Neutral Citation: **[2024] UKUT 00319 (TCC)**

Case Numbers: UT/2020/000404,
UT/2020/00405 and UT/2023/000095

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Location: Rolls Building

CHARGEABLE GAINS – deemed disposal on ceasing to be resident in the UK and becoming resident in another EU member state – compatibility with EU freedoms – whether a conforming interpretation exists – yes - ss80 and 185 TCGA, para 10A, Sch 9, FA 96, and ss59B and 59D TMA

Heard on: 21 to 23 May 2024
Judgment date: 08 October 2024

Before

MR JUSTICE RAJAH
JUDGE NICHOLAS ALEKSANDER

Between

THE TRUSTEES OF THE PANICO PANAYI ACCUMULATION AND MAINTENANCE SETTLEMENTS NUMBERS 1 TO 4

First Appellants

REDEVCO PROPERTIES UK1 LIMITED

Second Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the First Appellants: Tim Johnston, Counsel, instructed by Azets
For the Second Appellant: Daniel Margolin KC, Counsel, of Joseph Hage Aaronson LLP

For the Respondents:	Jonathan Bremner KC and Ben Elliott, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. These appeals concern the "exit tax" that arises on a deemed disposal when the trustees of a settlement or a company cease to be resident in the UK for the purposes of taxation.

2. In the case of the trustees of The Panico Panayi Accumulation and Maintenance Settlements Numbers 1 to 4 ("the Trustees"), the majority of the Trustees ceased to be resident in the UK and became resident in Cyprus with effect from 19 August 2004. In the case of Redevco Properties UK1 Limited ("Redevco"), its place of effective management moved to the Netherlands on 15 January 2008.

3. In the case of the Trustees, HMRC issued a closure notice, amending the Trustees' 2004/5 tax return, on the basis that they are liable to capital gains tax under s80, Taxation of Chargeable Gains Act 1992 ("TCGA"). In the case of Redevco, HMRC issued a closure notice in respect of its accounting period ended on 15 January 2008 on the basis that it is liable to corporation tax under s185 TCGA, paragraph 10A of Schedule 9, Finance Act 1996 ("para 10A"), and Part 2, Capital Allowances Act 2001[1].

4. For convenience, unless the context otherwise requires, in this decision references to:

   (a) "CGT" are to be taken to include corporation tax on chargeable gains and corporation tax charged under para 10A, as well as to capital gains tax; and

   (b) "exit tax" are to be taken as referring to the charges to tax under ss80 and 185 TCGA and under para 10A.

5. At the hearing, the Trustees were represented by Mr Johnston and Redevco was represented by Mr Margolin. In respect of the Trustees' appeal, HMRC were represented by Mr Bremner and Mr Elliott. However, in respect of the Redevco appeal, HMRC were represented by Mr Elliott alone.

6. Counsel for the parties made helpful submissions for which we are grateful. We have carefully considered these in reaching our decision, but in so doing have not found it necessary to refer to each and every argument advanced by them on behalf of their respective clients nor to all of the authorities cited.

PROCEDURAL HISTORY

7. The matters giving rise to the Trustees' appeal took place some 20 years ago. The procedural history is lengthy:

   (1) 29 September 2010: HMRC closure notice issued.

   (2) 18 October 2010: the Trustees appealed to HMRC against the closure notice.

   (3) 14 November 2012: the Trustees notified the appeal to the FTT.

   (4) 30 November 2015: the FTT made a Request for a Preliminary Ruling to the CJEU. The Request asked whether a trust was capable of benefitting from the four freedoms, and if it was, whether the charge to tax imposed by s80 TCGA was a proportionate and necessary interference with the four freedoms (*Trustees of the P Panayi Accumulation and Maintenance Settlements v RCC* (Case C-646/15).

   (5) 21 December 2016: Advocate General Kokott gave her Opinion.

[1] The liability to capital allowances under Part 2 Capital Allowances Act 2001 is not within the scope of this appeal.

(6) 14 September 2017: the CJEU gave judgment in which it held that a trust was capable of benefitting from the four freedoms and the imposition of an immediate charge to tax (at the exit date) was a disproportionate interference with the freedom of establishment ("*Panayi CJEU*").

(7) 24 October 2019: Following a hearing, the FTT released the decision now under appeal ("*Panayi FTT*").

(8) 17 February 2020: Permission to appeal to the Upper Tribunal was granted by the FTT.

(9) 31 December 2020: IP Completion Date ("Brexit").

(10) 21 June 2021: the hearing of the Trustees' appeal was stayed pending the outcome of the reference to the CJEU in *Gallaher Limited v HMRC* (Case C-707/20).

(11) 16 February 2023: Judgment was handed down by the CJEU in *Gallaher* - but the CJEU's decision was decided on a different basis to the issues in these appeals, and so was not dispositive of the issues that arise in these appeals.

8. In the case of Redevco, the matters giving rise to this appeal took place over 16 years ago. The procedural history of the Redevco appeal is as follows:

(1) 31 December 2020: Brexit.

(2) 2 August 2021: HMRC closure notice issued[2].

(3) 31 August 2021: Redevco appealed to HMRC against the closure notice and notified the appeal to the FTT.

(4) 21 July 2023: Following a hearing, the FTT released the decision now under appeal ("*Redevco FTT*").

(5) 18 September 2023: Permission to appeal was granted by the FTT. In granting permission, Judge Brooks recommended that given the similarity of the issues and legislation concerned, consideration be given by this Tribunal to hearing Redevco's appeal at the same time as the Trustees' appeal.

9. On 17 January 2024 Judge Aleksander directed that the Trustees' and Redevco's appeals be heard together by the same judicial panel in order to ensure that all relevant issues are ventilated at one hearing and that all parties have the opportunity to address them in their submissions.

10. On 19 July 2024, after the hearing of this appeal, the Supreme Court handed down its judgment in *Lipton and anr v BA Cityflyer Ltd* [2024] UKSC 24. In view of the statements made in the judgments relating to the tensions between s16 Interpretation Act 1978 and the provisions of the European Union (Withdrawal) Act 2018, we asked the parties whether they wished to make representations on any impact the Supreme Court's decision might have on this appeal. All of the parties confirmed that they considered that the decision of the Supreme Court had no relevance to the issues before the Tribunal. We agree. We note in particular that sections 2, 3 and 4, Retained EU Law (Revocation and Reform) Act 2023 ("REULA"), do not apply "in relation to anything occurring before the end of 2023" (s22(4) REULA). As the material events that are the subject of this appeal all took place well before the end of 2023, we find that none of the provisions of REULA providing for the "sunset of the supremacy of EU

[2] Prior to this "final closure notice", HMRC had purported to issue a partial closure notice, which the parties ultimately agreed did not meet the legislative requirements and was therefore invalid.

law", the "sunset of general principles of EU law", and the "sunset of retained EU rights, powers, liabilities etc" are engaged.

11. For completeness, we mention that Judge Aleksander, in his capacity as a Judge of the First-tier Tribunal, had some involvement in the case management of Redevco's appeal before the FTT. He did not consider that that his earlier involvement precluded him from sitting on this appeal as he was concerned only with case management matters and none of the substantive issues. The parties were asked for their views and none of them objected to him sitting on this appeal.

THE LEGISLATION

Trusts

12. Capital gains tax is charged on chargeable gains computed in accordance with the TCGA and accruing to a person on the disposal of assets (s1(1) TCGA).

13. Provision for the treatment of settled property is made in Part III TCGA. Section 69(1) TCGA specifies that (a) the trustees of a settlement "shall for the purposes of this Act be treated as being a single and continuing body of persons (distinct from the persons who may from time to time be the trustees)"; and (b) that body "shall be treated as being resident and ordinarily resident in the United Kingdom unless the general administration of the trusts is ordinarily carried on outside the United Kingdom and the trustees or a majority of them for the time being are not resident or not ordinarily resident in the United Kingdom."

14. Section 80 TCGA addresses the situation where trustees cease to be resident in the UK. As it was in force for the 2004/05 tax year it relevantly provided as follows:

> **80 Trustees ceasing to be resident in UK**
>
> (1) This section applies if the trustees of a settlement become at any time ("the relevant time") neither resident nor ordinarily resident in the United Kingdom.
>
> (2) The trustees shall be deemed for all purposes of this Act—
>
> (a) to have disposed of the defined assets immediately before the relevant time, and
>
> (b) immediately to have reacquired them,
>
> at their market value at that time.
>
> (3) Subject to subsections (4) and (5) below, the defined assets are all assets constituting settled property of the settlement immediately before the relevant time.
>
> […]

15. Trustees were required to file a return for tax year 2004/05 not later than 31 January 2006 (ss8A(1) and (1A) Taxes Management Act 1970 ("TMA")). The difference between the amount of capital gains tax contained in the trustees' self-assessment for a tax year and the aggregate of any payments on account made by them in respect of that year "is payable or repayable on or before the 31st January next following the year of assessment" (ss59B(1) to (4) TMA).

Companies

16. Corporation tax is charged on the taxable profits of a UK resident company arising in an accounting period[3]. Taxable profits include chargeable gains accruing to the company in the

[3] Note that an accounting period ends on a company ceasing to be UK tax resident (s12(3) ICTA). As Redevco ceased to be resident in the UK on 15 January 2008, its accounting period ended on that date.

relevant accounting period (s6 Income and Corporation Taxes Act 1988 ("ICTA") and s8 TCGA).

17. Section 185 TCGA addresses the situation where a company ceases to be resident in the UK. As it was in force for the 2007/08 tax year it relevantly provided as follows:

> **185 Deemed disposal of assets on company ceasing to be resident in UK**
>
> (1) This section and section 187 apply to a company if, at any time ("the relevant time"), the company ceases to be resident in the United Kingdom.
>
> (2) The company shall be deemed for all purposes of this Act—
>
> (a) to have disposed of all its assets, other than assets excepted from this subsection by subsection (4) below, immediately before the relevant time; and
>
> (b) immediately to have reacquired them,
>
> at their market value at that time.
>
> […]

18. For the material period, Chapter 2 of Part 4, and Schedule 9, Finance Act 1996 provided for the computation of all profits and gains arising to a company from its loan relationships. Para 10A provided that, on a company ceasing to be resident in the UK, the company was treated as if, immediately before the time at which it ceased to be resident in the UK, it had assigned the assets and liabilities that represent its loan relationships for a consideration equal to their fair value at that time and immediately reacquired them for the same consideration. The relevant provisions of para 10A were as follows:

> **Paragraph 10A**
>
> (1) This paragraph applies if at any time ("the relevant time")—
>
> (a) a company ceases to be resident in the United Kingdom, or
>
> […]
>
> (2) In a case falling within sub-paragraph (1)(a) above, this Chapter shall have effect as if the company had—
>
> (a) immediately before the relevant time, assigned the assets and liabilities that represent its loan relationships for a consideration of an amount equal to their fair value at that time, and
>
> (b) immediately reacquired them for a consideration of the same amount.
>
> […]

19. Section 130 Finance Act 1988 ("FA 88") applied to any company intending to cease to be UK tax resident. It relevantly provided as follows:

> **130 Provisions for securing payment by company of outstanding tax**
>
> (1) The requirements of subsections (2) and (3) below must be satisfied before a company ceases to be resident in the United Kingdom […].
>
> (2) The requirements of this subsection are satisfied if the company gives to the Board—
>
> (a) notice of its intention to cease to be resident in the United Kingdom, specifying the time ("the relevant time") when it intends so to cease;

(b) a statement of the amount which, in its opinion, is the amount of the tax which is or will be payable by it in respect of periods beginning before that time; and

(c) particulars of the arrangements which it proposes to make for securing the payment of that tax.

(3) The requirements of this subsection are satisfied if—

(a) arrangements are made by the company for securing the payment of the tax which is or will be payable by it in respect of periods beginning before the relevant time; and

(b) those arrangements as so made are approved by the Board for the purposes of this subsection.

[…]

20. Corporation tax for an accounting period is generally due and payable nine months after the end of that period (s59D TMA).

Subsequent legislative changes

Companies

21. Finance Act 2013 ("FA 13") provided that TMA be amended by the inclusion of a new Schedule 3ZB ("Sch 3ZB"). Sch 3ZB provides that where a company ceased to be UK tax resident, it could enter into an agreement with HMRC for the payment of any exit taxes (including the liability under s185 TCGA) in six equal instalments over five years: the first instalment payable nine months after the company ceased to be resident, and the subsequent instalments paid at 12-monthly intervals thereafter. FA 13 provided that that Sch 3ZB was treated as having come into force on 11 December 2012 in relation to an accounting period if the relevant day, in relation to that period, fell on or after 11 December 2012[4].

Trusts

22. Finance Act 2019 provided that TMA be amended by the inclusion of a new Schedule 3ZAA ("Sch 3ZAA"). Sch 3ZAA provides that where (amongst other things) trustees ceased to be UK tax resident, they could enter into an agreement with HMRC for the payment of any exit taxes (including the liability under s80 TCGA) in six equal instalments over five years: the first instalment payable on the normal due date for payment, and the subsequent instalments paid at 12-monthly intervals thereafter.

BACKGROUND FACTS

23. The background facts are not in dispute, and we summarise them, based on the respective decisions of the FTT, as follows.

Panayi

24. Mr Panayi was born in Cyprus. He moved to the UK as a child in the late 1940s. He lived and worked in the UK after that date until he returned to Cyprus as set out below. Mr Panayi had never acquired a UK domicile.

25. In 1992 Mr Panayi established four settlements for the benefit of his children and other members of his family. He transferred into the trusts some of the shares which he owned in Cambos Enterprises Ltd ("Cambos"). Mr Panayi and a UK trust company were the original trustees. Later Mrs Panayi was added as a trustee. The four trusts were accumulation and maintenance trusts and the Trustees of those settlements are the Appellants in this appeal.

[4] 11 December 2012 was the date on which HMRC published draft legislation for consultation, including a draft of the provisions of what would become Sch 3ZB.

26. Early in 2004 Mr and Mrs Panayi decided they wished to return to live in Cyprus. To that end, amongst other things, on 19 August 2004 Mr and Mrs Panayi resigned as trustees of the four trusts; in their place three individuals resident in Cyprus were appointed as trustees. The UK resident trust company remained as a trustee; but the effect was that three out of the four trustees were then non-UK resident.

27. The following month, Mrs Panayi moved back to Cyprus with their youngest child. Mr Panayi moved there in early 2005.

28. On 19 December 2005 the Trustees sold the shares in Cambos. The sale took place after the migration of the trusts but before the due date for payment of any capital gains tax arising under s80 TCGA.

29. The value of the Cambos shares at the time the majority of the Trustees ceased to be resident in the UK has been agreed by the parties at about £30 million. After indexation and taper relief, it is agreed that the tax in dispute amounts to £332,952 plus interest (£83,128 plus interest per trust).

30. While the facts relating to the change in the Trustees' residence and the disposal of the shares were given to HMRC in the Trustees' self-assessment returns for 2004/5, the returns did not include a self-assessment of any liability under s80 TCGA.

31. In January 2007 HMRC opened enquiries into the Trustees' tax returns. On 29 September 2010 HMRC issued closure notices to the Trustees, assessing tax on the basis that there was a liability under s80 TCGA.

Redevco

32. Redevco, which owned a portfolio of retail estate investments, was incorporated in the UK and, until 15 January 2008, was resident solely in the UK for tax purposes. It is a member of a corporate group, the origins of which can be traced to the C&A fashion retail stores founded in the Netherlands in 1841. COFRA Holding AG ("COFRA") is the ultimate parent company of that group.

33. The C&A stores began trading in the UK in the early 1920s. Stores were opened throughout the UK, and C&A companies bought properties (in the main either as freeholds or on long leases) as the business expanded. The properties acquired were mostly retail stores but also included storage facilities and office accommodation held by local UK subsidiaries which the stores occupied under licence arrangements. In 2000, although it continues to be a major retail chain throughout much of Europe, it was decided to close the C&A stores in the UK due to their poor performance.

34. Between 1999 and 2002 the business of the group was reorganised and COFRA (which is resident in Switzerland) was introduced as the ultimate parent company. The group's business consisted of a fashion retail division trading under the "C&A" name, a property investment management division, Redevco Properties Holding BV ("Holding"), with its managerial headquarters in the Netherlands, and (from around 2002) a private equity investment division known as "Bregal".

35. The former C&A properties in the UK remained in the ownership of the original subsidiaries, whose shares were transferred to a UK intermediate holding company, UK Redevco Properties, a private unlimited company incorporated in England and Wales whose parent was Holding in the Netherlands. New tenants were found where vacancies had arisen due to the closure of the C&A stores. Those properties in the less attractive or secondary locations were sold so that UK Redevco Properties could focus on developing and acquiring properties in prime locations.

36. The incorporation of Redevco, on 16 November 2004, was part of an asset-backed securitisation undertaken by Holding which sought to raise capital to invest in the expansion of its property investment business in the UK by releasing value from its existing portfolio of mostly prime retail properties.

37. In late 2006 the management of Holding started to consider whether it was feasible to transfer the management of Redevco to the Netherlands in order better to co-ordinate its management with that of the group and, in particular, with that of the securitised sub-group of which it was the only member managed outside the Netherlands. As part of that process advice was sought from leading counsel as to whether the UK would be able to impose an exit tax charge on Redevco's migration. Counsel advised that:

> […] UK exit charges are, in his opinion, contrary to EU law and he is not aware of any other Counsel taking a different view. [Redevco and the group] had a particularly good set of facts. HMRC will presumably open an enquiry into the returns submitted by the companies and will not readily concede that no exit charge arises but they will be aware of the weakness of their case and so will have no appetite for litigation. While the companies might wish to bring the issue to litigation, it was not likely that this would be achievable within a reasonably short time frame.

38. On the basis of the advice received (in the words of a former Redevco director) that "there was a very good chance of succeeding in arguing that the tax was not due", Redevco decided to move its place of effective management to the Netherlands.

39. The FTT found that:

> (i) it was more likely than not that Redevco's migration would have proceeded in any event irrespective of the advice of leading counsel;
>
> (ii) Redevco's decision to leave the UK was made primarily for commercial reasons, although the tax advice received also played a part in the decision process; and
>
> (iii) the properties owned by Redevco were long-term held assets and there was, at the time of migration, no foreseeable expectation of their sale beyond group ownership.

40. On 31 October 2007 Redevco notified HMRC pursuant to s130 FA 88 of its intention to migrate. In the initial notification Redevco set out its view that no exit tax was due because it was "invalid under European Community law". Following the provision of an adequate guarantee from another UK resident group company and a power of attorney to the UK resident legal counsel, HMRC granted consent to the migration.

41. On 15 January 2008, Redevco moved its place of effective management to the Netherlands, thereby ceasing to be resident for tax purposes in the UK.

42. On 22 March 2011 Redevco sold all of the relevant properties to another group company.

43. In December 2010, HMRC opened an enquiry into Redevco's corporation tax return for the accounting period ended 15 January 2008. On 2 August 2021 HMRC issued a final closure notice. The relevant parts of the closure notice determined that Redevco was liable to corporation tax in respect of: (a) chargeable gains of £139,700,000 arising under s185 TCGA and (b) profits on loan relationships of £2,700,114 arising under para 10A.

THE BATTLEGROUND

The jurisprudence of the CJEU

44. It is well-established that the imposition of an exit tax, on a person transferring his tax residence from one EU member state to another, may constitute a restriction on that person's freedom of establishment or on the free movement of capital. Exit taxes place a person that chooses to transfer to another member state in a worse position than if he had not done so. This renders any decision to transfer less attractive: *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond* (Case C-371/10):

> [37] In the case in the main proceedings, it is clear that a company incorporated under Netherlands law wishing to transfer its place of effective management outside Netherlands territory, in the exercise of its right guaranteed by Article 49 TFEU, is placed at a disadvantage in terms of cash flow compared to a similar company retaining its place of effective management in the Netherlands. In accordance with the national legislation at issue in the main proceedings, the transfer of the place of effective management of a Netherlands company to another Member State entails the immediate taxation of the unrealised capital gains relating to the assets transferred, whereas such gains are not taxed when such a company transfers its place of management within the Netherlands. The capital gains relating to the assets of a company transferring its place of management within the Netherlands are not taxed until they are actually realised and to the extent that they are realised. That difference of treatment relating to the taxation of capital gains is liable to deter a company incorporated under Netherlands law from transferring its place of management to another Member State (see, to that effect, *de Lasteyrie du Saillant*, paragraph 46, and *N*, paragraph 35).

45. It has also been recognised that exit taxes may be justified by reference to the legitimate objective of preserving the origin member state's right to tax activities carried on within its own territory: *N v Inspecteur van de Belastingdienst Oost* (Case C-470/04):

> [46] Thus, gains realised on the disposal of assets are taxed, in accordance with Article 13(5) of the OECD Model Tax Convention on Income and on Capital, and in particular in accordance with its 2005 version, in the contracting State of which the person making the disposal is a resident. As the Advocate General has observed in paragraphs 96 and 97 of her Opinion, it is in accordance with that principle of fiscal territoriality, connected with a temporal component, namely residence within the territory during the period in which the taxable profit arises, that the national provisions in question provide for the charging of tax on increases in value recorded in the Netherlands, the amount of which has been determined at the time the taxpayer concerned emigrated and payment of which has been suspended until the actual disposal of the securities.
>
> [47] It follows, first, that the measure at issue in the main proceedings pursues an objective in the public interest, and, secondly, that it is appropriate for ensuring the attainment of that objective.
>
> [48] Finally, it needs to be examined whether a measure such as that at issue in the main proceedings goes beyond what is necessary to attain the objective it pursues.

46. There have been a number of cases before the CJEU which have considered the extent to which exit tax provisions of EU member states are so justified. In *National Grid Indus* and *Commission v Portuguese Republic* (Case C-38/10), the CJEU held that, because the underlying domestic law did not permit deferral of payment, the exit taxes levied in those cases were disproportionate and unlawful.

47. In *DMC* (Case C-164/12) and *Verder LabTec GmbH & Co KG v Finanzamt Hilden* (Case C-657/13), the underlying domestic laws permitted the taxpayer to elect to make payments in annual instalments over a period of five and ten years respectively. The CJEU held that the options were proportionate restrictions, and compatible with EU law. The CJEU noted that whilst member states were not required to defer the payment of tax until the ultimate disposal of the taxpayer's assets, such an option is not unlawful (*Verder LabTec* at [45]). In the case of *Wächtler* (C-581/17) deferral of payment until the disposal of the asset was held to be proportionate.

48. The CJEU has held that payment of interest in respect of exit taxes is a matter for the member states concerned - see for example *DMC* at [61] where the Court stated that interest may be charged in accordance with the applicable national legislation.

Application of EU law freedoms to trusts

49. The CJEU decided in *Panayi CJEU* that a trust established in the UK could benefit from the four EU law freedoms. It went on to consider whether the imposition of a "charge to tax on unrealised capital gains on the increase in value of assets held by trusts at the time when the majority of the Trustees cease to be resident or ordinarily resident in that Member State" had disproportionately interfered with the Trustees' right to freedom of establishment. In her opinion Advocate General Kokott said:

> 55. The Court has already held on a number of occasions that the taxable person must have the choice between immediate taxation and deferred payment, together with, if appropriate, interest in accordance with the applicable national legislation. In that connection, it considered the act of recovering the tax on hidden reserves over a period of five years rather than immediately to be proportionate. UK national law does not make any provision for deferment, however. Consequently, the tax debt relating to the unrealised hidden reserves was incurred immediately. That is disproportionate according to the case-law of the Court of Justice.
>
> […]
>
> 58. The tax at issue in the present case therefore remains disproportionate despite the fact that the hidden reserves were realised before the due date for its payment because there was no option to defer payment at the time of the assessment to tax. Such an option to defer does not necessarily have to amount to the five years referred to in the Court's case-law. The UK legislature could instead have linked the option to defer to realisation of the hidden reserves within that five-year period (as now also provided for in Article 5(4) of Directive (EU) 2016/1164 38).

50. The Court agreed with the Advocate General and held that:

> (a) The UK legislation gives rise to a difference in treatment that is liable to discourage trustees from transferring the place of management to another Member State and deter the settlor from appointing non-resident trustees, and that difference is a restriction on freedom of establishment (at [47]).
>
> (b) The imposition of a charge to tax as regards the capital gains that accrued within a national territory is in principle capable of being lawful if proportionate (at [52]).
>
> (c) The quantification of the tax liability may be determined at the point of departure. However, a lawful regime will provide a choice, at the point of exit between immediate payment or deferred payment of that tax (together with, if appropriate, interest in accordance with the national legislation) (at [57]).

(d) "It is apparent from the documents submitted to the Court that the legislation at issue in the main proceedings provides only for the immediate payment of the tax concerned. It follows that such legislation goes beyond what is necessary to achieve the objective of preserving the allocation of powers of taxation between the Member States and constitutes, therefore, an unjustified restriction on freedom of establishment." (at [59])

(e) The fact that the assets in this case were realised prior to the final date for payment is not relevant because it does not remedy the disproportionate interference that arises from the fact that the tax became payable immediately without an option to defer (at [60]).

ISSUES IN DISPUTE

51. It is not in dispute that UK law at the relevant times, at least on its face, interfered with the EU law right of freedom of establishment of both appellants. What is in issue in this appeal is how those rights are to be vindicated. Does a conforming interpretation of the legislation exist which would give effect to the EU law rights of the appellants?

52. If a conforming interpretation is not possible the jurisprudence of the CJEU is that:

> […] the national court must fully apply EU law and protect rights which the latter confers on individuals, disapplying, if necessary, any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to EU law […] (*Joachim Pöpperl v Land Nordrhein-Westfalen* (Case C-187/15) at [45]).

53. So, where a conforming construction is not possible, the proper approach is to disapply the incompatible provision. In such circumstances, the disapplied provision remains applicable, save to the extent that it is incompatible with EU law. An example given to us was in *Factortame,* where the court held that the restriction in Part II of the Merchant Shipping Act did not apply to nationals of other EU Member States, although it continued to apply to persons who were not EU nationals.

54. In both *Panayi FTT* and *Redevco FTT*, the FTT held that an appropriate conforming interpretation exists. The Trustees and Redevco submit that the FTT was wrong, no such conforming interpretation exists, and the exit tax provisions of UK legislation should be disapplied.

CONFORMING INTERPRETATION

55. All of the parties agree on the principles that apply to the adoption of a conforming interpretation or construction. They disagree on their application to the issues in this appeal.

56. The principle of a conforming interpretation was set out in the decision of the CJEU in *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89), as follows at [8]:

> [I]n applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.

57. Both the UK courts and the CJEU have held that whether a conforming interpretation is possible, or alternatively, what disapplication is required, is a matter for domestic law, and is not a matter for the CJEU: see, for example *Teckal Srl* (Case C-107/98):

> [33] Next, it must be pointed out that in the context of Article 177 of the Treaty the Court has no jurisdiction to rule either on the interpretation of provisions

> of national laws or regulations or on their conformity with Community law. It may, however, supply the national court with an interpretation of Community law that will enable that court to resolve the legal problem before it (Case C-17/92 *Federación de Distribuidores Cinematográficos v Spanish State* [1993] ECR 1-2239, paragraph 8).

In *RCC v IDT Card Services* [2006] EWCA Civ 29 at [81], the Court of Appeal reached essentially the same conclusion.

58. The Court of Appeal summarised the approach to be taken by English courts when applying a conforming interpretation in its decision in *Vodafone 2 v RCC* [2010] Ch 77. In his judgment Sir Andrew Morritt C quoted at [37] and [38] with approval a summary prepared by counsel for HMRC of the principles established in case law (and from which counsel for Vodafone did not dissent). These principles are:

> (1) The obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
>
> (a) it is not constrained by conventional rules of construction;
>
> (b) it does not require ambiguity in the legislative language;
>
> (c) it is not an exercise in semantics or linguistics;
>
> (d) it permits departure from the strict and literal application of the words which the legislature has elected to use;
>
> (e) it permits the implication of words necessary to comply with Community law obligations; and
>
> (f) the precise form of the words to be implied does not matter.
>
> (2) The only constraints on the broad and far-reaching nature of the interpretative obligation are that:
>
> (a) the meaning should go with the grain of the legislation and be compatible with the underlying thrust of the legislation being construed: an interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; and
>
> (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate.

59. In *FII Group Test Claimants v RCC* [2012] UKSC 19 at [176] ("*FII SC1*"), Lord Sumption described the adoption of a conforming interpretation as a:

> […] highly muscular approach to the construction of national legislation so as to bring it into conformity with the directly effective Treaty obligations of the United Kingdom. It is no doubt correct that, however strained a conforming construction may be, and however unlikely it is to have occurred to a reasonable person reading the statute at the time, a later judicial decision to adopt a conforming construction will be deemed to declare the law retrospectively in the same way as any other judicial decision. But it does not follow that there was not, at the time, an unlawful requirement to pay the tax. It simply means that the unlawfulness consists in the exaction of the tax by the Inland Revenue, in accordance with a non-conforming interpretation of what must (on this hypothesis) be deemed to be a conforming statute.

60. It is agreed that the authorities make it clear that the case law on the application of s3 Human Rights Act 1998 ("HRA") and the case law on conforming interpretations are interchangeable - see for example the speech of Lord Steyn in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [45]:

> 44 It is necessary to state what section 3(1), and in particular the word "possible" does not mean. First, section 3(1) applies even if there is no ambiguity in the language in the sense of it being capable of bearing two possible meanings. The word "possible" in section 3(1) is used in a different and much stronger sense. Secondly, section 3(1) imposes a stronger and more radical obligation than to adopt a purposive interpretation in the light of the ECHR. Thirdly, the draftsman of the Act had before him the model of the New Zealand Bill of Rights Act which imposes a requirement that the interpretation to be adopted must be reasonable. Parliament specifically rejected the legislative model of requiring a reasonable interpretation.
>
> 45. Instead the draftsman had resort to the analogy of the obligation under the EEC Treaty on national courts, as far as possible, to interpret national legislation in the light of the wording and purpose of Directives. In *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, 4159 the European Court of Justice defined this obligation as follows:
>
> > It follows that, in applying national law, whether the provisions in questions were adopted before or after the Directive, the national court called upon to interpret it is required to do so, as far as possible, in light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of article 189 of the Treaty.
>
> Given the undoubted strength of this interpretative obligation under EEC law, this is a significant signpost to the meaning of section 3(1) in the 1998 Act.

DECISIONS OF THE FTT

61. In both *Panayi FTT* and *Redevco FTT*, the FTT held that a conforming interpretation of the legislation existed.

Panayi FTT

62. Judge Mosedale held at [80] that:

> […] a conforming interpretation is possible for all the reasons above. That conforming interpretation is that s59B TMA, at a time before the legislation was actually amended to comply with EU law, should be read in cases where the taxpayer's right of freedom of establishment would otherwise be infringed, as including an option to defer payment of s80 exit tax in 5 equal annual instalments, without liability to interest. (Interest would of course arise under the normal legislative provisions (s 86 TMA) to the extent that an instalment was unpaid after its due date). Early realisation would not precipitate liability nor could security be required.

63. As a conforming interpretation existed, the FTT decided that disapplication was not applicable.

Redevco FTT

64. Judge Brooks decided that it was not appropriate to distinguish the decision of the FTT in *Panayi FTT* or to consider that it was wrongly decided. He considered a conforming construction to be appropriate and followed Judge Mosedale's decision in *Panayi FTT*. At [62]

he adopted Judge Mosedale's reasoning in relation to s59B TMA and held that a corresponding conforming construction should be applied to s59D TMA which is to be read as follows:

> Corporation tax for an accounting period is due and payable on the day following the expiry of nine months from the end of that period or, in cases where the taxpayer's right of freedom of establishment would otherwise be infringed, in five equal annual instalments following the end of that period.

SUBMISSIONS OF THE PARTIES

65. It is convenient to address the submissions of the parties under the following broad headings.

EU law on exit taxes

66. While the imposition of an exit tax may constitute a restriction on the freedom of establishment or the free movement of capital (see *National Grid Indus* at [37]), the CJEU has recognised that such taxes may be justified by reference to the legitimate objective of preserving the right of the origin member state to tax activities that were carried on within its own territory (see *N* at [46]). The authorities on exit taxes are therefore concerned with issues of proportionality. Mr Johnston referred us to two decisions in particular of the CJEU addressing this point.

67. The first was *European Commission v Portuguese Republic* which was an infraction proceeding against Portugal whose law required capital gains tax on departure – which Mr Johnston submitted was on all fours with the circumstances in this case. The Court held that:

> 32. Furthermore, as is apparent from paragraph 73 of the judgment in *National Grid Indus*, national legislation offering a company transferring its place of effective management to another Member State the choice between, first, immediate payment of the amount of tax and, secondly, deferred payment of the amount of tax, possibly together with interest in accordance with the applicable national legislation, would constitute a measure less harmful to freedom of establishment than the measures at issue in the main proceedings.
>
> 33 In this connection, the Portuguese Republic acknowledged in its written response to the Court's question referred to in paragraph 12 of the present judgment that, if the Court were to find that its legislation does restrict the exercise of freedom of establishment, it would be incumbent upon it to introduce into its national legislation the possibility for companies wishing to transfer their seat to another Member State not to have to pay immediately the entire amount of the tax on unrealised capital gains that have been generated in Portuguese territory.

68. The second was the CJEU's decision in *Verder LabTec*:

> 45. Besides, Member States entitled to tax capital gains generated when the assets in question were on their territory have the power, for the purposes of such taxation, to make provision for a chargeable event other than the actual realisation of those gains, in order to ensure that those assets are taxed.
>
> 46 In the present case, it is apparent from the order for reference that the tax legislation at issue in the main proceedings covers the case of a transfer of assets to a permanent establishment located within the territory of a Member State other than the Federal Republic of Germany, whose income is exempt from tax in Germany.
>
> 47 Accordingly, the disclosure of unrealised capital gains relating to those transferred assets generated prior to that transfer within the tax jurisdiction of the Federal Republic of Germany, and the taxation of those unrealised capital gains, is intended to ensure the taxation of those unrealised capital gains,

> generated within the tax jurisdiction of the Federal Republic of Germany. The taxation of income relating to those assets generated after such a transfer falls to the other Member State, in whose territory the permanent establishment is located. Accordingly, tax legislation such as that at issue in the main proceedings is appropriate for ensuring the preservation of the allocation of powers of taxation between the Member States concerned.
>
> 48. As regards the proportionality of the legislation at issue in the main proceedings, it should be noted, at the outset, that it is proportionate for a Member State, for the purpose of safeguarding the exercise of its powers of taxation, to determine the amount of the tax due on the unrealised capital gains that have been generated in its territory pertaining to the assets transferred outside its territory, at the time when its powers of taxation in respect of the assets concerned cease to exist, namely, in the present case, at the time of the transfer of the assets at issue outside the territory of that Member State.
>
> 49 As regards the recovery of such a tax, the Court has held that it was appropriate to give the taxable person the choice between, on the one hand, immediate payment of that tax, and, on the other hand, deferred payment of that tax, together with, if appropriate, interest in accordance with the applicable national legislation.

69. Mr Johnston acknowledges that it is lawful for the United Kingdom to levy capital gains tax in respect of gains attributable to the period when the taxpayer was resident in the UK. However, the UK must give the taxpayer the option of either paying that tax when it ceases to be UK tax-resident, or being able to defer payment. Mr Johnston derives from the decisions of the CJEU that the UK has a number of choices as to how to determine the amount of the gain and the date(s) on which it is payable. He submits that paragraph [45] of *Verder LabTec* is authority for the proposition that not only is it compatible for a member state to provide that the exit tax is calculated on the basis of the value of the taxpayer's assets at the date of exit and the tax payable in instalments, but it is also compatible with EU law for a member state to determine that the exit tax is levied at the time when the relevant asset is ultimately sold (or otherwise disposed of) based on the disposal value at the sale date. Mr Johnston notes that Judge Mosedale in the FTT in *Panayi* (at [39]) and the CJEU in *European Commission v Kingdom of Denmark* (Case 261/11) (for which there is no official translation into English) support this contention.

70. Mr Johnston notes that it is not the charging provision for the exit taxes that gives rise to the incompatibility with EU law, but rather the payment provisions. This can be seen from the opinion of the Advocate General in *Gallaher* before the CJEU:

> 65. In the first place, before I examine the substance of that question, it is necessary to make certain clarifications of a procedural nature. More specifically, I recall that, in the case at issue in the main proceedings, the tribunal had held at first instance that a remedy involving an option to defer payment on an instalment basis was compatible with EU law, but that it could not give effect to such a measure (since it was not for it to decide on the precise details of an instalment payment plan) and that, instead, the tribunal left the exit tax charge disapplied. In addition, [Gallaher], having appealed against the partial closure notice relating to the 2014 disposal, deferred payment of the corporation tax pending the determination of that appeal, as it was entitled to do, under Section 55 of the TMA 1970. Consequently, [Gallaher] has not been required to pay (and has not paid) the relevant corporation tax. The question that arises, therefore, is whether the fact that [Gallaher] succeeded in deferring payment by lodging an appeal and applying other provisions of national law is relevant. In my view it is not. In fact, as the referring court rightly observes,

> if the Court considers that, in order for the national legislation to be compatible with EU law, it must have made provision for an option to defer the tax, that option must be available irrespective of whether there was any litigation.

71. Mr Margolin identifies the breach of EU law differently, as being the imposition by the UK of a restriction on Redevco's freedom of establishment by imposing an exit tax without including a deferral provision. Mr Margolin submits the tax charges in these appeals will be unduly levied unless they are both justified and proportionate. Whilst HMRC accept that the charge cannot be justified without deferral provisions, as there were no deferral provisions at the time, he submits that the charge cannot be justified. Proportionality would address whether any deferral provisions went beyond the minimum required to achieve their objective. But as there simply were none, we do not even proceed to the proportionality stage of the analysis.

Conforming interpretation generally

72. Mr Johnston referred us to the opinion of Advocate General Bobek in *Joachim Pöpperl v Land Nordrhein-Westfalen* (Case C-187/15) where he said:

> 62. It is settled case-law that national legislation which is not compatible with EU law has to be interpreted in conformity with it. If that proves impossible, it has to be disapplied. There is nonetheless no strict order of precedence between the two: their order will depend on the individual case. In general, however, interpretation in conformity with EU law might be more advisable since it minimises the impact on the national legal system, provided that it is still able to ensure compatibility with EU law by interpretation.
>
> 63. Even if interpretation in conformity with EU law might be the preferred approach, it has its clear limits. In particular, the Court has recognised that interpretation in conformity with EU law cannot serve as the basis for an interpretation of national law *contra legem*.

73. Mr Johnston submits that although the precise application of a conforming construction is a matter of national law, the opinion of the Advocate General offers a helpful framing – in particular that the courts should not embark on the exercise with the assumption that a conforming construction takes priority over disapplication. Rather, each case has to be considered on its own merits – taking account of the extent to which it has an impact on the national legal system. The court has to consider whether the proposed conforming construction complies and is compatible with EU law. Mr Johnston submits that in this case it does not.

74. Both Mr Johnston and Mr Bremner referred us to the submissions of the taxpayer's counsel in *Vodafone 2* which are set out in the decision of Sir Andrew Morritt C in the Court of Appeal at [55] *et seq*:

> 55. The third objection summarised in para 41 above is to the effect that the suggested conforming interpretation would be retrospective in operation, would involve legal or economic policy decisions and would fail to satisfy the test of legal certainty. Counsel for V2 points out that a conforming interpretation necessarily applies retrospectively and in the tax field has to be applied by inspectors of taxes and taxpayers up and down the country. As such it must be sufficiently certain from both a practical and a legal point of view. Counsel for V2 contends that the conforming interpretation advanced by counsel for HMRC is not only insufficiently certain but has involved a decision on legal, economic and policy grounds which should be left to Parliament.
>
> 56 There are a number of points wrapped up in that submission. I will take them in turn. First, it is inevitable that a conforming interpretation will be retrospective in its operation. Unless and until it is averred that the legislation

> is inconsistent with some enforceable Community right there is no occasion to consider a conforming interpretation. The fact that the effect of such an interpretation is felt retrospectively is no more an objection in the field of conforming interpretation than it is in the case of domestic statutory construction.
>
> 57 Second, it is not a requirement of a conforming interpretation that it should be capable of precise formulation. That is precisely the point summarised in sub-paragraph (f) quoted in para 37 above. The dicta there referred to were made in such widely diverse situations as equal pay, right to succession of a protected tenancy and the imposition of a liability to VAT. It is inevitable that the conforming interpretation will lack the crispness to be expected of properly considered legislation; but, that cannot be a sufficient objection.
>
> 58 Third, the conforming interpretation advanced by counsel for HMRC reflects and excepts from the operation of the CFC legislation precisely that element of it which the Court of Justice held to constitute the hindrance to freedom of establishment. That is, by definition, sufficiently certain for a conforming interpretation whether or not the exclusion from the exception of wholly artificial transactions is included. There can be no objection to such an exclusion for the like reason. It follows precisely the formulation of the justification for the hindrance which the Court of Justice found to be acceptable.
>
> 59 It is the case that there are likely to be other ways of achieving conformity, for example section 751A inserted into the CFC legislation by paragraph 5 of Schedule 15 to the Finance Act 2007, and the choice of one rather than another may well involve policy decisions. But if that consideration alone could render a conforming interpretation illegitimate it would considerably restrict the occasions in which a conforming interpretation could be adopted and lead to an increase in disapplications. The choice of a conforming interpretation which faithfully follows a conclusion of the Court of Justice, as in this case, does not in my view trespass on the forbidden ground of legislation.

75. Mr Johnston accepts that a conforming interpretation is determinative of what the law has always been – and therefore (in that sense) is retrospective in operation. However, in the circumstances of the Trustees' appeal, he submits that a conforming interpretation is unable to give effect to the rights of the taxpayer – and therefore cannot remedy the breach of EU law. This is because the taxpayers are as a matter of EU law entitled to choose between paying tax on their exiting the UK, or choosing to defer payment. It is now impossible to give effect to that choice – as that choice would have had to be made some 20 years ago. Mr Johnston does not disagree with what is said in *Vodafone 2* but submits that it does not bite in the case of the Trustees' appeal. Whilst a conforming interpretation has retrospective effect, in the sense that it declares what the law has always been, the question is, whether such a declaration remedies the Appellants' EU law rights? Mr Johnston submits that a conforming interpretation does not remedy the EU law rights of the Trustees because they cannot now be given an effective choice in respect of the events of 2004-05. The object of a conforming interpretation is to vindicate the Trustees' EU law rights, and the vindication of their EU law rights requires a conforming construction that gives effect to their rights. Mr Johnston submits that the finding by Judge Mosedale in *Panayi FTT* that payments in stages vindicates their rights is wrong. It does not vindicate their rights, because they were not given a choice of payment at the time of exit or payment in instalments. The question is whether the entitlement to a retrospective choice, which is entirely hypothetical and could never be exercised, gives effect to the EU law rights of the Trustees – and Mr Johnston submits that the answer to this question is "no". Further – even if (hypothetically) the Trustees had sought to make such a choice at the time they ceased

to be UK resident – HMRC would have rejected any such choice – and this can be inferred from the fact that HMRC's position at the time was that trusts were not entitled to benefit from the EU law freedoms (and this was one of the issues that was resolved by the CJEU in its decision in *Panayi CJEU*).

76. Mr Johnston distinguishes the circumstances in the appeals before us from the circumstances in *Vodafone 2*. The dispute in *Vodafone 2* related to the application of the UK's controlled foreign company ("CFC") regime to companies established in the EEA. In the circumstances of *Vodafone 2*, the conforming interpretation advanced was relatively straightforward, being the addition of a further exemption to the application of the CFC regime – and such an addition was sufficiently certain. However, submits Mr Johnston, in the circumstances of these appeals, "a whole series of complex policy choices have to be made", which means that the adoption of a conforming interpretation cannot be sufficiently certain, and offends against the legal certainty principle.

77. Mr Margolin submits that the obligation of adopting a conforming interpretation derives from the national courts' duty of cooperation and the general principles of the supremacy and effectiveness of EU law. It is important in ensuring that EU law is effective and that EU nationals can assert and vindicate their EU law rights. However, this obligation is subject to various constraints, two of which are particularly relevant in Redevco's case. The first is that a national court is not required to interpret legislation in a manner that is contrary to its drafting. Secondly, the retrospection inherent in the adoption of a conforming interpretation must not offend against the principle of legal certainty. Mr Margolin submits that this is of particular importance in the case of tax and criminal law, and that this principle requires that the meaning of legislation affecting a taxpayer must be established with clarity in advance. Failure to comply with that principle may infringe the right of a taxpayer to assert their EU law rights. Those subject to the law must know in advance what the law is so as to be able to plan their actions accordingly. Mr Margolin submits that the retrospective nature of a conforming interpretation in this case has the effect of depriving Redevco of its ability to make a commercial decision (whether or not to migrate) on the basis of legislation which was incompatible with Redevco's right of freedom of establishment. Further, it does that in circumstances where there is no obligation on the national court, under EU law, to do anything other than to disapply the tax charge. Mr Margolin distinguishes Redevco's circumstances from the circumstances in *IDT*, which concerned the failure of the UK to properly implement the Sixth VAT Directive into UK law. In contrast, in Redevco's case, the only EU law obligation is that the UK must not impose an immediate tax liability on exit – there was at the time no EU law obligation to impose an exit tax.

78. Mr Margolin distinguishes the circumstances in Redevco's case with the circumstances in many of the authorities cited to us, and submits that in *Redevco FTT*, Judge Brooks was persuaded to adopt a conforming interpretation which was inconsistent with the legislative provisions that actually applied at the relevant time, and which imposed a charge to tax which was not lawfully due and for which there was no EU law duty to impose[5]. Mr Margolin referred us to the judgment of Lord Sumption in *FII SC1* at [176] (cited above) where he refers to *Marleasing* as being authority for the "highly muscular" approach of conforming interpretation.

79. Mr Margolin submits that there was a breach of UK law, irrespective of any conforming interpretation or disapplication which might subsequently be effected: conforming

[5] We note that a requirement to impose an exit tax can arise under Article 5 of the EU's Anti-Tax Avoidance Directive (Council Directive (EU) 2016/1164 of 12 July 2016) ("ATAD"), but ATAD post-dated the events considered in this appeal by many years.

interpretation is part of the principle of effectiveness - the requirement of an effective remedy. It applies at the stage of determining the consequences of a breach, it is not part of determining whether a breach had occurred. Mr Margolin submits that the conforming interpretation mechanism is intended to give effect to, and safeguard, an EU national's rights – but in this case HMRC are seeking to use it to retrospectively amend non-compliant UK legislation in order to make it hypothetically compliant, and thereby nullify the UK's breach of EU law – all to the disadvantage of the taxpayer. This, he submits, goes beyond the proper limits of a conforming construction pursuant to *Marleasing*.

80. Mr Margolin referred us to the decision of the House of Lords in *Fleming and Conde Nast v RCC* [2008] UKHL 2, which concerned the absence of transitional provisions when the UK reduced the time limit for VAT refund claims. In considering whether courts could adopt a conforming interpretation which allowed for a transitional period (where none was included in the legislation) Lord Scott said the following:

> [21] It is argued, alternatively, that the court can and should fix the duration of an extra period, a transitional period, that must be allowed to claimants whose pre-1 May 1997 claims would otherwise be barred by paragraph (1A). It is, to me, a surprising proposition that the court can, by judicial legislation, add a transitional period in order to cure the invalidity of a statutory provision that would not otherwise comply with European law and be enforceable against certain claimants. There are, to my mind, several objections to the proposition. First, it is not the function of judges to legislate. Second, the principle that people must be expected to know the law and conduct their affairs in accordance with the law can hardly apply to a judicial amendment to primary or secondary legislation that, until it is made known in the judge's pronounced judgment, is held *in pectore*. The objection to retrospective legislation would apply here too. Third, the important principle of certainty can hardly be satisfied. The terms of the judicial amendment might change as the case travelled up the appellate chain. And the ability of this House to depart from previous decisions would need to be kept in mind.
>
> [22] The notion that a court can add a transitional provision to regulation 29(1A), and thereby avoid the need to disapply the paragraph in relation to regulation 29 claims based on some pre 1 May 1997 input tax payments, appears to derive from language used by the ECJ in paras 40—43, but particularly para 41, of the judgment in the *Grundig* case [2002] ECR I-8003. These paragraphs are set out in para 44 of Lord Walker's opinion. In para 41 the ECJ said that the fact that a national court had held a transitional period fixed by its national legislature to be insufficient did not necessarily mean that the new limitation period could not be applied retrospectively at all, and continued:
>
> > The principle of effectiveness merely requires that such retroactive application should not go beyond what is necessary in order to ensure observance of that principle. It must, therefore, be permissible to apply the new period for initiating proceedings to actions brought after expiry of an adequate transitional period, assessed at six months in a case such the present, even where those actions concern the recovery of sums paid before the entry into force of the legislation laying down the new period.
>
> My Lords, the ECJ in this passage was dealing with the principle of effectiveness. But that is not the only principle in play. The principle of certainty, too, must be taken into account. Taxpayers are entitled to know from the statutory scheme what input tax repayment claims they can bring under regulation 29. In the absence of any statutory transitional provision, how are they to know whether pre-1 May 1997 claims that are more than three years

> old can be brought or, as to claims based on input tax paid between 1 May 1994 and 1 May 1997, within what period they can be brought? It is no answer to the requirement of certainty to be told that the claims can be brought within "an adequate transitional period". There is also the constitutional point, which may or may not apply to judges sitting in Italian courts. It is the function of judges sitting in UK courts to construe primary and secondary legislation. It is the function of judges sitting in UK courts to disapply UK legislation that is inconsistent with Community law. It is not the function of judges sitting in UK courts to amend UK legislation that is inconsistent with Community law. Moreover, the passage I have already cited from the ECJ judgment in Commission of the *European Communities v United Kingdom* (Case C-33/03) [2005]STC 582, para 25 seems to me pertinent here too:
>
> > incompatibility of national legislation with Community provisions can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended.
>
> Mere administrative practices cannot do this. Nor can judges.

81. Mr Margolin submits that Lord Scott's speech has clear resonance to these appeals. The circumstances in these appeals are similar to the circumstances in *Fleming*, in that in these appeals there is a legislative void that the courts are not equipped to fill.

Threshold between construction and amendment

82. We were referred to various decisions of the House of Lords and the Supreme Court.

83. The first is the decision in *Re S* [2002] 2 AC 291 which concerned the interpretation of the Children Act 1989 in a manner to give effect to rights under the European Convention on Human Rights pursuant to s3 HRA. In issue in *Re S* was the failure by local authorities to give effect to care plans and to meet key milestones. The Court of Appeal decided that the answer was to impose a series of "starred" milestones – and that if these starred milestones had not been achieved by a specified time, there was a requirement on the local authority to return to the court and explain why. Lord Nicholls in his speech said the following:

> 38 […] Section 3 [HRA] is concerned with interpretation. This is apparent from the opening words of section 3(1): "so far as it is possible to do so". The side heading of the section is "Interpretation of legislation". Section 4 (power to make a declaration of incompatibility) and, indeed, section 3(z)(b) presuppose that not all provisions in primary legislation can be rendered Convention compliant by the application of section 3(1). The existence of this limit on the scope of section 3(1) has already been the subject of judicial confirmation, more than once: see, for instance, Lord Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [1002] QB 48, 72-73, para 75 and Lord Hope of Craighead in *R v Lambert* [2001] 3 WLR 206, 233-235, paras 79-81.
>
> 39 In applying section 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament.
>
> 40 Up to this point there is no difficulty. The area of real difficulty lies in identifying the limits of interpretation in a particular case. This is not a novel problem. If anything, the problem is more acute today than in past times. Nowadays courts are more "liberal" in the interpretation of all manner of documents. The greater the latitude with which courts construe documents,

> the less readily defined is the boundary. What one person regards as sensible, if robust, interpretation, another regards as impermissibly creative. For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation. The boundary line may be crossed even though a limitation on Convention rights is not stated in express terms. Lord Steyn's observations in *R v A* (No 2) [2002] 1 AC 45, 68D-E, para 44 are not to be read as meaning that a clear limitation on Convention rights in terms is the only circumstance in which an interpretation incompatible with Convention rights may arise.
>
> 41 I should add a further general observation in the light of what happened in the present case. Section 3 directs courts on how legislation shall, as far as possible, be interpreted. When a court, called upon to construe legislation, ascribes a meaning and effect to the legislation pursuant to its obligation under section 3, it is important the court should identify clearly the particular statutory provision or provisions whose interpretation leads to that result. Apart from all else, this should assist in ensuring the court does not inadvertently stray outside its interpretation jurisdiction.
>
> […]
>
> 43 In his judgment Thorpe LJ noted that the starring system "seems to reach the fundamental boundary between the functions and responsibilities of the court and the local authority": see [2001] 2 FLR 582, 596, para 31. I agree. I consider this judicial innovation passes well beyond the boundary of interpretation. I can see no provision in the Children Act which lends itself to the interpretation that Parliament was thereby conferring this supervisory function on the court. No such provision was identified by the Court of Appeal. On the contrary, the starring system is inconsistent in an important respect with the scheme of the Children Act. It would constitute amendment of the Children Act, not its interpretation. It would have far-reaching practical ramifications for local authorities and their care of children. The starring system would not come free from additional administrative work and expense. It would be likely to have a material effect on authorities' allocation of scarce financial and other resources. This in turn would affect authorities' discharge of their responsibilities to other children. Moreover, the need to produce a formal report whenever a care plan is significantly departed from, and then await the outcome of any subsequent court proceedings, would affect the whole manner in which authorities discharge, and are able to discharge, their parental responsibilities.
>
> 44 These are matters for decision by Parliament, not the courts. It is impossible for a court to attempt to evaluate these ramifications or assess what would be the views of Parliament if changes are needed. […]

84. Mr Johnston submits that the limit of what is permissible by conforming interpretation can be seen in Lord Nicholl's speech. A Tribunal is not able to evaluate possible ramifications of the different policy decisions and assess what Parliament would have done if changes were needed. To adopt a conforming construction in these circumstances would be undertaking statutory amendment and not statutory construction. Mr Bremner submits that the "starring" arrangements went against the grain of UK domestic law, as it was inconsistent with the scheme of the Children Act, as it would give the courts a continuing supervisory role, whereas the

underlying policy of the legislation was that the courts would have no continuing role once it had determined that the threshold condition for taking children into care had been met.

85. In *R (oao Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, reference was made to *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. In *Ghaidan*, the defendant had lived in a long-term same-sex relationship with a protected tenant of a flat. The tenant died and possession proceedings were begun. The statutory provision referred to somebody who had lived "as his wife or husband". The question was whether these words could be read in as if a partner in a same-sex relationship were his wife or husband, with the result that the surviving partner could enjoy the benefit of the protected tenancy. In his speech, Lord Steyn considered the limits on a court's power to adopt a "possible" interpretation:

> 49. A study of the case law listed in the appendix to this judgment reveals that there has sometimes been a tendency to approach the interpretative task under section 3(1) in too literal and technical a way. In practice there has been too much emphasis on linguistic features. If the core remedial purpose of section 3(1) is not to be undermined a broader approach is required. That is, of course, not to gainsay the obvious proposition that inherent in the use of the word "possible" in section 3(1) is the idea that there is a Rubicon which courts may not cross. If it is not possible, within the meaning of section 3, to read or give effect to legislation in a way which is compatible with Convention rights, the only alternative is to exercise, where appropriate, the power to make a declaration of incompatibility. Usually, such cases should not be too difficult to identify. An obvious example is *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837. The House held that the Home Secretary was not competent under article 6 of the ECHR to decide on the tariff to be served by mandatory life sentence prisoners. The House found a section 3(1) interpretation not "possible" and made a declaration under section 4. Interpretation could not provide a substitute scheme. *Bellinger* is another obvious example. As Lord Rodger of Earlsferry observed "in relation to the validity of marriage, Parliament regards gender as fixed and immutable": [2003] 2 AC 467, 490, para 83. Section 3(1) of the 1998 Act could not be used.
>
> 50. Having had the opportunity to reconsider the matter in some depth, I am not disposed to try to formulate precise rules about where section 3 may not be used. Like the proverbial elephant such a case ought generally to be easily identifiable. What is necessary, however, is to emphasise that interpretation under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights. Perhaps the opinions delivered in the House today will serve to ensure a balanced approach along such lines.

86. In *Anderson*, the House of Lords held that having the Home Secretary decide the tariff for a life sentence breached the right of the prisoner under Article 6 ECHR. However, it declined to make a s3 interpretation as there were too many variables – and to do so would be to produce a "substitute scheme" – which, submitted Mr Johnston, moved from construction to amendment. Mr Bremner submits that the nature of the underlying incompatibility of the legislation with the human rights of the prisoner made it impossible for the courts to adopt a conforming interpretation. This is because the legislation gave to the Home Secretary "and no one else" the power of release and the power to determine how long a convicted murderer should remain in prison for punitive purposes. Once the court had found that was incompatible with Article 6 for the Home Secretary to have that power, there was nowhere to go other than a declaration of incompatibility - as the legislative policy was that only the Home Secretary

had the power of release, the court cannot by the mechanism of conforming interpretation give the power to somebody else.

87. We were also referred to *Pickstone v Freemans* and *Litser v Forth Dry Dock*. In all of these cases, the Appellants submit that the nature of the conforming interpretation was to make a relatively minor amendment to the legislative wording, and one that was wholly consistent with the purpose of the UK provisions.

88. An example of circumstances where a conforming interpretation would raise policy issues which only Parliament should resolve was given by Arden LJ (as she then was) in her judgment in *IDT* at [113]:

> Such issues might arise for instance (to take a very different case) if the interpretation of a statute in conformity with a European Union directive required the court to limit a provision of domestic law which had been inserted to protect third parties, such as creditors or consumers, and some equivalent protection would have to be provided. In those circumstances, the task of interpretation might go beyond the judicial role of interpretation […].

89. Mr Johnston submits that it would be improper to adopt a conforming interpretation in circumstances where it involves making policy choices that should be reserved to Parliament. This can be seen from Sir Andrew Morritt C's judgement in *Vodafone 2* at [59]. Mr Johnston distinguishes the circumstances in *Vodafone 2* from those in the appeals before us. In *Vodafone 2* the court was presented with only one possible conforming interpretation, and the CJEU had already identified how the legislation should be made conforming – all that was required was to add a further exception to the CFC rules that directly mirrored the test identified by the CJEU.

90. Mr Margolin submits that whether it would be improper to adopt a conforming interpretation may be informed by the extent of the choices which fall to be made in relation to what is then required to be compliant with the requirements of EU law or the ECHR. Where there is a clear indication in an EU directive as to what UK law ought to be, that gives a very clear steer as to what conforming construction should be adopted – for example the terms of the EU law underpinning the Equalities Act provided a clear purpose for which the domestic legislation has to be given a conforming construction so as to give effect to those clear legal principles underpinning it.

91. Mr Johnston referred to paragraphs [39] to [40] of the decision in *Panayi FTT*, and noted that it referred to "a range of options any one of which the national legislature could select". It was agreed by the parties before the FTT that there were multiple different lawful mechanisms by which exit taxes could be levied that were compliant with EU law. By choosing from "a range of options", Mr Johnston submitted that the FTT was making policy decisions which ought properly to be reserved to Parliament. Mr Johnston referred to three such policy choices:

> (a) The first was the payment scheme to be adopted – whether payment in instalments, or payment on the disposal of the underlying assets subject to the exit tax. In the case of payment by instalments, should payment be accelerated if there was a disposal of the asset before the final payment? In the case of payment on disposal, should the obligation to pay expire at the end of a set period if no disposal had occurred by then, or be accelerated at the end of the period?
>
> (b) Secondly, if payment was to be in instalments, how many instalments?
>
> (c) Thirdly, whether the taxpayer was required to provide security or to pay interest.

92. The FTT did not, submitted Mr Johnston, adopt a conforming interpretation, but effectively amended the legislation. Mr Johnston noted that in *Gallaher* [2019] UKFTT 207 (TC), the FTT (Judge Beare) reached the conclusion that a conforming interpretation of the exit tax provisions was not possible. In an appeal with materially similar facts, Judge Beare held that:

> [220] […] I am not equipped to decide which of the vast array of possible instalment payment options should be selected […] Any decision as to the precise basis on which deferred payment by way of instalments should be offered is a matter for Parliament and not for the UK courts.
>
> […]
>
> [212] […] I consider that it is clear both as a constitutional matter and based on the observations of Lord Nicholls in *Ghaidan* and Lord Scott in *Fleming* that, if there are a number of different ways of applying a conforming interpretation of the existing UK legislation, each of which is proportionate and equally valid as a matter of EU and UK law, I am precluded from applying a conforming interpretation of the existing UK legislation which involves selecting one of those options over the other or others. That selection can be made only by Parliament and my role must necessarily be confined to disapplying some part of the existing UK legislation which will have the effect of rendering the UK legislation EU law-compliant.

93. Judge Mosedale in *Panayi FTT* and Judge Brooks in *Redevco FTT* held that *Gallaher* was wrongly decided. Mr Johnston submits that *Gallaher* was correctly decided and that the FTT in *Panayi FTT* (and presumably *Redevco FTT*) was wrong. He submits that this is because the conforming interpretation adopted in *Panayi FTT* involves, says Mr Johnston, a substantial amendment to the existing statutory scheme. It adopted a novel and complex mechanism for deferred payment of the exit tax. Mr Johnston submits that this is evident from the content of Sch 3ZB and Sch 3ZAA. When Parliament implemented a framework that was similar – but not identical – to that selected by the FTT, it required the addition of whole new schedules to the TMA. They run to several pages and contain a number of paragraphs setting out the method by which a company may enter into an Exit Charge Payment Plan. This is the kind of amendment by interpretation that has been deprecated in the authorities. It was wrong for Judge Mosedale to take comfort from the fact that her conforming interpretation was similar to Sch 3ZB – rather her construction involved the creation of a substitute scheme that required lengthy legislation. This was an indication that her preferred interpretation amounted to amendment rather than a conforming interpretation.

94. Further, submits Mr Johnston, Judge Mosedale applied the wrong test for a conforming interpretation. At [137] to [138] she held that the Tribunal was only precluded from "making decisions with far-reaching consequences that are difficult to assess or where it involves making choices between competing rights of different persons". Mr Johnston submits that the test the FTT should have adopted is whether the Tribunal is making a decision which properly ought to be one for Parliament, as the Tribunal could not know what Parliament would have decided. By adopting the wrong test, the FTT sidestepped the difficult questions relating to the timing of payment, interest, security and acceleration of payment on realisation, by relying on the proposition that conforming constructions should be simple. In doing so, the FTT evaded the fundamental issue that it was choosing between different options that had considerable and wide-ranging ramifications, and that choice should have been left to Parliament.

95. We note that in his speech in *R v Lambert* [2002] 2 AC 545 at [78], Lord Hope referred to the interpretation powers under s3 HRA as being "far-reaching". But he went on to say that they should be "employed consistently with the need (a) to respect the will of the legislature so

far as this remains appropriate and (b) to preserve the integrity of our statute law so far this is possible". He went on to say at [81] that "[…] the interpretation of the statute by reading words in to give effect to the presumed intention must always be distinguished carefully from amendment", the latter being "an exercise which must be reserved to Parliament."

96. Mr Johnston submits that another example of where Judge Mosedale adopted the wrong test is at [153] where she referred to "Option 4" (assessment when the asset was realised) as going "further than required". The issue arises at [163] to [165] where she finds that payment in instalments over five years is the "minimum recognised as lawful", and that a conforming interpretation should be "as simple as possible". Mr Johnston submits that what Judge Mosedale is implying is that a conforming interpretation should not be too generous to the taxpayer. This, he says, is the wrong test. The test that should be adopted is how best to interpret the UK statute so that it adheres to the requirements of EU law - Judge Mosedale's finding that the Tribunal was precluded from making decisions which may have "far reaching consequences that are difficult to assess" (at [137]) places the threshold too high.

97. Although the FTT held (at [138]) that the conforming interpretation it adopted would not affect anyone else's rights, Mr Johnston submits that this statement is not correct. The fact that the appeal to the Upper Tribunal was stayed behind *Gallaher*, and that *Redevco* has been joined, shows that other taxpayers (and not just the appellants in those cases) will be affected by the FTT's decision. How they will be affected will depend on their particular circumstances – but it was not correct to state that the conforming interpretation will have no effect on others.

98. The decision of the FTT did not, submits Mr Johnston, vindicate the Trustees' right to freedom of establishment, which is the whole purpose of a conforming interpretation. In *Panayi CJEU*, the Court held at [57] that:

> […] legislation of a Member State which provides that a trust which transfers its place of management to another Member State may choose between immediate payment of the tax due on those capital gains or deferred payment of that tax, together with, if appropriate, interest in accordance with the applicable national legislation […]

was compatible with EU law. Mr Johnston submits that a retrospective reading into the legislation of an option to choose to defer tax does not vindicate the Trustees' rights. The FTT was wrong at [118], submits Mr Johnston, to state that the Trustees would not be "disadvantaged" by the retrospective nature of a conforming construction. This is because the incompatibility of the UK provisions with EU law is the inability of the Trustees to so choose at the exit date. This cannot be remedied by a retrospective construction of the legislation, as that option could never have been exercised – even if the Trustees had offered to pay in instalments, or to be assessed to tax when the assets were realised, HMRC would have refused. For this reason, the FTT's construction did not vindicate the Trustees' EU law rights. Mr Johnston does not dispute that a conforming construction has retrospective effect (see paragraph [105] of *Panayi FTT*) – but that is to miss the point. The issue is that a conforming construction (even with retrospective effect) cannot give the Trustees the choice that EU law required that they had when they left the UK.

99. Mr Margolin submits that the decision of the FTT in *Panayi FTT* and in *Redevco FTT* involve the insertion, in practical terms, of an entirely new payment deferral scheme, which did not exist at the relevant time, in order to fill a legislative void. Mr Margolin submits that the fact that the wording introduced by the FTT is relatively brief is irrelevant, because of the need to consider the fundamentally different effect which it gives to the exit tax provisions, particularly against the backdrop of legal certainty in the commercial decision which Redevco

had to make. Further, the language used by the FTT is prevalent with unstated assumptions of various kinds.

100. He submits that the FTT went too far in its process of conforming construction. Unlike the circumstances in *Vodafone 2* or *Lister*, for example, a conforming interpretation is not required in the circumstances of these appeals to give effect to the requirements of EU law. Mr Margolin draws a distinction between the current position, where exit taxes are mandatory under Article 5 of ATAD, and the position then, which was that they were permitted but not required. He submits that EU law neither requires, nor permits, the Tribunal to devise a deferral regime of its own in circumstances where EU law does not mandate that an exit tax must be levied. He submits that the approach which the FTT was persuaded to take is inconsistent with the legislative provisions which actually applied at the relevant date and imposed a charge which was not lawfully due and for which there was no duty to impose.

101. Mr Margolin referred us to the consultative document that preceded the adoption of Sch 3ZB, and in particular to the range of choices that were considered in the document, namely the payment by six annual instalments, deferral until the eventual disposal of the assets, or some combination of the two. The fact that number of different options were under consideration reinforces the submissions made by Mr Johnston that in adopting a conforming interpretation, the FTT were going beyond the bounds of what is permissible.

102. Mr Bremner referred us to the decision of the Upper Tribunal in *Banks v HMRC* [2020] UKUT 101 (TCC), a decision of Falk J (as she then was) and Judge Herrington. Having dismissed the appeal on other grounds, they went on to consider a conforming interpretation of the Inheritance Tax Act 1984, and in that context considered *Panayi FTT* and the refusal of Judge Mosedale to follow *Gallaher*:

> [242] We do not think that either [*Panayi FTT*] or *Gallaher* assist us to any material extent. They do not establish any precedent and were decided on their own particular facts. In any event, as we have mentioned, in *Panayi*, the FTT had the assistance of CJEU case law which set out a clear framework within which it could make its choice of conforming interpretation. The position was similar in *Vodafone 2*, where at [59] the Court of Appeal said that it chose a conforming interpretation that 'faithfully follows a conclusion of the [CJEU]'. That is not the position in the case with which we are concerned. There is, for example, no specific judgment of the ECtHR which can operate as a framework for our decision.
>
> [243] We therefore do not accept Mr Afzal's submission that the statement at [99] of [*Panayi FTT*] referred to at [230] above, establishes that as a matter of principle a conforming interpretation in tax cases does not go against the grain or contradict a fundamental feature of the legislation where a tax relief is extended or a tax charge restricted, as long as there is still scope for some taxpayers to be outside the scope of relief or within the charge to tax. It is necessary for the tribunal or court in question to apply the principles set out by the higher courts to the facts in question, and the fact that the statute concerned is a taxing statute makes no difference to the principles to be applied.

Going with the Grain

103. In his judgment in *Vodafone 2*, Sir Andrew Morritt C held that one of the constraints in adopting a conforming interpretation was that it had to "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed". A conforming construction will amount to amendment where the court is required to speculate as to what Parliament's intention would have been.

104. In the franked investment income litigation in the High Court [2014] EWHC 4302 (Ch) ("*FII HC2*"), this requirement was expressed by Henderson J as follows:

> [54] As to the difference in approach which is reflected in the example which I have discussed, I consider that the claimants' approach as set out in their alternative case is to be preferred. The question of the unlawfulness of the Case V charge does not arise in a legislative vacuum. It has to be considered in the context of the actual tax system operated by the UK, which was binding as a matter of domestic law and has to be applied by the English court subject only to any disapplication or conforming construction which may be needed in order to make it compliant with EU law. The introduction of a credit for tax at the FNR should therefore be implemented in a way which, as far as reasonably possible, reflects and goes with the grain of the existing UK legislative scheme.

This formulation was endorsed on appeal by the Court of Appeal ([2016] EWCA Civ 1180 at [113]). Mr Bremner described this as requiring a conforming interpretation to "best fit" with the provisions of UK law.

105. Mr Johnston submitted that in circumstances where UK legislation was intended to give effect to EU legislation – but failed adequately to do so (such as in the case of *Lock v British Gas Trading Ltd* [2016] EWCA Civ 983, per Sir Colin Rimer at [111]) – it should be relatively straightforward to identify the "grain" of domestic legislation. However, in circumstances where Parliament intended to achieve an outcome which was subsequently determined to be incompatible with EU law rights, it may be more difficult to identify the "grain". Similar issues arise in circumstances where Parliament did not intend to comply with EU law, or intentionally sought as narrow an application of EU law as possible. In such cases, submitted Mr Johnston, a court will be slower to reach a conforming construction. Parliament did not intend to give effect to EU law, and it may not be possible to render the domestic law conforming. Where a conforming construction is not possible, the proper approach is to disapply. As Lord Keith explained in *R v Secretary of State for Employment ex p Equal Opportunities Commission* [1995] 1 AC 1 at 27A, the disapplied provision remains applicable, save to the extent that it is incompatible with EU law.

106. The conforming interpretation adopted by the FTT, submits Mr Johnston, also does not go with the grain of the legislation. Section 80 TCGA provides for there to be a deemed disposal and reacquisition at the point in time when the Trustees exit the UK. That provision needs to be read together with s59B TMA, showing that Parliament envisaged that calculation, assessment to tax, and liability to the exit tax is established at that one point. It was no part of Parliament's thinking that payment would be deferred.

107. Mr Margolin referred us to the judgment of Lord Sumption in *FII SC1* at [205]:

> The Court of Appeal held that section 33 did impliedly exclude a right of action at common law, even in relation to claims for tax overcharged contrary to EU law. They then dealt with the resulting inconsistency with EU law by reinterpreting the section so as remove the offending restrictions and the element of discretion. I think that this was wrong in principle. I very much doubt whether such radical surgery can be justified even under the extended principles of construction authorised in *Marleasing*. Its effect would be fundamentally to alter the scheme of the provision. But, however that may be, it seems, with respect, eccentric to imply an ambit for section 33 which is inconsistent with EU law and then to torture the express provisions so as to deal with anomalies that but for the implication would never have arisen.

Mr Margolin submits that no matter how muscular an approach is permitted under the *Marleasing* principles, it is subject to limits.

108. Mr Margolin submitted that an example of these limits can be seen in the decision of the Supreme Court in *Routier v RCC* [2019] UKSC 43. This case concerned a charitable trust established in Jersey, and whether it was entitled to benefit from the statutory exemption from inheritance tax ("IHT"). On the basis of the legislation as interpreted by reference to the long-standing *Dreyfus* case, a charitable trust established and governed by Jersey law could not benefit from the relief. The Court of Appeal gave the legislation a conforming interpretation to permit relief, where the relevant charity satisfies UK law requirements concerning a charity and is based in an EU member state or a third country which has an information exchange agreement with the UK. In the Supreme Court, Lords Reed and Lloyd-Jones (with whom the rest of the Court agreed) in their judgment said the following:

> 50 On its face, section 23 of the Inheritance Tax Act does not impose any restriction on the free movement of capital. In particular, it does not discriminate between gifts to charities governed by the law of the United Kingdom and gifts to charities governed by the law of other EU member states or third countries. It is, on its face, entirely compliant with article 56 TEC. That is so even if section 272 of the Inheritance Tax Act and section 989 of the Income Tax Act are taken into account, since those provisions, on their face, are equally non-discriminatory.
>
> 51 The only relevant restriction which existed at any material time, and with which this appeal is concerned, is the restriction imposed by the judicial gloss which was placed on the words now found in section 989 of the Income Tax Act in the case of *Dreyfus* [1956] AC 39: a restriction which, when incorporated into section 23 of the Inheritance Tax Act, has the effect of confining relief under that provision to trusts governed by the law of a part of the United Kingdom and subject to the jurisdiction of United Kingdom courts. There can be no doubt that the *Dreyfus* gloss on the language of section 989 of the Income Tax Act, as applied to section 23,is incompatible with article 56 TEC. It is plain that the restriction of relief from inheritance tax to trusts governed by the law of a part of the United Kingdom cannot be justified under EU law.
>
> 52 Article 56 TEC is directly applicable as law in the United Kingdom, and must be given effect in priority to inconsistent national law, whether judicial or legislative in origin. It follows that the *Dreyfus* gloss on the language of section 989 of the Income Tax Act cannot be applied to section 23 in situations falling within the scope of article 56. The resultant position is as set out in para 49 above: applying section 23 without incorporating the *Dreyfus* gloss, there is no relevant restriction on the availability of relief beyond the conditions appearing on the face of the provision. That result is in conformity with article 56. Since it is undisputed that the Coulter Trust satisfied those conditions at the relevant time, it follows that it qualifies for the relief.
>
> 53 That is the conclusion which the Court of Appeal should have reached, once it had decided that the *Dreyfus* gloss on the language of section 989 of the Income Tax Act, if incorporated into section 23 of the Inheritance Tax Act, imposed a restriction which was incompatible with article 56. Having reached that decision, the court could not apply that entirely judge-made restriction, and therefore had to apply section 23 without the gloss placed on the language used in section 989 of the Income Tax Act in the Dreyfus case. It would then have arrived at a result which complied with article 56.

> 54 With great respect to the Court of Appeal, it should not have concerned itself with a hypothetical restriction concerned with the existence of mutual assistance agreements, even if it considered that such a restriction might have been justifiable under EU law and might have been imposed by Parliament. The fact was that there was no such restriction in existence. Neither section 23 of the Inheritance Tax Act nor section 989 of the Income Tax Act made relief for trusts in third countries conditional on there being a mutual assistance agreement in place. The fact that such a restriction, if it had existed, might have been in conformity with EU law did not mean that it could be imposed by the court, by means of a purported interpretation of the language used in section 23.

109. Mr Margolin submits that *Routier* shows that what the court should not do is to try to think up whatever might be the minimum protection required by EU law and then by means of a purported interpretation of the statutory language, introduce that. The fact that something might have been in conformity if it had existed did not mean that the Court of Appeal was entitled to devise a compliant scheme of its own in the way which it did. Mr Margolin submits that the FTT was wrong in *Panayi FTT* to hold that *Routier* concerned the effect of an entirely judge-made restriction and as such, provided little, if any, assistance in the present case. Rather, says Mr Margolin, there is nothing that limits the application of *Routier* to the interpretation of judicial decisions and nothing in English or EU law to distinguish the operation of a conforming construction in that way. He submits that *Panayi FTT* is inconsistent with *Routier*, and the Supreme Court in its decision gives a clear indication of what a court or tribunal can legitimately do when it is seeking to give a conforming construction to the words adopted by Parliament.

110. Mr Margolin submits that the conforming interpretation adopted by the FTT was contrary to the express will of Parliament. FA 2013 provided that Sch 3ZB was treated as having come into force on 11 December 2012 in relation to an accounting period if the relevant day, in relation to that period, fell on or after 11 December 2012. If Parliament had considered it appropriate to introduce the regime with a further element of retrospectivity it would have done so. Adopting a conforming interpretation which would have retrospective effect back to the original enactment of the exit taxes goes against the grain or thrust of the legislation and is, says Mr Margolin, *contra legem*. Further the provisions of Sch 3ZB are materially different from, and more liberal than, the conforming interpretation adopted by the FTT.

111. Mr Margolin submits that it is "eccentric" for HMRC to suggest that a conforming interpretation could be moulded by reference to s281 TCGA, which provides that a taxpayer may elect to pay CGT arising on some disposals by way of gift in ten equal yearly instalments. The submissions by HMRC that s281 has relevance to these appeals just goes to show the range of choices facing the Tribunal in adopting a conforming interpretation.

Legal Certainty

112. Mr Margolin submits that the FTT in *Redevco FTT* erred in law by not distinguishing Redevco's case from that of the Trustees. He submits that Judge Brooks ought to have distinguished *Redevco FTT* from *Panayi FTT* because, the question of legitimate expectation did not arise in Panayi.

113. Mr Margolin submitted that a conforming interpretation must not breach the EU law principle of legal certainty. In order to set Redevco's decision to emigrate from the UK in the context of its understanding of the risks it thereby assumed, he referred us to the witness statements of Mr Faber and Mr Drury before the FTT, which showed that they believed (on the basis of clear and robust advice from leading counsel) that it was likely (70% to 80% in Mr

Drury's evidence) that an exit tax was unlawful. He referred us in addition to a number of publications (including the specialist tax press) which supported this view.

114. He also referred us to the HM Treasury/HMRC consultation document published on 11 December 2012 which led to the FA 2013 amendments which introduced the deferral arrangements in Sch 3ZB. The consultative document refers to the CJEU decisions in *National Grid Indus* and *Portugal*, and states that a deferral option is required to make the UK's exit tax provisions proportionate. However, there is no mention in the document of the possibility of a conforming interpretation. Nor is there any reference in the Law Society's response to the consultation to the possibility of the UK's exit tax being "saved" by the adoption of a conforming interpretation.

115. Whilst the consultation document (and response) post-dates Redevco's decision to migrate, this (and the other documentary references) are, says Mr Margolin, consistent with Redevco's reasonable belief that the exit tax was unlawful.

116. We were referred by Mr Margolin to the judgment of Lord Sumption in *FII SC1* at [152]:

> […] First, even if the change applies only to future claims, it is likely to operate retrospectively to some extent. It will usually extinguish the possibility of enforcing existing rights to recover sums which have already been paid and could in due course have been reclaimed and recovered under the previous law, but are time-barred under the new one. This necessarily engages the principle of effectiveness. Of course, the legislation may also be retrospective in the more radical sense of abrogating claims that have already been properly made under the old law. The second potential objection is that to the extent that the change is retrospective, it may offend against the principle of legal certainty. People must be taken to appreciate that the law may be changed. But until it is, they are entitled to organise their affairs on the basis of the law as it stands and to assume a sufficient measure of predictability in its future development to enable them to exercise their EU law rights. This means that if they have already paid money which is in principle recoverable, they are entitled to be guided by the existing law when deciding how long they have left in which to claim. This objection is commonly analysed as depending on the principle of the protection of legitimate expectations. But this is not really a distinct principle. It has been described as
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> > the corollary of the principle of legal certainty, which requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable: *Duff v Minister of Agriculture and Food, Ireland* (Case C-63/93) [1996] ECR I-569,para 20.
>
> It is one manifestation of the broader principle that those subject to the law should be able to ascertain their rights and obligations at the time that they are called on to decide what to do about them.

117. Mr Margolin submits that it is necessary for a taxpayer to know with clarity the liabilities it will suffer before, not after, undertaking its transaction. If a law can be interpreted so as to insert a deferral provision with retrospective effect, the law itself lacks certainty, and that is itself in breach of EU law. Redevco cannot be expected to have ordered its affairs when undertaking its migration, or, when subsequently undertaking its intra-group transfer, on the basis of a fundamentally different regime which a tribunal might hypothetically consider it would be appropriate to introduce many years later. This, he says, is self-evidently incompatible with the principles of legal certainty and legitimate expectation.

118. Redevco, says Mr Margolin, had to make its decision whether or not to migrate on the basis of the legislation as it stood and cannot be taken to have been in a position where it could have foreseen what might eventually be determined, whether by way of conforming construction or partial disapplication, to be an EU law compliant regime. It could not have anticipated what a tribunal might do some 15 years later and might materially have altered the assessment of the legality of the legislation which Redevco had to make, in deciding whether or not to exercise its right to migrate.

119. Mr Margolin submits that Redevco had a legitimate expectation that the exit tax provisions in s185 TCGA would be declared to be incompatible with EU law, and disapplied. He submits that it is common ground that they were incompatible.

120. Mr Margolin confirmed to us that counsel's advice was not the source of Redevco's legitimate expectation, but his opinion reinforced its understanding of the legislation in terms of the clarity and robustness of that advice and the fact that leading counsel said he was not aware of anybody else at the tax Bar who took a different view. Redevco's legitimate expectation is based on its understanding of the law, which was informed by or reinforced by the advice which it received.

121. Mr Margolin does not challenge the FTT's finding that Redevco would have migrated to the Netherlands, irrespective of counsel's advice. However, he submits that the FTT's finding does not extend to the application of the legislation. Bearing in mind the findings that were made about taking tax considerations into account, along with the primary commercial reasons for the migration, he submits that it is highly unlikely that Redevco would have exposed itself to a very substantial and wholly unavoidable tax charge by migrating if they were aware of the existence of a conforming interpretation. In any event, the Tribunal cannot second guess that decision because that wasn't the option that was on offer under the legislation at the time. The only way that Redevco, in the circumstances, could assert its right of freedom of establishment was by migrating and taking action, practically, to exercise that right. The effect, says Mr Margolin, of adopting a conforming interpretation, is that Redevco is now caught out and required to suffer a tax liability in consequence of its exercise of its right of freedom of establishment by reference to something that was neither foreseen nor foreseeable at the time. This offends against the principle of legal certainty. He submits that the importance given to that principle of legitimate expectation can be seen in the speeches of the House of Lords in *Fleming*.

122. In addition to the application of the principle of legal certainty, Mr Margolin submits that the FTT made a further error of law in *Redevco FTT* by failing to distinguish *Panayi FTT* on the grounds that (i) Redevco's motivations for migration were primarily commercial, and (ii) the assets were transferred to another group company following the migration, and that there was an intention for the group to hold the assets for the long term. In the absence of any finding (or indeed allegation) of abuse or artificiality, Mr Margolin submits that the fact that, according to the FTT's findings, "tax considerations certainly played a part in the decision" cannot have the effect of depriving Redevco of its EU law rights or its entitlement to assert such rights.

123. Mr Margolin raises a number of points in relation to the FTT's treatment of the evidence in *Redevco FTT*, in particular the finding by the FTT, by reference to the advice of leading counsel, that it did not have a legitimate expectation that it would not have to pay exit taxes. Mr Margolin submits that the FTT misinterpreted the note of conference and purported conforming constructions. In fact, these references were to potential statutory amendments that might be made to the legislation by Parliament to bring it into conformity with EU law, and not to the court adopting a conforming construction. He submits that this finding gives rise to an error of law in *Edwards v Bairstow* terms.

124. In addition, challenges to the FTT's factual findings were raised in Redevco's notice of appeal, and although they were not pursued at the hearing, they were not abandoned. In essence these challenged the findings by the FTT that:

(a) Redevco has not established that the migration would not have happened if the advice it received from leading counsel had been different or less positive (although we note that Mr Margolin submitted in the course of the hearing that he did not challenge this finding);

(b) Rejected the evidence of Mr Drury and Mr Faber in relation to this issue, or alternatively, Judge Brooks did not recognise the difference in their roles; and

(c) Redevco did not have a legitimate expectation that it would not have to pay tax as it disposed of the properties following its migration.

Jurisdiction

125. Mr Johnston also challenged the jurisdiction of the FTT to apply a conforming interpretation of s59B TMA. The jurisdiction of the FTT on an appeal under s31 TMA extends only to increasing or decreasing an assessment. Section 50 TMA provides that on an appeal the FTT may decide that the appellant has been "overcharged" or "undercharged". It does not provide that the FTT has jurisdiction to decide that the tax was due on a different date. For this reason, a conforming construction of ss59B goes beyond the competence of the FTT and the FTT was bound to disapply s80 instead.

Alternative analysis

126. Mr Johnston went on to submit that if we were against him on his submission that there was no possible conforming interpretation, then the only conforming interpretation that went with the grain of the legislation was to assess and require payment of CGT at the time the asset was realised. Judge Mosedale was wrong to say that the offending provision was s59B TMA (at [91]) and that s80 TCGA was consistent with EU law (at [155]). She was wrong to say that the CJEU "allowed tax to be assessed at the point of exit" (at [154]) – the CJEU's decision was that although the amount of tax can be quantified at that point, it cannot be assessed – as it is the assessment that generates the liability to pay, and it is the liability to pay being triggered at the time of the Trustees' emigration that offends against EU law. The decision of the CJEU and the Advocate General's opinion in *Panayi CJEU* made no reference to s59B – the finding of the CJEU was that it was s80 TCGA that offended EU law. The defect found by the CJEU can (and should) be rectified by adopting a conforming interpretation of s80 TCGA. Section 80 is the provision that governs the exit tax and provides for the quantification and the assessment of the charge at the time the Trustees leave the UK. It is the assessment that creates the obligation to pay on 31 January following the end of the relevant tax year. Therefore, an amendment to s80, that creates a choice to delay to the date of assessment, remedies the defect identified by the CJEU. This, he says, is consistent with the scheme of CGT, and the decision of the CJEU in *Panayi CJEU*.

127. Mr Johnston submits that a conforming interpretation that allowed for an option that the exit tax be assessable and payable at the time of the asset's realisation was to be preferred for the following reasons:

(1) It is a less substantial amendment as it merely needs to provide for an option to defer assessment until disposal of the asset up to a specified time limit.

(2) It goes more readily with the 'grain' of the legislation because

(a) it sits within the relevant section of the TCGA that is concerned with exit taxes; and

(b) Parliament intended that the assessment of liability would be straightforward and simple.

(3) It gives rise to fewer procedural complexities as the Tribunal does not engage in decisions of public policy questions concerning the number of instalments and their timing, payment of interest, and the giving of security. The position is straightforward: quantification and assessment take place at the date of disposal. The liability to pay arises at the time of disposal, and the existing statutory framework is otherwise untouched.

DISCUSSION

128. We accept the submission of Mr Bremner that the exercise the courts have to undertake is first to identify the manner in which UK domestic legislation is incompatible with EU law. Having done so, the courts can then consider what is required to remedy the defect. The court can then consider whether this can be done by adopting a conforming interpretation, and if so its terms. If it cannot, then the court moves on to consider disapplication, and the effect of the disapplication. This is an approach regularly adopted by the courts, and an example to which Mr Bremner referred us can be seen in the judgment of Henderson J in *Prudential Assurance Co Ltd and another v RCC* [2013] EWHC 3249 (Ch):

> [84] […] Thus the basic question which I am now considering is how, as a matter of domestic English law, that infringement of EU law is to be remedied. It is common ground that the claims to recover the unlawfully levied tax are properly to be characterised as *San Giorgio* claims, and that the EU principle of effectiveness requires the UK to provide a remedy for those claims which does not make the test claimants' art 63 TFEU rights either virtually impossible or excessively difficult to exercise.
>
> [85] In order to answer this question, it is first necessary to understand in precisely what relevant respects the UK legislation infringed art 63 TFEU. This enquiry has both a negative and a positive aspect. Negatively, what were the defects in the legislation? Positively, what would have been required to eliminate them? On the negative side, it is abundantly clear from the authorities which I have reviewed that the infringement lay, at least, in the failure of the UK system to provide a tax credit for the actual underlying tax paid on the distributed profits in the source state, when the UK had chosen to counter economic double taxation of domestic dividends by the exemption in s 208. This is a recurrent theme from its first emergence in December 2006 in *FII (ECJ) I* ([2007] STC 326, [2006] ECR I-11753, notably paras 50, 63–64 and 74) to its latest iteration in November 2012 in *FII (ECJ) II* ([2013] STC 612, [2013] Ch 431, paras 37 to 39), *citing FII (ECJ) I*, *Haribo*, *Accor*, and the reasoned order.

129. We disagree with the submission of Mr Johnston that there is no presumption that a conforming interpretation has to take precedence over disapplication. The obligation of the tribunals and courts in the UK is to give effect to legislation that has been enacted by Parliament. They can only disapply UK legislation if they cannot lawfully give effect to it (including giving effect by the use of conforming interpretations).

130. Our first task is to understand precisely what relevant aspects of UK domestic law infringe the EU law rights of the Trustees. We draw the following conclusions from the jurisprudence of the CJEU:

(1) The imposition of an exit tax on a person transferring his tax residence from one EU member state to another may constitute a restriction on that person's freedom of establishment or on the free movement of capital (*National Grid Indus*);

(2) An exit tax may be justified by reference to the legitimate objective of preserving the origin member state's right to tax activities carried on within its own territory (*N*);

(3) But, it is disproportionate for the origin member state to impose an exit tax in circumstances where the taxpayer cannot defer payment of the exit tax (*National Grid Indus* and *Portugal*);

(4) It is proportionate for tax to be deferred by payment in five or ten annual payments, or by payment following the disposal of the asset (*DMC*, *Verder LabTec*, and *Wächtler*); and

(5) It remains undecided whether deferring paying by fewer than five annual payments would be proportionate.

131. It was acknowledged by Mr Johnston in his submissions in relation to the Trustees that the UK was entitled to charge tax on unrealised chargeable gains that had arisen in the UK at the time of exit. This can be seen from the decision of the CJEU in *Panayi CJEU* at [52] where the court states that:

> […] in accordance with the principle of fiscal territoriality linked to a temporal consideration, namely the taxpayer's residence for tax purposes within national territory during the period in which the capital gains arise, a Member State is entitled to charge tax on those gains at the time when that taxpayer leaves the country. Such a measure is intended to prevent situations capable of jeopardising the right of the Member State of origin to exercise its powers of taxation in relation to activities carried on within its territory, and can therefore be justified on grounds connected with the preservation of the allocation of powers of taxation between the Member States.

132. We find that the breach of the EU law rights of the Trustees does not arise because of the imposition of an exit tax, rather it arises in respect of the failure of the UK to allow a deferral of the payment of that liability. This follows from *Panayi CJEU* at [57] where the Court said that:

> […] legislation of a Member State which provides that a trust which transfers its place of management to another Member State may choose between immediate payment of the tax due on those capital gains or deferred payment of that tax, together with, if appropriate, interest in accordance with the applicable national legislation, would constitute a measure less harmful to freedom of establishment than the immediate payment of the tax due (see, to that effect, judgment of 21 May 2015, *Verder LabTec*, C-657/13, EU:C:2015:331, paragraph 49 and the case-law cited).

133. The CJEU goes on to state at [58] that the member state of origin is not obliged to take account of losses arising after the migration.

134. We find that the imposition of an exit tax under s80 TCGA is not the aspect of UK domestic law that infringes the EU law rights of the Trustees. Rather it is the failure of UK domestic law to provide for deferral of the payment of that liability. The breach (in the case of the Trustees) is in s59B TMA. This is the finding correctly reached by Judge Mosedale in *Panayi FTT* at [92]. A similar analysis in respect of the corresponding corporation tax provisions applies to Redevco.

135. The next step in the analysis is to consider what is required to remedy the defect. We can then consider whether this can be done by adopting a conforming interpretation of s59B TMA (in the case of the Trustees) and s59D (in the case of Redevco), and if so its terms. Whether a conforming interpretation is possible is a matter for domestic law, and not a matter for the CJEU.

136. We note that the CJEU in *Panayi CJEU* did not consider what deferral right the UK would need to give to the Trustees in order for UK legislation give effect to their EU law rights. This follows from the scope of the terms of the reference made to the CJEU by the FTT. However, in its jurisprudence the CJEU has found that payment in instalments over five or ten years is compatible with taxpayers' EU law rights (see *DMC*, *Verder LabTec*, and *Wächtler).* This can also be seen in the opinion of AG Kokott in *Panayi CJEU*:

> 55. The Court has already held on a number of occasions that the taxable person must have the choice between immediate taxation and deferred payment, together with, if appropriate, interest in accordance with the applicable national legislation. In that connection, it considered the act of recovering the tax on hidden reserves over a period of five years rather than immediately to be proportionate. UK national law does not make any provision for deferment, however. Consequently, the tax debt relating to the unrealised hidden reserves was incurred immediately. That is disproportionate according to the case-law of the Court of Justice.

137. The legal principles governing conforming interpretations were identified by the Court of Appeal in *Vodafone 2*, and have been set out above. These principles are not in dispute. What is in dispute is their application to these appeals.

138. In essence, the submission of the Appellants is that a court cannot apply a conforming interpretation in the particular circumstances of these appeals. To do so, they say, would involve having to make policy choices of a kind that should be reserved to Parliament. They point to Sch 3ZB and Sch 3ZAA to demonstrate issues that arise in putting into place a scheme for the deferral of payments of exit taxes – and the choices that Parliament had to consider when legislating such a scheme – including number of instalments, timing, security, etc. Mr Johnston points to the "buffet" of "possible lawful options" that Judge Mosedale considered in the course of her decision in *Panayi FTT* to show the difficulties for a court in determining the nature of a conforming interpretation.

139. However, we do not consider that the "options" to which Judge Mosedale referred in her decision were in reality different choices that were all potentially open to her. These "options" never constituted a smorgasbord of delicacies from which she could freely select. Rather Judge Mosedale considered a range of different potential conforming constructions that were raised in the course of argument before her, and which of these satisfied the criteria in *Vodafone 2* and best remedied the defect in UK domestic law.

140. In determining whether a conforming interpretation is available, we need to consider whether a muscular approach to interpretation is able to remedy the breach of EU law. In adopting a conforming interpretation, we cannot go beyond what is necessary to remedy the breach (see *Re S*). The precise form of words does not matter, and we do not need to engage in legislative drafting.

141. We find that it is possible to apply a conforming interpretation to ss59B and 59D TMA. This can be achieved by reading words into those sections to provide that, at a time before the legislation was actually amended to comply with EU law, those provisions should be read in cases where the taxpayer's right of freedom of establishment would otherwise be infringed, as including an option to defer payment of the exit tax in five equal annual instalments, with the first instalment payable on the normal due date for payment, and at yearly intervals thereafter.

142. Such a conforming interpretation gives effect to the EU law rights of the Trustees and Redevco, and provides the "best fit" with the EU law requirements. To the extent that we have made any choices, those choices were resolved by the application of the principles that apply to a conforming construction. In particular that the construction should not go further than is

necessary to give effect to the EU law rights of the Appellants, should go with the grain of UK law, and recognise that the other provisions of UK law continue to apply.

143. We find that this conforming construction does not require us to choose between competing rights of different persons. The examples given by Mr Johnston of rights of third parties that might be affected by this interpretation do not compete with the rights of the Appellants. Rather they are persons who also might benefit from the conforming interpretation we have given, as they would be able to defer payment of any exit tax.

144. Nor does the construction give rise to unpredictable ramifications. The only consequence of the interpretation is to delay the payment of tax by a few years.

145. We find that the conforming interpretation we have adopted respects (in the words of Lord Hope in *Lambert*) the will of Parliament as far as this remains appropriate, and preserves the integrity of statute law as far as possible. We recognise that in adopting a conforming interpretation we must not stray into interpreting legislation in a way that in effect involved statutory amendment of a kind that should be reserved to Parliament, and we consider that we have not done so.

146. We know from the CJEU's decision in *DMC* that providing for payments over five years is proportionate. Whilst other deferral periods (including deferral until realisation) may also give rise to a proportionate result, the fact that there may be other potential conforming interpretations that could give effect to the Appellants' EU law rights is not a reason why this Tribunal cannot adopt the conforming interpretation given above. In making a conforming interpretation, it is open to us to make choices providing they are not of a type that require Parliamentary deliberation; choices that involve competing rights of different persons; or consequences that we cannot evaluate.

147. Having adopted a conforming interpretation that provides for payments over five years, UK law now conforms to EU law. There is therefore no need, and no ability on our part, to introduce any further provision to allow for acceleration of payments in the event of a disposal of the assets before the end of the five-year period.

148. As regards the payment intervals, annual intervals are consistent with the judgment in *DMC*. We find also that they go with the grain of UK law, as provisions in UK law that allow for payment of CGT in instalments (such as s281 TCGA) provide for annual payments. We find that the conforming interpretation we have adopted does not go against the grain of UK law, as UK law at the time provided for instalment payment of CGT – for example on gifts (s281 TCGA) and where the consideration for the disposal is paid in instalments (s280 TCGA).

149. Mr Margolin has submitted that the conforming interpretation goes against the grain and is *contra legem*. He submits that adopting a conforming interpretation that allows for deferral of payment is *contra legem* to the UK domestic law which clearly provides for immediate payment without deferral. Further, the fact that Parliament gave limited retrospection to the enactment of Sch 3ZB, and chose not to legislate for the retrospection to apply back to the original time that the exit charge provisions were enacted shows that it must be *contra legem* to adopt a conforming interpretation that has retrospective effect. Finally, the fact that Sch 3ZB is in some respects more liberal than the conforming interpretation shows that the conforming interpretation is *contra legem*. We find that these submissions are misplaced. First, it is not the exit charge itself that gives rise to the breach of EU law, rather it is the failure of UK law to allow for deferral of payment. The adoption of a conforming interpretation gives effect to the EU law rights of the Appellants. By the logic adopted by Mr Margolin, the fact that Parliament subsequently enacted a deferral scheme for payment, suggests that the conforming interpretation goes with the grain of UK law – however for the reasons we give below, we do not accept Mr Margolin's use of later legislation as an aid in considering whether a conforming

interpretation is appropriate or goes with the grain. As regards the limited retrospective effect of Sch 3ZB, it is common for tax legislation to be given retrospective effect back to the date on which the legislation was first published in draft form. In the case of FA 13, draft legislation (including the provisions which were to become Sch 3ZB) was published on 11 December 2012. But more importantly, the nature of a conforming construction takes effect by reference to the incompatibility of UK law with EU law rights – what was described by Henderson J in *Prudential* (at [105]) as a *prima facie* breach. The conforming interpretation is required to give effect to the EU law rights of the relevant parties. If, however, Parliament subsequently legislates to bring UK law into conformity with EU law, there is no longer any requirement to adopt a conforming interpretation, and it does not matter if Parliament adopted a scheme of legislation to rectify the breach that was different to the conforming interpretation. This can be seen in relation to the FII litigation, where the breach of EU law was ultimately resolved through the enactment by Parliament of an exemption from taxation. It did not enact a tax credit at the foreign nominal rate – that does not mean that it was wrong for the courts to adopt a conforming interpretation to read in a nominal rate credit.

150. We recognise that when Parliament enacted a statutory deferral scheme in Sch 3ZB and Sch 3ZAA, the provisions were lengthy, and involved policy choices. But such drafting – involving those policy choices – is neither required nor permitted for a conforming interpretation. We have identified the breach of the Trustees' EU law rights as being the failure of UK law to allow a deferral of payment of the exit tax. The remedy is to provide an option to defer payment – and such an option does not require extensive drafting. There is no need for us to engage in the kind of drafting included in Sch 3ZB and Sch 3ZAA to provide such a deferral – indeed to do so would go beyond what is merely necessary to remedy the breach of EU law. We therefore do not need to concern ourselves with such matters such as the provision of security or the payment of interest – as these are not issues in the scheme of UK legislation at the time of the migrations that breached the Appellants' EU law rights. We note that UK domestic law already provided for the provision of security (see s130 FA 88) for companies migrating out of the UK, and s86 TMA makes provision for the payment of interest.

151. We contrast the conforming interpretation we give to ss59B and 59D to the circumstances in *Re S* or in *Anderson*. In both those cases, the conforming interpretation under consideration was fundamentally incompatible with the policy objectives of the underlying UK legislation. In the case of *Re S*, the "starring" system proposed by the Court of Appeal was incompatible with legislative policy which provided that the courts would have no continuing supervisory role over children in care once the courts had determined that the threshold conditions for taking a child into care had been met. In *Anderson*, the legislation gave to the Home Secretary, and no one else, the power of release – the court having decided that this was incompatible with Article 6 ECHR, there was no possible interpretation that could give that power to anyone else. We find that there is no incompatibility of a conforming interpretation allowing for deferral of tax in these appeals with the policy of the TCGA, as the TCGA includes provisions for deferral of payment of tax in a number of specified cases.

152. Nor do we consider that the decision of the Supreme Court in *Fleming* is relevant to these appeals. In *Fleming* the UK retrospectively removed the right of the taxpayers to make claims, without any transitional period. The courts found that the taxpayers had a right to be told in advance that their rights were going to be restricted, and that there had to be a sufficient transitional period. These circumstances are in complete contrast to the circumstances in these appeals. The exit tax levied by the UK is compatible with the Appellants' EU law freedom of establishment. The mischief lies in the failure of UK law to give the Appellants a right to defer payment of that tax. The conforming interpretation that we propose has the effect of improving the position of the Appellants.

153. We also consider that the references made by Mr Margolin to the decision of the Supreme Court in *FII SC1* need to be understood in the context of the complex statutory regime that applied at that time to dividends, and paragraph [205] cited to us by Mr Margolin relates to the right to recover tax assessed under Schedule D Case V that had been overpaid, which represented a very small part of the taxes in issue. The question Lord Sumption was addressing was the interaction of the statutory right to make a claim (section 33) with rights to make claims under EU law. The Court of Appeal had decided (following previous cases on the application of section 33) that the section impliedly excluded the availability of other causes of action at common law (including rights arising under EU law), even though there was no express exclusion in the provision. Having made that implication, the Court of Appeal found that there was then an inconsistency between domestic and EU law. The Court of Appeal resolved this inconsistency by reinterpreting section 33 to remove the restriction (and the discretion conferred on the Inland Revenue (as was) by the legislation). Lord Sumption's reference to torture is to the approach taken by the Court of Appeal to interpret section 33 as ousting EU law rights as a matter of UK domestic law – and then giving a conforming interpretation to section 33 to allow EU law claims. The approach taken by Lord Sumption was that section 33 did not impliedly exclude claims under EU law in the first place (as there was nothing in the provision that expressly excluded such claims). We find that there is no analogy between the highly technical issues that arose in the FII litigation and the issues before us.

154. A similar analysis can be applied to the decision of the Supreme Court in *Routier*. Although there was nothing on the face of the legislation to exclude non-UK charities from the right to relief from IHT, previous cases had decided that references to "charities" meant charities established under laws in the UK. All the courts needed to do to give effect to the EU law rights of the parties was to give effect to the plain meaning of the statute, and allow relief to charities governed by laws other than those of the UK. It was not necessary to interpret section 989 in accordance with *Dreyfus*, and then apply a conforming interpretation to make the legislation EU law compliant. All that was required was to give effect to the plain language of the legislation. The approach that has to be taken is to analyse the mischief in the legislation – which in the case of *Routier* was the application of the *Dreyfus* gloss. Once that gloss is excluded, the legislation becomes EU law compliant, and no further conforming interpretation is required. Where we agree with Mr Margolin is that the Court of Appeal went too far when it imposed a requirement for there to be a mutual assistance agreement between the UK and the relevant other jurisdiction. This was not necessary to make the legislation compliant with the appellant's EU law rights, and could therefore not be imposed through a conforming interpretation.

155. The exercise undertaken by the Supreme Court in both *FII SC1* and *Routier* was carefully to examine the UK legislation to identify the provisions that were incompatible with EU law – and then to adopt a conforming interpretation (if one was necessary) that addresses that mischief. In these appeals the mischief is not the imposition of the exit tax, rather it is the absence of any right to defer payment. And it is the absence of any right to defer payment that this Tribunal has addressed by the conforming interpretation we have given.

156. Mr Margolin also referred us to paragraph [176] of Lord Sumption's judgment in *FII SC1*, and in particular the statement made in his judgment that it does not follow from the retrospective nature of a conforming interpretation that tax was not unlawfully levied. As with paragraph [205], Lord Sumption is dealing here with a highly technical issue. The unlawfulness to which Lord Sumption refers, is to the Inland Revenue exacting taxes contrary to the conforming interpretation given to the statute in order to give effect to the EU law rights of the taxpayers. It is the fact that the taxes were levied unlawfully that allows the taxpayers to make a repayment claim in restitution. Lord Sumption's judgment confirms that a conforming

interpretation has retrospective effect, in the same way as any other judicial decision on the interpretation of statutes.

157. We find that the EU law principles of legal certainty or legitimate expectation are not engaged in these Appeals. Because a conforming interpretation has retrospective effect, the Appellants always had a right to defer payment of the exit tax. Mr Margolin submits that Redevco was entitled to certainty as to the liabilities it was assuming by migrating from the UK, and could not be expected to anticipate what a tribunal might decide some 15 years later. He submits that the adoption of a conforming construction cannot take precedence over legal certainty, otherwise legal certainty could never be possible as a taxpayer would be taken to know that a provision could always be altered by way of a conforming construction and retrospectively by the court. So, in terms of legitimate expectations, Redevco's expectation was that any subsequent interpretation of the law by way of a conforming construction would respect the overriding requirement of legal certainty to which the obligation to give a conforming construction is subject, rather than the other way round. We find that this submission is based on a misunderstanding of the nature of a conforming interpretation. If the domestic law of a member state is incompatible with the EU law rights of a taxpayer, one of the potential mechanisms of giving effect to those rights is a conforming interpretation. A conforming interpretation gives effect to EU law general principles of effectiveness and the supremacy of EU law over domestic law. We find that Mr Margolin's submission is made on a false premise – namely certainty on the part of Redevco that the courts would disapply the UK's exit tax provisions as being incompatible with their EU law rights. There could never be certainty that the courts would disapply the exit tax provisions in full – and there is nothing we have seen in the evidence before the FTT that would justify Redevco having such a belief. The finding of the FTT was that they would have left the UK even if they had been advised of the risk that an exit tax liability would arise. The conforming interpretation we have given to s59D TMA has retrospective effect, and so Redevco always had a right to defer payment of tax. We acknowledge that Redevco had to make a decision in circumstances where there was uncertainty as to their tax position under UK law, but the same thing could be said of Vodafone in deciding to structure its acquisition of Mannesmann through a Luxembourg intermediate holding company.

158. The retrospective nature of a conforming interpretation is also an answer to Mr Johnston's submission that a conforming interpretation does not vindicate the Trustees' EU law rights, as it is now too late for them to be able to exercise any option that the conforming interpretation may have given them. This is not a case where a conforming interpretation gives rise to a retrospective imposition of a tax liability. The conforming interpretation gives retrospective effect to a relief from taxation – namely a right to pay the tax in instalments. Mr Johnston is, in a sense, looking down the wrong end of the telescope. When analysed, his argument starts at the wrong place, which is that it is the imposition of an exit tax which is incompatible with EU law rights, and the effect of imposing a conforming interpretation is to retrospectively resurrect a liability which would otherwise be incompatible with EU law. But this is incorrect – it is the failure of UK law to provide for deferral of payment of the tax which gives rise to the breach – and by providing a conforming interpretation which allows for a deferral, we are vindicating those EU law rights. As that interpretation has retrospective effect, the right to elect to defer payment was always available to the Trustees. The fact that the Trustees might not have been aware at the relevant time that they had the right to elect to defer payment is irrelevant. This can be seen from the many cases where the courts and tribunals have had to address the failure of UK domestic VAT law to give effect to the Principle VAT Directive, and taxpayers find that they are out of time to make claims to which they were entitled under the Directive, but of which they were unaware as UK law made no provisions for the claims (VAT bad debt relief comes to mind as an example). It is also irrelevant that

HMRC would have rejected any attempt by the Trustees to make a deferral election – in the event of such a rejection, the remedy of the Trustees would be to challenge HMRC's decision.

159. We find that Mr Margolin's submissions that the FTT in *Redevco FTT* erred in law by failing to distinguish Redevco's case from that of *Panayi FTT* are misplaced. Mr Margolin submitted that the FTT erred because (i) there were commercial reasons for the migration, and (ii) the group intended to hold the assets for the long term. But these are irrelevant considerations. The growth in value of Redevco's assets that are subject to tax arose whilst Redevco was UK resident. Its motivations for leaving the UK or its future intentions have no bearing on the basis for taxation. Exit taxes are justified under EU law in order to preserve the rights of member states to tax activities carried on within their borders. In the circumstances of these cases, EU law allows the UK to tax any chargeable gain which arose during the Appellants' period of UK residence – irrespective of their reasons for migration or their future intentions.

160. In his skeleton Mr Margolin referred to s4(1) of the Bill of Rights 1689 which forbids the levying of money for the use of the Crown without grant of Parliament. This submission is grounded on the basis that it was unlawful of the UK to impose an exit tax, and that charge was therefore a nullity. In essence Mr Margolin submits that it is impermissible for the courts and tribunals to retrospectively impose a tax charge on Redevco which was not lawful (as it was incompatible with Redevco's EU law rights) when Redevco filed its tax return. This argument was not earnestly pursued in the course of oral argument, and it can be addressed very briefly. We have found that the exit tax is lawful – the incompatibility with EU law rights arises out of the failure of the payment provisions to allow for deferral of payment. There is therefore no question of the FTT (or this Tribunal) imposing a tax charge that has not been enacted by Parliament.

161. Redevco also challenges findings of fact made in *Redevco FTT*. Many of the challenges raised in its Notice of Appeal were not pursued at the hearing. Indeed, Mr Margolin stated in the course of his submissions that he did not challenge the FTT's finding that Redevco would have migrated to the Netherlands irrespective of counsel's advice. But for the avoidance of any doubt, we find (as regards the disputed factual findings that were not pursued in the hearing) that there was sufficient evidence available to the FTT to reach the findings that it made, and that the high threshold required by *Edwards v Bairstow* was not met. The only challenge pursued at the hearing related to the FTT's finding that Redevco did not have a legitimate expectation that it would not have to pay exit taxes by reference to the advice received from leading counsel. This relates to the references in the note of consultation which Mr Margolin submits were potential amendments to legislation that might be adopted by Parliament in order to correct the breach of EU law, and not to any conforming construction. Even if Mr Margolin is right (and we are by no means convinced that he is), this is of no assistance to his case. The advice received by Redevco from their professional advisors cannot improve their remedy for any breach of EU law, or give rise to any justiciable legitimate expectation.

162. Mr Johnston raised a challenge to the jurisdiction of the FTT to apply a conforming interpretation to s59B TMA. We find that this submission is misconceived. We find that it is clear that s59B can be addressed by the FTT. First, s59B can clearly come within the scope of the FTT's jurisdiction – take for example an appeal regarding penalties for late payment of tax. In such a case, the FTT would have to consider s59B in order to determine the due date for payment of the tax. But, in any event, in these appeals, the FTT must consider s59B – amongst a range of other statutory provisions – in order to determine whether a conforming interpretation exists and what its terms are. The Trustees' appeals are challenging the validity of HMRC's closure notices. The Trustees' appeals relate to the validity of a tax liability under s80 TCGA – and the FTT clearly has jurisdiction to consider those appeals. In so doing, and in

considering a conforming interpretation, the national court is obliged to examine all relevant domestic laws (including, in this case, s59B) in order to assess how they may be applied so as to conform to enforceable EU law rights.

163. It follows from our discussion that we find that the FTT in *Gallaher* was wrong in its decision that a conforming interpretation was not available.

164. As we have found that a conforming interpretation of the UK law exists, we do not need to consider whether any provisions of UK law need to be disapplied.

DISPOSITION

165. The conforming interpretation adopted in *Panayi FTT* and *Redevco FTT* provided that there would be no liability to interest (otherwise than interest on late payments). We find that this aspect of the FTT's decisions goes beyond what is required to give effect to the EU law rights of the Appellants – and in doing so the FTT made errors of law. We note that there are no statutory appeal rights to the FTT in respect of interest, and therefore the liability of the Appellants to interest was not before the FTT. In any event, the CJEU has held that the payment of interest does not interfere with the freedom of establishment, and therefore adopting a conforming interpretation that addresses interest goes beyond what is permissible. We find that the FTT in *Panayi FTT* and *Redevco FTT* made an error of law in making provision for interest not to be paid in the conforming interpretations that they adopted.

166. We therefore must set aside the decisions of the FTT, as regards the issues within the scope of this appeal, on the grounds that they made a material error of law. Redevco's liability to capital allowances under Part 2, Capital Allowances Act 2001 is not within the scope of this appeal. The FTT in *Redevco FTT* had found at [21(11)] and [64] that the balancing charges under Part 2, Capital Allowance Act 2001 assessed by the final closure notice of 2 August 2021 were unlawful. These findings were not appealed, and we do not set these findings aside.

167. Since we have set aside the FTT's decisions (other than in relation to Part 2, Capital Allowances Act 2001), we must decide whether to remake them or remit them.

168. We have found that there exists a conforming interpretation of ss59B and 59D TMA which gives effect to the EU law rights of the Appellants. We therefore remake the decisions of the FTT in both *Panayi FTT* and *Redevco FTT* by finding that there exists a conforming interpretation by reading words into ss 59B and 59D TMA to provide that, at a time before the legislation was actually amended to comply with EU law, those provisions should be read in cases where the taxpayer's right of freedom of establishment would otherwise be infringed, as including an option to defer payment of the exit tax in five equal annual instalments, with the first instalment payable on the normal due date for payment, and at yearly intervals thereafter.

169. The conforming interpretation given does not address the liability of the Appellants to interest. Interest payment is therefore governed by the usual statutory provisions. Whilst interest is strictly outside the scope of our decision, we consider that it may be of assistance to the parties to provide them with our view on how any liability to interest would arise in respect of the exit taxes. The liability to interest as regards the Trustees is governed by s86 TMA, and would run on the outstanding amount from the "relevant date"[6], which is 31 January next following the tax year in which the migration occurred. As regards Redevco, interest is governed by s87A TMA. This provides that interest runs from the date on which tax becomes "due and payable"[7] under s59D, which is normally the day following the expiry of nine months

[6] See ss 59B(4) and 86(2)(b) TMA.
[7] See ss 59D(1) and 87A(1) TMA.

from the end of the relevant accounting period. We note that this is consistent with the liability to interest which arises when tax is deferred under s281 TCGA (see s281(5)).

MR JUSTICE RAJAH
JUDGE NICHOLAS ALEKSANDER

Release date: 08th October 2024