Appeal number
UT/2015/0115

Capital Gains Tax – forfeited deposit on rescinded contract for purchase of land – whether contractual rights a chargeable asset – whether disposal – whether an allowable loss

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ANTHONY HARDY **Appellant**

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

Tribunal: The Hon Mr Justice Arnold and Judge Greg Sinfield

Sitting in public at the Rolls Building, Fetter Lane, London EC4A 1NL on 4 July 2016

Rory Mullan, instructed by direct access, for the Appellant

Kate Balmer, instructed by the Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal from a decision of the First-tier Tribunal (Tax) (Tribunal Judge Malachy Cornwell-Kelly and Duncan McBride) dated 3 June 2015 [2015] UKFTT 250 (TC) dismissing an appeal by Anthony Hardy against a closure notice issued by the Commissioners of Her Majesty's Revenue and Customs ("HMRC") under section 28A of the Taxes Management Act 1970 disallowing a claim to losses for capital gains tax purposes in respect of the deposits on the purchase of two properties which Mr Hardy forfeited when he was unable to complete the contracts. The appeal is confined to only one of the deposits considered by the First-tier Tribunal.

The facts

2. The facts are not in dispute and were clearly and succinctly summarised by the First-tier Tribunal in its decision at [3]-[6]. Given the way in which counsel for Mr Hardy put his case on this appeal, however, we shall give a slightly fuller account.

3. On 7 May 2008 Mr Hardy and his wife Grazyna Chont-Rudzka (collectively "the Buyers") entered into a contract ("the Contract") with St James Group Ltd ("the Seller") for the off-plan purchase of a leasehold property situated at Plot No 187 in a development at the former Queen Mary Hospital, Roehampton Lane, Roehampton, London SW15 ("the Property"). The Buyers' intention was to let the Property for rental.

4. The Contract incorporated the Standard Conditions of Sale (Fourth Edition) with some minor exclusions (clause 1). The Contract provided for the Vendor to erect the Property as soon as reasonably practicable (clause 2.1). Completion was to take place not less than 10 working days after service of notice in writing by the Seller's solicitors on the Buyers or their solicitors that the Property had been, or would be on the day the notice was due to take effect, substantially completed (clause 3.1).

5. The purchase price was £720,000 (Particulars paragraph 9). A deposit of 10% of the purchase price (i.e. £72,000) was required to be paid on the date of the Contract (Particulars paragraph 6 and clause 6). The Buyers duly paid the deposit. On completion, the deposit was to be credited against the purchase price (Particulars paragraph 9 and Standard Conditions 6.4).

6. The benefit of the Contract was not assignable by the Buyers (clause 7.4 and Standard Condition 1.5).

7. Completion was initially scheduled to take place on 22 May 2009. The Buyers were able to raise 75% of the purchase price (£540,000) by way of mortgage. This left a shortfall of 15% (£108,000), plus stamp duty and legal fees. The Buyers intended to raise the necessary shortfall by selling two other properties which they had let for rental situated at Flat 4, Phillimore Place and 34 Darling

House, Twickenham ("the Existing Properties"), but they were unable to do so in time to meet the completion date and sought extra time to raise the money.

8. Standard Condition 6.8 provides, so far as relevant:

> "**6.8 Notice to complete**
>
> **6.8.1** At any time on or after completion date, a party who is ready, able and willing to complete may give the other a notice to complete.
>
> **6.8.2** The parties are to complete the contract within ten working days of giving a notice to complete, excluding the day on which the notice is given. For this purpose, time is of the essence of the contract.
>
> …"

9. Standard Condition 7.2 provides, so far as relevant:

> "**7.2 Rescission**
>
> If either party rescinds the contract:
>
> (a) Unless the rescission is a result of the buyer's breach of contract the deposit is to be repaid to the buyer with accrued interest,
>
> …"

10. Standard Condition 7.5 provides, so far as relevant:

> "**7.5 Buyer's failure to comply with notice to complete**
>
> **7.5.1** If the buyer fails to complete in accordance with a notice to complete, the following terms apply.
>
> **7.5.2** The seller may rescind the contract, and if he does so:
>
> (a) he may:
>
> (i) forfeit and keep any deposit and accrued interest,
>
> (ii) resell the property and any chattels included in the contract,
>
> (iii) claim damages,
>
> …
>
> **7.5.3** The seller retains his other rights and remedies."

11. The Vendor served a notice to complete on the Buyers on 27 May 2009. The Buyers were unable to complete. Accordingly, on 12 June 2009 the Vendor exercised its right to rescind the Contract and keep the deposit.

12. Completion of the sales of the Existing Properties took place later in the same tax year, giving rise to capital gains.

13. Mr Hardy filed a self-assessment return for the year ended 5 April 2010 on 15 July 2012. He declared the entire gains on the Existing Properties,

notwithstanding that these had been in the names of his wife and himself. Mr Hardy sought to set the loss he had suffered on the Contract through forfeiture of the deposit against those capital gains.

14. An enquiry was opened by HMRC on 1 May 2013 and a closure notice issued on 31 October 2013, disallowing Mr Hardy's claim to capital losses.

The legislative framework

15. Section 1(1) of the Taxation of Chargeable Gains Act 1992 ("TCGA92") provides:

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

16. Section 2(2) TCGA92 provides:

> "Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting—
> (a) any allowable losses accruing to that person in that year of assessment, and
> (b) so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable losses accruing to that person in any previous year of assessment (not earlier than the year 1965-66)."

17. Section 16 TCGA92 provides, so far as relevant:

> "(1) Subject to sections 261B, 261D and 263ZA and except as otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed.
>
> (2) Except as otherwise expressly provided, all the provisions of this Act which distinguish gains which are chargeable gains from those which are not, or which make part of a gain a chargeable gain, and part not, shall apply also to distinguish losses which are allowable losses from those which are not, and to make part of a loss an allowable loss, and part not; and references in this Act to an allowable loss shall be construed accordingly.
>
> (2A) A loss accruing to a person in a year of assessment shall not be an allowable loss for the purposes of this Act unless, in relation to that year, he gives a notice to an officer of the Board quantifying the amount of that loss; and sections 42 and 43 of the Management Act shall apply in relation to such a notice as if it were a claim for relief.
> …"

18. Section 21 TCGA92 provides:

> "(1) All forms of property shall be assets for the purposes of this Act, whether situated in the United Kingdom or not, including—
>
> (a) options, debts and incorporeal property generally, and
>
> (b) currency, with the exception (subject to express provision to the contrary) of sterling and
>
> (c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired.
>
> (2) For the purposes of this Act—
>
> (a) references to a disposal of an asset include, except where the context otherwise requires, references to a part disposal of an asset, and
>
> (b) there is a part disposal of an asset where an interest or right in or over the asset is created by the disposal, as well as where it subsists before the disposal, and generally, there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of."

19. Section 24(1) TCGA92 provides:

> "Subject to the provisions of this Act and, in particular to sections 140A(1D), 140E(7) and 144, the occasion of the entire loss, destruction, dissipation or extinction of an asset shall, for the purposes of this Act, constitute a disposal of the asset whether or not any capital sum by way of compensation or otherwise is received in respect of the destruction, dissipation or extinction of the asset."

20. Section 28 TCGA92 provides:

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

21. Section 38 TCGA92 provides, so far as relevant:

> "(1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to—
>
> (a) the amount or value of the consideration, in money or money's worth, given by him or on his behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to him of the acquisition or, if the asset was not acquired

by him, any expenditure wholly and exclusively incurred by him in providing the asset,

(b) the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset,

(c) the incidental costs to him of making the disposal.

(2) For the purposes of this section and for the purposes of all other provisions of this Act, the incidental costs to the person making the disposal of the acquisition of the asset or of its disposal shall consist of expenditure wholly and exclusively incurred by him for the purposes of the acquisition or, as the case may be, the disposal, being fees, commission or remuneration paid for the professional services of any surveyor or valuer, or auctioneer, or accountant, or agent or legal adviser and costs of transfer or conveyance (including stamp duty or stamp duty land tax) together—

(a) in the case of the acquisition of an asset, with costs of advertising to find a seller, and

(b) in the case of a disposal, with costs of advertising to find a buyer and costs reasonably incurred in making any valuation or apportionment required for the purposes of the computation of the gain, including in particular expenses reasonably incurred in ascertaining market value where required by this Act.

…"

22. Section 144 TCGA92, which is headed "options and forfeited deposits", provides, so far as relevant:

"(1) Without prejudice to section 21, 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.

…

(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."

The First-tier Tribunal's decision

23. Mr Hardy represented himself before the First-tier Tribunal. His argument was that, on entering into the Contract, he had acquired beneficial ownership of the Property, which was an asset, and that, when the Vendor rescinded the Contract, he had (involuntarily) disposed of that asset, suffering a loss in the amount of the forfeited deposit. The First-tier Tribunal did not accept this argument. It held that the present case was covered by the observations of Lord Hoffmann and Lord Walker of Gestingthorpe in *Jerome v Kelly* [2004] UKHL 25, [2004] 1 WLR 1409 at [11]-[12] and [30]-[32] respectively. As the First-tier Tribunal put it at [21]:

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

The appeal

24. Mr Hardy was refused permission to appeal against the First-tier Tribunal's decision both by the First-tier Tribunal and by this Tribunal. Having instructed counsel, Mr Hardy amended his grounds of appeal to advance a new argument. Tribunal Judge Colin Bishopp granted Mr Hardy permission to appeal with respect to his new argument at an oral reconsideration hearing.

25. Mr Hardy's new argument is that, when he entered into the Contract, he acquired valuable contractual rights, which constituted an asset, and that, when the Vendor rescinded the Contract, those contractual rights were extinguished, and hence disposed of, resulting in a loss in the amount of the forfeited deposit.

26. HMRC contend that Mr Hardy's new argument is flawed for three reasons. First, Mr Hardy did not acquire an asset. Secondly, even if he did, he did not dispose of that asset. Thirdly, even if he did, the forfeited deposit does not constitute an allowable loss.

27. It is common ground that, if the forfeited deposit is in principle an allowable loss, the question of how the loss should be allocated will require further consideration by HMRC. As will be appreciated from our account of the facts, both the loss and the gains on the Existing Properties were in fact made by Mr Hardy and his wife jointly, but Mr Hardy declared all the gains in his self-assessment and sought to claim all the loss. HMRC contends that the loss should be allocated between Mr Hardy and his wife. Mr Hardy contends that, in that case, the gains should also be allocated between Mr Hardy and his wife; but he remains content to be accountable for tax on the basis that he was solely entitled to the gains and the loss even though this will result in the payment of a higher amount of tax. Accordingly, in the remainder of this decision we will concentrate upon Mr Hardy and ignore his wife.

General points

28. It is convenient to consider two general points relied upon by counsel for Mr Hardy before turning to the issues identified above.

29. First, he relied upon the approach to the construction of what is now TCGA92 articulated by Lord Wilberforce in *Aberdeen Construction Group Ltd v Inland Revenue Commissioners* [1978] AC 885 at 892-893:

> "The capital gains tax is of comparatively recent origin. The legislation imposing it, mainly the Finance Act 1965, is necessarily complicated, and the detailed provisions, as they affect this or any other case, must of course be looked at with care. But a guiding principle must underlie any interpretation of the Act, namely, that its purpose is to tax capital gains and to make allowance for capital losses, each of which ought to be arrived at upon normal business principles. No doubt anomalies may occur, but in straight-forward situations, such as this, the courts should hesitate before accepting results which are paradoxical and contrary to business sense. To paraphrase a famous cliché, the capital gains tax is a tax upon gains: it is not a tax upon arithmetical differences."

We of course accept that this is the correct approach.

30. Secondly, he submitted that it was indisputable that Mr Hardy had suffered a loss, and that it would be contrary to business sense, and would create anomalies in the capital gains tax system, for that loss not to be allowable. As counsel for the HRMC submitted, however, the mere fact that a taxpayer has suffered a loss does not compel the conclusion that it is an allowable loss under the TCGA92. It remains necessary to consider whether the legislative conditions are satisfied.

Issue 1: Did Mr Hardy acquire an asset?

31. "Assets" for the purposes of capital gains tax are widely defined in section 21(1) TCGA92, and include "options, debts and incorporeal property generally". It is well established that contractual rights are capable of being an asset for capital gains tax purposes, and will be if they can be turned to account even if they cannot be transferred or assigned to another: see *O'Brien (Inspector of Taxes) v Benson's Hosiery (Holdings) Ltd* [1980] AC 562 at 572-573 (Lord Russell of Killowen).

32. Counsel for HMRC drew attention, however, to the warning given by Warner J in *Zim Properties Ltd v Proctor* [1985] STC 90 at 108:

> "I have no difficulty in accepting that 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 legislation requires, as does the interpretation of any legislation, the exercise of common sense, rather than just the brute application of verbal formulae."

33. Accordingly, it is necessary carefully to analyse the contractual rights which Mr Hardy acquired when he entered into the Contract. 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.

34. It is precisely because Mr Hardy acquired the right, subject to compliance with his obligations, to obtain specific performance of the Seller's obligation to convey legal title to the Property to him that Mr Hardy acquired beneficial ownership of the Property. How then do the contractual rights upon which Mr Hardy now relies differ from his beneficial ownership of the Property? 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.

35. Even if counsel for Mr Hardy did not accept this analysis, we consider that it is clearly supported by the reasoning of Lord Hoffmann and Lord Walker in *Jerome v Kelly*. Furthermore, we agree with the First-tier Tribunal as to the import of that reasoning.

36. The facts of *Jerome v Kelly* were complicated, but simplified to their bare essentials were as follows. There had been a contract for the sale of land with development potential on 16 April 1987 which was completed in stages from 1 November 1990 to 7 December 1992. On 15 December 1989 the taxpayer and his wife had assigned part of their beneficial interest in the land in question to a trustee in Bermuda. The issue was as to the effect of what is now section 28(1) TCGA92, in combination with what is now section 60(1). The House of Lords held that the effect of section 28(1) was directed solely to the timing of disposal, and did not introduce a statutory fiction as to the parties to the disposal. Thus the disposal was deemed to have occurred on 16 April 1987, but the party that made the disposal was the Bermudan trustee.

37. Both Lord Hoffmann and Lord Walker were critical of the way in which the legislation treated contracts for the sale of property which were completed subsequently, and noted that section 28(1) gave rise to problems to which there was no entirely satisfactory answer. It is surprising that, more than 12 years later, the legislation has still not been amended to deal with this.

38. Be that as it may, Lord Hoffmann said at [11]:

> "… [What is now section 28(1)] does not deem the contract to have been the disposal as the 1962 Act had done. For that reason, it includes no provisions dealing with what happens if the contract goes off. In such a case, there will be no disposal and nothing to deem to have happened at the time of the contract. The time of the contract is deemed to be the time of disposal only if there actually is a disposal. This assumes that the contract will not in itself count as a disposal and so deals with the academic arguments about the effect of the equitable interest which arises at the time of the contract. …"

39. Similarly, Lord Walker said at [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."

40. In short, when a seller and a buyer enter into a contract for the sale of land, the seller does not dispose of an asset and the buyer does not acquire an asset. The

asset, which is the land, is disposed of by the seller and acquired by the buyer when completion takes place, albeit that section 28(1) will then deem the date of the transfer to be the date of the contract. It makes no difference to the analysis whether one considers the buyer's contractual right to obtain specific performance of the Contract or the buyer's beneficial ownership of the land. These are two sides of the same coin, and both are contingent upon the buyer's compliance with the buyer's own obligations. If the buyer fails to complete, there is no disposal or acquisition of the asset.

41. It follows that the First-tier Tribunal was correct to conclude that Mr Hardy did not acquire an asset for capital gains tax purposes when he entered into the Contract. He therefore had no asset to dispose of when the Contract was rescinded.

42. We would add that counsel for HMRC submitted that, because the Contract was not assignable by Mr Hardy, he could not have turned it to account. As counsel for Mr Hardy submitted, this does not necessarily mean that it was not an asset, because Mr Hardy could have unilaterally declared himself a trustee of the benefit of the Contract for a third party and turned it to account in that way. But this does not affect the fundamental point considered above.

43. It follows from our conclusion on the first issue that the second and third issues do not arise. In deference to the arguments we received, we will nevertheless deal briefly with them.

Issue 2: Did Mr Hardy dispose of an asset?

44. For the purposes of considering this issue, it must be assumed that Mr Hardy's rights under the Contract constituted an asset. Counsel for Mr Hardy submitted that the rescission of the Contract amounted to extinction of Mr Hardy's rights under the Contract, and hence a disposal of that asset within section 24(1) TCGA92. Counsel for HMRC did not concede that this was so, but submitted that, even if it was, the disposal was excluded by the combined operation of section 144(7) and section 144(4). Counsel for Mr Hardy disputed this.

45. Section 144 is not entirely easy to interpret, and HMRC's reliance upon it gives rise to a number of questions.

46. The first question is whether the present case falls within section 144(7). Counsel for Mr Hardy submitted that it did not. His 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". We do not accept this interpretation of section 144(7).

47. The second question is what the effect of section 144(7) is. So far as relevant to the present case, it provides that section 144 applies to a forfeited deposit as it applies in relation to "the consideration for an option which binds the grantor to sell and which is not exercised". Counsel for Mr Hardy submitted section 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. 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.

48. The third question concerns the interrelationship between section 144(7) and section 144(4). As we have just explained, section 144(7) says that section 144 applies to a forfeited deposit in the same way as it applies to the consideration for an option to purchase which is not exercised. How does section 144 apply to the consideration for an option to purchase which is not exercised? Counsel for HMRC submitted that, given that it is common ground that Mr Hardy did not enter into the Contract for purposes of a trade carried on by him, this was covered by the concluding words of section 144(4): "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". 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.

49. 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).

50. Accordingly, we conclude that the combined effect of section 144(7) and section 144(4) in a case such as the present is that the buyer's loss of the right to enforce performance of the contract of sale, resulting in forfeiture of the deposit, does not amount to a disposal.

Issue 3: Did Mr Hardy incur an allowable loss?

51. For the purposes of considering this issue, it must be assumed that Mr Hardy's rights under the Contract constituted an asset which was disposed of when the Contract was rescinded. Counsel for HMRC submitted that, even so, 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. Counsel for Mr Hardy submitted that it was so incurred.

52. 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

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

53. 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.

54. Accordingly, we conclude that the forfeited deposit was not in any event an allowable loss.

Conclusion

55. For the reasons given above, the appeal is dismissed.

MR JUSTICE ARNOLD

JUDGE GREG SINFIELD

Release date: 19 July 2016