

Neutral Citation Number: [2008] EWHC 108 (Ch)

Case No: CH/2007/0415

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31/01/2008

**Before :**

**MR JUSTICE BRIGGS**

**Between :**

**P J UNDERWOOD**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HM REVENUE  
AND CUSTOMS**

**Respondents**

**Mr Patrick C Soares and Miss Hui Ling McCarthy** for the Appellant

**(Mr Christopher Tidmarsh QC** instructed by **Solicitor of HMRC, Somerset House, East Wing, London WC2R 1LB)** for the Respondent

Hearing dates: 23<sup>rd</sup> - 24<sup>th</sup> January 2008

**Judgment**

## **Mr Justice Briggs :**

1. This is an appeal from a decision (“the Decision”) of the Special Commissioners (Mr T Wallace and Dr A N Brice) promulgated on 16<sup>th</sup> May 2007 whereby they dismissed an appeal by Mr P J Underwood against two estimated assessments to capital gains tax for the years ending 5<sup>th</sup> April 1993 and 5<sup>th</sup> April 1995.
2. The issue in the case is whether the manner in which Mr Underwood and a company known as Paul Rackham Limited (“Rackham”) dealt with the rights and obligations arising from the simultaneous existence of two contracts for the sale and repurchase of land in Thetford, Norfolk (“the Property”), for different prices, gave rise to a disposal by Mr Underwood of his beneficial interest in the Property under the contract of sale, such that it would pursuant to section 28 of the Taxation of Chargeable Gains Act 1992 (“the 1992 Act”) be deemed to have been disposed of at the time of the contract of sale. The respondent (“HMRC”) has contended throughout that it did not, and the Special Commissioners agreed. Mr Underwood claims that it did.

### **THE FACTS**

3. The issues raised on this appeal involve no contentious questions of primary fact. Rather, they concern the correct legal analysis of how the parties to those two contracts dealt with them, and the application of the 1992 Act to their dealings, once correctly analysed. The relevant facts are to be found set out in admirable detail in paragraphs 8 to 33 of the Decision. While those paragraphs constitute worthwhile background reading, the facts relevant to this appeal may be summarised as follows.
4. Mr Underwood acquired the Property on 16<sup>th</sup> July 1990 for £1.4 million, with the assistance of a loan of £1 million from Royal Bank of Canada (“the Bank”). Not long thereafter the market for property of that type went into serious decline, such that by March 1993 it was professionally valued as having an open market value of £400,000 and a forced sale value of £290,000.
5. By a contract (“the 1993 Contract”) dated 2<sup>nd</sup> April 1993 Mr Underwood agreed to sell the Property to Rackham as beneficial owner, with vacant possession, for £400,000, with a contractual completion date of 31<sup>st</sup> December 1993. During the year of assessment which ended three days later he had made substantial chargeable gains on other assets and, although this affected only the timing of the sale rather than the decision to sell, he hoped to crystallise a substantial loss upon performance of that contract. In his tax return for the year ending 5<sup>th</sup> April 1993 he claimed a loss in relation to the Property of £1.174 million odd.
6. On the same day as the 1993 Contract was made, Mr Underwood and Rackham entered into an option agreement (“the Option”) by which Rackham granted to Mr Underwood the right, by notice in writing served at any time before 31<sup>st</sup> December 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, plus 10% of any difference between the sum thus identified and the value of the Property on the date of exercise of the option (to be

determined if necessary by an expert). The premium for the grant of the option was £1.

7. The Decision affords no explanation why Rackham was prepared by the combination of the 1993 Contract and the Option to incur all the risks of a fall in value of the Property, while at least potentially limiting itself to only a 10% share of any increase in value. Nonetheless, and after full inquiry by HMRC, it was common ground that the 1993 Contract and the Option were to be treated as arm's length commercial transactions.
8. 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 agreed to extend the completion date to 31<sup>st</sup> December 1994.
9. 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. There was not even a deposit paid on exchange.
10. By November 1994 Mr Underwood had decided that the best solution to his continuing financial difficulties was to sell the Property to Brickfields Estates Limited ("Brickfields"), a company with which he was connected, and which he controlled, for £600,000. For that purpose, he needed to extricate the Property from the 1993 Contract, and the Option offered a ready means to achieve that objective, albeit at a price. Since Rackham 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 his net cost of exercising the option and re-acquiring the Property would be £20,000. After lengthy negotiations with Rackham, rather than simply send an option exercise notice, Mr Underwood and Rackham entered into a contract for the re-purchase of the Property for £420,000, on 29<sup>th</sup> November 1994 ("the 1994 Contract"). On the same day, Mr Underwood exchanged contracts ("the Brickfields Contract") for the sale of the Property to Brickfields for £600,000.
11. It is 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. Although the completion date was left blank in the 1994 Contract, since the Option provided for completion 28 days after exercise, the purchase and re-purchase of the Property had by 29<sup>th</sup> November been contracted to be completed more or less simultaneously, at the end of December 1994.
12. Mr Underwood, Rackham, Brickfields and the mortgagees of the Property all used the services of the same solicitor, a Mr Cunningham, who drafted all the relevant contracts. It appears 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.

13. Since Mr Cunningham's solution to that question lies at the heart of the case, it is worth quoting in full the Special Commissioners' findings as to what he then did, in paragraphs 28 and 30 of the Decision:

“28. Mr Cunningham, who was the solicitor acting for the Appellant, 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 the Appellant to Rackham Ltd to complete the 1993 contract, one from Rackham Ltd to the Appellant under the exercise of the option, and one from the Appellant 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 the Appellant throughout, the Appellant was able to execute just one transfer of the property direct to Brickfields. The position as between the Appellant 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 the Appellant for the property under the option agreement (£420,000). Mr Cunningham therefore prepared a transfer of the property from the Appellant 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 the Appellant to sell to Brickfields.

...

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

14. Those steps left Mr Underwood free to complete his sale of the Property to Brickfields for £600,000, which he did on 30<sup>th</sup> November 2004.

### **ANALYSIS**

15. The question is whether those facts disclose a chargeable disposal of Mr Underwood's interest in the Property which, pursuant to section 28, is to be deemed to have occurred on the date of the 1993 Contract. Section 28(1) provides as follows:

“(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).”

It is common ground that section 28(1) (formerly section 27(1) of the Capital Gains Tax Act 1979 (“the 1979 Act”)) is nothing more nor less than a deeming provision as to time. As Lord Hoffmann put it (in relation to section 27(1) of the 1979 Act) in Jerome v. Kelly [2004] 1 WLR 1409 at 1412-3:

“Whatever may be the explanation, 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 had happened at the time of the contract. The time of the contract is deemed to be the time of the 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.”

16. The Capital Gains Tax legislation does not define what is meant by a disposal, but section 60 of the 1992 Act does have the effect of directing attention away from the transfer of bare legal title to an asset and towards the transfer of beneficial ownership. In the words of Lord Nicholls in Kirby v. Thorn EMI [1988] 1 WLR 445 at 450F:

“... the basic structure of the tax is of a charge on gains accruing to a person on disposal of an asset by him. There is no statutory definition of disposal but, having regard to the context, what is envisaged by that expression is a transfer of an asset (i.e. of ownership of an asset) as widely defined, by one person to another. ”

This therefore means the beneficial ownership rather than bare legal title.

17. In the case of contracts for the sale of land, the question precisely when beneficial ownership passes from vendor to purchaser is complicated by the traditional analysis that, from the moment of the contract, the vendor becomes in certain respects a trustee for the purchaser: see Lysaght v. Edwards (1876) 2 Ch D 499, 506. There is a useful summary of this jurisprudence in the speech of Lord Walker in Jerome v. Kelly (supra) at paragraphs 30 to 32, on pages 1418 to 1420. For present purposes, it is sufficient to quote his conclusions, in paragraph 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.”

18. It is precisely because section 28(1) of the 1992 Act deems the disposal of the land to have occurred at the date of the contract for its sale that, as Lord Hoffmann observed in the passage which I have already quoted, refined analysis of the stages by which the beneficial interest passes from vendor to purchaser in a contract which has completed is unnecessary for Capital Gains Tax purposes. In Jerome v. Kelly the House of Lords was dealing with a contract which had completed, and the question was by whom the disposal had been made, having regard to dealings which took place between contract and completion. In the present case, the 1993 Contract did not proceed to completion in any conventional sense, by conveyance of the legal estate to Rackham. It therefore raises a question which did not have to be considered in Jerome v. Kelly, namely whether there ever was a disposal and an acquisition under the 1993 Contract, within the meaning of section 28(1), so as to give rise to a back-dating of that disposal to the 1993 year of account. Put more simply, the question is whether there was a disposal under the 1993 Contract at all, by means of a transfer of Mr Underwood’s beneficial interest in the Property to Rackham.
19. It has been common ground at all times in this litigation that there cannot have been a transfer of beneficial ownership in the Property under the 1993 Contract unless, and until, payment of £400,000 had been made by Rackham to Mr Underwood pursuant to that contract. Before the Special Commissioners, HMRC’s preferred case was that, on an analysis of the primary facts which were not in dispute, all that had been paid was £20,000, by Mr Underwood to Rackham. Mr Underwood’s case was that Rackham had paid £400,000 to him, and that he had simultaneously paid £400,000 of the £420,000 purchase price due under the 1994 Contract to Rackham, 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.
20. Both before the Special Commissioners and before me, Mr Soares relied as the basis of that analysis on Coren v. Keighley (1972) 48 TC 370, in which, basing himself on 19<sup>th</sup> century authorities, Ungood-Thomas J held, at page 375, that:

“... if two cross-demands for money immediately payable are honestly set-off against each other without the formality of handing the money over and handing it back again, each such set-off would substantiate a plea of payment in cash and a set-off would constitute such payment.”
21. It appears from paragraphs 41, 46 and 49 of the Decision that the Special Commissioners accepted this set-off analysis, and also Mr Soares’ consequential

submission 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. It appears that, by the end of the hearing, this analysis had even been conceded on behalf of HMRC.

22. Nonetheless, this failed to carry the day for Mr Underwood, because the Special Commissioners concluded, notwithstanding payment of the purchase price in full under the 1993 Contract, that no beneficial interest in the Property ever passed under that contract to Rackham, capable of constituting a disposal by Mr Underwood and an acquisition by Rackham “under the contract” within the meaning of section 28(1). Their reasoning, which was placed in the forefront of HMRC’s submissions on this appeal, was that since the payments both occurred simultaneously by way of set-off, there was not even a moment in time (or *scintilla temporis*) when the beneficial interest in the Property vested in Rackham. In substance, it never moved from Mr Underwood at all. As they put it in paragraph 49 of the Decision:

“... 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 the Appellant under the contract of 29 November 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 had paid the Appellant but the Appellant had not paid Rackham Ltd.”

In reaching that conclusion the Special Commissioners drew some comfort, at HMRC’s invitation, with the *scintilla temporis* analysis in Abbey National Building Society v. Cann [1991] 1 AC 56 and the ‘*uno ictu*’ analysis of a sale and leaseback transaction in Sargaison v. Roberts [1969] 1 WLR 951, although neither of them were concerned with the identification of a disposal for capital gains tax purposes.

23. For most of the hearing before me, (and in their skeleton arguments) Mr Soares and Mr Tidmarsh QC for HMRC adopted without challenge the Special Commissioners’ analysis that the primary facts disclosed performance of the 1993 and 1994 Contracts, in each case by payment in full of the respective purchase prices. Mr Soares made, in summary, three main points. First, once it was accepted that Mr Underwood had paid £420,000 in performance of a contract to re-purchase the Property, it inevitably followed that Rackham had “turned an asset to account” within the meaning identified by Lord Russell in O’Brien v. Benson’s Hosiery (Holdings) Limited [1980] AC 562 at 573D. That he submitted can only have been the beneficial interest in the Property. It followed that, consistent with general principles relating to the passing of beneficial interests under contracts for the sale of land, Mr Underwood’s original beneficial interest in the Property must have passed, however momentarily, to Rackham to make it worth Mr Underwood paying £420,000 to get it back. If so, the beneficial interest passed under the 1993 Contract when it was performed by payment of £400,000 by Rackham, and there was therefore both a disposal and an acquisition under that contract for the purposes of section 28.
24. Secondly, he submitted that there was no need to be concerned about the inability to identify a moment in time during which the beneficial interest rested with Rackham. He pointed to the observation of Lord Walker in Jerome v. Kelly (supra) at paragraph

42 that, contrary to the view of the Court of Appeal in the same case, there was nothing absurd in the context of capital gains tax in recognising that the disposal of an asset might precede its acquisition. If that was not absurd, why should not a simultaneous disposal and acquisition be equally capable of recognition?

25. Mr Soares' third point was that the Special Commissioners' refusal to recognise a disposal of the beneficial interest on the sale and re-purchase was inconsistent with the common-place recognition for capital gains tax purposes of disposals and re-acquisitions in bed and breakfast transactions, pointing to the implicit approval of that analysis by the House of Lords in MacNiven v. Westmoreland Investments Limited [1998] STC 1131 at 1143h to 1144b, and to an extract from Inland Revenue Manual in which it was suggested, at least by implication, that a transfer of beneficial ownership could be assumed to have occurred provided that the sale and re-purchase contracts were not made at the same time.
26. It is convenient to take those three points in reverse order. Bed and breakfast transactions are used by the owner of an asset which has, due to a fall in value, an unrealised loss, in order to crystallise an allowable loss against chargeable gains arising on disposal of other assets in the same (or later) year of account, without permanently disposing of the asset. Typically, the asset is sold late on one day, and re-acquired under a separate, pre-arranged contract on the following day at the same price. Where the subject matter consists of quoted shares, it is common for there to be no transfer and re-transfer of legal title, for example where the sale and re-purchase is transacted through a member of the Stock Exchange within the same Stock Exchange period of account. Mr Tidmarsh showed me another part of the HMRC Manual which demonstrates that HMRC will generally require to be satisfied that:

“The sales were real sales, fully paid for, with the stocks or shares held overnight at the risk of the purchaser without binding legal obligation to re-purchase and that any stamp duty arising has been paid.”
27. There is no reported case in which the question whether a claimed bed and breakfast transaction included the necessary disposal and re-acquisition for capital gains tax purposes has been decided. In MacNiven, bed and breakfast transactions were simply identified as an example of transactions which, because of their tax-driven purpose, their circular nature and their artificiality might prima facie attract the Ramsay principle, but which were never challenged on that basis because they recognised, and crystallised, a real loss. For the purpose of analysis, it was assumed *sub silentio* that the typical bed and breakfast transaction did involve the necessary disposal and re-acquisition.
28. Where the sale and re-purchase of an asset under a bed and breakfast transaction has been “properly paid for”, and where for however short a period the beneficial interest in the asset has therefore resided with the buyer before re-sale, as contemplated by the extract from the HMRC Manual which I have quoted above, there can be no doubt that such a disposal and re-acquisition occurred.
29. Mr Soares pointed to the fact that, far from there being an overnight sale and re-purchase, in the present case the two contracts were some twenty months apart. In my judgment that comparison focuses on the wrong event. The requirement in a bed and

breakfast transaction for the contracts of sale and re-purchase to be separated in time may be a necessary condition but is not a sufficient condition of its effectiveness for tax purposes. The necessary condition is that the two transactions must have involved a disposal and re-acquisition of the asset, by the passing and re-passing of the beneficial interest. There is therefore nothing, in my judgment, in Mr Soares' third point.

30. Nor in my judgment does Mr Underwood avoid his difficulties by reference to Lord Walker's observation that there is nothing inconceivable about a disposal preceding an acquisition under section 28, in Jerome v. Kelly. In the passage upon which Mr Soares relied, Lord Walker was not contemplating with equanimity the notion that a disposal might precede the acquisition in fact, but merely that it might be deemed to do so by virtue of the deemed back-dating of the disposal in section 28. He was expressing his dissent from the following passage in the judgment of Jonathan Parker LJ in the Court of Appeal (reported at [2003] STC 206 at 220):

“In my judgment it is implicit in section 27(1) that, consistently with the general proposition stated above and with the observations of Nicholls LJ in Kirby v. Thorn EMI plc [1987] STC 621 ... it applies only where, at the date of the contract, the asset which is the subject of the disposal is owned by the contracting party. Otherwise the sub-section would be liable to lead to what I would regard as the absurd result that, in the case of a contract for the sale of an asset yet to be acquired by the contracting vendor, the disposal of the asset for capital gains tax purposes would precede its acquisition.”

Lord Walker's response was as follows: reported at [2004] 1 WLR 1409, at 1422:

“The first difficulty (quite apart from section 52(1)) is the notion that Codan should be treated as making a disposal on 16 April 1987 of an asset which it acquired on the 15 December 1989. The Court of Appeal regarded as absurd the notion that the disposal of an asset for capital gains tax purposes might precede its acquisition. But that is just what happens whenever a speculative investor sells short (that is, contracts to deliver shares which he does not then own) in the hope of making a gain by acquiring the shares at a lower price before the time for delivery under his sale contract. That may or may not be a socially or economically useful activity but it is not absurd that any gain which he makes ... should be taxed by deducting the (later) acquisition price from the (earlier) sale price.”

It is in my judgment plain that both Jonathan Parker LJ and Lord Walker in their differing views were addressing purely the acceptability or otherwise of the deemed back-dating of actual disposals and acquisitions to the dates of their respective contracts.

31. It follows that nothing in Jerome v. Kelly justifies the notion that a person can in fact achieve a disposal (i.e. transfer of ownership) of an asset which he has yet to acquire, even though he may of course contract to do so. *Nemo dat quod non habet*. The fact

that, in the eyes of equity, difficulties of that kind may in appropriate cases be overcome by an aspect of the law of estoppel, where a vendor sells and receives payment for something before he later acquires title to it, is in my judgment neither nor there.

32. Mr Soares' first point, that if Rackham received £420,000 by way of performance of the 1994 Contract this can only have been because it turned to account a beneficial interest in the Property, disposed of under the 1993 Contract, is however of considerable force. On the hypothesis that Mr Underwood really paid £420,000 under the 1994 Contract, Mr Tidmarsh was unable to explain what asset other than a beneficial interest in the Property can have been turned to account by Rackham. It cannot have been the value to Rackham on the 1994 Contract itself. Since the Property was by then worth £600,000 even on a forced sale, a contract to sell it for £420,000 was hardly an asset of value. Indeed, its negative value reflected the rather uncommercial terms of the Option by which Rackham's interest in any improvement in value of the Property above £400,000 was limited to a mere 10%. Nor can the asset turned to account have been the combined rights of Rackham under the 1993 and 1994 Contracts which, taken together, afforded it the right to acquire the Property for £400,000, alongside a concomitant obligation to sell it again at the same time for £420,000. The combined value of those rights was of course £20,000.
33. In my judgment, the problem with the first of Mr Soares' submissions is not its lack of logic as an extrapolation of the assumption that the full purchase prices were paid under both contracts, but rather the extreme unreality of that assumption itself. It depends entirely on accepting without critical analysis the theory that the primary facts as to what took place on 29<sup>th</sup> November 1994 disclosed a payment and cross-payment of £400,000 by means of a self-cancelling set-off, in full performance of the purchase price obligation in the 1993 Contract, and in performance (bar £20,000) of the purchase price obligation in the 1994 Contract. Without the set-off theory, there was no payment of the purchase price under the 1993 Contract, or anything else which could justify the notion that a beneficial interest in the Property ever passed to Rackham. Equally, if there was no payment of £400,000 by way of set-off by Mr Underwood to Rackham under the 1994 Contract, then Rackham did not turn to account an asset for £420,000 by the combination of that payment and the £20,000 left outstanding as a debt. It merely turned to account an asset worth £20,000.
34. In my judgment, nothing in the primary findings of fact by the Special Commissioners, nor for that matter in the evidence upon which they were based, justifies 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. Both Mr Cunningham and Mr Paul Rackham of Rackham Limited gave evidence to the Special Commissioners in the form of witness statements which were not the subject of cross examination. Neither of them referred to any payment and cross-payment of £400,000 or to any set-off. Both spoke in terms of recognising the obvious commercial reality that, once the Option had been exercised by the creation of the 1994 Contract, the net effect of the existence of those two contracts was to yield a profit of £20,000 to Rackham, and that all that needed to be done before Mr

Underwood could complete his sale to Brickfields for £600,000 was for him to pay Rackham £20,000 (or in the event promise to pay by way of a debt). That is all that was done. 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. The Special Commissioners implicitly recognised that this was the real outcome in their finding in paragraph 28 of the Decision, that:

“The position as between the Appellant and Rackham Ltd could be settled by the payment of the sum of £20,000 by the 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 the Appellant for the property under the option agreement (£420,000).” (my underlining)

35. Before leaving this point, I must however deal with the twin obstacles to what I regard as the true analysis of the primary facts, constituted first by Mr Soares’ reliance on Coren v. Keighley (supra) and secondly by what appears to have become a concession by HMRC during the hearing before the Special Commissioners, and for most but not all of this appeal, that the set-off analysis was indeed correct.
36. In Coren v. Keighley, Ungood-Thomas J accepted in his identification of the relevant set-off principle in the passage which I have already quoted that the cross-demands for money should be “immediately payable”. In the case before him they were, because the cross-demands in question were the purchaser’s obligation to pay the purchase price for land actually transferred by a land registry transfer on the completion date and the vendor’s obligation to advance part of the purchase price to the purchaser on a ten year loan, to be secured by a legal charge. Plainly, both the demand and cross-demand were, on the completion date, immediately due and payable, since the sale and mortgage contract were, in all other respects, fully performed on that day by transfer of the land and the execution of the legal charge.
37. In the present case, as it seems to me, the position is the exact opposite. On 29<sup>th</sup> November 2004, 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. Performance by transfer of the Property was simply abandoned. Indeed, it seems to me unlikely that there was ever an intention actually to complete or perform the 1994 Contract. The answer therefore to the point based on Coren v. Keighley is simply that, on the primary facts found by the Special Commissioners, neither of the two sums of £400,000 and £420,000 was immediately due on 29<sup>th</sup> November.
38. As for the concession that the set-off analysis was correct, this seems to me to have been no more than a concession as to legal analysis which cannot be allowed to stand in the way of the correct analysis, in particular, if it would otherwise produce the wrong result. Of course, the withdrawal of such a concession must not be allowed to cause an injustice. In the present case Mr Soares had a full opportunity to address, for the first time before me, the consequences of its withdrawal at a late stage by HMRC, and the possible costs consequences remain to be decided after hearing submissions.

39. For as long as the present case was argued on the basis of an assumption that the primary facts disclosed a mutual set-off of payments of £400,000 by way of performance of the two contracts, I became increasingly oppressed by the apparently irreconcilable tension between on the one hand, Mr Soares' submission that Mr Underwood could only have paid £420,000 for a beneficial interest in the Property that must therefore have passed, however momentarily, to Rackham, and on the other hand the sensible conclusion of the Special Commissioners that it was both in theory and in practice difficult to see how any such beneficial interest did actually pass, in the sense necessary to constitute a disposal of it for Capital Gains Tax purposes. Disposal is, after all, a concept to be addressed by the application of common sense.
40. Once however the set-off analysis is revealed to be an artificial and fallacious construct, and that in reality all that happened was that the two contracts were settled by payment of a £20,000 difference, without any substantial performance of either of them, then the tension disappears. There was no performance of either contract, there was therefore no transfer of the beneficial interest in the Property under either contract, or at all. 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. It follows that, for reasons different from those of the Special Commissioners, this appeal must be dismissed.