FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2021/03191

Corporation Tax – Migration of appellant from UK to the Netherlands – Appeal against assessment pursuant to the 'Exit Charge Provisions' (s 185 Taxation of Chargeable Gains Act 1992 and para 10A of schedule 9 to Finance Act 1996) – Not disputed that Exit Charge Provisions incompatible with EU law – Whether Exit Charge Provisions capable of conforming construction – Yes – Appeal allowed in part

Heard on: 6 – 8 June 2023
Judgment date: 21 July 2023

Before

TRIBUNAL JUDGE BROOKS

Between

REDEVCO PROPERTIES UK 1 LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

<u>Representation:</u>

For the Appellant: Daniel Margolin KC, of Joseph Hage Aaronson LLP

For the Respondents: Ben Elliott of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. On 15 January 2008 the appellant, Redevco Properties UK 1 Limited ("Redevco"), ceased to be UK resident for corporation tax purposes and became resident in the Netherlands. In doing so it was deemed, under s 185 of the Taxation of Chargeable Gains Act 1992 ("TCGA"), to have disposed of its assets and re-acquired them at market value giving rise to a taxable gain of £139,700,000. In addition Redevco was deemed, under paragraph 10A of schedule 9 to the Finance Act 1996, to have assigned the assets and liabilities that represented its loan relationships for a consideration equal to their fair value and immediately re-acquired them for the same consideration, giving rise to profits, for corporation tax purposes, of £2,700,114.

2. It is not disputed that, at the time of Redevco's migration from the UK to the Netherlands, s 185 TCGA and paragraph 10A of schedule 9 to the Finance Act 1996 (the "Exit Charge Provisions") when read with s 59D of the Taxes Management Act 1970 ("TMA") were incompatible with EU law. This was because of the failure in the UK legislation to provide a taxpayer with a choice to defer payment of the relevant tax. It is also accepted that Redevco is entitled to rely on directly effective EU law, in particular the freedom of establishment under Article 49 of the Treaty on the Functioning of the European Union ("TFEU").

3. However, the parties disagree as to the appropriate remedy. Mr Ben Elliott, who appeared for HM Revenue and Customs ("HMRC") contends that, as in *Trustees of the P Panayi Accumulation and Maintenance Trusts Nos 1-4 v HMRC* [2020] SFTD 209 ("*Panayi*"), it is possible to apply a conforming construction to the UK legislation to provide for payment of the tax over a five year period. Mr Margolin KC, for Redevco, submits that such an approach trespasses into the field of judicial law-making, the task of Parliament and not the courts or tribunals, and that the Exit Charge Provisions which were incompatible with EU law should therefore be disapplied.

4. Although greatly assisted by the detailed and helpful submissions, both written and oral, on behalf of the parties I have not found it necessary to refer to each and every argument advanced or all of the authorities cited in reaching my conclusions.

EVIDENCE

5. In addition to an electronic hearing bundle comprising 1,524 pages I heard from Mr John Drury and Mr Herman Faber who gave evidence on behalf of Redevco.

6. Mr Drury was, until his retirement in May 2022 a senior legal adviser to COFRA Holding AG ("COFRA"), Redevco's ultimate parent company and currently has a consultancy arrangement with COFRA. Mr Drury gave evidence in relation to the group structure of which Redevco was part and the background to the movement of the central place of effective management and control of Redevco from the UK to the Netherlands UK in January 2008. He explained that prior to the migration advice had been sought from leading counsel in conference on 6 December 2006 but was unable to recall, when asked, why the 'Instructions to Counsel' did not state that the decision on whether to proceed with the migration was dependent on his advice even though they had stated that:

> "Depending on Counsel's views as to the prospects of success, the companies may seek to insure against the risks of litigation."

Mr Drury also confirmed that other than the Note of Conference recording counsel's advice "there was no record of any other advice on this issue" and that Redevco "saw no need to get another opinion or to update [counsel's] advice between December 2006 and the actual migration in January 2008. This was because, he said, that advice "was so clear, came from the top expert and recorded that all other counsel knowledgeable in the area were of the same view."

7. Mr Faber, at the time he made his witness statement in June 2020, was the Managing Director Fund Management of the Redevco division employed by Redevco BV in the Netherlands. At the date of the hearing Mr Faber was the Head of Business Development and part of the management team of Redevco. His evidence concerned the migration of Redevco to the Netherlands and his role in relation to it as tax director of the Redevco group between 2007 and 2012. He said that if it had been advised that an exit charge would have been due on migration either immediately or on a deferred basis Redevco would "unquestionably" never have migrated to the Netherlands. However, having said that the migration was for commercial purposes, Mr Faber accepted that there were also tax advantages for Redevco in relocating to the Netherlands. Also, in contrast to Mr Drury, Mr Faber said in evidence that Redevco had obtained additional advice to that of leading counsel in relation to likelihood of an exit charge on migration and that counsel's advice was the end of a process. However, no documentary evidence of any such additional advice being provided was produced.

8. Both Mr Drury and Mr Faber were straightforward witnesses who clearly sought to assist the Tribunal. They both gave considered answers to the questions put to them. However, and perhaps not surprisingly as the events on which they were giving evidence occurred over 17 years ago, the answers given were not entirely consistent with the contemporaneous documentation (eg the Instructions to Counsel and Note of Conference etc, described below). Therefore, in reaching my findings of fact on the basis of the documentary, and particularly the witness evidence before me, I have kept in mind the well known observations of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm) in the light of what Floyd LJ had to say, in giving the judgment of the Court of Appeal, in *Kogan v Martin & Ors* [2019] EWCA Civ 1645 at [88]:

> "We start by recalling that the judge read Leggatt J's statements in *Gestmin v Credit Suisse* and *Blue v Ashley* as an "admonition" against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS Trust* [2019] 7 WLUK 57, *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay *The Judge as Juror: The Judicial Determination of Factual Issues* (from The Business of Judging, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

FACTS

Background

9. Redevco, which owned a portfolio of retail estate investments, was incorporated in the UK on 16 November 2004 and was, until 15 January 2008, was resident 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 chain founded in the Netherlands in 1841. COFRA is the ultimate parent company of that group.

10. The C&A chain began trading in the UK in the early 1920s. It opened stores gradually throughout the country and bought properties (in the main either as freeholds or on long leases) as the business expanded. The properties it acquired were mostly retail stores but also included storage facilities and office accommodation held by local UK subsidiaries which C&A 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. At the time of closure there were 109 C&A stores in the UK.

11. Between 1999 and around 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".

12. The former C&A properties in the UK remained in the ownership of the original subsidiaries which were moved 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 and those properties in the less attractive or secondary locations were sold with UK Redevco Properties concentrating on developing and acquiring properties in prime locations.

13. The incorporation of Redevco, on 16 November 2004, was part of a major 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 and then using that capital to develop its business by the acquisition of new properties and the redevelopment of existing ones.

The Migration

14. In late 2006 the management of Holding started to consider the feasibility of moving 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 non-Dutch managed member. 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.

15. The 'Instructions to Counsel', prepared by PricewaterhouseCoopers LLP ("PwC"), commence by referring to the proposed migration of Redevco and PwC's view that certain areas of tax law legislation were contrary to EU law before stating:

> "Depending on Counsel's views as to the prospects of success, [Redevco] may seek to insure against the risks of litigation."

The Instructions continue and, in the section setting out the 'Reorganisation Details' state that the "plan" was to transfer the management of the company from the UK to the Netherlands on 1 March 2007. The Instructions also state that details of the "forthcoming emigration" of Redevco, "will be given to the UK tax authorities on 10 January 2007, as required under the provisions of Finance Act 1988."

16. There is no indication in the Instructions that the decision as to whether the migration would take place was dependent on the opinion of counsel. Also, although not produced, Appendix 4 to the Instructions to Counsel comprised a draft of the notice to be given to HMRC in relation to the migration and counsel was asked whether he had any comments on this draft notice.

17. On 6 December 2006 a conference was held at the chambers of leading counsel. It was attended by Mr Drury and a Mr Bradford of COFRA and representatives of PwC. A Note of Conference settled by leading counsel records that:

> "The conference was called to discuss the migration of … [Redevco] from the UK to the Netherlands as set out in Counsel's Instructions. These notes of conference should be read in conjunction with the Instructions."

The Note continues:

> "4. Counsel is strongly of the view that corporate exit charges are contrary to EU law, however this matter has not yet been tested in litigation before the ECJ. Counsel's view is a widely held one; indeed, he believed, a universal one at the Tax Bar. Exit charges were considered in two cases concerning individuals, *de Lasteyrie*, concerning the French exit charges, and *N*, concerning exit charges in the Netherlands. Both cases were decided in favour of the taxpayer. …
>
> 5. While both the precedent cases concerned individual taxpayers, Counsel considered that the analysis for a corporate was the same. ...
>
> 6. Counsel circulated a paper on Exit Charges which had been prepared by the Law Society's International Tax Sub-Committee, of which he is a member, which had come to the same conclusion. Counsel noted that the issue of such a paper by the Law Society was indicative of the broad consensus on this issue within the legal profession.
>
> 7. Counsel added that he believed that HMRC understood the weakness of the UK exit charge legislation in its current form under EU law and are undertaking a review of the changes which would be required to make it compliant. He thought that the most likely response compatible with EU law might be to have a 'trailing' exit charge which would tax a company, which had ceased to be resident, on disposals of UK assets within a period of 3-5 years, at most 6, years after migration, based on the market value at migration but adjusted downwards in the event that the value of the assets had decreased in the period to the actual disposal.
>
> There was some discussion of whether such an approach could also be seen as discriminatory. There was also a discussion whether this might be introduced with effect for disposals made after the legislation came into force, but in respect of companies which had moved residence prior to the change in the law: no definitive view on this point could be reached at present.
>
> …
>
> 11 … Counsel said that the 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.
>
> 12 … Counsel stated that he did not consider the plan of migration to be aggressive tax planning. It was not artificial but commercially driven and was aimed at uniting the management of the UK properties in the Netherlands. The only reason why the management was not united in the first place was the UK tax charge. If anything is aggressive, it is the failure of the UK to come to terms with its responsibilities under EU law."

18. No further advice was obtained from any other source. Neither was any update sought from leading counsel between the date of his advice in December 2006 and the migration of Redevco in January 2008. There was also no contemporaneous document such as board minutes or emails that confirmed that leading counsel's advice had been shown to the board and it was on that basis the decision was taken for the migration of Redevco.

19. The Law Society paper referred to by leading counsel was published on 1 August 2007 and stated, so far as material:

> "5. We are of the view that in its present form the exit charges [sic] provisions (in section 185) breach EU law and specifically Article 43 of the EC Treaty which prohibits (as extended by Article 48) restrictions on the freedom of establishment of natural persons and companies in the EU.
>
> 6. However, in the light of the ECJ Decisions in the *De Lasteyrie* and *N* cases (see below) some form of deferred charge would be a more acceptable and proportionate measure, in particular, if it was to be realised only on the disposal of the asset within 6 years of migration (with no charge after that date) …
>
> 14. We believe that this decision [Case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* EU:C:2004:138] and the court's reasons for the decision confirm that the UK exit charges are unlawful. A UK corporate taxpayer which maintains its residence in the UK is not normally taxed on unrealised gains whereas a UK corporate taxpayer which ceases to be resident in the UK is taxed on unrealised gains. This means that a UK corporate taxpayer which ceases to be resident in the UK is treated disadvantageously in comparison with a UK corporate taxpayer which maintains its UK residence. The likely effect of this difference in treatment is to dissuade UK corporate taxpayers from transferring their residence elsewhere. In this way, exit charges hinder UK companies' freedom of establishment.
>
> …
>
> 29. The Commission considers that the ECJ's interpretation of EC Law implies conclusions as regards exit taxes for all tax payers including companies. The Commission also supports our analysis of the application of ECJ law to the UK domestic legislation and recommends a co-ordination [sic] approach in this area between Member States.
>
> …
>
> **Conclusion and proposals**
>
> 39. On the basis of our analysis, we conclude that exit charges in their present form are in clear breach of Article 43 of the EC Treaty. Taxing residents on a realisation basis and departing residents on an accruals basis is a difference in treatment which constitutes an obstacle to free movement. Nor can the provisions be justified either on the grounds of preventing tax avoidance or ensuring cohesion of the tax system. They are, therefore, vulnerable to a successful challenge before the European Court of Justice.
>
> …
>
> 42. A modification of the rules is required. The starting point could be the postponement of the charge to tax until the realisation of the asset by the company within a 6 year period; a similar period is used where a subsidiary of a UK parent migrates. The charge will be calculated by reference to the gain (if any) accrued during the period of residence but with some mechanism to ensure that if the gain actually realised on disposal was smaller than the

gain calculated at the date of migration the charge would only arise on the smaller amount.

43. However, such a modification would have to take into account a number of factors:

- First, in the light of the decision in the *de Lasteyrie* and *N*, no form of security or guarantee could be required, both constituting a restrictive effect in that the taxpayer is deprived of the enjoyment of assets used to support the security or guarantee.

- Any means of preserving the tax claim must be strictly proportionate to that objective and must not entail disproportionate cost for the taxpayer.

- Thirdly, and more significantly, to avoid double taxation (and double non taxation) and mismatches in asset valuation methods it will be necessary to take into account the position in other Member States. This would require co-ordination at the EU level including a review of the basis on which non UK companies migrating to the UK are taxed on gains which have accrued before migration.

44. Until a co-ordinated regime on exit charges can be agreed between EU Member States, we believe that gains accruing before migration to the UK are not taxed in the UK, and gains which have accrued during residence but are not realised before migration from the UK are taxed on a deferral basis.

45. The charge in those circumstances would be deferred until the asset was sold within 6 years of migration and calculated by reference to the lower of an agreed market value at the date of migration and the actual disposal proceeds.

46. In all cases however, there should be no exit charge if disposal of the asset occurred more than 6 years after migration"

20. On the basis of the advice it had received that, as Mr Faber put it, "there was a very good chance of succeeding in arguing that the tax was not due", Redevco moved its place of effective management from the UK to the Netherlands on 15 January 2008 thereby becoming non-resident for tax purposes in the UK.

Statement of Agreed Facts and Issues

21. The following is taken from the Statement of Agreed Facts and Issues produced by the parties on 12 April 2022:

The Migration

(1) The values of the properties at the date of migration (15 January 2008) have been agreed between the parties.

(2) Redevco notified HMRC of its intention to migrate on 31 October 2007. In the initial notification Redevco set out its view that no exit tax was due because it was "invalid under European Community law". Upon 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.

(3) Redevco's corporation tax return for its final UK accounting period from 1 January to 15 January 2008 was filed on 24 November 2009. The return did not record a charge payable on migration. The letter accompanying the return recorded:

"As you are aware from our previous correspondence the company migrated to the Netherlands with effect from 16 January 2008. As set out in the company's letter of 31 October 2007 to your colleagues at CT & VAT International (Company Migrations), the company does not believe that 'any

> tax charge arises as a consequence of the migration…, for example under s337(1) ICTA 1988, s185 TCGA 1992 or para 10(a) Sch 9 FA 1996 as… such charges are invalid under European Community law'. Consequently no such charges are self assessed in the CT600."

Although not recorded in the Statement of Agreed Facts and Issues, 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. However, as in fact was the case, all of the properties were sold on 22 November 2011 by Redevco, albeit to another group company.

The Enquiry

(4) The enquiry was opened by notice (from HMRC to Redevco) of 14 December 2010.

The Partial Closure Notice

(5) On 11 February 2019 HMRC sent Redevco two letters. The first purported to be a partial closure notice under paragraph 32 Schedule 18 Finance Act 1998. The second was intended to set out the reasons for that decision.

(6) The parties ultimately agreed that the letters of 11 February 2019 did not meet the requirements of a partial closure notice under paragraph 32 Schedule 18 Finance Act 1998 and therefore were not a valid partial closure notice. The Tribunal disposed of the proceedings relating to the 11 February 2019 letters (including a related application by the Appellant for a final closure notice) by a consent order on 29 June 2021.

(7) By a letter of 10 August 2020 HMRC re-opened the enquiry in order to review and agree the value of the properties owned by Redevco at the date of its migration to the Netherlands on 15 January 2008. By June 2021 the parties had agreed that those valuations gave rise to £139,700,000 of unrealised gains as at the date of migration.

The Final Closure Notice

(8) On 2 August 2021 the Respondents sent a final closure notice under paragraph 32 Schedule 18 Finance Act 1998 (the "FCN") to the Appellants. The FCN stated:

> "<u>Our Conclusion</u>
>
> I have now competed my enquiries into your return and have concluded that:
>
> • On 15 January 2008 the company ceased to be resident in the UK for corporation tax purposes and became resident in the Netherlands.
>
> • Section 185 TCGA 1992 applied such that the company was deemed to have disposed of certain assets giving rise to Chargeable gains of £139,700,000 for corporation tax purposes.
>
> • Paragraph 10A of Schedule 9 FA 1996 applied giving rise to profits on loan relationships of £2,700,114.
>
> • Balancing charges of £10,403,421 arose under Part 2 CAA 2001.
>
> as a result, the Return for the period ended 15 January 2008 requires amendment to:
>
> • increase the chargeable Corporation Tax profit to £152,803,535, based on adjustments for agreed amounts relating to chargeable gains, loan relationships and balancing charges as at the year-end;
>
> • increase the Corporation Tax payable to £45,841,060.50 as set out in the computation below."

(9) On 31 August 2021 Redevco appealed the FCN and notified the appeal to the Tribunal. Redevco filed its statement of case alongside its appeal.

(10) HMRC filed their statement of case on 28 January 2022.

(11) In their statement of case HMRC accepted that the balancing charges of £10,403,421 under Part 2 Capital Allowances Act 2001 assessed by the closure notice were unlawful and that the FCN should be amended to remove those charges. Accordingly the balancing charges of £10,403,421 under Part 2 Capital Allowances Act 2001 are accepted as not being due and are no longer in dispute between the parties.

(12) Redevco filed a reply to HMRC's statement of case on 4 March 2022.

The Common Ground

(13) It is common ground that:

(a) On 15 January 2008 Redevco ceased to be UK resident for corporation tax purposes and became resident in the Netherlands;

(b) If s 185 TCGA applied such that Redevco was deemed to have disposed of the Assets and to have reacquired them at market value, this would have given rise to a chargeable gain of £139,700,000;

(c) If paragraph 10A of Schedule 9 FA 1996 applied such that Redevco was deemed to have assigned the assets and liabilities that represented its loan relationships for a consideration equal to their fair value at that time and immediately reacquired them for the same consideration, this would have given rise to profits of £2,700,114;

(d) Redevco is entitled to rely on directly effective EU law, in particular the freedom of establishment under Article 49 TFEU.

The Issues

(14) Issue 1 concerns whether the domestic legislation is in breach of EU law. The parties disagree as to its formulation:

(a) Redevco's formulation: Were the provisions in section 185 of the Taxation of Chargeable Gains Act 1992, paragraph 10A of Schedule 9 to the Finance Act 1996 and section 59D of the Taxes Management Act 1970 (together the "Exit Charge Provisions") in breach of the rights of the Appellant under EU law upon its migration to the Netherlands on 15 January 2008?

(b) HMRC's: Were the charges imposed under section 185 of the Taxation of Chargeable Gains Act 1992 and paragraph 10A of Schedule 9 to the Finance Act 1996 (the "Exit Charge Provisions") and/or the obligation to pay tax under section 59D of the Taxes Management Act 1970 in breach of the rights of the Appellant under EU law upon its migration to the Netherlands on 15 January 2008?

(15) Issue 2: As at 15 January 2008 were any of the following provisions capable of providing deferral of tax upon corporate migration in a manner compatible with EU law:

(a) The filing of a tax return purportedly on the basis that the tax was not immediately payable;

(b) Section 55 of the Taxes Management Act 1970; or

(c) HMRC's collection and management powers under section 5 of the Commissioners for Revenue and Customs Act 2005?

(16) Issue 3: If the answer to Issue 1 (on the appropriate formulation) is that the Exit Charge Provisions did impose charges in breach of EU law and/or the obligation to make payment under s 59D TMA was in breach of EU law, can a conforming interpretation be applied by the Tribunal and, if so, what is the effect of that conforming interpretation?

(17) Issue 4: If the Tribunal cannot apply a conforming interpretation to the Exit Charge Provisions and/or s59D TMA, so that the legislation falls to be disapplied, is the effect of the disapplication:

(a) To disapply the charges raised by the FCN (the Appellant's case);

(b) That the charges cannot be enforced other than in annual instalments over five years (the Respondents' case); or

(c) A different effect as determined by the Tribunal?

22. By the time of the hearing the issues between the parties, as stated above, had narrowed leaving only the following to be determined:

(1) Whether s 59D TMA can be subject to an appropriate conforming construction with the effect that payment of tax may be made by instalments over five years; and

(2) if not, what are the consequences of disapplication in the present case.

23. Also, HMRC, having been criticised for failing to do so sooner, produced the following alternative conforming interpretations for s 59D(1) TMA following the short adjournment on the second day of the hearing:

> **Short Version**
> "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 five equal annual instalments**."
>
> **Longer Version**
> "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.**"

Further Findings of Fact

24. As Redevco has raised the issue of legitimate expectation, as an element of legal certainty, an essentially fact based argument, further findings of fact are required in relation to whether the migration was solely for commercial reasons and whether it would have happened at all if the advice Redevco received from leading counsel had been different or less positive.

25. On the first I find that the migration was primarily for commercial reasons although, given, as Mr Faber agreed, that the migration did result in tax advantages for Redevco, tax considerations certainly played a part in the decision.

26. Although the evidence of Mr Drury that the decision to migrate was not a "foregone conclusion" and that of Mr Faber was that the migration would not have occurred if Redevco had not received positive advice from leading counsel, the contemporaneous documentation does not support such assertions. As such, I find that it is more likely than not that the migration would have proceeded in any event irrespective of the advice of leading counsel.

RELEVANT LEGISLATION

27. Under s 6 of the Income and Corporation Taxes Act 1988 ("ICTA") and s 8 TCGA 1992, the taxable profits of a UK resident company include chargeable gains accruing to the company in the relevant accounting period.

28. In so far as material for present purposes section 185 TCGA provides:

> **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.

29. Paragraph 10A of schedule 9 to the Finance Act 1996 provided, at the material time:

> (1) This paragraph applies if at any time ("the relevant time")—
>
> (a) a company ceases to be resident in the United Kingdom, or
>
> (b) in the case of a company that is not resident in the United Kingdom, an asset or liability representing a loan relationship of the company ceases to be held for the purposes of a permanent establishment of the company in the United Kingdom in any circumstances not involving a related transaction.
>
> (1A) But this paragraph does not apply if—
>
> (a) paragraph 12A below (transferee company leaving group) applies in relation to the company, and
>
> (b) the cessation in sub-paragraph (1)(a) or (b) above occurs at the same time as the cessation in sub-paragraph (1)(b) of that paragraph.
>
> (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.
>
> (3) Sub-paragraph (2) above does not apply in relation to an asset or a liability to the extent that, immediately after the relevant time, it is held or owed for the purposes of a permanent establishment of the company in the United Kingdom.
>
> (4) In a case falling within sub-paragraph (1)(b) above, this Chapter shall have effect as if the company had—
>
> (a) immediately before the relevant time, assigned the asset or liability, so far as ceasing to be held or owed for the purposes of the permanent establishment, for a consideration of an amount equal to its fair value at that time, and
>
> (b) immediately reacquired it for a consideration of the same amount.

30. At the relevant time s 59D TMA provided:

> **General rule as to when corporation tax is due and payable**
> (1) 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.
>
> (2) If the tax payable is then exceeded by the total of any relevant amounts previously paid (as stated in the relevant company tax return), the excess shall be repaid.
>
> (3) The tax payable means the amount computed in accordance with paragraph 8 of Schedule 18 to the Finance Act 1998 …

31. Article 49 TFEU prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. It provides:

> **Article 49**
> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

32. Under Article 54 TFEU, companies formed in accordance with the law of a Member State who have their registered office, central administration or principal place of business within the EU are treated as nationals of Member States it provides:

> **Article 54**
> Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.
>
> 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

33. I have not referred to schedule 3ZB to TMA, inserted by paragraph 6 of schedule 49 to the Finance Act 2013, which came into effect on 11 December 2012 (which makes provision for the payment of tax to be deferred) or Article 5 of Council Directive (EU) 2016/1164 of 12 July 2016, the Anti Tax Avoidance Directive which was implemented in the UK (by paragraph 11 of schedule 8 to the Finance Act 2019 by the insertion of a new s 184J TCGA) on 1 January 2020 as neither were in force at the time of Redevco's migration and cannot therefore apply in the present case.

PANAYI

34. In *Panayi* the Tribunal (Judge Mosedale) considered s 80 TCGA which provided:

> **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 UK.
>
> (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

The due date for payment of the relevant capital gains tax was, under s 59B(4) TMA, 31 January next following the year of assessment. There was no option to defer payment beyond that date or to pay in instalments.

35. The issue between the parties was whether the s 80 TCGA exit charge on trustees if they (or a majority of them) ceased to be resident in the UK, was compatible with EU law, and in particular compatible with the fundamental freedoms (of establishment, of provision of services and of movement of capital) guaranteed by the TFEU. Having made a reference to the Court of Justice of the European Union ("CJEU"), an option not open to me, Judge Mosedale summarised the Court's decision at [55]:

> "The CJEU was clear that existing UK law (as explained to them) was in breach of the appellant's right to freedom of establishment. That was because the appellant did not have the option to defer payment of the tax,"

36. The issue for Judge Mosedale was therefore, as in the present case, whether a conforming interpretation could be given to UK law and the effect that has on the appellant's appeal.

37. The arguments of parties in *Panayi* were also similar to those in the present case. These were summarised by Judge Mosedale as follows:

> "18. HMRC's position, in brief summary was that the s 80 tax charge was lawful; what was disproportionate was the timing of the liability to pay the tax charge, and in particular the lack of option to defer payment of it. The Tribunal, said HMRC, should look at the provisions on timing (contained in the Taxes Management Act 1970 – 'TMA') rather than the charging provisions (contained in the TCGA) and consider whether a conforming interpretation of the TMA was possible; and if a conforming interpretation was not possible, it was the TMA which fell to be disapplied to the extent necessary to allow the payment of the tax to be deferred.
>
> 19 The appellant's case, in brief summary, was that a conforming interpretation was not possible for various reasons including that it was not possible to alter history and give the trustees an option to defer which they did not have at the time the tax charge arose in 2004/5; the only manner in which the Tribunal could abide by the CJEU ruling was therefore to disapply the s 80 charge because that was the only remedy for failure to give an option to defer in 2004/5. The appellant relied on the fact that the CJEU were well aware that the shares were realised before the date the tax charge arose or was due for payment but still considered UK law to be disproportionate: the only way (said the appellant) of implementing the CJEU's decision was therefore to disapply s 80; anything else would fly in the face of the CJEU ruling."

38. Having referred to the various conforming constructions suggested to her, Judge Mosedale set out the following principles of conforming construction:

> 65. The principles of conforming interpretation were given by the Court of Appeal in *Vodafone II* [2009] EWCA Civ 446 at [37] and have more recently been restated by the Court of Appeal in *Wilkinson v Churchill Insurance Co Ltd* [2012] EWCA Civ 1166 at [50]. Those principles seem to divide into two parts: the first part sets out the nature of a conforming interpretation and the second sets out the restrictions on the making of a conforming interpretation:

(i) The obligation on UK courts to construe domestic legislation consistently with EU law obligations is both broad and far-reaching;

(ii) It is not constrained by the normal domestic rules of statutory interpretation;

(iii) It does not require ambiguity in the legislation being interpreted;

(iv) It is not an exercise in semantics or linguistics;

(v) It permits departure from the strict and literal application of the words used by Parliament;

(vi) It permits the implication of words necessary to comply with EU law;

(vii) The precise form of the words to be implied does not matter;

The restrictions are that

(viii) the interpretation adopted should 'go with the grain of the legislation' and be compatible with the underlying thrust of the legislation in issue;

(ix) an interpretation cannot be adopted which is inconsistent with a fundamental or cardinal feature of the UK legislation (as that would be amendment rather than interpretation);

(x) the interpretation adopted cannot require the court to make a decision which it is not equipped to make nor lead to important practical repercussions which the court cannot evaluate.

66. The parties were agreed on these ten principles set out above, although fundamentally opposed on what they meant for this appeal. I will consider each in turn and what it means for this appeal. Counsel for HMRC also considered that there were effectively additional principles of conforming interpretation not included in the above list but apparent from other authorities, and they were:

(xi) Any provision of UK law can be subject to a conforming interpretation and not just the provision which gave rise to the infringement of EU law (citing [34] of *Vodafone II*)

(xii) A conforming interpretation is 'retrospective' in the same sense that any interpretation is retrospective: the court declares what the meaning of the legislation has always been. Mr Bremner [counsel for HMRC] cited [56] in *Vodafone II* and [176] of *FII* [2010] EWCA civ 103;

(xiii) The UK courts are obliged to interpret UK law to be EU-law compliant but are not obliged to go any further (citing Arden LJ in *Routier*);

(xiv) A conforming interpretation may require the national court to make policy choices, citing *Vodafone II* at [59];

(xv) A conforming interpretation can be strained and might be one unlikely to have occurred to a reasonable person reading the legislation by itself (per Lord Sumption in *FII* at [176];

(xvi) A conforming interpretation may breach a prohibition in the national legislation.

> 67. Mr Baker [counsel for the appellant] did not agree with these last six propositions; I consider whether they are correct where relevant to this appeal."

39. In relation to the 'restrictions', (viii) – (x) above, Judge Mosedale observed, at [94], that although itemised separately "they seem to express similar, perhaps identical, concepts." She said:

> "99. The cases indicate that a conforming interpretation in tax cases at least does not go against the grain or contradict a cardinal 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 the relief or within the charge to tax.
>
> …
>
> 101. The due date for payment of the exit charge was, as I have said, not provided for in the TCGA but under the TMA. It is difficult to see that it was a cardinal feature of UK legislation that a s 80 charge should be paid on this particular date: the legislation which provided for the charge was in an entirely different Act to the legislation which provided for the date of payment. It looked as if Parliament had intended there to be an exit tax, but had been content to let the normal rules for due dates which applied to virtually all other direct taxes to apply to that exit charge. The due date for payment did not appear to be a fundamental feature of the exit charge.
>
> 102. It seems to me that the 'grain' or cardinal feature of s 80 TCGA is that the UK government intended there to be a tax on exit; as s 80 itself does not provide when that tax is payable, the timing of the payment of the tax is not fundamental to the exit charge. As long as the exit charge is payable at some point, it is consistent with the grain of s 80 for a conforming interpretation to alter the timing of the payment.
>
> 103. Moreover, altering the due date for payment of the s 80 charge does not go against the grain of s 59B either; s 59B itself provides for various due dates (eg s 59B(3) and (6)) and elsewhere in the legislation there is provision in some cases for deferred payment:
>
> > (1) s 280 TCGA which permitted payment by instalments where the consideration was paid in instalments;
> >
> > (2) s 281 TCGA which permitted payments in instalments on gifts; and
> >
> > (3) the various hold over reliefs which could be seen as provisions which defer tax liability until (subsequent) realisation of the assets;
> >
> > (4) s 55 TMA also permitted deferral where the liability to the tax is reasonably in dispute."

40. Judge Mosedale continued by considering whether a conforming construction could be retrospective. Having considered the judgment of the House of Lords in *Fleming (trading as Bodycraft) v HMRC* [2008] 1 WLR 195, a case concerning disapplication as opposed to conforming constructions, and the "somewhat different opinions" of the five law lords in that case, she said:

> "115. Even assuming that what was said in *Fleming* by the majority (Hope, Neuberger and Carswell) applied equally to conforming interpretations as to disapplications, it cannot be understood as a complete bar on conforming interpretations on the grounds they are retrospective. If it was, the Court of Appeal would have said so in later cases and conforming interpretations would be impossible.

116. This is because any conforming interpretation could in theory adversely affect a taxpayer who chose not to do something (eg exit to another EU state or pay dividends to parent in a different EU state) because of the naturally interpreted national legislation, but who would have done it had that taxpayer understood what the legislation actually was once given a conforming interpretation (such as a right to defer tax due on exit or pay dividends with tax credit). Without a conforming interpretation, that taxpayer may have a right for damages against the member State concerned; with it, it has no right to damages. But EU law itself imposes the obligation to make a conforming interpretation, and so the fact a conforming interpretation is retrospective cannot be a bar to making it.

117. *Fleming*, I think, must be understood as a case which dealt with national law which imposed restrictions on the exercise of EU law rights. It was not a case which dealt with conforming interpretation to give effect to EU law rights. It should not be read across as barring conforming interpretations because any conforming interpretation has the potential to retrospectively affect taxpayers."

41. In *Gallaher Limited v HMRC* [2019] UKFTT 207 (TC) the Tribunal (Judge Beare) had considered whether UK domestic tax provisions relating to inter-group disposals were compliant with EU law provisions. Like *Panayi* and the present case it concerned the issue of whether a conforming construction should be applied. However, in *Gallaher* Judge Beare came to the conclusion, at [199] that a conforming interpretation should be rejected as it was:

"… beyond the competence of the UK courts to choose between various proportionate options because that would involve legislating and is therefore something which can be done only by Parliament"

However, Judge Mosedale, having reviewed the authorities on which Judge Beare had relied, came to a different conclusion saying:

"137. My conclusion is that it is clear that some choices should not be made by the courts. Lord Nicholls in *Ghaidan* viewed choices between options which 'would have had exceedingly wide ramifications, raising issues ill-suited for determination by the courts or court procedures' as prohibited. In *IDT* at [113] the Court of Appeal suggested that a conforming interpretation that impinged on rights of third parties would be a situation where a conforming interpretation ought not to be made. So the FTT can choose between different options for conforming interpretations, but only where it does not involve making decisions with far-reaching consequences which are difficult to assess or where it involves making choices between competing rights of different persons.

138. In my view, none of the conforming interpretations put forward in this appeal involve competing rights of different persons. Whichever option was chosen would affect the trust's liability to the tax and (if payable) its liability to interest on the tax (as it would affect the due date of payment). But none of the options would affect anyone else's rights. Nor would any of the proposed conforming interpretations involve consequences the Tribunal cannot evaluate: there would be no knock-on effect.

139. In conclusion, the fact that making a conforming interpretation will necessarily involve me in deciding which of the proposed conforming interpretations is the most appropriate, does not mean a conforming interpretation should not be adopted. I am unable to agree with Judge Beare in *Gallaher*."

42. Judge Mosedale then considered whether a conforming construction would involve too much detail. In doing so she referred to legislation that was subsequently introduced to address the issue of exit charges for trusts and although the provisions were "extremely detailed" (see at [141]) she agreed with HMRC's counsel that there was "no need for an option to defer to be set out in great detail" (see at [143]) concluding that:

> "145. … the breach of EU law ostensibly made by the UK legislation at issue in this appeal is capable of remedy by a conforming interpretation as explained in the authorities including *Vodafone II*.
>
> 146. It will involve choices, but not choices that a court or tribunal should not make."

43. She then set out, at [148], the following principles on which that choice mut be made:

(1) A conforming interpretation must not go further than necessary;

(2) It must go with the grain of existing legislation and involve as little alteration to the existing legislative scheme as possible;

(3) Preferences indicated by Parliament or the CJEU should be borne in mind.

Having applied these principles Judge Mosedale concluded at [166]:

> "My decision is that a conforming interpretation is possible for all the reasons above. That conforming interpretation is that s 59B 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 s 80 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."

44. The decision of Judge Mosedale in *Panayi* was effectively approved by the Upper Tribunal (Falk J, as she then was, and Judge Herrington) in *Banks v HMRC* [2020] STC 996 which noted, at [237]:

> "The conforming interpretation that Judge Mosedale chose in that case [*Panayi*], as set out at [166], was that the legislation in question should be read as including an option to defer payment of the s 80 TCGA exit tax in five annual instalments, without liability to interest. In doing so, Judge Mosedale adopted an interpretation which clearly recognised and built on the specific defect that the CJEU had identified in the legislation in its judgment following the FTT's reference, and reflected earlier case law which indicated that setting the period at five years was proportionate (see para [28] of *Panayi*)."

The Upper Tribunal went on find that it was unable to derive assistance "to any material extent" from either *Panayi* (or *Gallaher*) saying, at [242], that the cases did not establish any precedent and were decided on their own particular facts but noted that;

> "… 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]'."

45. About the same time as Judge Mosedale was hearing *Panayi*, the case of *Routier v HMRC (No 2)* [2021] AC 327 was being heard by the Supreme Court. It handed down its decision on 16 October 2019 shortly before the decision in *Panayi* was released on 24 October 2019.

46. The issue before the Supreme Court in *Routier* was whether, as the Court of Appeal had held, a conforming construction could be given to s 23 of the Inheritance Tax Act 1984 to permit relief from inheritance tax to be given where the relevant charity both satisfied UK requirements concerning a charity and was based in either an EU or third country which had an information exchange with the UK. Lord Reed and Lord Lloyd Jones (with whom Baroness Hale, Lord Carnwath and Lord Hodge agreed) said:

> "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 *Dreyfu*s [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.
>
> 55 Having reached the conclusion that section 23 of the Inheritance Tax Act can be brought into conformity with article 56 by disapplying the *Dreyfus* gloss on the meaning of the words contained in section 989 of the Income Tax Act, and that, having done so, the gift to the Coulter Trust qualifies for relief under section 23, it is unnecessary for this court to decide the other issues in dispute between the parties: in particular, whether the Court of Appeal was correct to hold that the *Dreyfus* gloss applied to both limbs of section 23(6), and whether it was correct to hold that a general requirement that there be a mutual assistance agreement in place at the time of the testator's death would constitute a justifiable restriction on freedom of movement of capital under EU law. The Court of Appeal's decision cannot stand, even if it was correct in its determination of those issues."

47. It is clear from this, as Mr Elliott submits, that *Routier*, rather than being authority for the limitation or restriction on a conforming construction, concerned the effect of an entirely judge-made restriction and, as such, provides little, if any assistance, in the present case.

DISCUSSION AND CONCLUSION

48. Mr Margolin, having referred to the principles of conforming construction and the decisions of the House of Lords from which they flow (*Pickstone v Freeman* [1989] AC 66, *Lister v Forth Dry Dock* [1990] 1 AC 546 and *Ghaidan v Godin-Mendoza* [2004] 2 AC 557) contends that the conforming construction sought by HMRC in this case "goes well beyond the scope of those illustrated in those three House of Lords cases" and that what I am being invited to do by HMRC is to "write into the legislation something that is entirely new" which "would amount to impermissible judicial legislation." As such, he says, that I should give effect to EU law by disapplying the incompatible domestic provisions with the result that Redevco should not be required to pay the tax in dispute.

49. Mr Elliott, for HMRC, contends that, as in *Panayi*, a conforming construction which follows the jurisprudence of the CJEU can be applied to s 59D TMA and, given its approval by the Upper Tribunal in *Banks v HMRC*, invites me, as a matter of judicial comity (unless I consider it to have been wrongly decided) to follow *Panayi* in this case.

50. The principle of judicial comity was succinctly described by Judge Brown KC in the case of *The Executors of the Estate of Linington and another v HMRC* [2023] UKFTT 89 (TC). She said, at [177]:

> "In summary, the principle requires that whilst courts of competent jurisdiction are not bound by the legal conclusions of one another's judgments, such conclusions will be highly persuasive and should be followed unless the second court is convinced that they are wrong. There was some debate as to the meaning of "convinced" (established by the Upper Tribunal to be the same as "satisfied" - see *Gilchrist v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKUT 169 (TCC)), and whether the second court (or Tribunal) must consider them to be "plainly" or "clearly" wrong (as determined in *HMRC v Abdul Noor* [2013] UKUT 71 (TCC)).

51. *Linington* concerned IHT planning arrangements that were "broadly" the same as those in the case of *Salinger and Kirby v HMRC* [2016] UKFTT 677 (TC). Although the principle of comity was considered, the parties agreed that Judge Brown should "simply" reach her decision on the law and facts of the case. If, as a result, she came to a different conclusion than the Tribunal had in *Salinger*, she should determine the appeal by reference to her own conclusions

without considering whether she "was 'convinced' or 'satisfied' that *Salinger* was wrong" (see *Linington* at [178]).

52. This is, in fact, exactly what she did saying, at [179]:

> "I express no view on whether, in the light of the evidence available to it, the Tribunal in *Salinger* was wrong, but I have reached a different conclusion by reference to the evidence and legal arguments as they were presented to me."

53. It is clear from an article in *Taxation* by the appellant in *Linington* who had appeared in person – HMRC were represented by two counsel – that permission had been granted for an appeal against the decision *Salinger* which had initially been listed before the Upper Tribunal for 30 April 2018. However:

> " … just a few days before the hearing I was told that it had been postponed. It was rescheduled for November 2018 and a few days before the hearing date HMRC informed me that it was now no longer going to take place. HMRC refused to give a reason for this, stating taxpayers' confidentiality. However, my understanding is that the Salinger family pulled out due to concerns about costs."

It was similar concerns about costs in *Linington* that had led to the appellant acting in person in that case. She explained in the *Taxation* article, that she was "very mindful of the fact that even if we won at an FTT then HMRC would be likely to appeal and that we might have to pull out of a Upper Tribunal if there were any risks of incurring HMRC's costs." (See Bridget Jones, 'A most uneven fight: me v HMRC' (2023) Volume 191 (Issue 4487), Taxation, 11 May 2023)

54. Although there is no indication in the article that concerns about costs had any bearing on the agreement of the parties that Judge Brown should reach her own decision without reference to *Salinger*, that agreement is enough, in my judgment, to distinguish *Linington* from the other authorities, particularly *Gilchrist v HMRC* [2014] UKUT 169 (TCC) which was cited by Judge Brown in *Linnington*.

55. Mr Elliott described *Gilchrist*, a decision of the Upper Tribunal, as being "still the binding authority, the latest word on judicial comity." Mr Margolin also accepts that the position under *Gilchrist* is that a tribunal should as a matter of comity follow a prior decision unless satisfied that it is wrong. I agree.

56. Therefore, given the clear and obvious similarity between the almost identical statutory provisions considered in *Panayi* and those in the present case, I should follow *Panayi* unless I consider it to have been wrongly decided.

57. Mr Margolin contends that *Panayi* was wrongly decided. In essence this is because of the failure by Judge Mosedale to consider the principle of legal certainty, a principle which includes the protection of legitimate expectations and concerns issues relating to retroactivity. It was distilled by Professor Tridimus as expressing "the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly" (*The General Principles of EU Law* (2nd ed., 2006), p. 242).

58. While Judge Mosedale clearly did have regard to the retrospective effect of a conforming interpretation (see paragraph 40, above) it does appear that, given the rapid realisation of the assets concerned before the date payment of the tax was due, the question of legitimate expectation did not arise in *Panayi*.

59. However, as is clear from my further findings of fact, 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. Moreover, even if that was not the case, although there is no mention

of a conforming construction in the advice, counsel considered (at paragraph 7 of the Note of Conference) that the most likely response compatible with EU law "might be to have a 'trailing' exit charge which would tax a company, which had ceased to be resident, on disposals of UK assets within a period of 3-5 years, at most 6, years after migration, based on the market value at migration." As Redevco disposed of its properties within such a period I am unable to conclude that it had any reasonable legitimate expectation that it would not have to pay the tax concerned.

60. I therefore do not consider it appropriate to distinguish *Panayi*, or indeed consider it to have been wrongly decided, on the basis that it did not deal with legitimate expectation. As such, *Panayi* was not, in my judgment, wrongly decided but, as the Upper Tribunal observed in *Banks*, consistent with the jurisprudence of the CJEU.

61. I would also add that the argument advanced by Mr Margolin in relation to legal certainty bore more than a passing resemblance to that raised by the appellant in *Vodafone 2 v HMRC* [2010] Ch 77. This was dealt with by the Chancellor, Sir Andrew Morritt, at [58] who held that the conforming interpretation advanced by HMRC in that case reflected and excepted from the legislation concerned (in relation to CFCs):

> "58. … 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.

62. For the same reasons I consider a conforming construction to be appropriate in the present case and have no hesitation in following *Panayi*. I gratefully adopt Judge Mosedale's reasoning in relation to s 49B TMA which is equally applicable to s 49D TMA in the present case. Accordingly, a conforming construction should be applied to s 49D 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.

63. Given my conclusions and adoption of Judge Mosedale's decision in *Panayi* in relation to conforming construction it is not necessary for me to consider the question of disapplication.

64. Therefore, for the reasons above, the appeal is allowed in respect of the balancing charge (see paragraph 21(11), above) but is otherwise dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

65. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant

to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE
RELEASE DATE: 21 July 2023