 1993 Contract was made, Mr Underwood and Rackham Ltd entered into an option agreement (“the Option”) by which Rackham Ltd granted to Mr Underwood the right, by notice in writing served at any time before December 31, 1995, to re-purchase the Property. The price payable upon exercise of the Option was to be £400,000, plus the cost of any capital improvements, maintenance or insurance of the Property by Rackham Ltd, plus 10% of any difference between the sum so identified and the value of the Property on the date of exercise of the Option (to be determined if necessary by an expert). The Revenue accepted that the 1993 Contract and the Option were to be treated as arm’s length commercial transactions.

Extension of completion date to December 31, 1994

11. The 1993 Contract did not complete, as contemplated, in December 1993, because Mr Underwood was unable to negotiate a redemption of his mortgage of the Property to the Bank. Instead, he and Rackham Ltd agreed to extend the completion date to December 31, 1994.
12. By the end of September 1994 the Property had substantially increased in value. It was professionally valued at £750,000 on the open market, and at £600,000 on a forced sale. The 1993 Contract had in the meantime not been completed, and accordingly no part of the purchase price had been paid.

Sale to Brickfields Estates Ltd

13. By November 1994 Mr Underwood had decided that the best solution to his continuing financial difficulties was to sell the Property to Brickfields Estates Ltd (“Brickfields”), a company which he controlled, for £600,000. Since Rackham Ltd had never taken possession of the Property, it had incurred no costs of improvement, maintenance or insurance, and an assumed £200,000 rise in the market value of the Property meant that Mr Underwood’s net cost of exercising the Option and re-acquiring the Property would be £20,000.

1994 Contract for re-purchase

14. After negotiations with Mr Rackham, Mr Underwood and Rackham Ltd entered into a contract for the re-purchase of the Property for £420,000, on November 29, 1994

("the 1994 Contract"). As the Special Commissioners recorded, the 1994 Contract was treated by Mr Underwood and Rackham Ltd as the exercise of the Option, and it was accepted by Mr Underwood and the Revenue that the 1994 Contract was in effect the exercise of the Option. It was common ground that the 1994 Contract was in substantially the same terms as would have arisen by operation of law had the Option simply been exercised.

Contract of sale to Brickfields

15. On the same day, Mr Underwood exchanged contracts for the sale of the Property to Brickfields for £600,000, a company of which he was the controlling shareholder.

Mr Cunningham

16. Mr Underwood, Rackham Ltd, Brickfields and the mortgagees of the Property all used the services of the same solicitor, a Mr Cunningham, a partner in Cunningham John, who drafted all the relevant contracts. The judge said that it appeared that the parties left him to devise a sensible means of dealing with the consequence of there being simultaneously in existence contracts between the same parties for the sale and re-purchase of the same property for completion at substantially the same time, at prices £20,000 apart.
17. The Special Commissioners' findings (paras 28 and 30, which were based on an agreed statement of facts) were:

"28. Mr Cunningham, who was the solicitor acting for [Mr Underwood], Rackham Ltd, Brickfields, and the two building societies, formed the view that there was no need to execute three transfers of the property, one from [Mr Underwood] to Rackham Ltd to complete the 1993 contract, one from Rackham Ltd to [Mr Underwood] under the exercise of the option, and one from [Mr Underwood] to Brickfields to complete the Brickfields contract. The stamp duty on three separate transfers would have amounted to £14,200. Mr Cunningham concluded that, as the legal title to the property had remained with [Mr Underwood] throughout, [Mr Underwood] was able to execute just one transfer of the property direct to Brickfields. The position as between [Mr Underwood] and Rackham Ltd could be settled by the payment of the sum of £20,000 by Appellant to Rackham Ltd, being the difference between the sale price for the property of £400,000 mentioned in the contract of 2 April 1993 and the amount due to Rackham Ltd from [Mr Underwood] for the property under the option agreement (£420,000). Mr Cunningham therefore prepared a transfer of the property from [Mr Underwood] to Brickfields and two mortgages, one to each of the two building societies. Mr Cunningham had the funds to be advanced by the two building societies in his client account. Immediately before the completion of the sale to Brickfields there were three contracts in existence: the April 1993 contract as varied for a sale to Rackham Ltd; the contract for resale by Rackham

Ltd implementing the option agreement; and the contract by [Mr Underwood] to sell to Brickfields.

...

30. [Mr Underwood] did not then pay Rackham Ltd the sum of £20,000 under the option agreement but [Mr Underwood] was recorded in Rackham Ltd's books of account for the year ending on 31 December 1994 as a debtor in that amount. [Mr Underwood] paid the sum of £20,000 to Rackham Ltd on 4 December 1996."

III The decisions below

A Special Commissioners

18. The Special Commissioners accepted the Revenue's submission that Rackham Ltd had paid £400,000 to Mr Underwood, and that he had simultaneously paid £400,000 of the £420,000 purchase price due under the 1994 Contract to Rackham Ltd, the two equal and opposite payments being by way of mutual set-off, leaving the outstanding £20,000 as a debt owed by him to Rackham Ltd and that both the 1993 and 1994 Contracts were performed in the sense that the purchase prices payable under both of them were in fact paid in full.
19. The Special Commissioners dismissed the appeal on the basis that Rackham Ltd never acquired the Property (and thus Mr Underwood never disposed of it). No beneficial interest in the Property ever passed under that contract to Rackham Ltd, capable of constituting a disposal by Mr Underwood and an acquisition by Rackham Ltd "under the contract" within the meaning of section 28(1) of the 1992 Act. There was no moment in time when the rights in the property vested in Rackham Ltd because the very event which constituted payment by Rackham Ltd of the consideration under the contract also constituted payment by Mr Underwood under the contract of November 29, 1994 made in exercise of the Option. The payment being by set-off, there was not and could not be a moment in time when Rackham Ltd had paid Mr Underwood but Mr Underwood had not paid Rackham Ltd.

B Briggs J

20. The judge dismissed the appeal, but his grounds were different. Despite the Revenue's concession that there had been payment under both contracts by way of set-off, he thought that the assumption that the full purchase prices were paid under both contracts by set-off was extremely unreal. Nothing in the primary findings of fact by the Special Commissioners, nor in the evidence upon which they were based, justified the conclusion that any such set-off was either intended, or occurred. Mr Underwood's objective was not to transfer and re-acquire the Property, but simply to remove the 1993 Contract as an obstacle to his intended sale of the Property to Brickfields for a substantially greater price, an objective which he had the power to achieve by the exercise of the Option, at a net cost to him of £20,000.
21. Neither the 1993 nor the 1994 Contract was performed at all. They were simply settled by way of the payment of the difference between the value of their combined rights and obligations to each of the parties. On November 29, 1994 the contractual

dates for completion of each of the 1993 and 1994 Contracts were approximately 28 days off. The parties had by then abandoned any intention to proceed to completion of either contract. Consequently there was no performance of either contract, and there was therefore no transfer of the beneficial interest in the Property under either contract. There was therefore no disposal of the Property under the 1993 Contract, so that there was nothing upon which section 28(1) could bite so as to deem there to have been a disposal in the 1993 year of account.

IV The appeal

22. The arguments for Mr Underwood can be summarised as follows.
23. The judge was wrong to depart from the concession made by the Revenue (and accepted by the Special Commissioners) that on the facts that there had been a set-off. The existence of simultaneous payment obligations which arose pursuant to the 1993 and 1994 Contracts resulted in a set-off of purchase monies (namely, two lots of £400,000 plus a payment of the £20,000 difference) owing under each contract. For capital gains tax purposes, a set-off is equivalent to actual payment: *Coren v Keighley* [1972] 1 WLR 1556. The consequence of the satisfaction of both contractual payment obligations can only be that the sale and repurchase contracts were both performed, and not simply abandoned.
24. The Special Commissioners were wrong to find that there had been no disposal pursuant to the 1993 and 1994 Contracts. No movement of the legal estate need have taken place under the Contracts as Mr Underwood had repurchased the Property. The existence of the 1994 Contract for the sale of the Property from Rackham Ltd back to Mr Underwood was itself evidence of the intention to perform the 1993 Contract.
25. The parties had given clear authority to Mr. Cunningham to complete the three contracts on November 30, 1994. There was no evidence to show the parties determined to abandon the 1993 and 1994 Contracts. The 1993 and 1994 Contracts were a contract for sale and a contract for repurchase of the Property, and the court is required to give effect to the arrangement entered into by the parties wherever possible. The 1994 Contract required Rackham Ltd to transfer beneficial ownership of the Property to Mr Underwood. In order to be in a position to have made such a transfer (and so fulfil its obligations under to the 1994 Contract) Rackham Ltd must first have acquired the beneficial ownership of the Property pursuant to the 1993 Contract. Rackham Ltd made a real commercial profit from the turning of the land: the contracts showed an outlay of £400,000 and a receipt of £420,000.
26. There were therefore two separate events: the acquisition of beneficial ownership of the Property by Rackham Ltd which had to have taken place before its disposal back to Mr Underwood. Rackham Ltd must have acquired beneficial ownership of the Property at some point pursuant to the 1993 Contract and prior to the completion of the 1994 Contract in order for it to be in a position to complete the 1994 Contract at all.
27. There is a disposal and acquisition if the vendor puts the purchaser in the position where the purchaser can turn the property to account: *O'Brien v. Benson's Hosiery (Holdings) Limited* [1980] AC 562, 573. Rackham Ltd had acquired the right to turn

the property to account and made a capital gain of £20,000 from the rise in market value of the Property in the period between the 1993 and 1994 Contracts.

28. The Revenue's contention cannot be reconciled with the common "bed and breakfast" transaction where A contracts to sell property to B (crystallising a loss) and B in quick succession contracts to sell it back to A without the legal title ever moving. This is an acceptable way of realising a loss for capital gains tax purposes: *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] 1 AC 655, 676; *MacNiven v Westmoreland Investments* (1998) 73 TC 1, 48, affd [2003] 1 AC 311.
29. In the case of a sub-sale transaction, where A contracts to sell to B but prior to the agreed completion date, B contracts to sell to C (with A transferring the legal estate direct to C and without B being an executing party to the transfer in the case of registered land), on the analysis of the Revenue B would not be treated at any moment in time as having acquired the property. Although B would not have been the absolute beneficial owner of the property at any moment in time in the sense of being able to enjoy the fruits of the property etc., nevertheless B was in a position to turn the asset (the property) to account and did so.
30. The Revenue supports the reasoning of both the Special Commissioners and of the judge. The principal points made in support of the conclusions of the Special Commissioners are these. There was no event which resulted in a disposal of the Property by Mr Underwood to Rackham Ltd under the 1993 Contract or an acquisition by Rackham Ltd of the Property under that contract.
31. As between Mr Underwood and Rackham Ltd there was a single event, namely the netting off of the £400,000 purchase price stipulated by the 1993 Contract against the £420,000 price stipulated in the 1994 Contract (leaving Mr Underwood as a debtor to Rackham Ltd in the sum of £20,000).
32. But, whether the netting off constituted payment or not, Rackham Ltd cannot thereby have obtained anything additional to the rights that it acquired on the making of the 1993 and 1994 Contracts. The only relevant event (the netting off) extinguished all Rackham Ltd's rights and interests in the Property. A single indivisible event which extinguished Rackham Ltd's rights and interests in the Property cannot have vested additional rights and interests in the Property in Rackham Ltd and cannot have resulted in an acquisition of the Property by it.
33. There was not separate performance of the 1993 Contract followed by performance of the 1994 Contract.
34. The asset that Rackham Ltd turned to account was its contractual rights under the 1993 Contract to acquire the Property. The result of the transaction was that Rackham Ltd's rights and interests in the Property were extinguished and Mr Underwood became owner of the Property free of the rights and obligations arising under the 1993 and 1994 Contracts.
35. The Revenue also supports the judge's approach on the basis that the 1993 and 1994 Contracts were not, quite apart from the absence of any transfers, performed in accordance with their terms and that when the netting off occurred the purchase prices payable under the contracts were not immediately payable. When the netting off

occurred (which must have been on or before November 30, 1994) the contractual dates for completion of the 1993 and 1994 Contracts were some way off. Payment of the purchase money was not therefore then due. The Revenue takes the new point (against the opposition of Mr Underwood) that the arrangement suggested by Mr Underwood would not render the purchase money legally payable because the contractual completion date could be varied only by an instrument in writing signed by both parties: Law of Property (Miscellaneous Provisions) Act 1989, section 2(1); *McCausland v Duncan Lawrie Ltd* [1990] 1 WLR 38.

V Conclusions

36. By section 28(1) of the 1992 Act:

“... 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).”

37. What is now section 28(1) was first introduced by the Finance Act 1971 after academic speculation about whether a contract could be said to be a disposal on the ground that a purchaser acquired an equitable interest: *Jerome v. Kelly* [2004] UKHL 25, [2004] 1 WLR 1409 at [9], *per* Lord Hoffmann, and [33], *per* Lord Walker of Gestingthorpe. In that decision it was held that what is now section 28(1) is simply a timing provision, deeming the disposal and acquisition (once occurred) to take place at the time of the contract. It was intended to deal only with the question of fixing the time of disposal and not with the substantive liability to tax. Section 28(1) contains no provisions dealing with what happens if the contract goes off. In such a case, as Lord Hoffmann said in *Jerome v Kelly* at [11], there will be no disposal and nothing to deem to have happened at the time of the contract. That makes practical sense because it would be unjust to impose capital gains tax on the basis of the contract price when the property is left with the vendor.

38. After contract, and until completion, the vendor becomes in equity a trustee for the purchaser (*Lysaght v Edwards* (1876) 2 Ch D 499) but a trustee with peculiar duties and liabilities: *Earl of Egmont v Smith* (1877) 6 Ch D 469, 475. In *Englewood Properties Ltd v Patel* [2005] EWHC 188 (Ch), [2005] 1 WLR 1961, at [40] *et seq* I reviewed the authorities and concluded that the main purpose of the imposition of the trust is to impose duties on the vendor to preserve the property in the period between contract and completion. A few months earlier in *Jerome v. Kelly* [2004] UKHL 25, [2004] 1 WLR 1409 Lord Walker of Gestingthorpe had said that it would be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of the beneficial interest) in the land; neither the seller nor the buyer had unqualified beneficial ownership; beneficial ownership of the land was in a sense split between the seller and buyer on the provisional assumptions that specific performance was available and that the contract would in due course be completed, if necessary by the court ordering specific performance; and if the contract proceeded to completion the equitable interest could be viewed as passing to the buyer in stages, as title was made and accepted and as the purchase price was paid in full: at [32]. Consequently the vendor may become a bare trustee for the purchaser if the purchase price is paid in full prior to completion: *Lewin on Trusts*, 18th ed 2008, para 10-06, citing *Shaw v Foster* (1872) LR 5 HL 321, 338.

39. What, then, is a disposal of land for the purposes of capital gains tax? The capital gains tax legislation does not define what is meant by a disposal. What is envisaged is a transfer of an asset (i.e. of ownership of an asset) as widely defined, by one person to another: *Kirby v. Thorn EMI* [1988] 1 WLR 445 at 450, per Lord Nicholls. Except in certain cases where transactions are deemed to be disposals, the word “disposal” bears its “normal meaning”: *Berry v Warnett* [1982] 1 WLR 698, 701, per Lord Wilberforce.
40. The expression “normal meaning” is used in a rather special sense. A house owner who has contracted to sell the house might well regard himself or herself as having disposed of the house. Plainly “disposal” is used in a special sense to refer to a legal concept (just as in the familiar discussion of the meaning of “possession” or “ownership” in the traditional texts on jurisprudence), and it was common ground on this appeal that it meant disposal of the entire beneficial interest in the asset.
41. It is, of course, relevant to identify the asset which is being disposed of. It was in that context that, speaking of rights under a service agreement, Lord Russell said in *O’Brien v. Benson’s Hosiery (Holdings) Limited* [1980] AC 562, 573, that “the mark of an asset [is] something which he can turn to account ...”
42. What was the relevant asset? It was common ground that Mr Underwood could succeed only if he showed that the relevant asset was the Property. The Revenue argued that he had not disposed of the Property to Rackham Ltd and that Rackham Ltd had not acquired it; and that the only dealings they had had in November 1994 between themselves were in relation to the 1993 and 1994 Contracts, and not the Property.
43. Consequently in my judgment it is necessary to identify, in a practical and common sense way, what in law the parties were doing in November 1994.
44. I would accept the submission on behalf of Mr Underwood that a central feature of the capital gains regime is that transactions entered into by contracting parties must be respected and given full effect. If the question is raised what method has been adopted, and the transaction is in writing, the answer must be found in the true construction of the document or documents read in the light of all the relevant circumstances. If the terms of the document are clear, that is the end of the question. If however, there is any doubt or ambiguity upon the language used read in its proper context, it may be possible to resolve that doubt or ambiguity by reference to the inherent probabilities of businessmen entering into the transaction in one form rather than another: *Spectros International plc v Madden* [1997] STC 114, 138.
45. I have already set out the findings of fact by the Special Commissioners, which were based on an agreed statement of facts. The underlying evidence from the protagonists makes the position even clearer. Mr Underwood’s evidence (para 30 of his witness statement) was that his instructions to David Cunningham with regard to legal documentation were clear:

“the sale of the Property was to be completed to [Rackham Ltd], the option for repurchase was to be exercised by me at £420,000 and the property was to be conveyed to Brickfield Estates Limited for £600,000...”

46. Mr Rackham's evidence (paras 12 and 13 of his witness statement) was that although he could not recall the negotiations surrounding the exercise of the option and Mr Underwood's repurchase of the property, it was as far as he was concerned a straightforward contractual matter completed by their solicitors

"I let the company's solicitors deal with the paperwork and did not insist on the transfer of the title deeds to [Rackham Ltd] once Mr. Underwood had exercised the option – what useful purpose would this have served other than to increase costs?"

47. Mr Cunningham's evidence was:

"19. At the end of 1994, Mr Underwood instructed me that he wished to exercise the option, re-purchase the Property and then sell it on to Brickfield Estates Limited. I drew up the agreements for the re-purchase of the Property and for the onward sale to Brickfield Estates Limited and, again, ensured both were properly signed and exchanged.

...

21. It will be noted that immediately before the time of completion – 30 November 1994 – there were three contracts in existence:

- (i) A contract under which Mr Underwood contracted to sell the Property to [Rackham Ltd] for £400,000;
- (ii) A contract under which [Rackham Ltd] contracted to resell the Property to Mr Underwood for £420,000;
- (iii) A contract under which Mr Underwood contracted to sell the Property to Brickfield Estates for £600,000.

22. All three transactions could have been completed by executing three separate transfers with the payment of a total of £14,200 in stamp duty.

23. I formed the view that there was ample evidence from the existence of the contracts, that as a result of the resale by [Rackham Ltd], it was entitled to £20,000 profit, and there was no need to go through these steps. As the title deeds were still in the name of Mr Underwood, he was able to execute one transfer in favour of Brickfield Estates and pay [Rackham Ltd] the £20,000.

24. If [Rackham Ltd] had not been a contracting purchaser, it could not have contracted to resell the Property and would not have been entitled to receive the £20,000. No doubt the return to the Revenue of the sale of the Property by Mr Underwood to Brickfield Estates Limited indicated that he had bought the Property for £420,000 and sold it for £600,000."

48. Mr Cunningham did not complete the sale of the Property to Rackham Ltd and the Option was not actually exercised. Instead Mr Cunningham netted off the purchase price payable under the 1993 and 1994 Contracts.
49. What is the result in law of this? I am satisfied that there was no event which resulted in a disposal of the Property by Mr Underwood to Rackham Ltd under the 1993 Contract or an acquisition by Rackham Ltd of the Property under that contract.
50. There could have been a disposition only if the beneficial interest in the Property had been transferred to Rackham Ltd. The only relevant transactions were the 1993 Contract, the 1994 Contract and the payment of £20,000.
51. It was common ground that the 1993 Contract itself did not transfer the beneficial interest. There was no event which could have constituted the disposal to Rackham Ltd. All that actually happened was that the position as between Mr Underwood and Rackham Ltd was treated as settled by treating Mr Underwood as a debtor of Rackham Ltd in the sum of £20,000. I accept the Revenue's argument that as between Mr Underwood and Rackham Ltd there was a single event, namely the netting off of the £400,000 purchase price stipulated by the 1993 Contract against the £420,000 price stipulated in the 1994 Contract (leaving Mr Underwood as a debtor to Rackham Ltd in the sum of £20,000).
52. It is true that the 1994 Contract must have proceeded on the basis that Rackham Ltd had an interest in the Property capable of constituting the subject matter of the 1994 Contract. But there was at that time no disposal to Rackham Ltd because Rackham Ltd obtained nothing additional to the rights which it acquired on the making of the 1993 and 1994 Contracts. It is unrealistic and contrary to the facts to conclude that there were two events, one by which Mr Underwood disposed of the Property to Rackham Ltd and another by which Rackham Ltd disposed of the Property to Mr Underwood. The netting off was the only "performance" of those contracts. There was no other performance at all, and the netting off was accepted by the parties in substitution for the performance required by the contracts. To the extent that Rackham Ltd turned an asset to account, the asset was its contractual rights under the 1993 Contract to acquire the Property, and not its beneficial interest in the Property.
53. Rackham Ltd did not acquire the Property by becoming the beneficial owner of it, and Mr Underwood did not dispose of it. Rackham Ltd did not pay £400,000 for a beneficial interest in the Property. Rackham Ltd agreed that its obligation to pay £400,000 could be set off against Mr Underwood's obligation to pay £420,000 thereby extinguishing Rackham Ltd's interest in the Property, which was the right to require transfer of the beneficial interest, but subject to the Option.
54. I do not consider that Mr Underwood is assisted by reliance on other types of transaction which are said to be similar. In "bed and breakfast" transactions the owner of the asset disposes of it and then re-acquires it: *MacNiven v Westmoreland Investments* (1998) 73 TC 1, 48, aff'd [2003] 1 AC 311. So also in the case of a sub-sale where a transfer is made direct to the sub-purchaser at the request of the purchaser, the transaction can be characterised as two transactions in which the purchaser pays the seller for an interest and the sub-purchaser pays the purchaser for the same interest. There are two disposals, one by the seller to the purchaser and one by the purchaser to the sub-purchaser.

55. I consider therefore that the reasoning of the Special Commissioners is correct and I would dismiss the appeal.

Lord Justice Goldring:

56. I agree.

Lord Neuberger of Abbotsbury:

57. I have reached the same conclusion, but because I reach it with some regret, and also out of deference to the clear and concise arguments which we heard on behalf of each party, I shall briefly explain my thinking.
58. In very summary terms, the relevant facts, which are more completely set out by Lawrence Collins LJ at [8] to [17], are as follows. By a contract made on 2 April 1993, Mr Underwood agreed to sell the Property for £400,000 to Rackham Ltd, who, at the same time, granted him an option to re-purchase the Property for £420,000. Before that contract had been completed, Mr Underwood exercised the option, and, as a result, Rackham entered into a contract on 29 November 1994 to sell the Property back to him. On the same day, Mr Underwood agreed to sell the Property to Brickfields Estates Ltd for £600,000.
59. Mr Underwood's instructions to his solicitor, Mr Cunningham, on 29 November 1994, were (a) to exercise the option he had been granted in 1993 by Rackham Ltd to repurchase the Property for £420,000 from Rackham Ltd; (b) to complete the repurchase of the Property from Rackham Ltd; and (c) to sell on the Property to Brickfields for £600,000. Had those steps been performed, it would have been necessary, before completing the repurchase by Mr Underwood from Rackham Ltd at £420,000, to have completed the sale of the Property by Mr Underwood to Rackham Ltd for £400,000 under the 1993 contract.
60. With the perfectly proper aim of helping his client save stamp duty, Mr Cunningham decided to short-circuit the arrangements by not transferring the Property from Mr Underwood to Rackham Ltd for £400,000 and then retransferring it back for £420,000 to Mr Underwood, to enable him to transfer it on to Brickfields for £600,000. Instead, on 30 November 1994, Mr Cunningham simply transferred the property from Mr Underwood to Brickfield for £600,000, and, effectively setting off the £400,000 due from Rackham Ltd to Mr Underwood against the £420,000 due the other way, ensured that the balancing payment of £20,000 was accounted for in Rackham Ltd's books.
61. Mr Underwood contends that, in these circumstances, section 28 of the Taxation of Chargeable Gains Act 1992 applies to his disposal of the Property to Rackham Ltd for £400,000 under the April 1993 contract. Section 28(1) provides that "where an asset is disposed of and acquired under a contract", then "the time at which the disposal and acquisition is made is the time the contract is made", and not "the time at which the asset is conveyed or transferred." The question on this appeal is whether, bearing in mind the previous contractual history and Mr Cunningham's instructions, the arrangements on 30 November 1994 whereby the Property was transferred by Mr Underwood to Brickfields for £600,000 and Mr Underwood was recorded as a debtor in the books of Rackham Ltd in the sum of £20,000, involved the Property being

“dispose[d]” of by Mr Underwood and “acquired” by Rackham Ltd, under the 1993 contract.

62. It was rightly, indeed inevitably, common ground that, in order for Mr Underwood to succeed on this appeal, he must establish that he disposed of the Property, or at the very least some interest in the Property, to Rackham Ltd on 30 November 1994. In *Berry v Warnett* [1982] 1 WLR 698, 701, Lord Wilberforce said that, save in cases such as deemed disposals, the word “disposal” in the Capital Gains Tax legislation should bear its “normal meaning”. As a matter of ordinary language, it is very difficult to see how it could be said that there was either a disposal of any asset (save, perhaps, the £20,000 balancing payment) as between Mr Underwood and Rackham Ltd on 30 November 1994. On that date, legal title in the Property, which had been vested in Mr Underwood at all times since before the 1993 contract, was simply transferred by him to Brickfields. If any interest in the Property was ever disposed of by Mr Underwood to Rackham Ltd, it would have been through the grant of some sort of equitable interest, when the 1993 contract was entered into. It is unnecessary to decide whether any such interest did pass then, because, even if it did, it would get Mr Underwood nowhere. His whole argument rests, indeed depends, on an asset being disposed of and acquired at the date of completion as opposed to the date of contract.
63. I accept that it is possible to treat the “netting off” as between Mr Underwood and Rackham Ltd, through the payment of the £20,000, as being a payment of the £400,000 to Mr Underwood and a payment of the £420,000 to Rackham Ltd (see e.g. the analysis in *Coren v Keighley* (1972) 48 TC 370, 375). To that extent, I would agree with the Special Commissioners rather than Briggs J (although the difference between their respective analyses is very refined and pretty slight). While, as Briggs J said, it is a somewhat artificial analysis, the two contracts between Mr Underwood and Rackham Ltd were, in my opinion, performed, rather than cancelled, by the payment of the £20,000.
64. However, in agreement with Mr Tidmarsh QC for the Revenue, it seems to me that the fact that one can treat the payment of £20,000 as representing the performance of the two contracts does not lead to the conclusion that there was a disposal of the Property by Mr Underwood to Rackham Ltd or, indeed, a disposal back from Rackham Ltd to Mr Underwood. All that the netting off achieved was to free the Property from Rackham Ltd’s rights, which included an equitable interest. In other words, the fact that the two contracts between Mr Underwood and Rackham Ltd were “performed” on 30 November 1994 does not necessarily mean that the Property was disposed or acquired (as between the two contracting parties) on that date. Viewed from the perspective of the Judge, artificiality can only be carried so far.
65. The authorities have been fully considered by Lawrence Collins LJ and there is nothing that I wish to add about them, save in relation to Lord Russell’s statement in *O’Brien v Benson’s Hosiery (Holdings) Ltd* [1980] AC 562, 573 that “the mark of an asset” is “something which can be turned to account”. Mr Soares, who appears for Mr Underwood, says his client disposed of the Property to Rackham Ltd by turning it to account on 30 November. In my view, that is not correct: if he turned anything to account, as against Rackham Ltd on 30 November 1994, it was the 1993 contract.
66. I should also mention Mr Soares’s point that, if we dismiss this appeal, it would call into question the validity of the standard “bed and breakfast” arrangements entered

into by the holder of an asset (normally a parcel of shares) to crystallise a capital loss by selling, and immediately repurchasing, the asset. In such cases, there are two reciprocal transactions, under which the original holder of the asset can fairly be said to dispose of his interest in the asset, and immediately thereafter to re-acquire it. In this case, it is clear that there were two transactions, the 1993 contract and the 1994 contract, and the issue is not whether those two contracts operated as disposals, but whether Mr Underwood can invoke section 28(1) to alter the statutorily deemed time of any disposal (see *Jerome v Kelly* [2004] UKHL 25, [2004] 1 WLR 1409, [9] and [33]). That depends on whether the Property was disposed of by Mr Underwood to Rackham Ltd on 30 November 1994.

67. I also accept that, where an asset is the subject of an initial contract and a sub-contract, and, on completion of the two contracts, the buyer directs the seller to transfer direct to the sub-buyer, there are two disposals, one under each contract. However, that is because it can fairly be said that the asset is disposed of under each contract, albeit that the mechanics of the transaction involve an acceleration, or conflation, of the two disposals. The essential point is that, on completion, as between the buyer and seller, the asset is “disposed of and acquired under the [initial] contract” (and, indeed, under the sub-contract) whereas that cannot be said about the Property under the 1993 contract (or, indeed, under the 1994 contract). An important difference between the sub-sale case and this case is that, here, the contractual arrangements between Mr Underwood and Rackham Ltd formed no part of the contractual chain, or what one might call the chain of equitable title, between the initial seller of the Property (Mr Underwood) and its ultimate buyer (Brickfields). Thus, Rackham Ltd, unlike the buyer/sub-seller in the sub-sale case, was not in a position to direct the sale of the Property to Brickfields (or, thus, to turn the Property to account)
68. I reach this conclusion with regret because, had Mr Cunningham carried out his client’s instructions to the letter, it appears to be undisputed that Mr Underwood could have been entitled to rely on section 28(1). I should add that I cannot accept that the nature of Mr Underwood’s instructions dictates a different result from that which I have reached. The issue in the present case has to be resolved by analysing what actually happened.
69. The Revenue advanced a further point (not raised below), based on the fact that any completion of the 1993 contract took place, pursuant to a purported agreement, earlier than the contractual completion date. The essence of the argument is that any purported agreement to effect completion early would have fallen foul of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, so, in any event, any disposal by Mr Underwood and acquisition by Rackham Ltd would not have been “under [the 1993] contract” (see *McCausland v Duncan Lawrie Ltd* [1996] 1 WLR 38). It is unnecessary to decide the point, but I am very sceptical about its correctness. Assuming that the basis for the point was otherwise sound, I would have thought that the words “under a contract” are apt to cover a disposal to which the parties are committed by virtue of a contract, even when they complete that contract early as a result of a non-binding agreement to do so.

For these reasons, which are no more than a coda to the more fully expressed judgment of Lawrence Collins LJ, with which I wholly agree, I would dismiss this appeal.