Neutral Citation Number: [2015] EWCA Civ 1036

Case No: A3/2014/1405

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND TRIBUNAL CHAMBER)
Mr Justice Rose
[2014] UKUT 98 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 October 2015

Before :

LORD JUSTICE MOORE-BICK
LORD JUSTICE LEWISON
and
SIR TIMOTHY LLOYD

- -

Between :

DMWSHNZ LIMITED (In Members' Voluntary Liquidation)	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

GRAHAM AARONSON QC and **MS ZIZHEN YANG** (instructed by **Ernst & Young LLP**) for the **Appellant**
MICHAEL GIBBON QC (instructed by **General Counsel and Solicitor to HM Revenue & Customs**) for the **Respondents**

Hearing date : 7 October 2015

- -

Approved Judgment

Lord Justice Lewison:

1. The issue on this appeal is whether a gain accruing to one company in a group of companies can be set off against a loss accruing to another company in the same group for the purposes of corporation tax on capital gains. This turns on whether the taxpayer and its sister company made a valid election under section 171A of the Taxation of Chargeable Gains Act 1992 ("TCGA"). Both the First Tier Tribunal (Judge Jonathan Cannan and Mrs Caroline de Albuquerque) and the Upper Tribunal (Rose J) held that they did not. The decision of the FTT is at [2013] UKFTT 37 (TC), [2013] SFTD 648; and that of the UT is at [2014] UKUT 98 (TCC), [2014] STC 1440. The taxpayer appeals with the permission of the UT. For the reasons that follow, I would dismiss the appeal.

2. I can take the facts verbatim from the decision of the FTT. Unless otherwise stated all references to legislation are references to the TCGA as it stood at the time of the relevant events.

3. Until 22 October 2003 DMWSHNZ Ltd ("the appellant") was a member of the Bank of Scotland Group. Until that time its name was BOS Holdings (New Zealand) Ltd.

4. On 9 September 1998 the appellant sold its shares in Countrywide Banking Corp Ltd, its wholly-owned New Zealand subsidiary. The consideration was NZ$ 850,000,000 and was satisfied by ten-year unsecured floating rate notes 2008 ("the Loan Notes"). The Loan Notes were qualifying corporate bonds for the purposes of capital gains tax ("CGT"). As such, a gain crystallised on the disposal of the shares but that gain would only be charged to tax on a future triggering disposal. In 2002 the held-over gain was £203,753,103.

5. In 2003 Bank of Scotland was owed £42,150,000 by an investment trust called Geared Income Investment Trust plc ("Geared Income"). Lloyds TSB Bank plc was owed a similar amount. Together the two banks appointed joint administrative receivers. The effect of this was that capital losses realised by Geared Income would be allowable for CGT. Geared Income thereby realised capital losses on its investments of approximately £180m.

6. A planned re-structuring was then put in place with a view to effectively setting off Bank of Scotland's share of the losses in Geared Income against some of the held-over gains.

7. Pursuant to the re-structuring certain transactions took place. The following steps are relevant for present purposes and are described with some simplification:

   i) Geared Income's investments were divided equally and transferred to two newly created subsidiaries. One of these subsidiaries was called GIIT Realisations 1 Ltd ("GR1") and was for the benefit of Bank of Scotland. At the same time a further subsidiary of Geared Income was set up called GIIT Realisations 3 Ltd ("GR3") also for the benefit of Bank of Scotland.

   ii) Geared Income then transferred 26% of its shares in GR1 outside the Geared Income capital gains group. The effect of this was to crystallise capital losses in GR1 of approximately £92m.

iii) The shares in the appellant were re-structured and on 22 October 2003 the resulting 'A' shares were purchased by GR3. At that time therefore the appellant and GR3 formed part of the same capital gains group.

iv) On 28 October 2003 the appellant served notice on NBNZ requiring repayment of NZ$370m Loan Notes.

v) On 28 November 2003 NZ$370m was repaid by NBNZ to the appellant bringing into charge to tax a held-over gain of £88,692,527.

vi) On 1 December 2003 GR1 and GR3 made a joint election pursuant to section 179A to treat the £92m losses at step (ii) as accruing to GR3 rather than GR1. Both parties agreed that this election was effective.

vii) Also on 1 December 2003 the appellant and GR3 made a joint election pursuant to s 171A to deem the disposal on repayment of the Loan Notes at step (v) to have been made by GR3 rather than the appellant.

8. It is the effectiveness of step (vii) which is the subject of this appeal. If it was effective then the chargeable gain at step (v) would accrue to GR3 and it could offset the losses accruing to it at step (vi).

9. It was not suggested by HMRC that if the re-structuring achieved the intended objective, it was anything other than legitimate tax planning on the part of the appellant and Bank of Scotland. Indeed HMRC accepted that a variation of the structure involving a disposal of the NZ$370m Loan Notes to a third party at a time when the debt remained outstanding, rather than repayment to the appellant, could have been effective. The appellant did make attempts to sell the Loan Notes to a number of third-party financial institutions but was unable to find a buyer at an acceptable price.

10. A company is chargeable to corporation tax on chargeable gains computed in accordance with the TCGA and accruing to a person "on the disposal of assets": s. 1. All "forms of property" are assets for the purposes of the Act; and debts are specifically included: s. 21 (1) (a). The word "disposal" is not comprehensively defined by the TCGA but there are a number of provisions which elucidate its meaning. Many of them are in Chapter II of the Act. Thus section 22 (1) provides that there is a disposal of assets by their owner where any capital sum is derived from an asset "notwithstanding that no asset is acquired by the person paying the capital sum"; and it goes on to give examples such as sums received as compensation or damages, and sums received under a policy of insurance. Section 24 (1) provides that there is a disposal of an asset where it is lost, destroyed, dissipated or extinguished. Under section 161 where an asset acquired otherwise than as trading stock is appropriated to trading stock it is treated as having been sold at market value.

11. Section 25 creates a deemed disposal where an asset ceases to be a chargeable asset because it ceases to be situated in the United Kingdom. In such a case the asset is deemed to have been sold and reacquired at market value. The FTT referred to other situations where the TCGA creates deemed disposals; for example:

i) Where a company acquired an asset from a group company and then ceases to be a member of the group. In such a case the company is treated as having sold the asset at market value and to have immediately reacquired it: section 179.

ii) Where an asset ceases to be chargeable by virtue of ceasing to be dedicated to an oil field. In such a case it is deemed to have been disposed of at market value and immediately reacquired: section 199.

12. It is clear, then, that there are situations in which a disposal takes place without any corresponding acquisition of the asset which is the subject of the disposal. It is also clear that in some cases the Act specifies not only a deemed disposal but also a deemed acquisition (or reacquisition).

13. So far as debts are concerned, section 251 (2) provides that the satisfaction of a debt or part of it (including a debt on a security) is treated as a disposal of the debt or of that part by the creditor made at the time when the debt or that part is satisfied. I shall return to section 251 in due course.

14. Section 171 provided for the effect of transfers between members of groups of companies. At the time of the events with which we are concerned it provided so far as relevant as follows:

> “'171 **Transfers within a group: general provisions**
>
> (1) Where—
>
> (a) a company (“company A”) disposes of an asset to another company (“company B”) at a time when both companies are members of the same group, and
>
> (b) the conditions in subsection (1A) below are met,
>
> company A and company B are treated for the purposes of corporation tax on chargeable gains as if the asset were acquired by company B for a consideration of such amount as would secure that neither a gain nor a loss would accrue to company A on the disposal …
>
> (2) Subsection (1) above shall not apply where the disposal is—
>
> (a) a disposal of a debt due from Company B effected by satisfying the debt or part of it; or
>
> (b) a disposal of redeemable shares in a company on the occasion of their redemption; or
>
> (c) a disposal by or to an investment trust; or
>
> (cc) a disposal by or to a venture capital trust; or
>
> (cd) a disposal by or to a qualifying friendly society; or

> (d) a disposal to a dual resident investing company; …
>
> (4) For the purposes of subsection (1) above, so far as the consideration for the disposal consists of money or money's worth by way of compensation for any kind of damage or injury to assets, or for the destruction or dissipation of assets or for anything which depreciates or might depreciate an asset, the disposal shall be treated as being to the person who, whether as an insurer or otherwise, ultimately bears the burden of furnishing that consideration."

15. As Rose J explained in the UT at [9]:

> "This meant that if Company A had an asset that it wanted to sell which would generate a capital gain and Company B in the same group had an asset that it wanted to sell which would generate a capital loss, Company A could transfer its asset to Company B without thereby generating a gain, Company B could then sell both assets and set the loss on one off against the gain on the other. … The First-tier Tribunal described s 171 as a "very straightforward and uncontroversial piece of tax planning which helped to ensure full use of allowable losses within a group of companies"."

16. It is also to be noted that section 171 (4) tells us, in the cases to which it applies, *to whom* the disposal is "treated" as being made. But it does so only for the purposes of section 171 (1) and not for any other purpose.

17. Section 171A, on which this appeal turns, was inserted into the TCGA by the Finance Act 2000. It provides:

> "'171A **Notional transfers within a group**
>
> (1) This section applies where—
>
> (a) two companies ("A" and "B") are members of a group of companies; and
>
> (b) A disposes of an asset to a person who is not a member of the group ("C").
>
> (2) Subject to subsections (3) and (4) below, A and B may, by notice in writing to an officer of the Board, jointly elect that, for the purposes of corporation tax on chargeable gains—
>
> (a) the asset, or any part of it, shall be deemed to have been transferred by A to B immediately before the disposal to C;
>
> (b) section 171(1) shall be deemed to have applied to that transfer;

> (c) the disposal of the asset or part to C shall be deemed to have been made by B; and
>
> (d) any incidental costs to A of making the actual disposal to C shall be deemed to be incidental costs to B of making the deemed disposal to C.
>
> (3) No election may be made under subsection (2) above unless section 171(1) would have applied to an actual transfer of the asset or part from A to B.
>
> (4) An election under subsection (2) above must be made on or before the second anniversary of the end of the accounting period of A in which the disposal to C was made."

18. Because the applicable legislation uses capital letters to designate the various entities involved, it is useful at this stage to apply those designations to the companies involved in our case. The appellant is "A"; GR3 is "B", and NBNZ is "C".

19. The two questions we need to answer are:

    i) Does section 171A (1) (b) require not only that A disposes of the asset in question but also that C acquires it?

    ii) If so, was that condition satisfied on the facts of this case?

20. There is no serious dispute about the approach to the interpretation of a taxing (or indeed any other) statute. The parties were largely content to rely on the discussion in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684; and so am I. Lord Nicholls gave the opinion of the Law Lords. He referred to the new approach that had been developed in previous cases and said at [32]:

> "The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found."

21. At [36] he referred to the two necessary steps, namely:

> "…first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so.

> As Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, para 35:
>
> "the driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically." "

22. Mr Aaronson QC, for the appellant, also referred to *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [16] for the proposition that the meaning of an instrument (including an Act of Parliament) is the meaning that it would convey to a reasonable reader with the background knowledge reasonably available to the audience to whom the instrument was addressed. I accept that proposition as far as it goes; but I do not think that it goes very far.

23. It is common ground between the parties that section 171A does not enable corporate groups to match chargeable gains and allowable losses between group companies in respect of all disposals by group companies. Parliament has drawn a line which differentiates between those cases where it can be done, and those where it cannot. The question is: where? Mr Aaronson submits that the line has been drawn so that cases in which there is a "non-group counterparty" fall within the scope of section 171A, even though the counterparty acquires no asset as a result of the disposal. This, he says, is clear from the extra-statutory material which he placed before both tribunals and before us.

24. The first item consists of the Budget Notes relating to clause 100 of the Finance Bill 2000. These are produced by the Press Office of HMRC. Unlike Explanatory Notes, they are not placed before Parliament and, in my judgment, they are inadmissible in interpreting legislation. But even if I am wrong about that I do not consider that the Budget Notes go as far as Mr Aaronson submitted. The high point of the submission is that the Budget Notes say that the new provision (which became section 171A) allows two companies:

> "[to] elect that an asset which has been disposed of outside the group by one of them may be treated as if it had been transferred between them immediately before that disposal."

25. Mr Aaronson's point is that the Budget Notes do not say that the asset in question must have been acquired by a person outside the group. That is true; but it is a very shaky argument to rely on extraneous material for what it does not say, rather than for what it does say. I cannot give the Budget Notes any weight in supporting Mr Aaronson's argument; and to be fair he did not strenuously press this argument orally.

26. The status of Explanatory Notes is different. It is because they are produced by the Government Department responsible for promoting the Bill that they accompany, and are placed before Parliament, that the courts are willing to look at them when interpreting legislation, although the ultimate question is still to determine the meaning conveyed by the text as enacted: *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 WLR 2956 at [2] to [6].

27. The Explanatory Notes to clause 100 do not, in my judgment, support the appellant's case. They begin with a summary of the clause which says:

> "This clause enables two companies within a group to elect that an asset shall be treated as though it had been transferred between them immediately before being sold to a person outside the group."

28. Plainly the sale of an asset entails a corresponding purchase. Thus the general summary envisages both a disposal and an acquisition. The Explanatory Notes go on to say:

> "New section 171A describes the circumstances in which an election can be made under this section. It requires that two companies ("A" and "B") are members of a group, and that A disposes of an asset to a person ("C") outside the group."

29. This is little more than a paraphrase of the section itself; and does not alert the reader that its scope is far broader than the initial summary suggested. The background referred to in the Explanatory Notes goes on to say that a form of tax relief was available:

> "… by utilising the rules which allow tax neutral transfers of assets between group members, This is achieved by transferring an asset on a tax neutral basis before its eventual disposal outside the group, so that chargeable gains and allowable losses are brought together within a single company."

30. The Explanatory Notes go on to point out that:

> "This has necessitated the actual transfer of ownership of an asset between group companies before the disposal outside the group. This new provision … will allow the effect to be achieved by an election by two group members, without the need for actual transfer of ownership of the asset.
>
> … Groups will be able to make sales of assets without the preliminary transfer between group companies, and will be able to make elections under the new provision up to two years after the accounting period in which the sale took place."

31. The final paragraph of the Explanatory Notes mirrors the opening paragraph in that it refers explicitly to "sales" of assets. I do not, of course, suggest that the provisions of section 171A are restricted to sales in the strict sense, but there is nothing in the Explanatory Notes which, to my mind, supports the suggestion that what was in contemplation was a disposal without a corresponding acquisition. The final piece of material was the statement in the House of Commons made by the Chief Secretary when introducing the clause. He said:

> "Clause 100 enables groups to bring together chargeable gains and allowable losses on asset disposal, without having to go

> through the rigmarole of transferring asset ownership within the group."

32. At a high level of generality that is true. But since the issue on this appeal is the precise point at which the line is drawn it is really of no assistance at all on that question.

33. Mr Aaronson placed some reliance on the new version of section 171A that was introduced by Schedule 12 paragraph 1 to the Finance Act 2009. The new section 171A (1) provided:

> "(1) This section applies where—
>
> (a) a chargeable gain or an allowable loss accrues to a company ("company A") in respect of an asset (or would so accrue but for an election under this section),
>
> (b) at the time of accrual, company A and another company ("company B") are members of the same group, and
>
> (c) had company A disposed of the asset to company B immediately before the time of accrual, section 171(1) would have applied."

34. It is common ground that the new section 171A (1) is wider than the old. It will be noted that there is no longer any reference to a disposal "to C". But that, to my mind, does not tell us anything about what was meant in the old section 171A (1) by a "disposal to C". Whatever it meant, the new section 171A does not contain this condition.

35. Accordingly in my judgment we are thrown back to the wording of the section.

36. Section 171A (1) begins by stating the conditions that must be satisfied before it applies. The second condition is that A disposes of an asset "to a person who is not a member of the group ("C")". Section 171A (2) introduces the deeming provision. It refers twice to "the disposal to C", once to "the actual disposal to C" and once to the "deemed disposal to C". Section 171A (4) deals with the timing of the election, which must be made within a certain time from the accounting period of A "in which the disposal to C" was made. In the light of (a) the fact that there were well-established situations in which disposals of assets occur without a corresponding acquisition, and (b) the common ground that section 171A does not apply to all disposals, it seems to me to be clear that the insistence in section 171A on a disposal (or "actual disposal") "to C" means that it only applies where the disposal of the asset in question results in a corresponding acquisition by C.

37. Mr Aaronson explained that section 171 (2) (a), which provides that section 171 (1) does not apply where the disposal is "the disposal of a debt due from company B effected by satisfying the debt," was necessary in order to prevent artificial tax avoidance by the manipulation of debt within a group of companies. He went on to argue that section 171 (2) (a) shows that the satisfaction of a debt counts as a disposal for the purposes of section 171. Since section 171 (1) is only concerned with disposals

from A to B, the disposal must consist of the disposal of an asset (i.e. the creditor's rights) by the creditor (A) to the debtor (B). Section 171 (2) (a) must have been enacted for a purpose. If it had not been enacted, so the argument goes, the satisfaction of a debt must have fallen within the more general provision of section 171 (1). Therefore the satisfaction of a debt counts as a disposal to another company. Since (a) the immediate context of section 171A is section 171, and (b) the purpose of section 171A was to avoid the need to effect an actual transfer of assets internally within a group before disposal to an outsider, section 171A (1)(b) should be interpreted in the same way. It follows that the satisfaction of a debt by C is the acquisition by C of the creditor's rights disposed of by A; and that disposal and acquisition may give rise to an election by A and B. The effect of the election is that the asset (i.e. the creditor's rights) is deemed to have been transferred by A to B immediately before the disposal to C; and the disposal to C is deemed to have been made by B. In that way B will be entitled to set off gains and losses.

38. Both the FTT and the UT rejected this argument. They characterised it as "the argument from redundancy"; and said that such an argument carries little weight, even in a taxing statute: *Walker v Centaur Clothes Group* [2000] 1 WLR 799, 805D (Lord Hoffmann). That case was concerned with an argument that one sub-section of a taxing statute would be redundant if another sub-section of the same section was interpreted in a particular way. The argument from redundancy carries even less weight when what is in issue is a different section and, moreover, one introduced by amendment. Mr Aaronson's warnings about the abuses that might result from the manipulation of intra-group debt support the inference drawn by the UT that section 171(2) (a) may well have been included for the avoidance of doubt. I agree, therefore, with both tribunals that this argument does not undermine the straightforward reading of section 171A.

39. There is one other point to make about this argument. If correct it would apply to any debt (whether or not it is a "debt on a security"). In the real world under the ordinary law of contract the payment of a debt by a debtor to a creditor does not entail the transfer of anything by the creditor to the debtor. Its legal effect is to discharge the obligation to pay, with the result that the obligation disappears at the moment of payment. As Lord Wilberforce famously observed in *WT Ramsay Ltd v IRC* [1982] AC 300, 326D CGT "was created to operate in the real world, not in the world of make-belief;" an observation repeated by the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson* at [31]. The reasonable reader, to whom Mr Aaronson appealed, would know this basic principle of the common law of contract. Of course Parliament may alter the ordinary incidents of transactions for the purposes of taxation, but one would expect that such a fundamental alteration to a well established principle of the common law would be explicit, rather than implicit. We have seen several instances of the Act deeming disposals and acquisitions to have taken place.

40. Accordingly, in my judgment in order for section 171A to apply it is necessary for C to acquire the asset which is the subject matter of the disposal.

41. If (as I have held) it is necessary for C to acquire the asset which is the subject matter of the disposal, has that happened on the facts of this case? The FTT held that the relevant asset was the debt rather than the Loan Notes (to the extent that they are different assets). The UT disagreed; but held that C did not acquire the Loan Notes,

because the Loan Notes ceased to exist once the debt had been repaid. HMRC argue that the FTT was right to say that the asset in question was the debt rather than the Loan Notes; but that even if the latter continued to have some existence after repayment that continued existence is irrelevant for the purposes of CGT. The appellant argues that the UT was right in distinguishing between the debt and the Loan Notes; but wrong in holding that the Loan Notes ceased to exist once the debt was repaid. That continuing existence meant that there was a "disposal to C" with the consequence that the election under section 171A was validly made.

42. The Loan Notes were constituted by a deed poll dated 10 September 1998. NBNZ was described as the Issuer. Although the document is described as a deed poll (which means that there is no counterparty to it), Lloyds TSB Group joined in the deed as guarantor of the Issuer's obligations. I regard that as without significance. All that it means is that there were two separate obligations of different legal characters combined in a single piece of paper. The Notes were defined as "the … Notes … hereby constituted or, as the case may be, the principal amount thereof for the time being issued and outstanding." Clause 2 provided that the principal amount of the Notes "constituted by this Deed Poll" was NZ$850 million. They were to be issued on the Issue Date (11 September 1998) in denominations of NZ$10 million. Clause 3 stated that when issued the Notes would rank equally as unsecured obligations of the Issuer. Clause 7 required the Issuer to maintain a register of holders of the Notes (called "Noteholders"). Clause 6 entitled each Noteholder to a Certificate for the Notes registered in its name. The conditions of issue were contained in Schedule 2. Condition 1.1 provided for the repayment to a Noteholder of the nominal value of its holding of the Notes. It went on to say:

> "To exercise such entitlement, the Noteholder must complete the Notice of Repayment set out below, stating the amount required to be repaid and the date for repayment thereof, sign and date the Notice of Repayment and lodge the same with the relative Certificate(s) … at the offices of the Issuer not less than 30 days prior to the date upon which repayment is required."

43. Condition 4.1 provided that every Noteholder whose Notes were due to be repaid:

> "… shall, not later than five Business Days before the due date for such repayment … (but, in the case of repayment pursuant to Condition 2, contemporaneously with the giving of written notice under that Condition) deliver up to the Issuer … the Certificate for its Notes which are due to be repaid … in order that the same may be cancelled. Unless payment of the amount due to be repaid has already been made in accordance with Condition 3, upon such delivery and against a duly signed or authenticated receipt for the principal moneys payable in respect of the Notes to be repaid … the Issuer shall on the due date for repayment … pay to the Noteholder the amount payable to it in respect of such repayment…

44. Condition 4.2 said that if a Noteholder failed to deliver up its Certificate then the moneys payable to it would be paid into a separate bank account and held by the Issuer in trust for the Noteholder.

> "Such setting aside shall be deemed for the purposes of these Conditions to be full and proper payment to such Noteholder and the Issuer shall thereby be discharged from all obligations in connection with such Notes."

45. Condition 5 provided that:

> "All Notes repaid … shall be cancelled forthwith thereafter and the issuer shall not be at liberty to keep the same for the purposes of re-issue or to re-issue the same."

46. Accordingly, the sequence of events contemplated by the Loan Notes is as follows:

    i) The Noteholder gives notice requiring repayment under Condition 1.1 and delivers the Certificate to the Issuer not later than 5 Business Days before the repayment date;

    ii) The Issuer repays the Notes, against a signed receipt;

    iii) Having repaid the Notes, the Certificate and the Notes are cancelled.

47. It is common ground that the debt payable under the Loan Notes was (or at least was until the debt was satisfied) a debt on a security as defined in section 132; and that the Loan Notes were (at least until the debt was satisfied) qualifying corporate bonds. The first stage in the appellant's argument under this head is that the Loan Notes and the underlying debt are two separate and distinct assets for the purposes of CGT. That proposition was said to be supported by the judgment of Chadwick LJ (with whom Pill and Buxton LJJ agreed) in *Weston v Garnett* [2005] EWCA Civ 742, [2005] STC 1134 at [28]:

> "It is important to keep in mind the words that Parliament has used in s 117(1) TCGA 1992: 'For the purposes of this section, a "corporate bond" is a security, as defined in Section 132(3)(b) … the debt on which represents and has at all times represented a normal commercial loan'. The statutory language makes a distinction between the 'security' and 'the debt on [the security]'. 'Security' is defined by s 132(3)(b) TCGA 1992: it includes 'any loan stock or similar security … of any company, and whether secured or unsecured'. In the present context it is the loan note which is the security; but it is the underlying loan, which the loan note secures, which is the debt; and it is the underlying loan which must satisfy the condition that it 'represents and has at all times represented a normal commercial loan'."

48. Applying that to our case the Loan Notes are the security and the underlying loan is the debt.

49. Ms Yang, who presented this part of the argument, took us through the provisions relating to exchanges of shares for corporate bonds. In general a gain that arises on the disposal of qualifying corporate bonds (QCBs) is not a chargeable gain: section 115. However, there is a limited exception to that general proposition. In summary if shares are exchanged for QCBs no CGT is immediately payable. Instead what is calculated is the gain that would have arisen if the shares had been sold at market value. CGT on that gain is, in effect, deferred until a disposal of the QCBs. This is achieved by section 116 (10). In the terminology of section 116 the shares in Countrywide Banking Corp Ltd which were sold are "the old asset"; and the QCBs which constituted the consideration for those shares (i.e. the Loan Notes) are "the new asset." The transaction which constituted the exchange of the shares for the QCBs is "the relevant transaction". Section 116 (10) provides:

> "… so far as it relates to the old asset and the new asset, the relevant transaction shall be treated for the purposes of this Act as not involving any disposal of the old asset but—
>
> (a) there shall be calculated the chargeable gain or allowable loss that would have accrued if, at the time of the relevant transaction, the old asset had been disposed of for a consideration equal to its market value immediately before that transaction; and
>
> (b) … the whole or a corresponding part of the chargeable gain or allowable loss mentioned in paragraph (a) above shall be deemed to accrue on a subsequent disposal of the whole or part of the new asset (in addition to any gain or loss that actually accrues on that disposal); and
>
> (c) on that subsequent disposal, section 115 shall have effect only in relation to any gain or loss that actually accrues and not in relation to any gain or loss which is deemed to accrue by virtue of paragraph (b) above."

50. Ms Yang argued that the only disposal that triggers the charge in accordance with section 116 (10) is the disposal of the QCBs. Thus the relevant asset upon which to concentrate is the Loan Notes. Even after the debt was repaid the Loan Notes continued in existence, not least because the Issuer still had the obligation to cancel the Notes under condition 5. In addition the creditor's rights were transferred to the Issuer even if only for a *scintilla temporis*. In the course of his reply Mr Aaronson characterised this argument as "angels dancing on pinheads". I agree. I do not believe that the approach to interpretation of taxing statutes laid down by *Barclays Mercantile Business Finance Ltd v Mawson* with its insistence on a realistic view of the facts leaves any scope for angels, pinheads or *scintillae temporis*. Mr Aaronson said that this was the wrong approach since what was in issue was not the appreciation of the facts, but the legal analysis of the facts. As I have said, in the real world when the debt was repaid the obligation to pay was discharged; and there were no remaining creditor's rights that could have been transferred to the Issuer. I cannot see that the world of CGT compels any different conclusion.

51. There are three other points to mention. First in a case where the Noteholder does not produce its certificate, payment of the money into a separate account discharges the Issuer from "all obligations" in connection with the Notes. I take that to include the obligation to cancel them. Second, the insistence on the Loan Notes (rather than the underlying debt) does not sit well with section 171 (2) (a) (which refers only to the debt) and might enable the purpose of that exclusion to be circumvented. Third, the Issuer's obligation to cancel Notes which have been repaid (and to alter the relevant entries in the register) is of an administrative nature which only the Issuer can perform; the performance of which does not require or presuppose that the Issuer owns the Notes in any sense.

52. There is, however, a longer and more technical answer to the point. The Loan Notes will only amount to QCBs if they are an asset "representing a loan relationship": section 117 (A1). A loan relationship is defined by section 81 (1) of the Finance Act 1996 as a relationship in which a company "stands … in the position of a creditor or a debtor as respects any money debt". The first of these quotations is a present participle and the second is the present indicative. At the moment of repayment the Issuer no longer "stands" in the position of a debtor and the Noteholder no longer "stands" in the position of a creditor. Thus at the moment of payment the Loan Notes cease to be QCBs. I also consider that whatever residual contractual obligations the Issuer may have (e.g. to cancel the Notes) they cannot, in any ordinary sense of the word, be regarded as "property"; and under section 21 in order to count as an "asset" there must be "property" in some form or another. Moreover, nothing in section 116 expressly disapplies section 251.

53. Section 251 provides, so far as material:

> "(1) Where a person incurs a debt to another, whether in sterling or in some other currency, no chargeable gain shall accrue to that (that is the original) creditor or his personal representative or legatee on a disposal of the debt, except in the case of the debt on a security (as defined in section 132).
>
> (2) Subject to the provisions of sections 132, 135 and 136 and subject to subsection (1) above, the satisfaction of a debt or part of it (including a debt on a security as defined in section 132) shall be treated as a disposal of the debt or of that part by the creditor made at the time when the debt or that part is satisfied."

54. It is clear from these sub-sections that:

    i) The satisfaction of a debt on a security is a disposal of the debt (section 251 (2)); and

    ii) A gain arising on such a disposal is not excluded from being a chargeable gain (section 251 (1)).

55. In addition section 251 says nothing about any deemed acquisition.

56. Returning to the sequence of events contemplated by the Loan Notes, the satisfaction of the debt (and hence the disposal of it) takes place before the cancellation of the Certificates and the Notes. If, therefore, the Issuer acquires the Loan Notes, it does so after the disposal of the debt has already taken place.

57. Accordingly, in my judgment, whether or not the Loan Notes continued to have an existence of some sort after repayment of the debt is irrelevant.

58. The final point to mention is Mr Aaronson's argument (not pressed in oral submission) that the result for which HMRC contended is grossly unfair because the appellant could have achieved the setting off of gains and losses if it had actually transferred the Loan Notes within the group before the debt had actually been repaid; and that it had been misled by section 171 (2) (a) and the extra-statutory material into believing that an actual transfer was no longer necessary. However, for the reasons I have given neither section 171 (2) (a) nor the extra-statutory material support the appellant's interpretation; and the fact that the taxpayer could have achieved the desired result by other means does not, in my judgment, affect the fiscal consequences of what it actually did.

59. For these reasons, I would dismiss the appeal.

Sir Timothy Lloyd:

60. I agree.

Lord Justice Moore-Bick:

61. I also agree.