Neutral Citation: [2024] UKFTT 00346 (TC)

Case Number: TC09146

FIRST-TIER TRIBUNAL
TAX CHAMBER

Sitting in London

Appeal reference: TC/2021/02726
TC/2021/02727
TC/2023/08121
TC/2023/08122

CAPITAL GAINS TAX – closure notices – Section 144 Taxation of Capital Gains Act 1992 – whether an agreement entered into by the Appellants constituted the grant of an option, or the giving of security for a loan – giving of security – appeal allowed in principle – parties to agree figures

Heard on: 15 May 2023
Judgment date: 25 April 2024

Before

TRIBUNAL JUDGE BAILEY
MR JULIAN STAFFORD

Between

(1) MAHADEVAN KRISHNAMOHAN
(2) THANUSHA KRISHNAMOHAN

Appellants

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Mr Michael Firth of counsel, instructed by H W Fisher LLP

For the Respondents: Mr Max Simpson, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This joined appeal is made against a closure notice issued to each of the appellants, in each case closing an enquiry into their self assessments for the year 2014/15. The closure notice brought into charge approximately £336,000 in additional tax for each of the two appellants. Some of this additional amount is not in dispute. However, for each of the appellants, the Respondents contend that transactions entered into by the appellants together were the grant of an option, chargeable to capital gains tax under Section 144 of the Taxation of Capital Gains Act 1992 ("TCGA 1992"). The Appellants dispute this conclusion, arguing that the transactions, properly construed, were loan agreements with the Appellants giving security for various amounts advanced by way of loan.

PRELIMINARY POINT – WHETHER THE TRIBUNAL IS SEIZED OF A VALID APPEAL

2. The Appellants originally appealed to this Tribunal on 29 July 2021 against a review decision dated 23 April 2021. When the Respondents reviewed their papers prior to the preparation of their Statement of Case at the end of 2021 they noticed an issue with the closure notices originally issued to the Appellants. Further closure notices were issued by the Respondents on 11 February 2022 and the Appellants appealed against those to the Respondents on 14 April 2022. On behalf of the Respondents, Mr Simpson told us that, to be best of his knowledge, no review was offered and so the clock did not begin running for the Appellants to refer their 2022 appeals to the Tribunal. However, perhaps because the parties knew there was already a Tribunal appeal in existence at that time, no referral was made to the Tribunal of the appeals made to the Respondents in 2022.

3. As the closure notices issued on 4 December 2019 were invalid, the appeals made to the Tribunal in July 2021 were against notices that were no longer in existence. Therefore, those 2021 appeals to the Tribunal could not proceed as the Tribunal no longer had jurisdiction. We began the hearing by inviting the Appellants to make a referral to us of the appeals they had made to the Respondents in 2022 so that the hearing before us could proceed. Neither party objected to this way of proceeding. The Appellants' accountant emailed a joint appeal to us. We admitted and categorised that appeal, dispensed with the need for either party to file any additional document, and then proceeded on the basis that we were seized of a valid appeal from each Appellant.

4. As the Tribunal had no jurisdiction in respect of the two appeals made in 2021, those two appeals – with the references TC/2021/02726 and TC/2021/02727 – are struck out.

5. The decision that follows is in respect of the two appeals admitted by the Tribunal on 15 May 2023 – with the references TC/2023/08121 and TC/2023/08122.

EVIDENCE BEFORE US

6. We had before us a bundle of documents prepared by the Appellants. A further document was provided to us at the commencement of the hearing. The Respondents did not object to its late production and we admitted it in evidence.

7. In addition, we heard oral evidence from the First Appellant. We found the First Appellant to be an honest witness who did his best to assist us. Understandably, the First Appellant was nervous in giving his oral evidence but we do not consider that detracted from his credibility. Due to the passage of time, there were some gaps as to dates and other details in the First Appellant's oral evidence (and the documentary evidence), nevertheless we accept the oral evidence given by the First Appellant except where it conflicts with the contemporaneous documents.

FACTS FOUND

8. Much of the factual background to this appeal was not in dispute. On the basis of the documents in the bundle and the First Appellant's oral evidence, we find as follows:

9. The First and Second Appellants are a married couple. Since 1992, the First Appellant had been building a property portfolio alongside his day to day business of running a newsagents and general convenience store. The First Appellant's aim was that the rental properties would generate sufficient income to support him, the Second Appellant and their family, and that, ultimately, these properties would form an inheritance for the Appellants' children.

10. Until late 2013 and the events relevant to this appeal, the Appellants' purchase of properties had been relatively straightforward. The equity in earlier purchases supported the Appellants in obtaining loans from high street lenders to fund subsequent purchases.

11. In late 2013, the First Appellant was introduced to a property named Cliveden Stud Farm, previously a working stud farm. This substantial property consisted of a number of commercial and residential properties, stables and barns on land comprising 130 acres.

12. The asking price was £5.8 million. This was significantly greater in value than any property previously purchased by the Appellants. However, the selling agent led the First Appellant to believe that it would be relatively easy to remove certain agricultural covenants that were in place, and that Cliveden Stud Farm could then be sold on, free of those covenants. The selling agent informed the First Appellant that he had a prospective buyer in mind who would be interested in buying Cliveden Stud Farm from the Appellants, giving them a generous profit.

13. The First Appellant viewed the acquisition of Cliveden Stud Farm as a short-term venture only. However, a deposit of £600,000 was required to exchange contracts on Cliveden Stud Farm, and the high street banks from whom the Appellants had previously taken loans were not interested in lending amounts for the purchase of Cliveden Stud Farm because of the agricultural covenants that were in place. In his oral evidence the First Appellant also told us that time constraints prevented him from exploring further conventional financing options.

14. The agent who had introduced the First Appellant to Cliveden Stud Farm had previously introduced the Appellant to a company called Sheen Development Limited ("Sheen"). Sheen was a BVI registered company that provided short-term loans. The Appellants understood that Sheen would be willing and able to provide them with short-term finance to enable the acquisition of Cliveden Stud Farm.

15. On 18 November 2013, the Appellants entered into an agreement with Sheen. It is this agreement (and the subsequent, similarly worded, agreements) that is at the centre of the dispute between the parties to this appeal.

16. This initial agreement between Sheen and the Appellants (the "First Sheen Agreement"), drawn up by Sheen, was entitled "OPTION AGREEMENT". Relevantly, the First Sheen Agreement provided:

> 2. Grant of the Option
>
> 2.1 In consideration of the sum of SIX HUNDRED THOUSAND POUNDS (£600,000.00) ('the Option Price') the [Appellants] jointly and severally grant to [Sheen] the option to buy the freehold and or leasehold interest as appropriate in the Property at the Purchase Price.

> 3. Exercise of the Option
>
> 3.1 The Option shall be exercisable by [Sheen] serving on the [Appellants] a notice in writing at any time after the Option Period has elapsed.

17. Clause 1.6 provided that the "Option Period" meant the period of twelve calendar months from 18 November 2013, the day on which the parties entered into the First Sheen Agreement.

18. The First Option Agreement continued:

> 3.2 On the valid exercise of the Option the Sellers shall sell and the Buyer shall buy the Property at the Purchase Price on the terms of this Agreement.

19. Clause 1.8 defined "the Property" as the properties described in the Schedule to the First Option Agreement. The Schedule listed three properties owned by the Appellants (in Red Lion Street, Cannon Lane and Uxbridge Road).

20. Clause 1.9 defined "the Purchase Price" as £600,000 plus whatever sum was owing to the NatWest Bank in respect of two specified properties at the date on which the option was exercised, if it ever was exercised. Clause 15 recorded the Appellants' covenant with Sheen that they would pay all sums due to NatWest for the duration of the Option Period.

21. Clause 8 of the First Option Agreement provided:

> 8.1 The [Appellants] consent to the registration of a Unilateral Notice in the Charges Register in respect of each of the [Appellants] title to the Properties shown in the Schedule.
>
> 8.2 Subject to Clauses 8.3, 8.4 and 8.5 below, if the [Appellants] repays to [Sheen] the sum of £600,000.00 plus compensation for loss of use of the Option Price before expiry of the Option Period calculated at the rate of 18% per annum, from the date hereof until repayment together with [Sheen's] legal costs on an indemnity basis (together referred to as "All Sums Due"), then [Sheen] shall forthwith acknowledge that this Option Agreement has ceased and determined and shall apply to withdraw the Unilateral Notice referred to in Clause 8.1 above.
>
> 8.3 The [Appellants] are to serve a minimum of one month's prior written notice but such notice cannot be served within six months of the date hereof on [Sheen] if [they] intends to repay [Sheen]. The [Appellants] is to repay the whole sum in one payment….
>
> 8.4 In the event that the [Appellants] repay [Sheen] All Sums Due within the first 6 months of the Option Period, the compensation for loss of use of the Option Price will be subject to a minimum payment of £54,000.
>
> 8.5 After 6 months of the Option Period have elapsed the [Appellants] shall pay compensation for the loss of use of the Option Price calculated at the rate of 18% per annum on £600,000.00 such compensation shall be calculated at monthly rests.

22. Clause 10 provided that any variation to the agreement must be in writing, and finally, Clause 13 provided:

> 13. In the event [Sheen], having exercised this Option, in unable to complete the purchase within 120 days after the date of service of the Option Notice in accordance with Clause 1.2 hereof, [the Appellants] shall return to [Sheen] forthwith the sum of six hundred thousand pounds (£600,000) with interest at a rate of 18% per annum calculated on the sum of £598,000 from the date hereof until repayment together with [Sheen's] costs on an indemnity basis. The [Appellants] shall be entitled to retain the sum of £2,000 which sum the [Appellants] accept in full and final settlement, and undertake not to pursue any action for specific performance or damages in lieu.

23. The charge given over the three properties listed in the Schedule was a second charge, as the NatWest bank already had a first charge. The First Appellant's evidence was that the equity in the three properties on the Schedule had a value of about £1.9 million. This is clearly considerably in excess of the £600,000 provided under the First Sheen Agreement.

24. In addition to the security given in the First Sheen Agreement, the Appellants also each gave a personal guarantee to Sheen that they would pay the £600,000 and all other accrued liabilities.

25. The First Appellant had instructed solicitors in respect of the purchase of Cliveden Stud Farm and the financing of that purchase, and he was given advice on the First Sheen Agreement. In cross-examination, the Appellant told us that he had asked if the First Sheen Agreement was a loan or an option, and he was told that if he paid back the amounts due, then the agreement was a loan, but that if he didn't pay the amounts due, the agreement would turn into an option.

26. The First Appellant also told us that he understood that, if he took no action, then he would be bound but that the equity in the properties on the schedule was almost £2 million so (if he had needed to) he would sell off one of those properties given as security in order to pay the amounts due to Sheen and keep the remaining properties.

27. After the Appellants had exchanged contracts for the purchase of Cliveden Stud Farm, the prospective buyer pulled out. Having exchanged contracts, the Appellants concluded that completing would be preferable to forfeiting the deposit of £600,000 they had already paid, but that they would need to obtain additional finance to complete the purchase.

28. On 21 February 2014, the Appellants obtained bridging finance of £5.2 million from West One Loans Limited. The interest rate on this loan was 12% p.a., charged monthly. The First Appellant believed that they would be able to pay the monthly interest payments due to West One Loans Limited out of the rental income the Appellants received in respect of the other properties they owned.

29. The First Appellant also still believed at that time that the Appellants would be able to sell on Cliveden Stud Farm within a short period of time, despite the initial prospective buyer having pulled out.

30. In March 2014, the Appellants entered into a further agreement with Sheen (the "Second Sheen Agreement"). As with all subsequent agreements, this Second Sheen Agreement was entitled "OPTION AGREEMENT". Under the terms of the Second Sheen Agreement, the Appellants gave Sheen security against another property (this time the

convenience store from which they traded) and in return, Sheen provided the Appellants with £63,000. This amount was required by the Appellants so that they could pay Sheen seven months' worth of compensation due under clause 8 of the First Sheen Agreement.

31. On an unknown date, the Second Appellant's parents entered into an agreement which resulted in a further £250,000 being available to the Appellants. In his witness statement, the First Appellant says that this agreement was entered into in May 2014. The date is not determinative of this appeal but, on the balance of probabilities, we find that the first agreement the Second Appellant's parents entered into to provide funds for the Appellants was entered into around December 2013 (although a variation may have been agreed in May 2014).

32. In the bundle there is an agreement dated "2015" which Mr Firth told us was a copy of the 2014 agreement entered into by the Second Appellant's parents but with a typographical error in respect of the date. However, that agreement refers to events that occurred later in 2014 (see clause 8.2) and in early 2015 (see clause 1.9), that the parties could not have been aware of, or known the specific dates for, in May 2014. We find that the copy agreement in the bundle before us was not the agreement the Second Appellant's parents entered into in, as we have found, the end of 2013.

33. We find, on the balance of probabilities, that the other party to the agreement which the Second Appellant's parents entered in early 2014 was either Sheen or a company associated with Sheen, for example a company called Norton Star Invests Limited ("Norton Star"). Norton Star was a company associated with Sheen and, like Sheen, it was a BVI registered company which provided short term finance.

34. On the balance of probabilities, we also find that under the terms of this agreement, the Appellants were provided with £250,000 and Sheen/Norton Star was given security over a property owned by the Second Appellant's parents (in Hornsey Road).

35. On 6 May 2014, there was an email from the solicitor acting for Sheen/Norton Star to the First Appellant. In that email, the First Appellant was reminded that the agreement entered into by the Second Appellant's parents "is due for payment now", but it was also recorded that the First Appellant had asked for a three month extension to this agreement. If the agreement entered into by the Second Appellant's parents was similar to the First Sheen Agreement then a first compensation payment would have become due after six months. Therefore, payment becoming due in May 2014 is consistent with the Second Appellant's parents having first entered into an agreement in December 2013.

36. In June 2014, the Appellants entered into a further agreement with Sheen that was in very similar terms to the previous agreements. Under the terms of this agreement (the "Third Sheen Agreement"), the Appellants were given £152,000, and gave security over their residential home. The Appellants entered into the Third Sheen Agreement in order to repay £100,000 due under an agreement that a company associated with the First Appellant had entered into in March 2014.

37. As recorded in an email sent on 29 June 2014 from Sheen's solicitor to the First Appellant, the First Appellant was still requesting an extension of three months to the agreement entered into by the Second Appellant's parents. The solicitor advised the First Appellant that outstanding amounts of "interest" due under other agreements would need to be paid before the request could be considered. The solicitor also advised that the fee for an extension would be £2,500 and suggested that the extension should be of a year, reminding the First Appellant that he had not paid any charges for "the last roll over in March for three months".

38. In August 2014, the Appellants repaid to Sheen the £63,000 that they owed under the Second Sheen Agreement. This money came from the rental income on properties the Appellants owned.

39. As set out above, Clause 1.6 of the First Sheen Agreement had provided that the "Option Period" expired on 18 November 2014, being twelve calendar months from the date on which the parties entered into the First Sheen Agreement. On 7 October 2014, the First Appellant emailed the solicitors acting for Sheen to ask for a six month extension to the Option Period so it did not expire on 18 November 2014.

40. On an unknown date, and following a conversation between Sheen, their solicitors and the First Appellant, it was agreed that a three months extension (i.e. until 18 February 2015) would be granted in respect of the First Sheen Agreement. The First Appellant's unchallenged evidence, which we accept, was that this agreement was reached before 18 November 2014. Sheen required a fee of £3,500 to agree the extension, which the First Appellant agreed to pay. Sheen also agreed that the Option Period in the agreement entered into by the Second Appellant's parents would also be extended by a further three months, to March 2015. As noted above, the fee for this was £2,500.

41. On 21 November 2014, the First Appellant spoke about the agreed extensions of time and extension fees in a telephone conversation with Sheen's solicitor. The solicitor emailed the First Appellant later on that day to provide a written record of the agreements and to seek payment of the two extension fees, and other amounts outstanding from the Appellants.

42. By December 2014, the Appellants had still not been able to sell Cliveden Stud Farm. It had become clear to the Appellants that removal of the agricultural covenants was not possible, and so it would not be easy to sell on Cliveden Stud Farm quickly, in the way the Appellants had initially hoped.

43. On 15 December 2014, the Appellants entered into an agreement with Norton Star (the "Norton Star Agreement"). This was in similar terms to the previous agreements the Appellants had entered into with Sheen. Under the Norton Star Agreement, Norton Star provided the Appellants with £1 million. However, from this £1 million was deducted:

- the £600,000 already provided by Sheen under the First Sheen Agreement, and
- the £250,000 provided to the Second Appellant's parents under the agreement they had entered.

44. Therefore, the amount provided to the Appellants was £150,000. The Appellants used this £150,000 to pay off the amount due under the Third Sheen Agreement.

45. The effect of the Appellants entering into the Norton Star Agreement was that the First Sheen Agreement, and the first agreement entered into by the Second Appellant's parents, were brought to an end. The "Option Period" in the Norton Star Agreement (i.e., the period of time which must elapse before Norton Star could exercise an option to buy the property listed in the Schedule, this time Cliveden Stud Farm) was twelve months from 15 December 2014. The price agreed that the Appellants would have to pay to bring the Norton Star Agreement to an end was £1 million plus 18% interest.

46. In or about December 2014, the Appellants also:

- sold two other properties they owned,
- re-mortgaged two other properties, and
- borrowed £1.6 million from Lloyds Bank.

47. The Appellants also borrowed further sums from the Second Appellant's parents. We make no finding about when this borrowing occurred, but we find that, in 2015, the Second Appellant's parents entered into the agreement, dated 2015, that is in the bundle. That agreement refers to charges given in February and March 2015, and so this agreement cannot have been entered into any earlier than March 2015.

48. On an unknown date or dates, the Appellants used the money they received from these sales, second mortgages and loans to pay the remainder of the amounts due to West One Loans Limited under the bridging loan agreement.

49. In December 2015, the Appellants borrowed £2.8 million from Metro Bank. The Appellants used this amount to pay the outstanding amounts due to Lloyds Bank and to Norton Star. The payment to Norton Star brought the Norton Star Agreement to an end, and concluded the Appellants' arrangements with Sheen/Norton Star.

BURDEN OF PROOF

50. The onus of proof in an appeal against a closure notice is on the Appellants to persuade us that the closure notice should be varied. The standard of proof is the civil standard of the balance of probabilities.

DISCUSSION AND DECISION

51. The dispute between the parties in this appeal is whether the effect of the First Sheen Agreement (and the other agreements entered into by the Appellants) is that the Appellants granted an option to Sheen.

52. If an option was granted by the Appellants then, as that option was not exercised, the grant of the option would be a disposal of an asset and so a chargeable event. That is because of the effect of Sections 21 and 144 TCGA 1992 (set out below). The Appellants argue that on the proper construction of the agreements, no option was ever granted. The Respondents take the opposite view.

53. Section 21 TCGA 1992 provides:

> **21 Assets and disposals.**
>
> (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,
>
> (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.

54. The relevant parts of Section 144 TCGA 1992 provide:

> **144 Options and forfeited deposits.**

> (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.
>
> …
>
> (6) In this section references to an option include references to an option binding the grantor to grant a lease for a premium, or enter into any other transaction which is not a sale, and references to buying and selling in pursuance of an option shall be construed accordingly.

55. The Appellants argue their case in three ways:

- no options were granted under the agreements because there was never a time when Sheen had an option to do anything;

- viewing the transactions realistically, in context and considering the legislation purposively, the agreements were for loans and they did not involve the grant of options;

- even if an option was granted under the First Sheen Agreement, the reality and substance of the transactions were that the options were conveyed by way of security for the payment of the sums set out in clause 8.2 of that agreement, and so there was no chargeable disposal pursuant to Section 26 TCGA 1992.

Was an option granted under the First Sheen Agreement?

56. In order for us to decide whether an option was granted under the First Sheen Agreement, clearly we will also need to decide what is required for there to be the grant of an option. Both parties addressed us in detail throughout the hearing upon their points and their understanding of the true nature of the First Sheen Agreement. We hope our summary of the points made by each party does not do a disservice to the careful arguments that were made.

57. Both parties referred to the definition in HMRC's Capital Gains manual:

> An option may be defined as a right, binding in law, to accept or reject a present offer within a specified time in the future. An option is only binding under English law if acquired under a contract for consideration, or if granted in a deed.
>
> An option is an agreement between the grantor, or writer, and the grantee. Typically, the grantor gives the grantee the right to buy or to sell a specified quantity of something such as shares, currency, or land at a price fixed by the option agreement. This right can only be exercised during a specific period or on a specific day. If dealing at arm's length the grantee will commonly pay the grantor a premium for granting the option. The grantee is not obliged to exercise the option.

58. The Appellants focussed upon the revocable nature of what they had granted to Sheen under the First Sheen Agreement (and subsequent agreements), arguing that what they had

granted was not binding upon them. The Appellants argued that if the person granting an option could revoke that grant at will, and could do so before the time came for it to be exercised, then there was never any moment in time when the grantee was in a position to exercise the option. Mr Firth submitted that on the basis of the terms contained within it, the First Sheen Agreement could not – in reality – be the grant of an option to Sheen.

59. Both parties referred us to a number of authorities giving examples of option agreements in other situations. Mr Firth built on his submissions about the irrevocable nature of options by referring us to *Gardner v Blaxill* [1960] 2 All ER 457 at 460H, where per Paull J held, in the context of the demise of a lease containing an option:

> The plain meaning of the word "option" is "choice". Reading "choice" for "option", the clause means that the tenant has the choice of continuing his tenancy.

60. The Appellants also referred us to *Mountford v Scott* [1974] 1 All ER 248 at 254, where Brightman J stated:

> It was conceded by counsel for the plaintiffs that an option on a proper analysis is no more than an ordinary offer coupled with a promise not to withdraw the offer during the period of the option. Indeed, an option was analysed on this basis by Danckwerts J in *Stromdale & Ball Ltd v Burden*.

61. Mr Firth argued that, on the facts of this appeal, there was never a time when Sheen could make a choice – as explained in *Gardner v Blaxhill* – to exercise the Option. This was because Sheen had to wait until the Option Period had elapsed before they could choose whether to give notice to exercise the Option. During the Option Period (initially 12 months, but subsequently extended), the Appellants were able to take steps which would end the agreement and so remove entirely the opportunity for Sheen to exercise the Option. Mr Firth argued that the terms of the agreement, and the fact of the extension, were such that there was no date on which Sheen had the choice of whether to exercise the Option.

62. In response, Mr Simpson argued the Respondents' case that an option had been granted to Sheen under the First Sheen Agreement, albeit that the option was revocable at the will of the Appellants. In Mr Simpson's words, the Appellants had bound themselves and would need to take action to unbind themselves.

63. Mr Simpson's submission was that it was not unusual for option agreements to have clauses or conditions preventing the option from being exercised immediately and that such a clause did not prevent an agreement from being the grant of an option. The Respondents argued that following the signing of the First Sheen Agreement, the Appellants had bound themselves to sell the properties in the Schedule. In the Respondents' submission it was immaterial that there were steps the Appellants could subsequently take to "unbind" themselves.

64. Although Mr Simpson referred us to examples where the right to exercise an option became available only after a specified event, Mr Simpson accepted that he had not been able to identify any authority where the courts or tribunals had concluded that an option had been granted despite the relevant agreement providing that what had been granted could be removed at the will of the grantor before it could ever be exercised by the grantee.

65. We consider this aspect of control on the part of the grantor to be critical to our conclusions.

66. We have concluded that the First Sheen Agreement, despite its unfortunate title of "Option Agreement", was an agreement by the Appellants that, if they did not pay £600,000 plus a further payment of £108,000 to Sheen within 12 months of the date of entering into the

agreement, then Sheen would have the right – at that stage and, critically, only at that stage – to decide whether it wanted to buy the properties on the schedule. In other words, the First Sheen Agreement was an agreement that the Appellants would grant an option to Sheen in a year's time if, and only if, certain defined circumstances came to pass. Those events were within the control of the Appellants and they did not come to pass here. We are satisfied that the agreement the Appellants entered into was not an irrevocable disposition: the Appellants were able to avoid selling the properties in the Schedule to Sheen at a considerable undervalue by instead paying the agreed amount to Sheen. Throughout that first year the Appellants had the ability (subject to their financial resources) to control whether Sheen had the choice to buy the properties.

67. This is to be distinguished from some of the examples the Respondents gave where an option was not immediately exercisable. We agree with the Respondents that an option does not need to be immediately exercisable. However, where the grant is dependent on a subsequent event, we consider it relevant in deciding whether an option has been granted to look at whether the grantor can control the events which must occur for the grantee to have the relevant choice. In *Gardner v Blaxill*, for example, the landlord was bound to extend the lease if the tenants fulfilled the covenants. The grantor could not control the behaviour of the tenants and so he was immediately bound upon entry into the agreement.

68. Therefore, there was no grant of an option by the Appellants when they entered into the First Sheen Agreement in November 2013. We agree with Mr Simpson that if, through lack of funds or otherwise, the Option Period had elapsed, then at that stage, Sheen would have had the choice about whether to exercise the Option.

69. However, as events turned out, Sheen agreed to extend the Option Period and the Appellants paid the agreed amount by the end of that extended period. Had the Appellants ultimately not been able to pay Sheen by the end of that extended period, or if Sheen had refused to grant any further extension, then the terms of the First Sheen Agreement provided that Sheen could – at that time – choose whether to buy the properties. We conclude that the terms of the First Sheen Agreement were such that, on its proper construction, an option would have been granted only at the time that Option Period elapsed (if it ever did).

70. The subsequent agreements contained similar terms, and we understand both parties to be agreed that they should be construed similarly. Therefore, we conclude that there was no grant of an option when the Appellants (and the Second Appellant's parents) entered into the subsequent agreements with Sheen and Norton Star.

71. Having reached that conclusion, it is not necessary for us to express an opinion on either the second or third arguments made by the Appellant, and we do not do so. Both parties presented interesting arguments on both points and we are grateful for their careful submissions but we consider it would be more appropriate for these points to be decided in an appeal where they are determinative, and that is not this appeal.

72. The conclusion we have reached also accords with what might be termed the "common-sense" view of the matter. When they entered into the First Sheen Agreement, the Appellants received £600,000 in return for binding themselves either to pay £708,000 within a year, or grant an option that Sheen could buy properties with equity of approximately £1.9 million for the price of £600,000 plus the amounts outstanding on the mortgages. In neither case would the Appellants have "gained" anything in any conventional sense of the word. The best case scenario for the Appellants was that, the price to them of having £600,000 available in November 2013 would be £708,000 in November 2014, a loss of £108,000.

73. Therefore, the Appellants are successful in this appeal. The parties indicated that they were content for us to reach a decision in principle, and so we do not attempt to provide figures for the conclusions we have reached.

CONCLUSION

74. This appeal is allowed. The parties should provide the Tribunal with the agreed figures no later than 42 days from the date of issue of this Decision. The parties are at liberty to apply either for more time to reach agreement, or for the Tribunal to determine the final figures if they are unable to reach agreement.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

75. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JANE BAILEY
TRIBUNAL JUDGE

Release date: 25th APRIL 2024